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Scelus et Poena: A Comparison of Legal Bias in Ancient Rome and Contemporary America

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Abstract

Of the many advances made by the ancient Romans, perhaps their greatest contribution to contemporary Western society stemmed from their sophisticated legal system. Ancient senators, jurists, and eventually emperors set forth policies that encompassed the expectations of Roman citizens in respect to property, family, and behavior. Roman law allowed for the creation of an efficient government bureaucracy, promoting an unprecedented era of peace and prosperity that stretched over the first two centuries of the Common Era. This peace, however, did not apply to all individuals under control of the Roman government. While wealthy and dignified citizens enjoyed leniency in legal matters, individuals of lesser status faced discrimination at the hands of prejudiced police forces and judges. Based on recent events in contemporary American society, a systematic bias against those of lower class exists also in modern police forces and courtrooms. This prejudiced structure promotes not only classist discrimination, but also racial discrimination as those of lower income tend to be people of color. In addition to highlighting the legal inequity that existed in ancient Rome, this study calls attention to the comparable schemes of prejudice, particularly concerning the War on Drugs, which plague law enforcement in contemporary American society.

Introduction

Of the many advances made by the ancient Romans, perhaps their greatest contribution to contemporary Western society stemmed from their sophisticated legal system. Ancient senators, jurists, and eventually emperors set forth policies that encompassed the expectations of Roman citizens in respect to property, family, and behavior. Though several civilizations had developed legal codes to maintain order and establish a government, Roman law allowed for the creation of an efficient government bureaucracy, promoting an unprecedented era of peace and prosperity that stretched over the first two centuries of the Common Era. With this enduring peace, the Roman Empire promised both Roman citizens and foreign inhabitants a stable world in which to live and prosper.

This peace, however, did not come without its price. In order to protect the borders and maintain civility within the empire, every inch of territory needed to be guarded. Governors were appointed and thrust into the provinces in place of the Roman emperor. On top of their warfare duties, soldiers were called upon to watch the day-to-day activities and function as pseudo-police. In order to preserve peace and prosperity throughout the Mediterranean, the enforcers of the law needed to keep the people safe and happy to prevent revolutions and preserve the trade and political alliances that military conquest had provided throughout the lengthy history of the Roman people. The Roman government, therefore, created a judiciary system that dealt with those individuals who attempted to disrupt this order. Outsiders were no longer the sole concern of the Roman government as the Roman people were now threatened by criminals inside their borders.

The creation of this vigilant legal system seemed to place the safety of entire populations under Roman control above all else. While overall security in the realm may have increased,

legal procedures failed to provide equal protection to all who lived in the Roman world. Men who were free, wealthy, and/or held public office enjoyed legal privileges that afforded protection from accusatory Romans and leniency in the event that they broke the law. In addition, many groups, including slaves, lower class individuals, and women, faced discrimination under the color of law and harsher penalties if convicted by the courts. As public officials and emperors fought to maintain order and reinforce their authority, more policing factions were created and impinged further on the freedoms that were promised to those under Roman rule. These biases effectively created a mechanism that allowed a small number of families to remain in power and that oppressed those who possessed less influence. Eventually, those of lesser means began to fight back against their privileged oppressors, inciting civil wars and the subsequent fall of the Roman Empire.

Although over two millennia have passed since the inception of the Roman Empire, discrimination against people of lower socioeconomic status still pervades contemporary legal systems. Systematic biases among law enforcement officials in the United States have created a culture where racial minorities experience more economic hardship and increased rates of imprisonment. In American society, wealthy white citizens enjoy legal privilege and freedom from profiling much like the dignified men who possessed power in ancient Rome. People of color, however, lack these privileges and tend to face punishments in greater numbers just as those of lower economic status did in ancient Rome. The pervasive nature of both forms of discrimination stem not from coincidence, but from systematic institutions of prejudice.

In order to demonstrate the parallels between the legal systems of ancient Rome and contemporary America, this account draws from literary examples of Roman discrimination and modern sociological texts that focus on the effects of prejudiced legal structures in contemporary

society. Following a succinct overview of the historical developments that led to the Roman legal system (chapter one), the ensuing chapters first examine the various facets of the Roman legal system that contribute to the biases against those of lower classes, including police forces, legal proceedings, criminal punishments, and social privileges (chapters two through five, respectively). The remaining segments shift to the systematic prejudice of American legal structures and underscore the comparable features in the two systems.

This explanation of the legal systems seeks not to present a complete record of all forms of prejudice within either society nor does it attempt to claim that the two systems are identical in their discriminatory policies. Rather, this study intends to argue that the modern American legal system cannot be exempted from forms of discrimination just as the Roman legal system cannot be described as an equal system of justice. For this reason, it seems reasonable to claim that prejudice permeates both legal systems to a point where an intrusion on guaranteed freedoms exists. Due to the militarization of law enforcement and the overwhelming skew of criminal charges toward people of color and lesser privilege in the American legal system, it is conceivable that while Roman legal discrimination was directed not toward people of color, but against lower classes, women, and slaves, parallels between ancient Roman and American law exist as prejudice permeates both structures and prohibits uniform liberties within the societies.

Chapter I: A Brief History of Roman Government

It is irresponsible to discuss the Roman methods of legal control without a discussion of the history of Roman society as the laws of the Romans evolved as the society moved through various political systems. Constant changes in leadership led to equally constant alterations to the legal policies within Roman borders. Although this brief overview of Roman legal history does not discuss the entire evolution of the legal systems in ancient Rome, it does make note of the most significant portions of its rich history.

The Monarchy and the Republic

Historical sources claim the founding of Rome to have occurred in 753 BCE, with the creation of a monarchy that lasted until 510 BCE after the removal of king Tarquinius Superbus.[1] Over the next century-and-a-half, Rome emerged as a Republican city-state with two classes of citizens known as the patricians and the plebeians. The former consisted of Roman nobility while the latter comprised those of lesser status and made up a greater proportion of the population.[2] During this period, the first known written laws were published. Dated at 451 BCE, the *Duodecim Tabularum Leges*, or Twelve Tables, established a written index of laws that were to be obeyed in Rome and marked the beginning of known Roman law.[3] In addition, Romans crafted the Republican constitution following hostilities between the two groups of citizens. The constitution called for the formation of three public groups that influenced the Republic and later the Empire for multiple centuries: the magistracies, the Senate, and the assemblies.[4]

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[1] Barry Nicholas, *An Introduction to Roman Law* (Oxford: Oxford University Press, 1962), 1, 3.
[2] Ibid., 3.
[3] H.F. Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge: University of Cambridge Press, 1952), 108.
[4] Nicholas, *Introduction to Roman Law*, 3.

Magistracies

After the ousting of the kings, the Romans divided power between two men known as consuls. Consuls who were elected to one-year terms possessed *imperium*, or the ability to carry out the law, over the entire city-state, subject to limitations by legislation. Furthermore, each consul enjoyed the power to veto any decision made by the other consul.[5] This significant responsibility was judged to be too great for two men as further magistracies (all with a lesser degree of *imperium*) were put into place to delegate power throughout Rome. In 367 BCE, Romans established the office of the praetor to carry out the civil law of Rome. The number of praetors increased to two in 242 BCE to manage the workload of civil disputes. A *praetor urbanus* managed the cases involving citizens while a *praetor peregrinus* oversaw the disputes in which at least one of the participants was a foreigner.[6]

The office of aedile was founded in 367 BCE as well. Although aediles made few direct contributions to Roman law, they controlled the public works and the market of Rome, two sectors of Roman life that would be put under strict controls by policing forces later in history.[7] The government also introduced censors in 443 BCE. Censors were elected once every four to five years to perform a census of the people in order to collect information about political affiliations and taxation statuses. In addition, censors monitored the moral habits of Roman citizens. If a censor condemned the behavior of a citizen, he reserved the right to place a *nota* (mark) against his name and take away some or all of his rights.[8] Most censors obtained their position following their service as a consul. Despite a lack of *imperium*, this office enjoyed a high level of prestige among the magistrates until the later years of the republic and was

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[5] Ibid.
[6] Nicholas, *Introduction to Roman Law*, 4.
[7] Ibid.
[8] Ibid., 4, 5.

disbanded in 22 BCE. The power of the *nota* continued to affect the lives of those living in Rome, however, as Roman emperors took up the power following the dissolution of the republic.[9]

The Senate

To supplement the responsibilities of the magistrates, republican officials also established the Senate. Membership in the Senate was generally limited to those who had served as magistrates. Although the group was meant to be an advisory council, the Senate became a powerful force in the Roman Republic as magistrates could rarely go against the recommendation of the elders.[10] The influence of the Roman Senate developed an ideal representation of Roman life and established expectations for the betterment of the city-state.

Assemblies

The republican status of early Rome would not be possible without the existence of the assemblies composed of the entire citizenry. Several assemblies convened at the call of a magistrate. Only the magistrate who presided over the assembly could choose the motions which were to be placed in front of the assemblage; furthermore, the members of the council could only approve or reject a motion as they possessed no power to amend the bill.[11] One of these assemblies, the *comitia curiata*, held little political power. The most effectual assemblies were the *comitia centuriata* and the *comitia tributa*, whose members were both patrician and plebeian and held wealth through the military and land ownership, respectively. An assembly comprised solely of plebeians, known as *concilium plebis*, was overseen by the tribunes, who were officials dedicated to protecting the rights of the lower class plebeians. While the decisions of this group (*plebiscita*) originally demonstrated no legal power, the *lex Hortensia* of 287 BCE

[9] Ibid., 5.
[10] Nicholas, *Introduction to Roman Law*, 5.
[11] Ibid.

provided the motions with legislative influence. This plebeian council became the most vocal of the assemblies as tribunes devoted more time to its organization than the magistrates that led the other legislative bodies.[12]

This increased power of the plebeians opened the door for plebeians to have greater political influence and hold magistracies. Despite this new honor, these magistracies were limited to those plebeians who were on the wealthier end of the spectrum. With this plebeian encroachment on the patricians, the line between the factions began to break down and power was distributed to those families who obtained the higher magistracies and entered the senatorial nobility. In this way, a noble ancestry became even more necessary for entrance into the ranks of a political office.[13]

The republic held its form for several centuries, but began to lose its ability to maintain itself after years of expansion. The gap between the rich and the poor continued to increase, members of the Senate grew wealthier, and citizens refused to join the army that had built up the territory of Rome. Soldiers were recruited from the lowest classes of society and generals began to separate themselves from the republican army and fight to gain their own power. This fission in military leadership led to periods of civil war from which a man by the name of Octavian emerged. Following the assumption of the name Augustus, this man claimed to restore peace and constitutional government to Rome and its territories in 27 BCE. In doing so, Augustus founded what is now known as the Roman Empire.[14]

The Principate

Historians divide the Roman Empire into two periods: the Principate which lasted from 27 BCE to 284 CE and the Dominate which lasted from 284 CE to 476 CE. When Augustus

[12] Ibid., 6.
[13] Nicholas, *Introduction to Roman Law*, 7.
[14] Ibid., 9.

came to power, he chose to wield a greater amount of power for himself, but maintained integral parts of the republic. Though Augustus now held the highest power in Rome as *princeps*, or first citizen, he retained the magistracies and kept the constitution intact. Augustus allowed the assemblies to die out steadily so that the opinions of the assemblies were viewed only as ceremonial ratifications of the emperor's wishes. The Senate gained more political power that it split with the emperor. The word of the Senate (*senatus consulta*) echoed the voices of the former assemblies, but Augustus used his power so that the Senate acted as his right hand more than his colleague.[15]

Following a generally uninterrupted two-hundred-year peace, Romans from the territories began to seize the seat of the empire. A greater number of soldiers came from the frontiers of the empire and not from Rome. Irresponsible emperors such as Commodus and Septimius Severus lived lives of excess while they imposed heavy taxes on the people. This, coupled with wars on the frontiers of the empire, led to a politically unstable end of the third century which went uncorrected until 284 CE when Diocletian became emperor and initiated the Dominate.[16]

The Dominate

The beginning of the Dominate is marked by the rejection of the emperor as *princeps*. From this point forward, the emperor was to be known as *dominus*, or master. Just as Augustus had made changes only to the appearance of the republic, Diocletian did not change a great deal about the political situation in the empire, but updated existing political structures into his favor. The final remnants of the republic vanished as the Senate became a weak council and the title of consul became nothing more than an honorific. The placement of absolute power in the hands of Diocletian instigated a split in the Roman Empire that became permanent in 395 CE. This

[15] Nicholas, *Introduction to Roman Law*, 10.
[16] Ibid., 10-11.

division led to a strict hereditary class system that pinned citizens down to specific trades. The emperor Constantine succeeded Diocletian and transferred the capital of the Empire to Constantinople in 330 CE.[17] The geographic shift of power led to an opening in Rome that allowed the Goths to sack the city in 410 CE. The close of the Western Empire of Rome finally took place in 476 CE with the removal of the then Western emperor Romulus Augustulus.[18] The revival of Roman law did not come about until the reign of Justinian in 527 CE. As part of his plan to restore the glory of the Roman Empire, Justinian insisted that Roman law be rejuvenated and enforced in the empire once again.[19]

The history of ancient Roman government is fraught with periods of war and social tumult. As power passed from magistrate to magistrate and emperor to emperor, the people living under Roman rule were subjected to changing legal systems. During the Roman Republic, plebeians fought for their right to have a voice in the governmental hierarchy that the magistrates had created. Their movements eventually led to plebeian inclusion in the magistracies, but only among the richer citizens of this lower class. As the Roman Republic transitioned to the Roman Empire, emperors took this power away from the commoners and promised to protect the people by making the decisions in their stead. In the end, the empire expanded to a size that could not be sustained by the emperor and the centralization of the government removed the influence of the empire from the distant territories and promoted uprisings.

Throughout this series of events, several aspects of the government remained constant. Those individuals who were poor never achieved a status that would allow them to hold public office or improve their condition. Only men held positions of power in both the republic and the empire. Furthermore, those who possessed an honorable ancestry controlled the majority of the

[17] Ibid., 13.
[18] Ibid., 14.
[19] Nicholas, *Introduction to Roman Law*, 14.

Senate and the magistracies in the republic and emperors succeeded from either heredity or military conquest. In order to understand why these groups never attained any political standing or broke through the political system of Rome, one must grasp the social and political prejudices that existed in Roman law. This analysis now turns to the history of Roman criminal procedures that shaped social attitudes toward crime and legal actions.

Chapter II: Roman Criminal Procedures

Although the actions of Justinian following the fall of the Western Roman Empire allowed Roman law to survive and influence modern legal thought with its philosophy, there was no such legal code prior to the Byzantine records. Prior to the Roman Republic, a systematized criminal procedure did not even exist as legal sanctions were actions that were to be undertaken privately. Following the establishment of the republic, Roman law became the rule of the land, but was still not written down in a single text. Despite the lack of legal documents, countless literary examples provide a substantial glimpse into the inner workings of Roman criminal procedure before and during the height of ancient Roman culture.

Criminal Procedures prior to the Republic

During the monarchy of Rome, Roman rule was enforced by the military and a king who claimed to possess a divine right.[20] Though there was a belief in public repercussions for crime, it was expected of the affected parties to carry out their own legal proceedings. Many of these private proceedings of the monarchy guided Roman law to a more refined system of crime and punishment. Gellius informs readers that during the early years of Roman history, there was a Sabine word *multa* that referred to a compensation of cattle to signify the payment for a wrong committed against a man, a concept that would survive in the fines given out by the Roman courts.[21] The Twelve Tables retained the allowance of *talio* or retaliation equal to that of the offense (an eye for an eye).[22] The retention of specific titles for crime in republican and imperial literature indicates a strong belief in crime as sin. For example, *supplicium*, or the most severe

[20] A.H.J. Greenidge, *The Legal Procedure of Cicero's Time* (Oxford: The Clarendon Press, 1901), 298.
[21] Gellius, *Noctes* Atticae, 11.1.5
[22] *Duodecim Tabularum Leges*, 8.2, "Si membrum rupit, ni cum e pacto, talio esto."

punishment, originally referred to an offering for a sin, sometimes to the point where the offender and his belongings were sacrificed to the gods.[23]

Religious mediation from these crimes proved necessary during the early years of Rome. Roman religious officials established guidelines for atonement based on the severity of the crime. Penitence for general offenses committed by the entire populace and the private sins of individuals was carried out by a sacrifice at the conclusion of the census.[24] From its inception, however, there was a belief in crimes for which there was no atonement that would allow the offender to live. For instance, Cicero explains that perjury and incest are two crimes that are committed *prudens* (in full understanding)[25] and must be punished by death.[26] The legal power of Roman priests stemmed not from divine right, but from an earlier period of family law where familial councils dealt with the punishment of sinners.[27] It is this idea, perhaps, that led to the firm conviction in *paterfamilias* and *patria potestas* (see chapter five).

Toward the end of the monarchy, Romans began to move away from the death penalty when a sin was committed. In place of execution, a man who wronged the gods was now excommunicated from Roman society and "separated from the fire and the water of his tribe."[28] This development in the Roman criminal procedure provided the gods with the property of the offending party, but not his life. Romans now understood that a harsh penalty did not require the life of a person and continued to utilize exile as a punishment until its ultimate downfall.[29]

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[23] Greenidge, *Legal Procedure of Cicero*, 298-299.
[24] Ibid., 299.
[25] Ibid.
[26] Cicero, *de Legibus*, 2.22 "Periurii poena divina exitium, humana dedecus. Incestum pontifices supremo supplicio sanciunto."
[27] Greenidge, *Legal Procedure of Cicero*, 301.
[28] Ibid., "aqua et igni interdictus"
[29] Ibid., 302.

The emergence of a political society in Rome began to shift legal thought away from religion and toward the amelioration of the state. While the king remained ultimate judge and oversaw most cases involving public safety, he could also delegate power to another individual who had been approved to be a judge by a political council.[30] From this new secular form of legal procedure arose the two concepts of *perduellio* (treason) and *parricidium* (murder), though the scope of these two terms expanded well beyond their common English translation. *Perduellio* included any attack against the political body, magistrates, or citizens if the attacker identified as a public enemy.[31] *Parricidium* generally referred to the killing of a free citizen without any justifiable reasoning, but likely included a wider range of offenses.[32]

Crimes of *perduellio* and *parricidium* were met with the judgment of the king and carried out by his servants. If convicted of either of these crimes, a man would be sentenced to death via the *arbor infelix* (a precursor to crucifixion), scourging, drowning, or throwing from the Tarpeian rock based on the *mos majorum*, or the custom of the ancestors.[33] A trial did occur, but the sentence was generally given preceding the outcome of the investigation performed by the delegates of the king. It is possible that the delegates could appeal to the king to overturn his decision, but no evidence in existence officially indicates that the king had a power of pardon.[34] Livy describes an instance where a *provocatio*, or appeal, occurs during the possibly fictional trial of Horatius, but the idea appeared to be struck down by the right of the king.[35] The strong

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[30] Greenidge, *Legal Procedure of Cicero*, 302.
[31] Ibid., 303. See also Ulpian, *Digesta Justiniani*, 48.4.11 “Perduellionis reus est hostile animo adversus rem publicam vel principem animatus.”
[32] Greenidge, *Legal Procedure of Cicero*, 303.
[33] Ibid., 304.
[34] Ibid., 304-305.
[35] Livy, *Ab Urbe Condita*, 1.26. “Duumuiri perduellionem iudicent; si a duumuiris provocarit, provocatione certato; si vincent, caput obnubito; infelici arbori reste suspendito; verberato vel intra pomerium vel extra pomerium." Hac lege duumuiri creati, qui se absolvere non rebantur ea lege ne innoxium quidem posse, cum condemnassent, tum alter ex iis "Publi Horati, tibi perduellionem iudico" inquit. "I, lictor, colliga manus." Accesserat lictor iniciebatque laqueum. Tum Horatius auctore Tullo, clemente legis interprete, "Provoco" inquit”

ties of the law to the military and religion of Rome, however, made this process of appeal unlikely.[36]

Many of the procedures discussed in this portion of text were abandoned following the disposal of the monarchy in favor of a system that took the opinions of citizens into account. The reliance on religion and customs, however, influenced the legal procedures of the Romans as they shifted to a republican form of government. Without an absolute ruler, legal power and jurisdiction spread to a greater number of individuals and created a streamlined system of delegation. This change in leadership provided the entire populace with stronger powers for appeal and legal negotiation, though not in an egalitarian manner as one may expect.

Republican and Imperial Criminal Procedures

Shortly after the dissolution of the kingdom, consul Publius Valerius passed the *lex Valeria* in 509 BCE. This historic decision instituted a popular jurisdiction concerning sentences of capital and corporal natures, eliminating the ability to sentence someone to death or flogging within the city borders without an appeal.[37] Consuls became the highest judges in Rome in the absence of a king, but delegated their role in criminal cases to two assistants known in the early Republic as *quaestores* (they would eventually manage the treasury of the city).[38] *Quaestores* possessed a plethora of powers, including financial obligations, but their responsibility to the criminal courts defined them in the early Republic. The consuls could overturn the decision of the *quaestores* at any time, but consuls generally allowed their delegates to communicate with the popular assemblies along with the *duumviri perduellionis* in cases of treason.[39]

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[36] Greenidge, *Legal Procedure of Cicero*, 307.
[37] Ibid., 308. See also Cicero, *de Re Publica*, 2.31, 53 "ne quis magistratus civem Romanum adversus provocationem necaret neve verberaret"
[38] Greenidge, *Legal Procedure of Cicero*, 308.
[39] Ibid., 304. *Duumviri perduellionis* were brought in during cases that involved high treason and were implemented first during the kingdom of Rome as delegates of the king.

The Twelve Tables

As previously mentioned, Romans gained a more significant power of appeal with the initiation of the *lex Valeria*. The new power of *provocatio*, however, was not yet implemented to the full extent as no magistrate was willing to authorize its use.[40] In order to induct an appeal, a convicted man had no choice but to beg for mercy from the citizens (at that time known as Quirites) in the vicinity. Once tribunes were introduced as speakers for the plebeians, this method of appeal did begin to dissipate with the exception of a passive tribune who had to be urged by the common people. In time, the need for *provocatio* faded entirely as magistrates either avoided handing down sentences that would allow for an appeal or went directly to the assembly to seek its opinion when such sentences were applied.[41] Cicero, in reference to the Twelve Tables, claimed that *provocatio* could be used at any legal level:

> "*provocationem autem etiam a regibus fuisse declarant pontificii libri, significant nostri etiam augurales, itemque ab omni iudicio poenaque provocari licere indicant XII tabulae conpluribus legibus.*"[42]

All of this did assume that the appropriate individuals were aware of the appeal and willing to go through with the process.

In addition to the *provocatio*, the Twelve Tables addressed the principle of *privilegia* and the jurisdiction for capital punishment. *Privilegia*, or laws in one's favor, were not meant to be created or enforced and one was not to be sentenced to capital punishment by anyone except for the highest assembly (*comitia centuriata*).[43] Laws of privilege possessed all or some of the

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[40] Greenidge, *Legal Procedure of Cicero*, 311.
[41] Ibid.
[42] Cicero, *De Re Publica*, 2.54. "The sacred books verify, however, that the right of appeal had existed, even against the rule of the kings. Our augural books mean the same thing. And the Twelve Tables indicate, through a great many laws, that there was a right of appeal from each judgment and punishment."
[43] Cicero, De Legibus, 3.44. "Tum leges praeclarissimae de duodecim tabulis translatae duae, quarum altera priuilegia tollit, altera de capite ciuis rogari nisi maximo comitiatu uetat. Et nondum inuentis seditiosis tribunis plebis, ne cogitatis quidem, admirandum tantum maiores in posterum prouidisse. In priuatos homines leges ferri noluerunt, id est enim priuilegium: quo quid est iniustius, cum legis haec uis sit, ut sit scitum et iussum in omnis?

following five characteristics: The law of privilege references a specific person, directs itself against a specific person or group and intends to harm them, indicates individuals to be harmed by name, functions as a retrospective law, and/or calls for a sentence prior to a trial.[44] Although *privilegia* were forbidden, the Roman government did not provide a body to monitor laws and prevent these inequalities. In addition, all laws, including those written on the Twelve Tables were up for interpretation and revision.[45]

The reservation of capital punishment for the *comitia centuriata* created a great deal of controversy as well. By limiting these important cases to the highest court in Rome, the lesser *concilium plebis* was degraded to an even lower status. This action, however, likely failed to surprise the plebeians who had been ignored by the statutes of the Twelve Tables. In fact, when Cicero was prosecuted by the plebeians prior to his exile, his eventual punishment was never considered a judicial sentence.[46]

The portions of the Twelve Tables that survived antiquity informed readers of other legal procedures including the call to trial, the right of a father to dominate his household, the belief in the final word of the people becoming the current law, and many others.[47] Despite the hope to eliminate all *privilegia*, the Twelve Tables exemplified the controls placed on women and plebeians. While women never gained substantial power due to their second-class status in ancient Rome, the plebeians did manage to stand up for themselves and campaign for their voices to be heard. One of the few affronts to legal privilege came from this demand for plebeian rights and the tribunes that helped to enforce them.

Ferri de singulis nisi centuriatis comitiis noluerunt. Descriptus enim populus censu, ordinibus, aetatibus, plus adhibet ad suffragium consilii quam fuse in tribus conuocatus."

[44] Greenidge, *Legal Procedure of Cicero*, 313.

[45] Ibid., 315.

[46] Ibid., 317-318.

[47] See *Duodecim Tabularum Leges*.

The Power of the Tribunes

The position of tribune was established not as a magistracy, but as a supervisory role in which individuals tied to the government could keep laws that offered certain privileges off of the table. It proved necessary, however, to provide tribunes with powers that would allow them to enforce their decisions at the magisterial level. As a result, tribunes gained *coercitio*, or the power of coercion, which would allow them to impose fines, imprisonment, and even death on anyone in the republic in order to gain support for their political endeavors (see following section).[48] Due to the non-magisterial status of the tribunes, the patricians challenged the right to *coercitio*, but lost their appeal as the government ruled that no aid could be enforced without the right to exact consequences.[49]

The power of the tribunes became difficult to subdue as cases involving *perduellio* continued to appear before the *concilium plebis* well after the creation of the Twelve Tables. In 212 BCE, a contractor by the name Postumius was sentenced to pay a fine for a conviction of fraud against Rome. Postumius initially avoided this sentence with the help of other contractors, but was eventually sentenced to capital punishment when the case was referred to the Senate. The case legitimized the ruling of the tribunes and the plebeian assembly, indicating that the Roman legal system paid attention to the activity that occurred in the lower classes.[50] It is imperative to note, however, that the tribunes did lack the ability to produce a capital sentence without first referring it to a higher assembly.[51] Despite these limitations, the tribunes and the plebeians did gain a specific jurisdiction that provided a service to the Roman judicial system.

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[48] Greenidge, *Legal Procedure of Cicero*, 327.
[49] Ibid., 328.
[50] Ibid., 329. See also Cicero, *In Verrem*, 2.1.100.
[51] Greenidge, *Legal Procedure of Cicero*, 329.

Coercitio

The ability to enforce legislation and judicial decisions was crucial in the sphere of Roman politics. Magistrates, along with the tribunes, utilized *coercitio* to supplement their jurisdiction and further their agendas. *Coercitio* was practiced not against individuals who had committed a crime, but against those individuals who needed to be persuaded of a certain legal action proposed by an official. This power affected all levels of Rome's inhabitants and could be practiced by a magistrate against citizens, senators, judges, and even lower-ranking magistrates.[52] The unbridled nature of this political coercion allowed magistrates to use several methods to carry out their wishes.

Fines were the most prevalent form of coercion utilized by political officials. With the exception of the quaestors, all magistrates had the power to impose a fine as a method of coercion following the *lex Aternia Tarpeia* in 454 BCE.[53] The *multa suprema*, or greatest fine, was set in 452 BCE as two sheep for poor offenders and thirty oxen for rich offenders. This amount evolved with the adoption of coinage to three thousand *asses*, the value of thirty oxen. In order to levy a fine of greater value, a magistrate would need to solicit an approval from the proper assembly.[54] The fine was a favorite coercion weapon of tribunes as they possessed the right to seize all of the goods from an individual and offer them to the gods.[55]

Imprisonment, although not a penalty under Roman law, allowed magistrates to gain "obedience from, not merely from [sic] private citizens, but from lower magistrates and senators" and "secure the appearance on trial of one whom they accused."[56] With the exception

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[52] Greenidge, *Legal Procedure of Cicero*, 331-332.
[53] Ibid., 335. See also Cicero, *De Re Publica*, 2.60.
[54] Greenidge, *Legal Procedure of Cicero*, 335.
[55] Ibid., 336.
[56] Ibid., 333.

of the tribunes, many magistrates did not imprison individuals in order to punish them. Cicero tells readers of a particular incident when a consul was imprisoned in one of his letters to Atticus.

> "*Restitit et pervicit Cato. Itaque nunc consule in carcere incluso, saepe item seditione commota, aspiravit nemo eorum quorum ego concursu itemque ii consules qui post me fuerunt rem publicam defendere solebant*."[57]

Imprisoning an accused party was more common. A magistrate could put a person in prison and retain him there if the magistrate chose not to accept bail. Bail was accepted frequently and relatively few people remained in confinement. In addition, the imprisonment *coercitio* could be nullified by another magistrate at the same level via veto.[58]

Exile as a form of coercion was said to have occurred only once in 58 BCE when a knight was told to move at least two hundred miles away from Rome.[59] *Pignoris capio*, or the seizure of a pledge, was used against other magistrates and those of the political elite. This punishment consisted of an acquisition of goods and destroying them in front of the appropriate group of people. Julius Caesar even employed this method during his term as praetor in 62 BCE after putting the informer Vettius in prison and destroying pieces of furniture that belonged to him.[60] *Death* was by far the ultimate form of *coercitio* that was employed by all magistrates with the proper amount of *imperium*. Although the power of political coercion was, in theory, unlimited, deaths rarely occurred as a means of *coercitio* as it would have likely been rejected by another magistrate as the proper course of action.[61]

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[57] Cicero, *Ad Atticum*, 2.1.8. "Cato resisted and pervaded. And so, having now had a consul thrown into prison, of riots often and again aroused, no man of them moved, with whose support I and the consuls that followed after me were accustomed to defend the Republic."
[58] Greenidge, *Legal Procedure of Cicero*, 334.
[59] Ibid. See also Cicero, *pro Sestio*, 12.29. L. Lamiam, qui cum me ipsum pro summa familiaritate quae mihi cum patre eius erat unice diligebat, tum pro re publica vel mortem oppetere cupiebat, in contione relegavit, edixitque ut ab urbe abesset milia passuum ducenta, quod esset ausus pro civi, pro bene merito civi, pro amico, pro re publica deprecari.
[60] Greenidge, *Legal Procedure of Cicero*, 337. See also Suetonius, *Divus Julius*, 17. "pignoribus captis et direpta supellectile."
[61] Greenidge, *Legal Procedure of Cicero*, 332.

The *Judicium Populi*

If there was to be a trial for a person not involving the invocation of the *provocatio*, that person would present himself in front of a *judicium populi*, or a court of the people. A case heard at a *judicium populi* would have started when the magistrate felt that any sentence he would impose on an offender would likely be appealed. Rather than have two trials in the case of a *provocatio*, magistrates wished to hand cases over to the popular courts to avoid having their authority questioned.[62] If a magistrate wished to sentence a criminal, but expected this punishment to be appealed, he would summon a *contio*, or informal assembly, to witness an *anquisitio*, or an inquiry prior to the trial. After three days of meetings, the magistrate constructed a bill to indicate his decision, which proposed either the penalty intended before the *anquisitio* or that same penalty in an amended form. The decision was then passed on to the assembly which could either accept or deny the proposal. During this time, the magistrate may also be influenced to alter the recommendation, but this occurred rarely. If a trial brought before the *judicium populi* stemmed from a *provocatio*, the same procedure would follow, but a different magistrate would oversee the *anquisitio*, as in the case of capital punishments being relayed to specific courts.[63]

Rome advanced from a kingdom ruled by vengeance and religious zealotry to a republic and empire with a well-organized legal system with levels of jurisdiction. Citizens of Rome gained the power to judge those who challenged their bureaucracy through the formation of popular assemblies. In spite of these delegations, magistrates continued to further their own agendas and administrate the city-state and territories through coercion. As the population of the Roman Republic and Empire grew, however, it became necessary to install more officials who

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[62] Greenidge, *Legal Procedure of Cicero*, 345.
[63] Ibid., 345-348.

could observe the people and verify that they were safe and, perhaps more importantly, living to uphold the realm that had been established. These new forces promoted the division of rich and poor in Roman society and deepened a system of privilege and discrimination. These pseudo-police forces revealed the underlying motives driving the political careers of those few families who maintained power throughout the history of Rome.

Chapter III: Roman Policing

The amount of territory controlled by Rome continued to grow as the Republic shifted to the Empire. This vast area of land could not be monitored by Roman magistrates and judges alone. In order to pacify the provinces and maintain order in the entire society, Roman officials and citizens created law enforcement positions to make city living safer, to protect property, and to keep the provinces "*pacata atque quieta*" (peaceful and quiet).[64] These pseudo-police forces helped to remove criminals from Roman streets and enforce the wishes of Roman magistrates and the emperor. Their presence, however, also instilled new fears in the hearts of residents as these police forces surveilled every inch of territory and created a culture of apprehension.

The formation of these police forces transpired when groups of people with similar goals joined forces to complete their task. In order to display the evolution of civilian bands to state-sanctioned police outfits, this section of the account turns initially to the prevention of slave flight. The effort of masters securing their slaves led to other, law-based police forces at the civilian, imperial, provincial, and military levels of society. While these watches prevented crimes and destruction, their birth allotted a new area of government from which corruption could flow.

Slave Hunting

In losing track of a slave, masters lost more than a helping hand around their homes; they also lost a valuable piece of property. When a Roman slave fled, there was no available method to track down this person as there was no trustworthy force dedicated to recovering these individuals. A class of slave hunters known as the *fugitivarii* did exist, but these men were

[64] Ulpian, *Digesta*, 1.18.13.pr.

corrupt and often conspired with their bounty to aid in their escape.[65] Slave revolts had occurred under Spartacus and many Romans knew that this threat existed if the runaway slaves managed to organize.[66] The prevalence of this social problem was recognized by Augustus who took the time to gain public favor and boast about his accomplishment of returning thirty-thousand slaves to their masters when he took command.[67] The Roman hatred of runaway slaves was contradictory, considering the early populations of Rome were made up of a significant number of fugitives.[68]

Regardless of this irony, masters began to take preventative actions to ensure the security of their slaves. One notable method was the placement of *stigmata*, across the forehead of slaves. A common branding involved the sequence of letters *TMQG*, which stood for *tene me quia fugi* ("Detain me because I have fled").[69] This protection of economic assets was the first of many steps taken to inhibit the escape of slaves.

The dedication to capturing fugitive slaves came about by the cooperation of the differing levels of policing to secure runaways. Ulpian described a system where the Senate and emperor combatted slave flight through fines against those who hid slaves and through promises of impunity for those who found and returned slaves to a magistrate or their owner. In addition, soldiers and civilians were granted the right to enter the estates of any person if they were in search of a fugitive. These latter two groups were also charged with aiding in the search of a fugitive slave if there was a master in the process of tracking him or her down.[70] This

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[65] Christopher J. Fuhrmann, *Policing the Roman Empire* (Oxford: Oxford University Press, 2012), 23. See also, Ulpian, *Digesta*, 48.15.2.1.
[66] For example, Tacitus, *Annales*, 3.43, 46 and 4.27.
[67] Augustus, *Res Gestae Divi Augusti*, 1.25. "Eo bello servorum qui fugerant a dominis suis et arma contra rem publicam ceperant triginta fere millia capta dominis ad supplicium sumendum tradidi."
[68] Livy, *Ab Urbe Condita*, 1.8-9.
[69] Fuhrmann, *Policing the Roman Empire*, 29. See also Petronius, *Satyricon*, 103.1-5.
[70] Ulpian, *Digesta*, 11.4.1.1-2

coordinated effort against runaway slaves benefited the elite members of Roman society as their services and funds allowed Roman society to function.[71] This struggle against fugitive slaves exhibited the common values shared by the free men of Roman society and initiated the development of coordinated forces that could preserve the livelihoods of these owners.

Civilian Policing

The right to retaliate with force against someone who has committed an offense (*vim vi repellere*) was guaranteed by the Twelve Tables and continued to influence Roman society.[72] The right of the father to torture slaves and execute his wife and adult children for public offenses (*pater familias*) indicated a dedication to self-policing and identified the home as a space under a domestic jurisdiction that was separated from the public laws. If the residence ever came under distress, it was the responsibility of all those who lived there to defend the home, call neighbors to divert intruders, and possibly serve as witnesses at a later date.[73] Homes of the elite may have utilized guards while agricultural estates charged the *vilicus,* the head slave, with the task of securing the compound. *Saltuarii,* or specialized slaves, worked under the *vilicus* and guarded other slaves living on the estate.[74] Livy claimed that guard dogs were also instrumental in the protection of property.[75]

Travel was also hazardous, particularly for those who could not afford bodyguards. Lower class individuals often armed themselves on lengthy trips and set up watches during the night.[76] These people trusted in the kindness of strangers to provide protection if someone

[71] Fuhrmann, *Policing the Roman Empire*, 43.
[72] Ibid., 49. See also *Duodecim Tabularum Leges*, 8.12.13.
[73] Fuhrmann, *Policing the Roman Empire*, 50.
[74] Ibid., 51.
[75] Livy, *Ab Urbe Condita*, 5.47. "tanto silentio in summum evasere ut non custodes solum fallerent, sed ne canes quidem, sollicitum animal ad nocturnos strepitus, excitarent."
[76] Fuhrmann, *Policing the Roman Empire*, 51-52. For example, see Petronius, *Satyricon*, 62.

decided to stir up trouble on the streets.[77] Scuffles on the street rarely involved a man of repute and, for this reason, a civil police force was not imperative in the eyes of men with political power.

Civil posses helped to quell criminals that lived near the small towns under Roman control. Although this vigilante justice did not technically follow the criminal procedures of Roman law, the *vim vi repellere* clause in the Twelve Tables supported the actions of these groups.[78] To supplement these men, young men near the age of twenty were known to practice fighting skills and could be called upon during an emergency as a makeshift militia.[79] References in the texts of Apuleius noted that there may have been a security official known as *praefectus nocturnae custodiae*, or prefect of the night guards.[80] An inscription left behind in modern-day Switzerland did indicate that there was a *praefectus arcendis latrociniis*, or prefect for defending against bandits.[81]

The closest institutions to a civilian police force in Roman towns were the *apparitores*, or attendants of the magistrates who oversaw the needs of the people. [82] It would have been foolish for a person of low status to upset the magistrates in any town as they had the ability to punish them in a variety of ways (see chapters two and four) and affect their livelihoods. Magistrates also provided watchmen at markets to ensure fair trade and stifle any attempts at robbery.[83]

Despite the exceptional ability of Roman residents to come together and keep their towns safe, civilian policing lacked the support of Roman law. Political rivalries and class division incited tensions that could not always be suppressed. The possibility of imperial interference

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[77] Juvenal, *Saturae*, 3.329-348.
[78] Fuhrmann, *Policing the Roman Empire*, 53.
[79] Ibid., 56.
[80] Apuleius, *Metamorphoses*, 3.3.
[81] Fuhrmann, *Policing the Roman Empire*, 57.
[82] Ibid., 58.
[83] Fuhrmann, *Policing the Roman Empire*, 60.

worried the illegal policing systems that had sprung up in Roman towns.[84] In addition, these forces lacked any form of official jurisdiction over those whom they arrested or charged with a crime. It was unclear if residents of towns could subdue criminals only inside of the borders, just outside the border, or anywhere at all.[85] In order to legitimize their power, police forces needed to be supported by the Roman government.

Policing by the Emperor

When Augustus took power in 31 BCE, he changed the manner in which Roman leaders would influence public policy and maintain order in Roman lands. Although police forces existed prior to the formation of the Empire, such as the *tresviri capitales*[86] and the *custodes* placed in a market by Julius Caesar in 46 BCE,[87] it was Augustus who prioritized the stabilization of the sociopolitical world in Rome. His legislation instigated the development of police forces in Roman towns and laid the foundation for civilians and soldiers to begin surveilling territories under Roman control.

Police Appointments during the Reign of Augustus

Augustus eased his ascension to power by compromising between his new position and the former republican system of government. Although he assumed power over the military and called himself a *princeps* (first citizen) with uncontested power, he maintained the overall structure of the Roman Republic.[88] This shift in power forced domestic and provincial magistrates to reconsider their governing practices as their ability to remain in power now rested

[84] Ibid., 82-83.
[85] Ibid., 86.
[86] Ibid., 93. "head council of three"
[87] Suetonius, *Divus Julius*, 43. "Legem praecipue sumptuariam exercuit dispositis circa macellum custodibus, qui obsonia contra vetitum retinerent deportarentque ad se, submissis nonnumquam lictoribus atque militibus, qui, si qua custodes fefellissent, iam adposita e triclinio auferrent."
[88] Augustus, *Res Gestae*, 34.1.

in the hands of Augustus.[89] Governmental corruption decreased and the Roman Empire entered a period of relative peace. Tacitus admitted,

> "*Neque provinciae illum rerum statum abnuebant, suspecto senatus populique imperio ob certamina potentium et avaritiam magistratuum, invalido legum auxilio quae vi ambitu postremo pecunia turbabantur*."[90]

In order to pacify the extent of Roman territory, however, Augustus had to improve law enforcement systems in the provinces as years of civil war in the later years of the Republic had lingering effects on his new empire.[91]

To begin his efforts to bring peace to the provinces, Augustus first spared no expense to strengthen the Roman army. Augustus demanded from his soldiers a total separation from civilian life, going so far as to forbid soldiers to marry and seating them apart from the rest of the crowd at entertainment events.[92] A significant portion of free, Italian men who lived in the early Empire served as legionaries or support soldiers (*auxilia*). Under Augustus, the army grew to a size of about three hundred thousand men. Following the expansion era of Augustus' reign, many of these men probably avoided combat and served in a peacetime force. So as not to waste revenue on lazy soldiers, Augustus employed the men to take on small policing tasks throughout the Empire.[93] With the exception of a permanent military police force at an important mint in Lugdunum,[94] soldiers were assigned to temporary policing tasks in certain cities and at certain events to maintain order; however, these tasks were said to make soldiers lazy if performed in

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[89] Fuhrmann, *Policing the Roman Empire*, 101.
[90] Tacitus, *Annales*, 1.2. "The provinces did not negate the status of things, with the power having been undertaken by the Senate and the people was not trustworthy on account of the disputes of those in power and the greed of the magistrates. There was no valid aid of the laws which were corrupted by fighting, corruption, and the worst, money."
[91] Fuhrmann, *Policing the Roman Empire*, 101.
[92] Ibid., 105.
[93] Ibid.
[94] Tacitus, *Annales*, 3.41.1.

too great a number.[95] Although some literary texts hyperbolize the accomplishments of Augustus in terms of pacifying the Roman Empire, his actions did promote civil concord.

In Rome itself, Augustus promised to take the responsibility for protecting the capital and the people living in it as he absorbed the power of the tribunes in 23 BCE.[96] Soon after, he established a personal bodyguard known as *Germani corporis custodes* (the German bodyguard), a protective service that would remain loyal to emperors for several centuries.[97] Another group, the *cohors praetorian* (Praetorian Guard), was meant to guard the headquarters of a general (the *praetorium*); yet, Augustus expanded this body to protect the entire Roman citadel. Less than a decade into Augustus' imperial reign, the Praetorian Guard had grown to include nine cohorts made up of five hundred to one thousand Italian men. The men in this force enjoyed increased pay and shorter terms of service than ordinary soldiers. Men of this cohort wore lavish garments to distinguish themselves from civilians and other soldiers on ceremonious days, but wore regular togas during their day-to-day tasks. This extension of Augustus' rule marked one of the first of many major diversions from the model of the Roman Republic.[98]

The Praetorian Guard was then supplemented by three *cohortes urbanae* (urban cohorts), which likely served as more of a day-to-day police force. Although they performed many of the same tasks as their praetorian colleagues, the urban cohorts were valued less than their counterparts, having been forced to longer terms of service and a lower ranking in the serial numbering of the cohorts.[99] Augustus also undertook the arson problem that had plagued Rome since its inception. After several failed attempts to establish a strong firefighting force, Augustus installed four thousand freedmen known as *vigiles* (watchmen) to protect the city against arson.

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[95] Suetonius, *Divus Augustus*, 24-25.
[96] Fuhrmann, *Policing the Roman Empire*, 113.
[97] See Tacitus, *Annales*, 15.58. and Suetonius, *Galba*, 12.2.
[98] Fuhrmann, *Policing the Roman Empire*, 115.
[99] Fuhrmann, *Policing the Roman Empire*, 116.

Vigiles lacked the proper technology to put out fires and focused more on policing the streets to prevent the start of a fire, lest they have to destroy buildings in order to stop its spread. The Praetorian Guard and *vigiles* were under the command of equestrian prefects while the urban cohorts were under the discretion of a former consul known as the *praefectus urbi*. Each of these command positions carried a high level of prestige and guaranteed an increase in political power and legal privilege.[100]

By the middle of the first century CE, Augustus had created a security force of approximately ten thousand men, one for every one hundred people living in Rome.[101] This ratio surpassed the police to inhabitant ratio of both modern-day Washington D.C. and New York City.[102] In a few decades, Augustus had established perhaps the largest urban security force in history. These new police forces promoted not only peace within the city, but also the rule of Augustus. The devotion of the police outfits to the *princeps* would serve the Roman Empire well for the next several centuries.

Policing after Augustus

Augustus' control over his empire continued postmortem as he ordered each member of these new police forces to be paid a significant amount following his death in 14 CE.[103] This devotion to the imperial seat proved necessary as later emperors such as Nero required these guards to intimidate political opponents and unstable crowds.[104] The Julio-Claudian emperors that succeeded Augustus began to send praetorians on missions to dispose of political opponents,

[100] Ibid., 117.
[101] Ibid.
[102] Ibid.
[103] Tacitus, *Annales*, 1.5-8.
[104] Ibid., 15.58.

cementing the praetorian role as servants to the emperor.[105] The protection of the city was left to the lesser *vigiles* and urban cohorts.

This mobilization of the Praetorian Guard against imperial disturbances and uprisings initiated the militarization of Roman police forces. The personal wishes of the emperor slowly became the unspoken law of the land. Security measures within the city became more violent over time. During gladiatorial games and theatre events, emperors were known to call upon the guard to threaten and possibly execute individuals who did not appear to be supporting the "correct" side.[106] Police forces were susceptible to major corruption. At one point, *vigiles* and praetorians were pitted against one another when Tiberius called for the downfall of Sejanus, the praetorian prefect.[107] In another instance, both praetorians and *vigiles* were seen starting new fires in the great fire of 64 CE in order to increase their plunder of the city.[108]

Despite setbacks, Roman emperors continued to strengthen the numbers of these police forces in the capital. Constant threat of disorder, particularly in times of scarcity, required the suppression of crowds that may or may not attack the emperor.[109] This occupational hazard led to a colorful history of imperial bodyguards. The aforementioned *Germani corporis custodes* were disbanded by Galba and a later emperor (possibly Trajan) instituted the *equites singulares Augusti* in their place. Peoples from Germanic provinces still formed the majority of the force, but it was now known for its use as a cavalry unit that traveled with the emperor on campaigns.[110] New police forces continued to be inaugurated following the reign of Augustus.

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[105] See Tacitus, *Annales*, 11.1. Claudius sends one of his guards to dispose of Valerius Asiaticus. "At Claudius nihil ultra scrutatus citis cum militibus tamquam opprimendo bello Crispinum praetorii praefectum misit, a quo repertus est apud Baias vinclisque inditis in urbem raptus."
[106] Suetonius, *Gaius*, 30.2., *Vitellius*, 14.3., *Domitianus*, 10.1.
[107] Cassius Dio, *Roman History*, 58.9, 12.
[108] Ibid., 62.17.1.
[109] Suetonius, *Claudius*, 18.2.
[110] Fuhrmann, *Policing the Roman Empire*, 128-129.

Classiarii, or marines, were stationed at Misenum and Ravenna and were expected to police the Italian coastlines and possibly monitor the harbors for criminal activity.[111] The one soldier to every one hundred inhabitants ratio increased by over fifty percent by the beginning of the third century, making one in every twenty-one men on the streets of Rome a soldier.[112]

The officers of these police forces continued to evolve into a militarized force. In the *Digesta Justiniani*, Ulpian described the expansion of duties for the urban prefect:

> "*Omnia omnino crimina praefectura urbis sibi vindicavit, nec tantum ea, quae intra urbem admittuntur, verum ea quoque, quae extra urbem intra italiam, epistula divi severi ad fabium cilonem praefectum urbi missa declaratur.*"[113]

Furthermore, the urban prefect had at his disposal four urban cohorts and posted soldiers known as *stationarii* when working as a security force at games and other recreational events. By the rule of Septimius Severus, the urban prefect had been put in charge of public order and domestic security, a task that had been under the control of magistrates during the Republic and early Empire.[114] The urban prefect position gained prestige with these new powers; the person who held it would have strong support in a bid to become the next *princeps*.[115]

The prefect of the *vigiles*, while not as distinguished as the urban prefect, gained greater jurisdiction during this time period as well. Although cases involving premeditated arson and other crimes of a severe nature were turned over to the urban prefect, small thefts and burglaries were referred to the prefect of the *vigiles*. This man could even subject criminals to beatings without a trial.[116]

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[111] Ibid., 129-130.
[112] Ibid., 130.
[113] Ulpian, *Digesta*, 1.12.1.pr. "A letter of Divus Severus to Fabius Cilo, urban prefect, declares that the urban prefect has for himself jurisdiction over all crimes, not only such, which are committed inside the city, but also, which occur outside the city and within Italy."
[114] Ibid., 1.12.1.12. Fuhrmann, *Policing the Roman Empire*, 131.
[115] Fuhrmann, *Policing the Roman Empire*, 132.
[116] Fuhrmann, *Policing the Roman Empire*, 131-132. Ulpian, *Digesta*, 1.15.4.

In the provinces, new soldiers known as *frumentarii* came into existence. *Frumentarii* performed the dirty tasks for the army and emperor, including execution, arrest, and domestic espionage.[117] In this way, the *frumentarii* acted as a specialized task force that carried out the wishes of the emperor in a fashion similar to the Praetorian Guard. As provincial soldiers, *frumentarii* likely performed small side missions for governors and military commanders. Under the command of the emperor, these specialists surveilled and sometimes killed possible enemies. Several examples of these uses are known, including Hadrian's use of *frumentarii* to spy on his friends and Didius Julianus's attempt to assassinate Septimius Severus in 193 CE through a group of f*rumentarii*.[118] The creation of *frumentarii* provided yet another outlet for corruption that could be utilized by many individuals at all levels of the army and government.

The dispatching of soldiers to all areas of the Empire required emperors to entrust their governors with managing the security forces in the provinces. Although governors were extensions of the emperor's will, they maintained the power to pacify their own provinces so that the Roman government did not need to involve itself with every riot or political uprising. These powers led to unique questions of jurisdiction under Roman law and displayed the relationships between an emperor and his appointed governors.

Policing by Governors

Provincial governors held the power of all magisterial offices that existed in Rome for themselves during their tenure.[119] Governors were expected to be the ultimate judges in their provinces, but were not compelled to hear any case, even if the emperor himself had called for his intercession.[120] While they were at the mercy of the emperor, it was common for governors

[117] Ibid., 152.
[118] Ibid., 153.
[119] Ulpian, *Digesta*, 1.16.8.
[120] Fuhrmann, *Policing the Roman Empire*, 171.

to be corrupt. Governors could not be tried for crimes while they held office, often making non-imperial prosecutions of corruption weak and ineffective.[121] Above all, it was the duty of the governors to protect the people within the provinces so that they may view the emperor and his extensions (governors) as protectors and not tyrants.[122] In particular, this account is concerned with how these governors responded to their legal duties.

As mentioned at the beginning of this chapter, provincial governors had one true job in regards to crime which Ulpian clearly described:

> "*Congruit bono et gravi praesidi curare, ut pacata atque quieta provincia sit quam regit. Quod non difficile optinebit, si sollicite agat, ut malis hominibus provincia careat eosque conquirat: nam et sacrilegos latrones plagiarios fures conquirere debet et prout quisque deliquerit, in eum animadvertere, receptoresque eorum coercere, sine quibus latro diutius latere non potest*."[123]

By entering a province with a group of soldiers, the optimal governor would be able to subdue crime in even the most villainous of places.[124] The group that accompanied a governor as he traveled through a province included a full cohort of soldiers, a personal quaestor, ambassadors, miscellaneous companions, military advisors, and individual servants.[125] With this group of associates, it is likely that intimidation was the strongest tool for a governor in his role as a pacifier.

Regardless of the severity of a sentence handed down by a governor, it was always carried out by his soldiers. In a particularly gruesome decision, governors were accustomed to placing soldiers on guard during crucifixions to prevent families from saving the condemned or

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[121] Ibid., 177.
[122] Ulpian, *Digesta*, 1.16.9.4-5. 1.18.6.2,4,9.
[123] Ibid., *Digesta*, 1.18.13.pr. "A benevolent and serious governor ought to make sure that the province which he rules is peaceful and quiet. It will be fitting to do this without difficulty, if he diligently removes bad men from the province: for he needs to search out sacrilegious people, burglars, kidnappers, and thieves, punishing each in proportion to the crime under the law. He should also turn away their accessories, for without them a thief is unable to hide for a long time."
[124] Fuhrmann, *Policing the Roman Empire*, 183.
[125] Ibid., 186.

taking their bodies as relics of their martyrdom.[126] Soldiers served as an essential bodyguard to governors during politically unstable periods. Suetonius related a story of Vespasian's time as a proconsul of Africa in which soldiers had to protect Vespasian from a barrage of turnips.[127] Tacitus described another instance in which a governor of Spain, Lucius Piso, was killed with a blunt object by a lone assassin in 25 CE.[128] These violent actions only justified the insistence of the emperor and governors to increase military presence in the Empire.

Governors also placed soldiers in administrative positions as clerks, notaries, and bailiffs which were collectively known as *officiales* as they were in the service of the governor's staff (*officium*). These positions, along with *beneficiarii consularis* (see under Military Policing below), allowed soldiers to perform duties outside of combat that strengthened their cause to become more educated and possibly develop a political career.[129] The individuals in the *officium* could be dispatched to carry out specialized policing missions by order of a governor. In one case, soldiers were ordered to oversee the repair of buildings.[130] Governors also appointed *speculatores* who served in the provinces as bodyguards and executioners as opposed to their role as imperial bodyguards in the capital.[131]

Another form of policing in the provinces came through a procurator who was appointed by the emperor to oversee the leader's plans for the province by collecting taxes, building roads, overseeing mines, and any other tasks that the emperor deemed necessary.[132] Procurators, like governors, were susceptible to corruption and could only be punished by the emperor himself. In addition, procurators had in their possession a litter of soldiers who could be deployed for

[126] Fuhrmann, *Policing the Roman Empire*, 187.
[127] Suetonius, *Vespasian*, 4.3.
[128] Tacitus, *Annales*, 4.45.
[129] Fuhrmann, *Policing the Roman Empire*, 190.
[130] Ibid., 192. Ulpian, *Digesta*, 1.16.7.1 and 1.18.7.
[131] Fuhrmann, *Policing the Roman Empire*, 193.
[132] Fuhrmann, *Policing the Roman Empire*, 195.

specific security tasks at any time.[133] Although governors and procurators performed a similar role in the provinces, a letter from Pliny to Trajan suggested that procurators may have been subordinate to governors as governors commanded a stronger force of soldiers.[134] Whether or not these two offices were viewed at the same level by the government, Tacitus conveyed his annoyance with the "two kings" who ruled the provinces, the governor with his centurions and the procurator with his slaves.[135]

While governors and procurators wielded power over the inhabitants of the provinces, it was ultimately the emperor who ordered the watches over the people of the Roman Empire. To observe this fact, one does not need to look further than the letters that were sent by Pliny to Trajan to increase the military presence in his provinces. Trajan denied nearly all the requests of Pliny as he judged the current policing presence in his province to be sufficient.[136] Governors and procurators were expected to maintain their provinces as the emperor wished. If the emperor received word that they were failing at this task, the emperor did not hesitate to step in and replace the officials with someone who could get the job done. In the subsequent section, this account discusses the soldiers under the control of these governors who performed the actual task of policing civilians.

Military Policing

It is a common misconception that soldiers were sent far from Rome and other Roman cities while citizens enjoyed two centuries of peace. In fact, soldiers made up a large portion of

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[133] Ibid., 196.
[134] Pliny, *Epistulae*, 10.27.
[135] Tacitus, *Agricola*, 15. "Namque absentia legati remoto metu Britanni agitare inter se mala servitutis, conferre iniurias et interpretando accendere: nihil profici patientia nisi ut graviora tamquam ex facili tolerantibus imperentur. Singulos sibi olim reges fuisse, nunc binos imponi, e quibus legatus in sanguinem, procurator in bona saeviret. Aeque discordiam praepositorum, aeque concordiam subiectis exitiosam. Alterius manus centuriones, alterius servos vim et contumelias miscere. Nihil iam cupiditati, nihil libidini exceptum."
[136] Pliny, *Epistulae*, 10.21-22, 77-78.

the police forces that protected not only these cities as well as the entire border of the Roman Empire. Large military forces could be sent into provinces to quell uprisings and reinforce the order that was expected by the emperor. In addition, titles were given to some soldiers who performed specific tasks while serving in the military. These specific posts, such as *beneficiarii consularis* and *stationarii*, enforced imperial control and strengthened the influence of the army in managing the empire.

Beneficiarii Consularis

As mentioned above, *beneficiarii consularis* served as an administrator more than a soldier (see Policing by Governors). One or two *beneficiarii* would be assigned to *stationes,* or military posts, which were placed in most provinces and along several frontiers of the empire. These positions provided soldiers with higher pay and the comfort of knowing that they would be excluded from the chores of an ordinary infantryman. Moreover, *beneficiarii* were often rewarded with promotions in rank for their services. Terms of service could last for up to four years, but a term of six months to two years was more common.[137] As with many military positions, a *beneficiarius* would sometimes perform police work by surveilling obstinate workers.[138] This surveillance added yet another form of imperial observation to the already substantial monitoring forces throughout the empire.

Stationarii

Although few direct references to *stationarii* exist in Latin literature, literary evidence claimed that s*tationarius* was an assignment of a soldier to a temporary police squad away from their typical regiment.[139] In order to supplement existing police forces and remedy situations in unruly provinces, soldiers would be designated as *stationarii* and sent to these places as

[137] Fuhrmann, *Policing the Roman Empire*, 204-205.
[138] Ibid., 206.
[139] Fuhrmann, *Policing the Roman Empire*, 211.

needed.[140] *Stationarius* was a designation of the soldier rather than a true position like *beneficiarius* or *frumentarius* and, as a result, carried less prestige and less chance at an increase in status.[141]

The Social Outcomes of Police Intervention

The continued growth of policing in the Roman Empire helped to decrease public disorder and make cities safer spaces. The increased security improved daily life, travel, and public events. This increase in police presence most benefited the emperor for whom these officers would kill political opponents and surveil possible threats to the Empire. Despite their oaths to Rome and its emperor, these officers caused a less stable political atmosphere as their influence became an integral part of any successful political campaign or seizure of power.

In an attempt to protect Roman inhabitants and create a safer environment, the Roman government established a military presence across its borders. Although Augustus promised to guard the people of the Roman Empire, his foundations of police forces became a pervasive institution that scrutinized every aspect of Roman life. In addition, the loyalty of the police forces and the cruelty that they imposed fluctuated with the behavior of the emperor himself. This, in turn, created a society in which one could not oppose the government in public without fear of retribution. All of Roman society was now on permanent conspiracy watch. For those who did run into trouble with the law, there were many punishments which officials could sanction against them. These punishments could drastically alter the life of any person; however, some individuals were judged more harshly than others based on their social standing or lifestyle. In the next chapter, this account highlights the types of punishment and the social implications with which they were associated.

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[140] Ibid., 212. This was the case when Pliny asked Trajan for a supplemental force in Juliopolis and was denied. Pliny, *Epistulae*, 10.77-78.

[141] Fuhrmann, *Policing the Roman Empire*, 252.

Chapter IV: Punishments for the Condemned

Just as all cases brought before judges, the punishments that were assessed to offenders were diverse. In the *Digesta Justiniani*, Ulpian claimed that a hierarchy of penalties existed and not all should be subjected to the same penalty under this system.[142] Although *cognitio* judges knew of a set of recognized penalties, they were not limited to the common sentences as they were permitted to use methods of *coercitio* that had been practiced against foreigners and slaves.[143] It is most valuable, however, to expand on the more common punishments against criminals in Rome and, for this reason, the remainder of this chapter is devoted to these penalties. The following includes information on penalties in the late Republic and Early Empire as punishments in the kingdom of Rome have already been presented (see pp. 13-14).

Romans considered all penalties to be quite a serious matter not only for convicted parties, but for the judges who passed sentence as well. Marcianus stated,

> *Perspiciendum est iudicanti, ne quid aut durius aut remissius constituatur, quam causa deposcit: nec enim aut severitatis aut clementiae gloria affectanda est, sed perpenso iudicio, prout quaeque res expostulat, statuendum est. plane in levioribus causis proniores ad lenitatem iudices esse debent, in gravioribus poenis severitatem legum cum aliquo temperamento benignitatis subsequi.*[144]

A penalty that was beyond reason could harm the people of Rome and stain the reputation of a public judge. For this reason, the Romans developed a system with a clear distinction between penalties for smaller crimes and those for more severe matters. Non-capital criminals were normally required to pay a fine to the government and were possibly subjected to corporal

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[142] Ulpian, *Digesta*, 48.19.9.11 "sed enim sciendum est discrimina esse poenarum neque omnes eadem poena adfici posse."

[143] Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford: Oxford University Press, 1970), 103.

[144] Marcianus, *Digesta*, 48.19.11. "The judge must be careful so as not to impose a sentence which is either more or less severe than demanded; for neither harshness, nor the glory of leniency should be his goal; but, having carefully weighed the circumstances of the case, we should decide whatever the matter requires. It is clear that in cases of lesser importance, judges should be inclined to lenity; and with more severe penalties, while they must comply with the strict requirements of the laws, they should ease them with some degree of leniency."

punishment. Capital offenses, however, produced sentences of increasing severity in the order of torture, labor in the mines or public, exile, and finally death.[145]

Fines, Beatings, and Torture

In cases involving criminalized activity, fines were imposed in addition to a more severe punishment, particularly beatings. Beatings were conducted using *fustes*, or military staffs, which had replaced the *virgae*, or rods, that had been used in earlier years. The severity of beatings ranged from the more violent *verberatio* (lashing) to the tamer *castigatio* (tempering) and *admonitio* (warning). Beatings could occur as a judicial punishment or as an exercise of *coercitio*. *Levia crimina*, or minor crimes, could result in a beating sentence by an official outside of the court system.[146] Beatings were also given before more severe sentences, including hard labor and execution.[147] Fines were often coupled with beatings, allowing for men of lesser means to accept a heavier beating in lieu of paying the fine. Beating was viewed as a more severe action to take against a person than the fine and occurred more often among people of lower status.[148] These types of punishments were reserved for foreigners, slaves, and citizens of lower classes as *honestiores*, or men of honor, were exempted from this form of corporal punishment (see chapter five).[149]

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[145] Callistratus, *Digesta*, 48.19.28.pr, 1. "Capitalium poenarum fere isti gradus sunt. summum supplicium esse videtur ad furcam damnatio. item vivi crematio: quod quamquam summi supplicii appellatione merito contineretur, tamen eo, quod postea id genus poenae adinventum est, posterius primo visum est. item capitis amputatio. deinde proxima morti poena metalli coercitio. post deinde in insulam deportatio. Ceterae poenae ad existimationem, non ad capitis periculum pertinent, veluti relegatio ad tempus, vel in perpetuum, vel in insulam, vel cum in opus quis publicum datur, vel cum fustium ictu subicitur."
[146] Garnsey, *Social Status and Legal Privilege*, 137.
[147] Macer, *Digesta*, 48.19.10.pr.
[148] Macer, *Digesta*, 48.19.19.2. "solus fustium ictus gravior est queam pecunaris damnatio." Garnsey, *Social Status and Legal Privilege*, 138.
[149] Garnsey, *Social Status and Legal Privilege*, 139. Callistratus, *Digesta*, 48.19.28.2.

Paulus claimed *honestiores* and *decurions* (city senators) to be exempt from torture as well, based on a decree from Pius.[150] After passing the *Lex Julia*, Augustus declared that all Roman citizens were also exempt from torture;[151] however, emperors who succeeded Augustus seem to have applied their own interpretations of this rule. Suetonius reported that following the death of his son, Tiberius wildly tortured many individuals, including a man who he suspected to be a conspirator in his son's death, but was actually a man who had hosted him at Rhodes.[152] Claudius, who had vowed not to torture free men, freely subjected possible conspirators and assassins to this punishment.[153] Throughout the history of the Roman Empire, free men were legally exempted from torture, but free men who fell out of favor with the emperor found little comfort in that.

Metallum and *Opus Publicum*

For more serious crimes, criminals may be sentenced to hard labor in the forms of *metallum*, labor in the mines, or *opus publicum*, labor on public works. According to Callistratus, "*Deinde proxima morti poena metalli coercitio*."[154] Someone punished in this manner lost his citizenship, freedom, and became a penal slave.[155] A man could be sentenced to labor in the mines without losing his freedom, but this punishment carried a different title. Callistratus quoted Hadrian thus:

> *in opus metalli ad tempus nemo damnari debet. sed qui ad tempus damnatus est, etiamsi faciet metallicum opus, non in metallum damnatus esse intellegi debet:*

[150] Paulus, *Digesta*, 50.2.14. "De decurione damnato non debere quaestionem haberi divus pius rescripsit. unde etiam si desierit decurio esse, deinde damnetur, non esse torquendum in memoriam prioris dignitatis placet."
[151] Ulpian, *Digesta*, 48.6.7.
[152] Suetonius, *Tiberius*, 62.
[153] Suetonius, *Divus Claudius*, 34.
[154] *Digesta*, 48.19.28.pr. "Then the next penalty to death is of labor in the mines."
[155] *Digesta*, 40.5.24.6; 48.19.8.4; 49.14.12; 28.3.6.5-7; 29.1.13.2

> *huius enim libertas manet, quamdiu etiam hi, qui in perpetuum opus damnantur.*[156]

Therefore, men may work in the mines for a time and retain their freedom (*metallicum opus*) only if they are never truly sentenced to the mines (*metallum*). Any man who did perform labor in the mines, however, still lost his citizenship and was likely subjected to harsher punishments. Ulpian claimed that the only real difference in these sentences was the weight of the chains used to confine the men who had been condemned.[157]

Opus publicum followed *metallum* in order of severity for capital punishments.[158] Being condemned to public labor diminished *existimatio*, public reputation, *dignitas*, and citizenship (if he was a citizen), but did not strip a man of his freedom (*libertas*). Public labor was on the same level of severity with exile as it took away and maintained aspects of social standing in the same manner.[159] In summary, *opus in tempus*, sentenced a man to a temporary assignment of public labor. *Opus in perpetuum* resulted in a lifetime sentence to public labor, or to a temporary assignment in the mines followed by a lifetime sentence to public labor (*opus metallicum*). *Opus in metallum* carried the most severe consequences as it stripped a condemned man of all status, including his freedom, which was maintained by all other forms of sentence involving labor.[160]

Sentences of hard labor were penalties for the lower classes of Roman society who had committed an offense on par with armed theft.[161] A number of groups were able to avoid both

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[156] Ibid., 48.19.28.6 "No man ought to be damned to work in the mines for a (designated) time but he who is damned for a time, even if does not perform work in the mines ought not be understood to have been damned to the mines. For the freedom of this man remains, even as long as those, who were damned to public works for life."
[157] Ulpian, *Digesta*, 48.19.8.6. "Inter eos autem, qui in metallum et eos, qui in opus metalli damnantur, differentia in vinculis tantum est, quod qui in metallum damnantur, gravioribus vinculis premuntur, qui in opus metalli, levioribus, quodque refugae ex opere metalli in metallum dantur, ex metallo gravius coercentur." Garnsey, *Social Status and Legal Privilege*, 132.
[158] *Digesta*, 48.19.28.pr.
[159] Garnsey, *Social Status and Legal Privilege*, 133. Marcianus, *Digesta*, 48.19.17.1.
[160] Garnsey, *Social Status and Legal Privilege*, 133-134.
[161] Ulpian, *Digesta*, 47.17.1. "Fures nocturni extra ordinem audiendi sunt et causa cognita puniendi, dummodo sciamus in poena eorum operis publici temporarii modum non egrediendum. idem et in balneariis furibus. sed si

metallum and *opus publicum* based on their status or ancestry. These groups and their alternative punishments will be discussed in chapter five.

Exile

Individuals condemned to exile pervade a great deal of Roman legal history and literature. Exile came in non-capital and capital forms, each with specific guidelines as to where a person could reside and to what lengths the Roman government would go to enforce the punishment. In addition, each form of exile resulted in a different change in status for the offender.

Types of Capital Exile

Exile came about as a punishment in the final years of the Republic. The phrase *"interdictio aqua et igni*," meaning to separate a person from both the water and fire of his tribe, was not considered a penalty, but an administrative effort to block the return of those who had been exiled from Roman territory under penalty of death.[162] It was not until the jurist Labeo claimed both exile and death to be capital punishments.[163] *Interdictio aqua et igni* was synonymous with the common Latin term for exile, *exilium*, in the literature written in the time of Labeo and involved the loss of citizenship, property, and banishment to an island.[164] The term *deportatio* also came to stand for exile in the early second century.[165] The best evidence for this new use of *deportatio*, which usually means to carry something down from a place, came from Papinianus quoting Julian:

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telo se fures defendunt vel effractores vel ceteri his similes nec quemquam percusserunt, metalli poena vel honestiores relegationis adficiendi erunt."

[162] Garnsey, *Social Status and Legal Privilege*, 112.

[163] Garnsey, *Social Status and Legal Privilege*, 112. See also Clementius, *Digesta*, 37.14.10. "Labeo existimabat capitis accusationem eam esse, cuius poena mors aut exilium esset."

[164] Garnsey, *Social Status and Legal Privilege*, 112.

[165] Ibid., 113.

Si debitori deportatio irrogata est, non posse pro eo fideiussorem accipi scribit iulianus, quasi tota obligatio contra eum extincta sit.[166]

Relegatio

Relegatio, the term for non-capital exile, was, in the Republic, a form of *coercitio* that could be used by a father against his wife or family, a patron against his freedman, a master against a slave, and, in some instances, a magistrate against those living in Rome.[167] It was not until the reign of Augustus that *relegatio* became the official penalty for adultery. Individuals condemned to this sentence may have been banished to an island just as those who were punished with *exilium*, or only removed from Rome or a particular province. The duration of the sentence differed as one could be sentenced *in tempus* or *in perpetuum*. It is noteworthy that while these individuals were removed from their land, they retained their citizenship, freedom, property rights, and paternal rights.[168] Ultimately, *relegatio* did serve as a punishment, but it functioned also as a coercion tool for those of higher status against those of lower status. Discussion of this power continues in the following chapter.

Execution

Ultimum supplicium esse mortem solam interpretamur.[169]

It ought to come as no surprise that the most severe form of penalty for criminals in ancient Rome was execution. In the late Republic, the death penalty was recognized as *capite puniri*, meaning death by decapitation with a sword (no other way was permitted at this point in time). What is surprising, however, is that, despite the prevalence of executions in Latin

[166] Papinianus, *Digesta*, 46.1.47.pr. "If deportation is imposed on a debtor, Julianus says that a guarantor cannot be accepted for him, as the entire obligation against him is destroyed."
[167] Garnsey, *Social Status and Legal Privilege*, 115-116.
[168] Ibid., 116.
[169] Celsus, *Digesta*, 48.19.21. "We interpret the greatest penalty to be only death."

literature, this penalty was rarely used against members of the Roman citizenry.[170] Yet again, this circumstance arose from a privilege held by those held in higher regard in society. Nevertheless, many non-citizens living within the borders of the Roman Empire did face execution in a variety of methods, and it is to these individuals to which this account turns.

Summum Supplicium

The term *supplicium* is generally translated to "punishment." Although this translation is sound, Latin literature provided *supplicium* with several meanings, including punishment, torture, and death. For *supplicium* to mean death, it is generally preceded by a superlative adjective such as *summum*, *ultimum*, or *supremum*.[171] Some scholars have argued that *supplicium* may refer to torture and *summum supplicium* and its equivalents may have referred to death by torture, but this line of thinking seemed fallible as death by torture would have been illegal in Roman society.[172] For this reason, the following three forms of death penalty are to be classified as *summa supplicia*.

Crematio

Known also as *vivus exuri*, *crematio*, or burning, occurred rarely as it was considered to be one of the most extreme forms of the death penalty. Gaius stated, "He who will have set fire to a house, or a pile of grain lying next to a home, is ordered to be chained, beaten, and put to death by fire, if he committed the act knowingly and prudently."[173] A man by the name of Fadius was put to death by fire in Spain in which the man begged for the cessation of the

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[170] Garnsey, *Social Status and Legal Privilege*, 105. See also Ulpian, *Digesta*, 48.19.8.1. "Vita adimitur, ut puta si damnatur aliquis, ut gladio in eum animadvertatur. sed animadverti gladio oportet, non securi vel telo vel fusti vel laqueo vel quo alio modo. proinde nec liberam mortis facultatem concedendi ius praesides habent. multo enim vel veneno necandi. divi tamen fratres rescripserunt permittentes liberam mortis facultatem."
[171] Garnsey, *Social Status and Legal Privilege*, 122.
[172] Ibid., 123.
[173] Gaius, *Digesta*, 47.9.9. "Qui aedes acervumve frumenti iuxta domum positum conbusserit, vinctus verberatus igni necari iubetur, si modo sciens prudensque id commiserit."

execution by referring to himself as a citizen. It was likely, therefore, that Roman citizens were rarely burned to death.[174]

Tacitus also described the burning of Christians by Nero during his reign:

> "*Sed non ope humana, non largitionibus principis aut deum placamentis decedebat infamia, quin iussum incendium crederetur. Ergo abolendo rumori Nero subdidit reos et quaesitissimis poenis adfecit, quos per flagitia invisos vulgus Chrestianos appellabat. auctor nominis eius Christus Tibero imperitante per procuratorem Pontium Pilatum supplicio adfectus erat*."[175]

This type of punishment came about only in highly specific instances of crime. Callistratus asserted, "*Igni cremantur plerumque servi, qui saluti dominorum suorum insidiaverint, nonnumquam etiam liberi plebeii et humiles personae*."[176] Although this punishment was known in Roman society, its use was intended either to create a public display or punish a crime for which atonement could be made in only a specific way, much like the religious atonement that existed during the kingdom of Rome.

Crux

Translated as crucifixion, *crux* became the standard method for executions involving slaves in the late Republic and early Empire. For example, Tacitus wrote that a freedman named Asiaticus received a *servile supplicium* at the hands of the provincial governor, it is safe to assume that this man was crucified.[177] Furthermore, when a Roman citizen was crucified by Galba during his time as emperor, Suetonius believed the punishment to be quite cruel, despite

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[174] Garnsey, *Social Status and Legal Privilege*, 125. See also Cicero, *ad Familiares*, 10.32.3.
[175] Tacitus, *Annales*, 15.44. "But all human effort, all the luxurious gifts of the emperor, and the appeasements of the gods, did not banish the sinister belief that the fire had been ordered. Therefore, to eliminate the rumor, Nero tied the guilt and inflicted the most special tortures on a class hated for their abominations, named Christians by the populace. Christus, from whom the name had its origin, suffered the extreme penalty during the reign of Tiberius through one of our governors, Pontius Pilate"
[176] Callistratus, *Digesta*, 48.19.28.11. "Most of those burned by fire were slaves, who had evil plans toward the safety of their masters, also, freemen of the plebeians and men of low status sometimes."
[177] Tacitus, *Histories*, 4.11.

its legality.[178] Nero installed crucifixions as the method most popular for disposing of Christians, which continued until a decree from Constantine to replace the *crux* with the *furca*, or fork (gallows).[179] This alteration to the punishment is evidenced by the change in language in the Digest to exempt those of higher status from being placed on the *furcae*.[180] The punishment of crucifixion was handed down much more frequently and not only in specific cases as with *crematione*s.

Damnatio ad Bestias

Perhaps the most visceral of the *summa supplicia* were the *damnationes ad bestias*, or executions by being thrown to beasts. During the Republic, this form of punishment was rare, but a famous example of this death by beasts came from the orders of Scipio Africanus following his triumph over the Carthaginians in the Second Punic War. Here, Scipio threw foreign deserters and slaves to the beasts.[181] Many individuals who were killed this way were presented to Roman officials for use in the games. Nero was also accustomed to throwing Christians to the dogs as an alternative to crucifixion.[182] Generally these victims were non-Romans; however, Cicero did write of an unusual (but not technically illegal) occurrence where Roman citizens were thrown to the beasts.[183]

Although Roman citizens would rarely be subjected to this penalty, there were instances where emperors condemned men of higher class to be eaten by the beasts. Claudius "condemned

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[178] Suetonius, *Galba*, 9.; Garnsey, *Social Status and Legal Privilege*, 127.
[179] Ibid., 127-128.
[180] Ulpian, *Digesta*, 48.19.9.11. "nam in primis decuriones in metallum damnari non possunt nec in opus metalli, nec furcae subici vel vivi exuri."
[181] Garnsey, *Social Status and Legal Privilege*, 129. See also Livy, *Periochae*, 51.
[182] Garnsey, *Social Status and Legal Privilege*, 130.
[183] Cicero, *Ad Familiares*, 10.32.3. "bestiis vero cives Romanos, in iis circulatorem quendam auctionum, notissimum hominem Hispali, quis deformis erat, obiecit."

those convicted in severe fraud to the beasts which superseded reasonable punishment."[184] *Damnatio ad bestias*, though less common than crucifixion, became a significant method of execution for slaves and those of lower status. Once again, men with a fine reputation avoided this punishment, including senators, veterans, and soldiers who were not deserters or traitors.[185] The sole exception to this rule appeared in the late third century when those who had robbed a temple at night were immediately subjected to *damnatio ad bestias*, regardless of social class.[186]

Custodia

The final punishment, *custodia*, or imprisonment, cannot be categorized as a simple method of punishment. As previously discussed, imprisonment was a form of *coercitio* used to keep accused parties secured and promote the political actions of magistrates. In addition to these practices, *custodia* functioned as a judicial sentence. Ulpian, however, urged against imprisonment as a formal punishment.

> *"Solent praesides in carcere continendos damnare aut ut in vinculis contineantur: sed id eos facere non oportet. nam huiusmodi poenae interdictae sunt: carcer enim ad continendos homines, non ad puniendos haberi debet*."[187]

Despite these objections, governors of Roman provinces employed incarceration as a penalty in a manner nearly prescient of contemporary penal systems. Although more offenders were being detained for their alleged crimes, incarceration was never recognized as an official *poena* by the Romans.[188] Imprisonment was a penalty that was to be avoided if possible as prison conditions

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[184] Suetonius, *Divus Claudius*, 14. "in maiore fraude convictos legitimam poenam supergressus ad bestias condemnavit."
[185] Garnsey, *Social Status and Legal Privilege*, 131. See also Ulpian, *Digesta*, 28.3.6.10; 47.9.12.1; 49.18.3; 49.16.3.10.
[186] Garnsey, *Social Status and Legal Privilege*, 131.
[187] Ulpian, *Digesta*, 48.19.8.9. "Governors are accustomed to damn men in confined prison or in chains: but it is not fitting to do this to them, for punishments of this type are not allowed: for the prison must contain men, not to have them for punishing."
[188] Garnsey, *Social Status and Legal Privilege*, 149-150.

were horrific during the years of the Empire and alleged criminals often sought less severe forms of *custodia*.[189]

The development of a strong imperial pride generated a sophisticated gradation of punishments for those individuals who tried to disrupt the political system of ancient Rome. Citizens and aliens alike were subjected to a legal system that was designed to maintain order and pacify every inch of Roman territory. This system, however, did not guarantee equal protection to all groups of people. Roman citizens of higher class and status avoided the harshest of the penalties while slaves, women, and lower class freedmen felt the unbridled wrath of the legal system. This bias shaped Roman society and placed it in a position where only certain individuals could hope to live a prosperous social or financial life. The societal inequality in ancient Rome brought about ways of thinking that continue to affect modern legal systems and interpretations of status.

[189] Ibid., 151-152.

Chapter V: Legal Privilege in Roman Society

Legal privilege or a lack thereof affected all individuals living within the lands of the Roman Republic and Roman Empire. This topic influenced every aspect of Roman law and created a social hierarchy based on ancestry, socioeconomic position, and even gender. The wide-ranging nature of this issue produced sociological dichotomies that may or may not have been the true motivators behind the establishment of this privileged society. This section will first examine the main dichotomy of legal privilege before exploring the effects of legal privilege against specific societal groups and other means of classification in determining the amount of privilege granted to a person under the Roman legal system.

The *Honestiores/Humiliores* Dichotomy

The major distinction between those who received some degree of legal privilege and those who did not arose from a division in socioeconomic standing. *Humiliores*, or people of lesser means, held little to no legal privilege while *honestiores*, or people of higher socioeconomic status, held a great deal of legal privilege.[190] When casting judgment on individuals, penalties were always to be handed down *pro persona*, or for the person. This term was sometimes omitted, but still understood when referring to the status (*condicio, dignitas*) of the person who is to be sentenced.[191] Common names for *humiliores* included *qui humiliores loco positi nati sunt*, *plebeii*, *tenuiores*, and *humiles personae*. These names referred mainly to people of lower status with the exception of *plebeii* which, according to Gaius, were made up of *ceteri cives sine senatoribus*.[192] Those who earned the distinction *honestior* possessed *dignitas*,

[190] Garnsey, *Social Status and Legal Privilege*, 221.
[191] Callistratus, *Digesta*, 47.21.3.2. "aliquid eiusmodi faciunt, poena plectendi sunt pro persona et condicione et factorum violentia."
[192] Garnsey, *Social Status and Legal Privilege*, 222. Gaius, *Digesta*, 50.16.238.pr. "all citizens without the senators."

or "*est alicuis honesta et cultu et honore et verecundia digna auctoritas*,"[193] and generally belonged to a group with high status. These groups included veterans, *decuriones*, or members of a city senate, and senators.[194] Cicero claimed that an *honestior* was granted the privilege through affection from the Roman people.[195] Each group included diverse groups of people, each with its own level of privilege within Roman society. For this reason, it is necessary to consider these classes of people separately.

Humiliores

Slaves

Slaves possessed no legal rights in ancient Rome and were subjected to the entire range of punishments. Masters were able to punish their slaves as they wished without a formal trial. If a slave committed a crime that attacked the honor of the home, he or she often faced the death penalty.[196] Crimes committed by a slave against individuals outside of the home that he or she served were referred to the Roman legal system, although masters could also handle this punishment.[197] Slaves faced punishments that included all forms of execution (crucified, thrown to the beasts, etc.), *opus metallum* and *opus publicum*, and imprisonment. Slaves were not subjected to exile, however, as this punishment was reserved for criminals who could avoid harsher punishments. Ulpian provided an example to discuss the condition of the slave in Roman society:

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[193] Cicero, *de Inventione*, 2.166. "a type of power that is honest and deserves respect, honor, and praise."
[194] Garnsey, *Social Status and Legal Privilege*, 223. Marcianus, *Digesta*, 49.18.3. "Veteranis et liberis veteranorum idem honor habetur, qui et decurionibus."
[195] Cicero, *Brutus*, 281. "Cum honos sit praemium virtutis iudicio studioque civium delatum ad aliquem, qui eum sententiis, qui suffragiis adeptus est, is mihi et honestus et honoratus videtur."
[196] Greenidge, *Legal Procedure of Cicero*, 371-372.
[197] Ibid., 372.

> "*Levia crimina audire et discutere de plano proconsulem oportet et vel liberare eos, quibus obiciuntur, vel fustibus castigare vel flagellis servos verberare*."[198]

If a certain punishment would be handed down to a high-ranking citizen, a slave could expect a punishment much harsher than that penalty.

Freedmen and Citizens of Low Status

Freedmen did not enjoy the rights of Roman citizens, but possessed *libertas* despite their former status of slave. Based on literary evidence, freedmen were typically able to avoid the most severe forms of execution. The crucifixion of Asiaticus (see above) was seen as a *servile supplicium* and an unusual punishment for a freedman. A life sentence to the mines would cost a freedman his *libertas* and return him to slave status as a *servus poenae*.[199] Providing the crime was not severe, however, freedmen were more often sentenced to *opus publicum* for a time and maintained their freedom throughout the course of their punishment.[200]

As *humiliores*, freedmen rarely held any substantial finances. Prior to the imperial installation of beatings preceding monetary penalties[201], freedmen of the Republic likely came into even more devastating financial conditions as they fell into debt and forced to give away the few possessions that they did have. It was not uncommon for these financially destitute freedmen to fall back into slavery in order to save their lives.[202] The institution of the beating may have created a more violent and humiliating method of punishment,[203] but it ultimately allowed freedmen a greater chance to live a free life.

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[198] Ulpian, *Digesta*, 48.2.6. "It is fitting for the proconsul to hear and discuss from a level head all accusations of slight importance, and either free those against whom they are cast, or whip them with rods, or, if they are slaves, scourge them."
[199] Garnsey, *Social Status and Legal Privilege*, 132. "slave of the penalty"
[200] Ibid., 133.
[201] Ulpian, *Digesta*, 2.1.7.3. "In servos autem, si non defenduntur a dominis, et eos qui inopia laborant corpus torquendum est."
[202] Garnsey, *Social Status and Legal Privilege*, 138-139.
[203] Macer, *Digesta*, 28.19.10.2. "solus fustium ictus gravior est quam pecuniaris damnatio."

Citizens of lesser means suffered punishments under the law similar to those faced by freedmen; however, it was irregular for citizens to face any kind of execution. If a citizen did face execution, it was generally via decapitation (*capite puniri*, see above). When the Republic converted to the Empire, death sentences were given out to citizens when a crime of *maiestas*, or high treason, had been committed either in acts or in words.[204] While being of lower means classified these individuals as *humiliores*, it was always beneficial to possess citizenship in Roman society.

Women and *Patria Potestas*

Despite the complex alterations that occurred throughout the history of ancient Roman society, Roman family structure endured throughout. At the head of every Roman family was the *pater familias*, or the oldest male figure in the family. This man's power, known as *patria potestas*, held the power of life and death over all of his children and grandchildren and possessed all of their property for life.[205] *Patres familias* controlled as many aspects of their children's lives as possible and often arranged marriages for both their male and female children.[206] With this patriarchal system, men inherited control of their families while women were ineligible for such duties.

In the majority of cases, women were unable to bring up charges against another individual without the permission and assistance of a male.[207] Women were under the *potestas* of their father until they were married in the Republic, but remained under the control of their fathers after marriage in the Empire.[208] Although women were citizens, they could not hold

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[204] Garnsey, *Social Status and Legal Privilege*, 105.
[205] Lionel Casson, *Everyday Life in Ancient Rome* (Baltimore: The Johns Hopkins University Press, 1998), 10.
[206] Ibid., 11.
[207] Macer, Digesta, 48.2.8.1.
[208] Bruce W. Frier and Thomas A.J. McGinn, *A Casebook on Roman Family Law* (Oxford: Oxford University Press, 2004), pp.19-20.

political offices or vote as male citizens could.[209] Domestic abuse against women was prohibited, but was not enforced to a high degree.[210] This along with many other actions was cause for divorce, which occurred frequently in Roman society.[211] Women and children could be relegated from Rome at the order of the family head for as long as the latter wished.[212] Women were designated by social class and women of lower classes were subjected to severe punishments such as hard labor and death while women of higher classes avoided the harsher punishments.[213] Although women made contributions to Roman society, their lack of rights impeded their acquisition of legal privileges equivalent to the privileges of comparable men.

Honestiores

Although the Romans lacked a definition of *honestiores*,[214] their number can be traced from the vague sources of Roman law. In writings such as the *Digesta*, jurists and authors claimed that *decuriones* were to be held in the same regard as those individuals who held both *honor* and *dignitas*. While modern readers may find it challenging to distinguish *honestiores* and *humiliores*, a well-informed member of the Roman community would have been able to deduce this information without difficulty.[215]

Senators

Few areas of Latin literature or legal texts provide evidence for the legal privilege of senators; however, the few examples that were written down provide strong indications that senators were among the most privileged individuals in the Roman legal system. Any *iniuria*, or

[209] Ibid., 31-32.
[210] Ibid., 95.
[211] Casson, *Life in Ancient Rome*, 13.
[212] Ulpian, *Digesta*, 48.22.7.2, 14.pr.
[213] Ulpian, *Digesta*, 48.19.8.8.
[214] Iavolenus, *Digesta*, 50.17.202. Romans allowed the interpretation of all legal definitions and decrees.
[215] Garnsey, *Social Status and Legal Privilege*, 235.

offense committed against a senator by an *humilior* was seen as *atrox*, or despicable.[216] Senators and sons of senators were rarely sentenced to death. At one time, the son of a senator was exiled for stealing from a temple at night, a crime usually punished with death.[217] The theft of a small trinket warranted individuals of lower status a life sentence to the mines, but those in *honestiore loco nati*, or he who was born in an honorable place, were exiled to an island.[218]

There was likely no reason to record the legal privilege of Roman senators as their position would have been known by their political notoriety.[219] Their behavior toward those of lesser status would have been indicative of a more privileged lifestyle. In fact, Augustus forbade senators from marrying women of low status.[220] Women who married a senator shared the rank of their husband along with their male children, male grandchildren, and the wives of those individuals.[221] The legal privilege and expectations of senators established an order that preserved power for the descendants of the most prominent Roman families.

Equestrians

Equestrians were men who belonged to the *equester ordo* and were eligible to possess a public horse and voted in the *comitia centuriata*. Equestrians who lived in Roman cities were often the wealthiest individuals in their cities, possessing funds greater than that of the average

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[216] Gaius, *Institutiones*, 3.225. "Atrox autem iniuria aestimatur uel ex facto, uelut si quis ab aliquo uulneratus aut uerberatus fustibusue caesus fuerit; uel ex loco, uelut si cui in theatro aut in foro iniuria facta sit; uel ex persona, uelut si magistratus iniuriam passus fuerit, uel senatori ab humili persona facta sit iniuria."

[217] Marcianus, *Digesta*, 48.13.12.1. "Divus Severus et Antoninus quendam clarissimum iuvenem, cum inventus esset arculam in templum ponere ibique hominem includere, qui post clusum templum de arca exiret et de templo multa subtraheret et se in arculam iterum referret, convictum in insulam deportaverunt."

[218] Garnsey, *Social Status and Legal Privilege*, 236. Ulpian, *Digesta*, 48.13.7. "et scio multos et ad bestias damnasse sacrilegos, nonnullos etiam vivos exussisse, alios vero in furca suspendisse. sed moderanda poena est usque ad bestiarum damnationem eorum, qui manu facta templum effregerunt et dona dei in noctu tulerunt. ceterum si qui interdiu modicum aliquid de templo tulit, poena metalli coercendus est, aut, si honestiore loco natus sit, deportandus in insulam est"

[219] Garnsey, *Social Status and Legal Privilege*, 236.

[220] Paulus, *Digesta*, 23.2.44.pr-1.

[221] Ibid.

decurion.[222] Equestrians of substantial means, known as *eminentissimi viri* and *perfectissimi viri,* were not subject to the penalties of *humiliores* for three generations, just as Roman senators.[223] *Equites Romani*, equestrians of lower rank, may have only carried this distinction for the first generation.[224]

Several literary examples of punishments against equestrians, however, displayed breaches of these legal traditions. Pliny described an equestrian who was beaten, sentenced to *metallum opus*, and then killed in prison by order of the African governor, Marcus Priscus.[225] Caligula sentenced one equestrian to *damnatio ad bestiam*.[226] In many cases, equestrians did hold legal privileges above those of *humiliores*. An injustice against equestrians by a lower standing individual was considered to be *atrox* (or horrific).[227] Equestrians were entitled to less severe penalties as was the case of an equestrian thief who was banished from Rome, Italy, and Africa when his actions would have warranted a penalty up to *opus publicum* for a plebeian.[228] While equestrians did not possess the legal prestige of senators, their incredible wealth provided them with the satisfaction of legal leniency.

Decuriones

Decurions, as previously mentioned, were members of the councils that were established in Roman-controlled cities. The decurion class was made up of free-born men with high social standing and substantial sources of income.[229] Decurions received no pay and were expected to own homes of a certain quality. As financial patrons in their cities, decurions enjoyed unbridled

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[222] Garnsey, *Social Status and Legal Privilege*, 240.
[223] Ibid., 241. Marucs, *Codex Justiniani*, 9.41.11.pr.
[224] Garnsey, *Social Status and Legal Privilege*, 242.
[225] Pliny, *Epistulae*, 2.11.8.
[226] Suetonius, *Gaius*, 27.4.
[227] Garnsey, *Social Status and Legal Privilege*, 241.
[228] Ulpian, *Digesta*, 47.18.1.2. "oportebit autem aeque et in effractores et in ceteros supra scriptos causa cognita statui, prout admissum suggerit, dummodo ne quis in plebeio operis publici poenam vel in honestiore relegationis excedat."
[229] Garnsey, *Social Standing and Legal Privilege*, 243.

access to the opulent facets of Roman life, including dress, entertainment, and dining.[230] These distinctions removed decurions from the rest of society, keeping the rich and poor apart from one another.

The status of these civil servants and their children warranted their exclusion from the most severe forms of capital punishment. It was never possible to execute a decurion in Roman society; in fact, by the reign of Septimius Severus, it was not allowed to deport decurions out of the cities without the written consent from the emperor.[231] In addition to their immunity to execution, decurions and their children were excepted from sentences involving hard labor, torture, and all punishments designated as plebeian penalties.[232] The legal privilege of decurions served as the baseline for all other forms of *honestiores* as the jurists and authors who wrote in the *Digesta Justiniani* referred to this group more often than other groups.

Soldiers and Veterans

Arrius Menander provided a clear interpretation of the privilege afforded to veterans in Roman society:

> "*Veteranorum privilegium inter cetera etiam in delictis habet praerogativam, ut separentur a ceteris in poenis. nec ad bestias itaque veteranus datur nec fustibus caeditur.*"[233]

Veterans along with their sons are to be held in the same regard as the decurions, entitling them to most forms of legal privilege in line with their eventual distinction in Roman society.

It stood, however, that this legal privilege and societal distinction extended to Romans only after their service in the military. The legal condition of soldiers must be considered in two

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[230] Ibid., 244.
[231] Ulpian, *Digesta*, 48.22.6.2 (exile over execution); 49.4.1.pr. (consent of the emperor)
[232] Ulpian, *Digesta*, 48.19.9.11. (metallum); 49.18.3. (opus publicum); 48.19.9.12-13. (children of decurions).
[233] Arrius Menander, *Digesta*, 49.18.1. "The privileges of veterans, among others, have one even in their faults, that they are separate from the rest with in penalties; a veteran is neither thrown to wild beasts, nor beaten with rods."

separate spheres. Soldiers were subjected to beatings, a form of punishment that was not applied to *honestiores* as told by Callistratus.

> "*Non omnes fustibus caedi solent, sed hi dumtaxat qui liberi sunt et quidem tenuiores homines: honestiores vero fustibus non subiciuntur, idque principalibus rescriptis specialiter exprimitur*."[234]

In addition, soldiers who attempted to desert their posts or join the enemy were punished with even harsher penalties from which *honestiores* were exempt.[235]

Soldier who performed their duties and remained loyal to the army, however, were not punished in this way. Modestinus explained:

> "*Is, qui ad hostem confugit et rediit, torquebitur ad bestiasque vel in furcam damnabitur, quamvis milites nihil eorum patiantur*."[236]

Military personnel were subjected to beatings to combat a lack of discipline, not to address criminal actions. These types of beatings hardly coincided with the beatings handed out to citizens of low status who could not afford to pay their fines.[237] While they were on their way to becoming veterans and, in turn, *honestiores*, soldiers were exposed to punishments reserved for *humiliores* as part of their military indoctrination. For this reason, Roman soldiers represented a category that could not be classified as either *honestiores* or *humiliores*.

Other Distinctions of Privilege

The *honestiores/humiliores* dichotomy was not the only division of legal privilege in Roman society. Callistratus informed future jurists of other distinctions:

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[234] Callistratus, *Digesta*, 48.19.28.2. "Not all are accustomed to be beaten with rods, but only those men who are free and of inferior status; in truth, those of higher rank are not subjected to the beatings. This is specially explained by the rescripts of the Princeps."
[235] Tarrutenus Paternus, *Digesta*, 49.16.7. "Proditores transfugae plerumque capite puniuntur et exauctorati torquentur: nam pro hoste, non pro milite habentur."
[236] Modestinus, *Digesta*, 49.16.3.10. "He, who flees to the enemy and comes back, will be thrown to the beasts or damned to the gallows, however, soldiers suffer nothing of these punishments."
[237] Garnsey, *Social Status and Legal Privilege*, 247.

> "*Maiores nostri in omni supplicio severius servos quam liberos, famosos quam integrae famae homines punierunt*."[238]

Citizens possessed legal privilege in several instances as well, such as when the Senate gathered astrologers and magicians in A.D. 17 and exiled the citizens in the group rather than execute them with the rest of the group.[239] Furthermore, Roman law held that foreigners were subjected to *coercitio* without the possibility of *provocatio*, which was granted to those who possessed citizenship.[240] In the spheres of Roman law, it was almost always preferable to hold citizenship.

Citizens, even those labeled *infames* (known for infamy) and *intestabiles* (detestable), also held legal preference over freedmen. The legal condition of freedmen was stained with the remnants of their servile past. Freedmen were barred from holding magistracies, voting, fighting in the army, and gaining membership in the equestrian class.[241] This led to a rough legal hierarchy with freedmen at the lowest rank, low-class citizens just above them, and high-class citizens in the highest position.[242]

This hierarchy is disputed, however, if one considered the decurions, who were men of financial means, but may or may not have been Roman citizens.[243] Decurions gained citizenship if they held a position on a council within a city which had been labeled a "Roman" city in the Republic and early Empire or a city with *Latium maius* (greater Latin) status from the middle of the Empire and later. Although many cities did not claim these designations and decurions in these "non-Latin" cities were not Roman citizens, there were no instances of decurions with

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[238] Callistratus, *Digesta*, 48.19.28.16. "Our ancestors, in carrying out each punishment, treated slaves more harshly than free people; and they punished those who are known for bad deeds more severely than men of good reputation."
[239] Tacitus, *Annales*, 2.32.3. "Facta et de mathematicis magisque Italia pellendis senatus consulta; quorum e numero L. Pituanius saxo deiectus est, in P. Marcium consules extra portam Esquilinam, cum classicum canere iussissent, more prisco advertere."
[240] Garnsey, *Social Status and Legal Privilege*, 261.
[241] Ibid., 262.
[242] Ibid., 263.
[243] Ibid., 266.

citizenship retaining greater legal privileges than those without citizenship.[244] The legal status of decurions revealed that the *honestiores*/*humiliores* dichotomy crossed the citizen/foreigner division and obscured clear discrepancies in who did and did not receive legal privileges.

This shift from the citizen/foreigner dichotomy to that which divided *honestiores* and *humiliores* seemed natural to Tacitus, who claimed that there was a relaxing of the regulations for the acquisition of citizenship in the time of Trajan.[245] As the number of Roman citizens grew, the numbers of the political elite began to dwindle. Significant legal privileges could no longer be applied to those who held citizenship as few people would be subjected to the penalties under Roman law. Therefore, the system began to favor wealthy citizens who held public office since this number was small and could maintain the elite classes to which the Romans were accustomed. Thus, the Roman legal system that favored the elite classes and looked down upon those of lesser means was established.

Conclusion

From its founding as a kingdom in 753 BCE to its death as the Roman Empire in 476 CE, Rome and its territories believed in a culture where people ought to be separated based on their ancestry and share of wealth. Even during the Roman Republic, popular councils held little power while wealthy magistrates pushed their political agendas and maintained their wealth. As tribunes and plebeians began to combat these iniquities, Roman society broke down, resulting in decades of civil war and tumult. Following the collapse of the Roman Republic and its restoration as the Roman Empire, Augustus implemented innovative police forces to legitimize his power and bring peace to Roman territory. Although safety increased within Roman borders, it came at the price of true freedom as imperial inhabitants were subjected to constant monitoring

[244] Ibid.
[245] Tacitus, *Annales*, 3.40.2.

by officials who acted as extensions of the emperor. The policing efforts of these officials promoted the legislation of the emperor and the prejudicial views of Roman culture throughout the newly conquered territories.

If the classist attitudes of Roman society were not enough, the prestige-based sentencing of convicted criminals furthered the culture of inequality. Poor individuals were subjected to more severe punishments than individuals who had a noble ancestry, held political office, and/or possessed a great deal of wealth. In addition, these low-status factions known as *humiliores* were singled out as being less worthy than the *honestiores* class that was made up of senators, decurions, and veterans. Even citizenship began to lose its importance in the Roman legal system as those who held wealth and influence were favored over those who were full-blooded Romans. Over the centuries of its existence, ancient Rome was a state where, in general, the privileged minority remained in power and the lowly majority lingered in a political struggle.

Thus far, this account has described the classist biases and legal privileges that permeated ancient Roman society during its history. Although this system of bias existed in antiquity, its ideologies parallel the modern American system of law in more ways than may be immediately apparent. In the next two chapters, this account will identify the prejudices of the policing and prison systems of the United States using sociological studies concerning the War on Drugs and the prison system to which offenders are confined. Chapter nine will compare the two legal systems and highlight the similarities of the two legal systems. Although modern legal systems have been refined by written records and systems of appeal, contemporary American law has shown that it is capable of being biased in a fashion similar to that of ancient Roman law.

Chapter VI: Bias in American Legal Procedures

Unlike Roman law, many documents concerning the legal procedures of the United States exist and are available to the public. Slavery and most forms of discrimination are outlawed by the Constitution of the United States. For its legal procedures, American society boasts federal, state, and local police forces throughout the country that monitor the streets for crime and refer criminals to a sophisticated system of courts that provide trials by jury and the possibility of appeals. Lawyers offer legal aid to Americans and litigate for those who find themselves in trouble with the law. This complex level of government seeks to provide the safest environment for American citizens as it is interpreted daily and evolving constantly.

This inclination toward public safety has caused a decline in the violent crime rate within the country over the last forty years; however, the number of incarcerated individuals has jumped from just above three hundred thousand people in 1978 to over two million people in 2013.[246] Based strictly on the latter, one may have difficulty finding veracity in the former. Furthermore, the racial make-up of these incarcerated individuals is skewed heavily toward males of African-American descent.[247] In the following chapters, this account seeks to elucidate the reasoning behind these disparities through an examination of the biased American legal system. To begin, this report first will survey the composition of the American class system. Following this analysis, the text will consider the controversial War on Drugs and its role in promoting racist attitudes in the American legal system. Together, these investigations will display the association between socioeconomic status, race, and legal privilege in the United States.

[246] Carson, E. Ann. *Prisoners in 2013*. Annual Report, Washington D.C.: United States Department of Justice, 2014.
[247] Ibid.

American Class Divisions

The United States operates within a capitalist economy within which individuals are grouped into classes based on their wealth. In *Society in Focus*, William Thompson and Joseph Hickey divide American society into five economic groups: upper class, upper middle class, lower middle class, working class, and lower class. The upper class consists of individuals or family units who hold six-figure incomes and a high level of education while the lower class consists of people who live in household that rely on government support and minimal incomes.[248] Higher levels of income generate greater wealth and provide an individual with more economic and political power within the capitalist system. People who fall within the lower classes of this system have a lesser chance of holding political office or improving their economic situation, though it is technically possible.

Despite its attempt to package Americans into neat groups, the moniker of class distinction fails to divulge key qualitative data points that exist within each category. In a study of incomes in both white and African-American households, researchers discovered that the wealth gap between these groups nearly tripled from 1984 to 2009.[249] The report cited economic factors that allowed white families to increase their wealth more quickly than African-American families, including homeownership, education, and unemployment rates. White families owned their homes for longer periods of time, completed higher levels of education, and had a lower unemployment rate than their African-American counterparts. In addition, occupational promotions benefited white individuals at a higher percentage than African-Americans.[250]

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[248] Thompson, Willaim, and Hickey, Joseph. *Society in Focus* (Boston: Pearson, Allyn, and Bacon).
[249] Shapiro, Thomas, Tatjana Meschede, and Sam Osoro. "The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide." *Institute on Assets and Social Policy.* Feburary 2013.
[250] Ibid.

Racial economic disparities run far deeper than this single study; however, its data reveal a disturbing trend in American society. While there are wealthy Americans of all races, the overwhelming majority of those who possess greater amounts of wealth and, in turn, political power are white. America prides itself on diversity, but rarely spreads its wealth to a diverse pool of citizens. As minority populations have grown, their influence has begun to enter American politics. The call for equal representation at all levels of American society from these groups has threatened the absolute white authority and worried those who wish to remain wealthy and in power. In a counter effort, the lawmakers of the United States have used their power to disempower and disenfranchise minority citizens through systematic prejudice. This account turns now to one of the strongest of these efforts, the War on Drugs.

The War on Drugs

A Brief Overview of the War

The War on Drugs began in October 1982 under the administration of Ronald Reagan after he had promised to combat street crime in America.[251] At the time, less two percent of Americans believed that drugs were the greatest problem in society.[252] Federal spending on drug crimes skyrocketed during Reagan's first term while cuts were made to spending on drug treatment centers and drug education. At the onset of this war, an economic downturn hit inner-city residents that sparked an interest in selling drugs among the unemployed African-Americans who populated these areas. This trend led to the creation of crack, a cheaper form of cocaine that provided a stronger high with less of the product. The combination of the drug's creation and the

[251] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 49.
[252] Katharine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (New York: Oxford University Press, 1997), 56.

initiation of the War on Drugs caused an outbreak of violence in poor African-American neighborhoods.[253]

In September 1986, the government of the United States added fuel to the fire of war as it allocated two billion dollars to narcotic control groups, the allowance of the death penalty for certain drug-related crimes, and the admittance of illegally-obtained evidence in trials concerning drugs. In that same month, Ronald Reagan signed the Anti-Drug Abuse Act which enforced mandatory minimum sentences for the distribution of cocaine. Opponents of these legal actions were present, but their opinions were muffled by the congressional outcry against illegal drugs. The penalties for use of illegal drugs only increased in 1988 when Congress introduced new civil penalties for anyone found in possession of drugs. Drug offenses now allowed evictions to be served to anyone who carried out drug-related activities within public housing and the severance of financial benefits for anyone convicted of a drug offense.[254]

The War on Drugs held a solid footing through the presidencies of George H.W. Bush and Bill Clinton. The push against drug use led to an astronomical increase in the number of Americans who believed that drugs were the most critical problem facing society. Further legislation prohibited the distribution of public welfare and housing to anyone who had committed a felony related to drugs.[255] The United States had officially dedicated itself to the War on Drugs and planned to see it through.

While none of the legislation was technically directed at a specific race, inner-city communities that were populated primarily by African-Americans were impacted more than any other group. As noted above, the lower classes of American society tend to have higher populations of minority citizens than the higher classes and the programs that former presidents

[253] Alexander, *The New Jim Crow*, 50-51.
[254] Ibid., 53.
[255] Alexander, *The New Jim Crow*, 54, 57.

attacked were driven at the poorer citizens of America. This should come as no surprise, however, as the "non-racially driven" technicality has been the driving force behind the legislation and legal practices associated with the War on Drugs. While difficult to prove racist motivations under the rule of law, the discrimination toward minorities in the War on Drugs becomes apparent when viewing the statistics of those who are implicated by these new decrees.

Court Promotion of Profiling

The War on Drugs would have never progressed as it did without several Supreme Court decisions in which impositions on freedom were enacted in favor of a harsher penal system. Alexander claims, "With only a few exceptions, the Supreme Court has seized every opportunity to facilitate the drug war, primarily by eviscerating Fourth Amendment protections against unreasonable searches and seizures by the police. The rollback has been so pronounced that some commentators charge that a virtual "drug exception" now exists to the Bill of Rights."[256] Prior to the War on Drugs, American courts sternly upheld all attacks on the Fourth Amendment. At the conclusion of the 1991 Supreme Court term, however, Justice John Paul Stevens noted that the Supreme Court had "become a loyal foot soldier in the Executive's fight against crime" as the justices continued to uphold narcotics seizures in the majority of cases.[257] These initial relaxations paved the way for other constitutional guarantees to be disturbed by the War on Drugs.

One of these additional sanctions came from the *Terry v. Ohio* ruling in 1968, which allowed police officers to "stop-and-frisk" anyone whom they judged to be suspicious. This judgment was then put to the test in the case *Florida v. Bostick* in which an African-American man was found to be carrying cocaine after he "consented" to two armed policemen searching

[256] Ibid., 61.
[257] *California v. Acevedo*, 500 U.S. 565, 600 (1991) Stevens, J., dissenting.

his bag. Although an appeals court found the policemen to have violated the Fourth Amendment, the Supreme Court stood by the officers, claiming that a reasonable person would have known not to consent.[258] The precedent and subsequent challenge preserved "stop-and-frisk," a tactic which continues to this day.

This encroachment on the Fourth Amendment then strengthened the Comprehensive Drug Abuse Prevention and Control Act of 1970, which had authorized the government to seize all property that had been used to transport or store drugs. This legislative endeavor attempted to stop the economic flow of drugs by removing the necessary tools for its sale. In 1984, Congress added on a clause approving the use of these acquired items for police funding.[259] This new method of making a profit not only increased the incentives for more arrest, but also created a system that could be easily corrupted. In one well-documented instance, Donald Scott was gunned down in his home when police stormed in to search the premises for a marijuana farm. After the forced entry and homicide, no marijuana was found and the ensuing investigation into the incident uncovered that the raid was planned in order to attain Scott's sizable assets.[260]

The Supreme Court also backtracked on its *Gideon v. Wainwright* ruling that entitled poor individuals to legal counsel. This guarantee could not be monitored at the federal level so the Supreme Court handed over the burden of providing poor people with legal services to the state governments. This system failed to attract worthy employees, however, and poor defendants were provided with overworked and underpaid attorneys.[261] A 2005 article explained that, per year, eleven thousand poor defendants in Wisconsin never receive a lawyer because the

[258] Alexander, *The New Jim Crow*, 63-65.
[259] Ibid., 78.
[260] Alexander, *The New Jim Crow*, 81.
[261] Ibid., 85.

state judges anyone who earns more than three thousand dollars per year to be wealthy enough to afford a lawyer.[262]

The Promotion of Racial Profiling

While the Supreme Court cases discussed thus far supported the War on Drugs and impinged a great deal on the right to deny unlawful seizures, the rulings could be construed as being free of direct racial involvement. Unfortunately, the preceding cases are only a small sampling of the decisions that opened up the legal system to racial bias. In 1987, the *McCleskey v. Kemp* case tried to highlight the racial bias of the defendant's death sentence for killing a white police officer. The defense cited the Baldus study which had collected data showing that those who had killed a white individual received the death penalty at eleven times the rate as those who had killed a black person. The Baldus study was unique in that it had controlled for thirty-five nonracial variables and still concluded that the killing of a white person would warrant a death sentence at over four times the rate of a homicide involving a black person. McCleskey was still put to death.[263]

Sentencing biases bled into offenses involving specific types of drugs as well. An African-American man named Edward Clary was arrested shortly after his eighteenth birthday for possession of crack cocaine. Even as a first time offender, Clary received a minimum sentence of ten years in federal prison as he had been found with over fifty grams of crack. If he had been found to be in possession of the powder form of cocaine, however, Clary would have been sentenced to a much shorter prison term. The United States' government held that crack cocaine was more dangerous than powder cocaine and implemented the one-to-one-hundred ratio for sentencing. As discussed above, crack cocaine was an overwhelming drug that was

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[262] Laura Parker, "8 Years in a Louisiana Jail but He Never Went to Trial," *USA Today*, August 29, 2005.
[263] Alexander, *The New Jim Crow*, 110.

distributed mainly in poor neighborhoods populated mainly by African-Americans. Needless to say, most individuals arrested for possession of crack cocaine were black.[264] The case trickled through appeals courts and eventually on to the Supreme Court where the one-to-one-hundred ratio rule was upheld, forcing Clary back into prison after years of freedom.[265]

Masked racial bias even managed to invade the random process of jury selection. In 1995, the Supreme Court ruled in *Purkett v. Elm* that all nonracial reasons were permissible when dismissing jurors from a jury.[266] The prosecutor dismissed two African-American juror in that case and later explained his reasoning:

> "I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared not to be a good juror for that fact…Also, he had a mustache and goatee type beard. And juror number twenty-four also had a mustache and a goatee type beard…And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me."[267]

The absurdity of this case exhibited how devoted the Supreme Court was to keeping alive the fight in the War on Drugs and the racial bias that it supported.

In making decisions that contradicted the Constitution in order to support the War on Drugs, the Supreme Court put the agenda of conservative politicians ahead of the freedoms of citizens. Although the Supreme Court claimed that no racial bias could be proven by their rulings, the consequences of their decisions became apparent when police officers began to implement their newly approved tactics. With the blessing of the judiciary branch, police officers began to scope out the streets at their own racially-biased discretion.

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[264] Ibid., 112.
[265] Ibid., 113-114.
[266] Ibid., 122.
[267] *Purkett v. Elm*, 514 U.S. 765, 771 n. 4 (1995), Stevens, J dissenting and quoting prosecutor.

Profiling by American Police

In relating the decisions of the Supreme Court that allowed for discrimination, this account has already introduced the "stop-and-frisk" practice used by American police. This tactic refers to a specific action, but extends to include many other actions that profile American citizens based on race. Although it is believed that this approach leads to more drug arrests, in truth, it promotes police brutality and a systematic form of racism. In addition, police forces began to militarize with the expansion of SWAT teams and began to target neighborhoods populated by African-Americans. The War on Drugs gave birth to a police force that sought to take non-violent offenders off of the streets with little cause for restraint.

"Stop-and-Frisk"

With the Supreme Court approval of "stop-and-frisk," police officers were now free to detain an individual if he or she appeared to be in possession of drugs or other illegal items. The Supreme Court upheld the right of police officers to perform these searches only under consent; however, few people question the authority of an officer who wields deadly weapons and the power to arrest.[268] In truth, these coercive searches could be stopped with a negative response. Unfortunately, police officers have other means to gain "consent" from these individuals.

Pretext stops, such as minor traffic violations, provide officers with a reason to question and search individuals whom they believe to be in the possession of drugs. Although these stops occur frequently, a prominent case involved two African-American men who were stopped by police officers for a traffic violation. Despite admitting that they pulled them over to search their vehicle for drugs, the officers testified that the driver had failed to signal a turn and when they were pulled over a bag of cocaine was in plain sight. The two men appealed to the Fourth Amendment to combat this search, but lost their appeal on the grounds that the officers had

[268] Alexander, *The New Jim Crow*, 66-67.

pulled them over for a legitimate offense.[269] The concept of the pretext stop continued in a case in Ohio in which a man was discovered to be in possession of marijuana and methamphetamine following a traffic stop. The evidence encouraged the state court system of Ohio to instruct officers to inform those who are stopped that they can refuse the search. This action was eventually overruled by the Supreme Court as an unrealistic practice.[270]

The DEA brought the pretext stop to the forefront of American policing in 1984 when it spearheaded Operation Pipeline, which trained select officers at all policing levels on how to use traffic stops to make a drug bust.[271] The hope for this program was to provide a force that could increase the chances of making a drug bust through overt discretion and with less labor. This evolution of "stop-and-frisk" extended into airports, train stations, and busy highways. Officers began to develop "drug-courier profiles" to aid in the detection of criminals. The profiles were vague, however, and included oxymoronic observation tactics. For instance, a person may seem guilty if he or she is nervous, or calm, or in a rush, or walking at a slower pace.[272] Through the pretext stops, racial profiling was being advanced through actual criminal profiles that singled out specific individuals.

Mobilizing for War

The War on Drugs integrated a paramilitary force known as SWAT (Special Weapons and Tactics) to aid in the crackdown on drugs. Having originated in the 1960s for prison escapes and counterterrorism, SWAT teams became a specialized weapon against drug use. In present day, SWAT teams are now used to carry out arrest warrants through forced entry.[273] These raids involve blasting through doors with weapons loaded and drawn. In many cases, officers shout

[269] Alexander, *The New Jim Crow*, 68.
[270] Ibid.
[271] Ibid., 70.
[272] Alexander, *The New Jim Crow*, 71.
[273] Ibid., 74.

and hurl grenades as they enter a complex. SWAT tactics led to the death of one woman via heart attack after the police had been given a tip on one resident in the building. This innocent woman was the only one in the building when an officer threw a grenade and overwhelmed the woman.[274]

Ronald Reagan called for further militarization in 1981 with the passage of the Military Cooperation with Law Enforcement Act, allowing officers to utilize military bases, intelligence, and weaponry to combat the drug trade. As long as police departments dedicated themselves to the enforcement of drug laws, they would have full access to military instruments. The cooperation between police and the military led to a dramatic increase in drug related arrests, although drug usage did not increase during this time.[275]

Racial Profiling

It is noted that in some American states, African-Americans make up eighty to ninety percent of the drug offenders in prison and are twenty to fifty-seven times more likely to be imprisoned on drug charges than white individuals.[276] The sale of drugs is a unique crime in that it involves only violators of the law and no victim. This crime is actually enjoyed by all parties and is not common to a single group of people. One in ten individuals will partake in illicit drug activity in a year while only a fraction of these individuals will be arrested or imprisoned. In order to combat drug use, police officers must actively search out drug law violators.[277] The decision of whom to seek out was not in the hands of the officers, however, but in the hands of the political elite of the United States government.

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[274] Ibid., 75-76.
[275] Ibid., 77.
[276] Alexander, *The New Jim Crow*, 98.
[277] Ibid., 104.

At the beginning of the War on Drugs in the early 1980s, the Reagan administration used propagandistic stories involving the horrific effects of crack cocaine in poor African-American neighborhoods. Meanwhile, media stories concerning the powder cocaine popular among white suburban neighborhoods focused on drug rehabilitation efforts and focused on the possibility of breaking drug habits. Law enforcement officials became "well-versed" in what a drug offender looked like with the help of this media coverage. The answer was a poor nonwhite person, developing the war into a struggle between white suburbia and inner-city black people.[278]

This witch hunt against this metaphorical black person came to its inevitable conclusion. With ten percent of the population partaking in illegal drug use, it was essential to select a sample from the population to guarantee the removal of the most criminals and to maximize laudatory funding for law enforcement systems. Unsurprisingly, these "experts" chose to target the area with the least amount of political risk: poor urban neighborhoods populated mainly by African-Americans. Throughout these urban neighborhoods, "stop-and-frisk" tactics, SWAT teams, and drug raids occur frequently and tear up the already damaged microcosm of society. When a law student from the University of Chicago stepped into a poor community, she commented on how quickly individuals put their hands over their heads and spread their legs as if it was some sort of religious ritual.[279]

A handful of scholars attempt to justify the racial disparity in drug arrests by claiming that minorities tend to sell drugs outside because of a lack of private space in the smaller homes of the poor neighborhoods.[280] A study of drug arrests in the racially variegated city of Seattle collected data that refuted this claim. In the study, it was discovered that the people who dealt the most methamphetamine, ecstasy, cocaine powder, and heroin in Seattle were all white.

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[278] Ibid., 105.
[279] Alexander, *The New Jim Crow*, 125.
[280] Ibid.

African-Americans mainly dealt crack cocaine. Sixty-four percent of drug arrests; however, involved black people. African-Americans were not arrested more often because they sold drugs outdoors as black individuals who sold drugs indoors were also arrested at a higher rate. According to the study, outdoor markets run by white drug dealers received far less attention than their black counterparts.[281] The police in Seattle chose to focus their efforts on crack cocaine and, perhaps unconsciously, discriminated against an entire race of people.

Michelle Alexander writes, "The problem is that although race is rarely the sole reason for a stop or search, it is frequently a *determinative* reason."[282] Although it is difficult to single out race as the sole factor in the increased incarceration of black individuals, many of the tactics employed by the American government and law enforcement officials targeted programs and neighborhoods that would disproportionately affect African-Americans more than people of other races. In addition, the American media particularly demonized crack cocaine and associated it with black criminals while emphasizing the possibility of recovery with other drugs that were often used by suburban white people. African-Americans were taken off of the streets and stripped of their daily freedoms. The worst was yet to come for these African-American targets, however, as they were sentenced to a fate that would follow them for the rest of their lives. This account turns now to America's favorite and perhaps most broken institution, the prison.

[281] Katharine Beckett, Kris Nyrop, and Lori Pfingst, "Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests," *Criminology* 44, no. 1 (2006): 105-137.
[282] Alexander, *The New Jim Crow*, 131.

Chapter VII: The Cruelty of Prison

Considering the long history of law and human existence, the prison is a relatively new invention. The prison is meant to be a reformatory place where those who do not fit into the mold of society adjust themselves through a method predetermined by the designation of the prison (penitentiary, reformatory, penal colony, etc.). As mentioned above, there are over two million people sitting in jails and prisons in America at this moment. In this segment, this account will underscore the failure of these institutions and the reasoning behind their continued existence. In addition, this section will examine the implications for released prisoners and how the prison tends to follow inmates for the remainder of their lives.

The History of the Prison

Spaces of confinement have existed since antiquity; yet, the origins of the modern prison began in colonial Europe. Punishments in colonial Europe consisted of workhouses where offenders would perform public works while reflecting on their criminal behavior.[283] By the seventeenth century, wealthy citizens of the Dutch Republic urged masters of these workhouses to imprison other members of their families in order to avoid public embarrassment or to isolate them from the rest of society. Dutch workhouses did not require these wealthy individuals to perform the work of the other inmates and provided separate spaces.[284] It is from here that the modern prison began to develop.

Confinement complexes evolved over the next two centuries in Europe to become the main source of punishment for various types of crimes.[285] In 1975, Michel Foucault declared that this imprisonment culture began on January 22, 1840, the date which marked the opening of

[283] Carnochan, W. B., et al. The Oxford History of the Prison. Edited by Norval Morris and David J. Rothman (New York: Oxford University Press, 1995), 68-69.
[284] Carnochan, *History of Prison*, 72.
[285] Ibid., 76.

the Mettray penal colony. Foucault chose this date as Mettray represented "the disciplinary form at its most extreme, the model in which are concentrated all the coercive technologies of behavior."[286] It was at Mettray where solitary confinement and strict, regimented lifestyles became forms of penitence that were meant to adjust behavior.[287]

According to Foucault, the carceral seeped out of prisons and infected the entire social world. Carceral institutions such as convents, almshouses, and even schools began to use punishment as a way to normalize members of society. With this system, behaviors are monitored not only by prison guards, but also by doctors, criminologists, and even teachers. Violent crime was no longer the punishable act; rather, it was social deviancy.[288] The prison system wishes to treat this delinquency, but ironically produces that which it seeks to destroy so that it may thrive.[289] The carceral system aims to subject all individuals within it to social norms that are chosen by the observant authority figures of society.

In American law enforcement, this carceral system drives the War on Drugs and profiling by police. Criminals of all forms are placed into prisons and removed from general society. Inside, non-violent offenders are subjected to socialization techniques and confinement tactics that irreversibly alter their purview of the world. If and when they manage to leave this place, they are labeled as delinquents for the remainder of their lives, making a comfortable reentry into general society nearly impossible.

Prison Conditions and Populations

The increase in prison populations is directly related to the passage of laws that require prison terms for crimes that would have been punished by an alternative punishment prior to the

[286] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995), 293.
[287] Ibid., 294.
[288] Ibid., 299.
[289] Ibid., 301.

creation of the carceral system.[290] Prison sentences within this system are justified by the fact that they are to prevent crime. In addition, these punishments are not to be cruel and unusual by incapacitating prisoners or rehabilitating them so that they can function in society without becoming delinquent.[291] American prison systems operate under an instrumental philosophy that claims that the harm provided to a person deemed a criminal by the government will prevent the harm of others.[292] This sole justification of the American penal system might be acceptable if this idea were true.

When a person who is judged to be guilty is sentenced to prison, he or she is removed from the society as a form of pseudo-exile. This places a burden not only on the prisoner, but also on the governing board that placed him or her there.[293] In order to hold up the Eighth Amendment of the United States Constitution, which protects citizens against cruel and unusual punishments,[294] the corresponding government level must be wary of the way prisoners are treated. While there are no predetermined minimums or maximums as to what prisons must provide their inmates, it is expected that the conditions are not uninhabitable.

With these vague requirements for prison amenities and conditions, it is debatable as to what extent a person within the confines of a prison ought to be punished. In all prisons, inmates are not allowed to leave the complex, speak with many individuals, or provide for their own livelihood.[295] Prisons force their inmates to rely on other individuals for many of the items that they could normally provide for themselves, including food, toiletries, and water. With what

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[290] Steven Raphael and Michael A. Stoll, *Do Prisons Make Us Safer?: The Benefits and Costs of the Prison Boom* (New York: Russell Sage Foundation, 2009), 65.
[291] Ibid., 119.
[292] Ibid., 143.
[293] Sharon Dolovich, "Cruelty, Prison Conditions, and the Eighth Amendment" (*New York University Law Review*, October 2009), 911.
[294] Ibid., 881.
[295] Dolovich, “Cruelty and the Eight Amendment”, 911.

little money they have, prisoners are allowed to buy certain items, but the list is heavily restricted by the officers of the penal system. Therefore, the governing board that placed these individuals in this complex is the sole provider of sustenance and shelter.[296]

Based on the governance of these institutions, prisoners may or may not live a life that would be considered humane by the average American citizen. Some prisons provide their inmates with enough food and water, while others do not. Those who are deprived of these basic human needs even for a few days can experience physical and psychological suffering that could easily be construed as torture.[297] Thus, the government not only takes away the right of prisoners to provide for themselves, but also subjects them, in some cases, to near lethal starvation and dehydration. On a similar note, it is important to remember that violent criminals and non-violent criminals are all sentenced to the same prisons; the only difference between the two types of inmates is the length of their terms.[298] For this reason, many prisoners fear for their safety during their entire prison terms. If not monitored, prisoners are at risk to be put in solitary confinement, raped, beaten, or even killed by other prisoners.[299] While this does not happen in all prisons, the fact that it could happen could generate paranoia and permanent psychological damage. Even more troubling is the fact that there are estimates that claim as many as five percent of criminals in prisons are not guilty of the crime that put them in prison, meaning that thousands of people are being subjected to these horrors based on incorrect legal judgments.[300]

For the sake of brevity, this account will stop listing the numerous supplemental punishments that prisoners could encounter as a result of their being sentenced to a prison. Even under the assumption that all people who are confined in prison deserve to be there, the

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[296] Ibid., 912-913.
[297] Ibid., 914.
[298] Ibid., 885.
[299] Ibid., 915.
[300] Alexander, *The New Jim Crow*, 89.

dangerous nature of prison life does not match the sentence handed down by a judge in a courtroom. Conditions are unsanitary and cannot be cleaned. Food can be scarce and unattainable. Toilets can break and no one will come to fix them. In his own prison experiences, Michael Santos, a convicted drug trafficker and a man who earned a graduate degree while in prison, lived in jails that ranged from small prisons with adequate food, security, and incentives for cooperation to prisons where violence and deplorable conditions were the norm.[301] After numerous transfers to prisons across the United States, Santos has come to realize that the humane jails with protection from unreasonable violence for inmates are exceptions in the American carceral system. In larger correctional facilities, however, prison officials worry more about keeping their inmates in the prison and less about their humanity.[302] When a judge sentences an individual to prison, it is difficult to know what the sentence will truly entail.

The Mark of a Prisoner

If a prisoner is fortunate enough to leave prison without incurable physical or psychological scars, he or she now has yet to complete the sentence handed down by the judge. Although convicted felons are released from the horrors of prison, they face discrimination from future employers, parole officers, and the remainder of society. In fact, felons do not need to spend one day in prison to face this discrimination. Convicted felons are excluded from voting in elections or from serving on a jury. In addition to the approximately two million people in prisons, there are over five million on parole or under probation. Drug criminals have particular difficulties as they are prohibited occupying public housing, disqualified from obtaining food stamps, and barred from acquiring a wide range of licenses. [303]

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[301] Michael G. Santos, *Inside: Life Behind Bars in America* (New York: St Martin's Press, 2006), preface.
[302] Ibid., 18-19.
[303] Alexander, *The New Jim Crow*, 94.

As felons under parole or probation, individuals are subjected to officer surveillance and social restrictions that do not allow one to talk to other convicted felons. Any violation of these parole requirements would result in an immediate arrest and a return to a prison. In 1980, two years prior to the inception of the War on Drugs, one percent of prisoners were parole violators. Twenty years later, thirty-five percent of inmates were sent to prison after a parole violation, two-thirds of whom had committed no new crime.[304] A convicted felon may leave the prison behind, but the carceral society of America follows that person for the remainder of his or her life, waiting to restart the process and halt their societal progress.

The high placement rate of African-Americans and other minority citizens becomes even more worrisome when one understands the horrors of prison and the struggles of social reentry. The crackdown on crack cocaine (a drug sold primarily by black individuals) over other illegal drugs sold primarily by white people during the War on Drugs generated a systematic legal structure that discriminated against African-Americans. Biased media reports and controversial Supreme Court rulings supported this discrimination and opened the door to racial profiling in "post-racial" America. By removing African-Americans from society and imposing restrictions on their lives through probationary programs, the War on Drugs effectively disenfranchised a significant amount of African-Americans and championed systematic racism in the name of public safety. This legal discrimination suppressed the black population of America and maintained a hierarchy where rich white men possessed nearly all legal and political power.

[304] Ibid., 95.

Chapter VIII: Comparing the Legal Systems

Although ancient Romans and Americans never made direct contact, their legal systems exemplify the influence that ancient Roman law had on Western legal thought. Although the two legal systems are in no way the same, both are fraught with biased criminal procedures that singled out specific groups of people for harsher punishments. Despite two thousand years of human progress, the American legal system preserves similar prejudiced ideologies that pervaded ancient Roman law.

Police Militarization

Although Latin literature does not name an official police force, Roman emperors implemented soldiers and specialized task forces to keep the public peaceful and quiet. Initially, civilians were responsible for their own safety. Roman inhabitants, particularly the poor, protected themselves by traveling in groups, hiring guards, or recruiting young men for ersatz militias. After seizing power in Rome, Augustus strengthened the army to pacify the provinces and bring order to the Empire. The army expanded the borders of the Roman Empire and brought peace with them. In order to avoid wasting money, Augustus assigned soldiers to small policing tasks in all parts of the Empire. In Rome itself, the Praetorian Guard, urban cohorts, and *vigiles* were installed to stop criminal behavior and protect the people from mischief.

Subsequent Roman emperors continued to increase the jurisdiction of these pseudo-police forces. Soldiers dominated Rome proper and the territories. The duties of soldiers expanded to include protecting Roman elites and enforcing the decrees of the emperor and political councils. The power of the military became an important political tool and any Roman who wished to seize political power needed to have a loyal legion at his back.[305]

[305] See Chapter 2.

Unlike ancient Rome, contemporary American society has police forces that combat crime at the federal, state, and local levels. Police officers focus specifically on domestic crime while the military combats crime concerning the defense of the entire nation. Typically, these two institutions do not work together. With the passage of the Military Cooperation with Law Enforcement Act in 1981, however, the government of the United States granted law enforcement officers the ability to use military equipment in their fight against drugs. In addition, law enforcement offices increased the use of paramilitary SWAT teams to aid in drug raids during the War on Drugs, even though they had been created for use in only more extreme criminal situations.[306]

Both the ancient Roman and contemporary American legal systems employed law enforcement to mollify the areas of their respective lands. Over time, however, both law enforcement institutions experienced an increase in authority due to government warrants of force in certain situations. Rather than promote the peace they were meant to install, these officers struck fear into the general populations, particularly those individuals who held little to no legal privilege.

Punishments

The Romans developed a sophisticated gradation of penalties to which criminals could be sentenced. Capital punishments warranted executions, exile, or hard labor while less serious crimes led to beatings, tortures, and fines. Specific punishments, such as beatings and torture, were reserved for slaves, freedmen, and citizens of lower economic status. If a fine could not be paid in full, offenders were subjected to pay a portion of a fine and submit themselves to beatings to make up the difference. It was illegal to impose a corporal punishment against those of high social ranking save for extraordinary cases of treason. In addition to the primary consequences,

[306] See Chapter 6, Mobilizing for War.

some punishments stripped convicts of their freedom, honor, and citizenship, if applicable. Prisons existed mainly to detain defendants prior to an upcoming trial.

Execution was popular in ancient Rome. As with other punishments, specific forms of execution were reserved for slaves and men of low status. Crucifixions and deaths at the hands of wild beasts were common methods used by the Romans against these lower class individuals. *Honestiores* could be sentenced to death only for high treason. If an *honestior* was convicted of high treason, he would be sentenced to death via decapitation. This was avoidable in all instances, however, as high-ranking Romans could submit themselves to voluntary exile to avoid death. Forcing an *honestior* to death was considered cruel and unusual.[307]

The American legal system imposes fines, community service, probation, imprisonment, and execution onto criminals based on the severity of the crime. A sentence to pay a fine or perform community service results from a misdemeanor conviction while sentences of probation, imprisonment, and execution tend to stem from felony convictions. Executions are far rarer in contemporary American law than they were under ancient Roman law as they occur only in cases involving murder or treason.

Imprisonment is the preferable form of sentencing for those convicted of a felony. Violent crimes such as murder and rape generally warrant longer prison terms than non-violent felonies such as drug-related crimes. On the surface of American legal texts, no American is above the law; however, those who can afford superior legal aid tend to avoid harsher punishments. Individuals from lower classes cannot afford top lawyers and sometimes have no representation when their day in court arrives. The severity of the crime, however, judges only how long an offender will be imprisoned, not where he or she will be imprisoned. Non-violent

[307] See Chapter 4.

criminals are imprisoned with violent criminals, raising significant safety concerns. In addition, many prisons further the punishments of inmates with a lack of basic human necessities.[308]

The Romans were certainly ruthless in their willingness to execute scores of humans in violent manners. Western legal systems of modernity would likely be horrified at the amount of death caused by Roman law. Romans, however, would likely be horrified at the conditions of prisons and the number of incarcerated individuals in American society. Ulpian stated, "Governors are accustomed to sentence criminals into prison, or to be kept in chains; but it is not fitting to do this, for penalties of this kind are forbidden, for a prison should be used for the containing of men, and not to have for punishing."[309] The prison represents the indifference of the American government in a way similar to the executions carried out by ancient Roman society.

The Rich, the Poor, the Privileged, and the Disadvantaged

Roman law never attempted to hide the fact that it was biased against non-citizens and those who were of low economic class. Specific punishments (torture and beating) that were considered demeaning were employed specifically against slaves and *humiliores*, a collection of freedmen and low-class male citizens. Roman legal texts stated that punitive actions should be harsher against those of lower status. *Humiliores* found it difficult to improve their situations economically or run for political office. In addition, women held few rights and were not allowed to participate in the Roman political arena.

On the contrary, wealthy citizens, political elites, and veterans known as *honestiores* enjoyed reduced penalties for criminal actions and greater political mobility. Members of this

[308] See Chapter 7.

[309] Ulpian, *Digesta*, 48.19.8.9. "Solent praesides in carcere continendos damnare aut ut in vinculis contineantur: sed id eos facere non oportet. nam huiusmodi poenae interdictae sunt: carcer enim ad continendos homines, non ad puniendos haberi debet."

privileged group were exempted from corporal punishment and the death penalty. Roman law also reprimanded people of lower status for attacking these honorable individuals. The revered status of *honestiores* was bequeathed to younger generations of the family, perpetuating class divisions and keeping higher class citizens wealthy and in power.[310]

The United States operates in a capitalist economy and there is a clear distinction between rich and poor much like the Roman dichotomy of *honestiores* and *humiliores*. Members of the upper classes possess a majority of American wealth and hold most of the political offices. These wealthy citizens have access to strong legal counsel that helps to lessen the chance of being convicted of a crime or sentenced to a harsher penalty. In addition, upper class Americans live in richer neighborhoods which are targeted for crime less often than poor urban neighborhoods.

Lower class Americans, however, have much less legal privilege as they cannot afford decent legal counsel. Capitalism promises these individuals that hard work merits an increase in their economic standing, but wealth rarely reaches them. Lower class individuals tend to live in poor neighborhoods where a higher proportion of arrests are made. Furthermore, these humble individuals rely on the wealthier citizens for political endeavors as they hold most of the political power.[311]

Ancient Roman law and contemporary American law both discriminate against underprivileged individuals. Although contemporary American law condemns many forms of discrimination, the higher rate of drug arrests among poor African-American males among many other startling trends in American policing displays biases toward specific classes and races in the legal system. Lower class Americans wish to improve their situation and see that this is

[310] See Chapter 5.
[311] See Chapter 6.

possible through legislation. This legislation cannot be passed, however, if those who lobby for it have been disenfranchised by criminal records. The War on Drugs reveals that the white rich men do not want to give up their power nor allow social mobility for the poor, just as the Romans wanted to keep the *honestiores* honorable and the *humiliores* underprivileged.

Chapter IX: Conclusion

No legal system of the past, present, or future is perfect. Law is an inexact and qualitative science where theories are proven and disproven constantly. It is next to impossible to please all members of a society with any system of law as each piece of legislation affects some individuals positively and others negatively. Due to free enterprise systems, some individuals will always be wealthier than other individuals, particularly in the capitalist economy of the United States. Freedom tends to endorse inequality.

Ancient Roman society treated discrimination as its national sport. Roman emperors and magistrates wanted to subjugate the humble commoners so that they could keep in power and secure the glory of their name. They formed pseudo-police forces to keep inhabitants safe, but only to garner popularity. If the people were safe and enjoyed a higher quality of life, they were less likely to dispose of their political leaders. When the actions of these political leaders grew more totalitarian, however, the poor people of Rome began to challenge their social system. Unfortunately, Rome only knew how to function with this binary system of wealth and eventually collapsed. Despite its downfall, the Roman legal system remains one of the most important contributions to the development of Western societies. Although the cruel punishments and classist principles would not fit into contemporary society, the sophisticated organization of the law promoted the ideas of precedence and litigation. Discrimination aside, Roman law provided an important baseline for future legal systems.

After a great revolution, the peculiar institution, a civil war, two international wars, and countless demonstrations against discrimination of all types, American law has come a long way from its overtly discriminatory inception. Nearly all forms of socioeconomic forms of discrimination are condemned not only by American courts, but also by the majority of

American citizens. The shady ghosts of America's racist past seem to be just that, a thing of the past.

Unfortunately, those ghosts still haunt American law to this day. The War on Drugs targeted out the poor communities which had been leveled by the trafficking of crack cocaine. These communities were not only poor, but also predominantly populated by African-Americans. The Supreme Court, popular media, and the Executive Branch of the United States' government furthered the idea that the face of drug dealing was the face of a black man and that crack cocaine was the greatest danger to the safety of the country, even though studies showed that other drugs were just as dangerous and that drug dealing and drug use were racially-mixed activities.

In a few decades, incarceration rates skyrocketed, with the rate of incarcerated African-American men climbing the most. Although violent crime was dropping, Americans believed that there was a severe crime problem in their nation. The American government furthered this rumor by giving more authority to police officers so that they could crack down on this deep-seated drug problem. Officers were now able to use tactics that would have violated the Constitution in earlier decades. These tactics could have been used in any area, but the high number of drug users in the country forced officers to be selective about their drug raids. They chose to single out poor, African-American communities. As a result, African-Americans are suspected of drug crimes by police at a skewed rate. This suspicion leads to more arrests of African-Americans, which ultimately leads to the disenfranchisement that is associated with drug felons. Poor African-Americans cannot improve their socioeconomic standing when they cannot vote for their preferred political leaders and legislation.

What can possibly be similar about two legal systems that were in place two millennia apart? Ancient Roman law and contemporary American law share a tendency for societal discrimination. Both Roman and American law have suppressed attempts by the lower classes to move up economically. An invigorated lower class would take power away from those who have been in power for generations and disrupt the "natural" order of society. The main difference in these systems is that Romans knew they were discriminatory while Americans seem to be aloof. The Romans had the decency to tell their lower class citizens that they were respected less than others. American law calls all people equal, but then seeks to punish a specific subset of people. As if in an instant, it is once again a crime to be African-American in America. It is fair to say that the ancient Roman legal system was harsh. It is also fair to say, however, that the American legal system is harsh and hypocritical. Just as in the study of law, one needs only to turn his or her head and look at legislation with a different point of view.

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