CRIME & PUNISHMENT IN ANCIENT ROME

RICHARD A. BAUMAN

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PREFACE

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

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

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

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

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

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

R.A.B.
Sydney
April 1996

LIST OF ABBREVIATIONS

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

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

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

1

INTRODUCTION

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

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

CRIME AND PUNISHMENT

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

Another question of definition arises. What do we mean by 'a crime',

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

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

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

PUNISHMENT: THE GREEK EXPERIENCE

The first explorations of Crime and Punishment in its philosophical mode were conducted by Greek thinkers. They took their inspiration from Plato. As it is not our intention to embark on a comparative study, we content ourselves with an outline of Plato's theories in a few broad

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

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

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

ROMAN PUNISHMENT IN THEORY AND PRACTICE

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

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

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

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

CRIMINAL COURTS AND PUNISHMENTS

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

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

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

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

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

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

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

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

HUMANITAS, SAEVITIA AND PUNISHMENT

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

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

prominent. The theme is pursued in chapter 5 and is prominent in chapters 10 to 12. The final three chapters abandon the chronological approach, in favour of a number of themes which bring together and amplify matters touched on in the chronological section of the work.

As against the humane influences, the Principate also exhibits some of the worst features of *saevitia,* cruelty. *Saevitia* is probably the most pejorative term that the sources can apply to an emperor. Cruelty in punishment is examined in chapter 6 and, with special reference to its link with *utilitas publics,* in chapter 7. It is seen in another special context in chapter 8, in connection with the punishment of Vestal Virgins. But the very excesses of some of the first-century rulers provoked a reaction. In one sense it was a reaction by the punishers themselves. Starting with Claudius, the emperors began decreeing *liberum mortis arbitrium,* a free choice of the manner of death; one of the most important motives was the wish to spare the condemned the indignity of public execution. An even more curious phenomenon is the perception by some emperors of the damage that the capital penalty does to their own image; starting with Nero, they make strenuous efforts to deflect the odium from themselves to subordinates. There were also strong reactions against *saevitia* by public opinion. There was almost a literary sub-genre devoted to black comedy in this regard.

The supreme ambivalence is, however, displayed in another direction, one that applies to 'good' and 'bad' emperors alike. It is the emergence of grading, of different scales of punishment according to status. Those above the dividing-line, the *honestiores* (the upper classes) were punished less severely than the *humiliores* (the lower classes). Capital punishment for the *honestior* was often in the form of exile, but even when he was put to death he was spared the horror of being crucified, burnt alive or thrown to the beasts in the arena, all of which awaited his more humble counterpart. Even liberal-minded emperors failed (if they ever tried) to halt the sharp differentiation between the two echelons of society. The topic is discussed in chapter 11 and is also touched on in chapter 12.

Finally, chapter 12 examines attitudes to punishment, with special reference to the death penalty. The discussion includes the debates on punitive theory that Aulus Gellius claims to have attended. The chapter also offers some suggestions as to the purposes of punishment, especially in its nastier forms.

A word about aspects of the work for which originality can perhaps be claimed may not be out of place. The overall theme, namely looking at punishment across a time-span of some five hundred years, with

successive phases based on different court systems, and correlated with both theory and practice, does not appear to have been tried before. The theme has drawn massive support from, in particular, Mommsen, Strachan-Davidson, Brasiello, De Robertis, Cardascia, Levy, Kunkel, Garnsey, Cloud, Giofrredi, Jones, Nörr, Fanizza, Pugliese, Ducos, Rilinger and Cantarella. The symposia respectively edited by Thomas and Diliberto have also been most helpful. But the particular approach, buttressed by the bifocal inspection through the twin lenses of Roman law and Roman history, may be the first of its kind.

Specific innovations, in the sense of matters which have either not been raised before, or not in the form in which they are presented here, include the following: voluntary exile; *humanitas* and capital punishment; interdiction from water and fire; the magistrate's role in a jury trial; the penalty for *parricidium;* the right to kill under the adultery law; Cicero on punishment; Augustus and *cognitio;* criticism of the criminal law; Julio-Claudian innovations with special reference to Caligula and Claudius; the free choice of the manner of death; parodies of punishment; Seneca's exposition of *dementia* and Nero's attempts to apply it; the Stoics and the *poena legis;* deflecting the odium of death sentences; *humanitas* and *utilitas publica;* Domitian and the propaganda value of punishment; aspects of the prefectorial jurisdictions; the *De poenis* genre; *honestiores* and status symbols; attitudes to punishment and to human rights; catch phrases; the *poenae metus.*

2

TRIAL BY MAGISTRATE AND PEOPLE

THE EARLY *POENA LEGIS*

The first king of Rome, Romulus, is said to have allowed the death penalty for women who committed adultery or drank wine. His successor, Numa, is more credibly reported to have provided for the perpetrator of an accidental homicide to compensate the victim's family by tendering a ram; and Tullus Hostilius carefully defined the punishment of being affixed to 'an infertile tree' and beaten to death for treason.[1] In the Early Republic the primitive code known as the XII Tables prescribed fixed penalties for some crimes. Stealthily pasturing animals on another's crops by night earned the offender death by hanging, which a later age considered harsher than the penalty for homicide. For deliberately setting fire to a barn or a heap of grain the culprit was burnt alive; and for incantations that either cast a spell on someone or charmed away his crops the perpetrator was beaten to death.[2]

There was no general formulation of penalties in early legislation. Acts considered especially dangerous were singled out for ad hoc sanctioning. There were not many; Cicero tells us that the XII Tables decreed a capital penalty for very few crimes (*Rep.* 4.12). But when it did so decree, the method of execution was clearly spelled out. This degree of precision was essential, for only if the penalty had originated in a *lex* was it insulated against the charge of cruelty, *saevitia.* According to the annalists, the Alban leader Mettius Fufetius was punished for treachery by being torn apart by two chariots going in opposite directions. The king, Tullus Hostilius, justified the penalty as 'a warning to all mankind', but Livy adds that it was the first and last Roman punishment to disregard the laws of *humanitas* (L. 1.28.6–11). In reality it was no worse than being burnt alive or thrown to the beasts in the arena, but its trouble was that it did not have a statutory credential.

THE IUDICIUM POPULI: PROCEDURE AND PENALTIES

The origins of the *iudicium populi* have been in contention ever since Mommsen linked the process to *provocatio ad populum,* the appeal to the people. The idea is that during the plebeian struggle against the patricians, a plebeian threatened with summary punishment by a patrician magistrate would appeal to the bystanders. A tribune of the plebs would intervene to veto the imminent flogging or execution, and over time the practice arose whereunder the tribune tested the matter by submitting it to a formal assembly of the people. And so the *iudicium populi,* trial by the people, was born. But according to Mommsen's theory of universal *provocatio* it never broke its links with *provocatio*. An appeal to the people was always the indispensable trigger to the initiation of a *iudicium populi*.[3]

Mommsen's theory has come under sustained attack over the last fifty years. The ideal enshrined in *provocatio,* that capital punishment was the prerogative of the people, and that no citizen should be punished without trial, was seen in the Late Republic as the bastion of liberty, the guardian of the rights of the individual.[4] It was no doubt notionally present in the tribunician process, but as an indispensable prerequisite the theory leaks at every seam.[5] *Provocatio* was not a device to activate the tribunician process, any more than Magna Carta activates trials at the Old Bailey. Of the many alternatives to Mommsen's theory, the most persuasive is that of Kunkel, who argues that the regular tribunician process evolved quite independently of *provocatio*. The only role of *provocatio* was to restrict a magistrate's abuse of *coercitio,* that is, when he summarily punished fractious citizens and exceeded the authorized punishments that could be inflicted in this extra-judicial way. The victim would invoke *provocatio,* and this might or might not induce the magistrate to initiate a hearing by the people. But that was quite separate from the regular (and gradually evolving over time) tribunician process.[6]

A tribunician trial began when a tribune of the plebs summoned the suspect to an enquiry known as an *anquisitio*. The enquiry was held over three sessions *(contiones),* on different days. The proceedings were held in public and attracted crowds of spectators, whose vocal interjections often influenced the tribune's decisions. In this way public opinion made itself felt. At the end of each *contio* the tribune announced a penalty, and asked the accused whether he admitted his guilt. If he did, the tribune sentenced him without any more ado, as a *confessus*. But if he denied it three times a triable issue emerged, and

the tribune proceeded to the fourth hearing, the *quarta accusatio*. This took place at a formal assembly of the people convened by the tribune. If he was proposing a capital penalty the people assembled as the *comitia centuriata,* the assembly by centuries. If the proposal was for a sub-capital penalty, usually a *multa* or fine, the thirty-five tribes assembled as the *comitia tributa/concilium plebis*. There was no discussion at the meeting of the assembly; public opinion had been expressed at the *contiones,* and all that the centuries or tribes were required to do was to vote.[7]

PUNITIVE ASSESSMENTS BY TRIBUNES

As no *lex* regulated the penalty,[8] the tribune had a discretion on sentence. But it was only a relative discretion. He decided whether to proceed capitally or sub-capitally, but he did not have to make a decision until the conclusion of the third *contio*. Up to that point he could switch from a sub-capital to a capital proposal from one *contio* to the next; or public opinion might force him to do so. During the Second Punic War the tribunes charged Fulvius Flaccus with dereliction of duty in connection with his disastrous defeat by Hannibal (L. 26.1.9–3.12). At the first two hearings the tribune proposed a fine, but at the third hearing it appeared that the panic which the accused blamed for the rout had in fact been started by his cowardly desertion of his men. The spectators demanded that a capital penalty be substituted for the fine. Fulvius appealed to the college of tribunes for a ruling as to whether a change of penalty in midstream was permissible. The college ruled that it was.

> They would not prevent their colleague from conducting the *anquisitio* in the manner allowed by ancient custom, that is, by proceeding according to either the laws or custom, as he preferred, until either a capital or a pecuniary penalty emerged.
> (L 26.3.8)

The ‘laws’ are the XII Tables rule making the *comitia centuriata* the exclusive venue in capital cases (Cic. *Leg.* 3.11, 44–5). ‘Custom’ is the de facto jurisdiction of the tribal assembly in sub-capital cases. There being no *lex* in that instance, there was no *poena legis,* no statutory penalty spelling out the sentence. But this did not deprive the sentence of respectability, because it received the people’s imprimatur from their verdict, which was tantamount to a *lex*.