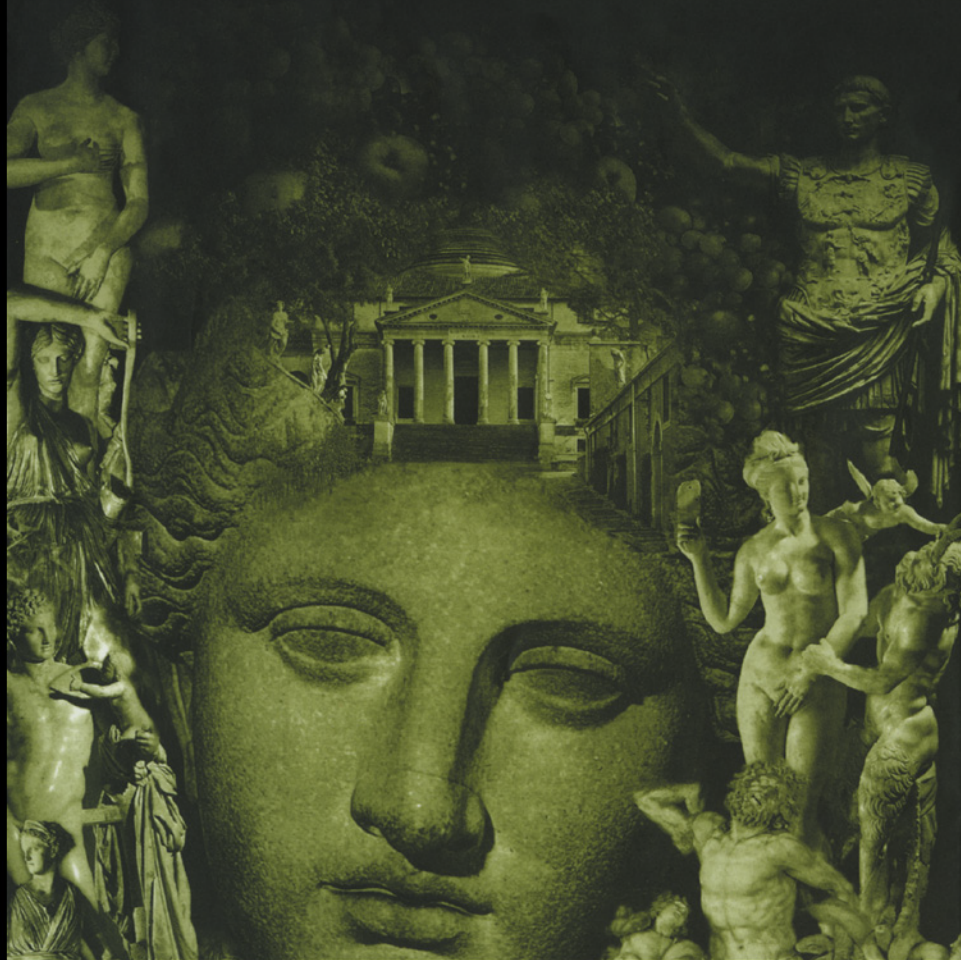


HUMAN RIGHTS
in ANCIENT ROME

RICHARD A. BAUMAN



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Richard A. Bauman



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For Sheila, Adrian and Sandra

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PREFACE

In a certain sense this work is a sequel to the writer's previous investigations of *humanitas* (1980, 1996). While exploring that theme in a strictly criminal law context it occurred to me that Roman human rights as a whole might usefully expand the area under discussion. But it was found that there was very little in the literature apart from narrowly focussed etymological—semantic studies. A broader picture is needed, both for its own sake and because of its ability to shed light on the vital topic of human rights in today's world.

The work is cast in chronological form, covering the Roman Republic and Principate. For the Republic the main thrust is from the late third century BC to the era of Cicero and Caesar. The Principate is covered from its inception to AD 235 with the main emphasis on the period from Augustus to Marcus Aurelius. The Republican and imperial phases are treated separately, corresponding to what are in some respects significant differences between the liberal, easygoing climate of the former and the more carefully tailored, professional ambience of the latter. One of the by-products of the investigation has been the updating of some of the writer's findings on *maiestas*.

The book has been written with two classes of reader in mind—those primarily interested in the Roman scene, and those interested in human rights in general. In order to move the story along as briskly as possible, technical discussions are largely confined to the notes.

My sincere thanks are due to Mr Richard Stoneman, Senior Editor at Routledge, who again provided a generous measure of counsel and support; and to Professor Edwin Judge of Macquarie University, Sydney, who read part of the work in draft and made some valuable

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suggestions. I am also indebted to the librarians and staff of the Law Library of the University of New South Wales, Fisher Library, University of Sydney, and Macquarie University Library, for their unfailing courtesy and co-operation.

R.A.B.
Sydney
February 1999

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 Lid-dell & Scott, *A Greek—English Lexicon*.

- ANRW H.Temporini & W.Haase (eds.), *Aufstieg und Niedergang der römischen Welt*, Berlin/New York, 1972–
- BZCS R.Busa & A.Zampoli, *Concordantiae Senecanae*, Hildesheim 1975
- CAH *Cambridge Ancient History*, 2nd edn, vols. 7 (1989), 8 (1989), 9 (1994), 10 (1996)
- CJ *Codex Justiniani*
- Coll. *Mosaicarum et Romanarum Legum Collatio*
- CTh *Codex Theodosianus*
- D. *Digesta Justiniani*
- EJ V.Ehrenberg & A.H.M.Jones (eds.), *Documents Illustrating the Reigns of Augustus and Tiberius*, 2nd edn, Oxford 1955
- EST H.Estienne, *Thesaurus graecae linguae*, Paris 1831–65
- FIRA S.Riccobono et al. (eds.), *Fontes Iuris Antejustiniani*, 3 vols., 2nd edn, Florence 1942–3
- Gai. *Gai Institutionum Commentarii Quattuor*
- GCN E.M.Smallwood, *Documents Illustrating the Principates of Gaius, Claudius and Nero*, Cambridge 1967
- J.Inst.* *Institutiones Justiniani*
- KL.P. K.Ziegler & W.Sontheimer (eds.), *Der Kleine Pauly*, 5 vols., Stuttgart 1964–75
- LRSB N.Lewis & M.Reinhold (eds.), *Roman Civilization*, 2 vols., 3rd edn, New York 1990
- LSJ H.G.Liddell & R.Scott, *A Greek-English Lexicon*, 9th edn, H.Stuart Jones, Oxford 1940
- Merguet H.Merguet, *Handlexikon zu Cicero*, Hildesheim 1962
- MRR T.R.S.Broughton, *The Magistrates of the Roman Republic*, 3 vols., New York 1951–2, 1986

ABBREVIATIONS

| | |
|-----|--|
| MW | M.McCrum & A.G.Woodhead, <i>Select Documents of the Principates of the Flavian Emperors</i> , Cambridge 1961 |
| NTH | E.M.Smallwood, <i>Documents Illustrating the Principates of Nerva, Trajan and Hadrian</i> , Cambridge 1966 |
| OCD | <i>Oxford Classical Dictionary</i> , 3rd edn, Oxford 1996 |
| OLD | <i>Oxford Latin Dictionary</i> |
| PS | <i>Pauli Sententiae</i> |
| RE | A.Pauly et al. (eds.), <i>Real-Encyclopädie der classischen Altertumswissenschaft</i> , Stuttgart 1894–1978 |
| SIG | Dittenberger-Wissowa (eds.), <i>Sylloge Inscriptionum Graecarum</i> , 3rd edn, Leipzig 1915 |
| TLG | Marianne McDonald et al., <i>Thesaurus Linguae Graecae</i> , CD ROM 1972– |
| TLL | <i>Thesaurus Linguae Latinae</i> |
| VIR | <i>Vocabularium Iurisprudentiae Romanae</i> |

1

INTRODUCTION

‘Homo sum: humani nihil a me alienum puto’

‘I am a man: I deem nothing pertaining to man foreign to me.’ The words of the comic playwright P. Terentius Afer reverberated across the Roman world of the mid-second century BC and beyond. Terence, an African and a former slave, was well placed to preach the message of universalism, of the essential unity of the human race, that had come down in philosophical form from the Greeks, but needed the pragmatic muscles of Rome in order to become a practical reality. The influence of Terence’s felicitous phrase on Roman thinking about human rights can hardly be overestimated. Two hundred years later the philosopher Seneca ended his seminal exposition of the unity of mankind with a clarion-call:

There is one short rule that should regulate human relationships. All that you see, both divine and human, is one. We are the parts of one great body. Nature created us from the same source and to the same end. She imbued us with mutual affection and sociability, she taught us to be fair and just, to suffer injury rather than to inflict it. She bids us extend our hands to all in need of help. Let that well-known line be in our hearts and on our lips:
*Homo sum, humani nihil a me alienum puto.*¹

With access to an intellectual coterie in which culture, influence and realism all played a part, Terence’s message epitomised the Roman conception of human rights. It was not a starry-eyed concept. Prompted by the need to define their relations with non-Romans, the new masters

of the Mediterranean world sought to combine the tenets of Greek *philanthropia* with traditional Roman values. The resultant product, *humanitas*, was given theoretical form by thinkers like Cicero and Seneca, and practical expression by laws and trials. The idea of *humanitas* was not confined to the external scene. It also had an impact on the domestic scene, primarily with reference to relations between ruler and subject, but also taking in relations between fellow-citizens.

The word *humanitas*, together with its adjective, *humanus*,² has a broad semantic span. Its primary connotation is the quality of civilised and cultural behaviour that is inculcated in people by education and training. From there it broadens out so as to become an incentive to do the right thing. In particular it acts as an incentive to avoid savage and brutal behaviour towards other members of the human race, either as individuals or in groups. But there is even more to it. There is a considerable amount of material pertaining specifically to human rights that is not identified by a specific *humanitas* label, or indeed by any label. That material must be given full weight in order to complete the picture of Roman human rights in the round. But no barrier will be erected between the *humanitas/humanus* material and the unlabelled material. At any given point the context will show whether it is a question of *humanitas/humanus* as expressly used in a source, or of human rights as a whole.

The meaning of ‘human rights’

What do we mean by ‘human rights’? Given the high profile of the idea in today’s world, one might look for a contemporary answer. But this is true to only a limited extent. The modern founding charter, the *Universal Declaration of Human Rights*, does not attempt a comprehensive definition. As adopted by the United Nations in 1948, the *Declaration’s* preamble recognises that ‘The inherent dignity and...equal and inalienable rights of all members of the human family [are] the foundation of freedom, justice and peace in the world.’ This is little more than a restatement of the doctrine of universalism that came down to Rome from the Greeks. For specific details we must consult Articles 2–29 of the *Declaration*.³ These may be grouped as follows:

- (i) The right to life, liberty, security of person, equality before the law, fair trial, asylum, and freedom from torture and inhuman punishment;

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- (ii) the right to privacy, reputation, opinions, religion, mobility, nationality;
- (iii) the right to marry, own property, take part in government, choose one's occupation, receive an education.

A number of these categories can be matched by Roman parallels. But not all the categories have the same importance—or perhaps the same sense of urgency. For us, and indeed for the *Declaration* itself, the main focus is on the first group. The struggle against brutality-driven assaults on the human person and human dignity is the central core. On the ancient scene an apposite illustration is supplied by Cicero in his defence of C. Rabirius:

Scourging, the executioner's hook, the dread of the cross—these things have long been obsolete. The credit belongs to your 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 lenient laws rather than by savage punishments.

(Cic. *Rab. perd.* 10)

Cicero here stresses the negative side of *humanitas*, he cites examples of what should *not* be done. Seneca makes even more extensive use of the same approach. The negative and the positive sides are not often covered in one and the same passage, but Flavius Josephus comes close to it. Although based on the Laws of Moses, his exposition reflects Graeco-Roman thinking:

The Laws of Moses promote piety, communal friendliness and *philanthropia* to the world at large. The Laws furnish a lesson in gentleness and *philanthropia*: food for all who ask, guidance on the road, no unburied corpses, and clemency to declared enemies by not burning their land, cutting down their trees, outraging prisoners, especially women, or ill-treating their animals.

(Jos. *Ant. Iud.* 2.146, 211–14)

On the negative side a damning condemnation comes from the Greek historian Polybius, writing in the mid-second century BC. He describes how, in the previous century, rebellious Carthaginian mercenaries had butchered 700 Carthaginians, cutting off their hands and other

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extremities, breaking their legs, throwing them alive into a trench, and refusing to hand over their bodies for burial. Polybius throws up his hands in despair:

Tumours become savage, brutalized and incurable. If treated they spread more rapidly, if neglected they continue to eat into the flesh. Similar malignancies grow in the human psyche. If we treat the disease by *philanthropia* they become suspicious, if we try to cure it by retaliation they react violently, stopping at no atrocity or abomination. In the end they are totally brutalized and can no longer be called human beings. The prime cause of the evil is bad manners and wrong training, but there are contributory causes like habitual violence and unscrupulous leaders.⁴

Latin writers are also highly critical of brutality. According to the annalists, the Alban leader Mettius Fufetius was punished for betraying his treaty obligations to Rome by being torn apart by two chariots going in opposite directions (in retaliation for his having been ‘torn’ between fulfilling his obligations and awaiting the outcome of the battle). The king Tullus Hostilius had justified the punishment ‘as a warning to all mankind’, but Livy condemns it as the first and last Roman punishment (*sic*) to disregard the laws of *humanitas* (Livy 1.28.6–11). And Cicero fulminates against his former son-in-law, Dolabella:

He killed Trebonius brutally, torturing him as Regulus had been tortured at Carthage, and so forgetful of *humanitas* that after breaking his neck he showed insatiable cruelty to the dead, cutting off Trebonius’ head and parading it on a spear. He has been false to his city, his country and his gods—in short, false to nature and mankind.

(Cic. *Phil.* 11.8–10)

The modern scene has also prompted despairing assessments, not only of the unbridled savagery of the second to fifth decades of the twentieth century, ‘the darkest of the dark ages’, but also of the more hopeful period ushered in by the *Universal Declaration*. In a work published in 1993, E.L. Doctorow expressed black pessimism reminiscent of Polybius:

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When introduced [human rights] referred to a person's right to speak freely, to hold any political opinion or to be tried under due process of law. But under pressure of worldwide practices the term has taken on a humbler meaning. Now [it] refers to standards of treatment that you hope to expect of your oppressor after he has taken all your rights away. He should not pack you away in an isolation cell while denying that you're under detention; or with relish take you into a ditch and break every bone in your body before killing you. If you're an infant you have the right not to have your skull smashed against a wall; if a nursing mother, not to have your breasts sliced off. The right not to have these things done to you—the right not to be tortured, mutilated, enslaved or injudiciously murdered—is what we've come to understand by the term *human rights*.⁵

Our identification of brutality and savagery as the central problem of human rights is every bit as valid for the modern scene as for the ancient. But this does not mean that other, non-brutal values are not important. In ancient times they easily outweigh the brutality group numerically. But they should be seen as regulators. Values like culture, education, kindness, clemency are (hopefully) capable of counteracting the central core. Polybius has drawn our attention to this in the concluding sentence of the above passage.

Questions of terminology

Does 'human rights' imply 'rights' in the technical sense? Some would make the concept an essentially modern invention because 'rights' as such were unknown in classical antiquity and did not surface until the English, American and French Bills of Rights of the seventeenth and eighteenth centuries, or at best until the Middle Ages.⁶ To this there are two answers. First, is the word 'rights' used technically even on the modern scene? The *Universal Declaration* does not think so. It hedges its bets by addressing 'human rights and fundamental freedoms'.⁷ But even if 'rights' is used technically, there is a small but important group of Latin expressions of the type *ius humanum*, *lex humana/humanitatis* that seems to supply what is needed.⁸

What is the relationship between the Greek *philanthropia/philanthropos* and the Latin *humanitas/humanus*? Was *humanitas* a straightforward Latin equivalent for *philanthropia*, or was it an original formulation drawing only part of its content from *philanthropia*? This question will lead us into the most important terminological question of all, the emergence in the second century BC of what has come to be known as *humanitas Romana*.

Humanitas can also be seen as an umbrella under which were grouped moral values that furthered the ideals of the parent concept. The most important of these is *clementia*, with *aequitas*, *lenitas*, *mansuetudo*, *moderatio*, *indulgentia*, *iustitia*, *fides* and *pietas* helping to fill out the picture. Standing apart from these is a hitherto unrecognised concomitant of *humanitas*, namely *maiestas populi Romani*, ‘the greatness of the Roman people’. This embodiment of the Roman imperial idea played more than a supporting role in the external sphere, that is, in relations between Rome and non-Romans, whether subjects or independent nations.

The enforcement of human rights

If Roman human rights should be seen as the ultimate source of the modern institution,⁹ how do the two compare in the matter of practical enforcement? Our answer is that Rome anticipated the modern idea of creating a world environment in which solutions become possible. The Roman empire was the first global village. It was uniquely placed to give effect to the ideal of universalism. When the sole arbiter was Roman governance and Roman law, there was a less pressing need to educate, persuade or cajole a diversity of nations and peoples; Rome’s writ ran right across the Mediterranean world. This greatly helped the installation of new rules of behaviour. And the enforcement of those rules was in the hands of an established court system and a single system of law.¹⁰ It did not have to be left to international tribunals of dubious muscularity.

The modern version appears to have the advantage in respect of the scope of human rights. Since the adoption of the *Universal Declaration* those rights have been expanded by legislation by individual states and interpretation by international organs. On the other hand, Roman *humanitas* was a flexible, and indeed chameleon-like, concept¹¹ that constantly adapted to changes in society. Adaptation was effected partly by redefining *humanitas*, but in an even more subtle

way by making it always subject to the dictates of the public interest, *utilitas publica*.¹² The public interest acted as a brake on the enthusiasms of *humanitas*. At the end of the day, however, the difference between the ancient and modern models may not be as great as appears at first sight. On the modern scene braking mechanisms like commercial interests have a comparable effect to *utilitas publica*.

Structure and scope

The study focusses on the period of the Republic and the Principate, with occasional forays into the Later Empire. The discussion is initiated, in chapter 2, with an overview of human rights in Greece. This could not be ignored. As Cicero tells his brother Quintus, governor of the Greek-speaking province of Asia, ‘Even if you were governing the barbarous peoples of Africa, Spain or Gaul it would befit your *humanitas* to look after their interests. How much more desirable is this when you are dealing with the race that gave *humanitas* to the world?’¹³

The remaining chapters pose the problem of the particular approach to be followed. To an even greater extent than usual, structuring is frustrated by the impossibility of dealing with the same topic in two places at the same time. Our preference is for a diachronic rather than a thematic approach. There were significant changes in the perceptions of *humanitas* down the centuries, and each change is best understood in its own context. In any case there is a major dividing-line between the Republic and the Principate. The liberal climate of the former was severely curtailed in the imperial period, but in compensation the Principate adopted a more professional approach. Our method will basically be a diachronic one, with thematic treatments within time periods.

Chapter 3 covers the evolution over the second century BC of *humanitas Romana*, which is the linchpin of the entire Roman system. Chapter 4 goes back slightly in time, a necessary deviation because it is best understood against the background of *humanitas Romana*. Chapter 5 is devoted to Cicero, with glances at other writers. One particular theme, *humanitas* and the law, takes in both the Republic and the Principate. This particular theme is uniquely suited to the exception. Chapter 6 is an in-depth study of legislative and judicial curbs on greed and brutality as inflicted on non-Romans in the Republican period. Chapter 7 addresses the new image of *humanitas*

in the Principate, developing the topic through two themes, *humanitas-clementia* and *Clementia Caesaris*. Chapter 8 continues the new image of *humanitas*, focussing on the further development of curbs on greed and brutality and on universalism, freedom of speech and social welfare. Chapter 9 addresses the other side of the coin, acts of innate brutality that tend to devalue the positive achievements. Chapter 10 draws the threads of the discussion together.

A word about original aspects of the work may not be out of place. The overall theme, human rights in the round as distinct from more narrowly focussed studies of *humanitas*,¹⁴ does not appear to have been tried before;¹⁵ nor has the time-span running from the Early Republic to the Late Principate. Specific innovations, in the sense of matters that have either not been raised before, or not in the form in which they are presented here, include the following: the exposition of Greek *philanthropia*; Roman human rights before Terence, including the first links between *humanitas* and *maiestas*, and the competitive drive for primacy in the introduction of Greek *philanthropia* to Rome; Terence as a formative influence leading into Panaetius and Aemilianus; the first use of the word *humanitas*, as distinct from the older *humanus*; the link between *humanitas* and the law; Cicero's ambivalent uses; Cicero and the *lex Calpurnia repetundarum*; Cicero (and later Seneca) and universalism; the death sentence and voluntary exile; the new image of *humanitas* and *clementia* in the Principate; the manifold contributions of Seneca to human rights; advantages and disadvantages of universalism; curbs on greed and brutality right across the Principate; devaluatory factors, especially genocide and racial prejudice.

Evaluation

That the notion of human rights was well understood in Ancient Rome is already clear and will become even clearer in the pages that lie ahead. The picture is admittedly clouded by the dark side, but so is the modern institution. Whether the Roman model is so distorted by the negatives as to forfeit all claims to humanitarianism remains to be seen. Meanwhile one or two preliminary observations can usefully be made.

First, we have not attempted to cover all aspects of the multifaceted concept of human rights. It is not possible to say everything about everything. Considerations of space prescribe that a selection be made.

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The study is geared primarily to the brutality/ savagery aspect, which corresponds to the first group in the *Universal Declaration*. It comes closer than any other selection to presenting human rights in the round. One or two non-treated aspects will however be touched on.¹⁶

Second, there are differences of genesis between ancient and modern versions of human rights. Modern formulations are responses to crisis situations. The seventeenth- and eighteenth-century models were triggered by revolutions, while the *Universal Declaration* was a reaction against twentieth-century barbarism. Crisis situations, or at any rate defining moments, can of course be identified on the Roman scene as well. But there is a difference. Where the *Universal Declaration* was cobbled together in some haste after World War II, the Roman model evolved more slowly and casuistically. It was a true product of an ethos that disliked putting reforms in place ahead of time. It was essentially a matter of organic growth, of steady adaptation to change. The unique combination of growth coupled with flexibility-within-stability gave an advantage denied to the modern successor. The Romans had a clearer perception of the limitations of human nature. *Humanitas* was, after all, an attribute of the human race, and its ideals had to be pitched at an achievable level. Rome was never disposed to reach beyond the possible.

Finally, a further word about our suggestion that the Roman model was the ancestor of modern human rights. That claim will not be seriously disputed by workers in the ancient field,¹⁷ but it is usually ignored by modern investigators. It is hoped that this study will not only offer students of antiquity some new insights, but will persuade workers in the modern field to move their goalposts further back.

HUMAN RIGHTS: THE GREEK EXPERIENCE

Preamble: the meaning of *philanthropia*

The word *philanthropia* supports a number of different meanings. EST lists a range running from ‘love of men, *humanitas*’ to ‘the laws of friendship and hospitality’. LSJ define it as ‘humanity, benevolence, kind-heartedness, humane feeling or, in a weaker sense, kindness, courtesy’.¹ In antiquity Diogenes Laertius defined three kinds of *philanthropia*: the kind based on names, as when one greets someone with a name and a handshake; the kind based on giving help to every unfortunate; and the kind based on convivial encounters with boon companions.² EST notes another important aspect: ‘*Philanthropia* is not only the goodwill of superiors towards inferiors, such as a god’s towards us, a king’s towards his subjects, or a magistrate’s towards his subordinates, but also anyone’s friendship or affection for another.’ There is a hierarchy, at the upper levels of which it is not so much a question of friendship and affection as of an obligation to treat inferiors properly. The hierarchy was visible to Plato.³

The basic category of ‘kindliness, courtesy’ can also be expressed as ‘fellow-feeling, civility’. It is an attitude, one that needs to be deliberately inculcated, and the mechanism for doing that is *paideia*, ‘training, education’.⁴ Educated civility is largely presented as a stereotype devoid of detail,⁵ but more specific connotations branch out from it. Diplomacy is a particularly fertile field, so much so that the adjectival form, *philanthropos*, assumes the force of a noun, *ta philanthropa*. It comes to mean treaty-generated privileges, then treaty-generated obligations, and ultimately all relations between ruler and subject.⁶ When the Aetolians reminded the Romans of *ta progegonota philanthropa* (Pol.

20.9.7–8) they did not mean ‘their former kindnesses’.⁷ They meant their due performance of their treaty obligations; the Romans expected compliance from their allies, not kindness.

Our special interest is in *philanthropia* as a curb on brutality. The civilised attitude induced by *paideia* would, it was hoped, restrain the innate savage instincts of man. As we have already noticed, Polybius doubts the efficacy of *paideia* in his despairing comment on the Carthaginian mercenaries (Pol. 1.81.5–11). But society continued to travel hopefully.

A feature of *philanthropia* is its bilaterality. One philanthropic act expects another, a *quid pro quo*. For example, the Spartan king Agesilaus treated prisoners of war well not only out of clemency, but also because it promoted the future security of captured fortresses.⁸ Cicero emphasises bilaterality in his letter to Quintus: the Greek gift of *humanitas* to the world must be matched by *humanitas* towards Greeks (Cic. *Ad Q. fr.* 1.1.27).

Philanthropia: the Athenian model

Philanthropia is not prominent in the fifth century. Attic literature supplies only three examples of its use. In Aeschylus’ *Prometheus* the gods punish his presumption by discontinuing their usual *philanthropia* towards men (vv. 11, 28). Aristophanes’ ‘most gracious of daimons’ (*Pax* 392) is no more than a ‘courteous’ stereotype. A fragment attributed to Euripides’ lost play, *Kresphontes*, has an unhappily married daughter beg her father for ‘a just and philanthropic favour’ (Eur. fr. 953.40–42). But whether this important link between *philanthropia* and justice is genuine is a moot point, given the doubts as to the fragment’s Euripidean provenance.⁹ In any case the absence of any other occurrence of *philanthropia* in Euripides, especially in his *Trojan Women*, is worrying. That play is thought to have been written by a poet appalled at the wanton destruction of Melos by the Athenians.¹⁰

Most disturbing of all is the silence of Thucydides. One might have expected to find *philanthropia* on display in that catalogue of human values, Pericles’ Funeral Oration (Thuc. 2.34–46). But Thucydides gives only the substance of human rights, not the label. We are less surprised at its omission from the Mytilenian Debate of 427 (3.36–50); both speakers simply press for a decision based on the public interest (*to sympheron*). But in the Melian Dialogue (5.84–116) the historian does not even bother to plead the public interest *motif*.

The advent of the fourth century brings a change. Xenophon has nineteen uses,¹¹ eight of which occur in the *Cyropaedia*, a treatise on the training of Xenophon's model philanthropist, the Persian king Cyrus. For example, when Cyrus addresses his allies after completing his conquests, he says that although by an eternal law conquerors own the persons and property of the conquered, *philanthropia* should persuade them to forgo some of those rights. Elsewhere Xenophon links the adjectives *philanthropos* and *demotikos* ('in the spirit of the people, democratic'). He says that by citing Homer (*Iliad* 2.212–69) Socrates did not intend to chastise common folk while favouring the mighty. He was simply, as a philanthropic man of the people, condemning those who refused to render assistance to the army, the city or the Demos (*Mem.* 1.2.58–60). The link between philanthropy and democracy is also stressed by Demosthenes. He says that laws regulating legislative procedures are not offensive, violent or oligarchic; they facilitate the philanthropic and democratic passage of legislation (*Dem.* 24.24). We note with some surprise the absence of *philanthropia* from Xenophon's major works. It does not occur in *Anabasis*, and there is only a single occurrence in *Hellenica*.¹²

Demosthenes' seventy uses¹³ include our first clear example of *philanthropia* in the sense of a brake on brutality. Attacking Thebes in 355, Demosthenes says this:

The Thebans do not observe the same laws, customs or system of government as us. They take more pride in brutality and wickedness than we do in *philanthropia* and justice. May they always refuse honour to those who serve them, may they always treat kindred peoples as savagely as they treated Orchomenus! May we always honour our benefactors and promote justice by debate in harmony with the laws.

(Dem. 20.109, 165 adapted)

Thebes' treatment of Orchomenus (*Diod.* 15.79.1–2) provides the contrast that Demosthenes wants. The discovery of a plot by Orchomenus had prompted a revision of the Thebans' original compliance with the principle that those who sought supremacy should guard by *philanthropia* what they had won by valour. They ended up by decreeing that all male citizens of Orchomenus be killed, that the women and children be enslaved, and that the city be razed.

Demosthenes' speech marks a slight shift with respect to the formative influence behind *philanthropia*. Here it is not so much a question of *paideia* as of reasoned debate within the framework of the laws. The legal theme is prominent in Demosthenes. Thus, a decree allowing state debtors to remain at liberty on furnishing sureties is, although pernicious, likely to win approval because of the philanthropic associations of the word 'law'.¹⁴ Also, by the laws of all cities¹⁵ laws are divided into two classes: those which regulate the private dealings of citizens, and those which govern the citizen's relations with the state. It is in the public interest for private laws to be moderated by clemency and philanthropy; but public laws must be rigorous and severe, so that politicians be unable to do so much harm to the community (24.192–3). Demosthenes presents the Athenians as a sort of corporate body united by the natural bond of *philanthropia*, much as private families are (25.87–9). He thus takes in the notion that human rights was a product of natural law; this again brings in 'the laws of all cities', that is, the *ius gentium*. Cicero would do the same with *societas/communitas* (*Off.* 1.51–4).

Demosthenes offers a number of texts dealing with external issues, with relations between Athenians and other peoples. In at least two speeches he draws a distinction between harmonious domestic debate and the (perfectly acceptable) brutal treatment of enemies. The Demos should be gentle and humane towards Athens and her allies; they should be philanthropic in the courts, which are the proper vehicle for the enforcement of civic rights. But enemies must be overcome by force of arms, and one should be terrible and implacable towards them (8.33, 13.16–17). This is in accordance with the generally narrow Greek view of racial differences. It was hard enough to encourage *philanthropia* between Hellenes of different cities, let alone between Hellenes and barbarians.¹⁶

Megalopolis' appeal to Athens for help against Sparta in 353 evoked an ambiguous response from Demosthenes:

You are bound to help Messene rather than Megalopolis not only by treaty but also because of your interest [*to sympheron*] in preserving Messene. But which stand will be more honourable and philanthropic? Help for Megalopolis is morally right, whereas help for Messene will be seen as prompted less by a regard for justice than by fear of Sparta. The proper course is to decide what is

right and then to do it, but at the same time we must make sure that what we do is expedient as well.

(16.9–10 adapted)

Demosthenes was literally hedging his bets. Cicero would do the same.

When discussing *hubris*, the infliction of personal outrage on another, Demosthenes makes a rare foray into the area of human rights and slavery. He praises the *philanthropia* of a law which penalises outrages against any person, whether child, woman or man, and whether free or enslaved. He imagines the astonished reaction of a barbarous nation from whom slaves are drawn, if it were told that ‘Some Hellenes are so philanthropic that although imbued with natural hostility towards you, they permit no outrage to be inflicted on those whom they have bought from you as slaves’ (21.47–50). Aristotle might not have agreed,¹⁷ but Rome understood it.

There are (unexpectedly) no allusions to *philanthropia* or its violation in Demosthenes’ repeated attacks on his *bête noire*, Philip of Macedon.¹⁸ There is only one marginal allusion in the Second Philippic, when he observes that although the diatribes against Philip are just and philanthropic, there has been no action to match those sentiments (6.1). Elsewhere he declares that while other nations have experienced the cruelty that always surfaces when Philip gains the upper hand, the Athenians have been lucky enough to enjoy the *philanthropia* that Philip has contrived to show them with an eye to the future (18.231).

Philip’s concession of lenient terms to Athens after Chaeronea did, of course, envisage a *quid pro quo* in the shape of the leadership of Hellas.¹⁹ This brought in the ideal of Panhellenism. Philip thus gave a new impetus to *philanthropia* by using it as a political weapon, and the question is, who put that idea into his head? The answer is almost certainly the theoretician of Panhellenism, Isocrates.²⁰ After first canvassing a Panhellenic movement under Athenian leadership,²¹ he shifted his ground to the ideal monarch, whose rule he considered superior to democracy. His blueprint was based on major philanthropic principles: honours must go to the best, but the masses must enjoy freedom from outrage, injustice, terrorism and cruel punishments; and international relations must be dealt with as one would want stronger states to deal with oneself. This comprehensive Panhellenism, taking in both the domestic and the external aspects of *philanthropia*, should be entrusted to a paternalistic monarchy under Philip.²²

Philanthropic, the defining moments

Can the contrast between the negligible use of *philanthropia* in the fifth century and its proliferation in the fourth be explained as a reaction to a crisis? The closing years of the fifth century saw the Greek world engulfed by a rising tide of violations of human rights. The problem is graphically portrayed in Thucydides' essay on *stasis*, where the mutual savagery of oligarchs and democrats prompts as pessimistic an assessment as that of Polybius on the Carthaginian mercenaries. The essay was written in the light of the democratic massacre of the opposition at Corcyra in 427, when fathers killed sons and suppliants were butchered on the very altars or walled up in temples. Thucydides comments as follows:

Revolutions produced a general deterioration. Old values like honour were ridiculed and society was divided into two hostile camps. There was no way of ending this state of affairs. No guarantee was to be trusted, no oath to be relied on. Everyone felt that it was hopeless to expect a permanent solution. Corcyra saw the first breakdown of law and order, with men swept into savage and pitiless excesses by their ungovernable passions. Human nature, always rebellious even where laws exist, was now quite incapable of controlling itself or of showing respect for justice. When pursuing revenge men do not hesitate to nullify general laws which give hopes of salvation to all in distress.²³

A partial solution was found in the fourth century. Its hallmark is the sudden upsurge of uses of *philanthropia*. The dying years of the Athenian empire had seen comparable violations of human rights to those that were convulsing the Greek world as a whole. The ultimate absurdity was perpetrated by the Demos in 406, when the generals who had chalked up Athens' last naval victory, at Arginusae, were tried for failing to pick up the dead and the survivors after the battle; a court which denied them any semblance of natural justice sentenced them to death.²⁴ In effect they were charged with violating human rights, though that was not the technical thrust of the indictment. The Demos had tried to bite its own tail, it had created a situation in which a denial of human rights was used to punish a violation of human rights. Finally the extreme oligarchy known as 'The Thirty'

elevated brutality to the status of an ideology by giving a specious colour of legality to its atrocities.²⁵ Sulla would remember the Thirty.

The fall of the Thirty brought the restoration of democracy and the great reconciliation and amnesty law of 403. The sources do not speak specifically of *philanthropia* in connection with the amnesty, but in the Hellenistic period such decrees were regularly known as *philanthropa*.²⁶ However, even without a specific label the law of 403 was the most important single act of *philanthropia* in antiquity. It set the pattern for both Greece and Rome.²⁷

If the law of 403 was the first formal Athenian response to the crisis facing the Greek world, Isocrates' model based on Panhellenism was the genesis of a second response. Ideologically the two defining moments were far apart. As one of the fruits of democracy, the amnesty of 403 inspired an image of *philanthropia* in which the formative influence was not so much *paideia* as reasoned parliamentary debate and judicial integrity, as Demosthenes repeatedly reminds us. Also, the model was only designed for domestic use, as a brake on internal mayhem. The larger crisis of internecine savagery amongst the Greeks had to wait for Isocrates' Panhellenism. His limited form of universalism applied only to the Hellenes; it would be for Universal Rome to broaden the scope. But as far as it went, Isocrates' model broke important new ground. But it did so by a paternalistic monarchy and elitism, not by Demosthenes' democratic process. The lesson would not be lost on the Roman emperors.

The Hellenistic period

The period from the third to the first century BC makes two important contributions to our theme. The first is *ta philanthropa*, the acts of the ruler which confer benefits on his subjects and ultimately epitomise all relations between ruler and subject.²⁸ *Ta philanthropa* offers the clearest Greek examples of the legislative entrenchment of *philanthropia*. The ruler might be paternalistic, but he still relied on laws. The evidence consists largely of documents from Ptolemaic Egypt. Some of the examples are discouragingly banal. There is nothing particularly inspiring about a decree granting a worthy citizen a crown, a place of honour at the theatre or a commemorative stone, or approving of a city's plan for its games.²⁹ But sometimes more meaningful values are canvassed. The famous *philanthropon* of Euergetes II, which put an end to a civil war in Egypt in 118 BC,

included an extensive amnesty for criminal offences, tax relief, payment for liturgies, regularisation of property rights, privileges for special groups, and clarification of court jurisdiction as between Greeks and Egyptians.³⁰

The other important contribution is the historical work of Polybius and Diodorus. Writing respectively in the mid-second and mid-first centuries BC, their uses of *philanthropia*—125 by Polybius, 150 by Diodorus³¹—rank them with Demosthenes as the most important literary sources for Greek human rights.

Polybius supplies invaluable information about brutality-driven violations of human rights. And he draws on his experience as a diplomat in the service of the Achaean Confederacy³² to elevate the basic educated civility of *philanthropia* to the level³³ of a diplomatic instrument. On the first of these, he gives further information about the brutality of the Carthaginian mercenaries, and it is worth glancing at what he and Diodorus have to say about the background to that episode. As Polybius presents it, in 241 the Carthaginian Gesco negotiates with the mutinous mercenaries. The latter are led by Spendius, a fugitive Roman slave who fears torture and death if recaptured. Although Gesco meets the complaints about arrears of pay, Spendius arrests him. Eventually Hamilcar defeats the rebels, killing 10,000 and taking 4,000 prisoners, whom he frees. But Spendius dismisses Hamilcar's *philanthropia* as a pretext and persuades his men to torture and kill Gesco and the other prisoners.³³ Diodorus knew a somewhat different tradition. He says that Hamilcar's reputation for probity was enhanced by his humane (*anthropinos*) treatment of Hecatompylus. But the cruelty of the mercenaries forced Hamilcar to abandon his *philanthropia*, and he threw prisoners to the elephants. Eventually Hamilcar crucified Spendius, but later on another mercenary leader, Matho, nailed Hannibal³⁴ to the same cross. Thus Fortune alternated between two offenders against human nature (*ten anthropinen physin*).³⁵

The episode of the mercenaries produces Polybius' very first use of the word *philanthropia*. He uses it again in the immediate aftermath of the Third Macedonian War, when he finds the attitude of the Macedonians impossible to explain. They had received great benefits from Rome, and when fighting for their legitimate king, Perseus, they were defeated. But after that, fighting for the false Philip, they worsted the Romans, displaying great valour despite having seen more of their citizens exiled, tortured and murdered than under any of their real kings. Polybius puts it down to madness sent by the

gods (Pol. 36.17.12–15). Even this pales by comparison with his strictures on Charops of Epirus:

Charops was the most brutal and unprincipled men ever. His death (in 157 BC) purged Greece of a curse. But Epirus was still unsettled due to his cruelty and lawless violence. After the Romans had executed or taken to Rome all suspects, Charops committed every kind of crime, murdering citizens in the market-place or in their houses, sending agents to kill others, confiscating properties, and exiling all the wealthy. The people were terrorised into condemning them as enemies of Rome, and they went into exile.³⁶

Polybius is less pessimistic when he looks at *philanthropia* on the international scene. He takes special pride in the performance of the Achaean Confederacy:

The equality, freedom of speech and democratic constitution of the Achaean Confederacy led to all members being put on the same footing. The instruments in achieving this were equality and *philanthropia*, as is shown by their response to the Mantinean defection. They were received back with every mark of *philanthropia*, but they then defected to the Spartans and massacred the Achaean garrison. This breach of the right accorded even to enemies by the common laws of nations [*tous koinous ton anthropon nomous*] was an act of impiety, a violation of rights common to all men [*ta koina ton anthropon dikaia*]. They ought to have been sold into slavery with their wives and children, but their only punishment was that their adult males were enslaved and their property was pillaged. And when Aristomachus of Argos defected, instead of being led around the Peloponnese and tortured to death as a public spectacle, he was merely drowned in the sea.³⁷

Polybius has told us that there was no absolute standard of *philanthropia*; there were grades according to either the gravity of the offence or the instincts of the punisher. Cicero would take up the grading system. Polybius also uncovers an important idea when he describes the Mantinean defection as ‘impiety’. Although ‘the rights common to all men’ exist, in embryo, in ‘the common laws of nations’

(*ius gentium*), they have to be extracted from that reservoir. That is done by treaties, which involves swearing oaths by the gods (e.g. Pol. 9–32.8); hence breaching a treaty is an act of impiety.

Diodorus philanthropia takes a somewhat different course. Having no personal involvement in public affairs, he is more interested in the ruler's treatment of his subjects than in diplomacy.³⁸ For example, Gelon of Syracuse is commended for being fair and humane to both neighbours and enemies; slaves who sought asylum were allowed to remain until sure of humane treatment. Acragas received 2,600 refugees from devastated Selinus with every kindness, reflecting the Acragan tradition of showing strangers old-fashioned *philanthropia*.³⁹ Diodorus is often anecdotal, but he rises above that level in his account of the Sicilian Slave War of 135–132. The cruelty of the great landed proprietors, including Damophilus and his wife, earned them harsh treatment. But their daughter was spared because of her humanity and compassion towards slaves. This leads Diodorus into an excursus:

Kings and magistrates should conduct themselves humanely towards those of humble degree. They should treat their slaves decently, if we are temperate [= humane] people. Harsh arrogance breeds civil strife in public, while in private it brings plots against masters and defections from the state. The greater the injustice and cruelty of the mighty, the more are slaves driven to stubborn madness. Those assigned a humble lot by Fate freely concede honour to their betters, but if deprived of *philanthropia* they become enemies.⁴⁰

Evaluation

Originality can be claimed for the chapter in a number of respects. First, it offers an organised exposition of *philanthropia* rather than a lexicographer's list. Unlike *humanitas*, *philanthropia* lacks special studies; it is not so much as noticed by *RE*,⁴¹ *OCD* or *Kl.P.* Second, original individual items include the following: Demosthenes' uses of the word; the two defining moments of *philanthropia*, with the crisis situations that provoked them; the different approaches of Demosthenes and Isocrates; Polybius and brutality; Polybius and diplomacy with the common laws of nations and the rights common to all men; Demosthenes and Diodorus on slavery.

HUMANITAS ROMANA

Preamble: the meanings of *humanitas*

The meaning of *humanitas* is dogged by a controversy that troubled the ancients. The antiquarian Aulus Gellius, writing in the second half of the second century AD, puts it as follows:

Correct Latin speakers do not give *humanitas* the meaning that it is commonly thought to have, namely what the Greeks call *philanthropia*, which is a sort of correctness and goodwill towards all men. Latin purists give *humanitas* approximately the force of the Greek *paideia*, which we know as education and training in the liberal arts. Those who pursue these goals are essentially human, for the cultivation of this kind of knowledge and training has been given to man alone, therefore it is called *humanitas*.

(Cell. NA 13.17.1)

Gellius has confused cause and effect. *Paideia*, training and education, is as important to *humanitas* as it was to *philanthropia*. It promotes a mindset, a behavioural pattern that distinguishes civilised man from savages and beasts, a pattern that predisposes him against committing acts of brutality. But *paideia* itself is not that mindset. That role is (largely) filled by *philanthropia/humanitas*. It can no doubt be claimed that Gellius' idea still enjoys some currency, for a liberal education is still said to be 'in the humanities'. But modern lexicographers do not hesitate to credit *humanitas* with similar values to those credited to *philanthropia*. According to the *Oxford Latin Dictionary*, *humanitas* covers 'human nature or character; the quality distinguishing civilised man from savages or beasts; civilisation, culture; humane character,

kindness, human feeling'. And the adjective *humanus* embraces 'human (both absolutely and as distinct from the divine or the animal); proper to man; characteristic of human beings; civilised, cultured, cultivated; morally worthy of humanity; kindly, considerate; befitting the dignity of man; merciful, indulgent'.¹

In order, however, to understand human rights on the Roman scene it is necessary to probe deeper. In the first place, a large area has to be identified not by any particular label, but by its content. Nevertheless phraseology is important and calls for careful attention. As already observed, various values forming part of *humanitas* are often identified by separate labels. The most important is *clementia*. Also as already observed, *ius humanum* provides an almost exact terminological equivalent for the modern 'human rights'; the theme will be developed in our next chapter. Another value of even greater importance is *maiestas populi Romani*, 'the greatness of the Roman people'. That, too, will be explored in our next chapter, and thereafter in a number of places.

The duty to conserve *maiestas populi Romani* involved the use of both the carrot and the stick, of morality and severity. As such it is almost the mirror-image of the special perception of *humanitas* to which the more specific label of *humanitas Romana* has been given. *Humanitas Romana* is seen as an amalgam of Greek *philanthropia* and the austere traditional values making up Roman *virtus*. *Humanitas Romana* is thought to epitomise the entire concept of *humanitas* as perceived and practised by the Romans. The formation and significance of this concept are the subject of the present chapter.

The concept of *humanitas Romana*

When did the concept of *humanitas* first make its appearance on the Roman scene? Schadewaldt (1973) offers an answer which is, with certain modifications, largely acceptable. Schadewaldt divides his presentation into three phases. In the first phase the word *humanitas* was not yet in use. The adjective *humanus* was known, but in matters of behaviour the spotlight was more inclined to be focussed on traditional values like *gravitas* and *severitas*. In the second phase, which dawned at a particular historical moment, the demands of the *humanus* value became so pressing that the noun *humanitas* was coined; but it was a purely Latin construct, not a translation of either *philanthropia* or *paideia*.

We pause at this point to note that the expression *humanitas Romana* is not found in the sources. The usual term is the bare *humanitas* or one of its equivalents.² However, *humanitas Romana* is a most convenient signpost, and Schadewaldt appears to have devised it as such; he does not claim any source authority. In the pages that lie ahead its character as something essentially Roman will be repeatedly confirmed. It is proposed to use *humanitas* both with and without the qualifying adjective to designate the Roman concept.

In formulating his second phase Schadewaldt argues that *humanitas* acted as a prism, drawing *humanus* values like *clementia* and traditional values like *gravitas* and *severitas* into a synthesis. The amalgam was ‘a coincidence of opposites’ to which Cicero draws attention in two passages:

[Atticus] has achieved the most difficult combination of *gravitas* and *humanitas*, both in his life and in his language. Avidius has such a well-balanced character that it combines the most rigid *severitas* with the highest degree of *humanitas*.³

Schadewaldt’s historical moment at which the word *humanitas* came into use is the mid-second century BC. The innovation is credited to the Scipionic Circle, the group of intellectuals around Scipio Aemilianus that is thought to have modified a number of traditional Roman ideas by synthesising them with Greek thought. One of these modifications was the synthesis of Roman severity and Greek humanity.⁴ But attributing the innovation to Aemilianus is said to raise ‘a gigantic paradox’ in the shape of Aemilianus’ brutal treatment of Carthage and Numantia in, respectively, 146 and 133 BC. Schadewaldt’s answer is that Aemilianus’ *humanitas* is not to be measured by an idealistic yardstick. The synthesis was devised for the specific purpose of giving a colour of morality to Rome’s subjugation of the Mediterranean world. Events like the destruction of Carthage and Corinth were in harmony with traditional Roman *virtus*, but they needed a complement. That was provided by the humane values inherent in Greek *philanthropia*, to which Aemilianus personally contributed by practising such virtues as moderation, integrity, magnanimity and cultivation of ‘the humanities’.

The fundamental source, the fountainhead of the whole construct, from which Aemilianus drew his ideas was provided by the Stoic philosopher, Panaetius of Rhodes, who used the twin instruments of

Greek ethics and Roman realism to design the kind of *humanitas* that found favour with Aemilianus.

Schadewaldt's third phase is what he describes as 'the universal importance of *humanitas* in Cicero'. This phase can more conveniently be reserved for a later chapter,⁵ and the rest of the present chapter is devoted to a critical assessment of the second phase.

Humanitas Romana: a first appraisal

The two passages in Cicero on which Schadewaldt relies (above) can be supplemented by further evidence. Cicero raises two questions in *De officiis*: Is it a good man's duty to let his slaves starve during a famine? And what of the man who has to jettison a cargo during a storm, and is torn between sacrificing a valuable horse and a worthless slave? Panaetius' pupil, Hecaton, had held that duty was regulated by expediency (*utilitas*) rather than by *humanitas* (*Off.* 3.89). Cicero makes no comment of his own, but elsewhere he says that 'Mildness and clemency are only to be practised if they can be replaced by *severitas* when the interests of the state require it' (*Off.* 1.88). Demosthenes had drawn a similar distinction between private and public interests (*Dem.* 24.192–3). We begin to wonder how far back the origins of *humanitas Romana* really go.

What of 'the gigantic paradox', Aemilianus' brutal treatment of Carthage and Numantia? This depends on how much flexibility we think antiquity was prepared to allow *humanitas*. Greek thinking was creative: Demosthenes saw nothing wrong with the brutal treatment of enemies; and not even savagery against fellow-Greeks deterred Thucydides from praising Athens' unilateral beneficence.⁶ Polybius, who stood at Aemilianus' side as Carthage went up in flames, records both the anti- and the pro-Roman assessments circulating amongst the Greeks. He reports quite impartially, and only comes down on Rome's side at the end, and even then on the rather austere technical ground that Carthage had surrendered to the *fides* of the Roman people, that is, at discretion.⁷ He finds the fate of Corinth (also in 146) much more distressing,⁸ but that was not the work of Aemilianus.⁹

Cicero relies entirely on the public interest, *rei publicae utilitas*, to justify these atrocities:

Our ancestors razed Carthage and Numantia to the ground. I wish they had not destroyed Corinth, but they

had good reason, for its location might one day precipitate another war. Carthage and Corinth were remote outposts of our empire but our ancestors destroyed them to prevent their rising again.

(*Off.* 1.35; *Leg. agrar.* 2.87)

Appian reflects the adverse view. He says that Aemilianus destroyed Carthage by decree of the senate because it was a great imperial power, but Numantia on his own initiative (*Iberica* 98). Diodorus declares that ‘After acquiring dominion over almost the whole world Rome confirmed her power by terrorism, in Corinth, against Perseus, and in Carthage and Numantia’ (Diod. 32.1–2, 4).

There is still more to be said about ‘the gigantic paradox’. For example, Aemilianus’ natural father, L.Aemilius Paullus,¹⁰ followed up his victory over Perseus in the Third Macedonian War (171–167) by destroying seventy cities in Epirus and selling 150,000 people into slavery.¹¹ But this did not silence the chorus of praise that celebrated his *humanitas*.¹² (Was Polybius attacking Paullus indirectly—he could not do so to Aemilianus’ father directly—when he fulminated against Charops of Epirus?)

An important factor is supplied by Cato the Censor, the custodian of traditional Roman virtues. In the late 150s, as is well known, he ended major speeches in the senate with the words *ceterum censeo Carthaginem esse delendam* (‘Moreover I propose that Carthage be destroyed’).¹³ In the dialogue *De senectute* (dramatic date 150) Cicero has Cato call on Aemilianus to destroy Carthage in order to complete the work that his (adoptive) grandfather, Scipio Africanus, left unfinished (*Senect.* 18–19). Cicero clearly believed that the obligation had been impressed on the mind of Aemilianus by the most authoritative traditionalist in Republican history.

The role of Panaetius

Panaetius’ role as the draftsman of a blueprint for *humanitas Romana*¹⁴ goes back to the lecture tour of Rome in 155 by the Middle Academy philosopher, Carneades. Carneades argued that there was no such thing as natural justice; the natural determinant of human behaviour was self-interest. Rome had won her empire by acting unjustly towards both gods and men, and could not now abandon

expediency in favour of justice without sinking back to the status of an impoverished village.

Carneades had gone out of his way to discount every tenet of Greek *philanthropia*. He had virtually challenged the philosophical fraternity to prove him wrong. Panaetius is thought to have responded to the challenge in a work entitled *Peri tou kathekontos*, ‘On duties’, which was the model for Cicero’s *De officiis*.¹⁵ Panaetius formulated an ethical justification for the Roman empire. Of course some men were meant to be ruled and benefited from it; but this imposed a duty on rulers to consult their subjects’ welfare.¹⁶ In this way severity and morality were reconciled: to rule called for severity, but the ruler’s moral obligations promoted philanthropy. In short, Panaetius introduced ‘the moralisation of the imperial idea by the Middle Stoa’.¹⁷

Panaetius communicated his ideas to Aemilianus, both in Rome and on a Mediterranean journey. The association started when Panaetius first visited Rome; the deliberations were attended by Polybius (Cic. *Rep.* 1.34). Now, the earliest possible date for Panaetius’ first visit is 144 BC,¹⁸ which means that it was not until two years *after* the destruction of Carthage that Aemilianus learnt that he had complied with an acceptable code of conduct after all. It was therefore thanks to the timely arrival of Panaetius—an arrival possibly instigated by Aemilianus himself or by Polybius on his behalf—that Aemilianus was able to make an adequate reply to the critics who were already attacking him.

The debut of the word ‘*humanitas*’

Schadewaldt’s belief that the noun *humanitas* was formed in Aemilianus’ day, contemporaneously with the emergence of *humanitas Romana*, confronts a formidable obstacle. A guided tour of the labyrinth of sub-categories in the *Thesaurus Linguae Latinae* (s.v. *humanitas*) reveals that the earliest known uses of the word date to the first century BC. The earliest examples are from a rhetorical treatise, the *Ad Herennium* which was written in about 87 BC. Second place goes to Cicero, who first used the word in the speech that he delivered on behalf of P.Quinctius in 81.¹⁹

Schadewaldt does not motivate his date, nor does any motivation seem possible. The Greek sources for Aemilianus’ day supply an important clue. They fail to use the word *philanthropia* where it would be expected if the (presumably lost) Latin sources had used

humanitas. The best example is Polybius' total omission of *philanthropia* from his encomium on Aemilianus, despite lavish allusions to the latter's moderation, temperance, magnanimity, severity and probity.²⁰ If nothing else, Aemilianus' high level of culture ought at least to have earned a *philanthropia*. The omission contrasts sharply with Polybius' six uses for the era of Aemilianus' adoptive grandfather, Scipio Africanus.²¹ The word does not appear in Plutarch's lengthy account of the dominant feature of Aemilianus' last years, Tiberius Gracchus' agrarian law.²² There is also no trace of it in Appian's account of that law, despite the fact that he does not go back to the same Latin source as Plutarch.²³

The Aemilian-Gracchan period knew little or nothing of the noun *humanitas*. The 80s BC is when it was introduced, or at any rate was sufficiently in use to get into the sources. One can in fact identify a watershed, a major precipitating event that prompted the introduction. The proof is furnished by *Ad Herennium*. Although Book II's uses of *humanitas* are mere rhetorical commonplaces (2.24, 26, 50), Book IV addresses the more meaningful topic of external relations: those who betray their country have been deserted by *humanitas*; and the victor in war looks on the vanquished as fellow men, and his *humanitas* advances peace (4.12, 23). Elsewhere in Book IV there are allusions to the Social War of 91–88 BC: when our allies wished to go to war against us they deliberated fully, assisted by confederates from our side; there is also an allusion to 'perfidious Fregellae'.²⁴ The uses of *humanitas* in a work that was written in c. 87 point to the introduction of the noun in, or shortly after, the Social War. If Cicero's *De inventione* dates to c. 91,²⁵ the total absence of *humanitas* from its pages suggests that the noun was not yet in use. The Social War could well have been the watershed that we are looking for.

***Humanus*: Terence and universalism**

We conclude this chapter with a pendant to the Panaetius–Aemilianus synthesis of *humanitas Romana*. What light is shed on the formation of that concept by Terence's *Homo sum: humani nihil a me alienum puto* (*Heaut.* 77)? The phrase occurs in Terence's *Heauton Timorumenos*, 'The Self-Torturer'. Chremes having given Menedemus some gratuitous advice on how to get the best out of his land, Menedemus asks what business it is of his. Chremes replies that 'I am a man, I count nothing pertaining to man foreign to me.' Chremes

is showing human concern for his neighbour's problems; he is aware of common humanity, of universalism. It has however been suggested that the line was taken from Menander,²⁶ thus proving nothing special about Aemilianus' circle; or that it is simply a piece of comic repartee, or an excuse for meddling.²⁷ To this one can reply, first, that if Greek origins disproved Roman adaptations there would be much less to say about Ancient Rome. Second, even if there is anything funny about Chremes' retort, it has that quality because it strikes a responsive chord in the audience—the busybody using current intellectualism for a humdrum purpose.

Terence made extensive use of moralising precepts that reflected educated public opinion.²⁸ Whether or not he was a member of the Scipionic Circle,²⁹ he was well known to Aemilianus. When the latter's natural father, Aemilius Paullus, died in 160 Terence's *Hecyra* and *Adelphi* were produced at the funeral games.

Other uses of *humanus*, both in Terence and in other second-century works, are more pedestrian.³⁰ It seems, then, that Terence's maxim is unique, it is the only second-century example of *humanus* expressing a basic principle of human rights. This has an unexpected impact on the Panaetius—Aemilianus synthesis. It means that the need for guidelines on Rome's imperial role was felt something like a decade before Carneades' lectures and Panaetius' response.³¹ The Scipionic Circle may thus have begun working towards *humanitas Romana* before Panaetius appeared on the scene. This was long before Aemilianus sacked any cities; perhaps he already had the synthetic amalgam in mind when he destroyed Carthage in 146. Be that as it may, the 160s model of *humanitas Romana* will only have been a preliminary sketch. It would still be for Panaetius to supply the working drawings.

Evaluation

The inclusion of Terence's maxim among the parameters of *humanitas Romana* is not the only potentially unsettling factor. Our next chapter addresses even more awkward predecessors in the shape of *humanitas* in the era of Scipio Africanus. It is just possible that a further complication is raised by Ennius.³² We find ourselves in substantial agreement with the main thrust of Schadewaldt's theory, but our final assessment of Aemilianus' role must await our discussion of developments prior to *humanitas Romana* in the next chapter.

HUMAN RIGHTS PRIOR TO *HUMANITAS ROMANA*

Preamble

Important as the emergence of *humanitas Romana* is, it is only part of the story of Roman human rights. That story is much older than the Panaetius—Aemilianus synthesis. We interrupt our chronological progression at this point in order to add a further dimension to a prelude already expanded by the inclusion of Terence’s contribution.

The earlier period divides broadly into two phases. Our major focus is on the phase running from the last decade of the Second Punic War to the early second century. Scipio Africanus and his contemporaries were involved in human rights developments to a most significant, but hitherto largely neglected, extent. The preeminence of Aemilianus’ adoptive grandfather in those developments may have been a significant factor in the evolution of Aemilianus’ own thinking.

There are also matters of interest before the Scipionic Age. The material is of special relevance because it is here that the Latin phraseology displays its closest equivalent to the expression ‘human rights’, in the shape of *ius humanum* and related expressions. Such phraseology is of course anachronistic, but its use by, especially, Livy gives a useful focal point around which something of a picture of the very early period can be built.

Early Rome: *ius humanum*

The earliest event purporting to involve human rights is located in the seventh century BC, in the reign of Tullus Hostilius. As already observed, the Alban leader Mettius Fufetius violates his treaty with Rome: instead of fighting at Rome’s side he waits until the outcome of the battle in Rome’s favour seems assured. The king declares him

an incurable offender and decides to make an example of him ‘so that the human race may learn to hold treaty commitments sacred’. Mettius is tied to two chariots going in opposite directions and is torn apart. The punishment has a certain talionic symbolism: he had been torn between honouring the treaty and waiting for the outcome of the battle. But Livy was not impressed:

All eyes were turned away from this foul sight. It was the first and last Roman punishment to disregard the laws of human rights [*leges humanae*]. Usually we pride ourselves on the fact that no nation has favoured milder punishments.¹

Livy reflects a debate on punishment. But when did the debate take place? We recall that Mettius is mentioned in a fragment of Ennius’ *Annales*.² If that fragment can be given the tentative interpretation that we have noted, the debate would be virtually contemporaneous with Terence’s ‘*Homo sum*’. But the evidence of the fragment is too fragile to support a firm finding.

Livy again canvasses human rights in an episode dating to 390 BC, when Roman envoys killed a Gallic leader in breach of *ius gentium*. Although they had violated human rights (*violatores iuris humani*) they were rewarded with honours (Livy 5.37.4, 36.6). *Ius gentium* is here a synonym for *ius humanum*. *Ius gentium* was defined by the jurists as ‘The reservoir of universal legal rules to which all peoples subscribe’.³ It thus shared the basic quality of universalism with *ius humanum*. But it was also virtually synonymous with natural law, and the latter in turn embraced human rights.⁴ Demosthenes, we recall, had postulated a similar concatenation.⁵

Ius gentium is also prominent in Livy’s account of Lars Tolumnius, the Veientine leader who in 437 brushed aside humane restrictions and put three Roman envoys to death. In the ensuing battle the Romans killed ‘the breaker of a humane treaty [*foedus humanum*], the violator of *ius gentium*’.⁶

Still maintaining his impartial stance, Livy has the Samnite general Gaius Pontius justify the war which is to land Rome in the Caudine Forks disaster:

If the strong leave the weak no human rights [*nihil iuris humani*], I will pray the gods to punish those who, not satisfied with adding the property of others to their own,

or with the death of the guilty, want to drink our blood
and rend our flesh.

(Livy 9.1.8–10 adapted)

Livy also supplies an example using a different terminology. When the Gauls burst into Rome in 390 men of military age withdraw to the Capitol, leaving the older men outside to die. But no one prevents the women from taking refuge in the stronghold; to have left them outside might have helped the defenders but it would have been inhuman, *parum humanum* (5.40.4). Exceptionally, it seems, *humanitas* had taken precedence over the public interest.

Cicero supplies some parallels. Thus, the XII Tables rule moderating the penalty for accidental homicide is ‘a tacit law of humanity—*tacita lex humanitatis* (Cic. *Tull.* 51). Other examples are located in the Late Republic. Cicero says that if he were defending a man of humble birth, but still a citizen, he would urge the jury, by reason of the rights of common humanity—*communis humanitatis iure*—not to surrender a citizen to suborned witnesses (*Place.* 24). Demosthenes and Polybius would have agreed.⁷

Seneca also makes a contribution. He says that the ill-treatment of slaves should be moderated by *commune ius animantium* (*Clem.* 1.18.2). And in furtherance of a point made by Livy (above), he says that a man who feeds on human blood, butchers children and tortures his victims before killing them, severs the bonds of human rights (*iuris humani societas*) (*Ben.* 7.19.8–9). We also note the elder Pliny’s comment that using human parts as remedies destroys *ius humanum* (*NH* 28.6).

The Scipionic age: *humanitas* and *maiestas*

Scipio Africanus is the focal point of *humanitas* in the closing stages of the Second Punic War. And that focal point is strengthened by a special relationship between *humanitas* and *maiestas populi Romani*.

We begin with Livy. The word *humanitas* occurs only three times in the extant books of his *History*,⁸ but all three are linked to Scipio. The earliest use is in connection with an incident at Locri in 205. Scipio’s lieutenant, Q.Pleminius, is in command of the Roman forces as propraetor. A smaller detachment is commanded by military tribunes. A dispute over a stolen silver cup leads to violence between the two groups. Pleminius tells his lictors to flog the tribunes, whereupon the tribunes’ men attack Pleminius. Paying no regard to

either the *maiestas* of his office or to *humanitas*, they mutilate his nose and ears and leave him almost lifeless: *sine respectu non maiestatis modo sed etiam humanitatis... prope exsanguem relinquunt*. After holding an enquiry Scipio absolves Pleminius but orders the tribunes to be sent to Rome for punishment. But Pleminius considers this too lenient. Declaring that only a man who has suffered a savage assault knows how to name a penalty, he has the tribunes tortured and killed and throws their bodies out unburied. He also plunders and ill-treats the Locrians (Livy 29.8.5–9.12).

Pleminius eventually paid the penalty for his crimes,⁹ but only for plundering the Locrians; there is no sign of his having been brought to book for his part in the carnival between the Roman groups. But the acts for which the tribunes would have been punished tell us quite a lot. As a magistrate Pleminius possessed *maiestas* as a derivative of the *maiestas* of the Roman people. Consequently the attack on him was culpable irrespective of the savagery or otherwise of the means employed.¹⁰ But because of the ferocity that was used *humanitas* came into it.

Later on the exaction of money from provincials was, if accomplished with special savagery, treated as a violation of *maiestas* as well.¹¹ There were also links not dependent on brutality. On his recall from exile Cicero extolled ‘The *humanitas* of the citizens, the dignity of the Republic, the *maiestas* of the Roman people!’ (*Red. Quirit.* 4). And at the turn of the first century AD the younger Pliny observed that the emperor Trajan’s *humanitas* in no way detracted from his *maiestas* (*Plin Pan.* 4.6).

There was an important connection between the two concepts in the area of treaties. It adds a new dimension to the links between *ius gentium*, natural law and human rights. When the city of Gades (Cadiz) in Spain defected from Carthage in 206, Scipio struck a treaty with the Gaditans under which they were obliged ‘to uphold the *maiestas* of the Roman people courteously’—*maiestatem ...comiter conservanto*.¹² The standard of behaviour, *comiter/comitas*, was a synonym for *humanitas* in the general sense of ‘courtesy’. When Scipio passed through Macedonia on his way to the East, Philip received him with finesse and *humanitas*; this was acceptable to Scipio, who had no objection to *comitas* as long as it was not ostentatious.¹³ The incorporation of *comiter/comitas* in an allied relationship went even further back: after the Caudine Forks disaster the *comitas* of the allies was enlisted in a (vain) attempt to console the Romans (Livy 9.6.8). But the Gaditan *maiestas* treaty was followed by a different formula in the Aetolian treaty of 189. The Aetolians were

obliged to uphold Roman *maiestas* ‘without trickery’, *sine dolo malo* (Livy 38.11.1–2). The more rigorous criterion was adopted because of the contumacious behaviour of the Aetolians.¹⁴ The Gaditans’ defection from Carthage had entitled them to a *humanitas-oriented* formula based on an expectation of proper behaviour. But trickery was anticipated from the Aetolians in view of their past record.

After 189 the *maiestas* treaty reverted to *counter*, and that was still the criterion in the first century AD. The link with *humanitas* was, however, a masterpiece of camouflage. As the lawyers put it, the ally under such a treaty was free, but his status was analogous to that of a client vis-à-vis a patron. And—the real mailed fist in the velvet glove—all questions concerning his compliance with his obligations were decided by Roman courts.¹⁵ The always tricky question as to whether *maiestas* had been preserved or diminished¹⁶ provided Rome with a particularly effective synthesis of *humanitas* and traditionalism. And the link was discovered several decades before the evolution of *humanitas Romana*.

Livy’s third use of *humanitas* is in his account of a debate in the senate in 189, when the Rhodians and Eumenes of Pergamum presented their respective claims to the territories seized from Antiochus of Syria. The Rhodians gave a thumbnail sketch of *maiestas—humanitas*:

Rome has not waged wars in order to acquire territory. Her goal has always been status and fame in the eyes of the entire human race, which places her name and empire next to those of the gods. In the war against Antiochus she defended the liberty of an ancient people famed for its achievements and renowned for its culture and learning [*humanitas doctrinaque*]; she is the patron in a patron-client relationship with a whole people.¹⁷

The Rhodians were in fact describing a *maiestas* treaty of the *comiter* type. After a somewhat rocky run they eventually got such a treaty in 165–164 BC.¹⁸

The Scipionic age: *philanthropia*

Polybius has some important information regarding Scipio and human rights. As the passages include several different technical expressions

for that concept, it is proposed to retain the Greek in transliteration.

Polybius is dealing with Scipio in Africa, after his defeat of Hannibal. He tells Carthaginian envoys that Rome is not bound to give Carthage lenient terms (*philanthropon*) because by violating an existing treaty¹⁹ she has forfeited the right to pity or pardon. Nevertheless, adds Scipio, Rome will be clement and magnanimous, both for her own sake and in consideration of the common human condition (*ta anthropina*). Some of the terms will be severe, but there will be indulgences.²⁰ This seems to point to a two-tier system of diplomatic *philanthropia*. On the technical level one's right to indulgence is defined by one's record on treaty obligations; the Aetolians would argue for lenient terms because they had, they claimed, always honoured their treaty commitments (Pol. 20.9.7–8). But over and above those commitments there is the *super-philanthropia* which finds its rationale in the human condition, in 'the common laws of mankind'.²¹

The treaty violation that troubled Scipio had occurred before the end of the African campaign, when Scipio had made a peace treaty and had it confirmed by the senate, only to find the Carthaginians blatantly violating its terms. Carthaginian envoys had entreated the Romans, in the name of the common fortune of mankind (*he tyche ton anthropon*), to forgo punishment (Pol. 15.1.8). Scipio ordered his legate to treat the envoys with due *philanthropia*. He did this not because they deserved it, but because it was the moral duty of Rome (15.4.1–11). This was followed by Hannibal's return to Africa and Rome's final victory.

The Scipionic age: domestic *humanitas*

The period also displays a high regard for domestic human rights, that is, those which were not involved in external relations. The most striking example concerns the punishment of Vestal Virgins guilty of unchastity. The traditional penalty was the barbaric ritual of burying the culprit alive, in order to persuade the gods to lift the pollution brought upon the city by the guilty woman, or to forestall an imminent disaster that her unchastity threatened to precipitate.

The Second Punic War saw the traditional penalty being relaxed and revived in rapid succession. In 217 an unusually large number of prodigies was reported, but instead of immolating an unchaste Vestal, a more humane method of expiation was tried. It was decided to

organise animal sacrifices and a supplication, with offerings to the gods. But this abandonment of benighted superstition did not last, for the following year brought the disaster of Cannae and a return to superstition. Two Vestals were condemned; one was buried alive and the other killed herself. For good measure a Gaul, a Greek and their wives were buried alive.

The wheel turned again in the closing decade of the war, as the Carthaginian danger receded and Scipio's influence burgeoned. The year 207 was a particularly bad one for prodigies; the birth of a hermaphrodite as big as a child of four caused special concern. The pontifical college, headed by Scipio's close collaborator Licinius Crassus, decreed that the prodigy be drowned, and that twenty-seven girls sing a hymn composed by the poet Livius Andronicus, by way of expiation.²²

Primacy in *humanitas*: rival contenders

Not all the sources acknowledged Scipio's primacy. Plutarch presents M. Claudius Marcellus as a serious rival. He was modest, humane and an admirer of *paideia*, and after capturing Syracuse in Sicily in 212/11 he restricted his soldiers' devastation of the city, ordering them not to lay hands on any citizen or free Syracusan. The soldiers obeyed, but reacted violently against property and slaves, plundering the city as thoroughly as Carthage would be. Nevertheless Marcellus took the lead in *humanitas*:

To other nations the Romans were formidable in war but lacked kindheartedness, *philanthropia* and other civic virtues. Marcellus seems to have been the first to show the Greeks that the Romans had a greater sense of justice [than had been thought]. He showed this by the benefits that he granted, including those that he gave to Syracuse.
(Plut. *Marc.* 1.19–20 adapted)

Livy also approves of Marcellus at Syracuse, citing his claim to have come to prevent deserters and foreigners from holding the city captive, not to enslave it (Livy 25.31.8–9). Cicero is more measured, confining his approval to Marcellus' abstention from stripping the city of all its treasures. As a conqueror he could have done that,²³ but his *humanitas* preserved for Syracuse as much as his conquest secured for Rome (*Verr.* II 4.120–1).

Elsewhere Plutarch says that people contrasted the plundering of Syracuse with Fabius Cunctator's moderation at Tarentum.²⁴ The sources had good reason to be cautious. Marcellus' treatment of Syracuse was in fact responsible for the very first complaint by non-Romans about the excesses of Roman commanders. It was left to Scipio to repair the damage when he was in Sicily a few years later.²⁵

Evaluation

The Scipionic Age certainly anticipated some of the thrust of *humanitas Romana*. But there was (inevitably) another side to the coin. Scipio may have earned from Polybius an accolade that the latter did not concede to Aemilianus, but Polybius also reversed his priorities when it came to the brutal treatment of conquered cities. Where Aemilianus at Carthage had got away with a gentle tap on the wrist, Scipio's treatment of New Carthage in Spain earned him a fierce denunciation:

When enough of his men had got into the city he sent them, as is the Roman custom, against the inhabitants with orders to kill all whom they met; they were not to start plundering until the signal was given. They do this to inspire terror, so that one often sees not only human corpses but dogs cut in half and the dismembered limbs of other animals. There were many such scenes on this occasion owing to the large number of inhabitants. After the massacre they began plundering.²⁶

Scipio had not breached the traditional rules, however. The capture of an enemy city could take place in two ways. The city might surrender to the *fides* (good faith) of the Roman people, in which case terms would be based by the victor on the combination of traditional severity and *humanitas* that would later be known as *humanitas Romana*. But if there was no surrender and the city had to be taken by storm there was no place for leniency.²⁷ New Carthage had not surrendered, and Scipio had acted in due accordance with the laws of war. His adoptive grandson would not be able to say as much. Hence the special pleading about the public interest taking precedence over *humanitas* in the cases of Old Carthage and Corinth.

HUMAN RIGHTS IN THE LATE REPUBLIC: CICERO

Preamble

We are now at our second defining point in the history of Roman human rights. The dominant force is Cicero. He takes almost complete possession of the words *humanitas* and *humanus* and also supplies a wealth of material in the unlabelled form.¹ There is no serious challenger to Cicero. The closest is Caesar, not so much numerically as conceptually. He is the prime Republican exponent of *humanitas*' most important offshoot, *clementia*, but that can more conveniently be considered in a later chapter.² Sallust is disappointing. He is alone among the major Republican sources in not using the word *humanitas* at all,³ nor are his uses of *humanus* of much value.⁴ He does provide some unlabelled material of which notice will be taken in due course.

A theory that crops up periodically sees Cicero's concept of *humanitas* as a distinct advance on the Panaetius-Aemilianus model. Cicero, it is said, moves from an elitist, ethical—political ideal of the nobility to universalism which is the true humanity that embraced all members of the human race. But, so the theory goes on to say, that position was shortlived, because with Cicero's death the word lost its vitality and its survival in later writers is only a shadow.⁵ The theory does not stand up under scrutiny. Cicero, and Seneca after him, should simply be seen as continuators, albeit with substantial revisions and amplifications, of *humanitas Romana*. Even the new image of *humanitas* in the Principate kept in touch with its origins.

It is not proposed to make much use of the many Ciceronian uses of *humanitas* falling under the 'kindly, courteous' stereotype.⁶ Such uses certainly reinforce the basic importance of *humanitas* as a *paideia*-

induced mindset. They also emphasise the liberal climate that gave the Late Republic its leading role in the promotion of human rights. But the message does not need detailed reiteration. The way forward is through certain dynamic themes that show Cicero in action. Three themes will be addressed. They are, first, universalism which can also be described as *humanitas* in its external connotations. Second, punishment with special reference to the death sentence and voluntary exile. And third, a discussion of *humanitas* and the law. Although all Ciceronian genres are taken under advisement, the court speeches are of special value. It is in the cut, thrust and parry of court situations⁷ that Cicero takes human rights out of the ivory tower.

Cicero and universalism

Strictly speaking universalism takes in not only non-Romans as well as Romans, but also slaves as well as free persons. But Cicero is not known as a champion of slaves' rights. We therefore confine ourselves to the treatment of free persons, leaving slaves for later consideration.

Cicero's classic statement on universalism appears in *De officiis*:

Nature has established principles of human community and society. The first principle, applicable to all members of the human race, is reason and speech, which unite all people in a natural association. Everything that nature has produced for the common use of man is defined by statutes and common law where such exist, while everything else falls under the Greek proverb, 'Amongst friends all things are common.' The notion of the common property of all men is in the same line of country as Ennius' allusion to 'Courteously [*comiter*] showing the way to a wanderer.'⁸ This involves giving even a stranger what it costs nothing to give, such as taking fire from our fire. Following these principles, we should make it our business to contribute to the common advantage [*communis utilitas*].

(*Off.* 1.50–2)

Cicero here touches on the *ius gentium*—natural law—*humanitas* combination with which Demosthenes and Polybius are familiar. But elsewhere in *De officiis* Cicero weakens the principle. He says that displays of kindness (*benignitas*) should be graded according to the

closeness of the relationship. The lowest priority should be given to the universal bond (*societas hominum*), after which should follow, in ascending order, membership of the same clan, nation or language group; citizenship of the same state; and propinquity, between husband and wife, parents and children, brothers and sisters, and cousins (*Off.* 1.53–4). In other passages he cites Terence’s *Homo sum*. In one place he says that it is not an easy matter to worry about other people’s affairs, and in another he cites it to show that justice must be in accordance with nature.⁹

The priority accorded to members of the same ethnic or linguistic group seems to have been in contention in Cicero’s day, for Dionysius of Halicarnassus has this to say:

The Romans are magnanimous, unlike the Athenians and Spartans who treated people of their own stock with the brutality of barbarians. Greeks are to be distinguished from barbarians not by name or language, but by intelligence and a predilection for decent behaviour that shuns inhumane treatment. Those should be called Greeks whose plans and actions are fair and humane.

(Dion. Hal. 14.6.1–6 adapted)

The classification of the Romans as honorary Hellenes is a novel idea, but would it have appealed to Cicero?

The low priority that Cicero assigns to the universal bond conflicts with his views on the treatment of non-Romans who happen to be provincials.

In the famous letter to his brother Quintus on the prorogation of the latter’s Asian governorship, Cicero offers the following advice:

Use your wisdom and *humanitas* to make the additional year worthwhile. Your province is a peaceful one, the inhabitants are the most civilised members of the human race. You are well qualified to put down corruption. By doing so you will make the Greeks think that a deified mortal has come down to them from heaven. Your custodial function makes you answerable to the provincials, the citizens and the Republic. You may administer justice with the utmost severity, as long as you are consistent and impartial. You must be affable in hearing cases, and lenient in deciding them. Severity must be sweetened with a seasoning of

humanitas. If that quality is welcome in Rome, how welcome must a governor's courtesy [*comitas*] be in Asia, where people watch for the nod of a single man. A great man, refined by learning and the arts, should see to it that his subjects never regret his power. Priority must always be given to the interests [*utilitas*] of the governed—not only of provincials and citizens, but also of slaves and dumb animals. You meet these criteria fully.¹⁰ In your command there is nothing harsh or cruel, all is clemency, leniency, humanity.

(*Ad Q.fr.* I 1.3–8, 10, 17, 20–5)

The letter makes another important pronouncement:

Plato thought that states would only prosper when wise and learned men ruled them. One day this will perhaps happen to our whole empire [*universa republica*], as it has happened to your province under a ruler steeped in philosophy, virtue and *humanitas*.

(*Ad Q.fr.* 1.1.27–9)

So far so good. Cicero has given his most detailed exposition of *humanitas Romana*, and he has identified universalism as the ultimate ideal. But elsewhere, specifically in his court speeches, he almost destroys this favourable impression. His agility in one of the speeches against Verres almost obliges us to suspend belief:

The Sicilians have none of the failings of other Greeks. Their hardiness, uprightness and honesty remind us of the stern Roman manners of old. They have repeatedly tolerated acts of oppression on the part of Roman officials, including Lepidus in that dreadful year (80 BC) and M. Antonius (74 BC). But they have never until now sought the protection of the law. It was a tradition of theirs to consider Rome so great a benefactor that they should even endure oppression if the oppressors were Romans. They would even have endured Verres if he had wronged them in ordinary human fashion—*humano modo*.

(*Verr.* II 2.7–9 adapted)

Cicero was no doubt compelled to devise this extraordinary role for the Sicilians. The depredations of M. Aemilius Lepidus in 80, and of

M.Antonius in 74¹¹ were still fresh in the jurors' minds. But the passage further qualifies the system of priorities. A certain amount of ill-treatment is acceptable, given the benefits of Roman rule. But beyond a certain point it becomes *inhumanitas*. The dividing-line is, it seems, in the eye of the beholder. But racist considerations also come into it, as in the speech in defence of M.Aemilius Scaurus:

I am not so inhuman as to close my eyes to Sardinian complaints, especially after my brother's integrity and *humanitas* as supervisor of their corn supply. But they are not entitled to any credence in this case, descended as they are from the same treacherous stock as the Carthaginians. No doubt some of them have risen above their inherited vices by their characters and *humanitas*. But most of them lack any integrity or bond with our race.

(Scaur. 39–45 adapted)

The appeal to the jury's racial prejudices was a trump-card. Despite the damaging evidence of Scaurus' malpractices in Sardinia, he was acquitted by 62 votes to 8.

The racist theme was also used successfully on behalf of L. Valerius Flaccus, charged with malpractice in Asia. This time the racist attack was aimed at the very people whom Cicero urged Quintus to treat with *humanitas*:

Some Greek cities have been persuaded by Mithridates to spurn the friendship of the Roman people, to violate all the laws of duty and humanity. Mithridates massacred Roman citizens,...imprisoned Roman envoys, and issued documents that nearly obliterated the memory of the Roman name and empire. If I were defending a man of humble birth but still a citizen, I would beg you by the law of common humanity and pity not to surrender a citizen to suborned witnesses, to men who have the fickleness of Greeks and the cruelty of barbarians. The Greeks are unable to tell the truth, any more than they have been able to conduct their assemblies properly.¹²

Cicero here makes universalism turn on itself, setting the law of common humanity against the humane treatment of all members of the human race. An advocate naturally wants to win his case, but he

will not be able to do so unless the line that he adopts strikes a responsive chord in his audience. Cicero himself makes this clear: ‘In order to arouse people to anger or hatred, or to recall them to mildness and mercy, the speaker needs insight into people’s natures and motives, and into the whole force of *humanitas*’ (*Orat.* 1.53–4).

Cicero occasionally says something about the treatment of non-Romans who are not provincials:

The laws of war must be upheld. To settle a dispute by negotiation is proper for man; the use of force is the mark of a beast, only to be tried as a last resort. The only excuse for going to war is in order to live in peace. When victory is won those who have not been barbarous in their resistance should be spared. We should always aim at a peace that excludes deceit.¹³

Cicero knows that the treatment of Carthage, Corinth and Numantia violated this doctrine. But he is trying to weaken the impact of the criticisms listed by Polybius in regard to the destruction of Carthage. That is why he goes on to say that Rome has acted justly towards those who surrendered at discretion.¹⁴

In the dialogue on the *Republic* Cicero notes Numa’s reforms which dampened the people’s martial ardour, turning their thoughts from the savage pursuit of war to *humanitas* and kindness. The discussion then takes an interesting turn. Aemilianus denies that Numa was a pupil of Pythagoras, to which Manilius replies that it is a good thing that they have been educated by native excellence rather than by arts imported from abroad. To this Aemilianus rejoins that even borrowed institutions have been greatly improved by the Romans (*Rep.* 2.27–30). This clear exposition of some of the fundamentals of *humanitas Romana* is not offered by Cicero as a mere historical excursus. He offers it because he subscribes to it.¹⁵

Humanitas and punishment: the death sentence

Some—but by no means all—modern societies consider the abolition of capital punishment¹⁶ an essential step in the consolidation of human rights. What was Roman society’s position on this question in the Late Republic? Our answer will, at this stage, focus mainly on the situation where sentence of death is legitimately imposed after due

and proper trial at which the accused is informed of the charges against him and is given every opportunity to make his defence. Less commendable ways of achieving an offender's death will be inspected in a later chapter.¹⁷

The keynote speech—in effect the text for our sermon—was delivered by Cicero in 63 BC as part of his defence of C. Rabirius, charged with killing the populist tribune of the plebs, L. Appuleius Saturninus, thirty-seven years before. Cicero fulminates against the brutality of the populist forces, the *Populares*, who brought the prosecution:

I had cruel punishment taken out of the case. I wish I had been the first to do this; nothing could add more lustre to my consulship¹⁸ than removing the executioner with his scourgings and hook from the Forum and the cross¹⁹ from the Field of Mars. But the credit belongs to our ancestors. Far from endangering your freedom by harsh punishments, they protected it by mild laws which forbade the scourging of citizens or the holding of capital trials without your authority.²⁰ But the *duumviri* condemned a citizen unheard, digging up savage procedures in musty archives. Penalties under the regular laws leave some trace of freedom. *Even if death is proposed we may die as free man.* But the executioner, the covered head, the cross are the tools of tyrants, not of our society.²¹

Although Cicero does not use the word *humanitas* in the passage,²² he has made a fundamental statement on human rights. A rapid sketch of the background to the case will help to make this clear.²³ Despite the lapse of time since Saturninus' death in 100, the killing of a plebeian tribune in office had not been forgotten. The trial of 63 was the second attempt to bring Rabirius to book. The first trial, by regular process, had resulted in an acquittal. But the populist forces were determined to try again. Bypassing the rule against double jeopardy—itself a feature of human rights²⁴—they resuscitated the ancient tribunal presided over by *duumviri*.²⁵ Caesar and his cousin were appointed to that office and all the trappings of the ancient process were set up: the 'unfruitful tree' (*infelix arbor*) on which the condemned man would be beaten to death; the lictor with his rods, ready to carry out the lethal beating; and a picture of Saturninus.

The *duumviri*, whose only mandate was to find the accused guilty,²⁶ duly handed down that finding. Rabirius faced immediate death unless he appealed to the people, that is, availed himself of the institution known as *provocatio ad populum*. The institution was seen as Rome's Magna Carta, as the shining beacon of the liberty of the subject; it had been written into the ancient duumviral process.²⁷ Rabirius exercised the right of appeal and the case went to the people, that is, to a regular trial by the popular assembly presided over by a tribune. During the preliminary stages of the trial Cicero persuaded the senate to substitute exile for the death penalty.²⁸ It was at this trial that Cicero delivered the extant speech for Rabirius. The case had an inconclusive outcome. The people, appalled at the harshness of the duumviral process, were disposed to acquit, but before a verdict could be returned a praetor struck the flag on the Janiculum; this traditional sign that the enemy was at the gate terminated the proceedings.²⁹

Cicero makes a number of human rights points in his speech. The most important is that although he condemns the cruel manner of death laid down by the duumviral process, he does not condemn the death penalty as such, as long as it is authorised by the regular laws. Brutality, says Cicero, was eliminated long ago; the reference is to two second century laws (again the ubiquitous second century), a *lex Porcia* which forbade the scourging of citizens and Gaius Gracchus' *lex Sempronia de capite civium* which forbade capital trials of citizens except on the authority of the people.³⁰ Those laws ranked with *provocatio ad populum* as bulwarks of freedom (*libertas*); that attribute was one of the components of *humanitas*. Finally, Cicero asserts the right of fair trial, the right to be heard in one's defence. The mandatory duumviral condemnation excluded that, although *provocatio* had been introduced in order to circumvent that inhumanity.³¹

Cicero had begun attacking savage forms of the death penalty, but again without condemning the death sentence as such, at an early stage of his career. In 80 he defended Sex. Roscius on a charge of *parricidium*, murder of a parent. The law prescribed a barbaric penalty: the condemned person was sewn into a sack in company with a dog, a monkey, a snake and a rooster and the whole package was thrown into the sea. Cicero addressed the jury as follows:

It is for you, jurors, to remedy the evils afflicting the state.
The Roman people, once considered most lenient to its

enemies, today labours under cruelty to its own citizens. Banish this cruelty from the state. It has condemned many citizens to an atrocious death, and has so hardened the most merciful men to evils that they have lost all sense of pity. When every hour brings another act of cruelty, even those of us who are most merciful by nature lose all feelings of *humanitas*.

(Cic. *Rosc. Amer.* 154)

Elsewhere Cicero says that the only way to avoid the penalty for *parricidium*, set in concrete as it is, is to persuade the jury to acquit, regardless of the evidence (*Inv.* 2.58–9). He used the same technique of making the judges' flesh creep in Rabirius' case. But the point is that you cannot persuade people of anything unless it is in accordance with their general thinking. As Cicero himself said, you have to be able to read the public mind.³²

Cicero launched further attacks on irregular uses of the death penalty when he condemned Dolabella's execution of Trebonius,³³ and when he registered a protest against his brother Quintus' threat to burn people alive (*Ad Q. fr.* 1.2.6). He also noted with disgust that a slave who was expected to testify against his mistress had his tongue cut out prior to being crucified (*Cluent.* 187–8). Crucifixion did not usually arouse much emotion when used against slaves; it was a standard servile punishment. But the preliminary savagery was too much for Cicero. If any criticism can be levelled at Cicero in respect of the death penalty,³⁴ it is that he did not entertain any serious objections to the slaughter at the games. But very few people objected to it.³⁵

Humanitas and punishment: exile

Humanitas Romana was the source of one of Rome's greatest contributions to human rights, in the shape of the right of voluntary exile which allowed a wrongdoer to avoid punishment by leaving Rome and Italy.³⁶ There are two phases in the history of this institution. In the first phase there was a convention by which the responsible magistrate allowed the culprit to remain at liberty pending trial, or even after having been tried and sentenced to death.³⁷ He had to furnish sureties—a bail bond, in effect—and to leave Rome and Italy within a stipulated time.³⁸ He was then free to take up residence in any state with which Rome had an appropriate treaty.

No attempt was made to extradite him, and as long as he stayed away he was safe. But if he returned he was liable to be imprisoned and executed, or even killed by the first comer with impunity. This was because the people had voted an *aquae et ignis interdictio*, an interdiction from water and fire, against him. That decree excluded the fugitive from sustenance and shelter and made him an outlaw.

The second phase saw the conversion of voluntary exile into what was, for all practical purposes, a statutory right. This was done by changing the wording of the capital sentence in respect of some crimes. The change was first made by Sulla. For example, his law of murder, the *lex Cornelia de sicariis*, replaced the death sentence by the *aquae et ignis interdictio*. Some later laws, including those of Caesar on *maiestas* and public violence, followed suit. Where a decree of interdiction had hitherto been something that the magistrate issued as a follow-up to his decision to leave the offender at liberty, his issuance of such a decree was now mandatory.³⁹

Voluntary exile (in its first phase) was greatly admired by Polybius. He says that when those who are tried capitally are found guilty they are given an opportunity to depart openly, thus sentencing themselves to voluntary exile. They may do this even if only one of the tribes has not yet voted.⁴⁰ Such exiles are safe in Naples, Praeneste and Tibur, and in other cities with whom Rome has treaties (Pol. 6.14.7–8).

The sentence of *aquae et ignis interdictio* was not a sentence of exile, although loosely referred to as such in literary sources.⁴¹ Exile was simply the offender's expected response to the interdiction. Cicero makes this clear in his speech on behalf of A. Caecina:

Exile is not a capital punishment; it is an escape from punishment. No law of ours makes it a punishment for any crime. Those who wish to avoid imprisonment, death or disgrace take refuge in exile as if at a sanctuary. If they had not departed they would only have lost their citizenship when they lost their lives. When they go into exile they do not lose their citizenship by law, they are stripped of it by their own act of abandonment.⁴² The decisive moment is when the fugitive becomes an exile, that is, when he acquires the citizenship of the other state.
(Cic. *Caec.* 100)

At the time of *Pro Caecina*, 69 BC, Cicero's statement that exile was not a punishment for any crime was correct. But in 63 BC he

introduced the *lex Tullia de ambitu* which laid down a penalty of banishment for ten years for electoral corruption (*ambitus*).⁴³ The human rights connotations of *ambitus* provoked considerable debate. Four years before Cicero's law, a tribune had proposed a harsh set of penalties for the crime. The senate had refused to recommend the bill, on the grounds that while harsh punishment was of some value as a deterrent, it was counter-productive because it discouraged juries from convicting (Dio 36.38.4–5). Cicero had taken a similar view of the punishment for *parricidium* (*Inv.* 2.58–9).

So much for the technicalities of voluntary exile. But does it have a more fundamental importance? Was it, even if only for the Late Republic, a de facto abolition of the death penalty? Caesar may have thought so, judging by the speech that Sallust puts into his mouth in the senatorial debate on the Catilinarian conspiracy. Cicero having invited senators to frame a penalty, and D.Silanus having proposed that they be put to death, Caesar replied as follows:

Why not also recommend, Silanus, that they first be flogged? Was it because the Porcian law forbids it? So it does, but there are also laws that lay down that when citizens are found guilty they do not lose their lives but are allowed exile. Our ancestors took over from the Greeks the flogging of citizens and death for the condemned. But with maturity came the Porcian and other laws which allowed the alternative of exile.⁴⁴

None of the laws in question abolished the death penalty. The Porcian law forbade flogging, and Sulla's laws substituted interdiction for death. In fact, therefore, Caesar was not contending for any formal abolition of the death penalty, he was merely claiming its de facto cessation. The record of punishments over the last fifty years of the Republic bears him out. It does not display any executions, only exiles.⁴⁵

Humanitas and the law

It is proposed to deal with this topic in one continuous discussion taking in both the Republic and the Principate. The topic lends itself admirably to such treatment. For similar reasons *clementia* as a whole

is being reserved for a later chapter. To that extent, therefore, Cicero's role is being fragmented.

Cicero strikes something of a keynote on *humanitas* and the law in his speech on behalf of P.Sestius in 56:

Before the appearance of natural law or civil law there was no settled order. But mankind was teachable, and wise men [the Stoics] brought people from savagery to justice and mildness. First came divine and human law, then communal public institutions, and finally states and cities. The difference between savagery and a life refined by humanity [*vitam perpolitam humanitate*] is the difference between violence and law [*ius*]. If violence is to be eliminated law must prevail, and so must the courts on which law depends.

(*Sest.* 91–2 adapted)

The passage states the Stoic belief that *humanitas* can only exist when founded on law. Cicero repeated the sentiment in the same year in his defence of M.Caelius: 'The Wolf-Men [*Luperci*] were a savage, rustic fraternity...before the introduction of *humanitas* and *leges*' (*Cael.* 26). Demosthenes had identified a similar link between *philanthropia* and the law.⁴⁶

The basic cultural aspect of *humanitas* is not overlooked by the judicial model. In 62 Cicero made the following points on behalf of the poet Archias, charged with falsely assuming Roman citizenship:

All arts pertaining to *humanitas* have a certain common bond and belong...to a common family. Pleading for a distinguished poet before a highly literate audience and a jury steeped in *humanitas*, I may be allowed to enlarge on the pursuits of *humanitas* and literature. Let my client be raised by your *humanitas* rather than cast down by your disapproval.

(*Arch.* 2–3, 31)

Cicero's frequent appeals to the jury's *humanitas* gave that concept the quality of a cultural guide to the right decision of a case. A composite illustrates the technique:

I have no doubt of your wisdom and *humanitas*, and I ask you not to punish talent, industry, *humanitas* and virtue;

you have, I am sure, been persuaded not by my words but by your own *humanitas*. Your *humanitas* is deeply moved by my account of Oppianicus' crimes; I leave the case to your kindness and *humanitas*. The treatment of Heraclius demands that you listen with *humanitas*. You should, as jurors endowed with wisdom and *humanitas*, give careful thought to the fact that the accused is at a disadvantage when the accuser is a tribune.⁴⁷

Cicero also refers to laws of *humanitas*. The XII Tables rule allowing unintentional killing to be purged by giving a ram as compensation is 'a tacit law of *humanitas* which punished intention, not accident' (Tull. 51). We also note 'the law of common humanity', 'the laws of duty and humanity' (Place. 24, 57), as well as a passage in the speech on behalf of Deiotarus:

By bringing capital charges and suborning slave witnesses Deiotarus' family have violated every law of life, common welfare and *humanitas*. Have they come to Rome to subvert its laws and precedents, to besmirch our community's *humanitas* by domestic terrorism?
(Deiot. 30, 32)

There is an unexpected twist in Cicero's very first use of the word *humanitas*. Defending P.Quinctius in a civil suit in 81, he addresses the following appeal to the single judge who is trying the case:

To sell a man up is something that decent people hesitate to do to their adversaries. It is worse than an honourable death. No decent man wants to put a citizen to death; he even spares strangers and enemies for the sake of public opinion and common humanity [*communis humanitas*]. My client begged his adversary to show compassion [i.e. by not driving him to the wall financially]—if not for the man himself, at least for *humanitas*.⁴⁸

We do not know the outcome of the case, but the point was sound enough in law to be put to the judge, who happened to be the eminent jurist, C.Aquilius Gallus.

Cicero was not the only man in Late Republican Rome to detect the link between *humanitas* and the law. Caesar tells us that the

urban praetor Trebonius (Dolabella's future victim) thought that in the critical days of the civil war jurisdiction should be exercised with clemency and moderation. He therefore framed his edict with such *aequitas* and *humanitas* that no one found it necessary to appeal against Caesar's fiscal arrangements. Consequently no one availed himself of the services of another praetor, M.Caelius Rufus, who had placed his tribunal close to Trebonius' chair in order to assist anyone who wished to appeal (Caes. BC 3.20).

Cicero's ideas on *humanitas* and the law went down to the legal science of the first two centuries AD. The most striking feature is the classical jurists' handling of Cicero's perception of *humanitas* as a guide to the right decision. This was now elevated to the status of a specific canon of interpretation; it was one of the avenues for the importation of notions of equity into the law, it fostered the correct application of legal principles. For example, when Marcus Aurelius and Verus relaxed the penalty for handing in unprovable documents where that appeared to have been done by mistake, the relaxation was granted 'in conformity with their humanity' (*pro sua humanitate*) (D. 48.10.3). They could have spoken of *aequitas* instead of *humanitas* without the slightest difference in meaning. The same emperors noted with approval 'the excellent rationale of humanity' (*egregia ratio humanitatis*) shown by a governor who rescinded his conviction of a slave for homicide on learning that the slave had only confessed in order to avoid returning to his master (D. 48.18.1).

The jurists also display pertinent uses of *humanitas*. Ulpian, writing in c. AD 200, notes the case of a man who induces another's slave to desert to him. Ulpian excuses him if he receives the slave in order to return him to his master, or is moved by humanity or compassion (*humanitate vel misericordia ductus*).⁴⁹ A fragment of Salvius Julianus, discussing the interpretation of a will, says of an opinion of Celsus that it is 'prompted by humanity' (*sententia humanitate suggerente*) (D. 28.2.13 pr.). And Ulpian says of an opinion of Julian himself that 'it has *humanitas*' (D. 44.44.7.1). These uses of Julian are important. He was a valued member of the *consilium* of Marcus and Verus,⁵⁰ who issued the two *humanitas* rescripts cited above. Those rescripts should be enough to put paid to the widespread belief that all references to *humanitas* by classical jurists are interpolated.⁵¹ One of the decrees, concerning the governor who sets aside a slave's conviction, is cited verbatim by Ulpian who even gives the names of the governor and the slave (D.

48.18.1.27). Julian may well have been the draftsman of those rescripts.⁵²

Evaluation

Does Cicero have a consistent position on *humanitas*? He earns that credential reasonably well with respect to the punishment and legal themes, but not with respect to universalism. I think however that a distinction should be drawn between different Ciceronian genres. He is a model universalist in his philosophical and epistolary works. Witness *Off.* 1.50–52, *Ad Q.fr.* I 1. But in his court speeches he tunes in to his audience. Public opinion was not quite sure where it stood with reference to non-Romans. As will be demonstrated in our next chapter, second-century brutality towards subjects eventually forced people to think about the responsibilities of empire. But backsliding in individual cases was never eliminated. As a court practitioner—and a politician using the courts as his media—Cicero could not refuse to capitalise on ambivalence.

HUMAN RIGHTS IN THE LATE REPUBLIC: CURBS ON ILL-TREATMENT

Preamble

We are now ready to enlarge on our picture of universalism, of Rome's reaction to the problem of how to treat non-Romans. The need of a better perspective on the question of reconciling the realities of empire and the ideals of *humanitas* had prompted the conceptualisation of *humanitas Romana* in the second century. We have also looked at Cicero's position, but mainly from the point of view of his presentation of universalism within the confines of domestic politics. It is now time to look at what was actually happening to non-Romans in the external sphere, and at what the Romans were doing about it.

The Roman response to the ill-treatment of non-Romans was driven by two ideas. One, as already observed, was *maiestas populi Romani minuta*. Romans guilty of brutality towards non-Romans were seen to have diminished the majesty of Rome, to have destabilised her delicately balanced hegemony.¹ This notion gave precise legal definition to the moral values underlying *humanitas* and provided machinery for the protection of those values.

The other concept was a more narrowly focussed version of the same idea. One of the most troublesome threats to the imperial image was posed by the insatiable appetite of Roman officials for other people's property. Exacting money² from non-Romans, frequently using brutality on a scale prejudicial to *maiestas p. R.*, stirred the conscience of the nation and inspired laws punishing the culprits and restoring to the despoiled what had been taken from them. These extortion laws, these *leges repetundarum*, achieved a partial coalescence with *maiestas* and provided Rome with a blueprint for international morality. The

system was not an unqualified success, but it gave *humanitas* a practical means of enforcement not matched in antiquity, if ever.

Maiestas, morality and humanitas

The earliest case concerns the ill-treatment of prisoners of war. Diodorus writes that in 241 BC Atilius Regulus' widow, remembering the savage death of her husband at Carthage, seeks revenge against Carthaginian prisoners. She confines Hamilcar and Bodostor in a very small room, and when Bodostor dies she keeps Hamilcar closeted with the corpse for five days, so far removed is she from *philanthropia*. The tribunes threaten to charge the Atilii with a capital crime 'for befouling the image of Rome'. Regulus' sons rebuke their mother, send Bodostor's ashes to his family and relieve Hamilcar of his distress (Diod. 24.12.1–3). This is the first known use of the *maiestas* idea against the ill-treatment of non-Romans. It came only five years after the first use on the domestic front.³

The leading case of the period is that of L.Quinctius Flaminius. As consul in 192 he campaigned against the Ligurians. One day at dinner his mistress complained that she had never seen a man die. Flaminius had a Ligurian—either a condemned criminal or a noble who had deserted and sought asylum—brought in and beheaded by a lictor.⁴ Eight years later Flaminius was expelled from the senate by Cato the Censor for having 'befouled the *maiestas* of his high office by so foul a crime'.⁵ The previous censors had not taken any action in 189; but one of them was the culprit's brother, the well-known T.Quinctius Flaminius. Cato, the conscience of the nation, made it clear in 184 that he was doing what T.Flaminius should have done.⁶

The expulsion of L.Flaminius provoked an immediate public reaction. A public meeting (*contio*) was held. Cato delivered a speech that would have served as a court indictment for *maiestas minuta* if it had been delivered before imposing a censor's *nota* on Flaminius rather than afterwards.⁷ Flaminius refused Cato's invitation to vindicate himself through a *sponsio*,⁸ but subsequently when he took an isolated seat in the theatre, the people clamoured for him to take his place among the senators (Plut. *Flam.* 19.4). As so often, 'the people' were a selective fragment of the populace, possibly *claqueurs* put up by T.Flaminius; he reacted strongly to the expulsion, counter-attacking by launching a prosecution against Cato (Plut. *Cato* 19.2). This Flaminius was himself a sponsor of *humanitas*. When he

proclaimed ‘The Freedom of the Greeks’ in 196 BC he instituted what was, or appeared to be, a more lenient system of control than outright annexation. But his view of *humanitas* was Hellenistic; it did not extend to Western ‘barbarians’.⁹

The brutal killing of the Ligurian inspired a torrent of declamations in the schools of rhetoric.¹⁰ The declaimers gave an instructive twist to the concept of *maiestas minuta*:

[Flaminius] made a game out of the terror inspired by the empire. Remember that the aim of our power is terror, not amusements for women. Decapitation in proper fashion under the law is quite in order, but not when the *maiestas* of the Roman people, spread through all nations and provinces, lies in the lap of a whore.

(Sen. Rhet. *Contr.* 9.2.7–11 adapted)

In other words, punishment in order to instil terror into the empire’s subjects is quite proper. But it must be carried out in the manner prescribed by law, which in the standard form for free men was decapitation. Only then does it serve the public interest.

Curbs on rapacity: early attempts

The most persistent abuse of the human rights of non-Romans was the extortion of money from them. In its developed form the crime was defined as ‘the unlawful removal, seizure, exaction, embezzlement or misappropriation by Roman magistrates of the property of [non-Romans]’.¹¹ Legislation to curb the mischief was first introduced in 149 BC. It was a response to some sixty years of extortion and brutality on the part of Roman commanders abroad. Prior to 149 repeated efforts had been made to compel offenders to make restitution to their victims, but without definitive statutory machinery the attempts had met with indifferent success. Nevertheless the fact that the attempts were made at all is important. It marks the start of a new phase in Roman thinking.

The first attempt to compel restitution was made in the closing stages of the Second Punic War, at exactly the time when Scipio and others began taking an interest in *humanitas*.¹² The target of the first attempt was M. Claudius Marcellus, whose equivocal treatment of captured Syracuse had made his image so controversial.¹³ Apart from

giving his men a Roman holiday against slaves and other property, Marcellus had himself removed some works of art to Rome. They included Archimedes' globe of the world, after the great thinker had been mysteriously killed.¹⁴ In 210 the Syracusans sent a deputation to Rome to seek restitution. They begged the senate at least to order the return to the owners of what was still in existence and could be identified.¹⁵ But after some intricate footwork by Marcellus the *démarche* suffered a predictable fate: the senate ratified his actions at Syracuse. There was however a sop to Cerberus, for it was arranged that Marcellus, now consul for the fourth time, would exchange provinces with his colleague, Valerius Laevinus. Marcellus accordingly took Italy instead of Sicily.¹⁶

The Syracusan affair had an unexpected sequel. In 205 Scipio, governing Sicily on his way to Africa, restored exacted property to its Syracusan owners. He announced the move in an edict which granted actions against those who persisted in their unlawful possession.¹⁷ The edict will have been in the *si quis...fecerit iudicium dabo* form commonly found in the praetor's edict. Scipio thus anticipated the legislation that would be initiated in 149; that is, he provided effective machinery. He was very much alive to Rome's interests, for the measure was so well received by the Sicilian communities that they agreed to lend even more support to Scipio's preparations for the invasion of Africa (Livy 29–13–14, 18). The importance of Sicily as a staging-post for Africa had undoubtedly been in the minds of those who supported the Syracusan complaint against Marcellus in 210.¹⁸

The sixty years following the attack on Marcellus brought a succession of instructive cases.¹⁹ The classic example is the proceedings against M. Popillius Laenas. Campaigning in 173, in the disaster-prone region of Liguria, he received the surrender of the Statellates. As we know, the *deditio in fidem p. R.* meant unconditional surrender, the terms of which would be dictated by the conqueror, but only after the surrender and in his sole discretion. There might however be preliminary negotiations before the formal surrender, and any understandings given by the Roman side carried the pledge of Roman *fides* and were expected to be honoured.²⁰ Scipio's restitution of plundered property in 205 was decreed in order to safeguard *publica fides*, Marcellus having pledged the public faith when Syracuse surrendered to him.²¹

Laenas brushed aside the implications of *deditio in fidem* and proceeded to destroy the Statellates' town and to sell 10,000 of their

people into slavery. The matter was brought before the senate, which condemned Laenas' excessive cruelty and decreed that he restore to the Ligurians 'their liberty and so much of their property as could be recovered'. He was also to repay the purchase-price to those who had bought Ligurians at the slave auction.

Laenas refused to comply with the senate's decree. The following year the consul P.Aelius Ligus tried to revive the decree, but his colleague, who was Laenas' brother, threatened to veto it. The senate however exerted pressure by delaying the allocation of consular provinces. Two tribunes proposed that if the Ligurians were not restored to liberty by 1 August the senate was to appoint a special commission 'to enquire into and punish the person responsible for their servitude'.

In August the senate named the urban praetor C.Licinius Crassus to preside over the commission. But Laenas, now abroad as proconsul, did not appear. The tribunes proposed that if he did not return by 13 November the commission was to proceed in his absence. For good measure the senate ruled that their freedom be restored to all Ligurians (not only Statellites) who had not been enemies since 179. At last Laenas returned and the trial went ahead. Two sessions were duly held, but at the third hearing Crassus, succumbing to corruption, adjourned the case to 15 March of the next year. This happened to be the day on which Crassus' term as praetor would come to an end, and as the senate had appointed him in his capacity as praetor the commission would be aborted. And so, says Livy, the attempt to help the Ligurians was frustrated by a trick.²²

The case against Laenas combined extreme violations of *humanitas* tantamount to *maiestas minuta* with the wrongful receipt of money, that is, the proceeds of the slave auction. The pattern would be repeated time and again over the ensuing decades. But there was also a political background to the case.²³ Laenas had not acted alone. He and his colleague in the consulship of 173 were involved in the current policy of letting large parcels of land in Campania to the multinationals of the time, the publicans to whom the state let out the right to collect the taxes. The new *latifundia* ('Broad Acres') being set up in Campania would need vast supplies of agricultural labour, and Laenas was privy to this. Hence his brutal treatment of the Statellites. But Cato, the champion of peasant smallholders, rigorously opposed that policy. As in his attack on L.Flamininus, he enlisted *humanitas* and *maiestas* in his campaign. But the publicans outwitted him in the end.²⁴

Nevertheless Cato was rapidly making *humanitas* his battle-cry. He used it again in a *cause célèbre* in 171 (Livy 43.2.1–2). Envoys from both Nearer and Farther Spain complained to the senate about exactions from the provincials. L.Canuleius, about to take over Spain²⁵ as praetor, was directed to assign five *recuperatores* (‘recoverers’) to adjudicate on each magistrate who was alleged to have exacted money. The *recuperatores* were to make findings on guilt or innocence before assessing the amounts to be repaid. The *patroni* (barristers) who would represent the provincials were to be chosen by the envoys. They chose Cato and three others. The first case heard was that of M.Titinius, praetor in Nearer Spain in 178–176. He was acquitted at the third hearing (Livy 43.2.6). Furius Philus and Matienus, ex-praetors of Nearer and Farther Spain respectively, were brought up on ‘most serious charges’ (*gravissimis criminibus*). But after being part-heard their trials were adjourned, whereupon both men went into voluntary exile.²⁶ It was rumoured that the *patroni* representing the provincials had blocked proceedings against influential men. Suspicion almost hardened into certainty when the praetor Canuleius suddenly gave up the investigation and left to take up his appointment in Spain.²⁷

Despite its inconclusive result this case, generally accepted as a true case of *repetundae*,²⁸ testifies to the strength of the humanitarian impulse. The ‘most serious charges’ against Furius and Matienus included not only greed and brutality, but also ‘other disgraceful acts’ (*alia indigna*).²⁹ In other words, the element of *maiestas minuta* present in Laenas’ case was also in evidence here. A capital penalty for exactions accompanied by special brutality would only be included in the *repetundae* legislation in the distant future, but it was foreshadowed in the Furius—Matienus case. That is why their departure into exile stirred up suspicions of collusion by the *patroni*. People were starting to question the easy escape from the consequences of one’s acts.³⁰

The first phase of the Third Macedonian War was a vintage year for provincial brutality. In 171 the consul P.Licinius Crassus ruthlessly plundered cities in Central Greece and carried out mass enslavements. The senate decreed that he be fined and that such of the slaves as were found in Italy be bought back from the purchasers.³¹ Similar action was taken against the naval commander L.Hortensius, who took Abdera by storm in 170, beheaded its leaders with an axe,³² and sold the population at auction (Livy 43.4.8–11). The devastation of Chalcis by Hortensius’ predecessor, C.Lucretius Gallus, had

prompted an innovation. Instead of being dealt with by the senate, he was brought before the popular assembly by the tribunes and was fined one million *asses*³³ by the unanimous vote of the thirty-five tribes. The senate decreed freedom for the slaves and directed Gallus' successor, Hortensius, to carry out the liberation.³⁴

A reaction was setting in against the recent chicanery. Men like Cato could now respond more effectively to the rising yeast of *humanitas*. But it would take one more effort by Cato to bring matters to a definite head. In 150 Ser. Sulpicius Galba defeated three Lusitanian tribes and induced them to make a *deditio in fidem* by promising to settle them on fine arable land. When they duly surrendered he ordered them to lay down their arms and to parade in three columns so that he might organise the distribution of land. He then proceeded to butcher some of them and to sell the rest into slavery.³⁵ The elimination of at least 8,000 Lusitanians³⁶ was greeted with horror by many people, and Cato launched his last assault on brutality.

The assault was mounted in 149, the last year of Cato's life. He put up a tribune to propose that freedom be restored to the Lusitanians and that a commission be set up to try Galba for breaking his pledged word.³⁷ But in spite of a powerful speech by Cato in support of the proposal³⁸ Galba managed to blunt the attack. He tearfully displayed his young children to the people and commended them to the people's protection 'after I am gone'. This was the winning move. As Cato said, Galba snatched himself from the flames by playing on the people's compassion for little children. The bill proposed by the tribune was rejected.³⁹

Statutory relief for non-Romans: the *lex Calpurnia*

The absolution of Galba is the low-water mark in the long history of starts and stops that marks the decision-making of the Roman people. For sixty years the overall trend had been upwards, there had been a growing desire for reform. The reversal of that trend was so abrupt that it is almost as if the gods wanted a traumatic trigger for a fundamental change. That change was initiated in the same year as the Galba debacle by L. Calpurnius Piso Frugi, tribune of the plebs and an annalist who shared the traditionalism and morality of Cato.

Calpurnius Piso's *lex Calpurnia repetundarum* created the first permanent jury-court (*quaestio perpetua*), and it did so in the area

of exactions from non-Romans.⁴⁰ It set up a court composed of a panel of jurors⁴¹ drawn exclusively from the senatorial order and sitting, as the special commissions had done, under the presidency of a praetor. The peregrine praetor, who was responsible in general for cases in which non-Romans were involved, was appointed as the first president of the court.⁴² The court's function was to investigate claims lodged on behalf of non-Romans for repayment of money exacted by Roman magistrates.⁴³ Claims were brought through Roman *patroni*, thus following what had been done, for example, at the Canuleius commission. The court's procedure was based on the *legis actio sacramento*, an ancient process that can best be described as a bet, the lodgement of a sum of money by each party with the winner taking all.⁴⁴ If the court ordered restitution, it was for simple repayment of the amount exacted. The strictly penal aspect was *infamia*, the disgrace resulting from an adverse decision.⁴⁵

Cicero looked back to the *lex Calpurnia* as the great pioneer, the charter of provincial rights. Cicero spoke with the authority of a specialist in the *repetundae* laws:

The existing *repetundae* practice is well known to all of you, but if experience is the best teacher it must be best known to me. I have prosecuted for *repetundae*; I have defended many accused; I have sat as a juror; I have presided over the *repetundae* court.

(*Rab. Post.* 9)

In no other area of expertise does Cicero make such a claim. His enthusiasm is amply borne out by a wealth of laudatory statements by him. The following composite is our first example:

C.Papirius Carbo [*tr. pl.* 131] was the best *patronus* of his day. During his pre-eminence there was an increase in the number of cases. This was partly due to an innovation dating back to his youth, namely the creation of the first permanent jury-court, the *repetundae* court established by L. [Calpurnius] Piso's law...It is now [44 BC] less than 110 years since the enactment of L.Piso's law of *repetundae*, the first of its kind. Afterwards came many laws, each harsher than the one before. So many people tried and convicted, such a fierce war [the Social War of c. 90–88 which pitted the Italian allies against Rome]

which was stirred up by [exactors'] fear of the courts, such frightful pillaging and plundering of the allies [provincials] when the laws and the courts were suppressed!

(*Brut.* 106, *Off.* 2.75 adapted)

The harsher laws that followed the *lex Calpurnia* began with the *lex Acilia repetundarum* of 123/122. This law, the third in the series of *repetundae* laws, raised the amount to be repaid to double the amount that had been exacted. Harshness was intensified under subsequent laws that formally sealed the link with *maiestas minuta* by prescribing capital penalties for exactions in circumstances of excessive brutality.⁴⁶

One of the many borrowings from the second-century special commissions was the rule that the *patroni* appearing for provincials should be the persons chosen by the provincials themselves. Cicero gives this point special prominence in his prosecution of C. Verres for *repetundae* in 70 BC:

Recently L. Piso [*pr.* 74] defeated Q. Caecilius in an application to prosecute P. Gabinius. Piso succeeded because the Achaeans [the provincial complainants] had chosen him as their *patronus*. After all, the *repetundae* law itself is the *patrona* of the Roman people's allies and friends. Our most eminent men have devoted themselves to warding off wrongs from foreign nations who were under the sovereignty and friendship of the Roman people. Among them, Cato's championship of the Spaniards brought him many bitter enemies.

(*Div. in Caec.* 65–6 adapted)

The Verrines also provide the most decisive statement of all. Cicero is replying to a defence claim that in Sicily only the provincials are Verres' enemies; Roman businessmen like him:

The whole *repetundae* law was framed for the benefit of the allies. When Roman citizens are robbed of money they simply claim restitution by an action under the private law. *This* law is for the allies. It is the charter of foreign nations. It is their citadel—somewhat less fortified than before, but still their only hope.

(*Verr.* II 2.15, *Div. in Caec.* 17–18)

The citadel is less fortified than before because of the law's recent failure to protect the Sicilians against the depredations of Lepidus and Antonius, respectively dating to 80 and 74 BC.⁴⁷ Although Verres is being charged under Sulla's *repetundae* law of 81/80 BC, Cicero clearly implies that the laws prior to that had been more effective in protecting provincials. Thus his reference to 'this law' is not a specific reference to Sulla's law. It is a reference to the *repetundae* laws as a whole.

The monumental role assigned by Cicero to the *lex Calpurnia* as the pioneer in giving statutory relief to provincials is accepted by most scholars.⁴⁸ A recent attempt has however been made to dislodge the *lex Calpurnia* from its pedestal. Richardson (1987) flies in the face of the Ciceronian evidence and claims that the primary purpose of the *lex Calpurnia* was to provide a remedy for Roman citizens.⁴⁹ His argument, if I understand it correctly, is that it was not until the third *repetundae* law, the *lex Acilia repetundarum* of 123/122,⁵⁰ that protection for non-Romans was brought into it, when claims for restitution were granted to

Any person who is a member of an ally, or is of the Latin name, or is a member of a foreign nation or lives under the sovereignty or friendship of the Roman people. Any such person may claim in respect of money carried off, seized, exacted, embezzled or misappropriated from the person himself or from his king, his nation or his parent.
(*lex Acil.* 1–2)

There are two prime weaknesses in Richardson's case. The first is that he rejects Cicero's repeated assertions, always a hazardous operation against an ancient writer who was there, and doubly so where the assertions are the fruit of a special interest and special expertise. Secondly, where are the oppressed citizens desperately seeking relief? We have a long line of oppressed non-Romans culminating in the Galba affair which was the last straw and was followed, in the very same year, by the *lex Calpurnia*. What prompted the legislators to go off at a tangent and enact a remedy for citizens who already had an adequate resource in the private law?⁵¹ It was hard enough to get the casuistic Romans to change the law in the absence of a pressing need, but here we are asked to believe that they ignored the real problem and legislated for a fantasy. In any case, if they did do just that, what caused them to change their minds a

mere twenty-five years later? That is to say, what happened to the citizen's remedy under the *lex Calpurnia* when the *lex Acilia* was passed? The latter was simply a restatement of the *lex Calpurnia*?⁵² albeit with some procedural changes.⁵³ And if by any chance the citizen's remedy was preserved by the *lex Acilia*, what had happened to it when Cicero defined 'this law' in 70 BC?

One or two of Richardson's technical arguments call for a specific reply. If the inclusion of non-Romans in the *lex Acilia* was a complete innovation, why does the *lex Acilia* rule against double jeopardy: 'In regard to any person acquitted or convicted under the *lex Calpurnia* or the *lex Junia*, such person may not be summoned under this [Acilian] law'?⁵⁴ Where was there a danger of double jeopardy between apples and oranges, that is, if the *lex Calpurnia* and the *lex Junia* dealt with claims by citizens, the *lex Acilia* with claims by non-citizens? Richardson fares no better with his trump-card, the fact that the *legis actio sacramento* was not available to non-citizens.⁵⁵ It is of course quite true that the procedure under the Calpurnian and Junian laws was based on that *legis actio* (*lex Acil.* 23), but given that a claimant had to proceed through a *patronus* who was a citizen, is there any reason why the *patronus* should not have availed himself of the *sacramentum* on the claimant's behalf?⁵⁶ Alternatively, the *sacramentum* could have been adapted for use by non-citizens. Such a solution would simply have been the latest in the series of experiments that had marked attempts to deal with *repetundae* prior to the *lex Calpurnia*. They had tried special commissions and tribunician prosecutions, they had tried assessments by *recuperatores* and globular fines by the people. Another adaptation should not have been beyond the wit of a society that managed to live with two heads of state, two legislative assemblies, two systems of law, two kinds of ownership—and different grades of *humanitas*.⁵⁷

The first phase in the evolution of the *repetundae* laws takes us up to the *lex Acilia*. We have identified as much of that law as we need, and there is not much to be said about the shadowy *lex Junia* that was passed at some point of the interval between the Calpurnian and Acilian laws. Speculation about the date and content of the *lex Junia* has not come up with anything of note.⁵⁸ The only thing that can be said with some assurance is that this law must in some way have improved on the first venture into statutory protection for non-Romans. The alternative, that it took a citizen-oriented *lex Calpurnia* a stage further, merely serves to confirm how unconvincing that

interpretation of the *lex Calpurnia* really is. How much more spoon-feeding did the citizen-litigant need?

The problem of mass enslavement

We are almost ready to move on to the next phase of the *repetundae* legislation, the formalisation in statutory form of the partial fusion of *repetundae* and *maiestas* that had surfaced over the decades preceding the *lex Calpurnia*. But first something more needs to be said about mass enslavement. It was the most brutal feature of the cruelty shown to non-Romans over those decades, and as such it was at the very heart of the concept of *maiestas minuta*. At the same time it was at the very heart of *repetundae*. Sales into slavery brought profit on an unprecedented scale.

The first matter to claim our attention is the restoration of liberty, *restitutio libertatis*. Volkmann argues that the only successful attempts to invalidate mass enslavements were, first, in respect of the Ligurians who were freed by order of the senate after the collapse of the commission investigating Popillius Laenas; second, in respect of the Greeks of Abdera, Coroneia and Chalcis enslaved by a consul and two naval commanders in 171–170; and third, in respect of Heracleia in 67.⁵⁹ But the last-mentioned liberation, arising out of M. Aurelius Cotta's devastation of Heracleia in 70, may have followed Cotta's trial for *peculatus*, embezzlement of public money, rather than for *repetundae*.⁶⁰ If so, and if the liberation of the Ligurians occurred in spite of, and not because of, the commission against Laenas,⁶¹ then Abdera, Coroneia and Chalcis are the only unequivocal examples of liberation occurring as a result of verdicts in *repetundae* proceedings.⁶²

In all three cases the culprits—Licinius Crassus, Hortensius and Lucretius Gallus—were tried by the people and the penalty took the form of substantial fines. Now, this group of three contemporary processes (171–170) marks the only time in the pre-Calpurnian period that the government employed the tribunician process rather than the special commission. If, as I have suggested, it also marks the only examples of liberation pursuant to verdicts in *repetundae* proceedings, then it has a very special place in the history of *humanitas* towards non-Romans. Having lost confidence in the will of the traditionalists to remedy matters, those who believed in popular sovereignty turned to the tribunes, the time-honoured shield against oppression. In effect they were giving non-Romans indirect access to *provocatio ad*

populum. It is not surprising that later on the *lex Acilia* listed *provocatio* as one of the rewards open to successful peregrine claimants (*lex Acil.* 78). Moreover, in order to make the order for liberation effective, they employed an occasional feature of trials by the people. A fine was imposed, subject to its being remitted when the condemned man complied with certain conditions—in this case liberation.⁶³

The experiment of 171–170 was of course casuistic. Coming at the start of the Third Macedonian War, it was devised specially for the Greeks, to fortify Rome's image as the protector of Greek freedom against the demonised Macedonians. The experiment was not repeated, but in 149 the reform lobby remembered the efficacy of a solution grounded in a permanent jurisdiction that did not have to be specially activated every time.

Additional statutory relief: *repetundae* and *maiestas*

Until the very end of the second century the *repetundae* laws were only concerned with restitution—twofold under the *lex Acilia* but reverting to simple repayment after that⁶⁴—plus *infamia*. Even where exactions were particularly brutal, such as enslavement followed by an auction, the offender did not incur any strictly penal consequences other than *infamia*. Punishment for the brutality as such lay outside the *repetundae* laws, in the general area of *maiestas minuta*. But that was changed by a series of laws running from 104/101 to 59 BC, when a partial fusion of *repetundae* and *maiestas* was worked out. This second wave of *repetundae* laws moved on to a much broader terrain, one which included capital punishment alongside restitution. The increased penalty was imposed not only when exactions against individuals and communities were accomplished with extreme savagery (*saevitia*), but also when money was received not so much for brutal exactions as for treasonous activities against the Roman people. Like so much in the *repetundae* legislation, the idea was not entirely new. The 'most serious charges' against Furius and Matienus had had a similar outcome. But systematic enforcement required legislation.

The second wave opens with the *lex Servilia repetundarum* carried by the tribune C. Servilius Glaucia in 104 or 101 BC.⁶⁵ That law was used in 92–91 against Aemilius Scaurus, and also against the cardboard Stoic saint, Rutilius Rufus. Both were involved in dubious trafficking with Mithridates of Pontus in the course of which money

changed hands.⁶⁶ But the best attestation of the treasonous activities version is in a speech delivered by Cicero in 55:

[L.Calpurnius Piso *cos.* 58] left his province of Macedonia, led his army out of it, waged war on his own authority and entered a kingdom without the authority of the Roman people or senate, all acts that are expressly forbidden by a number of ancient laws, and also by Sulla's *maiestas* law and Caesar's *repetundae* law.

(*Pis.* 50)

It is quite clear that Caesar's *repetundae* law, the *lex Julia repetundarum* of 59 BC, incorporated treasonous provisions that Cicero also ascribes to Sulla's *maiestas* law. Sulla also enacted a *repetundae* law, but apart from the fact that Verres was tried under it, and that it continued the *repetundae* tradition of giving relief only to non-Romans (against the depredations of governors), we know very little about its content.⁶⁷ At all events, Caesar's law was the most comprehensive of the series, providing in detail for both restitution and a capital penalty, the latter in respect of both *maiestas* and *saevitia* against individuals or communities.⁶⁸

The full scope of Caesar's law is illustrated by the trials of A. Gabinius, who was consul with Piso in 58 and proconsul in Syria over 57–54. Gabinius, a close associate of Pompey, earned at least two prosecutions in 54 as a result of his involvement in the restoration of Ptolemy Auletes to the Egyptian throne.⁶⁹ Gabinius left his province without authority, invaded Egypt without authority and in breach of the Sybilline Books and a senatorial veto, restored Ptolemy, collected a bribe of 10,000 talents that Ptolemy had offered, and delayed handing over his province to his successor.⁷⁰

Gabinius was charged under Sulla's *maiestas* law, but the intervention of Pompey and the distribution of bribes to the jury secured him an acquittal, though only by the narrow margin of 38 votes to 32. He was later tried under Caesar's *repetundae* law. The same unauthorised acts in Egypt were brought up, but this time they were linked to his receipt of the 10,000 talents. The *maiestas* case had a different criterion, namely that the acts were calculated to diminish the *maiestas* of the Roman people. The different criteria ruled out any question of the second trial breaching the rule against double jeopardy.⁷¹ Dio says that Gabinius was astonished at the

outcome: money had acquitted him in the first trial but had convicted him in the second (Dio 39–55.5–6).

Gabinius was sentenced to a fine of 10,000 talents. This was the *litis aestimatio*, the assessment of restitution made by every *repetundae* jury,⁷² except that in this case the money stayed in the state treasury instead of being paid out to claimants.⁷³ Gabinius may have also been given a capital sentence. Dio reports a homicidal public reaction against him. At his first trial the people wanted to lynch him or convict him *in absentia*, and after his acquittal they wanted to lynch the jurors (Dio 39.61–3). He did go into exile (ibid. 39.63.5), though this may have been because of his inability to pay the fine rather than because of a capital penalty.⁷⁴

Evaluation

The partial fusion of *repetundae* and *maiestas*, both under the second wave of *repetundae* legislation and before the advent of any legislation, is reasonably secure. The only qualification that need be added is a further note on mass enslavement. As already observed, this fell under the general head of actions calculated to besmirch the imperial image; it therefore fell under *maiestas minuta*. But it was only if there had been a *dedition in fidem* that this was unequivocally the case; the Romans had to honour their fiduciary commitments. But if enslavement followed the capture of a place by storm, that is, where the inhabitants preferred to resist rather than entrust themselves to *the fides* of the Roman people, no holds were barred; the laws of war (*ius gentium*) imposed no limits on savagery.⁷⁵ Greek and Roman thinkers urged *humanitas* on victors, but with mixed results. Scipio showed common humanity to the Carthaginians in the closing stages of the Second Punic War, but earlier he had shown New Carthage a degree of severity that appalled Polybius. Aemilianus went further; he interpreted *deditio in fidem* in the light of the public interest. His natural father, Aemilius Paullus, had been even less humane to the Epirots.

When the Sicilians complained about Marcellus in 210, he gave the senate an interesting exposition of the imperial image:

He had always been mindful of the *maiestas* and empire of the Roman people. Whatever he had done in Sicily had been done under the laws of war, for they had closed their city and defended it with an army of Carthaginians.

When some of their leading men tried to surrender the city, he had refused to accept it.

(Livy 26.31)

Marcellus' case was thus that Syracuse was *capta*, taken by storm, not *recepta*, received *into fides*.⁷⁶

THE NEW IMAGE OF HUMANITAS: PART ONE

Preamble

The title of this chapter is not misconceived. The introduction of one-man rule by Augustus in 27 BC was a watershed in the perception of human rights, as in so much else. As the Roman hegemony began being transformed into the Roman empire under the realisation that Rome was no longer a small city-state on the Italian mainland but a global village, so old ideas were infused with new vitality and old lamps were exchanged for new. Some of the changes were merely cosmetic, but others probed below the surface of precedent. Others, again, broke entirely new ground.

In some areas, however, progress in *humanitas* was blunted by relapses into inconsistency, *Clementia*, for example, moved beyond its modest Republican dimensions, evolving into both a cardinal virtue of the emperor and a fully-fledged canon of criminal interpretation. The change flowed from the increasing personification of the Great Man as the fountainhead of human rights. But *clementia's* more lenient approach to crime and punishment was offset by punitive differentials. Punishments were made in a way that was either humane or inhumane, depending on the status of the wrongdoer, and society seemed indifferent to the standards of *humanitas* that had motivated Cicero's fulminations against barbaric methods of execution. But such was the ambivalence of the time that one major feature of human rights was pursued more vigorously than ever before. Ill-treatment—still focussed primarily on non-Romans—was suppressed more effectively than it had been in the Republic.

To some extent *humanitas* now played a lesser part in the practical enforcement of human rights than its offshoot, *clementia*; it did not have the same direct impact on people's daily lives. Though not entirely

lacking a counterpart to *clementia*'s, special credential as a virtue of the emperor,¹ *humanitas* is not prominent in this respect. Also, systematic leniency as worked out by, especially, Seneca is labelled *clementia* rather than *humanitas*. Perhaps most interestingly of all, where *humanitas* is basically a *paideia*-inculcated predisposition to do the right thing, *clementia* is the actual doing of it. Overall, however, *humanitas* remains the major label on the human rights scene.²

The diversity of categories and material obliges us to make a choice. Some categories are omitted completely. Six topics will be covered, the first two in this chapter and the others in the next. They are: *humanitas* and *clementia*; *Clementia Caesaris*; curbs on rapacity; universalism; freedom of speech; social welfare.³ The first of these covers uses of the two words within the general ambit of human rights, taking *clementia* in its general sense of an offshoot of *humanitas*. The second topic inspects *clementia*'s, special role as a virtue of the emperor. The third pursues the protection of non-Romans under the Republican *repetundae* statutes, plus one imperial enactment. The fourth examines the expansion of universalism under the influence of the *Pax Romana*.⁴ The fifth and sixth topics respectively cover freedom of speech and social welfare.

The chosen topics all reflect positive aspects of human rights. But there is also a negative aspect, a darker side that exemplifies *inhumanitas* rather than *humanitas*. Some of the examples will be incorporated in our six topics, but others will be grouped under a special rubric in chapter 9.

Humanitas and *clementia*: Augustus and Tiberius

The human rights terminology for the first emperor, Augustus, reflects some important uses of *clementia*, but very little on *humanitas/humanus*. We do not know what Livy said about Augustus and *humanitas* in the lost books of his history, but we do know that the Augustan poets said nothing of particular interest about *humanus*⁵ nor, with the exception of Ovid, about *clementia*.⁶ Only Seneca Rhetor provides a point of interest when he has Cassius Severus fulminate against fathers whose cruelty to their children includes 'factories of human misery' (*humanarum calamitatum officinae*) and children mutilated for begging (Sen. Rhet. *Controv.* 481M). Shades of Dickens' London!

Tiberius is somewhat better served. Valerius Maximus includes a unique rubric entitled *De humanitate et dementia* in Book 5 of his

Memorabilia. Although intended primarily as a source-book for orators and rhetoricians, the work was also in touch with public opinion; orators needed to tune in to juries' perceptions of *humanitas*. The work was popular enough to run into a second edition.

If the opening words of the rubric are any guide, the words *humanitas* and *clementia* were now being used in a specific rather than a generalised sense:

What more fitting companions can I give *liberalitas* than *humanitas* and *clementia*? The first caters for the needy, the second for the unfortunate, the third for the uncertain.⁷

Liberalitas has here the basic, civilised-behaviour-encouraging role usually assigned to *humanitas*, while the other two words are given more direct roles in the promotion of human rights. 'The unfortunate' was already one of the more specialised connotations of *philanthropia*; 'the uncertain' is the accused hoping for lenient punishment.⁸ Valerius illustrates the latter when he has a commander remit the punishment of a young Numidian who was found in the enemy ranks, on the grounds that the youth erred by mistake, not by wrongful intent (Val. Max. 5.1.7). This is precisely the sort of thing that Seneca would convert into a positive legal rule. The other major Tiberian writer, Velleius Paterculus, has only one passing reference to Tiberius' *humanitas*, but a more generous notice of Augustus' *clementia*.⁹

Humanitas and clementia: Seneca

Seneca the philosopher is, after Cicero, the most prolific user of *humanitas/humanus*¹⁰ and, perhaps ahead of Cicero, the most significant contributor to the theory of human rights as a whole. His ideas are developed in three treatises, *De clementia* ('On clemency'), *De ira* ('On anger'), *De beneficiis* ('On benefits') and in the *Moral Epistles*.¹¹

Seneca launches a sustained attack on brutality. His thoughts run as follows:

Poverty and disease are minor evils compared with what is inflicted by man. Huge displays are devoted to swords, fire and chains, wild animals tearing at human flesh, the

dungeon, the cross, the rack, the hook, the stake driven through a man, the tunic in flames, the limbs torn apart by chariots going in opposite directions. Cruelty, the least human of all evils, is the province of rulers rather than of private citizens. The ruler's brutality exceeds all human bounds, his ingenuity devises new and prolonged forms of suffering, making a pleasure out of cruelty and a hobby out of ferocity. He delights in butchering children before their parents' eyes, in torturing, burning and roasting. Taking pleasure in torture is not just cruelty, it is savagery [*saevitia*], even madness when it goes as far as murder and mutilation.¹²

At first sight the passage has a ring of genuine involvement, of dedication to something more than an academic exercise. But on the whole Seneca is expressing Stoic thinking rather than sentiment. This is shown by a passage in which he justifies the Stoic elements in *humanitas Romana*:

The Stoics are considered excessively harsh. At first sight this casts odium on the sect, making it seem to demand punishment without any allowance for human error, and obliging us to unlearn *humanitas*, thus cutting off mutual help. But in fact no school is more kindly and gentle, more loving of men and more concerned for the common good. But pity [*miser cordia*] and sorrow at the distress of others cloud the wise man's [the Stoic's] judgment. What is clemency? There are several definitions, such as restraint in taking vengeance, or the leniency of a superior in fixing an inferior's punishment. In a word, it consists in stopping short of what could have been deservedly imposed. It is wrong to suppose that the opposite of clemency is severity [*severitas*], for *no virtue is the opposite of a virtue*. The opposite of clemency is harshness of mind [*atrocitas animi*] in exacting punishment.

(*Clem.* II 3–4, 5.2–5 adapted)

The passage fits into the Stoic conception of punishment, and through that into the basic parameters of *humanitas Romana*.¹³ The Stoics believed that criminal penalties should be precisely defined by the law and should always be exactly as defined, making no allowances

for aggravating or extenuating circumstances. Hence the assertion that severity, itself a virtue, excludes maudlin sentiments like pity and sorrow which merely cloud the face of true *humanitas*. Under the jury-court system the statutory penalty, the *poena legis*, was the immutable canon of punishment. The system had no room for judicial discretion, for any intensification or mitigation of the penalty by reason of increased or diminished responsibility.¹⁴

Seneca did not, however, go all the way with mainstream Stoicism. As new criminal jurisdictions took shape alongside the jury-courts,¹⁵ so the iron grip of the statutory penalty was loosened and discretionary punishments became possible. Seneca was the pioneer in this fundamental, *humanitas-driven* redefinition of punishment. Using *clementia* as his medium, he shaped contemporary thinking about crime and punishment, and he made it his (ultimately unsuccessful) mission to domicile his ideas in Nero's thinking.

Changed ideas about punishment are the most visible reflection—but no more than that—of changes in the perception of *humanitas* as a whole. Seneca also used *clementia* to remodel other institutions, such as the treatment of slaves and universalism. But reforms threw up by-products which tended to produce anomalies. In other words, the definition of *humanitas* was constantly under review. When Nero decided to blame the Christians for the Great Fire of AD 64, he staged a public entertainment at which the victims were crucified and set alight in a macabre travesty of the principle of *talio*, retaliation in kind. Nero was accused of *saevitia* but justified his act on the grounds of *utilitas publica*. Many people (though not Seneca) accepted this qualification of *humanitas*.¹⁶ The definition of *humanitas* was drastically revised in the Later Empire, when the penalty for adultery was raised from banishment to death; the change was signalled as a contribution to *humanitas*, since by its deterrent effect it would cause people to save their immortal souls.¹⁷

When it came to the death penalty as such, as distinct from the manner in which it was carried out, Seneca remained an orthodox Stoic.¹⁸ He notes, with no sign of discomfort, that a magistrate sentencing a criminal to death shows no more emotion than if he were killing a poisonous snake (*Ira* 1.16.3–6). He is also flexible when he defines *humanitas*: 'A superior's treatment of an inferior should be based on *humanitas*, but the inferior should show the superior *reverentia* (respect, awe)' (*Quaest. Nat.* 4A.18). Thus elitism, always entrenched in Roman society, was considered perfectly compatible with *humanitas*.

Humanitas and *clementia*: Flavians, Antonines,
Severans

The most important source for the period is the younger Pliny, especially in the *Panegyricus*, his speech of thanks to Trajan for making him suffect consul in 100.¹⁹ The following is of special interest:

I have often speculated on the qualities required of a man whose word rules land and sea, peace and war. But no one has met all the criteria until today. No one's virtues have remained unsullied by faults. But in our prince all admirable qualities are found in complete harmony. Nothing is detracted from his severity by his common touch [*hilaritas*]; or from his gravity by his openness; or from his *maiestas* by his *humanitas*.

(*Pan.* 4.4–7 adapted)

Gathering together a number of threads of the new humanitarian image, Pliny centres the totality in one individual, the Great Man, rather than in the traditional abstraction of senate and people. The result is unmistakably *humanitas Romana*, however. On the one side are three features of traditional severity, namely *severitas*, *gravitas* and *maiestas*; on the other side are three *humanitas* values, *hilaritas*, *simplicitas* and *humanitas* itself.

Trajan abolished charges of *maiestas minuta* for the duration of his reign. He was not the first emperor to do this,²⁰ but he was the first to give a clear exposition of the thinking behind the abolition. During Pliny's term as governor of Bithynia charges were lodged against Dio Chrysostom, who had erected a statue of Trajan within the same precincts as the place where Dio's wife and son were buried. Pliny having written to the emperor for guidance, Trajan replied as follows:

You well know that it is not my policy to secure reverence [*reverentia*] for my name by exposing people to fear or terror, or by sanctioning charges of *maiestas*. Therefore abandon the enquiry, which I would not allow even if it were supported by precedent.

(*Ep.* 10.81, 82)

Trajan here uses the same word as Seneca, *reverentia*, for the obligation of the *humanitas* inferior. In another letter Pliny reports

that he has found in Bithynia ‘the spirit of obedience and loyalty which you have earned from the human race’ (*Ep.* 10.17b). The emperor’s respect for human rights is further shown by his instructions in regard to the Christians. Pliny had written that he was dismissing charges against those who recanted, taking as proof of recantation the rendering of cult to the Roman gods and to Trajan’s statue, and the pronouncement of a curse—*Christo maledicere*. The emperor replied excluding his own statue and the curse from the recantation.

There was, however, a flexible element in Trajan’s *humanitas*. In order to punish the notorious informers who had ruined many people in previous reigns, Trajan held a mass trial in the amphitheatre and deported them *en masse* in specially chartered ships. Pliny found it ‘a beautiful sight’ that relieved the entire human race of its cares.²¹ The episode ranked as an outstanding act of *humanitas*. Again that elastic concept was in the eye of the beholder.

We are indebted to Pliny’s adoptive father, the elder Pliny, for a memorable thought:

Winged missiles are the most criminal perversion of the human genius. To kill people more quickly we have taught iron how to fly.²²

Trajan’s position on human rights was built on foundations laid not only by Seneca, but also by subjects of rulers after Nero. In 69 the urban prefect, Flavius Sabinus, tried to avoid trying a case that involved the death penalty, because of his abhorrence of bloodshed. He eventually capitulated, but only under pressure from the ephemeral emperor Vitellius (*Tac. Hist.* 2.63–4). Then, in Domitian’s reign, the urban prefect Pegasus, equally averse to bloodshed, refused to accept from the emperor a mandate authorising him to conduct trials that carried the death sentence. Later in the reign another urban prefect, Rutilius Gallicus, received a special accolade from the poet Statius for his leniency.²³

The younger Pliny’s contemporaries add very little to our picture.²⁴ The great disappointment is Tacitus. The most penetrating critic of inhumanity has not seen fit to give an overview of its remedy. His two uses of *humanitas* are routine examples of courtesy and culture.²⁵ He does slightly better with *humanus*: ‘The immense slaughter ordered by Tiberius extinguished by the force of terror sympathy with the human lot; as savagery grew, pity receded’ (*Tac. Ann.* 6.19.3). Also, ‘Germanicus should not have kept his wife and

son among madmen who violated all human laws' (ibid. 1.40.2). And 'Domitian hoped that burning the philosophers' books would destroy the voice of the Roman people, the liberty of the senate and the conscience of mankind' (*Agric.* 2.2). But none of this measures up to the profound analyses of Seneca, or even the well-turned phrases of Pliny.

In the second century the uses of *humanitas* in legal texts, which we have already discussed, are supplemented by one literary source of major importance.²⁶ Aulus Gellius, whose piece on the etymology of the word *humanitas*²⁷ points to an upsurge of interest in human rights, confirms that impression by his account of the great debate on punishment theory in Antoninus Pius' reign.²⁸ The debate, which Gellius claims to have attended in person, features the rhetorician Favorinus and the jurist Africanus. Favorinus launches a stinging attack on the punishments laid down by the XII Tables. He claims that the penalties are either too harsh, too lenient, too obscure or too improbable. He cites the right to kill the nocturnal thief, the trifling penalty for minor assaults, the talionic principle that allowed retaliation in kind, and the right given to creditors to cut up a debtor's body in proportion to their claims.

Africanus replies that the XII Tables, far from being inhuman, is the most humane of all laws. He enunciates a proposition:

A law should be interpreted in the context of its own time. Punishments are in a constant state of flux. They depend on contemporary *mores*, on forms of government, on the current view of what best serves the public interest, and on the kinds of fault needing to be cured.

The jurist ends his speech with a justification of the deterrent effect of savage penalties. Noting the punishment of the Alban, Mettius Fufetius, that had so disturbed Livy, he points out that the culprit had broken his pledged word; he cites Vergil in support of the point.²⁹ The debate ends with the audience expressing its approval of the jurist's case.

Whether the debate is fact or fiction is of minor importance.³⁰ What does matter is that Gellius has given us some valuable insight into the thinking of the mid-second century. Africanus' victory is in perfect accord with the dominant role of *humanitas* in the legal sphere at that time. By assigning pride of place to *paideia* in his comment on the etymology of *humanitas*, Gellius implies that the trained mind

is best equipped to handle the problems troubling society. And it is the trained legal mind, rather than that of the rhetorician or orator, that provides what is required. The situation is starting to be governed by a constant jurisprudence, by a consistent set of rules. The seed sown by Seneca is bearing fruit; discretionary punishment is being consolidated as one of the hallmarks of human rights.³¹

Clementia Caesaris: Julius Caesar

Clementia filled a special role in addition to its general function as an offshoot of *humanitas*. It served the emperor's propaganda needs by presenting as one of his special virtues. The message was propagated partly in decrees and on coins, and partly by exercising leniency in punishment.

Clementia Caesaris preceded the Principate, for the concept was first put in place by Julius Caesar during his dictatorship. To his contemporaries, Caesar's clemency was the quintessential expression of his image after his victory in the Civil War. The concept was celebrated on coins, with specific use of the words *Clementiae Caesaris*.³² But this official recognition was limited; it does not appear to have a counterpart in Caesar's own account of the Civil War. A recent investigator points out that although the theme of clemency is dominant in *Bellum Civile*, Caesar deliberately avoids the word *clementia*; he uses either *lenitas* or circumlocutions like *incolumes climittere* ('to dismiss unharmed'). The reason is said to be that Caesar wanted to present as the defender of the Republic, whereas *clementia* was a virtue of the legitimate monarch.³³ The theory is an interesting one, but cannot quite be driven home. Whatever his phraseology in *Bellum Civile*, in his account of the Gallic War Caesar uses *clementia* significantly. The tribes beseech him to show his usual clemency and kindness—*sua clementia ac mansuetudo* (BG 2.14.4). Here *sua* identifies his own special virtue, in competition with the *clementia* of the Roman people.³⁴ Hirtius takes it even further in Book 8 of *Bellum Gallicum*: *Clementia Caesaris* is explicitly spelt out, and *clementia* and *humanitas* are combined.³⁵ In case it is claimed that the Caesar of the Gallic War did not need to watch his words so carefully as the Caesar of the Civil War, the monograph on the African campaign, which was written when the Civil War was well under way, refers to *C. Caesaris clementia* and two combinations of 'his *lenitas* and *clementia*'.³⁶

So much for Caesar's own words. But Cicero is ambivalent. In general he is well aware of the importance of *clementia*. He lists moderation (*temperantia*) as the desideratum in punishment and makes *clementia* one of its components (*Inv.* 2.164). He recommends the technique of arousing either severity or clemency in a judge, depending on the needs of one's case. He condemns Verres for riding roughshod over the *clementia* of the Roman people.³⁷

Noting that *clementia* is the regulator of the victors in war as well as of judges in trials, he regrets that Caesar has not shown Pompeians the same clemency in Africa as he had shown in Asia and Greece.³⁸ He cites Caesar as the only conqueror whose unlimited clemency has meant that no civilians have fallen in his wars; he has the mild and merciful nature credited to him by the Pompeian Caecina.³⁹

After many expressions of unequivocal approval in letters both to Caesar and about him,⁴⁰ Cicero's praises rise to a crescendo in his speech on behalf of C.Ligarius, who was tried for treason by Caesar himself in 46. Cicero admitted the facts,⁴¹ but appealed for clemency:

We rely on your *humanitas*, not on the merits of our case. If the accuser opposes this he will reveal his own lack of *humanitas*. Your mildness [*lenitas*] is as great as your victories, in spite of those of your followers who would frustrate your *clementia*. The accuser warns you to be cautious about pardoning my client, but these are the words of a man who is more likely to thrust *humanitas* away from himself than to strip you of it. Every word that I speak falls under a single head—your *humanitas*, your *clementia*, your *misericordia*. I am not addressing a jury, I am pleading to a father: I beg you to forgive his mistake, I throw myself on your *clementia*.

(*Lig.* 13–16, 29–30 adapted)

Hardened though we are to Cicero's agility, it comes as a shock to see him also operating on the other side of the page. In a letter to Atticus he says that people prefer Caesar's cunning clemency (*insidiosa clementia*) to Pompey's anger (*Att.* 8.16.2). On the eve of the civil war he predicts that Caesar will be no more merciful than Cinna when it comes to killing leading men (*ibid.* 7.7.7). And shortly after the start of the war he tells Atticus that although Caesar is not opposed to cruelty either by inclination or by nature, he has calculated that *clementia* will win him popular favour (*Att.* 10.4.8). It is only

fair to point out, however, that Cicero also displays ambivalence about *clementia* when Caesar is not involved. After Caesar's death he wrote to Brutus criticising him for thinking that matters like civil wars could be settled by *clementia*: 'I cannot endorse your clemency. Rather salutary severity than an empty illusion of clemency' (*Ad Brut.* 1.2a.2[5]). On the whole, however, we may conclude that Cicero has not seriously dented the image of *Clementia Caesaris*.

Clementia Caesaris: Augustus and Tiberius

Augustus institutionalised *Clementia Caesaris*. Its enhanced status was announced at the very beginning of the Principate. In 27 BC, in return for his 'restoration of the Republic', Augustus received a number of honours, including a golden shield commemorating his valour, clemency, justice and piety—*virtus, clementia, iustitia, pietas*.⁴² He was also awarded a civic crown to be fixed to his door. Usually awarded to soldiers who saved the lives of citizens, the decoration acknowledged that his merciful administration of justice had done just that.

The awards were designed to put an end to the recriminations in regard to the punishment of Caesar's murderers. The Republicans claimed that 'Cassius and Brutus⁴³ had fallen to an inherited feud,⁴⁴ but private enmities should be subordinated to the public interest [*publicae utilitates*]' (*Tac. Ann.* 1.10.2). Augustus himself claimed that he had driven them into exile by due process of law.⁴⁵ His propaganda machine was more explicit: 'It was in keeping with *clementia Caesaris*⁴⁶ that none of those who had borne arms against him was put to death by him, or at his order; Antony's cruelty had been responsible for that.'⁴⁷ The rider about Antony was aimed at an even more embarrassing criticism. Octavian (Augustus) had been a member of the triumvirate that mounted the notorious proscriptions after Caesar's death.⁴⁸ Putting the blame on Antony, but without using the dread word 'proscriptions', was as close as Augustus ever got to apologising for his part in that tenebrous episode.

Augustus' clemency moved ahead of Caesar's in one important respect. He did not confine it to the treatment of political offenders. Common law criminals were also shown consideration. This is well illustrated by the case of a man whom the emperor tried for parricide. The penalty for that crime was a variable one. If the defendant was manifestly guilty or confessed, he received the barbaric penalty of 'the sack'. But if he was tried on a plea of 'Not guilty' the penalty was only

interdiction from water and fire—effectively exile. The man was manifestly guilty, but in order to avoid the more savage penalty Augustus put it to him that ‘You surely did not kill your father, did you?’⁴⁹

The institutionalisation of *clementia* continued under Tiberius, but in a somewhat different way. *Clementia* was shown on coins, and an *Ara Clementiae*, an Altar of Clemency, was dedicated.⁵⁰ But the altar tended more to commemorate public *clementia* than that of the emperor.⁵¹

Tiberius took some important steps in respect of clemency to enemies. Augustus had focussed primarily on *clementia* as an institution for the benefit of citizens, and in regard to enemies he had laid down that foreign nations were only to be saved rather than destroyed if that could be done without jeopardising the public interest.⁵² Tiberius began applying this policy even before Augustus’ death. In AD 12, having brought the Pannonian campaign to a successful conclusion, he sent the Pannonian leader, Bato, to comfortable retirement at Ravenna on the Italian Adriatic coast, instead of putting him to death. During the campaign Bato had surrendered *in fidem*, thus Tiberius simply honoured the *fides* due to a surrendered foe.⁵³ Technically the case is not one of *clementia*, but it has a general humanitarian flavour.

The year AD 18 produced a case that stands closer to actual *clementia*. The Suebian leader, Maroboduus, was driven out of his kingdom and found that his only resource was to appeal to the *miserericordia* of his old enemy, Tiberius. The emperor offered him a home in Italy, which he would be allowed to leave if it became expedient for him to do so. But in the senate Tiberius said that Maroboduus was more dangerous than Pyrrhus; he was being held as a hostage for the good behaviour of the Suebi. He lived at Ravenna in comfort for eighteen years.⁵⁴

There was nothing new about *libera custodia*, the comfortable house arrest given to Bato and Maroboduus.⁵⁵ In a general sense it was *clementia*, provided that it served Rome’s interests. But it was only to citizens that *clementia* was available as of right.⁵⁶ But the question is, whose *clementia*? For this we must turn to the court situation. Two cases arise. In AD 16 Libo Drusus was charged with using occult arts against the dynasty. He killed himself before the senate reached a verdict, but Tiberius told the senate that he would have spared Libo’s life even if he had been guilty.⁵⁷ The emperor made his statement on oath in order to give it the force of an *exemplum*, a precedent that was persuasive even if not formally binding. Five years later Clutorius Priscus was

charged with practising black magic by composing a premature elegy for Tiberius' son Drusus, who had been ill but recovered. Most senators favoured the death penalty under an ancient XII Tables rule, but Marcus Lepidus tried to have the case subsumed under the *maiestas* law in order to give Priscus access to voluntary exile:

The crime is atrocious, but his punishment should be tempered by the emperor's *moderatio* and by old *exempla*. There is room for a sentence that neither leaves the crime unpunished nor causes us to regret either *clementia* or *severitas*. I have often heard the emperor complain when someone forestalled his *misericordia* by taking his own life.⁵⁸ I propose that Priscus leave Rome, that his property be confiscated, and that he be interdicted from water and fire. This I propose as if he were bound by the *lex maiestatis*.⁵⁹

Lepidus' proposal failed and Priscus was executed. Tiberius was out of Rome at the time, but on his return he criticised the senate's haste and got it to decree that in future its sentences were not to be carried out until the tenth day after pronouncement, so as to give the emperor time to veto them.⁶⁰

There were two competing claims to *clementia* at this time. *Clementia publica*, which had come down from the Republic,⁶¹ was being exercised by the senate.⁶² But there was also the matter of the emperor's *clementia*. Lepidus balanced it against the senate's *clementia* in his speech. But *Clementia Caesaris* did not get as far as inclusion in the Altar of Clemency.⁶³

Caligula tried to end the concurrence of two claims to *clementia*. When he revived charges of *maiestas* in 39, the senate voted annual sacrifices to his clemency; and a golden image of the emperor was to be carried up to the Capitol (Dio 59.16.8–11). But this travesty of Augustus' golden shield did not succeed in eliminating the dichotomy. There would be a major confrontation between Nero and his senate, and another between Domitian and that body.

Clementia Caesaris: Seneca and Nero

Seneca was the principal architect of *Clementia Caesaris* in both its theoretical and practical modes. Although his first contributions were

made under Claudius,⁶⁴ it was in Nero's reign that he shaped his ideas and incorporated them in his *De clementia* which was published in 55/56.

The treatise was addressed to Nero, then some eighteen years old, and was intended to guide 'the ruler of the whole world' towards the ideal of a merciful monarch. The work put together a fundamental theory of *clementia*,⁶⁵ but it did so in a special way. Seneca provided guidelines that not only fostered leniency in punishment, but also redefined the basic question of criminal responsibility. *Clementia* aims at complete absolution. Looking beyond the formal evidence, it takes note of such factors as youth, error, intoxication, curative potential. In other words, factors producing diminished responsibility. Those factors may warrant total acquittal, or they may authorise a lesser penalty. Its potential for complete exoneration sharply distinguishes *clementia* from pardon [*venia*].

Seneca told Nero that he had been induced to write the work by what the emperor had said when asked by his praetorian prefect to sign a death warrant: 'Would that I had not learnt to write!' (*Clem.* 2.1.2). Nero took his tutor's guidance seriously—too seriously. He was so eager to try out what he had been taught that he tried to create situations in which the senate imposed a death sentence, thus opening the way for Nero to veto that sentence. This ingenious device was one of Nero's major weapons in his confrontation with the mainstream Stoic majority in the senate.⁶⁶

Nero's first essay in contrived *clementia* was made in 61. The murder of the urban prefect Pedanius Secundus by a domestic slave had activated a decree of Augustus' senate, the *senatus consultum Silanianum*, under which every slave who was under the same roof at the time of the murder had to be questioned under torture and later put to death.⁶⁷ Some 400 men, women and children of Pedanius' household were tried by the senate. The eminent lawyer and hardline Stoic C. Cassius Longinus argued for the strict enforcement of the death penalty prescribed by the *s.c. Silanianum*. He said that 'Although innocent people may die and there is an element of injustice in every major *exemplum*, the interests of individuals are outweighed by *utilitas publica*' (Tac. *Ann.* 14.44.6–7). The conviction and mass execution of the 400 slaves followed. But Nero was able to exercise some clemency, for it had also been proposed that freedmen under the same roof be punished by deportation.⁶⁸ Nero vetoed this and announced in an edict that 'Though ancestral custom has not been

tempered by *miseriordia*, it should not be aggravated by *saevitia*' (Tac. *Ann.* 14.45.3–4).

The following year Nero tried again. Antistius Sosianus was charged with having recited defamatory verses about Nero. There was a demand for the death penalty. According to Tacitus this was done by arrangement with Nero, who wanted to display his clemency by vetoing a death sentence (*Ann.* 14.48.3). But the motion for the death penalty put forward by some senators was opposed by the intractable Stoic Thrasea Paetus. At this time the *maiestas* law was in abeyance, but Thrasea proposed that it be revived and that the statutory penalty⁶⁹ be imposed:

The executioner and the noose were abolished long ago. The laws lay down penalties which punish without brutalising the judges or disgracing the times. Let him forfeit his property and be sent to an island, where he can drag out his guilty life as an example of private misery and public clemency [*publica clementia*].⁷⁰

Thrasea's proposal was accepted. Nero was deprived of a death sentence to veto, and the clash between *Clementia Caesaris* and *publica clementia* was brought into the open. By endorsing the Stoic doctrine of the supremacy of the statutory penalty, Thrasea had displayed the 'true *humanitas*' to which Seneca himself had drawn attention (*Clem.* 2.5.3). That doctrine had certainly prevailed in this case. But Seneca, who was undoubtedly the author of Nero's plan, was not amused.

Nero's savage treatment of the Christians in 64 was a sharp reaction against what he had been taught, but this unpredictable individual had not finished his experiments with *clementia*. Acting on suspicions that Seneca was implicated in the conspiracy of Piso (AD 65), Nero sentenced him to *liberum mortis arbitrium*, a free choice of the manner of death. This order to commit suicide was considered a humane alternative (although elitist) to the terror and indignity of public execution.⁷¹ Nero also demonstrated his *humanitas* by preventing Seneca's wife, Paulina, from dying with him. Common though it was for spouses to die together, Nero said that he had no quarrel with her (Tac. *Ann.* 15.60–4). But so confused was his thinking that in 66, when the Stoic Antistius Verus and members of his family killed themselves in order to forestall trial by the senate, Nero arranged for the senate to try them posthumously and to sentence

them to death. This time no one proposed the statutory penalty, and Nero was able to veto the death sentence and to substitute *liberum mortis arbitrium*.⁷²

Clementia Caesaris: Domitian to Alexander

Competitive *clementia* was given a new twist by Domitian. Suetonius says that he never imposed a harsh sentence without a preliminary promise of *clementia*, so that the *lenitas* of his preambles came to be a sure indication of a cruel death. On one occasion he brought some men charged with *maiestas* into the senate and told the senators that this day would show how devoted they were to him. The senate took the hint and sentenced the men to death. Domitian expressed his horror at the cruelty of the sentence and vetoed it. Suetonius quotes his exact words:

Allow me, senators, to ask of your loyalty [*pietas*] something that I know I will only obtain with difficulty, and that is that you grant them *liberum mortis arbitrium*. You will thus spare your own eyes and everyone will know that I was present in the senate.

(*Dom.* 11.2–3)

Domitian had guarded against the dilemma that had defeated Nero. Where the latter had failed to get a sentence against Antistius Sosianus that he could veto, Domitian used a veiled threat to get what he wanted. And by having his attendance at the senate recorded he warded off any possibility of clemency being credited to *publica clementia* instead of to the emperor.

Domitian's programme of moral reform included matters that made contributions to *humanitas*, such as a ban on castration, restrictions on child prostitution, and very possibly a ban on circumcision.⁷³ The last-mentioned can perhaps be inferred by combining two pieces of evidence. First, the fact that Hadrian is known to have imposed a total ban on circumcision, which Antoninus Pius relaxed to the extent of exempting the Jews from the ban.⁷⁴ Second, that Suetonius, after observing that a tax on the Jews⁷⁵ was rigorously enforced, tells us that in his youth he was present when a man of ninety was examined to see whether he was circumcised (*Dom.* 12.2). This indignant comment can well mean that the Jews paid a tax in order to be exempted from a ban already in force. The old

man was suspected of hiding his circumcision in order to avoid paying the tax.

Domitian's arrangements had a mixed reception. The contemporary poet Statius was enthusiastic: 'Not yet had our ruler's fine clemency [*pulchra ducis clementia*] begun to preserve males as they had been born. Now it is a crime to shatter a sex or to change a man. His clemency rejoices to see men as nature produced them' (*Silv.* 3.4.73). But Juvenal satirised the whole idea of clemency: '[Judaea], the country where kings celebrate the sabbath and clemency allows pigs to reach old age' (6.156–60).

The second century displays an elaboration of existing arrangements rather than radical innovations. There are no further challenges to the emperor's *clementia* by the senate. Sometimes there is no progress at all. The absence of *clementia* from Trajan's coins is said to be consistent with the fact that Trajan did not fight any civil wars and was not called upon to save any citizen lives.⁷⁶ This agrees with the fact that the trials of the reign do not make a feature of the emperor's clemency.

Clementia on some of Hadrian's coins is no more than one of a group of stereotyped virtues.⁷⁷ For Hadrian's true humanity we must consult his legal rulings. He followed Domitian in reacting severely against mutilations of the human form, making both castration and the excavation of *thlibiae*⁷⁸ constructive forms of murder under the *lex Cornelia de sicariis*:

The penalty for making eunuchs or *thlibiae* is confiscation of property, but for slaves who perform the operation it is death. Governors must take such cases under advisement even if the victims remain silent, for they have lost their manhood [*virilitas*]. No one may castrate a free man or a slave, whether the victim is willing or unwilling. Nor shall anyone of his own accord offer himself for castration, on pain of a capital penalty. The physician who performs the operation also incurs a capital penalty.
(*D.* 48.8.4.2, 5 adapted)

The passage does not include circumcision, but it has been cogently argued that Hadrian also banned that practice.⁷⁹

Another example of Hadrian's clemency is the case of the father who, learning that his son had committed adultery with the stepmother, 'accidentally' shot the son while hunting. Hadrian

condemned it as the act of a bandit rather than a father; a father's power over his children should be based on piety, not savagery (D. 48.9.5). The ruling placed an important restriction on the traditionally unfettered power of life and death (*ius vitae necisque*) of a father over his children.

Respect for the human form as an aspect of *humanitas* continued to be enforced by Hadrian's successor, Antoninus Pius. He enacted (or took over from Domitian or Hadrian) a law punishing circumcision with the penalty for castration; the law exempted Jews.⁸⁰ He also found a way around the savage penalty for confessed parricides that had eluded Augustus. A senator who confessed was merely marooned on a desert island, and even that was only done because it was against the law of nature to let such a man live in comfort (on a more pleasant island) (*SHA Pius* 8.10). Pius is credited with a remark that could have been made by Terence. When the young Marcus Aurelius wept at the death of his tutor, Pius told the attendants: 'Allow him to be a man; neither philosophy nor empire can eliminate natural feelings' (*ibid.* 10.9). Again the link between *humanitas* and natural law. Pius presents as possibly the most liberal of the Antonines. It was no accident that located Aulus Gellius' great punishment debate in Pius' reign.

Marcus Aurelius is a difficult case. On the one hand he is identified with *humanitas-driven* interpretations of the law.⁸¹ He also gave practical expression to Seneca's principle of diminished responsibility when he ruled that a son who killed his mother in a fit of madness was sufficiently punished by his insanity, and needed nothing further except to be kept under restraint for his own safety and that of others.⁸² On the other hand, this rescript merely took a ruling by Pius a stage further,⁸³ and there are no other contributions by Marcus in the area of homicide, which was the chief repository of the penal reforms of his two predecessors.

The derivative nature of Marcus' punitive legislation is borne out by the literary texts. When we are told, for example, that Marcus punished all crimes with lighter penalties, but was sometimes implacable towards the manifestly guilty in serious cases (*SHA Marc.* 24.1), it is not clear whether he was following Seneca or overruling an Augustan precedent. In any event there was nothing original in it. The assertion that he scrupulously observed *aequitas* in his dealings with captured enemies (*ibid.* 24.3) is equally unhelpful. Even when Dio cites, as an example of this, Marcus' decision not to sentence Tiridates of Armenia to death, but merely to send him to Britain

(Dio 71 [72]. 14.2), this does not seem to represent any advance on Tiberius' treatment of Bato and Maroboduus. Similarly, the leniency shown to the accomplices of the usurper Avidius Cassius⁸⁴ was simply a continuation of Augustus' policy of saving the lives of citizens. Even the killing of Cassius himself is carefully described so as to preserve the image of benevolence: 'In accordance with his *clementia* he suffered, rather than ordered, Cassius' execution' (*Marc.* 26.10). Augustus had said much the same about Caesar's murderers.

If Marcus is to be credited with originality at all, it is as a synthesiser. His principal legal adviser, Volusius Maecianus, wrote the first, and most comprehensive, treatise on the public criminal laws in fourteen books; and Venuleius Saturninus wrote more compactly on the same subject in three books. These ventures into an untouched field will have owed their inspiration to Marcus.⁸⁵ It was also at this time that the first collection of emperors' decrees was compiled, when Papirius Justus assembled the decrees of both Marcus and Verus, and of Marcus alone.⁸⁶ The collection was not official, any more than the works of Maecianus and Venuleius were, but again the Stoic-king is the likely source of encouragement.

Humanitas and *clementia* had been professionalised by the Antonines. There is nothing of note to report about the first Severan dynasty, but there is something to be said about Severus Alexander. The jurist Ulpian, whose encyclopedic work included the reorganisation of the criminal courts from 222 until he was murdered in 228,⁸⁷ began redefining *humanitas Romana*. The redefinition was built around a new set of catchwords that did not quite replace *humanitas* and *clementia* but provided an alternative label.⁸⁸ Alexander's rescripts, as drafted by Ulpian, employ expressions other than *pro humanitate sua* as canons of interpretation. Thus, 'charges of *maiestas* are in abeyance in my age—*meo saeculo*'; to misinterpret an act as *maiestas* 'is alien to my school of thought—*aliena sectae meae*'; capital charges against one's mother are not allowed 'by my school—*secta mea*'; the (relatively mild) penalty for adultery 'accords with the chastity of my times—*castitas temporum meorum*'.⁸⁹

Ulpian was no longer using the word *humanitas* in his own writings.⁹⁰ He led the way in giving punishment a degree of systematisation and rationalisation that left no room for sentiment.⁹¹ This was not entirely new. We recall Seneca's judge who pronounces sentence of death without any sign of emotion (*Ira* 1.16.3–6). But Seneca at least fulminates against brutal punishments, whereas Ulpian draws fine legal distinctions that have no basis in *humanitas*. For

example, he writes that although those guilty of *sacrilegium* (temple-theft) have been thrown to the beasts, burnt alive or suspended from the fork, the penalty should be moderated (*sic*) to a maximum of being thrown to the beasts (D. 48.13.7). This was not because it was more humane, but because it was better placed to satisfy the insatiable demands of the games.⁹²

Evaluation

The first half of the chapter is dominated by *clementia* and *humanitas*, with Gellius' debate in a useful supporting role. Pliny's Trajan is of interest as an essay in theoretical *humanitas*, though not entirely in touch with the real world. The second half opens up new aspects: (i) *clementia* as a prime virtue of the emperor; (ii) its systematisation by Seneca; (iii) its preoccupation with the integrity of the human form from Domitian to Pius; (iv) its redefinition by Ulpian and Alexander. In the third of these aspects Rome outdoes the modern world.⁹³ The fourth helps to explain the absence of *humanitas* from Alexander's biography.

THE NEW IMAGE OF HUMANITAS: PART TWO

Curbs on rapacity: jurisdiction

Most of the rules regulating the *repetundae* process in the Principate were drawn, either directly or by interpretation, from Caesar's *lex Julia repetundarum* of 59 BC.¹ That law was defined by the classical jurists as covering any improper receipt or acquisition of money by anyone occupying an official position or by any associate of such a person.²

It was, however, not only the law that the Principate inherited from the Republic. There was also a legacy of problems. The jury-court for *repetundae* suffered from even more serious delays than the courts for other crimes. This was due to the twofold nature of the process. After reaching a verdict on the merits, that is, on the culprit's guilt as a whole, the jury moved on to the second phase, the *litis/litium aestimatio* at which the amounts to be repaid to complainants were assessed. This part of the case was particularly time-consuming. Another inconvenience was the need to hear witnesses from distant provinces. There was no system of circuit courts, and witnesses had to be brought to Rome. Yet another problem arose when excessive cruelty (*saevitia*) surrounding the exactions brought into play a capital penalty in addition to the pecuniary assessment.

In 4 BC the emperor Augustus took steps to rectify some of the problems, to put a more positive spin on *humanitas Romana* vis-à-vis non-Romans. He wanted to reinforce the welfare of the allies of the Roman people (= provincials), to ensure that 'none of our subjects' suffered any improper treatment or exactions.³ He therefore arranged for the senate to enact the *senatus consultum Calvisianum*.⁴

The primary purpose of the *senatus consultum* was to speed up the assessment part of a case.⁵ Provision was made for the selection

of five senators to act as assessors. The selection process was triggered by provincials lodging claims with a magistrate⁶ for repayment of moneys that had been exacted. Claims were lodged either by individuals or by communities,⁷ the latter the forerunner of the modern class action. The magistrate brought the matter before the senate, after appointing a person nominated by the claimants as *patronus* to speak for them. After an elaborate process of selection,⁸ five senatorial *indices* were appointed. Their only function was to enquire into the claims and to order the exactor to repay the sums found to have been exacted. Each *iudex* had to announce his findings in open court, and the majority decision prevailed. The decision had to be given within thirty days; to help them meet the deadline they were excused all public duties except worship. The magistrate handling the matter presided over their deliberations and granted permission to summon those witnesses who were in Italy, allowing not more than five subpoenas to private claimants, and ten to communities.⁹

One difficulty is raised by the new arrangements. What happened when *all* the witnesses were outside Italy? If we suppose that they were expected to attend voluntarily, we run up against the reasons for the reform as given in the preamble to the senate's decree:

Although our ancestors passed *repetundae* laws, the senate wishes to make it easier for *allies* to prosecute wrongs done to them and to recover moneys exacted, since cases of this kind can be very expensive and troublesome, requiring witnesses, including the poor, the sick and the aged, to be dragged from distant places.

(*FIRA* 1.410–11, vv. 94–5)

Our first thought is that the limit on the number of subpoenas only applied to witnesses who were in Italy. But this negates the fine humanitarian sentiments expressed by the preamble, for it leaves the poor, sick and aged in distant places without the very relief that they were meant to receive. There is nothing to suggest that the five-man panel went out to the provinces to take evidence. The best guess seems to be that written depositions were taken by the governor's staff and forwarded to the panel in Rome, reserving the more satisfactory procedure of *viva voce* evidence for witnesses in Italy who could come to court more easily. Writtendepositions are common enough to make this solution a feasible one.¹⁰

The five-man panel carried out both phases of a *repetundae* trial, namely the finding on the merits and the assessment. But this was only where there was no question of a capital penalty for *saevitia*. At some point of time the senate began exercising jurisdiction on the capital aspect as well, but whether this was authorised by the *Calvisianum* or came about in some other way is a moot point.¹¹ The most that can be said is that from an early date the senate exercised all the functions that had hitherto been the exclusive preserve of the jury-court for *repetundae*. But contrary to a widespread belief, the jury-court was not supplanted by the senate.¹² It continued to operate at least until the early second century. The proof is supplied by Pliny. He speaks of ‘the praetor Nepos who holds court under the laws’ (*qui legibus quaerit*). Nepos had given notice of his intention to enforce the ban on the acceptance of fees by counsel. Advocacy was a *munus*, an official position for the purposes of the *repetundae* law, and Mommsen identified Nepos as president of the jury-court for that crime. An alternative possibility is that by this time a number of courts had been amalgamated under a single praetor. Either way Pliny’s evidence confirms the survival of the jury-court into Trajan’s reign.¹³

There was accordingly a twofold *repetundae* jurisdiction in the first and early second centuries. But it was not, strictly speaking, a concurrence of jurisdictions. It was more of a divided function. The jury-court was confined to offenders of sub-senatorial status.¹⁴ There were more than enough sub-senatorial pleaders whose acceptance of fees could have exposed them to Nepos’ edict.¹⁵ Offenders of senatorial status had their cases handled by the senate.¹⁶

This is as far as we need take the jurisdictional basis of *repetundae* trials in the Principate. We therefore move on to the cases and the principles to be extracted from them.

Curbs on rapacity: some cases

We open our account with Volesus Messalla who governed Asia in 11/12 AD. He beheaded 300 people in one day and strutted arrogantly among the corpses as if he had done a glorious deed, crying out in Greek, ‘What a regal act!’ (*O rem regiam!*). Seneca compares him with Hannibal, who on seeing a trench flowing with human blood, exclaimed, ‘What a beautiful sight!’ (Sen. *Ira* 2.5.4). Messalla seems

to have conducted a thriving trade in corrupt condemnations in breach of Caesar's *repetundae* law.¹⁷ Augustus sent a memorandum to the senate, and Messalla was put on trial on a charge of aggravated extortion, with overtones of *maiestas minuta*.¹⁸ The senate sentenced him to interdiction followed by exile; the case was later cited as an *exemplum* by Tiberius.¹⁹

Asia, the hope and despair of Rome's investment in Greek *humanitas*, was again prominent in AD 22 when C.Silanus, a former governor, was brought before the senate. A working model of this seminal case²⁰ has the provincials lodge charges of extortion. Their *patroni* tell the senate that Silanus has violated Augustus' *numen* and spurned Tiberius' *maiestas*.²¹ They cite as *exempla* the ancient cases of L.Cotta accused by Aemilianus, Servius Galba by Cato the Censor, and P.Rutilius by M. Scaurus.²² Having thus brought *repetundae* and *maiestas* into congruence, the *patroni* arrange for the examination under torture of Silanus' slaves.²³ The forces arrayed against the accused are augmented by a team of expert speakers from Asia,²⁴ and the hostility of many senators is brought to the boil by a deadly cross-examination by Tiberius. With no one prepared to speak for him,²⁵ Silanus finally throws in the towel and abandons his defence (Tac. *Ann.* 3.67.2–4).

The senate then addresses the question of punishment. Tiberius orders the papers in Messalla's case—Augustus' memorandum and the senate's verdict—to be read as an *exemplum* (ibid. 3.68.1). The senate decrees interdiction and banishment to an island; Tiberius displays *moderatio* by proposing that the pleasant island of Cythnus be substituted for the forbidding Gyarus which lacks the company of men.²⁶

Silanus' trial was a test case, perhaps the most important in the Principate. It placed a capital penalty for aggravated extortion on a firm footing. But there is one thing that Tacitus does not tell us, and that is whether any restitution to the provincials was ordered.²⁷ Presumably he did not think it necessary to deal with it, but in a subsequent case he makes an extraordinary statement. In 24 C.Silius, a former legate of Upper Germany, was put on trial. Both treason and extortion were alleged against him:

He was charged with connivance in Sacrovir's rebellion [in Gaul] and with ruining his victory over Sacrovir by greed [*victoria per avaritiam foedata*]. His wife was charged with him. They were undoubtedly guilty of

repetundae, but the whole case was conducted as a trial for *maiestas*.²⁸

Tacitus enlarges on the *maiestas-oriented* character of the case. After noting Silius' suicide prior to a verdict, he says that execution was levied against Silius' property, 'but this was not done in order to make restitution to provincial taxpayers,²⁹ none of whom had lodged claims' (*quorum nemo repetebat*); the purpose was to recover gifts given by Augustus (*Ann.* IV 19.5–20.1). In other words, Silius' treasonous conduct was taken as disloyalty to the regime. Ingratitude was a ground for revocation of a gift in private law; it was now being given a public application. But the *avaritia*, which had taken the form of an increased levy of tribute on the Gauls,³⁰ had not evoked any claims for restitution. Yet the indictment had in fact included specific charges of *repetundae*; Tacitus says they were undoubtedly caught up in the *repetundae* charges—*repetundarum criminibus haerebant* (*Ann.* 4.19.5). But how did such charges come to be framed by people who did not lodge claims? The answer may be that the *patroni*, and no one else, were responsible for the inclusion of charges of *repetundae* in this specialised form.³¹ To adapt what Tacitus says elsewhere of the *lex maiestatis*, the *lex repetundarum* was growing up.³²

A year before Silius' case Tiberius had cleared up a problem that had worried Augustus. In 26 BC the latter had complained bitterly about the senate's interference in the case of Cornelius Gallus, who as Prefect of Egypt was the servant of the emperor rather than of the Roman people (*Suet. Aug.* 66.2). Now, in AD 23 when L. Capito, Procurator of Asia, was accused of *repetundae* by the province, Tiberius declared that he had only given his agent authority over imperial slaves and revenues; if Capito had gone further than that the provincials must be heard, and the trial must take place in the senate.³³

In recognition of the steps taken against Silanus and Capito, Asia erected a temple to Tiberius, Livia and the senate (*Tac. Ann.* 4.15.5). The honour acknowledged Tiberius' completion of a crucial phase in the consolidation of remedies for non-Romans. The rest of the Julio-Claudian period witnessed a change in the centre of gravity. For the first time the spotlight was on domestic, rather than external, *repetundae*. When Claudius' senators called for the revival of the *lex Cincia* of 204 BC in order to control the exorbitant fees paid to court pleaders, the emperor refused to revive the total ban. He merely

laid down a ceiling of 10,000 sesterces; only payments above that would fall under the *repetundae* law (Tac. *Ann.* 11.7.8). Claudius was even more lukewarm about external *repetundae*. P.Suillius, who accumulated a vast fortune in counsel's fees, probably held office as governor of Asia under Claudius rather than Nero.³⁴ But it was only in Nero's reign that he was prosecuted. And even then the provincials' complaints were postponed for a year to enable evidence to be collected.³⁵ Meanwhile domestic charges of *repetundae*, for which witnesses were available,³⁶ were brought to trial and Suillius was exiled. But Nero vetoed an attempt to charge his son with *repetundae*.³⁷ There are other instances of indifference to the interests of provincials by the last two Julio-Claudians. Claudius absolved Junius Cilo, governor of Bithynia, of charges of *repetundae*; and Nero, being precluded by the weight of evidence from showing clemency to P.Celer, former governor of Asia, delayed the case until Celer died of old age.³⁸

Seneca was involved in *repetundae* matters. He tried to have Suillius charged while Claudius was still on the throne; under Nero, Suillius tried to talk himself out of trouble by vilifying Seneca (Tac. *Ann.* XIII 42.1–3, 43.1). Then, under AD 64 Tacitus notes that 'Italy was ransacked for funds and the provinces were ruined, both subject provincials and free communities'. The depredations included despoiling temples in Rome and plundering religious institutions in Asia and Greece. Seneca tried to avoid the odium of this sacrilege by retiring to the country, but permission was refused (ibid. 15.45).

Remedies for non-Romans moved back into top gear after the end of the Julio-Claudian dynasty. As with *clementia*, the revival starts unexpectedly with Domitian. Suetonius has him judging cases in public in the Forum, and getting the senate to appoint jurors for the trial of a corrupt aedile accused of *repetundae* (Suet. *Dom.* 8.2). Suetonius pays Domitian a glowing tribute: 'He exercised restraint over urban and provincial magistrates with such care that they were never more moderate or just; since his time we have seen many of them charged with various offences' (ibid.). But one wonders what gave Suetonius the idea of honest officials. Was he not in Rome in 93, when Pliny represented the provincials of Baetica against the former governor, Baebius Massa? The case was something of a *cause célèbre*, for when Massa's property was sequestered to secure payment of provincials' claims, Pliny's co-accuser Herennius Senecio earned himself a criminal charge by impugning the consuls' honesty:

he asked them to make sure that the property was safe while in public custody (Plin. *Ep.* 7.33).

Trajan's reign provides us with our most detailed information about extortion trials in the Principate. This is because of four trials in which Pliny appeared—for the provincials against Marius Priscus and Caecilius Classicus, and for the defence on behalf of Julius Bassus and Varenus Rufus.³⁹ We begin with Priscus and Classicus. In 97–8 Priscus was governor of Africa, while Classicus governed Baetica in the same year. After the completion of their tours of duty they were charged with *repetundae*; Priscus' trial preceded that of Classicus.⁴⁰

Pliny opens his account of Priscus' trial with the observation that it is a major example of severity in the interests of public *maiestas* (*Ep.* 2.11.1). Complaints having been lodged by the Africans, the senate assigned them Pliny and Tacitus as their *patroni*. Priscus made no defence to the claims for repayment and asked that *iudices* be appointed.⁴¹ But Tacitus and Pliny told the senate that by his inhuman cruelty (*immanitate et saevitia*) Priscus had exceeded the limits of a simple procedure for restitution; he had taken bribes to convict innocent persons, even to sentence them to death (*Ep.* 2.2.2–3). In effect this repeated the position in Silius' case: the provincials were only interested in restitution; the *patroni* took it on themselves to raise the capital issue.

There was a heated debate on the issues raised by Tacitus and Pliny. Priscus' counsel argued that the senate's powers were limited by the *lex repetundarum*,⁴² but other senators claimed that the senate's jurisdiction was free and unrestricted, authorising the punishment of the accused for everything that he had done. It was eventually decided that in the meantime *iudices* be appointed to make an assessment, but that those who had paid Priscus for corrupt condemnations be summoned. In other words, that evidence of *saevitia* be gathered.⁴³

Two of those who had given bribes, Honoratus and Marcianus, were summoned. They were charged with paying Priscus 300,000 and 700,000 sesterces respectively for corrupt sentences. Honoratus had secured the exile of a Roman knight and death sentences against seven of his friends; Marcianus had had a Roman knight flogged, condemned to the mines and strangled in prison. Honoratus committed suicide before he could be put on trial, but Marcianus came to court. But as Priscus was not present, the hearing was adjourned to the senate's next meeting (*Ep.* 2.11.8–10).

The trial was duly held in January 100, with Trajan presiding. He happened to be consul at the time, but his presidency was deliberately arranged for what was undoubtedly a test case. Priscus was of very high status, having held the consulship and a major priesthood (ibid. 2.11.12). Speeches were made by Pliny, Tacitus and defence counsel (2.11.14–18), after which proposals on sentence were addressed. A suggestion that no further penalty be imposed on Priscus apart from the recuperatory assessment was rejected. It was resolved that Priscus pay the 700,000 sesterces into the treasury and be exiled from Rome and Italy. Marcianus was exiled from Rome, Italy and Africa (2.11.19–22). Priscus' deputy (*legatus*), Hostilius Firminus, who had given substantial assistance to his commander, was tried at a subsequent session and sentenced to lose his eligibility for a provincial governorship. This was considered more lenient than expelling him from the senate, though Pliny did not agree (2.11.23–4, 12).

The main importance of Priscus' case lies in the decision to make both restitution and capital punishment components of a single, overall offence. They had been working towards this in cases ranging from Volesus Messalla to Baebius Massa, but only now was the whole question debated and decided. It should not be brushed aside as a careless violation of the rule against double jeopardy.⁴⁴ Modern courts award compensation to victims at the same time as they impose criminal punishment on offenders. It is considered a feature of human rights. It was inherited from Rome.

Caecilius Classicus' trial, shortly after that of Priscus, introduced something of an innovation. The complaints against Priscus had been partly a class action, having been lodged by some individuals and by one community, the city of Lepcis in Africa, but Classicus' case went further. Classicus was charged by the whole province of Baetica, thus confirming a precedent that had been established for that province in Baebius Massa's case.⁴⁵ In Classicus' case the province requested the senate to appoint Pliny as its *patronus*. Classicus died before the trial.⁴⁶ The Baetici continued the action, thus reviving what Pliny considered a lawful but lapsed practice.⁴⁷ Charges were also brought against Classicus' associates. In order to lay a foundation for that Pliny had to establish the deceased Classicus' guilt. He did this by producing Classicus' detailed accounts, together with a letter that Classicus had written to his mistress: 'Ho, ho, I'm coming home to you free of debt; I've raised four million by selling up half of Baetica.'⁴⁸

The position of Classicus' associates raised a question. Some of them admitted the facts, but pleaded that as provincials themselves

they had acted under duress. Pliny managed to defeat this contention (*Ep.* 3.9.4–6). The senate ordered that the property owned by Classicus prior to his governorship be given to his daughter. The balance was to be divided among his victims; money that he had paid to his creditors was to be recalled and added to the amount available for distribution. Most of the associates were sentenced to exile (*Ep.* 3.9).

Julius Bassus was tried some two years after Priscus and Classicus. Pliny appeared for the defence. Bassus was acquitted of the charges, which related to his governorship of Bithynia (*Ep.* 4.9). Four years later, when defending Varenus on charges laid by the same Bithynians, Pliny established a new principle. He got the right to an adjournment to collect evidence, always available to the prosecution, extended to the defence. The tactic seems to have paid off, for when Trajan personally took over the case on his return from Dacia, doubts were expressed as to whether the province was still of the same mind. Those doubts will have been fuelled by what Pliny had found out in the province. Trajan undertook to find out the wishes of the provincials, but nothing more is heard of the case.⁴⁹

Trajan's reign gave the *repetundae* process in the external sphere its definitive shape. Some of the great evils of the past had, of course, ceased to be a problem long before this. There is no trace of depredations of genocidal proportions in the Principate.⁵⁰ Henceforth it was a question of a more professional approach. Combating extortion was still important after Trajan, but the evidence is so flimsy that the *Augustan History's* detailed summary of Marcus' reforms has only one dubious reference to *repetundae*.⁵¹ Nor does the evidence, such as it is, indicate any important advances in law or principle. Just about the only point of interest is the unusually high proportion of verbatim citations of the *lex Julia*;⁵² the classical jurists cite no rulings by emperors, and only a handful of their own opinions.⁵³ Even more surprisingly, the *Sentences of Paul*, which reflects the position in c. AD 300, includes only one trivial notice of *repetundae* (*PS* 5.28), compared with the same work's copious material on the other criminal laws. It is not until the Later Empire that interest in *repetundae* seems to revive. The earliest constitutions in the late imperial codes date to the late fourth century (*CTh* 9.27.1, *CJ* 9.27.1).

Universalism: the merits

Terence is the earliest Roman writer to have addressed the idea of universal *humanitas*.⁵⁴ Cicero gives shape and substance to the notion,⁵⁵ especially in his classic definition of Italian patriotism as loyalty to both the common *patria* and one's place of birth (*Leg.* 2.5). But ambivalence⁵⁶ tells against wholehearted universalism on Cicero's part. Caesar also contributed, though how far his *clementia* operated in the external sphere is uncertain.⁵⁷ In any event the idea of Universal Rome, of *Pax Romana*, is so essentially a feature of the Principate⁵⁸ that it is best considered in that context.

The idea of Universal Rome evolved gradually over the period from Augustus to the Antonines, as the emperors moved steadily towards the virtual abolition of the distinction between Italy and the provinces.⁵⁹ By about the mid-second century AD Rome was everywhere. Universal Rome was the *communis patria*, the common fatherland of almost the entire Mediterranean world. The multicultural impulse in which Rome always outstripped Greece was eloquently described by a Greek-speaking Roman in the mid-second century:

Most unique and marvellous of all is the grandeur of your citizenship. You have divided all the people of the empire—which means the whole world—into two classes. The more cultured, better born and more influential everywhere are Roman citizens; the rest are subordinates and subjects. The state is universal, with common laws [*nomoi koinoi*], magistrates who treat the governed not as foreigners but as their own people, and swift punishment for corrupt officials. That there were ever wars is now doubted; to most people they are mere legends.

(Aelius Aristides, *Panegyric to Rome*, 59–60, 63–71, 102 adapted)

Aristides' message reached Edward Gibbon 1,600 years later and 'The Golden Age of the Antonines' was born.

The Roman global village was not built in a day. Augustus made peace one of the ideological pillars of his regime. The much-publicised erection of the *Ara Pacis*, the Altar of the Augustan Peace, in 13 BC signalled that war, and with it any extension of the empire's existing boundaries, was no longer in favour as an instrument of national

policy.⁶⁰ Clemency was even extended to defeated enemies, albeit in a qualified form.⁶¹ The policy of keeping the empire within its existing boundaries⁶² gave citizenship a certain scarcity value, a feeling of belonging to an exclusive club. Claudius took practical steps towards creating the conditions that fostered such sentiments,⁶³ but the most important thoughts on universalism in the first century were formulated by Seneca:

To worship the gods we must believe in them and in their *maiestas*—and in their goodness without which there is no *maiestas*. We must know that they preside over the universe [*mundus*], controlling all things and acting as guardians of the human race. But how are we to deal with men? We live in common, in a society which judges certain rights as common to the human race [*iudicat aliquod esse commune ius generis humani*], so much so that acts that can be classed as wrong even when done to an enemy. Here is a rule of thumb for human relationships: everything that you see, both divine and human, is one, we are the parts of one great body. We are all blood relatives, created by nature from the same source and for the same purpose. She has endowed us with mutual love, sociability and helpfulness. Let us possess things in common, for our birth is common. Let this line be in our hearts and on our lips: *Homo sum, humani nihil a me alienum puto*.⁶⁴

The concluding quotation confirms, as already observed, that Terence indeed had universalism in mind when he wrote his famous line.

Elsewhere Seneca says that one need not repay a benefit received from someone who feeds on human blood, because he severs the bonds of human rights (*iuris humani societates*). ‘Even if such a person assails his own country rather than mine, which means that he is not my personal enemy, his depravity makes him hateful to me and obliges me to fulfil the duty that I owe to the entire human race’ (*Ben.* 7.19.8–9).

In a notable passage Seneca encourages Nero to give practical effect to universalism:

The emperor’s reluctance to sign death warrants even for convicted criminals should be made known to all nations, both inside and outside the empire. It should have been

announced at a gathering of all mankind, princes and kings should have sworn allegiance to Nero's proclamation of the public innocence of the human race. His kindness [*mansuetudo*] will gradually be diffused throughout the empire.⁶⁵

Cicero, we recall, had also predicted the eventual triumph of *humanitas* throughout the world, though he did not expect it to happen in his time.⁶⁶

The Senecan tradition was exploited by Galba, who was called to rule by the consent of gods and men, by the consent of the human race (Tac. *Hist.* I 15.1, 30.2). The idea is prominent in the elder Pliny:

Italy, chosen by the gods to unite scattered empires, to make manners gentle, to foster uniformity of language, to give man *humanitas*—in short, to become throughout the world the single fatherland of all races. The welfare of mankind is due to the vast majesty of the Roman Peace; the gods gave Romans to humanity like a second sun.

(*NH* 3.39, 27.3)

The younger Pliny saw universalism as a powerful weapon in Trajan's humanitarian armour:

You are the father of the human race and its protector and benefactor. When you became emperor you saved the empire. The protection and security of mankind depended, and continue to depend, on your safety. Speaking as consul on behalf of all humanity, I call on the gods, the governors and guardians of our empire. Good emperors are loved for their benefits to the human race as a whole rather than to individuals.⁶⁷

On the practical side the Antonine emperors gathered together the threads and put Universal Rome on a firm basis. The principal architect of this policy was Hadrian, the most important continuator of the Augustan Peace since Augustus himself. He was motivated by social and economic realities, and above all by strategic considerations. Trajan's expansionist policy was already showing signs of strain (*SHA Hadr.* 5.2); the sword was not the best instrument

of universalism. Hadrian was also imbued with a strong philhellenistic bent, as well as a sort of intellectual universalism that chimed well with practical needs.⁶⁸ His physical presence in the East for prolonged periods generated a torrent of governmental activities, especially through the law.⁶⁹

Hadrian reshaped and centralised the empire's legal system⁷⁰ and made it a pliable instrument for the Romanisation of the Greeks. Roman law, as he sent it down to posterity, was well on the way to becoming the juristic *lingua franca* of the Mediterranean world.⁷¹ Hadrian's policies were largely carried out by the jurist Salvius Julianus. He codified the praetor's edict in the interests of centralisation; he rewrote the laws of Athens, adding a patina of Roman law to her traditional customs; and he laid down as an empire-wide criterion that if no solution to a problem was provided by customary law, 'the law of the City of Rome, the capital of the world, should be consulted by all communities'.⁷² As already observed, Julian was in the forefront of the jurists who made *humanitas* a canon of interpretation. Nothing could so effectively stimulate an awareness of membership of the same club as the law, which nearly everyone's daily affairs obliged them to consult. Aelius Aristides knew exactly what he was saying when he wrote about *nomoi koinoi* and magistrates who dispensed justice to subjects as if they were their own people.⁷³

Hadrian's successors built on his foundations, but without contributing much in the way of innovations⁷⁴ until the Severan period, when a stroke of the emperor Caracalla's pen conferred citizenship on all free inhabitants of the empire.⁷⁵ But by this time the distinction between Romans and non-Romans was largely academic. Elitism dominated the world of Aristides, as it had always dominated the world of Rome. Aristides' Romans were 'the more cultured, better born and more influential everywhere', irrespective of racial or linguistic differences, and largely irrespective of whether they were citizens or peregrines.⁷⁶ The second century saw the formalisation of a new dividing-line in society, between the *honestiores*, 'the more respectable' covering everyone of the better sort, and *humiliores*, 'the more humble' which covered the rest.⁷⁷ Therefore when Caracalla lowered the citizenship barrier almost to ground-level he put the final point to something that had ceased to matter. But from the human rights point of view the triumph of elitism was bad news. It is to that question that we now turn.

Universalism: the demerits

The second century saw the formal recognition of differential punishments based on status. That status was defined in terms of the distinction between *honestiores* and *humiliores*.⁷⁸ Capital punishment for *honestiores* took the form of exile rather than death for most crimes; and where death was still decreed the offender was often spared the horror of public execution by being allowed to choose the manner of his death, that is, to commit suicide in private. But for *humiliores* punishment remained firmly geared to actual death. Worst of all, the standard form of execution by public decapitation, which society had always considered a proper way for a free man to die,⁷⁹ was largely supplanted by more brutal forms that had hitherto been used only against slaves. To mention only the most ‘popular’, free persons were now thrown to wild animals in the arena, burnt alive, crucified or forced to fight as gladiators. A typical legal text of the period runs as follows:

The penalty laid down by the Cornelian homicide law⁸⁰ is deportation to an island.⁸¹ But nowadays⁸² capital punishment is usual, except for those whose status is too high. *Humiliores* are usually crucified or thrown to the beasts, those of higher status are deported to an island.
(D. 48.8.3.5).

The reasons for the distinction were partly sadistic and partly commercial. Deriving pleasure from cruelty may have been condemned by Seneca,⁸³ but it was a fact of Roman life. It might however have been curtailed had it not been for the games. That industry had to keep on furnishing enough entertainment to satisfy the public demand, and the supply of condemned criminals had to be kept up.⁸⁴

Nevertheless there was some light in the tunnel. The fully-fledged criminal jurisprudence that emerged in the second century featured the replacement of fixed statutory penalties by discretionary sentences. Discretion could move either towards or away from leniency, and the latter included discrimination against *humiliores*. But there were also moves towards leniency. Under the principles of clemency enunciated by Seneca even the humble offender could hope for a lesser sentence than death if the facts warranted it. The lawyers therefore explored punishments which, even though still capital,

stopped short of actual death. The offender might be sent to the mines, and a graduated scale determined whether he stayed there for life or for a period. Even the impact on civic status was carefully worked out. Where a woman was consigned to the mines for the convenience of the convicts, she retained her citizenship if she was only consigned for a period, but she lost it if she was consigned for life (D. 48.19.8.8). Sometimes even more subtle distinctions were drawn. A sentence to fight at the games might be expressed as *in gladium* ('to the sword') or *in ludum* ('to the games'). In the former case the offender had to be killed within a year. But in the latter case the entrepreneur to whom he had been consigned might keep him in reserve, depending on his schedule of commitments. If the offender was not called on within three to five years, he was entitled to his freedom (*Coll.* 11.7.4).

Subtle distinctions like these were unknown in the Republic, but they took up a great deal of the jurists' time in the Principate. The results were sometimes generous and sometimes bizarre, but they were always an expression of *humanitas Romana*.

Freedom of speech

In the broader sense this topic is almost as comprehensive as *humanitas* itself. The value known as *libertas* could apply to any of the following: participation in the process of government by everyone; the restriction of such participation to a privileged elite; the absence of *humanitas-negating* acts of governmental oppression; the absence of restraints on intellectual activity and freedom of thought; the status of a free person rather than that of a slave; and the simple absence of physical restraints on individual freedom of movement.⁸⁵

Our focus will be on the absence (and later presence) of restraints on intellectual activity/freedom of thought. Our specific focal point is freedom of speech, which broadly corresponds to the *Universal Declarations* 'right to reputation and opinions'.

In a well-known passage Tacitus criticises Tiberius for having enforced the *maiestas* law, and says that he forfeited the right to be seen as a protagonist of *humanitas*.⁸⁶

That law had the same name in the Republic, but quite a different scope. It covered acts, such as betrayal of an army, incitement of the plebs and maladministration of

public affairs. But it did not apply to words. Augustus was the first to take judicial action against defamatory writings under the *maiestas* law, prompted by Cassius Severus' scurrilous attacks on eminent men and women. Next, Tiberius ruled that the *maiestas* law was to be enforced. He, too, was vexed by anonymous pamphlets about his cruelty and arrogance and his disagreements with his mother.⁸⁷

One or two examples of the lampoons circulating against Tiberius and his mother, Livia, will serve to illustrate the sort of mischief that the regime wanted to suppress. 'You cruel and merciless man! I'll be damned if even your mother loves you!' Also, 'You are no knight; you do not possess the hundred thousands. If you must know, you were an exile at Rhodes. He who comes to the throne from exile always drenches his reign in blood' (Suet. *Tib.* 59.1–2). The compressed subtleties of the lampoonist are quite remarkable. Tiberius is not even a knight because he does not possess property of 400,000 sesterces, which was the minimum for equestrian status. In other words, as the adopted son of Augustus he owns no property in strict law. In fact he is not even a citizen, for his withdrawal to Rhodes (6 BC–AD 2) was exile. Of course it was not—only exile following a criminal conviction involved loss of citizenship—but the scribbler was not concerned with such niceties.

The essence of the change in the *maiestas* law was the attachment of a criminal penalty to defamation. In the Republic defamation had been a delict, a civil wrong generating a claim for pecuniary damages; but there had been no criminal sanction.⁸⁸ Even the civil remedy was circumscribed. Attacks on character were a standard manoeuvre in both political debate and trial proceedings. To cite only one of the innumerable Ciceronian examples, in 44 BC after Caesar's murder the great orator delivered in the senate a series of scathing verbal assaults on Caesar's lieutenant, Mark Antony. In one of these *Philippics* Cicero addressed the following remarks to Antony:

You utter madman! You practise declamation to evaporate your wine, not to sharpen your wits. When your boyhood ended you assumed a man's toga but turned it into a woman's gown. You were intimate with Clodius and attempted a certain act at his house. After joining Caesar you became bloated with the proceeds of your robberies.

You became a tribune in order to share a magistracy with your husband [C.Curio].

(Cic. *Phil.* II 42, 44, 48, 50)

Antony retaliated in kind, but took his ultimate revenge as triumvir in 43, when he had Cicero killed in the proscriptions.

The free climate of the Republic also permitted aspersions to be cast by actors, as long as the victim was not identified by name.⁸⁹ Most striking of all, scurrilous pamphlets were a feature of the Republican literary scene. We possess the vituperative lampoons that Cicero and Sallust are supposed to have hurled at each other. They were probably the work of hacks using the names of prominent figures whose real enmity was known from their opposing positions in the Catilinarian debate,⁹⁰ but they illustrate the complete absence of restraints at that time. The invective against Cicero has such choice phrases as ‘You think one thing about the Republic when you stand up, another when you sit down. You revile some and hate others, a turncoat showing loyalty to neither one side nor the other.’ Cicero is represented as retaliating with ‘Your lifestyle is similar to your words, you say nothing so foul that your conduct from earliest childhood does not match it with every kind of vice.’ The lampoonist had obviously read Cicero’s denunciations of Antony. As always, the motives were political, as they were in yet another device, that of lodging a false criminal indictment purporting to have been signed by a well-known public figure.⁹¹

These various forms of character-assassination display the Roman equivalent of the media at work in the sphere of public life. They were so much part of the landscape that no one found it necessary to talk about them. When the young Cicero defended Sextus Roscius on a charge of parricide in 80 BC, he considered it his simple moral duty to attack members of Sulla’s faction even though he knew that he was virtually attacking the feared dictator himself (Cic. *Off.* 2.51). There were occasional reactions against this freedom, but none outside the parameters of the public interest doctrine that always had a braking effect on *humanitas*.⁹²

A special freedom existed between Caesar and his army. Caesar was attacked on all sides for his special relationship with king Nicomedes of Bithynia, and for his liaisons with women. When he celebrated his Gallic triumph his soldiers marching in the procession sang ribald songs about him: ‘Caesar conquered Gaul, but Nicomedes conquered him. But now Caesar rides in triumph, not Nicomedes’;

and ‘Citizens, put your wives away, the bald adulterer’s here today’ (Suet. *Caes.* 49.4, 51).

But eventually the liberal Republic disappeared, and the new order brought the dissemination of information and opinions under a new set of rules. The criminalisation of anonymous pamphleteering was the first step. Augustus’ immediate purpose was to seek out the anonymous authors and to destroy the offensive material.⁹³ But ‘the burning of the books’ was anything but a routine measure. It signalled the start of censorship and thought control. The new technique had an exceptional potential for growth, spreading rapidly beyond the modest confines of pamphleteering. As early as AD 25 Cremutius Cordus was charged with publishing a history in which he had praised Caesar’s murderers, Brutus and Cassius, and had called Cassius ‘the last of the Romans’. In other words, the work had extolled the Republic at the expense of the Principate.⁹⁴ At his trial Cordus delivered a stirring defence of freedom of speech:

It is my words that are attacked, so innocent am I of deeds. But those words were not aimed at the emperor or his parent, who are protected by the *maiestas* law. I praised Brutus and Cassius, but many have spoken well of them without suffering for it. Caesar did not resent Cicero’s praise of Cato or the poems of Bibaculus and Catullus, nor did Augustus take umbrage at the false allegations in Antony’s letters and Brutus’ speeches.⁹⁵ Those rulers tolerated such things, displaying both moderation and wisdom. The Greeks were tolerant of attacks on those whom death had placed beyond censure or praise. It is not as if I am stirring up the populace to take up arms on behalf of Cassius or Brutus, both dead these many years. All that I claim is the right to remember them as an historian.⁹⁶

Cordus also mentioned that he had read the work to Augustus during the latter’s lifetime. But Tiberius’ senate was unmoved, and Cordus went on a terminal hunger-strike. The senate ordered that his works be burnt. But there was an unexpected sequel. Cordus’ daughter Marcia managed to save a copy, and the work was republished by order of Caligula, though only in the form of an abridgement; and even then it was noted for its ‘daring opinions’.⁹⁷ The relaxation of censorship was hailed by Seneca in a homily addressed to Marcia:

You have done a great service to Roman scholarship and to posterity, which will read the uncorrupted record of a writer whose honesty cost him dear. His memory will live as long as it is important to learn the facts of Roman history, to know what it means to be a Roman, free and unconquered in thought, purpose and deed. You rescued a man who had been cast into oblivion for two of the noblest virtues, eloquence and *libertas*. He lives and flourishes in the hearts of men, while his executioners will soon be forgotten.

(*Ad Marc.* 1.3–4)

Seneca's high regard for Cremutius Cordus was shared by his nephew Lucan, whose epic poem *Pharsalia* deals with the civil war between Caesar and Pompey. The work is in fact a bitter attack on the Principate as an institution. Lucan says the following of the battle of Pharsalus that virtually decided the civil war in Caesar's favour:

Pharsalus undid us for all time, it doomed all future generations to slavery. What crime did the sons and grandsons of those who fought at Pharsalus commit that caused them to be born into slavery? Were they guilty of cowardly flight from the battle? To us, born later, Fortune gave a master. Why did she not also give us the chance to fight for freedom?

(*Phars.* 7.640–6 adapted)

One wonders how much of Lucan's Republicanism was inspired by his uncle's admiration for Cordus; but without the latter's history we cannot make a comparison. Eventually Nero ordered Lucan to commit suicide, but that was because of his persistent hostility, culminating in his loud trumpeting of support for the conspiracy of Piso (Suet. *Lucan*). Lucan was, of course, part of the Stoic opposition to the kind of autocrat that Nero was. The indomitable Stoic philosopher Thrasea Paetus snapped his fingers at Nero even more resolutely than Lucan, though not so much in written attacks; by this time anything derogatory of the ruler, whether by words, deeds or gestures, attracted a charge of *maiestas*.⁹⁸

Stoic opposition intensified under the Flavians. The elder Helvidius Priscus, son-in-law of Thrasea Paetus, denigrated Vespasian so persistently that the emperor felt that he had been

reduced to the status of a private citizen. Helvidius was put to death.⁹⁹ Domitian mounted a full-scale assault on the sect. The writings of Herennius Senecio, Arulenus Rusticus, the younger Helvidius Priscus and Fannia, daughter of Thrasea Paetus, earned them death or exile and the burning of their works. Besides praise of Thrasea and the elder Helvidius, their writings included a stage piece in which Paris and Oenone spoke words capable of being construed as a reflection on Domitian for divorcing his wife (Suet. *Dom.* 10.3–4). On a somewhat different tack, a spectator at the games died in the arena for loudly accusing Domitian of favouring a particular team of gladiators.¹⁰⁰

The systematic suppression of freedom of speech ended with Domitian. This was partly due to a sharper perception of *humanitas* by second-century rulers, but there was also something else. The intelligentsia finally realised that the game was up; the Principate had won.¹⁰¹ But the victory only came at a price. The emperors accepted the Stoic principle that succession to the throne should not be hereditary, but should go to the best man for the job, the *Optimus Princeps*. The resultant equilibrium made it unnecessary to continue suppressing independent thought, for the simple reason that it was no longer independent. The Stoics had become a pillar of the regime, so much so that eventually one of their number, Marcus Aurelius, was elevated to the imperial throne. As for literature, it had entered the so-called Silver Age, which is simply another way of saying that professionalism, dull but dependable, had replaced the pyrotechnics of the rebel with a cause.¹⁰² Tacitus describes the reigns of Nerva and Trajan as a fortunate age in which one could think what one wished and say what one thought (*Hist.* 1.1.4). Elsewhere he epitomises the character of the new thinking; he is writing specifically about oratory, but the passage has a wider relevance:

Great oratory is like a flame, needing fuel to feed it and movement to fan it. The eloquence of our fathers flourished under such conditions. Today's pleaders exert as much influence as can be expected under a stable and settled regime, but in those turbulent times they did not need a strong single ruler. With champions of the people's rights impeaching powerful criminals, the high status of the defendants was an incentive to eloquence. It is one thing to drone on (albeit systematically) about common

theft, but quite another to fulminate against electoral corruption, extortion and homicide. On such topics was built the fame of Demosthenes and Cicero.

(*Dialogus* 36–7 adapted)

Not all the confrontations were with Stoics. Nor were they all based on defamation as such, whether written or oral. The *maiestas* law rapidly attained such a degree of flexibility that it protected the *persona* of the deified predecessor, as well as that of the incumbent ruler, against any diminution of his dignity, status or security. Suetonius was able to look back from the turn of the first century AD:

It was a capital crime [in Tiberius' reign] to criticise any word or act of Augustus, such as removing Augustus' head from a statue in order to substitute that of Tiberius, punishing a slave near a statue of Augustus [thus breaching the humane right of asylum], taking coins bearing Augustus' image into privies or brothels.

(Suet. *Tib.* 58)

Other unusual extensions covered a member of the audience who failed to listen attentively to Nero's 'heavenly voice' and a woman who undressed in front of a statue of Domitian.¹⁰³

Many of these absurdities were instigated by professional informers seeking rewards,¹⁰⁴ but the emperors tolerated and even encouraged these architects of thought control. The professionals reached the peak of their form in the mid-twenties AD, when Tiberius' Grey Eminence, Sejanus, commissioned four informers to build a case against Titius Sabinus, one of the leaders of the opposition party established by the elder Agrippina.¹⁰⁵ After winning Sabinus' confidence and getting him to speak freely against the emperor, the ingenious quartet 'bugged' the house of one of them, with the owner engaging Sabinus in treasonous conversation while the other three lay concealed in the roof, taking down a record of everything that was said.¹⁰⁶

Despite all this, however, a substantial body of public opinion condemned the excesses perpetrated under the umbrella of the *maiestas* law. Starting with Caligula, emperor after emperor proved his civic-mindedness, that is, in effect, his *humanitas*, by suspending the offending law. Some found ingenious ways around the

suspension,¹⁰⁷ others reinstated the law,¹⁰⁸ but only after honouring the suspension for some time. Seneca's enigmatic pupil is an example. An actor mimed the actions of drinking and swimming, accompanied by the words 'Farewell father, farewell mother', thus alluding to the death of Claudius and Nero's first attempt to kill his mother. Nero banished him but did not impose a capital sentence under the *maiestas* law. After Nero's second (successful) attempt to kill Agrippina he greeted the flood of pamphlets ('Nero Orestes Alcmeon—mother-killers all') with a refusal to even seek out the authors (Suet. *Nero* 39.3, 2). From Nerva's reign the suspension was carefully observed, though Marcus had to burn the record of one case to conceal the fact that he had cheated.¹⁰⁹ His credentials may be even more suspect if the jurist Venuleius Saturninus reflects a ruling of Marcus when he says that the *maiestas* law embraces the melting down of statues of the emperor that have already been consecrated (*D.* 48.4.6). But Venuleius may simply have been noting an interpretation going back to an active period of the law.

The law certainly resurfaced under the first two Severan emperors. The contemporary Cassius Dio speaks about 'fictitious charges', which is his way of way of presenting the *maiestas* law as an instrument of thought control (Dio 60.3.7). Septimius Severus and Caracalla laid down that the law did not apply where imperial statues worn down by age were restored, or where an imperial statue was struck by a stone thrown accidentally or was sold before it was consecrated (*D.* 48.4.5). It is clear that in circumstances not covered by these exclusions the law was in operation.

The only Severan ruler to revert to the Antonine practice of suspending the law was Severus Alexander; he totally ruled out the use of the law, whether for 'fictitious' purposes or to suppress conspiracies and other palpable threats to security.¹¹⁰ The lawyers were never really comfortable with the 'fictitious' charges. Writing shortly after Alexander's reign, the jurist Modestinus observed that 'Judges should not use this charge as an opportunity to show reverence to the emperor's majesty; it should be decided on the actual circumstances of the case' (*D.* 48.4.7.3). The esoteric categories were still in use. Thought control was still alive and well. It was needed in the Later Empire as much as in the Principate. A string of decrees from AD 319 to 406 provided for the destruction of defamatory writings and the punishment of the authors (*CTh* 9.34.1–10).

Social welfare: the *alimenta*

The *alimenta*, or child-feeding scheme, is an excellent example of *humanitas Romana* in a positive mode—not forbidding but doing, thus (exceptionally) dispensing with a criminal sanction.¹¹¹ Following on private philanthropic foundations that benefactors had begun setting up in Nero's time,¹¹² the imperial government introduced an official scheme in Nerva's reign. As a fourth-century writer describes it, 'Nerva decreed that girls and boys born of needy parents were to be supported at public expense in the towns of Italy' (Aurelius Victor *Epitome* 12.4). The children in question had to be freeborn. Trajan expanded the scheme, as did subsequent rulers; although originally confined to Italy, the scheme eventually spread to the provinces as well. The scheme continued until the third century AD. In the Italian sector, about which we are best informed, at least fifty municipalities are known to have been involved, but the full number may have been higher.

The pattern of a typical scheme was as follows. The imperial treasury (the *fiscus*) made loans to farmers in a given district, as security for which the *fiscus* took mortgages. The average amount of a loan was of the order of one-twelfth of the value of the property. The farm-owner paid interest on the loan at the rate of 5 per cent per annum. The interest was paid into an alimentary fund administered by the relevant local authority, and these funds were earmarked for the maintenance of a predetermined number of poor children. Payments were gender-discriminatory, boys being given larger amounts than girls. For example, at Veleia (near Parma) loans in a total amount of 1,044,000 sesterces yielded interest of 52,200 sesterces. That amount was applied as to 47,040 sesterces to the maintenance of 245 legitimate boys at 16 sesterces per month each; 4,896 sesterces to 34 legitimate girls at 12 sesterces per month each; 144 sesterces (per annum) to one illegitimate boy, and 120 sesterces (per annum) to one illegitimate girl.¹¹³ The two illegitimates were probably included in order to balance the arithmetic; there are not enough of them to suggest a humane relaxation of the disadvantages of illegitimacy. Based on the evidence of private foundations, it is believed that boys received payments from the age of three to the age of fifteen, girls from three to thirteen.¹¹⁴

The scheme benefited the farmers as well as the children. It provided working capital at a lower rate of interest than the going rate, thus promoting the expansion of the country's agricultural

resources while combating poverty.¹¹⁵ In the same way as the farmer gladly (at this time though not later) accepted an appointment as a decurion or municipal councillor, thus performing a *munus* or public service, so did he welcome an alimentary loan. The imperial government made much of the propaganda potential of the scheme. It was commemorated on an arch at Beneventum, in numerous inscriptions, and on coins with the legend *Alimenta Italiae*.¹¹⁶ In at least Trajan's case the scheme was regularly credited to the *indulgentia* of the *Optimus Maximusque Princeps*.¹¹⁷ By this time *indulgentia* was starting to function as one of the components of *clemential humanitas*.¹¹⁸

The purpose of the scheme has been convincingly identified¹¹⁹ as a response to the impoverishment of the rural sector, a problem sparked off by the swallowing up of small properties in the mergermania¹²⁰ of the great estates (*latifundia*)¹²¹ and aggravated by urban development and the growing wealth of the elite. The younger Pliny, himself our best-known benefactor under a private foundation, was inclined to see Rome's manpower needs as an important motive.¹²² That is quite possible; a similar motive had prompted an earlier social welfare programme, in the shape of the Gracchan agrarian reforms of 133–121 BC.¹²³ But the idea does not fully account for the *alimenta*. Why were girls included at all? Perhaps a combination of military needs and social awareness would meet the case. A disruptive current of opinion doubts the poor-relief motif and argues that the *alimenta* was aimed at the children of comfortable middle-class families.¹²⁴ But apart from other objections to this theory,¹²⁵ can any amount of dotting i's and crossing t's explain why the imperial government should have adopted the principle that 'To him that hath shall be given'?

Evaluation

The discussion of curbs on rapacity rounds out our inspection of the same theme in the Republic. The overall sweep of attempts to protect non-Romans, running from the second century BC to the second century AD, presents as one of Rome's most impressive contributions to human rights. Freedom of speech and social welfare add non-violent dimensions to the picture—the former mainly in the Republican period with sporadic breaks in the clouds in the Principate, the latter of entirely imperial vintage. Universalism sums up the

majestic sweep of *humanitas Romana* in the Principate. Universal Rome, the idea that Rome was everywhere, survived even the catastrophic events of 476 with consummate ease and shaped French and Dutch humanism in Early Modern Europe. Rome was no longer a place on the map, but a set of eternal verities that continued to be known as *humanitas*. The twentieth century has preferred to advance rash claims of total originality in the matter.

MAN'S INHUMANITY TO MAN

Preamble

The Romans had a bad reputation for brutality even in antiquity.¹ Greek writers are quite patronising when they come across exceptions to the expected pattern of Roman behaviour.² The saving grace is *utilitas publica*, but not everything can be smoothed over by that panacea, or at least not convincingly. The least acceptable manifestations of brutality are genocide, slavery, torture and the games. There is one important non-violent form, racial prejudice.

Genocide

Genocide occurs in two forms on the Roman scene. The external form encompasses acts of unbridled savagery, of virtual extermination, against large groups of non-Romans. In the internal form Romans systematically annihilate each other.

External genocide is stigmatised by Seneca: 'We are a mad people, checking individual murders but doing nothing about war and the "glorious" crime of slaughtering whole peoples under the authority of duly enacted laws' (*Ep.* 95.30–1). To illustrate this we have chosen an example from the first century BC; it was perpetrated by that enigmatic figure, L.Cornelius Sulla. As for internal genocide, the ready-made examples are the proscriptions of Sulla and the triumvirs, which date as improbably as the external model to the *Blütezeit* of *humanitas*.³

Sulla's external victims were the Samnites, who had come perilously close to ending Rome's drive for empire before it began. Later on, in 82 BC, the Samnites, long seen as 'the old enemy', fought

on Marius' side in the civil war against Sulla. Sulla defeated them in a decisive battle at the Colline Gate of Rome. Sulla took more than 8,000 prisoners, but because they were mostly Samnites he killed them, though only after accepting their surrender and imprisoning them for three days, after which he told his soldiers to butcher them. This breach of a *deditio in fidem* was pure savagery; it had neither the strategic objectives of Aemilianus nor a commercial interest in selling them into slavery. But Sulla was only at the start of his murderous career. At Praeneste he paraded prisoners in three sections, consisting of Romans, Samnites and Praenestians. The Romans were pardoned, but the male Samnites and Praenestians were put to death. Their wives and children were spared, but Sulla was determined to exterminate the Samnites. Thinking back to the Caudine Forks disaster of 321 and, more recently, the Samnites' role in the Social War of 90–88, Sulla declared that no Roman could live in peace as long as the Samnites survived as a separate nation. A systematic campaign of extermination was launched in Samnium, at the end of which some towns had vanished, while others had become mere villages. Visitors to the region refused to believe that Samnium had ever existed.⁴

Sulla's final solution was not his only barbaric act at this time. He is also said to have transported 6,000 townsmen of Antemnae to the Circus Flaminius in Rome and to have had them butchered while he was addressing the senate.⁵ It may have been at this meeting of the senate that one of his supporters asked Sulla when the slaughter was going to stop.⁶ It was also possibly at this meeting that the senate refused (for the present) to support the introduction of a proscription.⁷ Public opinion was starting to draw a line in the sand on the grounds of *humanitas*. But the line was drawn this side of the Tiber. External mayhem evoked rumblings of protest, but no more than that.

In the same year, 82, Sulla turned to domestic genocide. Installed as dictator, he was able to adopt a more legalistic approach this time. Laws of the people made him dictator 'to write laws and reconstitute the state', with power 'to put any citizen to death without trial' and to organise the proscriptions.⁸ With the implements of state terrorism in place, Sulla went ahead with the proscriptions. He posted up the names of people who were liable to be killed with impunity. Rewards were paid to assassins; this meant that killings had to be by decapitation, because payment of the reward depended on production of the severed head. The property of the proscribed was confiscated, burial and mourning were denied them, and civil disabilities were

imposed on their children. The number of victims fluctuates in the sources. The best estimate is Appian's 105 senators, 2,600 knights and an unspecified number of others; but Valerius Maximus' 4,700 in all is not necessarily wrong.⁹

This same Sulla was responsible for a major humane innovation when he replaced the death penalty by interdiction from water and fire in some of his criminal laws.¹⁰ The contrast with the proscriptions seems palpable, but on reflection the two have something in common. The *proscriptus* could, if he was lucky enough to get away from Rome and Italy, live undisturbed in a safe haven;¹¹ so could the *interdictus*. The only difference is that the proscribed were pursued relentlessly, whereas the *interdictus* was given time to make his escape. Also, the ancillary penalties attached to proscription did not apply to interdiction, except for confiscation.

Sulla humanised the prescriptive edict when he transferred it from the political arena to common law crimes. But he made sure that the change of emphasis did not cause any problems. He laid down that *percussores* (bounty hunters) who hunted down the proscribed, would not be liable to be prosecuted as *sicarii* (cutthroats) under his homicide law (Suet. *Caes.* 11). The *sicarius* was someone who went about in public with a weapon for the purpose of killing someone, and that is precisely what the proscription law authorised *percussores* to do. It is clear that the proscriptions were not the product of a sudden fit of anger. They were a carefully thought out blueprint for mayhem.

The second proscription was mounted after Caesar's death by the triumvirate of Lepidus, Antony and Octavian (Augustus). It followed the Sullan model closely, although the triumvirs had announced that they did not intend to proscribe as many as Sulla.¹² They kept their word, posting up somewhere between 140 and 300 names.¹³

The triumvirs, although Caesar's political heirs, deliberately ignored the policy of Caesar himself. As far back as 64 he had, as president of the homicide court, refused to exempt *percussores* from the provisions of Sulla's homicide law.¹⁴ The triumvirs did not propose following Caesar's example. They declared at a public meeting that in order not to be hated they had not emulated the cruelty of Marius and Sulla,¹⁵ but in order not to be underestimated they had not emulated Caesar's clemency (Dio 47.13). But there were serious differences in the Caesarian camp. In August 43, three months before the creation of the triumvirate, Octavian's cousin Q. Pedius enacted the *lex Pedia* which provided for the punishment of Caesar's murderers by regular criminal process; they were to be tried by the jury-court for *maiestas*. Later on

Octavian claimed credit for having dealt with the conspirators under this law (*RG* 2), but at the time he agreed with Antony to kill seventeen people (including Cicero) immediately; they would ratify the act after their installation as triumvirs. Peditus, then suffect consul, took it upon himself to publish the seventeen names and pledged the public faith to all others who might be implicated. Peditus died the following night.¹⁶ 'Peditus' stand may have fuelled the criticism of Octavian that soon made itself heard. It was said that Cassius and Brutus had been sacrificed to inherited personal enmity, and it was morally indefensible to allow private hatreds to take precedence over the public interest (*Tac. Ann.* 1.10.1–2).

External genocide was not repeated in the Principate.¹⁷ The proscriptions also died with the Republic.¹⁸ Sulla's savagery and its clumsy imitation by the triumvirs are a passing cloud over Roman human rights. But our next topic is less easily written out of the script.

Slavery

Slavery is generally considered the greatest impediment to the formulation of a general theory of human rights for Ancient Rome. The slave's identity was ambiguous: he or she was both a human being and a piece of property.¹⁹ This made the question of how to treat a slave something of a problem. For a long time society gave preference to the proprietary side,²⁰ and it was not until the Principate that the Roman conscience was seriously disturbed. Writers like the elder Pliny began looking at the institution with a critical eye:

In the old days a victorious general returned to his small property and ploughed his field with the same diligence that he had shown on campaign. But nowadays²¹ farmwork is done by feet that have been chained, hands that have been punished, faces that have been branded. Should we be surprised at not getting the same returns from slave dungeons as we once got from the honest toil of generals?

(Plin. *NH* 18.4.21)

Pliny was, however, still a rare voice. Aristotle's theory that slavery was a natural institution²² was widely accepted. In the second century

AD the lawyers said that 'Slavery is an institution of the *ius gentium* by which someone is made subject to the ownership of another contrary to nature.'²³ But the ambivalent identity of the slave was reflected in the legal texts, for *ius gentium* was in fact the body of rules that natural reason had established for all men (Gai. 1.1.1). Therefore the only way out was to argue that by strict Roman law slaves were regarded as nothing, but by natural law all men were equal (Ulpian *D.* 50.17.32).

The corner into which the lawyers painted themselves had been stirred up by Seneca a hundred years earlier:

It befits a sensible and well-educated man²⁴ to live on family terms with his slaves. 'But they are slaves.' No, they are men, companions and humble friends. Some people think it below their dignity to dine with a slave; he is there, they say, to attend to his master's needs, and in complete silence at the risk of a flogging. Consequently slaves talk about their master behind his back, unlike the old days when they conversed with him and even risked their necks to save him. Nowadays 'You have as many enemies as you have slaves' is a truism. We treat them cruelly and inhumanely as if they were not men but pack-animals. Remember that he whom you call your slave sprang from the same stock and breathes, lives and dies under the same skies as you. Treat your slaves as you would be treated by your superiors. Live mercifully and humanely [*comiter*] with your slave, allow him to talk with you, plan with you, live with you.²⁵

But Seneca could not hope to eliminate the dichotomy. The younger Pliny saw no future in the humane approach: 'No master can feel safe because he is kind and considerate to his slaves, for it is their malice rather than their reason that causes them to murder their masters' (*Ep.* 3.14).

One aspect of the treatment of slaves, namely torture and punishment, is of special interest to us. It was believed that a slave was incapable of telling the truth except under torture. Moreover, although the evidence of a slave was generally inadmissible against his or her owner, it was allowed in cases of treason, adultery and tax frauds.²⁶ Thus when Nero's sinister praetorian prefect Tigellinus was looking for evidence of adultery against Nero's wife Octavia, he put

her slave-maids (*ancillae*) to the painful question. Some were induced by the pain to make false admissions against their mistress. But the majority persisted in defending Octavia's chastity, and one of them, Pythias, gave the prefect more than he had bargained for.²⁷

There was one situation in which the torture of slaves was a positive instrument of public policy.²⁸ It was when an owner was murdered by one of his slaves. Under an Augustan decree, the *s.c. Silanianum*,²⁹ every slave who was under the same roof at the time of the murder was questioned under torture, and was later put to death, failing proof that he or she had done everything possible to help the victim.³⁰ In 61 Nero's urban prefect, L. Pedanius Secundus, was murdered by a domestic slave. Pedanius' household, numbering some 400 men, women and children, was put to the question, and in due course the entire household was tried by the senate.³¹

Tacitus' account of the trial (*Ann.* 14.42–45) casts important light on attitudes to slavery. The principal speaker was C. Cassius Longinus, the leading lawyer of the day and a hardline Stoic who favoured the strict enforcement of statutory penalties. He declared that the only way to control 'the scum from various nations'³² infesting the city was by terror. The innocent would perish with the guilty, but *utilitas publica* took precedence over the rights of individuals. Cassius moved that the entire household of slaves be put to death. Some senators protested against the punishment of women and children and of the innocent, but there was no counter-proposal from any senator. There was a hostile demonstration outside the senate-house,³³ but Nero stationed troops along the route leading to the place of execution. The 400 slaves were put to death. Nero did however salvage some *clementia* from the case by vetoing a proposal to punish Pedanius' freedmen as well as the slaves.

The case raises a problem that sometimes troubled the ancients. How could one allow torture to damage valuable property? Horace protests against crucifying a slave for a minor offence, or throwing stones at slaves for whom one has paid good money.³⁴ Horace is not alone. The adultery law laid down that when a slave accused of adultery was about to be tortured, the accuser had to give the owner security for the value of the slave (D. 48.5.28 pr., 16); and Ulpian observes that torture should not be allowed to destroy a slave, even if guilty (D. 48.18.7). But the practice was firmly entrenched. An inscription has the funeral director at Puteoli obliged to torture slaves on request; he had to supply crosses, yokes and floggers, and to see to the removal of corpses.³⁵ There is clearly no point in asking why

an independent fortune was destroyed in the Pedanius case. The law was strictly applied.³⁶ Not even Seneca was able—or perhaps even tried—to halt it.³⁷

In matters of punishment the governing principle was that the slave was answerable with his body for any infraction, whether serious or trivial. It has been claimed that the purpose was to undermine his humanity, to distinguish him from those human beings who were not property.³⁸ But was there any conscious motivation of this sort? Was it not simply the need to keep large numbers under control by terror, as Cassius Longinus said? The range of punishments inflicted by the owner was certainly brutal: summary execution, branding, flogging, sexual assaults.³⁹ A list of the punishments that Constantine tried to control reflects what had come down from the Republic and Principate:

If a master beats a slave with light rods or lashes, or puts him in chains, and the slave dies, the master incurs no criminal liability. But he is guilty of homicide if he kills a slave intentionally by a blow of a club or stone, or has him hanged by a noose or thrown from a high place, or poisons him, or subjects him to public punishments by cutting through his sides with metal claws, burning him alive, or torturing him to death. But disciplinary correction that is not meant to kill the slave, but to improve his behaviour, is not penalised.

(*CTh* 9.12.1, 2)

The ‘public punishments’ to which Constantine refers were those imposed by the state rather than by owners. They included being thrown to the beasts in the arena, burnt alive, crucified, or forced to fight as gladiators. Constantine excludes crucifixion which by then was absolutely forbidden. And he lists the updated version of throwing to the beasts, namely cutting through his sides with metal claws, which gave the master a facsimile of what was done at the games.⁴⁰

Torture was not only used against slaves, but also against free persons. When so used it was not necessarily restricted to those of humble status, nor was it restricted to accused persons, since witnesses could also be tortured. The topic is too vast to be discussed in detail here,⁴¹ and all that need be said is that the torture of free persons appears to have been in use throughout the Principate. Periodical

attempts to reduce its scope—but not to abolish it completely—were made, but met with limited success.⁴²

Not everything on the servile scene runs counter to *humanitas*. Probably the most important reform was a *lex Petronia* of uncertain date which deprived owners of the unrestricted power to hand over their slaves to fight with wild beasts in the arena.⁴³ The effect of the law was to deprive the owner of his easy access to lucrative contracts with entrepreneurs at the games. Hadrian imposed a general prohibition on killing a slave without a court order; he also forbade the sale of a male slave to a trainer of gladiators or of a female to a procurer, except on showing good cause (*SHA Hadr.* 18.7–8).

A consolidating ordinance may have been enacted by Antoninus Pius:

By a constitution of Antoninus Pius anyone who kills his own slave without cause earns the same penalty as one who kills another's slave. Even excessive severity is curbed by the same emperor. When consulted about slaves who seek asylum at the emperor's statue, he ruled that if the severity of masters is intolerable they are to sell their slaves on fair terms; it is in the public interest that no one should use his property badly. Pius' rescript reads as follows: 'The power of masters over their slaves is unlimited and unrestricted. But it is in the interests of masters that help against savagery, hunger or unbearable injury be not denied to those who seek it. If you find that the slaves who fled to the statue were treated more harshly than equity allows, order them to be sold.'

(*Just. Inst.* 1.8.1)

Finally, as we have seen, Constantine reviewed the whole position.

Other humane measures include Claudius' ruling that sick slaves who were abandoned by their owners because of the expense of treating them were, if they recovered, to be free; killing such a slave instead of abandoning him would be murder.⁴⁴ This ruling had no discernible economic motive; it was prompted by 'pure' *humanitas*. The same goes for the decree of Domitian's senate forbidding castration and reducing the price of eunuchs who had already come into the hands of slave-dealers.⁴⁵ Hadrian raised the penalty from half-confiscation to that prescribed for homicide (*D.* 48.8.4.2).

One or two reforms are credited to Augustus. He is said to have done something about *ergastula*, the notorious dungeons in which slaves were confined. Although Augustus is only said to have inspected them (Suet. *Aug.* 32.1), he may have called for repairs when necessary. Hadrian abolished the *ergastula* (*SHA Hadr.* 18.9). He had an economic motive. Something had to be done about the low returns from the labour of *ergastula-incarcerated* slaves that worried the elder Pliny.

It has also been claimed that Augustus put limits on torture.⁴⁶ But this is based on an erroneous interpretation of a *senatus consultum* of AD 8 that in fact dealt with the admissibility of the evidence of slaves against their owners.⁴⁷ The emperor who got the senate to pass the *s.c. Silanianum* and the popular assembly to restrict the conferment of freedom on slaves did not extend his *humanitas* beyond the freeborn.

Racial prejudice

Racial prejudice was a fact of life in Ancient Rome.⁴⁹ Despite the steady progress of universalism, the Romans of both the Republic and Principate display an undertone of sneering contempt for other races at best; and sometimes that sentiment is translated into positive action. One thinks of Cicero's denial of protection against extortion to the Sardinians, whose blood was tainted by their remote Carthaginian ancestry. One thinks also of Cicero's ongoing love—hate relationship with the Greeks, in which the pejorative word *Graeculi* ('Greeklings') rubs shoulders with loud praises of Greek *humanitas*. Even the comfortable assumption that the Sicilians did not mind ill-treatment as long as it was moderate and inflicted by Romans, belongs here.⁵⁰

On the practical side it suffices to mention the *lex Licinia Mucia* of 95 BC which cancelled the registration as Roman citizens of Latins and Italians who had illegally registered as such. Cicero, although not sharing the xenophobia of M. Aemilius Scaurus who sponsored the law, approved of it in principle, though he did regard it as *inhumanum* to expel the illegal immigrants from Rome. But in his defence of the Greek poet Archias he even obscured the principle behind a smokescreen of *humanitas*.⁵¹

In the Principate we see Cassius Longinus justifying the use of the *s.c. Silanianum* against a slave population made up of 'the scum of other nations'. He was thinking mainly of slaves of eastern origin.⁵² The sentiment was shared by Juvenal, who complained that 'the

Syrian Orontes has flowed into the Tiber'.⁵³ The thrust was broader than that of Cassius; Juvenal was thinking as much of free migrants as of slaves. Martial sneered at the freed slave who incorporated his former owner's name in his nomenclature in order to conceal his origins: 'Cinnamus, you bid us address you as Cinna. Is this not a barbarism? If you had been called Furius before, you would now be called Fur (a thief)' (Mart. 6.17.4).

Although the only Republican uses of *Graeculus* are in Cicero,⁵⁴ the word is used so widely, and in such different contexts, in the Principate that it must be accounted part of common parlance. In an official letter to Pliny, Trajan observes that 'the Greeklings all love gymnasiums'. Pliny himself sneers at the 'Greekling manager' of Domitian's gymnastic festivals; he also approves of the suppression, at Vienne, of Greek-style gymnastics which had been a bad example to the rest of the empire.⁵⁵ Juvenal embellishes his remark about the Syrians with a reference to 'true Greek scum'; elsewhere he speaks of 'the greedy Greekling who gobbles up knowledge'.⁵⁶ Tacitus has 'our children handed over to some silly Greekling maid', and Florus speaks of 'the effeminacy of the Greekling city, Marseilles'.⁵⁷

Offensive language was also used for Africans.⁵⁸ The elder Pliny noted with some amusement that a well-known boxer, born at Byzantium (Istanbul) and descended from an African grandfather and a Roman grandmother, was himself black although his mother was white (*NH* 7.1). Seneca had tried to counteract such an attitude: 'The colour of the Ethiopian is not something to be specially noticed; nothing is odd or disgraceful for an individual if it is a characteristic of his whole nation' (*Ira* 3.26.3). But Seneca was swimming against the tide.

Augustus made official discrimination against slaves, especially those of eastern origin, a cornerstone of his policy. By a series of laws he imposed restrictions on the manumission (liberation) of slaves.⁵⁹ The legislation placed a ceiling on the number of slaves that any owner was permitted to manumit. There were also restrictions on the respective ages of the manumitting owner and the slave, and—one of the most important features—on the moral credentials of the slave.⁶⁰ The purpose of the legislation was to cut down the number of Roman citizens created by manumission. As Suetonius puts it, there was a deliberate attempt to insulate the citizen body against any taint of foreign or servile blood:

Considering it of great importance to keep the people uncorrupted by any taint [*colluvio*] of peregrine or servile blood, Augustus conferred Roman citizenship sparingly and put a limit on manumissions. When Tiberius sought citizenship for a Greek dependant of his, Augustus replied that he would not grant it unless the man appeared in person and showed cause for the grant.⁶¹

In other words, he wanted to make a racial assessment.⁶² Similarly, when Livia sought citizenship for a Gaul from a tribute-paying region, Augustus only granted the man freedom from tribute, declaring that he would rather suffer a loss to the treasury than debase the honour of citizenship (Suet. *Aug.* 40.3). He displayed another side of the same policy when he directed the aediles not to allow anyone to appear in the Forum except when wearing the toga instead of the Greek cloaks that had become popular (*ibid.* 40.5).

Dio says that Augustus left in his papers a directive against freeing many slaves. He also counselled against enrolling large numbers of new citizens, for that would obscure the difference between Romans and subject peoples (Dio 56.33.3). Dio's version is understandably sanitised. He could hardly be expected to come out openly with the anti-Greek motivation.

The official Augustan line⁶³ was gradually watered down as universalism took hold. Tiberius gave Junian Latins full citizenship if they performed particular public services (*munera*). Nero rated it as an appropriate *munus* if a Junian Latin possessed a certain patrimony and used at least half of it to build a house in Rome; Trajan added further exemptions.⁶⁴ But these modest relaxations were largely cosmetic, as far as slaves were concerned. Trajan did not hesitate to overturn Nero's exemption of freedmen from the *s.c. Silanianum*.⁶⁵ The one truly progressive force in the first century was Claudius; but he operated more in the extension of citizenship to free Greeks and others than in the specific area of slavery.⁶⁶

Death at the games

Nothing has quite as damaging an effect on Rome's humanitarian image as the blood sports, the lethal combats at the games to which the populace was addicted with nearly as much fervour as modern football fans. To make matters worse, participation was often

compulsory, being imposed as a sentence on condemned criminals.⁶⁷ Although non-lethal entertainments like chariot races and drama were earlier developments than gladiators and animal hunts,⁶⁸ history's spotlight is on the lethal forms.

Seneca would launch a scathing attack on some features of the games, and the question is whether Cicero anticipated him. The evidence is equivocal. Sometimes he expresses unqualified approval: 'The games were magnificent and well received' (*Att.* 4.15.5). At other times he approves of their political efficacy; Milo's consular campaign 'won the support of the common man by the magnificence of his games' (*Fam.* 2.6.3). At still other times he has practical reservations. He rejects Scribonius Curio's plan to hold games to mark the death of his father. Cicero believes that Curio's pursuit of office will be better served by natural talent and fortune than by public spectacles; the latter merely testify to wealth, not merit, and in any case everyone is sick and tired of them (*Fam.* 2.3.10).

Cicero comes somewhat closer to a moral issue in a late work:

A gladiatorial show seems cruel and inhuman to some.
That may be so, given the way that it is now structured.
In the days when criminals crossed swords in death
struggles there was no better training; their highest aim
was to give satisfaction to their owners or to the people.
When they fell they died without disgracing themselves.
(Tusc. Disp. 2.41)

Cicero's complaint is that free persons of unblemished reputation have started coming forward as gladiators.⁶⁹ It is this, not the brutality of the sport, that troubles a conscience that was perfectly comfortable as long as the players were slaves or condemned criminals.

Cicero did however share the view of his correspondent Asinius Pollio, who wrote to him about an atrocity in Spain, when Caesar's lieutenant Balbus burnt the Pompeian Fadius alive for refusing to fight at Balbus' games (*Fam.* 10.32.3). Cicero also protested against his brother Quintus' threat (apparently meant as a joke) to burn T.Catienus and his father alive (*Ad Q.fr.* 1.2.6). Something of a comic tradition was attached to burning people alive. Valerius Maximus solemnly records that in 468 BC a tribune of the plebs, P.Mucius Scaevola, burnt his nine colleagues for conspiring with Sp. Cassius, the putative author of the first agrarian law (6.3.2). This is a parody of the events of 133 BC, when P.Mucius Scaevola orchestrated the

removal from office of the tribune M. Octavius, who was blocking Ti. Gracchus' agrarian bill in the interests of the great landowners. And one can hardly believe that the author of a late fourth-century law was serious when he stipulated that men who played a woman's part in intercourse were to expiate the crime 'in avenging flames in the sight of the people' (*CTh* 9-7.6). In a pastiche of this and similar laws, the *Augustan History* credited Macrinus (early third century) with always fastening the bodies of co-adulterers together and burning them alive (*SHA Macr.* 12.10).

Equivocation continued in the Principate. Seneca attacked the games, but he was more concerned with the behaviour of the spectators than with the immorality of the whole institution:

Nothing is so morally degrading as the spectators at the games. As if armed combats are not bad enough, the midday intermission, when criminals have to fight without helmet or armour, are sheer murder. Many spectators prefer this to the regular programme. In the morning they throw men to the lions, at midday they throw them to the spectators.⁷⁰

Seneca was attacking the emperor Claudius who had exiled him. Claudius was said to have been particularly interested in the net-fighters (*retiarii*), ordering their throats to be cut even when they fell by accident, so that he could watch their faces as they died. He was so involved in the midday entertainment that if any mechanical devices broke down he would have the workmen responsible included amongst the combatants (Suet. *Claud.* 34.1-2).

Nero, having thrown off Seneca's influence, staged his bizarre punishment of the Christians—crucifixion followed by burning alive—as a special entertainment; some may have condemned it as a travesty of *utilitas publica*, but society as a whole accepted it. Domitian made the great Flavian stadium, the Colosseum, the headquarters of a virtual league competition between teams of gladiators, including one sponsored by the emperor. A spectator who was rash enough to allege bias against the other teams was thrown into the arena, where he was either burnt alive or killed by the beasts.⁷¹ And as already observed, Trajan held a mass trial of informers in the arena, although they were exiled instead of being put to death.⁷²

The second century throws up an episode that Marcus Aurelius would have preferred to forget. In 177, at Lyons and Vienne,

Christians were subjected to 'pagan inhumanity', being led into the arena and thrown to the beasts. When one of them, Attalus, claimed to be a citizen he was returned to prison, to be held with others pending the receipt of instructions from the emperor. Marcus replied that they should be tortured to death, but those who recanted should be freed. The governor, carefully keeping to the letter of the law, beheaded those who were citizens and consigned the rest to the beasts (Eusebius *Eccles. Hist.* 5.1).

The dismal litany need not be prolonged. Constantine made some changes in the interests of Christian morality,⁷³ but the fundamentals remained in place. Gladiatorial contests continued to be staged in the Colosseum until the reign of Honorius (fifth century), and victims were still being thrown to the beasts after the fall of the Western Empire. By the irony of fate it took a barbarian, the Ostrogoth king Theoderic, to dismantle the whole institution.⁷⁴ The wheel had come full circle. Those who lacked the essentials of civilised behaviour were the ultimate bulwark of *humanitas*.

CONCLUSION

What have we said about human rights in Ancient Rome, and have we said it effectively? How far does our evidence support the belief that the principles were clearly perceived and vigorously applied?

The picture is something of a patchwork. Four things in particular stand out on the credit side. They are, first, voluntary exile; second, the protection against ill-treatment afforded to non-Romans, primarily to those who were provincials, but also to those who were outside the circle; third, freedom of speech (mainly in the Republic); and fourth, social welfare. Polybius was greatly impressed by voluntary exile; he knew of nothing in his world to match it. As for the consideration shown to non-Romans, the enthusiasm backed by expertise that Cicero brought to bear on it speaks for itself, as does its professionalisation in the Principate. Coupled with the liberal extension of citizenship, which was the other side of the same coin, it was one of the reasons why Rome was able to create an enduring empire that had eluded the Greeks. Freedom of speech and social welfare speak for themselves.

Punishment is more equivocal. Cicero fulminates against cruel punishments, but it is not the death penalty as such that troubles him. As long as it is inflicted in an approved manner, and after fair trial, he has no complaint; any twinge of conscience is allayed by the panacea of *utilitas publica*. Seneca is equally selective, though on a somewhat different level. His *bête noire* is the special kind of nastiness served up at the games, something to which Cicero is indifferent. Yet both in the Republic and in the Principate strenuous efforts to reduce the incidence of death sentences were made. The Republic pinned its hopes on voluntary exile, to such good effect that executions were, at least under regular criminal process, transmuted into exile for much of the first century BC. Caesar was even able to say that the

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death penalty was obsolete. The Principate pursued the same goal by a different route, *clementia* and discretionary punishment. The approach owed much of its efficacy to Seneca. Fine detail, in the shape of juristic distinctions between different grades of punishment, also helped. But the relentless pressure of elitism took some of the gloss off.

Universalism is another grey area. In theory the idea was firmly entrenched; the essential unity of mankind has seldom been proclaimed as cogently as by Seneca. But that was offset by the courtcraft of Cicero, and even more drastically by the intransigence of Cassius Longinus. The elitism so admired by Aristides does nothing to season the dish. The mischief is compounded by the blatant second-century division of society into upper and lower brackets, which brought with it punitive differentials that no one seems to have found reprehensible. Racial prejudice is another dislocating feature, though Rome is not alone in this. But despite the adverse impact that it must have had on other ethnic groups, Rome went down to posterity as the great exponent of multiculturalism.

One of the unequivocal successes is the reverence for the human form displayed by rulers from Domitian to Antoninus Pius. The repeated restraints on castration and other assaults on nature reveal an ability to give practical expression to natural law that is well ahead of anything that the moderns have been able to achieve.

Special pleading is required for the really dark areas. However much the treatment of slaves may have improved in the Principate, and however widespread slavery was in antiquity, the institution was a gross denial of people's fundamental humanity. In the case of the *s.c. Silanianum* and other punishments it was more than that. Even a *tu quoque*, in the shape of the vast indifference of today's world to similar manifestations, cannot detract from its innate wrongness. The prospects for genocide are slightly better, not because it was less atrocious in itself, but because it was discontinued (under the influence of *humanitas*) after Sulla and his lukewarm imitators. In any case the enigma of Sulla, the man who combined wholesale massacres with enlightened relaxations of the death penalty, has not yet been resolved. As for the games, they were an ingrained part of the Roman ethos; even the Later Empire did little more than tinker with the edges of the problem. Some credit must however be given to the lawyers, who meticulously distinguished between necessarily lethal and conditionally lethal consignments to the games.

CONCLUSION

Perhaps the best credential that *humanitas Romana* has to offer is its recognition by the law as a definitive canon of interpretation. If a submission by Cicero or an opinion by a classical jurist could be based on *humanitas*, that was its title to elegance. It acquired a rationale in accordance with the accepted principles of *aequitas*. It broke away from the straitjacket of the strict law, importing a degree of flexibility that allowed members of the human race to be treated as individuals with diverse problems rather than as cyphers.

There is something more to be said about the link between Roman *humanitas* and modern human rights. A memorable passage in Edward Gibbon's *Decline and Fall* runs as follows:

If a man were called to fix a period in the history of the world during which the condition of the human race was most happy and prosperous, he would, without hesitation, name that which elapsed from the death of Domitian to the accession of Commodus. The vast extent of the Roman empire was governed by absolute power, under the guidance of virtue and wisdom. The armies were restrained by the firm but gentle hand of four successive emperors whose characters and authority commanded involuntary respect. The forms of the civil administration were carefully preserved by Nerva, Trajan, Hadrian and the Antonines, who delighted in the image of liberty, and were pleased with considering themselves as the accountable ministers of the laws. Such princes deserved the honour of restoring the republic, had the Romans of their days been capable of enjoying a rational freedom. The labours of these monarchs were overpaid by the immense reward that inseparably waited on their success; by the honest pride of virtue; and by the exquisite delight of beholding the general happiness of which they were the authors. (From ch. 3 of *Decline and Fall*)

Madame Necker described his masterpiece as a bridge that carried one from the ancient world to the modern. The comment was even more apt than she knew. Gibbon not only looked back to the second century AD as the quintessence of *humanitas*, he also looked forward to modern human rights. If the *Universal Declaration* of 1948 had any direct ancestors, they were the *American Declaration of Independence* of 1776 and the *French Declaration des droits de*

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l'homme et du citoyen of 1789. Both documents were exactly contemporaneous with the publication of *Decline and Fall* (1776–88). Gibbon was a child of the Enlightenment, he was steeped in the same liberal climate as the sponsors of the two declarations. The American founding fathers absorbed the same classical tradition as Gibbon. And the author of the French declaration advertised his debt to Rome by covering both ‘The Rights of Man’ and ‘The Rights of Citizens’. Gibbon would not have quibbled about modern human rights’ debt to Ancient Rome.

The many similarities between the ancient and modern systems can readily be gathered from the summarised references in this chapter. But at the end of the day there is a more fundamental question. Has the modern system borrowed wisely from Rome? Has it been able to benefit from its inheritance? We live in a world in which the global village, lacking the cohesion and dedication of the Roman empire, threatens to destroy *humanitas*. Greed and corruption, for which no *repetundae* remedy is available, are everywhere. Technology has debased freedom of information into a licence to disinform. Human rights now grow out of the casing of a bomb. *Quo vadis?* Where will it all end? There is no satisfactory answer. The writing is on the wall, but who has understood it?

NOTES

1 Introduction

- 1 Seneca *Epistulae Morales* 95.51–53. That the concluding sentence is a quotation of Terence *Heautontimorumenos* 77, from which our *leitmotif* is taken, is self-evident. Seneca provides a complete answer to those who deny the Terentian phrase any human rights connotations. Their arguments, and further reasons for rejecting them, will be discussed in due course. See especially chapter 3, under the rubric ‘Humanus: Terence and universalism’. Also the more detailed examination of Seneca’s exposition in chapter 8 under ‘Universalism: the merits’.
- 2 There are also adverbial forms, *humaniter/humanitus*, as well as *inhumanitas/inhumanus*. These will be noticed when necessary. But our main focus is on *humanitas/humanus*.
- 3 For the text see Davies 1988: xvii–xxv.
- 4 Pol. I 81.5–11. Cf. I 68.3–70.7, 72.1–3, 78.10–15, 79.8–14, 80.2–81.4. Cf. perhaps Cicero *Off.* 3.32.
- 5 Doctorow 1993:65 (abridged). Cf. perhaps Henkin 1979, prefatory note and 109–13. He notes the imperfect realisation of the *Universal Declaration*’s expectations, drawing attention to the controversies on political, philosophical and legal issues and the violations perpetrated by slavery, ghettos and mass murders.
- 6 On the modern concept in general see Owen 1978:15; Henkin 1979:5–30; Holcombe 1948:23–46; D.Weissbrodt, in Davies 1988:1–8. On the legislation of the seventeenth to twentieth centuries see Schabas 1996:15–42. On medieval and early modern theorists see Henkin 1979: ‘The first two hundred years of an idea’. For a concise historical survey of humanism see Guillermand 1994:194–216. On the claim that ‘rights’ were unknown in the classical period see Constant, 1957:1026–59; Dagger 1989.
- 7 See the 6th and 8th preambles and articles 2, 18, 19, 20, 28, 29, 30.
- 8 See chapter 4 s.v. ‘Early Rome: *ius humanum*’.
- 9 Despite Veyne 1993:347–8. To him modern universalism is ‘one of the greatest exploits in human thought’; the possession of human rights by all humans will have originated in twentieth-century sociological thought. He asserts that it implies culture rather than nature, invention rather than discovery, and has ‘a radiant future’. None of this stands up to scrutiny. Universalism was fully canvassed in antiquity; culture was at the root of *humanitas*; invention is not significantly different from discovery; and as for the radiant future, see Doctorow (above).

- 10 The installation of Roman law in, especially, the East was not completed until much later. But the courts, including those of provincial governors, dispensed only Roman law in human rights cases.
- 11 This felicitous description is used by Schadewaldt 1973:44.
- 12 Cicero favours the alternative expression, *utilitas rei publicae*. See Jossa 1964. But the two expressions have substantially the same meaning. Gaudemet 1951:467–8 and *passim*.
- 13 Cic. *AdQ. fr.* 1.1.27. Cf. Cic. *Place.* 62; Plin. *Ep.* 8.24.2. Also Isoc. *Pan.* 29.
- 14 Those studies divide broadly into two groups. The one addresses *humanitas* in its philosophical and general humanitarian aspects. The contributors include Reitzenstein 1907; Heinemann 1931; Harder 1934; Stroux 1926; Büchner 1967; Boyancé 1970; Schadewaldt 1973; Veyne 1993; Guillermand 1994. The other group concentrates on *humanitas* and the law. It includes Krüger 1899; Schulz 1936; Maschi 1948; Honig 1960; Riccobono 1965; Lapicki 1969; Mignot 1988. See also Waldstein 1964 and Gaudemet 1967, though they address a special aspect rather than legal *humanitas* as a whole. The theme is also broached in Bauman 1980 *passim* and 1996 *passim*.
- 15 Veyne 1993 comes close to an overall view, but he treats the Greek and Roman positions as a single entity, which they are not. Also, his pessimistic assessment is close to asserting that there was no such thing as human rights in antiquity.
- 16 See chapter 8, s.v. ‘Freedom of speech’ and ‘Social Welfare: the *alimenta*’.
- 17 With the probable exception of Veyne 1993.

2 Human rights: the Greek experience

- 1 See also Heinemann 1931, *passim*. The word is not noticed by *RE* (except for a specialised piece on to *philanthropon*), *OCD* or *Kl.P.*
- 2 Diog. Laert. 9.38. See also Dem. 19.139; *Div. Arist.* col. 26, vv. 10, 19.
- 3 Plato *Namoi* 713 D. Cf. *Symp.* 189 C; Aesch. *Prom.* 11, 28; Diod. III 60.2, 61.4, 72.4; Plut. *Num.* 4.3.
- 4 It was described as ‘finery for the fortunate, a refuge for the unfortunate’. Cf. perhaps LSJ s.v. *paideia*. To Polybius the ultimate mark of savagery was the inability of *philanthropia*, even when moulded by *paideia*, to control ‘the cancer’. Pol. 1.81.5–11. See also Gell. *NA* 13.17.1.
- 5 E.g. Pol. 28.17.11: at the conference between the Romans and the Rhodians the two commanders compete in the kindness of their language. Diod. 13.69.1: Alcibiades greeted the crowds in kindly fashion. Plut. *Cat. Mai.* 3.8: Scipio was pleasant in his friends’ company but was never led by his courteous lifestyle to neglect important matters. See also Xen. *Cyr.* 11.2.1; Isoc. *Ep.* 5.2; Dem. 45.4, 19.139.
- 6 The evidence is largely epigraphic. See Welles 1934:369–70 with documents nos. 67, 6.D, 13, 15, 22, 48.A, 64, 66. See also Kortenbeutel 1940; Sherk 1969 *passim*. On the literary evidence see Walbank 1957–79:2.332–3, 349–50, discussing Pol. 12.5.3. See also Diod. 26.17.1,

- 32.4.2; Jos. *Ant. Iud.* 14.10.2. Further epigraphic evidence *P. Ryl.* 296 (second century AD): ‘Your Clemency’; and *SIG* 564.12–14, 669.21, 748.46, 502.20, 548.3, 456.8, 888.9–10, 481.7.
- 7 Despite W.R.Paton, Loeb edn of Polybius *ad loc.*
- 8 *Xen. Ages.* 1.22. Cf. *ibid. Cyr.* 1.41, 7.5.72–4; *Diod.* 32.4.2; *Pol.* 1.79.8–11.
- 9 On this see A.Harder, *Euripides’ Kresphontes and Archelaos*, Leiden 1985, 5–7, 276.
- 10 Rose 1950:186–7.
- 11 See *TLG* s.v. *philanthropia* Xenophon.
- 12 It occurs in Xenophon’s account of the trial of the Arginusae generals. *Hellen.* 1.7.1–35. See further at n. 24 below.
- 13 See *TLG* s.v. *philanthropia* Demosthenes.
- 14 *Dem.* 18.112, 21.43, 24.156. But a law could also be motivated by *misanthropia*. 18.112.
- 15 24.192: *kata pasas tas poleis*. It is Demosthenes’ expression for the *ius gentium* which also played a part in Roman *humanitas*.
- 16 Some advocated the treatment of all Greeks as kindred. But others defined the privileged area more narrowly, as for example Demosthenes on the Demos’ attitude towards ‘Athens and her allies’ (above). See also Demosthenes on Thebes and Orchomenus (above). Also *Aristot. On Vices and Virtues* 1250 B; *ibid. Frag. Vat.* (*TLG* s.v. *philanthropia* Aristotle); *Diod.* 13.20–32. Natural enmity towards strangers was common in antiquity. Cf. Ziegler 1972 with bibliography at p. 69 n. 1. Add De Martino 1973:13–21.
- 17 On his position see Veyne 1993:346–8.
- 18 That is, in the Olynthiacs and Philippics. *Dem.* I–IV, VI, IX, X.
- 19 *Dem.* 18.231; *Diod.* 32.4.2.
- 20 Aristotle’s thoughts on *philanthropia* do not include Panhellenism. See *TLG* s.v. *philanthropia* Aristotle. Aeschines’ conduct on the peace mission to Philip (Bauman 1990:89–94), equivocal as it was, is not enough to make him Philip’s adviser.
- 21 *Panegyricus* 29: Demeter’s bounties of crops and mystic rites made Athens so beloved of the gods and so philanthropic that she shared them with the whole world. Cf. Goodenough 1928:55–7: the sharing even included revealing the mysteries to foreigners.
- 22 See *Isoc. Ad Nicocles* 15, 16, 19, 22–24, read with *Philip* 114, 116.
- 23 *Thuc.* 3.81–4 adapted. Even now he does not use the word *philanthropia* although his ‘general laws which give hopes of salvation’ come perilously close to machinery for the protection of human rights. ‘To nullify general laws’ fairly expresses the Greek. Cf. R. Crawley’s translation, *Everyman’s* 1910:172. R. Warner, Penguin translation 1972:245 gives ‘general laws of humanity’. This seizes the implication of Thucydides’ words but it is not what he says.
- 24 On this trial see Bauman 1990:69–76.
- 25 The definitive work on the Thirty is Krentz 1982. On the legalities see Bauman 1990:78–80.
- 26 On the law of 403 see Aristotle *AP* 39.1–6. Discussions: Dorjahn 1946; Ostwald 1986:497–509.

- 27 Cf. Cic. *Phil.* 1.1: 'I laid the foundations of peace and renewed the old precedent of the Athenians. I even adopted the Greek word [*ammestia, adeia*] which they used to sedate discord. I proposed that every memory of discord be erased in eternal oblivion.' Cf. Dio 60.3.5–7, 4.1–2; Oros. 7.6.5.
- 28 See the references in n. 6.
- 29 See Welles 1934: documents nos. 13, 15, 22, 66, 67, 31, 32, 52. Also the remarks of Walbank 1957–79:2.332–3 apropos of Pol. 12.5.3.
- 30 *P. Tebt.* 5. Also of interest: the address to a superior, *be se philanthropia*, 'Your Clemency' (*P. Ryl.* 296, second century AD); and the annual subsidy to a city to maintain its laws, ancestral constitution and religious privileges (Welles 1934:196).
- 31 See *TLG* s.vv. *philanthropia*, Polybius, Diodorus.
- 32 For an account of Polybius' career see Walbank 1957–79:1.1–6.
- 33 Pol. I 68.3–70.7, 72.1–3 (cf. Xen. *Vect.* 3.6), 78.10–15, 79.8–14, 80.2–81.11.
- 34 Should probably read 'Hamilcar'. In any event it is not the Punic general of the Second Punic War.
- 35 Diod. 24.5–10, 25.3.1, 25.5.2. Cf. Pol. I 78.13–15, 79.8, 84.8, 86.4–7. The alternative to *philanthropos*, viz. *anthropinos*, has only a limited range. On *anthropotes* see Schadewaldt 1973:52 n. 25.
- 36 Pol. XXX 12.3, 13.4., 32.12; XXXII 5.3–14.
- 37 Pol. II 38.1–8, 57–8, 60.7 adapted.
- 38 On Diodorus see R.Drews, *AJP* 83 (1962), 383–92; M.von Albrecht, *Kl.P.* 2 (1967), 41–2. He does not however ignore international affairs altogether. See for example Diod. III 12.3, 60.2, 61.4, 72.4, V 7.7. Also XIII 69.1, 96.1, XIV 42.1, 102.2, XVI 79.2, XVIII 14.1, 46.2, XIX 9.6, 91.5, XXI 16.6, XXVIII 15.1, XXIX 22.1, XXXI 7.1.
- 39 Also notices of Cyrus, Pittacus the Mytilenian lawgiver, and Charondas of Catania. Diod. IX 24.1, 11.1 (cf. X 28.3), XI 67.2, 89.7 (cf. XII 3.3), XII 16.2 (cf. XIX 50.2), XIII 58.3 (cf. XIV 6.2), 83.1.
- 40 Diod. XXXIV/XXXV 2.13, 2.33, 2.39.
- 41 Except for *to philanthropon*.

3 *Humanitas Romana*

- 1 See also the adverbial forms *humaniter*, *humanitus* and the opposite values, *inhumanitas*, *inhumanus*. OLD, TLL s. vv. Some writers define *philanthropia* by reference to *humanitas* rather than the reverse. EST; Heinemann 1931.
- 2 For these see n. 1.
- 3 Cic. *Leg.* 3.1, *Fam.* 12.27. Cf. Vell. 2.116.3.
- 4 The existence of this group is inferred from Cic. *De Amicitia* 69: 'Equality is often over-shadowed by pre-eminence, such as that of Scipio [Aemilianus] in our circle, so to speak' (*in nostro, ut dicam, grege*). The inference has had a turbulent career. In favour: Schadewaldt 1973:52–4 with literature. Against: Astin 1967:294–306 with literature.

- It is worth noting that *grex Iuliae* apropos of Augustus' daughter certainly denotes a cohesive entity. See Bauman 1967:198–201; 1992:113–16 with Sen. *Brev. Vit.* 4.5, *Ben.* 6.32.1–2, Plin. *NH* 7.45.149.
- 5 See chapter 5.
 - 6 Dem. 8.33, 13.16–17; Thuc. 2.40.
 - 7 Pol. 36.9. See 38.19–22 on his presence at Carthage. Walbank 1957–79:3.663–4 thinks that by presenting the views as those 'of the Greeks' Polybius can state them openly without committing himself. He certainly gives no more than grudging approval in the end. For further discussion of this question see Musti 1972:1163. On surrender at discretion (*in fidem populi Romani*) see the last section of chapter 4, the last section of chapter 6, and *passim*.
 - 8 Pol. 38.1, 39.2, including the curious claim that the Greeks bequeathed their feelings of desolation to their descendants, whereas the total destruction of Carthage deprived her of future generations who would feel the pain. Carthage is therefore supposed to be better off.
 - 9 Though it has been surmised that the destroyer of Corinth, L. Mummius, was a member of the Scipionic Circle. See Aymard & Auboyer 1956:220.
 - 10 Aemilianus had been adopted by a son of Scipio Africanus. As one of his *cognomina* was Africanus, he is often referred to as Scipio Africanus Minor, but 'Aemilianus' is less confusing.
 - 11 On this episode see Walbank 1957–79:3.438, citing Pol. 30.15, Livy XLV 33.1–8, 34.1–9, Strabo 7.7.3, App. Ill. 9, Trog. *Prol.* 33, Eutrop. 4.8.3, Plin. *NH* 4.39, Plut. *Aem.* 29.1–3.
 - 12 E.g. Diod. XXX 8.1, 20, 22, 23; XXXI 8.4–5, 8.6–9.1, 9.4, 11, 25–26.2, 27.3.5. But he does say elsewhere that Perseus was kept in an Alban dungeon and depended on common criminals for food. Diod. 31.9. Cf. Plut. *Aem.* 37.
 - 13 Cic. *Senect.* 18–19, *Off.* 1.79; Vell. 1.12.7, 1.13.1; Flor. 1.31.4; *Vir. Ill.* 47.8. Cf. Livy *Per.* 49; Plin. *NH* 15.74; Diod. 34.33.2–3; Plut. *Cato* 27.2.
 - 14 What follows is based on the findings of Capelle 1932 with modifications and amplifications.
 - 15 Cicero's debt to Panaetius is generally recognised, at least in respect of the first two books of *De officiis*. Apart from Capelle, see Fedeli 1973:361–75; *OCD* s.v. Panaetius. See also Cic. *Off.* 2.60, 3.7; *Att.* 16.11.4.
 - 16 Carneades had denied this, claiming that rulers ruled only for themselves.
 - 17 Capelle 1932:104: 'Das eben ist hier die Wesentliche: die Versittlichung des imperialistischen Gedankens durch die mittlere Stoa.'
 - 18 Astin 1967:300–1 doubts both Panaetius' formulation of a blueprint and his communication of it to Aemilianus. The attack is aimed at the inference drawn by Capelle from Cic. *Rep.* 3–32–41. But Schadewaldt 1973:56–8 with 57 n. 43 draws an important parallel between Cic. *Ad. Q. fr.* 1.1.27 and *Off.* 1.85–89 (cf. Harder 1934); he also compares *Off.* 1.85–89 and Pol. 31.25–29. I would add a saying of Aemilianus:

- ‘Unbridled and egotistical men should be given a course in reason and learning [*ratio et doctrina*] to help them to understand the frailty of human affairs [*res humanae*]’ (*ap.* Panaetius via Cic. *Off.* 1.90). In other words, those who overstep the bounds of moderation prescribed by *humanitas* should be given a refresher course by *paideia*. Also, Augustine (*Civ. Dei.* 19.21 ad Cic. *Rep.* 3.32–41 which is spoken by Laelius, a member of the Scipionic Circle): ‘They are part of the argument for the justice of... imperialism in which it is claimed that some nations are naturally fitted for and benefited by subjection to others.’ See also Cic. *Rep.* 3.41: ‘Ti. Gracchus...violated the treaty rights of our allies and the Latins. If this lawless habit causes those who have obeyed us willingly to be held down by terror alone [cf. Diod. 32.1–2, 4]... then I fear for the stability of the Republic.’ On 144 as the date of Panaetius’ visit see H.Dorrie, *Kl.P.* 4 (1972), 447. Astin 1967:297 considers 140–139 the only reliable date for Aemilianus’ contacts with Panaetius. *OCD* s.v. Panaetius puts him in Rome ‘in the 140s’.
- 19 On various conjectures as to the date and authorship of *Ad Herennium* see Caplan 1954: vii–xv. The Rhodian rhetorician, Apollonius Molo, visited Rome in 87, which may be a pointer to the date of the treatise. H.Gams, *Kl.P.* 1 (1964), 1175, thinks Cicero’s *De inventione* preceded *Ad Herennium*. Cf. Caplan 1954: xxv, dating Cicero’s work (his first) to c. 91. Cicero’s first use of *humanitas*: *Quinct.* 51.
- 20 Pol. XXXI 25.2, 25.8, 25.9, 26–8.
- 21 Pol. XV 17.3–7, 4.1–11, X 34.9, 38.1–4, XI 27.3–30.5, XI/XII 2a.4.
- 22 This despite his 170 uses of *philanthropia* altogether. *TLG* s.v. *philanthropia* Plutarch.
- 23 See *TLG* s.v. *philanthropia* Appian.
- 24 *Ad Herenn.* 4.16, 22. There is a reference to Aemilianus in 4.19, ‘Scipio razed Numantia, destroyed Carthage, brought peace, saved the state’, but it is not a *humanitas* passage.
- 25 Cf. n. 19. Caplan 1954: xxv points out that the work contains no references to any event that took place during or after the Marsic (Social) War.
- 26 So Lesky 1957/8, citing Menander fr. 484 K: *hois charien est’ anthropos ...an anthropos ei*.
- 27 Astin 1967:305–6 on repartee. Veyne 1993:353 on meddling. Neither argument, nor that of Jocelyn 1973, weakens Seneca *Ep.* 95.51–3 in any way.
- 28 Sc. Mariotti, *Kl.P.* 5 (1975), 600.
- 29 He died in 159, when Aemilianus had not started on the public career that was to be the basis of his influence. However, if he began his association with Polybius as early as 167—M.Deissmann-Marten, *Kl.P.* 5 (1975), 49—there is no serious objection to a similarly early link with Terence.
- 30 E.g. Ter. *Adelphi* 687; *Heaut.* 99. On Plautus’ uses see G.Lodge, *Lexicon Plautinum*, Leipzig 1924, vol. 1, s.v. *humanus*. On Ennius see L.Mueller, *Q.Enni Carminum Reliquiae*, Petersburg 1884, s.vv. *humanitus*, *humanus*. If the editor’s juxtaposition of *Si quid me fuerit humanitus*,

ut teneatis and *Mettoeo(que) Fufetioeo* (p. 80) reflects a linkage between the two fragments in Ennius' actual text, there may have been a reference to Tullus Hostilius' brutal treatment of the Alban leader, Mettius Fufetius, treatment that Livy 1.28.6–11 described as the first and last Roman punishment to disregard the laws of *humanitas*. This would lift the reference above the pedestrian level.

- 31 *The Self-Torturer* was produced in 163.
 32 See no. 30.

4 Human rights prior to *humanitas Romana*

- 1 Livy 1.28.9–11. Cf. Varro fr. *Non.* p.287 ME: *imperiosius quam humanius*; Dion. Hal. 3.30.5–7.
- 2 Cf. chapter 3 n. 30.
- 3 Gaius 1.1.1. For an account of *ius gentium* see Jolowicz 1972:102–7. Also Wieacker 1988:444–6; Spruit 1992:76–80.
- 4 Jolowicz, loc. cit. Also Villey 1969:73–84.
- 5 Dem. 24.192–3; 25.87–9. Cf. also Pol. II 38.1–8, 57–8, 60.7.
- 6 Livy IV 17.2–4, 19.3–5. *Foedus humanum* does not imply a neutral sense (of 'human' as opposed to ?). Philanthropic adjectives are very common with reference to treaties. See below *passim*.
- 7 See the references in n. 5.
- 8 Livy 29.8.8–9.12; 37.7.15; 37.54.15–17.
- 9 Livy XXIX 9.10, 21.1, 22.9, XXXIV 44.6.
- 10 Bauman 1967:12–15 and *passim*.
- 11 See chapter 6.
- 12 Bauman 1978:22 with Cic. *Balb.* 34–5.
- 13 Livy 37.7.15. See also Cic. *Balb.* 36, *Deiot.* 19; Plin. *Ep.* 8.21.1; Apul. *Met.* 10.17.
- 14 On the frustrating negotiations leading to the treaty see Dahlheim 1968:34–6; Bauman 1983:185 with Pol. 20.9.3–10.12, Livy 36.27.1–28.6.
- 15 The *locus classicus* for the *maiestas* treaty is D. 49.15.7, written by Proculus, head of the Proculian law school, in the mid-first century AD.
- 16 Bauman 1967, 1974, 1983 *passim*. Briefly, the defence to a charge of diminishing the *maiestas* of the Roman people was that, far from diminishing it, one had actually preserved it. This applied equally to the *maiestas* treaty. Cf. Cic. *Balb.* 35–6: 'The treaty between Rome and Gades contains a clause not found in all treaties—"let them courteously preserve..." The word *conservanto* is more appropriate in laws than in treaties because it implies a command, not a request.'
- 17 Livy 37.54.15–17 adapted. We also have Polybius' version of the speech. Pol. 21.23.4–9. It is the same as Livy in substance, but omits the Rhodians' praise of themselves, including their renown for *humanitas doctrinaeque* and their patrocinal relationship with Rome.
- 18 Bauman 1983:220–2.

- 19 That is, the treaty of 226 excluding Carthage from interfering north of the R.Ebro in Spain. On this see F.Hampl, *ANRW I 1* (1972), 428–37. There is also talk of an abortive treaty prior to Carthage’s final defeat. See below. In Pol. 15.17.3 Scipio appears to accuse them of having violated both those treaties. But the second one is described in Pol. 15.1.2–4 as the gravamen of Scipio’s complaint.
- 20 Pol. 15.17.3–7. On the terms offered by Scipio see Pol. 15.18, Livy 30.37.1–6, App. *Pun.* 53–4, Dio 17.82, Zon. 9.14.
- 21 On ‘the common laws of mankind’ see the references in n. 5. It is of course the *ius gentium*.
- 22 On these various developments during the Second Punic War see Bauman 1992:22–5, 27–8, 52–9, 61–3; 1996:92–7. On Licinius Crassus see Bauman 1983:92–110.
- 23 See the references in n. 27.
- 24 Plut. *Marc.* 21.3–4. Cf. Livy 27.16.8. But in *Fab.* 22.5–6 Plutarch says that Fabius fell short of Marcellus in mildness and *philantropia*.
- 25 See chapter 6.
- 26 Pol. 10.15.4–5. Cf. Livy 26.46.3–10.
- 27 The distinction in the text between the two forms of capture represents the optimum position as far as *deditio in fidem populi Romani* is concerned. In practice commanders to whom a *deditio* had been made allowed themselves considerable latitude. See for example Harris 1979:74–7. Also Dehlheim 1968:48–52; De Martino 1972–4: 2.54–63; Ziegler 1972:94–6; Bauman 1978:30 n. 16; Volkmann 1990: *passim*.

5 Human rights in the Late Republic: Cicero

- 1 He has some 150 uses of *humanitas* and 250 of *humanus*. See *TLL* and Merguet s.vv.
- 2 See chapter 7.
- 3 As against that, the following uses occur in works of Sallust’s contemporaries: *Ad Herennium*: five of *humanitas*; Caesar: four *humanitas*, three *humanus*; Varro: three *humanitas*, ten *humanus*; Nepos: two *humanitas*. For Caesar see C.M.Birch, *Concordance and Index to Caesar*, Hildesheim 1989. For the others see *TLL* s.vv.
- 4 Twenty-seven uses in all. See J.Rapsch & D.Najock, *Concordantia in Corpus Sallustianum*, Hildesheim 1991.
- 5 Reitzenstein 1907:6–7; Heinemann 1931:305; Harder 1934:64, 74; Schulz 1936:190–2 (but cautiously); Honig 1960:28–9, Büchner 1967; Boyancé 1970. Recent subscribers include Schadewaldt 1973. For this and other reasons his third phase in the evolution of *humanitas* is the least impressive part of his case. His remarks about Cicero are apparently based on the (unpublished) dissertation of J.Meyer, ‘*Humanitas in Cicero*’ which I have not seen.
- 6 A few random examples are Cic. *Arch.* 3; *Balb.* 18; *Cael* 54; *Mur.* 61; *Att.* 5.1.3, 12.44.1; *Fam.* 2.17.6, 10.5.2; *Ad Q. fr.* 2.3.5; *Orat.* 3.29.

- 7 Cicero's principal venue was the jury-courts for a number of crimes that dominate the criminal courts of the first century BC. On these *iudicia publica* or *quaestiones perpetuae*, each made up of a magistrate sitting with a number of *iudices* (jurors), see Kunkel 1974:33–110; Jones 1972:43, 48, 52, 54–9, 92; Robinson 1995:1–8, 10, 12, 21, 89, 90; Bauman 1996:21–34. The old *iudicium populi*, trial by the people at the instigation of a tribune or aedile, still surfaced occasionally in Cicero's day. On this process see Bauman 1996:9–20. See also Jones 1972:4–6, 11, 17–18, 25–6, 55, but caution is needed because of his views on *provocatio ad populum*.
- 8 Cf. *comiter* in the *maiestas* treaty. Chapter 4 above.
- 9 *Off.* 1.30; *Leg.* 1.33.
- 10 For the specific acts that had earned Quintus this accolade see *Ad Q. fr.* 1.1.25. I do not pretend to be able to reconcile this with the statement later in the letter, that Quintus' bad temper made everyone long for his *humanitas*. *Ad Q. fr.* 1.1.37–8.
- 11 *Cic. Div. in Caec.* 55; *Verr.* II 3.212–216; Ps. Ascon. 187, 259 St.
- 12 *Placc.* 9–12, 16–19, 24, 57, 60 adapted. Mithridates is the ruler of Pontus who wrote to the Greek cities of Asia Minor, calling on them to kill Roman citizens. He avoided all references to Rome's hegemony, thus undermining *maiestas p. R.*
- 13 *Off.* 1.34–5. Augustus took a similar position on sparing the conquered. *RG* 3.2, discussed in chapter 7.
- 14 *Off.* 1.34–5. On *editio in fidem p. R.* see chapter 3 n. 7, chapter 6 n. 20 and below *passim*.
- 15 This is further shown by his laudation of the XII Tables at the expense of Greek philosophy. *Orat.* 1.193–7. Cf. Bauman 1998:197–8. But the matter was contentious. Caesar unequivocally supported borrowing. *Caesar ap. Sall. Cat.* 51.37.
- 16 On the Roman scene this does not only mean the death sentence. It includes punishments which leave the offender alive but inflict the highest diminution of status (*capitis deminutio maxima*) on him, such as deportation to an island accompanied by loss of citizenship and confiscation of property. The context will show the sense in which the expression is used here. But in order to cut down on ambiguity we will for the most part use more specific expressions such as 'the death sentence'.
- 17 See chapter 9 and elsewhere *passim*.
- 18 Cicero was consul at the time of the speech.
- 19 *Crux* in *Rab. perd.* 11, 16 but *arbor infelix* in 13. That suspension on 'the infertile tree' means death by beating, not by crucifixion, see W. Oldfather, *TAPA* 39 (1908), 49–72; Cantarella 1991:175–206. One need only add that in Livy's account of the trial of Horatius in the regal period, *arbor infelix* cannot possibly mean that crucifixion, which until the Principate was exclusively reserved for slaves, was inflicted on someone who was not only a free citizen but a hero. See Livy 1.26.2–6.
- 20 On the laws in question see at n. 30 below.
- 21 *Cic. Rab. perd.* 10, 12–13, 15–17, 32.

- 22 His only use of it in the speech is in a stereotype. *Rab. perd.* 26.
- 23 Cf. Bauman 1996:41–4. For some of the literature see *ibid.* 173 n. 38.
- 24 As far back as 249 BC the tribunes of the plebs had laid down a ban on double jeopardy. *Schol. Bob.* p. 90 St.
- 25 The paradigm case is the trial of Horatius in the regal period. Livy 1.26.2–6. On that and subsequent employments of the duumviral process see Bauman 1969.
- 26 This is made clear in Livy 1.26.6: the dread formula ran thus: ‘Let the *duumviri* pronounce him guilty of treason.’ Also 1.26.7: they considered that they could not even acquit someone who was innocent. They were simply a trigger to set off *provocatio ad populum*, the appeal to the people by the condemned man. On *provocatio* see below.
- 27 Cf. n. 26. Cicero calls *provocatio* ‘the patron of citizenship and the champion of liberty’. To Livy it is ‘one of the two bastions for the defence of liberty’. Cic. *Orat.* 2.199; Livy 3.45.8. Cf. Cic. *Rep.* 2.53–5; Livy III 55.4, 56.6, X 9.4. I do not propose going into the labyrinthine controversy as to the history and meaning of *provocatio*, especially its relationship to the tribunician criminal process. For some of the literature see Bauman 1996:165 n. 5. Suffice it to say that at Rabirius’ trial it meant exactly what Livy 1.26.2–6 says it meant at Horatius’ trial, an appeal to the people against the mandatory conviction by the *duumviri*.
- 28 That is the meaning of Cicero’s assertion that ‘I was responsible for abolishing the *perduellio* procedure [= taking the duumviral penalty out of the case]; it was by my counsel, merit and authority that [the senate] rejected the cruel, savage penalty.’ *Rab. perd.* 10, 17. This was the only change. It was proposed by Cicero to the senate after the duumviral condemnation and Rabirius’ exercise of *provocatio*. That appeal had brought into play a regular trial by a tribune (Labienus) and the popular assembly. There was ample time during the preliminary stages of the tribunician process to go to the senate.
- 29 Suetonius *Caes.* 12 says that the barbarity of the duumviral process persuaded the people to acquit. That is quite possible. In his speech Cicero was still dwelling on the savage penalty although it had by that time been taken out of the case. But Dio 37.27.3 says that the people were on the point of convicting when Metellus Celer struck the flag on the Janiculum. Dio is probably right.
- 30 On the *lex Porcia* see for example J.S.Ruebel, ‘The Political Development of Cato Censorius’, Diss. Cincinnati 1972:133–6. See also D.Kienast, *Cato der Zensor*, 1954, repr. Rome 1973:90–2; A.E. Astin, *Cato the Censor*, Oxford 1978:22. On the *lex Semproniana* see Ungern-Sternberg 1970:48–54.
- 31 I do not propose dealing with the other great forensic episode of Cicero’s consulship, the trial of the Catilinarian conspirators at which Cicero bypassed the jury-court for *maiestas* by having the senate declare the men enemies, *hostes* of the Roman people, which exposed them to summary execution without trial. It can be shown that Cicero was perfectly consistent. The Populares had recharged Rabirius in order to launch another attack on the *senatus consultum ultimum*, the senate’s

- 'last decree' which had periodically suspended constitutional guarantees since its invention for use against Gaius Gracchus. Cicero made it clear that he was defending Rabirius in order to defend the *s.c. ultimum*. *Rab. perd.* 1–4. He was doing so in the public interest. He had exactly the same motive in the Catilinarian affair. *Humanitas* was always exposed to qualification by *utilitas publica*. On these matters see for example Bauman 1996:38–49 with literature.
- 32 Cic. *Orat.* 1.53–4, on which see above.
- 33 Cic. *Phil.* 11.8–10, discussed in chapter 1.
- 34 On his position in the Catilinarian affair see n. 31 above.
- 35 On the games see chapter 9.
- 36 Cf. Bauman 1996:13–18, 55. An amplified version is presented here.
- 37 Voluntary exile was not restricted to cases of capital punishment. Bauman 1996:14–15, 16–18. Jones 1972:14 doubts whether heavy fines were evaded by voluntary exile, but he overlooks cases much later than Camillus. He also overlooks the evidence for its exercise even by humble offenders.
- 38 Possibly three days for Rome and thirty for Italy, although those limits are not attested until the Early Principate. Bauman 1996:75.
- 39 Cf. Bauman 1996:26–9. Strictly speaking the *lex* did not actually impose the interdiction. It ordered that it be done: *aqua et igni interdicatur*, 'Let him be interdicted.' It was then for the magistrate to carry out the law's command by issuing an edict of interdiction.
- 40 Polybius means 'the centuries', since he is referring to capital trials which went to the *comitia centuriata*. He also does not know that the facility was available after condemnation as well as before it.
- 41 But not in the legal texts. See *Coll.* 12.5.1, 15.2.1; *Gai.* 1.128; *D.* 47.9.12.1, 48.13.3, 48.19.2.1; *PS* 5.29.1.
- 42 Cf. *Pol.* 6.14.7: *hekousion heautou katagnonta phugadeian*, 'sentencing themselves to voluntary exile'. The name 'voluntary exile' was invented by Polybius.
- 43 Cic. *Mur.* 3, 5, 46–7, 67, 89; *Sest.* 133; *Vat.* 37. Cf. *Dio* 37.29.1. The penalty was sub-capital; the offender retained both his property and his civic rights.
- 44 *Sall. Cat.* LI 14, 18, 21–2, 39–40; Cic. *Cat.* 4.6, 7.
- 45 Cf. Jones 1972:77–8. Cicero's execution of the Catilinarians does not affect it—at least not technically. He claimed that they had lost their civic rights retrospectively to the time of their crime.
- 46 *Dem.* 18.112, 21.43, 24.156, 24.192–3.
- 47 Cic. *Balb.* 19, 62; *Cluent.* 29; *Suit.* 92; *Verr.* II 5.111; *Cluent.* 95 (the editors' bracketing of *vestra sapientia [et humanitate]* is mistaken—cf. *Cluent.* 29).
- 48 Cic. *Quinct.* 49–51, 97. Cf. *Flacc.* 24, *Mur.* 65.
- 49 *D.* 11.3.5 pr. Poaching of slaves was such a problem in Ulpian's day that the Fabian law on kidnapping was passed. See Bauman 1996:110–14.
- 50 Bauman 1989:263–72.
- 51 On this belief see for example Schulz 1936:190: 'Wherever [*humanitas*] is found in classical texts it has been interpolated.' But apart from the

evidence in our text, *VIR* does not include D. 11.3.5 pr. among the *humanitas* passages that it lists as interpolated.

- 52 Besides being a member of the *consilium* of Marcus and Verus, Julian is described by Marcus as *Iulianus noster*, *Salvius Iulianus amicus noster*, both in D. 37.14.17 pr. and in a letter to Fronto *Ep.* 4.2, pp. 60–1.

6 Human rights in the Late Republic: curbs on ill-treatment

- 1 Cf. D. 48.4.1.1, 4 pr.: ‘The charge of *maiestas* lies against those who have so acted as to cause foreign kings to be less submissive to the Roman people, or foreign peoples to become enemies of the Roman people instead of friends.’ See also Bauman 1967:8.
- 2 Commonly rendered in modern works as ‘extortion’. Perhaps ‘exaction’ is less confusing, given the usual meaning of ‘extortion’. As far as possible I prefer to keep to the Latin *repetundae*. Strictly speaking it only means the restitution of exacted property, but Tacitus does have *repetundarum a sociis postulatam*. *Ann.* 3.66.1–2.
- 3 In the case of the patrician matron Claudia, on which see Bauman 1967:28–9; 1992:19–20.
- 4 *Sen. Rhet. Contr.* 9.2 pr.; Livy 39.43.2; Plut. *Cato* 17.3–4. Livy 39.42.10–12 claims that Flamininus killed the man himself.
- 5 *Sen Rhet. Contr.* 9.2 (25) p. 382 M: Livy 39.42.5–43.5; Cic. *Senect.* 42; Val. Max. 2.9.3, 4.5.1; Plut. *Cat. Mai.* 17.1–6, *Flam.* 18.2–19.4; *Vir. Ill.* 41 A; *ORF* Cato frs. 69–71. Valerius Maximus’ ‘besmirched the *maiestas* of his high office’ is paralleled by Cicero’s *cum probro privato coniungeret imperi dedecus*. For some of the modern literature see Bauman 1983:214 n. 416.
- 6 Livy 39.42.7; Cic. *Senect.* 42; Plut. *Flam.* 19.1.
- 7 Livy 39.42.7. He does not say that the charge would have been *maiestas minuta*, but that is clear from Valerius Maximus and Cicero (n. 5 above).
- 8 Livy 39.43.5; Plut. *Cat. Mai.* 17.5–6, *Flam.* 19.2.
- 9 *Pol.* 18.46; Livy 33.32.5. Cf. Badian 1958:72–5.
- 10 Even Cicero draws a distinction in his letter to Quintus. *Ad Q. fr.* 1.1.27. Cf. the citation in chapter 1 above. See also Cic. *Flacc.* 62; Plin. *Ep.* 8.24.2. Also Isoc. *Pan.* 29.
- 11 Cf. *lex Acilia* 1–3. *FIRA* 1.84. See also Eder 1969:6.
- 12 We do not have evidence of rapacity in Sicily or Sardinia over the decades following the First Punic War. It would be naive to suppose that it did not occur.
- 13 Cf. chapter 4 s.v. ‘Primacy in *humanitas*: rival contenders’.
- 14 Cic. *Verr.* II 4.121, *Rep.* 1.21; Livy XXVI 21.6–9, 31.9; Plut. *Marc.* 22. Archimedes had, much to Marcellus’ regret, been killed by a soldier who did not know who he was. Livy XXV 31.9–10. But it was Marcellus who took the globe of the world to Rome.
- 15 Livy 26.30.10. Eder 1969:10 and *passim*, denies that this or other cases until 171 are *repetundae* cases because they do not use the judicial

- machinery needed to enforce restitution. Even without that they reflect relevant thinking, but in fact some of them do employ such machinery. See for example in 205 (below).
- 16 Livy 26.29–32, making the exchange antecedent to the debate in the senate. That is no doubt possible if there was a prearranged understanding with an influential group of senators. On Marcellus' speech in the senate see the end of this chapter.
 - 17 Livy 29.1.15–17: *partim edicto, partim iudicii etiam in pertinaces ad obtinendam iniuriam redditis suas res Syracusanis restituit.*
 - 18 For some of the names involved in the attack see Eder 1969:11–12, although he ascribes the attack to the tired stereotype of personal enmity. One might add the name of M. Cornelius Cethegus, praetor in Sicily in 211 and credited with organising the Syracusan démarche against Marcellus. Livy 26.26.8. He was a gentile relative and friend of Scipio. Scullard 1970:197.
 - 19 For full lists see Eder 1969:15–57; Volkmann 1990:91–105 with 71–91. See also Bauman 1983:200–7.
 - 20 On this type of surrender see Ziegler 1972:94–6 with n. 219; Volkmann 1990: *passim*.
 - 21 The Syracusans had probably made a *deditio in fidem* to Marcellus in 211. Eder 1969:11 n. 1. That is why Scipio's edict of 205 was issued in order to safeguard *publica fides*. Livy 29.1.17.
 - 22 Livy XLII 8.1–9.6, 21.1–5, 21.8–22.5, 22.7–8.
 - 23 I here summarise, with amplifications, Bauman 1983:157–60, 170, 175–6, 181, 200–02, 207 n., 212–13, 218–19, 251 n., 260, 373.
 - 24 Eder 1969:29 offers a different interpretation of the case. He thinks that Laenas' violation of the *deditio in fidem* was seen as a bad precedent for hoped for surrenders in the forthcoming Third Macedonian War. But were those who persuaded the praetor to abandon the commission worried by this?
 - 25 The Two Spains, separately organised since 197, were temporarily combined for the purposes of the Third Macedonian War. A.C. Schlesinger, Loeb edn of Livy, xiii 7 n. 3.
 - 26 Livy 43.2.8–11. Furius went to Praeneste, Matienus to Tibur—both places noted by Polybius in his account of voluntary exile.
 - 27 Livy 43.2.1–12. The rumour of patronal collusion (ibid. 43.2.11) is unlikely to have applied to Cato. Cicero says that Cato's championship of the Spaniards brought him many bitter enemies. *Div. in Caec.* 66. If there was talk about Cato, it was a calumny put out by his enemies.
 - 28 It is even so accepted by Eder 1969:34. Kunkel 1962:12–13 has no difficulty in accepting it.
 - 29 Livy 43.2.10, confirmed by the epitome: several praetors were condemned for administering their provinces with greed and cruelty. *Per.* 43. Condemnation does not apply to Furius and Matienus, but the epitomator may have found an *aquae et ignis interdictio* in Livy. Livy himself says that the Spanish envoys complained to the senate about *avaritia superbiaque et alia indigna*. 43.2.2–3.
 - 30 How was restitution enforced when the accused left before a verdict? In the ordinary course condemnation and assessment were followed

- by execution against property. Presumably a plebiscite of the people was required against the fugitive, on the analogy of the interdiction in capital cases.
- 31 The repurchase was made by the authorities. Livy *Per.* 43; Zon. 9.22.6.
- 32 A special affront since it was used against condemned criminals. Caracalla criticised the praetorians for killing the jurist Papinian with an axe instead of a sword. *SHA Carac.* 4.1.
- 33 This amount was presumably paid into the treasury and used to fund repayments. Cf. *lex Acilia* 59–60, 66.
- 34 Livy XLIII 7.10, 8.1–3, 8.7–10. It is likely that the fine imposed on Licinius Crassus (above) also emanated from the plebeian assembly, with the senate merely giving preliminary approval, as was often done both in criminal and other matters.
- 35 Sources in *MRR* 1.457, 459; Eder 1969, 51. Add Tac. *Ann.* 3.66.2.
- 36 So Val. Max. 9.6.2. Suet. *Galb.* 3.2 makes it 30,000, all massacred. But enslavement was the greater part of these exercises. There was not much of a market in corpses.
- 37 Livy *Per.* 49; Cic. *Brut.* 89. The broken pledge is in App. *Iber.* 60. The tribune proposing the bill, L.Scribonius Libo, wanted a special commission (*quaestio extraordinaria*) under a praetor. Cic. *Orat.* 1.227–8, *Brut.* 89; Livy 39.40.12; Val. Max. 8.1 abs. 2. The alternative tradition in which Galba was actually prosecuted and acquitted has the solitary evidence of Livy *Per. Oxy.* 49. Both Tac. *Ann.* 3.66.2 and *Vir. Ill.* 47.7 have *accusatos* in a general sense. Cicero's *L.Libone...rogationem in Galbam privilegi similem ferente* (*Brut.* 89) is decisive. There would not be any mention of a *privilegium* if an actual prosecution had been launched.
- 38 It was incorporated in his historical work, *Origines*, shortly before his death. Cic. *Brut.* 89. Cf. Cic. *Orat.* 1.227; Livy 39.40.12, *Per.* 49; Val. Max. 8.1 abs.2; Plut. *CatMai.* 15.4; Tac. *Ann.* 3.66.2; *Vir. Ill.*
- 39 Cic. *Brut.* 90, *Orat.* 1.228; Livy *Per.* 49, *Per. Oxy.* 49; Val. Max. 8.1 47.7. abs. 2; App. *Iber.* 60.
- 40 A recent attempt to disprove this interpretation of Calpurnius' law is discussed below.
- 41 The members of the Calpurnian court were *indices* or *recuperatores*. The latter is adopted by Eder 1969:96, 100, 116. But this depends on the jury having only assessed the amount to be repaid, hence *recuperatores* ('recoverers'). If such assessors did not also decide on guilt or innocence, how did they acquit M.Titinius, or adjudicate on 'most serious charges' against Furius and Matienus, at the Canuleius commission? Deciding on guilt or innocence would be a regular feature of the jury's duties under the third *repetundae* law, the *lex Acilia* of 123/122. Eder 1969:79–86 seems to be against his dominant view. Kunkel has shown that the early second century special commissions in general were composed of a magistrate sitting with a *consilium iudicum*. Kunkel 1962:58–60; 1974:46–9, 52. Jones 1972:50–1 credits Calpurnius with having provided for a jury instead of *recuperatores*.
- 42 This is inferred from a clause in the *lex Acilia* requiring the peregrine praetor, within ten days after the passage of the law, to select a panel of

- 450 persons. *Lex Acilia* 12; *FIRA* 1.88. Cf. Eder 1969:95–9, 170–1; Jones 1972, 48. This was a carry-over from his function under the *lex Calpurnia*.
- 43 The definition of this function will have been similar to that in the *lex Acilia*, on which see below.
- 44 See *lex Acilia* 23; *FIRA* 1.90. This is one of the few occasions on which the reasonably well-preserved epigraphic text of the *Lex Acilia* gives a direct, and not merely an inferential, attestation of a provision of the *lex Calpurnia*. On the use of the *sacramentum* in *repetundae* proceedings see Kunkel 1962:13, 15, 102, 132; Eder 1969:66–71 and *passim*.
- 45 Cf. the humiliation that an adverse finding even in a civil suit brought P.Quinctius. Cic. *Quinct.* 49–51, 97, discussed in chapter 5. Titus Menenius was unable to endure the *ignominia* of a fine and died of shame. Livy 2.52.5. One of the reasons for going into voluntary exile was to escape *ignominia*. Cic. *Caec.* 100.
- 46 See below *passim*.
- 47 On this see chapter 5 at n. 11.
- 48 E.g. Eder 1969:3: ‘The *lex Calpurnia* and the *lex Acilia* established permanent jury-courts “that offer no points of comparison with factually similar offences against Roman citizens”.’ Cf. *ibid.* 6–14, 47, 53, 58–74 and *passim*. See also Jones 1972:48; Kunkel 1974:51–2; W.V.Harris, *CAH* 8.131–2.
- 49 Richardson 1987, *passim*. The idea appears to have originated with A.Rudorff in 1863, judging by Eder 1969:155 n. 1. It was also briefly anticipated by Watson 1974:81 and n. 3. As presented by Richardson it has been endorsed by D.Cloud, *CAH* 9.506; and Robinson 1995:81 with n. 83. Richardson reluctantly suggests that peregrines were also included in the *lex Calpurnia*, but he neither motivates his idea nor attempts to reconcile it with his basic thesis. In fact he contradicts himself, because if, as he contends, peregrines could not have been included in the *lex* because they did not have access to the *legis actio sacramento*, how did they get into the picture at all? Brunt 1988:526–30 abandons his previous adherence to the majority view. He now has both peregrines and citizens entitled by the *lex*, but he does not motivate the inclusion of citizens. Richardson does not repeat his theory in *CAH* 9.578.
- 50 The second law was a *lex Junia* passed at some time between 149 and 123/2. Like the *lex Calpurnia*, its procedure was based on the *legis actio sacramento*.
- 51 The private remedies to which Cicero refers were the *legis actio sacramento* and the *condictio*. On these see Jolowicz 1972:176, 180–2, 192–6, 214–15, 284–5 and *passim*. They included both a *legis actio sacramento* and a *legis actio per conductionem*.
- 52 The *lex Acilia* is precisely what, on our view, the *lex Calpurnia* was, namely a law providing exclusively for relief to non-Romans. This is clear from the opening clause (*lex Acil.* 1–2, quoted above). Richardson thinks that the *lex Acilia* also made provision for citizens. He deduces this from a fragmentary clause in the extant text: ‘If any Roman citizen

- shall have lodged the name of another under this law (*ex hac lege alte[rei nomen detulerit]*).' *Lex Acil.* 87. The inference is not cogent. Citizen participation is dealt with in *lex Acil.* 6, authorising a citizen to lodge a claim not in his own name but in the name of someone else. The fragment on which Richardson relies is in the thick of a group of clauses laying down rewards for successful accusers. *Lex Acil.* 76–90. This simply means that besides acting as a *patronus* (*lex Acil.* 10–11), a citizen could be empowered to bring an action *suo nomine*, especially where the complainant was a foreign nation or a king. The position is analogous to that of a *mandatarius* or *cognitor* appointed to litigate for another (on which see Buckland 1963:514–21; Kunkel 1967:330–1). The agent was the principal as far as third parties were concerned. Whatever was recovered was paid to him and he accounted to his principal. The Acilian agent would similarly have accounted for the money repaid, but not for the reward. That was not practicable. The rewards as we have them offered a choice between citizenship and the right of *provocatio*. These only applied to non-citizens; due to a *lacuna* the rewards for citizens acting under a mandate are not stated. Eder 1969:231 n. 1 suggests exemption from military and public service. He rejects Rudorff's conjecture of adlection into the senate and permission to wear the *toga praetexta*.
- 53 See *lex Acil.* 3, 7, 8, 12, 15, 23, 58, 59: the *legis actio sacramento* replaced by an accusatory procedure initiated by *nominis delatio*; the senatorial panel of *iudices* replaced by a panel of *equites*; a special praetor appointed to preside over the *quaestio* after the peregrine praetor, who had presided ever since the *lex Calpurnia*, had assisted the change by empanelling 450 *equites*; the penalty raised to double the amount exacted. The substitution of equestrian jurors for senatorial is the hub of the matter. The *lex Acilia* was a Gracchan operation. Gaius Gracchus and his associates were interested in the Italian allies, which did not require any change in principle from the *lex Calpurnia*. I take the list of Roman officials whose exactions fell under the *repetundae* process, as set out in *lex Acilia* 1–2, namely 'dictator, consul, praetor, magister equitum, censor, aedilis, tribunus plebei, quaestor, IIIvir capitalis, IIIvir agreis dandeis adsignandis, tribunus militum legionibus IIII primis, or any son of any of them, or any of them whose father is a senator' to have been taken over from the *lex Calpurnia*.
- 54 *Lex Acil.* 74–5. Cf. 56.
- 55 Richardson 1987:4–9.
- 56 Cf. the agency suggested in n. 52 above.
- 57 Mommsen 1899:708 thought that the *lex Calpurnia* had made *condictio* available to non-citizens. Even if that view is unsound (Kunkel 1962:13–15, 102, 132), some adaptation is quite possible. On the possible opening up of the *legis actiones* to peregrines as early as 304 BC see Bauman 1983:39–43. Richardson cites (but rejects) other theories as to how the *sacramentum* problem could have been overcome.
- 58 Eder 1969:67–8 with n. 2 dates the law to 134. Jones 1972:49–50 notes M.Iunius Silanus (*cos.* 109) as the possible author during his tribunate (date unknown). *MRR* 1.513 tentatively makes him tribune

- in 123, but as the same entry in *MRR* also dates the *lex Acilia* to 123 the legislative calendar is somewhat crowded. M. Iunius Pennus (*tr.* 126) gives a more viable date if any Iunius would do, but his *lex Junia de peregrinis* against peregrines who usurped citizenship is condemned by Cicero as inimical to *humanitas*. *Cic. Off.* 3.47, *Brut.* 109.
- 59 Volkman 1990:104.
- 60 Cf. Volkman 1990:102, pointing out that in order to counter allegations that he had misappropriated booty, Cotta delivered a large part of it to the *aerarium*. See also Alexander 1990: no. 192.
- 61 Livy says that Crassus' trick deprived the Ligurians of relief. Cf. at n. 22 above.
- 62 Mark Antony's reversal of a number of Jewish enslavements in 41 on the grounds that they had not been imposed under the laws of war (on which see the end of this chapter) was based on recognised principles but did not result from criminal proceedings. Volkman 1990:103–4 considers it the last mass enslavement, citing *Jos. Ant.* 14.304, 313, 321. Antony's edict of liberation ended with a threat to prosecute anyone failing to release the slaves or to restore their property. *Jos. Ant.* 14.322. He thus followed the precedent set by Scipio at Syracuse in 205.
- 63 The classic case is the dispute in 189 between the pontifex maximus, Licinius Crassus, and Fabius Pictor, the flamen Quirinalis, as to whether Fabius could leave Italy. Fines were imposed, but the people remitted the fine against Fabius on condition that he obeyed Crassus. Livy 37.51.3–6. See also Impallomeni 1955:121–5.
- 64 So Mommsen 1899:728, though arguing it merely as a logical possibility without evidence. Contra Kunkel 1974:61. Kunkel also rejects the theory that *Cic. Verr.* 1.56, *Div. in Caec.* 19 means that restitution had been raised to two-and-a-half times the amount exacted. Kunkel 1962:15 n. 26 rightly points out that Sulla's *repetundae* law removed Italians holding Latin rights from the list of claimants, as a result of citizenship having become the norm for them since the Social War.
- 65 On Servilius Glaucia's law and trials thereunder see Bauman 1983:387–96.
- 66 Bauman, loc cit.
- 67 On this law see Kunkel 1974:60–1.
- 68 Cf. Kunkel 1974:66–7, 286–9 and *passim*. See also Brunt 1961; D. Cloud, *CAH* 9.512–13.
- 69 Sources for the two cases in Alexander 1990: nos. 296, 303. Add *Cic. Planc.* 86. The study by Fantham 1975 is useful on the political side but does not address the legal issues. The trials usually receive little more than a passing mention. See for example *CAH* 9.273, 320, 401–2. Also Lintott 1981:212, though he is more forthcoming on the legislative background, suggesting that the Cornelian *maiestas* law's ban on activities outside one's province was anticipated by a *lex Porcia repetundarum* of 101. That could have been one of 'the ancient laws' to which Cicero refers.
- 70 *Schol. Bob.* 168 St has him collect the bribe. Cicero says that distress on Gabinius' property failed to realise the full amount of the assessment.

Rab. Post. 8. The shortfall could be due to Gabinius having parted with some of the money. The *lex Julia* allowed money received from a condemned person to be followed up. Cicero takes this as an example of the Julian law's greater strictness, but adds that the provision had previously been in Sulla's *repetundae* law and in the still earlier *lex Servilia (Glaucia) repetundarum* (on which see below). *Cic. Rab. Post.* 8–9, 12. When Dio 39.55.5 says that the second trial was for plundering the province of more than 10,000 talents, it must be supposed that he has the right amount but the wrong basis.

- 71 Or to put it another way, there was no bar on a second charge on the same facts but under the law of a different jury-court, as here: *lex maiestatis* and *lex repetundarum*.
- 72 It is not proposed to enter into the totally inconclusive debate as to the connection between *litis aestimatio* and *iudicatio* in the *repetundae* process—what part did the *maiestas* component play, which was broached first as between it and the assessment, etc.? A fair idea of the opposing points of view can be obtained from Henderson 1951 and Sherwin-White 1952.
- 73 It was of course always paid into the treasury even when a distribution was going to be made. Cf. *lex Acilia* 59–60, 66.
- 74 Cf. n. 70 above.
- 75 See the references in n. 20 above.
- 76 On the consequences of *capta* see Harris 1979:52–3, 263–4; Volkman 1990: *passim*.

7 The new image of *Humanitas*: part one

- 1 See for example *CIL* VI 31692.10, 13: *summa humanitas (Domitiani); humanitas sua*.
- 2 In terms of the volume of material *humanitas* easily outstrips *clementia*. *TLL* has twenty-four columns on *humanitas* and associates compared with only four on the *clementia* series. Cf. *VIR* s.vv.
- 3 The last two are exceptions to our concentration on brutality-driven issues.
- 4 Cf. especially the corresponding categories in our discussion of the Republic.
- 5 The noun is not found in the poets.
- 6 On Ovid see especially *Met.* 8.57: *victoris placidi clementia* (cf. *RG* 3.2); *Ep. Pont.* 1.2.61: *clementia Augusti*; *ibid.* 3.6.7: *c. Caesaris*. Less directly in point: *Ep. Pont.* 2.2.121, 4.1.25; *Trist.* 2.12.5, 3.5.39, 4.4.53, 4.8.39, 4.9.3, 5.4(5).19. Vergil has six uses of *humanus*, none of them apposite with the possible exception of *Aen.* 10.152. He does not use *clementia*. Horace has a solitary *clementia*: *Carm.* 3.11.46; *humanus* in *Carm.* 1.12.49 may be apposite.
- 7 Val. Max. 5.1 pr., reading *prima inopi, proxima occubanti, tertia ancipiti fortunae* with Madvig.
- 8 On the postulated meaning of *libertas* see *OLD* s.v. It is associated with *humanitas* by Seneca. *Ira* 2.28.2. On 'the unfortunate' see chapter

- 2 on the meanings of *philanthropia*. On ‘the uncertain’ see below in this chapter.
- 9 Vell. 2.114.1: Tiberius shows both *humanitas* and *utilitas* to soldiers who fall ill. One might have expected Aelius Lamia’s tempering of traditional *gravitas* by *humanitas* (2.116.3) to have been applied to Tiberius. On Augustus’ *clementia*: victory in the civil war brought death to no one and exile only to the intransigent. Vell. 2.85.5–87.3, where much space is devoted to his merciful use of his victory, clearly in rebuttal of the hostile tradition that reached Tacitus. Cf. Tac. *Ann.* 1.10.2.
 - 10 He has 24 uses of the noun and 333 of the adjective, as well as 65 of *clementia*. See BZCS s.w.
 - 11 Seneca’s tragedies yield nineteen uses of *humanitas* but none of immediate cogency. One might have expected something in the *Octavia*. If Seneca wrote *Apocolocyntosis* (on which see Roncali 1989:11–30), the solitary *humanus* (4.19) is of no interest.
 - 12 *Clem.* I 5.2, 13.2, 25.1, II 4.2; *Ira* II 5.1, 5.3, III 3.6; *Ep.* VII 2.3–5, XIV 4–5, XC 45, XCV 30; *Ben.* 7.19.8. Seneca condemns savagery even more vigorously than Polybius.
 - 13 What follows is a summary, with amplifications, of findings in Bauman 1996, especially chapters 3, 5–8, 10–11. But Seneca also pursued a somewhat different line than the Stoics. See below.
 - 14 Cases under both Tiberius and Nero confirm Seneca’s view of the two virtues of clemency and severity, as well as supporting his claim that the Stoics have a better appreciation of *humanitas (Romana)* than any other sect. See below.
 - 15 That is, the senate sitting as a court; the emperor’s court; and the courts of the urban and praetorian prefects and of governors.
 - 16 The episode is attested by Tacitus *Ann.* 15.44.3–8. The regime’s citation of *utilitas publica* (probably in an edict) and the acceptance of that explanation by many people are inferred from the gentle tap on the wrist in Tacitus’ criticism: although the victims were guilty and deserving of exemplary punishment, they were pitied because it was felt that they were being sacrificed to one man’s *saevitia* rather than to *utilitas publica*. *Ann.* 15.44.8. Seneca’s opposition to the travesty is not only likely in view of his general stance, but may be specifically deduced from the very next episode in Tacitus, Nero’s unbridled exactions against Asia and Greece. Seneca was so opposed to this that he asked leave to withdraw from Rome. *Ann.* 15.45.
 - 17 *J.Nov.* 30.11. The doctrine may have originated with Constantine, given the extraordinary form of death that he prescribed for adultery. *CTh.* 11.36.4.
 - 18 On Seneca and the death penalty as such see also André 1979.
 - 19 His letters concentrate mostly on the ‘courtesy, culture’ version of *humanitas*, but his correspondence with Trajan in Book 10 rises above that level.
 - 20 He was preceded by Caligula, Claudius, Nero, Galba, Otho, Vitellius, Vespasian, Titus. Bauman 1974:191–225.
 - 21 *Ep.* X 96.5, 97.2; *Pan.* 34–5.
 - 22 Plin. *NH* 34.138. Other useful allusions in *NH* II 43, 174–5, 25.4.

- 23 On Flavius Sabinus, Tac. *Hist.* 2.63–4. On Pegasus and Rutilius Gallicus see Bauman 1996:101–2, 144–5, discussing Juv. 4.75–81, Stat. *Silvae* 6.3, 1.4.43–8.
- 24 Quintilian focusses on the needs of the schools. *Inst. Orat.* I 2. 31, 10.7, 12.2; II 2.10; III 8.59; V 11.19, 13.6; VI pr. 10, 1.22, 2.13; VII 3.5, 4.18; VIII 4.20; XIX 2.28, 2.90, 4.88; X 1.50, 3.15; XI 1.16, 1.42; 3.169; XIII 1.125, 2.8, 2.20, 10.8, 11.5, 11.10, 11.28. We might glance at 2.2.10, 5.13.6: the worst kind of approval is the storm of indiscriminate applause which has come to be called *humanitas*; in pleading for a lighter sentence we should urge the judge to consider the worthiness of *humanitas* rather than the pleasure of revenge. None of Suetonius' single *humanitas* and three of *humanus* (*Tib.* 29, *Aug.* 28.3, *Cal.* 50, *Vit.* 11.2) are worth quoting. For Juvenal see 14.173–6: no vice of the human mind has so stimulated the preparation of a poisoned cup or a sharpened blade as avidly as implacable greed. See also I 17, 113; III 174; VI 82, 114, 556; X 137, 163, 301; XI 111; XII 64; XIII 159, 222; XIV 34, 264; XV 12–13, 132. Martial has no uses of *humanitas* or *clementia*.
- 25 *Agr.* 21.1–2: Britons, trained in liberal arts by Agricola, give the name of *humanitas* to what is part of their slavery; *Germ.* 21.2: they receive even a self-invited guest with the usual *humanitas*.
- 26 It is the only one. The *humanitatis clementia* of Apuleius *Plat.* 2.13 (cf. Firm. *Math.* 1.10–12) would be interesting if we could enlarge upon it. Fronto *Ad Ver. Imp.* 273 shares an expression with the jurists: 'If anything *humanitus* happened to me'. Cf. D. 16.3.26 pr.: *si aliquid mihi humanum contigerit*. In both passages it is a euphemism for 'if I died'. See also Fronto *Ad Ver. Imp.*, Naber 131: 'when pleading to you I call on *humanitas* itself, for to err is human and to forgive is most appropriate to men'. Also *Ad Ver. Imp.* 1.2, 1.4; *Ad Amicos* 2.8.
- 27 Chapter 3 s.v. 'Preamble'.
- 28 Gell. *NA* 20.1, on which see Kunkel 1967:172–3; Nörr 1974:66–9; Casavola 1980:1–125; Ducos 1984; Diliberto 1993:146–70; Bauman 1996:145–7.
- 29 Gell. 20.1.54, citing Verg. *Aen.* 8.643: 'Alban, you should have kept your word.'
- 30 It is taken as authentic by Casavola 1980:92–7; Ducos 1984.
- 31 The literary sources after Aulus Gellius offer very little. From Hadrian to Severus Alexander, Dio occasionally credits a ruler with *philanthropia* (69.2.5, 74.5.2, 72.27.3[2]), but the *Augustan History* avoids *humanitas* altogether. Even Severus Alexander, that catalogue of all the virtues whose biography is crammed with allusions to Trajan (*SHA Alex.* 10.2, 13.2, 25.6, 26.4, 26.11, 39.1, 48.6, 65.5) fails to win the accolade of an express *humanitas*. See however below on the new set of words used by Alexander.
- 32 See *OLD* s.v. *clementia*, Group 'c'.
- 33 Collins 1972:959–63. His identification of *clementia* as a virtue of a legitimate monarch appears to be a reference to the Hellenistic monarchies, though Collins does not expressly claim it as such.

- 34 On *dementia populi Romani* see Cic. *Verr.* II 5.74. Cf. Ps. Quint. *Decl.* 14.2, *clementia publica*,
 35 BG VIII 3.5, 21.2.
 36 B. *Af.* 86.2, 88.6, 92.4.
 37 Part. *Orat.* 11; *Verr.* II 5.74.
 38 *Fam.* 15.15.2. The author of *Bellum Africum* would not have agreed. Cf. n. 36.
 39 *Deiot.* 34; *Fam.* 6.6.8.
 40 *Att.* 11.12.2; *Fam.* 7.5.2, 13.15.3; *Att.* IX 7a.2, 7b.2; *Fam.* 4.13.2.
 41 Ligarius had supported the Pompeians in Africa. Acts against Caesar, the ultimate victor, were retrospectively interpreted as acts against the Roman people.
 42 RG 34. The Arles inscription (*E-J* p. 59) has *pietatis erga deos patriamque*, but the defining words may be a local gloss. The meaning of *pietas* was known everywhere.
 43 They were of course the leaders of the plot to kill Caesar.
 44 Octavian (Augustus) was Caesar's adopted son. *Pietas* required him to avenge his father's death.
 45 RG 2. The law in question was the *lex Pedia* of 43 BC.
 46 Vell. 2.87.2: *fuit et fortuna et dementia Caesaris dignum*.
 47 Ibid. 2.87.2–3, noting also that Brutus and Cassius committed suicide.
 48 On the proscriptions see chapter 9 s.v. 'Genocide'.
 49 Suet. *Aug.* 33.1, citing it as an example of *lenitas*. For other examples of his clemency in common law cases see Suet. *Aug.* 34.2; Sen. *Clem.* 1.15.1–7.
 50 On these matters see Levick 1976:87–9 with 252 nn. 20–4.
 51 See below on the conflict between the two forms of clemency.
 52 Cf. RG 3.2: 'When victorious in my wars I spared all citizens who sued for pardon. Foreign nations which could safely [*tuto*] be pardoned I preferred to save rather than destroy.'
 53 Vell. 2.90–114, especially 2.114.4; Suet. *Tib.* 20; Dio LV 29–32, 34.4–7, 56.11–17. On the surrender in *fidem* in particular, Vell. 2.114.4; Dio 56.13.2–3, 16.
 54 Tac. *Ann.* 2.62–3, 88.3; 3.11.1. Catualda, the author of Maroboduus' downfall, received similar treatment.
 55 Diodorus notes the generous treatment accorded to the Macedonian king, Perseus, by Aemilius Paullus in the Third Macedonian War. Diodorus considers it a general Roman practice which made her rule tolerable. Diod. 30.23.2. On *libera custodia* in general see F.Raber, *Kl.P.* 1 (1964), 1352.
 56 Cf. RG 3.2, quoted in n. 52.
 57 Tac. *Ann.* 2.27–32. The rider 'even if he had been guilty' covered the sort of weakness (in Libo's case rash youth) that would, in Seneca's hands, make *clementia* exculpatory rather than merely merciful. See below.
 58 Lepidus here refers to Libo's case.
 59 Tac. *Ann.* 3.49–51; Dio 57.20.3–4.
 60 Tac. *Ann.* 3.51.2–3; Dio 57.20.4.
 61 Cf. at nn. 34, 37 above.

- 62 Hence Lepidus' reference to the senate not regretting (its) *clementia* or *severitas*.
- 63 Levick 1976:89 notes that *clementia* was coupled with *moderatio* on the shields depicted on Tiberius' coins. But I do not take her to mean that those two values were interchangeable. They were not.
- 64 Especially *De ira* which advised against allowing anger to influence punishment. Claudius' record on *clementia* was not an impressive one. Griffin 1984:64.
- 65 The theory is not compactly assembled by Seneca. It has to be sifted out from *De clementia* and other writings, especially the *Epistles*. See Bauman 1996:78–89. I here summarise some of the findings in that work.
- 66 To which in my view Seneca did not entirely belong. Stoicism was not a homogeneous monolith. See the works cited in Bauman 1996:183 n. 1.
- 67 Tac. *Ann.* 14.42–5. On the *senatus consultum Silianianum* see the works cited in Bauman 1996:184 nn. 13, 14.
- 68 Freedmen were not included in the original *s.c. Silianianum*. It was now being proposed that they be included by interpretation.
- 69 It now took the form of deportation to an island. Under Tiberius the original interdiction from water and fire had been amplified by naming a specific island to which the condemned man was obliged to go if he wished to escape summary execution under the interdiction.
- 70 Tac. *Ann.* 14.48.5–7. The sentiments are similar to those expressed by Marcus Lepidus at Clutorius Priscus' trial. But Lepidus speaks of a penalty of interdiction, whereas Thræsea uses the term 'deportation to an island' which had only come in since Clutorius' trial.
- 71 The condemned man usually got into a warm bath and opened his veins. If he was not able to do this within an hour, the emperor sent a surgeon to do it for him. Suet. *Nero* 37.2.
- 72 Tac. *Ann.* 16.10–11. Nero's actions were equally bizarre when *clementia* was not the issue. In 62 he had Faustus Sulla and Rubellius Plautus murdered. He then wrote to the senate denouncing the two men as agitators, but without disclosing that they were dead. The senate voted a thanksgiving and expelled the two dead men from its ranks. Tac. *Ann.* 14.57–9.
- 73 Suet. *Dom.* 7; Mart. 9.5(6), 7(8); Ammian. 18.4.5. Smallwood 1959 and 1961 thinks Hadrian imposed a total ban on circumcision which Pius relaxed to the extent of exempting the Jews. But there is some reason to think that Domitian's policy of moral reform (on which see Grelle 1980) included something on circumcision. See below.
- 74 See Smallwood (works cited in n. 73); also below.
- 75 It was two drachmae a head. Jos. *BJ* 7.2.18.
- 76 Waters 1975:394, citing P.Jal, *La guerre civile à Rome*, Paris 1963.
- 77 Thornton 1975:442, listing *clementia*, *fortuna red.*, *indulgentia*, *iustitia*, *liberalitas*, *patientia*, *tranquillitas*.
- 78 *Thlibiaie* does not mean circumcision, despite Garnsey 1970:161 n. 1. It falls under the reference in Statius *Silv.* 3.4.73 (above) to 'it is a crime to shatter a sex or to change a man'.

- 79 Smallwood 1959 and 1961 thinks Pius merely relaxed *pro tanto* a total ban imposed by Hadrian. That is quite possible, as is the attribution of the original ban to Domitian.
- 80 *D.* 48.8.11 pr.
- 81 Cf. chapter 5 s.v. ‘*Humanitas* and the law’.
- 82 *D.* 1.18.14, quoting a rescript of Marcus and Commodus in full; more briefly, of Marcus and Verus in *D.* 48.9–9.2.
- 83 *D.* 1.18.13.1. That fragment does however make it a general rescript on *furiosi*, leaving Marcus to include it in a ruling on parricide.
- 84 Dio 71 [72].22.2–28.4; *SHA Marc.* 24.5–26.13; *Av. Cass.* 2.1–8, 7–13.
- 85 On these jurists, and on Maecianus’ special relationship with Marcus, see Fanizza 1982, xi–xii, 10–11, 18–19, 93–123; Bauman 1989, 244–5; 1996, 116–20, 123, 194 n. 11. Cf. *D.* 37.14.17 pr., 1: ‘Volusius Maecianus, *amicus noster*, declared at our council?...’
- 86 On this man’s compilation in twenty books see Schulz 1946:153; Kunkel 1967:216–17; Jolowicz 1972:372, 390; Robinson 1997:37. He apparently (we do not have the actual work) did not cover any emperors other than Marcus and Verus, and Marcus alone.
- 87 He thus covered the first six years of Alexander’s reign. On the date of his death see Bauman 1995, rejecting the current preference for an earlier date. On Ulpian in general see Honoré 1982.
- 88 For a full discussion see Bauman 1996:152–6.
- 89 *CJ IX* 8.1, 8.2, 9.9, 22.5. Cf. Bauman, loc. cit.
- 90 The word is used by him in *D.* 4.6.38.1; 44.4.7.1; 48.18.1.27; 48.20.5.1; 49.4.1 pr. All the works from which these fragments come are dated by Honoré 1982, *passim* to Caracalla’s reign at the latest.
- 91 On this in general see Bauman 1996:124–50, 149–56.
- 92 On the games see chapter 9 s.v. ‘Death at the games’. For other examples of Ulpian’s detached approach see *D.* XLVIII 19.8.8, 19.6 pr.
- 93 Female circumcision is a notorious violation of human rights, but one looks in vain for determined opposition by protest groups.

8 The new image of *Humanitas*: part two

- 1 See for example Brunt 1961. The continued use of the *lex Julia* as a frame of reference is amply borne out by *D.* 48.11, *De lege Iulia repetundarum*, which contains an exceptionally high proportion of verbatim citations of the *lex Julia*, only a minimum of jurists’ opinions, and no citations of decrees of the senate or emperors’ rulings.
- 2 Cf. *D.* 48.11.1 pr.: The *lex Iulia repetundarum* pertains to money received by anyone holding a magistracy, office, commission, deputy or any other public office, function or ministry, or any associate of any of them. Part of this is probably interpretation. The categories in the Principate are given in *D.* 48.11.3, 4(?), 6 pr., 6.2, 7 pr., 7.2, 8.1. A full

- list can be put together from information supplied by Brunt 1961:191–3, 198.
- 3 From Augustus' edict promulgating the *s.c. Calvisianum* (on which see below). Cf. *FIRA* 1.410 vv. 75–80.
 - 4 See the *Edicts of Cyrene* in which the *s.c. Calvisianum* is edict no.5. Greek text and Latin translation in *FIRA* 1.409–14. Greek text, bibliography and discussion in Sherk 1969:174–82. English translation in *LRSB* s.v. '9. the Cyrene Edicts'. Discussions in De Visscher 1940; Sherwin-White 1949; Brunt 1961:199–200, 202, 204; Bleicken 1962:36–43, 168–78; Sherk 1969:177–82; Jones 1972:75, 92, 111; Kunkel 1974:191 n. 34, 284–94, 320 n. 98, 322, 326, 328. Brief notices in Robinson 1995:7; *CAH* 10.101, 350, 635.
 - 5 On the other, incompletely defined, objective see n. 11 below.
 - 6 Defined as 'any magistrate who is authorised to convene the senate'.
 - 7 *FIRA* 1.411 v.95: *chremata demosiai e idiai prachtentes apaitein; pecunias publice vel privatim exactas repetere* in the Latin translation.
 - 8 The idea was to bring all grades into the picture. See *FIRA* 1.412–14 vv. 106–29.
 - 9 *FIRA* 1.413–14 vv. 130–42.
 - 10 For example Staius *Silvae* I 40.10–12, 52–7, where the urban prefect tries cases remitted from outlying areas. It is unlikely that the witnesses had to come to Rome. Also *D.* I 15.3.1–2: the prefect of the watch may try cases of arson and housebreaking, unless the gravity of the crime warrants a remittal to the urban prefect. In fact the whole of the emperor's personal jurisdiction, insofar as it dealt with appeals from governors and prefects, involved sending up the record, not the witnesses. Also, when the urban prefect sentenced to deportation he had to get the emperor's approval for a particular island. *D.* 1.12. Even in the Later Empire the prefect had to forward the record to the emperor. *CTh* IX 16.10, 40.10. See also n. 35 below.
 - 11 The purpose of the *s.c. Calvisianum* was to make it easier for allies 'to prosecute wrongs done to them [*iniurias quascumque persequi*] and to recover moneys exacted from them [*recuperare ademptas pecunias*]. To reclaim moneys they should approach a magistrate, 'except if they are accusing the exactor capitally'—*chorts tou kephales euthunein ton eilephota; praeterquam si capite accusent (illum) qui exegerit.* *FIRA* 1.411 vv. 91–2, 97. But this is the only mention of capital jurisdiction. The only aspect dealt with in detail is recuperation (*recuperare pecunias*). On the other side (*iniurias persequi*) it has to be inferred that the five-man panel will, in cases of simple *repetundae*, adjudicate before assessing; but for aggravated (*saevitia*) extortion the five-man panel has no authority. This continued to be the position at the turn of the first century AD, namely that *indices* handled simple restitution, but capital penalties had to go to the plenary senate. See below on cases under Trajan. Whether the full senate derived its power by inference from the passing allusion in the *Calvisianum*, or by express authorisation somewhere else, cannot be determined. For discussions of this and other anomalies see Sherwin-White 1949; Sherk 1969:179–82; Kunkel 1974:284–94; Robinson 1995:7–8.

- 12 On the supposed cessation of the jury-court see for example Robinson 1995:7–8, arguing that the *repetundae* court disappears totally ‘after the beginning of Tiberius’ reign’; had it been otherwise Suetonius and Tacitus would have recorded examples. H.Galsterer, *CAH* 10.409 goes badly astray when he has all the jury-courts, ‘with the one possible exception of the adultery court’, obsolete by the end of the first century AD.
- 13 The comment on Nepos: Plin. *Ep.* 5.9. Nepos’ presidency of the *repetundae* court: Mommsen 1899:205 n. 1. Advocacy as a *munus* under the *repetundae* law: *D.* 48.11.1 pr. The amalgamation of a number of courts: Bauman 1968:85–7.
- 14 The jury-court’s jurisdiction over non-senators goes back to the case of the great equestrian prefect of Egypt, Cornelius Gallus, in 26 BC. He was accused of *peculatus* and *repetundae*. The senate interpreted the *repetundae* law so as to enable the jury-court to try him. Kunkel 1974:277–84; Bauman 1967:180–3; 1980:147–9. Cf. Ammianus 17.4.5; *D.* 48.13.16. On another aspect of Gallus’ case see below.
- 15 See for example Tac. *Ann.* 11.7.7: plebeian pleaders grace the gown. Also (Sen.) *Apocol.* 12.2; *Juv.* 7.106–8, 8.47–50: *plebs togata*.
- 16 From Tiberius’ reign the emperor also took personal cognisance of cases. See below.
- 17 On corrupt condemnations for money see the case of Marius Priscus below. Registering a high score in such condemnations was something of a pastime. Caligula once boasted of having condemned more than forty defendants in a single judgment. *Suet. Cal.* 38.3. It was also considered an achievement to execute twenty Sejanians in a single day. *Suet. Tib.* 61.4.
- 18 There was an element of *maiestas minuta* in his regal pretensions.
- 19 See on the trial of Silanus below.
- 20 I here abridge and restructure the discussion in Bauman 1974:92–9.
- 21 Tac. *Ann.* 3.66.2–3. Augustus’ *numen* was violated by similar brutality to that which he had condemned in Messalla’s case. On the spurning of Tiberius’ *maiestas* see Bauman 1974:96.
- 22 We know what Galba had done in 149; money was involved, through his receipt of the proceeds of the slave auction. Rutilius’ condemnation for *repetundae* in 92 was based on a bribe received from Mithridates. Bauman 1983:387–96. L.Cotta’s trial in 138 was adjourned seven times before he was finally acquitted. *Val. Max.* 8.1.11.
- 23 Tacitus *Ann.* 3.67.2–3 says that charges of *maiestas* were added to the indictment in order to deprive Silanus of the services of counsel. A second reason was to be able to examine Silanus’ slaves; as a general rule the evidence of a slave against his owner was inadmissible. Bauman 1974:98 and *passim*.
- 24 *Ann.* 3.67.2: *facundissimi totius Asiae*. This can simply mean orators who employed the Asian style, but here speakers who had specially come from the province are more likely.
- 25 *Ann.* 3.67.3.
- 26 *Ibid.* 3.68.1–2, 69.8: L.Piso, after a long preliminary statement about the emperor’s *clementia*, proposes interdiction and banishment to Gyarus. Tiberius substitutes Cythnus.

- 27 Although he does say at the beginning of his account that a complaint of *repetundae* was lodged by the provincials; later on he admits that there was no doubt that Silanus was guilty of *saevitia* and the improper receipt of money. *Ann.* 3.66.2, 67.2.
- 28 *Tac. Ann.* 4.18–20.3, including 4.19.5. Again he concedes that the accused was guilty of *repetundaei*
- 29 *Ibid.* 4.20.1: *stipendiarii*. They paid a land tax in a fixed amount of money or produce.
- 30 Questions of tax were linked to *humanitas*. Cicero puts it like this: ‘Your *humanitas* bids you save the tax farmers from ruin. You should defend both the safety of your allies and the dignity of your empire, especially as your most important taxes are involved.’ *Cic. Leg. Manil.* 18, 14.
- 31 The actual benefit to Silius from increasing the rate of tax is not clear, but a possible answer is that he was rewarded by the tax farmers (*publicani*). Cf. Cicero (n. 30) on the publicans. But whether Silius would have had to pay back money that he had not received, namely the additional taxes, if the provincials had lodged claims is a moot point. If he in fact received the taxes but failed to use the money officially, it was *peculatus* rather than *repetundae*.
- 32 Cf. *Tac. Ann.* 2.50.1: Meanwhile the *lex maiestatis* was growing up.
- 33 *Tac. Ann.* 4.15.3; Dio 57.23.4. Capito was convicted by the senate.
- 34 On Suillius: *Tac. Ann.* 11.4.1, 6 (a million sesterces to Suillius); 11.5.1–2 (400,000 to Suillius, who was then found to be in cahoots with the other side); 11.6.1–5, 13. 42–3. On the location of his Asian governorship in Claudius’ reign see Brunt 1961, 206.
- 35 In other words, they were taking written depositions on the spot, as we have suggested. Cf. n. 10 above.
- 36 Because they were in Italy and could be subpoenaed. Cf. at n. 9 above.
- 37 *Tac. Ann.* 13.42–3. The *lex Cincia*, whose revival Claudius had rejected, was revived by Nero’s senate for use against Suillius.
- 38 Dio 60.33.6; *Tac. Ann.* 13.33.1–2. Dio’s silly reason for Claudius’ decision to acquit does not alter the fact that there was an acquittal.
- 39 *Plin. Epp.* 2.11–12 (Priscus); 3.9 (Classicus); 4.9 (Bassus); 5.20 (Varenus).
- 40 On the chronology see Sherwin-White 1966:56–60.
- 41 That is, that the non-capital phase laid down by the *s.c. Calvisianum* be carried out, except that Priscus’ plea of ‘Guilty’ made it unnecessary for them to adjudicate; all they had to do was to assess. As to whether the *Calvisianum* was still in force, Sherwin-White 1966:161 thinks it was. Contra Brunt 1961:199, suggesting its early replacement by more direct participation by the full senate.
- 42 On whether the expression as used here included the *Calvisianum*, see n. 41.
- 43 *Ep.* 11.2.4–5. Sherwin-White 1966:163 is critical of what he considers the senate’s general ignorance of public law and procedure. Elsewhere he thinks it peculiar that Marius Priscus was tried both by recuperators and by the full senate. See his *Fifty Letters of Pliny* 2nd edn, Oxford 1969:89–90. But the point is that some new principles were being put

- in place and others were being given their definitive shape. See further below.
- 44 Despite Sherwin-White (in n. 43 above).
- 45 On which see Sherwin-White 1966:58–60, 162; *Fifty Letters of Pliny*, 143.
- 46 *Ep.* 3.9.2–3. Pliny is not sure whether the death was accidental or voluntary. The latter is likely enough.
- 47 It had been laid down by the senate in 26 BC, when Cornelius Gallus killed himself before his trial. According to *D.* 48.13.16 charges of *peculatus* and *repetundae* are continued against the heir. And *peculatus* and *repetundae* are precisely what was alleged against Gallus. Ammianus 17.4.5.
- 48 *Ep.* 3.9.3–5.
- 49 *Epp.* 5.20, 6.5, 6.13, 7.6, 7.10. It is of course possible that Varenus was convicted. That might explain Pliny's silence.
- 50 Whatever devastation resulted from Germanicus' campaign against German tribes over 14–15 AD, it was motivated by the regime's desire to erase the disgrace of Varus' catastrophic defeat in 9 AD, not by greed. Tac. *Ann.* 1.3.6.
- 51 *SHA Marc.* 11.9: he gave *curatores* (in Italy—Mommsen 1899:718 n. 6) power either to punish those who exacted money in excess of authorised taxes, or to remit them to the urban prefect. Mommsen, loc. cit. notes the passage under 'Repetunden' but refers the practice that it attests to the Later Empire. Also, it is attested for Italy, not the provinces. The same chapter records unspecified provisions for Italian settlers in the Spanish provinces. *SHA Marc.* 11.7.
- 52 *D.* 48.11.2–7 pr., 7.2, 8.1.
- 53 *D.* 48.11.1.1, 7.1, 7.3, 8 pr., 9.
- 54 On Greek antecedents see Heinemann 1931:283–99, though his division of intellectual thought into three types—pedagogic—formal, cultural—philosophical and ethical-sociological—is less than illuminating. Veyne 1993:347–50 also draws unclear distinctions—between universalism and cosmopolitanism, and universalism and internationalism. Our thoughts on Isocrates (chapter 2) also belong here.
- 55 *Off.* 1.50–52, *Ad Q. fr.* 1.1.3–29, *Quinct.* 49–51. Discussions in chapter 5.
- 56 *Off.* 1.53–54 (low priority of the universal bond); *Off.* 1.30, *Leg.* 1.33 (citations of *Homo sum*); *Scaur.* 39–45, *Place.* 9–12, 16–19, 24, 57, 60 (racial prejudice). Discussions in chapter 5.
- 57 For views on Caesar's universalism see Starr 1965:19–27; C.E. Stevens, in Birley 1967:20–30; De Martino 1972–4:3–339–40; Sherwin-White 1973:399–402; Veyne 1993:357, 361.
- 58 See generally Starr 1965: chapters 2, 3, 5, 7, 8–12; Birley 1967:1–59; Sherwin-White 1973:402–8; Stier 1975; Fears 1981; Veyne 1993.
- 59 For some succinct remarks see Hammond 1959:9–10, 22–3 nn. 42–4. See also Salmon 1968:47, 163–5; Sherwin-White 1973:402 with 38–95. Technically there were differences between Italy and the provinces, notably in the special character of provincial land which was not

- susceptible to full private ownership. Cf. Jolowicz 1972:267–8, 505. But by Aelius Aristides' time (see below) such matters were of minor importance.
- 60 On Augustus' policy in these matters see Weinstock 1960; Starr 1965:33, 38, 40, 46–7, 51–3; Sherwin-White 1973:402–3, 424, 430–1; Petit 1975: *passim*, 1976: *passim*; Stier 1975:18–42; Fears 1981:884–9; J.A.Crook, *CAH* 10:96, 139–40. Among the sources see especially Tac. *Ann.* 1.11.7, Dio 56.33.5–6: guidelines on limiting territorial expansion in a document deposited with Augustus' will. See also Dio 54.9.1. Syme 1958, 527–31 is sceptical about superficial propaganda. But how often are statements of government policy anything else? Very often it is only by knowing what they were saying that we can form an idea of what they were doing. The reduced frequency of wars (they were not eliminated entirely) meant less opportunities for commanders to practise mass brutality. The great *repetundae* trials (below) measure up well to their Republican predecessors in the savagery that they uncover, but fall far short in terms of the numbers of victims.
- 61 RG 3.2: 'External nations who could safely be pardoned I preferred to preserve rather than destroy.' Veyne 1993:353–4 thinks that Augustus here asserts 'the privileges of a master who reigns because he is who he is' more unequivocally than the Greeks did when they advised victors to show *philanthropia* to the vanquished. Augustus' words strike Veyne as 'unimaginably terrible with their fierce and merciful smile'. This is over-dramatised. Augustus was merely doing what Cicero had said should be done—cf. his 'vanquished who have not been barbarous' (*Off.* 1.34–5) with Augustus' 'those who could safely be pardoned'—and what Panaetius and Aemilianus had said (and done) before that.
- 62 See above.
- 63 One thinks of his admission of leading citizens of Gallia Comata to magisterial and senatorial careers in Rome. See Sherwin-White 1973:237–50. Less credible is the satire crediting Claudius with wanting to enfranchise all Greeks, Gauls, Spaniards and Britons. (*Sen.*) *Apocol.* 3.
- 64 *Sen. Epp.* 48.2.3, 95.50–53, 120.6 (cf. *Ben.* 5.21.1); *Clem.* 1.18.1–2.
- 65 *Clem.* 2.1.1–3; 2.2. Cf. 1.24.2.
- 66 Cic. *Ad Q. fr.* 1.1.27–9, discussed in chapter 5.
- 67 Plin. *Pan.* 2.7, 6.1, 90.2, 94.1; *Epp.* X 52, 102, 176.
- 68 On Hadrian's policies see Syme 1958:465–503; Birley 1967:49–54; Thornton 1975:445–52. See also Tertullian's description of him as *omnium curiositatum explorator*.
- 69 During his empire-wide travels to which he devoted a total of twelve years (out of a reign of twenty-one years), Hadrian sat in judgment, granted charters and privileges, founded cities on which he bestowed his own name, and almost made the eastern half of the empire a second capital. With the exception of his legal reforms, his work is adequately summarised by Thornton 1975.
- 70 For general accounts of his legal reforms see Pringsheim 1934; D'Orgeval 1950; Bauman 1989: ch. 8.

- 71 To confront L.Mitteis, *Reichsrecht u. Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*, Stuttgart 1891, repr. Hildesheim 1963 would take up an inordinate amount of space. In any event our objectives are tangential to, rather than coincident with, Mitteis' work.
- 72 On the codification of the edict see generally the works cited in n. 70. On the specific point about centralisation see especially Palazzolo 1974:19–36. On the revision of the laws of Athens see Bauman 1989:281–6. On the empire-wide criterion see *D.* 1.3.32 pr.; Just. *Deo auctore* 10.
- 73 As Sherwin-White 1973:427 points out, Aristides is well aware of the technical distinction that still exists between citizens and peregrines, but the distinction was breaking down in the popular perception.
- 74 One of the few noteworthy facts about Antoninus Pius in this regard is that Aristides wrote his *Panegyric to Rome* during the reign. As for Marcus Aurelius, even if the unfavourable assessment of his *Meditations* by Starr 1965:249–50 ('The stale mumblings of Stoic thought, no single original thought in the entire work') is exaggerated (see the more favourable analysis of Noyen 1954/5), the work does not have any memorable thoughts on universalism. One could no doubt put together some sort of picture from the *Augustan History's* biography and Dio. E.g. *SHA Marc.* 9.8, 11.7, 16.3–5, 17.1, 17.4, 22.10–11, 22.2, 22.12, 24.3, 25.12, 26.1–2; Dio 71.3.1, 72(71).13.1–2, 72.9.3–6. But no informative picture would emerge.
- 75 This was done in the well-known *Constitutio Antoniniana*, all the essentials of which are covered by Sherwin-White 1973:279–87, 380–93.
- 76 All this is expressed by Aristides himself. Including the position of peregrines, given that Aristides knew that he was not being technically correct but was reflecting the *de facto* realities. Cf. n. 73. On Aristides' attitude as a whole see Sherwin-White 1973:425–30.
- 77 On this see Cardascia 1950; Garnsey 1970:221–3 and *passim*; Rilinger 1988; Bauman 1996:125–30, 139–41 and *passim*.
- 78 See the works cited in n. 77.
- 79 Cf. Cicero's remarks at Rabirius' trial, discussed in chapter 5. That decapitation was the normal form is attested by *D.* 48.19.8.1.
- 80 Passed by Sulla in 81 BC.
- 81 Under the original *lex Cornelia de sicariis* the penalty was interdiction from water and fire, which effectively meant exile to any place with which Rome had a treaty. In the Principate a particular island was nominated by the sentencing authority. An interdiction was still imposed, but the difference was that now the offender could only avoid death by going to the nominated island. This was deportation.
- 82 The Severan period, the turn of the second century AD.
- 83 See the composite of passages from Seneca cited in chapter 7 at n. 12.
- 84 See further the discussion of the games in the next chapter.
- 85 Participation by everyone is the early nineteenth-century view of B.Constant, recorded in Constant 1957. That opinion is not generally shared (see e.g. Wirszubski 1950), though the role of the popular

- assembly increases in stature as prosopography's grip on Roman politics weakens.
- 86 Tacitus' *civilis animus* merges comfortably with *humanitas*.
- 87 Tac. *Ann.* 1.72.3–4. On defamation and *maiestas* see Bauman 1974, 25–51 and *passim*. The initial subsumption of pamphleteering under the *lex maiestatis* was in respect of pseudonymous writings under someone else's name rather than strictly anonymous models.
- 88 The *malum carmen* for which the XII Tables had prescribed a capital penalty was an evil spell (Plin. *NH* 28.4.18) rather than an attack on character (Cic. *Rep.* 4.12). Cf. Jolowicz 1972:171 with n. 9.
- 89 Bauman 1983:242–4, discussing the action against a mimist by the poet Accius.
- 90 They are the *Invective against M. Tullius Cicero* attributed to Sallust and *The Invective against Sallustius Crispus* attributed to Cicero. The attack on Sallust is generally regarded as spurious. That on Cicero is largely so regarded, but has some support for genuineness. Discussion by J.C.Rolfe, Loeb edn of Sallust, xviii–xx.
- 91 For example, Dio 39.62.2 says that Cicero was Gabinius' accuser in 54 BC. Cicero was forced to deny it; he said that he was only a witness. *M Q. fr.* 3–9.1.
- 92 For example, in 206 BC the poet Naevius was imprisoned for his slanders of prominent men, having said of the powerful Metelli that 'They are fated to be consuls at Rome', and of Scipio Africanus that his father had once forcibly led him away from a woman in a state of undress. Cell. 3.3.15, 7.8.5. According to Gellius the tribunes released him from prison. But Jerome *a. Abr.* 1805 says that he died at Utica after being driven from Rome by the Metelli. The explanation probably is that after his release he left Rome in the interests of his personal safety, not because of any legal requirement. That plebeians continued to speak out is shown, for example, by the case of Junius Novatus who was merely fined for publishing a scathing letter against Augustus under the name of Agrippa Postumus. Suet. *Aug.* 51.1.
- 93 Dio 56.27.1. Cf. Bauman 1974:25–51. The most helpful work on bookburning is still F.H.Cramer, 'Bookburning and censorship in Ancient Rome', *Journal of the History of Ideas* (1945), 157.
- 94 Bauman 1974:157–9.
- 95 As a rule he either replied with a *tu quoque* or ignored words that did not threaten hostile action against him. Suet. *Aug.* 51.2–3.
- 96 Tac. *Ann.* IV 34.1–2, 35.5. Cf. Dio 57.24.3, Suet. *Tib.* 61.3, Sen. *Ad Marc.* 1.3.
- 97 Sen. *Ad Marc.* 1.3, 26.1; Tac. *Ann.* 4.35.5; Suet. *Cal.* 16.1; Quint. *Inst. Orat.* 10.1.104.
- 98 On Thræsea and Nero see Bauman 1974:153–7; Griffin 1984:165–6 and *passim*. Suet. *Nero* 32.2, a generalisation about *maiestas* charges, is not to be taken literally but does indicate the very wide scope of the law.
- 99 Bauman 1974:157–9.
- 100 Cf. chapter 9 at n. 71.

- 101 For a full discussion of this topic see Starr 1965:31–163 (The unfolding of absolutism’).
- 102 Starr 1965:165–250 (‘The intellectual decline of the Early Empire’) is perhaps over-pessimistic. Tacitus, for example, by no means reflects an intellectual decline, but he does have to go to an earlier period for spectacular set-pieces. His *Histories*, dealing with the Flavians, is not enlivened by such pieces to anywhere near the same extent as the *Annals* which covers the Julio-Claudian period.
- 103 Nero’s *caelestis vox* was based on the idea that the power of speech possessed *maiestas*. Thrasea Paetus offended by failing to do homage to it. Tac. *Ann.* XVI 22.1, 21.1. Vespasian incurred Nero’s displeasure by either staying away from Nero’s performances or falling asleep at them. Suet. *Vesp.* 4.4, 14. Cf. Tac. *Ann.* 16.5.5, Dio 66.11.2. The Domitianic incident is in Dio 67.12.2.
- 104 If an informer secured a conviction he received a portion of the confiscated property.
- 105 On Sejanus’ use of the *lex maiestatis* as a weapon of thought control, and on the party led by Agrippina, see Bauman 1974:113–24; 1992:154–6.
- 106 Tac. *Ann.* 4.68.1–70.7. Cf. Dio 58.1.1b–3.
- 107 E.g. Claudius. Bauman 1974:194–204.
- 108 E.g. Caligula and Nero. Ibid. 204–10, 211–13, 143–53.
- 109 Dio 71.28.3.
- 110 CJ 9.8.2, 9–8.1 (‘Charges of *maiestas* are in abeyance on whatever grounds they are based in my age’).
- 111 The works consulted in the preparation of this topic include R.P. Longden, *CAH* (first edn 1954) 11.210–12; Hammond 1959: *passim*; Sherwin-White 1966:104–5, 422–4; J.R.Patterson, ‘Crisis: what crisis? Rural change and urban development in imperial Apennine Italy’, *PBSR* 55 (1987), 115–46; G. Woolf, ‘Food, poverty and patronage: The significance of the epigraphy of the Roman Alimentary schemes in early imperial Italy’, *PBSR* 58 (1990), 197–228; LRSB vol. 2, s.v. ‘The imperial child-assistance scheme (*alimenta*)’. For a list of other works see Woolf op. cit. nn. 1, 2 and 123, and *passim*. See also *OCD* s.v. *alimenta*; *FIRA* 3.373–5.
- 112 The earliest known private benefactor is T.Helvius Basila who bequeathed 400,000 sesterces to the municipality of Atina, the income from which was to provide grain to the town’s children until they reached maturity, and thereafter a cash payment of 1,000 sesterces each. For the relevant inscription see LRSB vol. 2, s.v. ‘Child assistance funds (*alimenta*)’.
- 113 The inscription recording the details of the Veleia model is in *FIRA* 3, no. 116. For the other major document, the inscription of the Baebian Ligurians, see *ibid.* no. 117.
- 114 Cf. the inscription from Sicca, LRSB vol. 2, s.v. ‘Child assistance funds (*alimenta*)’.
- 115 So, for example, Longden, op. cit. in n. 111,211; Patterson, op. cit. in n. 111. *OCD* s.v. *alimenta* takes the opposite view: ‘There is no reason to think that the landowners needed or even welcomed the loans (which

- placed a perpetual charge on their property).’ Why? Even if Italian agriculture was not depressed, working capital on favourable terms will always have been welcome. Roman property owners were no more afraid of mortgages than their modern counterparts. The younger Pliny established a private trust for freeborn boys and girls at Comum by successive mancipations of his property to and from the municipal agent, thus making 30,000 sesterces per annum available. Nowhere does he suggest that it was an unwelcome burden. His only difficulty, he says, was to persuade the childless to endorse a scheme that was only of benefit to parents. Plin. *Ep.* 1.8.8–10. Cf. 1.8 as a whole, 7.18. The reluctant included childless officials who were saddled with the administration of the trust. On the *munus* aspect of the official version see below.
- 116 This legend appears on Trajan’s coins from 107/8 to 111/12. Sherwin-White 1966:422.
- 117 This appears in both the inscriptions noted in n. 113.
- 118 On *indulgentia*, which later combined the qualities of *clementia* and *humanitas*, see Gaudemet 1967, Waldstein 1964.
- 119 Longden and Patterson, *opp. cit.* in n. 111. Also, by citing Aurelius Victor with approval, *FIRA* 3.374. For the opposing view see n. 124.
- 120 The expression is mine, not Longden’s or Patterson’s.
- 121 The elder Pliny said that the *latifundia* had ruined Italy and were now ruining the provinces; six men owned half of Africa. Plin. *NH* 18.7.35.
- 122 Plin. *Pan.* 26. But he lists generosity and principle as the motives behind his own private trust. *Ep.* 1.8.9.
- 123 This is, for example, the thesis of D.C. Earl, *Tiberius Gracchus: A study in politics*, Brussels 1963. For a survey of the deeper social background to the reforms see E. Badian, *ANRW* I 1 (1972), 670–90.
- 124 So Woolf, *op. cit.* in n. 111, *passim*, with literature. Despite a certain amount of backtracking, his considered opinion seems to be that the principal motivation was a combination of heightened appreciation of civic values coupled with patronage, rather than rural poverty.
- 125 Aurelius Victor (whose evidence Woolf cannot quite bring himself to reject) notes Nerva’s pioneering venture in the context of general relief to depressed towns—*afflictas civitates*. *Vict. Ep.* 12.4. Dio 68.5.4, the only other literary source to notice the *alimenta*, has Trajan making many grants to Italian towns for the support of their children, and conferring benefits on the *agathoi*. Dio thus separates the benefits reserved for *agathoi* from those given to the towns. See also below.

9. Man’s inhumanity to man

- 1 See especially Harris 1979:50–3, 263–4.
- 2 See for example Dion. Hal. 14.6.1–6 making the Romans honorary Hellenes (discussed in chapter 5). Also Plut. *Marc.* 19–20 (see chapter 4).
- 3 The external example should be viewed in the light of, especially, the *pre-lex repetundarum* atrocities in Spain. Also, brutal treatment of

- defeated enemies (e.g. by Scipio Africanus, Aemilius Paullus, Aemilianus, Caesar [BG 1.6.1, 5; 1.7.1; 4.2.2–5; 4.4.5; 4.6.2–4; 4.15.1–3]) is generally similar to our example but lacks Sulla's unique objective of total extermination. The proscriptions that followed the mutual mayhem between Marius and Sulla over 88–87 (on which see Bulst 1964:313–18, Meier 1966:229 n. 140, MRR 2.46), and the accompanying *hostis* declarations (Bauman 1973), went back to the Gracchan *s.c. ultimum*, but our concern is with the updated version of 81.
- 4 Livy *Per.* 88, *Per. Oxy.* 88; Dion. Hal. 5.77.4–5; Strabo 5.249–50; Plut. *Sulla* 29–30; App. *BC* 1.93–5, 4.28–41; Dio fr. 109.3–4; Oros. 5.21.1–10.
 - 5 Plut. *Sulla* 30.2–3; Dio fr. 109.3–9; Oros. 5.21.1.
 - 6 On this see Hinard 1985:103–43, with Flor. 2.9.25, Plut. *Sulla* 31.2–4, Oros. 5.21.2–3.
 - 7 The senate did not want something harsher than ancestral custom to be seen to have the approval of the *publicum consilium*. Cic. *Rose. Amer.* 153 with Hinard 1985:108–9, 115–16.
 - 8 The principal law, the *lex Valeria*: Cic. *Leg.* 1.42. Despite the objections of Hinard 1985:68–9, the accepted interpretation of the passage should stand. Cic. *Dom.* 43 is not against this. Cicero there defines 'proscription' in the same terms: *poena in cives Romanos nominatim sine iudicio constituta*. The supplementary law, the *lex Cornelia*: Hinard 1985:100, calling it the *lex Cornelia de hostibus rei publicae*. This title has the merit of highlighting Sulla's motivation as presented by himself. In 88 he had said that he was marching on Rome to deliver the city from tyrants. Bauman 1973:283.
 - 9 App. *BC* 1.103 (rather than 1.95); Val. Max. 9.2.1. Also Plut. *Sulla* 31.3–6; Oros. 5.22.4; Eutrop. 5.9.4.
 - 10 He thereby gave statutory underpinning to voluntary exile (discussed in chapter 5).
 - 11 For example, when Sulla issued a *hostis* declaration in 88, Marius and his son managed to escape to Africa. In fact, of the twelve named in Sulla's decree, only P.Sulpicius Rufus was caught and killed. Sources in MRR 1952, 2.42. Sulla was determined to avoid such a poor result in 81.
 - 12 App. *BC* 4.10, in the context of his verbatim quotation of the triumvirs' edict, on which see Hinard 1985:228–9 with n. 4. Other departures from the Sullan model noted by Hinard: 229–30 are minor.
 - 13 App. *BC* 4.7 (297), but 4.5 (2300); Plut. *Brut.* 27.6, *Ant.* 20.2; Flor. 2.16.3; Livy *Per.* 120; Oros. 6.18.10. Hinard 1985:119, 265, 267–9 settles on a figure of 300 for the triumvirs. But his estimate of 520 for Sulla is far too low. Appian's account seems reliable.
 - 14 Suet. *Caes.* 11; Ascon. 70 St. Caesar made the ruling at the trial of the Sullan centurion, L.Luscius, who had killed three *proscripti*.
 - 15 Over 88–87 BC, together with Sulla's larger contribution in 81.
 - 16 The *lex Pedia* was passed in August 43 when Pedius became suffect consul with Octavian. Rotondi 1912:435; MRR 2.336–7. The triumvirate was created in November 43. It was only then that the

- proscriptions were formally authorised. On Pedius' publication of the seventeen names and his death see App. *BC* 4.6–7.
- 17 The British chieftain's bitter 'They make a desert and call it peace' (Tac. *Agric.* 30.7) is more of a Tacitean *topos* than a serious statement of fact. The theme was also pursued elsewhere, by Tacitus and others. See Syme 1958:529 with some observations on Tacitus and *Pax Romana*.
 - 18 The use by some sources, notably the *Augustan History*, of the verb *proscribere* in fact refers to interdiction decrees.
 - 19 Cicero's contemporary, Varro, distinguished three kinds of agricultural equipment (*instrumentum*): instruments endowed with speech (slaves); inarticulate instruments (cattle); speechless instruments (wagons and ploughs). *Res Rusticae* 2.2.5–6. Cf. D. 34.4.31. On slavery's part in blocking a general theory of human rights see Finley 1983, 93–123; Bradley 1984:113–37; Veyne 1993:346–8.
 - 20 Cicero's position is on the whole one of acceptance of the existing situation. Dumont 1987:743–60 notes that Cicero's works include only four in which the treatment of slaves is discussed: *Rep.* 3.37, 5.4–5; *Tusc.* 2.47–51; *Leg.* 2.29; *Off.* 1.41. Add *Off.* 2.24, 3.89 (not noticed by Dumont): 'To keep subjects in check severity has to be employed. For example, masters towards slaves if they cannot control them in any other way.'
 - 21 Mid-first century AD.
 - 22 *Pol.* 1254a. 18, 1254b.25. Cf. Finley 1983:117, 119; Veyne 1993:347–8.
 - 23 *D.* I 5.3, 5.4.1; Just. *Inst.* 1.3.1, 3.
 - 24 That is, one inducted into *humanitas* by *paideia*.
 - 25 *Ep.* 47.1–5, 10, 11, 13 adapted.
 - 26 Bauman 1974:43–8. Torture was also employed in order to extract a confession from a slave who was himself an accused. Robinson 1981:223–5. Cf. Jones 1972:115.
 - 27 Tac. *Ann.* 14.60.4. Dio 62.13.4 confirms Pythias' reply but makes her the only one to assert Octavia's innocence. In Suet. *Nero* 35.2 all the maids maintain her innocence.
 - 28 On what follows I give an abridged version (with additions) of Bauman 1989:92–5. To the literature listed at 93 n. 100 add Robinson 1981:233–5; 1995:45; Watson 1987:134–8; Wolf 1988; Bauman 1996:81–3.
 - 29 See the works listed in n. 28. There were further decrees of the senate after the Augustan decree of AD 10, but Justinian retained the name of the original decree: *De senatus consulto Silianiano et Claudiano. D.* 29.5.
 - 30 Every slave was deemed to be an accomplice. The onus of rebuttal was on the slave.
 - 31 There is something of a problem here. Tac. *Ann.* 14.43.4, 45.1 says there were 400 slaves and neither age nor sex saved any of them. But the jurist Maecian, writing in the mid-second century AD, says that children below puberty (*impuberes*) are exempted from the provisions

- of the *s.c. Silanianum*. He does however note an exception to that rule. *D.* 29.5.14. Cf. *D.* 29.5.1.28. Presumably the exemption of *impuberes* was not in the original *s.c.* but came in at some time after 61.
- 32 Tac. *Ann.* 14.44.5: ‘Since we have in our households peoples of different rites and beliefs, you can only control *conluviem istam* by terror.’
- 33 Not so much by the populace at large as by *villae* proprietors whose small complements of slaves could not tolerate extermination without financial disaster. Bauman 1989:102–7. But the actual demonstrators throwing stones and filth (Tac. *Ann.* 14.45.2) could have been a rented crowd from the city proletariat.
- 34 Hor. *Sat.* 1.30.80–82, 2.3.128–30. Cf. Bradley 1984:122 with n. 54.
- 35 Dated to the Late Republic or Augustus by Finley 1983:95. Text and discussion: Bove 1967.
- 36 It continued to be so applied right down the Principate. Nero’s refusal to apply the *s.c.* to freedman was reversed in 105. Plin. *Ep.* 8.14. And Hadrian, sentencing an *ancilla* to death for failing to give the alarm when her mistress was killed, said that his ruling would remind other slaves not to think of themselves first. *D.* 29.5.1.28. There were a few cosmetic changes from time to time (see Robinson 1981:234–5), but the law remained basically unchanged. *D.* 29.5; *CJ* 6.35.
- 37 As Tacitus says, no counter-proposals to Cassius’ motion were made. But Seneca was probably responsible for Nero’s refusal to punish the freedmen.
- 38 Finley 1983:93–6.
- 39 Garnsey 1970:122–9, 139; Robinson 1981:220; Bradley 1984:119; Watson 1987:116–19. Buckland 1908:36 thinks that in the Republic slaves enjoyed effective protection from the censor. For a criticism of Dion. Hal. 20.13 on which the censor’s role is based see Watson 1987:116–17.
- 40 Constantine’s position on the games is equivocal. Sentencing to the gladiatorial games was forbidden. *CTh* 15.12.1; *CJ* 11.44(43). But kidnappers were, if slaves, thrown to the beasts at the games; if free they were sentenced to the gladiatorial games, but on condition that they be destroyed by the sword before doing anything to defend themselves. *CTh* 9.18.1. (Cf. the position in the Late Principate: *Coll.* 11.7.4 discussed in chapter 8.) A person condemned to the arena was not to be branded on his face, but on his hands and legs, in order not to disfigure the face which is in the likeness of celestial beauty. *CTh* 9–40.2. Cf. the respect of Domitian and the Antonines for the human form: see chapter 7. Valentinian and Valens forbade the sentencing of Christians to the arena for any crime. *CTh* 9.40.8. The crux is the three decrees of Constantine—*CTh* 15.12.1, 9.18.1, 9.40.2. The only solution that occurs is that 15.12.1 was issued in 325, whereas the other two date to 315 and 316. But a complete ban on sentencing to the gladiatorial games was no longer in force when 9.40.8 was issued in 365.

- 41 For a useful account of an obstreperous topic see Garnsey 1970:141–7, 213–16. Brunt 1980:259–65 makes some interesting points but does not leave the reader with a clear overview. Robinson 1995:13 is very brief.
- 42 For the fluctuations see Garnsey 1970: locc. cit. One or two comments are worth making. Despite Claudius' oath not to torture any free men, torture was applied to accused persons of every status, citizens and peregrines, and plebeians, knights and senators. Dio 60.15.6. Cf. Suet. *Claud.* 34.1. Brunt 1980:259 n. 17 thinks that only slave witnesses are referred to in the Suetonius passage. But torture for that purpose was not something to provoke any special comment or notice. In Tac. *Ann.* 11.22.1–2 men involved in the conspiracy against Nero break down at the sight of the rack, but a freedwoman puts them to shame by refusing to give in. Hadrian ruled that if anyone claimed to be free in order to avoid being examined under torture, the claim to free status must be decided before proceeding with the examination. *D.* 48.18.12. We infer from this that by this time there was legislation against torturing free persons. Cf. *D.* 48.18.1.13, 9.2 on Pius; discussions in Garnsey 145–6, Brunt 260–1. But if Marcus had to rule that persons of great eminence were not subject to plebeian penalties or torture (*CJ* 9.41.11), there could not have been an overall ban on torturing free persons. Commodus made military veterans who had been guilty of treachery or desertion during their service liable to torture. *D.* 49. 16.7.
- 43 The slave had first to be formally tried by a judge. Datings of the law fluctuate between Tiberius and Nero. Tiberius: Garnsey 1970:130 n. 7; Levick 1976:257 n. 47. Nero: Rotondi 1912:468; Watson 1987:121 ('before 79'); Robinson 1995:43.
- 44 Suet. *Claud.* 25.2; *D.* 40.8.2; *CJ* 7.6.1.3. Restated by Pius. Gai. 1.53. Watson 1987, 122 wonders why Suetonius limits the abandonment of slaves to the island of Aesculapius in the Tiber. But the reason is obvious. An owner had sent his sick slave there for medical treatment but had found the cost too high. Later on Claudius' ad hoc ruling hardened into a general rule, hence the omission of the reference to the island of Aesculapius in the legal texts.
- 45 Suet. *Dom.* 7.1; Dio 67.2.3; *D.* 48.8.6. Bradley 1984:128 credits the legislation to Nero. That is possible if the consul Neratius referred to in *D.* 48.8.6 is the jurist Neratius' father rather than the jurist himself. But on the whole Suetonius' version is to be preferred.
- 46 See Levy 1963:2.374–5; Volkmann 1969:85 n. 3; Robinson 1981:225.
- 47 The crucial passage is *D.* 48.18.8 pr.: 'I do not think that evidence under torture should be used in every case or with respect to every person. [But] when capital and aggravated crimes cannot be uncovered except through the evidence of slaves under torture, I consider such evidence most efficacious in ascertaining the truth, and I propose that it be allowed.' The writer has argued that Augustus was here discussing the admission of slaves' evidence against their owners. See Bauman 1974:43–8. The works listed in n. 46 do not consider this alternative. It is however discussed by Brunt 1980:256–9; he takes a different view.

- Without revisiting the whole issue, it must be said that to take the passage as a limit on torture in general runs up against a serious difficulty. The passage has to be taken to mean that Augustus was interfering with the rule that traditionally required the slave witness to be tortured whenever, on whatever charge, and against any accused whomsoever, he gave evidence. Augustus will have been proposing the abolition of that rule and its replacement by a rule that only applied to capital and aggravated crimes, and even then only when the case could not be made by other evidence. This immediately excludes adultery, which was sub-capital but particularly difficult to prove. But in fact there was never such an exclusion. The examination of Octavia's *ancillae* (above) was certainly conducted under torture.
- 48 On Augustus' restrictions on manumission see the next section of this chapter.
- 49 What follows owes a great deal, in stimulation as much as in actual material, to Sherwin-White 1967 and Thompson 1989. Saddington 1975 has also helped to shed light on a neglected field.
- 50 The Sardinians and Sicilians are discussed in *Scaur.* 39–45, *Verr.* II 2.7–9. See also chapter 5. The uses of *Graeculus* (some of which are noticed in chapter 5) are in *Orat.* I 47, 102; *Place.* 23; *Tusc.* 1.86; *Scaur.* 4.
- 51 On the *lex Licinia Mucia* see Bauman 1983:366–71. Cicero's attitude: *Off.* 3.47. Cf. *Ascon.* 54 St. On Cicero's defence of Archias see chapter 5.
- 52 Tac. *Ann.* 14.42–45, discussed in chapter 8.
- 53 Juv. 3.62. See also Juv. 3.78, 6.186 and below.
- 54 That is, as far as the extant sources go.
- 55 Plin. *Ep.* 10.40.2; *Pan.* 13.5; *Ep.* 4.22. Cf. Sherwin-White 1967:76–8, making the pejorative nature of *Graeculus* very clear: '[It] is Latin for "wog".'
- 56 Juv. 3.61; 3.77–8.
- 57 Tac. *Dial.* 29.1; Flor. 2.13.24. For other examples see Sen. *Suas.* 1.5; Petron. *Satyr.* 10.
- 58 On this see especially Thompson 1989:26–38, 40–7.
- 59 The laws are *lex Fufia Caninia* of 2 BC; *lex Aelia Sentia* of AD 4; *lex Junia* of uncertain date. An Augustan date for the *lex Junia* is accepted by Watson 1987:28 and Treggiari 1996:894–5 (contrary opinions in her n. 73).
- 60 On the contents of these laws see Buckland 1908:533–51; Watson 1987:29–31; Treggiari 1996:894–6. One of the rules laid down that a slave who had been punished by his owner by way of shackles, branding, torture, condemnation to fight in the arena or imprisonment would, on manumission, have the status of a *dediticius*, an enemy who surrendered at discretion. Although becoming free, he was ineligible for citizenship and suffered other disabilities. Gai. 1.25–27. But his criminal record as a slave was liberally interpreted. Torture that had not extracted a confession was disregarded, as was shackling if applied by only one of several co-owners: 'It befits humane reasoning to favour the unfortunate' *PS* 5.12.3, 5. A slave manumitted informally or when

- less than thirty years old only acquired the status of a Junian Latin. Watson 1987: *passim*. The vexed question of Junian Latinity is taken as far as we need by Treggiari 1996, 895–6: ‘Half-citizenship...like that of Latin colonists of an earlier age.’ One doubts whether the classical jurists (Gai. 3.56, 1.29, Just. *Inst.* 1.5.3) knew what it was. Did Caracalla know in 212 when he excluded *deditticii* from the grant of citizenship to all free inhabitants of the empire?
- 61 Suet. *Aug.* 3–4. Watson 1987:29 thinks that Augustus wanted to reduce the number of freedmen because testators used to emancipate all their slaves in order to have many freedmen following their biers. Cf. Dion. Hal. 4.24.6. But was this a problem calling for an ideological intervention? With *colluvio* in Suetonius’ text cf. *conluuiam istam* in Cassius Longinus speech. See n. 32 above.
- 62 Cf the remarks of Thompson 1989:104–9 on *physiognomonía*.
- 63 Modern opinion is divided on the evidence of Suetonius and Dio. H. Last, *CAH* 1st edn, 1966, 10.432–4 accepts it unreservedly. Watson 1987:29 rejects it. Treggiari 1996:896 cites a rejectionary view but does not state her own position. J.A.Crook, *CAH* 2nd edn, 10.103–4 links the *lex Fufia Caninia* to the reduction of free handouts of corn to 200,000 recipients. But then why did the law survive Augustus?
- 64 See Watson 1987:31–2.
- 65 Plin. *Ep.* 8.14. Pliny tried to prevent the reversal but was defeated by a sudden coalition between two opposing points of view.
- 66 All necessary information on Claudius’ citizenship policy is in Sherwin-White 1973:237–50 and *passim*. On Claudius’ intervention in favour of sick slaves see above.
- 67 Auguet 1994:62–8, 93–6.
- 68 Chariot races went back to 366 BC. The first gladiatorial contests were staged in 264. *Venationes* (‘hunts’) appeared in the first century BC, which is when the games began being used as an instrument of electioneering propaganda. W.H.Gross, *Kl.P.* 5 (1975), 312; Auguet 1994:19, 25. Non-lethal forms continued to be staged in the Principate. *D.* 48.19.8.11 has compulsory public entertainment (pursuant to criminal sentences) provided by ‘those who take the part of hunters, or perform Pyrrhic dances, or provide some other kind of entertainment by mime or other bodily movements’.
- 69 Cf. Auguet 1994:191.
- 70 *Ira* 3.3.6; *Clem.* I 13.2, 5.2, 25.1; *Epp.* 14.4–5, 7.2.4, 90.45, 95.30.
- 71 Burnt alive in Plin. *Pan.* 33.3–4; to the beasts in Suet. *Dom.* 4.1. Two separate incidents are possible, but Pliny may have reworked the material in the interests of elegance.
- 72 Trajan, the focus of Juvenal’s ‘Bread and Circuses’, was inordinately fond of games. On his return from Dacia he gave 107 entertainments over 123 days, taking in 10,000 gladiators and 11,000 animals. Dio 68.15.
- 73 See n. 40 above.
- 74 On these late developments see R.Gross, *Kl.P.* 2 (1967), 569.

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