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## THE LEX POMPEIA AND THE POENA CULLEI.<sup>1</sup>

By MAX RADIN, The University of California.

When the South Sea Bubble burst, a passionate member of the British Parliament called for the application of the *Lex Pompeia* on Parricides to those who had defrauded the nation. Just as the Romans, he argued, face to face with a monstrous and unprecedented crime, devised for it a monstrous and unprecedented punishment, so the British were invited to tie the directors of the South Sea Company into sacks with a dog, a cock, a viper and an ape in each, and sink them in the Thames.

The statement then made is, it seems, the general belief about the origin of this famous Roman death-penalty. That belief is demonstrably wrong, although Seneca, who doubtless knew better, makes a rhetorical point by pretending to share it.<sup>2</sup> Parricide did not first occur in Rome in the first pre-Christian century, nor was tying in a sack and subsequent drowning first introduced then. Both the offence and this particular mode of vindicating it were ancient.<sup>3</sup>

However, the punishment, when its details are considered, is seen to be very strange indeed. Immediately upon conviction, the head of the criminal was bound in a wolf's skin; wooden soles were put under his feet; he was beaten with either blood-red rods, or rods of a special shrub<sup>4</sup>; he was then tied in a sack with animals and

<sup>1</sup> I desire to thank Professor J. S. Reid for his kindness in reading through this article in manuscript, and, with his consent, I have taken the opportunity of incorporating in my notes comments made by him. These comments have been inserted in brackets after my own notes and are marked by his initials, J.S.R.

<sup>2</sup> Seneca, *De Clementia*, i, 23.

<sup>3</sup> Val. Max. i, 1, 13. Dionys. Halic. iv, 62, 5. Cicero, *Pro Rosc. Am.* 25, 70.

<sup>4</sup> Strachan-Davidson, *Problems of the Roman Criminal Law* (p. 21), thinks that the *virgae sanguineae* were shrubs of a certain kind, and compares Pliny, *N.H.* 24, 73; 16, 74; 16, 176. Hitzig in the *Rev. Pen. Suisse* (not seen), p. 41, believes that they were simply painted red. The special efficacy of certain shrubs for purifying purposes is well known. Cf. Tzetzes, *Cbil.* v, 725, quoting Lycophron that *φαρμακόν* were beaten with branches of wild fig before they were burned on the beach. [As to the *virgae sanguineae*, it seems not unlikely that they were merely painted red. From the purificatory and expiatory nature of blood actually shed, the colour red was used in connexion with burials and other ceremonies connected with it. See a number of references in Gruppe's *Griechische Mythologie*, § 272, p. 891, n. 3. The tying of the *fascēs* with a piece of red

material belongs to the same group of ideas (Lyd. *de Mag.* i, 32), also the use of *minium* in the earliest sepulchral inscriptions, in which the inscription was painted red on stone. Probably, for example, the early inscriptions belonging to the tombs of the Scipios were not cut on the stone till long after they had been painted. There is a similar indication about the Duilius inscription. The flogging of the *parricida* is parallel to the flogging of other criminals before execution by the axes: the object in both cases being expiation by shedding of blood. The same idea (probably) is behind the flogging of the Spartan boys at the altar of the goddess. For *sanguinea virga* see Columella x, 242, as in Pliny, *N.H.* 24, 73. There is a sort of homeopathic principle involved here, like the use of fire to cure fever (the amatory fever included). Colour had something to do with the use of *myrtus* (expiatory) in the *triumphus*, and in the Pythagorean practice of burial (Varro ap. Plin. 35, 160). Cf. Plut. *Qu. Rom.* 20 for the *ῥαβδὸν μυρσίνης* with which a wife was chastised. Water, especially salt water, had of course a great vogue in religious purifications. (Gruppe, *op. cit.*, p. 815, n. 1). Myrtle rods were used in the purification of *fetiales*. The myrtle twigs on the ancient *ξόανον* of Hermes (Paus. i, 27, 1) seem to me wrongly explained by Gruppe p. 26; he has them as *ψυχόπομπος*, but cf. *op. cit.* pp. 143, 197. J.S.R.]

the sack drawn by a yoke of black oxen to the sea or to the nearest river. Surely we have here not an apparatus of horror intended to act as a deterrent influence, but a religious ritual.<sup>1</sup>

And this religious ritual has a specific name. It is plainly a *procuratio prodigii*<sup>2</sup>—a disposal of a thing of evil portent. The offence was an outrage against the established course of nature—being an infringement of the parental reverence which was one of the bases of the Roman state. The perpetrator was not merely a criminal amenable to punishment, but a foul thing, unclean, causing the gods to withdraw their presence from a world he polluted, and requiring therefore hasty removal from the world in such a manner as to remove at the same time the miasma his body would inevitably spread. Cicero understood the penalty as an attempt to cut the guilty man off from communication with any of the four elements.<sup>3</sup> That may be wrong as far as water was concerned, although Cicero scores neatly on this point as well,<sup>4</sup> but in the main it is the obvious explanation of many of the details.

Now, modern criminal codes may go upon the assumption that murder is murder. However, that is a relatively late conception. *Parricidium* in all likelihood meant the murder of a clansman—one for whose death there could be no compensation, because those who were to receive the blood-price were the same persons.<sup>5</sup> And whether or not the word still retained this precise meaning<sup>6</sup> when

<sup>1</sup> *Auctor ad Herennium*, i, 23. Cicero. *De Ino.* ii, 148. Cf. also Hitzig, s.v. *culleus*, Pauly-Wissowa, *R.E.* iv, 1747; Mayor on Juvenal viii, 214, and the passages there cited. Cf. also Mart. Cap. 465 and Tibullus ii, 5, 79-80. [The passage in the *Auct. ad Herennium* is difficult. For one thing the syntax shows that the text is not sound. The paragraph describing the 'lex' is generally condemned, in a comparison with Cic. *De Ino.* 148, 149. From the latter passages *lupino* is omitted, and in the former the manuscripts are confused. This must throw doubt on the wolf skin, which appears (I think) only in *Ad Herennium*, i, 23. The only connexion I know between bloodguiltiness and the wolf is in such passages as are referred to by Gruppe—see ind. s.v. *Wolf*. The wolf skin averts *veneficia* in Pliny, *N.H.* 28, 157. There seems to be no example of a wolf skin used ceremonially; the Luperci had their goat skin (Lupercus really = 'wolf'). But cf. Wissowa's article on Hirpi Sorani in *Roscher*. J.S.R.]

<sup>2</sup> Brunnenmeister, *Todtungsverb. in altrom. Recht.* 185-198. For a striking example of *procuratio prodigii* cf. Livy, xxvii, 37, 6: *nuntiatum Frusinone natum infantem esse quadrimo parem, nec magnitudine tam mirandum quam quod is . . . incertus, mas an femina esset, natus erat, id vero haruspices ex Etruria acciti foedum et turpe prodigium dicere; extorrem agro Romano, procul terrae contactu, alto mergendum. Vivum in arcam condidere, provectumque in mare proiecerunt.* [The killing of a portentous birth seems to have

been obligatory on the paterfamilias; for *water* in this connexion see Sen. *De ira*, i, 15. *Deportatis in insulam desertam*, Pliny, *N.H.* 7, 36. J.S.R.]

<sup>3</sup> Cic. *Pro. Rosc. Am.* 26, 71 seq.

<sup>4</sup> Cicero, l.c.: *ne . . . ipsum polleret quo cetera quae violata sunt, expiari putantur.* However, it is certainly not a general belief that any pollution whatever would affect the sea. Cf. Euripides, *Ipb. Taur.* 1193. In Aeschylus, *Persae*, 578, the sea is *ἡ ἀμίαντος* 'the unpollutable one.'

<sup>5</sup> Brunnenmeister's suggestion (*Todtungsverb.* 101-102) that *parricidium* equalled 'kinsman-killing' (*πληθός*) is perhaps the most reasonable. Although in some of the medieval codes the influence of Christianity caused parricide to be reckoned as an offence that could not be compensated for, most of the old German codes continued to allow *wergild* for it. Wilda, *Über das Strafrecht der Germanen*, 714 seq.

<sup>6</sup> It is unnecessary to cite all the various discussions of the meaning of the word. They begin with the statement of Festus that *parricidium* originally was the murder of a free citizen (M. p. 221). Cf. Strachan-Davidson, *Problems*, 21 seq. Landgraf, *Ciceros Rede f. S. Roscius*, note to 25, 70. A favourite etymology of ancient times referred it to *par*, 'equal.' Priscian i, 26, 6. Cf. also Cuq, *Inst. Jur.* (2d ed.) 47, n. 3 and the passages cited, of which it may be well to mention Breal-Bailly's that *parricidium* equalled *patricidium* in the sense of 'murder of a patrician.'

the Lex Pompeia is assumed to have been enacted (81 B.C.),<sup>1</sup> it undoubtedly meant a murder of a graver sort than ordinary homicide, and one which consequently was punished in a different way. Some of the elements of the punishment lend themselves to the simple explanation already mentioned. The sack itself is old and occurs elsewhere.<sup>2</sup> Ceremonies like the covering of the head and the putting of wooden soles on the feet must have the same general significance. But the use of animals seems to be unique, and, in what follows, we shall be principally concerned with them.

In the first place there is an interesting conflict in the sources about the terms of the *Lex Pompeia*. The Institutes of Justinian (4, 18, 6) state that the law enforced the ancient *poena cullei*, the punishment of the sack; and Marcian (*Dig.* 48, 9, 1) says in effect that the law abolished it, and that it assimilated parricide to ordinary homicide. Mommsen in his *Strafrecht* (p. 644), and others who follow him, accept Marcian's statement and reject the other. But they must then assume an immediate repeal of the *Lex Pompeia*—for which there is no evidence—since the *poena cullei* was in force shortly after 81 B.C. and was in existence and often enforced throughout most of the Empire. Not only that, but the Institutes in this passage are at least evidence of a tradition that the Lex Pompeia did establish this very punishment, which, on the hypothesis of enactment and almost immediate repeal, is hard to understand. It is at least safer to assume that the tradition accepted by Tribonian and the compilers is better than the opinion of Marcian on this point of legal history.

But, even if the *Lex Pompeia* established the *poena cullei* or re-established it, did it specify the dog, the cock, the viper and the ape? And why these animals? Are parallels for this choice found elsewhere? It is often asserted that such parallels have been found in other places and times. But Post, who makes the general statement to this effect in his *Ethnologische Jurisprudenz*, has no instance other

<sup>1</sup>The date of the *Lex Pompeia* is uncertain. Its reference to the year 81 B.C. is generally made in a very positive manner, but is really based on nothing more than a desire to make it follow the Sullan Statute of Murderers and to precede the *Rosciana*. [As to the Lex Pompeia, the only passage implying that it introduced any change in the *poena* is Just. *Inst.* iv. 18. That passage is curious. It has reminiscences of Cicero, *Pro Roscio Amerino*; indeed, it looks as if the writer from whom it comes got his knowledge of the *poena* from Cicero, though he takes the title Lex Pompeia from elsewhere. I do not feel sure that Pompeius in his *lex* defined the *poena* in any other way than by referring to Sulla's law. *Dig.* 49, 9 surely implies this, while making it certain that Pompeius carefully defined the persons who were to be liable to the punishment. Paul. *Sent.* 5, 24, 1 (defective) confirms this idea. The natural inference from Cicero, *Pro Rosc. Am.* is that no recent statute had defined the punishment, but that it was traditional and immemorial,

like the *interdictio aqua et igni*. In all the references to this punishment, I do not remember to have seen it quoted from any statute; it was assumed to be notorious and immemorial. I should doubt whether even the *lex Cornelia* entered into particulars about the *poena*. If any statute were quoted, one would expect it to be of *Numa*. The *soleae* in *Auct. ad Herenn.* can have no ritual significance. They only indicate that the culprit is starting for his last journey. J.S.R.]

<sup>2</sup>There is, of course, the proverbial sack which romance has assigned to delinquent wives of the Grand Turk. Post, in his *Ethnologische Jurisprudenz* ii, 269, n. 5, speaks of the sack as though it were a common institution, but in the reference the punishment instanced is generally simple drowning. That seems also to be true of the citations in his *Afrikanische Jurisprudenz*. In Grimm's *Deut. Rechtsalt.* there are several instances of drowning, in some of which the criminal was enclosed in a sack or chest.

than this one.<sup>1</sup> Grimm's *Deutsche Rechtsalterthümer*<sup>2</sup> mentions two cases in which this exact penalty was inflicted, one in Cassel in 1576, and the other in Saxony in 1734<sup>3</sup>; but he correctly points out that these late incidents are simply enforcements, as far as was feasible, of the penalty prescribed in the Institutes.<sup>4</sup>

Of the ancient customs mentioned by Grimm, two are in point. The Slavs, it seems, hanged, or perhaps impaled, certain malefactors together with wolves. And in medieval Germany thieves were hanged head downward with a dog on either side. The former custom is remotely similar to the one under discussion, but too remote to be of value. The latter loses any special significance for our purpose by the peculiar fact that this punishment seems to have been reserved for Jews found guilty of theft, so that it is next to impossible not to see in it a reference to the Crucifixion.

In Rome the sack was used in the punishment of adultery as well as parricide.<sup>5</sup> However, this was apparently not statutorily provided. It was used in connexion with other forms of bodily contumely which the injured father or husband might inflict as a matter of personal vengeance. The statutes may have merely provided that if it should be so used, the victim or his family could not apply to the law for protection.<sup>6</sup>

But except for these two instances, there is no certain application of the sack or *culleus*. Mommsen<sup>7</sup> mentions a number of special cases, but they are of a different sort. The infliction of the sack penalty by Tarquin on the man who had betrayed the Sibylline secrets is scarcely historical. Besides, the tradition varies. According to another version, the victim had been guilty of parricide.<sup>8</sup> The other case is the killing of the Gracchan, C. Villius, in the riot in which Tiberius lost his life. But the circumstances are markedly different. Villius was shut in a large chest with snakes. The obvious purpose was to torture him to death with the double agony caused by the bites of the snakes and by suffocation. But there was no drowning here at all, and that fact is plainly of the greatest importance.<sup>9</sup>

<sup>1</sup> ii, 269, n. 5.

<sup>2</sup> ii, 278 seq. Cf. also the decree of Frederick William I of Prussia in 1739. Radbruch: *Einführung in die Rechtswissenschaft*, 3rd ed. p. 117.

<sup>3</sup> In the former case, all the animals were used. In the latter an ape apparently could not be procured.

<sup>4</sup> In both cases it is certain that the magistrates knew the *Institutes*. But Isidore, whose Etymologies quote the *poena cullei* (v, 27, 36, omitting the dog), was well known throughout the Middle Ages, as were the Glossaries that were often derived from him.

<sup>5</sup> *Schol. Terent.*, p. 111, 1, 15; Juvenal, x, 317. By a constitution of Constantine (Cod. Theod. xi, 36, 14) (A.D. 339) adulterers are either to be sewed alive in sacks or burned.

<sup>6</sup> With the adulterer was put a *mugilis*—which was a wedge-headed fish—or a scorpion. These were also used as instruments of torture without the sack. Whipping, too, might be inflicted, just

as the parricide was whipped. Cf. Athenaeus, 307 b; Papinian, *Dig.* 48, 5, 23. Valckenaer on Euripides, *Hipp.* 415. It is evident that there is a similarity between the punishment of these two offences—offences that might be analysed as the violation of two important taboos, that governing sex and that governing kindred blood.

<sup>7</sup> *Strafrecht*, p. 567, n. 4.

<sup>8</sup> Val. Max. i, 1, 13; Dionys. Hal. iv, 32; Zonaras 7, 11.

<sup>9</sup> Plutarch, *Tib. Gracch.* xx. Quintus Cicero drowned two Mysians in sacks, at Smyrna, in a fit of arrogant ill-temper, which his brother chides. (*Ep. ad. Q.F.* 1, 2, 2, 5). According to Eusebius, the martyrs Ulpien and Edesius were put to death in this way (*De Mart. Perst.* 5) [The passage in Cicero *ad Quint.* shows that the punishment was unusual (cf. *exemplum severitatis*). The cock is brought into relation with death in the story of Socrates: 'we owe a cock to Aesculapius.' J.S.R.]

Apparently, the four animals mentioned in the Institutes are found only in Rome and only in this connexion. Did they have a practical or a symbolic significance?

The older commentators glibly offered both. An old Greek paraphrase of the Institutes that goes under the name of Theophilus, tells us that the animals in question are impious animals, ζῶα ἀσεβῆ of which one group kills its parents and the other does not shrink from combat with them.<sup>1</sup> The Dositheus under whose name certain anecdotes of Hadrian have come down to us, has the same statement, *impiis animalibus impius homo*.<sup>2</sup>

The writers of those small lexica, whose scattered works have been collected by the labours of Loewe and Goetze into the valuable corpus of Glosses, frequently find it necessary to explain the term *culleus*, especially in its use as a punishment for parricides. They sometimes mention details not found elsewhere, such as the lining of the sack with pitch and bitumen.<sup>3</sup> And generally they suggest that the choice of the animals is determined by the following consideration. The animals are mutually hostile, and in their struggles with one another they would lacerate and torture the doomed wretch within.<sup>4</sup> One ingenious marginalist suggests that the cock was added to make it possible to know how far the sack was carried out to sea.<sup>5</sup>

It is obvious that such suggestions, occurring in writers both late and of scant authority, are merely unsupported guesses and can teach us nothing of the real purpose that these animals were meant to subserve.<sup>6</sup> The practical purpose may well be disregarded. The only conceivable one would be that already presented by the Glossaries, and it is scarcely satisfactory. If the injuries these animals could inflict were in the minds of those who devised this penalty, plainly more noxious creatures could have been found. The only other purpose must be the symbolic or ritual one.<sup>7</sup>

We can readily understand the viper. Even where snakes had a claim to veneration, they were always uncanny—creatures of the lower world, demonic in all senses of that term.<sup>8</sup> The viper, besides,

<sup>1</sup> *Inst.* (ed. Ferrini) iv, 18, 6.

<sup>2</sup> *Hadr. Sent.* 16. Published with his *Interpretamenta* (ed. Bocking, 1832).

<sup>3</sup> *Corpus Gloss. Lat.* iv, 502, 3; v, 593, 57; vi, 47, 20.

<sup>4</sup> *Idem.* iv, 224, 53.

<sup>5</sup> *Idem.* v, 617, 47 (11th cent. MS.).

<sup>6</sup> Hardly any modern writer takes the suggestions of any of these writers seriously. Rein, however, seems to do so, *Kriminalr.*, p. 457. He goes so far as to say that the dog was an animal despised by the Greeks and Romans. But that is in direct contradiction with the facts. Landgraf (*Ciceros Rede f. S. Rosc.* sec. 70) thinks that the dog and the cock represented good as the others represented evil. There seems scarcely any sufficient ground for balancing good and evil on such an occasion. [It has been sometimes suggested that the dog and

the cock were included as being watchers in the house, to give notice of approaching mischief; and had failed to secure the safety of the victim. The connexion of the snake with the underworld (as with Hecate) may belong here. J.S.R.]

<sup>7</sup> A general discussion and bibliography of the importance of animals in cults and superstitions is found in the article of Mr. Northcote W. Thomas in the *Hastings Encyclopedia of Religion and Ethics*, s.v. *Animals*. A more special discussion of animals in Greek and Roman beliefs is presented in Riess' article on *Aberglaube* P.W. *Real-En.*, pp. 77 seq.

<sup>8</sup> Snakes, it is well known, commonly represented spirits of the lower world, including the beneficent ones. But a distinction is made between venomous and non-venomous serpents (Rohde in *Rb. Mus.* 28, 278). The latter had all the uncanniness of



was a venomous snake, generally believed to owe its life to its parent's death. It would not be difficult to detect a symbolism here. But this cannot be said for the ape. In the ancient times, when this punishment was first introduced, the ape cannot have been known. As for the cock and the dog, their functions in the belief and life of ancient Greece and Rome make their presence here nothing less than astounding.<sup>1</sup> Was the cock, associated with the sun in practice and rite, and one of the most familiar and valued of domestic animals, in any sense uncanny or monstrous?<sup>2</sup> It may be that a game-cockerel was occasionally matched in a fight with his sire, but known instances of that cannot have been numerous, surely not numerous enough to make the cock a type of unfilial conduct.

When we consider the dog, the irrationality of his presence here is even more strikingly apparent. The only association with evil or punishment that can be found for dogs is that given by Plutarch in the Roman Questions, LI, in which the dogs of the Lares Praestites are, on authority of unnamed Roman writers, said to indicate that the function of these Lares is that of avenging furies. The dog is, above all others, the loyal friend of man. That is attested not merely incidentally, but specifically in more than one place.<sup>3</sup> Why does he seek, or why is he made to seek, this strange and gruesome company? It is a curious fact that all the glossaries which mention the sack and its contents omit the dog. This, however, may be an accident.<sup>4</sup>

If we disregard the Institutes for a moment and turn to the sources generally, we find that although Valerius Maximus makes the punishment ancient—as it doubtless was—Livy states that the first one to suffer it was a certain Malleolus, in 100 B.C.<sup>5</sup> And of Malleolus' punishment, the *Auctor ad Herennium* preserves some details (i, 13). Both he and Cicero in the speech for Roscius of

their species and individual noxiousness as well. Vipers arose from the backbones of evil men. Pliny, *N.H.* x, 188; *Aelian de Nat. An.* i, 51; Riess, P.W. *Real-En.*, s.v. *Aberglaube*, p. 77. However, even vipers were not of unmixed evil significance. Their flesh was conducive to longevity. Pliny, *N.H.* vii, 27; Dioscorides, *M.M.* ii, 18.

<sup>1</sup> Detailed citations are hardly necessary. Cf. Hehn, *Kulturpflanzen und Haustiere*. Also Orth. Huhn, P.W. *Real-En.* viii, p. 2531, and the corresponding articles in the Daremberg-Saglio, *Dict. des Ant.* See also Keller, *Die Antike Tierwelt*, pp. 91-151. The cock was most frequently depicted in the *lararii*. De Marchi, *Culto Privato di Roma Antica*, i, 103, n. 2.

<sup>2</sup> M. S. Reinach in his *Cultes, Mythes et Religions*, ii, p. 202, refers to the statue of Anteros in the Academy at Athens, which represents a youth with two cocks in his arms about to leap from a cliff. He ascribes to this group a symbolism connected with the lower world. The erotic explanation

given by Pausanias i, 30, and Suidas, s.v. *Meletus*, while as dubious as such explanations always are, is, in this case, perhaps preferable. The fact that the cock was sacrificed to Nox (Ovid, *Fasti* i, 405, may be accounted for without assuming a special chthonic significance.

<sup>3</sup> See the references in note 4. Cf. especially Pliny, *N.H.*, viii, 61, 40: *ex his quoque animalibus quae nobiscum degunt . . . fidelissimum ante omnia homini canis*. To the same effect, the Stoic interlocutor in Cicero's *De Nat. Deorum*, 63, 158. Against all this no weight can be attached to the swarm of Hecate, who is, after all, by popular belief and undoubted etymology, the sister of the Fardarter, or to the story of the crucifixion of dogs for failing to guard the Capitol. Nor is it of moment that dogs or goats might not be touched by the Luperci. Fowler, *Roman Festivals*, p. 313.

<sup>4</sup> The omission of the dog may be due to the fact that Isidore omits him, and that these glossaries largely depend on Isidore.

<sup>5</sup> Livy, *Epitome* 68.

Ameria (80 B.C.) speak of the *culleus* but say nothing of any animals used in that connexion. The elder Seneca, writing in the earlier decades of the first century, speaks of serpents, but of no other beasts—as also does Pseudo-Quintilian much later.<sup>1</sup> The younger and more famous Seneca mentions the *culleus* alone, in an essay addressed to Nero.<sup>2</sup> Juvenal, in his eighth *Satire*, which may have been written about A.D. 118, mentions the snake and the monkey.<sup>3</sup> Hadrian, we are told, allowed the punishment of being thrown to wild beasts—doubtless in the arena—to be substituted for the sack, if the sea were too far distant.<sup>4</sup> When the jurist Paul wrote his Sentences (after A.D. 206) the sack-penalty was remembered but obsolete, and the stake or the arena had taken its place.<sup>5</sup> Finally Constantine specifically re-enacted it in A.D. 318, with the details mentioned in the Institutes (*Cod. Just.* 9, 17, 1).<sup>6</sup>

Malleolus was executed in 100 B.C. without any reference to a specific law. The *Lex Pompeia*, which certainly mentioned the sack, cannot have been enacted much before or much after the date 81 B.C. Claudius re-enacted the penalty, and apparently enforced it with great severity, and, as we have seen, Hadrian permitted a modification of it. Within the next two hundred years it lapsed, until Constantine re-established it with direct reference to the burning and other forms of execution that had come into vogue previously. It was received into the Corpus as confirmed law by Justinian in A.D. 534, but by the time of the Basilica (about A.D. 900) it had again given place to death by fire.<sup>7</sup>

It is stated by Suetonius (*Aug.* 33) that the punishment could be inflicted only if the accused confessed, and he mentions the device used by Augustus which would provoke a plea of not guilty and therefore render the infliction of the punishment impossible. Apparently there is no other case in which the Roman law made confession a requisite for the infliction of a penalty. Yet Cicero's words (*Or. Part.* 33, 116) *non esse exspectandum dum fateatur: argumentis convinci posse*, at least allow the inference that it had been anciently otherwise. It would therefore be additional evidence of the antiquity of the sack-penalty. Whether the law of medieval

<sup>1</sup> Seneca Pater, *Contr.* 5, 4; 7, 1, 23. Ps.-Quint. *Decl.* 17, 19.

<sup>2</sup> *De Clementia*, i, 23, 1.

<sup>3</sup> *Sat.* viii, 214, with Mayor's note, and *Sat.* 13, 154.

<sup>4</sup> *Dig.* 48, 9, 9, pr.

<sup>5</sup> Paul, *Sent.* v, 24, 1.

<sup>6</sup> There is a difficult question of text at this point which must be briefly considered. The *Codex Theodosianus* (9, 15, 1) and the *Codex Justin.* (9, 17, 1) both cite this constitution of Constantine. In all the extant MSS. of the *Cod. Theod.* the mention of the animals is omitted. They are also omitted in the MSS. of the *Cod. Just.* which Mommsen designates as L and C, but they reappear

in the one called R (a MS. of the twelfth century). Mommsen believes that R interpolated them from the *Institutes*. However, it is a fact that the textual transmission of the Theodosian Code is wretchedly bad in quality and quantity of MSS. Without attempting to evaluate the evidence of L, C and R, it is clear that the Institutes directly quote this constitution. If the constitution did not contain the words, *cum cane et gallo gallinaceo et vipera et simia*, the word *ferales* that follows in all the MSS. of the Codes seems quite devoid of meaning. It is at least as likely that the words dropped out of L and C as that they were inserted by R.

<sup>7</sup> Basilica, 60, 40.



France that the death penalty could not be inflicted unless the criminal confessed (Livre des droiz et des commandemens, ii, 322, 323) was ancient Germanic custom, or a later rationalisation to justify torture, we cannot tell. The statement in the Life of Antoninus Pius by Capitolinus (8, 10) that even upon confession for parricide Antoninus would not execute a senator, but merely deport him, is to be taken with the same caution as all of the statements from this source, although it is not inherently improbable.

If we place the enactments side by side with the literary references, one fact is noteworthy. The earliest historically established case of the infliction of the penalty is that of Malleolus. We hear of many details, but not of any animals. Cicero likewise refers to the punishment, and attests its ancient character, but he says nothing of any animals. Now, about the time that Cicero's speech for Roscius was delivered, a law was passed concerning parricide—the *Lex Pompeia*. The date usually assigned to the law is slightly before that of the speech, but there is no evidence that it really was so, and the law may well have been passed after the Rosciana. At any rate, at a date surely subsequent to that of the *Lex Pompeia*, and before any other known enactment—i.e. in the writings of the elder Seneca—serpents are mentioned as one part of the contents of the *culleus*. Then we have the legislation of Claudius, whether by edict, senatus consultum, or formal *lex* (A.D. 41-54). After that, in Juvenal, we hear of both snake and monkey. Hadrian dealt with the matter, with the alteration already mentioned. Finally we have the constitution of Constantine, and then for the first time, in the Code, the Digest and the Institutes, we hear of all four animals.

It seems to fit this sequence if we assume that the sack and its ritual were ancient, that the *Lex Pompeia* introduced the viper, Claudius the ape, and Constantine the dog and the cock.

As against this we have the statement of the Institutes referring all four animals to the *Lex Pompeia*. However, this passage, as is perfectly apparent and has long been noted, is a verbal citation of the constitution of Constantine and stands out in its context like the purple patch that it is. Tribonian and his associates know the *Lex Pompeia* only as a general statute on parricide, into which every amendment, such as Constantine's constitution, would necessarily be incorporated.

Just as Tribonian was stating the law of his time when he spoke of the *Lex Pompeia*, so the passage from Modestinus (*Dig.* 48, 9, 9, pr.) is evidence only of what the law was in the time of Justinian. It is likely, as we know from Paul, that in the time of Modestinus, who was Paul's younger contemporary, the sack-penalty was obsolete.<sup>1</sup>

<sup>1</sup> Tertullian (about A.D. 200) says that Jupiter should have been torn asunder and put in two sacks (*De An.* 33, *Ad. Nat.* ii, 13). In doing that

he doubtless had in mind the use of the *culleus* as a punishment both for parricide and for adultery.

And it is assumed from the foregoing that up to the time of Modestinus the only animals used in it had been the viper and the ape. Now, if Modestinus had mentioned merely these two, the compilers who sought to state existing law could scarcely have failed to add the others. This, to be sure, involves an interpolation. But the only certain interpolations in the *Digest* are just of this kind—instances in which definite subsequent changes are put bodily into the fragments excerpted.

Marcian, as has been stated, is in direct and irreconcilable contradiction with the statement of the Institutes. We can only assume that he is in error. That the error was not corrected by the compilers may be due to the following fact. The fragment is at the head of the title, and its principal purpose is to enumerate the degrees of relationship comprised in the definition of parricide. The mention of the punishment is incidental, and the conflict between it and the Institutes may well have been overlooked or treated as negligible.

If the different beasts were introduced into the punishment for parricide, in the order mentioned, we have still to imagine some reason for their introduction. The only one among them that may be taken for granted is the viper. The others make larger demands upon our imagination.

What, for example, induced Claudius to add the monkey, if he did so? The monkey had no associations of uncanniness or horror or evil omen to the ancient Roman.<sup>1</sup> To be sure, it was unlucky to dream of one, but dream-books are unsafe guides for popular feelings.<sup>2</sup> Juvenal is sorry for the poor ape—which does not point to any general impression of appropriateness in the selection. But, even if not a creature of horror, the ape was the exemplar of hideousness and was regarded quite commonly as a sort of human caricature.<sup>3</sup> That fact might have induced a fantastic pedant to use him as a symbol of unnatural or inhuman crime—and a fantastic pedant Claudius Caesar doubtless was.

But it is next to impossible to suppose any reason at all for the inclusion of the dog and the cock in this group by an ancient and pagan Roman. Is it easier to find a reason, if the Roman was ancient, but not pagan—when he was Constantine?

It is a commonplace of recent historical research that the later Christian propaganda found its keenest rivals in the oriental cults that were sweeping through the empire. Renan overstated the

<sup>1</sup> Monkeys were always exotic pets. Cf. Oder, s.v. *Affe*, P.W. *Real-En.* i, p. 706. The story of the ape of the king of the Molossians refers to the evil omen of the overturning utensils used for sacrifice, not to the ill-omened character of the ape itself. Cic. *De Div.* i, 34, 76.

<sup>2</sup> Artemidorus, *Oneirocr.* ii, 12. Cf. also Lewy-

sohn, *Zool. des Talmuds*, 68, and De Gubernatis, *Zoological Mythology*, ii, p. 107. Riess, in P.W. *Real-En.*, s.v. *Aberglaube*.

<sup>3</sup> Not only the inevitable Ennian verse may be cited, but such passages as Pliny, *N.H.* xi, 100, 44, and Sch. *Juv.* 4, 89, where it is stated that the ape was the last animal created before man.

fact when he made his much-quoted comment on the closeness of the race between Mithraism and Christianity, but it is true that the Church militant had to turn its chief weapons in that direction.

We know that Mithraism had ceremonies sufficiently like those of Christianity to make them seem a diabolic parody of the Eucharist.<sup>1</sup> And in these ceremonies, as depicted in countless reliefs throughout the empire, not only does the bull play a prominent part, but the dog plays an almost equally important one.<sup>2</sup> Indeed it is the dog who is the faithful companion of Mithra; it is he who saves the soul of the dying bull and conducts it to heaven.<sup>3</sup> If Christians were aroused by this seeming perversion of their holiest ceremony, it would be natural for them to hold all these symbols in horror.

Perhaps we may add to this the fact that many Eastern Christians, despite their Greek names, were of Syrian or other Semitic origin, and at all events had been trained in a Semitic literature which regarded the dog as the symbol of uncleanness.

In some Mithraic monuments, in an unobtrusive corner, is a veritable *gallus gallinaceus*. What is he doing there? M. Cumont supposes—and he is very likely right—that these particular reliefs represent a syncretism of Mithra and Cybele elements.<sup>4</sup> At all events, the cock occurs frequently on the Cybele monuments. He is perched on the pine-tree where Attis hides, and reveals to the goddess the presence of her lover.<sup>5</sup>

Besides Cybele and Mithra, Isis is at times represented by the cock, and is particularly associated with dogs.<sup>6</sup> That is to say, the dog and the cock are found in close connexion with what seemed to the Christians demonic orgia—and especially those orgia with which they were thrown into most hostile contact. For pagan

<sup>1</sup> Justin Martyr, *Apol.* i, 66, 19.

<sup>2</sup> Cumont, *Textes et Mon. rel. au Mitbr.* i, p. 189, n. 7; p. 191 seq.

<sup>3</sup> Cumont, *loc. cit.*; H. Leitzmann in Wendland, *Hellenistisch-röm. Kultur*, p. 431.

<sup>4</sup> Cumont, *op. cit.* p. 212.

<sup>5</sup> Cumont, *Rel. orient. dans le pag. rom.* p. 69 seq.; Zoega, *Bassiriliavi*, tav. 13, 14; Lietzmann, *op. cit.* p. 425.

<sup>6</sup> Diod. Siculus i, 87, 3. Dogs preceded the Isaiac processions. τῶν καταδειξάντων τούτο τὸ νόμιμον σημαίνοντων τὴν παλαιὰν τοῦ ζώου χάριν Cf. Drexler, in Roscher, *Lexik. d. Myth.* ii, 272. [There are examples of the purificatory sacrifice of the dog: it figures remarkably in a *lustratio* of the Macedonian army, mentioned by Livy, xl, 6: 'caput mediae canis praecisae et pars ad dextram, cum extis posterior ad lacerem viae ponitur: inter hanc divisam hostium copiae armatae traducuntur.' The ceremony is mentioned also by Q. Curtius x, 9, 12. The emperor Julian in *Orai.* v (176 D): καὶ θύομέν γε, ἔφη, ὦ μακάριε, ἐν πονυρῶν τελεστικαῖς θυσίαις, ὡς ἵππων Ῥωμαῖοι, ὡς πολλοὶ καὶ ἄλλα θηρία καὶ ζῶα, κύνας ἴσως Ἕλληνες Ἐκάτη καὶ Ῥωμαῖοι δέ. (This is a curious reference to the

October horse and probably to the sacrifice of the dog by the Luperci.) The ἴσως is odd. Plut. *Qu. Rom.* iii says the dog was offered to none of the Olympians, owing to its impurity, but to Hecate in the trivia; among the Lacedaemonians 'τῷ φονιμωτάτῳ τῶν θεῶν Ἐναυαλέῳ ἐντέμνονσιν,' while in Boeotia it is a καθαροῦς κύνος διχοστομηθέντος τῶν μερῶν διεξελεθῆναι (as in the Macedonian military *lustratio*). Then comes a reference to the Lupercalia and to the fact that the flamen of Jupiter must hold aloof from the dogs. The *canarium* at the Robigalia involved the sacrifice of a red dog. On the other hand the dog is viewed as in a manner sacred in connexion with the Lares Praestites. Plut. *Qu. Rom.* 51: ἐπίσκοπος βίων καὶ οἴκων διὸ καὶ κυνῶν δέρμασιν ἀπέχονται, καὶ κύνας πάρεδρός ἐστω, because they are sharp at tracking out and running down τῶν πονηρῶν. Plut. *Qu. Rom.* 68 says that almost all Greeks used to sacrifice dogs, and do so still by way of καθαροί; and goes on to speak of the Lupercalia and Hecate. Pausan. iii, 14, 9, mentions sacrifice of dogs at Therapne, and says that the only other Greeks who practise it are the Κολοφώνιοι. Other references are given in Gruppe, *op. cit.*, p. 804, n. b. J.S.R.]

Rome, these two animals had only intimate and sacred associations. For Christians of the epoch of Constantine they may well have been symbols of evil.

If the hypothesis upon which we have been proceeding is correct, Constantine in A.D. 318 re-enacted an ancient penalty that had grown obsolete. And in doing so, he sought to make it, or allowed it to be made, a profession of his new faith, expressed with the intensity of a convert. By the time of Justinian, when Mithra, Cybele and Isis were as dead as Pan, all feeling of this significance would be lost, and the puerile suggestions of Pseudo-Theophilus and the glossaries are the result. This would explain the complete silence of all ancient sources, up to the time of the Byzantine jurists, about the dog and the cock—a silence hard to account for when there were so many occasions to refer to the animals, and doubly hard since their presence was so violently in contradiction with ordinary belief and with the habits of daily life.

There is a wholly different explanation of the presence of these animals which may commend itself. All of them except the monkey are definitely associated with the religious practices, both expiatory and apotropaic.<sup>1</sup> That is certainly true of the dog and the cock—that is, of the very animals whose use in this connexion cannot reasonably be ascribed to any horror of them or to any evil association. The viper, too, is sometimes apotropaic, and its living or its dead body could be used for an amulet in Rome.<sup>2</sup>

An apotropaic purpose is, of course, not the same thing as a mere chthonic association. The viper as such was not a chthonic symbol, and while the dog and the cock might possibly be, there seems no special point in loading the sack of the parricide with symbols that suggest death. After all, mortuary indications seem scarcely needed in the whole ceremony. But a real apotropaic function, if it could avail the community, would give an adequate reason for their inclusion. However, we must note that the apotropaic powers of a viper are highly specialised. The viper as an amulet will ward off snake bites. Further, such devices are meant to assist those with whom they are associated or physically connected. In this case they can only have been the parricide, and that surely cannot have been intended.

If a ritual function rather than a purely symbolic one is to be sought, we must have one of a different sort, and such a function is not hard to imagine. These animals may be a means of carrying off the pollution of the crime. It is a familiar belief that animals can do so, that they may be or may become the physical incarnations of sin. Thus by expelling the animal the sin is removed.<sup>3</sup> The best-

<sup>1</sup> Cf. Strong, *Apotheosis and After Life*, ii, n. 27, p. 257.

<sup>2</sup> Lobeck, *Aglaophamus*, 582; Pliny, *N.H.* xxx, 128.

<sup>3</sup> N. W. Adams, s.v. *Animals*, Hastings' *En. R. E.*, p. 498.

known example of this is the scapegoat of the Pentateuch, which describes a practice still widely observed throughout the world by Jews, except that a cock is substituted for the generally unavailable goat. Throughout the world dogs are used for this purpose, and the dog is hunted in Europe, just as the wren is, in a ceremony which lends itself readily to a similar explanation.<sup>1</sup> Coming closer to Rome we find that human pains can be transferred to dogs in a very simple fashion.<sup>2</sup> Not only that, but the idea of a scapegoat is known, and the scapegoat origin has been suggested for the *Populifugium* of the Roman calendar and for the rites of the Salii.<sup>3</sup>

The *poena cullei* would then be a means of removing a victim with a hideous taint, one bearing a miasma. This abhorred thing, this *prodigium*, by way of abundant caution, is to have its evil forces still further neutralised by having them first transferred to certain living animals capable of becoming vehicles of such forces, and then by having these animals promptly killed.

<sup>1</sup> *Ibid.* p. 527; *Folk Lore*, xi, 250.

<sup>2</sup> Riess, s.v. *Aberglaube*, P.W. *Real-En.* i 73; Pliny, *N.H.* xxx, 42, 43, 64.

<sup>3</sup> Fowler, *Roman Festivals*, p. 174; Frazer, *Golden Bough*, 2, 210.