

# HIRUNDO

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VOLUME THREE



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*Hirundo* is the Latin word for martlet, a mythical bird without legs, always shown in flight, unceasing in its quest for knowledge. The McGill coat-of-arms has three martlets.

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## Prefatory Note

As is obvious from the subject matter of many of the essays in this journal, classical studies at McGill are not limited to one faculty. Accordingly, *Hirundo* has been able to receive papers on an astounding variety of subjects, including philosophy, literature, religion, art history, law, science and history. It has thus been both a pleasure and a learning experience to oversee the creation of this year's edition.

I would like to thank all of those who aided us in preparing this journal including Georgii Mikula, Jodi Anderson and Joanne McAlpine. Professors Michael Fronda and Wade Richardson provided invaluable advice and help. I would also like to thank Jonathan Naymark, President of the History Students Association, and Ada-Maria Kuskowski, Editor-in-Chief of *Hirundo* in 2002, for their never-ending support and encouragement.

Funding for this edition of *Hirundo* was generously provided by the Department of History and Classics Program, the Arts Undergraduate Society, the McGill Alumni Association, the History Students Association, the Dean of Science and the Department of Philosophy.

I am deeply grateful to the editorial board for their tireless efforts, as well as to all of our contributors. Despite the journal's hiatus in 2003, *Hirundo* remains a testament to the energy and vitality of classical studies at McGill.

Lauren Kaplow  
EDITOR-IN-CHIEF  
HIRUNDO 2004

# RUNNING UPSTREAM: THE FUNCTION OF THE CHORUS IN EURIPIDES' *MEDEA*

Philippa Geddie

Euripides' *Medea* takes place in a chaotic world where vows are broken, trust is impossible, and every human value is brought into question. This state of affairs begins when Jason, in violation of Greek ethics, abandons his wife Medea, and culminates in Medea's murder of a fond father, a newlywed girl, and two small boys. Medea draws on deceit and artistry to conceal her plans from the actors in the drama; however, a group of fifteen Corinthian women, the play's chorus, are aware of Medea's murderous intentions. Although they seem shocked by Medea's plan to kill her children, they do nothing when given obvious opportunities to prevent the deaths. Initially, this seems unrealistic and therefore a dramatic flaw, but in actuality, the chorus' failure to act serves a vital role in the play. Euripides intentionally implicates the chorus as Medea's accomplices to further his depiction of a world turned upside down.

The chorus' attitude towards Medea and her plans vary throughout the course of the play. In the *parados*, the chorus tells us that they have heard Medea's cries (130).<sup>1</sup> During the dialogue with the nurse, they express sympathy for Medea (147-59) and friendly feelings for her family (136-8), stating explicitly that their purpose in coming is to calm Medea:

How might she come into our sight  
and hear the sound of spoken words,  
so that, perhaps, she'll let go  
of her sullen rage, her mind's arrogance? (173-7)

<sup>1</sup> Euripides, *Medea*, ed. Donald J. Mastronarde, (Cambridge: Cambridge University Press, 2002). All translations of *Medea* are my own..

Medea's first words to them, the respectful address "women of Corinth", emphasizes that the chorus is composed of reputable residents of the city (214). Yet, after a brilliant and persuasive speech by Medea, they eagerly approve her plans to take revenge on her husband (267-70). In the first *stasimon*, they rejoice at the new age that Medea's acts seem to herald:

Holy rivers are running upstream;  
Justice, everything, is twisted backwards.  
Men's designs are deceptive; their vows  
Though made by the gods, come loose.  
But fame will turn my life around to have respect:  
Dignity is coming to the race of women. (410-17)

The chorus begins the next *stasimon* mildly with criticism of excessive love and a prayer that they never have to leave their homeland, but end it with strong sympathy for Medea's plight and a condemnation of Jason: "May every thankless man be destroyed who doesn't have it in him to honour his family" (658-60). The chorus' firm support of Medea falters when she announces her plan to kill her children: they express horror, urge her to reconsider and, in the third *stasimon*, dwell on the impiety and cruelty of such a deed (824-65). However, they remain virtually silent during a subsequent scene in which Jason professes love for the boys, only stating: "I have begun to weep at these words" (906).

In the fourth *stasimon*, the chorus shows that they are fully aware of what will happen: "Now, I no longer have hopes that the children will live" (976-7). Despite their certainty that the children will die, the chorus still makes no comment when the paidagogos, the children's guardian, enters. During Medea's "Great Monologue" (1021-80), although Medea seems to be wavering, and even though she addresses the chorus directly - "My boldness is gone, women, because I looked at my children's joyous eyes" (1042-3) - they say nothing. The *stasimon* that immediately follows consists of a meditation that it is really better not to have children at all (1081-1115). The chorus stays quiet when the messenger arrives to announce the deaths of Creon and his daughter Glauke, and then comments that Jason has been justly punished (1231-2). The next *stasimon* takes place after Medea announces her intention to kill her children immediately and enters the house. The chorus pleads for divine intercession and criticizes Medea, but does nothing (1251-70). In the middle of this *stasimon*, the cries of the boys are heard off stage as Medea kills them. The chorus debates going in but does not (1275-6). Instead, they mourn the deaths and

veer into a brief mythological tangent about Ino.<sup>2</sup> When Jason appears, they inform him of what Medea has done. If, as seems probable, the formulaic anapests in line 1415-1419 are later additions, the chorus' last statement of the play is "When you've opened the gates, you'll see your children dead" (1313).

The behaviour of the chorus in *Medea* appears surprising to the audience because, given the opportunity to prevent the children's murder by alerting Jason or the *paidagogos*, the women stay quiet. It is generally assumed that Euripides provides a rationale for this early in the play: Medea asks the chorus not to reveal her plots against Jason (259-63). Their "vow of silence", in the view of Phoutrides, is all that keeps the chorus from speaking out.<sup>3</sup> This explanation, however, can be refuted by a comparison with a similar situation in Euripides' *Hippolytus*, written three years later.<sup>4</sup> In *Hippolytus*, the chorus of Troezenian women are aware that the title character is innocent of the charge of incest laid on him by his stepmother Phaedra; revealing this could prevent his death. Euripides explains the chorus' inaction by placing them under a vow of silence, apparently the same tactic he used in *Medea*. The circumstances of this vow, however, differ drastically in the two plays.

In the *Hippolytus*, the chorus hears of Phaedra's love for her stepson and her overwhelming guilt and shame. Overcome with embarrassment, Phaedra asks the chorus: "Grant me this...that what you have heard here you wrap in silence."<sup>5</sup> The chorus responds "I swear by holy Artemis, child of Zeus, never to bring your troubles to the daylight."<sup>6</sup> The chorus, then, makes this promise before Phaedra has contemplated any kind of crime. Once it is aware of the tragic consequences of its silence, it is powerless as the women have made an explicit vow to a goddess. Furthermore, in this play, an altar to Artemis is part of the set, intensifying the strength of the oath.

None of these circumstances apply to the corresponding oath in *Medea*. Medea asks:

"And so, I want to meet with just this much help from you:  
that if I should find out some way

<sup>2</sup> The wife of Athamas, who, the Chorus claims, is the only other woman to have killed her children; traditions differ concerning the exact circumstances in which she did this. Actually, other instances of mothers murdering children could be cited; for example, Procne and Althaea.

<sup>3</sup> Aristides Evangelus Phoutrides, "The Chorus of Euripides," *Harvard Studies in Classical Philology* 27 (1916): 132.

<sup>4</sup> 428 B.C.E.

<sup>5</sup> Euripides, *Hippolytus*, trans. David Grene (Chicago: University of Chicago Press, 1942), 192.

<sup>6</sup> Ibid.

to exact vengeance from my husband for his crimes,  
you be silent." (260-3)

The chorus responds: "I'll do that. For you would rightly take vengeance on your husband, Medea" (267-8).

The contrast is glaring. Instead of a sacred oath made to a specific deity, the chorus makes a casual promise. The phrase actually used for agreement, δ'ας? tade, "I will do these things", is significant. It occurs frequently in the play; at line 184, the nurse uses it to promise that she will try to make Medea leave the house, though she doubts she will succeed, and at line 1019 Medea uses it to promise the *paidagogos* that she will cheer up, although she is clearly being insincere. The phrase, then, is neither strong nor binding, let alone being the religious oath laid on the chorus in *Hippolytus*.

In addition, the chorus of *Hippolytus* only realizes the consequences of its oath when it is too late; they did not consciously agree to conceal a crime. The chorus of *Medea*, by contrast, agrees to keep quiet about Medea's plans to exact vengeance from Jason (261). Medea does not leave any room for doubt: "When [a woman] finds that she's been wronged in marriage, there is no other mind more bloody" (265-6). The word μιαι—φονώτερα, "more bloody", is formed from , μιαινω "to stain," and φόνος, "murder"; therefore, it has intense connotations of defilement and crime that listeners cannot have overlooked. The chorus in *Medea* is well aware of what Medea is planning. Their assertion "You would rightly take vengeance on your husband" is not merely condemnation of Jason's crime, but knowing approval of his murder (267-8). Medea's subsequent revelations that she also intends to kill Creon and Glauke pass without comment by the chorus and only the prospect of the children's execution makes their support of Medea waver.

Because the chorus was clearly aware of Medea's violent intentions, the attempt to represent them as innocent bystanders who have blundered into a binding oath is unsatisfactory. Nor can it be convincingly argued that it is mere clumsiness on Euripides' part that causes the chorus in *Medea* to make a perfunctory promise, while the chorus of *Hippolytus* makes a firm vow. The theme of promises is recurrent in *Medea*, usually with reference to the dire fate awaiting the man who breaks them; the proper form for a promise, however, also comes under discussion. After Aegeus offers Medea a safe refuge, she asks him to swear it formally, concerned that he might betray her "after agreeing just with words, not under oath in the gods' name" (737). There follows an elaborate procedure in which Aegeus is asked to make his vow "by the plain of Earth, and the Sun, my father's



father, and the entire stock of gods put together" (746-7). Medea, and therefore Euripides, is making a distinction between a holy oath, which is binding, and an agreement with words, which is *not*. Since the chorus has made its promise "just with words", they have the option of revealing Medea's plans.

Clearly, for the purposes of the plot, Euripides could not have allowed the chorus to prevent the children's murder. As testified by *Hippolytus*, however, he could have provided them with a sounder pretext for not doing so. By giving them only a flimsy excuse for staying silent, and by demonstrating that they are aware of Medea's violent intentions, Euripides intentionally implicates the chorus in the crime; they are no longer onlookers, but accomplices.

Was this abnormal? Aristotle, in his *Poetics*, has little to say on the subject of the chorus. Once "the most important element in Greek drama," used at great length and to great effect by Aeschylus, by Euripides' time it had decreased in significance.<sup>7</sup> On how the chorus should be employed, Aristotle has only one instruction: "It should be considered as one of the actors, [as] an [integral] part of the whole [action]...not in Euripides' way, but in Sophocles'."<sup>8</sup> Generally it is assumed that in saying "not in Euripides' way", Aristotle was making one of the criticisms often made of Euripides: that his choral odes were irrelevant to the action. Phoutrides, however, in his "Chorus of Euripides", argues against this assessment and suggests that Aristotle is finding fault with another characteristic of Euripidean choruses: "They come much nearer to being real men and women than the choruses of either Aeschylus or Sophocles."<sup>9</sup> Rather than being idealizations, as in Aeschylus, or impartial observers, as in Sophocles, the typical chorus of Euripides is realistic. This assessment is supported by the satirical portrayal of Euripides in Aristophanes' *Frogs*, where Euripides declares of his own dramas: "Nothing was wasted. Mistress spoke, slave, master, girl, old women..."<sup>10</sup>

As this comment suggests, Euripides' choruses show a wide range of different characters. Of the nineteen extant plays of Euripides, five have male choruses and fourteen female.<sup>11</sup> There are instances, as in *Alcestis*, *Heracleidae*, and *Hercules*, of the chorus of male citizens favoured by Sophocles. This kind of chorus tends to operate as the "representative of the people": they are the voice of reason that provides a foil to the turmoil unfolding in the play.<sup>12</sup> In *Iphigeneia in Aulis*, *Andromache*, and *Phoenissae*, there are female choruses who are residents of the city in which the play is set, watching and com-

<sup>7</sup>William Nickerson Bates, *Euripides: A Student of Human Nature*, (New York: University of Pennsylvania Press, 1961), 33.

<sup>8</sup>Aristotle, *Poetics*, trans. George Whaley (Montreal: McGill-Queen's University Press, 1997), 123.

menting on the action. These choruses are usually considered Euripides' weakest: they are detached from what is going on and have only a small importance to the plot. Another kind of chorus, made up of women in Euripides, represents "friends or servants of the hero or heroine devoted to their interests," as in *Orestes*, *Ion*, *Electra*, and *Hippolytus*.<sup>13</sup> We also find many instances of choruses made up of female slaves, suppliants, and captives, as in *Trojan Women*, *Suppliants*, *Helen*, *Hecuba*, and *Iphigeneia in Tauris*. Finally, there is the chorus of bacchantes in *Bacchae*, a frenzied crowd of worshippers.

In the following plays of Euripides, the chorus can be considered implicated in a murder or murder plot: *Orestes*, *Ion*, *Electra*, *Hecuba*, *Bacchae*, and *Medea*.<sup>14</sup> This seems a high percentage in light of the chorus' classic role as observer and moderator; of the fourteen surviving plays of Sophocles and Aeschylus, only three (Sophocles' *Electra* and Aeschylus' *Choephoroi* and *Eumenides*) depict the chorus as being similarly implicated. The level of the chorus' involvement, however, differs from play to play. In *Orestes* and *Ion* the choruses are not actively involved in the scheme but, being loyal to the tragedies' protagonists and concerned for their interests, they do not voice objections when the protagonists plan crimes to protect themselves.<sup>15</sup> In both plays, the planned crime does not actually take place. Similarly, in *Electra*, the chorus' deep sympathy for their friend drives them to take her side when the killing of Clytaemnestra is planned. In *Hecuba*, the chorus approves of Hecuba's murder of the man who, in violation of the sacred obligations of hospitality, killed her young son; compassion and a sense of justice motivates them. In the *Bacchae*, as in Aeschylus' *Eumenides*, the chorus is no longer the realistic, flesh-and-blood entity described by Phoutrides, but an otherworldly, insane throng. Their implication stems from their madness.

Therefore, while the chorus' implication in crime was not usual in Greek drama, it was certainly not unknown, especially in the plays of Euripides. It is possible to see, even within the small surviving fraction of his work, a number of ways in which Euripides portrayed choruses as accomplices to murder. He could have cast *Medea's* chorus in any of these lights. They could have been, like the chorus of *Ion*, loyal servants who supported their mistress implicitly or like the chorus of *Hecuba*, they could have been outraged at

<sup>9</sup> Phoutrides, 130.

<sup>10</sup> Aristophanes, *Frogs*, trans. Patric Dickinson (Oxford: Oxford University Press, 1970), 217.

<sup>11</sup> This number includes the chorus of *Cyclops*, a satyr play, and *Rhesus*, whose authorship is in question. Neither is included in subsequent discussion.

<sup>12</sup> Phoutrides, 114.

<sup>13</sup> Bates, 34.

<sup>14</sup> *Hippolytus* is excluded from this list because of the strength of their vow of silence, as described above..

Medea's sufferings and eager to see justice done. They could have been, as in *Electra*, faithful friends, or, as in *Bacchae*, half-mad revelers. Indeed, *Medea's* chorus includes all of these elements: friends of Medea, slightly in awe of her, who are shocked by Jason's crimes and who, at times, seem almost crazed in their anticipation of vengeance. What makes this chorus different, however, is that they also fill a role which seems irreconcilable with the rest: they are very similar to the typical chorus of male citizens whose function is to operate as the voice of reason.

Upon its entrance, *Medea's* chorus seems to fit into the category seen in *Heracleidae*, *Hercules* and *Alcestis*, and the works of other tragedians, such as Sophocles' *Ajax*. While sympathetic, speaking of "the poor Colchidean woman" (132), they urge Medea towards self-restraint and moderation: "If your husband's devoting himself to a new marriage, don't be angry at him" (155-6). They cite divine law: "Zeus will be your defender in these matters" (157). They are there to offset the rash emotion of the tragic hero and provide a dramatic foil. Neither a helpless bevy of slave women, nor an adoring set of servants, they fit well into the description that Phoutrides gives of the chorus of *Alcestis*: "They are free-born citizens whose fortunes are involved in the fortunes of their rulers. They have the right to speak, to question, to suggest."<sup>16</sup> Presented with this first glimpse of the chorus, the audience could have reasonably expected them to continue in this role. They would then have been similar to the chorus of Aeschylus' *Agamemnon*, who remain in ignorance of Clytemnestra's plans until they hear Agamemnon's off-stage scream.

This expectation, however, is frustrated. The chorus, who enter as the voice of reason, was converted within the course of one monologue to Medea's φίλοι, "friends-and-supporters," deeply implicated in her plans for revenge. She apparently trusts them enough to not bind them with oaths, as she does Aegeus. But the chorus does not become implicitly loyal, like the choruses of *Ion* or *Orestes*. They continue to question and waver. They support Medea, yet fear for her children; they argue with her, but preserve her secret.

To a Greek audience, *Medea's* chorus must have seemed incongruous. Euripides does not form this chorus according to any one of a number of predictable dramatic conventions, but leaves it betwixt and between. It disappoints the initial expectation that it will fill the conventional function of a chorus: moderator, observer, and foil. Later, it does not simply support Medea unquestioningly, like a number of other female choruses, but continues to debate and critique. Within the world of the play, the Corinthian women who form the chorus would have seemed equally strange. By criticizing men and permitting

<sup>16</sup> Moreover, the planned victim in *Orestes* is Helen of Troy, a figure typically seen as despicable

the children's murder, they fail to act in accordance with their social roles as loving mothers, virtuous women, and grateful wives.<sup>17</sup>

But such dramatic role reversal and failure to operate within prescribed parameters is exactly the theme that pervades *Medea*. With the exception of Aegeus, who, as the representative of upright Athens, is the voice of justice and reason, every character in the play is the opposite of the role he or she is supposed to represent. Jason, the hero, is a coward striving for his own comfort: "[I wanted] to knit the families together so that I might prosper" (565-6). Creon, in defiance of Greek moral codes, refuses Medea's passionate supplication (325). The nurse, conventionally the most loyal of servants, expresses her fear of Medea (37). The *paidagogos*, responsible for the children's safety, is unable to protect them; the children unwittingly kill their stepmother.<sup>18</sup> Finally, Medea, in the most drastic role reversal possible, murders her own offspring. The theme of a world turned upside down continues throughout the plot. The sound laws of Greece, praised by Jason, fail to provide Medea with protection (537-8), sacred oaths are broken (414), and the marriage of Jason and Glauke becomes a funeral.

The culmination of the play is also warped. Euripides frequently used the *deus ex machina* device: at the end of a tragedy, an actor playing a god would be hoisted up on the *machina*, or crane, at the back of the stage. The function of this god was to restore order to chaos; he or she would explain the situation, prevent further murders, and provide a sense of completion and finality. In *Hippolytus*, Artemis reveals Hippolytus' innocence and allows him to be reconciled with his father before his death. In *Medea*, however, it is the murderess and not a god who is hoisted above the stage at the end. The tragedy is not contained and controlled by divine intervention; the play ends not with understanding or reconciliation but with an anguished monologue by Jason. The world of Medea has been turned upside down and, at the end of the play, it remains that way.

Seen in this light, Euripides' guilty chorus is another dramatic device that shows that the world is falling apart. The chorus' inexplicable silence, in defiance of moral codes and their own better judgment, is comparable to the other unthinkable events that occur in the play. In addition, it is relevant that the chorus is female; women are shown as "both wild

<sup>16</sup>Phoutrides, 86. Women, of course, were not Greek citizens, but the free-born Corinthians of *Medea* would be the closest female equivalent.

<sup>17</sup>The monologue in which Medea convinces the women of Corinth that she is justified in taking revenge dwells at length on the burdens of wifehood: childbearing, imprisonment at home, paying a dowry and dealing with a husband. From the chorus' enthusiastic response, it can be reasonably assumed that this spoke to their condition. Therefore, the chorus contained some very dissatisfied wives.

and tamed", irrational and instinctive, in contrast to the logical male.<sup>19</sup> It shows that while females are viewed as weaker and more cowardly - a thought expressed several times in *Medea* - their emotional, irrational nature can drive them to acts of reckless passion. Even the respectable housewives of Corinth can undergo a drastic inversion that turns them into criminals.

This theme is implied in other Greek tragedies where a female chorus is implicated in murder. In Euripides' *Bacchae*, a chorus of insane Maenads establishes the mood of the play, where order and reason are overcome by madness, and a king is to be torn to death by a group of women that includes his own mother. The *Electras* of Euripides and Sophocles, the *Choephoroi* and *Eumenides* of Aeschylus, all revolve around a single subject: whether Orestes is justified in killing his mother, who is guilty of killing their own father, who was guilty of killing his own daughter. The same kind of inversion and role reversal so visible in *Medea* is an obvious theme in these plays where child and parent, spouse and spouse, are opposed. Much like in *Medea*, "all things are hateful, and what should be dearest is diseased" (16); right and wrong are inverted and it is beyond human understanding to determine what should be done.

Likewise, the chorus of *Medea*, through their participation in the crime, act as an index of the world's corruption. Their implication in the crimes, though, is more serious than the preceding examples. Because they were aware to Medea's intentions, respectable residents of the city and trusted by the protagonist, they are fully capable of contesting the murders, a fact of which an Athenian audience must have been aware. Without the excuse of ignorance or weakness, they allow by their silence not only murder, but the murder of children. More than in the *Oresteia* or Sophocles' *Electra*, the world of *Medea* is one of unrestrained chaos where nothing, not family, hospitality or the entreaties of a suppliant, let alone dramatic conventions, is sacred. As the chorus ask bewilderedly after the death of the children: "Is there any terrible thing that can't happen now?" (1290).

The chorus of *Medea* is not a dramatic afterthought, but an integral and vivid part of the action. As Aristotle suggested, it is a character in its own right, and like every other character in the play, it vacillates between cruelty and kindness, mixing correct with criminal conduct. Its conscious guilt is an important dramatic device with which Euripides can show that the world of *Medea* is inverted, profane, and wrong. The play's chaotic universe is not resolved by the appearance of a god; similarly, nothing occurs to absolve the chorus

<sup>18</sup>By giving her poisoned gifts prepared by Medea.

<sup>19</sup>Helen King, "Women," *The Oxford Companion to Classical Civilization* (Oxford: Oxford UP, 1998), 778.

of their culpability. It is even possible that while the essential Aristotelian reaction of pity would have been evoked by the children's murder, the accompanying idea of "terror" would have been produced by the thought of what the women of the chorus would say to their husbands on returning home that night.

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# WHO'S YOUR DADDY?

## EXPLAINING THE RISE OF ROMAN CRIMINAL LAW

Michael Brazao

### **Introduction**

As a staunchly patriarchal society, it can be said with confidence that Ancient Rome firmly adhered to the adage that "father knows best." This was certainly true in the eyes of the law, where under countless scenarios, ranging from contracts to delicts, political office to family affairs, the *paterfamilias* enjoyed a preeminent position vis-à-vis those who were subject to his potestas. But what was the position of the *paterfamilias* with respect to the criminal law? Criminal law may be defined as the promotion of public order through the imposition of penalties by the state in response to antisocial or deviant behaviour.<sup>1</sup> As Roman society progressed from Monarchy to Republic to Empire, it witnessed a manifold increase in the application of criminal law measures to its populace. Interestingly, the ascendancy of this public institution coincided with the decline of another, more private mechanism for regulating human behaviour: the domestic jurisdiction exercised by the *paterfamilias*.<sup>2</sup>

The present analysis proposes that the antithetical relationship between Roman criminal law and paterfamilial potestas may be illuminated by the writings of the eminent political philosopher Thomas Hobbes in his seminal tome *Leviathan*. After examining certain fundamental Hobbesian precepts, the present author will attempt to demonstrate how they may explain the gradual increase in the paternalistic role of the Roman state, whereby it assumed many of the "fatherly" rights and responsibilities once possessed by the head of

<sup>1</sup> Gwynn Nettler, "Definition of Crime" in Delos H. Kelly, ed., *Criminal Behaviour: Text and Readings in Criminology*, 2d ed. (New York, 1990), 11.

<sup>2</sup> F. Robinson, *The Criminal Law of Ancient Rome* (Baltimore, 1995), 41-42.



the Roman household. This Hobbesian analysis will proceed in two parts: first, the growth of Roman criminal procedure will be considered in light of its turbulent historical context; second, the expansion of substantive Roman criminal law will be related to the gradual aggrandizement of the Roman state.

### **The Application of a Hobbesian paradigm to Roman society**

#### **Some fundamental Hobbesian precepts**

Hobbes famously theorized that human beings are essentially savage creatures. In their primordial condition, without "a common power, to keep them in awe,"<sup>3</sup> he proposed that their animal impulses drive them into a perpetual war "of every man against every man,"<sup>4</sup> where anarchy reigns supreme and life is "solitary, poor, nasty, brutish, and short."<sup>5</sup> However, he also credited humans with being rational creatures, who, for the sake of security and self-preservation may choose to form peaceful covenants with each other. In order to ensure such covenants are respected, it is essential for them to "confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will."<sup>6</sup> This fusion creates a sovereign power known as a "Leviathan" or "commonwealth," i.e. a "mortal god" who is mandated by the collective will of his constituents to "defend them from the invasion of foreigners, and the injuries of one another."<sup>7</sup>

Hobbes postulated that sovereign power can be created through two regimes: acquisition and institution. Under acquisition, the power is derived by force,<sup>8</sup> whereas with institution it is conferred by consent.<sup>9</sup> It is hereby proposed that acquisition is capable of explaining the origins and workings of paterfamilial *potestas*, while institution is explicative of the rise of criminal law administered by the state.

#### **Acquisition of paterfamilial potestas**

<sup>3</sup> Thomas Hobbes, *Leviathan*, ed. by Richard Tuck (Cambridge, 1996), 120. Because *Leviathan* was penned by Hobbes in the seventeenth century, I have taken the liberty of automatically modernizing the spelling, capitalization and/or punctuation of certain quotes, where necessary, in order to facilitate reading.

<sup>4</sup> *Ibid.*, 90.

<sup>5</sup> *Ibid.*, 89.

<sup>6</sup> *Ibid.*, 120.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, 138.

<sup>9</sup> *Ibid.*, 121.

Hobbes proposed that sovereignty could be forcefully acquired by generation or conquest. Sovereignty is generated "when a man maketh his children,"<sup>10</sup> because the helpless infant relinquishes its natural right to self-dominion in exchange for paternal protection. The ability of this process to explain the Roman agnatic system of social ordering is evident when Hobbes writes: "He that hath the dominion over the child, hath dominion also over the children of the child; and over their children's children. For he that hath dominion over the person of a man hath dominion over all that is his."<sup>11</sup>

Conversely, sovereignty is created by conquest when a man "subdueth his enemies to his will."<sup>12</sup> Here, the vanquished party pledges his liberty, property and body to the service of the victor, on condition that his life be spared. Not only has Hobbes astutely identified one of the most common bases for imposing slavery in Ancient Rome,<sup>13</sup> he also identifies the utility of slaves as wealth-gathering instruments<sup>14</sup> when he writes: "the master of the servant, is master also of all he hath; and may exact the use thereof; that is to say, of his goods, of his labour, of his servants, and of his children, as often as he shall think fit."<sup>15</sup>

Regardless of whether sovereign power is derived through generation or conquest, Hobbes stressed that the resulting unit of social organization is a family, "whether that family consist of a man and his children, or of a man and his servants, or of a man, and his children, and servants together."<sup>16</sup> This characterization accords with the loose definition of the Roman family, whereby children and slaves were subjected to a virtually indistinguishable form of *potestas*.<sup>17</sup>

#### The institution of state criminal power

In contrast to sovereign power that is forcefully acquired, Hobbes theorized that sovereign authority could also be created by institution. This occurs when a multitude of men

<sup>10</sup> Ibid.

<sup>11</sup> Hobbes, 141.

<sup>12</sup> Ibid., 121.

<sup>13</sup> As Andrew Borkowski, *Textbook on Roman Law*, 2d ed. (Oxford, 1997), 90, writes: "Capture in war became the main source of slaves in the late Republic, campaigns such as those of Julius Caesar in Gaul resulting in the enslavement of large numbers of foreigners."

<sup>14</sup> For an overview of the modes and means by which slaves were employed to enrich their masters in ancient Rome, see e.g. *ibid.*, 88-96.

<sup>15</sup> Hobbes, 142.

freely consent to endow a higher authority with the power and responsibility to ensure peace and security for all members of the resulting state.<sup>18</sup> The most obvious and direct - though not the only<sup>19</sup> - mechanism through which a state pursues this protective mandate is the criminal law,<sup>20</sup> though other ends are also served by criminal justice.<sup>21</sup>

While families and states differ in their origins and scope, Hobbes was adamant that the quality of the sovereignty exercised by these two types of commonwealth was "the very same."<sup>22</sup> In this sense, a family was akin to a "little monarchy,"<sup>23</sup> and functioned as such in the absence of any superseding authority. However, while both families and states are capable of ensuring peace and security, he noted that when the members of a family "are manifestly too weak to defend themselves,"<sup>24</sup> they may seek out others in a bid to create an even greater commonwealth that is "entrusted with power enough for their protection."<sup>25</sup> When this occurs, "the sovereign of each [state] hath dominion over all that reside therein,"<sup>26</sup> including the children and slaves of the men who convened the commonwealth, since "no man can obey two masters."<sup>27</sup>

Applying these Hobbesian precepts to Roman penal practices, we would expect the rise of state-sanctioned criminal law and the correlative decline of the *paterfamilias'* domestic jurisdiction to occur during times of such socio-political instability that the pater-

<sup>16</sup> Ibid.

<sup>17</sup> Borkowski, 113.

<sup>18</sup> Hobbes, 121.

<sup>19</sup> As Joel E. Pink and David C. Perrier, *From Crime to Punishment*, 5th ed. (Toronto, 2003), 1, remark: "Social control, of course, also resides in many other mechanisms, including customs, peer group pressure, and institutional patterns of behaviour."

<sup>20</sup> On the emergence of criminal law as a social control mechanism, Graham Parker, *An Introduction to Criminal Law*, 2d ed. (Toronto, 1983), 51, writes: "The criminal law became a distinct legal entity - with its own special rules and procedures - when society wanted protection from antisocial acts that threatened internal security but could not be resolved by money payments or the chaotic private 'justice' of the feud. A central authority... assumed the role of protector of the people and guardian of the status quo."

<sup>21</sup> As Pink, 51, writes: "[t]he criminal law [is] an expression of the State's disapproval of acts that [are] contrary to current values", which means that certain offences that do not directly or obviously act to preserve peace and security, such as "blasphemy, heresy, and adultery" may be encompassed under the rubric of criminal law.<sup>14</sup> First divine being is "the most excellent of the divinities" to Taylor. A singular article, "the" implies one superlative deity. However, even if Taylor is providing imprecise language and instead means a plural set of gods, the point still stands that bad demons tricked people into believing that the ultimate source(s) of good in the world is (are) the cause(s) of evil. By emphasizing that bad demons laid blame on the greatest source of good, the first divine being, the point is reinforced.

<sup>22</sup> Hobbes, 142.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid., 143.

<sup>26</sup> Ibid., 140.

familial system of social organization was no longer able to effectively achieve peace and security within Roman society. The following analysis hopes to provide evidence in support of this proposition, by examining aspects of both procedural and substantive Roman criminal law.

### **Examining the rise of Roman criminal procedure within its historical context**

#### **Daddy's Home: the criminal justice of early Rome (or lack thereof)**

Evidence of legal sources during the Monarchy "is inevitably scanty."<sup>28</sup> Thus it is not surprising that "[e]arly Roman criminal law is both obscure and hotly debated. We only begin to approach reasonable probabilities around 200 BC, the period from which contemporary evidence - Plautus, Cato, and others - survives."<sup>29</sup> However, this much can be said with confidence: during the Monarchy "there was no doubt that Roman law was almost entirely customary,"<sup>30</sup> and only occasionally "embellished by royal decree."<sup>31</sup> Moreover, because historical evidence suggests that "[m]any of the most important and long-lasting customs in the realm of civil law were concerned with the family - its creation, structure, and operation,"<sup>32</sup> it is not unreasonable to conclude that the social control function exercised by the state during this period was extremely peripheral and only invoked as a supplementary measure.<sup>33</sup>

The promulgation of the Twelve Tables in the early Republic did add a number of criminal prohibitions to the repertoire of Roman public law, some of which were enforced "by the *tresviri capitales* (minor magistrates with police functions)"<sup>34</sup> in conjunction with "the jurisdiction of the assemblies of the people, i.e. trials before one of the *comitia*."<sup>35</sup> This system, known as the *iudicium populi*, has been dubbed "the first phase"<sup>36</sup> of Roman criminal justice, and it operated as follows:

A magistrate, in most cases a tribune of the plebs, conducts a preliminary

<sup>27</sup> Ibid., 139

<sup>28</sup> Borkowski, 26.

<sup>29</sup> Robinson, 1.

<sup>30</sup> Borkowski, 26.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> For an example of such a supplementary measure, see the discussion on the law of parricide, below.

<sup>34</sup> Robinson, 1.

examination, at the end of which he brings the accused before the popular assembly. The magistrate proposes a penalty, which may be either capital or sub-capital, in his discretion; if it is a fine he stipulates the amount. After hearing speeches the people vote on the proposal. The salient fact is that there is no fixed penalty; it depends on the magistrate's discretion and the endorsement by the people.<sup>37</sup>

While this crude and somewhat haphazard practice demonstrates that under early Roman law "there were certainly some wrongs that attracted a purely criminal sanction imposed by the State,"<sup>38</sup> it was nevertheless an exception to the general rule of state non-interference in the realm of deviant behaviour, and a comprehensive account of this period reveals that "the criminal law was generally less developed than the civil law."<sup>39</sup>

The proposition that early Roman criminal justice was underdeveloped finds support from at least two juridical qualities of Roman dispute resolution during that era. First, "in early Roman law... there was no clear distinction between crimes and civil wrongs (delicts),"<sup>40</sup> with the law of delict having "a strong penal element."<sup>41</sup> Thus, while the ancient and bloody custom of *vendetta* had been sanitized by the establishment of Roman courts,<sup>42</sup> the process for securing retributive justice was still heavily reliant on notions of self-help, as the onus for pursuing delictual recourse fell upon private citizens.

Another telling juridical quality of that era is the existence of an extremely broad domestic jurisdiction for the *paterfamilias*. Indeed, "[t]he *patria potestas* is an outstanding institution in the family government of the primitive Romans,"<sup>43</sup> under which "[t]he power of the father represented authority of a semi-public nature."<sup>44</sup> Thus, because Rome was a highly stratified society where people under *potestas* (such as slaves and children) typically lacked the requisite legal personality to gain standing before the public courts,<sup>45</sup> in most cases the *paterfamilias* took legal responsibility for the actions of his subordinates;

<sup>35</sup> Ibid.

<sup>36</sup> Richard A. Bauman, *Crime and Punishment in Ancient Rome* (New York, 1996), 5.

<sup>37</sup> Bauman, 5.

<sup>38</sup> Borkowski, 325.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> See Bauman, 2, where the author writes: "In primitive society a wrong was a private matter to be avenged by direct retaliation by the victim or, if he had not survived, by his family. As the community became more cohesive it began to involve itself in the repression of wrongful acts, at first by restricting the private vendetta and later on by abolishing it and placing the machinery of repression and punishment under public control."

their behaviour, in turn, was to be adjudicated "primarily, if not exclusively" under his domestic jurisdiction.<sup>46</sup> This exceptionally broad - and occasionally brutal - regime vested the *paterfamilias* with the absolute, unsupervised ability to discipline his subjects, which included the right to flog, to imprison, or to kill.<sup>47</sup>

In sum, from the Monarchy through the early Republic, the correction of antisocial behaviour was entrusted to a patchwork of different forums that included the domestic jurisdiction of the *paterfamilias*, private delictual actions, and the occasional resort to public processes. From a Hobbesian perspective, it is important to note the socio-political context that formed the backdrop to the Roman state's laissez-faire approach to peace and security during this period. While certainly not without bloodshed, hostile foreign relations or internecine tumult,<sup>48</sup> the Monarchy and early Republican periods of Rome were nevertheless generally characterized by tranquillity. This is particularly the case with respect to the "century and a half after the end of the struggle of the orders [in 287 BC, when] the internal political situation of Rome was relatively stable."<sup>49</sup> Under such conditions, the agnatic system of social ordering would have adequately served its protective function, needing to be buttressed by direct state intervention in only the most exceptional situations.

#### Where's Daddy? The expansion of criminal procedure during the late Republic

In stark contrast to the relative tranquillity of the Monarchy and early Republic, the later years of the Republic "were plagued by crises, disorder, and civil war, often precipitated by the abuse of power by military strongmen"<sup>50</sup> such as Marius, Sulla, Pompey, Julius Caesar, and Octavian.<sup>51</sup> In fact, it has been suggested that "[t]he demise of republican government began in 133 BC, when [these] powerful individuals began to ignore established constitutional practice, destroying the checks and balances upon which republican government depended."<sup>52</sup> The resulting chaos ushered in "a period of constitutional breakdown from 133 BC-27 BC,"<sup>53</sup> during which tumultuous factional violence posed a tremendous threat to the peace and security of the Roman populace.

From a Hobbesian vantage point, it is of considerable interest that while this nearly

<sup>43</sup> Floyd Seyward Lear, *Treason in Roman and Germanic Law* (Austin, 1965), 4.

<sup>44</sup> Borkowski, 93.

<sup>45</sup> Borkowski, 93.

<sup>46</sup> Robinson, 15.

<sup>47</sup> Borkowski, 113.

<sup>48</sup> For a brief overview of some of the political and social difficulties that afflicted early Rome, see *ibid.*, 1-13.

<sup>49</sup> *Ibid.*, 10.

<sup>50</sup> *Ibid.*, 11.

perpetual state of civil unrest was unfolding, "[t]he mid-second century [BC] saw the start of a radical reorganization of the criminal courts. Permanent jury-courts (*quaestiones perpetuae*) were created for a broad range of crimes, and by the end of the first century BC the new *iudicia publica* had completely supplanted the *iudicia populi*."<sup>54</sup> Obviously, for the Roman state to undertake such a massive overhaul of its criminal justice system,

"[a] specific incentive was needed, and it surfaced in the second century. Rome emerged from the wars of expansion as the undisputed mistress of the Mediterranean world, but at a price. Post-war Italy was shaken by a climate of violent protest, by great rents in the social fabric. And thinking people began asking whether the institutions of a small city-state were up to the task of governing an empire. The search for a new approach was spearheaded by the criminal law."<sup>55</sup>

Indeed, because the chaos that reigned during this period would have seriously impugned the credibility of the *paterfamilias* as a guarantor of public peace and security, it should not at all be surprising that "[t]he Romans were willing to hand over a great deal of power to these [new] courts."<sup>56</sup>

The system of *quaestiones perpetuae* established under the *iudicia publica* was a multi-pronged approach to criminal justice, by which "each court depended on a special *lex* or *plebiscitum* for its validity and its forms."<sup>57</sup> This new system quickly grew to the point where it "became the norm, the *ordo*"<sup>58</sup> of Roman criminal procedure, one that "dominated the trials of the first century BC and continued into the Principate."<sup>59</sup> The critical importance of the *iudicia publica* in expanding the normative purview of the Roman state cannot be understated, as "[i]t is on this system that the juristic development of the criminal law was predicated, and without this system a criminal jurisprudence would not have been possible."<sup>60</sup>

The emergence of the *quaestiones perpetuae* also had tremendous implications for the

<sup>51</sup> Unfortunately, a detailed account of the conflicts of this era exceeds the scope of the present inquiry. For a summary of the troubles that plagued Roman society during the waning years of the Republic, see *ibid.*, 10-13.

<sup>52</sup> Michael Lambiris, *The Historical Context of Roman Law* (North Ryde, Australia, 1997), 2.

<sup>53</sup> *Ibid.*, emphasis removed from original.

<sup>54</sup> Bauman, 21.

<sup>55</sup> *Ibid.* As the author states, "[i]t would take another 150 years to put a suitable constitution in place, but the courts adapted more quickly."

<sup>56</sup> Andrew M. Riggsby, *Crime and Community in Ciceronian Rome* (Austin, 1999), 7.

apportionment of coercive social control under Roman law, as the state expressed its growing concern for the deviant conduct of all its inhabitants. This is reflected by the fact that for the first time "[a]nyone, free or slave... could be accused"<sup>61</sup> before the public courts, signifying a chink in the once impenetrable armour of paterfamilial *potestas*. Thus, "[e]ven before the advent of Caesar's dictatorship and the subsequent establishment of the imperial system, there was a growing centralisation of authority in the Roman state apparatus. Two aspects of this centralisation are an increase in force used by the state to enforce public order and a parallel suppression of the use of force by private individuals."<sup>62</sup>

However, although the *quaestiones perpetuae* signified an increased state presence with respect to the regulation of antisocial behaviour, it is important to note that the assumption of state control over the administration of criminal justice had not yet reached its apex during this period. This is because the state had yet to accept the onus for pursuing penal sanctions, meaning that in criminal trials "[t]he defendant... squared off against a private person (or persons) who served as prosecutor."<sup>63</sup> In fact, "[t]he state... only participated to the extent of allowing or rejecting the prosecution, then arranging to pick the 'best' prosecutor when several had made themselves available."<sup>64</sup> Once the accuser had been selected and had "signed the *inscriptio*... [he] thus bound himself to follow through his prosecution or risk the penalties for *tergiversatio* or *praevaricatio*."<sup>65</sup> As far as the manner of prosecution was concerned, "[o]nce the case had been accepted by the praetor and the prosecutor had been chosen, there was little official interference in the conduct of the case; the quaesitor kept time and counted the votes [of the jury]."<sup>66</sup> In other words, "[n]early anything within the time limits seems to have been allowed."<sup>67</sup>

As the confluence of political instability and increased state involvement in criminal procedure outlined above demonstrates, there is considerable support for the Hobbesian proposition that in a time of strife, as the late Republic undoubtedly was, human beings will feel a powerful impetus to relinquish a sizeable portion of their personal sovereignty to a higher power. This measure is taken in the interest of ensuring communal peace and

<sup>57</sup> Robinson, 2.

<sup>58</sup> Ibid.

<sup>59</sup> Bauman, 5.

<sup>60</sup> Robinson, 1

<sup>61</sup> Ibid., 5.

<sup>62</sup> Riggsby, xi. The dynamic between paterfamilial potestas and criminal law will be considered as part of the examination of substantive Roman law, below.

<sup>63</sup> Ibid., 15.



security, since the Roman *paterfamilias*, through his inadequate custodial presence, had manifestly failed in achieving these ends.

### The Big Daddy: The expansion of criminal procedure in the Principate

When the dust from the catastrophic demise of the Republic had finally settled and Octavian triumphantly emerged as "master of the Roman world,"<sup>68</sup> the trend toward consolidation of state power that had begun during the previous century of civil strife continued with increased vigour. Because "[h]e understood well the lessons to be learned from the mistakes of the past,"<sup>69</sup> Octavian was fully cognizant of the role that the "inherently flawed"<sup>70</sup> republican constitution, with its potentially paralysing division of powers,<sup>71</sup> had played in the social turmoil of the preceding century. Therefore, with tremendous stealth, guile and caution, he proceeded to amass a significant concentration of executive power.<sup>72</sup> Consequently, "[t]he constitutional settlement that emerged during the course of Octavian's long rule was a novel mix - a restoration of the traditional forms of Republican government, but under the aegis of a *princeps*, i.e., first citizen."<sup>73</sup> In this capacity, "he reserved for himself a permanent, overriding power in military and foreign policy, and a general supervisory role over the civilian administration... In addition, by retaining personal power, he eliminated the threat of another military adventurer seizing control of the state."<sup>74</sup> All in all, "[t]he sum of [his] power and prestige was tremendous,"<sup>75</sup> even deific.<sup>76</sup>

An important consequence of this centralisation of power was that it "brought a change in the criminal courts."<sup>77</sup> In fact, the founding of the Principate in 27 BC "created the conditions for as profound a change in criminal justice as in any other sphere of government and society."<sup>78</sup> This change took the form of the *cognitio extraordinaria*, a more malleable system of meting out criminal justice that allowed for "free discretion both in the definitions of crimes and in the scale of punishments."<sup>79</sup> This "new-found freedom"<sup>80</sup> was

<sup>64</sup> Ibid.

<sup>65</sup> Robinson, 5.

<sup>66</sup> Riggsby, 15.

<sup>67</sup> Ibid.

<sup>68</sup> Borkowski, 13.

<sup>69</sup> Ibid., 14.

<sup>70</sup> Ibid., 9.

<sup>71</sup> As *ibid.*, 9-10, writes: "In particular, the concept of joint magistracy, coupled with the magisterial right of veto, was potentially fraught with problems. So too was the vesting of military, executive and even judicial powers in magistrates who could easily transpire to be rivals. Fortunately for Rome, the control exercised by the Senate, and the good sense of most of her office-holders, prevented serious problems for much of the time."

<sup>72</sup> See *ibid.*, 14, where Octavian's approach is described as follows: "he moved tentatively in seeking to establish his power, eschewing the type of precipitate action that had brought down Caesar. Gradually he acquired dictatorial powers but wisely avoided calling himself rex or dictator, titles which had hateful associations. He used his powers astutely, always careful to act constitutionally, or at least to give that impression."

explicitly "designed to 'liberate' criminal trials from the shackles of the *ordo iudiciorum publicorum*, that is, from the limitations of the jury-courts."<sup>81</sup> Given this revolution, "[t]he disappearance of the *quaestiones perpetuae*, or of most of them, seems to have taken place fairly early."<sup>82</sup> Under the new regime, "crimes tended to be brought before the Urban Prefect... and other new officials."<sup>83</sup> Moreover, "in some cases the emperor himself exercised jurisdiction,"<sup>84</sup> though this did not yet amount to "a full-scale emperor's court."<sup>85</sup>

While the actual manner in which the Roman emperor acquired personal jurisdiction over criminal matters is "obscure, and purely anecdotal,"<sup>86</sup> it is of significant interest that two of the arguments that have been advanced by historians to explain public acceptance of the emperor's jurisdiction resonate heavily with Hobbesian undertones. The first argument involves an equation of the emperor's role with "the jurisdiction of a *paterfamilias* over his *familia*."<sup>87</sup> In fact, Octavian, who had acquired the honorific of "Augustus" in 27 BC,<sup>88</sup> was also given the title of *pater patriae* ('father of his country') in 2 BC,<sup>89</sup> a designation that was "eloquently suggestive of the protecting but coercive authority of the *paterfamilias*."<sup>90</sup> A second argument is that "the emperor was commander-in-chief of Rome's armies, and he thus had *imperium* in the old sense, the power of life and death over all citizens, even if technically this only applied *militiae*."<sup>91</sup>

Finally, a Hobbesian analysis of these developments would not be complete without considering the tremendous impact that Augustus' reforms had on the stability and harmony

<sup>73</sup> Ibid.

<sup>74</sup> Lambiris, 71.

<sup>75</sup> Borkowski, 15, citing R. Syme, *The Roman Revolution* (Oxford, 1939), 475.

<sup>76</sup> As stated at Borkowski, *ibid.*, citing Syme, *ibid.*: "The different forms which the worship of Augustus took in Rome, Italy, and the provinces illustrate the different aspects of his rule - he is Princeps to the Senate, Imperator to army and people, King and God to the subject peoples of the Empire - and recapitulate the sources of his personal power in relation to towns, provinces and kings."

<sup>77</sup> Robinson, 6.

<sup>78</sup> Bauman, 50.

<sup>79</sup> Ibid. On this point, Bauman elaborates: "Acts not encompassed by the public criminal laws could be made justiciable, and the *poena legis* for any given crime could be mitigated or intensified in the discretion of the sentencing authority."

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Robinson, 6. However, the author cautions that some of the *quaestiones perpetuae* "may have survived into the second century; it was a matter of desuetude, not abolition". In fact, it is noted at 7 that "[t]he *quaestiones* were certainly not abolished; after all, Augustus was concerned to regulate and add to them."

<sup>83</sup> Ibid.

<sup>84</sup> Ibid., 6-7.

of Roman society. Indeed, by "attempt[ing] to change Roman society through the medium of legislation, i.e., social engineering... Augustus brought to Rome the internal peace, stability, sound administration, and good government for which she craved."<sup>92</sup> During the 200 year era of almost pristine peace and political stability that ensued,<sup>93</sup> which came to be known as the *pax Romana* or "golden age" of Rome,<sup>94</sup> "there was a great deal of goodwill between the inhabitants";<sup>95</sup> prompting one "renowned historian" to make the bold claim that "the human race was never happier than in this period."<sup>96</sup>

### The sum of all fears: The climax of state criminal power during the Dominate

Of course, the *pax Romana* did not last forever, and "[w]ith the death of Marcus Aurelius in AD 180 Rome's golden age came to a sudden end."<sup>97</sup> This event precipitated over a decade of poor governance, chaos, and civil war, a situation that was briefly interrupted by the Severan dynasty, when the rulers of Rome, "concerned with efficiency and the security of the state,"<sup>98</sup> were able to achieve a measure of peace through further consolidation of imperial power. However, following the murder of the last Severan ruler, Severus Alexander, at the hands of disloyal troops in AD 235, "[f]ifty years of anarchy followed."<sup>99</sup> As a result of this persistent and widespread tumult, "[b]y AD 285, the empire was in an unprecedented crisis. It was amid such chaos that Diocletian won sufficient military support to overcome all opposition and assume total power."<sup>100</sup>

In keeping with our Hobbesian analysis, it should be noted that "such serious problems [helped make] it both possible and necessary for Diocletian... to reform the constitutional

<sup>85</sup> As Bauman, 3, writes, "that would take place later in the first century AD." Nevertheless, he credits the emergence of three "strands" or "phases" of imperial criminal power during this period as being "important steps along the road" toward a full-fledged emperor's court: "In the first phase the emperor's domestic tribunal starts functioning as an analogue of a public criminal court, and matters that would have stayed in the private domain in the case of anyone else are punished under the aegis of the public criminal laws. In the second phase the emphasis is still on matters which affect the emperor personally, but the offences are essentially public; conspiracies head this list. Third, the emperor concerns himself with matters in which he has no personal interest at all; common-law crimes make up this list."

<sup>86</sup> Robinson, 9. For instance, "[t]here is no evidence for the first actual death sentence imposed" by the emperor.

<sup>87</sup> Ibid.

<sup>88</sup> As Borkowski, 14, comments, the title "Augustus" was "conferred on Octavian by the Senate in 27 BC in recognition of the powers vested in him, and to signify the Janus-like nature of his position - as a harbinger of good things to come, yet associated with the glories of the past. Henceforth Octavian called himself Augustus. A month of the year was named after him."

<sup>89</sup> Ibid.

<sup>90</sup> Simon Hornblower and Antony Spawforth, eds., *The Oxford Classical Dictionary*, 3d ed. (Oxford, 1999) s.v. "pater patriae".

<sup>91</sup> Robinson, 9.

<sup>92</sup> Borkowski, 15.

<sup>93</sup> As Lambiris, 110, writes, "[i]t was a peace marred by occasional lapses, such as the chaotic year of four emperors, but on the whole stable government lasted for 200 years, until AD 180 when Marcus Aurelius died."

arrangements of the empire"<sup>101</sup> by bestowing supreme autocratic rule upon the emperor. "These changes characterise the final period of Roman constitutional history which is called the dominate,"<sup>102</sup> and were accompanied by an emboldened sense of majesty emanating from the office of the emperor. While it is true that "[a] sort of 'royalism' had existed from the time of Marius,"<sup>103</sup> and there is much evidence to suggest that "the late Republican warlords had seen themselves as special,"<sup>104</sup> the lionisation of the Roman sovereign during the late empire was amplified to the point that "[t]he emperor was now deliberately a figure of awe, remote from his subjects, garbed in purple, and carrying an aura of the divine."<sup>105</sup> This aura of awe and respect<sup>106</sup> was ferociously backed by 'the crimes of *lèse-majesté*,'<sup>107</sup> which punished acts that "could affect the honour of the emperor, or of his family."<sup>108</sup>

At the same time that the power and prestige of the emperor were climbing to dizzying heights, several significant reforms occurred in the domain of criminal procedure. Firstly, the Roman state vastly increased its participation in the administration of criminal justice, so that "[s]tate prosecution - *inquisitio* - often replaced accusation by a member of the public."<sup>109</sup> Furthermore, the personal criminal jurisdiction of the emperor, which had begun in fledgling form under the rule of Augustus, was augmented so that "[n]o death sentence or sentence of total confiscation could be passed without imperial confirmation."<sup>110</sup> Finally, during this period the state's administration of "[s]evere punishments seems... to have been more widely used, and on a much higher proportion of the population."<sup>111</sup> Indeed, it has been observed that "[t]he Later Empire was a savage period; the arbitrary exercise of power was, in a sense, increasing."<sup>112</sup>

The broad historical analysis conducted above demonstrates a robust trend with

<sup>94</sup> Ibid., 110-11.

<sup>95</sup> Ibid., 110.

<sup>96</sup> Ibid., citing Gibbon.

<sup>97</sup> Ibid., 111.

<sup>98</sup> Ibid., 112.

<sup>99</sup> Ibid., 113. The author further describes "the Crisis of the 3rd Century" as follows: "some 20 different contenders tried to assume power, most of them meeting with violent deaths at the hands of soldiers who opposed them. Some of the contenders even tried to set up independent states, threatening the political unity of the Empire. The horror of these civil disturbances was compounded by barbarian invasions which began to occur on all sides of the Roman empire. In the east, Persian invaders threatened Syria, Egypt, and Asia Minor. In the north, the Franks and Alemanni invaded Gaul and Spain. In Africa, Berber tribes raided Roman towns. As if this were not enough misfortune, outbreaks of disease ravaged the population and imperial finances were brought close to collapse, inflation running out of control and coinage being greatly devalued."

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid., 113-114.

<sup>103</sup> Robinson, 77.

respect to the administration of criminal justice by the Roman state. In times of extreme turbulence, we see two significant developments: first, "in the interests of public order, the State developed a concern with the criminal behaviour of all who lived within its frontiers";<sup>113</sup> and second, under those circumstances we see the gradual reorganisation of the Roman constitution culminating in the creation of "an autocratic State where ultimate power resided... with one man, the Emperor."<sup>114</sup> Both of these developments cogently support a Hobbesian paradigm of social governance. We will now turn to an examination of this paradigm with respect to substantive Roman criminal law.

### **Examining the evolution of substantive Roman criminal law**

The present author submits that a comprehensive analysis of substantive Roman criminal law would greatly exceed the confines of the present scope of inquiry. Nevertheless, it is contended that the Hobbesian implications of the emergence and solidification of state criminal power during the Late Republican and Imperial periods of Roman history can be fruitfully examined in the context of three legal areas: 1) the diminished *potestas* of the *paterfamilias* and his increasing liability to criminal sanction; 2) the criminalisation of interpersonal violence such as murder and assault and the expansion of these notions; and 3) the evolution of the concept of treason and the broadening of its scope under the rubric of sedition.

### **The diminishment of domestic jurisdiction**

As predicted by our Hobbesian hypothesis, a broad overview of Roman legal history from the Monarchy through the Empire demonstrates that the gradual augmentation of criminal law entailed a correlative whittling down of the absolute authority inherent in the *paterfamilias*' domestic jurisdiction. While it is important to note that the *paterfamilias* retained a significant amount of influence and power over his subjects in other legal con-

<sup>104</sup> Ibid. However, Robinson cautions: "Nevertheless, Augustus and his immediate successors did not see themselves as gods, and elements of sacrilege or blasphemy were not part of the crime until late in the Empire."

<sup>105</sup> Ibid., 12.

<sup>106</sup> As Lambiris, 114, writes, "[a]nyone admitted to the emperor's presence was required to prostrate themselves and kiss the hem of the emperor's robe." Such measures "had a political role: to elevate the position of the emperor, to inspire awe and respect, to compel obedience, and to discourage usurpers."

<sup>107</sup> Robinson, 77.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid. However, Robinson, 12-13, cautions that "we should remember that an investigation must usually be triggered by an individual complaint", and the "victim of the crime did not lose the right of accusation."

<sup>110</sup> Ibid., 13.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid., 14.

<sup>113</sup> Ibid., 15.

texts, such as commerce and politics, there can be no gainsaying the fact that his penal prerogatives suffered a significant diminution during the course of Roman history. This diminution, which touched upon everything from capital punishment to corporal punishment to simple incarceration, indicates that "limiting an owner's rights over a slave [or child] was... slowly accepted as socially desirable and a matter for legal intervention"<sup>115</sup> in the interests of public order.<sup>116</sup>

With respect to the right to impose capital punishment, "[w]hile in strict law any *paterfamilias* [still] had rights of life and death over those in his power, it seems clear that, by the Empire, this power was normally only exercised in the acceptance or rejection of children at their birth."<sup>117</sup> Except in the most exceptional circumstances (such as the case of an adulterous daughter caught *in flagrante* in the family home),<sup>118</sup> the ability of a *paterfamilias* to impose a capital sentence upon his subordinates usually required the approval of a public authority,<sup>119</sup> failing which, he was liable for informal social disapproval,<sup>120</sup> *infamia*,<sup>121</sup> or even state penal sanction.<sup>122</sup> In fact, "[u]nder Constantine it was made an offence to kill a slave, even with cause, if the manner employed was deemed excessively cruel."<sup>123</sup>

The paterfamilial infliction of other punitive measures, short of capital punishment, also increasingly came under state scrutiny with the expansion of Roman criminal law. On the issue of corporal punishment, the castration of slaves was outlawed by Domitian,<sup>124</sup> a proscription that Hadrian would reinforce under pain of death. Antoninus Pius would introduce a rudimentary form of asylum against "brutality or starvation or intolerable wrongdoing,"<sup>126</sup> the ambit of which was extended by Severus to include sexual abuse and enforced prostitution.<sup>127</sup> Even the right of a *paterfamilias* to incarcerate was eventually impinged upon by Justinian's edict "that those who established private prisons should themselves, whatever their rank, spend as many days in the public prison as they had imposed on others, and also lose any legal claim they might have been trying to win by such means."<sup>128</sup> In fact, keeping private prisons was considered such an affront to the state that to do so was "seen as a crime akin to treason."<sup>129</sup>

### The criminalisation of interpersonal violence: murder and assault

<sup>114</sup> Borkowski, 13.

<sup>115</sup> Robinson, 90.

<sup>116</sup> Ibid.

In early Roman society there were few applications of the criminal law to interpersonal acts of aggression. With respect to homicide, "[i]t seems likely that for the Romans, as in our day, most murders were family affairs and, until well into the Principate, that these would therefore fall within the jurisdiction of the relevant *paterfamilias* or owner (or patron)."<sup>130</sup> Moreover, "[u]ntil the late Republic, and perhaps even into the Empire, it is probable that, for an ordinary murder not within one household, the victim's family was able to use a private criminal action to obtain the surrender to them of the murderer"<sup>131</sup> so that they could exact their penalty, unless they were "satisfied that the head of the perpetrator's household would take suitable steps to punish the offender by his domestic authority."<sup>132</sup> Similarly, "when the *paterfamilias* was the murderer, someone technically outside the *familia* would need to intervene" to bring the perpetrator before the courts.<sup>133</sup> Under such a system, the state played an essentially passive role in the administration of criminal justice, providing a forum for the resolution of the dispute but staking no direct interest in the outcome.

This reticent approach began to change with the passing of Sulla's *lex Cornelia* of 81

<sup>117</sup> Ibid., 60.

<sup>118</sup> The second edition of the *lex Iulia* "laid down that it was permitted to a *paterfamilias*... to kill with his own hand his daughter together with her lover... taken in the act of adultery in his house or that of his son-in-law." However, even then there were caveats: "[t]he statute did not extend this right to a father who was still himself a *filius-familias*, to a *paterfamilias* who was not the actual father, or to the father of an emancipated daughter." Furthermore, "[t]he couple must be surprised in the act" and "[t]he father's entitlement to kill was limited to his own house or that of his son-in-law." Finally, "the couple must be killed together, on the spot, almost with one blow... however, if the daughter fled while he was killing the paramour, and the father took some hours to catch up with her, this was counted as being killed together." Ibid, 161.

<sup>119</sup> Ibid., 46. For example, as Borkowski, 193, notes, Hadrian "forbade masters from killing their slaves without the consent of the magistrate."

<sup>120</sup> Robinson, 60.

<sup>121</sup> Borkowski, 113.

<sup>122</sup> For example, an edict by Antoninus Pius condemned as homicide the killing of a slave for capricious reasons. See *ibid.*, 93.

<sup>123</sup> Ibid.

<sup>124</sup> Dig.48.8.6.

<sup>125</sup> Dig.48.8.4.2 reads: "no one should castrate another, freeman or slave, willing or unwilling, nor should anyone voluntarily offer himself for castration. Should anyone act in defiance of my edict, the doctor performing the operation shall suffer a capital penalty, as shall anyone who voluntarily offered himself for surgery."

<sup>126</sup> Dig.1.6.2 reads: "The power of masters over their slaves certainly ought not to be infringed and there must be no derogation from any man's legal rights. But it is in the interest of masters that those who make just complaint be not denied relief against brutality or starvation or intolerable wrongdoing. Therefore, judicially examine those who have fled the household of Julius Sabinus to take refuge at the statue and if you find it proven that they have been treated more harshly than is fair or have been subjected to infamous wrongdoing, then issue and order for their sale subject to the condition that they shall not come back under the power of their present master".

<sup>127</sup> Robinson, 90.

BC, the first comprehensive Roman statute on murder. However, even this edict demonstrated the desire of the Roman state to wade carefully into the waters of criminalising violent acts, since its original purpose was "aimed more at repressing brigands and keeping the peace than at murder as a private matter."<sup>135</sup> Nevertheless, "[a]lthough public order was the background of the *lex Cornelia*, it did (or very soon came to) cover ordinary murder, not only murder on the public highway but in private houses, as well as death inflicted in a brawl or arising from going about with murder in mind."<sup>136</sup> An important aspect of this proscription is that it "extended to the killing of any man, no matter what his status," so that the owner of a felled slave could now bring a criminal charge for what had been merely a delictual interference with property.<sup>137</sup>

In the late Republic, the Roman state also expressed its mounting concern with non-fatal acts of violence under the rubric of *vis*,<sup>138</sup> which "was something of a catch-all crime... [that] could cover physical assault."<sup>139</sup> The first law of *vis* "seems to have been [the] *lex Lutatia* of 78 [BC],"<sup>140</sup> which was likely enacted in response to "the disturbed times of the 70s BC."<sup>141</sup> True to this chaotic context, and mirroring the cautious creep of murder into the realm of public criminal law, not all forms of physical assault originally qualified as *vis*. Rather, only violence that threatened the safety of the "empire, majesty... the state of [the] fatherland, and the safety of all"<sup>142</sup> was at issue. Therefore, upon its inception we see that "[t]he crime of *vis* has two defining characteristics. The first is the actual act of violence. The second is an adverse effect on society as a whole... it is *vis contra rem publicam* that is criminal."<sup>143</sup> According to these criteria, only serious forms of public insubordination, such as an armed attack on public officials, seizure of public places, or going armed in public,<sup>144</sup> originally fell within the purview of *vis*.

However, this criterion of public order was soon elasticised with the ensuing "*lex Plautia de vi*... [which] confirmed the range of offences covered by the *lex Lutatia*, and extended the jurisdiction of the *quaestio* to private offences or, more precisely, offences against private individuals that were *contra rem publicam*."<sup>145</sup> This marked an important

<sup>128</sup> Ibid., 49.

<sup>129</sup> Robinson, 49.

<sup>130</sup> Ibid., 41.

<sup>131</sup> Ibid., 41-42.

<sup>132</sup> Ibid., 42.

<sup>133</sup> Ibid., 41.

<sup>134</sup> Riggsby, 50 notes that prior to the *lex Cornelia* there was a specific court de sicariis charged with prosecuting gangsters and racketeers, and another court de veneficiis dealing with poisonings.

<sup>135</sup> Robinson, 41..



transition because it signalled that violent acts between private individuals, which hitherto were not germane to state-sanctioned criminal law, were deemed to pose a sufficient threat to public security that they merited the application of public sanctions. "In particular, it was no longer possible to claim that acts of violence had no political significance. They automatically constituted usurpation of state authority."<sup>146</sup>

Returning to our Hobbesian analysis, the creeping criminalisation of violence in later Roman history demonstrates that as the state gradually assumed a more prominent and intrusive role in assuring the protection of its citizenry, the types of behaviours that constituted an affront to its paternalistic authority increased accordingly. Whereas a *laissez-faire* Roman state needed only to concern itself with punishing and deterring popular insurrections and other egregious threats to public peace, the hands-on role assumed by the *pater patriae* required him to increasingly monitor the private acts of his "children." Thus, while "Rome had a long tradition of reliance on popular justice,"<sup>147</sup> the rise of the state entailed its claiming a "monopoly on the legitimate use of violence,"<sup>148</sup> since the "removal of violence from private hands is both a popular consideratum and a natural side effect of the resulting moves toward centralisation of power."<sup>149</sup>

### Treason: From *parricidium* to *perduellio* and *vis*

In any civilisation, "[t]reason must in a sense be the oldest crime, in that it can be defined as an offence against society itself."<sup>150</sup> Such a malleable definition means that "[t]reason is inevitably a wide-ranging offence; moreover, since it is an offence against the established order, its definition can change with the government."<sup>151</sup> With this in mind, as the Roman state adopted a more centralised, paternalistic social control function through the expansion of its criminal law, "[v]ery important changes in the content of the crime [of treason] occur[red]."<sup>152</sup> These changes, which signalled an evolution "from its early pri-

<sup>136</sup> Ibid., 43.

<sup>137</sup> Ibid. This is of course to be contrasted with the prohibition against owners killing their own slaves, discussed above.

<sup>138</sup> Ibid., 78.

<sup>139</sup> Ibid., 48.

<sup>140</sup> Riggsby, 79.

<sup>141</sup> Robinson, 78. Specifically, it has been "cogently argued" that "the lex Lutatia... [was]... set up... to deal with the consequences of Lepidus' insurrection."

<sup>142</sup> Riggsby, 79.

<sup>143</sup> Ibid., 112.

<sup>144</sup> Robinson, 78-79.

<sup>145</sup> Ibid., 79. However, there is no absolute consensus on when exactly the lex Plautia was passed. Robinson writes that it was "perhaps of 70 BC and certainly between 78 and 63 BC." Riggsby, 80, writes that "[t]he best solution... seems to be that the lex Lutatia was passed originally and specifically to deal with Lepidus' insurrection (in 78), and that a later lex Plautia succeeded it and, in normal 'tralatician' Roman fashion, absorbed it (presumably adding new provisions also.)"

vate and familial beginnings through the long process of becoming public and its final emergence as the ultimate offence in public law,"<sup>153</sup> can be broken down into two major stages: the transformation of treason from parricidium to *perduellio*; and the subsequent expansion of *perduellio* under the rubric of *vis*.

With respect to the first stage of development, "[t]he early history of Rome supplies much evidence supporting the theory that treason has evolved from an offence against the family in its primitive origins to an offence against the state regarded as a matured socio-political structure."<sup>154</sup> Recall that under the Monarchy and early Republic, the domestic jurisdiction of the *paterfamilias* was the most prominent social control mechanism in Roman society. Therefore, in order to instill a measure of respect for this seminal institution, "killing one's ascendants... was regarded as a heinous crime and was punished in a horrific manner."<sup>155</sup> The following passage is morbidly illustrative of the repugnance with which early Roman society viewed the crime of *parricidium*:

According to the custom of our ancestors, the punishment instituted for parricide was as follows: A parricide is flogged with blood-coloured rods, then sewn up in a sack with a dog, a dunghill cock, a viper, and a monkey; then the sack is thrown into the depths of the sea.<sup>156</sup>

By virtue of its extreme gravity and the fact that it constituted a rare exception to the paucity of criminal law in early Rome, "[i]t is clear that parricide contains rudimentary elements of treason in an age when the family was the chief agency for maintaining authority," because "[u]nder such conditions killing or injuring the pater familias would endanger social stability."<sup>158</sup>

However, with the eventual aggrandisement of the Roman state and the correlative emergence of criminal law as the primary means of enforcing public order, "the treasonable aspects of [parricide were] lost, for the state is a complex organism, the existence of which is not commonly shaken by isolated homicides."<sup>159</sup> In fact, as part of its paradigmatic shift

<sup>146</sup> Riggsby, xi.

<sup>147</sup> Ibid., 112.

<sup>148</sup> Ibid., 113.

<sup>149</sup> Ibid., 119.

<sup>150</sup> Robinson, 74.

<sup>151</sup> Ibid., 75.

<sup>152</sup> Lear, 3.

<sup>153</sup> Ibid.

toward normative ubiquity, "the state becomes an instrument to limit family self-help by making the punishment of crime a matter for public authority. In this new situation treason becomes a crime directed against the state, and among the Romans this crime was designated *perduellio*."<sup>160</sup>

Three interesting Hobbesian implications are evident in this transformation. First, the shift of sovereign power from *paterfamilias* to *pater patriae* can be seen in the fact that Saturnius, the Emperor responsible for enacting the first *quaestio perpetua* for *perduellio*,<sup>161</sup> "intended the statute to protect popular leaders like himself who as *populares* embodied the *populus*."<sup>162</sup> Secondly, *perduellio* "was one of the crimes where those normally barred from making accusations were permitted to lay charges: the infamous, soldiers, slaves, and freedmen even against their owners and patrons."<sup>163</sup> Finally, "anyone accused of treason might be put to... torture, no matter what his status."<sup>164</sup> Taken together, these three developments demonstrate that the fatherly facets of sovereign power were gradually transferred from the grassroots level of *paterfamilial postestas* to the uppermost echelons of the Roman state.

As for the second stage in the evolution of the Roman concept of treason, while the crime of *perduellio* always displayed certain "constant"<sup>165</sup> features, during the later period of Roman history we see a progressive broadening of its proscriptive scope to include various lesser, "seditious" acts under the rubric of *vis*.<sup>166</sup> For example, while certain grave breaches of public peace, such as bearing arms against the Roman people or aiding and abetting military opponents must always have been treasonous acts against the Roman state, later legal developments brought the penalisation of "less obvious"<sup>168</sup> offences against the state, such as knowingly writing or dictating a falsehood onto the public record, pretending to hold public office, or inscribing a name other than the emperor's on a public building.<sup>169</sup> The ambit for seditious acts eventually became so broad that "[i]n the Later Empire we find even intercession on behalf of someone guilty of treason treated as itself treasonable, whereas ancient custom laid down no more than that a traitor should not be mourned."<sup>170</sup>

<sup>154</sup> Lear, 3.

<sup>155</sup> Borkowski, 27.

<sup>156</sup> Dig. 48.9.9.pr. However, as Lear, 4, notes, the extreme gravity of this punishment underscores the reality that it was only exceptionally applied, as "such killings and rebellions against the patriarchal head of the family were probably uncommon in an age when family ties were strong."

<sup>157</sup> Lear, 6.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

In sum, through its evolution from a mechanism that buttressed the agnatic system of societal ordering to a high crime against the state capable of multiple permutations, the crime of treason in Roman society gives further credence to our Hobbesian hypothesis, by identifying the changing perception of which social control mechanisms were believed to be the most critically in need of protection and reinforcement.

The three themes outlined above - the dwindling *postestas* of the *paterfamilias*, the increasing state monopoly on the use of violence, and the changing face of treason - are succinctly illustrated in the trial of Horatius, as recounted by Livy.<sup>171</sup> Horatius, a soldier returning from war, killed his sister "for weeping for an enemy soldier (her fiancé) he had just slain in battle."<sup>172</sup> He was thus charged with treason, for "in taking his sister's punishment into his own hands, he ha[d] usurped the state's right to pursue her treason";<sup>173</sup> this, despite the pleas of Horatius' father that he, as head of the household, had authorised the slaying of the sister as a legitimate punishment.<sup>174</sup> Although Horatius, as a war hero, was ultimately acquitted on compassionate grounds,<sup>175</sup> his accusation is a prime example of how "the needs of family [were ultimately] subordinated to those of state,"<sup>176</sup> which contributed heavily to the "growing acceptance of the state's claim to a monopoly on the legitimate use of violence."<sup>177</sup>

### **Qualifications of the present analysis**

As the above analysis demonstrates, an examination of Roman history reveals significant support for the Hobbesian proposition that periods of civil strife are predictive of a rise in state-sanctioned criminal law and a correlative diminution of private remedies. However, working under the assumption that no theory is capable of infallibly and exhaus-

<sup>160</sup> Ibid. The author concedes that "[s]ince a Roman state existed prior to the earliest historical record, no documentary proof can be cited to show that parricidium must have existed before perduellio." However, "[i]t is on intrinsic grounds of progressive juridical development' that perduellio must be placed later than parricidium."

<sup>161</sup> Robinson, 75 writes that "[t]he first quaestio perpetua for [perduellio] seems to have been set up by the lex Appuleia, probably of 103 BC."

<sup>162</sup> Ibid.

<sup>163</sup> Ibid., 78.

<sup>164</sup> Ibid.

<sup>165</sup> However, "[t]he boundary between the treatment of what we should call sedition and full-blown treason was fluid." Ibid., 80.

<sup>166</sup> Ibid., 75-76, notes the following constant features of treason: "[unauthorized] communications with an enemy, including flight to them, giving them a password, or aiding them dolosely in some other way, such as selling flint as a fire-striker, or explaining to the barbarians how to build ships."

<sup>167</sup> Ibid., 77.

<sup>168</sup> Ibid.

tively explaining human behaviour, it is suggested that the inferences drawn herein be read in light of the following two caveats.

First, it is important to note that this analysis takes the political precepts expounded in Hobbes' *Leviathan* at face value. In making this deliberate leap of faith, the present author is mindful of the fact that the savage, atomistic view of humanity proposed by Hobbes is not a philosophical premise that is universally accepted. For example, the luminary philosopher Jean-Jacques Rousseau, in his *Discourse on Inequality*, believed that man in his natural state was a type of "noble savage" living an uncorrupted, self-reliant and, blissfully content life, and for whom the bonds of mutual social obligations were an inherently fractional force.<sup>178</sup> Such a fundamentally disparate view of human nature simply cannot be reconciled with the present Hobbesian analysis; the reader is merely encouraged to make his or her own determinations on this issue.

Second, it would appear that a Hobbesian analysis works best when dealing with crimes of violence and other tangible threats to peace and security. However, at its most basic level, "[a] crime can be defined as any form of human activity that the law defines as a crime,"<sup>179</sup> a somewhat circular definition "encompassing all kinds of pressure upon individuals to do what is customarily considered the right thing in a given society."<sup>180</sup> This means that the historical tendency for societies, including the Romans,<sup>181</sup> to proscribe and penalise various social and/or religious taboos under the rubric of "moral" crimes does not fit easily into the present analysis. In conceding this limitation, the present author wishes to stress that political and/or sociological forces do not operate in a vacuum, meaning that the Hobbesian paradigm expounded above may provide one broad source of influence that interacted with a matrix of other, often more discrete variables, to produce a comprehensive explanation of Roman criminal law.

<sup>169</sup> Robinson, 77.

<sup>170</sup> Ibid.

<sup>171</sup> Livy, *The History of Rome*, Book XXVI, available online: The Perseus Digital Library <<http://www.perseus.tufts.edu/>>.

<sup>172</sup> Riggsby, 117.

<sup>173</sup> Ibid.

<sup>174</sup> Livy explains how Horatius' father argued that "his daughter had been justly slain, had it not been so, he would have exerted his authority as a father in punishing his son."

<sup>175</sup> As *ibid.* notes, "[t]hey acquitted him because they admired his bravery rather than because they regarded his cause as a just one."

<sup>176</sup> Riggsby, 117.

<sup>177</sup> Ibid.

### **Conclusion**

Thomas Hobbes argued that the family and the state are simply variations of the same theme: the conferral of sovereign power upon a higher authority, in exchange for protection from the perils posed by human existence in its natural state. The family, as the less sophisticated of the two types of commonwealths, is logically the first to develop. However, there come times when such an arrangement is incapable of dealing with a widespread threat to public peace. When this critical situation is reached, free men may decide, for the sake of self-preservation, to forego certain prerogatives and create an additional layer of overarching governance.

As we have seen, during the early years of Rome, life was relatively tranquil, contained, and uncomplicated. Thus, the *paterfamilias* was an adequate safeguard of law and order, with the state assuming a subsidiary role when needed. However, the growth and change of Rome throughout the centuries brought new, violent threats to the welfare of its people. By relating Hobbesian principles to the historical record, we see that the significant growth of state-enforced criminal law during these periods of political instability, coupled with the diminution of paterfamilial *potestas*, signify that the Roman family was no longer functioning as an effective social protective mechanism. In sum, as he became manifestly incapable of serving and protecting his subjects, the Roman *paterfamilias* was forced to submit himself to the custody of a higher father figure.

<sup>178</sup> See Jean-Jacques Rousseau, *A Discourse On Inequality*, Translated by Maurice Cranston (Toronto, 1984), 82-92, 104-116.

<sup>179</sup> Parker, 1.

<sup>180</sup> *Ibid.*, 51.

<sup>181</sup> For example, a number of sexual crimes were proscribed under Roman law, including prostitution, homosexuality, and adultery. See e.g. Robinson, 54-73.

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# *Grapsai* : 'to draw an image' - 'to write a text'

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The institution of imperial authority underwent dramatic changes during the period of Late Antiquity. The idea of the Emperor as the *princeps*, or the first citizen, of Rome gave way to the idea of the Emperor as the *dominus*, or the absolute power.<sup>1</sup> This transformation in imperial power is portrayed in the artwork of Late Antiquity.

Art plays an extremely important role in all civilizations. It has a power to shape social and personal identity and to transmit complex political and theological messages.<sup>2</sup> Power is very rarely limited to the pure exercise of brute force. The Roman state increased its authority and legitimacy through intricate ceremonies -displaying wealth and tradition, but, more importantly, demonstrating the powers of the Roman imperium. Power is a matter of both impression and of persuasion. Imperial imagery serves to represent and define who the Emperor is and how he is to rule. In following the trail of this imagery, one can see the true nature of this transforming role. In the propagation of the imperial office, art is power.<sup>3</sup>

From the time of the first Augustus (43 BC) to the absolutism of Late Antiquity, there is a significant reformulation of imperial power. Through a concession of legal rights, Augustus was named princeps of Rome. He was also the rightful heir, nephew of Julius Caesar, to the Roman *imperium*.<sup>4</sup> By Late Antiquity, however, the Augustus neither had a legitimate concession of power nor a hereditary right to the throne (the death of Nero in AD 68 ends the hereditary line of the Caesars).<sup>5</sup> He is, however, considered the

<sup>1</sup> A.H.M. Jones, 'The Imperium of Augustus,' *Journal of Roman Studies* 41 (1951): 112.

<sup>2</sup> K. Clark, *Civilization* (New York, 1969), 1.

<sup>3</sup> J. Elsner, *Imperial Rome and Christian Triumph: The Art of the Roman Empire (AD 100-450)* (Oxford, 1998), 54.

<sup>4</sup> Suetonius, *The Twelve Caesars*, trans. R. Graves (London, 2003), 46. Please note that the relevant page numbers (and not chapter/verse numbers) are those quoted here for ancient sources.

absolute authority. This transformation of imperial authority is dramatically manifested in imperial images.

In the Early Roman Empire there is a great Hellenistic influence in art, in the usage of naturalism - an "imitation of 'real-life' desires... on an idealizing mythological level."<sup>6</sup> The early imperial way of life is therefore deemed "Graeco-Roman".<sup>7</sup> This Hellenization of Roman imagery under Augustus is shown in the cadaverous portraits of Julius Caesar, "still true to the unrelenting naturalism of republic portraiture, with the quasi-heroic features, decoratively generalized, that are given to Augustus and the Julius emperors that followed him."<sup>8</sup> In the Early Roman Empire, having a public portrait which transmits one's individual features is seen as the greatest proof of power and success.<sup>9</sup>

The Augustan Principate overturned the long-established social hierarchy of the Republic.<sup>10</sup> Augustus claimed his legitimacy through a series of constitutional rulings: Augustus, Princeps Senatus, tribunician power, and *Maius Imperium*.<sup>11</sup> But did these titles give him enough power to rule for fifty-eight years? Where did his power lie?

In large parts of the Empire, particularly the Greek East, many subjects regarded the living Augustus as a god.<sup>12</sup> While this belief was not common in Rome<sup>13</sup> until his death and divinization in AD 14<sup>14</sup>, Augustus' imperial images encouraged these Hellenistic tendencies as another means of legitimacy. For example, the statue of Augustus from the Prima Porta shows the emperor as larger than life - depicting him as seven feet tall. He is shown "as in a large number of Augustan and later imperial images, in cuirass and military cloak, [and] appears to be proclaiming victory."<sup>15</sup> Augustus, a small man of about 5'7"<sup>16</sup>, is said to have hid in the bushes during his first battle.<sup>17</sup> This monument to Augustus is meant to aggrandize and idealize the man both physically and in terms of military leadership.

<sup>5</sup> Ibid., 249.

<sup>6</sup> R. S. Nelson, *Visuality Before and Beyond the Renaissance* (Cambridge, 2000), 52.

<sup>7</sup> F. M. Clover & R. S. Humphreys, *Tradition and Innovation in Late Antiquity* (Madison, WI, 1989), 8.

<sup>8</sup> C. R. Morey, *Early Christian Art* (Princeton, 1942), 48.

<sup>9</sup> Pliny, *Natural History*, Vol IV, trans. W. H. S. Jones (New York, 1935), 226.

<sup>10</sup> Cassius Dio, *The Augustan Settlement*, trans. J. W. Rich (Warminster, 1990), 13.

<sup>11</sup> Velleius Paterculus, *Velleius Paterculus: Compendium of Roman History and Res Gestae Divi Augusti*, trans. F. W. Shipley (London, 1924), 355-357.

<sup>12</sup> Suetonius, 80.

<sup>13</sup> Ibid., 86.

<sup>14</sup> Ibid., 105.

On further investigation, this statue propagates the Augustan imperial image in even deeper and more divine ways. There is a strong Hellenistic undercurrent in his idealized features, and bare feet which, in ancient Greek tradition, signify divinity.<sup>18</sup> But even more potent is his sculpted support, a Cupid on a dolphin which alludes to the mythological, divine descent of the Julian family from the goddess Venus.<sup>19</sup> Thus, while the initial impact of the sculpture may be a political statement of authority through military leadership, the sculpture simultaneously legitimizes this so-called *princeps* by implying his connections to the deities. Such an assertion implies recognition of the world-order established on earth, and under the control of the Empire and Emperor.<sup>20</sup>

Augustus' ambivalent position, between *princeps* and monarch, man and god, was not an impasse to his legitimacy. It is this ambivalence that helps him to create the delicate role of Emperor in a quasi-Republican context. By bolstering his political and military power with imagery alluding to the divine, he secured his role in the Empire.

Through the ancient Greek tradition of hero worship,<sup>21</sup> the Roman imperial cult was formed. The Greeks understood the influence of art in worship and display of power, as no one can deny the "grandeur of the Parthenon and the majesty of Athena of Pheidias [in awakening]... Athenian hearts to the loftier notions... of divinity."<sup>22</sup> It is these influences of imperial imagery to which the first Augustus owes his divine legitimacy. The facade of the Roman Republic was continued in this manner.<sup>23</sup> The message demonstrated through his imagery however, shows an emperor who is more than just a first among equals, as his imperial images demand "every subject of the Roman empire to pay his respects."<sup>24</sup>

Augustus' *Res Gestae*, an account of his life and achievements, has a strong focus on the buildings and monuments he created.<sup>25</sup> Augustus used his artistic achievements to

<sup>15</sup> J. Elsner, *Art and the Roman Viewer* (New York, 1995), 162.

<sup>16</sup> Suetonius, 92.

<sup>17</sup> Ibid., 50.

<sup>18</sup> Elsner, *Art and the Roman Viewer*, 162.

<sup>19</sup> Ibid., 162.

<sup>20</sup> Dio Chrysostom, *Orations*, trans. D.A. Russell (New York, 1992), 14.

<sup>21</sup> Pausanias, *Description of Greece, Vol. I*, trans. F. W. Shipley (London, 1924), xviii. (introduction).

<sup>22</sup> Pausanias, Vol. I, xxi (introduction).

demonstrate his feats as emperor. This power of symbolism is also used on Augustan coinage. Before the last year of Julius' Caesar's life, coins did not portray living Romans, but because of the Hellenistic influences that re-emerged with vigour during the reign of Augustus, every coin portrays a picture of the princeps, and, on the reverse, depicts an image of one of his buildings.<sup>26</sup> In this way the "panegyric reflex [of interrelating] portrait and monument... [acts to] confer grandeur."<sup>27</sup> The *Res Gestae* also specifies which construction projects denote which reign (i.e. Republican, Caesarian, or Augustan) which suggest "that Augustus was using buildings specifically to elicit support from the different political constituencies he needed to satisfy."<sup>28</sup>

Augustus' reign shows a focus on rebuilding the empire rather than on foreign conquest.<sup>29</sup> He uses art to promote his administration of "peace, abundance, devotion to duty and reverence for tradition."<sup>30</sup> But after his death, the social order changes, the ambivalence between *princeps* and Emperor, god and man, that had served to gain legitimacy, while keeping a Republican facade, would become more obviously authoritarian.<sup>31</sup>

As early as Trajan (AD 98-117) the nature of the Principate had changed. Trajan's column, built in AD 112, acts as a triumph, depicting his military acts and victory against the Dacians (AD 105-106).<sup>32</sup> This column (which also acts as his funerary site) can be compared to Augustus' Mausoleum. Augustus, however, did not ask for his military acts to be engraved.<sup>33</sup> This omission serves to propagate the idea of Augustus as "restorer of the peace in order to transmit his power... on the contrary, Trajan needed to emphasize himself as warrior and triumphator,"<sup>34</sup> as he lacked hereditary legitimacy. Similarly however, Trajan's column is crowned with a statue of himself, in the same manner as Augustus' Mausoleum. Thus, Trajan's column shows his desire to gain legitimacy through connection to Augustus, while at the same time "affirming his own character, originality and power."<sup>35</sup>

Artwork of this period loses its traditional form of naturalism and idealism of

<sup>23</sup> Cassius Dio, 13.

<sup>24</sup> Pausanias, Vol. I, xxii (introduction).

<sup>25</sup> Velleius Paterculus, 345.

<sup>26</sup> Elsner, *Art and Text*, 41.

<sup>27</sup> *Ibid.*, 41.

<sup>28</sup> *Ibid.*, 43.

<sup>29</sup> J.J. Pollitt, *The Art of Rome*, (Cambridge, 1995), 100.

<sup>30</sup> Elsner, *Art and the Roman Viewer*, 169.

<sup>31</sup> *Ibid.*, 169.

Classical Hellenistic style seen during the early Principate. In one relief medallion of Emperor Hadrian (AD 118-136) there is a depiction of Hadrian hunting, and offering his hunt to the statue of Apollo. The figures are done in idealized proportions, with proper weight distribution. Each body is separated from each so that the individual as an "organic unit and a corporeally beautiful whole"<sup>36</sup> can be realized. Figures in the third century however, begin to lose their corporal beauty, and rather than existing in natural groupings, overlap each other. The movement and expressive calm of the Early Empire is lost to jagged and exaggerated contours and gestures. These dramatic figures, anarchic in form, draw parallel with their chaotic society.<sup>37</sup> Marcus Aurelius (d. 180), emperor during this fatal period, notes in his *Meditations* the desire for uniformity and world law,<sup>38</sup> in hopes of reuniting his empire. In this falling empire, Diocletian emerged to create such a cohesive uniformity.

The most decisive change in the Principate can be perceived in Diocletian's reign, beginning in AD 289.<sup>39</sup> In the second half of the third century, the Roman Empire was troubled by internal and external wars which disrupted social order and tradition. The Empire was invaded on all fronts. In this time of chaos, usurpation by local army leaders throughout the empire caused "the traditional connections between the provinces [to be] dissolved and unity of the empire [to be] shattered."<sup>40</sup>

"He was the new Jupiter on earth who would master chaos and fling the rebelling giants to the ground; it was in this aspect that Diocletian was celebrated by panegyrists and artists."<sup>41</sup> The empire became a system of absolutes-as there was no longer an Augustus concerned with pleasing various factions, or carefully accumulating collections of titles to legitimize his power.

In this transformation of imperial power, there is a decline in Hellenistic imagery. The Greeks detestation of representations of pain could not express this era of chaos. In classical Greek imagery, to submerge man's dignity to the circumstances of life would be

<sup>32</sup> Ibid., 10.

<sup>33</sup> Velleius Paterculus, 345.

<sup>34</sup> Elsner, *Art and Text*, 23.

<sup>35</sup> Ibid., 24.

<sup>36</sup> H.P. L'Orange, *Artforms and Civic Life in the Late Roman Empire*, (Princeton, 1965), 85

<sup>37</sup> L'Orange, 88.

<sup>38</sup> Marcus Aurelius, *Meditations*, trans. M. Staniforth, (Baltimore, 1964), 65.

<sup>39</sup> Ammianus Marcellinus, *Res Gestae*, Vol. I., trans. J. C. Rolfe (Cambridge, Mass., 1952), xxiii (introduction).

seen as grotesque, as man is master of his world.<sup>42</sup> While Augustus may have been such a master, this mould no longer fit the crumbling Roman world.

Diocletian created a new imperium, and a new respect for it, by introducing a series of Oriental customs into imperial court procedure, most notably mandatory obeisance (*adoratio*) before the emperor<sup>43</sup>. "Everything connected with the emperor was called... *sanctissimus* or *divinus*."<sup>44</sup> These decrees show the influence that invasion has had on the empire, transforming the previous Graeco-Roman imperium into a soon-to-be monarch influenced by Eastern religion and philosophy.<sup>45</sup> No longer was there ambivalence about man or god, Principate or Dominate. Coming out of the chaotic third century, Diocletian reorganized and stabilized the empire through absolute control based on divine legitimacy.

In Diocletian's establishment of the Tetrarchy, he further organized the dishevelled Roman Empire. With four leaders, guarding both fronts (eastern and western), Diocletian protected against usurpations to the throne.<sup>46</sup> In AD 287, Diocletian named the two Augusti '*Jovius*' and the two Caesars '*Herculius*'. In this way, while he established an obvious superiority between the four leaders, he also gave them a common origin based on divine inheritance. This commonality replaced the personal individuality of the emperor.<sup>47</sup> Coin portraits show this idea of *similitudo*, so that "one emperor's portrait [could] be substituted for another and thus to be considered current under the four different imperial names." <sup>48</sup>

During Diocletian's vicennalia in AD 303, the monumental Rostra at the Forum Romanum was erected. The monument consists of five huge columns: the center statue is topped with Jupiter, while the outer four, symmetrically grouped around the god, depict the four tetrarch leaders. Again the idea of *similitudo* is stressed, as the four leaders are all of the same type, dress, gesture, and appearance.<sup>49</sup> Further, the sides of the column depict the emperor sacrificing, in an act of showing his *pietas* that foreshadows "the hero of Late Antiquity-the martyr and the ascetic, as the legends of martyrdom would replace the heroic myths of the Early Empire."<sup>50</sup>

<sup>40</sup> L'Orange, 40.

<sup>41</sup> Ibid., 41.

<sup>42</sup> Morey, 58.

<sup>43</sup> Pollitt, 210.

<sup>44</sup> Ammianus Marcellinus, xxiv (introduction).

<sup>45</sup> L'Orange, 41.

<sup>46</sup> Ibid., 45

Diocletian's reign lead toward an empire no longer diverse in religious cult-life, or depicted diversely in an artist's interpretation, but one where a strict and uniform government was implemented into all facets of life.

“The great regularity and lawfulness of this higher and eternal world now, with the reform work of Diocletian, descended into our temporal reality, and the confusing multitude of the obstinate and unruly natural forms were aligned and arranged according to the strict lines of a transcendent order and symmetry.”<sup>51</sup>

The use of religion, begun in the Early Roman Principate, coupled with Diocletian's absolutism, acted as the precedent for imperium in Late Roman Antiquity. By the end of the third century, the battle against the threat of the Empire's dissolution culminates in religious discrimination against the Christians in the Great Persecution (303-311). But "trying to unify the Roman world under a state church [would] only be fulfilled with the constitution of the Christian state."<sup>53</sup>

The imperial imagery of the Tetrarchy is not the end to the development of who the Emperor is and how he is to be portrayed. The Second Tetrarchy proved to be less successful as a symmetrical foursome-by AD 324, Constantine gained control over the empire as the sole leader.<sup>54</sup> A Christian convert,<sup>55</sup> Constantine used Diocletian's precedent of religious uniformity. Acting under the ancient Roman tradition of *pontifex maximus*,<sup>56</sup> he first attempted to unify the Christian church. Over time this sought-after unity expanded beyond the Christian church to the entire empire, by the exclusion and persecution of pagan religions.<sup>57</sup>

His conversion to Christianity was pivotal in the transformation of Christianity from a religion on the margins to an integral element in imperial power. No longer are statues or portraits attempts to imply pagan divinity or heritage to the great emperors of the past. Instead, imperial portraits lose this sense of time and continuity, in a flat and standstill position, gazing into the world of the eternal. Imperial imagery, the power of *imperium*, becomes based on the symbolic. From the first moment of Constantine's con-

<sup>47</sup> Ibid., 50.

<sup>48</sup> Ibid., 46.

<sup>49</sup> Ibid., 46.

<sup>50</sup> Ibid., 28.

<sup>51</sup> Ibid., 53.

<sup>52</sup> Pollitt, 210

<sup>53</sup> L'Orange, 64.



version, his acceptance to Christ is shown by the act of putting a Christian symbol on his shield.<sup>58</sup> The cross simultaneously becomes Constantine's symbol and the symbol of *imperium*. "In these circumstances, it is not difficult to imagine that venerating the symbol or deciding to call oneself a Christian became an indication of loyalty to Constantine himself."<sup>59</sup>

How did the Christ-figure, a human of humble means and no significance, who could act as a saviour, become an integral element and symbol of Roman *imperium*? The very concept is irrational and distasteful in the Hellenistic- influenced polity of the Early Roman Empire. Its origins and success come not from Hellenism therefore, but rather from the eastern front, where the first iconic imageries are seen.<sup>60</sup> With the move of the capital to Constantinople in 324, we see the emperor make official this shift from Hellenistic to Eastern conception of the imperial image.

In Constantine's search for stability through religious uniformity, like Diocletian, he focused on *similitudo* and symmetry. The Arch of Constantine (completed AD 315), erected after his victory over Maxentius (AD 312)<sup>61</sup> depicts his imperial endeavours. The figures are not in natural groups, but are arranged uniformly in rows, symmetrically organized around the central dominating figure of the emperor.<sup>62</sup> This organizational strategy corresponds to the domineering structure of the empire under Constantine.<sup>63</sup> But it was not only subordination to the emperor that was mandatory in the fourth century, the relief also creates subordination of the figures toward the outer framework. The whole-the empire-becomes greater than the individual.

The loss of the importance of individuality in Late Antiquity can be seen as the naturalistic portrait of the emperor is reduced into a simplified face and body. Late Antique imperial portraits become "vehicles of symbols and signs, fixed formula of expression of sacred attributes or certain insignia of state, all adhering to a higher and perpetual order into which the fleeting human being has entered."<sup>64</sup> Whereas the pagan imperial court merely demanded the acceptance of a rite, Christianity gave a stricter means of

<sup>54</sup> Ibid., 64.

<sup>55</sup> F. Millar, *The Emperor in the Roman World: 31 BC-AD 337* (London, 1977), 580.

<sup>56</sup> Suetonius, 63.

<sup>57</sup> Ammianus Marcellinus, 5.

<sup>58</sup> S. Mitchell et al., *Ethnicity and Culture in Late Antiquity* (London, 2000), 7.

<sup>59</sup> Mitchell et al., 7.

<sup>60</sup> Morey, 59.

uniformity, "the adhesion of the [individual] will to a theology, in a word, faith, a new life in a new people,"<sup>65</sup> to a greater whole.

The absolutism of imperium increased with successive emperors. Concurrently, art expressed this final transformation of imperium in Late Antiquity. The Theodosius Obelisk at the hippodrome in Constantinople shows this absolutism. Unlike the Early Roman Empire, whose figures are free in space, these figures are bound to one row, seemingly frozen in time, and subordinated to the central figure of the Emperor, "just as in real life individuals were firmly tied by the Dominate to their state."<sup>66</sup> With the figures turned on a profile, symmetrically placed around a supernaturally sized frontal image of Theodosius, the hierarchy of the state is literally set in stone.

While the Late Antique Emperors officially dropped the idea of imperial divinity, their artwork is as suggestive of the divine as was the Augustan *Prima Porta*, showing descent from the pagan Venus. Their divinity however would not be pagan but Christian. Constantine's court is depicted in imagery as

"an imitation of the divine court of Christ, the universal Emperor who sits arrayed in imperial purple on a blue globe in the apse-conch... as he rules the cosmos, seated on a blue globe, they rule the empire, as he grants gifts, so they bring him gifts. In visual imagery... the Emperor is imitator of Christ-the kingdom of this world is the image of the kingdom of heaven."<sup>67</sup>

Though apotheosis was no longer practiced in Late Antiquity, upon his death in AD 337 Constantine was buried in the church of the Holy Apostles in Constantinople. On either side of this monumental tomb are six symbolic tombs of the Apostles.<sup>68</sup> The message of this imperial site is clear: Constantine was meant to be seen as a Christ-like figure.

In Justinian's reign (AD 524-565), the visual impression of direct linkage between the temporal world and the eternal reinforced legitimacy, even though it was not directly a statement of divine origin. This linkage is clearly manifested through Justinian's frontal gaze. In the *Prima Porta*, and other such works of the Early Roman Empire, the gaze of the Emperor is always averted from the viewer to make clear his divine separation

<sup>61</sup> Ibid., 56.

<sup>62</sup> L'Orange, 89-90.

<sup>63</sup> Ibid., 89-90.

<sup>64</sup> Ibid., 24.

<sup>65</sup> Mitchell et al., 4.

<sup>66</sup> L'Orange, 100.

from his people. In Late Antiquity, the Emperor stares straight into the eyes of his beholder. This eye contact, coupled with the fact that Justinian and Theodora are often portrayed within a sacred space, serves two purposes. First, both the viewer and the Emperor share common ground in that, they are both worshipping Christ. Thus the viewers can identify with their leader.<sup>69</sup>

This Late Antique imagery also serves another purpose. In the Early Roman Empire, imperial visual imagery is used to convey a message of legitimacy based on the strength and power of a stable and prosperous Empire. In Late Antiquity, artwork had the task of justifying a new kind of Emperor - one that could no longer claim legitimacy by such means. This shift in *imperium* shows that "physical power and idealism could no longer be used as conveyors of imperial power, for this power had long slipped away from Roman imperial hands."<sup>70</sup> It allows a weak empire to be acceptable by its analogous relationship to their humble Saviour. The change to Christianity allows people to seek, not happiness on earth, but a promise for the afterlife, a better life. This is the second impact of Justinian's frontal gaze - Justinian takes on the role of mediator, between the viewer and the divine.<sup>71</sup> Through his mediation, he becomes essential to the viewer and to the Roman Empire. For in his gaze there is the promise and the path to the afterlife, the divine.

Early Roman imperial art focuses on the uniqueness of the emperor through its usage of mythic-historical events and idealized naturalism. By contrast, in later Roman imperial art what is stressed is not the individual, but the hierarchic order of the world.

“How different this is from the specific events which glorify Augustus: on Theodora's mantle is no assertion of historical achievement but rather the sacred and eternal narrative of the Magi bringing gifts to honour the nativity of Christ. Augustus wears his own history mythologized on his cuirass; Theodora wears a witness to the incarnation.”<sup>72</sup>

While the art of Late Antiquity is flat, linear and schematic, the viewer sees these images as naturalistic in that they are living objects,<sup>73</sup> which communicate, by their intense gaze, a promise of a path to a greater place.<sup>74</sup> Imperial imagery is no longer called "to evoke a particular person, but an abstract relationship."<sup>75</sup> This role as mediator had

<sup>67</sup> Elsner, *Art and the Roman Viewer*, 180.

<sup>68</sup> Millar, 551.

<sup>69</sup> Elsner, *Art and the Roman Viewer*, 160.

been foreshadowed in the earlier Roman Empire, by the representations of the emperor as a practitioner of sacrifice.<sup>76</sup> But by also making the early emperor divine, the Roman populace is excluded. While this may have been an effective way of reigning during the height of Roman strength, it could no longer function in Late Antiquity. With the East and West at odds, and with usurpations and foreign invasions becoming common, the Emperor offers himself as the new saviour. It is through his mediation that the divine world can be attained. In exchange for his mediation, his imposing frontal gaze and sacred imagery demand all subscribe to his own God, his own state religion, his uniformity and absolutism.

The voyage through the visual imagery of the Roman *imperium* shows how power and fate can be personified. From the period of the Principate, through the Tetrarchs and Dominate of the third century, to the Christian Emperors of Late Antiquity, we see a series of rulers whose imperial imagery is not only innovative but omnipresent.<sup>77</sup>

The Late Antique emperor does not work within the traditional imperial cult but rather turns to a tradition which promises a path to a better world. No longer does the world view imperial imagery as paying court to the emperor's strength<sup>78</sup> but rather views the emperor as a means of escape from the misery permeating throughout the empire. This is the power of the Late Antique Emperor, manifested and propagated through his visual imagery.

"Crede mihi; plus est, quam quod videtur, imago"-"Believe me: an image is more that it appears to be."- Ovid, *Heroides* 13.155.

<sup>70</sup> Morey, 59.

<sup>71</sup> Elsner, *Art and the Roman Viewer*, 160.

<sup>72</sup> *Ibid.*, 180.

<sup>73</sup> Nelson, 143-4.

<sup>74</sup> *Ibid.*, 158.

<sup>75</sup> Elsner, *Art and the Roman Viewer*, 189.

<sup>76</sup> *Ibid.*, 188.

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<sup>77</sup> Elsner, *Art and the Roman Viewer*, 160.

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# THE PREVALENCE OF CHRISTIANITY IN ROMAN BRITAIN TO AD 410

Janka Dowding

Popular mythology claims that Joseph of Arimathea introduced Christianity into Britain in AD 63 when he brought the Holy Grail to Glastonbury after Christ's crucifixion. As this story demonstrates, a befuddling mix of myth, tradition and fact dominates the period preceding the Roman withdrawal. The literary evidence comes primarily from later sources like Bede and Gildas, who depend on older sources that have since been lost. In these texts it is often difficult to differentiate fact from fiction, as well as to establish with any certainty the depth to which Christianity had infiltrated the island. When the Romans withdrew from Britain in the early fifth century, they not only left behind a vast Roman culture, but also a religion, Christianity, which was inherently Roman. In the last centuries of the Roman Empire, Christianity was a major factor in defining oneself as being Roman, or possessing *Romanitas*. This held true even in areas as remote as Britain, but very little has been done to explore the correlation between Christianity and 'Romanness.' Twenty years ago, scholarship was remarkably lacking in explaining the extent of Romano-British Christianity. Given the dearth of literary and historical sources from this time period, students of Romano-British Christianity must inevitably turn to archaeology. In 1930, archaeologist and historian Collingwood emphasized the fact that there was very little evidence for Christianity.<sup>1</sup> However, since Jocelyn Toynbee's study of Christian art in Britain in 1953, archaeologists have discovered hundreds of new sites and artifacts. Dorothy Watts in particular has re-evaluated many previously ignored sites as well as introduced new indicators of Christianity. As a result, new research has proven that Christianity was not solely an urban, upper-class phenomenon. Instead, it had widespread appeal throughout Britain and elicited a deep commitment from its adherents, which allowed Christianity to persist even through the pagan attacks of the fifth century AD and beyond. New archaeological

1 D. Watts, *Christians and Pagans in Roman Britain* (London, 1991), 11.

evidence supports the primary sources that argue that Christianity penetrated a great further into the British land and society than previously thought.

There is a lack of literary sources from Late Roman Britain. Gildas, who wrote in the sixth century AD, laments in his *De Excidio Britanniae* that he cannot use very many literary remains from Britain because "such as they were, are not now available, having been burnt by enemies or removed by our countrymen when they went into exile."<sup>2</sup> However, there is some evidence of Christianity in Britain by the late second century. Tertullian, a North African scholar, claims in his *Adversus Iudaeos* that by AD 200 Christianity was already established in the more remote territories of the Roman Empire. He then lists those areas and makes mention of "*Britannorum inaccessa Romanis loca*" which were said to be "*Christo vero subdita*."<sup>3</sup> While this passage is rather vague, it nevertheless demonstrates that Christian writers were aware of Britain and its Christian inhabitants. Origen, a contemporary of Tertullian, also makes mention of "*the terra Britanniae*" as a region on the borders of the civilized world. This helped to demonstrate the triumph of the Church "*quae mundi limites tenent*."<sup>4</sup> Similar to Tertullian, Origen remarks that even the "end of the world" had a population of Christians worth mentioning. A question that arises from both of these accounts is how Tertullian and Origen received knowledge of Christianity in a place as remote as Britain. Most likely they received accounts through traders who sailed between Britain and the main trading centers of the Roman Empire.

Britain did not receive nearly as many missionaries as other remote parts of the Empire. Instead, the transmission of Christianity came in the form of trade routes from the Mediterranean. Trade allowed for British pilgrims to travel to the Continent, where they could experience Continental Christianity and then return and put their new-found beliefs into practice. Or, it could be the other way around, in that there was an increased demand by British Christians for passages to holy sites on the Continent.<sup>5</sup> Tertullian and Origen were from Carthage and Alexandria respectively, both large trading centers of the Empire. First- and second- century Greek coins from Carthage as well as Gallic swords have been discovered in Britain. Margaret Deanesly concludes that "there is thus no lack of evidence of sea trade between western Britain, Gaul, and the Mediterranean, and the possibility that here also Christianity came with the traders cannot be ruled out."<sup>6</sup> It stands to reason then

<sup>2</sup> Gildas, *De. Ex.* 17 (the page numbers of the relevant edition, rather than section numbers, are used here for ancient sources).

<sup>3</sup> Tertullian, *Adv. Iudaeos* 7, discussed by K. Hylson-Smith, *Christianity in England from Roman Times to the Reformation*. Vol. 1, *From Roman Times to 1066* (London, 1999): 37.

<sup>4</sup> Origen, *Homily 4 on Ezekiel*, discussed by Hylson-Smith, 37.

that traders would have brought stories from Britain and in addition introduced traditions into Britain.

Gildas is an important source, for his writings are the earliest extant on Roman Britain. Gildas wrote in the sixth century AD, with a deep interest in the state of Christianity in Britain. He explains that before Diocletian's reign (he supposes) "Christ's precepts were received by the inhabitants without enthusiasm; but they remained, more or less pure." During the persecution under Diocletian, "churches were razed throughout the world, the holy scriptures... were burned in the squares, and the chosen priests of the Lord's flock, together with their harmless sheep, were slaughtered - so that there should... be no trace of the Christian religion remaining."<sup>7</sup>

Gildas makes the first mention of three British martyrs, St. Alban of Verulam, Aaron and Julius of Caerleon (also known as Caerwent), as well as many others. Gildas's narrative suggests that their martyrdoms took place in the early fourth century. Christianity became much more popular after the Peace of the Church, or the Edict of Milan, in AD 313. Before this time, however, there is evidence of a limited Christian population. It is safe to assume that the martyrdoms of three early British men Alban, Aaron, and Julius are based on historical fact, given that the writings of Bede, Gildas, Constantius, and Venantius Fortunatus all mention them. While there is still much debate over the exact dates of the martyrdoms, their martyrdoms most likely took place under the persecutions of Emperor Decius in the third century, or as Gildas claims, in the beginning of the fourth century.

This also means that there was most likely a strong Christian base by the fourth century in Britain to produce so many martyrs. Bede also makes mention of the persecution under Diocletian: "Diocletian in the east and Maximianus Herculius in the west ordered the churches to be laid waste and the Christians persecuted and slain... it continued without ceasing for ten years accompanied by the burning of churches, the outlawry of innocent people, and the slaughter of the martyrs. In fact Britain also attained the great glory of bearing faithful witness of God."<sup>8</sup>

Bede is another critical primary source in studying the state of Christianity in Britain. If not for his work, knowledge of British Christianity would be virtually lost until St.

<sup>5</sup> C. Thomas, *Christianity in Roman Britain to AD 500* (London, 1981), 348.

<sup>6</sup> M. Deanesly, *The Pre-Conquest Church in England* (London, 1963), 5, discussed by Hylson-Smith, 38.

<sup>7</sup> Gildas, *De. Ex.* 19.

Augustine's mission in the sixth century. Bede writes his narrative in the eighth century and seeks to demonstrate the chronology of Christianity in Britain. In one particularly interesting passage Bede writes that in AD 156<sup>9</sup> "Lucius, a king of Britain, sent him [Bishop of Rome Eleutherius] a letter praying him that he might be made a Christian."<sup>10</sup> The *Historia Brittonum* from a century later also mentions this event. Reverend Gunn, the translator of the *Historia Brittonum*, provides an interesting note on the text regarding the history of Lucius's family. He explains that Lucius's grandfather Caractacus was exiled from Britain and they lived in Rome for an extended period of time: "At Rome, these unfortunate exiles could not but admire the virtues of the Christians who abounded in that city."<sup>11</sup> As a result of their experiences in Rome, when the family returned to Britain they sought to convert to Christianity, which was carried out under Lucius.

Several other sources also mention the conversion of King Lucius. The *Liber Pontificalis* (a possible source for Bede) and successors to Bede's text, such as the *Anglo-Saxon Chronicle* and the *Historia Brittonum*, all write about this event. Nennius writes that "after the Birth of Christ, one hundred and sixty-seven years, King Lucius, with all the chiefs of the British people received Baptism, in consequence of a legation sent by the Roman emperors and Pope Euaristus."<sup>12</sup> This is slightly different from Bede's account, which states that King Lucius specifically requested the baptism. Other sources, like the one Nennius is using here, claims that it was in fact Pope Eleutherius that spurred the conversion. The *Anglo-Saxon Chronicle* echoes Bede: "Eleutherius succeeded to the bishopric of Rome...To him Lucius, king of Britain, sent letters - asked that he might be made a Christian, and he carried out what he asked, and afterwards they remained in the true faith until the rule of Diocletian."<sup>13</sup> This shows that there were multiple accounts concerning the early history of the Church in Britain that have since been lost. It also demonstrates that there was a tradition of Christianity long before Constantine's conversion.

The authors themselves are another important detail surrounding the issue of Christianity in Roman Britain. Written sources provide valuable evidence about both politics and religion in later Roman Britain and they are all by, and about, Christians. "It certainly suggests that the educated and literate were more and more likely to adopt what was now the official faith of the Roman world. Opposition is manifested through heresy, not

<sup>8</sup> Bede, *HE* 28.

<sup>9</sup> The correct date of this event is actually AD 161.

<sup>10</sup> Bede, *HE* 25 states: 'Misit ad eum Lucius Britanniarum rex epistolam, obsecrans ut...Christianus efficeretur.'

<sup>11</sup> *HB* 135, n. 48.

<sup>12</sup> *Ibid.*, 57.

paganism."<sup>14</sup> Henig proposes that there may have been a shift towards Christianity at the end of the fourth century.<sup>15</sup> After Constantine, an overwhelming majority of Roman emperors were Christian. Once Christianity had the support of the Roman state behind it, it could play a much more important role in the far-reaching areas of the empire. Most importantly, Christianity became associated with *Romanitas*. For example, Sidonius Apollinaris was a "defender at one and the same time of his diocese and of *Romanitas*."<sup>16</sup> Once Christianity became the official religion of the Roman Empire, aristocrats wishing to maintain their Roman prestige began to shift their attentions to Christian matters. It is no surprise then that in the fourth century Britain had representation in many church meetings. In AD 314, three British bishops attended the Council at Arles: Restitutus the Bishop of London, Eborius of York, and Adelfius of Lincoln. Later in AD 359, there were bishops at a council in Rimini.<sup>17</sup> This demonstrates that Britain possessed a committed, organized church that spread from the South East all the way up to Lincoln in the North East.

Further literary references to Romano-British Christianity are virtually non-existent for the period up to the withdrawal of the Roman forces. Therefore, in order to determine the extent of Christianity in the period from the conversion of Constantine to c. 410, literary evidence must yield to archaeological evidence.<sup>18</sup> When Jocelyn Toynbee completed her initial work in 1953 on Christian archaeological findings in Britain, she found 50 items that could be viewed as Christian artifacts. Twenty years later, C.F Mawer provided another catalogue of British Christian items, which raised the total to 260 items of Christian significance. However, Mawer concluded from her findings that "Christianity in Britain was not only far less prevalent but also neither as complex nor as subtle as the claimed evidence indicated."<sup>19</sup> She narrowed her finds so that only 70 of these objects could be of "definite Christian significance."

Miranda Green also claimed that Christianity was not very widespread in Roman Britain. She labeled archaeological sites that were located primarily in towns, and she did not have any evidence for rural Christianity. Green depended almost entirely on archaeological references, with only a few literary references to Bede. "The distribution of Christian objects in Britain during the late Roman period shows a thin scatter throughout

<sup>13</sup> *Anglo-Saxon Chronicle*, 8.

<sup>14</sup> M. Henig, *Religion in Roman Britain* (London, 1984), 216.

<sup>15</sup> Henig, 216.

<sup>16</sup> *Ibid.*, 226.

<sup>17</sup> Hylson-Smith, 54.

<sup>18</sup> Watts, 11.

southern and eastern Britain."<sup>20</sup> Most archaeological evidence, according to Green, "is associated with the owners of Roman villas." Thus Green concludes that Christianity was popular mainly among the aristocracy of urban Britain, not among the lower rural classes.<sup>21</sup>

Archaeological evidence regarding Romano-British Christianity has grown substantially since the writings of Mawer and Green. When Thomas wrote in 1981, he wrote about several possible archaeological sites that could possibly be Christian. Since his research, scholars like Dorothy Watts have since revisited the previous evidence and re-interpreted it. As a result, there are now much greater numbers of sites that can be more confidently posed as Christian.<sup>22</sup>

One of the new approaches to gauge Christianity in Britain is the analysis of cemeteries. Prior to Dorothy Watts's and Charles Thomas's research, "tangible evidence [was] lacking in Britain, at least so far as burials are concerned, and up to now there have been no certain Christian cemeteries identified from the Roman era."<sup>23</sup> Indeed, Watts's data has proven that Christianity was much more prevalent in rural areas than Green thought: "Of the thirteen cemeteries presumed to be Christian, seven are from rural sites."<sup>24</sup> Critical criteria for a Christian cemetery included west-east orientation of the burial places, undisturbed graves, an absence of decapitated bodies, contemporaneous pagan burials, and absence of grave goods, especially the coin for Charon's fee.<sup>25</sup> Another important criterion that has not received proper attention is the presence of infant burials. Prior to Christianity, pagan religions periodically engaged in infant purging and rarely gave small children proper burials. When Christianity became popular, these practices changed. In his *Apologeticus*, Tertullian condemns those who commit infanticide by abortion or exposure.<sup>26</sup> Children were a very special group to Jesus, and there are many references in the New Testament instructing Christians to be child-like. In addition, by the early fourth century, baptism was available to infants, which made them members of the Christian community, and therefore worthy of a proper Christian burial in a cemetery with other Christians. Thus the presence of small children in cemeteries may denote an almost certain tie with Christianity. Another new discovery was the association of cemeteries with

<sup>19</sup> C.F. Mawer, *Evidence for Christianity in Roman Britain* (Oxford, 1995), 142; discussed by Hylson-Smith, xxi.

<sup>20</sup> M. Green, *The Religions of Civilian Roman Britain* (Oxford, 1976), 61.

<sup>21</sup> *Ibid.*, 63.

<sup>22</sup> Watts, 215. I am indebted to Watts' research regarding the criteria of identifying Christian cemeteries and churches, as well as her re-interpretations of previous research, most notably that of Charles Thomas.

<sup>23</sup> *Ibid.*, 38.

### Christian churches.

Church sites are also critical for establishing Christian presence in Britain. Literary evidence attests the presence of churches at Silchester, Caerwent (also known as Caerleon, who had two notable martyrs in Aaron and Julius), and (from Bede) Canterbury. Charles Thomas researched sites that had a similar shape to churches on the Continent. But Dorothy Watts argues that most communities were not rich enough to build such elaborate buildings. Instead, she poses that many square-shaped buildings (especially in rural areas) could have served as religious buildings. The rudimentary forms of these churches may reflect a lack of Roman sophistication, as well as the slowness in which *Romanitas* penetrated those areas.<sup>27</sup> Thus, it is much more difficult to identify buildings as churches that lack a "typical" construction or Christian iconography. Watts proposes that "the presence of non-domestic, non-industrial, or non-agricultural buildings in association with cemeteries of the fourth century and beyond is an indicator of the Christian identity for both the building and the cemetery."<sup>28</sup> Given the fact that cemeteries have not received wide attention from scholarship, their examination has produced many more possible Christian sites, many of which are located in rural areas. Watts concludes from her research that "of the seventeen [churches] analyzed, eight were urban and nine rural."<sup>29</sup> This is a vastly different conclusion from Miranda Green's research, who found that Christianity was present only in towns. The fact that there are so many more rural sites reaffirms the belief that Christianity was in fact much more widespread in Britain, and that it appealed to all classes, not just the elite.

In addition to the poverty of the buildings, many were originally Romano-Celtic temples that were converted to serve as Christian centers: "temples often replaced earlier Celtic structures or marked a sacred place."<sup>30</sup> These sites may have served a symbolic function in that they showed the new religion (i.e. Christianity) triumphing over the new. As a result, there is not a "typical" construction for churches, and indeed many would resemble pagan temples without closer inspection. Some churches were not even their own buildings, but were extensions of aristocratic villas, which is the case in the Lullingstone site.

<sup>24</sup> Watts, 220.

<sup>25</sup> *Ibid.*, 88.

<sup>26</sup> Tertullian, *Apologeticus*, 9.4, discussed by Watts, 49.

<sup>27</sup> Watts, 141.

<sup>28</sup> *Ibid.*, 115.

Villas and house churches contributed greatly to the spread and upkeep of Christianity in rural areas. Christian landowners could potentially encourage their tenants to adhere to Christianity by having a convenient church for the local community. A prime example of such a church is the Lullingstone site. Although the villa was eventually abandoned, its house church was still used by the surrounding population for years afterward.<sup>31</sup> Many of these constructions display murals and paintings with both pagan and Christian iconography. These depictions often show characters like Orpheus; in the early history of the church, Orpheus became a representation of Christ. Like Orpheus, Christ tamed wild animals and descended into the Underworld to free trapped souls. As a result, these depictions of Orpheus can be an indication of Christianity as well as the continuity between the Classical Roman religion and the new. Villas and country estates were critical in promoting and tending to the spread of Christianity in areas far from the influence of Romanized towns.

Another valuable method of determining the popularity of Christianity is to evaluate how many pagan shrines were in use compared to pre-Christian times. "Many of the Romano-Celtic temples were extremely active during the fourth century even though the Roman world was officially Christian... Some of the pagan town temples did have a shorter life than some of the country examples... of the town shrines only a few show evidence of use after 350."<sup>32</sup> This evidence suggests that as Christianity became more prominent in Britain, pagan practices dwindled. This would coincide with the fact that many aristocrats as well as merchants dwelled in the cities, the classes most concerned with Romanitas. After Christianity became the official religion of the Roman Empire, these same people had a vested interest in adopting the new religion to retain their Romanitas.

By the time of the Roman withdrawal, Christianity had penetrated not only into British towns, but into rural areas as well. When scholars first reviewed literary evidence regarding the period prior to the Roman withdrawal, they concluded that the sources were embellishing the prevalence of Christianity to fit their narratives. However, advances in archaeology have proven and continue to prove that Christianity was much more prevalent in Britain than previously expected, thus strengthening the claims of writers like Bede and Gildas.

Country villas played a vital role in spreading Christianity into these parts. Romano-

<sup>29</sup> Watts, 220.

<sup>30</sup> *Ibid.*, 107.

<sup>31</sup> *Ibid.*, 100.



British aristocrats who wished to uphold the idea of *Romanitas* adopted the customs of Christianity and built churches adjacent to their holdings. These buildings continued to be used by the general population even after the owners of the villas had departed. Archaeological evidence has played a vital role in re-assessing the prevalence of Christianity in Britain. Scholars such as Frend and Green, who originally saw Christians as a very small minority, have had to amend their views in light of new developments. Even Charles Thomas's work from 1983 has since been updated by Dorothy Watts. Watts re-evaluated sites that previous archaeologists wrote off as mere buildings, for they did not believe that there was a lower class component to Romano-British Christianity, which is not the case. Buildings that seemingly held no purpose have now been identified as poor churches. Thomas had limited his identification of churches to those buildings with clear apses or separate rooms for worship. However, these kinds of structures would not have been affordable to a poor rural community. Christianity was therefore much more alive in the British landscape than was previously thought.

Christianity was widespread in Late Roman Britain and it possessed roots in Britain strong enough to persist through the Anglo-Saxon invasions in the mid-fifth century and beyond. Although previous scholarship has painted Christianity as a minority religion in Britain, residing only in the towns and among the upper classes, new evidence has expanded this view. It is true that Christianity played an important role in maintaining Roman tradition in cities, which prevented Christianity from disappearing. The importance of urban Christianity is great, but it is also important to realize that Christianity was not limited to the more Romanized centers of Britain; it had more widespread appeal, even among the lower classes. Indeed, the rusticity of most of the church sites implies that lower-class Christians were even more common than rich, urban Christians. Scholarship has advanced a great deal in the last few decades, and with the amount of new evidence that scholars have found in such a short span of time, it stands to reason that there is still much more to be found and even more to be re-evaluated. As more evidence is unearthed, Christianity will prove to have been more prevalent than contemporary writers have believed.

<sup>32</sup> Green, 63.

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# "UNLESS ALL THAT THE POETS SING IS FALSE":

## THE ROLE OF PYTHAGORAS' SPEECH IN OVID'S METAMORPHOSES

Norah Franklin

Book XV of Ovid's *Metamorphoses* contains a lengthy soliloquy spoken by the fictionalized figure of the ancient philosopher, Pythagoras. In the past few decades, Ovid's Pythagoras episode has been the subject of much scholarly debate. Critics have generally agreed that the poet is being playful with Pythagorean philosophy. Yet even those critics who argue for the episode as parody recognise that parts of Pythagoras' speech correlate with the themes of the first fourteen books of the *Metamorphoses*. Ovid's fusion of comedy and gravity in this pivotal scene suggests that the poet meant to offset its significance. Perhaps the poet deliberately voiced serious sentiments through a character who would speak with "unheeded lips" (516). When read for its more serious content, Pythagoras' speech brings much unity to the first fourteen books of the *Metamorphoses* and complicates the seemingly straightforward conclusion of the poem.

In 1966, Brooks Otis argued for Pythagoras' speech as a "philosophic 'digression' by which Ovid, like Virgil in *Aeneid VI*, tried to give dignity and solemnity to his patriotic-Augustan ending."<sup>1</sup> In his *Ovid as an Epic Poet*, Otis places great emphasis on the end of Pythagoras' speech, especially the point at which the philosopher recalls Helenus' prophecy for Rome. Ovid's Pythagoras reports that Helenus foresees "that men descended / from Trojans are to found a city, and / no city is or shall be greater than / that city" (530). Otis identifies the recounted prophecy as "the Augustan orientation" of Pythagoras' philosophical digression. Yet Otis feels Ovid's plan for Book XV was an "external one which develops a motif that [is] peripheral rather than central to the preceding sections."<sup>2</sup>

In 1969, Charles Segal agreed with Otis' argument, saying: "Ovid wanted to create an

<sup>1</sup> Brooks Otis, *Ovid as an Epic Poet* (Cambridge: Cambridge University Press, 1966), 280-281.

Augustan epic, but was incapable of doing so."<sup>3</sup> However, Segal contends that the Pythagorean episode is meant to be parody, and thus "both the 'historical' and 'philosophical' sections of the closing books [...] do not contrast so markedly with the rest of the poem."<sup>4</sup> Segal sees "wit and playfulness" in Ovid's rendering of Pythagoras.<sup>5</sup> He questions how "the cultured Roman of Ovid's day" would read the figure, noting that Pythagoreans at this time were regarded as "a dubious and suspicious lot."<sup>6</sup> According to Segal, Pythagorean vegetarianism "seems to have been a point of special ridicule in Roman literature."<sup>7</sup> Citing examples from Horace and Juvenal, Segal points out that the dietary laws of vegetarianism were "often satirized as mildly inane."<sup>8</sup> More recent scholars have continued to read Ovid's Pythagoras speech with scepticism. John F. Miller argues that "against the background of the other speakers in the *Metamorphoses*, Pythagoras' single-minded, somewhat rambling, and interminable speech comes off like the sermon of a windbag."<sup>9</sup> Citing Callimachus and Horace, Miller maintains that the Pythagorean belief in metempsychosis, the transmigration of the soul, was also a subject of ridicule in the Graeco-Roman world. Miller argues that Ovid's depiction of Pythagoras' memory of his past life as "Euphorbus, son of Panthous" is meant to be a playful parody of the philosopher Pythagoras' "grand claim to recall an earlier death."<sup>10</sup> From Miller's contention, one could conclude that Ovid is also being playful, as Pythagoras' primary agenda seems to be to promote vegetarianism, not to philosophize metempsychosis.

Yet even as critics offer a playful reading of the Pythagoras episode, they recognise that there is material in the speech that "contains some serious import for the poem as a whole."<sup>11</sup> Although we may question "the vehicle [with] which Ovid has chosen to convey"<sup>12</sup> the more significant material, we must still examine the possibly relevant substance of the speech. Brooks Otis focuses on Helenus' prophecy and so-called Augustan ideology in his reading of the Pythagoras episode, but what is remarkable about the speech is, arguably, its emphasis on a world in flux. A closer reading of Pythagoras' philosophies

<sup>2</sup> Otis, 304.

<sup>3</sup> Charles Segal, "Myth and Philosophy in the *Metamorphoses*: Ovid's Augustanism and the Augustan Conclusion of Book XV," *American Journal of Philology* 90 (1969): 258.

<sup>3</sup> Charles Segal, "Myth and Philosophy in the *Metamorphoses*: Ovid's Augustanism and the Augustan Conclusion of Book XV," *American Journal of Philology* 90 (1969): 258.

<sup>4</sup> Segal, 262.

<sup>5</sup> Segal, 274.

<sup>6</sup> Segal, 280.

<sup>7</sup> *Ibid.*

<sup>8</sup> Segal, 281.

<sup>9</sup> John F. Miller, "The Memories of Ovid's Pythagoras" *Mnemosyne* 47.4 (1994): 477.

<sup>10</sup> Miller, 478.

reveals that there is much in the speech that correlates with the first fourteen books of the *Metamorphoses*.

Ovid's Pythagoras speech can be seen as a device that brings great unity to the preceding books of the poem. As Pythagoras argues for vegetarianism using the theory of metempsychosis, he recalls his past life as Euphorbus. Yet in a movement to more universal philosophy, Pythagoras claims that "all things change, but no thing dies" (519). For Pythagoras, the spirit "occupies a body, but / it never perishes" (519). After reading the first fourteen books of the *Metamorphoses*, the philosopher's statement rings true. When Ovid illustrates metamorphosis, he often contemplates the spirit that remains as form changes. In Book II of the poem, Jove rapes Callisto and the nymph is "banished from Diana's band" (55). Juno punishes Callisto by turning her into a bear. We are told that Callisto's "arms began to sprout rough, shaggy / black hairs" and "her hands began to curve and lengthen into hooked claws" (56). Yet as a bear Callisto "retains the mind she had before, / and shows her suffering with endless moans" (56). Even when Ovid does not focus on the psychology of a metamorphosis, he often shows the enduring spirit through a relationship between the original and changed forms. For example, when Niobe's children are killed by Apollo and Diana, grief makes "her stony, stiff" and "her face is deathly pale" while "above sad cheeks, / her eyes stare motionless" (189). Fittingly, Niobe is "carried to her native land" and transformed into a rock that "sheds tears" (189).

Furthermore, in his philosophy of metempsychosis, Pythagoras stresses a certain unpredictability and randomness of the transmigration of the soul. He believes that "the spirit wanders: here and there, at will, / the soul can journey from an animal / into a human body, and from us / to beasts" (519). Ovid has illustrated the randomness of transmigration throughout the first fourteen books of his poem. In Book IX, Iole tells the story of the metamorphosis of her sister, Dryope. She relates how Dryope picked "some blossoms to delight her infant son" and how "drops of blood" dripped "down from the blossoms" (302). Later, Iole discovers that a "nymph had changed into this plant" in order to escape "lewd Priapus" (302). Dryope is changed into a tree for her actions yet she is able to communicate some final words. She begs that her son be kept "far from pools; and he must not / pluck any flowers from trunks" as "any bush / he sees [...] may be / the body of a goddess" (304). Although Dryope's advice for her son seems overly cautious, the *metamorphoses* Ovid narrates are often characterized by the randomness of which she speaks.

<sup>12</sup> Ibid.<sup>11</sup> Segal, 280.

<sup>12</sup> Ibid.

Pythagoras' belief in the permanence of the soul and the unpredictability of transmigration in a world of universal change appears to correspond with Ovid's conception of metamorphosis.

As Ovid's Pythagoras digresses from his lecture on vegetarianism and metempsychosis, he begins to speak passionately about flux in the world at large. The philosopher illustrates the movement of time as "a river, flowing on an endless course" (520). He describes the *metamorphoses* that occur as night becomes day, as flowers grow, as seasons change, and as children mature. Yet Pythagoras also refers to the decline of the ages from "gold to iron" (523), an allusion that recalls Book I of the *Metamorphoses*. In Book I Ovid provides a detailed account of "the four ages," beginning with the first age in which "no law / and no compulsion [were] needed" (6). During this "age of gold" the forests "stood unfelled" (6) and the Earth "offered all that one might need" (7). According to Ovid, quality of life declined with the "silver age" and "the race of bronze" (7). The "last age was hard iron" and "this, the worst of ages, [...] gave way to every foul impiety" (8). Ovid tells us that Jove washes the impious inhabitants of the age of iron from the Earth with a flood to begin again with "a new race, one far different from the first" (12). Ovid's inclusion of the myth of the decline of the four ages in Pythagoras' speech suggests that the poet wishes to imply that he and his character are working with similar material.

Moreover, Pythagoras continues his speech with a discussion of changing landscapes and places. He remarks that he has "seen / what once was solid land turn into sea, / and what before was sea turn into land" (523). He says that while "here nature has new fountains flow, [...] here / she blocks their course" (523). Yet in this part of the speech, Pythagoras moves from universals back to particulars, and the examples he cites evoke some of the *metamorphoses* Ovid has described in the previous books. Pythagoras begins to list various bodies of water, the natures of which have changed over time. He cites "Anigrus' waters" that, once "pure enough / to drink," are now "better left untouched / [...] for there the biform centaurs bathed the wounds / inflicted by the bow of Hercules" (523-524). Pythagoras' mention of Hercules recalls Ovid's treatment of the Hercules myths throughout the first fourteen books of the poem. The connection between poet and character is emphasized by Pythagoras' apparent awareness of the relationship as he makes the disclaimer, "unless all that the poets sing is false" (524). Throughout this part of Pythagoras' speech, the philosopher refers to *metamorphoses* that Ovid could easily have included in his poem. He also overlaps with Ovid's material twice more, mentioning both "Salmacis' horrid pool" of Book IV and the voyage of Jason's Argo of Book VII. As Pythagoras catalogues various *metamorphoses* in the natural world, the character and his

author seem one and the same. If one reads Pythagoras' speech for its relationship to the first fourteen books of the *Metamorphoses*, one could conclude that Ovid believes that nature is organised by principles of change and flux.

The serious and relevant material in Ovid's Pythagorean episode rivals the parodic and playful segments. Ovid has combined humour and solemnity in Pythagoras' speech. At the beginning and end of the scene, the character Pythagoras' presence is overwhelming as he argues, humorously, for vegetarianism. Yet during the middle parts of the speech, Pythagoras' presence seems to give way to a different voice, possibly the poet's. Perhaps Ovid's humour is an "external [plan]"<sup>13</sup> to offset the weight of the more serious parts of the speech. Ovid may have intentionally chosen to speak significant words through a figure who would lecture "with learned but unheeded lips" (516). As Pythagoras' speech shifts from flux in the natural world to a discussion of changing eras, he speaks of the rise and fall of cities and nations. If the episode is read without entertaining the notion that it is parodic, this section of the speech can be seen as subversive and radical.

Otis feels that Ovid has Pythagoras meditate on the power of Rome in an attempt to assert Augustan themes in the conclusion of the poem.<sup>14</sup> He calls the section "Apotheosis Romuli," the apotheosis of Rome.<sup>15</sup> Yet what Otis appears to forget is that Pythagoras' speech is about a world that is organized by principles of change. Pythagoras introduces his contemplation of empire saying, "here some nations gain and grow in strength, there others lose the day" (529). The philosopher recalls that "Troy had might and men and wealth" while "now, razed, all she can show are ancient ruins--- / her only riches are ancestral tombs" (529). Pythagoras points out that "the land of Sparta now / is worthless; proud Mycenae is laid low" (530). He asks, "what has the Thebes of Oedipus to show / except for her own name?" and "what is left / to Cecrops' Athens other than her fame?" (530). The philosopher now turns to the growth of Rome, saying, "Rome is reshaped" and "one day / she will hold all the world beneath its sway" (530). The prophecy is not entirely satisfying as, according to the rest of the speech, Rome is subject to change and instability.

At the end of the section, Pythagoras asserts that "Rome is to become the greatest city" (531). Yet Ovid immediately undercuts the statement by having the philosopher suddenly realise that he has digressed from his purpose. Pythagoras says:

<sup>13</sup> Otis, 304.

<sup>14</sup> Otis, 278.

<sup>15</sup> Ibid.



"But lest I gallop far beyond my reach  
and, so, forget what I had meant to teach,  
know this: the heavens and all things beneath  
the heavens change their forms---the earth and all  
that is upon the earth; and since we are  
parts of the world, we, too, are changeable." (531)

The message is powerful and Ovid's juxtaposition of the two statements is meaningful. If Pythagoras' speech is read at face value, one could conclude that, in the world of the *Metamorphoses*, the strength and supremacy of Rome is impermanent.

It seems feasible that Ovid uses humour during the Pythagoras speech to counterbalance the weight of the more serious material, especially as the poet returns to parody at the conclusion of the scene. Realising that in his discussion of Rome he has strayed from his purpose, Pythagoras revisits his "real" agenda; that is to say, he turns once more to the promotion of vegetarianism. His case for vegetarianism seems insignificant next to his elevated philosophizing, and the episode closes on a humorous note. Yet the nature of Pythagoras' speech becomes relevant once more as Ovid reaches the conclusion of the *Metamorphoses*.

The poem draws to an end with praise for Augustus and his great deeds. Ovid declares that, although Augustus "forbids us to esteem what he has done / as finer than his father's labours, Fame / [...] will not obey that order: Fame insists / on greater glory for the son" (548). Ovid tells us that "just as Jove rules / high heaven and controls the triform world, Augustus rules the earth" (548). He begs the gods "to delay beyond [his own] death / that day on which Augustus, having left / the world he governs, will ascend on high" to heaven, where he "will hear the prayers addressed to him" (549). However, Ovid does not finish his poem with the deification of Augustus; he concludes instead with the apotheosis of his poetry. He says "the fatal day [...] can end my years" but "with the better part of me, I'll gain / a place that's higher than the stars: my name, / indelible, eternal, will remain" (549). The poet declares that "through all time--- / [...] [his] name and fame are sure: [he] shall have life" (549). Ovid seems, without authorial intrusion, to set aside by the apotheoses of both Augustus and his poetry.

Pythagoras' speech, if taken seriously, confuses Ovid's apparently straightforward epilogue. While the Pythagorean episode implies that the power of Rome is transitory, Ovid evokes the strength of Rome in the apotheosis of his poetry. He says, "everywhere that

Roman power has sway, / in all domains the Latins gain, my lines / will be on people's lips" (549). Pythagoras' speech compels the reader to examine the complex relationship between Ovid's poetry and Roman power, or between Ovid and Augustus. The two men depend on each other for fame. This reading of the end of the poem is reminiscent of the end of Virgil's *Georgics*. In the *Georgics*, Virgil comments that he "was singing while great Caesar / Was thundering beside the deep Euphrates / In war."<sup>16</sup> While Augustus is "appointing laws and setting his course for Heaven,"<sup>17</sup> the poet enjoys "the studies of inglorious ease."<sup>18</sup> Like Virgil's conclusion, Ovid's epilogue juxtaposes the deeds of Augustus and the work of the poet, and Pythagoras' speech forces the reader to interpret the connection that exists between the two men.

Yet Pythagoras also tells us that "the heavens and all things beneath the heavens change their forms" (531). According to the philosopher, nothing is permanent, but in his conclusion, Ovid insists on the permanence of his own name and poetry. Pythagoras' speech forces the reader to consider Ovid's relationship with the ever-changing world. Ovid has captured the metamorphosing world in his poetry, thus fixing flux. The heavens and the earth may change, but art is eternal, as it captures impermanence. In this reading, Ovid places his name and poetry above that of Augustus and his deeds. Ovid will "gain a place that's higher than the stars" (549). Pythagoras' speech helps to provide an explanation as to why the apotheosis of poetry brings Ovid's "seamless" song (3) of a world in flux to an end.

Ovid's artful fusion of parody and gravity in the Pythagorean scene of Book XV of the *Metamorphoses* suggests that the poet meant to offset the significance of the serious material in Pythagoras' speech. If read seriously, Pythagoras' contribution to the poem is to unify the first fourteen books as well as to prevent a straightforward reading of the conclusion. Perhaps the poet was still working through his ideas about the relationship of his art to Augustan Rome and to what he perceived to be an unstable, changing world. Elena Theodorakopoulos maintains that "the poet's ostensibly confident apotheosis [...] is undercut by the fate of almost every other artist in the poem."<sup>19</sup> Yet as these artist figures are transformed, something of their art often remains. Although Ovid may have perceived instability in the politics of Rome, or in an ever-changing world, it would seem that he felt that somehow his name, "indelible, eternal, [would] remain" (549).

<sup>16</sup> Virgil, *The Georgics*, trans. L.P. Wilkinson (London: Penguin, 1982), lines 559-561.

<sup>17</sup> Virgil, line 562.

<sup>18</sup> Virgil, line 565.

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<sup>19</sup> Elena Theodorakopoulos, "Closure and Transformation in Ovid's *Metamorphoses*." In *Ovidian Transformations: Essays on Ovid's Metamorphoses and its Reception*, ed. Philip Hardie et al. (Cambridge: Cambridge Philological Society, 1999), 144.

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# BOY, OH BOY: HOMOEROTICISM IN THE ANCIENT GREEK NOVEL

Joseph Dubé

It is all too easy to idealize the civilizations of yesteryear as golden ages, social utopias where the problems of today were unknown to the carefree and wholly liberated individuals of these earlier eras. But though their solutions to these problems may have differed, the Ancients wrestled with the same questions we continue to confront in our modern, post-Foucault, Western world.

We see that "placing the theme of Eros at the center of their moral and political reflections, the [Greek] philosophers-or at least some philosophers-found themselves faced with...the coexistence, among men, of impulses stimulated by love objects of different sexes."<sup>1</sup> In light of the current interest in all things sexual and, in particular, *homosexual*, as well as our tendency to hearken back to the example set by previous periods, it is fitting to thoroughly examine just how the authors of three Ancient Greek novels (*Chaereas and Callirhoe*, *An Ephesian Tale*, and *Leucippe and Clitophon*) present men who desire and have relations with other men.

In dissecting the few instances and characters depicting homoeroticism within each work, I will seek to prove that the Ancient Greek conception of inter-male erotic relationships, at least as far as one can glean from these romances, is overall one which disfavours them-particularly when such relationships overstep the boundaries of the rigidly formulated institution of pederasty-while simultaneously, and perhaps paradoxically, tolerating homoerotic desire.

<sup>1</sup> Eva Cantarella, *Bisexuality in the Ancient World*, trans. Cormac O Cuilleain (New Haven: Yale University Press, 1992), 54.

At its most simple, pederasty is "*quand un homme adulte aime, non pas un autre adulte, mais un adolescent*."<sup>2</sup> Eva Cantarella intelligibly outlines the general characteristics of an ideal Greek pederastic relationship. A physically matured, older male is smitten by the beauty of a younger man; however, the lover "does not choose boys who are too young...but only those who are already close to puberty and thus to the age of reason."<sup>3</sup> Furthermore, the social institution mandates that the lover woo his beloved through a full-out courtship. The pursuivant thus "courts [the beloved] with perseverance, and tries to show the serious nature of his intentions in every possible way." We can see that in Ancient Greek society the event of an older man, the *erastes*, desiring and courting a younger individual of the same sex is entirely acceptable, for "the observation of the rules of courtship guarantees the goodness of the sentiment," i.e. ensuring that the motivation is more *élevée* than mere base desire.<sup>4</sup>

The appropriate reaction to these overtures on the part of the young man who is the pederastic love object, or the *eromenos*, was prescribed with equal rigour. "First of all, the object of affection should start by resisting the courtship, running away from the lover, showing himself stubborn, difficult to win over, almost incorruptible."<sup>5</sup> In this way the beloved would retain his status as one on the cusp of a fully self-possessed manhood. For a male, voluntarily surrendering oneself is viewed as a grave breach in the integrity of one's masculinity, for "the active role belong[s] to the adult male, and the passive one to boys and women."<sup>6</sup> The construct along gender lines is clear and strict. Thus, the Greek young man would have "lost his honour only if he showed himself impatient and eager concerning his lover's choice,"<sup>7</sup> that is, if he were anything more than unresponsive and apathetic.

All these conditions being met, the relationship could then blossom into something "first of all spiritual, intellectual and educational by nature" but at the same time "also erotic."<sup>8</sup> It seems, however, that the expiry date of this pederastic couple is invariably limited to a few years after its inception. Aristotle describes the short 'shelf-life' of these quickly truncated partnerships in his *Nicomachean Ethics* (1157a, 3-12): essentially, the *eromenos* matures physically (namely, grows a beard), which signals the fading of the "beloved's bloom." The younger man, at least in theory, is no longer attractive to his

<sup>2</sup> Félix Buffière, *Eros adolescent: la pédérastie dans la Grèce antique* (Paris: Les Belles Lettres, 1980), 11.

<sup>3</sup> Cantarella, 18.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Cantarella, 31.

<sup>7</sup> Cantarella, 19.

<sup>8</sup> Cantarella, 22.

*erastes* and therefore no longer courted by him. The relationship is hereby ended, and the *eromenos* becomes a man and eventually, if he chooses, an *erastes* in turn for another *eromenos*.

Of the three novels, Chariton's *Chaereas and Callirhoe* presents us with perhaps the most superficially meager depiction of all things pederastic or even generally homoerotic. Nothing so blatant as swashbuckling figures with same-sex predilections strut their way into the plotline, nor do any lewd latches make aggressive sexual passes at a vulnerable Chaereas. What we do encounter quite early on, however, is a seemingly minor insult from Callirhoe, the heroine, directed at her husband Chaereas, the novel's hero. Chaereas has accused his new wife of having held a raucous party at her home the night before, though in actuality it was suitors envious of Chaereas's marital success who had framed her. In hot indignation, Callirhoe responds to the unjust claims: "There has been no riotous party at my father's house! Perhaps your house is used to parties, and your lovers are upset at your marriage!"<sup>9</sup> The key word in this short speech is 'lovers,' or *eromenos* in the Greek.

It thus seems clear that our hero, Chaereas, was quite possibly involved in not one, but several, relationships with other males. This is the only mention of Chaereas's alleged lovers in the entire novel, and Callirhoe's condemnation of the fact that her new husband had countless male loves before her does not seem to extend beyond the heat of the present situation. In other words, Callirhoe does not appear to be indignant over the lovers in themselves, but of Chaereas's presumptuous accusations of her infidelity, particularly when he himself is equally suspicious.

Callirhoe's remark, however, becomes more revealing when one takes into account the basic premise of the ancient Greek novel, as put by Massimo Fusillo: "[a] couple of exceptionally beautiful adolescents who fall in love at first sight swear fidelity to one another and consummate their bond after various obstacles."<sup>10</sup> The Ancient Greek novel offers an idealistic heterosexist paradigm, since it "revolve[s] about a primary couple...that is invariably heterosexual" as well as of noble birth, character, and physique.<sup>11</sup> Thus, we find with the protagonists "a pattern of symmetrical or reciprocal love, in which the attraction is both mutual and between social equals...not discriminated into an active and a passive partner."<sup>12</sup>

<sup>9</sup> B.P. Reardon, ed. *Collected Ancient Greek Novels*. (Berkeley 1989), 25.

<sup>10</sup> David Konstan, *Sexual Symmetry: Love in the Ancient Novel and Related Genres* (Princeton, 1994), 161.

The active-passive model provided by pederasty is therefore secondary to a more mutual and balanced love-one that is without an exception heterosexual. This is meaningful for the character of Chaereas, for he thereby becomes the exemplar of the ideal *eromenos* (or perhaps *erastes*, since the details here are far too scant to make an accurate assessment of his specific role), who relinquishes his same-sex affiliations when the time comes to pursue a more solid, higher bond with a member of the opposite sex. It is suggested that Chaereas had his moment in the company of men and, upon experiencing the enamoring beauty of a woman for the first time, recognized his duty to move on, to settle down, to essentially claim his manhood. Thus, Chaereas has done what any good presumed *eromenos* ripened into a strapping heterosexual lad during his stay in the world of pederasty, or an *erastes*, who regrettably finds it time to let his lover(s) go, should do.

Shortly after Callirhoe's comment, we encounter for the first time Chaereas's friend Polycharmus, whose questionable relations with our hero seem to have gone unnoticed by critics. With regard to Chaereas, Polycharmus is apparently "a special friend of his, as Patroclus was of Achilles in Homer."<sup>13</sup> One's 'homo-sensitive' alarms immediately sound off at this aside, for, as Halperin describes, "the classical Greeks, who, looking at the love of Achilles and Patroclus from the perspective of their own social and emotional institutions, tended naturally to assume that the relation between the heroes was a paederastic one."<sup>14</sup>

Like a pup with a blind, unquestioning loyalty for its master, Polycharmus follows his friend Chaereas about wherever he may go while in the pursuit of the abducted Callirhoe.<sup>15</sup> When Chaereas and Polycharmus are later enslaved and laboring, enchained, in Caria, the latter "completed both their allotted portions of work practically single-handed; he gladly took on most of the work to save his friend."<sup>16</sup> Chaereas appears here as weak, feebly overcome by the immensity of his love and sorrow for Callirhoe. He is an *eromenos*-like figure in the sense that he is a powerless subject to both the overseer and his own motions, passive in the face of his overwhelming situation. Polycharmus, pro-active and resourceful, also adds to the conspicuous hints of pederasty in their relationship, in this case appearing as an *erastes*-esque individual protecting his dainty, puerile beloved.

<sup>11</sup> Konstan, 14.

<sup>12</sup> Konstan, 7.

<sup>13</sup> Reardon, 27.

<sup>14</sup> David M. Halperin, *One Hundred Years of Homosexuality* (New York, 1990), 86.

<sup>15</sup> Reardon, 58.



However, Chariton is quick to point out that though Polycharmus is "a strapping young man," it seems that he "was not enslaved to Love."<sup>17</sup> So, though a most eligible mate in every way, Polycharmus is conveniently asexual, thereby precluding the possibility of a true pederastic relationship between the two characters. Otherwise, it would seem, Polycharmus would loom as too large a threat to the sanctity of the love between Chaereas and Callirhoe, which, according to the framework of the genre, must by all means come to a glorious fruition in the end. Furthermore, Polycharmus's asexuality and *erastes*-minus-the-sexual-component status serve as a foil, effectively highlighting the profundity of the throes of Chaereas's heterosexual passion, all the while serving to advance the plot. For example, Polycharmus convinces Chaereas innumerable times to refrain from murdering himself, without whom there would of course be no tale to tell and no joyful ending for the smitten couple.

Thus, we find through the character of Polycharmus that Chariton picks and chooses the elements of pederasty that are conducive to the success of the novel's heterosexist paradigm. Polycharmus is a friend who possesses the fierce loyalty and admiration needed in a practical sense to carry Chaereas through the scrapes and pickles they have come upon; he is one who also possesses sufficient concern and affection for his "special friend" so that Chaereas' attempts at suicide will be frustrated, ensuring that the heterosexual couple will be able to triumph and come together after all is done; and finally, he is a friend who very conveniently has no sexual relationship with Chaereas, for this would endanger the integrity of the larger-than-life passion of the opposite-sex couple.

When held up to comparison with *Chaereas and Callirhoe*, Xenophon's *Ephesian Tale* provides a much richer portrayal of homoerotically inclined personages. In this particular novel we encounter Habrocomes and Anthia, yet again a devastatingly beautiful heterosexual pair of wealthy origin and with passions for each other of equal ardor. Captured by pirates while on voyage together, they come upon Corymbus, the head of a ribald crew of brigands, who falls madly in love with Habrocomes. Correspondingly, we soon find out that his fellow pirate, Euxinus, has in fact fallen madly in love with Anthia, Habrocomes's girl.<sup>18</sup>

Corymbus and Euxinus confess to each other the secretly burning passions they have been harboring, and they make a pact to speak highly and persuasively on behalf of the other to his respective love object. This scene is significant, for it "presents a homoerotic

<sup>16</sup> Reardon, 67.

<sup>17</sup> Reardon, 67.

and hetero-erotic passion in strictly parallel terms, emphasized by the fact that each lover pleads the case of the other."<sup>19</sup> When each pirate presents the other's proposal to Habrocomes and Anthia in turn, he indicates nothing but a pure *eros* replete with promises of a life shared together in either marriage or quasi-marriage (the latter in the case of Corymbus and Habrocomes).<sup>20</sup> The *eros* of Corymbus would thus seem to refute the pederastic rule, since it appears to be a positive portrayal of a noble pirate's homoerotic desires and intentions, placed on par with opposite-sex love. Most importantly, Corymbus' desire to spend the rest of his life and to share "all he possesses" with Habrocomes presents an example directly opposed to the ephemeral model that pederasty offers.

Unfortunately, several things combine to make this *eros* leave a lasting impression to the contrary. The very act of undertaking the seduction and persuasion of the object one desires is indicative of the pederastic paradigm, in which the *erastes* works tirelessly to woo the resisting *eromenos*.<sup>21</sup> The loves of the pirates are doomed to a secondary status on the 'love hierarchy,' since they are not mutual and reciprocated, like that of the main couple. Further, "the pirates' protestations of love, made from a position of power, are coercive. Euxinus views the captive pair as a fair reward for services rendered in the trade of piracy."<sup>22</sup> This means that the desires of the two pirates "seem to conform to the pattern of transitive or asymmetric sexuality."<sup>23</sup> Euxinus' love for Anthia revolves about an inherent lack of symmetry, which relegates it to an inferior status when compared to the symmetrical relationship of the hero and heroine, so idealized in the ancient novel. Since Corymbus' passion is indeed on par with that of Euxinus, his too for Habrocomes is asymmetrical, secondary, and inferior; but, since it is also homoerotic, Corymbus' love is evidently nothing more than a typical pederastic infatuation instigated by a smitten *erastes*. Thus, Corymbus' promise of a future with Habrocomes loses credibility. As we have seen, it is the essence of pederasty to be both transitive and asymmetrical.

It is important to look at the scene of Corymbus and Euxinus in the context of the story as an entirety.<sup>24</sup> Heiserman, who tends to see homosexual characters in the novels simply as one of the "many incidents appeal[ing] to the fantasies and dreads that must underlie the idealization of erotic love," views Corymbus' seduction as "meant primarily to enhance the emotive powers of the story itself."<sup>25</sup> Again, Corymbus is not a unique champion of long-

<sup>18</sup> Reardon, 137.

<sup>19</sup> Konstan, 37.

<sup>20</sup> Reardon, 137-138.

<sup>21</sup> Akihiko Watanabe, 'The Masculinity of Hippothoos,' *Ancient Narrative* 3 (2003): 7.

<sup>22</sup> Konstan, 36.

term same-sex love. Instead, he is perhaps merely a hollow plot device used to illuminate the main couple's strict and all-important mutual fidelity and thereby the hauteur and grandeur of their love. In this way, the pirates simply provide a convenient pretext allowing the two main lovers to showcase early on the equality of their mutual love and adoration, an equality which is brought out by the parity of the proposals from the two pirates. In other words, Corymbus' promises to Habrocomes may be employed by Xenophon for no other reason than to enable Habrocomes and Anthia to repel equally strong advances from rivals.

Overall, what seemed like a promising example of pederasty surpassing its restrictive temporal and emotional confines by being compared to heterosexual desire is really nothing of the kind. On the contrary, the heterosexual love Euxinus fosters for Anthia is reduced to the level of a pederastic infatuation, essentially 'dragged down' by its comparison to that of Corymbus. This episode is an example of a larger trend found within the ancient Greek novel:

“The passion ascribed to rival figures in the Greek novel produces instances not of symmetrical love but rather of an unequal or what we may call a transitive relationship, in which neither the feelings nor the positions of the parties are alike -a structure that bears a resemblance to the canonical form of homoerotic relationships.”<sup>26</sup>

Since all rival loves are inherently inferior to the idealized love of the main, heterosexual couple because they are invariably ineffectual and vehemently repelled, and since we now find that these rival loves are essentially based on the homoerotic (i.e. pederastic) paradigm, homoerotic relationships must necessarily be the paradigm of love that is inferior.

More often than not, same-sex relationships in Greek literature end in tragedy, evoking a shroud of pervasive sadness, as Dr. T. Wade Richardson noted in a class lecture on February 10, 2004. "For as a number of critics have remarked, the world of the ideal Greek novel, at least as far as we have it represented in the surviving examples, is not a place where pederastic couples enjoy relationships that are as stable as those of the hetero-

<sup>23</sup> Konstan, 39.

<sup>24</sup> One must also consider that our hero and heroine are indeed on a pirate ship, a setting inherently devoid of women who are not slaves. Ergo, if Xenophon insists upon providing adequately menacing rivals at this early stage in the story to test the bond of the main couple, the only logical option is for a male, rather than a female, to approach Habrocomes. Furthermore, since the two men are pirates, and essentially lowly employees of their pirate chief, Apsyrus, can it really be believed that they have possessions, that they really want to settle down into a stable, long-term relationship? Right off, both Corymbus' and Euxinus' assurances thus seem a bit absurd.

<sup>25</sup> Arthur Heiserman, *The Novel before the Novel* (Chicago, 1977), 48.

sexual heroes and heroines."<sup>27</sup> The pederastic relationship between Hippothous and Hyperanthes is by no means an exception.

Hippothous, arguably Xenophon's most colorful creation in *An Ephesian Tale*, is at one time or another a bandit, an aristocratic city-dweller, a lover of males, and a married man. To be sure, he "presents the reader with a puzzling set of attributes."<sup>28</sup> What here concerns us most, however, is Xenophon's portrayal of Hippothous as a man enamored by members of his own sex, in particular his beloveds Hyperanthes and later Cleisthenes.

Having befriended Habrocomes in Mazacus, Hippothous pours forth to him the tragic tale of his lost love, Hyperanthes.<sup>29</sup> One discovers immediately that "his love affair with Hyperanthes is in accordance with the classical pederastic paradigm."<sup>30</sup> Indeed, as the *erastes*, "Hippothous takes the initiative in starting the relationship, for not only is he the one who falls in love but he also ventures to approach the youth and to beg him take pity on his erotic suffering (3,2,3)." As for Hyperanthes? Like a good little *eromenos*, all that he "has to do is to listen to him and comply."<sup>31</sup>

Xenophon relates that a certain Aristomachus, a Byzantine aristocrat, fell in love with the charms of the youthful Hyperanthes, paid off the father of the boy, and whisked him away from Hippothous to Byzantium under the pretense of teaching him rhetoric; there, the two formed a new pederastic relationship together.<sup>32</sup> Immediately, the actions of Aristomachus add to the work's denigration of same-sex love, for his purchase of Hyperanthes smacks of prostitution, an asymmetrical relationship at its ephemeral best.

What is more, one can begin to see the growing distance between the qualities of the main couple's relationship and that of Hyperanthes and Hippothous, for "[Anthia's] willingness to die is worlds apart from the submissiveness of Hyperanthes."<sup>33</sup> So, while Hyperanthes is a completely passive sex object dragged this way and that without uttering a sound, Anthia is represented as a lover who will go to any extreme, even death, to preserve the sanctity of her relationship with the hero Habrocomes. Indeed, she knifes one of the men making unseemly overtures upon her.<sup>34</sup> In keeping, therefore, with the traditional role of the *eromenos* as an apathetic partner, Hyperanthes' flippancy marks the pederastic relationship as amorously inferior to the intense bond of the heterosexual couple.

<sup>26</sup> Konstan, 9.

<sup>27</sup> Watanabe, 12.

<sup>28</sup> Watanabe, 1.

<sup>29</sup> Reardon, 147.

<sup>30</sup> Watanabe, 5.

Hippothous, in a jealous and vengeful rage, hastens to Byzantium, kills Aristomachus, and takes Hyperanthes away. While fleeing the region upon a ship bound for Asia, a furious storm strikes, the ship is sunk, and the couple finds itself flailing in the water. Hippothous, being too weak to go on, drowns in the ocean beside his lover.<sup>35</sup> This tragic death of the *eromenos* sends a clear message: the pederastic couple is destined for a sorrowful termination, after which despair will reign (it is despair that leads Hippothous into banditry in the first place), while the main couple is fated for success, in spite of the ridiculously insurmountable obstacles standing in its way. Truly, in a morbid sort of irony, "Hippothous's action [to save his beloved actually] leads to the death of his beloved, whereas Anthia, like her lover, will survive this and other trials through her own steadfastness."<sup>36</sup>

An interesting chain of events involving Hippothous occurs at the end of *An Ephesian Tale*. Having inherited the fortune of an old woman whom he married for pecuniary reasons, and who then died, Hippothous comes upon "a young Sicilian aristocrat named Cleisthenes [who]... was a handsome young man who shared all Hippothous's possessions."<sup>37</sup> This would seem to indicate that Hippothous was essentially in a stable, long-term relationship with another man. However, certain references strongly suggest that it was in fact a typical pederastic relationship: Cleisthenes is referred to as "young" several times; he never speaks and in fact fades out of the story completely until the very end; when he does resurface, Xenophon tells that "all the others lay down as they were—Leucon with Rhode, Hippothous with the handsome Cleisthenes."<sup>38</sup> The structure of this last phrase parallels Cleisthenes with Leucon, a woman. This likening to a female provides a further indication of his role as *eromenos*—but perhaps a long-term *eromenos* in a stable pederastic relationship?

Not exactly. In the meantime, after daily contact with Anthia, Hippothous "too fell in love with her, wanted to sleep with her, and offered her many inducements."<sup>39</sup> It is not clear whether Hippothous becomes attracted to Anthia because of her astounding beauty, which has continually been described as of a level such that could melt even the hardest of rocks, or whether Hippothous' sexuality is merely just fluid and indiscriminating. Regardless, he is obviously not particularly stringent in his fidelity to Cleisthenes, who like

<sup>31</sup> Ibid.

<sup>32</sup> Reardon, 147.

<sup>33</sup> Konstan, 27.

<sup>34</sup> Reardon, 157.

<sup>35</sup> Reardon, 147.

a proper, spineless minion or *eromenos*, "had followed him from Sicily to Italy."<sup>40</sup> This idiosyncratic, spontaneous love for Anthia succeeds in depicting the lack of fierce faithfulness inherent in this relationship and pederastic relationships in general, a lack that is perhaps necessary in the pederastic coupling so as to safely ensure its timely termination upon the wilting of the boy's bloom.

The story ends with a bizarre bit of information: Hippothous has adopted Cleisthenes as his son. This is an ambiguous turn of events, but one which could very well mean that Hippothous (or rather, Xenophon) has devised an ingenious method by which a man might live permanently with a male lover in a way that does not invoke social reprobation. However, as Konstan has suggested, the meaning could also be simply that "Hippothous's adoption of Cleisthenes marks the termination of the pederastic relationship,"<sup>41</sup> and the two have merely retained a permanent, non-sexual bond like that which Aristotle describes as possible for certain particularly well-suited pederastic couples.<sup>42</sup> Nevertheless, Konstan continues, the parallel drawn by Xenophon between Anthia and Habrocomes and Hippothous and Cleisthenes "at the end of the novel seems to echo in a positive key the twin desires of Corymbus and Euxinus, and to offer a model for an enduring domestic association, comparable to marriage, arising out of an original pederastic relationship."<sup>43</sup>

At the end of the day, the fact still remains that there is ambiguity and that the status of the same-sex relationship between Hippothous and Cleisthenes is moot. Furthermore, if Hippothous' adoption of his beloved is in fact only nominal, and the two remain an active couple full of passion, Xenophon and presumably the greater Greek world evidently still felt compelled to disguise it as something else, thus expressing, if not outright condemnation, then at least a reaffirmation of the same-sex couple's secondary status.

*Leucippe and Clitophon* by Achilles Tatius reasserts many of themes found within *An Ephesian Tale*. Like the main couples in the other two previous novels, "the relationship between Cleitophon and Leucippe conforms in principle to the parity of hero and heroine that is characteristic in the Greek novel."<sup>44</sup> The heterosexual couple is ravishing in its beauty, wealthy, and utterly alight with the flames of mutual love.

<sup>36</sup> Konstan, 27.

<sup>37</sup> Reardon, 164.

<sup>38</sup> Reardon, 169.

<sup>39</sup> Reardon, 165.

<sup>40</sup> Reardon, 169.

Comparable to the scene between Euxinus and Corymbus in *An Ephesian Tale*, Kleitophon confesses his debilitating love for a woman, Leukippe, to his cousin, Kleinias, who in turn spills forth the story of his love for a male, Charikles.<sup>45</sup> Again, neither of the two men seems at all put out by the fact that his love object is of a different sex than the other's. They relate their trials with equal candor, and Kleinias even gives Kleitophon advice on how to successfully seduce a woman. "Gender in sexuality is treated as a matter of comparable preferences, not of innate or inveterate disposition."<sup>46</sup> Again, the author seems to be presenting same-sex relations as perfectly equivalent to those that are between members of the opposite sex.

Charikles, the *eromenos*, interrupts their conversation with the announcement that his father has arranged that he be married to a girl—and a hideous one at that. With ample help from Kleinias, he proceeds to lament his fate and to elaborate upon the evils of marriage to a woman. Charikles finally ends the invective against females by simply shrugging his shoulders, assuming that the gods will somehow save him from such a ghastly fate, and scampers off to try out the new horse that Kleinias has bought him (in perfect *erastes* fashion) as a token of his affection.<sup>47</sup> Charikles' reaction here occasions the first direct comparison with the characteristics of the main heterosexual couple: while the *eromenos* passively awaits an intervention by fate, Leukippe, on the other hand, boldly, voluntarily, and actively seeks an elopement with her lover Kleitophon.<sup>48</sup> The inequality between the pederastic and the heterosexual couple is apparent: the former is relatively *laissez-faire* about its destiny, while the latter actively strives to secure its success.

A few pages later, we learn the shocking news that Charikles is dead, tossed by the horse and dragged along, "pelted by the branches, gashed with as many incisions as there were points on the broken wood... He was one continuous wound, at the sight of which no bystander could hold back his tears."<sup>49</sup> A homophile has 'bit the dust' in a horrifically gruesome and gory manner. First, it ought to be noted that Achilles Tatius describes the scene between the horse and Charikles in a somewhat erotic way: legs energetically vying with legs, the young man bouncing with the surges of the stallion, arching of the back, and Charikles, "while trying to ride out the squall... lost control... and surrendered himself to the hurricane of his mad career, a plaything of Chance."<sup>50</sup> The scene seems to evoke sexual

<sup>41</sup> Konstan, 39.

<sup>42</sup> Aristotle, *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis, 1999), 1157a, 3-12..

<sup>43</sup> Konstan, 39.

<sup>44</sup> Konstan, 70.

<sup>45</sup> Reardon, 181-183.

intercourse-in particular, sexual intercourse between two men, with Charikles having "surrendered himself" as the *eromenos* does. This subtle linking on the part of Achilles Tatius, between the bloody, terrible death scene and homosexual intercourse, cannot be entirely unintentional.

In this episode, "one suspects a hint of cynical nemesis: Clinias himself has just been ridiculing the love of women, and is quickly punished by events."<sup>51</sup> Thus, this terrifying occurrence seems to be symbolic, a sort of admonition against two men who are seeking to prolong the extent of their pederastic relationship beyond its fated lifespan. Essentially, we see that a young man who shuns women, like Charikles, is struck down by Fate and dies a horrible death. A similar episode is related once again when cousins Kleitophon and Kleinias befriend a man from Egypt, named Menelaos. Out one day hunting with his beloved, Menelaos and his *eromenos* came upon a wild boar charging out from the brush. In an attempt to save his beloved's horse, which was surely going to be gashed up by the beast, Menelaos let loose his javelin. The beloved "veered straight into its trajectory and intercepted the weapon," dying minutes later.<sup>52</sup>

Again, the *eromenos* dies most tragically. The fact that he is speared to death by a long, phallic shaft thrust into his body by his *erastes* is certainly highly symbolic and makes the event even more poignant. Furthermore, we can compare this episode to one at the beginning of *Chaereas and Callirhoe*, in which Chaereas, it was thought, had killed his fiancée by his own blow. However, while this incident in Leucippe and Clitophon leaves Menelaos with nothing but a sad story to be told, the false death of Callirhoe actually propels the two principal characters into a whirlwind of plot action in which they are allowed to prove and defend their profound love for each other. Again, the dichotomy between the pederastic, or homoerotic, and the heterosexual is evident.

Akihiko Watanabe maintains a slightly different view on these tragic deaths, believing that "pederastic relationships in the Greek tradition were bound to end with the physical maturation of the eromenoi, and the erastai's laments over the growth of hair on the cheeks of their beloved boys, presaging the termination of their love affairs, [are] a common motif."<sup>53</sup> Thus, the deaths can be viewed as solely symbolic mechanisms used to vividly

<sup>46</sup> Konstan, 28-29.

<sup>47</sup> Reardon, 182.

<sup>48</sup> Konstan, 28.

<sup>49</sup> Reardon, 185.

<sup>50</sup> Ibid.



portray the depth of an *erastes*' sorrow upon the loss of his *eromenos* due to physical development. What is more, "as matters stood thus, [an] end of a relationship brought about by the boys' death could actually be conceived as one of the more aesthetically pleasing options" (13). Why is this so? Watanabe holds that the "continuation of the erotic relationship into the adulthood of the beloved would have been stigmatized as a perverse act, while the maturation of the boy and his inevitable marriage with a woman was a prospect thought to cause anguish to the *erastes*." Essentially, a premature death would prevent "the embarrassment of losing the boy to a woman."<sup>54</sup>

Watanabe's analysis seems sensible in part. If we do grant that the deaths of the *eromenoi* are illustrated in this heart-wrenchingly tragic manner so as to represent the depth of the anguish and pathos felt on the part of the *erastes* at the end of the pederastic relationship, we are then forced to admit that the abrupt termination of the pederastic relationships is not due to the fact that the *erastes* wants it to end, as indicated by Aristotle, but simply that he wills it to; and he willed its demise simply because this is what was prescribed by the Greek social code. His feelings had most likely not diminished. After all, if a man is smitten by a boy who is sixteen, will he not likely still be smitten by him two years later when he is eighteen? It seems highly improbable that such minor physical changes as increased muscle mass and increased body hair would have completely and utterly altered, essentially eradicated, an *erastes*' erotic appetite.

However, in this world where the end of the pederastic relationship is so strictly enforced, it does not seem probable that an *erastes* would feel any great amount of embarrassment at the loss of his *eromenos*, as Watanabe implies, since it is by no means necessarily a reflection of the *eromenos*' decreased affections for him, but instead a mutual agreement to adhere to the prevailing tradition and moral regulations. Thus, it does not seem likely that the utter death of the *eromenos* would be the most "aesthetically pleasing" option; and, even if it were so for reasons other than "embarrassment", surely it need not be so grisly and tear-stained as those depicted in the ancient Greek novel.

The discussion of these tragic deaths in *Leucippe and Clitophon* is quickly followed by a brief and playful debate over the supremacy of women or boys as love objects.<sup>55</sup> The two sides are more or less presented with equal force, each detailing the physical merits of the woman and the boy which would make her or him the most toothsome overall. In the end,

<sup>51</sup> Graham Anderson, *Ancient Fiction: The Novel in the Graeco-Roman World* (Totowa, New Jersey, 1984), 112.

<sup>52</sup> Reardon, 204.

<sup>53</sup> Watanabe, 13.

it is simply a matter of taste, a conclusion (or lack thereof) that would seem to send a strong message in favor of same-sex relations.

During the debate, though, Kleitophon rebuts a remark made by Menelaos with the following: "A lover cannot come to the end of an affair with a boyfriend feeling unqualified gratification, for he is invariably left thirsty for something more." Menelaos responds that "to be unsatisfied is always a desirable state. Constant recourse to anything makes satisfaction shrivel into satiation."<sup>56</sup> Menelaos makes no attempt to refute Kleitophon's claim that same-sex relationships are always ephemeral and unsatisfying. Indeed, he could very well have made a protestation in defense of relationships that could continue beyond their allotted death knell, such as the possibility offered at the end of *An Ephesian Tale* when Hippothous adopts Cleisthenes. Evidently, though, this practice was not commonly accepted enough for Menelaos to even hint at it. Instead, he maintains that all things have an ideal threshold of satisfaction and that pederasty is no exception. Pederasty thus seems to afford to men the necessary amount of fulfillment to maintain its status as a social compromise: it is recognized and accepted that men may desire other men; therefore, they are allowed to pursue them, free of contempt, but only within very strict temporal and emotional boundaries that do not diminish in any way the *eromenos*' approaching manhood and which are not fully satisfying.

The incidents in the works examined support the observation that the ancient Greek novel possesses an inherent tension and confusion regarding same-sex relations, like that found within the greater institution of pederasty. Male same-sex desire in and of itself is tolerated and accepted as a natural condition of human nature. However, acting upon this desire becomes problematic. As far as these three romances are concerned, homoerotic relationships are doomed with respect to their duration, they are marginal, and they are invariably held as inferior to the ideal, heterosexual relationship. Indeed, when all is said and done, one never finds as a pair of protagonists two men passionately in love with each other, wealthy, divinely beautiful, whose relationship is tested to the maximum but triumphantly consummated in the end. There is no 'happily ever after'-as there is for Chaereas and Callirhoe, Habrocomes and Anthia, and Leukippe and Kleitophon-for the pederastic, homoerotic couple.

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<sup>54</sup> Watanabe, 13.

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<sup>56</sup> Reardon, 205-206.



# THE SHARI'A: ROMAN LAW WEARING AN ISLAMIC VEIL?

Ayman Daher

## INTRODUCTION

Law, much like language, is an ever-evolving body closely linked to the culture and society. A tree is often used as a metaphor for the relation of languages: for example, Spanish, Italian, Romany<sup>1</sup> and Sanskrit all share a common lineage, or branch. They are all Indo-European languages and all differ from the Semitic languages of the Middle East, a different branch. Due to political factors, however, many Arabic words have been assimilated into Indo-European languages. This integration was exterior, either imposed on or incorporated into the receiving culture. The onlooker can pinpoint why a "foreign" word, has made its way in another language. The word is truly foreign, it has no lineage or roots in its new language; it is borrowed and then used in its new home, assimilated to fit its host culture. Does this phenomenon apply to law? Do different legal traditions borrow from each other? Can legal concepts be taken from another tradition, and made to fit into a host legal system? This is the general topic of this paper; a plunge into historical comparative law.

Comparative law is the study of legal institutions, and constructions of different legal traditions, with the purpose of ascertaining similarities and differences. This inevitably leads the comparatists to examine origins as well. The nexus of our analysis will be Roman law. Roman law has been accepted as having greatly influenced, if not wholly shaped, the legal structures of many European countries, possibly because no unifying political force

<sup>1</sup> The language of the Magyar Gypsies.

emerged in the West after the fall of the Roman Empire.<sup>2</sup> Roman law, as an institution, was more resilient than the individual customary laws of the Germanic tribes that ruled Western Europe. Scholars have tried to locate the different times in which Roman law was "received" back into the different emerging legal traditions of the West. But what of its evolution in the East? Did Roman law have the same impact on the Arab-Islamic tribes that conquered the eastern Empire? Some orientalists have stated that "Islamic law is Roman law in Arab dress."<sup>3</sup> Is the answer so simple? At the same time, some Islamic writers stated that "Any law other than the law of Islam is obsolete."<sup>4</sup> According to believers, Islamic law is the word of God, therefore it cannot have any pagan origins.

It is argued that the answer lies between these two poles. Islamic Law is rooted in Arabic and Middle-Eastern legal traditions, but through its evolution, it has assimilated elements of Roman law. In other words, Islamic Law seems to be of a different tree than Roman law, but it has incorporated some of the fruits of Roman legal thought. As this is a legal analysis, not an historical one, the thesis will be explored, after a brief introduction to Islamic law, by comparing structural elements of Islamic and Roman law, as well as some substantive concepts. The structural elements, such as the role of the jurist in Roman and Islamic law, explain why Roman law influenced, rather than was received into, Islamic law. The focus of the substantive elements of the analysis will be family law as it is in this field that we can find the most developed themes of Islamic law.

#### A BRIEF INTRODUCTION TO ISLAMIC LAW

Islamic law is a complete legal system. It is not limited to "religious" aspects of life. Under Islam, all human behaviour is in some manner religious. Therefore, there is always a moral and immoral way of acting. There are five classifications of behavior:<sup>5</sup>

*Wajib*, actions obligatory on Believers; *Matlub*, desirable or recommended (but not obligatory) actions; *Mubah*, indifferent actions; *Makruh*, objectionable, but not forbidden, actions and *Haram*, prohibited actions. Islamic law deals with obligations, property, family law, criminal law, administrative law, etc. The religion of Islam and the government form one body.

<sup>2</sup> The Church is a force that linked the European factions but this force did not unite Europe politically except for specific issues in limited times (such as the Crusades).

<sup>3</sup> S. Amos as cited in P. Crone, *Roman, Provincial and Islamic Law* (Cambridge, 1987), 2.

<sup>4</sup> R. Mottahedeh, "Some Islamic views of the pre-Islamic past," *Harvard Middle Eastern and Islamic Review* 1 (1994): 17.

<sup>5</sup> H.A.R. Gibb, *Mohammedanism, An Historical Survey* (London, 1950), 77.

There are three words that mean "law" in the Islamic tradition: *fiqh*, which can be loosely translated as jurisprudence; *qanun*, which encompasses positive law rules that are set, such as state-made law; and *shari'a*, the generic term for Islamic law.<sup>6</sup> *Shari'a* denotes Islamic law as a whole. It originally meant "the place from which one descends to water", and has developed to mean "the law of water" and, with time, was extended to cover all issues which were considered vital to human existence, including what God has decreed for the people in terms of fasting, prayer, pilgrimage, marriage, contracts, succession and war.<sup>7</sup> *Shari'a* is thus the all-encompassing notion of the Islamic tradition; it contains written sources, *qawanin* (plural of *qanun*), and interpretations of those sources. In principle, the *shari'a* recognizes only two written sources: the Qur'an, the divine Book revealed to the Prophet Muhammad in the early 7th century AD, and the *sunna*, the reported compilation of the conversations (*hadith*) and deeds of the Prophet collected after his death by his Companions. The *Qur'an* counts approximately five hundred verses that deal with law and thus acts as foundational "Code" of sorts. This basic foundation underlies many legal texts written by jurists. This is *fiqh*, which also means "knowledge", "understanding" and "comprehension". It refers to the legal rulings of the Muslim scholars, based on their knowledge of the *shari'a*, and as such is the third source of rulings. The science of *fiqh* started in the late 7th century AD, when the Islamic state expanded and faced several issues that were not explicitly covered in the *Qur'an* and *Sunnah*. These writings are interpretive and, although not strictly authoritative, are fundamental to the development of the law.

### THE PIVOTAL ROLE OF THE JURIST

Roman law and Islamic law have a fundamental common ground, in the role of the jurist. In both traditions there is limited legislation, no judge to make law, and a reverence for customary and historical analysis.<sup>8</sup>

The jurist in Islam is both a legal and religious expert. *Fuqaha* were the class of Muslim scholars who dealt in theoretical Islamic law, or *fiqh* while a *mufti* gives legal responses (*fatwa*) to people's questions. It is the *mufti*, or jurisconsult, that attracts attention.

### The Jurist in Islamic and Roman Law

<sup>7</sup> (Author Unknown), *Fixed and Variable Aspects of Islamic Legislation* (Tehran, 2001).

<sup>8</sup> C. Mallat, "From Islamic to Middle Eastern Law, a Restatement of the Field," *Am. J. Comp. L.* 51 (2003): 719.

In order to be qualified to interpret the sources of law, a jurist had to master many branches of knowledge. Deep knowledge of the *Qur'an* and the *hadith* are essential, as well as an understanding of the science of interpreting these sources. Much like the Roman Jurist, this learning would be done at the hands of another learned man, by following in his footsteps and by attending meetings at assemblies.<sup>9</sup> Knowing the history of the law and the schools of law, their differences and legal precedents ("decisions" of other jurists in the past) is also part of the curriculum. Other disciplines such as logic, history, rhetoric and general knowledge as well as specialized areas like commerce or international relations might be important in deciding specific cases. Being proficient in commercial matters was expected. Indeed, most jurists were also merchants and tradesmen. Muslim jurists were scholars with specialized professional training, but their authority was very limited. There is no clergy or priesthood in Islam, and no central authority hands out final judgments. The source of a Muslim jurist's authority comes only from their recognized knowledge, not from the government nor from a central religious authority.<sup>10</sup> Judges (*Qadi*) are appointed and have the backing and support of the states. But judges' rulings, however, are not the foundation of Islamic law, but only its application to specific cases. Often, one could go directly to a *mufti* to resolve an issue and avoid the appearance in front of a judge.

The Roman Jurists gave *interpretatio*, an "elucidation of existing rules"<sup>11</sup> through *responsa prudentium*. This interpretation is not strictly authoritative but one can see the potential effect of this development, given that judges, advocates, governors and praetors were not necessarily skilled in the law.<sup>12</sup> These jurists would base their opinions on their knowledge of the legal texts, as well as on the opinions of other interpretations and on their general deductive reasoning, logic and studies. The jurists created a loose structure of legal construction that lasted until the post-classical era, when juristic writing withered and rules were being made by the unanimity of juristic thought rather than merit.<sup>13</sup> At the height of his "power", the Roman jurist was the active element of law creation.

Both Islamic law and Roman law had the common elements needed to be typified as jurist-based legal systems. They allowed affluent learned people to become legally authoritative. These men became authoritative if they could, by a discussion, internal to the community, agree or supplant the arguments of the other. The common pattern for jurist-made

<sup>9</sup> The word for assembly, in Arabic, is *Jami'*. This word also means University and Mosque.

<sup>10</sup> This lasted until the custom started, after AD 1200, to assign an official state *Mufti* with legal authority.

<sup>11</sup> A. Borkowsky, *Textbook on Roman Law*, 2nd ed. (New York, 2002), 34.

<sup>12</sup> Ibid., 36.



law is as follows: (1) law is not created primarily by legislation or by judges, (2) in their capacity as jurists, these individuals are largely independent of government, (3) their prestige, fundamental for their role, is independent of any job that they hold, indeed being a jurist was not a profession: they took no money for their services, (4) the materials on which they work are usually older, regarded as authoritative, but are insufficient and require a great deal of interpretation.<sup>14</sup> The difference between these two traditions is that Roman law is secular while Islamic law is religious; religious law is a search for fundamental truth. The characterization of Roman law as completely secular, however, might be underestimating the effect that the College of Pontiffs had on the development of juristic reason in early Roman law. The codification of the Twelve Tables was the end result of a conflict between the Patricians and the Plebeians; nevertheless, the Twelve Tables were rather limited in scope. Furthermore, the College of Pontiffs was the sole body permitted to interpret these laws. This gave a religious hue to legal interpretation. Rather than discuss the religiosity of Roman law, it is more important to stress the secularism of Islamic law. The *shari'a* is "of this world and the other."<sup>15</sup> In other words, it is both religious as well as civil. In modern times it has even extended to cover web-surfing and cellular phone usage.<sup>16</sup>

### **Juristic Reason as a Nexus of Roman Influence on the *Shari'a***

The role of the jurist is common to both legal regimes and might help explain why Muslim jurists, writing four hundred years after Roman jurists, would easily assimilate Roman legal doctrines. It would have been blasphemous and politically dangerous, however, to try to link Islamic law to Roman roots. Therefore, the Roman legal principles that permeated into the *shari'a* could not be imposed from "above". There could be no blanket "reception" of Roman law, and indeed, the political power structure would have been hostile to such an occurrence. The Roman legal principles had to be incorporated from "below". The jurist became the link between the customary interactions of the population and the written *qawanin*. By analogy and reasoning, the *mufti* rationalized behaviours to fit general principles of law. Unlike the judge, who deals with discrete matters, the jurist must account for dialectic reasoning when rendering opinions. This adds an analytical thread to broad ideas and notions as well as "on the ground" policy concerns. Jurist-made law is thus

<sup>13</sup> Ibid., 52

<sup>14</sup> Watson, 3-4.

<sup>15</sup> "al-din ou al-dounya"

<sup>16</sup> "Fatwa Online" *Islamonline* (05 December 2004), online: <<http://www.islam.tc/ask-imam/index.php>>

a way to systemize popular behavioural interaction into broad notions of justice. The Volkgeist is thus "sublimated" from society and "synthesized" back to the people.<sup>17</sup>

In addition to the role of the jurist, other legal structures that derive from that role are parallel in Islamic and Roman Law. Goldziher, in *Muhammeddanische Studien* and *Jogtudomány*, equates *fiqh* with *jurisprudentia*, the *fatwa* to *responsa prudentium* and *ra'y* (opinion) to *opinio prudentium*.<sup>19</sup> Goldziher does more than equate, he hypothesises that Islamic legal structures are somehow descendants of Roman legal structures. But the Muslim conquest reached Roman law in a late stage when the *prudentes* of Rome had already long disappeared.<sup>20</sup> Goldziher does not push the argument that Islamic law is, through its origins, linked to Roman law. He states that one is a fruit of the other, rather than another branch of the same tree. It is possible that both legal systems had a common origin in earlier times,<sup>21</sup> which might explain their common structures.<sup>22</sup>

It is enough to note that Islamic legal structures are similar to the Roman ones and that this similarity, whether due to relation or coincidence, allows easier permeation of substantive Roman legal notions into Islamic law. It is impossible to state, at this point, that Islamic law is of the same genetic line as Roman law, but some of the substantive concepts that are parallel in both traditions can be explored.

## THE AGNATIC LINE AND THE 'ASABA

### The Syro-Roman Code and the *Shari'a*

Legal studies of late antiquity were greatly advanced when Karl George Bruns and Eduard Sachau published their translation of the Syro-Roman law book in 1880, in Germany. The Syro-Roman law book of the fifth century AD was an amalgamation of imperial Roman law, roman legal literature and Provincial Roman law. It points out legal patterns that enlighten several features of Islamic family law. These similarities were generally ignored in the internal Islamic scholarly tradition because of the supremacy of reli-

<sup>17</sup> See generally A. Daher, "La construction de l'islamité et l'intégration des musulmans au Québec dans le discours de leurs leaders" (Ph.D diss., U. du Québec à Montréal, 1999) and P. Berger, *La religion dans la conscience humaine*, (Paris, 1971).

<sup>18</sup> It is to be noted that the Romans referred to the opinion of the jurists but there was no properly set institution in Roman law that is equivalent to *ra'y*.

<sup>19</sup> Crone, 103-104.

<sup>20</sup> *Ibid.*, 103

<sup>21</sup> Possibly before 1st millennium BC since there seems to be an Indo-European migration from Asia Minor to the Italian peninsula at that time.

gious law.<sup>23</sup> The Muslims conquered the area where the Syro-Roman law book held jurisdiction at a critical moment of their own legal development. It is now recognized that many elements of the Roman law influenced the development of the *shari'a* because of the conquest of Syria.<sup>24</sup> The Syro-Roman Code itself is recognized as a source of Roman influence on Islamic law.<sup>25</sup> One such element is the common structure of intestate succession in Roman and Islamic law. It is important to mention that, although the Syro-Roman Code comes from a mixture of legal sources, the intestate succession scheme described in the code is based on the principle of the agnatic line<sup>26</sup> which is a "truly" Roman principle.<sup>27</sup>

The similarities between the rules, as written in the Syro-Roman Code, and as interpreted in the *shari'a*, are striking. Chibli Mallat, a renowned Islamic legal scholar notes that:

"... the 130 articles in the Arabic version of the Syro-Roman Code sound so familiar to the modern Arab lawyer that the Code appears as some "vulgate" for the uninitiated [...] The following passage, taken from the very first article of the Syro-Roman Code, can equally serve as a good summary of the scheme of succession in Muslim Sunni law: "If a person dies without a will... and is not survived by his father or his mother or by a child or a brother, then his estate goes to his paternal uncles or the sons of his uncles."<sup>28</sup>

One of the most surprising realisations is that the word *sunnah* is used in the Syro-Roman Code to mean law,<sup>29</sup> thus predating the use of that word in Islam by two hundred years. Disregarding certain etymological influences of the Syro-Roman Code, this text still allows us to establish the influence of Roman Law on the substantive successions law of the *shari'a*.

In Roman law, the agnatic family is, as stated by Ulpian:

"...the one that comprises all paternal agnates; because, even after the

<sup>22</sup> It would be helpful to look at the genetic history of Jewish law as it is even closer to Islamic law than Roman law.

<sup>23</sup> Mallat, 708.

<sup>24</sup> See e.g. Crone, 103.

<sup>25</sup> Gibb, 72-84.

<sup>26</sup> Mallat, 710.

<sup>27</sup> Borkowsky, 212-215.

death of the paterfamilias, when each one of them forms a new family, they were under his potestas and continue to be considered of the same family, in other words from the same house and the same root."<sup>30</sup>

Therefore, "*agnati* are those who can trace relationship to each other by civil descents through males from a common ancestor."<sup>31</sup> The *proximus agnatus* is the nearest agnate. He is the member of the agnatic line that would get the succession upon the death of a relative who did not leave a will and had no heirs who were *sui heredes*.<sup>32</sup>

In Islamic law, some of the shares in the succession are prescribed to a defined number of heirs (daughter, son, wife, father, etc.). Once these prescribed Qur'anic shares are distributed, the nearest agnatic male kin receives the remainder of the succession to the exclusion of closer female relatives of the deceased.<sup>33</sup> What is left after the division of the prescribed shares goes to the nearest agnate. If the man died without direct heirs, this relative would receive everything. The word that describes this male "residuary line" is '*asaba*'.<sup>34</sup> It is essential at this point to give an example of how this notion is used. If a Muslim dies, leaving his widow, a son and a daughter, the widow would receive 1/8th of the succession as prescribed. This leaves 7/8th for the children. The son would receive double his sister's share, therefore he would get 2/3(7/8) while the daughter would get 1/3(7/8). If a Muslim dies with no sons, leaving only a widow and a daughter, the widow would still receive 1/8th of the succession, but the children would not receive 7/8. The nearest agnate would take the position of the lone son and thus receive 2/3(7/8), leaving the daughter with what she would have received had she had a brother.<sup>35</sup> Thus, the paternal nephew often has a larger share than the daughter.<sup>36</sup> The word '*asaba*' itself appears in the Syro-Roman Code at article 19.<sup>37</sup> The *Qur'an* has no mention of this word although it becomes a critical feature of succession law in Islam.

### The Diverging Interpretation of Sunni and Shi'a Law

This Roman rule was assimilated into the Sunni sect of Islam that formed over ninety percent of Muslims. On the other hand, the Shi'as, who form less than ten percent of

<sup>28</sup> Mallat, 709-710.

<sup>29</sup> Ibid., 709.

<sup>30</sup> Cited in B. Schmidlin & C.A. Cannata, *Droit Privé Romain*, (Lausanne, 1984), 49.

<sup>31</sup> W.W. Buckland, *Manual of Roman Private Law*, (Cambridge, 1953), 64.

<sup>32</sup> Ibid., 227.

Muslims and whose demographic strength is concentrated in the eastern fringe of the Arab world, do not recognize the '*asaba*'. In the absence of a male heir, the daughter receives under Shi'a law the whole succession. If we allude to the example used above, the daughter would thus receive the full 7/8 of the succession to the exclusion of paternal uncles or nephews. This rule derives without discontinuation from the Persian Zoroastrian (Sasanian) legal tradition that was prevalent in the Eastern fringe of Iraq.<sup>38</sup> This minority of Muslims, who occupy a territory that was not under Roman rule, apply an indigenous Sasanian rule that is exactly opposite of that of the Sunni sect, whose centre was in Syria on the Mediterranean during its formative legal years. By contrasting Islamic law's development outside the former borders of the Roman empire, one could contend that the Islamic law that developed in the Roman empire was influenced by Roman rules.

### ***DONATIO PROPTER NUPTIAS AND MAHR***

#### **The Concept in Roman and Islamic Law**

Western Roman law had recognized the institution of the dowry for much longer than the dower. The dowry is money or property brought by a woman to her husband at marriage. It is seen as a gift, an endowment. Whereas the dowry is given to the bridegroom, gifts from him to the bride were not subject to the same rules and were generally illegal during the marriage.<sup>39</sup>

The dower is defined in the modern Webster as "the rights of a widow in the property of her husband at his death." In Islam and in the Roman Empire, the dower is the groom's addition to his wife's estate. In late Roman Law, this concept was called *Donatio Ante Nuptias*. This was, as stated, a later development of the Roman Law and has a distinctly Eastern influence. "Roman Law acquired a Byzantine hue in the late Empire [...] The custom whereby the bridegroom made a substantial gift to his bride on marriage was recognized by late imperial legislation."<sup>40</sup> It is a counterpart to the dowry and serves two purposes: (i) a penalty for unjustified divorce and (ii) extra provision for the widow.<sup>41</sup> Justinian enlarged this institution, allowed such contributions during the marriage and renamed it *Donatio Propter Nuptias* (*propter*: "on account" of rather than *ante*: "before").<sup>42</sup>

<sup>33</sup> Mallat, 709-710

<sup>34</sup> Ibid., 710.

<sup>35</sup> See generally H. Taqiedin, *The Will and the Way of Succession in Druze Heritage* (Beirut, 1984).

<sup>36</sup> M. Motaharri, *Les Droits de la Femme en Islam*, (Paris, 1973), 164.

<sup>37</sup> Mallat, 710.

<sup>38</sup> Ibid., 713.

The two aims of this concept would immediately resonate with any Muslim jurist. Indeed, in Islam they are the exact words used to describe the Islamic *mahr*. The *mahr* is an obligatory contribution that a bridegroom must make to his bride. It is recognized as a gift, not a compensatory institution that aims to put a price on the wife. Its aims are dual. As in the Roman *donatio*, *mahr* serves both to discourage divorce and to provide for the wife at the end of the marriage.

### ***Mahr in the Jahiliya and the Qur'an***

*Mahr* for these purposes did not exist in pre-Islamic Arabia.<sup>43</sup> It was a practice that historically symbolized ownership. The money was paid to the bride's family, not directly to the bride, as a compensation for taking her out of her native tribe. In even earlier times, the bridegroom would work for the bride's father for an amount of time that was deemed necessary to pay his debt. This custom is present in the Bible when Jacob, who had no dower to give for his wife, gave his services instead.<sup>44</sup>

Even within the strict interpretation of the *Qur'an*, *mahr* also takes on different purposes. *Mahr* is a wife's right, which becomes binding upon the husband once the marriage is contracted. "And give women on marriage their dower as a free gift."<sup>45</sup> *Mahr* belongs to the wife and it is to be given to her only. It is not the property of her parents or her guardian. No one can relieve the husband from the *mahr* obligation except the wife herself. If a husband dies without paying *mahr* to his wife, the outstanding amount becomes a debt on his estate and therefore, must be paid before the distribution of his inheritance among his heirs. The rule is similar if there is divorce, as it becomes immediately due. The *Qur'an*, and several *muftis*, have stressed that the *mahr* has nothing to do with divorce. But, in classical Islamic legal circles, as well as modern ones,<sup>46</sup> the institution of *mahr* has taken on the roles that were described when talking of *donatio propter nuptias*. The rule that the *mahr* needs to be fully paid by the time of divorce becomes a de facto limitation on divorce.

It cannot be said for certain that the *mahr* institution derives from Eastern Roman Law because there existed an Arabian equivalent, but the juristic justification that was given to

<sup>40</sup> This was a limitation on the *liberum matrimonium* rule in Roman civil law. See Buckland, 66.

<sup>41</sup> Borkowsky, 53.

<sup>42</sup> P. Corbett, *The Roman Law of Marriage*, (Oxford: Clarendon Press 1930), 206.

*mahr* is taken from Roman legal thought. This tradition was so strong in the Eastern Mediterranean that it forced its way into Roman law and was crystallized in Book V of the Code of Justinian.<sup>47</sup> At the time of the Islamic conquest, the population in what is now Syria, Palestine and Southern Turkey was over ninety percent Catholic and had been living under Roman and Byzantine rule for the past five hundred years. The Muslim Umayyads transferred their capital to Syria and started its "Arabisation". This happened at an embryonic stage of Islamic jurisprudence, which allowed many local legal influences to enter Islamic legal thought.<sup>48</sup>

## THE ROMAN PATRONATE AND *WALA'*

### The Islamic *Wala'*

We have looked at two pillars of Islamic family law that seem to be descendants of Roman legal principles. But neither the *mahr* nor the *'asaba* have received the amount of attention that the concept of *wala'* has garnered after Patricia Crone and Martin Hinds published *Roman, Provincial and Islamic Law* in 1987.<sup>49</sup>

*Wala'* describes both "dependence on" and "affinity for" another. It is the patron-client relationship that develops when an "outsider" has to be integrated in a host group.

All societies must have a policy regarding the admission of outsiders to their ranks [...] in societies constituted by common faith, adoption of this faith will normally result in the acquisition of membership [...] Newcomers in a certain society necessarily receive their rights either indirectly via an individual or group or else directly from the community itself.<sup>50</sup>

In Islam, the non-converted subjects of the state were called *dhimmis*, and, in principle, their rights were never circumscribed. The manumitted convert also benefited from full rights upon manumission, but that act also created a bond between the freedman and the manumitter. That relationship, which was mostly asymmetrical, is *wala'*.<sup>51</sup>

<sup>43</sup> U. Mitter, "The Role of Non-Arabs in the Origins of Islamic Law," *Sharqiyyat* 9 (1997): 110.

<sup>44</sup> Genesis 29:18

<sup>45</sup> Holy *Qur'an Al-Nisa'* 4:4

<sup>46</sup> See e.g. *Kaddoura v. Hammoud*, [1998] O.J. No. 5054 (Prov. Ct.) or *N.M.M. v. N.S.M.*, [2004] B.C.J. No. 642 (Prov. Ct.)

<sup>47</sup> Buckland, 66.

The legal ramifications are limited, but one of the main consequences is that the manumitter inherits as an agnate of the freedman. There are other consequences as well, such as the manumitter becoming the marriage guardian to his freedwoman.<sup>52</sup> The freedman, on the other hand, does not inherit from the manumitter.<sup>53</sup>

### Roman Patronage

In Roman Law the rules are also clear. The law of the Twelve Tables gave the estate of a freedman to his former master provided he died intestate, and without *sui heredes*. The former master, by the act of manumission became his patron. The freedman did not acquire rights in his master's gens by his manumission, although he was allowed to adopt the gentile name of his patron. This is recounted in the Institutes of Justinian in Book III Title VII:

“Let us now turn to the property of freedmen. These were originally allowed to pass over their patrons in their wills with impunity: for by the statute of the Twelve Tables the inheritance of a freedman devolved on his patron only when he died intestate without leaving a family heir. If he died intestate, but left a family heir, the patron was not entitled to any portion of this property, and this, if the family heir was a natural child, seemed to be no grievance; but if he was an adoptive child, it was clearly unfair that the patron should be debarred from all right to the succession.”<sup>54</sup>

### Pre-Islamic *Wala'*

The parallels in the rules, do not, in themselves, show a direct link between *wala'* and the Roman patronate. Indeed, there was an institution in pre-Islamic Arabia that involved the accession of outsiders into the host society. It was *hilm* (alliance, partnership, and attachment) and *jar*<sup>55</sup> (protégé). These institutions describe the acceptance into the tribe of an outsider who then becomes subject to a relationship of patronage, not with any one individual, but with the tribe as a whole.<sup>56</sup> The relationship, in pre-Islamic Arabia, did not assimilate the outsider into his host tribe, and did not detach him from his native one.<sup>57</sup> Thus the

<sup>48</sup> Crone, 32.

<sup>49</sup> Crone, 3.

<sup>50</sup> Ibid., 35

<sup>51</sup> Ibid., 36

<sup>52</sup> Ibid., 36-37



two main characteristics of the pre-Islamic patronate are that it is formed between an individual and a tribe, and it is not assimilative. Therefore, Patricia Crone hypothesises that, due to the structural differences between the Arabian and Islamic patronate, and the structural similarities between the Roman and Islamic patronates, that the *shari'a* was influenced on this issue from its contact with Roman Law.

This is a plausible argument, which reinforces the main thesis of this paper, but the causal link is tenuous. Whether Islam is seen as exterior to this world, or a fruit of human thought, it cannot be denied that that philosophy had a great impact on the region. Focusing on some of the aims of Islam can reveal why, without Roman influence, it would transform Arabian *jar* and *hilm* into the Islamic *wala'*.

### Islam as an Autonomous Source of Law Reform

*Hilm* and *jar* are relationships of patronage that did not have, as a goal, the accession of the outsider to the tribe. It was a way of allowing the outsider to stay with the tribe, rather than become part of it. The importance of blood relations in the *jahiliya*<sup>58</sup> cannot be overstated. It is impossible to accede to the tribe of another as tribal identity is linked to lineage. This is not so in Islam. Fundamental to any religious dogma is the possibility, highly encouraged of course, of conversion. Without conversion to the belief, no expansion is possible. Islam, as an institution, rejects any divisive communitarian institution such as *hilm* or *jar*. One of the fundamental aims of Islam was to create a global community of members, the *umma*, in an effort to eliminate tribal sectarianism.<sup>59</sup> This means that any patron-client relationship under Islamic law would necessarily have to be assimilative and would need to detach the outsider from his prior identity. Furthermore, rejecting the idea of tribal identity, the patron-client relationship created cannot be between an individual and a tribe. It has to be between the *umma* and the individual. Thus, the only "real" patronage created has to be one of individual relationships as opposed to tribal ones. Islamic Law and Roman Law have similar rules on client-patron relationships, but it cannot be said for certain that there is an influential link between Roman law and Islamic law as regards patronage. Perhaps this is simply another case of Islamic juristic reasoning that builds on Roman texts on the subject.

<sup>55</sup> Except for small pockets of the Imami and Ismaili schools which allowed the freedman to inherit if the manumitter died with no heirs. All other schools rejected this position. See Crone, 37.

<sup>56</sup> "The Institutes of Justinian" *Lincolinn*: online <<http://members.aol.com/hsauertieg/institutes/book3.htm>>

<sup>57</sup> Interesting to note that in modern times this means "neighbour", or, in other words, he who is not of this household but resides near us.

<sup>58</sup> W. M. Watt, *La Pensée Politique de l'Islam* (Vendôme, 1995), 7 and 63.

## CONCLUSION

A point that was raised in this paper but not thoroughly explored is the possible genetic relation between Islamic and Roman Law. Do these systems come from the same legal tree? Are they of the same origin or family of law? They both treat obligations rather similarly, they both reorganize private property and they both have patriarchal family regimes that emphasize blood ties. This question is left unanswered because it is beyond the scope of this paper where the focus was on substantive legal influence and the structures that permit it.

By comparing substantive legal institutions of Roman and Islamic Law, it is possible to perceive a Roman influence on the *shari'a*. The influence is on the *shari'a* itself, and not on its foundational legal texts. The *Qur'an*, for example seems relatively free of direct Roman influence. But the rules that have evolved from it are heavily affected due to the structure of Islamic law. *Shari'a* and *shara'a* are words that mean many things, river, road, street, guide, but one other meaning is beginning, start, a new course. In the very meaning of the word, we can find an acceptance of interpretation being something new rather than recycled. The *Shari'a* is thus the "path to follow", but the path can evolve, it can seek out new terrain.

It is the unique structure of jurist-dominated legal systems that allows them to be so malleable to outside influence. In addition, Islam is individualist and decentralized. This decentralization does not allow for a predominant figure to emerge or a unique set of ideas to dominate. It is because of the looseness of this structure and the liberalism of the institutions that external influence is particularly strong on Islamic law. In essence, any rule that makes sense will find at least some followers. Therefore, a strong legal regime such as Roman law becomes particularly influential. Roman and Provincial law have indeed left a lasting footprint in Islamic law.

However, there is a flaw in the way we deal with comparative law. In this field, there is often talk of debts and borrowings when discussing legal history. If one looks at the writings of the late 19th century orientalists it would seem that barbaric, horse riding Bedouin tribes, after conquering the Eastern Mediterranean, were awed by the perfection of Roman

<sup>58</sup> In pre-Islamic Arabia, the "*Jahiliya*" came from the word for ignorance.

<sup>59</sup> Watt, 67-70.

law and thus proceeded to copy down the rules of the civilized Romans and purged from themselves the backwards tenets of their customary law. This is a skewed picture. Although it is true that there is a Roman influence on the *shari'a*, Islam itself, whether seen as a religion, a philosophy, or a socio-political movement, oversaw major law reform. Furthermore, the Roman influence that did occur was a slow integration of Roman ideas through the mechanisms of Islamic law. It follows a pattern of law evolution. If we look at the Middle East, its law has a certain linear pattern that goes from the Code of Hammurabi, through Assyrian Law, Rabbinic Law, Greek Law, Roman Law, Byzantine Law and finally to Islamic law.<sup>60</sup> Although the name of the legal regime that is in effect changes, the people living under it do not. It is these people that bring a rule from one tradition to another. When the Arab-Muslim empire became a real power, most of its inhabitants had still been born Byzantine. These people simply continued to live their lives as they always had and left it to the jurists to go through the mental acrobatics of reconciling their actions with "the law".

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<sup>60</sup> See generally Mallat.

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# PROCOPIUS' PORTRAYAL OF THEODORA IN THE SECRET HISTORY:

"HER CHARITY WAS *UNIVERSAL*"

Nadine Elizabeth Korte

There are many sources for the reign of Justinian (527-565 CE), such as those written by John Malalas, Evagrius Scholasticus, John Lydus and John of Ephesus; there are even the emperor's own legal works. Despite this, it is Procopius of Caesarea (c. 500 - c. 565) and his three works, the *History of the Wars*, the *Buildings* and the *Secret History*, which are inescapable. Procopius' importance is due to his unique first-hand knowledge; he accompanied Justinian's star general Belisarius on campaigns against both the Persians and the West. Yet the use of Procopius as a source is not without its difficulties. What is remarkable is the difference in the descriptions these three works give of Justinian and Theodora. Throughout the *Wars*, Procopius compliments Justinian for his expulsion of the barbarians. In the *Buildings*, Procopius describes how Justinian took a period of disorder and "not only made it greater in extent, but also much more illustrious."<sup>1</sup> The *SH*, on the other hand, has Procopius describing Justinian as the veritable anti-Christ, who along with his wife, was a demon incarnate responsible for all of society's problems:

"I, like most of my contemporaries, never once felt that these two were human beings: they were a pair of blood-thirsty demons...[f]or they plotted together to

\*Quote from title page: Edward Gibbon, *The Decline and Fall of the Roman Empire, 1776-1788*, (edited by Dero A. Saunders, Harmondsworth, 1952), 633, from a footnote commenting on a passage in the SH that tells how Theodora would often sleep with 10 men of common origin at dinner parties and would then proceed to sleep with their servants, as many as 30, all in one night.

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<sup>1</sup> Procopius, *Buildings*, in Procopius series, Loeb Classical Edition, v.7 (translated by H.B. Dewing, Cambridge, MA, 1914), 1:1-5.

find the easiest and swiftest means of destroying all races of men and all their works, assumed human shape, became man-demons, and in this way convulsed the whole world."<sup>2</sup>

Many authors seem content to relegate the *SH* to a mere footnote or to a parting remark, instead of trying to determine why Procopius would write the *SH* in such a vehement tone. Perhaps more unsettling than this change of opinion towards the emperor, is Procopius' treatment of Theodora. Justinian's wife Theodora is described in graphic sexual detail as a loose and immoral woman. As Judith Herrin jokingly states: "It is almost as if one of the most respected historians of our time published hard-core pornography under a pseudonym. Perhaps some do?"<sup>3</sup> Aside from the influential works of Averil Cameron and J.A.S. Evans, few other authors have dared to commit more than a small number of paragraphs to Procopius' *SH*.<sup>4</sup> The most important contribution that Cameron and Evans make is their effort to *show* the *SH* as a work worthy of having its historical merit debated, rather than treating its portrayals of Justinian, his wife Theodora, Belisarius, and his wife Antonina as amusing anecdotes. Yet even these authors seem reluctant to evaluate all of the accusations Procopius makes against Theodora, in particular, what has been carefully called "the pornographic section."<sup>5</sup> Procopius' statements about Theodora should not simply be grouped together and dismissed as meaningless slander while the rest of the *SH* is used as historical evidence. The goal of this paper is twofold. The first aim is to discover whether the representation of Theodora is exceptional for the period or representative of literary traditions and other influences. The second goal of this research is to clarify if the sexual portrayals of Theodora can be used as evidence for the period, and if so, how.

### Procopius, His World, and His Work

During Justinian's reign, the empire centred in Constantinople was experiencing instability and change. There was heavy religious fragmentation in Christianity between the Nestorians, the Monophysites and the Chalcedonians. The so-called 'Nika' riots broke out in 532 between the incredibly popular, opposing circus factions of the greens and the blues,

<sup>2</sup> Procopius, *Secret History*, (translated by G.A. Williamson, London, 1966, repr. 1981), 12:14 (102). This translation of Procopius' *SH* will herein be used as the base text for the work unless otherwise stated. Since Williamson's translation does not contain book and line numbers from the original Greek version, the page numbers from this edition have been included in brackets.<sup>3</sup> Judith Herrin, "The Byzantine Secrets of Procopius" (*History Today* 38, August 1988, 36-42), 36.

<sup>4</sup> Averil Cameron, *Procopius and the Sixth Century* (Berkeley, 1985); J.A.S. Evans, *Procopius* (New York, 1972).

<sup>5</sup> i.e. Procopius, *SH*, 9:1-29 (81-86), Cameron, *Procopius and the Sixth Century*, 59.



associated politically with the Monophysites and the Chalcedonians respectively.<sup>6</sup> Devasting natural disasters were plaguing the empire, such as the earthquakes at Antioch in 526 and the bubonic plague that hit Constantinople both in 542 and again in 558. Evagrius Scholasticus, who personally lost numerous family members to the plague, writes of the unpredictable nature of the devastation. Not only was the impact of the disease varied, killing whole populations while others escaped, but the nature of the plague and its manner of infection were then unexplainable:

“The ways in which the disease was communicated were various and unaccountable; some perished by merely living with the infected, others by only touching them, others by having entered their chamber, others by frequenting public places. Some, having fled from the infected cities, escaped themselves, but imparted the disease to the healthy.”<sup>7</sup>

In addition to an attempted reconquest of the West, wars with Persia were still being fought. Although Justinian made great advances in legal reform and transformed Constantinople with his building projects, by the end of his reign the attempts at religious unity as well as the reconquest of the West had failed, and his undertakings had left the empire bankrupt. Nevertheless, when Justinian passed away in 565, he had ruled the empire for over 38 years; his was the longest reign in Roman history up to that point save for two emperors: Theodosius II (408-450) and Augustus (27 BCE - 14 CE).

Like most other writers of late antiquity, what little is known about Procopius comes from his works. Born at the turn of the sixth century in Caesarea, he had the chance to receive education in the traditional Greek fashion, i.e. through the use of classical authors, before Justinian banned pagan teaching in 529.<sup>8</sup> A rhetor, a professional orator or lawyer, Procopius' viewpoints throughout his works have led Cameron and Evans to believe that he was from a higher, land-owning class.<sup>9</sup> Throughout the *SH*, Procopius is determined to criticize all that goes against traditional Roman ways, and he was able to find ample fuel in Justinian's increasingly autocratic and 'Byzantine' (i.e., back-door) policies.<sup>10</sup> The *SH* remained unpublished immediately after it was written, although it would be foolish to suggest that Procopius had not meant for it to be seen, at the very least, by a close inner circle. The earliest mention of the text is in the encyclopedic Souda of the 10th century, where it is

<sup>6</sup> Dates for the following paragraph taken from "Table of Dates" in Robert Browning, *Justinian and Theodora* (London, 1987), 173-177.

<sup>7</sup> Evagrius Scholasticus, *Ecclesiastical History*, in *Theodoret and Evagrius: History of the Church* (London, 1854, 255-467), 4:29.

referred to as the *Anekdotai*, or "the unpublished."<sup>11</sup> The text was only rediscovered in the 17th century, when a single copy was found amongst the Vatican manuscripts.<sup>12</sup>

These, however, seem to be the only things scholars can agree upon; there are numerous debates on various aspects of Procopius and his works. Although in-depth portrayals of all of these discussions would provide enough material for several books and are impossible here, the issues deserve at the very least acknowledgement and minor recapitulation. The contradictory nature of the *SH* compared to Procopius' other works has been explained away in previous years by doubting Procopius' authorship, however the discovery of linguistic continuity between the three works seems to have settled the issue.<sup>13</sup> The dates of Procopius' works are still the topic of a monumental and ongoing debate, in which conclusions seems to change in rapid succession.<sup>14</sup> Although there are ample theories as to the date of each work and the exact order of creation, I would agree with most by stating that the works were written concurrently instead of consecutively between 550 and the author's death c.565. A major issue has also developed over Procopius' true religious sentiment: is there evidence to support the claim that Procopius might have been a skeptical Christian?<sup>15</sup> I believe that much of the evidence often confuses Christian skepticism with pagan influence, which Procopius would have obviously run into during his classical education. Although a look at the descriptions of Theodora in the *SH* would benefit from concrete answers to such questions, a conclusion to this paper is not dependent on the outcome of the aforementioned issues.

### Theodora's Representation in the Secret History

As if Procopius' accusation of Theodora as a demon in disguise were not enough, the author also goes on to tell of her greed, her bloodthirstiness, and her sexual escapades. Procopius is appalled at men in charge who have acquiesced power to their wives. In the case of Theodora, "[t]he nation had become a community of slaves with Theodora as slave-

<sup>8</sup> Herrin, "The Byzantine Secrets of Procopius," 38.

<sup>9</sup> Cameron, *Procopius and the Sixth Century*, 5-7; Evans, *Procopius*, 30-32.

<sup>10</sup> Cameron, *Procopius and the Sixth Century*, 5-7.

<sup>11</sup> Pierre Maraval, "Introduction," *Histoire Secrète de Procope de Césarée* (Paris, 1990, 1-26), 11, originally "les Inédites".<sup>12</sup> Ernest Renan, "Anekdotai," in *Histoire Secrète de Procope de Césarée* (Paris, 1990, 199-211), 201.

<sup>13</sup> G.A. Williamson, "Introduction," in *Secret History* (London, 1981, 7-35), 29, 33.

<sup>14</sup> For the most recent opinions in the debate see J.A.S. Evans "The Dates of Procopius' Works: A Recapitulation of the Evidence" (*Greek, Roman & Byzantine Studies* 37, Fall 1996, 301-13); Cameron, *Procopius and the Sixth Century*, 9-12.

<sup>15</sup> For reasons why and opinions of, see Averil Cameron, "The 'Skepticism' of Procopius" (*Historia* 15, 1966, 466-482), which seems to have the most sound take on the issue; M.A. Elferink, "Tychè et Dieu chez Procope de Césarée" (*Acta Classica* 10, 1967, 111-134); J.A.S. Evans, "Christianity and Paganism in Procopius of Caesarea" (*Greek, Roman and Byzantine Studies* 12, 1971, 81-100).

driver."<sup>16</sup> A similar description is given of Belisarius' wife Antonina, who is also blamed for having an unexplainable control over her husband. Procopius writes that "[r]umour has it also that his wife used magic arts to enslave him, instantly destroying his resolution" which led Belisarius to swear, "he would be her faithful slave, not her husband."<sup>17</sup> Procopius' descriptions do not end here; he graphically describes the sexual behaviour of Theodora during her lowly upbringing. Her early days working in the circus as an actor are vividly portrayed; Procopius tells how Theodora was a prostitute in every possible way, who would even accept slaves as clients.<sup>18</sup> According to Procopius, "by constantly playing with novel methods of intercourse she could always bring the lascivious to her feet" and Theodora would also "invite both those who had already enjoyed her and those who had not been intimate as yet, [by] parading her own special brand of gymnastics."<sup>19</sup> As those who have read the work know, these excerpts are among some of the tamer comments that Procopius writes in these passages.

Just how out of place are the sexual descriptions in Procopius' *SH*? Although sexual depravity is described as negative, this does not mean that the subject itself was taboo in Procopius' society. Translations of the *SH* often fall prey to historical anachronisms with modern ideals; Gibbon is the key example of this with his statement regarding Theodora: "her murmurs, her pleasures, and her arts must be veiled in the obscurity of a learned language."<sup>20</sup> The first edition of the *SH*, printed in 1623, left out the sexual passages altogether.<sup>21</sup> The most influential description of these passages has been Averil Cameron's insistence that they are invective; in her opinion, trying to gather factual information from them is fruitless.<sup>22</sup> Invective is portrayed as a sort of negative, secular hagiography, with a focus on an individual history as a representation of the whole. The aim is to provide an example of what not to do, by using extremely insulting, abusive and insincere language. The sexual descriptions of Theodora and Antonina are then just "rhetorical flourishes" in Procopius' overall description of the imperial couple.<sup>23</sup> Thus, the general knowledge that Theodora had been an actress might have been all that was needed for contemporary readers of Procopius' time to accept these embellishments.

### Procopius' Contemporaries

It is safe to say that other authors writing about the reign of Justinian did not portray

<sup>16</sup> Procopius, *SH*, 15:16 (115-116).

<sup>17</sup> *Ibid.*, *SH*, 3:2 (52) and 4:30 (59).

<sup>18</sup> *Ibid.*, *SH*, 9:10-15 (83).

<sup>19</sup> *Ibid.*, *SH*, 9:15 (83) and 9:23 (85).

Theodora in such a light. John Lydus (490 - c. 565) does not mention Theodora's sexual history in his work, *The Magistracies of the Roman State*.<sup>24</sup> However, Lydus does not refrain from using such descriptions in association with the soon-to-be exiled praetorian prefect John the Cappadocian. In fact, Lydus treats John the Cappadocian in much the same way as Procopius treats Theodora: immoral, demon-like, and greedy. Lydus describes how "[h]arlots were wont to entice him, as he was being embraced by other naked-appearing harlots, with lascivious kisses which forthwith impelled him to sexual intercourse; and, after he had been worn out, he used to taste of both the delicacies and drinks offered him by other catamites."<sup>25</sup>

Another contemporary author of the period, John Malalas (c. 490 - c. 570),<sup>26</sup> only mentions Theodora three times: once as "the pious Theodora" who stopped brothel-keepers from enlisting unwilling young girls as prostitutes; second, to relate that while on a trip to Pythion, she was found "giving generously to the churches"; and lastly to report her death.<sup>27</sup> Although Malalas does not describe Theodora sexually, he does not shy away from graphic sexual descriptions of others whom he accuses "of living immorally in matters of the flesh." Malalas is able to write of Justinian's punishment of the bishop Alexander, who had been accused of homosexuality: "he amputated Alexander's genitals and paraded him around in a litter," and immediately decreed that all others practicing homosexuality should receive the same punishment.<sup>28</sup>

One of the most important contemporary writers to compare to Procopius is Evagrius Scholasticus (c. 536 - c. 600).<sup>29</sup> His *Ecclesiastical History* uses Procopius as a source, although Evagrius probably did not have access to the *SH*.<sup>30</sup> Evagrius criticizes Justinian's greed in much the same manner as Procopius did, and in one of the few mentions of Theodora, acknowledges her position of power by showing how correspondence relating to foreign affairs was in addressed in both of their names.<sup>31</sup> Although Evagrius' *Ecclesiastical History* does not contain the same degree of sexual descriptions as his contemporaries do, he was not averse to describing bodily functions in full detail. In his description of the

<sup>20</sup> Gibbon, 633-634.

<sup>21</sup> Williamson, 33.

<sup>22</sup> Cameron, *Procopius and the Sixth Century*, 59-60.

<sup>23</sup> Lynda Garland, *Byzantine Empresses: Women and Power in Byzantium A.D. 527-1204* (London, 1999), 13.

<sup>24</sup> Date of birth/death in Anastasius C. Bandy, "Introduction," in *The Magistracies of the Roman State* (Philadelphia, 1983, ix-lxxiv), x, xxiv-xxvi.

<sup>25</sup> John Lydus, *The Magistracies of the Roman State* (translated by Anastasius C. Bandy, Philadelphia, 1983) 3:65.

<sup>26</sup> Date of birth/death in Elizabeth Jeffreys, Michael Jeffreys and Roger Scott, "Introduction," (Melbourne, 1986, xxi-xxli), xxii.

plague, Evagrius tells how:

“The plague was a complication of diseases: for, in some cases, commencing in the head, and rendering the eyes bloody and the face swollen, it descended into the throat, and then destroyed the patient. In others, there was a flux of the bowels: in others buboes were formed, followed by violent fever...other died in a state of delirium, and some by the breaking out of carbuncles.”<sup>32</sup>

Lydus, Malalas, and Evagrius do not write about Theodora's sexual history. However, all three did not refrain from using explicit descriptions of sexual and other bodily functions to further their aims. At the beginning of the 20th century, Charles Diehl thought that the sexual descriptions were the result of Procopius' collection of the rumours which were present in society to describe Theodora's "prodigious good fortune."<sup>33</sup> From the above examples however, it can be shown that each author was not above putting either graphic details or rumours within the pages of their works. Procopius' *SH* is the only one to attack the empress in such explicit terms.

### Sex, Rumour and the Literary Tradition

In Cameron's opinion, the sexual passages would have only been shocking to modern audiences. It is her belief that: "[b]ecause of the modern preoccupation with sex, the romanticising and the idealising views alike dwell on the sexual details which for Procopius were probably never to be taken absolutely at face value."<sup>34</sup> Procopius was not the only writer to use explicit language, but does this mean that Procopius' descriptions had little effect on audiences in late antiquity? Sexual descriptions are not only limited to the *SH* in literary tradition. What is important is that sexual descriptions found in the literary tradition are not always the result of invective, nor were they all used for the same purpose. The history of literary slander can provide an excellent framework for trying to determine if the accounts of Theodora in the *SH* are exceptional or representational.

<sup>27</sup> John Malalas, *Chronicle* (translated by Elizabeth Jeffreys, Michael Jeffreys and Roger Scott, Melbourne, 1986) 18:24, 18:25 and 18:104.

<sup>28</sup> *Ibid.*, 18:18.

<sup>29</sup> Date of birth/death in "Account of the Author and his Writings," *Theodoret and Evagrius: History of the Church* (London, 1854, 253-254), 253.

<sup>30</sup> Cameron, *Procopius and the Sixth Century*, 65.

<sup>31</sup> Evagrius, *Ecclesiastical History*, 4:30 and 4:11.

<sup>32</sup> *Ibid.*, 4:29.

Roman emperors have always been subject to sexual slander in written works. The genre of biography has many such examples. Biography focuses on the "quirks and gestures" of a figure which would give readers a window into their soul.<sup>35</sup> That which made it into these biographies was thus hand-picked by the writer; these portrayals do not represent an entire picture of the person being depicted, but only selected incidents which the biographer believed would best reveal their true character. This biography could be both negative and positive, as can be seen in Suetonius' *The Twelve Caesars*, and serves mainly to showcase ideal behaviour by providing examples of people to emulate, or behaviour to avoid.<sup>36</sup> The first century CE writer included explicit sexual descriptions for all those emperors who went against his traditional, senatorial views. The more Suetonius hated an emperor, the more of a sexual invert the emperor became within the pages of *The Twelve Caesars*. Suetonius describes Julius Caesar's sexual relationship with King Nicomedes of Bithynia; Augustus' penchant for deflowering young girls; Tiberius' sexual palace at Capreae, where he used his pool to train young boys to swim through his legs and lick his genitalia; Caligula's incestuous relationship with his three sisters, as well as his homosexual relationships; Nero's passions for his mother Agrippina; Galba's excitement at Nero's death, when he exclaimed to his homosexual lover that he should "get ready and have intercourse with him without delay", as well as Domitian's "bed-wrestling."<sup>37</sup> In Suetonius' works, unlike the *SH*, none of the women associated with the emperors are given these same explicit sexual descriptions. Augustus exiled his own daughter and grand-daughter because of their immoral behaviour, yet Suetonius never describes a word of it except to say: "He came to the conclusion that the Elder and the Younger Julia had both been indulging in every sort of vice; and banished them."<sup>38</sup>

Other authors reflected a fear of women in charge. From the same century, Juvenal was not free from sexual descriptions; his Satires show a writer thoroughly scared of women's sexuality, education, beauty, and money.<sup>39</sup> In one instance he satirises the type of friend who would seduce a man's whole household:

"Besides, to him nothing's sacred nor safe from his groin,  
Not the lady of the house, not virgin daughter, nor  
Yet her still smooth betrothed, nor the hitherto chaste son.

<sup>33</sup> Charles Diehl, *Theodora: Empress of Byzantium* (translation of Théodora, impératrice de Byzance, 1904, repr. 1937, Samuel R. Rosenbaum, New York, 1972), 1.

<sup>34</sup> Cameron, *Procopius and the Sixth Century*, 82-83.

<sup>35</sup> Patricia Cox, *Biography in Late Antiquity: A Quest for the Holy Man* (Berkeley, 1983), xi.

<sup>36</sup> *Ibid.*, 15.

If there's none such, his friend's grandmother he prostrates.”<sup>40</sup>

The third century author Tacitus told of Messalina, the wife of the emperor Claudius (41-54 CE), who married another man while Claudius was away from Rome. This slander of an emperor's wife does not go into as graphic detail as Procopius does, yet it still has the same end: to show that “everything was under the control of a woman.”<sup>41</sup> This insult formed a common literary *topos* in Roman literature. However, the difference between Messalina and Theodora is that while Tacitus *tells* of Messalina's sexual escapades, Procopius *describes* Theodora's.

The *Historia Augusta*, from the late third and early fourth century, shows the same tendency as Suetonius to exaggerate descriptions of bad emperors (and thus bad models), with overt sexual descriptions. The *HA* tells how Commodus promoted a man in his company because he had “a male member larger than most animals,” and likewise, how Elagabalus opened a bath for the sole purpose of procuring a “supply of men with unusually large organs.”<sup>42</sup> In the cases of Suetonius and the *HA* those being subjected to sexual descriptions are those in power, not those married to the emperor. Roman morality relied on example and practice, and these authors have used sexual descriptions to further emphasise those whom people should not model themselves on.<sup>43</sup> Christian tradition, and its stress on the individual exemplar would have only reinforced this trend.<sup>44</sup>

Christian works are not exempt from sexual descriptions. Upset regarding Maximin Daia's persecutions, Lactantius tells of his womanising: “Matrons of quality and virgins were stripped of their robes, and all of their limbs were inspected, lest any part should be unworthy of the bed of the emperor.”<sup>45</sup> Although sexuality was portrayed in a negative manner in hagiography, its pages were still as full of attention grabbing details as Procopius in regards to sex and lewd behaviour.<sup>46</sup> The repentant prostitute was a common theme in hagiography, the two biggest examples being the legend of Mary Magdalene and Pelagia.<sup>47</sup> As Pelagia walks by the bishop of Nonnos during his trip to Antioch, her beauty, her clothes, jewelry, and fragrance, capture the attention of everyone in his party. Afterwards,

<sup>37</sup> Suetonius, *The Twelve Caesars* (translated by Robert Graves, London, 1957), Caesar: 20; Augustus: 71; Tiberius: 43-44; Caligula: 24,36; Nero: 28; Galba: 22; Domitian: 22.

<sup>38</sup> *Ibid.*, Augustus: 65.

<sup>39</sup> Juvenal, *Sixth Satire*, in *Roman Civilization: Selected Readings, Vol: 2: The Empire* (edited by Naphtali Lewis and Meyer Reinhold, New York, 1990), 356-8.

<sup>40</sup> Juvenal, *Sixteen Satires Upon The Ancient Harlot* (translated by Steven Robinson, Manchester, 1983), 3:9-12.

<sup>41</sup> Tacitus, *Annals*, in *The Complete Works of Tacitus* (translated by Alfred John Church and William Jackson Brodribb, New York, 1942), 12:7.

all are amazed at Pelagia's repentance and how "the mind of this sinful prostitute was set on fire and was burning with the love of God."<sup>48</sup> The purpose of the prostitute as a literary *topos* was twofold: not only could she describe an actual person, showing that salvation was available to even the worst of sinners, but she could also portray all of those in society who were unfaithful to God.<sup>49</sup> Such a theme can be seen in the Bible: Revelations 17:1-18 depicts the "judgment of the great whore," who was "holding in her hand a golden cup full of abominations and the impurities of her fornication" - the whore is Rome.<sup>50</sup> Hagiography also portrayed its post-repentance women as figures of great strength whose social roles were well respected.<sup>51</sup> Procopius judges Theodora and Antonina's power and influence negatively, but in light of hagiography, it would be unfair to excuse Procopius' viewpoints because any sort of misogyny inherent in Christianity. Rather, the mistrust of women in power had been a trend in pagan literature for centuries. Furthermore, the implication that a woman was in power was an insult to the emperor in and of itself.

### The *SH* as Evidence

What could have made Procopius write the way he did? Pushing aside the question of Procopius' religious sincerity, it is important to determine the author's educational influences as they appear in his works. Procopius' *Wars* is a sixth century CE text which tries hard to follow a model from the fifth century BCE, Thucydides' *History of the Peloponnesian Wars*. On a greater level, the work tends to imitate many other literary models as well. Not only did Procopius try to replicate Thucydides' use of classical Greek, but he also carefully copied the use of classical subject matter.<sup>52</sup> Procopius was faced with the tough question of how to fit Justinian's religious policy into Thucydides' secular model; only incidents which fit classical criteria were allowed in the *Wars* and this has led some to explain the *SH* as Procopius' outlet for that which he could not include in his reproduction

<sup>42</sup> *Historia Augusta* (translated by David Magie, v.1-3, London, 1921-1932), Comm.10: 9; Heliog.8: 6-7.

<sup>43</sup> Simon Swain, "Biography and Biographic in the Literature of the Roman Empire," in *Portraits: Biographical Representation in the Greek and Latin Literature of the Roman Empire* (M.J. Edwards and Simon Swain, eds., Oxford, 1999, 1-38), 32.

<sup>44</sup> *Ibid.*, 19.

<sup>45</sup> Lactantius, *On the Death of the Persecutors* (accessed electronically), 13:38.

<sup>46</sup> Alexander Kazhdan, "Byzantine Hagiography and Sex in the Fifth to Twelfth Centuries" (*Dumbarton Oaks Papers* 44, 1990, 131-143), 131.

<sup>47</sup> Benedicta Ward, *Harlots of the Desert* (Kalamazoo, MI, 1987), 7.

<sup>48</sup> Pelagia of Antioch, *In Holy Women of the Syrian Orient* (translated by S.P. Brock and S.A. Harvey, Berkeley, 1987, 40-62), paraphrase 42-43, quote 51.



of the classical formula.<sup>53</sup> This explanation makes it seem that the reason for the vehemence of the *SH* is because it is the compilation of all the negative comments from three works and not just one. Such an explanation fails to take into account the fact that Procopius was not a machine, but a human who had the capacity to change opinions, and to change writing models and styles.

Many of Procopius' narratives take place behind closed doors in the imperial palace, and often contain the 'actual' dialogue used during conversations that were most certainly private. Even in describing sexual encounters, Procopius seems to know exactly what occurred. Perhaps Theodora's lowly origins as an actress and circus performer were all Procopius needed to make these suggestions believable. Theodora's origins would have been no secret to those of the time, and Romans never held actresses, or actors for that matter, in high regard. Yet, Theodora's lowly origins were not that uncommon in comparison to other eastern empresses. Daughters with important status and imperial connection were more often than not sent to the edges of the Empire in an attempt to solidify foreign relations through marriage. Helena, wife of Constantius I (305-306) was an innkeeper, a title synonymous in ancient literature with the word 'whore' while Euphemia, wife of Justin I (518-527) was a freed slave.<sup>54</sup> Justin I himself even paved the way for his nephew's marriage when he had the law changed in order to have Euphemia declared a citizen retroactively, so as to allow their marriage legal status.<sup>55</sup> The fact that Justinian had to change the law against marriage to actresses or prostitutes in order to marry Theodora might be more a reflection of his legal reforms, rather than society's aversion to someone of Theodora's origins being on the throne. An overhaul of the laws was long overdue and, considering the extent of Justinian's legal reforms, this point would seem insignificant when placed in its context.

As for Theodora, the *SH* tells more about the myth of an empress than it does about Theodora as an individual, yet this does not imply that the myth holds no value. In fact, its worth is even greater as a myth, since it reflects much more than the sixth century. In studying its creation historians can gain insight into pre-sixth century periods, while following its diffusion allows for further understanding of history for all periods that follow. Theodora has taken on a life of her own throughout the ages. In what the influential

<sup>49</sup> Ward, 14, 57.

<sup>50</sup> *The Holy Bible Containing the Old and New Testaments with the Apocryphal/Deuterocanonical Books* (New York, 1989).

<sup>51</sup> Susan Ashbrook Harvey, "Women in Early Byzantine Hagiography: Reversing the Story," *That Gentle Strength: Historical Perspectives on Women in Christianity* (Charlottesville, 1990, 36-59), 42-43.

<sup>52</sup> Imitation of language and subject matter from Averil Cameron, *Procopius and the Sixth Century*, 36.

<sup>53</sup> Herrin, "The Byzantine Secrets of Procopius," 40.

Charles Diehl has called "the legend of Theodora,"<sup>56</sup> portrayals of the Byzantine empress by writers of late antiquity are twofold; Theodora is portrayed as both a saint and a sinner. Although Procopius describes her as a demon, John Malalas calls her "pious" and tells of her charity and benevolence.<sup>57</sup> In the Byzantine historical tradition, Theodora comes to be portrayed as extremely beautiful, intelligent and most importantly, pure.<sup>58</sup> In its simplest terms, even the stories of the *SH* reflect myths and literary traditions; lovers caught in the act, the problem of a gossiping maid, an older woman-younger man scenario, and a cuckolded lover.<sup>59</sup>

Just how negative is Procopius' portrayal of women? It is important to look first at what Procopius really objected to when he criticized. What Procopius objected to most was those in charge acquiescing to their wives. Belisarius is ripped apart for being a completely passive actor in history; his wife is not only Procopius' reason for all of Belisarius' favour, but her husband submits to her like a slave. Justinian lets his wife take control over certain situations: she is allowed to murder, torture, and steal. Theodora is likewise criticized for her lack of shame, yet this was a woman whose background provided her with none of the necessary training on the customs of imperial life.<sup>60</sup> The suggestion that a man's family and household were not in order had a negative connotation in ancient society, for if a man could not control things that were closest to him, how could he have control over anything else.<sup>61</sup> Yet Procopius mentions no incident in which Theodora was unfaithful to her husband after their marriage, unlike Antonina, all of Theodora's promiscuous behaviour occurs before their marriage. Procopius can only replace this insult by attacking her self-indulgence in regards to luxury, vanity, and food.<sup>62</sup> The *SH* does mention one incident in which Theodora was suspected of impropriety with one of her servants - she promptly had him flogged to dispel the myth.<sup>63</sup> No matter how much Procopius strives to portray the imperial couple as demons, he does nothing to suggest that the relationship of Justinian and Theodora was anything other than stable. Much of the time Procopius blames Theodora's and Antonina's beauty for casting a spell over her husband; it is as if Theodora is a passive agent in all that goes on, but her beauty has a mind of its own. Justinian and Belisarius are described as men helpless in face of the magic of their wives' beauty.

<sup>54</sup> Liz James, "Table 1: The social backgrounds of empresses, fourth to eighth centuries" in *Empresses and Power in Early Byzantium* (London, 2001), 62-63.

<sup>55</sup> Garland, 14.

<sup>56</sup> Originally "la légende de Théodora" in Charles Diehl, *Figures byzantines*, 2 ed., 2 vols. (Paris, 1906), 1: 60.

<sup>57</sup> Malalas, *Chronicle*, 18:24.

To take an example from Christian literature, hagiography had two components: first it was a celebration of a saint, second it used "a standardising language of literary *topoi* that identified the saint as saint."<sup>64</sup> Procopius' work could similarly be described as a denunciation of an emperor that uses a standard language of literary *topoi* for the purpose of slander. Yet Procopius has taken such a literary *topoi* for the slander of an emperor and has put a new and significant spin on it. From what has been shown of the literary tradition, Procopius' attacks on Theodora can be seen as diverted attacks on Justinian, since he was still alive at the time the *SH* was written. Procopius states in the preface to the *SH* that the reason he could not express these opinions earlier was simply because as long as those who were portrayed in his 'behind the scenes' account were still alive, the inevitable discovery of his work would lead to death "in its most agonising form."<sup>65</sup> Even though the *SH* was written after Theodora's death in 548 from cancer, Justinian and Belisarius lived for another 17 years. Procopius used sexual descriptions to add further emphasis to his opinions on the reign of Justinian. By including Theodora in these sexual descriptions, Procopius is including her in the literary tradition of attacking those *in power*. In the case of Theodora, these descriptions were based on such a slight amount of truth, that any real literal meaning from them would be small. This does not mean that the sexual descriptions are unimportant in understanding the reign of Justinian. Their real implication lies in how this slander was used. Those living in late antiquity would have been accustomed to such talk had it been directed at a male in charge. Procopius has spun the tables around by addressing such commentary to an empress.

## Conclusion

Procopius' portrayal of Theodora and Antonina should not just be grouped together and dismissed as invective. Although the purpose of these sexual descriptions was similar to invective - as insulting, abusive, and insincere language - such a definition diminishes the impact such descriptions might have had on readers of late Antiquity. They would not, as Cameron states, have thrown such descriptions to the wayside as embellishments. Sexual descriptions were not unique to the *SH*, but describing the sexual escapades of an empress was. The reason for this was two-fold: first, empresses had usually been spared from association with such graphic detail before; second, such graphic detail had usually been reserved only for those in power. Unlike previous authors, Procopius is not simply accus-

<sup>60</sup> Lynda Garland, 7.

<sup>61</sup> Kate Cooper, *The Virgin and the Bride: Idealized Womanhood in Late Antiquity* (Cambridge, MA, 1996), 3.

<sup>62</sup> Procopius, *SH*, 15:6-10 (114-115).

<sup>63</sup> *Ibid.*, 16:11 (120-121).

ing, he is describing. Dismissing Procopius' explicit passages as amusing anecdotes misses the point. Anecdotes exist solely for the pleasure they bring to readers; they are simply a good story. Procopius uses his description of women to further emphasise and advance his opinions.

In addition, although elements of invective can be found in the *SH*, it is not the only genre influencing the work; various literary traditions are all contributing factors. Grouping all of Procopius' insulting language together for examination limits finding the individual currents that all of these influences have left in the *SH*. The fear of women in power, and the use of sexual slander and feminine power as an insult all appear in the literary tradition, and can be better understood when placed in this context.

The *SH* cannot be used to determine what was really going on inside Procopius' head as his true opinions died along with him over a 1400 years ago. Instead of using these portrayals of Justinian and Theodora as evidence of Procopius' opinions, they should be used to study the literary and cultural trends of his time. Moreover, reactions to the work by subsequent historians can provide evidence of social norms and expectations within their own societies. It is important to determine what influences helped Procopius to write these insults the way he did and what impact they would have had, rather than whether anyone believed them, which is a thoroughly impossible task. Although the type and size of audience the *SH* had in late antiquity is unknown, it is worth discovering the impact such a work would have had in order to gain insight on how exceptional or representational Procopius' style really was.

What is unique in Procopius' use of sexual descriptions is his subject. Antique populations might have been used to sexual descriptions, but they would definitely have noticed such talk about their empress. I agree with Cameron on the factual basis of the sexual passages; they were probably based on a very small amount of truth and are not very useful in reconstructions of Theodora as an individual. However, this is not just insult for the sake of insult. Procopius' sexual descriptions of Theodora are based on a literary *topos*, but take it much farther. Procopius is using these insults to advance his claims, allowing him to project his dislike for Justinian in two ways: he can express the insult of Theodora holding power not only by criticizing her for acting like a man, but by criticising her as one would a man.

<sup>64</sup> Susan Ashbrook Harvey, *Asceticism and Society in Crisis: John of Ephesus and the Lives of the Eastern Saints* (Berkeley, 1990), xiii.

<sup>65</sup> Procopius, *SH* 1: 2 (37).

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