Classical Quarterly 60.2 596–606 (2010) Printed in Great Britain
doi:10.1017/S0009838810000194

CONSTANTINE AND THE GLADIATORS

Amongst the reforms of Constantine that are commonly regarded as 'anti-pagan' is an attempted ban on gladiatorial combat. The stress here must be upon the word 'attempted' since it has long been recognized that this ban was not effective (gladiatorial combats are attested into the fifth century). Constantine's measure can be seen, at best, as a premature attempt to eliminate an activity that Christians found deeply distasteful, and that was the way that it was taken by Georges Ville in what remains the fundamental study of gladiatorial combat under Christian emperors.[1] To take this view is, however, to misread Constantine's intention, and the nature of the evidence at hand. I will suggest that Constantine never intended to abolish gladiatorial games; that the principal piece of evidence for this view relates instead to the practice of *damnatio ad ludum* (a capital penalty whereby convicts were required to fight duels to the death in the amphitheatre; such duels were an extreme rarity for gladiators), and should be understood as what Fergus Millar would call an 'internal communication' connected with the penal code of the eastern empire, recognizing that some practices in the east were different from those in the west.[2]

THE RESCRIPT OF 325

The view that Constantine sought to ban gladiatorial combat is ostensibly based upon two texts, one in the Theodosian Code, the other in Eusebius' *Life of Constantine*, though the two may actually be one, since it quite possible that the evidence of Eusebius stems from his reading of the text that survives in the Code. The text in question is a rescript that was posted in Beirut, a location that has otherwise been postulated as a potential source for Constantinian documents in the *Life of Constantine*.[3] A third attestation of Constantine's action appears in

[1] G. Ville, 'Les jeux de gladiateurs dans l'empire Chrétien', *Mélanges d'archéologie et d'histoire* 71 (1960), 332: 'le souverain est intervenu pour des raisons idéologiques en 325, prématurément, et il n'a pas insisté; peut-être a-t-il fait une tentative quartre-vingt-cinq ans plus tard; une ultimate intervention a dû plutôt sanctionner la fin des jeux qu'imposer leur disparition.' Reasons for not accepting a somewhat different view – that *Cod. Theod.* 15.12.1 is concerned with providing slaves to replace Christians freed from the mines – favoured by T. Wiedemann, *Emperors and Gladiators* (London, 1992), 156–7 – will emerge below.

[2] For the nature of the texts collected in the Theodosian code see now F. Millar, *A Greek Roman Empire: Power and Belief under Theodosius II 408–450* (Berkeley, 2006), 7.

[3] For Eusebius' handling of imperial documents and his access to them, see the discussion in A. Cameron and S.G. Hall, *Eusebius, Life of Constantine* (Oxford, 1999), 16–21, and on this point in particular see B.H. Warmington, 'The sources of some Constantinian documents in Eusebius' *Ecclesiastical History* and the *Life of Constantine*', *Studia Patristica* 18 (1986), 83–98. The evidence for gladiatorial fights to the death has expanded with the publication of three texts relating to games at Beroea (two from Thessalonica) in the third century A.D. showing that, in the provinces, these displays fell into a special category and required special permission; see now *AE* 1971 n. 431. 10–11: προσεισάγοντες καθ' ἑκάστην ἡμέραν τῶν φιλοτειμιῶν καὶ ἕτερον

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

the *Codex Iustinianus*, in the form of an edited version of the rescript from the Theodosian Code under the *titulus de gladiatoribus penitus tollendis*. The texts are as follows:

1. Imp. Constantinus A. Maximo pp. Cruentia spectacula in otio civili et domestica quiete non placent. Quapropter, [qui] omnino gladiatores esse prohibemus eos, qui forte delictorum causa hanc condicionem atque sententiam mereri consueverant, metallo magis facies inservire, ut sanguine suorum scelerum poenas agnoscant. PP. Beryto kal. Octob. Paulino et Juliano conss. (*Cod. Theod.* 15.12.1)

Imperator Constantine Augustus to Maximus, Praetorian Prefect.[4] Bloody spectacles do not please us in civil ease and domestic quiet. For that reason we forbid those people to be gladiators, who by reason of some criminal act were accustomed to deserve this condition and sentence. You shall rather sentence them to serve in the mines so that they may acknowledge the penalties of their crimes with blood. Posted at Beirut on the Kalends of October (October 1) in the consulship of Paulinus and Julianus (325).

2. ἔνθεν εἰκότως ἐπαλλήλλοις τε νόμοις καὶ διατάξεσι τοῖς πᾶσι διεκελεύετο μὴ θύειν εἰδώλοις, μὴ μαντεῖα περιεργάζεσθαι, μὴ ξοάνων ἐγέρσεις ποιεῖσθαι, μὴ τελετὰς κρυφίους ἐκτελεῖν, μὴ μονομάχων μιαφονίαις μολύνειν τὰς πόλεις. (Euseb. *Vit. Const.* 4.25.1)

Hence, in successive laws and ordinances, he suitably forbade everyone from sacrificing to idols, practising divination, erecting cult statues, performing secret rites, and polluting cities with the bloodshed of *monomachoi*.

3. Imp. Constantinus A. Maximo pp. Cruenta spectacula in otio civili et domestica quiete non placent. Quapropter omnino gladiatores esse prohibemus. PP. Beryto k. Oct. Paulino et Juliano conss. (*Cod. Iust.* 11.44.1)

Imperator Constantine Augustus to Maximus, Praetorian Prefect. Bloody spectacles do not please us in civil ease and domestic quiet. For that reason we altogether forbid the existence of gladiators. Posted at Beruit on the Kalands of October (October 1) in the consulship of Paulinus and Julianus (325).

In translating the passage from Eusebius I have deliberately avoided translating the word μονομάχων because the word admits of two meanings. The basic meaning of the word is obviously gladiator, but, in Eusebian and other usage, μονομάχος is also used to describe people who sustained the penalty of *damnatio ad ludos*. The evidence for this slippage, in Greek, is as follows:

ζῦγος περὶ τῆς ψυχῆς ἀγωνιούμενον πρὸς τοῖς νενομισμένοις δυσὶν κατὰ συνχώρησιν τοῦ κυρίου ἡμῶν Μ. Ἀντωνίου Γορδιανοῦ εὐσεβοῦς εὐτυχοῦς Σεβαστοῦ; *SEG* 49 (1999), n. 815 (*AE* 1999 n. 1425). 8–9: κυνηγεσίων καὶ μ[ονομαχ]ιῶν ἡμέρας · γ΄· εἰσάγοντες ζυγὰ τὸν ἀριθμὸν ιη΄ περὶ ψυχῆς ἀτῶν [ἀγωνιούμ]ενα (the especially bloodthirsty nature of this spectacle compared to the two others might be explained by the special circumstances under which it was held – directly after the death of Decius in the battle at Abrittus); *SEG* 49 (1999), n. 817 (*AE* 1999 n. 1427).10: εἰσάγοντες [δὲ καὶ ζε]ύγη δύο [μονο]μάχων περὶ ψυχῆς ἀγονιούμενα. For previous evidence of such fights see L. Robert, *Les gladiateurs dans l'orient grec* (Paris, 1940), 255 quoting Philostr. *VS* 1. 541: ἰδὼν δὲ μονόμαχον ἱδρῶτι ῥεόμενον καὶ δεδιότατὸν ὑπὲρ τῆς ψυχῆς ἀγῶνα. The most significant evidence for the trade in gladiators is offered in the *senatus consultum* of 177, on which see nn. 11, 13, 14 below.

[4] For the career of Valerius Maximus, see *PLRE* Valerius Maximus 49 (pp. 590–1); in 325 he was *vicarius orientis*; his promotion to the rank of *praefectus praetorio orientis* took place in 326.

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

1. σὲ αἰτήσομαι κατάδικον εἰς τὰς μονομάχους φιλοτιμίας τοῦ υἱοῦ μου. (*P. Pion.* 18)

I will ask that you be a *damnatus* in the gladiatorial spectacle of my son

2. καὶ τρεῖς μὲν εἰς μονομαχίαν ἐπὶ πυγμὴ καταδικάζει. (Euseb. *MP* 7.4)

He sentenced three of them to the *ludus* to fight

3. ἀλλὰ καὶ Παλαιστίνων τοὺς ἐπὶ πυγμῇ εἰς μονομαχίας κατακεκρίσθαι μικρῷ πρόσθεν δεδηλωμένους, ἐπεὶ μήτε τὰς ἐκ τοῦ βασιλικοῦ ταμείου τροφὰς μήτε μὴν τὰς ἐπιτηδείους τῇ πυγμῇ μελέτας ὑπέμενον. (Eus. *MP* 8.2–3)

Among the Palestinians, those whom we have previously said were condemned to the *ludus* to fight, since they would take no food provided by the imperial treasury or engage in the necessary exercises for the combat …

If Eusebius is indeed quoting the rescript of 325 – his μὴ μονομάχων μιαιφονίαις may reasonably be taken as a reference to Constantine's *cruentia spectacula* – then his text in fact says no more than the text of the rescript, though, in Eusebius' abbreviated form, it is possible to misread Constantine's intention, so as to make it seem to be a ban on all gladiators (the slippage in the meaning μονομάχος makes it impossible to know what precisely is meant without more context, though the rhetoric of the passage might tend to support the view that Eusebius wanted to say that Constantine abolished gladiatorial combat). The problem with this reading is that the text in the Theodosian Code shows that Constantine is explicitly concerned with those who become 'gladiators' as a result of a legal process (*gladiatores esse prohibemus eos, qui forte delictorum causa hanc condicionem atque sententiam mereri consueverant*). Gladiators, in the strict sense of the word, could not become gladiators through judicial sentence – they were either slaves or free people who entered into contracts to fight for a fee. This means that Constantine's rescript must be concerned with *damnatio ad ludum*. The compilers of the Theodosian Code understood that the text was concerned with participation in armed combats, also the point at issue in the other texts included within the section of the Code with the *titulus* "*de gladiatoribus*". This decision shows both that they too conflated *damnati* with conventional gladiators, and that they understood the text was not a total ban on gladiatorial combat per se, since the *titulus* implies that the section deals with an ongoing activity (a point reinforced by the fact that the second text in this section is also concerned with the status of participants in the contests rather than the legality of gladiatorial combat per se).[5] The compilers of the Code of Justinian took a different view; possibly because by their time the distinction between gladiators and *damnati* was meaningless, they transformed this rescript by eliminating those sections that did not suit the purpose illustrated by the *titulus* of

[5] *Cod. Theod.* 15.12.2: *universi, qui in urbe Roma gladiatorium munus impendunt, prohibitum esse cognoscant sollicitandi auctorando milites vel eos, qui palatina sunt praediti dignitate, sex auri librarum multa inminente, si quis contra temptaverit. sponte etiam ad munerarium adeuntes per officium sublimitatis tuae ad magistros equitum et peditum aut eos, qui gubernant officia palatina, oneratos ferreis vinculis mitti conveniet, ut huius legis statuto palatii dignitas a gladiatorio detestando nomine vindicetur*.

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

the section into which they placed this text, and this text alone: *de gladiatoribus penitus tollendis*.[6]

DAMNATIO AD LUDUM

The view that Constantine was dealing with *damnatio ad ludum* rather than with gladiators is hardly a novel proposition. Theodor Mommsen made the point more than 150 years ago, in an article on the letter of Constantine to Hispellum.[7] The reason that Ville declined to accept this view, and promulgated his own that the text represented an effort to end gladiatorial combat altogether, was that a passage in the *Mathesis* of Firmicius Maternus plainly attests the continuation of *damnatio ad ludum* to the end of Constantine's reign. It should, however, be obvious that this passage has no more evidentiary value with respect to the rescript of 325 than do the two passages that caused Ville to admit that Constantine did not press the point about ending gladiatorial games – the letter to Hispellum, and a passage from Libanius concerning his uncle's exhibition of gladiators at Antioch in 328 (a year in which the recipient of *Cod. Theod.* 15.12.1 was both praetorian prefect and resident in Antioch).[8] As a simple methodological point, our understanding of what is intended by *Cod. Theod*. 15.12.1 must proceed from within the text itself. We may then attempt to explicate other evidence concerning both *damnatio* and gladiatorial combat in the light of what is in the rescript; since the rescript was a response to a specific issue in 325 we cannot presume that evidence of a later date is directly relevant to the circumstances under which the rescript was issued. Furthermore, the fact that *Cod. Theod.* 15.12.1 is a rescript means that it was originally intended to have force in the case to which it applied. It is entirely reasonable to think that the issue would not impinge upon people outside the charmed circle of the immediate correspondence before the compilers of the Theodosian Code selected this text for inclusion in their section on gladiators, an act which gave the text greater significance as a controlling precedent.[9]

Damnatio ad ludum was initially conceived as a lesser punishment than an automatic death sentence, but more harsh than *damnatio ad metallum*.[10] It is to

[6] On the significance of the titles, which are intended to give the specific import of the passages collected within each of them see *Cod. Theod.* 1.1.5: *et primum tituli, que negotiorum sunt certa vocabula*. For a further example of Justinianic rewriting of earlier texts to eliminate reference to, by then, irrelevant amphitheatrical detail see n. 15 below.

[7] T. Mommsen, 'Epigraphische Analekten N. 9', *Berichte der sächsischen Gesellschaft der Wissenschaften* (1850), 213 = id., *Gesammelte Schriften* 8: *epigraphische und numismatische Schriften* 1 (Berlin, 1913), 37.

[8] Ville (n. 1), 315–16 with Firm. 7.8.7: *Iovem Saturnus vel Mar de ipso loco superiore respiciat, gladiatores efficient, sed qui damnati ad hoc exitium transferantur*; Lib. *Vita* 5: ἀθέατος ἔμεινα μονομαχιῶν ἐκείνων, ἐν αἷς ἔπιπτόν τε καὶ ἐνίκων ἄνδρες, οὓς ἔφησθα ἂν μαθητὰς εἶναι τῶν ἐν Πύλαις τριακοσίων. ὁ μὲν δὴ ταῦτα λειτουργῶν ἦν θεῖος ἐμὸς πρὸς μητρὸς ἐκάλει τέ με ὀψόμενον; for the date (328) see A.F. Norman, *Libanius' Autobiography* (Oxford, 1965), 148.

[9] The formulation regarding rescripts is borrowed from J.F. Matthews, *Laying down the Law: A Study of the Theodosian Code* (New Haven, 2000), 13.

[10] See also Ulpian's observation (reported at *Coll*. 11.7.1; 3: *de abigeis puniendis ita divus Hadrianus rescripsit concilio Baeticae: 'abigei cum durissime puniuntur, ad gladium damnari solent. puniuntur autem durissime non ubique, sed ubi frequentius est hoc genus maleficii: alioquin et in opus et nonnumquam temporarium damnantur …' rescriptum divi Hadriani sic*

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

Ulpian, writing on the duties of a proconsul in the third century that we owe the clearest statement of this doctrine when he writes:

> est autem differentia inter eos qui ad gladium et eos qui ad ludum damnantur: nam ad gladium damnati confestim consumuntur vel certe intra annum debent consumi: hoc enim mandatis continetur. Enimvero qui in ludum damnantur, non utique consumuntur sed etiam pilleari et rudem accipere possunt post intervallum, siquidem post quinquennium pilleari, post triennium autem rudem inducere eis permittitur. (*Coll*. 11.7.4)

> There is, however, a difference between those who are given a capital sentence and those who are sentenced *ad ludum*: for those who are given a capital sentence are executed immediately, or, at least, should be executed within the year; this is stated in *mandata*. Those who are condemned to the *ludus* are not always killed, but can even be freed and receive the *rudis* [the wooden sword symbolizing release from service in the amphitheatre] after an interval of time, inasmuch as they may be freed after a *quinquennium*, and given the *rudis* after a *triennium*.

The history of the penalty prior to Ulpian cannot be written with any certainty, but it is likely that Mommsen is correct in sensing a connection with the massive military demonstrations of the early Julio-Claudian era such as the *naumachia* of Augustus in 2 B.C., Claudius' *naumachia* on the Fucine Lake and the destruction of a British village, staged on the Campus Martius.[11] It was certainly an available punishment in the time of Nero when Seneca commented upon the conditions of battle at a 'noontime' event in the amphitheatre.[12] Between Seneca's observation and the time of Ulpian, the sole evidence for *damnatio* is offered by the *senatus consultum de minuendis pretiis gladiatorum*, conventionally dated to 176 A.D.[13] In this case Marcus sets the purchase prices for a class of fighter known as the *gregarii* at 1,000 HS for ordinary combatants, and 2000 HS for people who are called 'superior *gregarii*'. These are men who are said to fight *ad signum*, and manifestly do so in a group. The significance of the price is made clear in a later section of the *senatus consultum* where the same sum is to be charged for a specific

loquitur, quasi gravior poena sit metalli: nisi forte hoc sensit divus Hadrianus gladii poenam dicendo ludi damnationem) that a rescript of Hadrian stating that rustlers in areas where the crime was common, or in cases where the defendant was particularly notorious should be sentenced *ad gladium* must be a reference to *damnatio ludi*. See also Paulus, *Sententiae* 5.17.2: *mediocrum delictorum poenae sunt metallum, ludus*, *deportatio*; id. 5.23.7; Tert. *de Spect*. 19. See also the discussion in P.D. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford, 1970), 104; 131 n. 4.

[11] T. Mommsen, 'Aes Italicense', *Ephemeris Epigraphica* 7 (1892), 408.

[12] Sen. *Ep*. 7.3–5: *casu in meridianum spectaculum incidi, lusus exspectans et sales et aliquid laxamenti quo hominum oculi ab humano cruore acquiescant. contra est: quidquid ante pugnatum est misericordia fuit; nunc omissis nugis mera homicidia sunt. nihil habent quo tegantur; ad ictum totis corporibus expositi numquam frustra manum mittunt. [4] hoc plerique ordinariis paribus et postulaticiis praeferunt. quidni praeferant? non galea, non scuto repellitur ferrum. quo munimenta? quo artes? omnia ista mortis morae sunt. mane leonibus et ursis homines, meridie spectatoribus suis obiciuntur. interfectores interfecturis iubent obici et victorem in aliam detinent caedem; exitus pugnantium mors est. ferro et igne res geritur. [5] haec fiunt dum vacat harena. 'sed latrocinium fecit aliquis, occidit hominem.' quid ergo? quia occidit, ille meruit ut hoc pateretur: tu quid meruisti miser ut hoc spectes?*

[13] For this date see J.H. Oliver and R.E.A. Palmer, 'Minutes of an act of the Roman Senate', *Hesperia* 24 (1955), 326; it is based on the assumption that the *oratio* of the emperor was delivered in person, which is not a necessary assumption, see R. Talbert, *The Senate of Imperial Rome* (Princeton, 1984), 180.

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

class of *condemnatus*, the *trinqui*, said to be found only in Gaul. Since price and status in this text are intimately linked for both conventional gladiators, it stands to reason that the same is true for unconventional performers as well: the fact that *gregarii* are priced the same way as *trinqui* is an indication that *gregarii* must be in a similar category, and thus that they must be *damnati ad ludum*. Superior *gregarii* are presumably men who had survived at least one fight.[14]

The continuation of *damnatio ad ludum* into the reigns of Diocletian and Constantine is made clear by the third passage quoted above from *The Martyrs of Palestine*, where it is expressly stated that imperial *lanistae* are responsible for the care and training of the *damnati*, and, by a rescript to Domitius Celsus, *vicarius* of Africa in 315, dealing with the punishment of kidnappers:

> plagiarii, qui viventium filiorum miserandas infligunt parentibus orbitates, metalli poena cum ceteris ante cognitis suppliciis tenebantur. Si quis tamen eiusmodi reus fuerit oblatus, posteaquam super crimine patuerit, servus quidem vel libertate donatus bestiis primo quoque munere obiciatur, liber autem sub hac forma in ludum detur gladiatorium, ut, antequam aliquid faciat, quo se defendere possit, gladio consumatur.
> (*Cod. Theod*. 9.18.1).[15]

> Kidnappers, who inflict upon parents the deprivation of living children, were previously sentenced to the mines and other well-known penalties. If anyone should now be charged with such a crime, after he has been found guilty, if he is a slave or freedman, he should be given to the beasts at the next *munus*; a freeman, however, should be handed over to a gladiatorial *ludus*, so that, before he can learn anything through which he can defend himself, he will perish by the sword.

It is perhaps significant that in the same year, or the next, Constantine issued a rescript to Eumelius, Celsus' successor as *vicarius*, stating that people who had been sentenced to the *ludus* or to the mines should not have their sentence marked on their faces 'so that the face, which is shaped in imitation of heavenly beauty,

[14] *ILS* 5163, 34–7: *utique in omnibus muneribus, quae generatim distincta sunt, lanista dimidiam copiam universi numeri promis<cuis>que multitu|dinis praebeat exque his, qui gregari appellantur, qui meliori<s> acertatis erit, duobus milibus sub signo pugnet, nec quisquam ex eo numero | mille nummum minore ...* 56–8*: ad Gallias sed et <t>rin<quos> qui in civitatibus splendidissimarum Galliarum veteri more et sacro ritu expectantur ne ampliore pretio lanistae praebeant quam binis milibus, cum maximi pr[in]cipes oratione sua praedixerint fore ut damnatum a<d> gladium | procurator eorum nisi plure quam sex aureis lanistis pra[ebea]t*. The text of lines 56–8 is that of Oliver and Palmer, 'Minutes of an act of the Roman Senate', 333. The situation of the *trinqui* is clarified by a section of the *marmor Sardianum*, which, although broken at this point, still shows that the *trinqui* are *damnati*; see *marmor Sardianum* fr. 1, 11–17: *Id*] *genus digladiantium, trincos eos* [*appellant Galli, inhumanitatis cuiusdam conde*]|*mnatur, verum uti aliud aput alios* [*veteri more et sacro ritu sancitur, in Galiis liceat*]| *trincos dimicare. Is dies religioni* [*condonetur – ut munus*] *commit<t>atur. Pretia quantum volu*[*erint, qui hos trincos muneri praebere solent, non*]| *facient. Nam procurator noster p*[*raebebit damnatum sex aureis ne pretium amplius*]| *fiat*. For discussion of the significance of this section see Mommsen (n. 11), 407–8. Mommsen does not discuss Euseb. *MP* 8.2–3, which makes it clear that in the fourth century imperial procurators were responsible for the feeding and training of *damnati* until such time as they could be disposed of.

[15] Compare *Cod. Iust.* 9.20.16: *plagiarii, qui viventium filiorum miserandas infligunt parentibus orbitates, metalli poena cum ceteris ante cognitis suppliciis tenebantur. si quis tamen eiusmodi reus fuerit oblatus, posteaquam super crimine patuerit, servus quidem vel libertate donatus bestiis obiciatur, ingenuus autem gladio consumatur*.

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

should not be desecrated'.[16] In 365 Valentinian wrote to Symmachus telling him that no Christian should be sent to the *ludus*, and two years later wrote to Viventius, then prefect of the city, telling him that no person who had once been part of the palatine bureaucracy should be sent into the arena, that 'no *lanista* should teach him, no savage and violent study should occupy him'.[17]

The passages from the Code that date to the middle of the fourth century show that it is most unlikely that Christian doctrine required an end to *damnatio ad ludum* as a penalty. What is striking about the rescript to Eumelius is that, in what is plainly an expression of Christian sentiment with regard to the penal code, the issue is tattooing the face rather than to the penalty itself. In the rescripts to Symmachus and Viventius, we see class issues coming to the fore. Christians in the fourth-century penal code increasingly come to occupy a position similar to other people of rank in terms of the penalties that can be inflicted upon them. Although there is ample evidence in the acts of Church Councils for profound objections to gladiators, and, indeed, other performers becoming members of a Christian congregation, there is no statement that can be taken as a self-evident Christian objection to specific penalties just because Christians had once been subjected to these penalties in times of persecution.[18] What is also clear is that Constantine's rescript to Maximus did not have general force in the fourth century.

In terms of Constantine's overall policy towards gladiatorial combat the key text comes from the last year of his life. It is the letter to Hispellum, in which he explicitly grants the people of that city the right to celebrate him with gladiatorial combats.[19] The contrast here with his request that they do not offer sacrifice in his honour is striking. The Christian Constantine could not countenance sacrifice directed to his person. But he could countenance gladiators.

If Christian influence should be discounted for the interpretation of *Cod. Theod.* 15.12.1, is there another explanation that might suit? I think that there is. We know that Constantine abolished crucifixion (though we do not know to what effect). The interesting thing about both actions is that, of the 56 recorded judicial sentences that can be obtained from martyr acts that are roughly contemporary with the Diocletianic persecutions, Eusebius' *Ecclesiastical History* and his *Martyrs of Palestine*, only one was *ad ludum*, and that appears to have been changed to *ad*

[16] *Cod. Theod.* 9.40.2: *si quis in ludum fuerit vel in metallum pro criminum deprehensorum qualitate damnatus, minime in eius facie scribatur, dum et in manibus et in suris possit poena damnationis una scriptione conprehendi, quo facies, quae ad similitudinem pulchritudinis caelestis est figurata minime maculetur*.

[17] *Cod. Theod.* 9.40.8: *quicumque Christianus sit in quolibet crimine deprehensus, ludo non adiudicetur. quod si quisquam iudicum fecerit, et ipse graviter notabitur et officium eius multae maximae subiacebit ...* 9.40.11: *neminem de numinis nostri sacrario prodeuntem harena suscipiat, lanista doceat, saeva meditatio et pugnatrix exerceat; multa si quidem possunt esse supplicia, quibus culpa plectatur*.

[18] For Christian doctrine regarding amphitheatric entertainers and its influence on the Code see Ville (n. 1), 313–14, and, more generally, J. Blänsdorf, 'Der spätantike Staat und die Schauspiele im *Codex Theodosianus*', in J. Blänsdorf (ed.), *Theater und Gesellschaft im Imperium Romanum* (Tübingen, 1990), 261–73 on the evidence for Christian influence on laws governing entertainers (esp. 266–8 on issues of status) while K. Sallmann, 'Christen vor dem Theater', in Blänsdorf (ed.), 243–59 deals with theological issues, as does Wiedemann (n. 1), 147–55.

[19] *ILS* 705, 30–8: *ibidemque his | sacerdos, quem anniversaria vice Umbria de|disset, spectaculum tam scenicorum ludorum | quam gladiatorii muneris exhibere, manente | per Tuscia ea consuetudine, ut indicem cre|atus sacerdos aput Vulsinios ut solebat | editionum antedictarum spectacula fre|quentare: precationi hac desiderio vestro facilis accessit noster adsensus.*

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

bestias after a year of inaction, and there is only one attested crucifixion (see Appendix). In the case of *damnatio ad ludum* the explanation for its avoidance may be most clearly expressed in an extract from the *acta* of Diocletian preserved in the *Codex Iustinianus*:

> filii decurionum non debent bestiis subici. Cumque a populo exclamatum est, iterum dixerunt: vanae voces populi non sunt audiendae: nec enim vocibus eorum credi oportet, quando aut obnoxium crimine absolvi aut innocentem condemnari desideravint. (*Cod. Iust.* 8.47.12)
>
> The sons of decurions should not be given to the beasts. When this was demanded by the people, they responded: the vain voices of the people must not be heard. It is not fitting that the acclamations of the people should be given credence in so far as they desired the guilty to be freed from punishment or the innocent to be condemned.

The view expressed here has precedent as early as the second century juristic writings (see n. 10), and, is likewise reflected in Constantine's rescript on kidnapping. The problem was that the condemned had too great a chance of survival, and that may have led to an increasing unwillingness on the part of some magistrates to use it. The case with regard to crucifixion may be the opposite. At the point that he records its abolition by Constantine, Aurelius Victor suggests that the punishment was barbarous.[20]

It was not an unheard-of phenomenon in the Roman Empire for penalties with the passing of time to have been regarded as outmoded. Modestinus wrote, in the early third century, that no one could be thrown from the Tarpeian rock.[21] At roughly the same period, Callistratus and Paul simply omit *damnatio ad ludum* from their lists of recommended penalties.[22] In the course of the third century crucifixion, listed amongst the *summa supplicia* by Callistratus, appears to have followed *damnatio ad ludum* into obscurity. Constantine's action with regard to both penalties should therefore be seen in the context of a gradual change in the nature of the penal code rather than as an explicitly Christian action. The fact that Eusebius does not even note the abolition of crucifixion would suggest that the issue was not a pressing one. The important point is that all of the evidence suggesting that *damnatio ad ludum* was used as a standard penalty in the fourth century A.D. comes from the western provinces, while the contrary evidence comes from the east. The reason that we have contradictory evidence on the application of the penalty stems most likely from differential developments in the application of the penal code between two regions of the empire that had, for administrative

[20] Aur. Vict. *Caes*. 41.4: *denique Constantinus cunctos hostes honore ac fortunis manentibus texit recepitque, eo pius, ut etiam vetus teterrimumque supplicium patibularum et cruris suffringendis primus removerit*; see also Soz. *HE* 1.8: *τὴν τοῦ σταυροῦ τιμωρίαν νόμῳ ἀνεῖλε τῆς χρησέως δικαστηρίων*. As early as the reign of Nero, the use of crucifixion as a 'spectator' sport – which required its combination with other torment – excited disapproval, see Tac. *Ann*. 15.44.4–5.

[21] *Dig*. 48.19.25.1: *non potest quis sic damnari, ut de saxo praecipitetur*.

[22] *Dig*. 48.19.28.pr: *summum supplicium esse videtur ad furcam damnatio. item vivi crematio: quod quamquam summi supplicii appellatione merito contineretur, tamen eo, quod postea id genus poenae adinventum est, posterius primo visum est. item capitis amputatio. deinde proxima morti poena metalli coercitio* (Callistratus); cf. *Dig*. 48.19.38 (Paul).

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

purposes, been distinct since 305, and, in effect, for some time before that.[23] In writing to Valerius Maximus, Constantine is simply confirming a specific eastern practice.

In any case it should also be clear that *Cod. Theod.* 15.12.1 has nothing to do with the history of gladiatorial combat in its original form, and only became relevant to the history of these games when it was taken into the *Codex Iustinianus*. As the title in this section of the Code indicates, the compiler was looking for a text that could be read as ending gladiatorial combat, which is what, with the aid of some judicious editing, *Cod.Theod.* 15.12.1 could become. At the time that the Theodosian Code was compiled, gladiatorial combat, although seemingly less significant than other forms of entertainment, was still common enough to require a title regulating participation.[24] By 529, that had ceased to be the case. It is unfortunate that we cannot date the ending of gladiatorial combat more closely than the century that intervenes between the two redactions of this text.

The University of Michigan DAVID POTTER
dsp@umich.edu

APPENDIX: JUDICIAL SENTENCES IN THE DIOCLETIANIC PERSECUTIONS

Sentencing event	Source	Year	Sentence
Procopius	*MP* 1	303	*amputatio capitis*
Alphaeus	*MP* 1	303	*amputatio capitis*
Zachaeus	*MP* 1	303	*amputatio capitis*
Romanus	*MP* 2	303	strangulation
Timotheus	*MP* 3	303	*crematio vivi*
Agapius	*MP* 3	304	*ad bestias*[a]
Thecla	*MP* 3	304	*ad bestias*[b]
Timolaus, Dionysius, Romulus, Paesis, Alexander from Egypt, Alexander from Gaza, Agapius, Dionysius	*MP* 3	305	*amputatio capitis*
Apphianus	*MP* 4	305	drowning
Ulpian	*MP* 5	305	sack
Aedesius	*MP* 5	305	sack
Theodosia	*MP* 7	307	drowning
Unnamed others	*MP* 7	307	*ad metallum*

[23] For traces of the legislative career of Licinius see S. Corcoran, 'Hidden from history: the legislation of Licinius', in J. Harries and I. Woods (eds.), *The Theodosian Code* (Ithaca, 1993), 97–119.

[24] Contra Ville (n. 1), 331 who suggests that *Cod. Theod.* 15.12.1's inclusion in the Code marks the effective end of gladiatorial combat *c.* 438; contrast Wiedemann (n. 1), 158–60, less dogmatic and more nuanced in recognizing a decline in interest.

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

Silvanus and others	*MP* 7; Euseb. *HE* 8.12.5	307	mutilation and *ad metallum*; Silvanus and forty others decapitated while incarcerated in the mines at Phaeno according to *HE*
Domninus	*MP* 7	307	*ad bestias*
Auxentius	*MP* 7	307	*ad bestias*
3, Unnamed	*MP* 7	307	*ad ludum*; punishment changed to *ad metallum* in 308
Unnamed others	*MP* 7	307	mutilation and *ad metallum*
97 Christians and the three sentenced *ad ludum*	*MP* 8	308	mutilation and *ad metallum*
Valentina and woman from Gaza	*MP* 8	308	*crematio vivi*
Paul	*MP* 8	308	*amputatio capitis*
130 Christians of Egypt	*MP* 8	308	*ad metallum*
Antoninus, Zebinas and Germanus	*MP* 9	310	*summum supplicium* carried out immediately
Ennathas	*MP* 9	310	*crematio vivi*
Unnamed Egyptians	*MP* 10	310	*Ad metallum*; sentence altered for Ares who was burnt and for Probus and Elias who were beheaded
Peter and Asclepius	*MP* 10	311	*crematio vivi*
Pamphilus, Valens, Paul and five unnamed	*MP* 11	311	*summum supplicium*
Servant of Pamphilus	*MP* 11	311	*crematio vivi*
Porphyry	*MP* 11	311	*crematio vivi*
Seleucus	*MP* 11	311	immediate execution
Theodulus	*MP* 11	311	crucifixion
Julian	*MP* 11	311	*crematio vivi*
Hadrian	*MP* 11	311	*ad bestias*
Maximilian	*Acta Maximiliani*	295	*amputatio capitis*
Marcellus	*Acta Marcelli*	298	*amputatio capitis*
Julius	*Acta Julii*	304	*amputatio capitis*
Felix	*Acta Felicis*	303	*amputatio capitis*
Dasius	*Martyrion of Dasius*	304	*amputatio capitis*
Agape, Irene and Chione	*Martyrion of Agape, Irene and Chione*	304	*crematio vivi*
Irenaeus of Sirmium	*Passio Sancti Irenaei*	304	*amputatio capitis*

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press

Crispina	*Passio Sancti Crispinae*	304	*amputatio capitis*
Euplus	*Acta Eupli*	304	*amputatio capitis*
Phileas	*Passio beati Phileae*	304	*amputatio capitis*[c]
Forty martyrs of Sebaste	*Testament of the Forty Martyrs of Sebaste*	304?	exposure/drowning
Athenogenes	*Acta Athenogenei*	304?	*crematio vivi*
Seven virgins of Ancyra	*Acta Theodoti*	310?	drowning
Theodotus	*Acta Theodoti*	310?	*crematio vivi*
Dorotheus	Euseb. *HE* 8.6.5	303	strangulation
Gorgonius	Euseb. *HE* 8.6.5	303	strangulation
Anonymous	Euseb. *HE* 8.5.1	303	*crematio vivi*
Anthimus	Euseb. *HE* 8.6.6	303	*amputatio capitis*
Anonymous and uncertain number	Euseb. *HE* 8.6.6	303	drowning
Adauctus	Euseb. *HE* 8.11.2	Before 305	unknown
Two women (unnamed) in Antioch	Euseb. *HE* 8.12.5	Before 305	drowning
Silvanus	Euseb. *HE* 8.13.4	Before 305	*ad bestias*
Peleus and Nilus	Euseb. *HE* 8.13.5	Before 305	*ad metallum*, but executed by ???? in the mines at Phaeno

[a] Sentenced in 304; executed in 306; he had been exhibited three previous times in the amphitheatre (*MP* 6).

[b] It is not actually stated that this sentence was carried out.

[c] Only the Latin version of the *acta* carry through to the execution; the version in Euseb. *HE* 8.10 is abbreviated at the point of death, and is more so in Rufinus' version (as might be expected since his Eusebius is his sole source). The violently anti-Semitic version contained in *P Bodmer XX* is a later version of the text known in Latin translation through *codex Bruxellensis* 7984.

https://doi.org/10.1017/S0009838810000194 Published online by Cambridge University Press