

Execution and Invention

*Death Penalty Discourse
in Early Rabbinic and Christian Cultures*

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Paradoxes of Power

"The Way that the Kingdom Does It"

Rabbinic Mimics

A criminal condemned to death in the Roman Empire might, among other penalties, end up either decapitated, exposed to wild beasts, crucified, burned alive, or condemned to be a gladiator, depending on his or her social status and on the nature of the crime.¹ Punishing Roman criminals was literally raised to an art form, with the condemned being forced to act out his or her death in the amphitheater, staging for the crowds either the story of the immolation of Hercules, the mauling of Orpheus by a bear, or some other well-known myth.² Though these "fatal charades" were relatively rare, gladiatorial combat and other executions in the arena were immensely popular throughout the Roman world. The deaths of the convicted and enslaved became one of the forms of mass entertainment consumed by the peoples of the Roman Empire. Scholarship on Roman punishment has burgeoned in recent years, fueled by subaltern studies, performance studies, and popular interest in the grislier parts of Roman imperialism as is to be found in such movies as *Gladiator*.

What does *Gladiator* have to do with ancient Jewish history? Philo, Josephus, and the Rabbis describe Roman capital punishments being inflicted on Jews. Philo recounts the torture and crucifixion of Alexandrian Jews by the prefect Flaccus.³ Josephus gives accounts of Jews being beheaded, crucified, burned, or sent to the arena, sometimes on a massive scale and often with other tortures.⁴ The Rabbis tell stories of being martyred at the hands of Rome and also legislate for the scenario of Jews fighting in the arena. There is also the famous story of the execution of the Jew named Jesus.

That Roman execution was a serious concern for late antique Jews is plentifully evidenced.⁵

That being said, we can ask: Did the Jewish experience of Roman execution shape the Rabbis' own laws of execution? My contention in this chapter is that it did—I will show that the discourse of rabbinic execution was engaged with Roman execution in both hidden and manifest ways. In one rabbinic text, the Rabbis break into a dispute over whether they may borrow the Roman method of decapitation. This text gives us our primary evidence—it makes explicit reference to Roman execution in the context of the rabbinic laws of execution. I will look closely at this text, and I will also suggest that the engagement with Rome is at work in other rabbinic criminal laws where Rome is never mentioned.

I borrow this approach from James Scott, whose postcolonial theory will be threaded through these interpretations. His work and that of Homi Bhabha and others get at the complexity of the relationship between colonized and colonizer, a relationship relevant to Roman Judea. While it may often appear that colonized peoples obediently submit to imperial authority, these writers uncover the appropriation and resistance that is often embedded within postures of submission, what Scott calls a “hidden transcript.” By looking at rabbinic law as a “hidden transcript,” hidden from Rome but also hidden from many other Jews, I will show that in their laws of execution, the Rabbis attempt to reverse the conditions of Roman power and relative Jewish powerlessness, representing themselves as the agents of penal power. Moreover, the Rabbis reverse the terms of power, shaping their executions both to resemble Roman executions but also to be their opposite. In these reversals, the Rabbis ultimately redefine who is a barbarian and who is civilized, terms very much at the heart of the construction of the Roman Empire. The rabbinic ritual of execution shows the true barbarian to be not the conquered provincials but the imperial power itself, and the Rabbis prove to be the rightful authorities. But in the course of these reversals, the Rabbis allow themselves to come dangerously close to looking very much like the authority they eschew. The question of who is a Rabbi and who is a Roman, and what are the differences, drives the rabbinic laws of execution.

I will emphasize the motif of mimicry. Often the colonial appears to be the mimic of an imperial “original”; such is the case in one Englishman's description of westernized Indians in 1835 as “a class of persons, Indian in blood and colour, but English in taste, in opinions, in morals, and in intellect.”⁶ Roy, Bhabha, and others argue that copying is rarely simple, however—masquerade, passing, drag, and camp are destabilizing modes of mimicry that transform the identities of both the mimic and the mimicked. Joshua Levinson has pointed to such subversive mimicry on the part of the Rabbis: In his reading of an aggadic tale of Titus from *Leviticus Rabbah*, Levinson lays out its tangle of intertexts and subtexts from the Bible, Jewish ritual, Greek myth, and Roman culture.⁷ The story of Titus's desecration of the Holy of Holies and ultimate death at the hands of a dove becomes not only an inversion of Yom Kippur ritual as well as the story of Jonah, but also its own “fatal charade” in

which Titus is forced to play out the story of Athena's birth from Zeus's head. In this narrative, the Rabbis appropriate the language of their conquerors, posing the “threat of the subordinate speaking with the voice of the hegemonic, thereby calling into question the very basis of the latter's superiority and difference.”⁸ Similarly, in another study, Levinson brings the Roman arena to a midrash from *Genesis Rabbah* that compares Cain and Abel to gladiatorial athletes.⁹ By reading this midrash in its full context, considering the Roman arena as political theater, as a liminal zone between life and death, human and God, man and woman, ruler and ruled, Levinson is able to show the midrash's theological radicalism. In the midrash's analogy between Cain's murder of Abel and one gladiator's murder of another, the midrash simultaneously indicts both sponsors for their injustice—God and Caesar. But Levinson discusses relatively late midrashic texts: Rabbinic subversions of Roman execution can be found also in the earlier legal discourse of the Tannaim, and that is what this chapter will show. The Mishnah's laws of criminal execution can be viewed as a field upon which the strategy of mimicry is tested and contested. Rabbinic power, especially the power to preside over execution, is constructed (at least partly) out of the discourse of Roman power that envelops the Rabbis.

“One Who Sits in the Stadium”

That the Rabbis must have been familiar with Roman spectacles of execution can be inferred from the material remains from late antique Palestine. According to Arthur Segal's work on theaters in Roman Palestine and Arabia, twelve theaters have been found west of the Jordan and eighteen to the east.¹⁰ These theaters were built over a period of three centuries, beginning in the first century B.C.E. and continuing into the third century C.E., and they continued to function well into the Byzantine period. Zeev Weiss, following the evidence of Josephus's accounts as well as the archaeological remains, tells that the first theaters were built by Herod in Jerusalem, Caesarea, and Jericho, and by his son, Herod Antipas, in Tiberias. In the Herodian period until Bar Kokhba, according to Weiss, games were performed in Palestine but remained a narrow cultural phenomenon among the Jewish populations.¹¹ Josephus suggests that the Jews of Palestine initially resisted Herod's theaters, regarding them as “foreign to Jewish custom.”¹² In the first century and especially in the second century, Weiss gives evidence for a sharp rise in the number of games buildings erected in the region of Palestine, which both he and Segal associate with the processes of urbanization occurring there during this period. Weiss argues that, according to the archaeology and rabbinic sources, the popularity of games among the Jews must have exploded in the third and fourth centuries. The theaters found in Palestine, Jacobs points out, are located not only in cities with a non-Jewish majority, but also in cities like Sepphoris that were considered to be Jewish cultural centers.¹³ Of these theaters, the number of amphitheaters—those structures used specifically for gladiatorial games and animal baitings (as opposed to dramatic productions, chariot racing, etc.)—is relatively

small, but Jacobs warns that a clear distinction between a dramatic theater and a gladiatorial amphitheater cannot often be made, due both to archaeological factors and to the unclear terminology of the sources.¹⁴

But one need not rely on archaeology—rabbinic sources explicitly deal with the Roman arena.¹⁵ They describe both Jewish attendance and Jewish participation in the gladiatorial games.¹⁶ The Tosefta prohibits attendance at various kinds of Roman theaters:

5. One who goes up into the theaters of the nations—it is prohibited on the count of idolatry, the words of Rabbi Meir.

And the Sages say: [If one goes up] at the time that they offer sacrifices—it is prohibited on the count of idolatry. If they are not offering sacrifices—it is prohibited on the count of [not] sitting in the seat of the scornful.¹⁷

6. One who goes to the stadia (*itstartiyonin*) or to the circuses (*karqomin*)¹⁸ and sees the sorcerers and enchanters, bokion,¹⁹ mokion, molion,²⁰ sagilarion, sagilaria²¹—behold this is sitting in the seat of the scornful, as it is said, “[Happy is the man who has] not sat in the seat of the scornful, but his delight is in the Torah of the Lord” (Ps 1:1–2)—behold you learn that these [performances] bring a person to neglect the study of the Torah.

7. One who goes up into the theaters of the nations, and cries out²² for the needs of the state—it is permitted. If he conspires with them (*mit'hashev*)—behold it is prohibited.

One who sits in the stadium (*istraton*)—behold he is guilty of bloodshed.

Rabbi Nathan permits [it] for two reasons, [first] because one cries out and [thereby] saves the lives [of the gladiators], and [second] because he may give evidence on behalf of the wife [of a gladiator] so that she may remarry.

They may go to stadia (*itstartiyonin*) in order to cry out and save lives, and to the circus for the sake of the state, but if he conspires with them, behold it is forbidden.²³

Tosefta Avodah Zarah 2:5, the first law in this series, deals with Rome's dramatic theater performances, which Rabbi Meir prohibits as idolatry but which the Sages consider to be idolatry only when sacrifices are offered. Nevertheless, the Sages still prohibit theater attendance when sacrifices are *not* offered out of a concern for “sitting in the seat of the scornful,” a less formal basis of prohibition than idolatry is, but emphatic nonetheless. The next law in the series (2:6), dealing with other kinds of performances—clowns and games—explains why: “sitting in the seat of the scornful” causes one to neglect the study of Torah. The following law (2:7) gives a loophole, permitting theater attendance if done as a civic duty, but then reverses again to the prohibiting stance in the event that a Jew participates too willingly. The law goes on to prohibit attendance at the mortal combat of the arena, which it treats in very severe terms, accusing of murder not just those organizing or participating in

the combat but those who go to watch.²⁴ Rabbi Nathan, a mid-second-century tanna, mitigates this position, however: He allows attendance at the gladiatorial games for two reasons, both of which involve helping those who are injured by the games.²⁵ First, one can scream out at the game, thereby either warning the gladiator of dangers he faces—“Look over there!”—or asking the *editor* (the producer of the games) to pardon the fighter. In this way, the audience member can try to save the gladiator from death. The second of Rabbi Nathan's reasons relates to the problem of the *agunah*, the anchored woman: If the wife of a gladiator has no evidence that her husband was killed, she is prevented from remarrying. Therefore, the audience member who testifies can save the gladiator's wife from a life of being chained to the husband who has long ago fallen in the arena. Finally the Tosefta extends the same caveat to Rabbi Nathan's stadium loophole that it did to the one involving theaters: If one gets swept away by the entertainment, the loophole disappears, and one is forbidden to attend.²⁶ It is one thing to go to the arena to save the *agunah* or to fulfill one's civic duties, but another thing altogether to go to cheer on the fight.

This text's sequence—its escalation from pious censure of “sitting in the seat of the scornful” to accusations of spilling blood—suggests that gladiatorial combat is a graver concern to the Rabbis than any other arena event (besides outright idolatry that might take place there). Nevertheless, Rabbi Nathan permits a Jew to attend, speaking of the need to save the lives of Jewish gladiators and to free the wives of those who die. The last legislation evinces a concern that Jews may be seduced by the arena's murderous events even if their motivations for attendance might be pure. According to this Tosefta, the arena poses a threat not only to the physical survival of the Jewish community, as Jews are condemned to fight, but also to their cultural/religious survival, as Jews who attend are seduced by its appeal. The Tosefta's concern recalls Augustine's famous story of his friend who, dragged to the gladiatorial games, refuses to open his eyes, but then when he does, cannot take them away from the fight.²⁷ This Tosefta offers up a host of fears about Jewish victimization and Jewish assimilation, seen also—with somewhat less intensity because of the lower stakes—with respect to the other theatrical events that threaten to take Jews away from Torah and lead them into a life of Roman leisure.

Anxiety about the Roman theater appears as a motif in many rabbinic texts. An insertion into the *Sifra* (customarily called the *Mekhilta d'Arayot*) interprets Lev 18:3 through this filter:

[You shall not copy the practices of the land of Egypt where you dwelt, or of the land of Canaan to which I am taking you] “nor shall you follow their laws” (Lev 18:3). And what did this verse say that has not been said, for was it not said, “Let no one be found among you who consigns his son or daughter to the fire . . . one who casts spells, or one who consults [ghosts or familiar spirits . . .] (Deut 18:10–11)? And why does the Torah teach: “Nor shall you follow their laws”? That you should not follow their laws (*nimusot*) in matters inscribed for them, for example, theaters, circuses, and stadia. . . .²⁸

Building on a perceived redundancy between Leviticus and Deuteronomy—Deuteronomy already specifies the prohibition on idolatry—the *Sifra* interprets Lev 18:3's prohibition on "their laws" to include not only blatant acts of idolatry but also general assimilation to foreign norms, which the *Sifra* defines here as Roman theatrical culture. A text from the Palestinian Talmud, along similar lines, contrasts the Roman theater with the rabbinic study house:

And in his departure [from the synagogue] what did he (Rabbi Nahunya ben Ha-Qaneh) say? I express thanks before you God, my God and God of my fathers, who gave my portion among those who sit in the study houses and in the synagogues and did not give my portion in the theaters and circuses, for I labor and they labor, I am industrious and they are industrious: I labor to inherit the garden of Eden, and they labor for the lowest pit (*be'er shahat*), as it is said: "For You will not abandon me to She'ol, or let Your faithful one see the Pit (*shahat*)." (Ps 16:10)²⁹

Both the Rabbi and the Roman labor, but in different places and for different ends. The Rabbi is defined by the synagogue and study house, the pagan by the theater and circus. These earthly locations are mirrored in the ultimate locations to which they deliver their inhabitants: either Eden or the "Pit." While the psalm verse suggests that those faithful to God will *avoid* the dreaded pit, the rabbinic reading sends those who deny God directly down to it. The opposition between the God-fearing audiences of the study-house and the God-denying audiences of the theater proliferates in amoraic midrash, which uses these two social spaces to divide the world between an "us" and a "them."³⁰ Possessive phrases help to create this impression: "*their* theaters" or "the theaters of the nations."³¹ The theater comes to stand for Rome, its power—political, cultural, and physical—embodied in its games. And this power is presented as the antithesis of rabbinic power. The Rabbis pair the study house with the theater in order to show the study house's superiority, but in the process they inextricably link the two. Buried in their rejection of Rome but also perpetuated by it is an anxiety about rabbinic distinctiveness. Living in the thick of paganized Jewish Palestine, the Rabbis are preoccupied with creating an alternative to the dominant Roman culture. Through these texts runs a pattern of repulsion, attraction, and competition with Roman culture, represented metonymically by the arena.

Rabbinic martyrdom narratives, telling the stories of Jewish suffering at the hands of Rome, are the counterpart to the anti-arena legislations. The tannaitic midrashim include two narratives of Rabbis persecuted under Hadrian in the first half of the second century, the first a double narrative of Rabbi Yishmael and Rabbi Shimon in the *Mekhilta*,³² and the second that of Rabbi Haninah ben Teradyon in *Sifre Deuteronomy*.³³ In addition, the *Mekhilta* describes the persecution of all Jews living in Palestine for their observance of God's commandments:

"[For I the Lord your God am an impassioned God, visiting the guilt of the parents upon the children, upon the third and upon the fourth generations of those who reject Me, but showing kindness to the thousandth generation] of those who love Me and keep My commandments" (Exod 20:6).

Rabbi Nathan says: "of those who love Me and keep My commandments"—these are [the people of] Israel who live in the land of Israel and give their lives for the commandments.

Why are you going out to be killed (*li-hareg*)? Because I circumcised my son.

Why are you going out to be burned? Because I read from the Torah.

Why are you going out to be crucified? Because I ate matzah.

Why are you going out to be flogged? Because I shook the lulav.

And it says: "[And if he is asked, 'What are those sores on your back?' he will reply,] 'From being beaten in the homes of my friends' " (Zech 13:6)—these lashes caused me to be loved by my father in heaven.³⁴

In this teaching of Rabbi Nathan's, the Jews of Palestine are made more beloved to God through the religious persecutions they suffer there. The back-and-forth dialogue of the midrash echoes the verse from Zechariah that comes at its end. The series of Roman punishments that Rabbi Nathan mentions, while it is distinctively Roman—it includes crucifixion—also seems to echo the Rabbis' own punishment methods, with its list of four and its executions of decapitation (the root *h-r-g* is the one the Rabbis use to describe decapitation) and burning. Roman execution, in the Rabbis' representation, comes to resemble the Rabbis' own executions, in the same way that the study house and theater mirror each other even while they are posed as opposites.

The Decapitation Cycle and the Hidden Transcript

The convergence of rabbinic execution with Roman execution becomes explicit in the death penalty of decapitation, the third of the four rabbinic death penalties, which the Rabbis organize according to degrees of severity—decapitation is considered less severe than stoning and burning but more severe than strangulation.³⁵ *Mishnah Sanhedrin* 7:3 offers a dispute between Rabbi Judah and the Sages about how the penalty of decapitation should be carried out. Which method of decapitation constitutes a "disgrace" (*nivul*) is at the heart of their argument:

The commandment of those to be decapitated: They would chop off his head with a sword the way that the kingdom (*malkhut*) does.

Rabbi Judah says: This is a disgrace.³⁶ Rather, they should lay his

head down on the block and cut³⁷ it with an axe.³⁸ They said to him:
There is no execution more disgraceful than that.

According to the Sages, decapitation is to be done with a sword, like Roman decapitation (as the Sages conceive it).³⁹ Declaring the Sages' method to be a disgrace, Rabbi Judah proposes a different method that uses the tools of the butcher: The criminal is laid down onto the chopping block and his head cut with an axe. The Sages respond in kind to Rabbi Judah's method, calling it more disgraceful than their own.

The parties in this mishnah, in their dispute about which method of execution is a greater "disgrace," do not explain the term, but if we look in other early rabbinic texts, we see it frequently associated with bodies, and physical sexuality in particular. A woman who is a "disgrace" is a woman who is sexually unappealing: "Rabbi Yosi says: 'You have a woman who is pleasing (*na'ah*) in her youth and when she ages, she becomes repulsive (*mitnavelet*).'"⁴⁰ The same antonym pair appears in *m. Ned.* 9:10, where the verb is used transitively: "At this time Rabbi Yishmael cried and said: 'The daughters of Israel are pleasing (*na'ot*), but poverty makes them repulsive (*menaveletan*).'"⁴¹ The disgraced woman, in this case, is a woman impoverished to the extent that she loses her sexual appeal. The word is also used to describe a repulsive male body: The "disgraced" man is coupled with the man who is diseased, the man who has no sexual organs, and the man who has female organs.⁴² The verb and adjective form of *n-v-l* suggest a loss of dignity, frequently through the diminution of sexual appeal or vigor. Rabbi Judah and the Sages would thus seem to be arguing here about the (gendered) norms of bodily dignity as they are conceived by rabbinic culture.⁴³ The disputants each wish to protect the criminal's body from indignity as best as possible given the circumstances, and the associations with indignity include desexualization and feminization. The text remains obscure, however, on why one method should be considered more or less disgraceful than the other. The medieval Talmud commentator Rashi suggests that Rabbi Judah criticizes the Sages' sword method because he considers it disgraceful for the criminal's body to collapse from a standing position. The *Tiferet Yisra'el* Mishnah commentary provides a possible rationale for the Sages' critique of Rabbi Judah: "it looks like one is chopping the meat of cattle."

The main textual ambiguity of this mishnah has to do with the Sages' description of decapitation, "the way that the kingdom does": To which kingdom do the Sages refer? While most commentators understand the "kingdom" to mean imperial Rome, others argue that it refers to the Israelites' own political leaders, but the former interpretation is better supported.⁴⁴ The entire phrase is used just one other time in tannaitic sources, in *Sifre Deuteronomy*, where it almost certainly refers to a Roman method of execution:

Is it possible that they hang him alive the way that kingdom does? The Torah teaches: "[If a man is guilty of a capital offense] and is put to death, and you impale him on a stake . . ." (Deut 21:22)⁴⁵

In this midrash, the verse is read as evidence that the body should be hanged after death rather than as a means of death, unlike the way the kingdom does it. Hanging as a means of death, the practice of the "kingdom," is shown to be excluded by the Torah. "The way that the kingdom does" functions as a reference to a non-Jewish method of execution, likely Roman crucifixion.⁴⁵

Moreover, the punishment of decapitation and specifically the sword are associated in several rabbinic sources with non-Jewish executing authorities.⁴⁶ A baraita found in the Babylonian Talmud states that even though the four rabbinic executions are annulled, they are still in force through acts of God.⁴⁷ For a person guilty of decapitation, the baraita claims that he will either be delivered over to the "kingdom" or be attacked by bandits. This text's use of the term "kingdom" refers almost by definition to a Roman authority and not to a Jewish authority, for the baraita's premise is that Jewish power is no longer functional. In addition, the baraita specifically links the penalty of decapitation with the Roman authority—it does not mention the kingdom with respect to any of the other rabbinic execution methods.⁴⁸ Another baraita makes the sword a symbol of Roman imperial power.⁴⁹ This baraita is an addition to a Mishnah in which the Sages prohibit images of men holding various items: a rod, a bird, a globe, all of which are considered to symbolize idolatrous Roman power. One of the items added by the baraita is a sword, as explained in the Gemara,⁵⁰ because of its "denoting that it has the power of slaying the whole world."⁵¹ Among other symbols, the sword represents Rome's world-conquering imperial drive. In sum, the "kingdom" of *m. Sanh.* 7:3 is undoubtedly the Roman Empire. But it is worth considering why one has to go through these steps, that is, why the Mishnah is vague in its reference to Rome. It may have been so painfully obvious to whom the "kingdom" belonged, i.e., to the Roman emperors, that the Mishnah may not have wanted to dignify their Roman conquerors with explicit reference. In the end, the Mishnah compels its audience to contend with the ambiguity, to be forced to guess who holds the power of decapitation and who does not.

Not only the referent but also the function of the phrase is ambiguous. "The way that the kingdom does" may be functioning as mere description, a handy tool of familiar reference, or as a statement of derivation, to indicate that the Rabbis borrowed Rome's distinctive method. Yair Lorberbaum, presenting these possibilities, claims that most scholars have incorrectly taken the second approach; Lorberbaum argues against them that the Mishnah deploys this phrase only to describe the sword method, not to derive it.⁵² Even if Lorberbaum is correct that the phrase does not point to the true origins of the custom, however, we must still ask what prompts the Sages to use Romans as their point of reference.

Homi Bhabha's writing on mimicry and James Scott's work on hidden transcripts and particularly strategies of reversal help to make sense of this nod to Rome. The Sages seem to be mimicking Rome, which is precisely what Lorberbaum and other writers on this mishnah resist. While some scholars do acknowledge that the Sages seem to be borrowing Roman decapitation,⁵³ others assert either the irrelevance or ambiguity of the key phrase in the Mishnah,

"the way that the kingdom does." Adolf Büchler, in his 1906 classic study of the rabbinic death penalty, begins his discussion of the Sages' sword by observing its absence in the Bible and its apparent imitation of Roman decapitation, but eventually he works his way around to claiming that Gen 9:6 is the true basis for the sword.⁵⁴ The orientation of Victor Aptowitz's 1925 analysis of decapitation is suggested in its subtitle: "The Exegetical Foundation of the Punishment of Decapitation for Murder." Lorberbaum follows in Büchler's and Aptowitz's footsteps.

But the Sages have good reason to borrow from Rome, if only to describe their form of decapitation. Under the Roman penal system, decapitation was a relatively honorable way to die, reserved generally for the upper-class condemned. According to Peter Garnsey, *capite puniri* (as decapitation is frequently referred to in Roman sources) was the "least painful and degrading form of execution" (1968:147)⁵⁵ and was imposed on decurions only rarely for extreme capital offenses.⁵⁶ Thomas Wiedemann writes similarly: "Beheading by the sword came to be a privilege reserved only for the *honestiores* (senators, soldiers, and others in the emperor's service, and members of municipal councils, with their families). If competently carried out by an expert executioner, decapitation was swift and inflicted a minimum of physical pain."⁵⁷ If the Sages were concerned to preserve the criminal's dignity, as they seem to be in *m. Sanh. 7:2*, then they chose well regarding Roman execution, adopting its most honorable method.

Does this emulation of Roman execution suggest that the Rabbis have perversely internalized the images of Roman power to which they were subject? This model of a subordinate group's relationship to the dominant culture has been described by such terms as false consciousness, hegemony, and naturalization.⁵⁸ But Bhabha's notion of mimicry allows us to understand such instances in a more complex way, as a potentially subversive strategy. Mimicry, while it may be viewed as flattery of the mimicked, can also be a menace to him: "The menace of mimicry is its double vision which in disclosing the ambivalence of colonial discourse also disrupts its authority."⁵⁹ The rabbinic mimicry at work here disrupts Roman authority by displacing it, as Bhabha continues: "I want to turn to this process by which the look of surveillance returns as the displacing gaze of the disciplined. . . ." The Sages of the Mishnah effect such a displacement, borrowing Rome's sword for their own executions, representing a reversal of the axes of power. The Mishnah creates an executioner that looks like the Roman one but with a rabbinic face. Rather than understanding rabbinic decapitation either as an unexamined borrowing from Rome or as totally unrelated to it, as the scholars mentioned above tend to do, we can understand it as something more, as an appropriation of power.

Such a reversal frequently characterizes the "hidden transcripts" of dominated groups, according to Scott. Scott devises the term "hidden transcript" to refer to the "discourse that takes place 'offstage,' beyond direct observation by powerholders."⁶⁰ Scott's term has already been used more than once to refer to rabbinic discourse, with its Hebrew/Aramaic language and its oral form making it intelligible and accessible only to the Jewish community and, more

important, unintelligible and inaccessible to the Roman powerholders.⁶¹ Scott makes this distinction between the public and the private transcript in order to explain why subordinate groups so often seem to embrace their servile status, reeling off a string of yessirs and nosirs without any apparent resentment. Scott assigns this behavior to the public transcript, where subordinate people are forced to seemingly accept their situation. In their private life, however, "every subordinate group creates, out of its ordeal, a 'hidden transcript' that represents a critique of power spoken behind the back of the dominant."⁶²

One strategy of critique is reversal. Scott brings the example of Aggy, an American woman slave in the antebellum South. Mary Livermore, a white governess from New England, describes Aggy's reaction after the master has just given Aggy's daughter a beating in Aggy's presence. After the master leaves the kitchen, Aggy turns to Mary and vents her fury: "Thar's a day a-comin'! Thar's a day a-comin'! . . . I hear the rumblin ob de chariots! I see de flashin ob de guns! White folks blood is a runnin on the ground like a ribber, an de dead's heaped up dat high!" According to Scott: "What is particularly striking is that this is anything but an inchoate scream of rage; it is a finely drawn and highly visual image of an apocalypse, a day of revenge and triumph, a world turned upside down using the cultural raw materials of the white man's religion."⁶³ Aggy's speech and that of the Sages share something: Each of them draws on the cultural materials of the powerful in order to empower themselves. Just as Aggy adapts the apocalyptic language of American Christianity, so do the Sages adapt the form of Roman execution, each in an effort to adapt the language of power and, in so doing, to challenge it.

The toseftan parallel to this Mishnah deals with the dangers of mimicry, however, asking: Is it possible that a reversal can leave everything exactly the same? The Tosefta expresses anxiety about whether rabbinic mimicry of Romans can leave the Rabbis looking too much like them:

Rabbi Judah says: Behold it says, "And love your fellow as yourself" (Lev 19:18)—choose for him a nice execution. How do they do this for him? One lays his head on the block and cuts it off with an axe. They said to him: There is no execution more disgraceful than this. He said to them: Of course there is no execution more disgraceful than this, but rather, [one must do it this way] because of ". . . nor shall you follow their laws." (Lev 18:3)⁶⁴

This toseftan text continues the conversation captured in the Mishnah and changes its terms. The dispute between the Sages and Rabbi Judah, as it is represented here, proves to be not only about the problem of bodily dignity but also about the problem of following "their laws," prohibited by Lev 18:3. In Rabbi Judah's view as the Tosefta represents it, the Sages are not cleverly constructing rabbinic power out of the cultural materials of Rome, as James Scott might describe it; they are forgetting what it means to be a Rabbi in the first place! You can not be a Rabbi and look like a Roman, argues Rabbi Judah, with Lev 18:3 as support. While this verse, in biblical context, prohibits the Israelites from imitating the religious transgressions of the Egyptians and Canaanites,

Rabbi Judah expands the prohibition even to practices that are not transgressive. A practice, simply by virtue of its being Egyptian, Canaanite, or, in this case, Roman, becomes prohibited. The real reason (according to the Tosefta) for Rabbi Judah's disapproval of the sword is not, as we might have thought from the Mishnah, that it violates the dignity of the criminal, but, rather, that it compromises Jewish uniqueness. In this toseftan expansion, Rabbi Judah is willing to surrender human dignity if it preserves the boundaries of Judaism.

The dispute between Rabbi Judah and the Sages deals with the troubling area of foreign practices not explicitly prohibited. Idolatry is clear-cut; it is practices such as dignified Roman decapitation, practices wherein the foreign power offers a positive alternative, that pose a problem.⁶⁵ The Sages allow such borrowings, distinguishing between that which is foreign and that which is transgressive. Rabbi Judah identifies the two, making the foreign inherently transgressive—anything Roman must be shunned.

Rabbi Judah's objection to the Sages invites a return to Scott's discussion of hegemony and false consciousness. Rabbi Judah's response to the Sages reveals that internalization and false consciousness are real concerns of subordinate groups as they express themselves in their private domain.⁶⁶ Rabbi Judah worries that in the Sages' resistance to Rome they will ultimately come to resemble them. The reversal of power will really be no reversal, since the executioner will look exactly the same. Scott argues that "there is little chance that acting a mask will appreciably affect the face of the actor,"⁶⁷ but it is precisely this fear that consumes Rabbi Judah.

Rabbi Judah's fear is the same fear that David Quint draws out of the *Aeneid*:

Once Turnus and Aeneas become interchangeable—both Romans—Aeneas seems to be victimizing himself even as he undoes his former victimization. What can be seen in one light as a therapeutic narrative mastering a traumatic past is in another only the perpetuation of that past, a mere repetition that cannot be narrated. Augustus repeats the violence of civil war that he seeks to end. His revenge may be part of larger cycle of reciprocity rather than a final settlement. Or it may be both at once.⁶⁸

At the point in the *Aeneid* when Aeneas and Turnus, the hero and anti-hero, become most similar, the closure of the *Aeneid* is most disrupted—Aeneas's vengeance, and by implication Augustus's vengeance in Virgil's own world, threaten to continue forever. It is at this same point in the laws of rabbinic execution—when the rabbinic executioner and the Roman executioner come to resemble each other most closely—that Rabbi Judah voices his objection. What to the Sages is a "therapeutic narrative" is to Rabbi Judah "mere repetition." Rabbi Judah worries that the subversive mimicry of the Sages might slide into a standard scenario of idealization, with the distinctive heritage of the Rabbis getting lost in the process. Ironically, it might be argued that Rabbi Judah allows in Roman influence as much as the Sages do, since he continues to let Roman culture define the parameters of rabbinic culture—Rabbi Judah

resorts to an inferior law simply because it is not Roman. Rabbi Judah even admits that his method is inferior; in the Babylonian Talmud's version of this text, he adds with a note of desperation: "But what can I do?" The Sages' assimilation and Rabbi Judah's rejection are two sides of the same coin.

In the argument between Rabbi Judah and the Sages, as it appears in the Mishnah and in various baraitot, is found both the drive towards resistance but also anxiety about the effects of resistance. These opposing forces represent a dilemma posed by the conditions of imperial domination, a dilemma whose terms might look something like this:

If rabbinic power is to look nothing like Roman power, then it is not power.
If rabbinic power is to look too much like Roman power, then it is not rabbinic.

The Sages embrace the first horn of this dilemma, Rabbi Judah the second. But then each is laid bare to a critique from the other side. It is this problem with which the Rabbis are contending: How do they assert their authority when they have so little of it within the status system of imperial Rome?

Burning Bodies

Roman-style burning, like crucifixion, is explicitly excluded from rabbinic legal boundaries, an exclusion that we might read as another point of resistance to Rome even though reference to Rome is never made. The rabbinic penalty of burning, set forth in *m. Sanh.* 7:2, is one of the most surprising and counter-intuitive of the rabbinic execution methods. While biblical and postbiblical burnings are assumed to be a on a pyre or at the stake,⁶⁹ mishnaic burning is inflicted internally:

The commandment of those to be burned: They would sink him into manure up to his knees, and put a hard cloth into a soft one, and tie it around his neck. One would pull in his direction and the other would pull in his direction until he opens his mouth, and he lights the wick and throws it into his mouth and it goes down into his insides and scalds his bowels.⁷⁰

Rabbi Judah says: If he dies in their hands they have not upheld the commandment of burning. Rather they open his mouth with tongs against his will, and light the wick and throw it into his mouth, and it goes down into his insides and scalds his bowels.

Rabbi Judah and the Sages disagree about how his mouth should be opened, but the two parties agree that the person is burned to death from the inside. Internal consumption is precisely how a text in the Babylonian Talmud articulates the principle underlying this penalty:

From where do we learn it? It is derived [from the verbal analogy] “burning, burning” from Korah’s group; just as there burning is of the soul and the body is left intact, so here burning is of the soul and the body is left intact. Rabbi Elazar said: It is derived [from the verbal analogy] “burning, burning” from the sons of Aaron, just as there burning is of the soul and the body is left intact, so here burning is of the soul and the body is left intact.

The Mishnah’s penalty of burning seems to be based on the concept that the external form of the body should be preserved.

Moreover, the continuation of the Mishnah explicitly rules out burning the body from the outside:

Rabbi Elazar ben Tsadoq said: There was an incident with one priest’s daughter who made a harlot of herself and they surrounded her with bundles of sticks and burned her (*hiqifuha havilei zemurot ve-sarfuha*).

They said to him: Because the court of that time was not expert.

Lorberbaum claims persuasively that the burning described by Rabbi Elazar ben Tsadoq is likely to have been normative law predating the Mishnah.⁷¹ The Mishnah then would be making a radical innovation. The Mishnah itself seems to be aware of the oddity of its penalty, paying as much attention to how it should *not* be carried out as to how it should.

We can suggest, following the concerns made explicit with respect to decapitation, that the Mishnah’s intention is not only to change the existing Jewish practice of burning but also to exclude the Roman method.⁷² When we examine Roman burning, we find precisely the kind of burning at the stake that the Mishnah excluded. The punishment of burning a criminal alive, *crematio*, has a long tradition in Rome going back to the fifth century B.C.E. legal code, the Twelve Tables.⁷³ In this early formulation, the penalty of burning seems to be grounded in the logic of measure-for-measure: A person who sets fire to a barn or heap of corn is himself set aflame.⁷⁴ This logic accompanies the punishment into the second century C.E., when Callistratus lists burning as the penalty for arson.⁷⁵ The penalty is expanded to other crimes, however, that do not have any explicit connection to fire, such as desertion, treason, and magic.⁷⁶ Nevertheless, the penalty’s *raison d’être* remains the total destruction of the condemned by fire.⁷⁷

The Rabbis’ own martyrdom stories represent Roman burning as exactly the kind of burning that the Rabbis prohibit. One version of the martyrdom narrative of Rabbi Haninah ben Teradyon, found in *b. Avod. Zar.* 18a, strongly suggests this reading. In the *Sifre*’s telling of the story, Rabbi Haninah ben Teradyon receives a decree that he will be burned with his scroll of Torah.⁷⁸ The Babylonian Talmud’s version expands the story:

... and upon their return they found Rabbi Haninah ben Teradyon sitting learning Torah, having collected together a large audience,

and a scroll of Torah resting upon his breast. They brought him and wrapped him in the scroll of Torah, *and they surrounded him with bundles of sticks (hiqifuha havilei zemurot)* and they lit the fire with them, and they brought sponges of wool and steeped them in water and laid them on his heart so that he would not die⁷⁹ too quickly . . .

The particular language of this narrative is highly suggestive: Rabbi Haninah ben Teradyon’s execution is identical to that which the Mishnah rejects. The method his persecutors employ—they surrounded him with bundles of twigs—is the same method, formulated with the same words, that the Sages of the Mishnah declare to be “inexpert.” Like the penalty of decapitation, the penalty of burning seems to have been a battleground for the culture wars of the Rabbis.

Spectacles of Death: The Stoning House and the Arena

Let me venture to suggest that the paradigmatic rabbinic death penalty, stoning, also has its Roman counterpart. Both the rabbinic ritual of stoning and the Roman ritual of the arena are the most elaborate and harshest rituals of execution in their respective schemes of execution, making them a somewhat natural parallel. Their characters criss-cross when we examine them synoptically.

The most salient feature of the Roman arena was its theatricality, as I discussed earlier. In the arena, Rome taught its residents the lessons of empire in impressive displays of power. According to MacMullen, Rome’s fondness for spectacles of punishment kept increasing over the first few centuries of the common era: “There had never been a moment when Roman Justice, aroused and representing the cause of right, had hidden her acts of vengeance behind a screen; but as the crimes multiplied that earned dramatic retribution—not a mere fine, not even exile, but some more violent assault upon the body of the person convicted—then, more and more, justice is acted out before the people assembled.”⁸⁰

The role of the arena specifically as a site of execution is complicated, since the arena offered not just executions but “conglomerate spectacles,” that is, “multi-dimensional entertainment” combining executions with athletic contests, mock battles, battles between wild animals, chariot races, plays, and other events.⁸¹ The gladiatorial arenas were not built for the purpose of housing executions, but their construction coincided with a shift of execution from the private domain to the public, making the amphitheater an obvious location to carry out executions.⁸² *Condemnatio ad bestias*, sending a criminal to the beasts, became one of the arena’s many activities (along with the other *summa supplicia*, which also began to be performed in the arena), performed between the *venationes* (animal hunts, including animal display and slaughter) in the morning⁸³ and the *munera* (gladiatorial blood shows) in the afternoon.⁸⁴ Seneca criticizes those spectators who stay during the lunch-break to watch the mass

executions, which, he scoffs, require no skill.⁸⁵ To complicate matters, we can think of the *venationes* in the morning and *munera* in the afternoon also as forms of execution, since the gladiator was sometimes, though not always, also a condemned prisoner just like those killed during the lunch break.⁸⁶ Condemnation to be a gladiator was different, however, from condemnation to the beasts or the other *summa supplicia*, “ultimate punishments,” since the gladiator had a chance to survive.⁸⁷

What would a day at the arena look like?⁸⁸ If one went early, the day would have begun with the entry of animals into the arena from its cellars, guided by the *venatores*, the “hunters”⁸⁹ in charge of the event. The activities that followed were subject to great variation: One might see beasts engaging with each other in bloody battle, professionally trained *venatores* battling beasts, untrained prisoners being mauled by beasts, mythological enactments, or exotic animals performing tricks for the crowds, much like modern circuses. After the *venationes*, the *meridiani*, the noontime executions, would be ready to begin. The three *summa supplicia*—burning, crucifixion, and condemnation to the beasts—could appear in any combination, in addition to other forms of torture and death.⁹⁰ According to Kyle, “criminals were led into the arena almost or fully naked, with a rope or chain around their necks, sometimes bearing the verdict (*titulus*) attached to them. Their condemnation was proclaimed, and, tied to posts or without weapons, they were exposed to beasts.”⁹¹ These executions differed from the afternoon *munera*, when the gladiators, sheathed in metal or leather or bearing a body-length shield, sword in hand, emerged in the arena ready to fight each other, each one given the chance to survive if he could triumph over his opponent.⁹²

The rabbinic sources on stoning display a variety of approaches towards spectacular execution, as I showed in an earlier chapter.⁹³ The tannaitic midrash collections create a full-scale spectacle of execution along the lines of the Roman ones. The Mishnah, on the other hand, sidesteps spectacle; it hints that the public is in attendance at an execution, but it leaves their role ambiguous. The Tosefta, at the other extreme of the midrash collections, eliminates all reference to audience. Both the Mishnah and Tosefta, however, do call for a spectacle when it comes to punishing certain crimes, i.e., those addressed by Deuteronomy’s deterrence clause: the enticer (Deut 13:12), the presumptuous man (Deut 17:13), the false witness (Deut 19:20), and the rebellious son (Deut 21:21). I showed how these positions are arrived at by a complex process of reading the Bible’s own intertexts. Now I can add the intertexts of Rome, reading the different rabbinic positions not only as attempts to make biblical execution coherent but also as attempts to coopt or reject Roman execution. The Midrash engages here in the subversions of mimicry, interpreting out from the Bible a spectacle of execution not entirely unlike the Roman one. The Mishnah charts out a middle course, hinting at the arena’s spectacles but reluctant to embrace them wholeheartedly. The Tosefta allows only an argument from silence, perhaps suggesting a rejection of spectacle.

The suspense of who will win and who will lose, or how long it will take

a gladiator to die, was what drew the crowds to the Roman arena.⁹⁴ Shelby Brown, in his work on mosaic representations of the arena, tells that “gladiators are depicted preparing to fight, fighting, and losing much more often than receiving a death blow or already dead. . . . The excitement of the encounter was at its peak when victory was still undecided. . . .”⁹⁵ It was not death itself that the spectators came to see (and that made it onto the mosaic floors of Roman houses), but everything before death. The gladiators would fight until one of them could no longer, at which point the spectators would give the famous thumbs-down signal for the execution of the loser. The spectators, seated according to their class, gender, and occupation, mapping out the hierarchies of Roman society in their rising rows,⁹⁶ participated in the action in a variety of ways: “Under the emperors, as citizens’ rights to engage in politics diminished, gladiatorial shows, games and theatre together provided repeated opportunities for the dramatic confrontation of rulers and ruled.”⁹⁷ Potter refers to a crowd that demanded that a Christian woman and her companion be flogged, but also to other crowds that advocated for the condemned, asking that they be clothed or set free.⁹⁸ Sometimes the spectators became more involved than they would have wished, themselves being thrown to the beasts.⁹⁹ Rabbinic sources attest to this feature of the arena, such as in *t. Avod. Zar. 2: 7* (discussed above), in which Rabbi Nathan allows arena attendance for the Jew who will cry out on behalf of the gladiator. But the suspense of the arena relied not only on the crowd’s advocacy but also on the gladiator himself. According to Barton, the gladiator “was allowed another opportunity to redeem his honor and display his valor before the eyes of his enemy (as an alternative to enslavement or execution).”¹⁰⁰

These elements of suspense—how long the gladiator can survive, and whether the crowd and gladiator will want or be able to save him—appear in another guise in the rabbinic ritual of stoning. There are three stages of stoning, only the last of which is assured to kill the criminal. The ritual plays with the drama: “if he dies . . . if he does not . . .” As in the Roman arena, one cannot be sure exactly when the criminal will meet his end. Furthermore, the rabbinic ritual is grounded in a give-and-take between community, criminal, and rabbinic authority: The community can testify on behalf of the criminal; the criminal can testify on his own behalf; the criminal earns life in the world to come by his confession, etc. The rabbinic ritual of execution, like the Roman one, is in many ways a ritual of individual and communal empowerment.

The body of the convicted, one of the rabbinic concerns in *Mishnah Sanhedrin*, also has strong Roman resonances from the arena. The bodies of the men and women who appeared in the Roman arena were typically naked, either nearly or completely: “The males might be naked or clad only in a loin cloth, the women at times in light tunics or in a skirt and brassiere, at other times in the nude . . .”¹⁰¹ The practice of stripping the condemned criminal is codified in the *Digest of Justinian*, though it originated much earlier according to the *Digest’s* testimony: “Someone should not be stripped when he is put in prison but [only] after his condemnation, as the deified Hadrian wrote in a rescript.”¹⁰²

The stripping of the criminal signified his or her inferior social status; the naked body of the condemned stood in contrast with the impressively armed and costumed body of the voluntary gladiator and the toga and tunic-wearing audience.¹⁰³

The naked exposure of women's bodies would have been particularly degrading. Peter Brown writes of fourth-century Antioch: "Nudity and sexual shame were questions of social status. . . . [T]he lower classes were not expected to be capable of protecting their womenfolk from exposure. The seclusion of one's womenfolk assumed power and wealth. The sexual vulnerability of poor girls was simply part of their general passivity to the powerful."¹⁰⁴ The degradation of naked women in the arena was sometimes so shocking that it backfired, at least according to Christian accounts, evoking pity in the crowd, who were said to have asked that women martyrs be clothed.¹⁰⁵

Rabbinic texts also prescribe a practice of stripping the condemned criminal before his or her execution. *Mishnah Sanhedrin* 6:3 calls for the stripping of the condemned and presents a dispute between Rabbi Judah and the Sages about whether it should be applied to women as well as men:

When he was four cubits' distance from the stoning house, they took off his clothes. The man—they cover him in his front, and the woman—in her front and in her back; the words of Rabbi Judah. And the Sages say: The man is stoned naked, but the woman is not stoned naked.

The Tosefta's parallel is almost identical but adds some words of explanation to Rabbi Judah's position:

At a distance of four cubits from the stoning house, they would take off his clothes. The man—they cover him one piece on the front, and the woman—one piece on the front and on the back *because she is all indecency (ervah)*; the words of Rabbi Judah who said it in the name of Rabbi Eliezer. And the Sages say: The man is stoned naked, but the woman is not stoned naked.¹⁰⁶

According to the Tosefta, Rabbi Judah requires that a woman's body be more covered than a man's because her body is all "indecency." The Tosefta's explanation seems somewhat misplaced, however: If a woman's body is all indecency, then surely all of it should be covered, not just small parts of it in the front and back! The Tosefta's explanation in fact fits the Sages' position better, which requires total covering. The medieval Talmud commentator Rashi addresses this problem, commenting on the baraita as it appears on *b. Sotah* 8a, explaining that the woman's pudenda can be seen both from the front and the back, unlike the genitals of the man. Thus Rabbi Judah requires the back covering as well.

A similar dispute appears in the Mishnah about the hanging of the corpse after the stoning is complete. The Sages and Rabbi Eliezer argue about the exposure of a woman's body:

The man—they hang him his face towards the people, and the woman—her face towards the tree; the words of Rabbi Eliezer. And the Sages say: The man is hanged, but the woman is not hanged.¹⁰⁷

The practice of stripping the body of the condemned is not found explicitly in the Pentateuch, but a tannaitic midrash locates it there:

[Anyone among the Israelites, or among the strangers residing in Israel, who gives any of his offspring to Molekh, shall be put to death; the people of the land] "shall pelt *him* with stones" (Lev 20:2); and not with his clothes on.¹⁰⁸

[Take the blasphemer outside the camp; and let all who were within hearing lay their hands upon his head, and let the whole community] "stone *him*" (Lev 24:14); and not with his clothes on.¹⁰⁹

[Then the Lord said to Moses, "The man shall be put to death: the whole community] "shall pelt *him* with stones . . ." (Num 15:35); not with his clothes on.¹¹⁰

These tannaitic midrashim all focus on the pronoun or suffix "him," which they propose to be superfluous and therefore to be teaching some implicit law. The pronoun's function, according to each midrash, is to exclude the clothing of the man who is to be stoned. The midrashim thus show a hermeneutical basis for the practice of stripping the condemned criminal.

The Roman context for this ritual, however, opens up the field of interpretation. While this mishnaic practice of stripping seems to have been interpreted out of the Pentateuch, the Roman practice of stripping the criminal adds to it another layer of significance. In their ritual of execution, the Rabbis would have seemed to be assimilating the Roman ritual into their own, tailoring its social symbolism of clothing and nakedness to the stoning house.¹¹¹ Saul Lieberman points to the same pattern in his discussion of an amoraic statement in *Esther Rabbah* that describes God punishing the wicked in Gehenna in their naked condition. According to Lieberman, "some of the cruel punishments used by the Roman authorities were inserted into Gehenna from real practice, and the authors were only speaking of ordinary custom."¹¹² Lieberman explains this borrowing from Roman punishment as a strategy of magnification: "The midrash only magnifies the disgrace of the transgressors and notes that they will be punished in Gehenna exactly as the government was accustomed to do in their days."¹¹³ By echoing contemporary punishment practices in the formulation of their own, the Rabbis ask that their punishments be treated with the gravity of those imposed by Rome.

The Mishnah's distinction between male and female nakedness, in contrast to the general practice of stripping, does not seem to have any clear midrashic anchor. Tannaitic midrash does distinguish between men's and women's executions, but only with respect to the practice of hanging, not with respect to their nakedness:

If a man (*ve-ish*) is guilty of a capital offense and is put to death . . ."
 (Deut 21:22): The man is hanged but the woman is not hanged.
 Rabbi Eliezer says: Even the woman is hanged . . ."¹¹⁴

This midrash works off the word *ish*, "man," interpreting that it must come to exclude women from hanging. Rabbi Eliezer, as he does in the Mishnah, disagrees with this interpretation, and the midrash does not reveal anything more about his logic. In fact, the distinction Rabbi Eliezer makes—that the woman should face the tree, and the man the people—is absent from the manuscripts of the *Sifre Deuteronomy* and added to it only later.¹¹⁵ Rabbi Eliezer's distinction would seem to be only partially anchored in midrash; moreover, the entire dispute about stoning men and women naked seems to have no midrashic basis at all.

The Babylonian Talmud addresses this problem, attempting to find some midrashic basis for the Mishnah's opinions on male and female nakedness. The redactor comes up with a complex midrash whose mechanics are obscure:

What is the reason of the Sages? The verse said, "and let them stone him," (Lev 24:14)—What is "him"? If I say "him"—and not her, behold it is written, "you shall take the man or the woman [who did that wicked thing out to the public place, and you shall stone them, man or woman, to death]" (Deut 17:5). Rather what is "him"? "Him"—without his clothes on, behold "her" should be with her clothes. And Rabbi Judah? "him"—without his clothes on, the man and the woman are not different from each other.¹¹⁶

According to the midrash, if one were to try to interpret the "him" of Lev 24:14 to exclude the stoning of women, one would find Deut 17:5 saying otherwise, that women are stoned. The "him" must then be coming to exclude not women's stoning, but women's nakedness. The problem with this midrash is that the "him" of the verse is forced to do double-time, excluding the clothes of the man at the same time that it includes the clothes of the woman.¹¹⁷ The redactor himself backtracks from this midrash, immediately suggesting that the motivating force of these positions is moral rather than midrashic: "Is it to say that the Sages are concerned about impure thoughts and Rabbi Judah is not concerned about impure thoughts? But behold I teach the opposite. . . ." The Talmud's anonymous redactor, ignoring his earlier midrashic offering, suggests that the Rabbis' position is based on social concerns having to do with the potential titillation for the public of a woman's execution.¹¹⁸ In the wake of the redactor's about-face, the Tosafot, medieval Talmud commentators, throw up their hands, claiming that the Sages' position is not a product of midrash, as the first part of the pericope might suggest, but is really a consequence of the Sages' ethical commitments.¹¹⁹ The pericope leaves the impression that the Mishnah's distinction between men's and women's nakedness cannot be comfortably connected to any biblical verse. At best (from a hermeneutical perspective), this legislation of gendered nakedness can be seen as an awkward midrashic fusion of the law of gendered hanging and the law of

naked executions, applying the gender distinction of the first to the nakedness prescribed by the second.

The murky midrashic roots of this gender distinction for nakedness make the distinction especially susceptible to a more complex reading. In the Mishnah's argument about whether the body of a woman should be exposed during her execution, the Tannaim are playing with terms carrying strong Roman cultural associations. In his study of crucifixion, David Halperin makes this connection between Roman bodies and rabbinic bodies, comparing the nakedness of Sanhedrin's criminals to the nakedness of victims of Roman crucifixion.¹²⁰ Nevertheless, the rabbinic embrace of Rome has its limits. By attaching the explanation of a woman's indecency to Rabbi Eliezer's position instead of the Sages, the Tosefta emphasizes that Rabbi Eliezer's position does not call for *complete* nakedness but for some degree of modest cover. The more scandalous position in the Mishnah, the more body-exposing position, is still far more modest than the Roman one.

Not only human bodies but also animal bodies were featured in Roman spectacles. Visual representations and inscriptions with advertisements or commemorations of particular shows tell of a wide variety of animals that appeared, both domesticated and wild, both from Italy and abroad. Rare, expensive, foreign animals were common to the shows as a means for the sponsor, the *editor*, to show off his wealth and power. Bears, elephants, lions, leopards, hippopotamuses, crocodiles, apes, lynx, rhinoceri, bulls, giraffes, hyenas, and other animals from far-flung parts of Africa and Asia all found their way into the arena and were slaughtered on massive scale. Emperors strove to come up with novel shows; for example: "Septimius Severus arranged a *venatio*, probably in the Circus Maximus, which consisted of a ship which fell apart to release bears, lions and lionesses, leopards, ostriches, wild asses and bison."¹²¹ The array of wild animals in the arena showed off to the audience, in palpable animal flesh, the rich and far-reaching dominion of the imperial sponsor.¹²²

The rabbinic sources explicitly allude to the wild beasts of the arena, but they refer only to the ox, called by the rabbinic texts the *shor ha-itstadon*, the "stadium ox." It is curious that the Rabbis focus on "the stadium ox," an animal which appears rarely on mosaic panels representing gladiatorial combats and which does not seem to have been particularly popular in the stadium. The Rabbis make the ox representative, let us hypothesize, because the ox holds a central position in their own legal system: The goring ox serves in biblical and rabbinic law as the symbol for injuriousness. The Rabbis make Roman culture conform to their own familiar legal vocabulary and criticize that culture in the process.

The goring ox, according to the rabbinic system, is put on trial and liable for the death penalty just as a human being is:

The ox liable for stoning—[he is tried by a court] of twenty-three [judges], as it is said, "[If, however, that ox has been in the habit of goring, and its owner, though warned, has failed to guard it, and it kills a man or a woman,] the ox shall be stoned and its owner, too,

shall be put to death" (Exod 21:29)—like the execution of the owner is the execution of the ox.¹²³

Mishnah Bava Qamma 4:4 makes a distinction, however, between the goring ox and the stadium ox:

The stadium ox is not liable for the death penalty, as it is said, "When an ox gores . . ." (Exod 21:28)—and not when they cause him to gore.

While the paradigmatic goring ox is accountable for his actions and therefore liable for the death penalty, the stadium ox is not considered responsible because of a primary difference between the two animals: The normal goring ox is said to gore of its own volition, while the stadium ox is by contrast trained to gore. A parallel baraita in the Babylonian Talmud explains: "The stadium ox is not liable for the death penalty and is kosher for the altar because it is like he is forced (*ke-me'useh*)." ¹²⁴ The stadium ox cannot be held accountable for the homicide it commits; by implication, only those who cause it or force it to do so, i.e., those who run the stadium, can be held responsible. The Rabbis, in deflecting guilt from the stadium ox, channel it towards the stadium itself as a Roman institution.

Comparing Systems

Finally, we can look at the Roman and rabbinic practices of execution on the level of system. Both the Roman and rabbinic systems function according to degrees of severity.¹²⁵ *Mishnah Sanhedrin* 7 begins:

Four methods of execution were delivered over to the court: Stoning, burning, decapitation, and strangulation. Rabbi Shimon says: Burning, stoning, strangulation, and decapitation.¹²⁶

Rabbi Shimon and the Sages seem to be arguing about the order of severity of the four rabbinic execution methods: Some forms of death are "better" to get than others.¹²⁷ Rabbi Shimon reverses the couplets of the consensus position, putting burning before stoning and then strangulation before decapitation.

Compare a later Roman legal text: "Those who commit capital crimes are, if from the upper classes, decapitated or exiled; those from the lower orders are crucified, burnt alive or thrown to the beasts."¹²⁸ The parallel here is strong, beyond the principle of gradation, since both the Mishnah and the Roman legal manual mention four methods of execution.¹²⁹ But their ordering principles are fundamentally different. Roman execution's ordering principle is social status. The first question a Roman judge would ask one who came before him, whether the witness or the defendant, was "What is your condition, your rank (*condicio, fortuna, tyche*)?"¹³⁰ According to Garnsey, the differential penalty system can be seen already in the classical lawyers and emperors of the first

century C.E. but becomes more formalized in the period of the Antonine and Severan emperors in the second and third centuries. This formalization occurs with rising imperial anxiety to protect the higher orders, and with the disappearance of the jury courts and rise of the *cognitio* procedure, examination by an individual official who had great powers of discretion.¹³¹ While the terminology and distinctions are inconsistent—the lines between slaves, the lower orders (*humiliores*), and the upper orders (*honestiores*) were blurry¹³²—the *Digest of Justinian* (in addition to other legal sources) makes clear that there was a hierarchy of punishments that determined and was determined by social class:¹³³ "You must know, however, that there are distinctions between punishments, and not all persons can have the same one imposed on them. To begin with, decurions cannot be condemned to the mines or to the opus metalli nor subjected to the gallows nor burned alive. If, by chance, they are so sentenced, they must be freed."¹³⁴ The penal system of the Roman Empire played an important role in the hereditary transmission and acquisition of privilege.

The hierarchization of punishment can be seen most acutely in the arena: "Contrary to popular opinion, most of the arena's dead victims were not true gladiators but doomed convicts (*noxii*), men (and women) sentenced to execution, crucifixion, fire, or the beasts."¹³⁵ The vast majority of gladiators were likely to have been defeated enemies of Rome—Gauls, Spaniards, Arabs, Thracians, Germans, Asians, Syrians, Greeks¹³⁶—and condemned criminals of servile status.¹³⁷ The gladiators were peoples marginal to the Roman order, those who the Romans believed "had excluded themselves from the community of civilized peoples, and deserved death."¹³⁸ The *noxii* are shown in Roman art very differently from the glamorized voluntary gladiator standing proudly in his armor—the *noxii* are shown "nude or nearly nude, with bound hands or bound to posts, under the control of arena handlers or in the grasp of beasts."¹³⁹ The *noxii* were, in Rome eye's, a surplus commodity, at Rome's disposal for Rome's amusement.¹⁴⁰

The rabbinic ordering principle, made explicit by *m. Sanh.* 9:3, works differently.¹⁴¹ This Mishnah discusses a scenario in which criminals who have been given death penalties of different degrees are mixed and cannot be resorted: Should they all be given the more lenient penalty or the more severe? Rabbi Shimon and the Sages, appearing again in this Mishnah, agree that the criminals should all be given the more lenient penalty, but they dispute, as *m. Sanh.* 7 attests, which penalty that is:¹⁴²

All those who have capital convictions who are mixed should be judged with the lighter penalty—
if those convicted with stoning [are mixed] with those convicted of burning¹⁴³—Rabbi Shimon says: They should be judged with stoning since burning is more severe. And the Sages say: They should be judged with burning since stoning is more severe.
Rabbi Shimon said to them: If burning were not more severe, it would not have been given to the priest's daughter who makes a harlot of herself!

They said to him: If stoning were not more severe, it would not have been given to the blasphemer and to the idolater . . .¹⁴⁴

In arguing over the scenario of a group of mixed criminals, Rabbi Shimon and the Sages seem to reveal the criterion by which they create their lists of executions from *m. Sanh.* 7.

The logic behind these lists proves to be somewhat counterintuitive, so I will examine it step-by-step. The Tannaim begin with one known quantity: that the Torah gives certain punishments for certain crimes. The Torah clearly prescribes that the priest's daughter is to be burned for sexual transgressions: "When the daughter of a priest defiles herself through harlotry, it is her father whom she defiles; she shall be put to the fire" (Lev 21:9). The Torah also explicitly condemns the idolater to stoning:

If there is found among you, in one of the settlements that the Lord your God is giving you, a man or woman who has affronted the Lord your God and transgressed His covenant, turning to the worship of other gods and bowing down to them . . . you shall take the man or the woman who did that wicked thing out to the public place, and you shall stone them, man or woman, to death. (Deut 17:2–5)

So too with the blasphemer: ". . . the son of the Israelite woman pronounced the name in blasphemy, and he was brought to Moses. . . . And the Lord spoke to Moses saying: 'Take the blasphemer outside the camp; and let all who were within hearing lay their hands upon his head, and let the whole community stone him'" (Lev 24:10–14). The Tannaim create out of these verses a game of inference: The Torah must have given the worst punishment to the crime it considered worst. The Tannaim work backwards from the crime to the punishment, guessing the degree of gravity of the punishment from the degree of gravity of the crime.¹⁴⁵ The rest is subjective, of course—each disputant chooses the crime which he believes to be the most heinous. For Rabbi Shimon, the priest's daughter's sexual transgressions surely must be the worst crime imaginable, in which case burning must be the worst punishment. For the Sages, idolatry and blasphemy are supreme, so they consider the punishment of stoning to be the most severe.¹⁴⁶ The degrees of severity in the rabbinic system of execution have to do with the degree of severity of the crime committed rather than anything inherent to the punishment or to the social status of the criminal.

The rabbinic execution system thus bears a pattern of striking resemblances with and powerful differences from the Roman one. The Rabbis mimic the gradations of Roman execution but at the same time reject the underlying principles of Roman power.¹⁴⁷ In this case, the logic of Rome's executions, based on social status, would have been personally devastating to the Rabbis: As one of Rome's conquered populations, the Rabbis themselves numbered among the *humiliores* subject to the *summa supplicia*, as the Rabbis' own martyrdom narratives show. In replacing this logic with their own sacred logic, the logic of the Torah, the Rabbis appropriate the ordering principles of Rome but

flip them, so that those who would receive the worst punishments are no longer the Rabbis but rather the Romans, the idolaters par excellence in rabbinic eyes.

I end with an alternate version of a rabbinic narrative that I discussed earlier. In that text, we saw Rome persecuting Jews with executions very similar to the Rabbis' own. The later amoraic version makes the Roman executions methods practically indistinguishable from rabbinic ones:

Why do you go out to be *stoned*? Because I circumcised my son.
 Why do you go out to be *burned*? Because I observed the Sabbath.
 Why do you go out to be *beheaded*? Because I ate matzah.
 Why do you go out to be *flogged*? Because I made a sukkah, because I shook a lulav, because I put on tefillin, because I put on *tekhelet*, because I did the will of my father in heaven.
 Thus it is written, "And if he is asked, 'What are those sores [on your back? he will reply, 'From being beaten in the homes of my friends']" (Zech 13:6)—these lashes caused me to be loved by our father who is in heaven.¹⁴⁸

Lieberman points to the twinning of Roman and rabbinic execution in this midrash: "The Amoraim transmitted the words in a literary style according to the Mishnah of Sanhedrin, the beginning of Chapter Seven: four executions were given to the court, stoning, burning, beheading and strangulation, and then lashes."¹⁴⁹ Lieberman illuminates the midrashic pattern at work here; the punishments listed within it are precisely the punishments of the rabbinic court. The Jew is persecuted for keeping God's commandments—circumcision, Sabbath observance, festival observance, worship—but oddly, the Jew is persecuted according to the punishments of the *rabbinic* court!

My argument in this chapter—that the rabbinic executions reveal a profound ambivalence towards Roman executions—helps us to understand this midrash. In this narrative of persecution, the Rabbis make Roman execution look exactly like rabbinic execution, and in so doing they create an astounding reverse-mimicry. Instead of the Rabbis' doing it "the way that the kingdom does," the kingdom does it the way that the Rabbis do! Rabbinic power is here the "given," while Roman authority can assert itself only through mimicry. Like Aggy borrowing the cultural materials of western Christianity in her vision of reversal, so the Romans appear forced to borrow the cultural materials of the Rabbis in order to resist them. The midrash assures its audience, however, that even this resistance will fail, since it only endears the persecuted Jew to God that much the more.

Charismatic Rabbis

In this chapter, I have argued that the laws of criminal execution act as a field on which the Rabbis test different strategies of resistance to Rome. The Rabbis choose the field of criminal execution because it is this field where Rome makes

itself so “resistible,” that is, where Rome expends a great deal of its imperialist energies. Rabbinic criminal execution attacks Roman power at just the place where it is most spectacularly, artfully, and painfully imposed.¹⁵⁰ Thus do the Rabbis experiment with modes of resistance through their own laws of execution, marginalizing Rome in the same terms by which Rome marginalizes people like the Rabbis. In conclusion, I want to explore the role these experiments play in rabbinic arguments for authority. Does the Rabbis’ resistance to Rome, in the end, make any difference, or is it just one more rabbinic fantasy?

James Scott addresses this problem of making a difference. Often, hidden transcripts seem not to matter; they do not change the conditions of domination and subordination. Consequently, it is often thought that the hidden transcript is ineffective, “that the offstage discourse of the powerless is either empty posturing or, worse, a substitute for real resistance.”¹⁵¹ We might be tempted to make this claim of the rabbinic hidden transcript in particular, since we know with historical hindsight that the Rabbis did not change the basic conditions of Jewish subordination. In fact, in the shift of the Roman Empire from paganism to Christianity, persecution of the Jews worsened. Scott, however, recommends that we understand the hidden transcript not as a deflection of real action but as the breeding ground for it. Scott reminds us that “most subordinates conform and obey *not* because they have internalized the norms of the dominant, but because a structure of surveillance, reward, and punishment makes it prudent for them to comply.”¹⁵² That being the case, the “hidden transcript is continually pressing against the limit of what is permitted on stage, much as a body of water might press against a dam.”¹⁵³ The hidden transcript, rather than channeling the anger of the oppressed away from the oppressor, gives it expression with revolutionary potential: “practices of resistance and discourses of resistance are mutually sustaining.”¹⁵⁴ It is these expressions of resistance within the hidden transcript that ultimately generate both the day-to-day “down-to-earth, low-profile stratagems designed to minimize appropriation” and the open revolutions that reach the pages of history books.¹⁵⁵

Scott’s conclusions help us to understand the potential impact of these laws of criminal execution. Rather than viewing the Rabbis’ strategies of resistance to Rome as ineffectual rabbinic fantasy, as *mere* discourse, we can instead view them as *practical* discourse, as real critique. The significance of the rabbinic hidden transcript lies in what Scott calls the “social production of charisma.” Scott gives the example of Mrs. Poyser, a character from George Eliot’s *Adam Bede*, who finally speaks her mind after years of frustration. In the novel, Mrs. Poyser and her husband resent the visits of their landlord squire, who each time imposes upon them new obligations and treats them with disdain.¹⁵⁶ After years of deference, Mrs. Poyser finally explodes when the squire issues a thinly veiled threat of eviction; she stands up for herself and the whole parish. News of Mrs. Poyser’s explosion soon circulates to the neighbors, who take great pleasure in her rebellion. Eliot writes: “It was known throughout the two parishes that the Squire’s plan had been frustrated because the Poyser had refused to be ‘put upon,’ and Mrs. Poyser’s outbreak was discussed in all the

farmhouses with a zest that was only heightened by frequent repetition.”¹⁵⁷ Scott identifies Mrs. Poyser’s outbreak as an instance of charisma because she fulfills the expectations of her similarly oppressed neighbors; she “had her basic speech written for her in the realm of the hidden transcript.”¹⁵⁸ Mrs. Poyser’s role as a heroine is “to a large extent scripted in advance offstage by all members of the subordinate group, and the individual who fills that role is that one who somehow—through anger, courage, a sense of responsibility, or indignation—summons the wherewithal to speak on behalf of others to power.”¹⁵⁹ Mrs. Poyser’s charismatic heroism “depends centrally on having spoken on behalf of, in a quite literal sense, all the tenants of the squire. They did not appoint her to the post of spokesperson, but they defined the role.”¹⁶⁰ Scott concludes:

Those who then sing Mrs. Poyser’s praises are far from being the simple objects of manipulation. *They quite genuinely recognize themselves in her speech; she quite genuinely speaks for them.* A relationship that has historically been seen as a relationship of power, manipulation, and submission becomes, on this view, a social bond of genuine mutuality. Mrs. Poyser, to invoke Jean-Jacques Rousseau, ‘wills the general will.’ The powerful emotional valence of the charismatic speech or act for subordinate groups—their sense of elation, joy, release—depends, I think, on it finding this resonance within the hidden transcript.¹⁶¹

Scott’s model of charisma, through the example of Mrs. Poyser, allows us to grasp the potential significance of the rabbinic laws of criminal execution. In their resistance to Rome—either through wholesale rejection or through subversive mimicry—the Rabbis speak not only for themselves, but they try to speak for the entire Jewish population of the Roman Empire. The Rabbis address Jewish concerns, the way Mrs. Poyser speaks for her parish. They creatively address problems of Jewish identity: how to be an oppressed minority and survive, maintaining commitment to the Bible and to Jewish observance in a pagan world. They capture the struggle for self-determination that characterizes colonized groups: The struggle to assert distinctiveness but also to co-opt sameness, to shun the colonizer and also to mimic him. It was the charisma of the Rabbis to capture this tension, to articulate it in recognizable and empowering ways. The rabbinic laws of criminal execution, in their resistance to Rome and in their disputes about the best way to resist, display the charisma of the Rabbis, in whose conversations the Rabbis hoped the Jews of the Roman Empire would be able to recognize their own concerns.