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Between the Spheres of  
*F u r t u m*  
The Development of Theft  
from Private to Public

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BY

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“COGNITATIONIS POENAM NEMO PATITUR.”  
– ULPIANUS, *DIGESTA*, 48. 19. 18

“NO ONE IS PUNISHED FOR THINKING.”  
– ULPIAN, *DIGEST*, 48. 19. 18

TO JESSICA I DEDICATE THIS THESIS.  
YOU ARE THE MOON OF MY LIFE,  
FOR THIS, I WILL ALWAYS ADORE YOU.

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# Abstract

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In the dawn of Roman law, *furtum* is found bound to the fixtures of private procedure with only a hint of stately supervision. While *furtum* has received much attention for its procedural complexities, questions remain concerning the development of theft from its roots in the private sphere with vengeance and self-help to the flowering of the public sphere with civic order and municipal authority. This paper attempts to narrate the history of *furtum* through significant legal and political developments, each of which bring theft further into the light of the public sphere. Not only does this paper attempt to offer the conceptual framework by which theft was conceived of as affecting society as a whole rather than the individual in particular, but this history also reflects the increasing interest and ability of the State to recognize and intervene in *furtum*.

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# Periodization of the Roman Jurists

(Chronologically)<sup>1</sup>

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## **Pre-Classical Jurists (100-30 BCE)**

Q. MUCIUS Scaevola  
SERVIUS Sulpicius Rufus  
A. OFILIUS  
C. TREBATIUS Testa

## **Early Classical (30 BCE – 90 CE)**

M. Antistius LABEO  
Fabius MELA  
Massurius SABINUS  
C. CASSIUS Longinus  
PROCULUS  
PEGASUS  
PLAUTIUS

## **Roman Emperors**

Augustus	(31 BCE – 14 CE)
Tiberius	(14 – 37 CE)
Claudius	(41 – 54 CE)
Nero	(54 – 68 CE)
Vespasian	(69 – 79 CE)
Domitian	(81 – 96 CE)

## **High Classical (90 – 190 CE)**

L. JAVOLENUS Priscus  
L. NERATIUS Priscus  
P. Juventius CELSUS  
P. Salvius JULIANUS  
Claudius SATURNINUS  
GAIUS  
Sextus POMPONIUS  
Q. Cervidius SCAEVOLA

Trajan	(98 – 117 CE)
Hadrian	(117 – 138 CE)
Antonius Pius	(138 – 161 CE)
Marcus Aurelius	(161 – 180 CE)
Commodus	(180 – 192 CE)

## **Late Classical (190-235 CE)**

Aemilius PAPINIANUS  
Claudius TRYPHONINUS  
Julius PAULUS  
MACER  
MARCIAN  
CALLISTRATUS  
Domitius ULPIANUS  
Herennius MODESTINUS  
HERMOGENIAN

Septimius Severus	(193 – 211 CE)
Caracalla	(211 – 217 CE)
Alexander Severus	(222 – 235 CE)
Tetrarchy: Diocletian	(244 – 311 CE)

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<sup>1</sup> General chronology from Frier's *Casebook on the Roman Law of Delict*, page xix with some modifications. When referencing jurists, the capitalized name is employed, usually after being Anglicized.



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## List of Abbreviations

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- Alexander, *TLRR*: Alexander, Michael C. *Trials in the Late Roman Republic: 149 BC to 50 BC*. Toronto: University of Toronto, 1990.
- Bauman, *CPAR*: Bauman, Richard A. *Crime and Punishment in Ancient Rome*. London: Routledge, 1996.
- Cloud, *Primary Purpose*: Cloud, J. D. "The Primary Purpose of the Lex Cornelia De Sicariis." *Zeitschrift Der Savigny-Stiftung Fur* 86 (1969): 258-86. *DigiZeitschriften*.
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- D.: Mommsen, Theodor, and Paul Krueger, eds. *The Digest of Justinian*. Trans. Alan Watson. Philadelphia: University of Pennsylvania, 1985.
- Echols, *Police*: Echols, Edward. "The Roman City Police: Origin and Development." *The Classical Journal* 53.8 (1958): 377-85.
- Frier, *CRLD*: Frier, Bruce. *A Casebook on the Roman Law of Delict*. Atlanta: Scholars, 1989.
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- Jolowicz, *DF*: Jolowicz, Herbert F. *Justinian, Digest XLVII - 2: De Furtis*. London: Cambridge UP, 1940.
- Jones, *CC*: Jones, Arnold H.M. *The Criminal Courts of the Roman Republic and Principate*. Oxford: Basil Blackwell, 1972.
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- Lintott, *CRR*: Lintott, Andrew W. *The Constitution of the Roman Republic*. New York: Oxford UP, 1999.
- Lintott, *VRR*: Lintott, Andrew W. *Violence in Republican Rome*. London: Oxford UP, 1972.
- Mommsen: Strachan-Davidson, J. L. "Mommsen's Roman Criminal Law." *The English Historical Review* 16.6 (1901): 219-91. *JSTOR*. Web. 31 May 2012.
- Nicholas, *IRL*: Nicholas, Barry. *Introduction to Roman Law*. London: Oxford UP, 2009.
- Nippel, *PR*: Nippel, Wilfried. "Policing Rome." *The Journal of Roman Studies* 74 (1984): 20-29. *JSTOR*.
- Tabula: Twelve Tables. Traditional numbering of the tables is used, but the text derives from Crawford's *Roman Statutes*.
- Watson, *SLC*: Watson, Alan. "Chapter IV - Roman Law: Further Points." *Society and Legal Change*. 2nd ed. Philadelphia: Temple UP, 2001. 31-46.
- Zimmermann, *Obligations*: Zimmermann, Reinhard. "Chapter 28 - Furtum." *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford: Oxford UP, 1996. 922-52.
- Zulueta, *Commentary*: De Zulueta, Francis C. *The Institutes of Gaius - Commentary*. Vol. 2. London: Oxford UP, 1953.

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# Chapter I: Introduction

## Elements of Furtum

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### ANY SPECIES OF DISHONESTY<sup>1</sup>

“Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve. Quod lege naturali prohibitum est admittere.” – Paulus

“Furtum is the fraudulent handling of an object with the intent to make a profit either from the thing itself or from its use or possession.”<sup>2</sup> “From such conduct natural law commands us to abstain.”<sup>3</sup> – Paul

Furtum is by no means a Roman legal innovation, for theft transcends all cultures and chronologies as a quintessential violation of natural law. Such generalities are unquestionably part and parcel of theft, but furtum came to encompass a whole range of acts that extended beyond the common understanding of theft as the illicit conversion of property. From the dawn of delictual law in the Twelve Tables to the pinnacle of legal exegesis in the juristic period, the development of furtum reflects the shifting legal dynamics of theft and the history of the Roman state as furtum moves from the private to the public sphere.

Fundamentally, the objective of this paper is to demonstrate how furtum evolved from the private sphere to the public one by examining theft along a series of four episodes. Except for the Twelve Tables, which are themselves subject to contentious debate, no unequivocal evidence survives of statutes or edicts until roughly the final century of the Republic;<sup>4</sup> legislation and commentary are comparatively copious during the Empire, but by this time the transformation that is at hand has largely transpired. Thus, this paper works in the dim light of history in an effort to explain by law, literature, or analogy the various machinations that influenced and changed furtum.

Originating in the Twelve Tables, furtum emerges as one of the principle delicts – alongside *iniuria* and *damnum iniuria datum*.<sup>5</sup> Before the trial courts, before the violence, before the juristic complexity, the delict of furtum was merely a protection from ordinary larceny, but the statute was a response to the system of vengeance that had preceded the Twelve Tables. Vengeance is a method of privatized justice characteristic of early societies that permits a wronged party to exact subjective remedies – to seek vengeance – upon a transgressor. This archaic method was not without its social restraints, but, presumably, was without legal ones at the foundation of the Republic. Delicts – of which furtum is only one – are derived from the institutionalization of vengeance.<sup>6</sup> However,

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<sup>1</sup> Jolowicz, *DF*, xx.

<sup>2</sup> Paul, D. 47.2.1.3. Frier, *CRLD*, 152n3.

<sup>3</sup> Paul, D. 47.2.1.3. Jolowicz, *DF*, 2.

<sup>4</sup> Jolowicz, *HI*, 288.

<sup>5</sup> Affronts to one’s character and damage to one’s private property (Tabula VIII.3-4 and Tabula VIII.6-10).

<sup>6</sup> Zimmermann, *Obligations*, 914.

such institutionalization, or the limitation of private justice, by procedures and magistrates is a process of gradual reform during the course of the Republic and the Principate.

The story of *furtum* rests on this backdrop of restricting vengeance; the Twelve Tables had mitigated vengeance by demanding the State's arbitration in some cases of theft,<sup>7</sup> but not in all. The remnants of vengeance lingered well into the Empire to shape the development of *furtum*. Each successive chapter demonstrates an innovation in the ability and interest of the State to foster and protect peace and order. There is a secondary narrative, one might call it the rise of the Roman state, that is intertwined with the development of *furtum*; after all, the State is the principal protagonist, for it is by the State that theft is drawn into the public sphere. When Rome is founded and the State is weak, so too are its laws and limitations on private justice, which, at this time, is essential in the maintenance of order. The State retracts delegated and consumes private authority as it emerges as an independent and stable, institutionalized authority.

*Furtum* emerges episodically into the public sphere by a tripartite process: recognition, liability, and intervention. While none of these exclude the others and they (with their individual degrees of development) exist simultaneously, each affecting the other, the initial phases are indubitably recognition and liability, by which, intervention then proceeds.

Upon recognizing that there is an injustice, the State then assigns some sort of liability for that injustice. After determining to whom such liability belongs, then the State provides (or permits) a course of action for some remedy, which is a form of intervention, however passive at times. Inasmuch as theft is a violation of natural law, it would be strange to attribute ignorance to the State's "recognition" of theft as a disruption of the peace; however, the pertinent recognition is that which arises when the State considers itself as both affected by and responsible for theft which does not strictly speaking concern the State.<sup>8</sup> This recognition of *furtum*'s effect is indicative of a state that identifies itself as entrusted with the duty to maintain and ensure peace within its communities.

Liability is first conceived of as pertaining only to the individual, yet the State's intervention permits a penal action (*actio furti*) that in part recognizes the general interest of society in the punishment of thieves. This early recognition lays the foundation for extending liability to the public, of which the State is merely the representative. For the purposes of this paper, intervention manifests itself in three ways: legislation by statute (*leges*) or magisterial interpretation (*ius honorarium*), punishment, and enforcement. Despite Nippel's criticisms,<sup>9</sup> the last one is informed by the modern expectation of a state's obligations and duties, but so too is it the Roman expectation.<sup>10</sup> As the State becomes sophisticated and centralized, the question turns to the will of the State to involve itself in the private dealings of theft.

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<sup>7</sup> Namely, the case of *furtum manifestum* and *furtum nec manifestum*. The degree of intervention is subject to some interpretation, see *Chapter II: The Twelve Tables*.

<sup>8</sup> Theft of public goods is typically construed as *peculatus* as differentiated from *furtum*; however, the *actio furti* is actually employed in some of these cases.

<sup>9</sup> Nippel, *PR*, 20n3.

<sup>10</sup> Ulpian, 1.18.13.pr.

## CRIME AND DELICT: THE PENAL SIDE OF FURTUM

“Fures privatorum furtorum in nervo atque in compendibus aetatem agunt, fures publici in auro atque in purpura.” – Cato Minor

“Those who commit private theft pass their lives in confinement and fetters; plunderers of the public, in purple and gold.”<sup>11</sup> – Cato the Younger

Between the spheres of *furtum* lies the nebulous territory of crime and delict. Sometimes an act will create liability to the state and other times to an individual. If a citizen were to commit treason, the liability is towards the state whose interest is protecting the citizenry. If a citizen were to negligently damage another citizen’s property, the liability is towards the individual whose interests in the property have been disturbed. On occasion, acts will simultaneously incur both criminal liability, the former case, and civil liability, the latter, such as reckless driving.<sup>12</sup> Generally, the difference between the two is in each claim’s objective: crimes seek to punish offenders and/or deter others, as opposed to torts, which are interested in equity, taking the form of restitution. In addition to the restitutory element of *furtum*, the delict of *furtum* retains an element of criminality inasmuch as theft is an affront to civic peace that is deservedly punished; only here, such punishment is administered by the citizen, not the State.

The penal and restitutory elements are distinguished in the available actions for *furtum* with the former inhabiting the *actio furti*<sup>13</sup> and the latter in the *vindicatio* and later the *condictio ex causa furtiva*. While the *actio furti* may have perhaps been intended to settle both the matter of property and punishment,<sup>14</sup> it is clear that by the time of the jurists, only the penal element remained in the *actio furti*, for possession of the item was an entirely different case.<sup>15</sup>

“Qui vas argenteum perdiderat eo nomine furti egit.<sup>16</sup> de pondere vasis controversia cum esset et actor manis fuisse diceret, fur vas protulit: protulit: id is cuius erat abstulit ei: qui subripuerat nihilo minus condemnatus est. Rectissime iudicatum est: nam in actionem poenalem non venit ipsa res quae subrepta est, sive manifesti furti sive nec manifesti agatur.”

“A man missed a silver vase and brought an action [*actio furti nec manifestum*] in respect of it; in course of the action the question came to be argued what was the weight, which the plaintiff put rather high, but the thief produced the vase, whereupon the plaintiff – the owner – laid hands on it and carried it off; and the defendant was still ordered to pay double the value. This was a perfectly correct decision; a penal action does not include a demand for the thing stolen itself, whether it is a case of *furtum manifestum* or *nec manifestum*.”<sup>17</sup>

<sup>11</sup> Gellius, *Noctes Atticae*, 11.18.10.

<sup>12</sup> Zimmermann, *Obligations*, 902.

<sup>13</sup> Which is further subdivided into *actio furti manifestum* or *actio furti nec manifestum*, which will be discussed in the following chapter.

<sup>14</sup> Zulueta, *Commentary*, 207.

<sup>15</sup> Gaius, *Institutes*, 4.6.

<sup>16</sup> Instead of *qui vas argenteum perdiderat eoque nomine furti egerit*.

<sup>17</sup> Ulpian, D. 47.2.48.pr; Jolowicz, *DF*, 64-65.

Crime and delict can both inhabit the public sphere and so it is difficult to easily distinguish between them.<sup>18</sup> In affording a penal action to the citizen, both the individual's claim to vengeance and society's interest in order are satisfied, albeit in disproportionate favor to the former.

Periodically during the development, the State provides some alternative punishment, at first pecuniary and then corporeal, but the former's application tends to be on the lowest caste of society, such as slaves by the *tresviri capitales*. When the State eventually has the capacity to administer justice through a sophisticated bureaucracy and provides for criminal recourse in the realm of *furtum*, the State never eliminates the possibility a civil alternative.<sup>19</sup> Civil liability is, however, released when the citizen opts for judgment *extra ordinem*, which is to say that civil and criminal liability (in the sense of citizen or state prosecution) are mutually exclusive and, consequently, both are equivalent in their objective, although different in their methods.<sup>20</sup> Crime and delict are convenient shorthand methods for describing *furtum*, but the development is more rooted in the conceptual spheres.

### THE SPHERES: *IUS CIVILE ET IUS PUBLICUM*

“Huius studii duae sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.” – Ulpianus

“There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interests.” – Ulpian<sup>21</sup>

The spheres are the conceptual tools by which to evaluate the relative interests of the State and the citizen with respect to *furtum*. They are roughly interchangeable with the *ius civile* and *ius publicum*.<sup>22</sup> At least as far as *furtum* is concerned, the spheres always have intersected because the interests were never diametrically opposed. However, the private sphere eclipses the public for the vast majority of this history, only to gradually emerge from the former's shadow with each consecutive episode. In the infancy of the Republic, one might dismiss the State's detached disposition because of the State's general lack of capacity, which demanded that the State defer authority to the private sphere. However, such a criticism loses strength as Rome garners vast wealth and influence, yet remains distant from the civil disturbances of daily life. Ability was certainly a restrictive factor, but it appears that the State saw itself as minimally responsible for the intervention in private affairs, providing only the structure for dispute

<sup>18</sup> Zimmermann, *Obligations*, 913. “Like trespass, the Roman notion of delict had a strongly criminal flavour; and even though the compensatory function came increasingly to the fore, in the course of Roman legal history the penal element was never entirely abandoned. ...As a result, the distinction between crime and delict was much less clear-cut than it is today.”

<sup>19</sup> Julian, D. 47.2.57.1 and Ulpian, D. 47.2.93.

<sup>20</sup> If the citizen opts for the State's method, surely he could still recovery the item itself by a *condictio* or *vindicatio*, but he would be unable to proceed with an *actio furti*.

<sup>21</sup> Ulpian, D. 1.1.2.

<sup>22</sup> Cloud, *Constitution*, 499.

resolution in the form of praetors and judges (*iudices*). When the State progressively reinterprets its relationship to society and civil order, it is then that the public sphere is enlarged. Upon the expansion of the public sphere, the State exercises new or adapted authority, which generally manifest in procedures and magistrates.

While public interest is necessarily at the heart of the public sphere, interest alone is not sufficient. Surely it was the case that the State perceived *furtum* as threatening the public good, but *furtum* was nevertheless prosecuted as a civil matter. The quintessential feature of what constitutes the public sphere is then the degree of state intervention – whereby the state assumes a duty on behalf of the governed to protect the people’s interests. Further, the mere involvement of the State does not itself establish the “publicity” of theft for, if one allows this, it would imply that “public” only denotes that which the State participates, thus losing the ability to distinguish between the two spheres. When theft is eventually established under the civil procedure, it is nevertheless a civil procedure sanctioned by the State; only the exceptional cases of self-defense remain outside the State’s reach. Together, intervention and interest constitute the spheres.

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## Chapter II: The Twelve Tables Mitigated Vengeance (510 ~ 400 BCE)

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### ORIGINS OF FURTUM: *FURTUM MANIFESTUM* & *NEC MANIFESTUM*

Furtum is already present in the earliest (surviving) law of the Republic, the Twelve Tables,<sup>1</sup> crafted a half-century after the founding of the Republic; thus, furtum has a legal presence at nearly the origin of the State. Despite the Twelve Tables' remoteness in history, their authority is largely retained through their character, relevance, and pervasiveness in Roman society by those like Cicero and Gaius.<sup>2</sup> Furtum derives its basic characteristics, including categories, procedures, and remedies, from the Twelve Tables, which is then the foundation of this delict. Further, the Twelve Tables represent the first expansion of the public sphere. Although it is unnecessary to delineate every peculiarity of furtum, the most fundamental distinction between *furtum manifestum* and *furtum nec manifestum* serves as the foundation of this history.

Although the categories derive from the Twelve Tables, they describe only the gravity of punishment or procedure delivered upon the respective types of thieves. *Furtum nec manifestum* is everything which is not *manifestum*, but the precise nature of *manifestum* becomes rather contentious for the jurists.<sup>3</sup> It can sufficiently be said that the former type of theft is one in which a thief is caught in the act<sup>4</sup> whereas the latter is not.<sup>5</sup> More significant are the differential treatments that shed light on the process of administering justice. The *manifestus*, that is, the thief (*fur*) caught in the act,<sup>6</sup> can be killed out of hand if he comes in the night<sup>7</sup> as well as a thief who defends himself with a weapon, provided the victim calls out (*quiritatio*) before the act is performed.<sup>8</sup> For all other instances or where the thief is not killed in the former cases, however, the Twelve Tables provides the following procedure:

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<sup>1</sup> Note that all references to the Twelve Tables utilize the traditional ordering rather than that proposed by Crawford; however, I have opted for his translations and additions where applicable.

<sup>2</sup> Cicero reminisces of the time when he was a child memorizing the Twelve Tables, a practice that had fallen into disuse in his later years (Cicero, *de Legibus*, II.4.3); while other jurists speak to the contents of the Twelve Tables, Gaius wrote six books concerning them (*Digest*, lxxvi).

<sup>3</sup> It is not pertinent here, but a dialogue emerges over where a theft must be caught to be "*manifestus*."

<sup>4</sup> This is the accepted view on *manifestus*, but Huvelin (*Etudes sur le Furtum dans Le Tres Ancien Droit Romain*, 1915, pg. 487 *sqq.*) regards *manifestus* as referring to thing stolen (that which can be touched by the hand, *manus*) rather than the thief who is caught red-handed (Jolowicz, *DF*, lxx-lxxi).

<sup>5</sup> See Ulpian (D. 47.2.3) for what is considered *manifestus*; Gaius (D. 47.2.8) defines *nec manifestus* as (obviously) all remaining thefts, giving no clear distinction.

<sup>6</sup> Alternatively, if one finds the stolen good through a ritual search, the thief is considered *manifestus* according to Gaius (*Institutes* III.192), who is likely referring to the treatment in the XII Tables (VII

<sup>7</sup> Gaius, D. 9.2.4.1. The provision of *quiritatio/fidem implorare* ("calling out") is extended to the thief who comes in the night as well as the one who comes by day with a weapon.

<sup>8</sup> Tabula VIII.12 and VIII.13, respectively.



“{Si furtum manifestum est, ni pacit, uerberato} transque dato. {Si seruus, uerberato deque saxo deicitio. Si impubes, uerberato noxiamque sarcito.}”

“{If the theft is manifest, unless he settles, he (the magistrate) is to flog (him) [the thief]} and he is to hand (him) over [to the victim of theft]. {If (he is slave, he is to flog (him) and he is to hurl (him) from the rock. If he is below puberty, he is to flog (him) and he (the thief) is to repair the damage.}”<sup>9</sup>

With the *manifestus* guilt is not the question at hand since he has proven himself the thief already; instead it is the exaction of the punishment, which, as mentioned above, has both a penal and restitutory element. Nevertheless, it is not within the authority of the citizen to merely administer some judgment at his own discretion, for he must present the thief for external review by the magistrate under whose jurisdiction the thief is assigned (*addictio*).<sup>10</sup>

The subsequent procedure is not entirely clear. The magistrate who adjudicates in the case of *nec manifestum* appears in Jolowicz’s view to have greater authority than in the case of *manifestum* wherein the earlier system of vengeance is activated.<sup>11</sup> The appearance before the magistrate then was merely a formality and the magistrate’s responsibility, Jolowicz argues, was simply to verify that “all was in order” – there was no trial.<sup>12</sup> Whether the *addictio* made a slave or a judgment-debtor out of the thief was open to interpretation even by *veteres*,<sup>13</sup> but it is clear that the *manifestus* was at any rate assigned in some capacity to the victim under the Twelve Tables.

If, however, the thief had not been caught in the act, it would be necessary to demonstrate his culpability before the magistrate by some process of adjudication or by mutual agreement. It must be inferred that the *nec manifestus* is brought before a magistrate despite the Twelve Tables’ silence on this point of actual procedure because if the *manifestus*, whose guilt and liability is not in question, requires oversight, then *a priori* so is the *nec manifestus*, who must be *proven* guilty. It is perhaps anachronistic to apply the principle of presumed innocence to the Twelve Tables<sup>14</sup> to explain the differential procedure. However, the doubt surrounding the thief’s criminality and the institutionalization of vengeance<sup>15</sup> must prefigure the rationale, to which I will give greater treatment below in the discussion of penalties.

Zulueta has attached a criminal<sup>16</sup> charge to the case of *nec manifestum* to justify the difference in procedure.<sup>17</sup> This is perhaps slightly premature and quite unnecessary since

<sup>9</sup> Tabula VIII.14. The braces ({} ) refer to text not classically attested (Crawford, *RS*, 557), but can be reasonably reconstructed. The brackets ([ ]) here are my addition for greater specificity.

<sup>10</sup> Crawford argues that the phrase “*transque dato*” appears analogous to if not synonymous with the *addictio* found in case of *nexum* (Tabula III.1-7) (Crawford, *RS*, 615).

<sup>11</sup> Jolowicz, *DF*, lxix.

<sup>12</sup> Ibid. Zimmerman assumes a similar position as well (Zimmerman, *Obligations*, 937).

<sup>13</sup> Gaius, *Institutes*, III.189. Gaius reports that the old lawyers (*veteres*) were unsure of this point.

<sup>14</sup> After all, Trajan wrote to Adsidius Severus that it was preferable that “the crime of a guilty man should go unpunished than [for] an innocent man [to] be condemned” (D. 48.19.5.pr Ulpian). In support of presumed innocence is the significance of evidence and the role of the search and seizure process, which is presumably necessary in order to secure a conviction (i.e., the thief has to be proven guilty instead of trying to prove his own innocence).

<sup>15</sup> Watson, *SLC*, 37.

<sup>16</sup> Zulueta may be applying the modern expectation on the view of criminality rather than the ancient one.

<sup>17</sup> Zulueta, *Commentary*, 200.

the procedure differs to account for the establishment of guilt, not the liability of the thief. But if Zulueta is right, then the question arises as to why the Decemviri saw fit to irregularly ascribe criminal liability to the one who must be proven guilty rather than the one whose guilt is manifest. It could be that *infamia* was the distinguishing factor, although Ulpian tells us that both *manifestum* and *nec manifestum* warrant *infamia*;<sup>18</sup> but he may be serving to further specify (extend or correct) *infamia* with respect to theft, for neither Julian<sup>19</sup> nor Gaius<sup>20</sup> unify *manifestum* and *nec manifestum*.<sup>21</sup> One can incur *infamia* by a variety of means, everything from stage performances to murder, and it seems to have evolved from a preexisting social mores. As a social mechanism, *infamia* would probably have discouraged reputable citizens from associating with the thief and certainly would have hurt the thief's reputation, which could have future consequences for engaging in various social and economic privileges.<sup>22</sup>

Although *infamia* was certainly a legal distinction by the time of the jurists, it is not clear whether it was applied *de jure* during the early Republic; nowhere in the Twelve Tables is there an actual reference to *infamia*.<sup>23</sup> Lintott attributes *infamia* to the duties of the censor and suggests that *infamia* attaches after a trial,<sup>24</sup> rather than as a consequence of the magistrate's decision (or *iudex*), which might help to explain the omission of *infamia* in the Twelve Tables. Lintott also proposes that such authority was established as a supplement to the judiciary, not a component of it. Furthermore, the creation of the censorship and the introduction of the Twelve Tables are roughly contemporaneous; however, the precise origin of the censor's power to inflict *infamia* is unknown.<sup>25</sup> Some evidence does exist that would lend support to the presence of *infamia* at the time of the Twelve Tables; if not *infamia* by name, then at least a similar legal distinction is created for the false witness.<sup>26</sup> It then would not be unreasonable to presume that State-inflicted *infamia* was the consequence of some cases around this time, although the application to *furtum* is still somewhat ambiguous.

In light of this, perhaps Zulueta's position, attributing to *nec manifestum* a criminal charge, reveals an early differentiation of liability through penal elements: the double damages<sup>27</sup> and the recovery of the item serve as the civil remedies, whereas the assignation of *infamia* serves as the State's "punishment"<sup>28</sup> for the *nec manifestus* or one

<sup>18</sup> Ulpian, D. 3.2.6.pr. He is clarifying the earlier point Julian makes, which is that theft incurs *infamia* (Julian, D. 3.2.1). It is possible that Ulpian is reflecting a later development of the law where the two were unified in this respect. Theft generally must have incurred some social disdain for the reprehensible actions of the thief, irrespective of what precisely those actions were.

<sup>19</sup> Julian, D. 3.2.1.

<sup>20</sup> Gaius, *Institutes*, 3.182.

<sup>21</sup> However, neither also references either case explicitly; it is possible that they both understood theft as *manifestum* and *nec manifestum*, only Ulpian felt compelled to articulate the principle further to close the potential loophole with respect to *manifestum*.

<sup>22</sup> The effect of *infamia* grows exponentially with the thief's position in society; were it to an aristocrat, all public life would be in jeopardy, but this is not to say that its effect would be powerless against the powerless.

<sup>23</sup> Crawford, *RS*, 815-857.

<sup>24</sup> Lintott, *CRR*, 119.

<sup>25</sup> Lintott, *CRR*, 119.

<sup>26</sup> Tabula VIII.22. Crawford avoids making the connection between *improbus* or *intestabilis* and *infamia* (Crawford, *RS*, 691). However, *improbus* or "unacceptable" evokes the sense embodied in *infamia*.

<sup>27</sup> *Duplum* is certainly penal, but it may have served to pacify the victim's vengeance.

<sup>28</sup> Bauman also regards *infamia* as a criminal penalty (Bauman, *CPAR*, 23).

who settles.<sup>29</sup> The reason for reserving *infamia* to only *nec manifestum* and the one who settles rather than *manifestum* would be that the *manifestus* has already been depreciated below the status of deserving *infamia* (for he is a slave or a judgment debtor)<sup>30</sup> and only later when pecuniary damages were assigned to the *manifestus* would it be necessary to extend *infamia* upon him as well. While it is possible that *infamia* is part of the settlement, it is more likely that *infamia* attaches once guilt is proven, irrespective of whether or not the victim wishes to pursue this recourse,<sup>31</sup> hence its public quality. Permitting the exception for the *manifestus*, who lies outside this distinction and whose punishment is ultimately deferred to the individual victim, the State was interested in prescribing remedies that reflected society's concern with the abuse of private authority, a theme especially evident with the Lex Poetelia.

Judging by the general character of the Twelve Tables and accounting for the delictual nature of *furtum*, it is likely that only the immediate victim of the theft – or the *paterfamilias*, should the victim lack capacity<sup>32</sup> – is able to lodge a claim or, in other words, has legal standing in either case of *furtum*. In the system of vengeance that preceded the Twelve Tables, the same cannot definitively be said. The jurists later discuss the expansion of liability for theft to other parties outside of the owner, those who have an interest in the recovery of the thing or those whose interest supersedes that of the owner.<sup>33</sup>

#### SELF HELP: POPULAR JUSTICE AND THE *LANX ET LICIVM*

“The ordinary Roman had to be his own policeman,” says Lintott,<sup>34</sup> and this autonomy is supported by the Twelve Tables' empowerment of the citizen, especially with respect to bringing a defendant to trial.<sup>35</sup> Returning to the residual impact of vengeance and the relatively rustic character of early Roman government, the case of the *manifestum* gives us insight into the extralegal process. Since the entirety of Roman law is perceived of as flowing from the Twelve Tables, it would seem that this was the first significant statutory innovation and, as such, was designed to address contentious or pressing concerns of the period. This is relevant because in its brevity we have to deduce the conditions that gave rise to Twelve Tables' creation. In particular, the case of the *manifestus* begs the question of what preceded the magisterial procedure.

Lintott has proposed that the purpose of the *quiritatio* was to enjoin one's neighbors to aid in the acknowledgment, seizure, and adjudicatory process of a crime.<sup>36</sup> The retention of the *quiritatio* in the Twelve Tables – a practice still in force under Justinian –

<sup>29</sup> If the thief makes an agreeable arrangement with the victim and settles the case out of court (*pacit*), the pact is essentially tantamount to a plea bargain, an admission of guilt (see Paul, D. 3.2.5).

<sup>30</sup> That is, he has received the capital penalty of being deprived of his status (*caput*) (Crawford, *RS*, 615).

<sup>31</sup> Perhaps the thief, fearing *infamia*, would gladly pay some multiplier higher than he would normally have incurred in an effort to avoid such disrepute (especially if he had some status to lose). However, once a thief is proven guilty, *infamia* is unavoidable (Macer, D. 47.2.64).

<sup>32</sup> As in cases of women, children, and those incapacitated.

<sup>33</sup> Gaius, D. 47.2.49. For more on the plaintiff in later law, see Jolowicz, *DF*, xxix-lv.

<sup>34</sup> Lintott, *CRR*, 156n38.

<sup>35</sup> Tabula III.2-3 are particularly compelling in their reference to the citizen's ability to arrest another.

<sup>36</sup> Lintott, *VRR*, 11-21. The crime need not be a theft, but any sort of malfeasance argues Lintott.

preserves at least the recognition of a theft (lest one open oneself to liability for murder), and probably sanctions the communal aid in the seizure of a thief. The seizure, effectively a citizen's arrest, indicates a lack of municipal resources for the suppression of such activity by the State; thus, the seizure would need to be sanctioned in order to bring a thief to justice. This is not particularly novel, since it is evident that the citizen himself already possessed the powers of arrest; this is merely the extension of such power to the community in an effort to secure the peace.

Lintott<sup>37</sup> claims that the *manifestus* could be summarily executed after quasi-judicial examination by the victim's *consilium*, representing the community, but his argument is derived from a case of (manifest) adultery in Greece attested by Lysias.<sup>38</sup> Although private arrest and searches are permitted under the Twelve Tables, discretionary judgment is not. Even modern law preserves the citizen's right to arrest criminals, but it does not grant them the ability to deliver summary judgment with or without a *consilium*.<sup>39</sup> Were such councils employed prior to the introduction of the Twelve Tables as maintained by Lintott, they were unquestionably curtailed when the *consilium* of neighbors was substituted for the *imperium* of the State.

In cases where a theft is not immediately detected and must be subsequently investigated, the citizen, not the State, secures the necessary evidence through a search. The prescribed method for a search in the Twelve Tables is that of the *lanx et licium*, a ritual search that permitted the investigator – not necessarily the owner – only a loincloth to wear and a silver dish<sup>40</sup> on which to ostensibly carry the stolen item.<sup>41</sup> The nudity<sup>42</sup> surely is designed in part to protect the alleged thief from the introduction of false evidence (“planting”),<sup>43</sup> but the whole affair is something of an archaic remnant that had lost its meaning<sup>44</sup> and was ridiculed by Gaius.<sup>45</sup> However, Gaius criticizes the solemn search because he argues that the Twelve Tables afforded another type of search, an informal one of the victim's friends,<sup>46</sup> which carried a lower penalty (*tripulum* instead of *quadruplum*). If the informal search was indeed as Gaius suggests, then the thief was

<sup>37</sup> Lintott, *VRR*, 13.

<sup>38</sup> Lysias, *On the Murder of Eratosthenes*, 23 ff. The speech (but not the Greek statutes), however, postdates the Twelve Tables, which, although based on the laws of Solon, has already demonstrated an interest in narrowing the collective right to deliver judgments on questions of manifest theft.

<sup>39</sup> Michigan Code of Criminal Procedure, Act 175 of 1927, §§ 764.16a-b.

<sup>40</sup> Gaius holds that the materials of the dish were irrelevant (*Institutes*, 3.193), but others have held that the dish is some kind of magic mirror used for divining a thief akin to procedures found elsewhere in the ancient world (see Crawford, *RS*, 617 for some interpretations).

<sup>41</sup> Tabula VIII.15. This is the traditional view and the one Gaius proposes (Gaius, *Institutes*, 3.192-94); Maxwell-Stuart surveys some other opinions (*‘Per Lancem et Licium’: A Note*).

<sup>42</sup> Crawford has suggested that nudity refers not to clothing, but to arms. Thus, the search would be conducted by peaceful means (Crawford, *RS*, 617).

<sup>43</sup> Gaius claims that there was a remedy for this known as *furtum oblatum*, which is utilized by the person who was mistakenly sued for theft when the stolen good was found at his house by the will of the actual thief (Gaius, *Institutes*, 3.187).

<sup>44</sup> Maxwell-Stuart proposes its magical quality; Zimmermann sees an appeasement of the household gods (Zimmermann, *Obligations*, 939)

<sup>45</sup> Gaius, *Institutes*, 193.

<sup>46</sup> Jolowicz with De Visscher finds that there was only one search available at the time of the XII Tables, the *lanx et licium*, and that the informal search arose later by praetorian law (Jolowicz, *DF*, lxxv-lxxix).

guilty upon the discovery of the *res furtiva* for *furtum conceptum*,<sup>47</sup> but an alleged thief could refuse to give warrant for such an informal search.

It is at this junction that the *lanx et licium* derives its most significant role: a search by *lanx et licium* was irresistible.<sup>48</sup> Gaius, having written six books on the Twelve Tables, is by no means unfamiliar with the statute, so it is difficult to dismiss him entirely,<sup>49</sup> but one need not accept his view that the search *per lance et licio* was resistible:

“Quae res lex tota ridicula est; nam qui vestitum quaerere prohibet, is et nudum quaerere prohibetur est, eo magis quod ita quaesita re et inventa maiori poenae subiciatur.”

“And this whole provision is ridiculous. For anyone who prohibits a person with clothes on from searching is going to prohibit him from searching naked, all the more so when he is to be subject to a higher penalty when a thing is searched for in this way and found.”<sup>50</sup>

What purpose would there be in the retention of the *lanx et licium* unless it was fundamentally different from the informal search? After telling us that the praetor introduced an action against one who prevents a search (*actio prohibiti*), Gaius criticizes the Twelve Tables for having not provided the same.<sup>51</sup> Praetorian authority to modify the law, however, comes largely after the Lex Aebutia and the introduction of the formulary system, which largely replaced the system of *actiones legis* in place at the time of the Twelve Tables.<sup>52</sup> Simultaneously, the *lanx et licium*, whether by irrelevance<sup>53</sup> or abolition, was no longer in practice after the Lex Aebutia.<sup>54</sup> It is by no coincidence then that the praetor felt obliged to create a remedy whence one had previously existed. The *lanx et licium* needed no stipulation for prohibition in the Twelve Tables because it could not be prohibited. It was only when the solemn search disappeared and the informal search remained that a new recourse was necessary.

At least in theory, magistrates may be able to compel citizens with their *coercitio*; the citizen himself can only employ his statutory right to this one, albeit powerful, tool to achieve justice. It should be noted that if *lanx et licium* produces the stolen artifact, the thief is considered *manifestus*.<sup>55</sup> However, De Visscher and Zulueta reject the distinction between the solemn and informal searches, proposing that all searches were made *cum lance liciumque*, but only in cases where a standard of proof could be met was the thief

<sup>47</sup> This likely requires some sort of magisterial oversight, however.

<sup>48</sup> Maxwell-Stuart, *Per Lancem*, 1; Crawford, *RS*, 614 Whether this was for religious reasons as suggested by Zimmermann or magical ones as purported by Maxwell-Stuart, the effect was the same: it was the endowment of a special right. Alternatively, if one accepts Jolowicz and De Visscher, the ritual search was resistible, thus meriting the disdain of Gaius who regarded the later praetorian adjustment to protect the victim from being refused (Jolowicz, *DF*, lxxvii).

<sup>49</sup> The “radical view” as espoused by Kruger, Huvelin, and Hitzig (see Zulueta, *Commentary*, 202 for a bibliography).

<sup>50</sup> Gaius, *Institutes*, 193.

<sup>51</sup> Gaius, *Institutes*, 192. The penalty for prohibition was *quadruplum*; see also *Chapter IV: To Be a Thief*.

<sup>52</sup> Jolowicz, *HI*, 179 and 205.

<sup>53</sup> Considering the strength of the *lanx et licium*, it seems unlikely that the search simply fell into obscurity, even if it was surrounded by strange customs.

<sup>54</sup> Gellius, *Noctes Atticae*, 16.10.8.

<sup>55</sup> Tabula VIII.15 and Gaius, *Institutes*, 192.

considered *manifestus*; lack of such evidence,<sup>56</sup> however, would only lead to *furtum conceptum*.<sup>57</sup> This compromise view is designed to allow Gaius to have been right that there were four types of theft present in the Twelve Tables;<sup>58</sup> however, it neglects to explain the confusion concerning the *lanx et licium*. If this were the only method of searching – and it was a resistible one at that – why, then, was it so obscure? Gaius is right about one thing: the thief would be a fool to prohibit an informal search when the penalty for the solemn one was capital. Considering this penalty, it would be more advantageous for the thief to simply allow an informal search than to risk one by *lanx et licium*. If the solemn search fell into obscurity not by abolition, but by disuse, this is perhaps the most likely reason. The purpose in delineating this is to illustrate the citizen's role in the judicial process as one of a largely privatized nature that appears to have been significantly independent of any institutionalized oversight until the Twelve Tables.

#### MAGISTERIAL MITIGATION: INSTITUTIONALIZED VENGEANCE

If we set aside the exceptional cases of nocturnal and aggravated theft, which both evoke a sense of self-defense,<sup>59</sup> it is clear that the State was already involved in dealing with alleged thefts; the question then rests not on this absolute, but rather on the degree to which the State exercised its power. It has already been demonstrated that policing was under the purview of the citizen and not the State, but what of the role of magistrates and the punishments? The role of the magistrate will be a recurring theme since as representative of the State his function within society is reflective of the role of the State. Likewise, the punishments are reflective of State's position relative to the citizen.

As with many details, the Twelve Tables are also silent on the issue of which magistrate oversees the hearings for *furtum manifestum* and *nec manifestum* as well as who is responsible for administering the punishments. Applying later classical law retrospectively would suggest that the praetors were responsible,<sup>60</sup> but it is possible also that the *quaestores parricidii*<sup>61</sup> were charged with these functions, and they are claimed to predate the Republic.<sup>62</sup> However, if the latter were the case, they would have been appointed only to oversee the case of *manifestum* (and cases of grain theft<sup>63</sup> and bearing

<sup>56</sup> This evidence required immediate tracing of the thing such as by following the thief back home, tracking cattle while the spoor was fresh, a thief refused to permit a search, and concealment of the *res furtiva* (Zulueta, *Commentary*, 202-203).

<sup>57</sup> Zulueta, *Commentary*, 202-203; De Visscher, *Etudes*, 217.

<sup>58</sup> *Furtum manifestum*, *nec manifestum*, *conceptum*, and *oblatum* as held by Sulpicius and Sabinus (Gaius, *Institutes*, 3.183 and 3.191).

<sup>59</sup> These cases will be returned to later. Ulpian attributes the first juristic mention of the right to repel force with force (*vim vi repellere licet*) to Cassius, but it clearly predates him (Ulpian, D. 43.16.1.27). The uncertainty of the night with its elevated risk accounts for the enhanced discretion given to the citizen in order to protect himself. See also Jolowicz, *DF*, lxxv.

<sup>60</sup> Gellius states that the praetor was indeed responsible at this time (Gellius, *Noctes Atticae*, 11.18.8).

<sup>61</sup> Not to be confused with the quaestors responsible for financial matters, who, in any case, postdate the Twelve Tables – they allegedly are first elected in 447 BCE (Tacitus, *Annals*, 11.22). The aediles follow the quaestors and thus are also ineligible for this position (Kunkel, *IRLCH*, 17).

<sup>62</sup> Gaughan, *Murder*, 14-15.

<sup>63</sup> Tabula VIII.9.

false witness<sup>64</sup>) since *nec manifestum* was non-capital.<sup>65</sup> Gaughan suggests that the *quaestor* “assisted private individuals...to determine the appropriate kind of vengeance, but probably not to exact it.”<sup>66</sup>

Irrespective of which magistrate was responsible, that the magistrate was the “originator of the punishment” demonstrates an early transition from the State’s absence in private affairs to a presence in them.<sup>67</sup> Assuming the relatively conservative view argued by Crawford, who claims that the tribune, not a magistrate, was responsible for the hurling of a person off a rock,<sup>68</sup> it is still the magistrate who flogs the culprit in the cases of *furtum* and grain theft.<sup>69</sup> As already mentioned, the magistrate is responsible for the oversight of both *manifestum* and *nec manifestum*, albeit to differing degrees, and it is by his power that the *addictio* is given. The State is still in some respect ceding (or more likely, not absorbing) the power to ultimately penalize the *manifestus*, despite having subsumed the citizen’s authority to determine whether punishment was appropriate.<sup>70</sup> In the case of the *nec manifestum*, the State has thoroughly displaced the system of vengeance by permitting only a pecuniary remedy.<sup>71</sup> The pecuniary remedy, however, is informed by the earlier system of vengeance.<sup>72</sup> Nevertheless, the replacement of the old remedy with this new one for *nec manifestum* serves as a precedent for the further displacement of vengeance in subsequent years.

The case of *furtum manifestum* ought to be revisited since it most demonstrates the limited scope of the State’s involvement or willingness to interfere with preexisting systems of justice. Why had the State chosen to only minimally involve itself with the case of *manifestum* when it had become instrumental in *nec manifestum*? Unlike the circumstances surrounding the performance of State-sponsored investigations or searches, which require a more centralized and endowed bureaucracy, the State already established that it had the requisite resources to administer the judicial functions involved in *nec manifestum*. Surely hearing cases of *manifestum* were no more strenuous than those of *nec manifestum*, which required greater deliberation over the matters of proof and guilt. Furthermore, the punishment itself could not be said to have taken a toll on the

<sup>64</sup> Tabula VIII.23.

<sup>65</sup> Pomponius, D. 1.2.2.23.

<sup>66</sup> Gaughan, *Murder*, 93-94.

<sup>67</sup> Crawford, *RS*, 615. Contra Mommsen (*Str.* 751 and 931) who held that both the delict and punishment were private.

<sup>68</sup> Crawford, *RS*, 692.

<sup>69</sup> Crawford, *RS*, 614 and 684, respectively.

<sup>70</sup> That is, the State must be consulted before any “remedy” can be delivered.

<sup>71</sup> Tabula VIII.16; Gaius, *Institutes*, 3.190. In place of the corporeal punishment likely to be exacted, the Twelve Tables allows the citizen to recover twice whatever the stolen object was worth (*duplum*).

<sup>72</sup> The classic explanation is provided by Maine (*Ancient Law*, 337): “The ancient lawyers doubtless considered that the injured proprietor, if left to himself, would inflict a very different punishment when his blood was hot from that with which he would be satisfied when the thief was detected after a considerable interval; and to this calculation the scale of legal penalties was adjusted.” Zulueta has proposed that the iudex set a precedent for *duplum* specifically (rather than *tripulum* or another arbitrary multiplier) (Zulueta, *Commentary*, 201-203), which also prepared the stage for the later *quadruplum* in the case of *manifestum*.

State's resources since it was merely prescription of a fine<sup>73</sup> – one it was not obliged to exact.<sup>74</sup>

Instead, the State assumed only narrow administrative duty and delegated the remaining justice to be exacted by the citizen. There is some debate over whether the adjudicatory process was merely a formality<sup>75</sup> before vengeance could be deployed or whether the process was more than just a governmental endorsement of an already committed seizure;<sup>76</sup> however, a relative consensus has formed around the view that following the hearing for *manifestum*, the victim would be free to kill the thief.<sup>77</sup> There appears to be no technical or logistical reason<sup>78</sup> preventing the State from subsuming *manifestum* with *nec manifestum*, but perhaps there is an argument for freedom. Perhaps the introduction of mandated ministrations constituted a governmental overreach and was perceived as a disenfranchisement of private authority in matters that were strictly private. Should this be the case, then the State could be seen as rather aggressive in the incorporation of theft into the public sphere; consequently, the relative freedom to exact punishment in the most offensive of thefts, *manifestum*, would be a compromise. Denying private recourse to *manifestum* may have been too offensive to bear, but in return, the State gained a significant foothold on the issue and dominated the procedure. Thus, while the State had enacted restrictions on the realization of vengeance, only in the case of *nec manifestum* was it substantively displaced.

#### THE INTRUSION OF PUBLIC INTERESTS IN PRIVATE DISPUTES

It can likely be agreed upon that at the time of the Twelve Tables the Roman bureaucracy was undeveloped,<sup>79</sup> yet it seems unfair to discredit the Republic for having “little interest in controlling murder [theft, or other crimes] because the government was too decentralized,”<sup>80</sup> for the State took measures to ensure at the earliest point of significant legislation, that it would be the State's responsibility to determine the culpability of criminals, even if it was not the State who punished them. Whatever the limits of the State's capacity at the time of the Twelve Tables, it took precautions to assure relative stability through either absorbing powers previously retained by the citizenry or subsuming those powers under those of the State. Elsewhere in the Twelve Tables, there is evidence of the State's emerging consciousness and the “direct intervention of the

<sup>73</sup> Assuming, of course, it handled *manifestum* as it had done with *nec manifestum*. If the State had to administer executions, making *furtum manifestum* a capital offense (in the modern sense), it is possible, however doubtful, that the State would be burdened with the quantity of manifest thieves.

<sup>74</sup> It would appear that the State merely oversees, rather than exacts, the fine, although deliberate failure to pay the judgment would likely be seen as contempt of court and might have resulted in some marshal action from the praetor's lictors or some other official.

<sup>75</sup> Jolowicz, *DF* lxix;

<sup>76</sup> Crawford, *RS*, 615.

<sup>77</sup> Watson, *SLC*, 37; Kunkel, *IRLCH*, 28; Zimmermann, *Obligations*, 937. Even if Crawford is right, the judgment debtor eventually becomes liable to death or slavery (Jolowicz, *HI*, 166-169, 170n6, 190-91).

<sup>78</sup> As there might have been if imprisonment or something similar was deemed the appropriate punishment, thereby placing a significant financial and administrative burden on the State.

<sup>79</sup> Gaughan, *Murder*, 65.

<sup>80</sup> Gaughan, *Murder*, 2.



public authority without any hint of its being a substitute for private vengeance.”<sup>81</sup> While the Twelve Tables did not wholly remove private justice, they laid the foundation for the evolution of governmental power by the establishment of mitigated vengeance.

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<sup>81</sup> Nicholas, *IRL*, 208

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## Chapter III: The Rise of Magistrates An Interlude (400 ~ 150 BCE)

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### INTERIM LEGISLATION: LEX POETELIA

Little can be said about the position of *furtum* in the wake of the Twelve Tables until the second century when some substantive evidence emerges concerning the development of theft proper. Instead of avoiding these intervening centuries due to a lack of focal evidence, it would be best to examine another, peripheral, development in Roman law, namely the Lex Poetelia, as perhaps reflecting the growing jurisprudence surrounding, but not necessarily concerning, theft. Even the determination of the praetorian edicts cannot be definitively isolated at this point, but changes in the attitude of Roman law can be seen within the early Republican legislation that may have influenced contemporary praetors. Ultimately, however, discussion of the *ius honorarium* will be left for examination in the next chapter, when it has more fully developed. In lieu of “relevant” data, it will be suitable in this minor chapter to address other developments in the magistracies with a view towards shedding light on the extent to which the State involved itself in society.

Introduced around 326 BCE, the Lex Poetelia was designed to restrict the rather Draconian provisions in the Twelve Tables which permitted the creditor to place a debtor in perpetual servitude (*nexum*) were he unable to repay his debt.<sup>1</sup> In effect, the statute is said to have prohibited the slaying and sale of the debtor abroad, while affording the creditor an extension in his powers of detention.<sup>2</sup> If, as argued by Crawford,<sup>3</sup> the process for assigning the *manifestus* was similar to that of a judgment debtor, then it is plausible that the provision sanctioning such an *addictio* for the *manifestus* was also thereafter revisited. True, the political climate surrounding debtors and creditors played an integral role in the early Republic, while more trivial (albeit commonplace) concerns about thieves merited less tension between the orders. There might not have been the same support for the thief’s freedom – for he was a criminal and outcast in society – as there was for the struggling plebeian, but there probably was some overlap between the two. Restricting the transformation of jurisprudential knowledge to merely the instance of *nexum* seems too narrow of an interpretation and, even if it was not immediate, the legacy of the Lex Poetelia influenced the later (or perhaps contemporary) shift in the penalty for *manifestum* from the scourge and *addictio* towards pecuniary remedies.<sup>4</sup> Nevertheless, no

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<sup>1</sup> Jolowicz, *HI*, 167.

<sup>2</sup> Jolowicz, *HI*, 192-194.

<sup>3</sup> Crawford, *RS*, 615.

<sup>4</sup> If the change was made in the late 4<sup>th</sup> century or early 3<sup>rd</sup> century, it is not certain whether the strict provisions of the Twelve Tables were repealed for both the citizen and slave. When Gaius mentions that the praetor’s edict introduced *quadruplum* as the new penalty, his syntax seems to support that the change was made simultaneously (Gaius, *Institutes*, 3.189).

evidence of any praetorian sanctions concerning *furtum* is attested before Labeo<sup>5</sup> outside the following circumstantial inferences.

Whatever insight can be gleaned from the *Lex Poetelia* derives from the penal-based approach, but, as seen above in the case of *nec manifestum*, the replacement of punishments is critical to the understanding of *furtum*. Again, since the degree to which this even applies to *furtum* is unclear, one cannot overextend the meaning of the law. Nevertheless, that the law of debt emerged out of the older law of delict, itself emerging from the earlier system of vengeance,<sup>6</sup> should give pause. The regulation and moderation of vengeance in particular is likely to affect its perception in general. Arguably, the State – the consuls – felt pressured to legislate on this tenuous issue of debt-bondage. Such a circumstance does not diminish the consequence: the State intervened in the private relationship between citizens for the benefit of the greater civic order.

### THE EMERGENCE OF OFFICIALS

Abraham Lincoln once said, “Laws without enforcement are just good advice.” The Twelve Tables indeed laid the foundation for civil disputes between two solvent parties insofar as *nec manifestum* is concerned (for it is still yet to be determined at what point *manifestum* becomes a question of financial discipline), but what of those who were unable to pay? Leaving aside *furtum manifestum*, the whole idea of recovering double the value of a stolen object from a typical thief is somewhat illusory<sup>7</sup> considering that those who steal are not usually of means,<sup>8</sup> hence their alternative industriousness. Judging from the Twelve Tables, it was not that the Romans were uneasy about punishment; it was the State’s marginal ability to enforce civil order.<sup>9</sup> That is not to suggest that the State may not have felt that such enforcement was part of a state’s duty towards its citizens;<sup>10</sup> however, if the State refused to acknowledge or adopt such a role, then it is curious why it would see fit to increasingly extend its bureaucratic reach into civil dealings by the introduction of official representatives of the State.

Buried in the plays of Plautus are two references to the *tresviri capitales* as the magistrates to whom some public (criminal)<sup>11</sup> policing functions were entrusted. The

<sup>5</sup> Jolowicz, *HI*, 288n8; see Costa, *Storia*, 321 and Huvelin, *Etudes sur le Furtum*, 567.

<sup>6</sup> Jolowicz, *HI*, 192

<sup>7</sup> See Zimmermann, *Obligations*, 944. Kelly calls refers the action on theft as a “fairly useless remedy” (Kelly, *Roman Litigation*, 162).

<sup>8</sup> Liability for slaves (noxal liability) was not incurred by the slave, but by the master, who had the option to surrender the slave (noxal surrender) or pay the damages on behalf of the slave. When slaves became increasingly more useful for special talents, the slave’s worth substantially rose and certainly gave pause to a master’s decision. Such is the case mentioned by Cicero where Ennius lodges an action against a slave of Habitus (*Pro Cluentio*, 93 and 163).

<sup>9</sup> One of the underlining principles behind Gaughan’s claim that the State did not interfere with homicide (in general, rather than in the particular cases articulated by statute like parricide or mob violence) was that such legislation would limit the authority of the paters, which were, in turn, integral parts in the functioning of the *res publica* (Gaughan, *Murder*, 19ff).

<sup>10</sup> Essentially the view expressed by Nippel, *PR*, 20n3. Unquestionably, however, the State felt obliged to intervene on cases on substantial significance (i.e., crises) as early as Publius Horatius (although the verdict speaks to different values, it was still nonetheless necessary for an investigation to occur).

<sup>11</sup> Jones, *CC*, 29. See below on the position of Nippel, Lintott, and Jolowicz.

closest reference to theft is in the *Asinaria* when Argyrippus threatens to petition the *tresviri* against Cleareta.<sup>12</sup> *Aulularia* may speak to the same issue since Euclio intended to lodge a charge<sup>13</sup> against Lyconides (or at least in his name, since the slave is not himself liable).<sup>14</sup> In *Amphitruo*, mention of the *triumviri* arises when Sosia, the slave of Amphitryon, expresses a fear of being detained and punished by the *tresviri*.<sup>15</sup> It may be proposed that the extent of criminal authority wielded by the *tresviri* extended only to slaves (or the humblest of classes) during this early period.<sup>16</sup> Lintott, however, rejects this view by citing the cases of the poet Naevius for some sort of moral imprudence and C. Cornelius for homosexual relations, and Lintott goes further by suggesting that the *tresviri* served as criminal judges.<sup>17</sup> The range of judgments allotted to the *tresviri capitales* by Lintott, however, do not exclude the possibility of the *addictio*.

During the same period Jolowicz suggests that the role of the aediles (both curule and plebeian) had limited jurisdiction over the streets and markets to pronounce minor penalties.<sup>18</sup> Such a function could ostensibly encircle certain cases of theft such as the knocking of coins from someone's hands (for the purpose of later retrieving them through some effort of collusion)<sup>19</sup> or the case of using false weights in the market.<sup>20</sup> The aediles had a wide range of functions that were rooted in commerce, but which spilled over into peace keeping; they had even been responsible for trying a case of *veneficia* and another for an offense the aediles had themselves created: *maiestas minuta*.<sup>21</sup> While Mommsen has criticized associating policing functions with the aediles, they were nevertheless responsible for the oversight of the *tresviri capitales*.<sup>22</sup> The aediles also made a novel contribution to State-sponsored punishment by turning a civil fine to the (direct) fulfillment of public good.<sup>23</sup>

In the earliest surviving words of Roman literature there is already the understood presence of the State's capacity for and interest in drawing criminality out of the private hands and into that of the institutionalized apparatus of the community's welfare. Lovisi's interpretation concerning the creation of the *tresviri* as the abandonment of

<sup>12</sup> Plautus, *Asinaria*, 131-143. While it is clear that Argyrippus sees a theftuous situation, it has an air of swindling, which is, strictly speaking, not theft (Ulpian, D. 47.20.2 and D. 47.20.3.2). The two offenses are both in Book 47 (as delicts) and contain other various overlapping features, but this case (and those following) only provide circumstantial evidence for the *tresviri* (or the State in general) overseeing cases of theft. For instance, swindling did not come with *infamia* (ibid.). These limitations on the *tresviri* make it difficult to assert in the affirmative (as Lintott does) that the *tresviri* were indeed the magistrates overseeing theft in the early second century (Lintott, *VRR*, 103n3).

<sup>13</sup> It may be argued that since Lyconides bears a knife that it is not the theft which will draw the attention of the *tresviri*, but rather the threat of violence. This would be reminiscent of the later *Lex Cornelia de Sicariis et Veneficis* or the *Lex Julia de Vis Publica* (see generally D. 48.6). However, the play turns on the issue of greed and the serendipitous theft of the gold by the slave, Strobilus (Plautus, *Aulularia*, 701ff).

<sup>14</sup> Plautus, *Aulularia*, 415-420.

<sup>15</sup> Plautus, *Amphitruo*, 154-162.

<sup>16</sup> Bauman, *CRAR*, 17.

<sup>17</sup> Lintott, *CRR*, 141ff and *VRR*, 104n1.

<sup>18</sup> Jolowicz, *HI*, 324.

<sup>19</sup> Ulpian, D. 9.2.27.21 and D. 47.2.52.13. If the coins were lost, rather than stolen, however, an action for wrongful loss or an action *in factum* was given under the *Lex Aquilia*.

<sup>20</sup> Ulpian, D. 47.2.52.22.

<sup>21</sup> Bauman, *CPAR*, 13. The case concerning Claudia in 246 BCE.

<sup>22</sup> Lintott, *CRR*, 131.

<sup>23</sup> Bauman, *CPRR*, 13. Such good manifested itself in edifices like the Temple of Venus or in public games.

private executions based on vengeance<sup>24</sup> may be an overreach since *furtum manifestum* was a remnant of said vengeance (the punishment is not technically a State-sanctioned execution, even if such a result was the inevitable byproduct of the trial). Since it is not the purpose of this paper to demonstrate the exact point at which one thing becomes another, the creation, establishment, and proliferation of the *tresviri capitales* serves as yet one more instance in which the State intervenes and exercises its power in the sphere of public interest.

#### A TIME OF CRISIS: PRECURSOR TO THE *QUAESTIONES*

The Bacchanalian Conspiracy of 186 BCE lies on the threshold of Rome's ascent to an organized, self-professed master of public order. As a precursor to the *quaestiones* and as a point of transition, the State's reliance on the private sphere as critical to the enforcement of public order is revealing. Having just discussed the merits of the *tresviri capitales*, it would appear that the State was involved in the trifling delinquencies of the streets, yet curiously the State refrained from intervening in this crisis until the threat became an epidemic threatening the highest echelons of society. The plebeian aediles were eventually ordered by the consuls to pursue and arrest the priests, while the *tresviri capitales* were dispatched to investigate any secret meetings with the aid of the *custodes*, who, argues Echols, were a rudimentary police force.<sup>25</sup> However, the sheer volume of the investigations required more resources than the State had available, thus requiring the aid of citizens and so demonstrating the important relationship between the public and private spheres in the maintenance of order.<sup>26</sup> The trials ensued – *ad hoc* tribunals, operating under the State's jurisdiction, charged with punishing all matters of offense related to the Conspiracy<sup>27</sup> – were the templates for the later *quaestiones perpetuae*. While Gaughan is more concerned with public trials than public interest (on the part of the State) and Nippel with public peace,<sup>28</sup> both conclude that State only engaged exceptional crises that posed a threat to not social safety, but political security.<sup>29</sup> When public trials were later implemented to charge those accused of performing secret rites in the Bacchanalian Conspiracy, a precedent for the later creation of the *quaestiones perpetuae* was established firmly in the public sphere.

#### LEX AEBUTIA: REFORMING THE SYSTEM

With the introduction of the formulary system by the Lex Aebutia in latter half of the second century and the novel (or perhaps only enhanced) flexibility of the praetor to

<sup>24</sup> Lovisi, *Contribution a l'etude de la peine de mort sous la republique romaine*, 98. Gaughan has suggested the issue of vengeance may not, however, have been eliminated at all, rather transferred from the individual to the State (Gaughan, *Murder*, 166n29).

<sup>25</sup> Echols, *Police*, 377-78 in reference to Livy, 39.14.9-10.

<sup>26</sup> Gaughan, *Murder*, 33-34.

<sup>27</sup> Bauman, *CPAR*, 21-22.

<sup>28</sup> Public in the more general sense such as a pandemic literally reaching all members of a society rather than a somewhat philosophical interest in the "private" actions of individuals.

<sup>29</sup> Gaughan, *Murder*, 24-27, 35, 79-80; Nippel, *PR*, 21. Surely, however, the latter rests on the former.

interpret and modify the law<sup>30</sup> comes the historical ability to attribute known changes to the *ius honorarium*.<sup>31</sup> At what point magistrates began to widely execute such power is not the matter at hand, yet the endowment of this authority broadens the scope of the law, particularly civil law, in which *furtum* is still deeply entrenched. Although primarily focused on the reorganization of legal procedure, the Lex Aebutia also reformed archaic remnants of custom and practice from the Twelve Tables. Gellius claims that the *lanx et licium* fell into obscurity as a result of this statute,<sup>32</sup> which would explain why over two centuries later the jurists had only a vague idea of the solemn search. Even if the Lex Aebutia abolished the *lanx et licium*, searches by private individuals were not.<sup>33</sup>

After the disappearance of the solemn search, nothing quite like it appeared in its stead. There was, after all, still the informal search.<sup>34</sup> What had been dissolved were any remains of a bygone system which allowed a citizen to infringe on the dwelling of his neighbor without appeal<sup>35</sup> – such authority was no longer in the repertoire of the people. The legacy of the *lanx et licium* does not appear to have been rooted in the system of vengeance – perhaps ritual or magic – as the penalties were and this may have allowed for the State to restrict the citizen's capacity<sup>36</sup> of self-help in this respect with minimal scrutiny.

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<sup>30</sup> Whether praetorian legal innovations preceded the Lex Aebutia is ambiguous (Jolowicz, *HI*, 98).

<sup>31</sup> Jolowicz, *HI*, 205.

<sup>32</sup> Gellius, *Noctes Atticae*, 16.10.8.

<sup>33</sup> Hence the value of an *actio prohibiti* and the presence of *furtum conceptum*.

<sup>34</sup> Such a search would give rise to *furtum conceptum* for *tripulum*.

<sup>35</sup> One could not enter another's house to deliver a summons lest he incur liability for *iniuria* (Ulpian, D. 2.7.1.pr and Paul, D. 47.10.23).

<sup>36</sup> Alternative actions were given later by the praetor for prohibiting a search (Gaius, *Institutes* 3.188).

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## Chapter IV: To Be a Thief

### Praetorian Perfections and the Quaestiones Perpetuae (149 ~ 27 BCE)

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#### PRAETORIAN PERFECTIONS: PENALTIES AND SEARCHES

Following the introduction of *Lex Aebutia* and the solidification of the formulary system, magistrates gained substantial authority to supplement the *ius civile*, giving recourse to previously excluded actions. In this vein, there were significant contributions to broadened standing, the extension of obligation, and a diversification of theftuous liability. These developments represent the future of *furtum*, so before pursuing them, a brief return to the case of *manifestum* and *lanx et licium* will both reiterate the general direction of the law and illustrate the new authority of the magistrates.

Unless the *Lex Poetelia* was effective against the *addictio* in *furtum manifestum*, or magistrates had the authority to alter the law before the *Lex Aebutia*, or some other statutory rule was enacted, it follows that the *addictio* survived until the period following the introduction of the *Lex Aebutia*.<sup>1</sup> However, Gaius explicitly states that it was by the urban praetor's edict that the capital penalty for *manifestum* was revised into *quadruplum* for both slaves and citizens.<sup>2</sup> Three centuries lapsed before such alteration was – or could be – made to the law, permitting a mitigated system of vengeance to perpetuate well into the established phase of the Republic. Of course the precedent had been established in the Twelve Tables, but if the delay in monetizing damages was deliberate, it would suggest that the State was unwilling to deprive the citizen of his (mitigated) right to vengeance. The State was not reluctant to regulate vengeance, for it had done so earlier, and perhaps it saw the threat of servitude (or death) as a more appropriate deterrent for thieves. Alternatively, the mere permission to proceed with the *addictio* does not necessitate its use. Plaintiffs had always retained the ability to settle with the thief<sup>3</sup> and, as such, it may have been that they frequently chose to negotiate a pecuniary penalty early on, either out of desire or distaste with the barbarisms of vengeance.

A certain illogicity would exist since the punishment for *nec manifestum* was of a pecuniary nature while *manifestum* remained corporeal. Although all kinds of theft may be differentiated along these lines (latent and immediate recognition of a theft), the latter might be more closely associated with an egregious form of theft or a more prevalent

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<sup>1</sup> Should such enactments only become possible after the *Lex Aebutia* then it is also plausible that such a change was not immediate. For the inclusion of this praetorian adjustment as mid second century BCE (rather than early first century) see Schulz, *CRL*, 582 and Watson, *Obligations*, 231 (Zimmermann, *Obligations*, 938n125).

<sup>2</sup> Gaius, *Institutes*, 3.189. Pomponius demonstrates that slaves could be executed for *manifestum* as far as the late third century (D. 12.4.15).

<sup>3</sup> *Tabula VIII.14* (similarly, *Tabula I.6*).

form of it, consequently deserving the strict punishment.<sup>4</sup> The case need not be robbery, since pickpocketing, market theft, and certainly cattle theft are all forms of reprehensible thefts that may have been more common cases of *manifestum* rather than forms of financial fraud or theft by finding. The whole proposition is purely theoretical and at any rate was resolved by the time the praetor was able to modify the law to actually protect thieves rather than punish them – quadruple damages would be justified since the praetor was sparing the thief’s life.<sup>5</sup>

It would appear that every succeeding piece of legislation or innovation serves to inhibit the right of the citizen to implement some form of self-help. Crawford<sup>6</sup> represents the search *cum lance licioque* as having been replaced by the *actio furti prohibiti*, which is attested in classical law as the action against one who prevents a search; and this is the appropriate view.<sup>7</sup> The praetor either as a substitution for or replacement to the *lanx et licium* introduced the *actio prohibiti*, which is evident from the penalty: *quadruplum*.<sup>8</sup> The only other penalty with such high damages is that of *manifestum*,<sup>9</sup> a status that could be acquired if one found the stolen items whilst executing the search *cum lance et licio*.<sup>10</sup> Again, this is in keeping with the increasing regulation of private justice, but that does not imply that the praetor was seeking to reduce the thief’s liability to the victim, quite the contrary, for he offered another remedy, the *actio prohibiti*, but not at the expense of the alleged thief’s own rights.

In retrospect, the provisions of the Twelve Tables appear crude and barbaric, but when they were originally crafted, such provisions were probably seen as progressive. The Twelve Tables preserved *talio* for certain cases of *iniuria*, which permitted a victim to retaliate in kind.<sup>11</sup> However, it was designed to limit a victim’s range of punishment and further disruption of peace – in the past, the victim may have taken more than his share, creating an endless cycle of vengeance. Likewise, searches prior to the Twelve Tables may have been done in the presence of armed men who practically ambushed an alleged thief’s home. By the time of the Twelve Tables had past, and the old statute had lost much of its progressive quality. Despite the reverence given to them, they were not

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<sup>4</sup> Some have anecdotally pointed to modern law as having similar provisions such as penalizing those who commit “white collar crimes” as receiving a disproportionately better punishment than the petty, although perhaps more aggressive or threatening, crimes in spite of the fact that the former can have greater implications than the latter (for instance, embezzling corporate pensions). Roman law, quite openly, acknowledges differences in punishments based on class (deportation versus the mines as demonstrated later by the jurists). Zulueta proposes a similar theory as it pertains to the action on theft (Zulueta, *Commentary*, 199). However, Zimmermann is suspicious of treating *manifestum* as involving cases of more viciousness or dangerousness as I am implying and, to the contrary, has demonstrated that some hold *nec manifestum* in greater disrepute (Zimmermann, *Obligations*, 936n109).

<sup>5</sup> Watson, *SLC*, 37.

<sup>6</sup> Crawford, *RS*, 614. Gaius (see below) does not present it in this fashion and instead implies the coexistence of searches, for he says that “anyone who prohibits a person with clothes on from searching is going to prohibit him from searching naked” (“*Qui vestitum quaerere prohibet, is et nudum quaerere prohibetur est*”).

<sup>7</sup> Gaius, *Institutes*, 188.

<sup>8</sup> Gaius, *Institutes*, 192.

<sup>9</sup> Technically, the *actio vi bonorum raptorum* could also yield quadruple damages, but such an action would not at any rate be available for another century, and it was of a different nature.

<sup>10</sup> Gaius, *Institutes*, 194. Granted, it is a different kind of “*manifestum*” because the theft is *manifestum* by statute, not nature.

<sup>11</sup> This is classically known as the provision permitting “an eye for an eye” (Tabula VIII.3).



sacrosanct and had to be adjusted. Gellius<sup>12</sup> recounts the story of Lucius Veratius, a man who amused himself by walking the Forum and slapping free men in the face. This offense was grounds for *iniuria*, the punishment for which was merely 25 asses (a punishment which had lost its punitive power long ago). Upon assaulting the citizen, Veratius ordered the slave in his wake to distribute the statutory sum. The praetors were not amused and they moved hastily to void the provision<sup>13</sup> of the Twelve Tables. While no similar evidence exists for the abuse of the *lanx et licium*, it was surely not the kind of authority the State wanted the citizen to possess; likewise, the State was surely not at ease with citizen's exacting capital penalties.

The *lanx et licium*, for all its peculiarity, had been a powerful tool in the discovery of a thief because with its practice came the irresistible authority that endowed the citizen with state-like power.<sup>14</sup> Gellius represents the decline of the *lanx et licium* as emerging out of a general decline in ancient customs that had since become meaningless. However archaic the procedure was, its efficacy seems undeniable.<sup>15</sup> As evidenced by the *actio prohibiti*, the praetor still permitted searches, but only those upon which both parties civilly agreed rather than by the imploring of some ancient magic or religious custom, superseding ordinary private (and perhaps public) powers. Moreover, the burden of searching and pursuing a thief remained fixed on the victim, whose capacity diminished in the absence of the *lanx et licium*.

#### FICTITIOUS CITIZEN: INTERESTS OF THE PLAINTIFF AND SOCIETY

Although Rome herself was already stretched across the Mediterranean, her laws were of narrow application, allowing the provinces a free hand in the development of their own laws. This point will be revisited later in the discussion of provincial governors, but what of inter-regional criminal activity, where a citizen steals from a peregrine or vice versa? This is a point on which the law was originally silent, since the *ius civile* only applies to citizens.<sup>16</sup> Such injustice is resolved through the establishment of a “fiction of citizenship,”<sup>17</sup> a necessary step towards the perception of *furtum* residing within the markedly public sphere. This broadened standing represents two trends in the development of *furtum*: limitations on extralegal solutions by private parties and awareness of theft as affecting society as a whole in addition to the individual in particular.

<sup>12</sup> Gellius, *Noctes Atticae*, 20.1.13.

<sup>13</sup> Tabula VIII.4.

<sup>14</sup> Either the alleged thief had the object or did not have the object, but either way the issue could be effectively resolved with respect to the situation at hand.

<sup>15</sup> The utility of *lanx et licium* is what merited a replacement or substitution. Had it been of little use or interest, the informal search by witnesses would have been sufficient.

<sup>16</sup> “The foreign thief was probably exposed to uncontrolled arrest by the citizen from whom he had stolen, while the foreigner who had been robbed was without any legal protection” (Kunkel, *IRLCH*, 86n1).

<sup>17</sup> Gaius, *Institutes*, 4.37. In other words, the praetor permits the provincial to lodge his case under statutory law despite the fact that those laws apply only to citizens. The praetor, in effect, grants procedural citizenship to foreigner and he is consequently liable to and eligible for all of the privileges of the *ius civile* (or at least lodging the *actio furti* in this instance).

If Kunkel is correct, the citizen's last uninhibited domain of self-help with respect to *furtum* was limited to the relationships between him, bearing Roman citizenship and privy to a suite of rights, and his foreign neighbor, who could only lay claim to the *ius gentium*. The deliberate circumvention of private enforcement against a thief by the establishment of imagined citizenship removes the need (or the possibility) for the individual to exercise any version of his vengeance. Although vengeance had been mitigated (and rectified in the case of *nec manifestum*) early with the Twelve Tables, the statutory right to magisterial oversight was limited only to citizens. Surely the application to citizens was intentional; deprivation of justice<sup>18</sup> for neighboring Latins, however, was likely not in the minds of the Decemviri. As the Republic grew into an empire, such loopholes must have become increasingly prominent and Rome's delegation of (provincial) legislation to foreign municipalities. The citizen's relationship to the State could be compromised by the enforcement of private vengeance on those not expressly included in the citizenry, but who were a part of the Republic.

For if the State is merely concerned with only those people who are strictly citizens, then it is unnecessary to provide any relief to foreigners who have been wronged since, after all, it was the citizen who profited; conversely, the exaction of vengeance by a citizen on a foreigner does not impede the rights of another citizen. The question of motivation arises as to whether it was for the preservation of preexisting rights of citizens or the extension of a right<sup>19</sup> to peregrines. In other words, was the fiction of citizenship used to establish a duty amongst individuals within society (in the broadest sense) or to provide remedies for foreigners on the analogy that a thief who steals foreign goods is just as likely to steal Roman goods?<sup>20</sup> There are elements of natural law found in Roman law and I am inclined to hold the former view, but it appears that irrespective of the exact disposition from which the modification was made, the change echoes a powerful sentiment: theft is a public menace. The conversion of private property is in itself a private matter as both the penal and reipersecutory elements convene on the victim; it is the awareness that *furtum* causes harm to society and that all acts of theft, irrespective of citizenship, ought to be actionable that elevates theft from private to public.

Just as "the *condictio* offered a means of extending liability to those who would otherwise go without redress,"<sup>21</sup> the *actio furti* was similarly extended – not to the same degree. There was a willingness to extend the *actio furti*, which required an interest in the stolen object,<sup>22</sup> to non-owners and thus expand the spectrum of affected parties. When a thief steals from a tailor who is repairing the clothes of another, it is the tailor, not the owner, who lodges the penal claim against the thief.<sup>23</sup> For it would not be equitable, argues Zimmermann, to allow for the owner to twice recover.<sup>24</sup> The availability of the

<sup>18</sup> Despite the integrated militancy in Roman culture, it also seems unlikely that the Romans were encouraging theft of their Latin's property as some means of display of cunning or technique as Gellius holds the Egyptians and Spartans were, even amidst themselves (Gellius, *Noctes Atticae*, 11.18.16-17).

<sup>19</sup> A right established by the presence of a remedy.

<sup>20</sup> The latter rendition evokes the idea of animal rights espoused by Kant: "Our duties towards animals are merely indirect duties towards humanity," which could be reworked in the Roman sense as to: "Our duties towards foreigners are merely indirect duties towards Romans" (*Indirect Duties to Nonhumans*).

<sup>21</sup> Zimmermann, *Obligations*, 839.

<sup>22</sup> Zimmermann, *Obligations*, 839-40 citing Ulpian, D. 47.2.25.2.

<sup>23</sup> Gaius, *Institutes*, 3.205. So long as the tailor is solvent thus absorbing the action on hire.

<sup>24</sup> Zimmermann, *Obligations*, 833-36. Other cases are also discussed here.

*actio furti* was conditional for the tailor, he had to absorb the claim that would be placed against him by the owner, otherwise the *actio furti* reverted to the owner, but such legality would appear to imply the dissociation of vengeance from the penal process (replaced instead by economic interests). It cannot be by some legal engineering that one citizen and not another is entitled to vengeance, which is to say, to punish a thief, unless the entitlement to vengeance has become obsolete.<sup>25</sup> More significantly, the ability to transfer penal damages from interest to interest permits the further extension of said damages to new future interests, that is, the interest of the commonwealth as represented by the State.

#### TO CATCH A THIEF, MAKE HIM LIABLE

From the modern perspective, it is against the thief that the state prosecutes, while the victim's interest truly lies in that which has been stolen, which is to say that the state's claim is *in personam*, not *in rem*.<sup>26</sup> It is also the case, of course, that theft is primarily the domain of criminal prosecutions rather than civil damages (although the latter is possible).<sup>27</sup> Furtum originated as a delict arising out of the interest in property stolen, giving rise to an action *in rem*<sup>28</sup> because the victim had an interest in the retrieval of his property, not in the thief's performance of an obligation.<sup>29</sup> Gaius explains the extension of theftuous liability to the action *in personem*, that is, the *condictio ex causa furtiva*:

“Plane odio furum, quo magis pluribus actionibus teneantur, receptum est, ut extra poenam dulpri aut quadruple rei recipiendae nomine fures etiam hac actione teneantur: ‘si paret eos dare oportere,’ quamuis sit etiam aduersus eos haec actio, qua rem nostrum esse petimus.”

“No doubt it was from hatred of thieves, to multiply their liabilities, that the law came to allow against them not only the claims for twofold or fourfold penal damages but also the pleading: ‘if it appears that they have a duty to give,’ even though the real action, by which we claim what is ours, is also competent against them.”<sup>30</sup>

The traditional meaning of *dare oportere* implies a lack of ownership, thus it is not possible to demand that the thief *dare* that which already belongs to the victim.<sup>31</sup> The upshot lies in the extension of liability to the thief, irrespective of whether or not he is in possession of the *res*.<sup>32</sup> Zimmermann is critical of the traditional application of *dare*

<sup>25</sup> The theft's original liability, although *in rem*, is deeply personal as an affront to the victim thereby allowing the victim to recover his object and punish the thief (Zimmermann, *Obligations*, 5n20). The tailor is the one from whom the object was stolen, but, presumably before praetor's permitted *custodia*, it would be the owner who had claim to exact vengeance, to punish the thief.

<sup>26</sup> LexisNexis, *Theft*, 26.01.A. (See also the Modern Penal Code, § 223).

<sup>27</sup> This seems to be frequent in cases involving music downloaded illegally instead, that is, of incarceration.

<sup>28</sup> An action *in rem* gives rise to the *vindicatio*, whereas the action *in personam* gives rise to the *condictio*.

<sup>29</sup> Refer to Chapter I for a more thorough explanation for this distinction and rationale.

<sup>30</sup> Gaius, *Institutes*, 4.4.

<sup>31</sup> Gaius, *Institutes*, 4.4.

<sup>32</sup> Provided the thief dispossessed the owner of his property (Paul, D. 47.2.22.10), the *condictio* stood whether or not such property was destroyed, altered, or lost (Pomponius, D. 13.1.16). This is in contrast of course to the *vindicatio*, which, because it was an action *in rem*, depended on these very points in order to proceed (Zimmermann, *Obligations*, 940-42; Jolowicz, *DF*, xxx-xxx).

*opertere* here, proposing that the definition had been previously different.<sup>33</sup> If, however, the extension of the action *in personam* was intentionally designed to multiply a thief's liability as Gaius suggests,<sup>34</sup> perhaps the root reason was to acknowledge the obligation that a thief had to the individual (and later, by extension, to society) rather than merely the refinement of the legal system to reduce loopholes.

Conceptualizing *furtum* in these terms removes the intrinsic quality of property from the center to the periphery by reinterpreting theft as a breach of civil concord. Although the theft and thief are somewhat inextricable,<sup>35</sup> the distinction, for the *condictio* to flow from some meaningful principle, is that not only was the victim entitled to his object, but that the thief was himself responsible for having stolen it, a violation of his obligation to not steal. Tryphoninus describes the thief as being in perpetual default.<sup>36</sup> It ought to be noted that it was still ultimately from the stolen object that liability arose, for the action is for recovery just as the *vindicatio*.<sup>37</sup> Furthermore, there was no penal element to the *condictio* as it remained with the *actio furti*.

For the cases in which individuals were immune to the *actio furti*,<sup>38</sup> the *condictio* was an excellent remedy, but the *actio furti* itself was also able to attach itself to new thieves. This is especially important when there is the involvement of a third party who does not actually *steal* anything. In instances of accomplice, such as the accomplice who knocks coins out of another's hand so that they may be retrieved by the thief or an accomplice, by whose aid and advice, persuades a slave to escape so that he may be stolen.<sup>39</sup> An older case demonstrates that if one maliciously summons another to court and his cattle are thereafter lost, the plaintiff (the "thief") is held for *furtum* irrespective of whether or not he actually stole the cattle, an application of liability by proximate cause.<sup>40</sup> Had the plaintiff of the malicious lawsuit not stolen anything, he would not be liable to a *condictio* or *vindicatio*, yet he was one deserving of punishment – not to mention that his behavior was undermining the legal process. It could be argued that the case does not truly apply to *furtum* since, strictly speaking, no theft is necessary for the *actio furti* to arise and that the action is more interested in penalizing wrongdoers in general than the thief specifically. Independent of this case, accessories in general were perceived as offensive and liable to reprimanding, even if this resulted in a windfall for the victim (who sued both the thief and accomplice). Interestingly, the broadened category of

<sup>33</sup> Zimmermann proposes that *dare oportere* had not developed this definition when the action *in personam* was created in the *condictio* (Zimmermann, *Obligations*, 941n152). Zulueta shows that some believe that the thief originally acquired possession following the *actio furti* (Zulueta, *Commentary*, 229).

<sup>34</sup> Neither Zulueta nor Scialoja have difficulties with this interpretation (Zulueta, *Commentaries*, 229, 299n3 referring to Scialoja, *Teoria della proprieta* I, 247).

<sup>35</sup> The case of the mule driver does seem to challenge this view, however (D. 47.2. 67.2 Paul).

<sup>36</sup> Tryphoninus, D. 13.1.20. "*Fur semper in mora.*"

<sup>37</sup> Paul, D. 47.2.22.10.

<sup>38</sup> Paul, D. 47.2.24 and D. 47.2.25 Ulpian. Ulpian, in agreement with Julian, holds that a youth can be liable to the *condictio* even though he escapes liability under the penal action, the *actio furti*, as argued by Labeo.

<sup>39</sup> D. 47.2.52.13 Ulpian and Ulpian, D. 47.2.50.1. In the case of the persuader, he need not even be working in league with thieves, but he must have some malice attributed to him (a view dating back to Celsus), otherwise one is immune to theft by bad counsel (Ulpian, D. 47.2.36.pr).

<sup>40</sup> Paul, D. 47.2.67.2.

thieves does not alter other excluded thieves such as sons in power, slaves, or wives *in manu*, who all escape liability for *furtum* while their accomplice does not.<sup>41</sup>

#### THE PROLIFERATION OF THE *QUAESTIONES PERPETUAE*

Of all the contributing factors, the rise of the *quaestiones perpetuae* is perhaps the single most compelling in the expansion of theft into the public sphere, which was already in the process of criminalizing disputes between private individuals. There had been precursors to the permanent *iudicia publica*, for instance those established by the Bacchanalian commission and other special circumstances.<sup>42</sup> Established in a quasi-criminal fashion wherein the State prosecuted on the interests of the commonwealth, these were exceptional and temporary.<sup>43</sup> However, these new courts prepared and encouraged a more involved approach on the part of the State. Their very permanency ensured that the State would be involved in some capacity to protect public interests.

Moreover, the early permanent courts helped to define the role of the State in prosecution by giving magistrates authority to litigate, summon witnesses, and even collect damages.<sup>44</sup> They also helped to define the meaning of what constituted the public. The *quaestiones perpetuae*, a form of *iudicia publica*, provided standing for nearly every citizen,<sup>45</sup> although it is questionable whether those who brought suits were entirely concerned with the public interest.<sup>46</sup> Of all the *quaestiones* created after the Lex Calpurnia introduced the *quaestio de repetundis*, the two courts, both established during Sulla's dictatorship under the Leges Corneliae (c. 82 BCE), of particular relevance to the development of *furtum* are the *quaestio de iniuriis* and the *quaestio de sicariis et veneficis*.<sup>47</sup>

Like *furtum*, *iniuria* had its origins in the Twelve Tables as a delict, but, unlike *furtum*, it was worthy of its own court in the late Republic owing, no doubt, to the exceptional turbulence in Roman society during that time. In so far as it was a delict, *iniuria* provides a crucial precedent for the incorporation of private wrongs into the public sphere. However, this is complicated by two doctrines associated with the *quaestio de iniuriis*. First, the court, despite its status as a *quaestio*, is described by Paul as serving the public interest while remaining a private suit, which means that standing was restricted only to the affected party (he who was insulted).<sup>48</sup> Second, *iniuria*, in the way it is generally construed, encompasses a great many forms of "insults," but the *quaestio* established by the Lex Cornelia provides only for insults arising out of forms of

<sup>41</sup> Ulpian, D. 47.2.36.1. Perhaps this is a later development, but it appears to preserve the distinctions and privileges of the *paterfamilias* to punish his own subordinates.

<sup>42</sup> For a more detailed history, see Bauman, *CPAR*, 22-26.

<sup>43</sup> Gaughan, *Murder*, 24-27, 35, 79-80; Nippel, *PR*, 21.

<sup>44</sup> Jones, *CC*, 45-46. These damages would enter the State's coffers.

<sup>45</sup> Jones, *CC*, 46-47. Justinian later explains, the public courts "are called public because their execution is generally given to any member of the public."

<sup>46</sup> Kunkel, *IRLCH*, 64. "In the case of capital condemnation the prosecutor actually received a proportion of the confiscated property."

<sup>47</sup> Jones, *CC*, 56.

<sup>48</sup> Paul, D. 3.3.42.1. Thus the *quaestio* cannot be claimed as a "criminal court" (Crook, *LLR*, 252).

violence.<sup>49</sup> The process of prosecuting *extra ordinem*,<sup>50</sup> the procedure by which *furtum* will be later punished,<sup>51</sup> seems to have been contemporaneously expanded to *iniuria*, at least, with respect to slaves.<sup>52</sup> Even though *furtum* was never prosecuted under a *quaestio*, that *iniuria* had a component of public interest, which in theory was on the principle of delictual insult, while in practice was of violence, allowed the doctrine of public interest to spread to other, similarly formulated delicts.

The revolutionary contribution of the Lex Cornelia de Sicariis et Veneficis is the detachment of the wrong from the individual by allowing the whole of the community to initiate a claim because all were considered to have been affected by the injustice.<sup>53</sup> Both Cloud and Kunkel see the Lex Cornelia as designed to “protect public safety and punish individuals who endangered public safety and order.”<sup>54</sup> Were such a principle to have been realized for theft generally, it would likely have given rise to the Lex Cornelia de Furtis. Theft, however, lacks one fundamental quality that is found in the Sullan legislation: violence.<sup>55</sup> There is a violent aspect to theft that would seemingly merit a *quaestio: rapina*. It is clear that there is a certain relationship between robbery and *furtum*, for the former arises out of the latter;<sup>56</sup> however, *rapina* was differentiated from *furtum* at least by the time of the jurists,<sup>57</sup> but probably even at this point. Overt acts of aggression in which property was dispossessed do come under the Lex Sicariis et Veneficis, namely carrying a weapon with intent to steal,<sup>58</sup> but it cannot be rightly said to apply to *furtum* more broadly; the same can be said for the application of *iniuria*. In addition to the provision in this statute, the praetor also permitted an action for *rapina* known as the *actio vi bonorum raptorum*, but this permitted only private recourse.<sup>59</sup> Nonetheless, the interest in repressing crime emerges out of the recognition that offenses between individuals can be just as publicly debilitating as offenses against the State.

<sup>49</sup> Ulpian, D. 47.10.5.pr. Specifically, only one who has been beaten, thrashed, or his house broken into may lodge a claim under this law. Even in the most liberal sense, however, Ulpian claims that “it thus appears that every physical affront is covered the Lex Cornelia,” but not the cases of traditional *iniuria*: disrespect or raising a clamor (Ulpian, D. 47.10.13.3-4 and D. 47.10.15.2-3). Slander and defamatory writings were likely not included in at this stage (Crook, *LLR*, 252n11).

<sup>50</sup> Hermogenian, D. 47.10.45.

<sup>51</sup> Ulpian, D. 47.2.93.

<sup>52</sup> Saturninus, D. 48.2.12.4. The authority for this is claimed to be from Cornelius Sulla himself.

<sup>53</sup> Nevertheless, a criminal case where more than one party is interested in prosecution, the judge must decide amongst the plaintiffs who is to proceed (seemingly by whatever reason suits the judge best) (Ulpian, D. 48.2.16)

<sup>54</sup> Cloud, *Primary Purpose*, 260.

<sup>55</sup> Lintott, *VRR*, 130.

<sup>56</sup> Ulpian, D. 47.2.53. “If someone forcibly remove something from a house which has no occupant, he may be sued by the action for goods taken by force for fourfold or for nonmanifest theft; obviously, in the event of no one seeing him in the process of depredation.”

<sup>57</sup> Paul, D. 47.2.89. “If someone proceed by the action for things taken by force [*actio bonorum raptorum*], he cannot also take proceedings for theft [*actio furti*]; but if he first choose to proceed for twofold on theft [*actio furti nec manifestum*], he can also have the action for things taken by force, so long as he does not recover more than fourfold in all.”

<sup>58</sup> Marcian, D. 48.8.1.

<sup>59</sup> The penalty for the *actio vi bonorum raptorum* was *quadruplum*.

## TRIALS IN THE LATE REPUBLIC

There has been a disproportionate discussion in this paper devoted to the socializing trend in theft by way of the increased ability and interest of the State to assume new roles, but the undeniable core of *furtum* was, as can be gleaned from its omission in the *quaestiones*, private. Furthermore, the gradual restriction of private justice has been the central theme in the development of *furtum*. For Polybius<sup>60</sup> and Plautus<sup>61</sup> reference to theft is generally tangential to whatever is of pressing historical value, so little survives concerning specific cases. In spite of this, there are references to three cases in the late Republic in which the *actio furti* was pursued.<sup>62</sup> Cicero hardly spends a moment on either of these cases – they are exclusively used to repudiate someone’s character – or elaborates on their procedure; but it is clear that they were private; one case was even settled by mutual agreement.<sup>63</sup> The only hint of trials *extra ordinem* for theft is for a special kind of theft, *peculatus*, the misappropriation of public (governmental) property;<sup>64</sup> however, such forms of theft are essentially committed against the State directly – similar to treason (*perduellio*) in this regard – and therefore a public crime.<sup>65</sup> It is not that theft itself, then, is worthy of a public trial, but rather the State has an obligation to prosecute on its own behalf.

Public offenses had, in general, expanded substantially during this period to include various criminal, characteristically violent, behaviors, and yet never made the requisite leap to include theft of a pedestrian nature among them. *Furtum* itself expanded under the relaxed hand of the praetor, who granted remedies for accomplices,<sup>66</sup> false pretenses,<sup>67</sup> unlawful retention of property,<sup>68</sup> and robbery.<sup>69</sup> It is curious too that while forgery was treated publicly and *iniuria* received a court, perhaps the most prolific of illicit behaviors was not also included.<sup>70</sup> The general quality of the legislation in the Sullan and late Republican period, however, seems to be informed by deeply political motivations. Fermenting in the background was an interest in securing public order and peace that would ultimately be realized under Augustus. Although “public authority [had] increase[d] without eclipsing the private pursuits of wrongs,”<sup>71</sup> the private citizen was still the anchor of public authority as he was generally responsible for instigating trials<sup>72</sup>

<sup>60</sup> See the discussion of the role of aediles in handling minor offenses (Lintott, *CRR*, 154n28).

<sup>61</sup> See the discussion above on the role of the *tresviri capitales* in *Chapter III: Rise of the Magistrates*.

<sup>62</sup> Cases 194, 197, and 213 according to Alexander (*TLRR*), all of which derive from Cicero’s mention: *Pro Cluentio*, 163 and *In Toga Candida*, 6.13.

<sup>63</sup> The suit between Q. Mucius Orestinus and L. Fufius Calenus, on whose behalf Cicero advocated (Cicero, *In Toga Candida*, 6.13 or Alexander, *TLLR*, Case 213).

<sup>64</sup> Alexander, *TLRR*, Case 64.

<sup>65</sup> Ulpian, D. 48.13.1. The whole of Title 13 is dedicated to this issue.

<sup>66</sup> See the discussion of accomplices above, *To Catch a Thief, Make Him Liable*.

<sup>67</sup> Ulpian, D. 47.2.55.22 and D. 47.2.55.23. Jolowicz devotes some time to the issue of false pretenses (Jolowicz, *DF*, xxv-xxviii).

<sup>68</sup> Ulpian, D. 47.2.55.7.

<sup>69</sup> Gaius, *Institutes*, 3.209.

<sup>70</sup> Jones, *CC*, 47.

<sup>71</sup> Lintott, *CRR*, 149.

<sup>72</sup> *Nominis delatio*. For the procedure, see Kunkel, *IRLCH*, 64 or Jones, *CC*, 44-46.

and the penalties inflicted in public trials were generally seen as “restitution to the injured.”<sup>73</sup>

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<sup>73</sup> Lintott, *VRR*, 130.



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## Chapter V: For the Public Good

### The Rise of the State & the Decline of the *Actio Furti* (27 BCE ~ 235 CE)

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#### REVISITING THE MAGISTRATES: IMPERIAL ORDER

Augustus transformed Rome into a bureaucratic machine that exercised authority in all realms of the public sphere, thus creating the requisite institutions to enforce the public good. Jolowicz summarizes this transformation:

“Justice, instead of proceeding from a voluntary contract, is imposed from above, and the official no longer merely supervises a submission to arbitration, but sees that the rules laid down by public authority are enforced.”<sup>1</sup>

The creation of the *praefectus vigilum*, with powers of *cognitio extra ordinem*, provided a specific magistrate for the hearing of and intervention in criminal cases, eventually displacing the *quaestiones*.<sup>2</sup> In cases where no ordinary criminal prosecution was provided by statute, the urban prefect had the authority – but perhaps not the obligation – to investigate cases that threatened “public order and peace.”<sup>3</sup> At Rome, the *praefectus vigilum* was something of a court of first instance trying cases of theft, robbery, burglary, and arson, unless the case was for a recalcitrant offender, in which case the *praefectus urbanus* would prosecute.<sup>4</sup> The *praefectus urbanus* had, by the time of Alexander Severus, a jurisdiction that encompassed a hundred mile radius<sup>5</sup> – an improvement over the original one mile – and was essentially the final magistrate in the succession.<sup>6</sup>

If the prefects were magistrates charged with the litigation of criminal offenses, it was the cohorts who actually enforced them. The three cohorts who were under the discretion of the praetor<sup>7</sup> for the purpose of maintaining public order, in other words, the police, evolved out of their military and protective duties.<sup>8</sup> However, the initial introduction of the cohorts is of questionable intent, for it seems that they were primarily concerned with riot control and bodyguard functions; moreover, their deployment was discretionary and

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<sup>1</sup> Jolowicz, *HI*, 406.

<sup>2</sup> Jolowicz, *HI*, 414-15. The urban praetor has similar powers to try cases *extra ordinem* (Ulpian, *Collatio*, 7.4.1).

<sup>3</sup> Kunkel, *IRLCH*, 67.

<sup>4</sup> Paul, D. 1.15.3.1. The urban prefect and praetorian prefect probably shared a number of similar functions but in different jurisdictions (Bauman, *CPAR*, 110)

<sup>5</sup> Ulpian, D. 1.12.1.pr.

<sup>6</sup> Jones, *CC*, 97. One could perhaps appeal to the *praefectus praetorio*, who, save for the emperor, was the ultimate magistrate during the fourth century (Arcadius, D. 1.11.1.2).

<sup>7</sup> Echols, *Police*, 380.

<sup>8</sup> See generally Echols, *Police*.

irregular.<sup>9</sup> With the increasing regularization, the urban cohorts developed more into a municipal force designed to enforce the laws and public order.<sup>10</sup>

If it is not wholly clear that the State felt itself compelled to keep order at Rome as part and parcel of functioning of government, then one need only look at the imperatives directed towards provincial governors. Ulpian demands from provincial governors<sup>11</sup> a high standard of public intervention:

“Hominibus provincia careat eosque conquirat: nam et sacrilegos latrones plagiarious fures conquirere debet et prout quisque deliquerit, in eum animaduertere, receptoresque eorum conercere....”

“For he is duty-bound to search out blasphemers, robbers, hijackers, and thieves and to punish them according to the evil he has done and to jail those who harbor them....”<sup>12</sup>

It is certainly possible that provincial governors were already entrusted with such functions during the Republic, but whether it was applied uniformly and to the extent that is seen here is unclear. Whatever ambiguity exists at Rome should be elucidated by the actions of the provincial bureaucracy, for it seems unlikely that all manners of enforcement and security should be relegated to the periphery while the capital succumbs to anarchy. Both the provincial and Roman bureaucracies appear to operate on a parallel system differing only in their official titles, not their functions.<sup>13</sup>

#### THE SOCIALIZATION OF FURTUM

Vengeance, and its mitigation, has been a central theme in the progressively public quality of theft, and the cases which lie on the threshold between self-defense and vengeance pose the last unadulterated form of private authority. The Twelve Tables permitted a citizen to slay a thief who came by night or by day with a weapon without any further requirements.<sup>14</sup> If one assumes the position, as Jolowicz does,<sup>15</sup> that such acts concerned self-defense and not vengeance, as Fletcher<sup>16</sup> and Gellius<sup>17</sup> suggest, then the question arises as to why it was necessary to restrict (or rather, criminalize) the discretion of the individual in these cases. It appears, however, that self-defense was only one aspect of this doctrine, the other evoking a tone of private justice. Cassius embodies the early view of self-defense: “*Vim vi repellere licere...idque ius natura comparator.*”<sup>18</sup> Unlike later interpretations, this view has no limiting principle.

<sup>9</sup> Nippel, *PR*, 29 and Echols, *Police*, 379-80.

<sup>10</sup> Echols, *Police*, 384.

<sup>11</sup> The provincial governors would then in turn create bureaucracies of their own to manage their obligations to the citizens (albeit at the behest of the State).

<sup>12</sup> Ulpian, *D.* 1.18.13.pr.

<sup>13</sup> Jones, *CC*, 98n67. Paul could also be referring to this point (Paul, *Collatio*, 7.2).

<sup>14</sup> Ulpian, *Collatio* 7.3.2-3. See also the discussion in Chapter II: The Twelve Tables: Mitigated Vengeance.

<sup>15</sup> Jolowicz, *DF*, lxxv.

<sup>16</sup> Fletcher, *The Metamorphosis of Larceny*, 476 and 479.

<sup>17</sup> Gellius, *Noctes Atticae*, 11.18.7. De Visscher is also of this view – not that anyone doubts the role of self-defense, for there is surely some strength behind that argument, but that vengeance was intimately intertwined in the dispensation of personal justice (De Visscher, *Etudes de Droit Romain*, 175n2).

<sup>18</sup> Ulpian, *D.* 43.16.1.26. “It is permissible to repel force by force, and this right is conferred by nature.”

Cicero argues for the statutory regulations found in the Twelve Tables based on the model of self-defense, but demonstrates, through requiring witnesses to help adjudicate the matter, that vengeance was a factor and that it had to be mitigated by the law, advice, and reason.<sup>19</sup> Aside from the *consilium*, Cicero imposes no self-restraint, unlike Paul who proposes that the victim should bring a thief to the magistrates or the (provincial) president, but he does not mandate such action.<sup>20</sup> Pomponius is willing to abandon the Twelve Tables with respect to the doctrine of nocturnal and aggravated theft, although he provides no alternative theory – or at least Ulpian does not credit him with one.<sup>21</sup>

Ulpian adopts a peculiar position: he maintains the efficacy of the Twelve Tables and introduces an element of restraint on the exercise of that law; the former permits a victim to slay a nocturnal thief with impunity, while the latter insists that he who slays the nocturnal thief kills wrongfully if he could have captured him, but chose otherwise.<sup>22</sup> Ulpian rejects the version of self-defense put forward by Cassius and replaces it with a doctrine of self-preservation. Although Cassius may have intended the rule to apply as Ulpian envisaged, it was in fact rather broad. As long as the requirement of force had been met, then it was permissible to retaliate in kind. Following Paul, Ulpian restricts the citizen's immunity from murder (or Aquilian liability) to cases of unavoidable death. Ulpian places a limiting principle on the self-defense doctrine, but his unwillingness to revoke the Twelve Tables entirely<sup>23</sup> may reflect deference to the individual considering the circumstances, "for the night is dark and full of terrors."<sup>24</sup> Self-defense, however constructed, is a core right imbued by natural law, so it seems unlikely that Ulpian needed the Twelve Tables for its statutory provision on the matter. Perhaps, accounting for the precarious situation, he wanted to ensure that the victim received the benefit of the doubt, an extracted freedom from the Twelve Tables. In redefining *furtum* in the public sphere, it is no longer appropriate to permit private performances of justice when public institutions are prepared to prosecute.

When the State had assumed the role of the plaintiff on behalf of society, it was to the State that such penalties were thereby incurred. It is not impossible to rule out fines to the imperial treasury as a form of punishment,<sup>25</sup> but nowhere do the jurists refer to them with any (direct) respect to *furtum*.<sup>26</sup> Although detention was utilized for immediate, practical purposes,<sup>27</sup> long-term imprisonment was not approved by Ulpian, who criticizes

<sup>19</sup> Cicero, *Pro Tullio*, 47-53.

<sup>20</sup> Paul, *Collatio*, 7.2.

<sup>21</sup> Ulpian, D. 7.3.2.

<sup>22</sup> Ulpian, *Collatio*, 7.3.2-3.

<sup>23</sup> If such authority was in the hands of Pomponius, it surely resided in those of Ulpian.

<sup>24</sup> Melisandre of Asshai, Benioff, David, and D. B. Weiss. "The North Remembers." *Game of Thrones*. Dir. Alan Taylor. HBO. 1 Apr. 2012. Television.

<sup>25</sup> Paul, D. 48.1.2 and Ulpian, D. 48.8.4.2. Precedent for such had been established by the *quaestiones* and Ulpian here refers to the Sullan legislation, retaining the penalty.

<sup>26</sup> Callistratus, D. 48.20.1.pr. That is not to say that money could not be collected from a thief on the State's behalf; however, property forfeiture was only the result for someone who lost life or citizenship, or was reduced to slavery, which was certainly a possibility for some kinds of theft (see examples below and Papian, D. 48.20.4).

<sup>27</sup> Modestinus D. 48.3.14.pr.-2. It is clear from his verbiage that officials could be charged if by their negligence, a prisoner escaped under their detention. Since he served as the *praefectus vigilum*, it is possible he is referring to these guards (Kunkel, *IRLCH*, 102).

provincial governors for engaging in the bad habit.<sup>28</sup> Instead, humble thieves were corporeally punished and noble thieves were exiled.<sup>29</sup> Ulpian prescribes a term of fixed public-works labor for ordinary thieves, but distinguishes the more egregious forms of theft as deserving a weightier sentence,<sup>30</sup> although punishments were also somewhat at the discretion of the magistrate.<sup>31</sup> In light of the punishments that the State actually encouraged, the State may have found it prudent to put the thief to work for the general welfare of the society he had wronged.<sup>32</sup>

#### THE LEGACY OF FURTUM IN THE PRIVATE SPHERE

After nearly a millennium of progress in the development of the State and sophistication of the law, the two private delicts that originated in the Twelve Tables are both concluded in the final lines of their respective titles in the *Digest* by statements of public interest: Hermogenian<sup>33</sup> on the title of *iniuria* and Ulpian on the title of *furtum*:

“Meminisse oportebit nunc furti plerumque criminaliter agi et eum qui agit in crimen subscriber, no quasi publicum sit iudicium, sed quia visum est temeritatem agentium etiam extraordinaria animaduersione coercendam. Non ideo tamen minus, si qui velit, poterit civiliter agere.”

“It must be remembered that now criminal proceedings for theft are common and the complainant lays an allegation [with the State]. It is not a kind of public prosecution in the normal sense, but it seemed proper that the temerity of those who do such wrongs should be punishable on extraordinary scrutiny. Still if that be the party’s wish, he can bring civil proceedings for theft.”<sup>34</sup>

Procedure had changed during the Principate and one no longer had to drag a thief to court; rather, the victim lodged a claim with a magistrate who then issued a *denuntiatio* (or possibly a *litterae* or *edictum* based on the presumed location of the thief), which was an official summons.<sup>35</sup> Nevertheless, the old formulaic method had not been totally

<sup>28</sup> Ulpian, D. 48.19.8.9.

<sup>29</sup> Ulpian, *Collatio*, 7. 4.2; Ulpian, D. 47.18.2; and Bauman, *CPAR*, 105. However, it seems that nobles could be sent to the mines, but such were rare cases (Bauman, *CPAR*, 66).

<sup>30</sup> Ulpian, D. 47.18.1. To this form he credits robbers, cutpurses, pickpockets, and burglars. These are certainly aggravated forms of theft and the compilers of the *Digest* saw dedicate to them their own title (Title 18 instead of Title 2). This is found throughout the *Digest*, various thefts are given their own titles (e.g., cattle theft, 14; thieves at the baths, 17; robbery, 18).

<sup>31</sup> Ulpian, D. 48.19.13. As long as the magistrate assigns the penalty within the reasonable limits.

<sup>32</sup> Alternatively, the State needed enormous amounts of labor to fuel its expansion and thieves were a convenient source of such servitude.

<sup>33</sup> Hermogenian, D. 47.10.45.

<sup>34</sup> Ulpian, D. 47.2.3.

<sup>35</sup> Jolowicz, *HI*, 407-409. The precise nature of the summons is unclear and the manner in which it was served during this period is equally, although it seems to have been customary in Rome for the victim to deliver the summons himself (Jolowicz, *HI*, 409n4). During Justinian’s time, the procedure had changed to mandate that an official (the *exsecutor*) serve the summons (now a *libellus conventionis*) and collect a fee and security from the alleged thief (Jolowicz, *HI*, 460). Under Justinian, the whole procedure became rather Byzantine.

displaced by the new extraordinary procedure<sup>36</sup> and the remains of civil proceedings for theft, as Ulpian states, persisted until the time of Justinian.<sup>37</sup>

Writing only a few decades earlier, however, the opinion was less decisive as both Macer and Marcian express reservations about the public nature of theft. Macer, the slightly older jurist, reasons that cattle theft (D. 47.14) is not the subject of public prosecutions because it derived from *furtum*, which is ultimately not subject to the public's dominion.<sup>38</sup> Upon closer inspection, however, all Macer claims is that *furtum* is not the subject of the *iudicium publicum*, a *quaestio*, which is precisely the point made by Ulpian. On the surface of Marcian's statement, it would appear that only special kinds of theft deserve the public's attention:

"Furta domestica si viliora sunt, publica vindicanda non sunt, nec admittenda est huiusmodi accusatio...."

"Domestic thefts, if of a more trifling kind, should not be the subject of public actions, nor should an accusation of this kind be permitted...."<sup>39</sup>

Rejection of the public view of theft is not found here either, but his interpretation is somewhat limiting by modern metrics. First, Marcian does not rule out public interest in domestic thefts of a non-trivial nature (for instance, robbery), and second, he appears to be suggesting that the majority of thefts of a non-domestic nature are within the scope of public interest. In spite of this, however, he bars from the public those thefts which occur when a slave steals from his master, a freedman from his patron, or a hired worker from his contractor. Each of these relationships is characterized by a certain level of duty and subordination (for Marcian does not propose the same relationships in reverse). If the case of the slave is analogous to the others, Marcian appears to suggest that minor thefts be managed within the internal household, which is to say, they ought not be litigated at all (either civilly or criminally) in much the same way that one would not now expect to sue a child who steals from a neighbor's house.<sup>40</sup> Granted, the distinction is different in the ancient and modern cases. Marcian does not seem to hold that theft, broadly speaking, is not of the public concern, but that, if these cases were to be included, it would be overbearing on the system. In spite of this, Marcian recognizes that there is a role for the individual in maintaining order, although this responsibility does not substantively differ from the modern expectation.

If such a distinction was made between criminal and civil proceedings, but had no practical value in terms of litigation, why did civil proceedings persist? Gaius, a half century before Ulpian, inadvertently seems to give substance to the continued presence of private prosecution by omitting any mention of extraordinary jurisdiction with respect to *furtum*, and he only remarks on the civil remedies (*duplum*, *tripulum*, and *quadruplum*).<sup>41</sup>

<sup>36</sup> Although the ordinary procedure disappeared by the time of Diocletian, remnants of the *formulae* persisted only to be officially prohibited by Constantine's sons in 342 (Jolowicz, *HI*, 408n1).

<sup>37</sup> Civil procedure was at least legally conceivable for Justinian since he retained (or perhaps even added (Jolowicz, *DF*, 128-29)) the provision, but it was, as Ulpian says, infrequent.

<sup>38</sup> Macer, D. 47.14.2.

<sup>39</sup> Marcian, D. 48.19.11.1. This same view is expressed by Marcian elsewhere (D. 47.17.2).

<sup>40</sup> One could envisage circumstances in which litigation may be necessary, but it is generally more likely that a parent's reprimanding would be sufficient.

<sup>41</sup> Gaius, *Institutes*, 3.189-192.

However, it ought to be noted that the jurists were more interested in the complexities of civil procedure and generally ignored the criminal aspects. Nevertheless, the presence of the *actio prohibiti*<sup>42</sup> would suggest that there were individuals who in fact proceeded to search the premises of alleged thieves, since presumably such prohibition would not be tolerated by the State. Were it simply for the exposition of the law, for the *Institutes* is an elementary legal textbook, and not of common practice, it would still indicate that these practices were legal, worth knowing, and, most importantly for our discussion, affiliated with the private sphere. Zimmermann sees these actions as having become obsolete by the time of Justinian; however, they could have been in the process of being replaced during, or shortly after, this period.<sup>43</sup>

Without Gaius, Ulpian himself makes a firmer distinction between a diurnal thief and a nocturnal thief where the former is sent to a civil tribunal while the latter is remitted to the praetor's extraordinary jurisdiction.<sup>44</sup> Previously, Paul held that the ordinary daytime thief was to be proscribed a fixed term of labor, while the nocturnal thief was sent to the mines.<sup>45</sup> In view of all the other evidence, it seems unlikely that Ulpian is dividing public concern from private interest based on the hour, for *furtum usus* during the night surely does not receive a punishment of servitude while the same crime during the day would warrant *duplum*. The plausible view is that while the State possessed theoretical jurisdiction over all of *furtum*, it was the State's responsibility to manage thefts of a particularly menacing character.

Finally, what of the choice permitted by Ulpian for the civil or criminal action? Independent of whether or not an individual wishes to pursue a murderer for his crime, the modern state does not recognize the individual's discretion because the matter is of public concern – one may refrain from suing for the tortious claim of wrongful death, however. The same is not true for Ulpian, who proffers the State's authority and power to punish the thief, but who cannot simultaneously revoke the individual's ability to pursue the delict.<sup>46</sup> Transforming the law, as we have seen, is a time consuming process that is built over successive generations and it is possible that Gaius represents a moment akin to the Twelve Tables. The private nature of theft was being challenged by the public one in the same fashion as vengeance had been challenged by pecuniary remedies. At first, the monetary remedies coexisted and served as an alternative, which had been incentivized by their high rewards, but they were later mandated.<sup>47</sup> If indeed it is the case that the civil action is an interpolation, then it is with Ulpian that *furtum* ascends from the *ius civile* and reaches the pinnacle of the *ius publicum*.

<sup>42</sup> Gaius, *Institutes*, 3.188.

<sup>43</sup> Zimmermann, *Obligations*, 940n143.

<sup>44</sup> Ulpian, *Collatio*, 7.4.1.

<sup>45</sup> Paul, D. 18.2.

<sup>46</sup> If one were to pursue the *extra ordinem* procedure in lieu of the *actio furti*, the victim would still likely have had access to the *vindicatio* or, more likely, the *condictio ex causa furtiva* (see Julian, D. 47.2.57.1). Zimmermann attributes this option to Justinian, thus leaving only *extra ordinem* to the victim during the classical period (Zimmermann, *Obligations*, 494).

<sup>47</sup> Zimmermann, *Obligations*, 914.

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## Chapter VI: Conclusion

### The Civil Survival

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#### FROM THE TWELVE TABLES TO DIGEST: STEALING AND THE STATE

Searches are instrumental in the discovery process and as such have been a key theme in the development of *furtum*. Out of necessity, the Twelve Tables endowed the citizen with enough authority to search his neighbor's premises, arrest him, and bring him before a magistrate. The victim had recourse to the archaic, but powerful, search by *lanx et licium* until the Lex Aebutia, which ushered in the progressive restrictions on private searches. Although the citizen was still expected to pursue the thief, he had less power to do so. Following the Lex Aebutia was the introduction of the *actio prohibiti* by the urban praetor to fill the void left by the absence of the *lanx et licium*. The praetorian action's response to abolition of unfettered private searches demonstrates the shifting dynamics between the State and citizen. The *actio prohibiti* permitted the victim to recover from the alleged thief for the non-performance of an action (the refusal of consent to search), but a favorable ruling for the victim neither authorized him to enter the thief's home nor mandated the thief's compliance with a search. However, it also does not seem to have compelled the State to intervene by way of some municipal authority (such as the police).

The *lanx et licium* did not merely fall into disuse and it was not by coincidence that the praetor provided the *actio prohibiti*; the victim was responsible for searches and seizures because the State was endowed with insufficient resources. The State delegated this authority – or usurped it from the perspective of the citizen – while municipal institutions were weak, but the State gradually developed the strength to administer, rather than merely regulate, the affairs of public order. Roman magistracies, major and minor, expanded throughout the Republic and some, the *tresviri capitales* in particular, incorporated aspects of theft into their responsibilities. It is clear though that the individual was indispensable throughout this development and well into the sophisticated bureaucratic phase of the Principate. Even if private searches had fallen into general disuse and victims were increasingly reliant on a magistrate's *cognitio extraordinaria*, the procedure surrounding these searches was sufficiently relevant to merit discussion in Gaius's *Institutes*. In contrast to Gaius, Justinian omits any reference to private searches, solemn or informal in the *Digest*, and he only makes a historical remark in his *Institutes* on these obsolete actions.<sup>1</sup>

Coeval with the decline of civil searches is the consecutive weakening of private discretion and penalties. The Twelve Tables mandated that, in all but the exceptional cases of theft, a thief had to be brought before a magistrate. Although for *furtum manifestum*, a thief would be relinquished to the victim for private punishment, the victim

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<sup>1</sup> Justinian, *Institutes*, 4.1.4. Although Justinian declaims the actions and distinctions concerning searches (e.g., *actio prohibiti* and *furtum oblatum*) as no longer in use, he does not explicitly substitute a State-issued search. Judging by the replacement of the individual with respect to summons, however, it seems plausible that the State also provided someone to supervise or administer the “modern” searches of Justinian's day.

was required to receive the State's approval prior to any legal execution of private penalties. Likewise with the case for *nec manifestum*, but it had, since the Twelve Tables, permitted only pecuniary remedies. However, until as late as the praetorian amendment to *furtum manifestum* mandating pecuniary damages for either slave or citizen, the victim retained a substantial authority to punish a thief at his own discretion,<sup>2</sup> so long as he presented the case for approval first before the magistrate.<sup>3</sup> The State was not adverse to corporeal punishments as illustrated by Ulpian's famous maxim: *Qui non habet in aere, luat in corpore*.<sup>4</sup> Nevertheless, such punishments were not in the authority of the civilian, save exceptional situations, but were available only to the State, who could ascribe a thief to the mines or public works.<sup>5</sup>

As the penalties were refashioned until only the relics remained of the bygone system of vengeance, the exaction of vengeance was slowly refined into the underlying right of self-defense. In the cases of aggravated or nocturnal theft, substantial discretion remained in the hands of the victim, provided that the citizen met the statutory requirements.<sup>6</sup> Perhaps this discretion was the unintended consequence, particularly later in the development, of a system designed to protect the victim and ensure immunity for whatever actions of self-preservation ensued. Apparent loopholes, whereby a thief could be summarily executed in the night, irrespective of the fear of or threat to the victim, were bridged by recognition that the power used to defend oneself was not without limitation. Ulpian was unwilling to abandon the Twelve Tables, but he did contribute a major modification to the extent of self-defense, which was incorporated into Justinian's law absent of any appeal to the Twelve Tables and, consequently, any claim to vengeance.<sup>7</sup>

<sup>2</sup> Technically, it would appear that the magistrate was more responsible for punishing the thief if he were a slave, since he would be responsible for flogging him and then throwing him off the (Tarpeian) Rock (Crawford, *RS*, 614 and 692). Crawford appears correct in asserting the punishment is private, but he is inconsistent in his application of punishments; the magistrate is the to flog both citizen and slave and throw the latter off a cliff in the case of proven *manifestum*.

<sup>3</sup> Whether or not the Lex Poetelia of 326 BCE applied to *furtum manifestum* is not clear. The conservative view would be that *manifestum* retained the *addictio* until mid-second century BCE, while the radical view would presume the Lex Poetelia applied to *manifestum* due to the similar consequences, but despite the lack of reference to this effect. Even if this particular law did not apply, it certainly represents a concern with the unadulterated authority of private individuals over other citizens (or even non-slaves, although the praetorian modification actually mandates pecuniary damages for both slave and citizen).

<sup>4</sup> *He who cannot pay in copper, must pay with his body*. This maxim probably derives from Ulpian's more specific statement: "*Generaliter placet, in legibus publicorum iudicorum vel privatorum criminum qui extra ordinem cognoscunt praefecti vel praesides ut eis, qui poenam pecuniariam egentes eludunt, coercionem extraordinariam inducant*" (Ulpian, D. 48.19.1.3).

<sup>5</sup> This "monopoly on the legitimate use of violence [force, *vis*]" evokes the theory of (modern) statehood espoused by Max Weber (*Politics as a Vocation*). Rome had no such monopoly during the Republic, despite having tried to absorb such authority, but was significantly more successful during the Empire.

<sup>6</sup> Gaius required *quiritatio* for both aggravated and nocturnal thefts, but Ulpian does not seem to be of the same mind on the latter case.

<sup>7</sup> Ulpian is credited with the limitations on self-defense in both the *Collatio* and *Digest*. In the *Digest* (Ulpian, D. 9.2.5.pr), Ulpian is almost directly quoted from the passage found in the *Collatio* (Ulpian, *Collatio*, 7.3.2-3), but without mention of the Twelve Tables and a slight modification to conditions: Justinian has added "for fear of death" (*metu mortis*). Justinian is particularly adamant on this point because he later reiterates through Ulpian that: "If anyone kills a thief by night, he shall do so unpunished if and only if he could not have spared the man[*'s* life] without risk to his own" ("*Furtem nocturnum si quis occiderit, ita demum impune ferret si parcere ei sine periculo suo non potuit*") (Ulpian, D. 48.8.9).



## THE STATE AND CITIZEN: BETWEEN THE SPHERES

Justinian inherited a bureaucratic infrastructure developed in the late Republic and expanded during the Principate, which had become capable enough to administer the responsibilities as the State saw fit. Considering the immense wealth Rome had acquired after the Punic and Macedonian Wars when Rome covered only half the area it would later inhabit, the question of ability is actually subsidiary to the integration of the State's interests and those of the public. In other words, prior to the realization (or admission) that *furtum* affected both State and citizen, any effective ability to intervene in private affairs would be meaningless without the State's interest in doing so. Throughout the history of *furtum*, the State repeatedly demonstrated a concerted effort in curbing popular justice, even though such efforts were not truly realized before Augustus. It had been the case that the State relied on private authority to execute actions in the public interest, but the lack of central authority, especially in the turbulent period of the late Republic, demonstrated the need for a comprehensive approach to civil order.

The beginning of the late Republic gave rise to the *quaestiones perpetuae* and later the civil wars demonstrated the need for a centralized approach to maintaining order. Furthermore, the State seems to have realized its own interests in the maintenance of public peace, absence of which had threatened the State's fundamental ability to govern in years prior. At the expense of republican freedom, the State ensured imperial peace. While it is certainly true that the State benefited materially from the inclusion of *furtum* by way of property forfeiture and servile labor, such "benefits" would not have outweighed the burden on the State.<sup>8</sup> *Furtum* had come fully into the light of the public sphere, but the private sphere was not entirely eclipsed.

*Furtum*, long after it has been brought under criminal procedure, never lost its civil character. *Iniuria* permitted the victim the option to press criminal charges or to pursue a civil claim, but it demanded neither; likewise, *furtum*, even though it was deemed of pressing public concern, never circumvented the citizen in applying a remedy. In many cases of *iniuria*, this may very well be an appropriate approach, but the application of this method to *furtum* is peculiar considering its nature. Nonetheless, *furtum* was less dissociated with the private sphere as it was added to the public.

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<sup>8</sup> Since the choice between applying criminal and civil liability rested with the citizen, the fiscally rational choice would be to employ civil liability where there was something to gain; however, one could just as easily request the criminal liability out of spite for some arrogant *honestior*. Despite claims that civil liability fell into disuse – leaving criminal liability by default – as a result of a declining slave population (relevant because of noxal liability, which permitted the victim to sue the master for either the slave or the high penalties), which in any case would be better applied to Justinian than to Ulpian, the State did not dictate which method to use (Duff, *Furtum and Larceny*, 88). Moreover, if it was indeed true that most thieves were of modest means, then it is all the more reason to illustrate that the State was not compelled by financial incentive to envelop *furtum*, even if it did occasionally profit from the wealthy embezzler.

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TRYPHONINUS	<i>Digest</i> , 3.2.6.pr.
<i>Digest</i> , 13.1.20	<i>Digest</i> , 9.2.5.pr.
PAULUS	<i>Digest</i> , 9.2.27.21
<i>Digest</i> , 1.15.1*	<i>Digest</i> , 43.16.1.27
<i>Digest</i> , 1.15.3.1	<i>Digest</i> , 47.2.3
<i>Digest</i> , 18.2	<i>Digest</i> , 47.2.18.1-2
<i>Digest</i> , 3.2.6*	<i>Digest</i> , 47.2.21.pr
<i>Digest</i> , 3.3.42.1	<i>Digest</i> , 47.2.25.1
<i>Digest</i> , 18.2	<i>Digest</i> , 47.2.36.pr.-1
<i>Digest</i> , 47.2.1.3	<i>Digest</i> , 47.2.46*
<i>Digest</i> , 47.2.22.10	<i>Digest</i> , 47.2.47
<i>Digest</i> , 47.2.24	<i>Digest</i> , 47.2.48.pr.
<i>Digest</i> , 47.2.67.2	<i>Digest</i> , 47.2.50.1
<i>Digest</i> , 47.2.89	<i>Digest</i> , 47.2.52.6
<i>Digest</i> , 47.10.23	<i>Digest</i> , 47.2.52.13
<i>Digest</i> , 48.1.2	<i>Digest</i> , 47.2.53
<i>Digest</i> , 48.13.11*	<i>Digest</i> , 47.2.55.7
<i>Collatio</i> , 7.2	<i>Digest</i> , 47.2.55.22-23
MACER	<i>Digest</i> , 47.2.66
<i>Digest</i> , 47.14.2	<i>Digest</i> , 47.2.93
<i>Digest</i> , 47.2.64	<i>Digest</i> , 47.10.5.pr.
<i>Digest</i> , 48.1.1*	<i>Digest</i> , 47.18.1*
<i>Digest</i> , 48.1.7*	<i>Digest</i> , 47.20.2*
<i>Digest</i> , 48.11.7*	<i>Digest</i> , 47.20.3.pr.-1*
<i>Digest</i> , 48.19.10*	<i>Digest</i> , 47.20.3.2
MARCIAN	<i>Digest</i> , 48.1.3*
<i>Digest</i> , 47.17.2	<i>Digest</i> , 48.2.16
<i>Digest</i> , 48.6.3.5*	<i>Digest</i> , 48.6.10.pr.-2*
<i>Digest</i> , 48.8.1	<i>Digest</i> , 48.8.4.2
<i>Digest</i> , 48.13.5.4*	<i>Digest</i> , 48.8.9
<i>Digest</i> , 48.13.6*	<i>Digest</i> , 48.13.3*
<i>Digest</i> , 48.19.11.1	<i>Digest</i> , 48.19.1.3*
CALLISTRATUS	<i>Digest</i> , 48.19.5.pr.*
<i>Digest</i> , 48.20.1.pr.	<i>Digest</i> , 48.19.8.9
ULPIANUS	<i>Digest</i> , 48.19.13
<i>Collatio</i> , 7.2.2-3	MODESTINUS
<i>Collatio</i> , 7.4.1-3	<i>Digest</i> , 48.3.14.pr-2
<i>Digest</i> , 1.1.2	HERMOGENIAN
<i>Digest</i> , 1.12.1.pr.	<i>Digest</i> , 47.10.45
<i>Digest</i> , 1.18.13.pr.	
<i>Digest</i> , 2.7.1.pr	

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<sup>i</sup> Included in this index are not only the sources cited in the paper, but also those which bear relevance either directly or indirectly and, at any rate, served to inform my view on the State, the public, and *furtum*. An asterisk notes portions of the *Digest* not cited in this paper but are of some relevance, but is by no means an exhaustive list.