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Paying the Price for Being Caught: the Economics of Manifest and non-Manifest Theft in Roman Criminal Law

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Abstract

In Roman Law, manifest theft (essentially, the one in which a thief was caught in the act) was punished with a more severe penalty than non-manifest theft. This legal policy seems to contradict the multiplier principle and efficient deterrence. Apparently, we should expect the penalty for manifest theft to be lower than for non-manifest theft since the probability of detection and conviction is higher for the former and lower for the latter. In this paper, we provide several efficiency-based arguments to solve the puzzle.

*Summary**

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1. Introduction

In Roman Law, the offenses (*crimina*) punishable by criminal Courts, following a State-controlled procedure, were either offenses directly against the political community (like treason, for instance), or offenses which were directed at individuals but produced insecurity in the entire community (some instances of murder, for example). These Courts, together with their rules and procedures, covered only the offenses understood to affect the state or the society as a whole. Other actions that nowadays we consider as punishable crimes, like simple (*furtum*) and aggravated (*rapina*) theft, and assault, were considered not to be *crimina*, but *delicta* (the ancestor of torts), and left to private Law courts and private prosecution. They were thought to have only an individualized effect upon a particular victim. However, forgery and counterfeiting (*falsum*) was a public *quaestio* because it was seen as making everyone's property more insecure (Andrew RIGGSBY,1999).

The victim suffering from a given behavior could go to civil courts or before the authorities to lay charges. In the vast majority of the cases, the authorities had no reason to intervene since reparation was paid. Certain classes of thieves were identified as very dangerous to society (usually due to large scale operations) and aggravated penalties were imposed by criminal courts. In these cases, the state intervened and it is not clear if a choice of prosecuting these classes of thief in civil courts was given to the victim.

Roman criminal or standing jury Courts (*iudicia publica*) are somehow different from the institutions with that name nowadays. The criminal inquiry (*quaestiones*) was heavily adversarial. The defendant, represented by one or more counsels, was faced by a private person (singular or plural) who acted as prosecutor. Neither side was typically a legal professional, though these were usually consulted. The state could accept or reject (by the praetor or a less important officer) the case, and would arrange for the best prosecutor in case more than one claim was made. The penalties were fixed by law, and damages should be assessed by the same jury in a separate proceeding (*litis aestimatio*). The court was presided by the praetor or his subordinate (*quaesitor*). No clear guidelines existed to determine the burden of proof.

Most of the offenses in Roman Law gave the injured party a right to civil actions[1]. These offenses were designated as *delicta*, including larceny and theft (*furtum*), robbery with violence (*rapina*), damage or losses to property (*damnum iniuria datum*), and personal injury (*iniuria*). Some other acts were described as quasi delicts. These quasi delicts bear, to some extent, a resemblance to modern vicarious liability principles, when one person is liable for acts of other people (e.g., employees) even though he is unaware of what they are doing.

[1] Those technically civil actions could be punitive (*actiones poenales*) in nature, like a given multiple of the stolen sum, restitutionary (*actiones reipersecutoriae*), like recovery of stolen gods, or mixed (*actiones mixtae*). The first two kinds could be accumulated in a given case.

The delict of theft could be manifest (*furtum manifestum*) or non-manifest (*furtum nec manifestum*). Manifest theft took place when the thief was caught in the act (or before the thing was transferred to the place the thief had designated for its storage). The penalty would be four times the value of the stolen good[2], whereas for non-manifest theft the penalty was just the double. The more severe penalty for manifest theft is explained by legal historians as an incentive for the victim (the injured party) not to kill the thief caught in the act and comply with legal proceedings (Henry SUMNER MAINE, 1986, but originally 1861[3]; Theodor MOMSEN, 1899), and as the result of certainty that the person apprehended is the thief (Alan WATSON, 1991)[4]. Killing the thief was generally unlawful[5].

The incentive for the victim not to kill was reinforced by the existence of noxal liability since it created a fair chance of reparation (Olivia ROBINSON, 1995)). When a delictual action was brought against the father or the master (*paterfamilias*) for the wrong committed by the son or by the slave, the former had the choice of either paying the amount due, or of handing over his dependent. However, if the master himself was directly involved in the wrongful action, he usually lost his right to noxal surrender[6].

A ritual search (*lance et licio*) for stolen property was established[7]. If the stolen property was found, the theft was treated as manifest. When the stolen property was found without the formal search, the penalty was reduced to three times the value of the stolen goods[8].

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[2] In archaic Roman Law, it is claimed that manifest theft led to corporal punishment and even enslavement (for adults), whipping (for impubers), and corporal punishment and immediate throwing from the Tarpeian rock (for slaves). See MONTESQUIEU (1772); Francisco HERNANDEZ TEJERO (1951); Reinhard ZIMMERMANN (1996).

[3] Henry SUMNER MAINE thought that the scale of punishment was adjusted to the degree of revenge sentiments in the victims that would arise as a likely consequence of the thief's action.

[4] We will later examine in detail the rationale behind these theories of the Roman distinction.

[5] Until the second century AD, it was lawful to kill someone stealing at night (*fur nocturnus*), or using a weapon even during daylight (*fur diurnus qui telo se defendit*), with the only requirement to call other people to watch the killing of the thief (obviously, to prevent strategic use of these self-defense possibilities).

[6] In later stages of legal development (post-classical period), only slaves could be noxally surrendered. Also it seems that noxal surrender has never applied to women. On *noxae deditio*, from an economic perspective, see Francesco PARISI (2001).

[7] The ritual involved being naked, except for an apron (*licium*) to conceal the privy parts, and carrying a dish (*lanx*) in each hand, all of this presumably as an expiation to the household gods disturbed by the search. See Reinhard ZIMMERMANN (1996).

[8] This remedy could be obtained through the *actio concepti*. The action depended on whether or not the owner of the household where the stolen goods were found was the thief. The householder could have an action against the person who placed the stolen goods in his household (*furtum oblatum*).

Violent robbery (*rapina*[9]) was initially subject to the same penal remedy (*in quadruplum*) than manifest theft, and even later, during the Justinian period, the penal remedy was reduced to three times the value of the stolen goods, although the victim could claim restitution of the property through *rei vindicatio* or *condictio*[10].

2. Is the Roman Rule an Exception in Historical and Present Terms?

In ancient Germanic Law, the prevailing rule against unlawful actions over property seems to have at the same time coincided and departed from the classical Roman rule, because it privileged, in terms of magnitude of punishment, overt illegal actions over concealed ones. Secret and concealed takings of someone else's property (*Diebstahl*), even those not involving any violence or further damage, were punished more severely than open and aggressive takings (*Raub*) of goods belonging to others. However, in case of a concealed taking being the criminal caught on the spot (or after house search on closed premises, an extension of the concept resembling somewhat the Roman lance et licio search) -*handhafter Diebstahl*- was subject to more severe penalties, often involving execution of the thief [11].

Traditional rules of Roman Law of theft seem to have survived in the early Middle Ages. In the *Lex Romana Visigothorum* or *Breviarum Alaricianum* (AD 506), the distinction between manifest and non manifest theft is kept, and the same happens with the corresponding penalties *ad quadruplum* and *ad duplum*. The also visigothic *Liber Judiciorum* (AD 654), considers non-manifest theft the central concept of *furtum*, with the familiar *ad duplum* penalty. In addition to that, it establishes a range of types of aggravated theft, which includes the manifest, but also the nightly theft, theft of goods belonging to the Treasury, theft contested in Court by the defendant. The penalty foreseen for all these types is nine times the value of the stolen goods. Moreover, when the defendant cannot pay the penalty, he becomes the slave of the plaintiff[12].

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[9] Although certain circumstances surrounding the act made a non-violent theft a *rapina*: public unrest, catastrophe, fire.

[10] For f*urtum* the penal action for *quadruplum* could be added to the civil restitutionary remedy.

[11] See Heinrich BRUNNER (1958). See also David FRIEDMAN (1979) on the punishment for murder in medieval Iceland: After killing a man, the killer was obliged to announce that fact immediately. A killer who tried to hide the body, or otherwise conceal his responsibility, was guilty of murder. Killing was made up by a fine, and for a murder a man could be outlawed, even if he was willing to pay a fine instead.

[12] See Gonzalo RODRÍGUEZ MOURULLO (1962).