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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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BARCELONA, FEBRUARY 2005

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**

* We are grateful to Giuseppe Dari-Mattiacci, Antonio Hespanha, Bruce Johnsen, Daniel Klerman, Bruce Kobayashi, Craig Lerner, Iñigo Ortiz de Urbina, Maurici Perez-Simeon, Eric Posner, Olivia Robinson, and Alan Watson for extremely helpful suggestions and comments. Part of the paper was written when both authors were Visiting Professors at George Mason University School of Law, whose hospitality and the opportunity to present an earlier version of this paper at the Levy workshop is gratefully acknowledged. Nuno Garoupa acknowledges financial support from Nova Forum and the Portuguese Ministry of Higher Education and Science under grant POCTI/ECO/44146/2002. Fernando Gomez acknowledges the financial support from the Spanish Ministry of Science and Technology under grant BJU2001-0956. The usual disclaimers apply.

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).

In later centuries, the direct influence of the Roman criminal Law rules seems to have waned to a certain extent[13], probably in favor of local customs of Germanic origin. Canon Law, with its emphasis on penitence and forgiveness, may have also played a role in the decreased importance of the Roman conceptual distinction. Still, its basic content was far from dead. Many local regulations (*fueros*, in the Spanish historical term), at least in Southern Europe, seem to have kept the distinction between *vencido por furto* (literally, won at theft: the defendant lost in Court after legal proceedings for theft) and *preso por furto* (literally, captured at theft: the thief was captured *in flagrantis*), punishing the latter more severely (often with *duplum* but also with death on top of the monetary penalty). We have even found other rules in Medieval Criminal Law resembling the Roman rule on *furtum*, thus punishing flagrant actions less heavily, but referred to other kinds of illegal acts.

The *Fuero de León* (AD 1020 approximately), which was widely enforced at the time across the northwestern quadrant of the Iberian Peninsula, punished more severely the murderer who was caught within 9 days of the murder. In fact, if the murderer could return home after 9 days without being caught, he could escape any punishment, public or private.
In the early renaissance period, the German *Constitutio Criminalis Carolina* (1532) still mentions the distinction between secret and public theft, and imposes *duplum* and *quadruplum* in favor of the victim, respectively. But the distinction applied no more than to petty theft, and only when the thief was an otherwise respectable person and could pay the penalty[14].

In later periods, general ideological and political trends, and technological changes concerning crime prevention and law enforcement, led to the progressive assumption by the State of crime prevention and sanctioning activities. This, in turn, seems to have produced the elimination of the old Roman rules on *actiones poenales*, which were based on the exercise of formally private actions by the aggrieved party. The separation between manifest and non-manifest theft was but one part of this private enforcement system of crime prevention rules. Moreover, during the XVIIIth century the rule was subject to severe criticism by very influential theorists, such as MONTESQUIEU and Cesare BECCARIA. The former called the distinction barbaric, because the difference in penalties had nothing to do with the nature of the crime[15]. The latter expressed the policy of employing the use of force as the only basis for aggravating penalties in theft[16]. In the XIX century, SUMNER MAINE named the conceptual distinction archaic, and based upon a rude jurisprudence[17].

[13] In those legal documents showing a heavier influence of the late medieval reception of Roman Law, such as the Castilian *Partidas* (1256-1263) of King Alphonsus X the Wise, the Roman distinction between manifest and non-manifest theft, and their different monetary penalties, have been preserved almost verbatim, with the addition in both cases of corporal punishment. But manifest theft is no longer one of the cases of aggravated theft (where death penalty is imposed), which now cover the theft of precious goods (as defined by the owner: the Church or the King). See also José Maria RODRÍGUEZ DEVESA (1951).

[14] Otherwise, the thief was subject to pillory, whipping, and banishment.

[15] See MONTESQUIEU (1772).

[16] Cesare BECCARIA (2003, but first 1764).

It should be noted, however, that Markus DUBBER (2001) discusses an act passed by the British Parliament in 1851 setting a three-year prison term for a person caught by night in possession of certain goods (for example, a key or a picklock) without lawful excuse, the burden of proof for such excuse being on his or her side.

In modern Criminal Law, the distinction between manifest and non-manifest actions, and also in the field of illegal takings of property, seems to have become virtually meaningless. Criminal sanctions for theft are aggravated when violence or threats are used to execute the taking, or when damage on other pieces of property (like in a forceful break-in into a house) results from the theft[18]. Concealed and secretive illegal actions (including theft) tend to be, in general terms, more severely punished by Modern Criminal Laws[19]. Voluntary surrender to the authorities soon after the crime is committed, which was an instance of manifest theft in Roman Law, involves a lighter punishment for the criminal[20]. It is not surprising that committing the action involves a lighter penalty and the sanction will be reduced when, after the fact the author of the crime, including theft, turns himself in to the authorities, or voluntarily confesses to the crime before being captured. These cases, if close enough in time to the illegal taking, were deemed manifest theft in Roman Law, and subject to the increased penalties of manifest theft.

It is true, though, that crimes discovered *in flagrantis* usually involve a speedier trial and a higher likelihood of the imposition of the criminal sanction, thus weakening to a greater or lesser extent, in expected terms, the impact of any decrease in the magnitude of sanctions for manifest theft that the doctrines just referred in modern Criminal Law might imply.

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[17] Henry SUMNER MAINE (1986, but originally 1861).

[18] Art. 237, Código penal, for Spain. For Portugal, Art. 71, Código penal. For Germany, Paragraphs 243, 244, and 249 Strafgesetzbuch.

[19] Art. 22, Código penal, for Spain. For Portugal, Art. 91, Código do processo penal. For Germany, Paragraph 46 Strafgestetzbuch.

[20] Art. 21 Código penal, for Spain. For Portugal, Art. 72, Código penal. For Germany, Paragraph 46 Strafgestezbuch.

3. An Economic Analysis of Manifest and non-Manifest Theft

The economic model suggests (for example, Mitchell POLINSKY and Steven SHAVELL, 2000) that efficient deterrence (or optimal law enforcement) is achieved when the expected sanction equals the social harm caused by the crime or offense (the so-called multiplier principle)[21]. In the case of manifest theft the probability of detection and punishment is higher than in the case of non-manifest theft for the same level of resources invested in apprehension and punishment. Apparently, we should expect the sanction for manifest theft to be lower than for non-manifest theft for the same underlying unlawful act (that is, generating the same level of social harm)[22]. The fact that the sanction for manifest theft was in fact higher than non-manifest theft is at odds with the multiplier principle and seems to be inefficient.

These observations are reinforced if we analyze the matter in the context of the economic models of avoidance activities (for example, Arun MALIK, 1990) and self-reporting (for example, Louis KAPLOW and Steven SHAVELL, 1994). Manifest theft could be seen as an expression of self-reporting behavior by which offenders make detection and prosecution easier whereas non-manifest theft could be understood as a consequence of criminal avoidance activities (offenders exert some effort to hide unlawful activities). There are two reasons why penalties should be designed to encourage manifest rather than non-manifest theft. First, it lowers investigation and prosecution costs for victims. Second, it reduces criminal avoidance activities that are just a waste of resources (and make detection and punishment more costly).

Looking from a perspective of marginal deterrence (for example, George STIGLER, 1970), we could say that manifest theft is less socially harmful than the non-manifest version of it (because it involves wasteful avoidance activities). Therefore the penalty for the former should be lower than for the latter. If individuals are not deterred, at least they should be given an incentive to commit manifest theft (easier to punish) rather than non-manifest theft (more difficult to punish and with costly criminal avoidance activities). Again the principle used in Roman Law is totally at odds with this conclusion[23].

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[21] This general result should be carefully qualified since the social harm could also include enforcement costs necessary to achieve deterrence, including judicial measurement costs to authenticate theft, see Mitchell POLINSKY and Steven SHAVELL (2000).

[22] In some cases, manifest theft is more harmful than non-manifest theft and hence punishment should be more severe. This will certainly be the case when theft is done in the face of the victim, with more emotional harm, or when it includes confrontational elements.

[23] Another possibility is that manifest theft is in fact a kind of unfinished crime, hence the marginal deterrence principle would justify a penalty enhancement for non-manifest theft on the basis of the harm difference between unfinished and finished theft.

In summary, Roman Law seems to violate the multiplier principle as well as the principle of marginal deterrence (in the context of avoidance activities and self-reporting). However, we should not conclude immediately that sanctioning more severely manifest theft is necessarily inefficient or no economic rationale can be provided. We investigate three nonexclusive perspectives.

3.1. Legal Error or Wrong Conviction: Problems with Enforcement Technology

a) Richard POSNER's Explanation

One possible explanation of the rule is the one advanced by Richard POSNER (1981). For POSNER the logic of the rule lies behind the willingness to avoid an excessive level of wrongful convictions for non-manifest theft. When the thief is not captured on the spot, and speedily brought before justice, that is, when theft is non-manifest, the likelihood of mistakenly convicting an innocent is high, due to the high costs and quick obsolescence of evidence in societies such as that of Ancient Rome: to provide evidence *post-factum* is very costly, given that written records are scarce and expensive (*vellum* and not paper is used, most people do not read nor write), and oral testimony is more perishable and less reliable than it is now. Other evidentiary instruments (so-called scientific modes of evidence, such as fingerprints, or DNA sampling and comparison) were non-existent or extremely primitive. So a reduced penalty for non-manifest theft makes sense to reduce the social burden of wrongful convictions for theft.

In modern times, the probability of mistaken convictions for both kinds of theft has substantially equalized, and thus, given the increased probability of conviction for manifest theft, it is efficient to eliminate the privilege of non-manifest theft in terms of sanction, and, may be, even to invert the Roman rule, and punish manifest theft more lightly than non-manifest theft.

This theory seems to fit well also with the broad application of the *actio furti* in Roman Law. *Furtum* covered a substantially broader ground than the modern concept of theft[24]. Any use[25] of a thing by a non-owner contradicting the desires of the owner could give rise to the *actio furti*. For instance, if a lessee mishandled the leased good, or an agent used for private purposes the good of the principal there was a case of *furtum*[26].

[24] It can be argued that the distinction between manifest and non-manifest theft was an interim taxonomy along the road to identifying what we now regard as theft.

[25] Provided it is in bad faith: *Dolus malus* is an element of the ideal type of furtum: Paulus, 2.31.1: *Fur est qui dolo malo rem alienam contrectat*.

[26] For instance, the Epitome Gaius 2, 10, 3 cites as a case of *furtum* that of the rider of a donkey for a longer distance than the one authorized by the owner. And Justinian's Instituta IV. I.6 say that if a person ride a horse that was lent to him for the purpose further than was contemplated, there is theft. In Digest 13.I. 18, to knowingly receive coins that are not owed is considered theft.

These cases of illegitimate or abusive uses of assets which were voluntarily put in possession of the potential offender, are typically hard to discern from cases of legitimate uses, because one needs to interpret the contract (which may be an oral contract) to determine the legal consequences of such a use. Given that this grey area is much more common for non-manifest behavior, the lighter punishment for the latter reduces the cost of wrongful convictions of legitimate users of alien property.

The Posnerian theory of ancient criminal Law rules (minimization of wrongful convictions) has been subject to criticism, however, on the basis of its inability to explain other common rules in ancient legal systems, such as the Biblical rule that sanctions theft of cattle and sheep more severely when the thief has killed or dispose of them, than when the animals are still in possession of the criminal[27].

b) Economic Interpretations of Legal Historians' Explanations

Related to legal error and the likelihood of wrong convictions, some legal historians (for example, see Andrew RIGGSBY, 1999) offer an explanation for more severe punishment of manifest theft based on the preferences of the Roman legal professionals. According to this view, Roman legal professionals were very much concerned with the reputation of the legal system, namely that offenders but not innocent people were punished under Roman Law. Punishing innocent people would generate a high reputation cost that could undermine the credibility of Roman Law and trust in the political and judicial organization of society. In order to avoid this cost, or at least reduce its magnitude, the sanction should be lower when there is a higher probability of wrongful conviction.

This argument is actually quite close to Thomas MICELI (1991) and can be given an economic interpretation. A model where deterrence goals are weighted against a cost of miscarriage of justice is developed. He concludes that lower sanctions are consistent with optimal law enforcement. The rationale for this conclusion is that the marginal cost of miscarriage of justice is positive and increasing in sanctions (higher sanctions mean that innocent individuals wrongly convicted will be more severely punished). A social-welfare maximizing government should balance the deterrence marginal gain of a higher sanction against the marginal cost of miscarriage of justice, a point neglected by previous literature.

[27] See Francesco PARISI (2001) for this criticism.

There is nevertheless a possible second economic interpretation for the argument by legal historians. When jurists and judges care about wrong convictions, there could be a chilling effect caused by high penalties. Consequently a negative correlation might be established between sanction and probability of conviction for a certain level of legal error. Imposing a higher sanction for non-manifest theft than for manifest theft could lead judges to punish non-manifest theft too infrequently. Therefore, a lower sanction for non-manifest theft could be justified in order to induce judges to apply and enforce it, given the likelihood of wrong conviction[28].

These two economic interpretations are quite distinct in substance but compatible with the explanation provided by legal historians. The first argument, along the lines of Thomas MICELI (1991), justifies less severe punishment for non-manifest crime by means of a trade-off where deterrence is balanced against cost of miscarriage of justice. The second argument relies only on deterrence by arguing that severe sanctions and penalties could be enforced less frequently if there is legal error (due to a chilling effect on judicial behavior), and therefore the expected sanction could end up being lower when a very high sanction is chosen than when a less severe sanction is set.

3.2. Private Nature of Criminal Prosecution: Adequate Incentives for Victims

a) The Theory based on Private Retaliation Avoidance (Francesco PARISI, 2001)

Francesco PARISI sees the gradual emergence of talionic principles (eventually, subject to multipliers) in ancient Laws of different societies as an evolutionary process that avoids the very harmful consequences of unlimited exercise of retaliation and private justice, specially when not just one person, but a family, clan, or tribe is at stake. So the talionic penalty should provide sufficient moral satisfaction to the victim, or his or her clan, for the offense suffered, so that the risk of inefficient physical retaliation is avoided. According to him, the use of multipliers for redistributive crimes, such as theft, is explained by two factors: Firstly, differences in valuation by offender and victim tend to be small. Second, probability of detection of such crimes was also small.

Also legal historians (most notably Alan WATSON, 1991) have detected a major concern with manifest theft leading to excessive private punishment (for example, the victim could end up killing the offender for relatively unimportant or costless thefts). From this perspective, the difference in sanctions for manifest and non-manifest theft is not justified by the underlying harm they generate, but by the need for achieving deterrence of private punishment in manifest theft. A more severe

[28] It must be noted that a chilling effect of harsh penalties on judicial sanctioning attitudes can happen regardless of the likelihood of judicial mistake. If Courts think a new penalty introduced by the legislature is excessive or disproportionate to the wrongfulness of the offense, they might resort to interpretive methods or strategies that reduce the impact of the increased penalty. In fact, it is not uncommon in Europe that Constitutional Courts strike down sanctions imposed by Statute on the grounds that their magnitude violates the principle of proportionality in sanctioning that is written, or implicitly found, in several European Constitutions. It is clear, though, that the risk of legal error and wrongful convictions increases the chances, and the size, of the possible chilling effect.

sanction guarantees compensation for the victim both in terms of monetary reward, but also with respect to retribution.

b) Inefficiency of Private Punishment: Fundamental Divergence Between Optimal Punishment and Private Choices

Explanations based on private retaliation avoidance touch on a more general issue, namely private bargaining between offender and victim. A clear distinction between non-manifest and manifest thefts is the possibility of private deals (including the possibility of private punishment). Generally speaking, private punishment is not expected to be efficient (Steven SHAVELL, 1993) due to the fact that victims, typically, only care about the harm they have suffered, that is, they do not care about the benefits to the offender and possible effects on third parties. Victims maximize their own expected utility, not social welfare.

There is a fundamental divergence between socially optimal punishment and private punishment by victims (or more generally by victims and third-parties). Private punishment could be below or above the efficient level. On one hand, victims ignore the harm caused by the theft for third parties and the social benefit in terms of future deterrence from public enforcement (this point is especially problematic if secret private deals are arranged between the two parties). Nevertheless, on the other hand, victims also neglect the benefit generated by the theft to the offender as well as other possible social benefits such as income redistribution (in particular, in the absence of a welfare state). Along this line, it could be argued that the increased penalty of manifest theft tried to avoid inefficient (from a social welfare perspective) bargains after the theft between thief and victim. Naturally we should expect that the fact that someone was a thief, to be hidden by a private deal and not made public, therefore it would not be known to others who in the future might interact with the thief. That piece of information was socially relevant, and the fact that theft, at least in early medieval Roman Law, implied infamy for the offender, attests to this. In this respect, the higher sanction for *furtum manifestum* would serve similar objectives as the punishment of blackmail[29].

[29] See Fernando GÓMEZ and Juanjo GANUZA (2001) on the relationship between the social value of personal information and the Law of blackmail.

In cases of non-manifest theft, the likelihood of *ex post factum* private composition between victim and thief was slim, so the victim, in order to obtain remedy, had to initiate legal proceedings: The discrediting information concerning the thief would be known to the entire community, which would improve social welfare. When the thief was caught by the victim, the likelihood of private composition was high, so the information on the thief would not reach the whole community. Increasing the monetary penalty for manifest theft[30] would make private hidden deals less likely, because the thief would be, with higher probability, unable to pay the amount that the victim would try to extract from him: the higher the penalty, the higher the bribe that the private enforcer would ask to abstain from enforcing. Why would the victim, then, insist in enforcing, and not simply trying to cash in the entire wealth of the thief caught on the spot? Because if, after the civil trial the thief was insolvent and could not pay the increased penalty for manifest theft (*quadruplum*), the victim could enslave the thief, that is, obtain an asset likely to be more valuable than the entire material wealth of the offender[31].

c) Precaution Incentives for the Victim

Another important aspect to be considered when law enforcement technology is not very sophisticated is the behavior of potential victims to avoid theft. Precaution becomes particularly relevant when public enforcement of the law is not very well organized and accurate judicial measurement is highly costly.

Generally speaking, private precaution aims at deterring theft. Nevertheless, when it does not fully deter offenders, it may make a successful theft to be more difficult to complete. For example, building fences and hiding valuable objects might not deter someone from breaking in, but it reduces the likelihood that such person will easily find a valuable object to steal and will make escaping more difficult.

A reduction in the chances of successfully escaping without being caught increases, for the same underlying offense, the likelihood of being manifest rather than non-manifest theft. Therefore, providing incentives for private precaution could be interpreted as a mechanism not only to deter theft, but also to increase the proportion of manifest rather than non-manifest for the undeterred thefts.

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[30] The legal system could also outlaw and sanction private arrangements between offender and victim, as most modern legal systems do in most circumstances. Roman Law might have been factually unable to do so, because of entrenched beliefs of private justice and reparation among the citizenry, or unwilling to do so, given the likely ineffectiveness of a ban on private deals. In fact, collusion between accuser and accused was a criminal offence, and private agreements between parties as a cover-up for malicious behavior were restricted. It is extremely likely, though, that private reparation would have reached significantly higher levels of occurrence than in modern legal systems.

[31] The problem of insolvency of offenders when penalties for theft are monetary was underlined already by Cesare BECCARIA.

A more severe penalty for manifest theft could be justified as a mean to provide a higher expected compensation for the victim, thus somehow inducing the victim to take more and careful precaution. Victims are more compensated as they take more precaution, and in principle the fact that a certain theft was manifest rather than non-manifest could be the consequence of more private precaution.

The rationale of the argument we propose is based on the idea that in the absence of incentives, private precaution is sub-optimal. The economic literature is not immune to controversy in this particular aspect (Nuno GAROUPA, 2001), but given the lack of effective public enforcement, it is not difficult to accept that we would need private precaution to internalize negative externalities caused by theft. Hence, we would expect the private choice of precaution to be less than the social efficient choice.

3.3. Incentives for Criminals

a) Shaping Preferences and the Educational Theory: Incentives for Shrewdness and Cunning

MONTESQUIEU (1772) when dealing with differences between the Criminal Laws across different societies, expresses the view that the lighter punishment for non-manifest theft was an incentive for citizens to become smart and not stupid thieves. He holds[32] that the Romans had adopted the rule inspired by the Spartan Laws by Licurgus, who only punished criminals who where incompetent enough to let themselves be captured on the spot or shortly thereafter. The Spartans and the Romans, thus, used criminal Law to instill values of shrewdness and cunning among their citizens, presumably for military purposes[33].

The historical basis of this theory is now widely discredited[34], and its explanatory power is doubtful, though the connection it poses with societal values might illuminate somewhat the contrast of the Ancient Roman Law of theft with Ancient Germanic Law.

b) Non-Manifest Theft may be Negligent, but Manifest Theft is Almost Always Willful

[32] As many scholars in the XVIIIth century did, mistakenly thinking that most of Roman Law had Greek origins.

[33] This theory was widely shared in the XVIIIth and XIXth centuries. A popular textbook (John ROBINSON, 1807) on Greece explains it in the following way: *Spartan youths were permitted to steal, provided they managed so dexterously as not to be detected in the theft; but if they were discovered, they were beaten with stripes… The design of this law was to accustom these to defeat the vigilance of the persons who watched over them, and exposed themselves courageously to the severest punishment, if they did not exert that dexterity which was required of them*.

[34] See Wolfgang KUNKEL and Martin SCHERMEIER (2001), stressing the fact that Roman jurisprudential and legal thinking was largely independent of Greek influence in its formation and global conception.

So far we have assumed that a certain theft being manifest or non-manifest is a rational decision by the offender. However, given the extremely wide scope of *furtum* in Roman Law, there is a chance that some proportion of non-manifest thefts may have been in fact, even if *dolus* had to be theoretically established to be deemed furtum instances of inadvertent breach of contract[35], that went unnoticed for some time, or even until the contractual relationship came to an end, and thus sanctions to deter such conduct needed not be as high as those to deter willful and overt acts of illegal taking.

As explained by Steven SHAVELL (1993), the magnitude of the sanction is relevant at the best stage to intervene and deter the act. Higher sanctions are less effective in deterring negligent or inadvertent behavior than willful acts due to the intrinsic characteristics of the former by which the potential actors may not even recognize that they are on the verge of committing a given unlawful act. The effectiveness of penalties against theft depends not only on the probability and magnitude of the sanction, but on what individuals perceive or understand to be theft. Clearly the likelihood that manifest theft is not perceived as an unlawful act by potential offenders is lower than for non-manifest theft. Therefore, imposing higher sanctions for non-manifest theft might not result in more deterrence, and at the same time, generates wrongful convictions.

c) Evidence Disclosure

We have debated the perverse incentive with respect to marginal deterrence by punishing more severely manifest theft rather than non-manifest theft. However, there is a second aspect to be considered. In order to achieve a conviction, evidence must be obtained and if enforcement technology is not very sophisticated, some cooperation by the offender could be necessary. A reduced sanction for non-manifest theft could be seen as the price to pay to secure this cooperation. In other words, by imposing a lower sanction, the marginal benefit from withholding evidence is reduced, thus making conviction easier to obtain. Obviously in the case of manifest theft such cooperation is hardly necessary, and thus no discount is applied and a more severe sanction is imposed. We could say that, in general, with manifest theft, there is no relevant evidence to be withheld by offenders.

[35] For instance, one of the parties mistakenly or negligently may hold an interpretation of her contractual rights and duties that induces her to voluntarily adopt a course of action that was deemed an illegitimate use of the other party's property, and thus, a *furtum*. It is true that, according to Justinian's Instituta (IV.I.6), persons who use a borrowed thing for a purpose other than that for which it was lent, commit theft only if they are aware that they do so without the owner's consent or that, had he known of it, he would not permit it, and if they (the borrowers) believe that the owner would agree to the use, they are not deemed guilty for theft. But the constructive agreement of the owner gives ample room to mistakes and overconfidence by the borrower, and to ex post strategic behavior by the owner, thus allowing for negligent acts that might be legally treated as theft. In fact, some of the examples given in the same passage of the Instituta allow us to think of this possibility (the creditor that uses the pledge, the depositee that uses the thing deposited, the person receiving a loan on the grounds of inviting some friends to dinner, and traveling with that sum of money).

The argument is similar to the economic defense of plea-bargaining. It is true that it makes conviction easier to obtain and at a lower cost for the prosecutor (public or private), however it also reduces expected sanctions and therefore dilutes deterrence of non-manifest theft. It is up to the government or the lawmakers to balance the plea-bargaining's advantage in terms of low cost conviction against deterrence costs. In the context of our paper, it could be that punishing non-manifest theft less severely is the outcome of a trade-off between securing more convictions at a lower cost and deterring non-manifest crime.

4. Conclusion

The evolution of law enforcement technology (evidence gathering, storage and analysis; judicial reliance on effective fact-finding and factual accuracy; effective means of tracking and surveillance of criminal offenders) has made the old Roman rule distinguishing manifest and non-manifest theft, redundant. Also recording statutes and clear title in property have reduced ambiguity concerning ownership. Finally, there is now a clearer sense of the limits of various actionable offenses, for example, conversion versus trespass to chattel, or larceny versus embezzlement.

There are two lines of reasoning to justify these observations, improvement in legal accuracy and articulation (less probability of wrong convictions) and the increased public nature of criminal prosecution (private deals are less likely, and are discouraged by the legal system, eventually through criminal punishment itself).

Though there is some discussion concerning the efficiency of private law enforcement (David FRIEDMAN, 1979 and 1995; Daniel KLERMAN, 2001; Nuno GAROUPA and Daniel KLERMAN, 2002; Bruce SMITH, 2004), the move from private to public nature of criminal prosecution was clearly associated with the development and improvement of law enforcement technology[36]. Private deals are less frequent when transaction costs are high, and the law increases these costs to the point of deterring most of them. Current law prosecutes and punishes effectively many private deals as crimes of obstruction to justice, or of blackmail (the victim of the initial crime becomes an offender).

At the same time, modern law enforcement technology has reduced the probability of wrongful conviction. On the one hand, new and more sophisticated police and investigation technology reduces the incidence of mistakes. On the other hand, legal systems have developed different institutions to protect the accused and allow for effective defense, including reforms for modern criminal procedure, development of evidentiary rules, or changes in allocation and level of the required burden of proof (just remember that hear saying, evidence obtained by torture or involuntary pleas were commonly accepted two hundred years ago).

[36] We do not claim that ideological or political influences have been absent in this process of publification of criminal Law and procedure, but simply that technological factors have been crucial to that effect.

Both changes, reduced probability of wrongful conviction and public nature of criminal prosecution, including that of theft, undermine an efficiency argument for a more severe punishment of manifest theft. Therefore, our rationale would associate the change from Roman Law to modern law with respect to manifest and non-manifest crime with fundamental changes in enforcement technology, including judicial knowledge.

We find nevertheless some similarities between the rationale for plea-bargaining (an institution of American criminal law that has slowly entered European criminal law, in Italy in 1989, and in France just recently) and a less severe sanction for non-manifest theft. Plea-bargaining is most commonly used in non-manifest theft, since the costs of prosecution and conviction of manifest theft are relatively lower. One important consequence of plea-bargaining is that it effectively reduces the expected sanction for non-manifest theft, thus creating a situation quite similar to the rule provided by Roman Law.

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