

## SOME COMPARATIVE LEGAL HISTORY: ROBBERY AND BRIGANDAGE

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Recently, in the course of a brief treatment of the problem of evolution in legal development, this author offered one or two remarks<sup>1</sup> regarding the methodology of comparative legal history.<sup>2</sup> These remarks criticized attempts to construct overall stages in the development of legal systems and suggested that it is more profitable to study the development of specific phenomena in order to determine whether patterns of development exist in individual branches of law. What follows is an attempt to substantiate the validity of this approach in an examination of the development of robbery in Jewish, Roman and English Law. As an application of the comparative method to legal history, it is, perhaps, not out of place in a new undertaking devoted to the study of international and comparative law.

One danger in comparing the legal institutions of one people with those of another is that one may possibly assume a common identity between such institutions as a result of translating terms from different systems by the same modern term. Thus, the Hebrew *gezelah*, the Roman *rapina*, the Anglo-Saxon *reaflac* and the Norman-French *roberie* may all be translated "robbery" without undue violence to the texts. This, however, begs the question of the definition of robbery in each system. Commonly, the concepts translated "robbery" denoted theft accompanied either by openness (however defined) or violence, or both. But there is a further element which may be isolated, and it is this element which distinguishes robbery from brigandage. Robbery was the act of an individual and was frequently undertaken in the pursuance of a claim of right. Brigandage, on the other hand, was the act of an organized group, with no claim of right and was often accompanied by greater offenses, such as murder. Commonly, in societies where the

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<sup>1</sup>See Jackson, *Evolution and Foreign Influence in Ancient Law*, 16 AM. J. COMP. L. 372, 372-90 (1968).

<sup>2</sup>The author uses the formulation "comparative legal history" to denote a more specific approach than the older "historical jurisprudence."

central authority had not greatly developed, brigandage was the act of an outsider, an enemy, whereas robbery was the act of a member of the community.

There is a pattern of development which emerges from this study. In the early period of a system's legal development, the distinction between theft and brigandage is far more important than the distinction, if any, between theft and robbery. It is only at a later stage that the latter distinction assumes great significance.

This comparative history commences with Biblical Law, since there the legal situation is the least complex and the line of development, though partially concealed, is of striking simplicity.

## I.

*Traditionally, it has been thought that Biblical Law distinguished between secret theft, signified by the verb ganav, and open robbery, signified by gazal. In fact, the original distinction between these verbs was between misappropriation by a member of the community (ganav) and misappropriation by an outside group of brigands (gazal). Later, gazal came to be used polemically to denote economic exploitation by a member of the community, and ganav came to include raids by outsiders. The original distinction here suggested is supported by the distinction between sharaqu and habatu in the Code of Hammurabi. As gazal originally denoted the offense of enemy brigands, no mention of its punishment can be found in the earliest Biblical legal collections, though the offense of a member of the community was regulated. It appears that the measures taken were military, not juridical. Brigandage was a universal problem in antiquity and attracted similar military measures elsewhere in the Ancient Near East. It did, however, have some private law consequences for members of the community, notably regarding responsibility for property taken by brigands, and these do appear in the legal collections. It is only at the end of the Biblical period, in the records of a Jewish military settlement in Egypt, that the first indications of the traditional distinction between theft and robbery are found.*

Biblical Law contains two principal passages concerning the misappropriation of movables. The first<sup>3</sup> uses the verb *ganav* and involves either double, fourfold, or fivefold restitution, according to the particular circumstances. The second,<sup>4</sup> which employs a number of expressions including the verb *gazal* (but not including *ganav*), involves a

<sup>3</sup>*Exodus 21:37-22:3; Exodus 22:6* [Unless otherwise indicated, Biblical citations are to the MASSORETIC TEXT]; *Exodus 22:1-4, 7* (Revised Standard Version) [hereinafter cited as RSV].

<sup>4</sup>*Leviticus 5:21-26; Leviticus 6:2-7* (RSV).

different penalty: restitution, plus a fifth, plus a guilt offering at a certain valuation. It has commonly been thought that the two passages are distinguishable in that the one deals only with theft and the other only with robbery. But this is a fallacy, as the following examination of the development of the two terms will show. An analysis of the actual relationship between the passages must, however, await another occasion.<sup>5</sup>

First, the verb *gazal* will be considered.<sup>6</sup> Commonly, the context of its use suggests an open, non-furtive act. In Genesis 21:25 Abraham complained to Abimelekh about the wells of water which the latter's servants had seized (*gazlu*). Because of its nature, such a seizure could hardly be secret. The period of the early settlement provides further illustrations. The tribe of Benjamin seized (*gazlu*) the dancers of Shiloh.<sup>7</sup> This was achieved by an open raid. In pursuit of their quarrel with Abimelekh, the men of Shekhem "put men in ambush against him on the mountain tops, and they robbed [*vayigzelu*] all who passed by them along that way."<sup>8</sup> Later the verb again occurs in the same context, being used of the exploit of Benaiah, one of David's foremost warriors, who snatched (*vayigzal*) the spear from the hand of his Egyptian adversary.<sup>9</sup> In the curses of Mount Ebal, applicable in case of Israel's disobedience of the law, the openness of the act was explicitly emphasized in the threat, "your ass shall be taken away from before your face."<sup>10</sup>

Yet the usage of *gazal* was not limited to this context. Indeed, in one of the most significant legal sources it is used as a species of deception.<sup>11</sup> Leviticus 5:21 deals, *inter alia*, with a man who "deceives his neighbor over a deposit or . . . *vegazel*." It is probable that this is not the original form of the passage.<sup>12</sup> Nevertheless, the final form shows that the verb

<sup>5</sup>See B. JACKSON, THEFT IN EARLY JEWISH LAW (to be published in 1971).

<sup>6</sup>Etymologically, the verb primarily denotes "tear away, cut off." W. GESENIUS, A HEBREW AND ENGLISH LEXICON OF THE OLD TESTAMENT (F. Brown, S. Driver & C. Briggs ed., reprinted with corrections 1968). It is of note that the form *hazal* in Pahlavi means "robber." Mr. G.R. Sabri-Tabrizi, of the Department of Persian of Edinburgh University, kindly informs me that the origins of this Pahlavi form are the Avestan *haz-* and the Sanskrit verb *Sdh*, both meaning "to vanquish." He suggests that the Hebrew may be derived from the Pahlavi. But the Pahlavi *hazal* is, he notes, an alternative form of *hazar*, and one cannot exclude the possibility that while the latter is derived from the Sanskrit and Avestan, the former may be influenced by the Hebrew.

<sup>7</sup>Judges 21:23.

<sup>8</sup>*Id.* 9:25. But see note 48 *infra*.

<sup>9</sup>2 Samuel 23:21; 1 Chronicles 11:23.

<sup>10</sup>Deuteronomy 28:31 (*Gazul milfanekha*).

<sup>11</sup>See C. KENT, ISRAEL'S LAWS AND LEGAL PRECEDENTS 119 (1907); J. SAALSCHÜTZ, DAS MOSAISCHE RECHT 555 (1846); Chifrinovitz, *Hageneivah*, 24 HASHILOAH 528, at 530 n.2 (1911). But see F. HORST, GOTTES RECHT 169 (1961); M. NOTH, LEVITICUS 49 (1965).

<sup>12</sup>See B. JACKSON, *supra* note 5.

could be used in this sense in a legal context. Probably it is this passage which is reflected in Psalms 69:4-5.<sup>13</sup> There also, as Büchler pointed out,<sup>14</sup> *gazal* is used for a secret taking:

Mighty are those who would destroy me,  
 those who attack me with lies.  
 What I did not steal [*asher lo gazalti*]  
 must I now restore?  
 O God, thou knowest my folly;  
 the wrongs I have done are not hidden from thee.

The context suggests that the content of the false accusation, had it been true, was such as would have been hidden from men but not from God. Thus, the Revised Standard Version translation of this as "steal," rather than "rob," seems appropriate.

The traditional understanding of *ganav* as a secret act is also well evidenced,<sup>15</sup> although there are significant exceptions. In favor of the traditional view one may cite Rachel's theft of her father's household gods<sup>16</sup> of which even her husband, Jacob, was not aware. The verb was also used to describe Akhan's theft of the booty of Jericho<sup>17</sup> and the spiriting away of the infant Joash by his aunt Jehoiada to save him from Athaliah's purge.<sup>18</sup> Job clearly conceived of the *ganav* as acting primarily at night<sup>19</sup> where the darkness provided a cloak of secrecy. The proverb "stolen water [*mayim genuvim*] is sweet, and bread eaten in secret is pleasant"<sup>20</sup> suggests, through the parallelism, that water which is *genuvim* is water which has been secretly acquired. Also, the phrase *ganav lev*,<sup>21</sup> (literally "to steal the heart"), even if earlier it had a more concrete significance,<sup>22</sup> came to bear the meaning "deceive," and was, it seems, capable of bearing that meaning even when shortened to the word *ganav* on its own.<sup>23</sup>

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<sup>13</sup>Here, too, the concepts of *gazal* and *asham* are linked.

<sup>14</sup>A. BÜCHLER, STUDIES IN SIN AND ATONEMENT IN THE RABBINIC LITERATURE OF THE FIRST CENTURY 376 (1912).

<sup>15</sup>But see W. GESENIUS, *supra* note 6, which notes that etymologically the verb denotes "put aside." See also M. DUSCHAK, STRAFRECHT 28 (1869); G. FÖRSTER, STRAFRECHT 79 (1900); F. HORST, *supra* note 11, at 167; C. TCHERNOVITZ, KIZUR HA-TALMUD 19 (1933).

<sup>16</sup>Genesis 31:19, 32.

<sup>17</sup>Joshua 7:11.

<sup>18</sup>2 Kings 11:2; 2 Chronicles 22:11. See also 2 Samuel 19:3.

<sup>19</sup>See Job 24:14, 16; cf. *Words of Ahikar*, line 125, in ARAMAIC PAPYRI OF THE FIFTH CENTURY B.C. 126 (A. Cowley ed. 1923).

<sup>20</sup>Proverbs 9:17.

<sup>21</sup>Genesis 31:20, 26; 2 Samuel 15:6.

<sup>22</sup>D. DAUBE, STUDIES IN BIBLICAL LAW 125-26 (1947).

<sup>23</sup>Genesis 31:27. See also 2 Samuel 19:42.

Here, too, there are significant exceptions, and again they involve the usage of the verb in legal sources. For instance, in both legal<sup>24</sup> and narrative<sup>25</sup> sources the verb *ganav* was used for kidnapping. In the case of the kidnapping of Joseph by his brothers,<sup>26</sup> it may be construed as the secret taking of an individual in *potestas* (power) from his *paterfamilias*. There, with reference to the *paterfamilias* (Jacob), the taking was secret even if, in regard to the victim, it was quite open. But there are also sources where the kidnapping clearly included persons *sui juris*<sup>27</sup> so that the element of secrecy was unmistakably missing. In addition, the verb *gazal* was also used for kidnapping.<sup>28</sup> Thus, the tannaitic distinction does not provide a satisfactory means of differentiation.

Associated with the alleged open/secret distinction is another based upon the presence or absence of force.<sup>29</sup> In many sources the verb *gazal* is shown by its context to refer to a forceful act.<sup>30</sup> Prime examples are those already adduced to illustrate the open nature of the act. Yet this distinction is not consistently followed, for in some sources *gazal* is not forceful while in others *ganav* is.

The usage of *gazal* in prophetic sources is significantly different from that already discussed. In the prophetic sources the context is clearly one of economic exploitation. Thus, the chastisement of Isaiah:

“It is you who have devoured the vineyard,  
the spoil of the poor [*gezelat he'ani*] is in your houses.  
What do you mean by crushing my people,  
by grinding the face of the poor?”  
says the Lord God of hosts.<sup>31</sup>

In Proverbs 22:22 a warning was issued: “Do not rob the poor [*al tizol dal*] because he is poor, or crush the afflicted at the gate.” The reference

<sup>24</sup>*Exodus* 21:16; *Deuteronomy* 24:7. See also the Akkadian equivalent *sharagu* discussed in I THE BABYLONIAN LAWS 46 n.7 (G. Driver & J. Miles ed. 1952) [hereinafter cited as BABYLONIAN LAWS].

<sup>25</sup>*Genesis* 40:15. See also *2 Kings* 11:2; *2 Chronicles* 22:11.

<sup>26</sup>See *Genesis* 40:15.

<sup>27</sup>See sources cited note 24 *supra*.

<sup>28</sup>*Genesis* 31:26. The verb appears also in a Phoenician Inscription of 286 B.C. as the figurative snatching away by death. I H. DONNER & W. RÖLLIG, *INSCHRIFTEN* 3 (1962). For a translation see F. Rosenthal in *ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT* 505 (2d ed. J. PRITCHARD 1955).

<sup>29</sup>E.g., MAIMONIDES, *THE LAWS OF ROBBERY AND LOST PROPERTY* 1:3. For the English translation see I THE CODE OF MAIMONIDES 90 (H. Klein transl. Yale Judaica Ser. Vol. 9, 1954). But Maimonides also stresses the secrecy of the *ganav*. MAIMONIDES, *THE LAWS OF THEFT* 1:3, *id.* at 60.

<sup>30</sup>The VULGATE made this element explicit: *vi abstulerant* in *Genesis* 21:25 and *violenter auferres* in *Genesis* 31:31.

<sup>31</sup>*Isaiah* 3:14-15; cf. *Psalms* 35:10.

is impliedly to an offense to which the victim was susceptible by reason of the sheer fact that he was already poor. Excessive credit and harsh execution of debt were the contemplated wrongs. This appears explicitly in other passages. Ezekiel bestows a blessing on the man who

does not oppress anyone, but restores to the debtor his pledge, commits no robbery [*gezelah lo gazal*], gives his bread to the hungry and covers the naked with a garment, does not lend at interest or take any increase, withholds his hand from iniquity, executes true justice between man and man . . . .<sup>32</sup>

In Jeremiah's exhortation to "deliver from the hand of the oppressor him who has been robbed [*gazul*] . . .",<sup>33</sup> the reference is again to debt enforcement. The debtor is "in the hand of," that is, in the power of, his creditor<sup>34</sup> because the latter had executed the debt upon his person.<sup>35</sup>

It is quite possible that even in the context of economic exploitation the verb *gazal* referred to a forceful act. As Büchler has pointed out,<sup>36</sup> many of the activities so described were in fact legal. The prophetic usage is polemical.<sup>37</sup> Thus, a creditor who wished to execute had no reason to hesitate. But although in this context the verb could still refer to a forceful execution of a debt, it would be entirely wrong to think it was confined to such forceful acts. The prophets certainly intended no such distinction. Exploitation of the poor, whether forceful or not, was condemned.<sup>38</sup>

Similarly the verb *ganav*, though usually used for a secret, nonviolent act, was by no means so confined. Its use for kidnapping has already been mentioned<sup>39</sup> but it is also relevant in this context. Kidnapping was

<sup>32</sup>Ezekiel 18:7-8; *cf.*, *id.* 33:15; *Mishnah, Shevuot* (Oaths) § 7:2. For English translation see THE MISHNAH 419 (H. Danby transl. 1933).

<sup>33</sup>Jeremiah 21:12; *cf.*, *id.* 22:3.

<sup>34</sup>See Genesis 16:6; Deuteronomy 2:24; Joshua 6:28; Judges 4:14, 9:29; 1 Samuel 30:23; *cf.* the Roman *manus*. *e.g.* INSTITUTES 1.5.pr.

<sup>35</sup>See 2 Kings 4:1; Job 24:9; M. ELON, HERUT HA-PERAT BE-DARKHE GEVIYAT HOV BA-MISHPAT HA-IVRI 1-9 (1964).

<sup>36</sup>A. BÜCHLER, *supra* note 14, at 376-78; *cf.* P. HEINISCH, HISTORY OF THE OLD TESTAMENT 304 (W. Heidt transl. 1952).

<sup>37</sup>See, *e.g.* Isaiah 3:14-15, 10:2; Ezekiel 22:29. Other passages are arguable. A. BÜCHLER, *supra* note 14, at 376, cites Micah 2:2, where the prophet condemns those who "covet fields and seize them—*vegazlu*; and houses, and take them away; thus they oppress a man and his house, even a man and his inheritance." In the light of Micah 3:2 he interprets this as referring to manipulation of the law. But the immediate context, which refers to "the power of their hand" (Micah 2:1), suggests a more direct approach. Certainly Büchler's theory must be confined to prophetic sources. It cannot be applied to Leviticus 5:21-26, where a penalty is imposed, or to Genesis 31:31. Büchler anticipated the argument which later developed over whether Jacob had contracted an *errebu* marriage, and therefore was not entitled to take his wives with him. A. BÜCHLER, *supra* at 377.

<sup>38</sup>See, *e.g.* Proverbs 22:22; Isaiah 10:2, 61:8 (though the text is uncertain).

<sup>39</sup>See p. 49 *supra*.

typically accompanied by the use of force, yet the verb *ganav* was used. To a lesser extent, force was also involved in burglary. Not only might the entry have been forceful, but the thief may have gone on to attack the householder. A prophetic description of the happenings on the "day of the Lord" foresees an invasion of "a great and powerful people" who, climbing into houses, "enter through the windows like a thief."<sup>40</sup> The primary point of the comparison was to highlight the element of surprise,<sup>41</sup> but the inference was clear that once inside, destruction and not merely theft would be accomplished. Indeed, the New Testament states that the householder would resist if he anticipated the entry into his house.<sup>42</sup> The elements of force and stealth were also combined in figurative usages of the verb. Job described the wicked as "like chaff that the storm carries away [*gnovatu*],"<sup>43</sup> and, elsewhere, as being carried off by a whirlwind in the night.<sup>44</sup>

The conclusions drawn thus far have been negative. The traditional distinctions between the two verbs are neither consistently found, nor are they carried over into the legal sources. There is, however, an important legal distinction to be found. *Ganav* was used primarily to describe the act of an individual, a member of the community.<sup>45</sup> *Gazal*, in its pre-prophetic usage, denoted the act of, or action against, an outsider. The act was usually committed by a group. Later, *gazal* came to be applied to the act of an individual within the community, and this gave rise to the separate offense of robbery found in late Biblical and post-Biblical sources.

In the early period of Biblical history<sup>46</sup> *gazal* was primarily used to describe a raid by an organized group. As we have seen,<sup>47</sup> the opposition

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<sup>40</sup>Joel 2:9. See also Obadiah 1:5, where, however, there may be an interpolation. BIBLIA HEBRAICA 928 (R. Kittel 10th ed. 1937).

<sup>41</sup>These prophetic descriptions may be compared with similar descriptions in the New Testament: 1 Thessalonians 5:2 (RSV); 2 Peter 3:10 (RSV); Revelation 3:3 (RSV); *Id.* 16:5 (RSV); see 3 THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT 755 (G. Bromiley ed. 1965); D. DAUBE, THE SUDDEN IN THE SCRIPTURES *passim* (1964).

<sup>42</sup>Matthew 24:43; cf. Rav in the Babylonian Talmud, *Sanhedrin* 72A.

<sup>43</sup>Job 21:18.

<sup>44</sup>*Id.* 27:20.

<sup>45</sup>This interpretation is broader than that suggested by Schulz who sees *lo tignov* in the *Decalogue* as part of the *Sippenrecht*. H. SCHULZ, DAS TODESRECHT IM ALTEN TESTAMENT 37-39 (1969). The author feels this is too restrictive. On the problem of the Eighth and Tenth Commandments, see Jackson, *Liability for Mere Intention in Early Jewish Law*. HEBREW UNION COLLEGE ANNUAL (to be published in 1971).

<sup>46</sup>It appears that here the development of the term corresponds to the different periods in which it was used, rather than the dates of the final editions. Thus here the original language, as well as the substance of the stories, has been handled down.

<sup>47</sup>See p. 47 *supra*.

of the men of Shekhem to Abimelekh was expressed in the form of stationing bands of men on the mountaintops to attack travelers on the roads.<sup>48</sup> To the modern reader this may appear to be a curious method of political, or even military opposition. But in fact it occurred quite commonly in different parts of the ancient world<sup>49</sup> and represented one of the greatest possible challenges to a central authority attempting to assert itself. Jerome, for instance, recognized the nature of the Shekhemites' activities in describing them as *latrocinia*<sup>50</sup> (acts of brigandage). The seizure of the dancers of Shiloh by the Benjaminites<sup>51</sup> was again the act of an organized band attacking an outside community. The dispute between Abraham and Abimelekh (an earlier Abimelekh) over the former's wells<sup>52</sup> falls into the same category.

An even more interesting illustration of the distinction between the early uses of *ganav* and *gazal* is the account of the quarrel between Jacob and Laban. The legal implications of the narrative are considerable and have been explored at some length with particular reference to the pursuit and search.<sup>53</sup> The verbs *ganav* and *gazal* were both used in the cross accusations, but the distinction between them has hitherto been overlooked. It is significant that it is Laban who used *ganav* while it is Jacob who used *gazal*. The reason is to be found in the circumstances of the quarrel. Jacob wished to leave Laban's household and establish himself independently. On the other hand Laban wanted Jacob to remain with him as part of his household. Therefore, Laban used the terminology appropriate to an offense committed by a member of the community. He accused Jacob of stealing (*ganavta*) his household gods<sup>54</sup> and emphasized the deception practiced upon him by Jacob.<sup>55</sup> In addition, he reproached Jacob for having led off his (Laban's) daughters

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<sup>48</sup>Judges 9:25. Two meanings are possible. First, the travelers themselves were seized, presumably as hostages. It has been suggested that this would be understandable on the assumption that Abimelekh guaranteed safe passage. C. BURNEY, JUDGES 277 (2d ed. 1930); 2 THE INTERPRETER'S BIBLE 756 (G. Buttrick ed. 1952). But there is no evidence to support such an assumption. Second, the preferable meaning is that it denotes robbing passing caravans. The later evidence of the *lestai* shows that both seizing travelers and robbing caravans were used as modes of political opposition. For *gazal* with the victim (not the property) used as the direct object, see *Proverbs* 22:22; 28:24. The issue is by no means vital to this discussion.

<sup>49</sup>Jackson, *supra* note 1, at 386.

<sup>50</sup>Judges 9:25 (VULGATE).

<sup>51</sup>Judges 21:23.

<sup>52</sup>Genesis 21:25. Here, however, there is also another reason. *Ganav* is never found in the Bible where reality is the subject matter.

<sup>53</sup>See D. DAUBE, *supra* note 22, at 205-24 (1947).

<sup>54</sup>Genesis 31:30.

<sup>55</sup>*Id.* 31:26-27.



“like captives of the sword [*kishvuyot harev*].”<sup>56</sup> The significance of Laban’s expression lies in the prefix *ki*, its force being “as if they were prisoners of the sword.” The reproach thus lay in the fact that Jacob, though in Laban’s view a member of his own household, had acted as if he were an enemy at war. The insider had acted as an outsider.

To this line of attack, Jacob replied, not with excuses, but with an assertion of his independence. He expressed his fear that “you would take your daughters from me by force [*tigzol*].”<sup>57</sup> By using the verb *gazal*, he emphasized that he was an outsider vis-à-vis Laban. He thus returned Laban’s taunt. Laban’s threatened seizure of his daughters (Jacob’s wives) would not, to Jacob, have been “like” an act of war. It would, in fact, have been an attack by an outside group. Jacob’s use of *gazal* here is closely linked with that of *kishvuyot harev* by Laban. The verb *shavah* is very close in meaning to this early use of *gazal*.<sup>58</sup> It should be noted that the context of kidnapping did not dictate Jacob’s terminology. As stated above<sup>59</sup> both *ganav* and *gazal* are used for this offense. It is only by use of the distinction here proposed that one may differentiate the one from the other. The kidnapping of the dancers of Shiloh was the act of an outside group. On the other hand, *ganav* was used for the kidnapping of Joseph by his brothers.<sup>60</sup> It is also *ganav* which appears in the legal sources,<sup>61</sup> where, again, the offense of one member of the community against another was contemplated.

The verb *ganav* was normally applied to the internal offender, usually an individual, not an organized band. This was certainly so in the Covenant Code,<sup>62</sup> the earliest legal corpus in the Bible, which regulated the internal norms of the early community. Elsewhere, too, it is clear

<sup>56</sup>*Id.* 31:26.

<sup>57</sup>*Id.* 31:31. Both here and in *Judges* 9:25 the relationship implicit in *gazal* is the more bitter in view of the earlier, closer relationship. On the former, see Daube & Yaron, *Jacob’s Reception by Laban*. 1 JOURNAL OF SEMITIC STUDIES 60-62 (1956).

<sup>58</sup>See p. 58 *infra*.

<sup>59</sup>See p. 49 *supra*. Schulz suggests that *gazal* is unusual for kidnapping and that the usages in *Genesis* 31:31, *Judges* 21:23 and *Job* 24:9 are exceptional. H. SCHULZ, *supra* note 45, at 38 n.154. The last is not a true example of these, as the usage is polemical. However, the two remaining passages are clear and can hardly be viewed as exceptional uses of *gazal* when there are only four clear cases of the use of *ganav* for kidnapping: *Genesis* 40:15, *Exodus* 21:16, *Deuteronomy* 24:7 and *2 Kings* 11:2 (repeated in *2 Chronicles* 22:11). *Ganav* in *2 Samuel* 19:42 may mean deceive, as in *Genesis* 31:27.

<sup>60</sup>*Genesis* 40:15; cf. the usage in *2 Kings* 11:2 and *2 Samuel* 19:42 (if the latter does indeed refer to kidnapping; see note 59 *supra*).

<sup>61</sup>*Exodus* 21:16; *Deuteronomy* 24:7.

<sup>62</sup>See *Exodus* 21:1-22:16.

from the context that the *ganav* was a settled member of the community. Proverbs decried popular hypocrisy:

They do not despise a thief when he shall steal,  
to fill his soul when it shall hunger.  
But if he be found, he shall restore sevenfold;  
he shall give all the substance of his house.<sup>63</sup>

The reference to the house of the thief, which is paralleled elsewhere,<sup>64</sup> together with the comment upon the thief's poverty (which is not, it now seems, a justification)<sup>65</sup> is in stark contrast to the image of the raiding band contained in *gazal*. Again, it was to the members of the settled community that Jeremiah addressed his temple sermon:

Will you steal [*haganov*] murder . . . and then come and stand before me in this house, which is called by my name, and say, "We are delivered!"—only to go on doing all these abominations?<sup>66</sup>

Hosea draws the distinction quite clearly:

[T]hey deal falsely, the thief [*ganav*] breaks in [literally, will come (*yavo*)], and the bandits [literally, the band (*gedud*)] raid without.<sup>67</sup>

The location of the offense is closely related to the fact that the *ganav* was a member of the community while the *gedud* consisted of a band of outsiders. Greek and Latin versions also emphasized the destruction.<sup>68</sup> Further support, though not entirely unambiguous, is derived from the early narratives: the narrator of the Jacob and Laban story used *ganav* for Rachel's theft of the household gods.<sup>69</sup> There, however, the usage does not occur in the speeches of the protagonists, thus reflecting their views of the basic issue. The theft by a member of Laban's own family was, therefore, quite properly denoted by *ganav*. On the other hand, its use by Joseph's brothers, when confronted by legally conclusive evidence that they had stolen Joseph's cup,<sup>70</sup> is less understandable. The theft was committed in Egypt by a group of Hebrews. However, it was in the brothers' own speech that the verb was used. This may well be viewed as an attempt to tone down their apparent offense. A later narrative

<sup>63</sup>*Proverbs* 6:30-31 as translated by Daube, *To Be Found Doing Wrong*, in 2 STUDI VOLTERRA 1, 11-12 (1969). *Contra*, the traditional interpretation in the RSV.

<sup>64</sup>*Zechariah* 5:4.

<sup>65</sup>See Daube, *supra* note 63, at 11-12.

<sup>66</sup>*Jeremiah* 7:9-10; cf. *Hosea* 4:2.

<sup>67</sup>*Hosea* 7:1.

<sup>68</sup>The SEPTUAGINT uses *kleptes* and *lestes*; the VULGATE uses *fur* and *latrunculus*.

<sup>69</sup>*Genesis* 31:19, 32.

<sup>70</sup>*Id.* 44:8.

described David's recovery of the bones of Saul from the men of Yabesh Gilad, who had taken them (*ganvu*) from the public square of Beth Shean.<sup>71</sup> Here the offenders were members of a neighboring community during the period which followed the establishment of the monarchy. Thus, they were not regarded as outside raiders. It should be noted that the use of *ganav* here can hardly be accounted for on the grounds of the secrecy of the exploit.

Yet there are sources, mostly prophetic, in which *ganav* does seem to indicate an outsider. Joel's description of the events of the Day of the Lord implies that *ganavim* might attack a city from the outside.<sup>72</sup> Jeremiah conceived of *ganavim* coming by night to destroy their opponents.<sup>73</sup> The object of the comparison was the Edomites. Similarly, Job's metaphors were of an outside agency—the storm or the whirlwind—unexpectedly attacking.<sup>74</sup> The verb was also used outside Israel to denote the activities of a bandit.<sup>75</sup> However, the existence of these sources does not destroy the distinction here being proposed. Rather, their appearance indicates a period when the original distinction between the two verbs was replaced by another. The incidents where *gagal* denoted the acts of outsiders all occurred before the time of David. The sources in which such activity was described by *ganav* are all later. It would seem that the change corresponds to a period when the central authority was increasing its power. The practical danger from outside raiders was thereby diminished. It is not surprising that at such a time the original context of *gagal* changed. Its edge became less sharp as a result of those events. Thus, the prophets were able to adopt it as part of their polemical vocabulary and associate it with economic exploitation. They achieved this so successfully that some other term had to be applied to raiding groups. *Ganav*, being less specific in its contextual associations, came to be applied to these groups. In the course of its adaptation, the verb *gagal* ceased to be primarily employed for an offense by a group and instead was applied to an offense of an individual. Thus an examination of the legal sources reveals that it is this latter offense which was exclusively regulated. In the Covenant Code *ganav*

<sup>71</sup>2 Samuel 21:12.

<sup>72</sup>Joel 2:9; cf. Obadiah 1:5.

<sup>73</sup>Jeremiah 49:9; see B. DUHM, DAS BUCH JEREMIA 355 (1901); 2 A. PEAKE, JEREMIAH AND LAMENTATIONS 244 (1911).

<sup>74</sup>Job 21:18, 27:20; see p. 51 *supra*.

<sup>75</sup>A. DUPONT-SOMMER, LES INSCRIPTIONS ARAMÉENNES DE SFIRÉ 18 lignes 36, 53-54 (1958); F. JEAN & J. HOFTIJZER, DICTIONNAIRE DES INSCRIPTIONS SÉMITIQUES DE L'OUEST 51 (1965).

was used,<sup>76</sup> but in the Holiness Code<sup>77</sup> and the Priestly Code,<sup>78</sup> both quite late pentateuchal sources, *gazal* was used in its later significance. That the legal sources should be concerned only with offenses by members of the community is hardly surprising.

Evidence from the Code of Hammurabi also supports the proposition that the distinction between theft and robbery was, in its original form, a distinction between misappropriation by a community member and raiding by an outside group. There the verbs *sharaqu* and *ḥabatu* were used. The former had a connotation similar to that of *ganav* in that it implied secrecy.<sup>79</sup> The latter denoted plundering and brigandage.<sup>80</sup> The two offenses were regulated by separate groups of provisions in the Code.<sup>81</sup> An important feature of the *ḥabatu* provision was that it imposed responsibility upon the local authorities if the offender was not caught. In the *sharaqu* provisions no such civic responsibility is mentioned, and it may be safely assumed that none was imposed. This in itself suggests that the *ḥabatu* was a more serious offense than robbery in its developed sense (theft committed openly and/or with force). The difference between the individual robber and the individual thief hardly seems great enough to merit civic responsibility in the one offense, but not in the other. The difference between the individual offender and the organized group is a far more satisfactory basis for such a distinction.<sup>82</sup> The imposition of civil responsibility here was an attempt to secure the central authority against attack. Similar cases of accountability existed in analogous situations elsewhere in the ancient world.<sup>83</sup>

A different interpretation has been proposed for *ḥabatu* by Leemans, who suggests that the verb indicates "breaking and entering with intent to steal."<sup>84</sup> He produces evidence from outside the Code indicating that *ḥabatu* could be used where the theft was from a house. However, this by no means destroys the primary association of the term with raiding. For,

<sup>76</sup>Exodus 21:37, 22:1-3, 6.

<sup>77</sup>Leviticus 19:13. See also *ganav* in its normal sense in Leviticus 19:11.

<sup>78</sup>*Id.* 5:21, 23.

<sup>79</sup>2 REALLEXIKON DER ASSYRIOLOGIE 212 (E. Ebeling & B. Meissner ed. 1928).

<sup>80</sup>See M. COLGECEN, LE CODE D'HAMMOURABI 60-61 (1949); S. COOK, THE LAWS OF MOSES AND THE CODE OF HAMMURABI 204 (1903); P. CRUVEILHIER, COMMENTAIRE AU CODE D'HAMMOURABI 64 (1938); 1 BABYLONIAN LAWS, *supra* note 24, at 109-110; 2 *id.* at 159; Good, *Capital Punishment*, 19 STAN. L. REV. 947, 962 (1968).

<sup>81</sup>For *sharaqu*, see CODE OF HAMMURABI §§ 6-10, 14; for *ḥabatu*, see *id.* §§ 22-23.

<sup>82</sup>Cf. Szelechter, *La Peine Capitale en Droit Babylonien*, in 4 STUDI IN ONORE DI EMILIO BETTI 147, 163 (1962).

<sup>83</sup>Jackson, *supra* note 1, at 386.

<sup>84</sup>Leemans, *Some Aspects of Theft and Robbery in Old-Babylonian Documents*, 32 RIVISTA DEGLI STUDI ORIENTALI 661 (1957).

presumably, these were attacks upon houses outside fortified areas.<sup>85</sup> A similar situation was contemplated by an Imperial Constitution of 213 A.D. which mentions *effracturae latronum* (housebreaking by a bandit).<sup>86</sup> When applied to the Code, Leemans' view presents considerable difficulties. First, it fails to explain the difference between sections 21 and 22-23. In the former, which does refer to housebreaking,<sup>87</sup> the verb used is *palashu*, not *habatu*.<sup>88</sup> Section 21 is a self-contained unit, and the sense does not appear to carry forward to the succeeding section.<sup>89</sup> Thus, a distinction between the two provisions was certainly intended. Second, Leemans fails to explain why civic responsibility was imposed in sections 22 and 23 if the reference was to housebreaking, and why it was not applied in other cases of theft.

The distinction between *sharaq* and *habatu* in the Code of Hammurabi can thus be accepted as one between the individual and the organized raiding group. In another respect, however, Leemans' study supports the historical development here being suggested. He notes that both verbs are used for cases of furtive theft.<sup>90</sup> This lack of a clear furtive/non-furtive distinction corresponds to that in the Biblical use of *ganav* and *gazel*.<sup>91</sup> Nor is there any such distinction in *Lipit-Ishtar*, *Eshnunna*, or the Hittite Laws<sup>92</sup> which, though later than Hammurabi, are thought to represent a more primitive stage of law.<sup>93</sup> A distinction between the thief and the individual robber is found, however, in the less primitive Nuzi documents.<sup>94</sup>

The penalties for raiding are not mentioned in Biblical Law. The offenders were outside the protection of the community and could be punished without recourse to law. However, the distinction between theft and raiding did have consequences in the law of the community. If an

<sup>85</sup>See Joel 2:9; P. CRUVEILHEIR, *supra* note 80. See also p. 51 *supra*.

<sup>86</sup>*Mosaicarum et Romanarum legum Collatio*, 10.9, in 2 FONTES IURIS ROMANI ANTEJUSTINIANI 570 (J. Baviera ed. 1964) [hereinafter cited *Collatio*]. Cicero also refers to the housebreaker as *praedonem et latronem*, though his language is polemical. CICERO, PRO TULLIO XXI.50.

<sup>87</sup>That the theft is from a house (*bi-tam*) is explicitly stated. See 2 BABYLONIAN LAWS, *supra* note 24, at 21, 158.

<sup>88</sup>See also CODE OF HAMMURABI § 125, where property is stolen "whether through breaking in or climbing" and again the verb used in *palashu*; 2 BABYLONIAN LAWS, *supra* note 24, at 51, 210.

<sup>89</sup>Notice that section 22 has an independent opening formula, *shu-ma a-wi-lum*.

<sup>90</sup>Leemans, *supra* note 84, at 663.

<sup>91</sup>See pp. 49-51 *supra*.

<sup>92</sup>See P. KORNGRUEN, HUKKI HAMIZRAH HAKADMON 227 (1944).

<sup>93</sup>A. DIAMOND, EVOLUTION OF LAW AND ORDER 75 (1951); A. DIAMOND, PRIMITIVE LAW 39-45 (1935).

<sup>94</sup>See Pfeiffer & Speiser, *One Hundred New Selected Nuzi Texts*, 16 ANNUAL OF AM. SCHOOLS OF ORIENTAL RESEARCH text 8, lines 36-37 (1935-36) ("One wooly sheep P. took away . . . One sheep and one goat P. took by force . . ."). See also *id.* lines 49-53, 57.

animal under the care of a shepherd was stolen (*gonov yiganev*), the shepherd was liable for the loss.<sup>95</sup> On the other hand, if the animal was "driven away" (*nishbah*), the shepherd could escape liability by swearing to his innocence.<sup>96</sup> The difference in liability corresponded to the gravity of the threat. The shepherd was expected to provide protection against theft, but not against a raid,<sup>97</sup> which he was powerless to prevent. It is true that the verb *gazal* was not used in this passage. But, the term *shavah* has a force very similar to the early usage of *gazal*. It denoted capture, often in warfare, where the commission of the act by a large organized group was presupposed.<sup>98</sup> Similar rules are found in the Code of Hammurabi. The bailee was liable for losses occasioned by a thief,<sup>99</sup> but the carrier was not liable for losses caused by an enemy.<sup>100</sup> This distinction puts into proper perspective Jacob's claim that in his service as Laban's shepherd, he had replaced whatever had been "stolen by day or stolen by night."<sup>101</sup> Though he was required to replace what had been stolen, he was apparently not required to replace what had been captured by raiding groups.

Other terms also were used to describe a raiding group,<sup>102</sup> chiefly

<sup>95</sup>*Exodus* 22:11; cf. CODE OF HAMMURABI § 263; 1 BABYLONIAN LAWS, *supra* note 24, at 455-56. Section 266 of the Code mentions two cases of *vis maior* where the shepherd may escape liability, but does not specify raiding as such a case. See D. MÜLLER, DIE GESETZE HAMMURABIS 164 (1903). But see sources cited notes 96 & 97 *infra*. See also *The Hittite Laws* tablet 1, § 75 in ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 188, 192 (2d ed. J. Pritchard 1955); 2 B. COHEN, JEWISH AND ROMAN LAW 424 (1966); Murray, *Liability of the Bailee and Pledgee in the Ancient Germanic Laws*, 41 TUL. L. REV. 851, 854 (1967) (Alfred's Laws); E. NEUFELD, THE HITTITE LAWS 170 (1951).

<sup>96</sup>*Exodus* 22:9-10; cf. Schulz, *Rechtsvergleichende Forschungen über die Zufallshaftung in Vertragsverhältnissen*, 27 ZEITSCHRIFT DER VERGLEICHENDE RECHTSWISSENSCHAFT 145, 151-57 (1912).

<sup>97</sup>See U. CASSUTO, EXODUS 287 (1967); D. DAUBE, ROMAN LAW 162 (1969); Daube, *Negligence in the Early Talmudic Law of Contract (Peshi'ah)*, in 1 Festschrift Schulz 145 (1951).

<sup>98</sup>See *Genesis* 34:29; *Numbers* 21:1, 31:9; 1 *Samuel* 30:2; 1 *Kings* 8:48; 2 *Kings* 6:22; *Job* 1:15.

<sup>99</sup>CODE OF HAMMURABI § 125; 1 BABYLONIAN LAWS, *supra* note 24, at 239-40.

<sup>100</sup>CODE OF HAMMURABI § 103 (*nakrum*); 2 BABYLONIAN LAWS, *supra* note 24, at 195. See *Collatio*, *supra* note 86, at 10.9, where *effracturae latronum* are considered by Paul as *vis maior*. See also A. DESJARDINS, TRAITÉ DU VOL 314 (1881), citing DIGEST 17.2.52.3 (Ulpian); *id.* 44.7.1.4 (Gaius); *Collatio*, *supra* at 10.7.4 (Paul) (which is the same as PAUL, SENTENTIAE 2.12.4); CODE 4.24.6.

<sup>101</sup>*Genesis* 31:39. Finkelstein assumes that liability for animals stolen at night was an unfair imposition upon Jacob. Finkelstein, *An Old Babylonian Herding Contract and Genesis 31:38 ff*, 88 J. AM. ORIENTAL SOCIETY 36 (1968). He cites no Babylonian evidence for this particular point and throughout the article completely ignores *Exodus* 22:9-11. There the liability of the shepherd for theft is stated, without any qualification as to nocturnal theft. Nocturnal theft is almost certainly contemplated, this being the normal time when the offense was perpetrated. See *Job* 24:14, 16. If Jacob was claiming credit for not having insisted upon his rights as a shepherd, it is rather on the grounds of *terefah*. Cf. 1 BABYLONIAN LAWS, *supra* note 24, at 456 n. 1.

<sup>102</sup>See Stoebe, *Raub and Beute*, in Festschrift W. BÄUMGARTNER 340-354 (1967).

*shod*,<sup>103</sup> *peshat*,<sup>104</sup> *gedud*<sup>105</sup> and *bazaz*.<sup>106</sup> Frequently their activities included large scale destruction as well as plundering. Though often quasi-military in form, they frequently had a political purpose.<sup>107</sup> On occasions such groups made attacks in order to resupply.<sup>108</sup>

Very similar problems existed elsewhere in the Ancient Near East. Referring to Egypt in the first intermediate period, a text related: "[m]en sit in the bushes until the benighted traveler comes, in order to plunder his load . . . . He who had no oxen is now the possessor of a herd."<sup>109</sup> Indeed, it has been thought that the later Egyptian robbers had a professional organization and gained recognition of a right to demand a ransom equal to a quarter of the value of the property seized.<sup>110</sup> That similar raiding groups existed in Mesopotamia is also well attested. The prologue to the Code of Ur Nammu, the oldest Mesopotamian law code discovered to date, claims that the king succeeded in suppressing the activities of those who "forcefully seized the oxen, seized the sheep, seized the donkeys."<sup>111</sup> His measures, however, lacked permanent effect. Hammurabi later had to act against the same problem.<sup>112</sup> It occurred again at Ugarit, as a Fourteenth or Thirteenth Century B.C. text

<sup>103</sup>See W. GESENIUS, *supra* note 6; C. TCHERNOVITZ, *SHI-URIM BA-TALMUD* 64 (1913); Seeligman, *Zur Terminologie für das Gerichtsverfahren in Wortschatz des Biblischen Hebräisch*, in *FESTSCHRIFT W. BÄUMGARTNER* 275-76 (1967).

<sup>104</sup>*Genesis* 37:23; *Numbers* 20:26, 28; *Judges* 9:33, 20:37; 1 *Samuel* 18:4, 19:24, 23:27, 27:8-10, 30:1, 31:8-9; 1 *Chronicles* 10:8-9, 14:9, 13, and in prophetic sources.

<sup>105</sup>2 *Samuel* 4:2; 2 *Kings* 5:2; 2 *Chronicles* 22:1. Frequently, *gedud* refers to military activities. 2 *Kings* 13:20, 24:2; 1 *Chronicles* 12:19. It occurs also in a Karetpe text. See Gordon, *Phoenician Inscriptions from Karatepe*, 39 *JEWISH Q. REV.* (N.S.) 44-45 (1948).

<sup>106</sup>Stoebe, *supra* note 102.

<sup>107</sup>See, e.g., 1 *Samuel* 22:2; 1 *Kings* 11:24. See also M. HENGEL, *DIE ZELOTEN* 28-29 (1961).

<sup>108</sup>1 *Samuel* 25.

<sup>109</sup>A. GARDINER, *EGYPT OF THE PHAROAHS* 109 (1961); Fensham, *Widow, Orphan, and the Poor in Ancient Near Eastern Legal and Wisdom Literature*, 21 *J. NEAR EASTERN STUDIES* 129, 133, (1962). The text itself, according to Gardiner, dates from the 19th dynasty.

<sup>110</sup>See Lutz, *The Alleged Robbers' Guild in Ancient Egypt*, 10 *U. CAL. PUBLICATIONS IN SEMITIC PHILOLOGY* 231-42 (1954).

<sup>111</sup>Kramer & Falkenstein, *The Ur-Nammu Law Code*, 23 *ORIENTALIA* 46 (1954). One may compare this with the prohibition of *reaslac* in the Coronation Oath of Edward in 975 A.D. (or of Aethelred in 978 A.D.). *LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I* 43 (A. Robertson ed. 1925).

<sup>112</sup>See *CODE OF HAMMURABI* §§ 22-24; pp. 56-57 *supra*. See also H. WEINER, *PENTATEUCHAL STUDIES* 326 (1912). Paragraph 109 of the Code indicates they would congregate at the premises of wine-sellers. See 1 *BABYLONIAN LAWS*, *supra* note 24, at 205. This created a problem comparable to the Roman *caupones*. See *DIGEST* 47.5. See also O. LENEL, *DAS EDICTUM PERPETUUM* 205-06 (1907) [hereinafter cited as LENEL, E.P.]; W. BUCKLAND, *A TEXTBOOK OF ROMAN LAW* 593-94 (3d ed. P. Stein 1963). On the regulation of winesellers in Babylonia see Goetze, *Tavern Keepers and the Like in Ancient Babylonia*, in *STUDIES IN HONOR OF B. LANDSBERGER* 211 (*U. of Chicago Assyriological Studies* No. 16, 1965).

shows.<sup>113</sup> A Ninth Century Phoenician inscription boasted that the king "built strong walls in all the extremities on the borders in places where there were bad men who had gangs."<sup>114</sup> The nature of the problem and the attitude of the law was clearly recognized long ago by Michaelis, who observed: "With regard to foreign banditti, who attacked travellers, or made inroads into the land, there was no occasion for special laws; because against them the laws of war operated."<sup>115</sup> It is for this reason that no penalties can be found in the legal sources for *gazal* in its early sense.

It is only late in the Biblical period that one finds an implied distinction between *ganav* and *gazal*. The Holiness Code lists the following prohibitions:

You shall not steal [*tignevu*] nor deal falsely, nor lie to one another. And you shall not swear by my name falsely, and so profane the name of your God: I am the Lord. You shall not oppress your neighbour or rob him [*tigzol*]. The wages of a hired servant shall not remain with you all night until the morning.<sup>116</sup>

*Ganav* here heads a list of types of deception. *Gazal* is part of a series of economic offenses. There is also a formal distinction. Whereas the former prohibitions are expressed in the second person plural, the latter occur in the second person singular. Significance is rightly attached to this in determining the literary history of the passage.<sup>117</sup> It may well be correct to conclude that its present form is the result of a conflation of earlier, independent sources. But even if this is so, its significance remains unchanged since the compiler was evidently satisfied that a meaningful distinction could be drawn between *ganav* and *gazal*. The nature of the distinction is not too clear. It may well be that *gazal* was used in its prophetic sense of economic exploitation, the offense of the rich against the poor,<sup>118</sup> whereas the opposite is true of *ganav*. For the purposes of this discussion, it is most significant to observe that by this time *gazal* could be used, in a quasi-legal passage, in the description of an offense by an individual and not a raiding band. Not much later, in

<sup>113</sup>See 4 C. SCHAEFFER, UGARTICIA 140 (1962).

<sup>114</sup>Gordon, *supra* note 105, at 44-45.

<sup>115</sup>J. MICHAELIS, COMMENTARIES ON THE LAW OF MOSES 280 (A. Smith transl. 1814). His citations, including *Judges* 11:3 (Jephthah) and 1 *Samuel* 22:2-3 (David) show that his statement is not to be confined to foreign banditti. See *Judges* 21:22 (VULGATE) (*iure bellantium atque victorum*).

<sup>116</sup>*Leviticus* 19:11-13.

<sup>117</sup>See R. KILIAN, LITERARKRITISCHE UND FORMGESCHICHTLICHE UNTERSUCHUNG DES HEILIGKEITSGESETZES 58-61 (1963).

<sup>118</sup>See M. NOTH, *supra* note 11, at 141.



one of the Elephantine papyri, comes the first clear indication that significance was placed upon the forceful nature of the taking.<sup>119</sup> However, the verb *gazal* was not used, nor was it indicated what difference in penalty, if any, was involved in the use of force. This was a problem which was to exercise the post-biblical developers of Jewish Law.

## II.

*Although brigandage attracted a military response from the earliest times, there was no distinction between theft and robbery in Roman Law until the First Century B.C. By the Second Century B.C., there were civil remedies against forceful dispossession, but even then brigandage was singled out as giving rise to a more extensive action. Two developments of the early First Century B.C., the Lex Cornelia de Iniuriis and the formula Octaviana, have been thought by some to give delictual (tortious) remedies for robbery. A closer examination, however, reveals that they actually concerned other offenses. The earliest trace of the separation of robbery from theft is the edict of the praetor Lucullus (76 B.C.) which in its original form dealt only with brigandage and only later was extended to cover ordinary robbery. An intermediate stage of separation resulted from an edict which gave a special remedy against one who robbed in certain defined circumstances, such as fire and shipwreck, where the temptation to rob was especially great.*

*The development of criminal sanctions followed a similar pattern. At first the criminal courts were only concerned with brigandage. The Lex Cornelia de Sicariis et Veneficis of 81 B.C. was later known to include the offense of possessing arms with the intent to steal. It is doubtful, however, whether this clause was in the original statute. The last half century of the Republic saw other sporadic legislation against violence, but it is far from clear whether simple robbery had been covered by this stage. Even in the later Leges Iuliae de Vi it is likely that only the use of bands and arms were covered originally, and that ordinary robbery was not covered until later. In the Second Century A.D. it appears that brigands were still singled out for special treatment.*

In both public and private Roman Law, a trend is observable which is similar to that noted in Biblical Law. Again, brigandage became a pressing problem long before robbery.

<sup>119</sup>ARAMAIC PAPYRI OF THE FIFTH CENTURY B.C., *supra* note 19, at No. 7; C. SACHAU, ARAMÄISCHE PAPYRI UND OSTRACA 103-08 (1911). This papyrus is dated 461 B.C.

### A. *Private Roman Law*

In the law of delict (similar to present day tort law),<sup>120</sup> the earliest evidence of special concern with either brigandage or robbery is found in the First Century B.C. From the earliest period it seems that *furtum* (theft), though itself implying secrecy,<sup>121</sup> was not so restricted in law.<sup>122</sup> Indeed, it is likely that many cases of *furtum manifestum* (being caught while in the act of committing *furtum*) would now be regarded as robbery rather than theft. This is not, however, to say that a difference was not popularly perceived. The evidence of Plautus suggests that there was such a popular distinction.<sup>123</sup> However, there is no evidence that this distinction was of any legal significance in the early period. On the basis of Cicero's identification of the *fur* (thief) in the Twelve Tables<sup>124</sup> with a *praedonem et latronem* (plunderer and brigand)<sup>125</sup> Mommsen thought that the same was true of the distinction between theft and brigandage.<sup>126</sup> This, however, is hardly convincing. Cicero's argument calls for a restrictive interpretation of the provision in the Twelve Tables. Actually the provision was not concerned with the offense itself, but with the owner's right of self-defense. Not only is Cicero's interpretation without any other support, it is contrary to his own interpretation elsewhere.<sup>127</sup> Although there is no evidence that Roman Law distinguished between the brigand and the robber before the Second Century B.C., it would be wrong to attach the same significance to this lack of evidence as is appropriate in the distinction between theft and robbery. For brigandage, as here understood, was the act of a hostile group. In the early Republican period it would have been normally committed by

<sup>120</sup>A *delictum* was a wrongdoing prosecuted through a private action of the injured party and punished by a pecuniary penalty paid to the plaintiff.

<sup>121</sup>See, e.g., the antithesis between *furtificus* and *rapio propalam* in PLAUTUS, EPIDICUS 11-12.

<sup>122</sup>See 1A(1) REAL-ENCYCLOPÄDIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFT *Rapina* col. 233 (1914) [hereinafter cited as REAL-ENCY]; TH. MOMMSEN, RÖMISCHES STRAFRECHT 660 (1899) [hereinafter cited as MOMMSEN, STRAFRECHT]; W. REIN, DAS CRIMINALRECHT DER RÖMER 326-27 [hereinafter cited as REIN, CRIMINALRECHT]; 3 E. WARMINGTON, REMAINS OF OLD LATIN 483 (1961).

<sup>123</sup>PLAUTUS, EPIDICUS 11-12; PLAUTUS, POENULUS 1385-86. See also P. HUVELIN, ÉTUDES SUR LE FURTUM 207-08 (1915). The emphasis of the distinction in EPIDICUS 11-12 may be on the openness—*propalam*. But it is still significant that *rapere* is used. The passage may well be based on ARISTOPHANES, PLUTUS 369. 372.

<sup>124</sup>*Lex duodecim tabularum*—the earliest Roman collection of fundamental rules of customary law. The name is derived from the fact that the work was published on twelve tablets.

<sup>125</sup>CICERO, PRO TULLIO xxi.50 (interpreting TWELVE TABLES VIII.13); cf. *Collatio*, *supra* note 86, at 7.3.1 (Ulpian), but this is only one example. *Latro* is not mentioned in the version of DIGEST 9.2.3.

<sup>126</sup>MOMMSEN, STRAFRECHT, *supra* note 122, at 629 n. 4.

<sup>127</sup>CICERO, PRO MILONE iii. 9.

noncitizens. Thus, it would not have been a concern of the civil law, but rather one of the military authorities.<sup>128</sup> Later, when brigandage became a common method of Roman political activity, as the speeches and letters of Cicero clearly indicate, it became the concern of the civil law.

Acts of robbery and brigandage first attracted special attention in the context of the possessory interdicts. The earliest of these appears to be the *interdictum de vi*,<sup>129</sup> probably already attested by Terence in 161 B.C.,<sup>130</sup> and the *interdictum de vi armata*.<sup>131</sup> Both were regarded by Cicero as being old.<sup>132</sup> These interdicts were remedies whereby possession would be restored to one who had been forcefully dispossessed. Others, the *interdictum utrubi*<sup>133</sup> and the *interdictum uti possidetis*,<sup>134</sup> became available to prevent the use of force against one still in possession.<sup>135</sup> From their formulations, all of these interdicts appear to have been designed against acts of force, whether executed or merely contemplated. Apparently, they did not apply to a non-forceful dispossession. Furthermore, in all but the *interdictum de vi armata* the dispossession envisaged is akin to robbery, not brigandage. One might conclude, therefore, that in this context the principal distinction resembled one between theft and robbery, and not between theft and brigandage. But these indications are misleading.

<sup>128</sup>See LIVY, AB URBE CONDITA I.v.3.7; 28.xxii.5; 35.vii.7; 42.xviii.1. See also his account of the Carthaginian action, *id.* 29.xxx.10-xxxii. For the military measures of Herod and later Roman authorities in Judea, see JOSEPHUS, ANTIQUITIES XIV, 420; JOSEPHUS, BELLUM JUDAICUM I, 304-17; II, 271, 654. See also B. JACKSON, *supra* note 5, at chs. 2, 11. Livy clearly thought of *latrocinium* as being only one step removed from warfare. LIVY, AB URBE CONDITA 2.xlviii.5; 3.lxi.13; 6.xxi.6; 21.xxxv.2; 29.vi.2; 38.xxxi.2. Roman brigands could be imprisoned, along with nocturnal thieves (*fures nocturnos ac latrones*), as early as the Fifth Century B.C. if Livy is to be taken at face value. *Id.* 3.lviii.3. See also M. HENGEL, *supra* note 107, at 33 n.1.

<sup>129</sup>A *interdictum* is defined as "[a]n order issued by a praetor or other authorized official . . . at the request of a claimant and is addressed to another person upon whom a certain attitude is imposed: either to do something or to abstain from doing something." Berger, *Encyclopedic Dictionary of Roman Law*, 43 TRANSACTIONS AM. PHILOSOPHICAL SOC'Y 333, 507 (1953). The *interdictum de vi* was used to regain possession where one had been deprived of it by physical force.

<sup>130</sup>TERENCE, EUNUCHUS 319-20; see A. LINTOTT, VIOLENCE IN REPUBLICAN ROME 28 (1968) [hereinafter cited as LINTOTT, VIOLENCE]; A. WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN EMPIRE 89 (1968).

<sup>131</sup>The *interdictum de vi armata* was used to regain possession in the special case where the possessor had been deprived of possession by, or with the assistance of, an armed group of persons.

<sup>132</sup>CICERO, PRO CAECINA xiv.40; CICERO, PRO TULLIO xix.44. *Contra*, LINTOTT, VIOLENCE, *supra* note 130, at 127. Cicero also records that the wording of the *interdictum de vi armata* had already changed from its original form. CICERO, PRO CAECINA xvii.49.

<sup>133</sup>The *interdictum utrubi* was used to maintain an existing possession of movables where the possessor was threatened with a suit over ownership.

<sup>134</sup>The *interdictum uti possidetis* was used to maintain an existing possession of immovables where the possessor was threatened with a suit over ownership.

<sup>135</sup>F. SCHULZ, CLASSICAL ROMAN LAW 448, 451 (1951).

Three of these four possessory interdicts, that is all except the *interdictum utrubi*, dealt with dispossession of immovables.<sup>136</sup> Such dispossession almost always had to be forceful. Furthermore, at an early stage the concept of force was interpreted very broadly in the *interdictum quod vi aut clam*<sup>137</sup> so as to include any case where the victim prohibited the disputed action.<sup>138</sup> Thus, it is likely that in the other interdicts, too, the allegation of force was liberally interpreted<sup>139</sup> and was comparable to the formal allegation of force found in the English writ of trespass.<sup>140</sup>

On the other hand, the allegation of brigandage in the *interdictum de vi armata* was far from formal. This was a remedy available only when the dispossession was committed *vi hominibus coactis armatisve* (by the violence of an assembled armed band of men).<sup>141</sup> Although the threat of force was apparently sufficient to constitute the condition of violence (*vis*), at least in Cicero's time,<sup>142</sup> the use of a gang, whether armed or not, was vital. The necessity of group action is verified by Cicero's consistent stress upon it.<sup>143</sup> The interdict was not only available when the dispossessor himself had been responsible for hiring the gang, but also when some member of his household or his *procurator* (general manager) had been responsible.<sup>144</sup> Moreover, the implication from the use of both *familia* and *hominibus coactis* makes it clear that one who used men from outside his own household was also liable. The

<sup>136</sup>By the time of Julianic redaction, the *interdictum* also contained a clause to restore ". . . quaeque ille tunc ibi habuit." See W. BUCKLAND, *supra* note 109, at 735; F. SCHULZ, *supra* note 135, at 446.

<sup>137</sup>The *interdictum quod vi aut clam* was used to order restitution against one forcibly or secretly doing permanent damage to another's property.

<sup>138</sup>DIGEST 43.24.1.5; see A. WATSON, *supra* note 130, at 222-23; Watson, *Morality, Slavery, and the Jurists in the Later Roman Republic*, 42 TUL. L. REV. 289, 289-90 (1968).

<sup>139</sup>See DIGEST 43.16.1.29 (Labeo's view). See also 2 H. ROBY, *ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND THE ANTONINES* 515-16 (1902).

<sup>140</sup>See *Petstede v. Marreys*, Y.B. 4 Edw. 2 (1310), 22 SELDEN SOC'Y (4 Y.B. Ser.) 29 (1907).

<sup>141</sup>LENEL, E.P., *supra* note 112, at 467-68 (on the basis of CICERO, *PRO CAECINA* xxi.59-60).

<sup>142</sup>CICERO, *PRO CAECINA* xiv.41; xv.44; xvi.47. Aebutius claimed that there was no *vis* since no one was killed or wounded. This fact was conceded. Apparently, Cicero won the case. See THE SPEECHES OF CICERO 90 (H. Hodge transl. 1966) (analysis). Therefore, Cicero's view on this point must have been accepted.

<sup>143</sup>See, e.g., CICERO, *PRO CAECINA* vii.20-xiii.23. At *id.* xxi.59, Cicero noted that the edict was formulated in terms of the common case, and that even if someone made forceful use of a group already assembled together (not by him), the edict still applied. The vital point, he stressed, is ". . . vim . . . multitudinis . . . non solum convocatae multitudinis." This interpretation is the more interesting in that it was not required in this particular case. Aebutius had, according to Cicero, admitted that he had assembled a gang: "*Convocavi homines: coegi: armavi . . .*" *Id.* ix.24, though this formulation of the admission is unlikely to be a direct quotation. See also *id.* xi.32; xxiii.66. For a discussion of the problem of gangs in the late Republic, see LINTOTT, *supra* note 130, at 74-78.

<sup>144</sup>See CICERO, *PRO CAECINA* xix.55 (*[U]nde tu aut familia aut procurator tuus . . .*).

importance of this interdict arises from the fact that the defense later known as the *exceptio vitiosae possessionis* could be applied to all of the possessory interdicts<sup>146</sup> except for the *interdictum de vi armata*.<sup>147</sup> This defense was appropriate when the applicant had himself originally gained possession from the present dispossessor by force or stealth or grant at will. Thus, everyone was to be protected against a dispossession caused by gangs, even if his own possession had been wrongfully obtained. This protection was denied only if the applicant himself had used a gang to obtain possession. The sole source for this states he must have used an armed gang (*hominibus armatis*).<sup>148</sup> If the dispossession amounted to ordinary *vis*, but without the use of a gang, the applicant would fail if his own possession had been wrongfully obtained. The use of a gang gave rise to a more extensive remedy than the use of ordinary force in another respect also. The *interdictum de vi* would be granted only if the act of dispossession had occurred in the preceding year,<sup>149</sup> but the *interdictum de vi armata* was not so restricted.<sup>150</sup> Thus, the use of a gang was of substantial practical importance since a remedy was then available in a number of cases where it otherwise would have been denied.

In the First Century B.C., various measures were taken to render the law of delict especially sensitive to violent acts against property. The earliest of those measures was the *Lex Cornelia*, which, according to Lintott, covered "personal affront arising from assault on person or property."<sup>151</sup> However, this formulation is unduly broad. As regards property, the special provisions of the *lex* envisaged the case where a man claimed *domum suam vi introitam* (that his home had been entered by force).<sup>152</sup> It applied even if property was not handled.<sup>153</sup> The mere forceful

<sup>146</sup>See *id.* xxi.59.

<sup>147</sup>See LENEL, E.P., *supra* note 112, at 464-65, 469-73, 489; F. SCHULZ, *supra* note 135, at 447-51.

<sup>148</sup>CICERO, PRO CAECINA xxxii.92-93; see W. BUCKLAND, *supra* note 112, at 735; H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 275 (1952); LENEL, E.P., *supra* note 112, at 467. See also 9A(1) REAL-ENCY *Vis*, *supra* note 122, at col. 325 (1961). Cicero further claimed that the applicant did not have to prove his possession in this interdict. CICERO, PRO CAECINA xxxi.91. But this is highly doubtful.

<sup>149</sup>CICERO, AD FAMILIARES vii.13.2.

<sup>150</sup>See LENEL, E.P., *supra* note 112, at 462-63; F. SCHULZ, *supra* note 135, at 447-48.

<sup>151</sup>CICERO, AD FAMILIARES xv.16.3; cf. LENEL, E.P., *supra* note 112, at 467.

<sup>152</sup>LINTOTT, VIOLENCE, *supra* note 130, at 125.

<sup>153</sup>DIGEST 47.10.5.pr. (Ulpian), upon which INSTITUTES 4.4.8 was based. See W. BUCKLAND, *supra* note 112, at 590-91; J. COROÏ, LA VIOLENCE EN DROIT CRIMINEL ROMAIN 230 n.3 (1915) [hereinafter cited as COROÏ, LA VIOLENCE]; E. GRUEN, ROMAN POLITICS AND THE CRIMINAL COURTS 149-78 B.C. 263 (1968); REIN, CRIMINALRECHT, *supra* note 122, at 370-74; G. ROTONDI, LEGES PUBLICAE POPULI ROMANI 359 (1962).

<sup>154</sup>DIGEST 47.2.21.7; PAUL, SENTENTIAE 2.31.35; see pp. 67-68 *infra*.

entry was sufficient. This means, then, that the special provisions of the *lex* are not strictly relevant to an inquiry concerning robbery and brigandage. Nevertheless, the texts raise some interesting questions which merit brief consideration.

The *lex* is not mentioned before the juristic sources,<sup>154</sup> though the Digest cites opinions of Labeo,<sup>155</sup> Ofilius<sup>156</sup> and Sabinus<sup>157</sup> on it. The omission, particularly from the speeches of Cicero, is mildly surprising, considering the part played in the later days of the Republic by attacks on the houses of opposing politicians, particularly those by men like Clodius. Instead, the prejuristic sources contain accusations *de vi*, actions based on the Edict of Lucullus, and applications for the *interdictum de vi armata*.<sup>158</sup> Was there some requirement in the *lex* which confined its use to only certain cases of forceful entry? Paul described the operation of the *lex* in these terms:

*Mixto iure actio iniuriarum ex lege Cornelia constituitur, quotiens quis pulsatur, vel cuius domus introitur ad his, qui vulgo directarii appellantur. In quos extra ordinem animadvertitur . . .*<sup>159</sup> [The action of *iniuriae* under the *Lex Cornelia* is established (as having) a mixed nature, in all cases where someone is struck, or where his house is entered by those who are popularly called *directarii*. Against them punishment is administered outside the regular courts. . . .]

The offense, then, was one committed by *directarii*, and there is nothing in the context to suggest that Paul was merely giving an example rather than defining the scope of this type of *iniuria* (wrongful act). Paul did not explain further who are meant by the term *directarii*. In fact, he implied that it is a nonlegal expression. It was, however, defined in a different context by Ulpian as "those who enter the attics [literally, the dining rooms] of others with the intention to steal."<sup>160</sup> The form of Ulpian's statement also implies that *directarii* was essentially a nonlegal term, although a legal definition came to be required. All that can be justifiably concluded, then, is that some special class of criminals was intended. None of the other sources on the *lex* mention *directarii*. This probably means that once the particular evil against which the law was designed had passed, the designation of a particular class disappeared,

<sup>154</sup>MOMMSEN, STRAFRECHT, *supra* note 122, at 785-92.

<sup>155</sup>DIGEST 47.10.5.5 (Ulpian).

<sup>156</sup>*Id.* 47.10.5.1 (Ulpian); 47.10.23 (Paul).

<sup>157</sup>*Id.* 47.10.5.8 (Ulpian).

<sup>158</sup>See p. 67 *infra*. See also pp. 69-77 *infra*.

<sup>159</sup>PAUL, SENTENTIAE 5.4.8.

<sup>160</sup>[I]tem hi qui *directarii* appellantur, hoc est hi, qui in aliena cenacula se dirigunt furandi animo. DIGEST 47.11.7.

and the law became applicable to any wrongful entry. But the lack of sources contemporary with the *lex* precludes any certainty that it was originally limited to *directarii*.

The scope of the provision regarding *directarii* apparently also widened in another respect. Information about the clause relating to the wrongful entry of a house comes entirely from Ulpian and Paul. The former mentioned the element of force. The latter did not. There is good reason to believe that the text of Ulpian accurately depicts the original. It is Ulpian who provided a systematic discussion of the *lex* in his commentary on the praetorian edict. He commenced with a statement of its terms,<sup>161</sup> which, though not a direct quotation, must be a reasonably accurate statement since it was the basis for the commentary which follows. Further, it is of some interest to note that his remarks are taken from Book 56 of his commentary on the edict. This same book also contains the edict on *vi hominibus coactis, turba, and incendio, ruina, etc.*—all of which involve acts of violence.<sup>162</sup> If, violence, therefore, ceased to be a requirement, when did this change occur?

At least one text of Paul has been thought to have been interpolated:

*Qui furti faciendi causa conclave intravit, nondum fur est, quamvis furandi causa intravit. Quid ergo? Qua actione tenebitur? Utique iniuriarum: aut de vi accusabitur, si per vim introivit.*<sup>163</sup> [One who has entered a room in order to perpetrate a theft is not yet a thief, although he entered in order to steal (because of lack of *contractatio*<sup>164</sup>). What then? By what action will he be held liable? Certainly to one of *iniuria*. Or he will be accused of violence if it was through violence that he entered.]

The facts suggested (*Qui . . . intravit*) contain no indication that the entry was forceful. Indeed the last clause (*si per vim introivit*) confirms that force was not implied in what preceded it. It has been suggested<sup>165</sup> that everything from *quamvis* to the end was interpolated. If this were true, one effect would be to render this source ineffective as evidence that the *lex* covered a non-forceful entry in the classical period. But the reasons for this suggestion can only be based on considerations of style. Jolowicz points to repetition, presumably that of *quamvis furandi causa intravit*, and to the "rhetorical questions." But, the point at stake deserved emphasis. What did one do with a thief caught on the premises

<sup>161</sup>*Id.* 47.10.5.pr.

<sup>162</sup>See 2 O. LENEL, *PALINGENSIA IURIS CIVILIS* 761-68 (1960).

<sup>163</sup>DIGEST 47.2.21.7. See H. JOLOWICZ, *DIGEST XLVII.2, DE FURTIS* 33 (1940).

<sup>164</sup>*Contractatio* denotes physical handling.

<sup>165</sup>H. JOLOWICZ, *supra* note 147, at 33.

if he had not handled the property? To many, the instinctive answer is that he would be guilty of *furtum manifestum*. The jurist wished to emphasize that this is wrong. Paul's formulation was therefore quite natural. As to the questions, "What then?" and "By what action?", they are hardly rhetorical.

The text, then, is good evidence that *vi* in *domum vi introitam* was no longer necessary. This is confirmed by other sources. Elsewhere, Paul discusses the same case: *Qui furandi animo conclave effregit vel aperuit, sed nihil abstulit, furti actione conveniri non potest, iniuriarum potest.*<sup>166</sup> ["One who has broken into or opened a room with the intention to steal, but has carried nothing off, cannot be covered by the action of theft, but can by that of *iniuria*."] Paul here expressly contemplated either a forceful or a non-forceful entry: *effregit vel aperuit*. Of course, this elimination of the element of force did not mean that any entry into another's home was actionable. Another of Paul's passages indicates that instead of *vi* (force), the requirement *invito domino* (against the will of the owner) was substituted.<sup>167</sup> That this change may have occurred early is indicated by the early watering down of *vis* elsewhere.<sup>168</sup>

Some have argued that the *formula Octaviana* of 80 B.C., the forerunner of the *actio quod metus causa*,<sup>169</sup> gave a remedy of *quadruplum* for robbery as well as for intimidation.<sup>170</sup> The argument is based on references to the activities of a certain Octavius<sup>171</sup> in two of Cicero's passages. One records a request for the *formulam Octavianam*, which is quoted as commencing: *Quod per vim aut metum abstulisset.*<sup>172</sup> ["What he has taken by force or fear." (emphasis added)]. Two alternatives were apparently contemplated: that property either had been obtained by force or by fear. This was confirmed by the formulation *quod vi metusve causa*, which, according to Ulpian, is an older version of the Julianic edict *quod metus causa*.<sup>173</sup> But Cicero's second reference states that the partisans of Sulla were forced to return *quae per vim et*

<sup>166</sup>PAUL, SENTENTIAE 2.31.35.

<sup>167</sup>DIGEST 47.10.23.

<sup>168</sup>See pp. 66-67 *supra*.

<sup>169</sup>The *actio quod metus causa* was a special action available where duress was used to compel a person to transfer property, and, later, to do other acts against his will.

<sup>170</sup>See Schulz, *Die Lehre vom erzwungenen Rechtsgeschäft im antiken römischen Recht*, 43 ZEITSCHRIFT DER SAVIGNY-STIFTUNG 171, 218-20 (1922). See also H. JOLOWICZ, *supra* note 147, at 292. For citation and discussion of the more recent literature, see U. EBERT, DIE GESCHICHTE DES EDIKTS DE HOMINIBUS ARMATIS COACTISVE 108-14 (1968) [hereinafter cited as EBERT, DIE GESCHICHTE].

<sup>171</sup>See LINTOTT, VIOLENCE, *supra* note 130, at 130; F. SCHULZ, *supra* note 135, at 217-18.

<sup>172</sup>CICERO, VERRINE ORATIONS II.iii.65.152.

<sup>173</sup>See DIGEST 4.2.1.



*metum abstulerant*<sup>174</sup> ["what they had taken through force and fear" (emphasis added)]. The phrase here appears to be a hendiadys.<sup>175</sup> Indeed, Ulpian noted that it was realized that the duplication was unnecessary.<sup>176</sup>

Even if Cicero's formulation in the first passage is accepted as accurate, there is reason to doubt that Octavius contemplated robbery in his reform. As has recently been pointed out by Ebert,<sup>177</sup> the verb *auferre* does not necessarily mean take. It can mean accept. The phrase need not refer to anything greater than blackmail or intimidation. There is also another objection. Schulz's view assumed that the formula of Octavius already carried a *condemnatio* of fourfold.<sup>178</sup> This is important to his argument for two reasons. First, one could say that the edict of Lucullus a few years later was modeled on the formula of Octavius, the former referring to robbery and the latter to wilful damage.<sup>179</sup> Second, without this fourfold *condemnatio* the whole purpose of such a formula for robbery would disappear, since the remedies for *furtum* (theft) would still be greater. But in fact there is no evidence that the *formula Octaviana*, unlike the later *actio quod metus causa*, did carry a *condemnatio* of *quadruplum*. The only sources are the two passages from Cicero noted above. These are less than neutral. One reports that the Sullan partisans were forced *reddere* (to return) the misappropriated property. The other does not state the effect of the action.<sup>180</sup> If, then, the result of the action was only an order to restore, it can hardly have been designed to cover a case of robbery. The *actio furti* for double (if simply a case of *furtum*), the *actio furti manifesti* for fourfold (if a case of *furtum manifestum* because the offender was caught in the act), and the reipersecutory actions already provided a better remedy.

The real development of robbery as a separate delict commenced in 76 B.C. in the praetorship of Lucullus, a few years after the praetorship of Octavius.<sup>181</sup> That robbery was a praetorian innovation was attested by

<sup>174</sup>CICERO, AD QUINTUM FRATREM I.i.vii.21.

<sup>175</sup>Cf. F. SCHULZ, *supra* note 135, at 600-01 (reversing his earlier opinion).

<sup>176</sup>DIGEST 4.2.1. The explanation of the difference is probably interpolated. See also CICERO, PRO CAECINA xvi.46.

<sup>177</sup>EBERT, DIE GESCHICHTE, *supra* note 170, at 108-10.

<sup>178</sup>Schulz, *supra* note 170, at 219.

<sup>179</sup>See pp. 69-77 *infra*.

<sup>180</sup>But the position of the clause in the edict (see ULPIAN, LIB. XI AD EDICTUM) along with other cases of *restitutio in integrum* also supports this view.

<sup>181</sup>See COROÏ, LA VIOLENCE, *supra* note 152, at 220; A. DESJARDINS, *supra* note 100, at 299-307; F. GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 424 (6th ed. 1918); P. HUVELIN, *supra* note 123, at 804; I. M. KASER, DAS ROMISCHE PRIVATRECHT 523 (1955); LINTOTT, VIOLENCE, *supra* note 130, at 128; MOMMSEN, STRAFRECHT, *supra* note 122, at 660-61; REIN, CRIMINALRECHT, *supra* note 122, at 326-29; A. WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC 256-57

Cicero<sup>182</sup> and confirmed by Gaius.<sup>183</sup> The edict of Lucullus was primarily a response to the domestic political upheavals of the time,<sup>184</sup> which resulted in armed bands of slaves running wild in the countryside.<sup>185</sup> It was primarily designed to cover the wrongs committed by, or in the context of, gang warfare.<sup>186</sup> Thus, the edict was a measure against brigandage rather than robbery. Later, probably by the end of the First Century B.C. (if Labeo's reported discussion of a case under *vi bonorum raptorum*<sup>187</sup> is accurate), the delict covered violent misappropriation where the element of gang activity was absent. Thus brigandage developed into robbery. This description of the overall development is generally agreed upon, although there is much room for debate on some of the more detailed problems involved.

Ulpian's quotation of the edict in its final form is given in the Digest as follows:

*Si cui dolo malo hominibus coactis damnum quid factum esse dicetur, sive cuius bona rapta esse dicentur, in eum, qui id fecisse dicetur, iudicium dabo . . .*<sup>188</sup> [If damage is alleged to have been caused to someone maliciously by the gathering together of men, or if the goods of someone are alleged to have been seized, I will give judgment against the one who is alleged to have done this . . . ]

This is certainly not the original form of the edict. Indeed, the most recent view is that this formulation is not even genuine Ulpian, but was partly the work of the compilers.<sup>189</sup> But, the formulation does point to two questions. First, the wrong alleged where men have been gathered together (*hominibus coactis*) is not the misappropriation of property, but rather damage to property (*damnum*). Second, in the separate clause

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(1965) [hereinafter cited as WATSON, OBLIGATIONS]; Niedermeyer, *Crimen Plagii und Crimen Violentiae*, in 2 STUDI BONFANTE 401, 403 (1930); Rouvier, *Remarques sur l'actio vi bonorum raptorum*, 41 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 443-56 (1963). Recently, the edict and its later development have received thorough attention in the monograph by Ebert. See EBERT, DIE GESCHICHTE, *supra* note 170.

<sup>182</sup>CICERO, PRO TULLIO iv.8.

<sup>183</sup>GAIUS III.209 (*praetor introduxit*).

<sup>184</sup>A. DESJARDINS, *supra* note 100, at 299; REIN, CRIMINALRECHT, *supra* note 122, at 327.

<sup>185</sup>See CICERO, PRO TULLIO iv.8; LINTOTT, VIOLENCE, *supra* note 130, at 128.

<sup>186</sup>Cf. COROÏ, LA VIOLENCE, *supra* note 152, at 220; F. GIRARD, *supra* note 181, at 424; I M. KASER, *supra* note 181, at 523; MOMMSEN STRAFRECHT, *supra* note 122, at 660.

<sup>187</sup>See DIGEST 47.8.2.20 (Ulpian). The *actio vi bonorum raptorum* permitted fourfold damages for *rapina* (robbery).

<sup>188</sup>*Id.* 47.8.2.pr.

<sup>189</sup>See EBERT, DIE GESCHICHTE, *supra* note 170, *passim*. This does not, however, affect the argument here. Nor does it even affect, in Ebert's argument, the period at which *hominibus coactis* disappeared as a real requirement.

which gave a remedy also where goods were robbed (*bona rapta*), the requirement of *hominibus coactis* was not repeated. This either provoked or reflected the argument that whereas the edict covered the offense of an individual who robbed, it did not cover an individual who caused *damnum*.<sup>190</sup> Both clauses provide potential challenges to the theory here suggested. If this version at least accurately reflects the law of the original edict, if not its formulation, then there was no development from brigandage to robbery. Robbery was covered *ab initio*. The *damnum* clause is relevant in that it has been commonly argued that the original edict dealt with *damnum* alone, and did not mention *bona rapta*, whether *hominibus coactis* or not.<sup>191</sup>

The argument that the edict originally covered only *damnum* is not, in the author's view, overwhelming. It is based partly on the evidence of Cicero and partly on the relationship of the edict to earlier law. The formula quoted by Cicero in *Pro Tullio*<sup>192</sup> mentioned *damnum* but not *bona rapta*, and throughout the speech Cicero emphasized the *damnum*.<sup>193</sup> But this is hardly of great significance. The essential allegations against Fabius were that his men had murdered the slaves of Tullius<sup>194</sup>—this being one of the original forms of *damnum*—and that they had demolished his house and villa.<sup>195</sup> There was no accusation of misappropriation of property, nor were the buildings occupied.<sup>196</sup> Thus it was natural for Cicero to stress the element of *damnum*. This applies equally to his introductory remarks about the origins of the edict and its terms. His statement was tailored to the needs of his case. Even if the edict had contained a clause on *bona rapta*, Cicero should not be expected to mention it when it was irrelevant to his case. After all, Cicero was speaking for a client and not writing a legal treatise. In fact, in one passage Cicero did suggest that the action covered other types of violent acts including *rapinas* (robberies).<sup>197</sup>

<sup>190</sup>See DIGEST 47.8.2.7.

<sup>191</sup>See A. DESJARDINS, *supra* note 100, at 299-300, 306-07; EBERT, DIE GESCHICHTE, *supra* note 170, at 15-22, 91-92; F. GIRARD, *supra* note 181, at 424; MOMMSEN, STRAFRECHT, *supra* note 122, at 660.

<sup>192</sup>CICERO, PRO TULLIO iii.7 (*Quantae pecuniae paret dolo malo familiae P. Fabi vi hominibus armatis coactisve damnum datum esse M. Tullio . . .*).

<sup>193</sup>*E.g.*, *id.* iv.8; xi.27.

<sup>194</sup>*Id.* i.1; ix.21; x.25; xiv.34.

<sup>195</sup>*Id.* ix.21; x.24; xiv.34. Other accusations, not relevant to the action but recalling provisions of the criminal law, were thrown in also. See *id.* viii.19 (where Fabius' men were said to have *vagabantur armati*, perhaps recalling the provisions on the bearing of arms in the *Lex Cornelia de Sicariis et Veneficis*, and the *Lex Plautia*; see pp. 80-83 *infra*); CICERO, PRO TULLIO ix.21 (accusing the men of forcible entry, *introitum ipsi sibi vi*, recalling the provision of the *Lex Cornelia de Iniuriis*; see pp. 65-68 *supra*).

<sup>196</sup>CICERO, PRO TULLIO ix.21.

<sup>197</sup>*Id.* xviii.42. See also Rouvier, *supra* note 181, at 448-49.

The relationship of the edict to earlier law is also used as evidence that originally the edict envisaged only *damnum*.<sup>198</sup> Robbery, whether *hominibus coactis* or not, was already covered by actions in theft which involved a penal fourfold condemnation if the offender were caught in the act. Thus, the edict would strengthen the penalty only where the robber was not caught in the act, though this is hardly an insignificant case.<sup>199</sup> On the other hand, the penalty for *damnum* was, at most, for double. Further, much weight has also been attached to Cicero's treatment of the defense of *iniuria* in *damnum* and the praetor's desire to eliminate this defense where there was the additional factor of *hominibus coactis*.<sup>200</sup> The reform, it is argued, was a significant alteration of the law of damages. However, there was no reason for it to include an additional *bona rapta* clause.

How, then, did that clause come to be attached? The common answer given by Mommsen and others is that soon after the edict was promulgated it was found to be awkward to distinguish acts of destruction from acts of misappropriation committed by bands.<sup>201</sup> It became convenient to include both acts in the same edict, so that a remedy could be sought in one action rather than in two. This is fair enough. It is probably correct if in fact only *damnum* was originally regulated. But if this practical difficulty soon arose, why was it not foreseen by Lucullus? Though the common view of the development presents a far from impossible picture of the law developing piecemeal in reaction to the successive difficulties encountered, there is, in the author's view, no certainty that the original edict did not include a *bona rapta* clause, and that Lucullus did not foresee the procedural difficulty which Mommsen claims was only later appreciated.

If, then, the edict contained a *bona rapta* clause, whether originally or by early addition, was that clause limited to the situation where the delict was committed *hominibus coactis*? If the edict *de incendio ruina*<sup>202</sup> was later (and there is no evidence that it was earlier), then the *bona rapta* clause must have been so limited. If not, there would be no need for a special edict prescribing the same penalty of fourfold within a year. Although this argument is less than conclusive since there is no absolute

<sup>198</sup>See, e.g., A. DESJARDINS, *supra* note 100, at 306-07.

<sup>199</sup>See DIGEST 47.8.1 (Paul); F. SCHULZ, *supra* note 135, at 582, suggests the strengthening of this penalty as being one reason for the edict.

<sup>200</sup>For a more detailed discussion see pp. 74-76 *infra*.

<sup>201</sup>F. GIRARD, *supra* note 181, at 424 n.8; P. HUVELIN, *supra* note 123, at 804; MOMMSEN, STRAFRECHT, *supra* note 122, at 660.

<sup>202</sup>DIGEST 47.9; see pp. 77-78 *infra*. This edict provided for fourfold damages where goods were robbed when a house collapsed and in other special circumstances.

certainty as to the order in which the two edicts appeared, there are other reasons to suppose such a limitation.<sup>203</sup> It is of note that Ulpian discussed the question of *hominibus coactis* not only in the context of the *damnum* clause but also in that of the *bona rapta* clause.<sup>204</sup> This can mean only one of two things. First, the *bona rapta* clause, though separate from the requirement of *hominibus coactis*, nevertheless was subject to it. Second, *bona rapta* originally was grammatically linked to *hominibus coactis* but was later isolated by the compilers, who wished to stress the separate identity of the delict *vi bonorum raptorum*. For our purposes it is unnecessary to decide which of these alternatives is correct. We may, however, exclude the only other possibility—that Ulpian limited the *bona rapta* clause by applying a requirement of *hominibus coactis* previously lacking. This would run counter to the whole direction of classical interpretation of the edict.

The Edict of Lucullus was, thus, originally confined to property offenses committed by bands. Indeed, the original formulation appears to have envisaged not merely *hominibus coactis*, but *vi hominibus armatis coactisve*.<sup>205</sup> The extra words, however, add very little. If damage or robbery were committed by armed men, they must have been *coactis* (gathered together). One badly corrupted text in Ulpian's commentary is restored by Lenel in such a way as to distinguish between *solus armatus* (an individual armed man) and *hominibus coactis* (men gathered in a group).<sup>206</sup> But even if this restoration is correct, it informs us only of Ulpian's interpretation of the Hadrianic edict and not of the meaning of the original. The difficulties of this text have led some<sup>207</sup> to suppose that it and a text in Ulpian's commentary on the edict on *turba*<sup>208</sup> (riot) were interpolated. Nevertheless, it is clear from sources outside the Digest that by the time of Gaius there was an independent delict *vi bonorum raptorum*.<sup>209</sup> The law had thus come to cover robbery as well as brigandage. Later development of the edict not only eliminated the requirement *hominibus coactis* by interpreting it, in robbery at least, as

<sup>203</sup>See EBERT, DIE GESCHICHTE, *supra* note 170, at 88-89.

<sup>204</sup>DIGEST 47.8.2.12.

<sup>205</sup>See LENEL, E.P., *supra* note 112, at 39; MOMMSEN, STRAFRECHT, *supra* note 122, at 660 n.2.

<sup>206</sup>DIGEST 47.8.2.7; cf. CICERO, PRO CAECINA xxii.62; LENEL, E.P., *supra* note 112, at 393; Niedermeyer, *supra* note 181, at 406-07.

<sup>207</sup>INDEX INTERPOLATIONUM QUAE IN IUSTINIANI DIGESTIS INESSE DICUNTUR 509 (E. Levy & E. Rabel ed. 1935) [hereinafter cited as INDEX INTERPOLATIONUM]. See also *id.* 509 (on DIGEST 47.8.2.2).

<sup>208</sup>DIGEST 47.8.4.6; see LENEL, E.P., *supra* note 112, at 393.

<sup>209</sup>GAIUS, INSTITUTES III.209. See also CODE 9.33.3 (293 A.D.) (a creditor forcefully executing a debt).

*etiam hominibus coactis* (even with men gathered together),<sup>210</sup> but also watered down the requirements of force<sup>211</sup> and arms.<sup>212</sup>

An inquiry into why the edict of Lucullus was thought to be necessary might be beneficial at this point. The general background is clear, but what was the particular defect in the law which made the measure necessary? Clearly, it was not merely the inadequacy of the penal provisions for *damnum* and *furtum nec manifestum* (non-manifest theft). The difference between double and fourfold, especially when the action for fourfold was only possible within a year, is hardly sufficient to deter potential brigands who would often be incapable of even paying double. Had the measure been essentially deterrent, criminal sanctions would have been chosen, as were found necessary a few years later.<sup>213</sup> The usual explanation is that it was found desirable to exclude the defense (which Cicero called the "loophole" (*latebra*)) of the *Lex Aquilia*<sup>214</sup> which required that the *damnum* (damage to property) be committed *iniuria* (wrongfully). Thus, it is argued, the new action excluded any kind of claim of right.<sup>215</sup> The theory is entirely based on Cicero's argument in *Pro Tullio* (though Cicero subscribed also to the theory that the edict was designed to achieve greater deterrence). In the present author's view,

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<sup>210</sup>DIGEST 47.8.2.7. The text is certainly out of order. Lenel's reconstruction is:

*hoc enim, quod ait "hominibus armatis coactisve", sic accipere debemus etiam hominibus coactis, ut sive solus armatus vim fecerit sive etiam hominibus coactis, vel inermibus, hoc edicto teneatur.*

LENEL, E.P., *supra* note 112, at 393. Almost as radical in its effect is what precedes: *Sed et si unus homo coactus sit, adhuc dicemus homines coactos.* DIGEST 47.8.2.6.

<sup>211</sup>See DIGEST 47.8.2.9. But, as Ulpian commented in the context of the edict *de naufragio runia*: *Rapi autem sine vi non potest. Id.* 47.9.5.

<sup>212</sup>See *id.* 47.8.2.7. See also CICERO, *PRO CAECINA* xxi.60-61; DIGEST 48.6.9; 48.11.1; 48.7.32; 50.16.41 (Gaius); PAUL, *SENTENTIAE* 5.3.3; 5.23.7; COROÏ, *LA VIOLENCE*, *supra* note 152, at 220; A. DESJARDINS, *supra* note 100, at 308 n.4; REIN, *CRIMINALRECHT*, *supra* note 122, at 328.

<sup>213</sup>See pp. 78-86 *infra*.

<sup>214</sup>The *Lex Aquilia* was a statute of the Third Century B.C. concerning wrongful damage done to another's property.

<sup>215</sup>See LINTOTT, *VIOLENCE*, *supra* note 130, at 128-29; REIN, *CRIMINALRECHT*, *supra* note 122, at 327-28; WATSON, *OBLIGATIONS*, *supra* note 181, at 256. Beinart observes:

Nothing can be more genuine than the story Cicero tells us about the praetor Lucullus who tried to counter hiding behind *iniuria* by introducing a new edict which was to punish damage caused by taking up arms intentionally (*dolo malo*) even in the exercise of a right.

Beinart, *The Relationship of Iniuria and Culpa in the Lex Aquilia*, in I *STUDI IN ONORE DI VINCENZO ARANGIO-RUIZ* 279, 298 (1952). The results of such a development would be absurd. The slave of *X* enters the house of *Y* at night. *Y* surprises him. The slave attacks *Y*. *Y* can kill the slave himself, self-defense being admitted as a defense under the *Lex Aquilia*. DIGEST 9.2.4.pr.; 5.pr. But he cannot call his slaves to kill the intruder, as the word *iniuria* is not included in the edict of Lucullus.

the explanation based on *iniuria* is unsound. Cicero was not writing a scholarly legal history. He was using every argument at his disposal to win his case. Apparently the defense of Fabius was based either on a claim of right or on self-defense.<sup>216</sup> Cicero had two alternatives, both of which he pleaded. First, he claimed that the edict of Lucullus did not contain any defense. The *Lex Aquilia* included the term *iniuria* to this effect, but the edict of Lucullus deliberately omitted it.<sup>217</sup> But later in his argument, Cicero went to the trouble of examining the scope of the defense of *iniuria* under the *Lex Aquilia* to show that even if the defense did exist under the edict, the acts of Fabius could not fall within it.<sup>218</sup> Assuming that Cicero won the case, his success could thus be due either to an acceptance of his plea that there was no defense of *iniuria* in the edict, or an acceptance of the alternative plea that the defense was inapplicable in the particular case. The latter is more than possible. From what is known of the defense of *iniuria* from sources other than Cicero,<sup>219</sup> one can conclude that it would have been most unlikely that Fabius could have successfully invoked this defense. It seems to have been already established in the period of Quintus Mucius Scaevola<sup>220</sup> that the minimum possible force had to be used.<sup>221</sup> Thus, Cicero's denial of the defense is by no means conclusive.

Cicero further argued with some degree of justification, that in the analogous case of the *interdictum de vi armata*, which also contemplated *vi hominibus armatis coactisve*, the *exceptio vitiosae possessionis*<sup>222</sup> was denied, whereas in the ordinary interdict the defense was granted.<sup>223</sup> Thus in the *interdictum de vi armata*, a claim of right based on a former wrongful dispossession of the applicant was excluded. Similarly, he argued, there was no defense of claim of right in the edict of Lucullus. What Cicero failed to mention was that even in the *interdictum de vi armata*, a claim of right was a valid defense if based on an earlier dispossession *hominibus coactis*. Nor is the interdict the only analogy.

<sup>216</sup>CICERO, PRO TULLIO xvi.38 & *passim* (this being the interpretation placed on *dolo malo* by Fabius). See also id. xiii.31; 2 CICÉRON, DISCOURS 34 (1960). For an analysis of the arguments, see ROBY, *supra* note 139, at app. C.

<sup>217</sup>CICERO, PRO TULLIO v.10-12.

<sup>218</sup>*Id.* xix.45; xx.48—xxi.50.

<sup>219</sup>See F. LAWSON, NEGLIGENCE IN THE CIVIL LAW 14-15 (1955) (and sources cited therein).

<sup>220</sup>Quintus Mucius Scaevola was consul in 195 B.C. and died in 82 B.C. H. JOLOWICZ, *supra* note 147, at 90.

<sup>221</sup>See DIGEST 9.2.39.pr.; F. LAWSON, *supra* note 219, at 122.

<sup>222</sup>See pp. 64-65 *supra*. The *exceptio vitiosae possessionis* was a defense of the possessor of a thing. Its use could defeat all actions, except those brought by the person from whom the present possessor acquired possession.

<sup>223</sup>CICERO, PRO TULLIO xix.44-45. See also EBERT, DIE GESCHICHTE, *supra* note 170, at 60-61.

For example, it is known that self-defense was a defense in the criminal law under the *Lex Plautia de Vi*<sup>224</sup> and to a charge of bearing arms, under the *Lex Iulia de Vi Publica*.<sup>225</sup>

Thus, it seems that the desire to restrict or eliminate the defense of *iniuria* in these cases was not a primary motive of Lucullus. *Iniuria* was not in his day a wide defense, much less a *latebra*. Had this been the principle objective, it could have been achieved in far less radical ways than the promulgation of a new edict.

The real reason for the edict was, in the author's view, the desire to attach liability to the instigator of gang violence as well as the actual perpetrators. Previously, there was no liability for being an accessory by helping and advising (*ope consilio*) in *damnum*. The instigator would be liable only if the violence was committed by members of his own household. The object of the edict was to create liability where a gang from outside the household was used, and this regardless of whether it was the *dominus* (master) who hired them or some member of his household. Indeed, Cicero uses a variant of *ope consilio* in stressing this point, even though his case did not depend upon it.<sup>226</sup> The point is stressed also in Ulpian's commentary where again the formulation included *consilium* (advice),<sup>227</sup> and in another passage where the formulation suggested that this is, in fact, the primary case envisaged.<sup>228</sup> If this is correct, it could be said to provide another argument in favor of the original edict's being restricted to *damnum*. We know that by the time of Cicero the doctrine of *ope consilio* applied in *furtum*.<sup>229</sup> But liability under this edict does not seem to have been restricted to cases covered by *ope consilio*. One who merely advised, and gave no help, was apparently covered by the edictal formulation.

The number participating in a disturbance was also significant in the edict relating to *turba* (riot). The purpose of this edict appears to have been to cover cases of *damnum* not envisaged under the edict of Lucullus. The latter applied only to the person who himself was

<sup>224</sup>See CICERO, PRO SESTIO xxxvi.78; xl.86; xlii.90.

<sup>225</sup>DIGEST 48.6.11.2; cf. CORÓI, LA VIOLENCE, *supra* note 152, at 229-30.

<sup>226</sup>CICERO, PRO TULLIO xi.28 (*/S/ive eam ipsam familiam sibi damnum dedisse, sive consilio et opera eius familiae factum esse*). Cicero also argued, in support, that the same was true of the *interdictum de vi*. *Id.* xii.29-30. However, even if this was correct, it is doubtful that the interpretation of *dolo malo tuo* as equivalent to *tuo consilio* represented the original intention. *Contra*, LINTOTT, VIOLENCE, *supra* note 130, at 127.

<sup>227</sup>DIGEST 47.8.2.2 (*/S/ed et qui praecedente consilio ad hoc ipsum homines colligit armatos . . .*).

<sup>228</sup>See DIGEST 47.8.2.12 (*Si quis non homines ipse coegerit, sed inter coactos ipse fuerit . . .*).

<sup>229</sup>See CICERO, DE NATURA DEORUM III.xxx.74.



responsible for a gathering of armed men and, at least as interpreted, to the person who himself was *coactus* (gathered). The edict on *turba* covered *damnum* committed by others—those who used the opportunity of the disturbance to commit *damnum*.<sup>230</sup> The penalty was *duplum* (double) if brought within a year,<sup>231</sup> reflecting, as one text stated,<sup>232</sup> the lesser *atrocitas* (severity) of this act compared with that prescribed by the edict of Lucullus. Labeo is said to have described *turba* as *ex genere tumultus* (in the category of insurrection) and to have given its derivation as from the Greek *thorubein* (to riot).<sup>233</sup> It is further defined by Ulpian as requiring the participation of more than three or four persons. The latter would be only *rixa* (a brawl). *Turba* required *multitudinis hominum turbationem et coetum*. Ulpian suggested that this meant ten or fifteen participants.<sup>234</sup> Ulpian's commentary is comparable to Ine's definition of a band of marauders,<sup>235</sup> though one may note that it is less precise. *Turba* was restricted to acts of *damnum*.<sup>236</sup>

Separate but closely related to the edict on *turba*,<sup>237</sup> there was an edict which covered robbery in certain analogous situations such as fire, the collapse of a building, shipwreck or the capture of a ship. This latter edict applied the same penalty as that under the edict of Lucullus.<sup>238</sup> The formulation explicitly stated *rapuisse* (that property was taken by robbery). But by what seems to have been a later extension,<sup>239</sup> probably postclassical,<sup>240</sup> this was interpreted also to include a nonviolent taking. Though not so confined, this edict, like the others considered,

<sup>230</sup>DIGEST 47.8.4.5-6. For a discussion on the edict on *turba*, see Niedermeyer, *supra* note 181, at 406.

<sup>231</sup>DIGEST 47.8.4.pr.; 47.8.4.11.

<sup>232</sup>*Id.* 47.8.4.7.

<sup>233</sup>*Id.* 47.8.4.2.

<sup>234</sup>*Id.* 47.8.4.3.

<sup>235</sup>See p. 90 *infra*.

<sup>236</sup>DIGEST 47.8.4.9. Note the reconstruction of PAUL, SENTENTIAE 5.3 under the rubric *De his quae per turbam fiunt* in 2 FONTES IURIS ROMANI ANTEJUSTINIANI 388-89 (J. Baviera ed. 1964). This proves, at the very most, that brigandage and arson (PAUL, SENTENTIAE 5.3.4-6) came under the general conception of *turba*, but not that these cases fell under the edict.

<sup>237</sup>PAUL, SENTENTIAE 5.3.1-2; ULPIAN, LIB. LVI AD EDICTUM; see D. DAUBE, FORMS OF ROMAN LEGISLATION 8 (1956); MOMMSEN, STRAFRECHT, *supra* note 122, at 662 n. 3.

<sup>238</sup>Ulpian gives the text of the edict as:

*[I]n eum, qui ex incendio ruina naufragio rate nave expungnata quid rapuisse recepisse dolo malo damnive quid in his rebus dedisse dicitur: in quadruplum in anno, quo primum de ea re experiundi potestas fuerit, post annum in simplum iudicium dabo . . . .*

DIGEST 47.9.1.pr. (Ulpian). See also LENEL, E.P., *supra* note 112, at 396-97. On the conditions as to time and place, see DIGEST 47.9.1. 2-5; 47.9.3.pr.; 47.9.4.pr.; 47.9.5; COROÏ, LA VIOLENCE, *supra* note 152, at 227 n.3; A. DESJARDINS, *supra* note 100, at 318.

<sup>239</sup>DIGEST 47.9.3.4-5; cf. A. DESJARDINS, *supra* note 100, at 317-18.

<sup>240</sup>LENEL, E.P., *supra* note 112, at 396-97.

contemplated a situation arising from the activities of organized groups. This is clear in the case of piracy.<sup>241</sup> Clear expression was given to the principal motive of the edict in the course of justifying Labeo's view that the edict also extended to robbery in the course of an attack upon a house or villa. For, it was said, brigandage was as much a threat at home as it was on the high seas.<sup>242</sup> Thus, Kelly's characterization of the edict as designed against "looting" is apt.<sup>243</sup> The date of the edict is not known. The earliest commentator upon it was Labeo, but since *vi bonorum raptorum* seems to have emerged as a separate delict by Labeo's time, it must be assumed that this edict was earlier. Otherwise, there would be no need for the *rapuisse* provision. Probably it dates from shortly after the edict of Lucullus.<sup>244</sup>

Thus, the development of robbery as an independent delict was preceded by two stages. In the first, only brigandage was distinguished from theft. In the second, only acts of robbery committed in certain situations akin to brigandage were distinguished. By the time of Labeo, however, it was found to be unreasonable to distinguish robbery in some situations from robbery in others, and so all robbery was henceforth regarded as falling within an independent praetorian delict.

### B. Roman Criminal Law

A similar pattern of development emerges from Roman Criminal Law. The earliest measures against the violent misappropriation of property, occurring in the Second Century B.C., take the form of *quaestiones*<sup>245</sup> dealing with brigands.<sup>246</sup> The earliest extant relevant legislation is the *Lex Cornelia de Sicariis et Veneficis*, of 81 B.C.<sup>247</sup> It was well known in the classical period that this statute included a clause which made it an offense to be in possession of arms with the intention to kill or to steal.<sup>248</sup> But whether the clause was part of the original statute is open to doubt.<sup>249</sup>

<sup>241</sup>DIGEST 47.9.3.1 (*praedonibus expugnantibus*).

<sup>242</sup>*Id.* 47.9.3.2. The reason, however, may well be an addition to the commentary.

<sup>243</sup>J. KELLY, ROMAN LITIGATION 165 (1966).

<sup>244</sup>*Cf.* WATSON, OBLIGATIONS, *supra* note 181, at 256-57.

<sup>245</sup>*Quaestiones* were special criminal courts.

<sup>246</sup>*See* LIVY, AB URBE CONDITA 39.xxix.8-10; 39.xli.6-7; CICERO, BRUTUS xxii.85; E. GRUEN, *supra* note 152, at 262; 2 J. STRACHAN-DAVIDSON, PROBLEMS OF THE ROMAN CRIMINAL LAW 228 (1912). Special *quaestiones* were also set up in the first century, despite the existence of permanent courts *de vi*. *See also* CICERO, PRO MILONE v.12-13.

<sup>247</sup>*See* E. GRUEN, *supra* note 152, at 262; G. ROTONDI, *supra* note 152, at 357-58.

<sup>248</sup>DIGEST 48.8.1.pr. (Marcian); PAUL, SENTENTIAE 5.23.1; 8.4.1; *Collatio*, *supra* note 86, at 1.2.1; 1.3.1-2 (Ulpian). These formulations differ slightly from one another. Marcian and Ulpian required that the offender walk (in public?) with a weapon (*sum telo ambulaverit*), whereas Paul, supported by Cicero, required only that the offender *cum telo fuerit*. *See* CICERO, PRO MILONE iv.11.

<sup>249</sup>That it was an offense to bear arms *occidendi hominis causa* is attested by Cicero. CICERO, PRO

The Digest title on this statute shows that it was found convenient, from time to time, to subsume new offenses under the *lex* by resolution of the senate or by imperial rescript.<sup>250</sup> One might say that this only proves the genuineness of those clauses attributed by the classical jurists to the *lex* itself, since later additions were described as such. But it is still possible that some additions, particularly early ones, were simply incorporated without being so described. The principal penalty of the *lex*, according to the classical jurists, was deportation. However, this was not, in fact, the original penalty, which was the interdict of fire and water. Deportation was substituted in the time of Tiberius.<sup>251</sup> Thus, it is quite possible that early additions to the substance of the law were not recognized as such by the classical jurists. It may well be that when the *Lex Plautia* was superseded, a clause on the bearing of arms was inserted into the *Lex Cornelia*. It is unlikely, in any case, that two such similar provisions were passed within the space of only a few years, the only apparent difference between them being that the *Lex Cornelia* required proof of the purpose for which the weapon was carried. There is no evidence of the existence of any proceedings under this clause of the statute. Furthermore, the *Lex Cornelia* was primarily aimed at homicide. When compared to the other provisions of the law, the offense of carrying a weapon for the purpose of theft stands out as carrying the least possibility of danger to life. Of the other offenses of the *lex* the closest of it is that of allowing members of one's household to take up arms to seize or regain possession of property.<sup>252</sup> This latter offense was itself an addition to the law rather than one of its original provisions. Even later it was rarely invoked, as seems to be implied by the need to reaffirm it in 294 A.D.<sup>253</sup>

But even if the clause were original, this would have no effect on the author's central proposition. The carrying of arms, like the use of gangs (themselves often armed), was a particular danger to the Republic in its last century. Thus it elicited special attention from the law. At this stage,

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MILONE iv.11. Lintott considers this a clear reference to the *Lex Cornelia*. LINTOTT, VIOLENCE, *supra* note 130, at 120. The wording is certainly close, but the offense would be equally covered by the later *Lex Plautia*. CODE 9.16.6 shows that in 294 A.D. it was still necessary to stress that the bearing of arms *hominis necandi causa* was covered by the statute.

<sup>250</sup>See DIGEST 48.8.3-4; 48.8.4.2; 48.8.5-6; 48.8.13; 47.9.3.8. One may compare the extension of the *Lex Plautia* during the Republic. See CICERO, AD QUINTUM FRATREM 11.3.5; R. GARDNER, THE SPEECHES OF CICERO, PRO CAELIO-DE PROVINCIIS PROCONSULARIBUS-PRO BALBO 401-02 (1965).

<sup>251</sup>See DIGEST 48.10.33 (Modestinus); 48.8.3.5 (Marcian); 2 J. STRACHAN-DAVIDSON, *supra* note 246, at 23-24, 55-56.

<sup>252</sup>DIGEST 48.8.3.4 (Marcian).

<sup>253</sup>CODE 9.16.6.

then, brigandage was specially treated, but ordinary robbery had not yet emerged as an independent offense.

A few years later there was passed a *Lex Plautia* (or *Plotia*) *de Vi*. Its date is still the subject of some uncertainty,<sup>254</sup> but it must have preceded the trial of Catiline in 63 B.C., since he was accused under it.<sup>255</sup> The law, unlike the *Lex Cornelia de Sicariis et Veneficis*, was superseded by later legislation. Thus, its provisions, except in relation to *usucapio*,<sup>256</sup> are not stated in the juristic sources. However, its use as a weapon of political warfare in the late Republican period has left some traces.<sup>257</sup> Coroï suggested that it covered "la déposition par violence,"<sup>258</sup> but this formulation is too wide. Its principal objects seem to have been the suppression of gangs and the carrying of weapons. One charge against Sestius was *homines emisti, coegisti, parasti*<sup>259</sup> (that he hired, assembled, and prepared [i.e., armed] men). Catiline was accused of having blockaded strategic points with armed men, and further, that he himself went armed.<sup>260</sup> Vettius, too, was incarcerated and tried when he admitted to having been armed.<sup>261</sup> It seems, however, that the law could only be invoked if the offense was viewed as *contra rem publicam* (against the good of the state), as was decided by the senate in the case of the attack by Clodius' gang on Cicero's house.<sup>262</sup> It is true that Cicero, in his defense of Milo, asserted that "no violence is ever used between citizens in a free state which is otherwise than *contra rem publicam*."<sup>263</sup> But here again, Cicero is choosing his argument to suit his case. Had every act of violence been automatically *contra rem publicam*, there would never have been any need for the senate to pass resolutions such as those relating to the attack on Cicero's house and the affray in which Clodius was killed.

<sup>254</sup>See G. AUSTIN, *PRO CAELIO* 42-43 (3d ed. 1960); LINTOTT, *VIOLENCE*, *supra* note 130, at 109-11, 122-23 (and literature cited therein); MOMMSEN, *STRAFRECHT*, *supra* note 122, at 654 n.2; G. ROTONDI, *supra* note 152, at 377-78.

<sup>255</sup>See SALLUST, *BELLUM CATILINAE* 31.4.

<sup>256</sup>See GAIUS, *INSTITUTES* 11.45; *DIGEST* 41.3.33.2 (Julian); *INSTITUTES* 2.6.2. See also COROÏ, *LA VIOLENCE*, *supra* note 152, at 37; Cousin, *Lex Lutatia de Vi*, 22 *REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER* 93 (1922). *Usucapio* was similar to the present day acquisition of title through adverse possession, although it applied to both movables and immovables.

<sup>257</sup>See R. GARDNER, *supra* note 250, at 515; LINTOTT, *VIOLENCE*, *supra* note 130, at 109-10; REIN, *CRIMINALRECHT*, *supra* note 122, at 756-62. On its procedural advantages for the prosecution see CICERO, *PRO SULLA* xxxiii.92-93.

<sup>258</sup>COROÏ, *LA VIOLENCE*, *supra* note 152, at 60.

<sup>259</sup>CICERO, *PRO SESTIO* xxxix.84.

<sup>260</sup>SALLUST, *BELLUM CATILINAE* 27.2 (*Opportuna loca armatis hominibus obsidere, ipse cum telo esse . . .*).

<sup>261</sup>See CICERO, *AD ATTICUM* II.24.

<sup>262</sup>CICERO, *DE HARUSPICUM RESPONDIS* viii.15; CICERO, *AD ATTICUM* IV.3.57. See also COROÏ, *LA VIOLENCE*, *supra* note 152, at 53; LINTOTT, *VIOLENCE*, *supra* note 130, at 116-17; MOMMSEN, *STRAFRECHT*, *supra* note 122, at 657; REIN, *CRIMINALRECHT*, *supra* note 122, at 737.

<sup>263</sup>CICERO, *PRO MILONE* v.13.

There is also evidence of a *Lex Lutatia*,<sup>264</sup> which has been identified with the *Lex Plautia*, but which most writers have thought to be separate.<sup>265</sup> Our only information about this statute, if it was a separate statute, comes from Cicero's defense of Caelius. Unfortunately for the purposes of this analysis, he shared this defense with Crassus and Caelius himself. Of the various charges brought against Caelius, Cicero addressed himself almost exclusively to the charge relating to the attempted poisoning of Clodius. One of the other charges concerned the property of one Pallas,<sup>266</sup> but according to Cicero this was dealt with by Crassus.<sup>267</sup> There is no existing information as to its details. In his argument, Cicero stressed the public nature of the threat against which the law was designed<sup>268</sup> and the fact that it was passed in the face of *armata dissensione civicum* (armed civil strife). This might lead one to suppose that each of the charges was of a public nature. But Cicero was emphasizing the gravity of the law in order to contrast it with what he maintained was the essential charge against Caelius, namely his youthful licentiousness. One cannot, therefore, place great reliance on his description. Cousin saw the proceedings resulting from the attack on Cicero's house as being based on the *Lex Lutatia* and not the *Lex Plautia*.<sup>269</sup> This, however, is purely a result of his view of the demarcation between the two statutes and is not evidenced in the text. Also related to the *Lex Plautia* was a *Lex Pompeia de Vi*,<sup>270</sup> but this was a temporary measure designed only to improve the available procedures and strengthen the existing penalties during the proceedings following the murder of Clodius and the ensuing disturbances.

In the Empire all the above mentioned criminal legislation, except the *Leges Corneliae*, was superseded by the *Leges Iuliae de Vi*. The early history of these statutes is extremely obscure. We know from Cicero that Caesar was responsible for legislation concerning *vis* (violence), but it is unclear whether this was an integral part of his law on treason or an independent law.<sup>271</sup> If Caesar was responsible for a *lex de vi*, its

<sup>264</sup>See CICERO, PRO CAELIO xxix.70 (*Quam legem Q. Catulus . . . tulit . . .*).

<sup>265</sup>For references and most recent discussion see E. GRUEN, *supra* note 152, at 264; LINTOTT, VIOLENCE, *supra* note 130, at 110-22. The question need not be decided here.

<sup>266</sup>CICERO, PRO CAELIO x.23 (*de bonis Pallae*). See also LINTOTT, VIOLENCE, *supra* note 130, at 111-12.

<sup>267</sup>CICERO, PRO CAELIO x.23. Quintilian, on the other hand, stated that Caelius himself defended this charge. QUINTILIAN, INSTITUTIONIS ORATORIAE 4.2.27.

<sup>268</sup>CICERO, PRO CAELIO xxix.70 (*De vi quaeritis. Quae lex ad imperium, ad maiestatem, ad statum patriae, ad salutem omnium pertinet . . .*).

<sup>269</sup>Cousin, *supra* note 257, at 94.

<sup>270</sup>See REIN, CRIMINALRECHT, *supra* note 122, at 740-41; G. ROTONDI, *supra* note 152, at 410.

<sup>271</sup>In PHILIPPICS 1.9.21 Cicero criticized Antony's proposal that *et de vi et de maiestate damnati*

relationship to the *Leges Iuliae* of the Digest is disputed.<sup>272</sup> Also disputed is whether there were originally one or two distinct statutes. There may have been one statute concerning *Vis Publica* and another concerning *Vis Privata*, but there is no agreement as to what was the original distinguishing principle.<sup>273</sup> Of greater interest for present purposes, however, is the fact that, like the *Lex Cornelia de Sicariis et Veneficis*, the *Leges Iuliae de Vi* was expanded over the years to include many cases not in its original text. Many of these are apparent in the Digest from the use of phrases such as *item tenetur* (is likewise liable) and *eadem poena tenetur* (is liable to the same punishment).<sup>274</sup> But even the phrase *lege Iulia de Vi tenetur* may be used for a case which was not originally within the statute.<sup>275</sup>

There cannot, then, be any absolute certainty as to what were the original provisions of the *Leges Iuliae de Vi*. But when what appears to be original is compared with what certainly is a later extension, the same pattern emerges as elsewhere. The use of bands and of arms was contained in the original provisions. Robbery was covered only later. Marcian attested that both bearing arms in public and collecting arms at home, except for hunting or traveling, was punished by the statute.<sup>276</sup> Emphasis was placed on the use of bands<sup>277</sup> in a number of different contexts. It was an offense to summon men together to commit an act of violence,<sup>278</sup> to conspire to cause riot or rebellion or to arm men for such a purpose,<sup>279</sup> to cause an assault through the use of *convocatis hominibus*

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*ad populum provocent, si velint*. This appears to be a hendiadys, as is shown by the reference to *qui maiestatem populi Romani minuerint per vim*. Later, however, Cicero accused Antony of attempting, thereby, to repeal two of Caesar's laws, namely *quae iubent ei, qui de vi, itemque ei, qui maiestatis damnatus sit, aqua et igni interdicti*.

<sup>272</sup>See LINTOTT, *VIOLENCE*, *supra* note 130, at 107-08; MOMMSEN, *STRAFRECHT*, *supra* note 122, at 128-29; 9A(1) REAL-ENCY *Vis*, *supra* note 122, at col. 333 (1961); REIN, *CRIMINALRECHT*, *supra* note 122, at 741-43; Girard, *Les Leges Iuliae iudiciorum publicorum et privatorum*, 34 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG* 295, 322-24 (1913).

<sup>273</sup>See literature cited note 273 *supra*. See also COROÍ, *LA VIOLENCE*, *supra* note 152, at 249-54; A. DESJARDINS, *supra* note 100, at 307; Flore, *Di alcuni Casi di Vis Publica*, in 4 *STUDI BONFANTE* 337 (1930); Niedermeyer, *supra* note 181, at 401.

<sup>274</sup>See DIGEST 48.7.1; cf. COROÍ, *LA VIOLENCE*, *supra* note 152, at 228; 4 REAL-ENCY *Crimen*, *supra* note 122, at col. 1714; REIN, *CRIMINALRECHT*, *supra* note 122, at 752-53.

<sup>275</sup>Cf. DIGEST 48.7.6 (Ulpian), of the *senatus consultum Volusianum*.

<sup>276</sup>DIGEST 48.6.1; 48.6.3.1.

<sup>277</sup>Cf. COROÍ, *LA VIOLENCE*, *supra* note 152, at 191; LINTOTT, *VIOLENCE*, *supra* note 130, at 162; MOMMSEN, *STRAFRECHT*, *supra* note 122, at 657; G. ROTONDI, *supra* note 152, at 451. On brigandage in the Roman Empire see 2 M. ROSTOVITZ, *SOCIAL AND ECONOMIC HISTORY OF THE ROMAN EMPIRE 738-39* (2d ed. 1957).

<sup>278</sup>DIGEST 48.7.3.pr.

<sup>279</sup>DIGEST 48.6.3.pr. The conspiracy clause has, however, been thought to have been interpolated. See 3 INDEX INTERPOLATIONUM, *supra* note 207, at col. 534.

(assembled men),<sup>280</sup> to call a meeting in order to impede the course of justice,<sup>281</sup> to drive a man from his property by the use of an armed group<sup>282</sup> and to engage in armed looting during a tumult or insurrection.<sup>283</sup> All of these cases, so far as can be ascertained, were in the original law. Indeed, as late as 293 A.D., a rescript was issued to an official who had been assaulted which, *inter alia*, authorized proceedings under the *Lex Iulia de Vi Privata* but only *si hominibus coactis hoc fecit* (if the assault was committed by group force).<sup>284</sup>

It seems that in the Empire the special delictual actions of the late Republic were found to be an insufficient deterrent to the violent misappropriation of property. The original provisions of the *Lex Iulia* made criminal the wrong contemplated by the edict of Lucullus, where a group was assembled.<sup>285</sup> It was, however, only by subsequent application of the penalties of the *Lex Iulia* that robbery during a conflagration<sup>286</sup> or during a shipwreck<sup>287</sup> became criminal. Coroï adopted the correction of Cujas, who transferred the words *ex senatus consulto* (from a decree of the senate) from the *principium* of Digest 48.7.1 to section one, so that the text would read: *Eadem poena adficiuntur, qui ex senatus consulto ad poenam legis Iuliae de vi privata rediguntur . . .*<sup>288</sup> ["In receipt of the same punishment are those who are rendered liable to the punishment contained in the *Lex Iulia de Vi Privata* as a result of resolution of the senate. . . ."] But even if that reconstruction was correct, it does not prove that robbery from a shipwreck was incorporated in the law by that *senatus consultum*. The final clause

<sup>280</sup>DIGEST 48.6.10.1 (Ulpian); *id.* 48.7.2 (Scaevola). This is one of a number of cases where there is a conflict in the Digest as to whether it falls under *vis publica* or *vis privata*.

<sup>281</sup>DIGEST 48.7.4.pr. (Paul). See also J. KELLY, *supra* note 243, at 11.

<sup>282</sup>PAUL, SENTENTIAE 5.26.3; DIGEST 48.6.3.6 (Marcian). On the conflict see COROÏ, LA VIOLENCE, *supra* note 152, at 216-27; Flore, *supra* note 274, at 342-45. For the later extension to cover an unarmed group, see DIGEST 48.7.5 (Ulpian); 3 INDEX INTERPOLATIONUM, *supra* note 207, at col. 535.

<sup>283</sup>DIGEST 48.6.3.2 (Marcian). In an analogous case Paul recorded the death penalty, but without reference to the *Lex Iulia*. See DIGEST 48.6.11.pr.; PAUL, SENTENTIAE 5.3.3.

<sup>284</sup>CODE 9.12.4.

<sup>285</sup>On its innate weakness, see J. KELLY, *supra* note 243, at 163.

<sup>286</sup>DIGEST 48.6.3.3 (Marcian) (*Item tenetur, qui ex incendio rapuerit aliquid praeter materiam.*); see *id.* 48.6.3.5 (an extension of *id.* 48.6.3.3). A similar offense attracted special attention in section 25 of the CODE OF HAMMURABI. See 1 BABYLONIAN LAWS, *supra* note 24, at 111; 2 *id.* at 20-21, 160-61.

<sup>287</sup>DIGEST 48.7.1.1 (Marcian). *Eadem poena adficiuntur, qui ad poenam legis Iuliae de vi privata rediguntur, et [?] si quis naufragio dolo malo quid rapuerit.* For an understanding of *ut* for *et*, see COROÏ, LA VIOLENCE, *supra* note 152, at 231 n.3. It is highly unlikely, as the Digest has it, that robbery from a conflagration was *vis publica* while robbery from a shipwreck was *vis privata*. This must be attributable to the compilers. See *id.* at 228.

<sup>288</sup>COROÏ, LA VIOLENCE, *supra* note 152, at 231.

would still be suspect even if the rest were classical. Actually, it is more likely that the whole passage was interpolated<sup>289</sup> and the offenses of robbing, shipwreck, etc., did not become subject to criminal sanctions until the imperial constitutions referred to by Marcian, which assigned criminal liability *extra ordinem* (outside of the regular courts).<sup>290</sup> It was not, however, the constitution of Antoninus, mentioned by Marcian, which made this change.

The earliest criminal provisions were contained in *senatusconsulta* of the time of Claudius.<sup>291</sup> They were principally designed to deter acts endangering the safety of a ship and those on it. Hence, the liability under the *Lex Cornelia de Sicariis* mentioned above. The other provision, against robbery, proves that no liability existed at that time under the *Lex Iulia*. It prescribed a fine to the *fiscus* (treasury) of an amount equal to the condemnation in the praetorian (delictual) action. It is not clear whether this implies a separate criminal proceeding. Hadrian directed that those found to have plundered wrecks should be severely punished by provincial governors.<sup>292</sup> The close similarity in terminology makes it probable that this is one of the imperial constitutions referred to by Marcian. Apparently there were separate constitutions for Italy and for the provinces.

In time, ordinary robbery also came within the scope of the *Leges Iuliae*. Indeed, the doubt as to when this occurred centers on whether it was in the classical or postclassical period. No one seems to have thought that robbing was originally within the statute. Macer, whose very formulation betrays an extension, stated that even where there was no gathering of men and no assault, the *Lex Iulia de Vi Privata* applied if something was wrongfully taken from another's possessions.<sup>293</sup> This formula is so wide that it would even include a nonviolent taking. One solution to this difficulty has been to view the whole text as interpolated.<sup>294</sup> Another, to the same effect, is to suggest that the text was corrupted by the removal of a verb of denial.<sup>295</sup> Ulpian's statement that

<sup>289</sup>See Niedermeyer, *supra* note 181, at 402. See also 9A(1) REAL-ENCY *Vis*, *supra* note 122, at col. 337 (1961).

<sup>290</sup>DIGEST 48.7.1.2.

<sup>291</sup>DIGEST 47.9.3.8 (Ulpian); COROÍ, *LA VIOLENCE*, *supra* note 152, at 231 n.4; Niedermeyer, *supra* note 181, at 402 n.77.

<sup>292</sup>DIGEST 47.9.7 (Callistratus).

<sup>293</sup>DIGEST 48.7.3.2 (*Sed si nulli convocati nullique pulsati sint, per iniuriam tamen ex bonis alienis quid ablatum sit, hac lege teneri eum qui id fecerit.*).

<sup>294</sup>2 DIGESTA IUSTINIANI AUGUSTI 818 n.2 (Th. Mommsen ed. 1870).

<sup>295</sup>See MOMMSEN, STRAFRECHT, *supra* note 122, at 818 n.2.



any forceful act is criminal<sup>296</sup> may have been interpolated.<sup>297</sup> Its confirmation in respect to robbery, a remark by the jurist in his commentary on the edict of Lucullus, has been similarly viewed.<sup>298</sup> In fact, the earliest undisputed evidence that simple robbery was criminal is in a constitution of 415 A.D.<sup>299</sup>

It is clear, however, that by 293 A.D. a creditor who forcefully executed his debt was criminally liable.<sup>300</sup> But, this seems to have been treated as a special case. Executions by creditors without court sanction had necessitated a decree by Aurelius which protected the debtor even if the creditor had not dispossessed him forcefully.<sup>301</sup> According to Modestinus such nonforceful action was also criminal.<sup>302</sup> Paul, however, restricted criminal liability to the situation where the creditor used force.<sup>303</sup> The text of Aurelius' decree makes no mention of criminal sanctions.<sup>304</sup> Nor can it be concluded from the statements of Paul and Modestinus that this case was included in the original statute. Paul said only that such a creditor *in legem Iuliam de Vi Privata committit* (offends against the *Lex Iulia de Vi Privata*). Modestinus stated that the creditor *hac lege tenetur* (is liable under this law), but this statement is an interpolation. The text continues: *et tertia parte bonorum multatur et infamis sit* (and is fined to the extent of a third of his goods and suffers *infamia*).<sup>305</sup> The explicit statement of this penalty comes from the second book of Modestinus' work *De Poenis*, so it is probably original. The words *hac lege tenetur et* (is liable under this law and) are inserted by the compilers to show that the extract is relevant to the Digest title. Book 2 of *De Poenis* was not concerned with the *Lex Iulia*.<sup>306</sup> Further, the statement that the penalty includes *infamia* is a simplification.<sup>307</sup> The

<sup>296</sup>DIGEST 50.17.152.pr.

<sup>297</sup>See Niedermeyer, *supra* note 181, at 410. But see COROÏ, LA VIOLENCE, *supra* note 152, at 225 n.3 (and literature cited therein).

<sup>298</sup>DIGEST 47.8.2.1; see Flore, *supra* note 273, at 344 n.26; Niedermeyer, *supra* note 181, at 408.

<sup>299</sup>CODE 9.12.9.

<sup>300</sup>CODE 9.33.3 (*Res obligatas sibi creditorem vi rapientem non rem licitam facere, sed crimen committere convenit . . .*).

<sup>301</sup>DIGEST 48.7.7 (Callistratus).

<sup>302</sup>DIGEST 48.7.8.

<sup>303</sup>PAUL, SENTENTIAE 5.26.4.

<sup>304</sup>Coroï thought that it was to be interpreted in the light of the excerpt from Modestinus which follows it. COROÏ, LA VIOLENCE, *supra* note 152, at 234. This may well have been the intention of the compilers. But the text does not suggest this, and the passage was included also in the title *Quod metus causa gestum erit*. DIGEST 4.2.13.

<sup>305</sup>*Infamia* involved civil disabilities of various kinds; see A. GREENIDGE, *INFAMIA IN ROMAN LAW* (1894); Berger, *supra* note 129, at 500.

<sup>306</sup>See I O. LENEL, *PALINGENESIS IURIS CIVILIS* 729 (1960).

<sup>307</sup>See DIGEST 48.7.1.pr. (Marcian).

date at which criminal sanctions against the creditor came within the *Lex Iulia* cannot, then, be determined. But there is no evidence that it was before the late classical period.

Alongside the relatively well defined terms of criminal statutes, there are indications that various classes of offenders were singled out for special punishment. Among these were *latrones* and *grassatores*. These categories are not further defined. Their meaning, it seems, was self-evident. Both, however, may be generally described as brigands. We know that *grassatores* sometimes engaged in highway robbery<sup>308</sup> and *latrones* in murder.<sup>309</sup> The political threat posed by *latrones* is seen in their engaging in *factio*<sup>310</sup> (faction) and their association with enemies.<sup>311</sup> As early as Gaius they were a separate category for the purposes of punishment. Indeed, their punishment must have been well known as others were punished by reference to it.<sup>312</sup> Probably it was death.<sup>313</sup> This would be consistent with the military measures taken by Augustus and Tiberius against them.<sup>314</sup> One juristic source distinguishes the two classes<sup>315</sup> and implies that the *latro* is the more serious. But even the *grassator* was sometimes put to death.<sup>316</sup> Thus, though many of the activities of these brigands would fall under clauses of the *Lex Cornelia de Sicariis* and the *Leges Iuliae de Vi*,<sup>317</sup> they were, it seems, singled out for special attention. This probably corresponds to the period to which the criminal statutes were increasingly extended to cover more and more mundane offenses. Brigandage then reverted to its early Republican status as an offense essentially outside the normal legal processes.

<sup>308</sup>CICERO, DE FATO 34; DIGEST 48.19.28.10 (Callistratus); see A. DESJARDINS, *supra* note 100, at 390; 7(2) REAL-ENCY *Grassatores*, *supra* note 122, at cols. 1829-30 (1912). Hengel's view of them as "vagrants" (*landstreicher*) hardly seems apt. M. HENGEL, *supra* note 107, at 32.

<sup>309</sup>PAUL, SENTENTIAE 5.23.8; *Collatio*, *supra* note 83, at 7.3.1 (Ulpian) (found also in DIGEST 9.2.3); *id.* 48.19.28.15 (Callistratus). See also SENECA, DE BENEFICIIS 5.14.2 in M. HENGEL, *supra* note 107, at 32.

<sup>310</sup>DIGEST 48.19.11.2 (Marcian); see 12(1) REAL-ENCY *Latrociniiis*, *supra* note 122, at col. 979 (1924). Hengel sees this as an aggravation. M. HENGEL, *supra* note 107, at 32. But the context is against this. The case is given as an example of intentional homicide.

<sup>311</sup>DIGEST 49.15.24 (Ulpian); *id.* 50.16.118 (Pomponius); cf. M. HENGEL, *supra* note 107, at 32.

<sup>312</sup>See DIGEST 47.7.2 (Gaius); *id.* 47.9.7 (Callistratus); *id.* 47.16.2 (Paul); PAUL, SENTENTIAE 5.3.4.

<sup>313</sup>See A. DESJARDINS, *supra* note 100, at 310.

<sup>314</sup>SUETONIUS, AUGUSTUS 32 (*grassatorum*); SUETONIUS, TIBERIUS 37 (*grassaturis ac Latrociniiis*); see TERTULLIAN, APOLOGETICUS ii.8.

<sup>315</sup>DIGEST 48.19.28.10 (Callistratus); see A. DESJARDINS, *supra* note 100, at 310.

<sup>316</sup>DIGEST 48.19.28.10.

<sup>317</sup>See A. DESJARDINS, *supra* note 100, at 310; M. HENGEL, *supra* note 107, at 32-34; 12(1) REAL-ENCY *Latrocinium*, *supra* note 125, at col. 980 (1924); REIN, CRIMINALRECHT, *supra* note 122, at 329.

## III

*The terminology of Anglo-Saxon Law distinguished theft and robbery, but the law did not treat the latter as an aggravated form of the former. However, the Laws of Ine did suggest that brigandage was already regarded as an aggravated form of theft. The earliest traces of royal concern with the administration of criminal law show an interest in brigandage. However, for a considerable period after the conquest, robbery was barely distinguishable from theft and attracted no greater penalty. A distinction did not emerge until 1340 when robbery of less than twelve pence was made a felony and thereby punishable by death. An earlier distinction between theft and robbery is suggested by Glanvill. He reported that robbery was a plea of the crown, while theft was a plea belonging to the sheriff. His statement, however, does not fully correspond with the facts recorded by contemporary documents.*

Through the intricacies of Anglo-Saxon and early Common Law emerges a pattern similar to that already observed. But there are also some significant differences. From the earliest compilation, the Kentish laws of Aethelbert, the terminology used shows that a difference was perceived between theft and robbery (*reaflac*).<sup>318</sup> The precise nature of the distinction is nowhere stated. The nearest attempt is a gloss in *Leges Wilhelmi* 6, where the author, apparently taking *ran* as synonymous with *reaflac*,<sup>319</sup> defined it as *quod Angli dicunt apertam rapinam*, the English name for open robbery. Thus, openness seemed essential, as opposed to the usual *Heimlichkeit* (secrecy) of the thief.<sup>320</sup> The writer's further identification of the offense with *rapina* is not, however, sufficient to prove that the Anglo-Saxon concept was identical to the Roman. In fact it is possible that *reaflac* did not necessarily involve force.<sup>321</sup>

Yet, though the terminology distinguished theft and robbery, it does not seem that robbery was regarded as an aggravated form of theft, so as to be punished more severely. Indeed, where there existed differences in

<sup>318</sup>F. LIEBERMANN, *DIE GESETZE DER ANGELSACHSEN* 623 (1903) [hereinafter cited as LIEBERMANN, *GESETZE*]; R. SCHMID, *DIE GESETZE DER ANGELSACHSEN* 554, 643 (rev. ed. 1858). There was no one standard Anglo-Saxon word for theft. For several Anglo-Saxon terms for theft, see 2 LIEBERMANN, *GESETZE*, *supra* at 222, 349; R. SCHMID, *supra* at 554-55.

<sup>319</sup>*Leges Wilhelmi* § 6, in 1 LIEBERMANN, *GESETZE*, *supra* note 318, at 487. *But see* 2 *id.* 623. According to 2 H. BRÜNNER, *DEUTSCHE RECHTSGESCHICHTE* 647 (1892), the term is Nordic.

<sup>320</sup>F. LIEBERMANN, *GESETZE*, *supra* note 318, at 349; R. SCHMID, *supra* note 318, at 555; F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 493-94 (2d ed. 1968).

<sup>321</sup>*See The Laws of Ine* § 10, in *THE LAWS OF THE EARLIEST ENGLISH KINGS* 40 (F. Attenborough ed. 1922) [hereinafter cited as *Laws of Ine*] (*where reaflac* and violent seizure—*niednaeme dō*—are separately mentioned, but identically punished); 2 H. BRÜNNER, *supra* note 319, at 647; 1 LIEBERMANN, *GESETZE*, *supra* note 318, at 94-95; 3 *id.* at 70.

punishment, the robber commonly fared better than the thief. In the Laws of Aethelbert, theft gave rise to double restitution,<sup>322</sup> or triple restitution plus a fine or confiscation to the king where a freeman stole from a freeman<sup>323</sup> or ninefold where the property belonged to the king.<sup>324</sup> On the other hand, fixed fines of three shillings and six shillings were imposed in cases involving *wegreaf* (highway robbery).<sup>325</sup> In the Laws of Ine of Wessex, a fine of sixty shillings was applied both to cases of theft and robbery.<sup>326</sup> The Laws of Cnut, on the other hand, dealt separately with *reafiac*. There, robbery resulted in double restitution and forfeiture of *wergeld* (the man's price),<sup>327</sup> and "proved" or "open" theft was treated as a capital offense.<sup>328</sup> The meaning of the latter is not entirely certain. If it only meant openly committed theft, it would seem barely distinguishable from *reafiac*. However, the later Latin versions<sup>329</sup> strongly suggest that the law referred to the thief caught in the act.<sup>330</sup> The Laws of Cnut do not reveal the penalty for ordinary theft, but a section of the earlier Laws of Aethelred<sup>331</sup> provided the same penalty for it as Cnut provided for *reafiac*.<sup>332</sup> A similar identity of treatment was obtained in many Germanic laws.<sup>333</sup>

Thus, the distinction between theft and robbery does not appear to have been of any substantial significance in the pre-Conquest compilations. This is not to say, however, that all acts of misappropriation were similarly treated. There were other distinctions of

<sup>322</sup>*The Laws of Aethelberht* § 90, in *THE LAWS OF THE EARLIEST ENGLISH KINGS* 16 (F. Attenborough ed. 1922) [hereinafter cited as *Laws of Aethelberht*].

<sup>323</sup>*Laws of Aethelberht*, *supra* note 322, at § 9. Attenborough translates this as: "If a freeman robs a freeman . . ." *THE LAWS OF THE EARLIEST ENGLISH KINGS*, *supra* note 322, at 5. But the verb used is *stelan*. See also Liebermann's translation: "Wenn ein Freier einem Freien [etwas] stiehlt . . ." 1 LIEBERMANN, GESETZE, *supra* note 318, at 3.

<sup>324</sup>*Laws of Aethelbert*, *supra* note 322, at § 4.

<sup>325</sup>*Id.* §§ 19, 89; see 2 LIEBERMANN, GESETZE, *supra* note 318, at 674.

<sup>326</sup>*Laws of Ine*, *supra* note 321, at §§ 7, 10. For a further discussion of the fine of sixty shillings, see J. GOEBEL, FELONY AND MISDEMEANOR 348 (1937); 2 LIEBERMANN, GESETZE, *supra* note 318, at 348. Section 10 also required restoration of the property taken. The omission of this clause from section 7 does not, however, necessarily mean that this was not also required of the thief.

<sup>327</sup>*The Laws of Cnut* § 63, in *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I*, *supra* note 111, at 204-05.

<sup>328</sup>*Id.* §§ 26, 26.1; *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I*, *supra* note 111, at 189.

<sup>329</sup>CONSILIATIO CNUTI 26.1 (*Manifestus autem fur*); QUADRIpartitus, 2 *Cnut* 26.1 (*fur probatus*); INSTITUTA CNUTI 26.1 (*Publicus latro*). These are found in 1 LIEBERMANN, GESETZE, *supra* note 301.

<sup>330</sup>See p. 90 *infra*.

<sup>331</sup>*The Laws of Aethelred* § 1.5, in *THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I*, *supra* note 111, at 52-53 [hereinafter cited as *Laws of Aethelred*].

<sup>332</sup>See note 310 *supra*.

<sup>333</sup>H. BRÜNNER, *supra* note 319, at 648-49.

far greater import. As in other Germanic systems,<sup>334</sup> a distinction was drawn according to the value of the property involved—a criterion which later was to determine what was “grand” and what was “petty” larceny. According to the Laws of Aethelstan,<sup>335</sup> a thief could be put to death if he were caught in the act and the *corpus delicti* was worth more than eight pence. A later provision of the same king raised the amount to twelve pence,<sup>336</sup> where it was to remain for centuries.<sup>337</sup> In this latter decree Aethelstan made no mention of the requirement that the thief be caught in the act. Indeed, he envisaged that there be some form of process. At any rate, by the time of Henry I the death penalty could be imposed even where the thief was not caught in the act.<sup>338</sup> By the time of Bracton it seems that capital punishment for the offense was normal and that the lesser penalties were exceptional. This is probably the implication of his negative formulation:

*Est etiam furtum de re magna et re minima, et ideo habenda erit ratio quae vel qualis sit res quae furatur. Pro parvo enim latrocinio vel pro parva re, nullus christianus morti tradatur.*<sup>339</sup> [Theft may concern property of great value or of the slightest value, and therefore attention must be paid to the nature and value of the property which is stolen.

<sup>334</sup> *Id.* at 639-40.

<sup>335</sup> *The Laws of Aethelstan* § 1, in THE LAWS OF THE EARLIEST ENGLISH KINGS 126-27 (F. Attenborough ed. 1922) [hereinafter cited as *Laws of Aethelstan*]; see *Leges Henrici Primi* § 59.20, in I LIEBERMANN, GESETZE, *supra* note 318, at 547, 579.

<sup>336</sup> *The Laws of Aethelstan*, *supra* note 335, at § 1.1, clearly stated that the greater penalty was to be applied only if the value of the object stolen exceeded twelve pence. 6 *Id.* at § 12.3 stated that no one may be put to death for theft of property worth less than twelve pence. The latter thus implies that if the property was worth twelve pence, the thief was subject to being executed. But the former is almost certainly correct, as appears from the analogy with 2 *id.* § 1, and from Y.B. Trin. 12 Edw. 2, pl. 29(f) (1319), 81 SELDEN SOC'Y (25 Y.B. Ser.) 123 (1964), where the accused was convicted of theft of six pigs worth eight pence. He was sentenced to six days in prison, but on the understanding that if he was later found guilty of the theft of fourpence halfpenny, he should be hanged. It thus appears that the minimum amount required for grand larceny was twelvecpence halfpenny. On the other hand Britton stated the lesser punishment applied when the property was worth less than twelve pence, in conformity with 6 *Laws of Aethelstan* § 12.3. 1 BRITTON ch. 16, § 7, at 61 (F. Nichols ed. 1901); cf. the formulation in the case of Ailward, *infra* note 376. See also 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 359 (7th ed. 1966).

<sup>337</sup> See Y.B. Trin. 12 Edw. 2, pl. 29(f) (1319), 81 SELDEN SOC'Y (25 Y.B. Ser.) 123 (1964); *Eyre of Kent*, Y.B. 6 & 7 Edw. 2 (1313-14), 24 SELDEN SOC'Y (5 Y.B. Ser.) 79-80 (1909); 3 W. HOLDSWORTH, *supra* note 336, at 366-67.

<sup>338</sup> LIEBERMANN, GESETZE, *supra* note 318, at 350 (citing *Leges Henrici Primi*, *supra* note 335, at §§ 46.1, 47, 64.2, 82.3). 4 *Laws of Aethelstan*, *supra* note 335, at § 6 seems to have been a temporary measure.

<sup>339</sup> BRACTON, THE LAWS AND CUSTOMS OF ENGLAND f. 151b, at 427 (S. Thorne transl. 1968) [hereinafter cited as BRACTON, LAWS AND CUSTOMS]. Thorne gives the textual variants and a slightly different translation.

For no christian [*sic*] may be put to death on account of petty theft or for a petty (amount of) property.]<sup>340</sup>

That such leniency was reserved for Christians seems implied also in the laws of Aethelred and Cnut.<sup>341</sup> Even more common and important than the value of the property stolen was the distinction between the thief caught in the act and the thief not so caught. In the former case the penalty was death<sup>342</sup> after a summary proceeding.<sup>343</sup> The distinction remained important long after the conquest.<sup>344</sup>

Yet, if robbery was not, per se, an aggravated form of theft in Anglo-Saxon times, it seems that brigandage was. This appears most clearly from the Laws of Ine which distinguished between a thief, a band of marauders and a raid, according to the number of men involved.<sup>345</sup> If less than seven, the men were thieves. If between seven and thirty-five, they were treated as a band of marauders. And if more than thirty-five, they constituted a raid. The laws further set out the consequences of this classification in the terms of increasing severity of punishment.<sup>346</sup> Harding is certainly correct in viewing this provision of the Laws of Ine as an illustration of the problem of keeping order.<sup>347</sup> The organized gang was commonly a great danger to the central authority in antiquity.<sup>348</sup> Thus, it was the professional nature of brigandage<sup>349</sup> which made it far more significant than ordinary robbery. Confirmation of this distinction between robbery and brigandage is found in other Germanic sources.<sup>350</sup>

In the Tenth and Eleventh Centuries brigandage seems to have been partly responsible for the increase of royal interest in criminal matters.

<sup>340</sup>Author's translation.

<sup>341</sup>See 5 *Laws of Aethelred*, *supra* note 331, at § 3; 6 *id.* § 10; H. RICHARDSON, *BRACTON: THE PROBLEM OF HIS TEXT* 134-35 (Selden Soc'y Supp. Ser. No. 2, 1965).

<sup>342</sup>See, e.g., *Laws of Ine*, *supra* note 321, at § 12.

<sup>343</sup>See 2 H. BRÜNNER, *supra* note 319, at 642; 1 J. GOEBEL, *supra* note 326, at 347; 1 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW IN ENGLAND* 61-74 (1883).

<sup>344</sup>See *Assize of Northampton*, ch. 3, in *SELECT CHARTERS* 151 (5th ed. W. Stubbs 1884), discussed in Pollock, *The King's Peace in the Middle Ages*, in 2 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 403, 409 (1908); 2 BRACTON, *LAWS AND CUSTOMS*, *supra* note 339, f. 154b, at 435; 1 BRITTON, *supra* note 336, ch. 16, § 2, at 57; 1 *BOROUGH CUSTOMS*, Scarborough, 1348, 18 SELDEN SOC'Y 54 (1904).

<sup>345</sup>*Laws of Ine*, *supra* note 321, § 13(1), at 41. See also R. SCHMID, *supra* note 318, at 555; 3 J. STEPHEN, *supra* note 343, at 129 n.1; T. PLUCKNETT, *EDWARD I AND THE CRIMINAL LAW* 12 (1960).

<sup>346</sup>*Laws of Ine*, *supra* note 321, §§ 14-15, at 41; 2 LIEBERMANN, *GESETZE*, *supra* note 318, at 295, 351.

<sup>347</sup>A. HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 16 (1966).

<sup>348</sup>Jackson, *supra* note 1, at 386.

<sup>349</sup>*Cf.* J. GOEBEL, *supra* note 326, at 64-65. The special danger from the professional offender was reflected also in greater penalties for repeating offenders even when not part of an organized group. See, e.g., 1 BRITTON, *supra* note 336, f.24, at 60-61.

<sup>350</sup>2 H. BRÜNNER, *supra* note 319, at 570-71; J. GOEBEL, *supra* note 326, at 73-74, 78-80.

*Hamsocn* was one of four offenses which comprised the earliest list of criminal infractions for which the king exacted dues.<sup>351</sup> The offense involved breaking into another's house. However, the one existing early definition envisaged that this would be done *cum haraido*.<sup>352</sup> Apparently this was a reference to the type of classification seen already in the Laws of Ine,<sup>353</sup> one based on the number of men involved. *Hamsocn* also appeared in the Domesday Book as one of the most prominent king's matters.<sup>354</sup> It survived in England in the procedure for the appeal of a felony.<sup>355</sup> *Hamsocn* also survived in Scotland until very much later.<sup>356</sup> Closely associated with *hamsocn* in the Anglo-Saxon sources was *forestal*<sup>357</sup> (later defined as assault on the king's highway),<sup>358</sup> which contemplated the problem of highway robbery and ambush. This too was a commonly found, early threat to central authority and a speciality of brigand groups.<sup>359</sup> *Forestal* was also one of the earliest criminal matters to engage the royal power.<sup>360</sup>

With the conquest by William and the new influences which accompanied him, the terminology of offenses against property changed, and Latin and Norman-French terms were substituted for the Anglo-Saxon. It seems that consistency was barely approached for more than a century. Maitland, referring to the time of Glanvill, noted the fact that *latrocinium* superseded *furtum* in the technical language of the law.<sup>361</sup> But the development was by no means straightforward from *furtum* to *latrocinium*. The latter was already found in Domesday, where, *inter*

<sup>351</sup>*The Laws of Cnut*, *supra* note 327, at §§ 12, 15; cf. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 426 (5th ed. 1956); 2 F. POLLOCK & F. MAITLAND, *supra* note 320 at 453-54.

<sup>352</sup>*Leges Henrici Primi*, *supra* note 335, § 80.11, at 597.

<sup>353</sup>J. STEPHEN, *supra* note 343, at 56 n.5.

<sup>354</sup>1 DOMESDAY BOOK 179 (of Hereford), 252 (of all England). See also 1 F. MAITLAND, COLLECTED PAPERS 233 (1911); 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 454-57.

<sup>355</sup>See, e.g., SELECT PLEAS OF THE CROWN, 1202, No. 60, 1 SELDEN SOC'Y 26-27 (1887); ROLLS OF THE JUSTICES IN EYRE, 1221, No. 945, 59 SELDEN SOC'Y 403 (1940).

<sup>356</sup>G. GORDON, THE CRIMINAL LAW OF SCOTLAND 762 (1967).

<sup>357</sup>THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I, *supra* note 111, at 353.

<sup>358</sup>*Leges Henrici Primi*, *supra* note 318, § 80.2, at 596. See THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I, *supra* note 111, at 325. On protection of the king's highway as one of the earliest forms of the king's peace, see Trial on Pinnenden Heath, 2 ENGLISH HISTORICAL DOCUMENTS 451 (D. Douglas & G. Greenway ed. 1953); 1 Curia Regis Rolls, 1198, at 49; INTRODUCTION TO THE CURIA REGIS ROLLS 1199-1230, 62 SELDEN SOC'Y 317 (1966); 1 F. POLLOCK & F. MAITLAND, *supra* note 320, at 44-46; Pollock, *The King's Peace*, 1 L.Q. REV. 37, 42, 45 (1885).

<sup>359</sup>Cf. *Judges* 9:25; note 48 *supra*.

<sup>360</sup>See sources cited in notes 351 and 354 *supra*.

<sup>361</sup>2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 494 n.4.

*alia*,<sup>362</sup> it was distinguished from *revelach*,<sup>363</sup> a latinization of *reafslac*.<sup>364</sup> The word *latro* (one committing *latrocinium*) occurred also in Richard's *Edictum Regium* of 1195<sup>365</sup> and in the Eyre Rolls of the early Thirteenth Century.<sup>366</sup> Thus, Bracton followed earlier practice<sup>367</sup> when he used *furtum* and *latrocinium* interchangeably.<sup>368</sup> The degree to which *latro* was ultimately accepted is illustrated by its supplanting of *fur* (one committing *furtum*) even in the phrase *fur manifestus* (thief caught in the act).<sup>369</sup> Yet *furtum*, which is found quite commonly in the sources from the Conquest until Bracton<sup>370</sup> and in treatises based on Bracton,<sup>371</sup> is also found later,<sup>372</sup> especially in the form of the passive past participle of the verb *furare*.<sup>373</sup> The Norman-French term *larrecin* was also substituted for the Anglo-Saxon during this period.

The Anglo-Saxon and Nordic terms for robbery were also superseded

<sup>362</sup>1 DOMESDAY BOOK ff 10b, 61b.

<sup>363</sup>*Customs of Chester*, in SELECT CHARTERS, *supra* note 344, at 87.

<sup>364</sup>See SELECT CHARTERS, *supra* note 344, at 548 (who takes it as meaning "theft"). *But see* 2 LIEBERMANN, GESETZE, *supra* note 318, at 181.

<sup>365</sup>SELECT CHARTERS, *supra* note 344, at 264.

<sup>366</sup>SELECT PLEAS OF THE CROWN, 1203, No. 90, 1 SELDEN SOC'Y 48 (1887); *id.*, 1220, No. 193, 1 SELDEN SOC'Y 127-28 (1887); *id.*, Uncertain Date, No. 126, 1 SELDEN SOC'Y 80-81 (1887); ROLLS OF THE JUSTICES IN EYRE 1221, No. 767, 59 SELDEN SOC'Y 348 (1940).

<sup>367</sup>See SELECT PLEAS OF THE CROWN, 1220, No. 193, 1 SELDEN SOC'Y 48 (1887); ROLLS OF THE JUSTICES IN EYRE, 1221, No. 767, 59 SELDEN SOC'Y 348 (1940).

<sup>368</sup>2 BRACTON, LAWS AND CUSTOMS, *supra* note 339, f. 150b, at 425: *Species autem furti sunt duae . . . videlicet manifestum et non manifestum. Non manifestum est ubi aliquis suspectus est latrocinio. . . .* Similarly, the following is found further in the passage: *Furtum vero manifestum est, ubi latro deprehensus est seisitus de aliquo latrocinio, scilicet handhabbende et bacberende. See also* 3 BRACTON'S NOTE BOOK, No. 1539, at 433 (F. Maitland ed. 1887); *Tractatus Coronae*, in PLACITA CORONE 36 (J. Kaye ed. Selden Soc'y Supp. Ser. No. 4, 1966): *Privatum est ubi aliquis suspectus est de latrocinio. . . . Furtum publicum est ubi latro deprehensus est seisitus de aliquo latrocinio.* Cicero, too, had used *latro* of the manifest thief whom the owner was allowed, in some instances, to kill. CICERO, PRO TULLIO xxi.50; *cf.* BRACTON, LAWS AND CUSTOMS, *supra* note 339, f. 155, at 438. But it was not the parallel with Cicero which was responsible for the introduction of the term.

<sup>369</sup>See 1 BOROUGH CUSTOMS, Norwich, 1340, 18 SELDEN SOC'Y 54 (1904), which uses *de latronibus manifestis*.

<sup>370</sup>*Statute of William*, ch. 6, in SELECT CHARTERS, *supra* note 344, at 84, and in THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I, *supra* note 111, at 240; *Leges Henrici Prima*, *supra* note 335, §§ 10.1, 47, 66; 2 DIALOGUS DE SCACCARIO, § 2.10, at 140 (A. Hughes, C. Crump & C. Johnson ed. 1902); TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIE QUI GLANVILLA VOCATUR bk. 14, § 8, at 177 (G. Hall ed. 1965) [hereinafter cited as GLANVILL]; 1 Curia Regis Rolls, 1201, at 422; BRACTON, LAWS AND CUSTOMS, *supra* note 339, f. 104b, at 298; *id.* f. 150b, at 425.

<sup>371</sup>*E.g.*, *Tractatus Coronae*, *supra* note 368.

<sup>372</sup>See *Leges Burgorum*, in 1 BOROUGH CUSTOMS, 1295, 18 SELDEN SOC'Y 55 (1904).

<sup>373</sup>See, *e.g.*, SELECT CORDENERS' ROLLS, Divers Counties, 1291, 9 SELDEN SOC'Y 128 (1895); 1 *Eyre of Kent*, 1313, 24 SELDEN SOC'Y (5 Y.B. Ser.) 63, 72 (1908). For the verb, see 2 H. BRÜNNER, *supra* note 319, at 637 n.4.



by Latin and Norman-French. But whereas *furtum* and *latrocinium* derive from the terminology of Roman Law, the Roman equivalent for robbery (*rapina*) seems to occur only once before Bracton. This occurrence is in the Statute of William<sup>374</sup> where *ran* is defined, perhaps by a later hand, as *quod Angli dicunt apertam rapinam quae negari non potest* (the English name for open robbery which cannot be denied). Elsewhere, the forms found are *roberia*, *robaria*, *robator*, and the Norman-French *roberie*.

It does not appear that theft and robbery were regarded as distinct wrongs. Robbery was regarded as a species of theft. Thus, the laws attributed to the Conqueror speak in one passage<sup>375</sup> of a person *apelé de larrecin u de robberie* (appealed of larceny<sup>376</sup> or robbery) but then go on to refer to the offender throughout as *larrun*. Glanvill, though evidently not especially interested in criminal law, dismissed robbery with a single statement that it presented no special problems.<sup>377</sup> An early Thirteenth Century Yorkshire Eyre Roll first described offenders as *latrones* and then stated that they had robbed.<sup>378</sup> This would be no surprise at all, of course, were *latro* to be taken in its Roman Law sense of brigand.<sup>379</sup> But, here it seems clear that it was interchangeable with *fur*.<sup>380</sup> The converse of the Yorkshire Eyre Roll is found in *Placita Corone* where an appeal of robbery contains the allegation that the offender acted *laronessement com laron* (thievishly as a thief).<sup>381</sup> This is confirmed by the Year Books.<sup>382</sup> The Mirror of Justices, often no more than a caricature of the law, here at least reflected the relationship when it stated: "There are two

<sup>374</sup>Statute of William, *supra* note 370, ch. 6.

<sup>375</sup>*Leis Willelme* 3, in 1 LIEBERMANN, GESETZE, *supra* note 318, at 494.

<sup>376</sup>On the derivation of the English term from the Norman, see R. SCHMID, *supra* note 318, at 555.

<sup>377</sup>GLANVILL, *supra* note 370, bk. 14, § 5, at 175. For the likely reason, see BRACTON, LAWS AND CUSTOMS, f. 150b, at 425, discussed at note 388 *infra*. For a position contrary to the usual view of Glanvill's treatment of crime, see H. RICHARDSON & G. SAYLES, LAW AND LEGISLATION FROM AETHELBERT TO MAGNA CHARTA 107 (1966).

<sup>378</sup>See ROLL OF THE YORKSHIRE EYRE, 1218-19, Nos. 587, 725, 56 SELDEN SOC'Y 231, 267 (1937).

<sup>379</sup>See p. 86 *supra*. Though the term is more commonly used simply as "theft," the Roman conception of *latro* was not entirely lost. See, e.g., ROLL OF THE WORCESTER EYRE, 1221, No. 1192, 53 SELDEN SOC'Y 582 (1934); *Latrones venerunt de nocte ad domum . . . et occiderunt . . .* ("Thieves came by night to his house . . . and killed . . ."); 2 BRACTON, LAWS AND CUSTOMS, *supra* note 339, f. 105, at 299: *Delinquent latrones proposito per factionem . . .* ("Latrones offend deliberately through faction," contrasted with drunkards who act upon impulse). Highway robbers are described as *latrones*. E.g., SELECT CORONERS' ROLLS, 1397, 9 SELDEN SOC'Y 101 (1895).

<sup>380</sup>See 2 LIEBERMANN, GESETZE, *supra* note 318, at 348.

<sup>381</sup>PLACITA CORONE, *supra* note 368, at 14-15. This may, however, be due to the fact that the appellee was said to have ". . . craftily entered the doors of his house, and entered discreetly, making no noise." But see *id.* at 10, where a highway robber was described as *laron*.

<sup>382</sup>*Eyre of Kent*, Y.B. 6 and 7 Edw. II (1313-14), 24 SELDEN SOC'Y (5 Y.B. Ser.) 142 (1909); Y.B. 12 Edw. II (1319), 70 SELDEN SOC'Y (24 Y.B. Ser.) 92 (1951).

kinds of larceny: one committed openly by robbery, the other by night or secretly."<sup>383</sup> Thus, robbery was a species of larceny. The details of these definitions in the Mirror probably conformed more to general notions than to the actual law.

The statement contained in the Mirror is not the only purported distinction between the offenses. A note in the MS.N. text of Britton<sup>384</sup> stated:

A robber is he who by force in the day or at night despoils another of his goods. A thief is he who carries off or steals another's goods in the absence of the owner, or in his presence but without his knowledge.<sup>385</sup>

But this distinction conflicts with earlier cases. In a case occurring in 1201, the appellor alleged that the robbery had taken place *dum absens fuit* (in his absence).<sup>386</sup> In fact the court found that the appeal was malicious. But this does not mean that the appeal would have failed anyway because the offense took place in the absence of the appellor. It seems more likely that robbery at this time was simply theft with any additional violence. The violence alleged in this appeal was the forceful entry into the house. This distinction is supported by Bracton, who, though almost avowedly speaking of Roman Law and quoting the Institutes, noted that *rapina* was the same as "our" *roberia*, and that it was no more than another kind of *contractationis contra voluntatem domini*,<sup>387</sup> i.e., another kind of theft.<sup>388</sup> He went on to repeat the rhetorical question of Gaius and Justinian: "For who handles a piece of property against the will of the owner more than the one who takes it by force?"<sup>389</sup> If Woodbine's text is correct, the distinction is made explicit by the inclusion of the word *vi* (by force). Thus, the additional element which turned theft into robbery was force, however widely it was defined.<sup>390</sup> Even if the variant MSS text, which omitted *vi*, is correct, the

<sup>383</sup>THE MIRROR OF JUSTICES, bk.I, ch. 10, 7 SELDEN SOC'Y 25 (1893).

<sup>384</sup>1 BRITTON, *supra* note 336, ch. 16, § 1, at 55.

<sup>385</sup>The definition appears to betray later common law formulations. See 2 RUSSELL ON CRIME 851 & n.2 (12th ed. J. Turner 1964).

<sup>386</sup>*Assize Roll of the Justices in Cornwall*, No. 345, in 2 PLEAS, 1198-1202, 68 SELDEN SOC'Y 77 (1949). For a similar problem in Roman law see DIGEST 47.2.53 (Ulpian): *Si quis ex domo in qua nemo erat rapuerit, actione de bonis raptis in quadruplum convenietur . . . .*

<sup>387</sup>Literally, handling (the things of another) against the will of the owner.

<sup>388</sup>2 BRACTON, *supra* note 339, f. 150b, at 425: *Est etiam quasi furtum, rapina, quae idem est quantum ad nos quod roberia, et aliud genus contractationis contra voluntatem domini . . . .* Thorne's translation of Bracton is based on Woodbine's text.

<sup>389</sup>*Quis enim magis contractat rem aliquam invito domino quam ille qui vi rapit? Id.;* cf. GAIUS, INSTITUTES III.209; JUSTINIAN, INSTITUTES 4.2.pr.

<sup>390</sup>See the later doctrine of constructive robbery observed by T. PLUCKNETT, *supra* note 351, at 451. The doctrine applied in the King v. Jones, 1 Leach 139 (1776), was not anticipated in Y.B. 44

implication from the verb (takes it) can only be force. If *rapit* meant only an open seizure, the argument would be very weak: *rapina* is a kind of theft because no one acts more against the will of the owner than he who openly handles the owner's property. In fact, the likely implication from an open handling is that it is being done pursuant to a bona fide claim of right. On the other hand, a forceful handling *does* give the appearance of a handling against the owner's will. This argument applies with equal force to the same problem in the Roman texts. It makes no difference whether *vi* is in or out.

The close relationship apparent between theft and robbery is confirmed by the penalties applied to them. Penalties were more or less severe according to a variety of factors, but it seems that until the Fourteenth Century the distinction between theft and robbery was not such a factor. This equality of punishment is reflected in the Domesday statement that it was the custom in Chester that one who committed *revelach* or *latrocinium* or violated a woman in her home should pay 60 *solidi*.<sup>391</sup> Bracton stated that a similar penalty (*similis poena*) attached to theft and robbery,<sup>392</sup> and there is no evidence to suggest that his use of *similis poena* instead of *eadem poena* (the same penalty) denoted a mental reservation. Rather, it may be a recognition of the discretion which existed in the punishment of both offenses, especially in the Eyres.<sup>393</sup> Elsewhere, he stated that the result of an appeal of felony was sometimes death and sometimes mutilation, according to the *qualitas et enormitas delicti* (nature and gravity of the offense).<sup>394</sup> This does not mean that there could be mutilation even when the smallest sum was involved. The felonious nature of the wrong required that the property involved be worth at least a shilling, as was shown as early as the reign of Henry II in the case of Ailward.<sup>395</sup> As applied to the felonies of larceny and robbery, Bracton's observation meant that above a shilling there

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Edw. III, f. 14, pl. 32 (1370), in A. KIRALFY, SOURCE BOOK OF ENGLISH LAW 38 (1957). In the earlier case, the threat was accompanied by physical seizure of the victim.

<sup>391</sup>*Qui revelach faciebat vel latrocinium vel violentiam feminae in domo inferebat, unumquodque horum xl. solidis emendabat.* SELECT CHARTERS, *supra* note 344, at 87. Despite classical grammatical rules, it seems probable that *vel latrocinium* goes with the clause that precedes it, so that it is not restricted to theft in a house.

<sup>392</sup>BRACTON, LAWS AND CUSTOMS, *supra* note 339, f. 150b, at 425: *et similis poena sequitur utrumque delictum*. Thorne thinks the phrase is displaced from the succeeding section which distinguished manifest from non-manifest theft. But would these two *species furti* be described as separate delicts? And was it a *similis poena*?

<sup>393</sup>See PLACITA CORONE, *supra* note 368, at 16-17.

<sup>394</sup>BRACTON, LAWS AND CUSTOMS, *supra* note 339, f. 146b, at 413-14. Cf. GLANVILL, *supra* note 370, bk. 1, §§ 1-2, at 3.

<sup>395</sup>See I J. STEPHEN, *supra* note 343, at 78-80.

was some discretion. From the reign of Edward I, however, it seems that this discretion disappeared or was greatly restricted, since every felony was capital.<sup>396</sup> But, the twelve pence rule still applied both for theft and robbery.<sup>397</sup> A Year Book case of 1340, however, recorded that the King's Bench hanged offenders found guilty of the robbery of a gown worth eight pence, but stated, "it is otherwise in the case of one who commits larceny."<sup>398</sup> This, then, marks the real emergence of robbery as a wrong separated from theft.<sup>399</sup>

There are indications that in practice brigandage was repressed more severely than theft at a date long before the emergence of robbery as an aggravated offense. Ine's measures against bands have already been mentioned.<sup>400</sup> In some of the earliest Rolls there are hints that acting as part of a group was especially serious. The record of Crown Pleas heard *in banco* in Hilary Term, 1203, consisted entirely of a series of appeals arising from the activities of a *forcia* (force of men).<sup>401</sup> We are not told whether the culprits were punished more severely on that account, but the allegation of participation in the *forcia* was important enough to be repeated in each appeal. Though this may serve the purpose of showing that the incidents were interrelated, this element could have been included in other ways. In an appeal of 1198, the allegation *cum hominibus armatis* (with armed men) was added to the common *cum vi sua et armis* (with force and arms).<sup>402</sup> But again, there is no information as to whether the punishment was greater on that score, if, indeed, the appeal was successfully carried through. Yet it is known that the professional offender was more severely treated in that by the time of Bracton, if petty larceny had been committed three times, the offender

<sup>396</sup>See 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 496; 3 W. HOLDSWORTH, *supra* note 336, at 366-67.

<sup>397</sup>1 BRITTON, *supra* note 336, ch. 16, § 17, at 61; ch. 25, § 10, at 122. See also 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 496-99. The rule seems implied in BOROUGH CUSTOMS, Godmanchester, 1324, 18 SELDEN SOC'Y 56 (1904), by the use of the phrase *latrocinia maiora*. See also note 337 *supra*.

<sup>398</sup>*Et, pur ceo qe ceo fut roberie, ils furent penduz. Mes autre est de laroun*, Y.B. 13 & 14 Edw. III, in RERUM BRITANNICARUM MEDIÆ Aevi SCRIPTORES 352 (Rolls Ser.); A. KIRALFY, *supra* note 390, at 83.

<sup>399</sup>W. HOLDSWORTH, *supra* note 336, at 368; cf. A. HARDING, *supra* note 347, at 83, which seems to refer to this case, although he gives the date as 1348. On the later history of robbery see sources cited in 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 493 n.7. See also note 385 *supra*.

<sup>400</sup>See p. 90 *supra*.

<sup>401</sup>SELECT PLEAS OF THE CROWN, 1203, No. 88, 1 SELDEN SOC'Y 45-47 (1887). It seems that the culprits were all appealed as principals rather than as accessories. Thus, there is no conflict with the rule, later related by Bracton, that when accessories in a *forcia* are appealed, they must all be appealed by the same man. 2 BRACTON, LAWS AND CUSTOMS, *supra* note 339, f. 146b, at 413.

<sup>402</sup>1 Curia Regis Rolls 63.

would hang.<sup>403</sup> Further, Bracton reported a special appeal for combined arson and robbery.<sup>404</sup> This was not confined to the brigand. Yet Bracton's formulation suggests, by envisaging circumstances of sedition,<sup>405</sup> that this was the principal type of case involved. The punishment here was death, apparently without the discretion allowed in the ordinary appeal of robbery.

Glanvill included *roberia* in his list of pleas of the crown<sup>406</sup> and explicitly excluded "the crime of theft."<sup>407</sup> Thus, it may be argued that by the time of Glanvill robbery was already regarded as more serious than theft. Some have relied upon Glanvill's statement and taken it at face value.<sup>408</sup> Others have been more circumspect.<sup>409</sup> In the face of Glanvill's statement and other evidence,<sup>410</sup> it would be difficult to assert that theft was never determined in the county court before the sheriff. Yet there is undeniable evidence that from the time of the Conquest the Crown was, at the very least, deriving revenue from the prosecution of theft. Domesday recorded that the king had forfeitures over theft in various places and sometimes granted these rights away.<sup>411</sup> A wider statement is that in *Leges Henrici Primi* § 10, where capital theft and robbery were separately listed as among the rights which the King of England, alone and above all men, held in his land.<sup>412</sup> Goebel has, with good reason, challenged the view that this text deals with pleas of the

<sup>403</sup>2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 497-98.

<sup>404</sup>2 BRACTON, LAWS AND CUSTOMS, *supra* note 339, f. 146b, at 414: *de iniqua combustione et roberia*.

<sup>405</sup>*Id.* at 414: *turbata seditione*. The formulation, at least, may well owe something to the Roman edict on *turba*. DIGEST 47.8.4. (Ulpian). Thorne in 2 BRACTON, LAWS AND CUSTOMS, *supra* note 339, at 414 n.2, notes the particular resemblance to DIGEST 48.6.5.pr.: *turba seditione incendium fecerit*. Arson had been a separate offense since Anglo-Saxon times, irrespective of accompanying robbery or sedition. See 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 492. On the political use of brigandage, see Jackson, *supra* note 1, at 386.

<sup>406</sup>GLANVILL, *supra* note 370, at 1.1-2: *Ad coronam domini regis pertinet ista (placita criminalia) . . . homicidium, incendium, roberia . . .*

<sup>407</sup>*Id.*: *Excipitur crimen furti quod ad vicecomites pertinet, et in comitatibus placitatur et terminatur*.

<sup>408</sup>2 W. HOLDSWORTH, *supra* note 336, at 359; S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 371. (1969); 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 494.

<sup>409</sup>Hall, *Preface to GLANVILL*, *supra* note 370, at xxi; F. PLUNCKNETT, *supra* note 351, at 421-22 (on Glanvill's overall classification).

<sup>410</sup>2 DIALOGUS DE SCACCARIO, *supra* note 352, at 140, says that the chattels of one class of thieves go to the sheriff *sub quo deprehensi et puniti sunt*. See p. 99 *infra*.

<sup>411</sup>1 DOMESDAY BOOK ff. 1, 10b, 56b, 61b; 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 454-55. But see 1 DOMESDAY BOOK f. 204.

<sup>412</sup>*Haec sunt iura que rex Anglie solus et super omnes homines habet in terra sua. Leges Henrici Primi*, *supra* note 335, § 10.10.1, at 556. On the apparent conflict with Glanvill, see Pollock, *supra* note 344, at 404.

crown in the later sense.<sup>413</sup> It may well be that this particular passage was restricted to rights of the king *in terra sua* (in his own land), which were *dominica* (pertaining to him as owner, feudal lord). There are other passages, however, which are not so restricted. In particular, § 66.9 of *Leges Henrici Primi* implies jurisdiction over theft by either the sheriff or the king.<sup>414</sup> There is, further, the surviving Pipe Roll of 1130 in which the payment of seven marks of silver by Roger son of Elyon *pro latrone quem celavit* (on account of the thief whom he concealed)<sup>415</sup> is recorded.

There is also evidence from the reign of Henry II to suggest that Glanvill's statement is misleading. The Assize of Clarendon of 1166 was formulated as a provision against any suspected *robator vel murdrator vel latro* (robber, murderer, or thief).<sup>416</sup> Though § 1 of the Assize of Clarendon allowed for inquiry after presentment by both royal justices and sheriffs,<sup>417</sup> the role of the sheriff was clearly subordinate to that of the justices.<sup>418</sup> However, outside the assize procedure, the sheriff still heard pleas of the Crown. This, it seems, was not forbidden until the *Edictum Regium* of Richard in 1195.<sup>419</sup> It is of some interest to note that the assize has been viewed as a measure primarily directed against professional thievery and brigandage.<sup>420</sup> Inquiry was to be made to discover not whether anyone had committed robbery, murder, or theft—what one would think to be the natural formulation,<sup>421</sup> but whether anyone was *rettatus vel publicatus* (suspected of or notorious for) having committed such an offense. The formulation was probably not occasioned by the practice, now almost always observed, of not

<sup>413</sup>J. GOEBEL, *supra* note 326, at 403-09.

<sup>414</sup>*Si quis a vicecomite vel iustitia regis legitime inplacitetur de furto, de incendio, de robaria, vel similibus, ad triplicum iudam iure sit applicandus.* LEGES HENRICI PRIMI, *supra* note 335, § 66.9, at 586.

<sup>415</sup>MAGNUM ROTULUM SCACCARII 73 (J. Hunter ed. 1833); *cf.* J. GOEBEL, *supra* note 326, at 404 n.228.

<sup>416</sup>Ch. 1 & *passim*. SELECT CHARTERS, *supra* note 344, at 143; *cf.* H. RICHARDSON & G. SAYLES, THE GOVERNANCE OF MEDIEVAL ENGLAND FROM THE CONQUEST TO MAGNA CARTA 441 (1963) (a shorter reconstruction of the Assize).

<sup>417</sup>*Et hoc inquirent Justitiae coram se, et vicecomites coram se.* Assize of Clarendon ch.1, in SELECT CHARTERS, *supra* note 344, at 143.

<sup>418</sup>*Id.* chs. 4, 6, 9, 11, 18, 19, at 170-73. *But see* 2 ENGLISH HISTORICAL DOCUMENTS, *supra* note 358, at 408 n.5, which suggests that the sheriff was left with jurisdiction. But the nature of the sheriff's inquiry is *si in hundredo suo vel villata sua sit aliquis homo qui sit retatus vel publicatus* . . . . Assize of Clarendon, *supra* note 417, ch. 1, at 143. *See also id.*, ch. 19, at 172. Once the presentments were taken, the accused was tried by the justices.

<sup>419</sup>SELECT CHARTERS, *supra* note 344, at 264; *see Magna Charta* ch. 24, in *id.* at 300 (a wider formulation).

<sup>420</sup>Hurnard, *The Jury of Presentment and the Assize of Clarendon*, 56 ENG. HIST. REV. 405 (1941).

<sup>421</sup>For an analogous problem in Jewish Law, see Daube, *supra* note 63, at 1-13.

describing an accused as having committed an offense before he is actually convicted. Rather the inquiry was to relate to his notoriety. Whether juries observed the line between general notoriety and suspicion of an individual offense may, however, well be doubted.

Yet, though the sheriff's jurisdiction was excluded in the Assize of Clarendon, it seems to have been partly restored by the Assize of Northampton.<sup>422</sup> There the justices are said to hold assize *de latronibus iniquis et malefactoribus terrae* (concerning the evil thieves and wrongdoers of the land).<sup>423</sup> The adjective *iniquis* (evil) would seem to imply that the more serious cases were to be heard by the justices. Confirmation of this appears from the tract *Dialogus de Scaccario*, which discussed the disposition of the goods of convicted thieves and robbers.<sup>424</sup> If the offender was outlawed, his life and goods belonged to whoever apprehended them. But if outlawry had not taken place, a distinction was drawn between the case of the robber (*praedo*) and that of the thief (*fur*). In the former case the chattels went to the Treasury; in the latter they went "to the sheriff in whose jurisdiction they have been caught and punished."<sup>425</sup> But this apparently clear distinction between thieves and robbers was subject to an important qualification. *Fures manifesti* (thieves caught in the act) impliedly came under the heading of robbers.<sup>426</sup> Further, if the sheriff took a case to the king's court because it was more properly dealt with there, the king took the chattels. The implication from the passage is clear. Both the sheriff and the royal justices heard cases of theft at this time. The passage states explicitly that if the sheriff had jurisdiction he was entitled to keep the chattels. This must mean that wherever there is evidence of the king collecting money in respect of theft, as in the Pipe Rolls of Henry II,<sup>427</sup> his justices exercised jurisdiction.<sup>428</sup>

<sup>422</sup> ENGLISH HISTORICAL DOCUMENTS, *supra* note 358, at 411-13; SELECT CHARTERS, *supra* note 344, at 150-53; I J. STEPHEN, *supra* note 343, at 83.

<sup>423</sup> SELECT CHARTERS, *supra* note 344, § 7, at 152.

<sup>424</sup> DIALOGUS DE SCACCARIO, *supra* note 370, § 2.10, at 140. See also 2 ENGLISH HISTORICAL DOCUMENTS, *supra* note 358, at 552-53; H. RICHARDSON & G. SAYLES, *supra* note 377, at 98; SELECT CHARTERS, *supra* note 344, at 231.

<sup>425</sup> ENGLISH HISTORICAL DOCUMENTS, *supra* note 358, at 552. The translation gives due force to the *sub* in the original *furum autem ad vicecomitem sub quo deprehensi et puniti sunt*. See also GLANVILL, *supra* note 370, 7.17, at 90-91.

<sup>426</sup> *Praedonum, qui et fures manifesti dicuntur, et latenter furantium, condicio dissimilis est*.

<sup>427</sup> Hen. II (1155), in THE GREAT ROLLS OF THE PIPE FOR THE SECOND, THIRD, AND FOURTH YEARS OF THE REIGN OF KING HENRY THE SECOND 4 (J. Hunter ed. 1844); 5 Hen. II, in 1 PIPE ROLL SOC'Y 38 (1884); 6 Hen. II, in 2 PIPE ROLL SOC'Y 12 (1884); 7 Hen. II, in 4 PIPE ROLL SOC'Y 26 (1885).

<sup>428</sup> *Contra*, J. GOEBEL, *supra* note 326, at 403-04 (of the *De Iure Regis* section of *Leges Henrici Primi*, *supra* note 335).

Thus, there is contemporary evidence to show that cases of theft were subject to royal jurisdiction in Glanvill's time. The statement in the tract is wrong in suggesting that *crimen furti* (the crime of theft) was always determined in the county court. The author of Glanvill was not, at least in this work, interested in criminal law. This may be seen from the cursory nature of his treatment of criminal law at the beginning and end of the work. As a simplification designed merely to clear the way for his treatment of the civil law, it is, perhaps, excusable.

Looking to the later evidence, it is possible to discern further factors which probably led Glanvill to simplify in such a manner. The consistent use of appeals *de latrocinio* beginning in the earliest royal judicial records<sup>429</sup> positively establishes that the procedure of appeal of felony<sup>430</sup> could be appropriately used in cases of theft.<sup>431</sup> Membrane 13 of the *Curia Regis Roll* of 4 Hen. III (1220) is headed *Rotulus Latronum*.<sup>432</sup> Also an appeal *de furto* in 1219 has been recorded.<sup>433</sup> Thus the descriptions by Bracton and his followers of the appeal of larceny<sup>434</sup> are of an institution already well established. Yet it is noticeable that the judicial rolls contain far more appeals *de roberia*<sup>435</sup> than appeals *de latrocinio*.<sup>436</sup>

<sup>429</sup>PLACITA ANGLO-NORMANNICA 233-34 (M. Bigelow ed. 1879); 1 *Curia Regis Rolls*, 1201, at 374; 2 *id.*, 1203, at 231; PLEAS OF THE CROWN, 1203, No. 90, 1 SELDEN SOC'Y 48 (1887); 1 SELECT CIVIL PLEAS, reign of John, date uncertain, No. 181. 3 SELDEN SOC'Y 73 (1889), despite Baildon's translation of *latrocinio* as robbery, etc.

<sup>430</sup>For a good account see C. MEEKINGS, CROWN PLEAS OF THE WILTSHIRE EYRE, 1249, 70-72 (Wiltshire Arch. & Nat. Hist. Soc'y, Records Branch Pub. No. 16, 1961).

<sup>431</sup>*Contra*, 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 494. Yet not every case of theft gave rise to a crown plea. In the Worcester Eyre of 1221, the jury presented *de ovibus furatis quod nonpertinet ad coronam* though the reason is not revealed. ROLL OF THE WORCESTER EYRE, 1221, No. 1237, 53 SELDEN SOC'Y 583 (1934). Possibly the sheep were worth less than twelve pence. For an appeal of larceny in a borough court, see 1 BOROUGH CUSTOMS, Salford, c. 1230, 18 SELDEN SOC'Y 55 (1904).

<sup>432</sup>Curia Regis Rolls 269; cf. INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230, 62 SELDEN SOC'Y 303 (1943).

<sup>433</sup>Curia Regis Rolls 134.

<sup>434</sup>BRACTON, LAWS AND CUSTOMS, *supra* note 339, ff. 150b-154b, at 426-36. See also *id.*, f. 104b, at 298; PLACITA CORONE, *supra* note 368, at 18; 1 BRITTON, *supra* note 336, ch. 25, § 1, at 115; 2 FLETA, bk. I, ch. 36, 72 SELDEN SOC'Y 90-95 (1953).

<sup>435</sup>Curia Regis Rolls, 1198, at 33; *id.*, 1199, at 86; *id.*, 1200, at 230, 255, 266, 292, 293; *id.*, 1201, at 342, 347, 379, 381, 384; ROLLS OF THE KING'S COURT, RICHARD I, 1194-95, in 14 PIPE ROLL SOC'Y 78, 142 (1891); PLACITA ANGLO-NORMANNICA, *supra* note 429, at 285 (1195); 1 SELECT PLEAS OF THE CROWN, 1200, No. 82, 1 SELDEN SOC'Y 38-40 (1887); *id.*, 1201, No. 3, at 2; *id.*, 1201, No. 13, at 5-6; *id.*, 1201, No. 14, at 6; *id.*, 1202, No. 21, at 8; *id.*, 1202, No. 23, at 9-10; *id.*, 1202, No. 33, at 13-14; 1 SELECT CIVIL PLEAS, 1200, No. 8, 3 SELDEN SOC'Y 3-4 (1889). See also 2 PLEAS BEFORE THE KING OF HIS JUSTICES, 1198-1202, 68 SELDEN SOC'Y (1949); ROLLS OF THE JUSTICES IN EYRE FOR YORKSHIRE, 1218-19, 56 SELDEN SOC'Y (1937); ROLLS OF THE JUSTICES IN EYRE FOR GLOUCESTERSHIRE, WARWICKSHIRE AND STAFFORDSHIRE, 1221-22, 59 SELDEN SOC'Y (1940).

<sup>436</sup>Unlike the judicial rolls, the early Pipe Rolls of Henry II contained a few records of money



There are a number of factors to explain this apparently strange imbalance. Some of these have already been noted. Often, an allegation of robbery was added to another charge,<sup>437</sup> such as wounding, and was commonly used as a fictitious device to invoke jurisdiction.<sup>438</sup> The taking of property under a claim of right, for example by a creditor or a genuine disputant to title, often gave rise to an accusation of robbery.<sup>439</sup> Such a taking under a claim of right would usually be open and forceful and not furtive. The result would then be an appeal *de roberia* and not *de latrocinio*. Thus, the appeal *de roberia* was not confined to what one might think of as robbery in the criminal sense. Other factors also point in the same direction. The secret nature of theft meant that the identity of the offender was far less likely to be known than in a case of robbery. Thus the records show far fewer direct accusations in the form of appeals *de latrocinio*. What they do show is a far greater number of cases where the procedure of the Assize of Clarendon was used. Commonly it was recorded that a person was *rettatus* (suspected) or *malecreditus de latrocinio* (in ill repute concerning a theft),<sup>440</sup> with the result that either he was indicted<sup>441</sup> or abjured the realm<sup>442</sup> or fled.<sup>443</sup> Thus, many of these cases would never come to trial. Of the appeals of larceny that are recorded, a very substantial number were accusations by approvers<sup>444</sup> who accused their accomplices *de societate latrocinii* (of complicity in

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received *pro latrone*, but none concerning *roberia* until a series of payments by Gillebertus de Heanlega *pro falso dicto de roberia*, commencing with 26 Hen. II, in 29 PIPE ROLL Soc'y 79 (1908).

<sup>437</sup>INTRODUCTION TO THE CURIA REGIS ROLLS, 1199-1230, 62 SELDEN SOC'Y 316 (1943).

<sup>438</sup>Kaye, *Preface to PLACITA CORONE*, *supra* note 368, at xxv.

<sup>439</sup>*Cf.* C. MEEKINGS, *supra* note 430, at 86; Kaye, *Res Adiratae and Recovery of Stolen Goods*, 86 L.Q. REV. 379, 395 (1970).

<sup>440</sup>*E.g.*, 5 Curia Regis Rolls, 1208, at 247; 7 *id.*, 1214, at 241; 9 *id.*, 1220, at 201; ROLLS OF THE YORKSHIRE EYRE, 1218-19, No. 1046, 56 SELDEN SOC'Y 378 (1937); ROLLS OF THE JUSTICES IN EYRE, 1221-22, Nos. 891, 894, 897, 909, 935, 59 SELDEN SOC'Y 384, 386, 391, 401 (1940).

<sup>441</sup>*E.g.*, ROLLS OF THE JUSTICES IN EYRE FOR YORKSHIRE, 1218-19, No. 228, 56 SELDEN SOC'Y 95 (1937); ROLLS OF THE JUSTICES IN EYRE FOR GLOUCESTERSHIRE, WARWICKSHIRE AND STAFFORDSHIRE, 1221, No. 839, 59 SELDEN SOC'Y 95 (1937); ROLLS OF THE JUSTICES IN EYRE FOR GLOUCESTERSHIRE, WARWICKSHIRE AND STAFFORDSHIRE, 1221, No. 839, 59 SELDEN SOC'Y 371 (1940); PLEAS BEFORE THE KING OR HIS JUSTICES, No. 3502, 84 SELDEN SOC'Y 116 (1967).

<sup>442</sup>*E.g.*, 4 Curia Regis Rolls, 1205-06, at 115; 7 *id.*, 1214, at 241; ROLLS OF THE JUSTICES IN EYRE FOR LINCOLNSHIRE AND WORCESTERSHIRE, 1221, No. 1238, 53 SELDEN SOC'Y 599 (1934); PLEAS BEFORE THE KING OR HIS JUSTICES, 1203, No. 752, 83 SELDEN SOC'Y 85 (1966).

<sup>443</sup>*E.g.*, ROLLS OF THE JUSTICES IN EYRE FOR GLOUCESTERSHIRE, WARWICKSHIRE AND STAFFORDSHIRE, 1221, Nos. 1276-77, 59 SELDEN SOC'Y 549 (1940). A person abjured the realm when he bound himself by oath to exile himself from England; see 2 F. POLLOCK & F. MAITLAND, *supra* note 320, at 590.

<sup>444</sup>On the procedure, see Hamil, *The King's Approvers*, 11 SPECULUM 238 (1936). It was described by Bracton. 2 BRACON, LAWS AND CUSTOMS, *supra* note 339, ff. 152-154b, at 429-36.

theft).<sup>445</sup> Hamil has pointed out the special function of this procedure in breaking up criminal bands.<sup>446</sup> Though the formulation of an appeal *de societate roberie* or the like seems to have been a rather late development,<sup>447</sup> and the formulation of the approver's confession was invariably *se esse latronem* (that he was a thief),<sup>448</sup> this does not mean that these were always matters of theft and not robbery.<sup>449</sup> The formula *se esse latronem* could be used also where *roberia* was the particular offense involved<sup>450</sup> and even where murder had been committed.<sup>451</sup> As has been noted,<sup>452</sup> there was no reason why the thief should not add murder to theft once the latter was itself a capital offense. For these reasons the appeal of robbery was more common than the appeal of larceny, and even where an appeal was formulated as *de latrocinio*, it often involved more than simple theft. This, it is suggested, is the factual background to Glanvill's simplification.

#### IV

This study in comparative legal history ends where it began—with methodology. The English lawyer has often been accused of burying himself in the mysteries of the common law to the exclusion of all else. Indeed, it is this attitude, expressed for many centuries in the separation between the law taught at the universities, *i.e.*, Roman Law and Canon Law, and the Common Law, taught at the Inns of Court, which bore much responsibility for the separate development (might one say apartheid?) of the English legal system. Today, English lawyers, especially academics, place far more weight upon comparative legal studies to provide the perspective necessary to illuminate the Common Law. Indeed comparative study is one of the principal methods of achieving such perspective.

<sup>445</sup>*E.g.*, 6 Curia Regis Rolls, 1210, at 339; 7 *id.*, 1214, at 100-01, 114; 8 *id.*, 1219, at 141, 143.

<sup>446</sup>Hamil, *supra* note 444, at 239.

<sup>447</sup>SELECT CORONERS' ROLLS, 1291, Divers Counties, 9 SELDEN SOC'Y 127-28, 130 (1895); *id.*, 1293, at 128. 2 BRACON, LAWS AND CUSTOMS, *supra* note 339, f. 152b, at 430 and 2 FLETA, bk. 1, ch. 36, 72 SELDEN SOC'Y 93 (1953) also suggest this possibility.

<sup>448</sup>*E.g.*, 8 Curia Regis Rolls, 1219, at 179-80; 1 SELECT PLEAS OF THE CROWN, 1220, Nos. 198-99, 1 SELDEN SOC'Y 133-34 (1887); ROLLS OF THE JUSTICES IN EYRE FOR LINCOLNSHIRE AND WORCESTERSHIRE, 1221, No. 1177, 53 SELDEN SOC'Y 578 (1934); BRACON, LAWS AND CUSTOMS, *supra* note 339, f. 152b, at 430; *Tractatus Coronae*, *supra* note 368, at 36; SELECT CORONERS' ROLLS, 1265-1413, Divers Counties, 9 SELDEN SOC'Y 66, 68-69, 86, 103, 127-32 (1895).

<sup>449</sup>On the preponderance of theft in appeals by approvers, see Hunnissett, *Pleas of the Crown and the Coroner*, 32 BULL. INST. HIST. RESEARCH 121 (1959).

<sup>450</sup>*E.g.*, SELECT CORONERS' ROLLS, Bedfordshire, 9 SELDEN SOC'Y 36-37 (1895); *id.*, Divers Counties, 9 SELDEN SOC'Y 131-32 (1895).

<sup>451</sup>*E.g.*, 8 Curia Regis Rolls, 1220, at 376; SELECT CORONERS' ROLLS, 1321, Northamptonshire, 9 SELDEN SOC'Y 67 (1895).

<sup>452</sup>Pollock, *supra* note 344, at 410.

Yet the isolationism which is becoming less respectable for the modern lawyer has become, if anything, more than respectable for the legal historian. There are, of course, some very sound reasons for this. The first effect of social evolutionary theories on lawyers was to produce a literature of generalized comparison, much of which was based, upon closer inspection, on shallow foundations. The legal historian of today rightly demands a scientific method, commencing in every case with a thorough examination of the primary sources. In this article the author's object has been to show that such an approach does not necessarily exclude the comparative method. Indeed, one may suggest that the comparative method is just as necessary in legal history as it is in modern law. Without it the legal historian tends to confine himself to the problems immediately suggested by his text. This is a necessary safeguard against subjectivism, though it does not exclude it. The need for comparative legal history stems from the fact that different systems express the same problem in different ways and to different degrees. Indeed, a problem which attracts specific regulation in one system may lie beneath the surface in another. No legal system, especially an historical one, is adequately or fully expressed by its texts. The comparative method in legal history enables one to select from the experience of other ancient systems questions beyond those immediately posed by the texts of any single system. Further, its use may allow a proper value to be placed on elements in a legal system which have not been given prominence because of the particular formulation of that system (a formulation in any case often distorted by the hazards of historical transmission).

In short, comparative legal history gives one the opportunity to achieve a perspective which the almost mechanical examination of texts from a single system denies. Primary sources will never lose their importance. They are, indeed, the stuff of history. But we, their interpreters, are in danger of becoming computers.