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de Boer, Luuk

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Luuk De Boer

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IN FLAGRANTE DELICTO: ON THE LEGAL IMPLICATIONS OF SIGHT

LUUK DE BOER

In a passage on the Roman law of theft embedded within his *De l'esprit des lois* (1748), Montesquieu took issue with a fact as well-known as it is disconcerting: there are two penal regimes in antiquity, one for crimes where the perpetrator is caught in the act and another for crimes where this is not so.[1] Some questions follow naturally: how can the crime change, merely depending on whether it was seen to be done or not? How can proof alter the nature of the act?

> It seems bizarre that the laws put such a difference in the status of these two crimes and in the penalty they inflicted for them; indeed, whether the robber was caught before or after carrying the stolen goods to the place of destination was a circumstance which did not change the nature of the crime. (Montesquieu 1989.610)

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1 This paper follows the *OCD* abbreviations when it refers to all things classical. For non-classical works, both primary and reference, the following abbreviations are used: CE: *Code of Eshnunna*; CH: *Codex Hammurabi*; HL: *Hittite Laws*; MAL: *Middle Assyrian Laws* (for which four texts Roth 1997 is used); M: texts from Mari; RV: *Rig Veda*; AV: *Atharva Veda*; *SSp. Landrecht: Sachsenspiegel Landrecht*; *HRG: Handwörterbuch zur deutschen Rechtsgeschichte*, 2nd ed.; *GAO: Germanische Altertumskunde Online* (formerly *Reallexikon der Germanischen Altertumskunde*); *DRW: Deutsches Rechtswörterbuch*; IM: Iraq Museum; IPArk: Gerhard Thür and Hans Taeuber 1994; *Coll.*: *Collatio Legum Mosaicarum et Romanarum* from Hyamson 1913.

Translations, unless otherwise noted, are my own. References to the Hebrew Bible follow the New International Version. I would like to thank the anonymous reviewers of *Arethusa* for their illuminating suggestions, as well as Teddy Fassberg for both the initial impetus and useful advice in the final stages.

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If the era in which Montesquieu wrote appears as particularly prone to weeding out inconsistencies and errors of reason, we should add that the puzzle of the flagrant delict continued to startle the sensitivities of the most eminent of jurists.[2] The likes of Rudolf von Jhering, Henry Sumner Maine, Frederic William Maitland, and Louis Gernet all discerned in the distinction between the flagrant and the non-flagrant delict a significant fact of collective psychology, the explication of which would unveil an essential truth about archaic law and legality.[3] For most scholars, perhaps still today, the psychological mechanism undergirding the distinction was that of revenge, and the difference in the treatment of the criminal caught in the act should be explained either with reference to a state too weak to interfere or a state accommodating the continued exigencies of an older, pre-legal phase in which self-help was the norm. The desire for vengeance, the argument invariably ran, would differ considerably according to whether the perpetrator was caught in the act or not.[4] An explanation of flagrancy that is historical and which appeals to an earlier pre-legal phase has always had the benefit of avoiding the awkward claim, singled out by Montesquieu, that a difference in the kind of evidence available equals a difference in the nature of the crime. The historical explanation has been widely adopted in scholarship and only very few scholars have embraced the alternative, awkward claim that the theft caught in the act, for example, is qualitatively different from a theft that is not caught in the act.[5]

Yet the historical explanation of vengeance, with its appeal to common sense, did and does little other than transfer the problem to a different realm where it is left unresolved. We may well agree intuitively that

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2 And had already preoccupied the 16th c. legal humanists, most notably Jacques Cujas; cf. Fenocchio 2008.272–73.

3 Gernet 1924.278–83, 292, 1937, 1951, 1956.385–87, and 1959.394–96, 398–400; von Jhering 1865.118–28; Maine 1888.365–68; Maitland and Pollock 2010.519–21. Other towering figures: Grimm 1899.194–204; Brunner 1887a.481–88; Mommsen 1899.62; Dareste 1902.299–301; Glotz 1904.201, 425–27; Huvelin 1915.142–52; de Visscher 1922; Latte 1931.130–34, 137–39; Arangio Ruiz 1932; Daube 1937, 1947, 1971; and Kaser 1949.213–19.

4 Thus von Jhering and Maine and accepted by, e.g., Mommsen 1899.62, Dareste 1902.299–301, Huvelin 1915.142, and de Visscher 1922.443. Critique based on the "quaestio lance et licio," "search with dish and girdle": Arangio Ruiz 1932.210–12, Pugsley 1969.140, and Fenocchio 2008.285–86; cf. Kunkel 1949.253 n. 5. See Pugsley 1969.139 and Pelloso 2008.244 n. 258 for an overview. On the connection between vengeance and the inauguration of law in 19th c. legal history, see Y. Thomas 1984.3–5.

5 E.g., Maitland and Pollock 2010.520 and Gernet 1956.385–87, 1959.394–95; obliquely: Daube 1971.

a more vehement and vengeful response is warranted if the perpetrator is caught in the act. But in so doing, one must tacitly claim that the difference in response is justified nonetheless by a difference in the quality of the act—the very qualitative difference deemed unjustifiable when it later appears in the domain of the law. Whether sequestered in the provinces of vengeance or not, the question is identical to that which perplexed Montesquieu and one must come to terms with it: how can the nature of the crime change depending on whether it was seen to be done or not?

The old puzzle has not disappeared, and it is easy to find more recent statements about catching a thief or an adulterer in the act that differ from Montesquieu only in the choice of words.[6] If scholars are still interested in flagrance, however, it is because its presence in a case of theft or adultery activates different procedures and punishments in some legal systems and not because it is a problem that sheds light on archaic law or collective psychology as such.[7] The still unresolved question, generated by a distinction that itself ignores the dividing lines of different crimes and different legal systems, remains and can be found in the Byzantine details of individual ancient legal systems. And while these details do not allow one to formulate a solution for one system or even for one legal provision, they do instantiate a basic and shared anthropological disposition that privileges sight to such an extent that the crime seen to be done is, in fact, worse than the crime that has gone without witnesses.[8] The circumstance of flagrancy, this paper argues, does render the delict qualitatively different: whether one is caught in the act or not changes the nature of the crime.

What follows, then, is a cross-cultural investigation of the flagrant delict. In general, calls for comparative studies of ancient law have resounded for decades, if not centuries, and recent analyses of flagrancy

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6 For Greek law on theft, see, e.g., Cohen 1983.60: accepted by Pepe 2004.87–113 but criticized by Harris 2006.373–90 (who retains the awkward assimilation of a difference in evidence to a difference in nature at 378 and 386 without explanation, as noted by Pelloso 2008.279 n. 330) and Pelloso 2008.70–72 and 79–98. Hansen 1976.120 embraces the paradox of different punishments for the same offense. For the Roman law of theft, see Pelloso 2008.264–65.

7 E.g., Hansen 1976.48–53; Cohen 1983.58–61; Westbrook 1990; Lafont 1999.29–91; Treggiari 2002; Pepe 2004; Harris 2006.373–90; Desanti 2008.69–71; Garoupa and Gomez 2008; Pelloso 2008.77–98, 192–279; and Otto 2015.86–88.

8 Traces of such a conception are found in Maitland and Pollock 2010.520, Holdefleiss 1933.107, Kunkel 1949.253 n. 5, and Daube 1971.

frequently deploy comparative material.[9] But my approach is different. This study will not privilege one legal culture and historical period, say fourth-century Athens, whose use of the notion of flagrancy is first placed in its historical context and then rendered more intelligible by adducing parallels from other cultures and periods. I am less interested in what flagrancy entailed in ancient Athens than in the light that ancient Athenian evidence might shed on the idea of flagrancy: this paper centers the cross-cultural concept of flagrancy itself. Again, this approach is not entirely original. The legal historian David Daube, in an article on the legal institution of the pursuit of a thief, once quipped that "if a man has been with me and after he has gone I miss my pet slippers, the natural thing to do is to follow him whether I am [a] Semite or Indo-Germanic."[10] So it also appears that punishing more severely in the case of a flagrant delict is the natural thing to do in antiquity, and this article seeks to explain why.

At the same time, the emphasis on flagrancy as a cross-cultural given does not mean that historical circumstances are irrelevant for the concept of flagrancy: its prevalence and import do vary between cultures and epochs, no doubt in large part depending on the size of the communities involved. Likewise, the specific punishment meted out for a culprit caught in the act changes across cultures and times and is determined primarily by the relevant sociocultural norms. In addition, the precise semantic contours of the notion of flagrancy are historically contingent. And yet alongside these context-dependent features, the culprit caught in the act is always distinguished from the culprit who has gone undetected and is punished more severely. It is indeed quite unlikely, as scholars have long recognized, that the cross-culturally attested differentiated punishments can be solely explained by different legal mechanisms specific to each legal culture (e.g., Kunkel 1949.253 n. 5). I will account for the *how* and *why* of the flagrant delict not by simply drawing on specific historical contexts but by bringing a cross-cultural constant into play: the power of sight.

By looking closely at a strange rite of ligation that is attested across various ancient legal cultures, the first two sections of this paper

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9 Recent calls for a comparative approach to ancient law: Ruschenbusch 1989; Barta 2012; Jacob 2014, 2020; and Westbrook 2015. Such an approach to flagrancy characterizes Treggiari 2002, Pepe 2004, Harris 2006, and Pelloso 2008.

10 Daube 1937.48. Many other cross-cultural legal institutions existed in antiquity that were often more transparently legible than the separate regime of punishment attached to the flagrant delict; see, e.g., the hue and cry discussed in note 39 below.

identify the seeing judge as the rite's central tenet. The third section enlists the connection between flagrancy and judicial sight to suggest that the flagrant delict is ultimately dependent on an attitude which judges the crime that is seen to be done to be worse than one that is not. The two regimes of punishment, finally, are shown to make sense when the judge witnessed some crimes and not others. However, in a world where the judge is never a witness, the distinction loses its footing. This is the world of Montesquieu and our modern courtroom, and, in either, the aggravated penalty for a flagrant delict can only appear as an irrational anomaly.

I. PERPETUATING THE CRIME

Again, my opening section suggests that the core idea sustaining *in flagrante delicto* and its aggravated punishment is not revenge but a seeing judge (a concept that is not immediately clear today). We are accustomed to separating the roles of witness and judge: witnesses are not the judges of what they have witnessed, just as judges have not witnessed the events which they will judge. Yet ancient counter-examples of the combination of these roles are readily forthcoming, and the most illuminating and enduring example—the perfect divine judge—may be summarily presented here to show how, after all, the figure of the witnessing judge is still familiar enough.[11] What characterizes this infallible judge of ancient religion is a probing eye: the Mesopotamian sun god Shamash, to suggest a famous example, the "great judge of heaven and earth" ("dayyānum rabium ša šamê u erṣetim") as he is called in the *Laws of Hammurabi,* makes no judicial mistakes because his solar qualities insure that his observations are without flaws.[12] Similar connections can be adduced for Dikē, the Greek goddess of justice, whose formidable powers are often focalized in her eye, the proverbial Eye of Justice (*dikēs omma*).[13] The unity of witness and judge exhibited by these perfect judges reappears in the human realm. It is

11 For ANE ancient solar judges, see Dölger 1971; Janowski 1989; Arneth 2000.1–17; Kutter 2008.276, 297, 301, 318–25, 332–39, 338, 355–418; on the ocular features of Dikē, see, e.g., Usener 1896.180 n. 12; Hirzel 1907.140–42; Nilsson 1957.201, 204; de Romilly 1971.168; Rudhart 1999.43–44; Chaniotis 2004.10; and O'Connell 2017.105.

12 CH 40.84–86, 43.14–16 (ed. Harper 1904). For Shamash and sight, see the *Great Hymn to Shamash* ll. 8–10 and 95–129.

13 Soph. frag. 11 N; further, e.g., Plut. *Adv. Col.* 30, *Sept. Sap. Conv.* 18; Polyb. 23.10.3; Suda s.v. *dikēs ophthalmos,* "eye of justice."

evident, above all, in terminology. The Latin *arbiter* and the Greek *histōr* are but two well-known examples of words which can designate both the judge and the witness.[14] In Athens, we likewise find traces of such an idea at the level of vocabulary designed to describe the formal prosecution of wrongdoing. At times, these verbs—*ephēgeisthai*, "to lead to"; *apagein*, "to lead off"; *endeiknunai*, "to point out"; *phainein*, "to reveal"—still refer to the process of *showing* the magistrate what has happened.[15] It is in this coming together of the figures of the judge and the witness that we should locate a basic conception of judgment as intimately bound up with sight: a conception that structures not only ancient religion and legal terminology but also the problem under discussion here, the problem of the flagrant delict.

In a strange section of a speech in the Demosthenic corpus, this nexus of vision and decision resurfaces (Dem. 45.81):

> But still, by the gods, if I had led you off (*apēgon*) like a thief caught in the act (*hōs ep' autophōrōi*) heaping upon your back (*epitheis soi*), if that was somehow possible, your present wealth, and had I then insisted that you, if you denied having acquired it through pilfering, refer me to the person you took it from, to whom would you have pointed?[16]

The passage is odd. What exactly is meant by "to lead someone off, heaping upon the back the wealth which they now possess, like a thief caught in the act"? We know that thieves who were caught in the act were at times led before the magistrates with their hands bound.[17] But here, evidently, something else is going on. What is this mysterious rite Demosthenes

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14 On the *arbiter*, see recently Guérin 2015.29–30, 34–38; Jacob 2020.341–49, following Benveniste 2016.402–04; cf. Broggini 1957 and Martino 1986. For the Greek *histōr*, e.g., Snell 1924.59–71; Sauge 1992, 2000; Connor 1993; R. Thomas 2000.161–67; Fusai 2006; Darbo-Peschanski 2007; Schepens 2011; and Basile 2018. More examples: Hsch. s.v. *iduioi*, "knowers"; *epēkooi,* "overhearers."

15 Laws ap. Dem. 21.45, 59.16, 59.52, 43.54, 23.28; Andoc. 2.14; Ar. *Ach.* 541–43, 819–20, 911–14, *Eq*. 278–79, 300–02; Isocr. 17.42, 18.6; cf. ML 49.1–3; *IG* II² 30a6; *SEG* 26.72. Discussion: Lipsius 1905.299–338 and Ruschenbusch 1968.64–74.

16 Discussion: Cohen 1983.57, Harris 2006.384, Thür 2020.43 n. 52, and the literature in note 25 below. Hansen 1976.50 and Harris 2021.286 imply that Demosthenes refers to an actual feature of Athenian law. If it is, this is the sole *testimonium*.

17 *FD* III 1:486, B.1, line 8; cf. *Hom. Hymn Ap. Merc.* 157, Xen. *Oec.* 14.4–5, Dem. 24.146, and Arist. frag. 84 Rose.

refers to? The wealth now in the thief's possession must surely be the stolen goods—Demosthenes says so himself. That which is illicitly acquired, we ought to infer, is strapped to the back of the thief. It is with this item bound to his body that the thief is to be led off. One may understand Demosthenes' remark to be a reference to some traditional rite in which the thief is exposed and ignominiously walked around the village, as Louis Gernet did in his edition of the text.[18] But the passage is quite clear, this is not just any thief. This is a thief caught *in flagrante delicto*, and the circumstance of flagrancy must be taken into account. Flangrancy separates one set of thieves from another set by virtue of one criterion alone: being *seen* committing the crime or not.

This is precisely what is at stake in the ritual. To strap the stolen object onto the back of the burglar caught in the act is not simply a means of public shaming. That would be to misunderstand the rite entirely: the act of strapping the stolen material to the body visually reproduces the moment in which the thief is caught with his hands on the object. The Greek word for thief, *phōr* (closely related to the Latin *fur,* "thief") must mean "he who carries on him (the stolen property)."[19] In Roman law, the Latin syntagma *fur manifestus* similarly singles out this very moment as crucial: at the *deprehensio*, "detection," the thief's body must be attached to the object.[20] We find the same notion of contact between thief and stolen object in the Germanic term *handhaft*.[21] And one can go further. In this rite, the moment of catching the thief is not just reproduced by tying the object onto the criminal's back. The ensnarement ensures that the moment is perpetuated.

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18 Gernet 1957.177; see Heraclid. Pont. 14 and Dem. 24.105 (discussion in Forsdyke 2008.10–11). For the rite in case of adultery, see Forsdyke 2008.3–26, Pepe 2021.35, and Phillips 2021.20–22 with sources.

19 See Gernet 1937.391 and Sommer 1948.153–59. Frisk 1960 (from *pherō*, "to carry") and Chantraine 1968 s.v. *phōr* both adduce the Armenian *burn*, "hand," "fist," cognate with the Greek *phōr*, "thief"; cf. Paoli 1950.141 n. 29 and Hansen 1976.48.

20 Dig. 47.2.5 pr., Dig. 47.3.2 ; cf. Dig. 47.2.7.1, Dig. 47.35, and Gell. *NA* 11.18.11. On the etymology, cf. Pugsley 1972.28–35 (with caution), Balzarini 1992.51–52, Pepe 2004.63–70 (who suggests at 86 that *deprehensio furis in faciendo,* "seizure of the thief in the act [of stealing]," is perhaps the originary notion), and Pelloso 2008.263–65 (with further literature). For *deprehendere*, see MacCormack 1995.276–78. Whether (*fur*) *manifestus* is etymologically connected to *manus*, "the hand," is disputed; see recently Pepe 2004.133–35.

21 On *handhaft*, see Brunner 1887a.481, Liebermann 1906.495–96, Munske 1973.61–62, *HRG* s.v. *handhafte Tat*, and *GAO* s.v. *handhafte Tat* with further literature. In the MAL, the same distinction seems to appear, but the crucial "in her possession" (*ina qātēša*, MAL A.1) is restored; discussion at Lafont 1999.434–44 and 475.

Walked around the city and carried off to the magistrates, it was clear to everyone that this was a thief caught in the act: one could see it.

It is not without interest that this same practice is attested elsewhere. Until the middle of the twentieth century, the legal systems involved would have been treated as unified and designated as "Germanic." Jacob Grimm, in the nineteenth century, could still write sweepingly that in the case of the thief caught in the act—an *offenbarer Diebstahl,* "a theft visible to everyone"—Germanic law required a particular mode of proof called *blickende Schein* or, in Latin, *evidentia ocularis,* "visual clarity."[22] The kind of proof—properly evidence—required is clear enough. But, we might ask, visible to whose *Blick*? To the eyes, said Grimm, of the judges. That the crime was *offenbar* or *scheinbar*, then, meant nothing less than that the crime had to be perceptible by the judge's senses. The presence of such proof renders the verdict all but certain. That which was formally perceived by the court became incontrovertible and could not be denied.[23] The thief against whom *blickende Schein* could not be established, on the other hand, would only rarely be acted against.

Today one is less inclined to grant Grimm the leeway necessary to claim that such a regime held sway across the board in late antique and medieval Germanic societies.[24] Yet Grimm's analysis that connects the doctrine of *evidentia ocularis* to the Demosthenic quotation is worthwhile. How, he asks, is *blickende Schein* obtained for a thief caught in the act? "Him one shall catch and bring before the court bounded," notes Grimm, citing the Alsatian city laws of Mulhouse, "and him one shall bind the stolen object on his back," adding that elsewhere the thief not caught in the act was said to "have a clean back" (*clæne bäc habban*).[25] He could have picked different examples, since the practice is widely attested in Germanic laws, including those of the Anglo-Saxons and of the Scandinavian

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22 See *HRG* s.v. *blickende Schein*, *DRW* s.v. *blickende Schein*; further Grimm 1899.182, 197, 521–23; Liebermann 1906.495; Holdefleiss 1933; and Munske 1973.265. For the same link in Latin, cf. *res erat manifesta*, *furtum erat apertum,* "the matter was clear, the theft was plain" (Cic. *QRosc.* 9.26; cf. 9.95), and *TLL* s.v. *manifēstus* (equating it with *publicus*, "public").

23 See *HRG* s.v. *handhafte Tat* and *blickende Schein* for *loci* and further references. On this incontrovertibility in Roman law on flagrant theft, see Kaser 1949.213 and Fenocchio 2008.279.

24 Schott 1979, Kroeschell 1986, and Faulkner 2016.1–8 for a critique of the old view that Germanic law was unitary.

25 Grimm 1899.197. Parallel with Demosthenes: Bernhöft 1882.223; Weiss 1921/22.12, 18; Latte 1931.137–38; and Hansen 1976.50.

Figure 1: Universitätsbibliothek Heidelberg, Cod. Pal. germ. 164 (Heidelberger *Sachsenspiegel*), fol. 10v.

regions.[26] The illustrated Heidelberger *Sachsenspiegel* (early 13th century) beautifully translates the legal provision into an image (figure 1).

Like the judge to the right, we can see the stolen object strapped onto the back of the thief to the left as he is carried off towards the magistrate. We, too, can now "catch" the thief in the act. Indeed, Grimm's ascription of *evidentia ocularis* to Germanic law at large may be faulty, but conceptually the connection of this evidentiary regime to the mysterious rite of ligature grasps what is at play: to give the court a vision of the crime akin to that of those who caught the defendant in the act.[27] The similarity between the Greek and the Germanic cases, it should be noted, extends beyond the mere binding of the stolen object onto the culprit's back. In a way, the binding is the epiphenomenal product of that which was perceived to be truly indispensable in both cases: *evidentia ocularis*. The judge must witness the crime. For the principle that guides this seemingly odd practice in a variety of Germanic laws and in the offhand remark

26 Collections: Grimm 1899.197–98; Wilda 1842.891; Brunner 1887a.484 n. 21; Maitland and Pollock 2010.519–20, 607–08; Dareste 1902.340–41; Liebermann 1906.495; de Visscher 1922.460–61; Holdefleiss 1933.23, 67–68 (who notes that binding was customary in other cases too); Munske 1973.168; Hansen 1976.50; E. Kaufmann 1979.336–42; and Strauch 2011.601.

27 So also Scherer 1909.135, Holdefleiss 1933.68, and *HRG* s.v. *handhafte Tat*.

of Demosthenes is the same. By binding the object onto the back of the thief, one continuously renders visible the moment in which the thief was caught laying hands on that item. The procedure, to borrow a phrase from Apuleius, served to "renew an earlier crime by means of a new display."[28] And the judge, fictionally or not, can now be present at the original crime.

There is always theater here, but some medieval German laws went beyond what is in the Demosthenic speech or in Athenian law more generally. First, there is the perpetrator who is led before the court, chained to the stolen object. Then, in almost every ancient legal system as Wilhelm Schulze established long ago, there is also the cry that is raised by the victim or by those who witnessed the crime: the hue and cry that warns the community and makes the theft a communal and public issue so that the perpetrator can be hunted down and the "freshness of the act," as David Daube once called it, prolonged.[29] In many medieval German laws, the spontaneous cry became a technical necessity and announced the start of legal procedures—"das Gerüfte ist der Klage Beginn" runs the legal proverb—and once in the courtroom, it had to be repeated before the judge.[30] Ideally, a court would be formed right away, and between the first cry and the cry that resounds in court there ought to be no interruption. But such an interruption was rather the rule, and the cry raised in court would thus consciously imitate the original *Gerüfte*.[31] One repeats the cry and binds the perpetrator so as to repeat the original moment; weapons used by the perpetrator and wounds suffered also had to be brought before the judge.[32] The situation had to be replicated as closely as possible or, to be

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28 Ap. *Met*. 3.9: "praecedens facinus instaurare nova ostensione."

29 Daube 1947.295, discussing the Roman *furtum manifestum*. See Schulze 1933.163–89, with Daube 1947.205–06 and Seeligmann 1967.257–60 for Hebrew evidence. Useful are Brunner 1887a.481–83, Maitland and Pollock 2010.607–08, Meyer 1916, Holdefleiss 1933.17–25, Hammerich 1941, and Watkins 1970.339–40. On *endoplorare*, the Roman "hue and cry," see Wieacker 1944, Pepe 2004.45–54, and Pelloso 2008.142–55. For ancient Athens, see Schmitz 2009.78–82 and O'Connell 2017.86 n. 11.

30 On the *Gerüfte* or *Geschrei*, cf. *DRW* s.v. *Geschrei*, *Gerüfte*, *HRG* s.v. *Gerüfte,* "das Gerüfte ist der Klage Beginn," and *GAO* s.v. *Gerüfte*. On the need to continue the cry in court, see Scherer 1909.103–04, Schulze 1933.165, Holdefleiss 1933.18–20, Hammerich 1941.83–93, and *GAO* s.v. *Gerüfte*.

31 E.g., Weichbildrecht 109.1 (ed. von Daniels and von Gruben 1858.159); *SSp. Landrecht* II.64.3 (ed. Eckhardt 1955.183). Discussion, with supplementary literature and examples: *HRG* s.v. *Gerüfte* and *GAO* s.v. *Gerüfte*.

32 Discussion Holdefleiss 1933.16; Hammerich 1941.11–12, 86; and Wieacker 1944.163. For Greek and Roman examples, see Ruschenbusch 1968.71–74, 1989.25; E. Hall 2006.353–92; J. Hall 2014.5–7, 18–20, 129–31, 133–35, 140, 146–47; and O'Connell 2017.46–50.

more precise, in order for the theatrical to stand in for the real, imitation and reality had to be indistinguishable. As its mirror image, that symbolic repetition was still—fictionally—taken to be the same as its model, even if the fiction was only accepted up to a certain point: the thief caught in the act had to be tried before sunset.[33]

The key concept in this legal theater is immediacy. In a gloss of the *Sachsenspiegel*, we read "the manifest (*hanthafft*) deed is the deed which happened just now (*to hand*), and which is brought before the court immediately (*to hand*), and which will be judged immediately (*to hant*)."[34] We might ask why immediacy is so crucial here, especially since the discussion up until this point could be taken as a splendid confirmation not so much of the importance of juridical sight but of Gernet's well-known thesis on the nature of time in archaic forms of law. The first steps of the law are exclusively concerned with the present, he argued, and in its infancy, the law knows neither the past nor the future. Aside from a series of Roman legal procedures (his initial inspiration), the concept of the flagrant delict was the centerpiece of Gernet's argumentation about the absence of proof in archaic law; the strange rite of ligation under discussion would seem to corroborate his basic intuition.[35] In the case of the flagrant delict, there is no proof, nor can there be: proof, after all, consists of the present reconstruction of a past event. Gernet was correct, also, to consider this the special force of the flagrant delict. There is no need to prove the present, nor does it seem possible to do so in a meaningful way.[36] Yet it seems to me that Gernet, with his emphasis on the present in archaic law, mistakes accessory for essence. The flagrant delict is less a testimony to the impossibility of the ancients conceiving of anything other than the present and more

33 E.g., *SSp. Landrecht* I.57 (ed. Eckhardt 1955.113–14) and *Schlesisches Landrecht* 360 (ed. Gaupp 1828.197); discussion at Wilda 1842.889; Liebermann 1906.496; Meyer 1916.426; Holdefleiss 1933.19, 23–24; and *GAO* s.v. *handhafte Tat*.

34 Both *hand* and *hant* are in the manuscript. Gloss to the *SSp. Landrecht* I.66.1 (ed. Kaufmann 2002.472); exceptions to this rule at Holdefleiss 1933.25.

35 Gernet 1956.385–88. Noailles 1949.97, on the *legis actio sacramento*, "legal assertion of claim (by oath)" with which Gernet opens his treatment, notes that "cet esprit [informing the action] est aiguillé sur le présent, rien que sur le présent." The idea of presentism was associated with archaic or mythical thought at the time in, e.g., Cassirer 2021.45–46, and subjected to a profound meditation in the third chapter of Bergson 1988.

36 Gernet 1956.387. Cf. Sext. Emp. *Math.* 2.65: "And just like we do not need art (*technēs*) to be convinced that 'it is now day' or that 'I am now speaking,' because they are obvious (*enargōn*) and self-evident (*autophōratōn*) things, in that way, too, there is no need of rhetoric to agree with the fact that the murderer caught in the act (*ep' autophōrōi*) is a murderer."

that it attests to the desire of the law to see the crime. Only an immediate present can be witnessed, the past cannot.

II. THE LOVERS' BOND

My previous section suggested that the central idea governing the flagrant delict is that of the seeing judge in one situation connected to flagrancy: a cross-cultural rite of ligation after a theft. However, the same ritual of ligation is found in ancient Greece, the ancient Near East, and Germanic law for the delict of adultery, and the same centrality of judicial sight is to be found in the flagrant delict's archetypal case: the victim catches a culprit in the act and summarily executes him.

So far our discussion of flagrancy has been restricted to a terse comment in a Demosthenic speech and a widespread legal custom in what one may imprecisely call Germanic legal systems that were concerned with thievery. The emphasis on theft is not accidental. In general, there is a close connection between the thief caught in the act and the concept of flagrancy as such, and here and there the abstract notion must have been extrapolated from the particular case of theft. In Greek, for example, *ep' autophōrōi*, "caught in the act," bears within it the word *phōr*, "thief." We find the same specialization in Roman law, where the semantic generalization of the word *manifestus* does not obscure the fact that the word itself was closely bound up with the act of catching the thief red-handed.[37] The notion of flagrancy, however, and even the practice of binding the perpetrator to the object of illicit desire in order to make a crime perpetually visible to the judge, is not exclusive to theft. Indeed, antiquity's most famous response to criminals caught in the act follows this practice of ligation. This response is, of course, the reaction of Hephaestus to the adultery of Ares and Aphrodite.[38]

Hephaestus, made aware of Aphrodite's relationship with Ares by the all-seeing Helios, decides to catch the two lovers in the act. To this end, he forges bonds that cannot be broken nor loosened (*desmous arrēktous*).[39] Hephaestus then feigns a voyage, and the lovers meet as arranged. But their

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37 De Visscher 1922.452–55 and Pepe 2004.133–34.

38 Recent discussion at Forsdyke 2008.10–11 and Phillips 2021.8–9. The parallel with Dem. 45.81 is remarked on by Weiss 1921/22.18 and Ruschenbusch 1989.295.

39 Hom. *Od.* 8.274–75; "graciles catenas retiaque et laqueos," "slender chains, nets, and fetters," at Ov. *Met*. 4.176–77; *ligati,* "bound fast," at 186; *laqueos,* "fetters," at Ov. *Ars Am.* 2.578 and 580.

pleasures are short-lived; they are caught immediately and inextricably by Hephaestus's creations. These bonds, importantly, bind Aphrodite and Ares to the conjugal bed of Hephaestus during intercourse—something implied in Homer and made explicit in the Ovidian rendition, where the artfully curated word order does as much as the words themselves to stir the imagination ("in mediis ambo deprensi amplexibus haerent," "in each other's arms, they were both caught and held fast," *Met.* 4.184). The same rather graphic moment is, perhaps apocryphally, singled out by Lucian as the defining feature of the delict of adultery in Athenian law; Lucian claims that the stipulation goes back to the *axones*, "wooden tablets," of either Solon or Draco. The Roman jurist Ulpian reports that Solon and Draco used the euphemistic expression "in the act," *en ergōi*; his colleague Pomponius preferred the circumlocution "in ipsis rebus Veneris," "in the very acts of Venus."[40] As with a thief caught *in flagrante*, physical contact between culprit and desired object is of the essence.

Moreover, the similarities between theft and adultery can be extended: unable to free themselves, the adulterous couple are not just caught in the act. Indissolubly tied to their crime by everlasting fetters, they are *perpetually* caught in the act. Again, there is *evidentia ocularis*—the crime is observable and undeniable: the chains ensure that it is not just visible to the one who discovered it but to everyone. Straightaway, Hephaestus calls out for all the gods to come (*smerdaleon eboēse, gegōne*, *Od*. 8.305) so that they can see the couple caught in the act (*idēsthe*, *Od.* 8.307).[41] In the next book, Polyphemus will also raise a cry when a crime is committed against him (*Od.* 9.399), though he is ignored, and scholars stress the connections between the Homeric *boē*, "cry," and the cross-cultural legal practice of the hue and cry, discussed above, when a criminal is caught red-handed.[42]

By trapping the couple in the act, their adultery is made evident to the assembly of the gods, that is, to the legal community. And if this

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40 Luc. *Eun.* 10: *arthra en arthrois*, "limbs on limbs" or, more graphically, "genitals in genitals"; see Paoli 1950.145–47, Carey 1995.409, Dig. 48.5.24 [23] pr. with Cantarella 1991.291–92, and Treggiari 2002.245–48. In Germanic systems, often *super* or *iuxta uxorem*, "on top of the woman" or "together with the woman," e.g., *Lex Ribuaria* 80 (77) (ed. Beyerle and Buchner 1954.129). In the Near East, CE 28 has "seized in the lap of another man"; see further Westbrook 1990.563.

41 Cf. Ov. *Ars Am.* 2.577–81. The Greek rite which placed the adulteress on a donkey to parade her across the town perhaps evinces the same logic—the donkey is a phallic animal; see Schmitt-Pantel 1981.119, Ogden 1997.21, and Forsdyke 2008.3.

42 Schulze 1933.85–7; cf. Hammerich 1941.16–21.

Homeric procedure seems odd, we must not forget that it was apparently extremely old, and, at any rate, it was not a practice exclusive to ancient Greece. In a Sumerian record of a divorce proceeding, the famous Judgement of Nippur, we find precisely the same elements (trans. Greengus 1969.34–35):

> He caught her upon a man; to the body of the man on the bed he tied her (and) carried her to the assembly. The assembly, because with a man upon her (sic) she was caught, his/her divorce money . . . (they) decided; . . . (her) pudendum they shaved; they bored her nose with an arrow (and) to be led around the city, the king gave her over.[43]

The parallels are remarkable, and the appearance of the same configuration of facts in an Old Babylonian letter from Mari confirms Samuel Greengus's reading.[44] Once more, we find a delinquent caught in the act; once more, we find a delinquent bound to the forbidden fruit; and once more that delinquent is led before a judicial entity—but the similarities are not exact. Hephaestus, we remember, cried out and called upon the gods to come, a practice attested in many ancient societies when the thief is caught in the act.[45] In the Sumerian divorce proceeding, on the other hand, the bound adulterous couple is led to the court. Here, together with the examples from the ancient Near Eastern codes, the Athenian *apagōgē* (leading a culprit before the judges—the procedure alluded to in the Demosthenic passage) is a closer parallel.[46]

Nonetheless, the difference between these two modes of prosecution should not be exaggerated, since both seek to bring about the same thing: *evidentia ocularis*. The culprit must be seen to be caught in the act—be seen, that is, by the judging entity. It is this very same thought that structures the very same response to adultery in some medieval Germanic laws. "He shall bind them onto each other and lead them along in public

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43 IM 28051, ll. 12–26; unprovenienced and undated, but Peled 2017.30 suggests ca. 2000–1900 BCE. Edition and translation at Greengus 1969.34–35; cf. Westbrook 1990.557 and Lafont 1999.37–39. All three note the parallel with the Homeric episode.

44 M. 5001, edition and commentary Durand 1988.524–25; recent text and translation in Johnson 2020.198.

45 E.g., Dig. 9.2.4.1 and Cic. *pro Tullio* 21.50; cf. Brunner 1887a.481 and Schulze 1933.197–210.

46 MAL A.15, HL 198 (cf. 93), and CH 129. Discussion of the *apagōgē* in Gernet 2001.116–17, 139; Hansen 1976; Hunter 1994.135–36, 177; Schmitz 1997.66–69; and Volonaki 2000. For the Germanic sphere, cf. Scherer 1909.102.

(*uffinbar*)," we read in the fourteenth-century *Meißener Rechtsbuch*, and further parallels appear in medieval German, Danish, and Swedish law.[47] Just as the thief had to be bound to the stolen object, the adulterous couple had to be bound to one another and brought before the court—a device effective enough, apparently, to appear in different times and places. So great was the necessity for the judge to see the crime that in these medieval laws, it had to happen even if the adulterers had already been killed. An official trial would be held to convict the dead criminals, still bound to one another.[48] In all these cases, it is not sufficient for victims or witnesses to merely witness the crime. They had to catch the culprits and bind them so as to allow others to see them also. This inclusion of an official or a judicial third party, either by raising the hue and cry or leading the criminals off to the authorities, is crucial. The crime had to be rendered manifest and made present in the public eye of the judge.

If we now move from this specific rite of ligation to the terminology generally used in ancient Greece and Rome for the flagrant delict, we can discern the same centrality of a "seeing judicial authority." Indeed, wherever we find ancient commentary about flagrancy, we are invariably drawn into the semantic sphere of public, judicial certitude.[49] When there is disagreement over the contours of the definition of the *furtum manifestum* in Rome, for example, it is over what situation can still be said to produce *evidentia ocularis* and render the link between culprit and crime unassailable.[50] Amidst this doctrinal wrangling (to which Roman law owes much of its charm), we find the conception of flagrancy suggested by the judicial redundancy: "Fur est manifestus . . . qui deprehenditur cum furto," "manifest is the thief who is caught with the stolen object."[51] But this is by no means the sole definition of flagrancy proffered.

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47 *Meißener Rechtsbuch* 4.11.2 (ed. Ortloff 1836.203). See Scherer 1909.39, 48, 100, 102–03, 135 and Weiss 1921/22.12.

48 See *HRG* s.v. "Klage mit dem toten Mann"; Scherer 1909, Brunner 1910, Wieacker 1944.173–74, and Wallén 1958.243–45.

49 We will have to restrict ourselves to these societies because elsewhere a discussion of terminology is largely absent, except for what has already been discussed above in the case of Germanic law. See also Kaser 1949.213 and Crook 1987.39 about *manifestus*, with further literature. For the ANE material, there is little discussion, but note Lafont 1999.66–67 and Puhvel 2007.

50 Discussion: MacCormack 1995, Pepe 2004.68–83, Harris 2006.377–79, Desanti 2008.69–71, Fenocchio 2008.274–84, and Pelloso 2008.265–79.

51 Dig. 47.2.3 pr., Dig. 47.2.5 pr., and Dig. 47.2.3.2. De Visscher 1922.449–52 and Desanti 2008.71 consider this the originary notion; Watkins 1970.342–43 discerns the same conception in the Indian *Laws of Manu* (9.270). For late antiquity, cf. the *leges* provisions listed in note 59 below in which the presence of Roman law is palpable.

It may seem ironic that Roman jurists deeply disagreed about the notion of *manifestum*, yet as Marco Fenocchio points out, for the *furtum manifestum,* whether the strict situation of the criminal caught committing the crime (Gai. *Inst.* 3.184 and Gell. *NA* 11.18.11), or the more lenient situation of the criminal caught before he reaches the place where he intends to leave the stolen goods (Gai. *Inst.* 3.184; cf. Dig. 47.2.3.2 and Dig. 47.2.5 pr.) Roman law unveils a single underlying *ratio* for both definitions: the *fur manifestus* is the author of an incontrovertibly criminal act.[52] While what is required to establish such an incontestable situation is a matter of debate and, as we will see (n. 90 below), can even become the subject of rhetorical abuse, no one refused to grant the qualification of *manifestus* to the thief caught while stealing. However, the further one moves from the core of settled meaning to a penumbra of uncertainty, the more slippery the terrain inevitably becomes (Harris 2006.385).

This is, of course, the argumentative terrain that delights Ulpian, Paul, Celsus, and the other Roman jurists. Given their propensity for disagreement, the one line they did draw in concert takes on greater significance. The thief who is seen (*visus*) by the victim but not stopped and captured (*deprehensus*), the jurists argued, was not caught in the act.[53] The reason for the jurists' apprehension, I suspect, resides in the fact that it is not enough for the victim (or a witness) alone to register the crime. Without stopping the thief and including the community, the victim is merely a witness for a third party who must later decide the case without having had the direct sensory experience. It is not enough to have witnesses if these are not also the judges, for the deed thus lacks the crucial characteristic which would render it *manifestum:* it has not been rendered incontrovertible in the eyes of the public.[54]

Scholars point out that the situation in ancient Greece was no different. The flagrant delict was the delict that was made public: irrefutable in the eyes of everyone.[55] And although there is broad agreement that this

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52 Fenocchio 2008.279; cf. Harris 2006.376–77. *TLL* s.v. *manifēstus: evidens* ("obvious"), *clarus* ("clear"), *publicus* ("public"), *perspicuus* ("transparent"), or even *praesens* ("present").

53 Dig. 47.2.7.1–2, Gai. *Inst.* 3.184, *Inst. Iust.* 4.1.3, Theophilus *Paraphrasis* 384 (ed. Lokin et al. 2010). All authors refuse to subsume this situation under the heading of manifest theft until the Justinianic text reverses the trend, as MacCormack 1995 notes (cf. Fenocchio 2008.277–78).

54 Cf. Wieacker 1944.176, Fletcher 1976.478, and Fenocchio 2008.273.

55 Hansen 1976.48–52, 1981.27–30; Cohen 1983.58–61; and Harris 2006.373–90. *Ep' autophōrōi* and *manifestus* are treated as equivalent in Roman sources (Dig. 47.2.3 pr.,

occurs when the criminal is caught *ep' autophōrōi*, there is disagreement about what cases can be subsumed under the term. Most explicit about its meaning, but also by their very nature the most suspect, are the scholia and lexica. Almost all of them give the definition that also characterized the rite of ligation. *Ep' autophōrōi* in Photius, in the *Suda*, in Hesychius, and in many other places, means "caught with the stolen item itself" ("ep' autōi tōi klemmati alous"), to which Hesychius adds an additional clue: *eti katechōn auto*, "still holding the very thing."[56] Again, it is by no means the sole definition suggested. Hesychius presents two, and the other, more restricted, definition is that of catching the perpetrator whilst committing the act ("ep' autōi tōi ergōi"), which appears also in the scholia to Aristophanes (ad loc. Ar. *Plut.* 455). In those same scholia and lexica, one also finds "seen by oneself" (*ep' autoptōi*) or "(seen) with the eyes" (*ep' ophthalmois*) or "openly" (*phanerōs*). The broad spectrum of definitions, fanning out from the rather restrictive to the capacious, has found a pendant in contemporary scholarship.[57] Here, no less than in Rome, we are faced with semantic discord about the notion of certainty. As in the medieval German laws and in Rome, the Greek flagrant delict served to establish *blickende Schein* precisely because the judge was confronted with a culprit whose link to the crime was incontrovertible. One might then disagree over the precise set of conditions that activates this evidentiary regime—as the ancients did then and as scholars do today. But it is critical to grasp the role of the flagrant delict in the establishment of evidence in the first place. What the unbreakable bounds of Hephaestus brought about, to recall that example, was precisely this: once the blacksmith had bound the couple and called forth the others, the unlawful act was rendered publicly visible and thereby incontrovertible.

Thus far we have moved not from the general idea of the flagrant delict to the specific case of imitating that idea before a judge in a case of theft, but inversely. Using the rite of ligation to isolate a central feature of the flagrant delict, we have sought to uncover that same feature in an ever-widening set of phenomena in order to illuminate the flagrant delict

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Inst. Iust. 1.4.1); Hansen 1976.49 and Harris 2006 accept the equation; Pepe 2004.80, 133 and Pelloso 2008.278 argue for a difference.

56 Suda (= Phot. ad loc. and *Etym. Magn.* s.v. *epautophōrōi*) s.v. *ep' autoptōi*, "seen by oneself"; Hsch. s.v. *ep' autophanesi,* "self-apparent"; s.v. *ep' autophōrōi*; see Pepe 2004.97–102 and Pelloso 2008.91–93.

57 Cf. Hansen 1976.48–52 (progressive widening), Cohen 1983.58–61 (strict interpretation), Harris 2006.373–90 (wide), Pepe 2004.87–112 (strict), and Pelloso 2008.79–98 (wide).

more generally. In closing this second section, I would like to discuss the relationship of the archetypal case of the flagrant delict—the victim who catches the criminal in the act—with the rite of ligation that consciously imitates this situation. It hardly requires emphasis, after all, that there is something artificial about the use of ligatures, ropes, and chains to stretch out the moment of catching a culprit in the act. The judge who sees a thief or an adulterer strapped to the desired object cannot meaningfully be said to have caught anybody in the act. That, in most cases, is reserved for the victim. And the victim's centrality was clear to everybody. It is especially evident from the fact that in many ancient legal systems, the victim had a choice: kill the criminal immediately or bring him or her before the judges.[58] At times, we find no choice at all, only the license to kill.[59] In the case of a response by execution, all the parties involved see the crime and immediately sit in judgment. Included is the victim, of course, but society, too, must be there (Gernet 1956.386). For it would be mistaken to claim that the public eye of the judge is absent in this archetypal case. The gods in Homer, Euphiletus's neighbours and friends who catch Eratosthenes, witnesses and arbiters in Cicero—all are called forth to witness and thus confirm that the crime took place, and they will subsequently assist with the response.[60] In some Germanic laws, as we already noted, the cadaver of the summarily slain criminal still had to be brought before the court and tried.[61] And to these convoked and witnessing judges, there is no need to explain anything: the crime will be immediately evident (Gernet 1956.386).

In claris, as the medieval glossators at Bologna said, *non fit interpretation,* "When the matter is clear, there is no need for interpretation." It is this same clarity that is fictively produced when a judge catches culprits

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58 For a close connection between victim and flagrancy, cf. Soph. *Ant.* 51; cf. Sommer 1948.155–56 and Pepe 2004.93. Also MAL A.15 with Wieacker 1944.176–77, Maffi 1986.9–20, Paoli 1955.309, and Lafont 1999.67–68; HL 198; Dem. 23.28, 23.53, 24.113; and *IG* I² 115.30.

59 E.g., Rome: *Twelve Tables* 8.12–13 (ed. Crawford 1996.578; all sources in Huvelin 1915.22–40 and Wieacker 1944.130–31); Israel: Ex. 22:1–2; ancient Greece: Lys. 1.36, Dem. 24.113, Plut. *Sol.* 23.1; ANE: CE 12–13, 28; Hittites: HL 197; late antique *leges*: e.g., *Lex Visigothorum* 3.4.4, 7.2.15–16 (ed. Zeumer and Werminghoff 1902.149, 294), *Lex Baiwariorum* 8.1, 9.6 (ed. von Schwind 1926.353, 372), *Lex Ribuaria* 80 (77) (ed. Beyerle and Buchner 1954.129).

60 Cic. *pro Tul.* 50; cf. Gortyn Laws, col. 2, ll. 36–41 (ed. Willetts 1967.40). See Gernet 1956.385–92 and 1959.394–98.

61 Cf. note 48 and, on the medieval *Notgericht am Tatort*, cf. *HRG* s.v. *Notgericht* and *GAO* s.v. *handhafte Tat* with references.

in the act by having them appear before the court while fastened to their crime. In the face of this contrived attempt to produce clarity where it is absent, one might be tempted to postulate an historical development and to claim that the fiction is an attempt on the part of the state to incorporate the quasi-legal solutions that stem from a time of self-help; the fiction, after all, is clearly modelled on a reality that logically and temporally preceded it. Yet such a claim is impossible to prove. The evidence for any self-help adaptations, as we have seen with Homer and the Judgment of Nippur, appears as early as the ancient evidence for summary execution by the victim in the case of *flagrante delicto*, just as the evidence for the victim taking matters into his or her own hands does not gradually disappear but is attested throughout antiquity. Recent scholarship more generally stresses, and correctly so, the absence of evidence for a developmental view of ancient law.[62] Rather than discussing a legal evolution that cannot be conclusively demonstrated, we have used the imitation of flagrancy as an opportunity to understand the original.

III. THE CRIME MUST MEET THE EYE

In the previous two sections, we traced an odd trick—a thief bound to a stolen object, adulterers to each other—and have seen that it was an attempt to solve a problem. What was necessary, yet absent, was a judge in whose eyes the criminal act was incontrovertible—a requirement, as we have seen, that also structures the legal terminology and the archetypal case of the flagrant delict. Our interest was less in the legal rite—in itself little more than an historical curiosity—than in the evidence it preserved about the flagrant delict. In following, *ex negativo*, not the idea of catching somebody in the act as such but instead the conscious attempt to recreate and imitate that idea where it was absent, we are able to uncover what animates the notion of flagrancy: not revenge but "judicial sight."

With judicial sight in place as the core feature of the flagrant delict, we can argue for a new explanation of the aggravated (and puzzling) punishment attached to it: that the crime seen to be done is, in fact, worse than the crime that remains unseen. This conclusion, in turn, raises an historical question: if the crime seen to be done is worse, how and why

62 Generally: Whitman 1995, with reference to other critical voices; for Greek law: Cohen 1989, 1995.9–24; Hansen 1976.117; and Forsdyke 2008.3–5; for ancient Near Eastern legal systems: Westbrook 2010.

did the differentiated regimes of punishment come to lose their intelligibility to the extent that they appear paradoxical today and even in antiquity?

That more severe punishments resulted from crimes caught in the act is well-known. The response to a Roman *furtum manifestum* was capital punishment or slavery, then later fourfold damages, but for a *furtum nec manifestum* merely double damages.[63] A similar regime held sway in Athens, in ancient Israel, and in the late antique and medieval Germanic laws.[64] There are, it seems, two types of theft. A similar distinction appears in the context of adultery. The famous case Euphiletus erects on the concept of the *dikaios phonos*, the "justified homicide" when the adulterer is caught *in flagrante*, is paralleled in ancient Rome, the ancient Near East, as well as in the Germanic laws.[65] Where there is information, the penal regime to which the *suspected* adulterer is subjected is frequently different. In ancient Athens, a variety of actions were available alongside the obvious *graphē moicheias,* "an indictment for adultery" that could be brought by any qualified citizen; all entailed a punishment unlike the one inflicted on Eratosthenes.[66] The situation in Roman law, which becomes properly legible only with the introduction of the Augustan *Leges Juliae*, was no different: justified homicide in case of flagrancy, loss of property and marriage rights if convicted via a *iudicium publicum,* "public criminal proceedings."[67]

The distinction is strange, but it is clearly maintained: manifest on the one hand, non-manifest on the other. One act is seen by the legal

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63 Gai. *Inst.* 3.189–90, *Inst. Iust.* 4.1.5, Gell. *NA* 11.18.6–12 and 11.18.15–6, Isid. *Etym.* 5.26.19, and Serv. ad Verg. *Aen.* 8.205. For scholarly treatments, see note 3 above and, e.g., la Rosa 1990.58–74, Balzarini 1992, MacCormack 1995, Pepe 2004, Harris 2006, Desanti 2008.70–72, Fenocchio 2008.272–87, and Pelloso 2008.

64 Dem. 24.105, 113–14; cf. Lys. 10.16, IPArk 17, ll.111–34, Xen. *Oec.* 14.5, Gell. *NA* 11.18.1–5; on the *duplum*, cf. Thür 2003.93–94. Israel: Fletcher 1976.477–78, cf. Ex. 22:1 with Ex. 21:37 and 22:3. For Germanic law: cf., e.g., the *leges* provisions of n. 59 and Wihtred 25 (ed. Liebermann 1903.14); see Beyerle 1915.470–71 and *HRG* s.v. *handhafte Tat*.

65 Lys. 1.2; on panhellenic status, Phillips 2021. Rome: *Coll*. 4.2.5, Dig. 48.5.24 [23], and Treggiari 2002.244–45. ANE: HL 197, CE 28, MAL A.15, Westbrook 1990.551–56 and Lafont 1999.65–74. Germanic laws, e.g., *Lex Baiwariorum* 8.1 (ed. von Schwind 1926.353), *Edictum Rothari* 212 (ed. Bluhme in Pertz 1868.51–52), *Lex Visigothorum* 3.4.4 (ed. Zeumer and Werminghoff 1902.149), Beyerle 1915.469–73, and *HRG* s.v. *handhafte Tat* (including other delicts).

66 For a recent review of these actions, see Phillips 2021.14.

67 See Paulus *Sent.* 2.26.14 and Dig. 48.5.30.1 for the outcome of a *iudicium publicum*; discussion in Treggiari 2002. In the ANE, the difference appears to be procedural, since the outcome in either case is death; cf. Lafont 1999.65–74.

community, the other is not. If not with the customary appeal to revenge, how might one explain the asymmetrical punishments? When all is said and done, we cannot wholly dismiss the idea that to remain unseen is to remain without guilt—at least in part, at any rate. Frederic Maitland had already challenged the *communis opinio* along these lines, but in lieu of a substantive explanation, he offered a witticism: "We doubt whether we can wholly acquit our forefathers of the less logical idea that half-proven guilt is proven half-guilt."[68] The absence of visibility here corresponds to an absence of guilt that can only be partially remedied at a later trial where direct sensory experience of the crime is missing. This has all the appearance of an outrageous equation, and yet Maitland was not alone in suggesting that the severity of any punishment is to be explained as a function of certainty versus doubt.[69] In response, however, Romanists are quick to point out that it is hard to see why differences in evidence would result in a qualitative difference in substantive law and not merely in leniency of sentencing (Yaron 1966.516 n. 24 and Pugsley 1969.139). And this is the central issue: the flagrant delict is presented not as a crime that can be punished more severely because an adequate degree of certainty is forthcoming, but as a categorically *different* crime compared to its non-flagrant counterpart.

One may not wish to follow Maitland, then, in his equation of the degree of certitude with the gravity of the penalty. Yet the more basic conflation on which his argument implicitly rests—that an absence of vision is tantamount to an absence of guilt—is crucial for understanding the flagrant delict and its differentiated punishments. This equation of sight with guilt, of course, is hardly an unfamiliar one. David Daube, in a meditation on the phrase "to be found doing wrong," notes the ancient and abiding concern not with the fearfulness of the crime but with "the fearfulness of the resulting appearance in the eyes of the beholder."[70] His interpretation of a few lines from the Biblical Proverbs on theft and adultery is illustrative. The text is as follows: "People do not despise a thief if he steals to satisfy his hunger when he is starving. Yet if he is caught, he must pay sevenfold" (Proverbs 6:30–31). The proper interpretation, argues Daube, is not along

68 Maitland and Pollock 2010.520, perhaps drawing inspiration from the glossatorial doctrine of *semiplena probatio,* literally "half-full proof" or "half proof" (cf. Franklin 2015.12–39) and developing it in a way that is alien to the medieval system.

69 Holdefleiss 1933.107 for Germanic law and Kunkel 1949.253 n. 5 for Rome.

70 Daube 1971.7, with an emphasis on ancient Israel and the Hebrew Bible; cf. Daube 2010.49–55.

humanitarian lines—exonerating the thief on account of his hunger—but involves lines of sight: people do not despise the thief so long as he steals in secret and all goes well. But when he is caught, then he suddenly incurs disgrace and vengeance. The case of the thief, Daube adds, is paralleled in Proverbs 6 by that of the discovered adulterer, which displays all the same characteristics. And so he concludes with apparent delight that the phrase "to be found doing wrong"—itself very near to the phrase "there shall not be seen"—ultimately condemns "not the blemish but its display."[71]

It should be observed that the particular valence of Daube's conclusion belongs to the wider concepts of shame and guilt cultures (Daube 1971.7). More generally, the basic contention that the flagrant delict measures the severity of the crime as a function of its outward appearance corresponds closely to ideas associated with shame cultures. There is no need to discuss this in any detail. The scholarly genealogy is well-known, and the debate about a shame culture gradually giving way to one centered around guilt has grown somewhat dull.[72] But it is worthwhile to discuss, however briefly, some of the evidence that connects theft and adultery with notions of secrecy and openness, for it is here that one might shed further light on the strange idea that the crime that was witnessed was qualitatively different from the one which had gone unobserved. Maitland himself, in the sole footnote that corroborates his bon mot, points to the ancient tolerance, even admiration, of theft under certain conditions.[73] Key to such admiration was the ability to remain unseen. Calvert Watkins and Stefan Zimmer highlight this feature on the level of language, evincing, e.g., the OInd *stāyát*, "secretly, furtively," and *stāyú-*, "thief" (cf. Avestan *tāiia-*, "secret, theft") but also the Latin pair *furtum*/*furtim* and the English pair *steal/stealthily*.[74]

More famous—and structurally similar to the thief in Proverbs—is the case of the hungry Spartan boys who were trained to steal food

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71 Daube 1971.12, noting that the phrase does not coincide with but encompasses *in flagrante*.

72 Cf., e.g., Freud 1930 chap. 7, Benedict 1947, and Dodds 1951.

73 Maitland and Pollock 2010.520 n. 216. Paradigmatic is Autolycus, who "excelled all in thievery and oaths" (Hom. *Od.* 19.395 with Russo, Fernandez-Galiano, and Heubeck 1993.96 ad loc.) and could not be detected (Hes. frag. 67b MW, cf. frag. 66 MW, Hyg. *Fab.* 201, and Ov. *Met.* 11.313–17). Cf. the Greek proverb "the eyes are the abode of shame" (*TrGF* frag. 457; Ar. *Rhet.* 2.6.18 adds that we are more ashamed of what happens in front of our eyes and in broad daylight). See Glotz 1904.1998–99 for more sources.

74 See Zimmer 2003.130–31 and Watkins 1970.335; cf. Jolly 2019.118 for the different treatment in ancient India of secret and witnessed crimes.

when people were "asleep or off their guard."[75] The boy who is caught, Plutarch says, is soundly flogged and must go without food—not because he attempted to steal, but because his thieving was thought to be *atechnōs* and *raithumōs*, "without skill" and done "carelessly" (Plut. *Lyc.* 17.3; *kakōs*, "badly," Xen. *Lac.* 2.8). Xenophon, addressing a Spartan general, claims that in Sparta, "so that you will steal most skilfully (*hōs kratista kleptēte*) and will attempt to escape notice (*peirasthe lanthanein*), it is the law of your land that if you are caught stealing (*ean lēphthēte kleptontes*), you are flogged."[76] The two categories—manifest and non-manifest theft—here appear once more, and they again appear as rigidly separate. And we should be precise about the distinction that was made in Sparta: rather than penalizing theft as such but failing to punish those who are not caught because there is no proof or certainty, *only* manifest theft is criminalized (MacDowell 1986.61). This is not a matter of proof. The two acts are qualitatively different. To steal is not a crime; to steal and get caught is. The famous story of the Spartan boy who preferred to have his bowels torn out by a fox rather than being found having stolen the animal takes its significance from this system (Plut. *Lyc.* 18.1). Among the Lacedaemonians, too, one condemns not the blemish but the display. Indeed, the blemish *is* the display.

Thus far both Proverbs and the Spartan laws of theft suggest that a qualitative difference between flagrant and non-flagrant delicts can be discerned in antiquity and that such a qualitative distinction revolves around the moral valence of sight and display. There are a number of other examples from across antiquity to corroborate this intimate connection between crime, sight, and secrecy. For example, when Apollo's cattle were stolen, he did not bring witnesses to his confrontation with Hermes but forces the alternative: the oath.[77] The gods invoked in such an oath always catch the culprit in the act. "Iudicabit deus occulta hominum," "god shall judge the secrets of humans," as the phrase would run in Paul's letters.[78]

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75 Plut. *Lyc.* 17.3–4; Arangio Ruiz 1932.110, Manfredini and Piccirilli 1980.264–65, and MacDowell 1986.59–61; cf. Pugsley 1969.139. Brelich 1969.38, 85 n. 102, 120 offers ethnographic parallels, as does Post 1880.286–300. On the incorrect report of the lawfulness of theft in ancient Egypt: Gell. *NA* 11.18.16 and Diod. Sic. 1.80; Pelloso 2008.355–66.

76 Xen. *Anab.* 4.6.15 and recent discussion in Gray 2020.188.

77 *Hom. Hymn Ap. Merc.* 370–74, and note the parallel with his protégé Autolycus (*Od.* 19.395). Cf. Daube 1937.50–51.

78 Romans 2:16; in later Canon Law, a gloss ("ecclesia de occultis non iudicat," "the church does not judge over secrets") explains Gratian's claim that god is a *cognitor secretorum,*

Some gods, in particular those of the solar kind (as we noted above), see everything. But Hermes had taken precautions: he made sure to commit his crime as the sun went down.[79] That thieves, including the hungry Spartan boys, operate at night is no coincidence. Every thief is a "skulking thief who hates the daylight," we read as early as the late second millennium Mesopotamian *Hymn to Shamash*, and in every ancient society, if someone is caught, nighttime was an aggravating circumstance.[80] The perpetrators of the two crimes above all others subject to *in flagrante delicto*—adultery and theft—await dusk to avoid being seen. For that which is "carried out in secret" (*lathrai*), Antiphon observes, "has none to witness it."[81] Aphrodite and Ares first laid together secretly (*lathrēi*, *Od.* 8.269). Night and secrecy, we add perhaps superfluously, are here but two expressions of the same idea: the impossibility of being seen.[82] A passage from the book of Job (24:15–16) wonderfully illustrates the ties that bind the adulterer and the thief to night, secrecy, and invisibility:

> The eye of the adulterer watches for dusk; he thinks, "No eye will see me," and he keeps his face concealed. In the dark, thieves break into houses, but by day they shut themselves in; they want nothing to do with the light. For all of them, midnight is their morning; they make friends with the terrors of darkness.[83]

No eye, no witness—no one will see me. Phormion, whose back offered the starting point for this piece, is "prudent by day" but at night, "does things

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"a knower of secrets" (Gratian Dig. 32.11); cf. Chiffoleau 2006 for further details. For Greece: e.g., Arist. [*Rh. Al.*] 17.1, *TAM* 5.1 231, Paus. 4.22.7, and Arr. *Epict. diss.* 1.14. India: *Laws of Manu* 8.85–86.

79 *Hom. Hymn Ap. Merc.* 67–72; Hes. frag. 66 MW connects night and darkness with the stealthy thieves Autolycus and Hermes.

80 *Hymn to Shamash* l.143 (trans. Foster 2005.633) and Lambert 1996.122–23. For nocturnal crime, see Grimm 1899.196–97, Latte 1931.130, Wieacker 1944.170–71, Kerneis 1999.292–93 and 299–308, Pepe 2004.23–30; and add Gortyn Laws, col. 2, ll. 2.14–15 (ed. Willetts 1967.40), IPArk 17.55, PHal. 1, l.194, and *CE* 12–13.

81 Antiph. 6.18; cf. Herod. 2: nocturnal crime (25, 35: *nuktos*) equals no witnesses (85: *amarturōn*); Arist. *Eth. Nic.* 1131a5–9 (theft and adultery are "secret," *lathraia* delicts). Cf. Paoli 1950.141 n. 29.

82 Cf. Apul. *Apol.* 47.3 on illicit magic: "So it is something secret (*occulta*) no less than something repulsive and horrible, for the most part done at night (*noctibus*), concealed in darkness (*tenebris abstrusa*), secreted from witnesses (*arbitris solitaria*)."

83 Cf. Numbers 5:12, Sirach 23:18–21, 2 Sam. 12, Prov. 7:6–12; adultery and secrecy: Lafont 1999.32–33, 66.

for which the punishment is death" (Dem. 45.80), Euphiletus catches the adulterous Eratosthenes in the act at night (Lys. 1.40–42), and Augustine steals from the pear tree in the dead of night (*nocte intempesta*, *Conf.* 2.4.9). Night and secrecy, in a way that is simultaneously banal and profound, are feared and identified with crime because they coincide with the impossibility of seeing.[84] "Honorable Laverna," prays the hypocrite while invoking the Roman protectress of thieves, "grant me to escape notice, grant me to appear just and pious, envelop my sins in night, my offenses in clouds!"[85] The most odious crimes were committed in secret, and *furtum* itself, said the Roman jurist Labeo while putting forth a spurious etymology, "comes from the word for dark (*furvo*), that is, from black; theft is what happens secretly (*clam*) and in the dark (*obscuro*), most frequently by night (*nocte*)."[86]

Inversely, the light of the day is associated with the law because it is light that enables sight. Of crime, Gorgias notes, "light is the enemy," and Seneca says that "crime dreads the sight of itself."[87] It is because of the deep roots of this structural association that Antonius Diogenes, in the imperial period, can have his protagonists, who are traveling to the very edges of the *oikoumenē*, stumble upon a city in Iberia whose inhabitants are blind during the daytime but can see at night (Phot. *Bibl.* 109b18–20). The inversion serves to accentuate the necessity of luminescence for sight. Euphiletus brought torches to surprise Eratosthenes in the night (Lys. 1.24); the Greek goddess of the night, Hecate, when called upon to assist with the search for a stolen cockerel in Aristophanes' *Frogs*, holds the "most piercing" (*oxutatas*) torches in her hands—an adjective, of course, used for arrows and the rays of the sun.[88] As always, the rays of her *lampades* pierce the night; they pierce darkness. Crime, in all these instances, acquires its meaning in the crosshairs of a scopic regime, and the tension between night and light, secrecy and openness, sight and blindness is everywhere of the greatest importance. The same tension, I suspect, resides at the heart of

84 Cf. Hom. *Il.* 3.10–12: the shepherd fears a thick mist, but to the thief, it is "better than night," and contrast *Il.* 8.555–59, where the shepherd rejoices in clear skies. Greece: e.g., Pl. *Phlb.* 66a, Hes. *Op*. 727–28 (with West 1978.335), and Plut. *Quaest. Rom.* 40. In the Hebrew Bible, Job 22:13; cf. Ezekiel 8:12 and Isaiah 29:15.

85 Hor. *Ep.* 1.16.60–62, cf. scholia ad loc. and Nonius p. 134 M 35; thieves found a hiding place in Laverna's grove (Paul. Fest. 104 L).

86 Dig. 47.2.1, repeated at *Inst. Iust.* 4.1.1; discussion in Kerneis 1999.291. Cf. the proverb at Cic. *Off.* 3.18.77.

87 Gorg. *Pal.* 10; cf. 7, 9–11 on secrecy and openness. Sen. *QNat* 1.16.4 and see Chaniotis 2018.186–88.

88 Ar. *Ran.* 1361–64. Cf. Zephaniah 1:12 and the seven magically burning oil lamps, the eyes of God, in Zach. 4:2–10.

the paradox of the flagrant delict, whose differentiated punishments appear to map onto these very oppositions.

Until this point, we have explained the flagrant delict's paradox by arguing that the crime seen to be done is qualitatively different from the crime that went unseen. Yet if this explanation holds true, it provokes a new question: if the crime seen to be done is, indeed, categorically different and this explains the more severe punishment attached to flagrant delicts in antiquity, then what might account for the fact that this distinctive penal regime was, already in the ancient world, no longer understood?

It is clear that the ultimately visual distinction between manifest and non-manifest delicts seemed strange in antiquity—a relic for which one could blame the ancient lawgivers (Alciphron 2.38 [3.40]). In Aulus Gellius's *Attic Nights*, we find an evidently confused attempt to explain the manifest delict placed in the mouth of the jurist Sextus Caecilius. He appeals to the "intolerable audacity" (*intoleranda audacia*) of the manifest thief to justify his greater punishment—as if the thief was captured because of his audacity and not because he was unlucky or lacked skill.[89] Where flagrancy was established as a category and known to activate a separate, more severe, regime of punishment, we also find practices that aim at subsuming certain cases under that category which, at least in the eyes of some contemporaries, clearly did not belong to it. Gaius scoffs, for example, at the *Twelve Tables* where a successful "quaestio lance et licio," "search with dish and girdle" (the formal search of a property for stolen goods) is awkwardly assimilated to a *furtum manifestum*.[90] For both Greece and Rome, scholars argue that the terminology for flagrancy was continuously interpreted in a wider sense.[91] In the Athenian law courts, at any rate, the term *ep' autophōrōi* does start to be used to rhetorical effect, and it often simply means "to demonstrate manifestly."[92] Here the concrete

89 Gell. *NA* 20.1.7–8; cf. Dig. 48.19.16.6 and Serv. ad Verg. *Aen.* 8.205; see Balzarini 1992.55–56 and Pepe 2004.59–60; Fenocchio 2008.245 n. 258, 272 for more literature.

90 *Lex tota ridicula est,* "the law is completely absurd" (Gai. *Inst.* 3.193; cf. Festus *Gloss. Lat.* 104; Gai. *Inst.* 3.192, 193; and Gell. *NA* 11.18.9, 16.10.8). Recent discussion: Pepe 2004.167–86, Fenocchio 2008.287–96, Pelloso 2008.276–78, and Wibier 2018; cf. Kunkel 1949.253 n. 5.

91 For Greece, this reinterpretation is controversial: only Hansen 1976.48–52 argues for it. For Rome: de Visscher 1922.461–65; MacCormack 1995; Fenocchio 2008.274, 276–78; and Pelloso 2008.272, 275–79. Medieval Germanic law, cf. *HRG* s.v. *handhafte Tat*.

92 As even those with a broad interpretation admit: Harris 2006.383, who adduces Dem. 19.121. Other passages are more controversial: Antiph. 6.45; Dem. 19.121, 26.24, 27.62; Din. 1.29, 53, 2.6; Lys. 9.9–10, 10.19, 13.30; and Aeschin. 2.88, 3.10.

visual experience of the judge is wholly absent and the original act is reduced to mere metaphor. The Latin *manifestatio* would undergo a similar fate. It has certainly lost all connections to flagrancy when it appears as a controlling principle in medieval scholasticism where it means nothing but "elucidation" or "clarification."[93]

But what was the distinctive feature of the flagrant delict that was, perhaps, lost by the time the ancients themselves began to approach the subject quizzically? That loss, it should be stressed, is not the import of sight and display, nor is it the grand and monumental loss of an alleged shame culture. The loss was more circumscribed: the conjunction of vision and judgment was no longer directly operative in the juridical arena; a fissure had opened that separated the figure of the witness from that of the judge. By the time of Demosthenes, or Gaius and Aulus Gellius, the judge, as a rule, had seen nothing of the crime. This situation is the antipode of flagrancy. For in the concept of flagrancy, one can perceive a certain legal ideal—the ideal that is still recognized as such when *in flagrante* is fictionally recreated before a judge via a rite of ligation. In that conscious imitation, the figures of the witness and the judge coincide completely; one might say that such a scopic regime of the law is identical to the divine Dikē's all-seeing eye which always catches perpetrators in the act.[94] But it is this ideal, embodied in divine justice, compared to which a (fallible) legal system and its judge in court will at times fall short. Chosen by sortition right before the trial commences, the Athenian juror, to take one example, cannot be said to have witnessed any crime. And one could invoke different judicial authorities from different historical contexts—the elders, annual magistrates, or imperial officials—to make the same point: none of these judges have seen the crime.

The attempt to pinpoint this change of juridical structures historically would be speculative, particularly since the earliest evidence already

93 E.g., Aquin. *Sum. Th.* 1.1.8.2.

94 Most conspicuous, perhaps, in the many extant *defixiones* which petition the gods for justice in the case of stolen goods—the richest yield is from a sanctuary in Bath of Sulis Minerva, a Celtic solar deity; cf. Tomlin 1988, Faraone, Garnand, López-Ruiz 2005, Versnel 2010, and Scholz 2011. Germane divine scopic regimes with Vedic Varuna (cf. *RV* 7.34.10; ed. Jamison and Brereton 2014.926); *AV* 4.16.1–7 (ed. Whitney 1905.176–8); the *dvandva* Mitra-and-Varuna, *RV* 7.61.2, 7.62.5 (ed. Jamison and Brereton 2014.955 and 958); see further *RV* 10.10.6–8 (ed. Jamison and Brereton 2014.1382–83), with Zoroastrian Mithra (cf. *Yasht* 10.2.7, 10.7.27, 10.21.82, 10.46; ed. Gershevitch 1959.76–77, 86–87, 112–13), and with the Mesopotamian god Shamash (cf. notes 11–12).

bespeaks judges who were not also witnesses and witnesses who were not also judges. It is unlikely that if such a change ever took place, it had taken place all at once in any specific society and, irreversibly, in a single direction. Attempts to be more precise than this involve debates on the origins of litigation and, particularly, on the transition from self-help to an official legal system—an historical change which, put in such stark and absolute terms, seems more imaginary than real in the face of a dearth of conclusive evidence.[95] Most conspicuously, practices of self-help in the case of flagrant theft or adultery continue to be well-attested throughout antiquity and operate alongside the "blind" judicial authorities. At the same time, to stress the opacity of the available evidence does not mean that historical contexts have no role to play in accounting for this change: small settlements are evidently more conducive to reproducing the ideal of a "seeing judge" than the imperial capital of Rome, and, as a result, one perhaps expects to encounter such judges earlier in antiquity rather than later. However the evidence does not seem to afford much more than speculation. We have therefore largely refrained from offering an historical reconstruction that seems beyond retrieval and, in its stead, argue for a conceptual metamorphosis of judicial structures that follows from the evidence we do have. This evidence everywhere points to an opposition between the judge who sees and the judge who does not.

In a system in which the judge is properly a witness to crimes *in flagrante*, all causes—in the juridical sense of the term—are either *in manifestatione* or *in accusatione*.[96] But when the judge no longer sees, the category of flagrancy loses much of its primal power. When the judge is blind, the distinction between manifest and non-manifest crimes was inevitably to become a matter of procedure, a matter of proof. With a judge who no longer catches any criminal in the act but has to infer the guilt of all, flagrancy inexorably transforms into mere circumstance: all causes are now *in accusatione*. It is at this point that the differentiated punishments lose their intelligibility, and the ancients testify to a growing

95 Still crucial in this context is Wolff 1946; for criticism, cf. the literature on evolutionary perspectives cited in note 62 above.

96 Such is the expression in the *Leges Henrici Primi*. 9.1 (ed. Liebermann 1903.554; cf. 9.6); cf. *Pactus pro tenore pacis* 2, 4, and 10 (ed. Boretius 1883.4–6), Brunner 1887b.485, Liebermann 1906.495, and Meyer 1916.401. In Greece, cf., e.g., Aesch. *in Tim.* 91 (*ep' autophōrōi,* "in the act," opposed to *ek tōn eikotōn,* "circumstantial evidence"); for Rome, *deprehensus,* "caught," is opposed to *ex suspicione,* "suspected," in Dig. 12.4.15 (theft); for adultery, see Venturini 1988, especially 92–98.

incomprehension which, by the time it has passed through the hands of Jacques Cujas, Montesquieu, and Henry Sumner Maine, has acquired an impressive pedigree. When judicial blindness abounds, flagrancy can no longer change the nature of the crime.

IV. THE MORALITY OF SIGHT

"I have never doubted the great influence of our senses and organs on our metaphysics and morals, nor that our most purely intellectual ideas, if I may call them that, are closely related to the organisation of our bodies," wrote Denis Diderot to Madame de Puisieux, the addressee of his 1749 *Lettre sur les aveugles* (trans. Tunstall 2011.179). Diderot took blindness as the point of departure for his reflections on morality, which he set out to show was created and constrained by our own sensorial experience. We owe to Carlo Ginzburg our understanding of Diderot's views within a web of other texts: Sade, Balzac, Chateaubriand, and Hume, but also all the way back to Aristotle's *Rhetoric* and *Poetics*.[97] The thread that binds these works to one another is the basic contention that distance in space or time weakens all feelings and all guilt. So Aristotle famously noted, for example, that it is the *nearness* of the terrible that makes humans pity, since the terrible is thereby placed before our eyes (*pro ommatōn poiountes*, *Rh.* 2.8.14). Crime, guilt, and morality—there is not much more to this, one might say with Diderot, than meets the eye.

A year earlier, in 1748, Montesquieu had published his *De l'esprit des lois*. It contains, as we have seen, a treatment of the distinction between manifest and non-manifest delicts in the Roman law of theft. We only presented his statement of the problem earlier. By way of conclusion, we should also offer his solution (Montesquieu 1989.610):

> I cannot doubt that the whole theory of the Roman laws on theft was drawn from Lacedaemonian institutions. Lycurgus, with a view to endowing his citizens with cunning, trickery, and quickness, wanted the children to be trained in petty theft and be severely whipped if they were caught; among the Greeks and later among the Romans,

97 Ginzburg 1994; the title of this piece is a nod to that wonderful essay. Especially in the *Rhetoric*'s treatment of pity and fear, sight is critical (e.g., 2.8.14, 2.8.15, 2.8.2, 2.10.1); on sight and emotions in Greece, see Cairns 2011.

> this established a great difference between manifest robbery and non-manifest theft.

One may feel the immediate urge to correct Montesquieu, for the idea of a Lacedaemonian borrowing is without any evidence and scarcely credible.[98] But it may be more productive to draw attention to his correct intuition as to where an answer to the riddle was to be sought: in the domain of vision. One could do worse than start with the Spartan children caught while thieving if one wishes to understand the confusing distinction between manifest and non-manifest crimes. For it is with them that we can perceive a qualitative difference between the flagrant and the non-flagrant delict—only the former is criminalized—and the difference is entirely predicated on sight. Such a difference, I argue, generally explains a more pervasive distinction and brings us quite close to Diderot's intuition that our senses, sight above all, exercise a commanding influence over our conceptions of morality and crime.

In the end, what so many legal historians have postulated may well be true: one can discern in the distinction between the flagrant and the non-flagrant delict a significant fact of collective psychology. Such a qualitative distinction made sense as long as the authority responsible for implementing it was a direct witness to the crime—or, rather, more than a witness pure and simple; it was properly the ideal of a seeing *judge* that informed the notion of the flagrant delict. The rite of ligation whereby wrongdoers are bound to the *corpus delicti* so that the judge can catch them in the act constituted a contrived attempt to reinstitute the figure of the seeing judge even where this was factually impossible. This very contrivance is illuminating and, by tracing it in detail, the conceptual stakes of the notion of flagrancy itself are brought to light.

To retrieve this *ratio* that sustains the distinction between the manifest and the non-manifest delict, finally, we looked at comparative evidence. By way of closure, a further word is in order. The role of ligation is cross-culturally attested as is a connection between sight, presence, and crime, and the division of delicts into manifest and non-manifest. What is the result of this kaleidoscopic foray into ancient legal systems? The customary route one takes in such instances is well-known. The great Romanist Leopold Wenger tasks every ancient legal historian with the obligation to account for similarities or identical practices and offers three possibilities:

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98 De Visscher 1922.443 and Garoupa and Gomez 2008.17.

reception, a common origin, or independent legal development (Wenger 1953.10). Given the specificity of some of the practices, coupled with the vast swaths of time and space that separate the legal systems under discussion, the result of such an account would no doubt consist of a laboriously wrought and ultimately flawed combination of all three options; evidence, in any case, is absent. And even if one were to grant, à la Montesquieu, an implausible series of borrowings, common origins, and independent developments, this still gets us only a little further. Because his tasks privilege beginnings, after all, Wenger's possibilities explain neither the persistence nor the waning of a given practice; they do not even explain the practice itself. At the risk of heresy, then, we have turned our attention to the question: why did the category of the flagrant delict once make sense? The simple answer is that nothing quite says it like seeing something for oneself. And when one does, to borrow from Diderot a final time, how different our morality.

Bilkent University

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