Who's Your Daddy?

Explaining the Rise of Roman Criminal Law

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Introduction

As a staunchly patriarchal society, it can be said with confidence that Ancient Rome firmly adhered to the adage that "father knows best." This was certainly true in the eyes of the law, where under countless scenarios, ranging from contracts to delicts, political office to family affairs, the *paterfamilias* enjoyed a preeminent position vis-à-vis those who were subject to his potestas. But what was the position of the *paterfamilias* with respect to the criminal law? Criminal law may be defined as the promotion of public order through the imposition of penalties by the state in response to antisocial or deviant behaviour.[1] As Roman society progressed from Monarchy to Republic to Empire, it witnessed a manifold increase in the application of criminal law measures to its populace. Interestingly, the ascendancy of this public institution coincided with the decline of another, more private mechanism for regulating human behaviour: the domestic jurisdiction exercised by the *paterfamilias*.[2]

The present analysis proposes that the antithetical relationship between Roman criminal law and paterfamilial potestas may be illuminated by the writings of the eminent political philosopher Thomas Hobbes in his seminal tome *Leviathan*. After examining certain fundamental Hobbesian precepts, the present author will attempt to demonstrate how they may explain the gradual increase in the paternalistic role of the Roman state, whereby it assumed many of the "fatherly" rights and responsibilities once possessed by the head of

[1] Gwynn Nettler, "Definition of Crime" in Delos H. Kelly, ed., *Criminal Behaviour: Text and Readings in Criminology*, 2d ed. (New York, 1990), 11.

[2] .F. Robinson, *The Criminal Law of Ancient Rome* (Baltimore, 1995), 41-42.

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the Roman household. This Hobbesian analysis will proceed in two parts: first, the growth of Roman criminal procedure will be considered in light of its turbulent historical context; second, the expansion of substantive Roman criminal law will be related to the gradual aggrandizement of the Roman state.

The Application of a Hobbesian paradigm to Roman society

Some fundamental Hobbesian precepts

Hobbes famously theorized that human beings are essentially savage creatures. In their primordial condition, without "a common power, to keep them in awe,"[3] he proposed that their animal impulses drive them into a perpetual war "of every man against every man,"[4] where anarchy reigns supreme and life is "solitary, poor, nasty, brutish, and short."[5] However, he also credited humans with being rational creatures, who, for the sake of security and self-preservation may choose to form peaceful covenants with each other. In order to ensure such covenants are respected, it is essential for them to "confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will."[6] This fusion creates a sovereign power known as a "Leviathan" or "commonwealth," i.e. a "mortal god" who is mandated by the collective will of his constituents to "defend them from the invasion of foreigners, and the injuries of one another."[7]

Hobbes postulated that sovereign power can be created through two regimes: acquisition and institution. Under acquisition, the power is derived by force,[8] whereas with institution it is conferred by consent.[9] It is hereby proposed that acquisition is capable of explaining the origins and workings of paterfamilial *potestas*, while institution is explicative of the rise of criminal law administered by the state.

Acquisition of *paterfamilial potestas*

[3] Thomas Hobbes, *Leviathan*, ed. by Richard Tuck (Cambridge, 1996), 120. Because *Leviathan* was penned by Hobbes in the seventeenth century, I have taken the liberty of automatically modernizing the spelling, capitalization and/or punctuation of certain quotes, where necessary, in order to facilitate reading.

[4] Ibid., 90.

[5] Ibid., 89.

[6] Ibid., 120.

[7] Ibid.

[8] Ibid., 138.

[9] Ibid., 121.

Hobbes proposed that sovereignty could be forcefully acquired by generation or conquest. Sovereignty is generated "when a man maketh his children,"[10] because the helpless infant relinquishes its natural right to self-dominion in exchange for paternal protection. The ability of this process to explain the Roman agnatic system of social ordering is evident when Hobbes writes: "He that hath the dominion over the child, hath dominion also over the children of the child; and over their children's children. For he that hath dominion over the person of a man hath dominion over all that is his."[11]

Conversely, sovereignty is created by conquest when a man "subdueth his enemies to his will."[12] Here, the vanquished party pledges his liberty, property and body to the service of the victor, on condition that his life be spared. Not only has Hobbes astutely identified one of the most common bases for imposing slavery in Ancient Rome,[13] he also identifies the utility of slaves as wealth-gathering instruments[14] when he writes: "the master of the servant, is master also of all he hath; and may exact the use thereof; that is to say, of his goods, of his labour, of his servants, and of his children, as often as he shall think fit."[15]

Regardless of whether sovereign power is derived through generation or conquest, Hobbes stressed that the resulting unit of social organization is a family, "whether that family consist of a man and his children, or of a man and his servants, or of a man, and his children, and servants together."[16] This characterization accords with the loose definition of the Roman family, whereby children and slaves were subjected to a virtually indistinguishable form of *potestas*.[17]

The institution of state criminal power

In contrast to sovereign power that is forcefully acquired, Hobbes theorized that sovereign authority could also be created by institution. This occurs when a multitude of men

[10] Ibid.

[11] Hobbes, 141.

[12] Ibid., 121.

[13] As Andrew Borkowski, *Textbook on Roman Law*, 2d ed. (Oxford, 1997), 90, writes: "Capture in war became the main source of slaves in the late Republic, campaigns such as those of Julius Caesar in Gaul resulting in the enslavement of large numbers of foreigners."

[14] For an overview of the modes and means by which slaves were employed to enrich their masters in ancient Rome, see e.g. ibid., 88-96.

[15] Hobbes, 142.

freely consent to endow a higher authority with the power and responsibility to ensure peace and security for all members of the resulting state.[18] The most obvious and direct - though not the only[19] - mechanism through which a state pursues this protective mandate is the criminal law,[20] though other ends are also served by criminal justice.[21]

While families and states differ in their origins and scope, Hobbes was adamant that the quality of the sovereignty exercised by these two types of commonwealth was "the very same."[22] In this sense, a family was akin to a "little monarchy,"[23] and functioned as such in the absence of any superseding authority. However, while both families and states are capable of ensuring peace and security, he noted that when the members of a family "are manifestly too weak to defend themselves,"[24] they may seek out others in a bid to create an even greater commonwealth that is "entrusted with power enough for their protection."[25] When this occurs, "the sovereign of each [state] hath dominion over all that reside therein,"[26] including the children and slaves of the men who convened the commonwealth, since "no man can obey two masters."[27]

Applying these Hobbesian precepts to Roman penal practices, we would expect the rise of state-sanctioned criminal law and the correlative decline of the *paterfamilias*' domestic jurisdiction to occur during times of such socio-political instability that the pater-

[16] Ibid.

[17] Borkowski, 113.

[18] Hobbes, 121.

[19] As Joel E. Pink and David C. Perrier, *From Crime to Punishmen*t, 5th ed. (Toronto, 2003), 1, remark: "Social control, of course, also resides in many other mechanisms, including customs, peer group pressure, and institutional patterns of behaviour."

[20] On the emergence of criminal law as a social control mechanism, Graham Parker, *An Introduction to Criminal Law*, 2d ed. (Toronto, 1983), 51, writes: "The criminal law became a distinct legal entity - with its own special rules and procedures - when society wanted protection from antisocial acts that threatened internal security but could not be resolved by money payments or the chaotic private 'justice' of the feud. A central authority… assumed the role of protector of the people and guardian of the status quo."

[21] As Pink, 51, writes: "[t]he criminal law [is] an expression of the State's disapproval of acts that [are] contrary to current values", which means that certain offences that do not directly or obviously act to preserve peace and security, such as "blasphemy, heresy, and adultery" may be encompassed under the rubric of criminal law.[14] First divine being is “the most excellent of the divinities” to Taylor. A singular article, “the” implies one superlative deity. However, even if Taylor is providing imprecise language and instead means a plural set of gods, the point still stands that bad demons tricked people into believing that the ultimate source(s) of good in the world is (are) the cause(s) of evil. By emphasizing that bad demons laid blame on the greatest source of good, the first divine being, the point is reinforced.

[22] Hobbes, 142.

[23] Ibid.

[24] Ibid.

[25] Ibid., 143.

[26] Ibid., 140.

familial system of social organization was no longer able to effectively achieve peace and security within Roman society. The following analysis hopes to provide evidence in support of this proposition, by examining aspects of both procedural and substantive Roman criminal law.

Examining the rise of Roman criminal procedure within its historical context

Daddy's Home: the criminal justice of early Rome (or lack thereof)

Evidence of legal sources during the Monarchy "is inevitably scanty."[28] Thus it is not surprising that "[e]arly Roman criminal law is both obscure and hotly debated. We only begin to approach reasonable probabilities around 200 BC, the period from which contemporary evidence - Plautus, Cato, and others - survives."[29] However, this much can be said with confidence: during the Monarchy "there was no doubt that Roman law was almost entirely customary,"[30] and only occasionally "embellished by royal decree."[31] Moreover, because historical evidence suggests that "[m]any of the most important and long-lasting customs in the realm of civil law were concerned with the family - its creation, structure, and operation,"[32] it is not unreasonable to conclude that the social control function exercised by the state during this period was extremely peripheral and only invoked as a supplementary measure.[33]

The promulgation of the Twelve Tables in the early Republic did add a number of criminal prohibitions to the repertoire of Roman public law, some of which were enforced "by the *tresviri capitales* (minor magistrates with police functions)"[34] in conjunction with "the jurisdiction of the assemblies of the people, i.e. trials before one of the *comitia*."[35] This system, known as the *iudicium populi*, has been dubbed "the first phase"[36] of Roman criminal justice, and it operated as follows:

> A magistrate, in most cases a tribune of the plebs, conducts a preliminary

[27] Ibid., 139
[28] Borkowski, 26.
[29] Robinson, 1.
[30] Borkowski, 26.
[31] Ibid.
[32] Ibid.
[33] For an example of such a supplementary measure, see the discussion on the law of parricide, below.
[34] Robinson, 1.

> examination, at the end of which he brings the accused before the popular assembly. The magistrate proposes a penalty, which may be either capital or sub-capital, in his discretion; if it is a fine he stipulates the amount. After hearing speeches the people vote on the proposal. The salient fact is that there is no fixed penalty; it depends on the magistrate's discretion and the endorsement by the people.[37]

While this crude and somewhat haphazard practice demonstrates that under early Roman law "there were certainly some wrongs that attracted a purely criminal sanction imposed by the State,"[38] it was nevertheless an exception to the general rule of state non-interference in the realm of deviant behaviour, and a comprehensive account of this period reveals that "the criminal law was generally less developed than the civil law."[39]

The proposition that early Roman criminal justice was underdeveloped finds support from at least two juridical qualities of Roman dispute resolution during that era. First, "in early Roman law… there was no clear distinction between crimes and civil wrongs (delicts),"[40] with the law of delict having "a strong penal element."[41] Thus, while the ancient and bloody custom of *vendetta* had been sanitized by the establishment of Roman courts,[42] the process for securing retributive justice was still heavily reliant on notions of self-help, as the onus for pursuing delictual recourse fell upon private citizens.

Another telling juridical quality of that era is the existence of an extremely broad domestic jurisdiction for the *paterfamilias*. Indeed, "[t]]he *patria potestas* is an outstanding institution in the family government of the primitive Romans,"[43] under which "[t]he power of the father represented authority of a semi-public nature."[44] Thus, because Rome was a highly stratified society where people under *potestas* (such as slaves and children) typically lacked the requisite legal personality to gain standing before the public courts,[45] in most cases the *paterfamilias* took legal responsibility for the actions of his subordinates;

[35] Ibid.

[36] Richard A. Bauman, *Crime and Punishment in Ancient Rome* (New York, 1996), 5.

[37] Bauman, 5.

[38] Borkowski, 325.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] See Bauman, 2, where the author writes: "In primitive society a wrong was a private matter to be avenged by direct retaliation by the victim or, if he had not survived, by his family. As the community became more cohesive it began to involve itself in the repression of wrongful acts, at first by restricting the private vendetta and later on by abolishing it and placing the machinery of repression and punishment under public control."

their behaviour, in turn, was to be adjudicated "primarily, if not exclusively" under his domestic jurisdiction.[46] This exceptionally broad - and occasionally brutal - regime vested the *paterfamilias* with the absolute, unsupervised ability to discipline his subjects, which included the right to flog, to imprison, or to kill.[47]

In sum, from the Monarchy through the early Republic, the correction of antisocial behaviour was entrusted to a patchwork of different forums that included the domestic jurisdiction of the *paterfamilias*, private delictual actions, and the occasional resort to public processes. From a Hobbesian perspective, it is important to note the socio-political context that formed the backdrop to the Roman state's laissez-faire approach to peace and security during this period. While certainly not without bloodshed, hostile foreign relations or internecine tumult,[48] the Monarchy and early Republican periods of Rome were nevertheless generally characterized by tranquillity. This is particularly the case with respect to the "century and a half after the end of the struggle of the orders [in 287 BC, when] the internal political situation of Rome was relatively stable."[49] Under such conditions, the agnatic system of social ordering would have adequately served its protective function, needing to be buttressed by direct state intervention in only the most exceptional situations.

Where's Daddy? The expansion of criminal procedure during the late Republic

In stark contrast to the relative tranquillity of the Monarchy and early Republic, the later years of the Republic "were plagued by crises, disorder, and civil war, often precipitated by the abuse of power by military strongmen"[50] such as Marius, Sulla, Pompey, Julius Caesar, and Octavian.[51] In fact, it has been suggested that "[t]he demise of republican government began in 133 BC, when [these] powerful individuals began to ignore established constitutional practice, destroying the checks and balances upon which republican government depended."[52] The resulting chaos ushered in "a period of constitutional breakdown from 133 BC-27 BC,"[53] during which tumultuous factional violence posed a tremendous threat to the peace and security of the Roman populace.

From a Hobbesian vantage point, it is of considerable interest that while this nearly

[43] Floyd Seyward Lear, *Treason in Roman and Germanic La*w (Austin, 1965), 4.

[44] Borkowski, 93.

[45] Borkowski, 93.

[46] Robinson, 15.

[47] Borkowski, 113.

[48] For a brief overview of some of the political and social difficulties that afflicted early Rome, see ibid. ,1-13.

[49] Ibid., 10.

[50] Ibid., 11.

perpetual state of civil unrest was unfolding, "[t]he mid-second century [BC] saw the start of a radical reorganization of the criminal courts. Permanent jury-courts (*quaestiones perpetuae*) were created for a broad range of crimes, and by the end of the first century BC the new *iudicia publica* had completely supplanted the *iudicia populi*."[54] Obviously, for the Roman state to undertake such a massive overhaul of its criminal justice system,

> "[a] specific incentive was needed, and it surfaced in the second century. Rome emerged from the wars of expansion as the undisputed mistress of the Mediterranean world, but at a price. Post-war Italy was shaken by a climate of violent protest, by great rents in the social fabric. And thinking people began asking whether the institutions of a small city-state were up to the task of governing an empire. The search for a new approach was spearheaded by the criminal law."[55]

Indeed, because the chaos that reigned during this period would have seriously impugned the credibility of the *paterfamilias* as a guarantor of public peace and security, it should not at all be surprising that "[t]he Romans were willing to hand over a great deal of power to these [new] courts."[56]

The system of *quaestiones perpetuae* established under the *iudicia publica* was a multi-pronged approach to criminal justice, by which "each court depended on a special *lex* or *plebiscitum* for its validity and its forms."[57] This new system quickly grew to the point where it "became the norm, the *ordo*"[58] of Roman criminal procedure, one that "dominated the trials of the first century BC and continued into the Principate."[59] The critical importance of the *iudicia publica* in expanding the normative purview of the Roman state cannot be understated, as "[i]t is on this system that the juristic development of the criminal law was predicated, and without this system a criminal jurisprudence would not have been possible."[60]

The emergence of the *quaestiones perpetuae* also had tremendous implications for the

[51] Unfortunately, a detailed account of the conflicts of this era exceeds the scope of the present inquiry. For a summary of the troubles that plagued Roman society during the waning years of the Republic, see ibid., 10-13.

[52] Michael Lambiris, *The Historical Context of Roman Law* (North Ryde, Australia, 1997), 2.

[53] Ibid., emphasis removed from original.

[54] Bauman, 21.

[55] Ibid. As the author states, "[i]t would take another 150 years to put a suitable constitution in place, but the courts adapted more quickly."

[56] Andrew M. Riggsby, *Crime and Community in Ciceronian Rome* (Austin, 1999), 7.

apportionment of coercive social control under Roman law, as the state expressed its growing concern for the deviant conduct of all its inhabitants. This is reflected by the fact that for the first time "[a]nyone, free or slave… could be accused"[61] before the public courts, signifying a chink in the once impenetrable armour of paterfamilial *potestas*. Thus, "[e]ven before the advent of Caesar's dictatorship and the subsequent establishment of the imperial system, there was a growing centralisation of authority in the Roman state apparatus. Two aspects of this centralisation are an increase in force used by the state to enforce public order and a parallel suppression of the use of force by private individuals."[62]

However, although the *quaestiones perpetuae* signified an increased state presence with respect to the regulation of antisocial behaviour, it is important to note that the assumption of state control over the administration of criminal justice had not yet reached its apex during this period. This is because the state had yet to accept the onus for pursuing penal sanctions, meaning that in criminal trials "[t]he defendant… squared off against a private person (or persons) who served as prosecutor."[63] In fact, "[t]he state… only participated to the extent of allowing or rejecting the prosecution, then arranging to pick the 'best' prosecutor when several had made themselves available."[64] Once the accuser had been selected and had "signed the *inscriptio*… [he] thus bound himself to follow through his prosecution or risk the penalties for *tergiversatio* or *praevaricatio*."[65] As far as the manner of prosecution was concerned, "[o]nce the case had been accepted by the praetor and the prosecutor had been chosen, there was little official interference in the conduct of the case; the quaesitor kept time and counted the votes [of the jury]."[66] In other words, "[n]early anything within the time limits seems to have been allowed."[67]

As the confluence of political instability and increased state involvement in criminal procedure outlined above demonstrates, there is considerable support for the Hobbesian proposition that in a time of strife, as the late Republic undoubtedly was, human beings will feel a powerful impetus to relinquish a sizeable portion of their personal sovereignty to a higher power. This measure is taken in the interest of ensuring communal peace and

[57] Robinson, 2.

[58] Ibid.

[59] Bauman, 5.

[60] Robinson, 1

[61] Ibid., 5.

[62] Riggsby, xi. The dynamic between paterfamilial potestas and criminal law will be considered as part of the examination of substantive Roman law, below.

[63] Ibid., 15.

security, since the Roman *paterfamilias*, through his inadequate custodial presence, had manifestly failed in achieving these ends.

The Big Daddy: The expansion of criminal procedure in the Principate

When the dust from the catastrophic demise of the Republic had finally settled and Octavian triumphantly emerged as "master of the Roman world,"[68] the trend toward consolidation of state power that had begun during the previous century of civil strife continued with increased vigour. Because "[h]e understood well the lessons to be learned from the mistakes of the past,"[69] Octavian was fully cognizant of the role that the "inherently flawed"[70] republican constitution, with its potentially paralysing division of powers,[71] had played in the social turmoil of the preceding century. Therefore, with tremendous stealth, guile and caution, he proceeded to amass a significant concentration of executive power.[72] Consequently, "[t]he constitutional settlement that emerged during the course of Octavian's long rule was a novel mix - a restoration of the traditional forms of Republican government, but under the aegis of a *princeps*, i.e., first citizen."[73] In this capacity, "he reserved for himself a permanent, overriding power in military and foreign policy, and a general supervisory role over the civilian administration… In addition, by retaining personal power, he eliminated the threat of another military adventurer seizing control of the state."[74] All in all, "[t]he sum of [his] power and prestige was tremendous,"[75] even deific.[76]

An important consequence of this centralisation of power was that it "brought a change in the criminal courts."[77] In fact, the founding of the Principate in 27 BC "created the conditions for as profound a change in criminal justice as in any other sphere of government and society."[78] This change took the form of the *cognitio extraordinaria*, a more malleable system of meting out criminal justice that allowed for "free discretion both in the definitions of crimes and in the scale of punishments."[79] This "new-found freedom"[80] was

[64] Ibid.

[65] Robinson, 5.

[66] Riggsby, 15.

[67] Ibid.

[68] Borkowski, 13.

[69] Ibid., 14.

[70] Ibid., 9.

[71] As ibid., 9-10, writes: "In particular, the concept of joint magistracy, coupled with the magisterial right of veto, was potentially fraught with problems. So too was the vesting of military, executive and even judicial powers in magistrates who could easily transpire to be rivals. Fortunately for Rome, the control exercised by the Senate, and the good sense of most of her office-holders, prevented serious problems for much of the time."

[72] See ibid., 14, where Octavian's approach is described as follows: "he moved tentatively in seeking to establish his power, eschewing the type of precipitate action that had brought down Caesar. Gradually he acquired dictatorial powers but wisely avoided calling himself rex or dictator, titles which had hateful associations. He used his powers astutely, always careful to act constitutionally, or at least to give that impression."

explicitly "designed to 'liberate' criminal trials from the shackles of the ordo iudiciorum publicorum, that is, from the limitations of the jury-courts."[81] Given this revolution, "[t]he disappearance of the *quaestiones perpetua*e, or of most of them, seems to have taken place fairly early."[82] Under the new regime, "crimes tended to be brought before the Urban Prefect… and other new officials."[83] Moreover, "in some cases the emperor himself exercised jurisdiction,"[84] though this did not yet amount to "a full-scale emperor's court."[85]

While the actual manner in which the Roman emperor acquired personal jurisdiction over criminal matters is "obscure, and purely anecdotal,"[86] it is of significant interest that two of the arguments that have been advanced by historians to explain public acceptance of the emperor's jurisdiction resonate heavily with Hobbesian undertones. The first argument involves an equation of the emperor's role with "the jurisdiction of a *paterfamilias* over his *familia*."[87] In fact, Octavian, who had acquired the honorific of "Augustus" in 27 BC,[88] was also given the title of *pater patriae* ('father of his country') in 2 BC,[89] a designation that was "eloquently suggestive of the protecting but coercive authority of the *paterfamilias*."[90] A second argument is that "the emperor was commander-in-chief of Rome's armies, and he thus had imperium in the old sense, the power of life and death over all citizens, even if technically this only applied *militiae*."[91]

Finally, a Hobbesian analysis of these developments would not be complete without considering the tremendous impact that Augustus' reforms had on the stability and harmony

[73] Ibid.

[74] Lambiris, 71.

[75] Borkowski, 15, citing R. Syme, The Roman Revolution (Oxford, 1939), 475.

[76] As stated at Borkowski, ibid., citing Syme, ibid.: "The different forms which the worship of Augustus took in Rome, Italy, and the provinces illustrate the different aspects of his rule - he is Princeps to the Senate, Imperator to army and people, King and God to the subject peoples of the Empire - and recapitulate the sources of his personal power in relation to towns, provinces and kings."

[77] Robinson, 6.

[78] Bauman, 50.

[79] Ibid. On this point, Bauman elaborates: "Acts not encompassed by the public criminal laws could be made justiciable, and the poena legis for any given crime could be mitigated or intensified in the discretion of the sentencing authority."

[80] Ibid.

[81] Ibid.

[82] Robinson, 6. However, the author cautions that some of the quaestiones perpetuae "may have survived into the second century; it was a matter of desuetude, not abolition". In fact, it is noted at 7 that "[t]he quaestiones were certainly not abolished; after all, Augustus was concerned to regulate and add to them."

[83] Ibid.

[84] Ibid., 6-7.

of Roman society. Indeed, by "attempt[ing] to change Roman society through the medium of legislation, i.e., social engineering… Augustus brought to Rome the internal peace, stability, sound administration, and good government for which she craved."[92] During the 200 year era of almost pristine peace and political stability that ensued,[93] which came to be known as the *pax Romana* or "golden age" of Rome,[94] "there was a great deal of goodwill between the inhabitants";[95] prompting one "renowned historian" to make the bold claim that "the human race was never happier than in this period."[96]

The sum of all fears: The climax of state criminal power during the Dominate

Of course, the *pax Romana* did not last forever, and "[w]ith the death of Marcus Aurelius in AD 180 Rome's golden age came to a sudden end."[97] This event precipitated over a decade of poor governance, chaos, and civil war, a situation that was briefly interrupted by the Severan dynasty, when the rulers of Rome, "concerned with efficiency and the security of the state,"[98] were able to achieve a measure of peace through further consolidation of imperial power. However, following the murder of the last Severan ruler, Severus Alexander, at the hands of disloyal troops in AD 235, "[f]ifty years of anarchy followed."[99] As a result of this persistent and widespread tumult, "[b]y AD 285, the empire was in an unprecedented crisis. It was amid such chaos that Diocletian won sufficient military support to overcome all opposition and assume total power."[100]

In keeping with our Hobbesian analysis, it should be noted that "such serious problems [helped make] it both possible and necessary for Diocletian… to reform the constitutional

[85] As Bauman, 3, writes, "that would take place later in the first century AD." Nevertheless, he credits the emergence of three "strands" or "phases" of imperial criminal power during this period as being "important steps along the road" toward a full-fledged emperor's court: "In the first phase the emperor's domestic tribunal starts functioning as an analogue of a public criminal court, and matters that would have stayed in the private domain in the case of anyone else are punished under the aegis of the public criminal laws. In the second phase the emphasis is still on matters which affect the emperor personally, but the offences are essentially public; conspiracies head this list. Third, the emperor concerns himself with matters in which he has no personal interest at all; common-law crimes make up this list."

[86] Robinson, 9. For instance, "[t]here is no evidence for the first actual death sentence imposed" by the emperor.

[87] Ibid.

[88] As Borkowski, 14, comments, the title "Augustus" was "conferred on Octavian by the Senate in 27 BC in recognition of the powers vested in him, and to signify the Janus-like nature of his position - as a harbinger of good things to come, yet associated with the glories of the past. Henceforth Octavian called himself Augustus. A month of the year was named after him."

[89] Ibid.

[90] Simon Hornblower and Antony Spawforth, eds., *The Oxford Classical Dictionary*, 3d ed. (Oxford, 1999) s.v. "pater patriae".

[91] Robinson, 9.

[92] Borkowski, 15.

[93] As Lambiris, 110, writes, "[i]t was a peace marred by occasional lapses, such as the chaotic year of four emperors, but on the whole stable government lasted for 200 years, until AD 180 when Marcus Aurelius died."

arrangements of the empire"[101] by bestowing supreme autocratic rule upon the emperor. "These changes characterise the final period of Roman constitutional history which is called the dominate,"[102] and were accompanied by an emboldened sense of majesty emanating from the office of the emperor. While it is true that "[a] sort of 'royalism' had existed from the time of Marius,"[103] and there is much evidence to suggest that "the late Republican warlords had seen themselves as special,"[104] the lionisation of the Roman sovereign during the late empire was amplified to the point that "[t]he emperor was now deliberately a figure of awe, remote from his subjects, garbed in purple, and carrying an aura of the divine."[105] This aura of awe and respect[106] was ferociously backed by 'the crimes of *lèse-majesté*',"[107] which punished acts that "could affect the honour of the emperor, or of his family."[108]

At the same time that the power and prestige of the emperor were climbing to dizzying heights, several significant reforms occurred in the domain of criminal procedure. Firstly, the Roman state vastly increased its participation in the administration of criminal justice, so that "[s]tate prosecution - *inquisitio* - often replaced accusation by a member of the public."[109] Furthermore, the personal criminal jurisdiction of the emperor, which had begun in fledgling form under the rule of Augustus, was augmented so that "[n]o death sentence or sentence of total confiscation could be passed without imperial confirmation."[110] Finally, during this period the state's administration of "[s]evere punishments seems… to have been more widely used, and on a much higher proportion of the population."[111] Indeed, it has been observed that "[t]he Later Empire was a savage period; the arbitrary exercise of power was, in a sense, increasing."[112]

The broad historical analysis conducted above demonstrates a robust trend with

[94] Ibid., 110-11.

[95] Ibid., 110.

[96] Ibid., citing Gibbon.

[97] Ibid., 111.

[98] Ibid., 112.

[99] Ibid., 113. The author further describes "the Crisis of the 3rd Century" as follows: "some 20 different contenders tried to assume power, most of them meeting with violent deaths at the hands of soldiers who opposed them. Some of the contenders even tried to set up independent states, threatening the political unity of the Empire. The horror of these civil disturbances was compounded by barbarian invasions which began to occur on all sides of the Roman empire. In the east, Persian invaders threatened Syria, Egypt, and Asia Minor. In the north, the Franks and Alemanni invaded Gaul and Spain. In Africa, Berber tribes raided Roman towns. As if this were not enough misfortune, outbreaks of disease ravaged the population and imperial finances were brought close to collapse, inflation running out of control and coinage being greatly devalued."

[100] Ibid.

[101] Ibid.

[102] Ibid., 113-114.

[103] Robinson, 77.

respect to the administration of criminal justice by the Roman state. In times of extreme turbulence, we see two significant developments: first, "in the interests of public order, the State developed a concern with the criminal behaviour of all who lived within its frontiers";[113] and second, under those circumstances we see the gradual reorganisation of the Roman constitution culminating in the creation of "an autocratic State where ultimate power resided… with one man, the Emperor."[114] Both of these developments cogently support a Hobbesian paradigm of social governance. We will now turn to an examination of this paradigm with respect to substantive Roman criminal law.

Examining the evolution of substantive Roman criminal law

The present author submits that a comprehensive analysis of substantive Roman criminal law would greatly exceed the confines of the present scope of inquiry. Nevertheless, it is contended that the Hobbesian implications of the emergence and solidification of state criminal power during the Late Republican and Imperial periods of Roman history can be fruitfully examined in the context of three legal areas: 1) the diminished *potestas* of the *paterfamilias* and his increasing liability to criminal sanction; 2) the criminalisation of interpersonal violence such as murder and assault and the expansion of these notions; and 3) the evolution of the concept of treason and the broadening of its scope under the rubric of sedition.

The diminishment of domestic jurisdiction

As predicted by our Hobbesian hypothesis, a broad overview of Roman legal history from the Monarchy through the Empire demonstrates that the gradual augmentation of criminal law entailed a correlative whittling down of the absolute authority inherent in the *paterfamilias*' domestic jurisdiction. While it is important to note that the *paterfamilias* retained a significant amount of influence and power over his subjects in other legal con-

[104] Ibid. However, Robinson cautions: "Nevertheless, Augustus and his immediate successors did not see themselves as gods, and elements of sacrilege or blasphemy were not part of the crime until late in the Empire."

[105] Ibid., 12.

[106] As Lambiris, 114, writes, "[a]nyone admitted to the emperor's presence was required to prostrate themselves and kiss the hem of the emperor's robe." Such measures "had a political role: to elevate the position of the emperor, to inspire awe and respect, to compel obedience, and to discourage usurpers."

[107] Robinson, 77.

[108] Ibid.

[109] Ibid. However, Robinson, 12-13, cautions that "we should remember that an investigation must usually be triggered by an individual complaint", and the "victim of the crime did not lose the right of accusation."

[110] Ibid., 13.

[111] Ibid.

[112] Ibid., 14.

[113] Ibid., 15.

texts, such as commerce and politics, there can be no gainsaying the fact that his penal prerogatives suffered a significant diminution during the course of Roman history. This diminution, which touched upon everything from capital punishment to corporal punishment to simple incarceration, indicates that "limiting an owner's rights over a slave [or child] was… slowly accepted as socially desirable and a matter for legal intervention"[115] in the interests of public order.[116]

With respect to the right to impose capital punishment, "[w]hile in strict law any *paterfamilias* [still] had rights of life and death over those in his power, it seems clear that, by the Empire, this power was normally only exercised in the acceptance or rejection of children at their birth."[117] Except in the most exceptional circumstances (such as the case of an adulterous daughter caught *in flagrante* in the family home),[118] the ability of a *paterfamilias* to impose a capital sentence upon his subordinates usually required the approval of a public authority,[119] failing which, he was liable for informal social disapproval,[120] *infamia*,[121] or even state penal sanction.[122] In fact, "[u]nder Constantine it was made an offence to kill a slave, even with cause, if the manner employed was deemed excessively cruel."[123]

The paterfamilial infliction of other punitive measures, short of capital punishment, also increasingly came under state scrutiny with the expansion of Roman criminal law. On the issue of corporal punishment, the castration of slaves was outlawed by Domitian,[124] a proscription that Hadrian would reinforce under pain of death. Antoninus Pius would introduce a rudimentary form of asylum against "brutality or starvation or intolerable wrongdoing,"[126] the ambit of which was extended by Severus to include sexual abuse and enforced prostitution.[127] Even the right of a *paterfamilias* to incarcerate was eventually impinged upon by Justinian's edict "that those who established private prisons should themselves, whatever their rank, spend as many days in the public prison as they had imposed on others, and also lose any legal claim they might have been trying to win by such means."[128] In fact, keeping private prisons was considered such an affront to the state that to do so was "seen as a crime akin to treason."[129]

<u>The criminalisation of interpersonal violence: murder and assault</u>

[114] Borkowski, 13.
[115] Robinson, 90.
[116] Ibid.

In early Roman society there were few applications of the criminal law to interpersonal acts of aggression. With respect to homicide, "[i]t seems likely that for the Romans, as in our day, most murders were family affairs and, until well into the Principate, that these would therefore fall within the jurisdiction of the relevant *paterfamilias* or owner (or patron)."[130] Moreover, "[u]ntil the late Republic, and perhaps even into the Empire, it is probable that, for an ordinary murder not within one household, the victim's family was able to use a private criminal action to obtain the surrender to them of the murderer"[131] so that they could exact their penalty, unless they were "satisfied that the head of the perpetrator's household would take suitable steps to punish the offender by his domestic authority."[132] Similarly, "when the *paterfamilias* was the murderer, someone technically outside the *familia* would need to intervene" to bring the perpetrator before the courts.[133] Under such a system, the state played an essentially passive role in the administration of criminal justice, providing a forum for the resolution of the dispute but staking no direct interest in the outcome.

This reticent approach began to change with the passing of Sulla's *lex Cornelia* of 81

[117] Ibid., 60.

[118] The second edition of the *lex Iulia* "laid down that it was permitted to a *paterfamilias*… to kill with his own hand his daughter together with her lover… taken in the act of adultery in his house or that of his son-in-law." However, even then there were caveats: "[t]he statute did not extend this right to a father who was still himself a filius-familias, to a *paterfamilias* who was not the actual father, or to the father of an emancipated daughter." Furthermore, "[t]he couple must be surprised in the act" and [t]he father's entitlement to kill was limited to his own house or that of his son-in-law." Finally, "the couple must be killed together, on the spot, almost with one blow… however, if the daughter fled while he was killing the paramour, and the father took some hours to catch up with her, this was counted as being killed together." Ibid, 161.

[119] Ibid., 46. For example, as Borkowski, 193, notes, Hadrian "forbade masters from killing their slaves without the consent of the magistrate."

[120] Robinson, 60.

[121] Borkowski, 113.

[122] For example, an edict by Antoninus Pius condemned as homicide the killing of a slave for capricious reasons. See ibid., 93.

[123] Ibid.

[124] Dig.48.8.6.

[125] Dig.48.8.4.2 reads: "no one should castrate another, freeman or slave, willing or unwilling, nor should anyone voluntarily offer himself for castration. Should anyone act in defiance of my edict, the doctor performing the operation shall suffer a capital penalty, as shall anyone who voluntarily offered himself for surgery."

[126] Dig.1.6.2 reads: "The power of masters over their slaves certainly ought not to be infringed and there must be no derogation from any man's legal rights. But it is in the interest of masters that those who make just complaint be not denied relief against brutality or starvation or intolerable wrongdoing. Therefore, judicially examine those who have fled the household of Julius Sabinus to take refuge at the statue and if you find it proven that they have been treated more harshly than is fair or have been subjected to infamous wrongdoing, then issue and order for their sale subject to the condition that they shall not come back under the power of their present master".

[127] Robinson, 90.

BC, the first comprehensive Roman statute on murder. However, even this edict demonstrated the desire of the Roman state to wade carefully into the waters of criminalising violent acts, since its original purpose was "aimed more at repressing brigands and keeping the peace than at murder as a private matter."[135] Nevertheless, "[a]lthough public order was the background of the *lex Cornelia*, it did (or very soon came to) cover ordinary murder, not only murder on the public highway but in private houses, as well as death inflicted in a brawl or arising from going about with murder in mind."[136] An important aspect of this proscription is that it "extended to the killing of any man, no matter what his status," so that the owner of a felled slave could now bring a criminal charge for what had been merely a delictual interference with property.[137]

In the late Republic, the Roman state also expressed its mounting concern with non-fatal acts of violence under the rubric of *vis*,[138] which "was something of a catch-all crime… [that] could cover physical assault."[139] The first law of *vis* "seems to have been [the] *lex Lutatia* of 78 [BC],"[140] which was likely enacted in response to "the disturbed times of the 70s BC."[141] True to this chaotic context, and mirroring the cautious creep of murder into the realm of public criminal law, not all forms of physical assault originally qualified as *vis*. Rather, only violence that threatened the safety of the "empire, majesty… the state of [the] fatherland, and the safety of all"[142] was at issue. Therefore, upon its inception we see that "[t]he crime of vis has two defining characteristics. The first is the actual act of violence. The second is an adverse effect on society as a whole… it is vis contra rem publicam that is criminal."[143] According to these criteria, only serious forms of public insubordination, such as an armed attack on public officials, seizure of public places, or going armed in public,[144] originally fell within the purview of *vis*.

However, this criterion of public order was soon elasticised with the ensuing "*lex Plautia de vi*… [which] confirmed the range of offences covered by the *lex Lutatia*, and extended the jurisdiction of the *quaestio* to private offences or, more precisely, offences against private individuals that were *contra rem publicam*."[145] This marked an important

[128] Ibid., 49.

[129] Robinson, 49.

[130] Ibid., 41.

[131] Ibid., 41-42.

[132] Ibid., 42.

[133] Ibid., 41.

[134] Riggsby, 50 notes that prior to the lex Cornelia there was a specific court de sicariis charged with prosecuting gangsters and racketeers, and another court de veneficiis dealing with poisonings.

[135] Robinson, 41..

transition because it signalled that violent acts between private individuals, which hitherto were not germane to state-sanctioned criminal law, were deemed to pose a sufficient threat to public security that they merited the application of public sanctions. "In particular, it was no longer possible to claim that acts of violence had no political significance. They automatically constituted usurpation of state authority."[146]

Returning to our Hobbesian analysis, the creeping criminalisation of violence in later Roman history demonstrates that as the state gradually assumed a more prominent and intrusive role in assuring the protection of its citizenry, the types of behaviours that constituted an affront to its paternalistic authority increased accordingly. Whereas a *laissez-faire* Roman state needed only to concern itself with punishing and deterring popular insurrections and other egregious threats to public peace, the hands-on role assumed by the *pater patriae* required him to increasingly monitor the private acts of his "children." Thus, while "Rome had a long tradition of reliance on popular justice,"[147] the rise of the state entailed its claiming a "monopoly on the legitimate use of violence,"[148] since the "removal of violence from private hands is both a popular consideratum and a natural side effect of the resulting moves toward centralisation of power."[149]

Treason: From *parricidium* to *perduellio* and *vis*

In any civilisation, "[t]reason must in a sense be the oldest crime, in that it can be defined as an offence against society itself."[150] Such a malleable definition means that "[t]reason is inevitably a wide-ranging offence; moreover, since it is an offence against the established order, its definition can change with the government."[151] With this in mind, as the Roman state adopted a more centralised, paternalistic social control function through the expansion of its criminal law, "[v]ery important changes in the content of the crime [of treason] occur[red]."[152] These changes, which signalled an evolution "from its early pri-

[136] Ibid., 43

[137] Ibid. This is of course to be contrasted with the prohibition against owners killing their own slaves, discussed above.

[138] Ibid., 78.

[139] Ibid., 48.

[140] Riggsby, 79.

[141] Robinson, 78. Specifically, it has been "cogently argued" that "the lex Lutatia… [was]… set up… to deal with the consequences of Lepidus' insurrection."

[142] Riggsby, 79.

[143] Ibid., 112.

[144] Robinson, 78-79.

[145] Ibid., 79. However, there is no absolute consensus on when exactly the lex Plautia was passed. Robinson writes that it was "perhaps of 70 BC and certainly between 78 and 63 BC." Riggsby, 80, writes that "[t]he best solution… seems to be that the lex Lutatia was passed originally and specifically to deal with Lepidus' insurrection (in 78), and that a later lex Plautia succeeded it and, in normal 'tralatician' Roman fashion, absorbed it (presumably adding new provisions also.)"

vate and familial beginnings through the long process of becoming public and its final emergence as the ultimate offence in public law,"[153] can be broken down into two major stages: the transformation of treason from parricidium to *perduellio*; and the subsequent expansion of *perduellio* under the rubric of *vis*.

With respect to the first stage of development, "[t]he early history of Rome supplies much evidence supporting the theory that treason has evolved from an offence against the family in its primitive origins to an offence against the state regarded as a matured socio-political structure."[154] Recall that under the Monarchy and early Republic, the domestic jurisdiction of the *paterfamilias* was the most prominent social control mechanism in Roman society. Therefore, in order to instill a measure of respect for this seminal institution, "killing one's ascendants… was regarded as a heinous crime and was punished in a horrific manner."[155] The following passage is morbidly illustrative of the repugnance with which early Roman society viewed the crime of *parricidium*:

> According to the custom of our ancestors, the punishment instituted for parricide was as follows: A parricide is flogged with blood-coloured rods, then sewn up in a sack with a dog, a dunghill cock, a viper, and a monkey; then the sack is thrown into the depths of the sea.[156]

By virtue of its extreme gravity and the fact that it constituted a rare exception to the paucity of criminal law in early Rome, "[i]t is clear that parricide contains rudimentary elements of treason in an age when the family was the chief agency for maintaining authority," because "[u]nder such conditions killing or injuring the pater familias would endanger social stability."[158]

However, with the eventual aggrandisement of the Roman state and the correlative emergence of criminal law as the primary means of enforcing public order, "the treasonable aspects of [parricide were] lost, for the state is a complex organism, the existence of which is not commonly shaken by isolated homicides."[159] In fact, as part of its paradigmatic shift

[146] Riggsby, xi.
[147] Ibid., 112.
[148] Ibid., 113.
[149] Ibid., 119.
[150] Robinson, 74.
[151] Ibid., 75.
[152] Lear, 3.
[153] Ibid.

toward normative ubiquity, "the state becomes an instrument to limit family self-help by making the punishment of crime a matter for public authority. In this new situation treason becomes a crime directed against the state, and among the Romans this crime was designated *perduellio*."[160]

Three interesting Hobbesian implications are evident in this transformation. First, the shift of sovereign power from *paterfamilias* to *pater patriae* can be seen in the fact that Saturnius, the Emperor responsible for enacting the first *quaestio perpetua* for *perduellio*,[161] "intended the statute to protect popular leaders like himself who as *populares* embodied the *populus*."[162] Secondly, *perduellio* "was one of the crimes where those normally barred from making accusations were permitted to lay charges: the infamous, soldiers, slaves, and freedmen even against their owners and patrons."[163] Finally, "anyone accused of treason might be put to… torture, no matter what his status."[164] Taken together, these three developments demonstrate that the fatherly facets of sovereign power were gradually transferred from the grassroots level of paterfamilial *postestas* to the uppermost echelons of the Roman state.

As for the second stage in the evolution of the Roman concept of treason, while the crime of *perduellio* always displayed certain "constant"[165] features, during the later period of Roman history we see a progressive broadening of its proscriptive scope to include various lesser, "seditious" acts under the rubric of *vis*.[166] For example, while certain grave breaches of public peace, such as bearing arms against the Roman people or aiding and abetting military opponents must always have been treasonous acts against the Roman state, later legal developments brought the penalisation of "less obvious"[168] offences against the state, such as knowingly writing or dictating a falsehood onto the public record, pretending to hold public office, or inscribing a name other than the emperor's on a public building.[169] The ambit for seditious acts eventually became so broad that "[i]n the Later Empire we find even intercession on behalf of someone guilty of treason treated as itself treasonable, whereas ancient custom laid down no more than that a traitor should not be mourned."[170]

[154] Lear, 3.

[155] Borkowski, 27.

[156] Dig.48.9.9.pr. However, as Lear, 4, notes, the extreme gravity of this punishment underscores the reality that it was only exceptionally applied, as "such killings and rebellions against the patriarchal head of the family were probably uncommon in an age when family ties were strong."

[157] Lear, 6.

[158] Ibid.

[159] Ibid.

In sum, through its evolution from a mechanism that buttressed the agnatic system of societal ordering to a high crime against the state capable of multiple permutations, the crime of treason in Roman society gives further credence to our Hobbesian hypothesis, by identifying the changing perception of which social control mechanisms were believed to be the most critically in need of protection and reinforcement.

The three themes outlined above - the dwindling *postestas* of the *paterfamilias*, the increasing state monopoly on the use of violence, and the changing face of treason - are succinctly illustrated in the trial of Horatius, as recounted by Livy.[171] Horatius, a soldier returning from war, killed his sister "for weeping for an enemy soldier (her fiancé) he had just slain in battle."[172] He was thus charged with treason, for "in taking his sister's punishment into his own hands, he ha[d] usurped the state's right to pursue her treason";[173] this, despite the pleas of Horatius' father that he, as head of the household, had authorised the slaying of the sister as a legitimate punishment.[174] Although Horatius, as a war hero, was ultimately acquitted on compassionate grounds,[175] his accusation is a prime example of how "the needs of family [were ultimately] subordinated to those of state,"[176] which contributed heavily to the "growing acceptance of the state's claim to a monopoly on the legitimate use of violence."[177]

Qualifications of the present analysis

As the above analysis demonstrates, an examination of Roman history reveals significant support for the Hobbesian proposition that periods of civil strife are predictive of a rise in state-sanctioned criminal law and a correlative diminution of private remedies. However, working under the assumption that no theory is capable of infallibly and exhaus-

[160] Ibid. The author concedes that "[s]ince a Roman state existed prior to the earliest historical record, no documentary proof can be cited to show that parricidium must have existed before perduellio." However, "'[i]t is on intrinsic grounds of progressive juridical development' that perduellio must be placed later than parricidium."

[161] Robinson, 75 writes that "[t]he first quaestio perpetua for [perduellio] seems to have been set up by the lex Appuleia, probably of 103 BC."

[162] Ibid.

[163] Ibid., 78.

[164] Ibid.

[165] However, "[t]he boundary between the treatment of what we should call sedition and full-blown treason was fluid." Ibid., 80.

[166] Ibid., 75-76, notes the following constant features of treason: "[unauthorized] communications with an enemy, including flight to them, giving them a password, or aiding them dolosely in some other way, such as selling flint as a fire-striker, or explaining to the barbarians how to build ships."

[167] Ibid., 77.

[168] Ibid.

tively explaining human behaviour, it is suggested that the inferences drawn herein be read in light of the following two caveats.

First, it is important to note that this analysis takes the political precepts expounded in Hobbes' *Leviathan* at face value. In making this deliberate leap of faith, the present author is mindful of the fact that the savage, atomistic view of humanity proposed by Hobbes is not a philosophical premise that is universally accepted. For example, the luminary philosopher Jean-Jacques Rousseau, in his *Discourse on Inequality*, believed that man in his natural state was a type of "noble savage" living an uncorrupted, self-reliant and, blissfully content life, and for whom the bonds of mutual social obligations were an inherently fractional force.[178] Such a fundamentally disparate view of human nature simply cannot be reconciled with the present Hobbesian analysis; the reader is merely encouraged to make his or her own determinations on this issue.

Second, it would appear that a Hobbesian analysis works best when dealing with crimes of violence and other tangible threats to peace and security. However, at its most basic level, "[a] crime can be defined as any form of human activity that the law defines as a crime,"[179] a somewhat circular definition "encompassing all kinds of pressure upon individuals to do what is customarily considered the right thing in a given society."[180] This means that the historical tendency for societies, including the Romans,[181] to proscribe and penalise various social and/or religious taboos under the rubric of "moral" crimes does not fit easily into the present analysis. In conceding this limitation, the present author wishes to stress that political and/or sociological forces do not operate in a vacuum, meaning that the Hobbesian paradigm expounded above may provide one broad source of influence that interacted with a matrix of other, often more discrete variables, to produce a comprehensive explanation of Roman criminal law.

[169] Robinson, 77.

[170] Ibid.

[171] Livy, *The History of Rome*, Book XXVI, available online: The Perseus Digital Library <http://www.perseus.tufts.edu/ >.

[172] Riggsby, 117.

[173] Ibid.

[174] Livy explains how Horatius' father argued that "his daughter had been justly slain, had it not been so, he would have exerted his authority as a father in punishing his son."

[175] As ibid. notes, "[t]hey acquitted him because they admired his bravery rather than because theyregarded his cause as a just one."

[176] Riggsby, 117.

[177] Ibid.

Conclusion

Thomas Hobbes argued that the family and the state are simply variations of the same theme: the conferral of sovereign power upon a higher authority, in exchange for protection from the perils posed by human existence in its natural state. The family, as the less sophisticated of the two types of commonwealths, is logically the first to develop. However, there come times when such an arrangement is incapable of dealing with a widespread threat to public peace. When this critical situation is reached, free men may decide, for the sake of self-preservation, to forego certain prerogatives and create an additional layer of overarching governance.

As we have seen, during the early years of Rome, life was relatively tranquil, contained, and uncomplicated. Thus, the *paterfamilias* was an adequate safeguard of law and order, with the state assuming a subsidiary role when needed. However, the growth and change of Rome throughout the centuries brought new, violent threats to the welfare of its people. By relating Hobbesian principles to the historical record, we see that the significant growth of state-enforced criminal law during these periods of political instability, coupled with the diminution of paterfamilial *potestas*, signify that the Roman family was no longer functioning as an effective social protective mechanism. In sum, as he became manifestly incapable of serving and protecting his subjects, the Roman *paterfamilias* was forced to submit himself to the custody of a higher father figure.

[178] See Jean-Jacques Rousseau, A Discourse On Inequality, Translated by Maurice Cranston (Toronto, 1984), 82-92, 104-116.

[179] Parker, 1.

[180] Ibid., 51.

[181] For example, a number of sexual crimes were proscribed under Roman law, including prostitution, homosexuality, and adultery. See e.g. Robinson, 54-73.

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