

CHANGING PUBLIC POLICY AND THE EVOLUTION OF ROMAN CIVIL AND CRIMINAL LAW ON GAMBLING

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I. INTRODUCTION

In Ancient Rome, gambling, at least in the form of dice games, was generally considered a vice, yet the only known criminal statutes prohibiting it were only sporadically and selectively enforced. Otherwise, aside from a legal prohibition on the enforceability of gambling debts and some limited private rights of action, the Roman state as a whole displayed what can only be described as a “laissez faire” policy toward all forms of gambling. What we would now call “sports betting” was exempted from the statutory prohibition altogether. This remained the case well into the Christian period, when a general crackdown might have been expected, but even under Theodosius II in the fifth century of the Common Era, no changes were made to the existing law on gambling.

With the sixth-century emperor Justinian, however, imperial policy towards gambling underwent a profound change in the attitude that informed new legislation, if not in the actual efficacy of enforcement. Guiding this shift in official attitudes toward gambling was a threefold policy objective: (1) concern for protecting the assets of tax-paying imperial subjects (many of whom also had additional financial and service obligations in their native cities), (2) concern for the public morals, and (3) concern for weeding out frivolous clerics.

In this Article, Part II examines Roman attitudes towards gambling, at least as exemplified in the surviving literary sources from the second century BCE to the fourth century CE. Part III discusses what constituted illegal gambling (*alea*) under Roman public (i.e., criminal) law and how, if at all, the statutory prohibitions were enforced in practice. Part IV will address Roman private law pertaining to gambling, including both the limited remedies available to losers in dice games and the bars to recovery for injury and property

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damage for owners or operators of backroom gambling establishments. Part V, finally, will examine the efforts of the Byzantine Emperor Justinian to revitalize and expand the existing law on civil and criminal gambling in the sixth-century CE.

II. PERCEPTIONS AND REALITY: ROMAN ATTITUDES TOWARD GAMBLING

Gambling in Ancient Rome was simultaneously frowned upon and indulged in enthusiastically. There is no question that gambling was popular with the ancient Romans. Extensive archaeological evidence from the city of Rome, from Italy, and from the wider Roman empire, attests to the popularity of a number of games of chance played with game boards and six-sided dice.¹ Game boards, from the most primitive and makeshift to the most elaborate, have been found almost everywhere in ancient Roman territory, from the backrooms of Italian inns and taverns to legionary bases in North Africa.² The popularity of increasingly elaborate board games involving betting continued well into the Byzantine period.³ Inns and taverns were commonly sites of gambling, and images from the ruins of Pompeii depict dice, game pieces, conventional symbols of wealth and good fortune, and terms and epithets commonly used in dice games in the Roman world.⁴ Yet, if we may trust the literary sources, at least some Romans profoundly disapproved of gambling. Even with so many of their fellow Romans seemingly addicted to it, Roman writers from Cicero to the fourth-century CE historian Ammianus Marcellinus condemned gambling and those who indulged in it.⁵ Roman writers of the late-republican and imperial periods, the vast majority of whom were educated and upper-class, considered gambling at best to be a waste of precious *otium*, at worst a ruinous vice that could seriously compromise an individual's reputation and status.⁶

Moreover, gambling to excess—or gambling in public places or at the expense of work or political and social obligations—was considered a potential source of legal and political corruption, especially for senators and elected officials.⁷ Soon after the assassination of Julius Caesar, Marcus Tullius Cicero, the famous Roman orator and statesman in a highly charged political attack on his arch-enemy, Marcus Antonius (Mark Anthony), referred to a disgraced senator named Licinius Lenticula who had been pardoned by Mark Anthony after having been “convicted of gambling” (*condemnatum de alea*).⁸ In his speech, Cic-

¹ JOAN LIVERSIDGE, *EVERYDAY LIFE IN THE ROMAN EMPIRE* 87 (1976).

² NICHOLAS HORSFALL, *THE CULTURE OF THE ROMAN PLEBS* 30 (2003).

³ G.W. BOWERSOCK ET AL., *LATE ANTIQUITY: A GUIDE TO THE POST-CLASSICAL WORLD* 459-60 (1999).

⁴ HORSFALL, *supra* note 3, at 77; *cf.* LIVERSIDGE, *supra* note 2, at 87.

⁵ WILLIAM SMITH, *A DICTIONARY OF GREEK AND ROMAN ANTIQUITIES* 74-5 (1875); *cf.* Cic. *Phil.* 2.23.56; *in* CICERO PHILIPPICS, 118-21 (Walter C. A. Ker trans. 1926) [hereinafter CICERO PHILIPPICS]; *and* Amm. Marc. *Hist.* 14.16 *in* AMMIANUS MARCELLINUS 1:51 (John C. Rolfe, trans.).

⁶ Pliny *Ep.* 9.6 *in* THE LETTERS OF THE YOUNGER PLINY 236 (Betty Radice trans. 1963).

⁷ CICERO PHILIPPICS, *supra* note 6, at 118-121.

⁸ Cic. *Phil.* 2.23.56 *in* CICERO PHILIPPICS I & II 22 (J.D. Denniston ed., 1926) (translation my own) [hereinafter CICERO PHILIPPICS I & II].

ero referred to Lenticula as “a supremely worthless individual who would not even hesitate to play dice in the forum itself.”⁹ Such misconduct was made all the more glaring by the fact that Lenticula was actually gambling in the very place where important state and judicial business was carried out.¹⁰ According to Cicero, Anthony (also known to indulge habitually in dicing) officially pardoned his “fellow player,” Lenticula, as a political favor in exchange for forgiving his own gambling debts.¹¹

Behind the obvious political animosity and prosecutorial fervor of Cicero’s vituperation of Lenticula and Anthony as gamblers in the *Second Philippic*, it seems that what most disgusted Cicero—a “new man” who had struggled to ascend the political and social ladder of late Republican Rome and was perhaps more acutely conscious of senatorial dignity than those like Mark Anthony who were born into the “senatorial class”—was the disregard of both propriety and the dignity of office on the part of Anthony, who had the advantage of being both the son and grandson of high-ranking senators. The preoccupation of Anthony and his like with dicing provided Cicero with a convenient pretext for vilifying them before the Senate: they acted in a manner unbecoming of their status as senators and state officials, even putting gambling debts before the law and the good of the Republic.¹²

The polarity between civic virtue (Cicero no doubt viewing himself as a prime example thereof) and vice (personified by Anthony and Lenticula) would have had particular resonance with Cicero’s aristocratic listeners and readers because of the association of games of chance with the urban poor of the capital in the minds of many Roman elites.¹³ Many Roman elites associated dicing with the lower classes generally, and with hustlers and petty criminals in particular.¹⁴ In fact, habitual gamblers seem to have been lumped in with actors,

⁹ *Id.*; cf. CARL SCHOENHARDT, ALEA: UEBER DIE BESTRAFUNG DES GLUCKSSPIEL IM ALTEREN ROMISCHEN RECHT 25-27 (1885).

¹⁰ CICERO PHILIPPICS I & II, *supra* note 9, at 21; cf. MARY T. BOATWRIGHT ET AL., THE ROMANS FROM VILLAGE TO EMPIRE 32 (2004) (forum as religious and political as well as economic center of Rome). For the traditional upper-class horror at the specter of debt and the resultant loss of patrimony and status from gambling, see Sall. *Cat. 14 in THE WAR WITH CATILINE* (John C. Rolfe trans. 1941); cf. Ps.-Cyp. *De Aleatoribus* 11 in DER PSEUDOCYRIANISCHE TRACTAT DE ALEATORIBUS: DIE ALTESTE LATEINISCHE-CHRISTLICHE SCHRIFT, EIN WERK DES ROMISCHEN BISCHOFES VICTOR II 29 (Adolf Harnack, ed 2010). This fear was compounded by the prospect of sub-elites gaining leverage over their social superiors by encouraging this vice, especially among the young and impressionable.

¹¹ *Id.* at 21. *Otium*, or leisure, meant time that was not taken up with labor, commerce, social obligations, warfare, or political activity. CHARTON T. LEWIS, LEWIS AND SHORT ELEMENTARY LATIN DICTIONARY 575 (1997). In the opinion of the educated elite, it should ideally be spent in reading, writing, or the pursuit of philosophical wisdom. Pliny, *supra* note 7, at 236.

¹² CICERO PHILIPPICS I & II, *supra* note 9, at 21; cf. SCHOENHARDT, *supra* note 10, at 34-35.

¹³ See Nicholas Purcell, *Literate Games: Urban Society and the Game of Alea*, 147 *PAST & PRESENT* 3, 17 (1995).

¹⁴ O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 92 (1995); cf. JERRY P. TONER, POPULAR CULTURE IN ANCIENT ROME 95 (1st ed. 1995). Having one’s son or other relation become indebted or otherwise beholden to individuals of low social status as a result of indulging in a syndrome of supposedly related vices from gambling to drinking to dicing to whoring was the classic nightmare of the propertied *pater familias*, which concern was a

astrologers, pimps, and petty criminals in Ancient Rome.¹⁵ This association, in turn, gave rise to a paranoia that gamblers of low social status might use gambling debts to blackmail the socially or politically prominent. To the objection that Roman emperors were known to have been fond of or even addicted to dicing, it must be countered that questionable conduct on the part of unpopular emperors such as Caligula, Claudius, Nero, and Commodus was emphasized in their biographies according to the customs of a biographical tradition that sought to discredit, or at least illustrate the moral failings of those rulers.¹⁶

As time went on, moralists and historians condemned gambling as both a dangerous distraction from work and personal obligations, and as a self-indulgent waste of personal and family resources that could better be used to help others or the wider community.¹⁷ Horace, writing during the reign of Augustus, vividly conjured up an image of a well-born Roman youth unable to ride a horse or hunt, but quite adept at dice-playing.¹⁸ Half a century after Augustus, during the reign of Nero, the senator and Stoic philosopher Seneca disapprovingly characterized gamblers as being fond of hanging about in the backrooms of disreputable taverns, hiding from the officials, looking pale, weak and soaked in perfume.¹⁹ Even the trenchant second-century CE satirist Juvenal lambasted thoughtless gamblers who bet their fortunes on a dice throw but gave no thought to the poor and hungry.²⁰ In the third-century CE, the anonymous

common theme in Roman comedy. See e.g., Plaut, *Trinummus* 389-390 in PLAUTUS: THE COMEDIES 3:188 (Daniel Mark Epstein trans., 1995).

¹⁵ ROBINSON, *supra* note 15, at 91-92.

¹⁶ Suet. *Claud.* 33.2 in Suetonius: THE CAESARS 220 (Donna W. Hurley, trans. 2011). Caligula, Nero were said variously to have gambled to excess or promoted gambling in the imperial palace. *Id.* at 184-220, 246; cf. *Commodus* in LIVES OF THE LATER CAESARS: THE FIRST PART OF THE AUGUSTAN HISTORY WITH NEWLY COMPILED LIVES OF NERVA AND TRAJAN 162-163 (Anthony Birley, trans., 1976). Claudius played dice obsessively and even wrote a book on dice games; Caligula cheated at dice to replenish his coffers; Nero reportedly risked hundreds of thousands on a single throw of the dice. Suet, *supra* note 17, at 184, 220, 246; cf. *Commodus*, *supra* note 17, at 162-63. For conventions of ancient biography, see DONNA W. HURLEY, Suetonius: THE CAESARS, at xxvi-xviii (2011).

¹⁷ See e.g., Juv. *Sat.* 1.88-90; Ps.-Cyp. *de Aleatoribus* 11 in DE PSEUDOCYPRIANISCHE TRACTAT DE ALEATORIBUS 29 (Adolf Harnack, ed. 2010) (translation of the Latin my own). Historians in the ancient world, and especially of Rome, saw supposed moral decay behind the decline of state or imperial power and the collapse of political institutions (such as the Roman Republic). The first-century BCE Roman historian Sallust, for instance, explained the collapse of the Republic as the ultimate result of the moral failures of the Roman elite, while Livy's multi-volume history of Rome from its foundation is laced with moralizing interpretations of legendary and historical events. Sallust, *Cat.* 14 in SALLUST: THE WAR WITH CATILINE 25 (John C. Rolfe, trans., 1021, reprt.1931). Writing centuries later, the fourth century historian Ammianus Marcellinus identified the widespread obsession with gambling, as well as with chariot races, as a cause for the decline of the old capital, and potentially of the entire empire should the vices spread to the new capital of Constantinople. AMMIANUS MARCELLINUS 6.25 (John C. Rolfe, trans. 1935).

¹⁸ THE ODES OF HORACE 130-31 (Jeffrey H. Kaimowitz trans. 2008). The laws (*legibus*) to which Horace refers in this poem are almost certainly the mid-republican *lex Talaria* (or *Alearia*) and several later republican laws that reaffirmed the earlier ban on dice games.

¹⁹ Sen. *De Vita Beata* 7.3 and *De Ben.* 7.16.

²⁰ Juv. *Sat.* 1.88-90.

author of a sermon on the evils of gambling perceptively commented on the blind self-destructiveness of habitual gamblers.²¹

Finally, the fourth-century CE historian Ammianus Marcellinus came close to attributing the decline of Rome itself to its citizens' compulsive gambling. Visiting the city of Rome for the first time *c.* 357 CE, the historian expressed disgust at the apparent obsession of the urban poor with gambling, especially dicing.²² Marcellinus painted an unflattering picture of the "commons" of Rome:

But of the multitude of the lowest condition and greatest poverty some spend the entire night in [wine shops], some lurk in the shade of the awnings of the theaters, which Catulus in his aedileship, imitating Campanian wantonness, was the first to spread, or the quarrel with one another in their games at dice, making a disgusting noise by drawing back the breath into their resounding nostrils . . . these and similar things prevent anything memorable or serious from being done in Rome.²³

Beyond the obvious class prejudice in this description, the historian associated the decline of the old capital of the Roman Empire (the new capital being Constantinople) with the trivial preoccupations and follies of its inhabitants. For Marcellinus, the obsession of the urban poor—the class that could presumably least afford the losses inherent in gambling—was both an explanation for their crushing poverty and a symptom of the fatal malaise of the once-great imperial capital.²⁴

III. WHAT CONSTITUTED ILLEGAL GAMBLING: DEFINING *ALEA* IN ROMAN LAW

Not all forms of gambling were illegal in Rome, or necessarily even frowned upon. As Toner has observed, betting on "contests of strength," or indeed on any sporting events, seems to have been "comparatively small-scale in terms of wins and losses."²⁵ Moreover, and perhaps more importantly, there does not seem to have been any industry surrounding sports betting comparable to that of today. Rather, it may fairly be said to have been a "gentleman's game," or at least a "matter between friends," and accordingly treated as an entirely private matter, whether or not it technically fell within the "contest of strength" exception established by the Sullan legislation.²⁶

The situation was entirely different with dicing, which was the center of a thriving, albeit comparatively small-scale and localized industry in the Roman Empire.²⁷ Commonly, the backrooms of inns and taverns were given over to gambling, as is attested in numerous inscribed gaming boards and mosaics discovered in Rome, Pompeii, various Italian and North African towns, as well as

²¹ DE PSEUDOCYPRIANISCHE TRACTAT DE ALEATORIBUS, *supra* note 18, at 29.

²² AMMIANUS MARCELLINUS 1:51.

²³ *Id.*

²⁴ *Id.* Marcellinus also cited the obsession of the city's inhabitants with chariot racing as a reason for its decline. *Id.*

²⁵ TONER, *supra* note 15, at 92.

²⁶ *Id.*

²⁷ JEROME CARCOPINO, DAILY LIFE IN ANCIENT ROME: THE PEOPLE AND THE CITY AT THE HEIGHT OF THE EMPIRE 253 (1960); *cf.* JOHN DISNEY, A VIEW OF THE LAWS AGAINST IMMORALITY AND PROFANENESS 280 (1729).

several frontier legionary bases.²⁸ Private homes or rented premises could likewise function as small casino operations, where money could be won or lost. A *susceptor*, a Latin term meaning “entrepreneur,” was used euphemistically to refer to the owners or operators of such establishments. While not forming part of a larger-scale “organized crime” network like 1920’s American “speakeasies” or illegal gaming establishments, *cauponae* and *popinae* that featured backroom gambling were generally considered disreputable places that also offered prostitution and were places from which upper-class youth in particular, were discouraged from frequenting.²⁹

The basic meaning of the term *alea* in Latin is dice (more accurately the singular, *die*), or by extension, the game of dice, of which there existed a number of variations.³⁰ *Aleator*, a term used both in Roman literature and in the sixth-century Byzantine emperor Justinian’s comprehensive *Code* and *Digest*, refers to one who plays at dice and was at least a “mildly derogatory term” when applied to one who indulged in dice playing habitually.³¹ The crucial question is, then, did the earliest known law on gambling prohibit merely the various games of dice (or knucklebones), or other forms of wagering as well? In other words, how narrow or broad was the actual use of the term *alea* (and related words such as *aleator*) in spoken Latin?³² Unfortunately, our sources on Roman gambling are limited and we necessarily have recourse only to the literary, archaeological and (more rarely) epigraphic references.³³

The earliest known reference to a criminal sanction against gambling occurs in a comedy of Plautus, generally dated to the late third- or early second-century BCE. The prohibition referenced in Plautus’ comedy, the *lex Talaria* (or *lex Alearia*), is believed by most scholars to have prohibited gambling,

²⁸ See SCHWARTZ, *supra* note 1, at 29.

²⁹ This concern may well explain the Praetor’s Edict imposing a penalty on anyone who compelled an individual to gamble or continue gambling against his will by force. DIG. 11.5.1 (Ulpian, Ad Edictum 23). On this point, we may point to an analogous situation in medieval and Early Modern Britain, where “rooks” or cheats haunted inns and taverns looking for well-dressed travelers, preferably young, to entice into playing rigged games of dice or cards. Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L.REV. 579, 581 (1997).

³⁰ The archaeological evidence for dice games in Ancient Rome is plentiful, from the actual dice (*tesserae*) thrown to game boards found in inns, taverns, and legionary camps and bases. SCHWARTZ, *supra* note 1, at 26-28.

³¹ *Id.* at 28.

³² Adolf Berger maintains that the law mentioned by Plautus (*Talaria* or *Alearia*, as he reads it) prohibited all games of chance, not just dice. ADOLF BERGER, *ENCYCLOPEDIA OF ROMAN LAW* 559 (1953). Exactly what Berger thinks fell within the scope of the mid-republican statute is unclear—perhaps he wants to make it clear that games involving the casting of nuts or knucklebones were also prohibited thereby—but the legal definition of *alea* in that *lex* probably did not include private wagering on the outcome of sporting events, as that would stretch the classical Latin term well beyond its normal usage.

³³ See generally SCHWARTZ, *supra* note 1, at 24; *cf.* Purcell, *supra* note 14, at 6. In addition to the numerous tavern wall-images, urban graffiti and *tabula lusoriae*, or inscribed game boards, there was an image of a game board mosaic carved in the stones of the town forum at Timgad in Roman North Africa, which read “to hunt, to bathe, to play, to laugh, this is to live.” *Id.*

and specifically dicing.³⁴ In the context of the play, at least, the character issuing the warning concerning this *lex* (for which no other direct evidence exists) is harboring young lovers and is fearful that the possible discovery of dicing on the premises could lead to exposure of the young couple as well.³⁵

The next question to be examined is what policy considerations lay behind this mid-republican statute (the full scope and provisions of which we may never be certain) outlawing games of chance. At least some Roman senators and officials who influenced, if not controlled the course of policy and legislation in the Republic, believed that games of chance were a waste of both time and money. Moreover, where the inheritances of young aristocrats were potentially at risk, a potential threat to the entire social and political order, the need to act was perceived to be urgent. Historically, all we know about the *lex Talaria* is that it was passed at a time when the Roman Empire was expanding rapidly. It was also passed at roughly the same time as a number of sumptuary laws affecting primarily the aristocracy.³⁶

Roughly contemporary with Plautus' allusion to the *lex Talaria* quoted above (arguably recent and therefore topical and worthy of mention by a popular comic poet), the Roman popular assemblies also passed a series of sumptuary laws forbidding frivolous spending on luxuries.³⁷ These laws were initially precipitated by the crisis of the Second Punic War in the late third-century BCE and further fueled by the ongoing and costly wars in Spain and on the eastern front (Macedonia and Syria) in the second.³⁸

In the troubled years of the Second Punic War in the late third-century BCE, and well into the second-century BCE, a series of laws were passed to curb citizens' "expenditure on, *inter alia*, private entertainment or individual dress."³⁹ Sumptuary laws also had the advantage of preventing (or at least deterring) the less well-off from spending beyond their means in order to vie with their social superiors for prestige. Roman historian Michael Crawford argues that the policy objective of this entire series of *leges*—although explicable in part by the exigencies of wartime—was primarily to maintain the cohesion of the powerful senatorial class by avoiding conspicuous consumption by wealthier or more politically powerful individuals or families who risked incurring the resentment of their peers.⁴⁰

³⁴ DISNEY, *supra* note 28, at 275. Some scholars have argued for a reading of *lex Alearia* in the passage, to be understood as a law specifically prohibiting *cheating* at dice. SMITH, *supra* note 6, at 74-75. Disney contends convincingly, however, that the context of the passage does not support an interpretation of the *lex* mentioned as one exclusively concerned with cheating. DISNEY, *supra* note 28, at 275.

³⁵ PLAUTUS, MILES GLORIOSUS 162-163 in PLAUTUS: THE COMEDIES 1:80 (Erich Segal, trans., 1995).

³⁶ M. CAREY & H.H. SCULLARD, A HISTORY OF ROME DOWN TO THE REIGN OF CONSTANTINE 191 (3d ed. 1975).

³⁷ Vincent Rosivach, The *Lex Fannia Sumptuaria* of 161 BC, CLASSICAL JOURNAL 102:1, 2 (2006); cf. CAREY & SCULLARD, *supra* note 37, at 191.

³⁸ CAREY & SCULLARD, *supra* note 37, at 191.

³⁹ *Id.*

⁴⁰ See *id.* at 76-77. Again, as it seems unlikely that such laws were realistically enforceable, at least on any kind of regular basis, another explanation, proffered by Vincent Rosivach, is that the passage of laws of this type represented a sort of "symbolic victory" of the conservatives who sponsored or supported them over their political rivals, more or less equals in

The law specifically prohibiting dicing, however, would seem to be driven less by concern about social and political rivalry than with protecting the wealth of gamblers, especially those who were members of senatorial families. One concern of Roman senators and officials who individually or collectively sponsored such legislation was undoubtedly the preservation of the wealth of the leading aristocratic families whose male ranks were being decimated by the Republic's seemingly endless wars. Young males were conventionally presumed to be especially vulnerable to the lure of gambling and the sordid characters who egged them on to play to the full extent of their *peculium* (a private fund made available to a son by his *paterfamilias* or a slave by his master), and beyond.⁴¹ While there was no documentation of the "policy concerns" that informed Roman legislation, let alone of the social and cultural forces that produced such ancient institutions as that of the *peculium*, nevertheless we do have evidence of upper-class Roman anxiety about gambling by adolescent and young adult males, primarily in the form of "horror stories" about young men ruined by the vice.⁴²

A related concern, as we have already observed, was the appropriate use of time and energy by the senatorial elite in traditional familial, religious and social obligations, and most importantly, warfare.⁴³ Leisure (*otium*) was traditionally restricted to either holidays or retirement. The only time dice-playing was officially permitted was during the December Saturnalia festival, a carnival-like holiday during which unrestricted leisure (*otium*) was deemed acceptable; slaves could command their masters, and the social order was generally reversed.⁴⁴

The elderly were also permitted to gamble without interference or censure.⁴⁵ Elite youth, or indeed leading citizens of any age (except the very old), by contrast were not supposed to waste time in addictive but unproductive pastimes such as drinking, sex, and gambling, especially at the expense of state-

wealth and position, and in the process allowed the former to appear to be champions of the state at large and of the *mos maiorum*, or traditional values of Ancient Roman society. Rosivach, *supra* note 38, at 1, 2.

⁴¹ See BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 93-95 (2d ed. 1975). The widely held stereotype of wealthy youth frittering away time and money on gambling and other vices appears in a speech attributed to the republican official Caius Titius, wherein he describes a throng of dissipated Roman youth playing obsessively at dice, steeped in costly perfumed oils and surrounded by prostitutes. MACR. *Sat.* 3.13.13.

⁴² For Roman anxiety about young males gambling away their money, see SALLUST WAR WITH CATILINE 25 (John Rolfe trans. 1931, reprt. 1941). This concern was not restricted to the Romans, and even contemporary sociological research on addiction suggests that young males are especially susceptible to gambling. For contemporary research about gambling by young males, see Ken Stinchfield & Randy Stinchfield, *Patterns and Characteristics of Adolescent Gambling*, 9 J. OF GAMING STUDIES, 371-386.

⁴³ See discussion, *supra*, Part II.

⁴⁴ SCHWARTZ, *supra* note 1, at 28.

⁴⁵ *Id.* The thinking was that elderly men had essentially passed beyond their working lives and might therefore be given license to devote their time to leisure activities without interference or public censure.

craft or participating in or preparing for war—at least if they hoped to have a successful military and political career.⁴⁶

We are on somewhat firmer ground when it comes to the laws of the early first-century BCE, three of which were either personally sponsored or supported by the powerful general and dictator, L. Cornelius Sulla (*lex Cornelia*). Three statutes in particular concerned gambling: the *leges Cornelia*, *Titia*, and *Publicia*, as well as a *senatus consultum* (technically, not binding legislation, but equally authoritative in practice), were cited by the prominent imperial jurist Julius Paulus, and presumably from the early first-century BCE.⁴⁷ As we do not have the actual text of these laws from Cicero, Paulus, or any other first century BCE source for that matter, we do not know the actual content of any of these laws.

However, we do know from Paulus that these laws affirmed (or reaffirmed) the general prohibition on dice-playing, but nonetheless made specific exceptions for betting on “contests of manhood,” including running, jumping, javelin-throwing, wrestling or boxing—in other words, traditional Olympic sports.⁴⁸ Carcopino maintains that these statutory exceptions arguably paved the way for what might now be called “sports betting,” including wagers on such popular sports as chariot races (which was, in fact, an Olympic sport) and gladiatorial combats.⁴⁹ As Paulus-writing in the late second- and early third-century CE-only mentions five sports, and Marcian subsequently qualified his summary with a specific assertion that the *leges Cornelia*, *Publicia*, and *Titia* only covered those five traditional sporting events, it is unlikely that the laws themselves made special provisions for betting on the more popular gladiatorial games and chariot races.⁵⁰

On the other hand, it is equally unlikely that the plebeian aedile, a junior official charged with supervision of taverns, inns, and brothels, or any other Roman official seriously attempted to police private betting on sporting events.

⁴⁶ MACROB. *Sat.* 3.13.13 (quoting speech given by the magistrate Caius Titius in favor of the *lex Fannia* of 161 BCE).

⁴⁷ DIG. 11.5.2-3.

⁴⁸ DIG. 11.5.2-3 (Paulus, Ad Edictum 19). Specifically, Paulus’ fragment references the late republican *senatus consultum* (a resolution of the Senate that technically lacked the authority of a statute but was nevertheless influential) that laid out which events constituted “contests of strength” (*virtutis causa*), while Marcian’s decree, explicitly quoted in the next section, held that wagers could lawfully be made on contests of running, jumping, javelin-throwing, boxing, and wrestling exhibitions. *Id.* Later Roman legal sources reference the *lex* cited by Plautus only negatively, stating that one or more laws of the early first century BCE created specific exceptions to the earlier general prohibition, namely for wagering on competitions of “spear- or javelin-throwing, running, jumping, wrestling, or boxing, which are contests of strength.” *Id.* Specifically, Paulus stated that a “*senatus consultum* has forbidden playing for money, except when one is competing at . . . contests of strength,” the objective presumably being to make such “useful” games more attractive to the young men who would compete by introducing an element of risk (and fun) into it by allowing, and implicitly encouraging, competition for money or other stakes. *Id.* In an edict, the fourth-century CE emperor Marcian, cited immediately after Paulus in the *Digest*’s section on gambling, clarified (or possibly expanded) this exception slightly, holding that a spectator at the contest in question could also make a wager (*sponsio*) on it. *Id.* No ancient sources indicate any curtailment or punishment of betting of this type, even before the passage of the Sullan legislation.

⁴⁹ CARCOPINO, *supra* note 28, at 251.

⁵⁰ DIG. 11.5.3; *cf.* Rosivach, *supra* note 38, at 1-2.

This ultimately raises the question of what was really so bad about dice-playing that it, unlike other forms of gambling, was statutorily prohibited and (as we shall see) otherwise legally de-incentivized under the *ius civile* (i.e., private law applicable to Roman citizens), which was fast evolving through the institution of the annual Praetor's Edict during the late republican and early imperial periods.⁵¹

So again, we must ask ourselves what policy concerns might have given rise to this late-republican legislation (late 80's BCE) on gambling, both the reiteration of the prohibition of the *lex Talaria* and the exceptions for betting on "contests of strength."⁵² The renewal of the *lex Talaria*'s prohibition on dicing is relatively easy to explain in light of the need of Sulla and his political allies. In the wake of the costly civil wars, Sulla needed to ensure the financial stability of some three hundred new senators he promoted in an effort to "pack" that august body with his own political supporters.⁵³ It is also possible that Sulla, who pushed programs of "moral" as well as constitutional legislation, was especially concerned about regulating his new senators' conduct—or at least ensuring that they avoid any appearance of impropriety. Thus, the reiteration of the mid-republican prohibition of dicing likely resulted from Sulla's concern that the previously obscure individuals whom he raised to senatorial status in the wake of the civil war acted in a manner befitting of their new rank.⁵⁴

As to the exception for betting on "contests of strength," one possible explanation is that the dictator, himself a highly skilled and experienced general, wanted to encourage activities that tended to increase men's fitness for warfare during an era dominated by war. This is true even though the most recent war on the Eastern frontier in Sulla's day, the war against Mithridates of Pontus, was already over by the time of the passage of these statutes. Under this theory, betting by bystanders would encourage participants (legionary soldiers or elite junior officers) to raise their game and inspire the ranks at the same time.

Another impetus was Sulla's desire to entertain the public through sporting events, especially those he personally organized. During the period in which he held supreme power in Rome (82-79 BCE), Sulla sponsored many public spectacles, including elaborate games of various types, which he held to celebrate his victories in the East, as well as the (supposed) success of his efforts to restore order to the Roman state.⁵⁵ At such events, private betting at all levels of society was inevitable. Wagers intensified spectators' interest in the games, and prohibiting them was not only futile, but also potentially dampened the enthusiasm of audiences whose good will and approval Sulla needed

⁵¹ JOHN CROOK, *LAW AND LIFE OF ROME 271-72* (1977). On the development of the Praetor's Edict generally, see OLGA TELLEGEN-COUPERUS, *A SHORT HISTORY OF ROMAN LAW* 53 (Rev. Eng. Ed, Routledge, 1993). For a detailed discussion of the civil law disincentives to gambling or operating gambling establishments see *infra*, Part IV.

⁵² DIG. 11.5.3 (Paulus, ad Edictum 19).

⁵³ MICHAEL CRAWFORD, *THE ROMAN REPUBLIC* 152 (2d ed. 1992).

⁵⁴ Geoffrey S. Sumi, *Spectacles and Sulla's Public Image*, 51 *HISTORIA*, 414, 415 (2002). Sulla was also known to have passed several enactments to check the extravagance of private persons. Rosivach, *supra* note 38, at 2.

⁵⁵ *Id.*

in order “to legitimate his extraordinary political position and establish him[self] as the center of power” in the state.⁵⁶

Finally, there was no perceived danger or disgrace attached to such wagers (*sponsiones*), even among the senatorial elite; rather, there being no organized “sports betting industry” in Ancient Rome, such bets were considered to be a purely private matter between friends (*amici*), which in Roman terms generally meant individuals of roughly equal social status.⁵⁷ Thus, the fact that the wager was between “friends” would mean that an elite bettor would not find himself in the debt of a social inferior, possibly even a freed slave, whom the Roman elites generally presumed to be morally inferior as well.

With regard to the actual enforcement of the laws governing gambling, a junior official (*plebeian aedile*) was nominally in charge of “enforcing” the laws, although it is likely that actual enforcement occurred sporadically at best, and even then only for political reasons or perhaps in cases of disorderly or disruptive conduct by the gambler(s) in question.⁵⁸ Punishment for violation of these republican anti-gaming laws—when enforced successfully—seems to have been a fine of four times the value of the stakes, presumably imposed upon all participants, winners and losers alike.⁵⁹

There does appear to be one historical instance, however, in which a different penalty was imposed upon a senator named Licinius Lenticula, depending upon one’s interpretation of the section of Cicero’s *Second Philippic*. As previously noted, Lenticula, like Anthony himself, was apparently a habitual gambler whose continuing defiance of law and custom Cicero censured in no uncertain terms.⁶⁰ Unfortunately, Cicero did not specify under which statute Lenticula had been condemned, or what penalty had been imposed upon him. Cicero merely described Lenticula as having been “convicted for dice-playing,” then “pardoned” (or “restored to his former rank” or “dignity”) by Anthony.⁶¹

⁵⁶ *Id.*

⁵⁷ TONER, *supra* note 15, at 92. This would also diminish the risk of men of higher social station becoming indebted to those of considerably lower status.

⁵⁸ CARCOPINO, *supra* note 28, at 251-53; *cf.* 1 MARTIAL EPIGRAMS 425 (D.R. Shackleton Bailey trans. 1993) (on a gambler being thrown out of a tavern at the end of the notoriously licentious Saturnalia festival, pleading with the aedile not to charge him with illegal gambling). Another possible explanation for the inconsistency in state enforcement of the anti-gambling legislation over time may have been the varying interest of state officials, or later emperors, in suppressing gambling. For example, Martial, writing during the reign of the unpopular imperial micro-manager Domitian (who also made a practice of punishing rumored unchastity on the part of Vestal Virgins), may have witnessed a period in which such laws were more actively—if not necessarily effectively—enforced.

⁵⁹ PS.-AUS. in *Div. Cic.* 124, PSUEDOASCONIANA 12 (Thomas Stangl ed. 1909). Of course, those who employed force to compel another to gamble or continue gambling against his will were subject either to a fine, imprisonment or hard labor in the mines, according to the circumstances of the case. DIG. 11.5.1.

⁶⁰ *See supra* Part II; Cic. *Phil.* 2.56.23.

⁶¹ *See* CICERO PHILIPPICS, *supra* note 6, at 118-21; *cf.* SCHOENHARDT, *supra* note 10, at 29-33. Note that a Roman senator could be removed from the Senate in one of three ways: via *capitis diminutio* (literally, “reduction of head,” a drastic punishment in the criminal law context usually resulting in a loss of citizenship status and possibly freedom as well, by an imperial pronouncement of *infamia* (which cannot have been the case in the late Republic); or lastly, by action of the censors, senior officials elected every five years to take the census and review the rolls of the Senate, among other things. As Cicero does not mention an action

As the Latin verb *restituo* could mean “to pardon” or “restore,” as well as to “recall” from exile, it may have been that Anthony simply exempted Lenticula from the statutory penalty for illegal gambling (a fine in the amount of four times what was wagered), or alternatively arranged for any fines paid to be returned.⁶² Still, this raises more questions than it answers. By definition, such a penalty applied to one-time instances of dicing, not for a general pattern of conduct. Furthermore, it seems unlikely that the mere imposition of a fine would warrant an official pardon.⁶³

What seems more likely, then, is that Lenticula had been officially reprimanded for his habitual and inappropriate gambling and *possibly* deprived of his rank and status.⁶⁴ In any case, Lenticula’s conviction for gambling, whatever the penalty imposed, was almost certainly politically motivated, while Cicero’s sweeping characterization of Lenticula as “convicted of dicing,” as if for a capital offense, was more rhetorical than strictly factual, since after all, the *Second Philippic* was not a prosecution of Lenticula, but a political attack on Mark Anthony.⁶⁵

IV. PRIVATE LAW DISINCENTIVES TO GAMBLING AND RUNNING GAMBLING ESTABLISHMENTS IN THE ROMAN EMPIRE

As we have seen, the Roman state did not interfere with bets on “contests of strength” and indeed protected such bets by a statutory exception to the general prohibition on gambling. By contrast, dice-playing was expressly forbidden under the public law, even if the prohibition was not regularly enforced by the state. In practice, it was Roman private law (*ius civile*) that really penalized illegal gambling by barring recovery for those individuals who had the greatest economic interest in it: namely, winners at dice and (very likely) the tavern owners and innkeepers who promoted dice games.⁶⁶

by the censors with regard to Lenticula, it is unlikely that the latter was the case here, while criminal *capitis diminutio* and *infamia* were penalties of the imperial period, not known in the Republic.

⁶² J.D. DENNISTON, COMMENTARY TO THE FIRST AND SECOND PHILIPPIC 132 (1998).

⁶³ SCHOENHARDT, *supra* note 10, at 34.

⁶⁴ See CICERO PHILIPPICS, *supra* note 6, at 118-121; *cf.* SCHOENHARDT, *supra* note 10, at 29-34. Schoenhardt maintains that any public disgrace attached to Lenticula for dicing was purely extra-legal and unofficial (*infamia facti*). See SCHOENHARDT, *supra* note 10, at 33-35. The determination of Lenticula’s actual punishment is further complicated by Cicero’s rhetorical exaggeration and deliberate conflating of the actions of Lenticula and Anthony, as if the two were interchangeable. Since there is no firm evidence either in the text or historically for either exile or a formal reduction of Lenticula’s legal status, I am forced to concur with Schoenhardt that Lenticula was subjected to no more than public embarrassment, politically damaging to be sure, but not affecting his legal status or rights in any way. *Id.* at 29-34.

⁶⁵ CICERO PHILIPPICS, *supra* note 6, at 118-121 (Cicero attributed Anthony’s reasons for lenience in Lenticula’s case to a desire to pay off his own gambling debts, and so a clear case of political favoritism).

⁶⁶ See DISNEY, *supra* note 28, at 280; *cf.* Charles S. Rayment, *Roman Anti-Gambling Measures*, 43 CLASSICAL WEEKLY, 121, 121-22 (1950) (on the House’s probable complicity in fleecing naïve gamblers).

First and foremost, gambling debts were not enforceable under Roman law.⁶⁷ By extension, mortgages, pledges or other securities posted to cover actual or potential gambling losses were deemed null and void, as were any sales or exchanges of property to cover wagers.⁶⁸ Furthermore, losers—and in certain circumstances, their family members—could recover sums lost in gambling from the winners. For example, a law datable to the late second-century of the Common Era—the existence of which we can again attribute to the authority of the early third-century jurist Paulus—held that the father, or more precisely the *paterfamilias*, might recover money lost by a son under his power (*in potestate*).⁶⁹ In effect, analogous rights and liabilities attached to the father of a son or the owner of a slave who won or lost money in dicing, rights and liabilities that arose out of the peculiarities of Roman law on the legal capacity of slaves and sons under the absolute legal power of their father or master.⁷⁰ Conversely, where the son *in potestate* won money from a third party, the loser had recourse against the winner's *paterfamilias*.⁷¹

⁶⁷ CROOK, *supra* note 52, at 271. Gambling debts might well be enforced in other, more violent ways, and it was highly unlikely that local or imperial officials regularly interfered in such matters.

⁶⁸ See DISNEY, *supra* note 28, at 278. To be precise, the Romans did not have “mortgages,” as the term is used in Anglo-American common law, but only pledge, antichresis (pledge of the fruits of real property) and a little-used transfer of outright ownership of property to a creditor by a debtor. NICHOLAS, *supra* note 42, at 151.

⁶⁹ DIG. 11.5.4 (Paulus, Ad Edictum 19); *cf.* ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 22 (1970). To clarify, one's *paterfamilias* was not necessarily his (or her) father, but rather the oldest living agnatic male ancestor (for instance, a paternal grandfather). As Barry Nicholas observed, a Roman *paterfamilias* traditionally had the power of life and death over his children (including adult children and even grandchildren on the direct paternal line) *in potestate*, analogous to the power of a master over a slave. With this power came both legal rights and responsibilities; for instance, a right to sue for gambling losses occurred by a son *in potestate* and a corresponding legal obligation to restore winnings by a son (or grandson), it presumably being rare for freeborn Roman women, with their very limited legal capacity) to gamble, *in potestate* up to the amount of the son's *peculium*. DIG. 11.5.4. (Paulus, Ad Edictum 19).

⁷⁰ AARON KIRSCHENBAUM, SONS, SLAVES AND FREEDOM IN ROMAN COMMERCE 33 (1987). *Patria potestas*, or the absolute legal power of a father (or paternal grandfather) over his children or grandchildren, technically included the power of life and death, and in many respects was analogous to the legal powers of masters over slaves. NICHOLAS, *supra* note 42, at 66; *cf.* WATSON, *supra* note 70, at 22. Although the power of the *paterfamilias* to kill sons *in potestate* was rarely exercised in practice, numerous important legal consequences flowed from the institution of *patria potestas*: for example, a son *in potestate* legally owned no property in his own right, though his *paterfamilias* typically gave him a private fund (*peculium*) for his own use (a similar arrangement could be made for trusted slaves). KIRSCHENBAUM, *supra* note 71, at 70-71. In cases where a son *in potestate* breached a contract or committed a delict (tort) for which a monetary remedy was recognized, the *paterfamilias* could be held liable up to the full amount of the *peculium*. WATSON, *supra* note 70, at 22. Conversely, in cases where a son or grandson *in potestate* had a private law claim arising out of a breach of contract, the *paterfamilias*, not the son, had the right and standing to sue for damages at law. NICHOLAS, *supra* note 42, at 68.

⁷¹ DIG. 11.5.4 (Paulus, Ad Edictum 19); *cf.* WATSON, *supra* note 70, at 22. To clarify, one's *paterfamilias* was not necessarily his (or her) father, but rather the oldest living agnatic male ancestor (e.g., a paternal grandfather). As Barry Nicholas observed, a Roman *paterfamilias* traditionally had the power of life and death over his children (including adult children and even grandchildren on the direct paternal line) *in potestate*, analogous to the power of a

Additionally, a delictual (tort) action potentially lay against those who induced a slave or son *in potestate* to play at dice. Paulus maintained that Roman law recognized a cause of action in favor of a slave owner or father (*paterfamilias*) whose slave or child *in potestate* was induced by a third party to gamble. The action was grounded upon either a theory of *iniuria* in the case of a child, or the *actio servi corrupti* in the case of a slave. In the words of John Disney, author of a comprehensive treatise on Roman law on vice, those potentially liable under this law would have included both the owners or operators of backroom gambling establishments (*susceptores*) and those “Common Sharpers, who make a Practice of seducing Youth, and drawing in whom they can to play,” often acting in cooperation with the tavern and innkeepers who promoted gambling.⁷²

V. JUSTINIAN’S PROACTIVE IMPERIAL POLICY AGAINST GAMBLING

With the great legal reformer and codifier Justinian (r. 527-565 CE), came a new trend in Roman gaming law, namely, comprehensive edicts expressly forbidding playing dice (*alea*) in public or private, and specifically providing penalties for owners or operators of establishments where gaming took place—beyond the customary bars to recovery for injury or property loss provided by classical Roman law.⁷³ Justinian is chiefly remembered as the enthusiastic reformer of the Byzantine Empire under whose auspices and careful supervision Roman law was methodically compiled and codified. It is worth adding here that, at the time of Justinian’s ascension to power, the need for administrative, legal and fiscal reform in his domains had never been greater.

Among the crises facing the young and ambitious emperor was a profound economic and social crisis throughout the Empire that threatened the survival of both the small, independent, and tenant farmers whose labors fed the capital and its army, and the provincial town elites (*curiales*) who traditionally maintained local infrastructures and acted as liaisons between local populations and the imperial government. Both groups were literally “on the run” from ruin-

master over a slave. NICHOLAS, *supra* note 42, at 68. With this power came both legal rights and responsibilities; for instance, a right to sue for gambling losses occurred by a son in *potestate* and a corresponding legal obligation to restore winnings by a son (or grandson), it presumably being rare for freeborn Roman women, with their very limited legal capacity) to gamble, in *potestate* up to the amount of the son’s *peculium*. WATSON, *supra* note 70, at 22. Conversely, in cases where a son (or grandson) *in potestate* had a private law claim arising out of a breach of contract, the *pater familias*, not the son, had the right and standing to sue for damages at law. NICHOLAS, *supra* note 42, at 68.

⁷² DISNEY, *supra* note 28, at 280; *cf.* DIG. 11.5.1-2 (*actio servi corrupti*); and Roberts, *supra* note 30, at 581. This recalls the “rooks” who haunted the inns and taverns of medieval and Early Modern Britain, looking for well-dressed targets to cheat in games. Roberts, *supra* note 30, at 581. The involvement of this quasi-criminal element in fleecing gamblers of good family no doubt also inspired a special provision for situations in which a loser at dice had been compelled by force to play or continue playing. Specifically, the one who employed force was made subject to a fine and imprisonment at hard labor. DIG. 11.5.1.4 (Paulus, Ad Edictum 19). Under Justinian, a remedy would ultimately be granted to allow losers under such circumstances to sue the winners at law to recover their losses, notwithstanding their own (technical) culpability under the criminal law prohibition of dicing still on the books.

⁷³ CODE. JUST. 3.43.

ously high taxes and civic burdens, corrupt tax collectors, and numerous other unscrupulous civil and military officials on the imperial payroll in the early sixth-century of the Common Era.⁷⁴

Justinian's mania for reform, meanwhile, was motivated by both the very real economic and social crises of the times and by his belief in his own divine mission to set the affairs of the Empire right. In short, he wanted not only to marry the best of pagan Roman tradition and Christian virtue, but also wanted all his subjects paying their taxes in full and on time, and for all government officials responsible for collecting taxes (and otherwise maintaining order) to perform their duties efficiently, honestly, and with a fatherly regard for the welfare of the subjects—a tall order for his troubled times. In this light, even as it became increasingly obvious that rebuilding the imperial treasury and ending corruption in government were fundamentally incompatible goals in his war-ravaged empire, it is easy to see why Justinian would have looked upon gambling as something to be suppressed as both a moral matter and as an unnecessary drain on the time, energy, and finances of all his subjects.⁷⁵ Thus, he introduced new laws expanding the right of action to recover gambling losses and penalizing clergy who engaged in any form of dicing, as well as punishing the owners of premises where gambling took place.⁷⁶

While in many cases Justinian's edicts merely clarified or filled in the gaps of existing law, in others he actually created new rights and remedies and occasionally even new criminal sanctions for certain classes of gamblers.⁷⁷ In an edict of 529 CE, Justinian cited his reasons for a comprehensive new law on gambling: "The game of dice is ancient and was permitted to soldiers while off-duty, but over the course of time led to ruin under a myriad of new names and variations,"⁷⁸ Justinian opened his edict of 529.⁷⁹ "Some play it," he continued with his rationale, "not knowing anything of the game, except to name the figures on the dice and have lost their property by playing day and night with silver, precious stones and gold."⁸⁰ What comes next and may appear trivial to us, is the emperor's complaint that losing gamblers "dare to blaspheme and

⁷⁴ See generally A.A. VASILIEV, HISTORY OF THE BYZANTINE EMPIRE 324-1453, at 154 (2d ed. 1976).

⁷⁵ JAMES ALLEN EVANS, THE EMPEROR JUSTINIAN AND THE BYZANTINE EMPIRE 29-30 (2005).

⁷⁶ SHELDON AMOS, THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME 175 (1883).

⁷⁷ See Caroline Humfress, *Law and Legal Practice in the Age of Justinian*, in THE CAMBRIDGE COMPANION TO THE AGE OF JUSTINIAN 161, 161-66 (Michael Maas ed. 2005) (on Justinian's concern for "correcting" the "imperfect" law of his predecessors).

⁷⁸ CODE JUST. 3.43.1 in ANNOTATED JUSTINIAN CODE (Fred Blume, trans., Timothy Kearley, ed., 2d ed. 2010), available at <http://uwacadweb.uwyo.edu/blume&justinian/Code%20Revisions/Book3rev%20copy/Book%203-43rev.pdf> [hereinafter CODE JUST.].

⁷⁹ CODE JUST. 3.43.1 in S.P. SCOTT, THE CIVIL LAW 12:342 (1932), available at <http://www.constitution.org/sps/sps12.htm> [hereinafter SCOTT]. Note that here I have deviated from the standard translation by Justice Fred Blume in several respects: namely, the original Latin *extra operas pugnantis* supports a translation of "off duty . . . soldiers," not the vague and meaningless "contenders" of Blume's translation, thus following Scott's older and less widely accepted translation; and I have substituted "prescribe," a term still in usage in civil law jurisdictions to refer to the period of time which a claim may be brought in court (similar to a statute of limitations at common law).

⁸⁰ SCOTT, *supra* note 80, at 12:342.

they execute duebills,” when they are forced to grapple with the consequences of their misconduct.⁸¹ We shall see soon, however, that this, for Justinian at least, was significant.⁸²

Justinian then set out his new law:

Desiring, therefore, to look after the interests of our subjects, we ordain by this general law, that no one shall be permitted to play in private or public places, either in appearance or in earnest. If this order is violated, no penalty shall follow, but lost money shall be repaid and recovered in a proper action brought by those who have lost, or by their heirs; and in case they fail to bring such actions, then in actions brought by the fathers or defenders of the cities, which shall not [prescribe] except in fifty years. The bishops of the places shall inquire into these matters, using the help of the presidents. They shall further arrange for five games: leaping, pole-vaulting, throwing javelins or pikes, wrestling and show fighting. But no one shall, even in these games, risk more than a gold piece, although he is very rich, so that when anyone happens to be best, the loss may not be great.⁸³

Later the same year (529 CE), the emperor supplemented his edict as follows, in a missive directed to one of his provincial governors:

We also prohibit (the game with) wooden horses; if any one loses in it, he may recover the loss. The houses of those where these games are played shall be confiscated.

- 1) If a person who lost refuses, however, to reclaim his loss, our procurator shall make investigation and employ the amount recovered on public works.
- 2) The judges must also take care that all blasphemy and perjury, which should be suppressed by them, may cease.⁸⁴

Finally, five years later, Justinian supplemented this edict with a statutory bar on gambling by members of the clergy, with penalties ranging from suspension for first-time offenders to defrocking, which entailed loss of attractive legal privileges and exemptions granted clergy since the reign of Constantine and were a major inducement to many for seeking careers in the church.⁸⁵

Dealing first with the edict of 529, a twofold policy concern seems to have lain behind Justinian’s first imperial edict: (1) the concern for the financial protection of losers, their dependents and (for the curial elites, especially) their estates, from their own folly; and (2) the concern for the public morals generally (e.g., idleness, cursing, and “blasphemy”). The former concern is obvious, particularly with reference to propertied *curiales*—local elites who comprised an actual legal class or order and who by law bore the brunt of financial and logistical burdens of local administration in the Byzantine Empire, from tax collection to ensuring a ready supply of military manpower and corvee labor to maintenance of infrastructures at the local level.⁸⁶ Already in flight from their duties, sixth-century *curiales* were essential to administration at the local and provincial levels and were literally being bound to their home cities by increasingly rigorous legal sanctions.⁸⁷

⁸¹ CODE JUST., *supra* note 79, at 3.43.

⁸² See *infra*, pp. 24-25.

⁸³ CODE JUST., *supra* note 79, at 3.43.

⁸⁴ CODE JUST., *supra* note 79, at 3.43.2.

⁸⁵ *Id.* at 3.43; cf. DISNEY, *supra* note 28, at 277.

⁸⁶ See VASILIEV, *supra* note 75, at 154, 160.

⁸⁷ See BOWERSOCK ET AL., *supra* note 4, at 530.

Justinian's concern for public morals, though it may seem self-evident to us today, accustomed as we are to the vigorous and primarily religious opposition to legalized gambling in the United States and Canada, in fact evolved from centuries of pagan Roman philosophical thinking that condemned gambling, at least in excess.⁸⁸ As David Schwartz pointed out, there was no express Biblical prohibition or even censure of gambling. Furthermore, Christianity was very slow to develop a specific anti-gambling dogma.⁸⁹ Throughout the Middle Ages in the West, official suppression of gambling was sporadic, the first instance being a provision of Charlemagne in the ninth-century punishing gambling with excommunication, both for clergy and lay Christians. The later Code of Chivalry, in its most developed phase, merely condemned excessive gambling by knights, especially where the object of the game in question was financial gain.⁹⁰ Even the rigid seventeenth-century Calvinistic theology that informed the development of criminal law in colonial New England did not recognize anything inherently immoral or ungodly about gambling per se, but rather viewed gambling—in all of its forms—as a species of diabolical idleness that distracted people from prayer and preparation for the hoped-for afterlife with God in Heaven.⁹¹

Justinian's moral and religious policy objectives also embraced "blasphemy." This term had a range of meanings in the sixth-century, from false-swearing before God to cursing and to heresy. While it may appear to us to be merely a matter of public decency, or perhaps judicial control, it was a matter of utmost seriousness to Justinian. The emperor, whose reign (both alone and jointly with his uncle Justin) was marked by a number of natural and man-made disasters, from earthquakes and famine to war, was convinced that such catastrophes were the result of divine wrath against mankind for blasphemy in all of its forms.⁹² To stop this dangerous practice, as he saw it, he went so far as to promulgate yet another edict in 529, imposing the death penalty for blasphemy in any form.

In short, Justinian's concern for suppressing gambling—or at least limiting what he perceived as its most deleterious effects—was informed both by social and economic policy concerns and by a concern for public morals in a very broad sense. This latter objective partly reflected a centuries-old philosophical, moral theme that condemned gambling, and dicing in particular, as an inappropriate use of one's leisure time (*otium*), and also associated dicing with lower-class establishments, shady characters, and even criminals.⁹³ Justinian appar-

⁸⁸ SCHWARTZ, *supra* note 1, at 33.

⁸⁹ *Id.* In fact, the only Christian writer to condemn gambling—or more precisely, dicing—was the pseudo-Cyprian's sermon entitled *de Aleatoribus*, warning the flock of the dangers of risking their property on a roll of the dice. While the anonymous author of the sermon attributes the temptation to gamble to the devil, he nowhere cites Biblical authority for this assertion. Rather, he views gambling as a gateway of sorts to more grievous sins such as lying, stealing, greed and sloth, hence the role of the devil as an instigator.

⁹⁰ *Id.* at 36-37.

⁹¹ *Id.* at 40.

⁹² LEONARD LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 50 (1st ed. 1993).

⁹³ See *supra* Part II; cf. ROBINSON, *supra* note 15, at 92 (gamblers as "dubious persons" along with actors, astrologers, philosophers, charioteers and gladiators). In fact, Justinian

ently thought that gamblers were exceptionally prone to “blaspheming” in order to continue playing or to satisfy impossibly large debts. While this may appear trivial today, blasphemy and false oath-swearing was deemed a grave sin capable of bringing divine wrath against a community or an entire empire.⁹⁴

Let us analyze Justinian’s first imperial edict on gambling piece-by-piece. To start, correcting the perceived social evils associated with dicing, in addition to reiterating an existing (if widely ignored) criminal statute against it, involved creating both a broader right of action for the loser and attempting to negate the financial advantages of winning—in other words—to de-incentivize success at dicing. It is significant that losers in dice games (if not in other types of wagers) were not penalized by Justinian’s edict of 529. In fact, not only were they spared from state legal sanctions, they were expressly given a right of action against the “winners,” which right of action continued in favor of their heirs, and against the winner’s heirs, for a period of fifty years.⁹⁵

Why was Justinian not content with the existing law granting the *paterfamilias* of the loser a right of action against the winner and conversely guaranteeing losers a limited right of action against the master or *paterfamilias* of a winner who was a slave or son *in potestate*? First, this was because of the very limited circumstances under which such actions were allowed under pre-existing Roman law, which required either the winner or the loser to be a slave or son *in potestate* under the classical Roman law of Persons. Second, recovery in suits to recoup losses brought against the winner’s master or *paterfamilias* would probably have been limited to the amount of the slave or son’s *peculium*, property allowed to him for his use by his *paterfamilias*, who still retained ownership thereof.⁹⁶ Third, the uniquely Roman institution of *patria potestas*—the absolute legal power of a *paterfamilias* over his children (or grandchildren)—had all but died out by the sixth-century.⁹⁷

Lest the loser be unwilling to sue for his losses under these circumstances (quite possibly out of fear of violence to his person), Justinian enjoined that the imperial procurator take over the matter and essentially convert it to a public

specifically imposed the duty of suppressing “blasphemy,” at least in the form of false-swearing” in the courts, on judges. CODE JUST., *supra* note 79, at 3.43.2.

⁹⁴ See LEVY, *supra* note 93, at 50.

⁹⁵ CODE JUST., *supra* note 79, at 3.43.1.

⁹⁶ See DIG. 11.5.4 (Paulus, ad Edictum 19). We may deduce this by analogy, from the jurist Paulus’ opinion that the amount recoverable from the owner of a slave who won at gambling was limited to the amount of the latter’s *peculium*, or money technically owned by the master but freely available for the slave’s use, a similar fund being available to sons *in potestate*, though legally the property of the *paterfamilias*. For a general discussion of the parallels between the legal position of slaves and sons *in potestate* under Roman law, see KIRSCHENBAUM, *supra* note 71 at 33.

⁹⁷ The age-old Roman institution of *patria potestas*—i.e., the power of the *paterfamilias* over the lives and even the earned or independently acquired property of his children (or grandchildren)—had eroded in the period between Constantine and Justinian, even as the power of sons (or grandsons) *in potestate*, especially those serving in the military or civil service, over the *peculium* was extended by a series of imperial decrees. See TELLEGEN-COUPERUS, *supra* note 52, at 127. Justinian would ultimately decree that a child *in potestate* (although not that of a slave) owned and controlled all property in his (or her) *peculium* except that which was directly given by the *paterfamilias*. *Id.*

prosecution.⁹⁸ Finally, only a very broad right of action, strengthened by the anticipated involvement of state or church officials in bringing the action in question, would achieve Justinian's double goal of protecting losers (especially those of curial rank) and their families financially and simultaneously de-incentivizing gambling by penalizing winners.⁹⁹ While he essentially followed earlier Roman law by allowing betting on "contests of strength," Justinian provided that no one, not even the wealthiest gamblers, could be permitted to lose money beyond one gold piece, so that even if one should lose a bet, he might not sustain a severe loss.¹⁰⁰ Bishops of the Empire were charged with investigating such instances of losses at dicing and to call in state security forces to aid them. City prefects and prosecutors at the local level were likewise enjoined to undertake civil actions on behalf of losers in dice games when they or their heirs were unwilling or unable to take action to recoup money lost, or so it appears from a provision of Byzantine canonical law.¹⁰¹

In fact, merely watching dice games was technically illegal under Justinian's decree, although neither spectators nor (as noted above) the gamblers themselves were subject to a criminal penalty for observing gambling by others. The law was different for clergy, however. Bishops and clergy who engaged in or even passively observed dice games were subject to additional penalties: namely, suspension of administrative and pastoral duties, temporary retirement to a monastery for first-time offenders, and de-frocking for repeat offenders.¹⁰² De-frocking in the sixth-century Byzantine empire entailed more than merely shame or concern for one's fate in the hereafter; loss of one's status as a bishop or cleric in the Byzantine empire meant loss of certain attractive legal exemptions from taxes, military service, and burdensome curial duties in one's hometown.

VI. CRACKING DOWN ON THE "HOUSE"

The proemium to the section of Justinian's edict dealing with gambling refers specifically to the places in which gambling typically occurred in his day, including both public squares and private homes where gambling took place with the knowledge and likely encouragement of the host.¹⁰³ The prohibi-

⁹⁸ CODE JUST., *supra* note 79, at 3.43.1-2.

⁹⁹ The question arises, however, whether and to what extent losers or their heirs actually availed themselves of this right of action, both for fear of harm to their persons from winners and because the courts of Justinian's empire were notoriously clogged with back-logged cases and if anything private litigation was generally discouraged. *See* BOWERSOCK ET AL., *supra* note 4, at 530.

¹⁰⁰ Specifically, he allowed betting at ecclesiastically-organized games of leaping, pole-vaulting, javelin-throwing, wrestling and show-fighting, but set a strict limit on wagering of one gold piece. CODE JUST., *supra* note 79, at 3.43.1.

¹⁰¹ NOMOC. 13.28. The latter, used by Mommsen and Krueger in their edition of the *Codex Iustinianus* to elucidate uncertain passages, however, stipulates a statute of limitations of only thirty years for such actions. CORPUS IURIS CIVILIS 2, 147 n. 2 (1923).

¹⁰² *See* CODE JUST., *supra* note 79, at 3.43.1

¹⁰³ *Id.* (*proprias substantias perdiderunt die noctuque ludendo in argento apparatu lapidum et auro*). A cynic might argue that perhaps wealthy homeowners, quite possibly aristocratic senators or the powerful and immensely rich private landlords who proved so difficult for imperial officials to control, were the primary targets of these newly created sanctions, there

tion pronounced—or better, reiterated with greater force—by Justinian not only prohibited dicing, but also imposed additional legal penalties on those onlookers or officials who failed to intervene and stop the game.

Justinian enumerated further sanctions against those who played “wooden horses” (*equi lignei*)—apparently a popular dice game in the sixth-century—with the primary target of this prohibition being most likely either experienced “professional” gamblers, who made their living by dicing, or (especially) the owners or operators of gaming establishments.¹⁰⁴ While the loser was entitled, and indeed strongly encouraged, to recoup his losses in the courts, the premises where the dicing took place were to be seized and sold at public auction.¹⁰⁵

So what did Justinian’s new provisions actually do that pre-existing legislation or established practice (enshrined in the Praetor’s Edict and the *responsa* of second- and third-century imperial jurists) did not? In short, they subjected not only the gambler himself, whether winner or loser, to criminal penalties, but also penalized the owner or operator of the premises on which the gambling took place with confiscation of his property, at least in cases where the popular game of “wooden horses” was being played on the premises.¹⁰⁶ Finally, if the loser or his heirs should be reluctant to press suit in the case of cheating by the winner (or possibly “the House” or someone working closely with the owner or operator of the premises), it was incumbent upon state officials to pursue the legal action for recovery of losses set out in the emperor’s edict.¹⁰⁷ In any case, the home or establishment where the crooked dicing took place was liable to confiscation by operation of law. In summary, this edict marks a major leap forward from a mere statutory bar to recovery for injury, theft, or property damage for the House, to active state penalization of gambling operations through closure and confiscation of property where gambling occurred.

VII. CONCLUSION

Ancient Romans traditionally frowned on gambling, yet seemed widely to indulge in it, at least if we may trust the literary sources of the Republican and imperial periods. The fundamental objection of elite Roman writers to gambling, from Cicero to Seneca to Ammianus Marcellinus, to playing at dice was not because it was immoral as we understand the term, but rather because it was a breach of decorum and derogation of duty, especially when aristocrats frittered away their time and fortunes in dice-playing. Meanwhile dice-playing by non-elites was viewed by Roman writers—depending upon the circumstances—as financially irresponsible, opportunistic, and in some cases even predatory.¹⁰⁸ In fact, habitual or “full-time” gambling was particularly associated

being a political as well as a financial advantage to penalizing and confiscating the property of someone who actively or potentially challenged his rule. For Justinian’s confiscations of the property of real or imagined political enemies, see PROCOPIUS, *SECRET HISTORY* (2010).

¹⁰⁴ CODE JUST., *supra* note 79, at 3.43.2; DISNEY, *supra* note 28, at 278-80.

¹⁰⁵ CODE JUST., *supra* note 79, at 3.43.2.

¹⁰⁶ *Id.* Justinian apparently eliminated the fines of four-times the stakes, which had been part of the Roman law perhaps as early as the Republic.

¹⁰⁷ CODE JUST., *supra* note 79, at 3.43.1-2.

¹⁰⁸ Satirists of the imperial era such as Juvenal and Persius added as objections social irresponsibility (Juv. *Sat.* 1.88-93) and the social double-standard that seemed to sanction or at

with the lower classes, especially those habitués of disreputable taverns and inns that relied on crooked dice games for a living. Conventionally lumped in writers' imagination with actors, pimps, and gladiators, all purveyors of "low" (if popular) entertainment, habitual *aleatores*, winners and losers, were portrayed as variously foolish, idle, or downright shady.

Not surprisingly, the Romans made dicing illegal, albeit with statutory exceptions for wagers on "contests of manhood." Enforcement of Roman criminal sanctions, however, was sporadic, and the primary legal disincentives to engaging in or facilitating illegal gambling came from the private law realm—specifically, the annual praetor's Edict, which was subsequently enshrined in the official opinions of imperial jurists and ultimately in the Code of Justinian. The private law expressly granted rights of action in favor of masters and fathers of sons *in potestate* (regardless of age or mental capacity) to recover for gambling debts incurred by their slaves (under a tort theory of corruption) or un-emancipated sons (under the rubric of *iniuria* or "insult"). Also permitted by private law were rights of action against masters or *patres familias* for sums won by their slaves or sons in dice games. On the other hand, rights of action under the civil law for theft, property damage, or even personal injury were specifically barred for the owners or operators of establishments, including private residences that allowed or facilitated illegal dice games.

By Justinian's time, the suppression of gambling in general, and *alea* in particular, had become more of a priority. On the whole, Justinian's legislative program reiterated and reinforced existing Roman law on gambling, and in some instances expanded it by granting, among other things, a general right of action to all losers in illegal dice games to sue winners for return of the lost property. To what extent he or his officials actually expected these laws, or the new private rights of action he sanctioned, to be enforced in practice and to be pursued by individual "losers" in the already clogged courts of his Empire, however, is impossible to say with any certainty. It is clear that Justinian viewed gambling as a social evil—or more precisely, a syndrome of social evils from financial ruin to blasphemy—to be suppressed to the maximum extent possible given the comparatively limited administrative resources of his domains.

In short, we have observed a profound shift in policy—if we may use this term with reference to Ancient Rome—from a narrow concern for protecting elites, and especially elite youths, from the dangers (real or imagined) of social disgrace, financial ruin, and corruption by their social inferiors, to a much broader concern for the safety of the empire as a whole. If we consider Justinian as the last Roman emperor, as he himself certainly did, he saw the Empire threatened not only by gambling, but also by plagues, famines, and disasters. The only response to these crises, as he saw it, was to crack down on all but "token" betting, and especially those who either promoted gambling for profit or cynically exploited clerical office to evade civic obligations while simultaneously persisting in the prohibited pastime.

least excuse dice-playing by emperors, senators, and other elites and condemn the same conduct by commoners (PERS. Sat. 3.48-50). See Purcell, *supra* note 14, at 10.

