INIURIA

1. Before we get to the problem of the praetor and the poor specifically, I'd like to do a relatively straightforward number on the concept of *iniuria* as it exists in the classical jurists.

2. You will recall that Gaius tells us that there are four kinds of delicts: *furtum*, *vi bonorum raptorum*, *damnum iniuria datum*, and *iniuria*. The fact that the word *iniuria* appears twice in the list suggests some problems with origins to which we must return, but Gaius doesn't deal with the problem here. For him, *iniuria* all by itself is a separate type of delict. The wrongdoer must have acted intentionally, and the injury (note our development of the same word) that he did can be either physical (like our assault and battery) or non-physical (like our libel and slander). What I would like to do right now is to see if we can burrow into this concept more extensively and get some kind of sense of what the jurists really thought was involved.

3. The development of the edict on this topic can probably be traced from the fragments in the Digest 47.10, the title *de iniuriis et famosis libellis*, extensive extracts from which are given in the *Materials* sec. 7 [not inlcuded in this year's *Materials*]. The first step is outlined in Aulus Gellius, relying on Labeo, who tells us that the XII Tables provision on 25 asses for *iniuria* was replaced by an edict in which the praetor "made an edict that they would give *recuperatores* for estimating *iniuria*." In all probability this applied only to physical injury, because Labeo (quoted in Ulpian, D.47.10.15.1) tells us that assault (as opposed to battery) was treated with an *actio utilis*, not the basic pretorian action.:

   D.47.10.15: "*ULPIANUS, Edict,* book 77: The question is also raised by Labeo whether, if a person derange another's mind by a drug or some other means, the action for insult lies against him; and he says that it does. **1.** If someone be not in fact struck but hands are raised against him and he is frequently afraid of a beating, though not in fact struck, the wrongdoer will be liable to an *actio utilis* for insult."

4. What happened next?

   a. The next steps in the edict cannot be precisely dated. One may suspect that they were already in the edict by Labeo's time, but we cannot be sure about all of them: "One who is said to have loudly shouted at someone (*convicium cui fecisse*) contrary to sound morals or one through whose efforts such shouting is effected contrary to sound morals, against him I will give an action." (D.47.10.15.2) As the succeeding sections make clear this means "assembling at somebody's house and raising an insulting and abusive clamor." (Schulz, p. 394)

   b. The next clause does not survive, but the language of D.47.10.16–23 suggests what some of its language might have been. *Attemptare pudicitiam* means something like our "accosting." The description suggests that we are dealing with an offense not unlike our stalking. It can only be committed against a respectable woman or young man. It can be committed either by following or accosting such a person or by removing her or his companion.

   c. "Let nothing be done for the sake of defaming. If anyone acts to the contrary, I will deal with it according to the nature of the issue." (D.47.10.15.25–28):

      25. The praetor says: "In order that nothing be done that is shaming, if anyone act to the contrary, I will deal with it according to the nature of the issue." **26.** Labeo says that this particular edict is superfluous since we can proceed under the general edict on insults.

But it appeared to Labeo himself (and he says so) that the praetor wished to speak specifically of this matter; for things which happen and merit redress may appear to be ignored unless they are specially mentioned. **27.** The praetor bans generally anything which would be to another's disrepute. And so whatever one do or say to bring another into disrepute gives rise to the action for insult. Here are instances of conduct to another's disrepute: to lower another's reputation, one wears mourning or filthy garments or lets one's beard grow or lets one's hair down or writes a lampoon or issues or sings something detrimental to another's honor. **28**. When the praetor says, "if someone act to the contrary, I will deal with it according to the nature of the issue," this means that the praetor has the widest discretion so that if there be anything that influences him in the person of the plaintiff or of the defendant or in the nature of what was done or in the scale of the affront, he will not hear the plaintiff.

d. "Where a man shall be said to have thrashed another's slave or to have submitted him to torture, contrary to sound morals, without the owner's consent, I will give an action. Equally, if is be said that something else be done, I will, according to the circumstances, give an action." (D.47.10.15.34)

5. What did the jurists do with this? In the first place, they lovingly elaborated the basic clauses. The action for defamation was particularly expandable. Particularly interesting are the texts dealing with defamation of credit: D.47.10.15.32.–3: "32. Similarly, if someone announce that he is selling a pledge to denigrate me, as though he had received it from me, Servius says that I can bring the action for insult. 33. If someone summon a nondebtor as if he were a debtor, by way of insult, he is liable to the action for insult." D.47.10.19: "If my creditor, whom I am ready to pay, to my discredit, should call upon my verbal guarantors, he will be liable to me in the action for insult."

6. They also debated its bounds:

a. D.47.10.11.9 "9. There can be no doubt that the action is available to one alleged to be a slave but who maintains his free status against the man who declares himself his master. This is true whether the prospective plaintiff is being claimed from liberty into slavery or himself is asserting his freedom out of slavery. For here we make no distinction."

b. D.47.10.13.7 "7. If someone prevent me from fishing in the sea or from lowering my net (which in Greek is *sagene*), can I have an action for insult against him? There are those who think that I can. And Pomponius and the majority are of opinion that the complainant's case is similar to that of one who is not allowed to use the public baths or to sit in a theater seat or to conduct business, sit or converse in some other such place, or to use his own property; for in these cases too, an action for insult is apposite. The older jurists, however, gave a tenant, assuming that he was a state tenant, the interdict since there is a prohibition on the use of force to prevent a tenant enjoying what he has hired. Now what are to say if I forbid someone to fish in front of my house on my approaches (*praetorium*)? Am I or am I not liable to the action for insult? In this context, it has been frequently stated in rescripts that the sea and its shores, as also the air, being common to all, no one can be prohibited from fishing; no more can a person be from fowling, unless it be a case where he can be barred from entering another's land. However, the position has been adopted (by landowners), although with no legal justification, that one can be banned from fishing before my house or my approaches; hence, if someone be so barred,

there can, in those circumstances, be an action for insult. But I can prohibit anyone from fishing in a lake which I own."

c. D.43.8.2.9 "9. If anyone is prevented from fishing or navigating in the sea, the interdict [to prevent things being done in public ways or places] will not serve him, any more than it will the person who is prevented from playing on the public sports ground, washing in the public baths, or being spectator in the theater. In all these cases, an action for injury must be employed." D.19.1.25: "The buyer of grapes on the vine, if he should be prevented by the seller from gathering the grapes and then sued for their price, may employ against him the defense 'unless the money in question is sought for something sold and not delivered'. However, if after delivery he should be forbidden to tread the crop of grapes or to take away the unfermented wine, he may bring an action for production (*ad exhibendum*) or for insult, just as if he were forbidden to take away any other property of his." The problem of the requisite intent. Texts 9 through 12 (I may have missed one of Schulz's; yes, I did, this is the one missed:).

d. (Note D.25.4.1.5 is dependent on the SC Plancianum (sometime prior to Hadrian) described in D.25.3, which is a procedure for a divorced wife to force her ex husband to recognize his paternity over the child she is carrying. The procedure described here is the reverse; the husband claims that the ex-wife is pregnant; she denies it. It is based on a rescript of the *divi fratres*, ? Marcus Aurelius and Antoninus Pius.)

e. D.47.10.18.4 (Watson trans.): *Paul, Edict, book 55* But when someone thinks a son-in-power to be a head of household, he cannot be regarded as insulting the son's father any more he insults her husband when he thinks a woman to be a widow; for no insult is directed to their person, and there can be no transferring of the imputation to them from the person of the son since the intention of the insulter (*affectus iniuriam facientis*) is directed to the son as being a head of household.

This would seem to contradict 47.10.15.15: "If someone accost maidens, <if, moreover, they be> in slave's garb, his offense is regarded as venial, even more so if the women be in prostitute's dress not that of a matron. Still if the woman be not in the dress of a matron and someone accost her or abducts her attendant, he will be liable to the action for insult." Schulz, on the one hand, argues that *adfectus iniuriam facientis* in the preceding text is interpolated but that 47.10.15.15 states the opposite of the classical rule, whereas Paul states the classical rule. My own view is that Paul is stating Paul's rule (note how he emphasizes subjective intent in some of his material on the *lex Aquilia*).

7. The penal character of action. (1) Neither actively nor passively transmissible (G.4.112 on active, no delictual action is passively transmissible; D.37.6.2.4 is a nice illustration of the point in the context of hotchpot). (2) Joint, several and cumulative liability. (3) Cumulation of *iniuria* and other delictual actions.

8. Relationship to the *lex Cornelia de iniuriis.* By and large we really don't know, but this should not prevent us from trying. In all probability the action that the praetor gave was both concurrent and broader.

9. Is this the reason why there is no protection of the free man's body? See how the mind works, from the XII to the praetor's expansion. Because of the focus on defamation we ignore

negligent injury to the person. If so, it is not an altogether happy creation. (This is Schulz's idea, and I think it may be right.)

VEXATIOUS LITIGATION

1. Gaius, 4.171–181 gives us the basics.

"**171.** Rash litigation (*temeritas agentium*, restored from JI.4.16.pr–1) on the part of both plaintiffs and defendants is restrained in some cases by a pecuniary penalty, in some by the sanctity of an oath *iusurandi religione*, and in some by fear of infamy. ... [approximately 25 illegible letters]. Restraint by pecuniary penalty is exercised on defendants in certain cases by the liability in the action being doubled if liability is denied: examples are an action on a judgment debt, or on a payment by a sponsor, or for wrongful damage to property, or on a legacy left by damnation. In certain other cases there is permission to enter into a *sponsio*, as in the *actio certae creditae pecuniae* and the *actio de pecunia constituta*, *sponsio* being in the former action for one third and in the latter for one half. **172.** But where the defendant is subjected to the risk neither of a *sponsio* nor of double damages, and the action is not one which from the very outset is for more than simple damages, the praetor permits an oath to be exacted from him to the effect that he is not denying liability vexatiously. Hence, though heirs and those standing in the place of heirs are liable to no pecuniary penalty (?) and women and pupils are excused from the risk of *sponsio*, the praetor nevertheless requires them to take the oath. **173.** Actions which from the outset are for more than simple damages are, for example, the *actio furti manifesti* for fourfold, that for *furtum nec manifestum* for twofold, those for *furtum conceptum* and *furtum oblatum* for threefold. For in these cases and in some others the action is for more than simple damages, whether the defendant denies or admits liability.

"**174.** Vexatious litigation (*calumnia*) on the part of plaintiffs is also subject to restraint, sometimes by a *iudicium calumniae*, sometimes by a *iudicium contrarium* sometimes by an oath, sometimes by a counter *stipulatio*. **175.** The *iudicium calumniae* is allowed in response to any kind of action; it is for a tenth of the amount claimed, except that against an assertor of another's liberty it is for a third. **176.** Defendants are free to choose between resorting with a *iudicium calumniae* and exacting an oath that the action is not being brought vexatiously. **177.** A *iudicium contrarium* exists only in certain cases-where the action is an *actio iniuriarum*, or where a woman is sued on the allegation that, having been put in possession on behalf of her child *in utero*, she has fraudulently transferred possession to someone else, or when an action is based on the allegation that the plaintiff was sent into possession by the praetor, but was not admitted by the defendant. The action is for a tenth when it is in face of an *actio iniuriarum*, but for a fifth in face of the two other actions mentioned. **178.** The restraint exercised by a *iudicium contrarium* is the more severe. For in the *iudicium calumniae* a man is not condemned in the tenth unless he knows he is suing unjustifiably and has brought the action merely in order to annoy the other party, trusting for success to some mistake or injustice on the part of the *iudex* rather than to the true merits of his case. For *calumnia*, like *furtum*, depends on intention. On the other hand, in a *iudicium contrarium* a plaintiff who has lost his action is condemned in all cases, even if he mistakenly believed his suit to be justifiable. **179.** Naturally in those cases in which a *iudicium contrarium* is possible a *iudicium calumniae* is also open; but one may bring only one or other. Upon the same principle, if an oath disclaiming *calumnia* has been exacted, just as a *iudicium calumniae* is not allowed, so the *iudicium contrarium* ought not to be. **180.** In some cases a penal counter-*stipulatio* is entered

into; and just as in a *contrarium iudicium* a plaintiff who has lost his case is invariably condemned, without inquiry as to whether he was aware that his suit was unjustified, so here, if he has failed in his suit, he is invariably condemned in the penal sum of the counter-*stipulatio*. **181.** A plaintiff who incurs the penalty of a counter-*stipulatio* is not faced with a *calumniae iudicium*, nor is he required to take the oath. And in such a case a *contrarium iudicium* is clearly inapplicable."

2. The rules that Gaius gives are complicated. They vary considerably depending on the kind of action. The penalties that one could incur by defending an action that one loses have a rather perverse effect. The person who is guilty as heck doesn't have to pay them. The one who has a closer case may have to pay them. For those actions that were not covered with a specific penalty, the oath of calumny could be demanded of the other party by either the plaintiff or the defendant. These oaths could then be sued on after the litigation was over, but the party bringing the suit had to prove vexatious or calumnious intent.

3. That the plaintiff who loses should suffer some consequences is a notion that goes back to the *sacramentum* procedure of the *legis actiones*. Other forms of *legis actio* also had that feature, though perhaps not all. In the case of the archaic procedure what may be at stake is the fact that the sanctions are religious. In the classical procedure it may be that what we're making up for is the absence of any system for taxing costs. Mixed in with this, however, is a notion of motivation: deliberately raising the cost of a lawsuit or deliberately imposing the cost of a frivolous lawsuit.

4. It would seem that the classical law took one further step, though it is not recorded by Gaius: **D.3.6.1.**ULPIAN, *On the Edict*, book 10: An *actio in factum* is available against a person who is alleged to have received money to bring or not bring a lawsuit with vexatious intent. Within the year it is for four times the sum he is alleged to have received after a year for the simple amount. **1.** Pomponius writes that it is not only in civil cases but also with criminal offenses that this action has to do, especially as anyone receiving money to bring or not bring a lawsuit vexatiously is also liable under the *lex repetundarum*. *Repetundae* was extortion, later extended to include bribery.

5. Gaius certainly suggests that there was a problem of vexatious litigation. It is possible that class was involved here, though of this we can't be sure.

SOCIAL INEQUALITY AND ROMAN LAW

1. The problem of class bias in Roman law, a recent school of thought. Crook and Kelly belong to it; Peter Garnsey, whose work I didn't give, belongs to the school in spades. The question, of course, is what do you mean by class bias. The Romans did not recognize a principle of the equality of all persons before the law. No legal system I know of does; ours in recent years has come as close as any to recognizing the principle, but we still make many distinctions in our public law between citizens and non-citizens, many in our private law between minors and adults. The extensive nature of the Roman law of persons suggests that equality was not a principle that the Romans paid much attention to, the virtual disappearance of a law of persons from our law perhaps indicates a greater respect for that principle.

2. The recent writings, however, make a slightly different point: it has long been recognized that slaves had virtually no rights in Roman law, that the capacity of a son or a daughter in power was severely limited, that freedmen had diminished capacity, that women at least in some

periods did too, but the traditional view is that the citizen *sui iuris* was, in a very real sense, equal before the law, that one of the great achievements of that law was the amount of freedom which it gave to the individual, at least the male citizen *sui iuris*.

3. Now we might attack this notion in 2 ways:
   a. We might say, as is now becoming fashionable, that freedom and equality are incompatible, that in a society in which there are disparities of wealth, a seemingly equal law will have unequal effects ("The law in its even-handed majesty forbids both rich and poor from sleeping under bridges.") or that in such a society freedom granted to all is simply freedom given to rich to repress the poor, or
   b. We might say that Roman law was in fact not equal, that if we look hard enough we can find plenty of evidence of class bias on the face of the law itself. Both attacks have been made and we ought to say a word about each.

4. As illustrative of the first point take Table 1.1 —> "If the plaintiff calls the defendant to law, let him go. If he does not, let the plaintiff call witnesses. If there is evasion or plying of the foot, let there be laying on of hand." We've faced this problem before and it's obvious enough to any lawyer, what happens if the defendant shakes off the plaintiff's hand and won't go? Kelly argues that this provision means that the weak could not sue the strong. It is indeed remarkable how much of Roman civil procedure prior to the introduction of the *evocatio* (perhaps in the time of Hadrian) is dependent on the *in ius vocatio*. Not only does it lie at the beginning of all civil actions; it also lies at the beginning of any procedure to enforce an interdict, and it also lies at the beginning of any action to enforce a judgment. There are various prohibitions in the law about the use of force to resist legal process, but these too depend on the enforcement of the *in ius vocatio*. It may not be quite true to say that nothing could happen unless the defendant appeared in court. We know that default judgments were possible in *in rem* actions, though we are poorly informed as to how they actually worked. They do not seem to have been possible in personal actions, at least up to the *litis contestatio*, the joinder of issue.
   a. Did it happen? When we dealt with this problem before, I said that there was no evidence that it did. That's not quite true, and we'll look at the evidence in a minute, but the evidence that Kelly presents in his chapter 1 stands in marked contrast to the evidence that he presents in chapter 2, where he talks about bribery and improper influence. Whether that evidence adds up to the proposition that the system was hopelessly corrupt or whether it adds up to the proposition that litigants throughout history have always been prepared to believe the worst, particularly when they lose, is certainly something we can argue about. What we cannot argue about is that the Romans complained continually about improper influences and bribery in the operation of the judicial system. Compared to this the number of instances in which there is evidence that the defendant simply did not show up are remarkably few. Let's take a look at the very little evidence that we have:
   b. Kelly (p. VII.B.13):
      i. A minor rhetorician of the first century of our era named Asconius reports that the censors excluded a man named Antonius (not <u>the</u> Antonius) from the senate in 70 B.C. because he had "ripped off allies of Rome, refused judgment, sold off land

because he was deeply in debt, and did not have control over his goods." Since there were wealth criteria for membership in the Senate, the last two would seem to have been sufficient reason for the action all by themselves. The first would probably be sufficient reason all by itself. The question is what does "refused judgment" (*iudicium recusare*) mean? The term appears quite frequently in the *Digest* and also in Cicero. It seems to have a technical meaning, and it refers to a procedure somewhat like a common-law demurrer. One refuses to enter into a *litis contestatio* on the ground that the plaintiff has not stated a cause of action. As is the case in much of the old procedure, we are not fully informed as to what happens if the defendant guesses wrong. It probably led to a *missio in possessionem*, that is to say, the defendant was treated as not defending the action, and while judgment was not rendered against him for the default, the plaintiff was authorized to seize the defendant's goods. What we do know is that refusing judgment wrongfully could lead to *infamia*. Now, I must confess that I do not understand why Kelly (who says all of these things) automatically assumes that Antonius had done something more, had physically resisted a summons. His evidence for this is a joke, a scene in Plautus's *Poenulus* where the putative defendant in a case says that he'll hang himself rather than going to law, and one of the characters doing the summoning asks him if he is refusing judgment. If I've got it right, we can put the joke into our own terms by imagining a scene in which a process-server shows up, the potential defendant says "don't give that to me; I'll shoot myself if you do" and the process-server says "Are you demurring to the pleadings or demurring to the evidence?"

ii. The second scene may or may not be historical—both have been argued. It appears in Seneca's *Controversiae* (10.1.30), though it seems to refer to an earlier period. (below). A poor man's father has been murdered. The father had been overly frank in his speech and had offended a rich man. The son suspected the rich man of having had his father killed. The son follows the rich man around in mourning clothes. The rich man finally turns on the poor man and says "If you think I killed your father, why don't you prosecute me?" "What me, the poor man says, a poor man prosecute a rich man?" Later in describing what had happened to crowd, the poor man makes clear that the rich man thinks of himself as being above the law. His threat was, he says: "What would I not dare to do to you if you accused me, when I had a man killed who only had a quarrel with me?" The follow-on of the story is interesting. The poor man succeeds in persuading the crowd that the rich man is a murderer, and the rich man is defeated in an election. The rich man then turns around and sues the poor man for *iniuria*, and we don't know what he result of the suit was.

iii. I agree with Kelly that much in the Roman law of *iniuria* reflects shaming practices that are used to bring social pressure on people who cannot be reached in another way. It may well be that the *actio iniuriarum* was expanded to cover just these situations. I also agree with Kelly, though he does not make as much of it as I would that the existence of such practices cuts in two different directions. It shows, in the first place, that social sanction could be a powerful force, particularly in the Rome of the late Republic. It also shows that the praetor was

making efforts to move the action off the streets and into the courts. Notice how Paul says in D.47.10.18.1 says: "It would not be right and proper that a person should be condemned for putting to shame a wrongdoer; for the sins of those who do wrong should be noted and noised about." Whether that means that upper-class values would then prevail is a matter about which one may argue.

c. There is so much that we don't know. That Roman society of the two centuries B.C. and A.D. had huge amounts of vertical distance, no one would deny. That litigation was largely an upper-class activity seems likely. All civil litigation between citizens had to pass through one praetor in a city of a million people. Whether the litigation system was consciously designed to exclude the poor or the less powerful seems to me to harder to show. That the barriers to a poor man suing a rich man were insurmountable has not, in my view, been shown, though it is possible.

5. Now the phenomenon that Peter Garnsey (*Social Status and Legal Privilege in the Roman Empire*; not in this year's mats.) is talking about is clearly a conscious one. The thesis of his book is that the law of the later Empire was just shot through with provisions designed to establish and maintain a class system.

   What is his evidence?

   a. The dual penalty system in criminal law.

   b. Appointment of judges from the upper classes.

   c. Differentiation in the marriage rules.

   d. The rules about *iniuria*.

   e. Soldiers as a privileged class.

   All of these phenomena exist and to these we can raise a number of objections:

   a. He doesn't say anything about property, contract and most of tort. The realm of private law is relatively free of this kind of penetration.

   b. His system of classes is weird: senators and equestrians, decurions, magistrates and soldiers; there are privileges of office, privileges of wealth, privileges of education. The class system he is showing us is complex; it won't fit the simple model he at times wants us to force it into, and save for the dual penalty system (which even our own law has not been able to get away from) he really doesn't demonstrate any systematic denial of justice.

6. Roman society like most complex societies had disparities in wealth, power and influence. We should be on guard for instances where the elite may be using the law or allowing the law to work to their advantage as a group, but let us not, at least not yet, go overboard.

Seneca the Elder, *Declamations*, (*Controversiae, Suasoriae. Fragments*). ed. Michael Winterbottom. 2 vols. Loeb Classical Library (Cambridge1974), 2:369–389 [odd pp. only]. (Copied and reformatted from https://www.loebclassics.com/view/seneca_elder-controversiae/1974/pb_LCL464.373.xml.)

This is a collection of set-pieces used as exercises in the rhetorical schools. Seneca the Elder (father of the Stoic philosopher) died in 39 AD. All of the names of rhetoricians that he mentions seem to have been roughly contemporary with him, perhaps slightly older, and hence from the Augustan period. The arguments made in the case are summarized under the names of the rhetorician who is said to have made them. At the end Seneca offers some commentary on the rhetorical techniques that the rhetoricians used. Winterbottom's notes are helpful at explaining what otherwise could be quite cryptic and obscure.

[p.369] **Controversiae 10.1**

1

The Grieving Poor Man's Son who Followed the Rich Man[1]

An action may lie for injury.[2]

A man who had a son and a rich enemy was found killed, though not robbed. The youth, dressed in mourning, began to follow the rich man about. The rich man took him to court, and demanded that if he had any suspicions he should accuse him. The poor man said: "I shall accuse when I can," and continued to follow the rich man in mourning clothes just the same. The rich man stood for office, but was rejected; he accuses the poor man of injury.

For the son

[1] Vibius Gallus. I am grateful to the rich man that nowadays he is satisfied to bring those he hates to court.[3]—By day I am barred from appearing in public; ask yourselves what may happen at night.—"You shall not walk," he says, "on the same road as I, nor tread in my footsteps, nor afford my fastidious eyes the sight of your black clothes, nor weep or keep silent if I do not wish it." I should be dead if this man were magistrate.

Albucius Silus. That I was in mourning is due to grief; that I wept, to affection; that I did not accuse [p. 371] you, to fear; that he was rejected is your doing.[4]—Am I not to keep silent—I who am still alive because I kept silent?[5]—You know the suspicions entertained by a gossipy people: "Why did he never seek office while the father was alive?"—Now I beg everyone, yes everyone, to aid me in the investigation of my father's death: I should have come to your knees too, rich man, if I weren't afraid you'd say it caused you unpopularity. This is why I've been following you about so long: I'm looking for the opportunity to speak to you. And I cannot say that it is the result of your cruelty that I do not dare; but my usual fault dogs me—I keep silent. Would that my father too had

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[1] Parallelled in Rhet. Gr. 4.235.32 Walz.

[2] See Bonner, 115–16. The extension to defamation is in accordance with Roman practice: see Dig. 47.10.15.27, where "wearing mourning clothes to arouse unpopularity against a person" is one of the examples given.

[3] [3]Rather than to kill them. The next epigram implies just this danger.

[4] [1]That of the judges, who, as voters, had prevented the rich man getting office.

[5] [2]Whereas the father, being outspoken (see below), had been killed for abusing the rich man, and, as the next epigram suggests, to remove an obstacle to his candidacy.

had this fault! By speaking freely, he caused much offence—for I don't suppose you were the only enemy he had in the state.—Just as he says,[6] I proved my case before the people.

[2] Julius Bassus. When are we not in mourning in the eyes of these rich men?[7]—"Accuse me," he says. Am I, a poor man, to accuse a rich man, am I, mourning, to accuse a candidate for office?[8] I cannot even walk where I will.—He called me to law, said: "Prosecute me to the bitter end, plead your case through." Who would venture to accuse one who talks thus?—"Why do you follow me?" As if poor men had one street, rich men another.

Cestius Pius. I should not be defending myself if I were capable of accusing.—Beard untrimmed and in mourning, I have come—together with what is [p. 373] charged against me.[9] Whatever may happen, I shall not stop looking for the murderer—perhaps I have already found him.—. . . when suddenly, in the middle of the city, my father—why do you look at me, why watch what I am going to say?—was removed.

[3] Arellius Fuscus. Those of my rank cannot go in great state, wearing bright clothes—that is possible for the rich: it is enough for us to be alive.—Since the body was found unrobbed, I don't know who the assassin was: but whoever he was, he resembled a rich man in despising loot.—"Why do you follow me in public?" A wicked crime has been committed: we, a rich man and a poor man, have gone along the same road.[10]

Moschus. "Accuse me," he says. What became of the man who began to?—"Why keep following me?" I wish my father hadn't left your side; he'd still be alive.—"Why not take me to court?" Because you have no fear of my accusations.—My father once dead—I'm afraid someone may think it an injury to him if I say "killed" . . .—My father was killed—by whom? If I am permitted to say so, I don't know.

[4] Junius Gallio. "You are in mourning; you weep." What else can I do, I, the son of a poor man who has been killed? My father was murdered in mid-city, though the laws still stood. Who could even tell the story without tears?—I shall not take off these dark clothes unless I find someone I can put them on to.[11]—Who killed my father? I don't know. You can swear to no more than that I said[12] that.

[p. 375] And I still don't know. Meanwhile I am considering whom I am to clothe in the suit his assassin did not take from my father.[13]—"Why do you follow me?" Even magistrates do not clear the streets behind their backs.

[5] Fulvius Sparsus. What would he have done if I had been accusing him, considering that he harasses me even when I keep quiet?—"Why not sue?" Because you are so confident that you hope to force me to sue you.—Surely I do you no injury now, in these mourning clothes? Is one who

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[6] The rich man, apparently, during his narration.

[7] That is, our clothes are always dark and shabby compared with the rich man's: cf. the pullatus circulus of Quintilian 2.12.10 (cf. Plin. Ep. 7.17.9 and Suet. Aug. 40).

[8] This too is a matter of dress: the poor man is in mourning clothes, a candidatus (as his name implies) wore a white toga.

[9] i.e. his mourning clothes, which he wears qua defendant as well as because of his father's death.

[10] Cf. Bassus' epigram in §13.

[11] As defendant.

[12] i.e. at the first trial.

[13] Compare the previous epigram: the speaker imagines the same dark clothes worn by the victim as passing to the murderer in court.

grieves not allowed what a defendant is allowed?—What less could I do for my father? It was out of respect for him that I changed my clothes.

Argentarius. Don't you want me to weep for my father? You didn't use to take the first step in provocation in the old days.[14]

Clodius Turrinus Senior. "Why have you put on mourning?" What—am I not to grieve for one I cannot avenge? I do no-one injury except my father—for whom I still weep, in silence.

[6] Porcius Latro. Amid his inevitable grief for a father so cruelly slain, he can do nothing more brave than to groan.—"Accuse me," he says. Why are you so confident? You sound as though you have identified another man as the murderer.—He had no spoils that a highwayman might seek, but he had the highest virtue, he had what is the surest protection of poverty—innocence obstinate in the face of proud riches: these were the spoils his enemy was [p. 377] after.—Amid troubles there is a kind of pleasure in being troubled—and generally all grief flows out in the form of tears.[15]—He exults excessively in our bereavement; he didn't use to provoke us to accuse him while my father lived.—People may have felt surprise at what has hitherto been regarded as sloth on the part of the most wretched of all mortals in the midst of the tears inevitably shed over a slain father; but they may lay aside all their surprise in the face of the monstrousness of my present danger. [7] Is it any wonder to you that a poor man hasn't summoned up the courage to accuse a rich man? He keeps quiet, yet finds himself accused.—I beg you by these tears, by this filthy garb, by these trappings that are essential for all those on trial, I ask you a favour that your pity will not grudge: that when I am acquitted I may continue to dress as I do now as a defendant.—This rich man was powerful and influential, as he himself acknowledges: he thought he could never have anything to be afraid of, even if he were accused. Then hatred for him grew day by day, thanks to the violence of the one and the outspokenness of the other.[16] The rich man thought us poor men nothing but harmful; we thought ourselves nothing but harmless. And amid these daily battles we were always the victors. I don't know who, meanwhile, plotted our death: I do know who prayed for it—that cannot be hidden.—He comes with his throng of clients and parasites, and pours out the riches of his whole palace to crush the poor.—"Why don't you accuse me, take me to court?" He could scarcely stop himself saying: "What would I not dare to do to you if you accuse me—I who arranged the killing of a man who [p. 379] merely quarrelled with me?"—[8] Generally neighbouring cities, when a sudden quarrel arises, are bursting to go to war; in civil strife sufficient revenge is taken by the man who has got his insult in first. How violently Macerio inveighed against the absence of Metellus![17] Marcus Cato had to listen to Pulcher levelling a charge of theft.[18] What greater indignity for that age than for Pulcher to accuse, or Cato to be accused! There was a man[19] capable of composing a lampoon against Pompey, victor on land and sea, who (as it said) scratched his head with one finger: a man capable of using the licence of a poem to make mock of three golden chariots.[20] He was torn by the eloquence of that most wicked of slanderers, Marcus

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[14] Cf. §6 "He exults . . ." The father is represented as the stronger character, with a hold over the rich man (cf. the remarks of the populace mentioned by Albucius in §1).

[15] For more on tears, see C. 8.6.

[16] The rich man and the poor father.

[17] For the feud of C. Atinius Labeo Macerio against Q. Metellus Macedonicus, see the Index of Names under Atinius.

[18] For Clodius' attacks on Cato for misappropriating money in Cyprus see Plut. Cat. Min. 45.1.

[19] Calvus: see C. 7.4.7.

[20] Three triumphs. See Plut. Pomp. 45 on the occasion of the third (61 b.c.).

Brutus,[21] who said that his hands were stained and even steeped in civil blood. Yet though he was attacking three consulships and three triumphs, he was so far from being afraid of being accused that he even took the trouble to be eloquent. This[22] is the only man in our state who is more innocent than Cato, more noble than Metellus, more brave than Pompey.

[9] Division

Latro's division went like this: Is there an injury in the case? "There is no injury if I am in mourning: how many do it! The law specifies all the types of [p. 381] injury: one cannot strike another, one may not abuse contrary to good morals."[23]

It was at this point that Scaurus said: "A new wording for injuries is being formulated: That he did weep contrary to good morals."

Even if there is an injury in the case, is he safe from condemnation if he does not act with evil intent? Does he act with evil intent? This Latro divided into two questions: If he believed the rich man had killed his father and if he was following him for that reason, is he to be forgiven? Next: Did he believe it?

Gallio made this the first question: If a man does something that everybody is entitled to do, is he liable to a charge of doing an injury? "It is permitted to weep, to walk where you like, to dress as you like." "But," the reply is, "one is not permitted to act in such a way as to arouse hatred against another. You are in mourning—I do not complain; but if your mourning arouses hatred for me, I do complain."

[10] Questions were raised about the colour. Some openly attacked the rich man, some said nothing at all against him, some took a middle way. Though there is no course apart from these three, Latro wanted the prestige of discovering a fourth type; this involved addressing the rich man as follows: "No, you didn't do it, but all the same I had reasons for being misled and for entertaining false suspicions about you: you were my enemy, my father was found unrobbed," and so on. But this in fact is the middle course, that of neither letting the rich man off nor accusing him: he ought not to let him off, despite [p. 383] having put off the accusation, and he ought not to accuse him, just because he has put the accusation off.

[11] Albucius said nothing against the rich man. His declamation had the following colour: "'To accuse someone without having prosecuted him is to commit an injury. Why do you follow me?' he says. So that you should at last take pity on me, should cease to persecute a prostrate household, should realise that I cannot in this plight accuse you, should covet the glory of avenging a death. You alone, if you will, can find the man who killed him, you alone can accuse him. 'But some people regard me as suspect because of this.' You can dispel that suspicion: look for the man responsible.' If you want to see that you are causing me unpopularity, remember that when I said: Accuse me, you didn't say you wouldn't, but instead you replied: I will accuse when I can.' Forgive me, I can no more accuse anyone yet than acquit him: I am looking for the man responsible. Mine are feeble proofs—but the ones that weigh against other people are empty. You are my enemy, he was found unrobbed; I have here no reason to accuse you—but I do have reason to suspect."

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[21] For Brutus' attacks on Pompey see ORF, 463. For his hatred of the general R. Syme, The Roman Revolution, 58.

[22] Latro says sarcastically that the rich man can claim immunity from criticism, being so far superior to these great personages.

[23] [1]For these two aspects of "injury" see Gaius 3.220.

[12] Vibius Rufus used this as a colour: "I am in mourning—I grieve. I follow you so as to be safer. I am afraid of whoever it was who killed my father; I know that I cannot perish so long as I am with you."

Following this colour, Murredius said, very foolishly:[24] "Why do I follow you? My father was killed because he walked the streets alone."

Moschus' colour displeased Gallio. "I follow you," said Moschus, "to find who did the deed. This is my [p. 385] train of thought: whoever did it will want to lay the blame on an enemy of mine, and he will come to the rich man." "It is much more injurious," said Gallio, "if he does this in order to make his investigations, if he follows the rich man not only to insult him but to endanger him."[25]

Gallio thought that one should employ finesse, and adapt the colour of the speech to the theme of the controversia, saying: "I suspect that you killed my father. Who else hated him more than you? Who else is so influential? Without doubt, some other murderer would have coveted his clothes. Someone may object: 'Well? If he is your enemy, does that straightaway make him the killer?' No: that is just why I make no accusation."

[13] Romanius Hispo made open accusations, and said that he lacked not the motive to bring a charge but the strength to carry it through. And he placed in his proem an epigram that was highly applauded: "I have an accuser who is surprised that he is not the defendant."

[14] Julius Bassus said on this subject: "'Why do you follow me in public?' Judges, a dreadful crime has been committed: we, a poor man and a rich, have trodden the same ground." He used to go in for vulgarity, and found people to admire that above all else. I remember him declaiming a controversia[26] on a pimp who forbade ten youths to go into a brothel. The young men slipped into a pit filled with fire [p. 387] and concealed with earth, which the pimp had prepared, and were burned up; the pimp is accused of harming the state. He was heard declaiming by Albucius, who was liable to listen with scorn to things that he might feel jealous about; he liked this epigram of Bassus': "I should not tolerate you if you had tied up a dog at the door."[27] This same man said that Latro's epigrams, that were being circulated with great admiration, were bombastic rather than forceful: "The fathers pick out their proofs, and use conjecture to make division of their children's bones."[28] Also: "Bring out your priestess!"[29] And: "Over the ashes of our children, the brothel must be rased to the ground." But he did at least praise the things he had inspired himself: for in this same controversia—making sure that Bassus shouldn't be thought to have said anything more vulgar—Albucius himself said: "Are ten youths to perish because of your two-pences?"

[15] Euctemon, on the son's side, having narrated how his father had been caught alone, with no companions, and murdered, said: "That is why it is safest to go about with rich men." He also said: "Why am I silent? My father spoke—and died."

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[24] It is not clear why this is so foolish.

[25] Apparently by helping the true criminal in his attempt to incriminate the rich man. But inputare may = "claim credit for."

[26] For the declamation see Calp. Flacc. 5 and RLM p. 83.1: and in a rather different form Rhet. Gr. 2.135 Spengel.

[27] Let alone protecting his house with a pit.

[28] Latro describes the search for the remnants of the bodies with rhetorical double entendre.

[29] i.e. the prostitute you guard so carefully.

Hermagoras said: “Let us poor men found a city separately: the rich have one of their own.”[30] And in his narration: “I don’t know who killed him. He had enemies, for he was by nature outspoken and could be abusive.”

[p. 389] Artemon said: “When I find the killer, I shall accuse him: and I’ll do it even if it’s a poor man I find.”

[30] For they exclude poor men from the existing city.