BRILL

JOURNAL OF GLOBAL SLAVERY 3 (2018) 92–128

Journal of Global Slavery

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Serviles personae in Roman Law

"Paradox" or "Otherness"?

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Abstract

This article aims at sketching the *prima facie* "paradoxical" legal *status* of "slaves" in Roman law. Hence, it deals with principles and rules directed to regulate two paradigmatic and highly relevant areas of economic life, i.e. sale and agency. Both shared the fundamental presence of *servi* or *mancipia*, conceived at times as mere objects, at times as real individuals. On the one hand, according to non-Roman conceptions (that consider slavery *per se* a liminal and, thereby, indefinable institution), the law concerning *serviles personae* would represent such a contradiction by merging the Aristotelian categories of *bios* and *zoe*. On the other hand, pre-classical and classical Roman law, adhering to a functional and wide notion of legal *persona*, and embodying a *status*-system, transcends any apparent inconsistency between property law and business law.

Keywords

Roman law – slavery – law of sale – law of agency – *status*

Introduction: Is Slavery a Roman "Paradox"?

A Ubiquitous and Ambiguous Institution

"Outside the region of procedure, there are few branches of the law in which the slave does not prominently appear."[1] Bearing this over-quoted statement

1 William Warwick Buckland, *The Roman Law of Slavery. The Conditions of the Slave in Private Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1908, reprint 1970), VI. Estimates of the percentage of the slave population of Italy range from 15% to 40% in the

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in mind allows for the framing of the supposed great "paradox" that characterized the archaic, pre-classical, and classical Roman law. A tablet found in London and dating back to late first century A.D. would seem to illustrate such a "paradox," as well as the inner complexity of the Roman system, by documenting a sale including a warranty against defects and eviction, together with a personal guarantee.[2] The buyer, Vegetus, is a slave of Montanus, also a slave of the Emperor, and the good sold by *mancipatio* is likewise a slave, a girl called Fortunata. Slaves buy. Slaves are bought. Slaves have dependents. Slaves are dependents.

Slaves between **Status** *and Ownership*

From several "patrimonial" aspects of the law of slavery, it is evident that *servi* or *mancipia* (the Roman legal terms regularly denoting slaves) were conceived of as *res*:[3] slavery was indeed defined by late-classical jurists as "an institution of *ius gentium* whereby a human being is, contrary to nature, subject to the dominical power of another."[4] Already in the last centuries of the Republican

first century B.C.; some 10% of the total population might represent the lowest limit for the Empire as a whole. See Keith R. Bradley, *Slavery and Society at Rome* (Cambridge: Cambridge University Press, 1994), 12; Walter Scheidel, "The Roman Slave Supply," in Keith B. Bradley and Paul Cartledge, eds., *The Cambridge World History of Slavery 1, The Ancient Mediterranean World* (Cambridge: Cambridge University Press, 2011), 288–310; Alessandro Launaro, *Peasants and Slaves: The Rural Population of Roman Italy (200 B.C. to A.D. 100)* (Cambridge: Cambridge University Press, 2011), 16. See also William Linn Westermann, "Industrial Slavery in Roman Italy," *Journal of Economic History* 2 (1942): 149–163; William Linn Westermann, *The Slave Systems of Greek and Roman Antiquity* (Philadelphia: American Philosophical Society, 1955), 68–69; Keith Hopkins, *Conquerors and Slaves: Sociological Studies in Roman History* (New York: Cambridge University Press, 1987), 99–100.

2 Roger S.O. Tomlin, "The Girl in Question: a New Next from Roman London," *Britannia* 34 (2003): 41–51; Giuseppe Camodeca, "*Cura secunda* della *tabula cerata* londinese con la compravendita della *puella Fortunata*," *Zeitschrift für Papyrologie und Epigraphik* 157 (2006): 225–230.

3 For an approach to the historical, social, and legal process of "reification" of slaves in archaic Rome, see Giorgio Bonabello, "La 'fabbricazione' dello schiavo nell'antica Roma. Un'antropopoiesi a rovescio," in Francesco Remotti, ed., *Forme di umanità* (Milano: Mondadori, 2002), 52–71.

4 D. 1.5.4.1; see I. 1.2.2, 3.3.2; D. 1.1.4; D. 50.17.32; Aldo Schiavone, "Legge di natura o convenzione sociale? Aristotele, Cicerone, Ulpiano sulla schiavitù-merce," in Mauro Moggi and Giuseppe Cordiano, eds., *Schiavi e dipendenti nell'ambito dell'«oikos» e della «familia». Atti del XXII Colloquio GIREA, Pontignano 19–20 novembre 1995* (Pisa: Edizioni ETS, 1997), 173–182; Eleonora Cavallini, "Legge di natura e condizione dello schiavo," *Labeo* 40 (1994): 72–86; Ernst Levy, "Natural law in Roman Thought," *Studia et Documenta Historiae Iuris* 15 (1949): 1–21; Alberto

era, Cato unsympathetically described slaves in terms of stock to be bought and sold, as well as in terms of pledgeable assets; likewise, Varro maintained that a slave, as *instrumentum vocale*, is a piece of property, a commodity, in the same way of oxen and wagons are.[5] Therefore, it is not erroneous to highlight that *servi*, as such, lacked any "legal, patrimonial and proprietary capacity," as well as any "procedural standing," during the Republic and the first centuries of the Empire, until the *ius naturae* gradually inspired more and more "humane" disciplines and treatments. Yet, one must be aware that this perspective is a non-historical one, tending to read the past—in particular the hierarchic stratifications that grounded and shaped Roman society as a whole—by means of current categories.[6]

The Roman *ius personarum*—and, as a result, any other area concerning relationships between individuals—was not focussed on the simple concept of "capacity," but on a multifaceted and multileveled system of "*status*" implying different duties and powers depending on the particular community to which one belonged.[7] Thus, maintaining indignantly that a slave was not a real "person" in the world of law, is misleading, inexact, and totally inadequate to understand (and not to judge) the Romans and their culture. For example, just like a slave, who was granted no "capacity," even a *consul*—that is the supreme

Burdese, "Il concetto di *ius naturale* nel pensiero della giurisprudenza classica," *Rivista italiana per la scienze giuridiche* 7 (1954): 407–421; Joseph Modrzejewski, "*Aut nascuntur aut fiunt*: les schémas antiques des sources de l'esclavage," *Bullettino dell'Istituto di diritto romano* 79 (1976): 15, 20; Renzo Lambertini, "L'etimologia di *servus* secondo i giuristi romani," in Vincenzo Giuffrè, ed., *Sodalitas. Scritti in onore di Antonio Guarino* 5 (Napoli: Jovene, 1984), 2385–2394; Elisabeth Herrmann-Otto, *Ex ancilla natus. Untersuchungen zu den 'hausgeborenen' Sklaven und Sklavinnen im Westen des römischen* (Stuttgart: Franz Steiner Verlag, 1993), 23 and n. 100; Gabrio Lombardi, *Ricerche in tema di ius gentium* (Milano: Giuffrè, 1946) 157 ff.; Wolfgang Waldstein, "*Jus naturale* im nachklassischen römischen Recht und bei Justinian," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 111 (1994): 1–65.

5 Cato, 2.7; Cato, 159.2; Varro, 1.17.1.

6 See, for the simplistic view adopting these modern and current categories to describe, from a legal perspective, "Roman individuality," Matteo Marrone, *Istituzioni di diritto romano* (Palermo: Palumbo, 1994), 193; for the opposite view, denying the presence of these categories in Roman legal thought, see Bernardo Albanese, *Le persone in diritto romano* (Palermo: Tipografia S. Montaina, 1979), 11; Pierangelo Catalano, *Diritto e persone. Studi su origine e attualità del sistema romano* 1 (Torino: Giappichelli, 1990), 167 ff., 172; Sebastiano Tafaro, "Diritto e persona: centralità dell'uomo," *Diritto @ Storia* 5 (2006): 23, n. 28.

7 Luigi Garofalo, "Principi e ordinamento romano: una riflessione sulle orme di Fritz Schulz," in Fernando Reinoso-Barbero, ed., *Principios Generales del Derecho. Antecedentes historicos y horizonte actual* (Madrid: Editorial Thomson-Aranzadi, 2014), 99–108.

magistrate of the Roman Republic—could not own anything and could not sue anyone, since he was not given any "right" up to his *pater*'s death or up to his emancipation.

Moreover, if nobody can deny that slaves, as *res*, could be ill-treated or even inhumanely overworked[8] (even though the *censores*, by means of their *nota*, punished the *domini* for private cruelty towards their own slaves),[9] one has to point out the following. First, starting from the mid-republican period, slaves appeared to become an extremely appreciated economic resource. They were legally labelled as *res mancipi*, that is *res pretiosiores* (very valuable goods), as Gaius still maintains in the second century A.D.[10] Should a *dominus* have treated his slaves cruelly and uselessly, he would have inflicted a serious economic harm to his current assets, to any possible income, and therefore to his present and future wealth. Second, many slaves were involved in rather skilled jobs.[11] In Rome, clerks, accountants, commercial agents, teachers, doctors, rhetoricians, and even superintendents, were predominantly slaves. Many of them, even though legally constituting "property" and—according to modern legal schemes—"object of rights,"[12] lived more comfortably than most free Roman citizens, especially if they were high-ranking officials in the adminis-

8 Keith R. Bradley, *Slavery and Masters in the Roman Empire: A Study in Social Control* (New York: Oxford University Press, 1987), 113 ff.

9 Dion. Hal. 20.3.

10 Gai 2.13–14a; D. 33.7.12.44.

11 One could oppose the brutal account on the use of slaves in mines, as presented by Alfred Michael Hirt, *Imperial Mines and Quarries in the Roman World: Organizational Aspects 27 B.C.–AD 235* (Oxford: Oxford University Press, 2010), 4.2.1. Yet, one has to keep it in mind that here we are dealing with criminals that, condemned *ad metalla*, became "slaves of the punishment," *servi poenae* (see D. 49.14.12; D. 29.2.25.3; D. 34.8.3 pr.), and not with *servi publici* or *servi fisci*. Accordingly, they lost their freedom, their citizenship, their "legal capacity;" their whole property was confiscated, with some partial exceptions (D. 48.20.7 pr.); they could not buy their freedom, be sold, or be set free, thus becoming "walking dead" (see D. 40.5.24.5; D. 48.19.28 pr.). See Aglaia McClintock, *Servi della pena. Condannati a morte nella Roma imperial* (Napoli: Edizioni Scientifiche Italiane, 2010), *passim*.

12 Against the view overlapping the legal term *res* and the concept of "object of rights," Yan Thomas, "*Res*, chose et patrimoine (Note sur le rapport sujet-objet en droit romain)," *Archives de Philosophie du droit* 25 (1980): 414; Pietro Paolo Onida, *Studi sulla condizione degli animali non umani nel sistema giuridico romano* (Torino: Giappichelli, 2002), 10 ff.; Pierangelo Catalano, "Diritto, soggetti, oggetti: un contributo alla pulizia concettuale sulla base di D. 1,1,12," in *Iuris vincula. Studi in onore di Mario Talamanca* 2 (Napoli: Jovene, 2000), 102.

trative service of the prince.[13] For instance, Musicus Scurranus was a slave of Tiberius and *dispensator* of the Gallic Treasury in the province of Lyon. After his death, he was sumptuously commemorated in Rome by as many as sixteen *servi vicarii* or *peculiares* (i.e. "under-slaves" or "slaves of slaves"):[14] a commercial agent, a treasurer, three secretaries, a physician, two slaves responsible for the silverware, two general attendants, two bedroom attendants, a valet, two cooks, and a "woman."[15]

Slaves: Actors on the Stage of Law

From the "natural" and "theoretical" point of view, slaves were unambiguously *homines*, i.e. human beings.[16] They were—in the same way as the *liberi homines*—*personae*, that is—etymologically—"individuals donning a mask," "actors" playing different "roles" on the "stage of law" in relation to their own *status*.[17] The Roman *ius civile*, in other words, could not rule out slaves' human

13 Paul R.C. Weaver, *Familia Caesaris: a Social Study of the Emperor's Freedmen and Slaves* (Cambridge: Cambridge University Press, 1972), *passim*. Some authors argue that self-sales were possible at Rome: see Galenus fr. 50 K; Martial 9.92; Raymond Theodore Troplong, *Préface a Le Droit Civil expliqué suivant l'ordre du Code, Commentaires des titres XVI et XVII, livre III du Code civile* (Bruxelles: Meline, Cans et compagnie, 1848); Jacques Ramin and Paul Veyne, "Droit romain et société: les hommes libres qui passent pour esclaves et l'esclavage volontaire," *Historia* 30 (1981): 472–497; Alfred Söllner, "Irrtümlich als Sklaven gehaltene freie Menschen und Sklaven in unsicheren Eigentumsverhältnissen—*Homines liberi et servi alieni bona fide servientes*," (Stuttgart: Franz Steiner, 2000); Morris Silver, "Contractual slavery in the Roman economy," *Ancient History Bulletin* 25 (2011): 73–132; see Leo Peppe, "Fra corpo e patrimonio. *Obligatus*, *addictus*, *ductus*, *persona in causa mancipi*," in Alessandro Corbino, Michel Humbert and Giovanni Negri, eds., *Homo, caput, persona—La costruzione giuridica dell'identità nell'esperienza romana* (Pavia: IUSS Press, 2010), 457 ff.

14 Francesca Reduzzi-Merola, *'Servo parere'. Studi sulla condizione giuridica degli schiavi vicari e dei sottoposti a schiavi nell'esperienza greca e romana* (Napoli: Jovene, 1990), *passim*.

15 CIL VI 5197= ILS 1514. See for funerary commemorations by free people received by *servi institores*, ILS 7546, 7607, 7608.

16 D. 50.16.152: Renato Quadrato, "*Hominis appellatio* e gerarchia dei sessi in D. 50.16.152 (Gai. 10 *ad l. Iul. et Pap.*)," *Bullettino dell'Istituto di diritto romano* 33–34 (1991–1992): 309–348.

17 Gai 1.8–9, 1.120 ff., 3.189. See, for the view supporting the neutral and abstract nature of the legal term *persona*, Vincenzo Scarano Ussani, "La 'scoperta' della persona," *Ostraka* 18.1 (2000): 237–248; Gianluca Mainino, "Dalla persona alla persona giuridica: la persona in Gaio e il caso delle 'istituzioni' alimentari nell'esperienza romana," *Studia et Documenta Historiae Iuris* 70 (2004): 481–498; Ulrico Agnati, "*Persona iuris vocabulum*. Per un'interpre-

characteristics,[18] and accordingly, it could not fail to recognize—alongside their intellect, their skill, and their bodily shape—their "natural" capacity to will, to agree, to be party to a contract, and to perform.

The awareness that slaves were—and had to be recognized as - *homines* and *personae* from a biological and legal perspective, seriously influenced Roman society and economy.[19] If, in the early Republic, a rather small number of slaves was living in Rome, as of the mid-third century B.C. the slave population quickly expanded and, by the end of the Republic, slaves represented one of the most predominant factors in the economic life of the city. Some tablets found at Murecine from the archive of the Sulpicii (a finance firm operating in Puteoli) clarify the importance of (skilful and smart) slaves in commerce, attesting to some interesting aspects of the process of the conclusion and recovery of a loan.

C. Novius Eunus is a dealer in grains and pulses, and he needs 10,000 sesterces. Hesicus is a slave of Euenus Primianus, a freedman of the emperor Tiberius. C. Novius Eunus borrows the money from Hesicus (acting on behalf of his master who is absent), and secures the return of the money by *stipulatio*. A few days later a further loan of 3,000 sesterces is concluded, but alongside the *stipulatio* (as personal security), wheat imported from Alexandria is pledged as real security. A third tablet, indeed, records Hesicus as taking over the lease of the

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tazione giuridica di *persona* nelle opere di Gaio," *Rivista di Diritto Romano* 9 (2009): 2 ff.; see, moreover, Jakob Fortunat Stagl, "Die Person: phrygische Mütze oder Nessushemd?—Eine Auseinandersetzung mit Roberto Esposito's Terza Persona," *Bonner Rechtsjournal* 1 (2012): 11–20; Jakob Fortunat Stagl, *Da 'qualcosa' a 'qualcuno', da 'qualcuno' a 'qualcosa'. Percorsi esatti ed errati del concetto di persona*, in Pierangelo Buongiorno and Sebastion Lohsse, eds., *Fontes Iuris. Atti del VI Jahrestreffen Junger Romanistinnen und Romanisten (Lecce, 30–31 marzo 2012)* (Napoli: Edizioni Scientifiche Italiane, 2013), 87–122 (pointing out that the general concept of *persona* represented a vehicle of discrimination, injustice and abuses).

18 See Olis Robleda, *Il diritto degli schiavi nell'antica Roma* (Roma: Università gregoriana editrice, 1976), 72 ff.; Giuliano Crifò, *Libertà e uguaglianza in Roma antica* (Roma: Bulzoni, 1984), 36 nt. 4; Renato Quadrato, "La persona in Gaio. Il problema dello schiavo," *Iura* 37 (1986): 1 ff., 10 ff., 28; Catalano, *Diritto e persone*, 163 ff., 168; Sebastiano Tafaro, "Centralità dell'uomo (*persona*)," in *Studi per Giovanni Nicosia* 8 (Milano: Giuffrè, 2007), 120 ff.

19 Moses I. Finley, *Ancient Slavery and Modern Ideology* (New York: The Viking Press, 1980), 126 ff.; Moses I. Finley, *Slavery in Classical Antiquity* (Cambridge: William Heffer and Sons, Ltd., 1968), 2; Kyle Harper, *Slavery in the Late Roman World, A.D. 275–425* (Cambridge: Cambridge University Press, 2011), 39–40; Max Weber, "Die sozialen Gründe des Unterganges der antiken Kultur," in Dirk Kaesler, ed., *Schriften 1894–1922* (Stuttgart: Kröner Verlag, 2002), 57; Hopkins, *Conquerors and Slaves*, 4 ff.

warehouse space where the stock pledged was stored, and on this occasion two slaves are parties to a contract. Hesicus is the *conductor*, while Diognetus likely acts as *servus negotiator cum peculio*: he belongs to Novius Cypaerus (a *horrearius* having a contract from the town council for letting the *horrea Bassiana publica*), and his activity is ratified by means of a dominical *iussum*. After one year and two months, Hesicus stipulates that the remaining debt, including the capital and interest, is due to be paid either to himself or to an alternative promisee (*adstipulator*) named Sulpicius. Finally, a last tablet attests the total amount that was still due, a time limit for payment, and a penalty for delay.[20]

Sympathy for Slavery?

Slavery is nowadays morally and ideologically unacceptable. This is incontrovertible and the following conclusions, based on the previous remarks, neither hide nor openly entail a politically incorrect position sympathizing with what is an abomination: i.e., "forcibly taking human beings as captives."[21] Yet, the so-called "Roman slavery", albeit seemingly rooted in the above-mentioned "paradox," sounds less singularly discriminatory and less inhumane (as well as less "paradoxical"), if one dispassionately considers the institution at issue not only in its articulated entirety, but also as part of a wider system of *status*.

On the one hand, slaves did not belong to a monolithic and undifferentiated social class deemed as always unsatisfied, exploited, and thereby regularly occupied in acts of resistance. With the important exceptions of the areas of politics, law, and war, private slaves were employed in any type of work.

On the other hand, the link "slavery / lack of legal capacity" is misleading, as its two poles are not perfectly bijective. Indeed, a *filius familias*, albeit *civis*

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20 TPSulp 7, 15, 16, 17, 18. Lucio Bove, *Documenti di operazioni finanziarie dell'archivio dei Sulpicii. Tabulae Pompeianae di Murecine* (Napoli: Liguori, 1984), 19 ff.; Feliciano Serrao, "Minima di Diogneto ed Hesicho: gli affari di due schiavi a Pozzuoli negli anni 30 d.C.," in Vincenzo Giuffrè, ed., *Scritti in onore di Antonio Guarino* 7 (Napoli: Jovene, 1984), 3605–3618; for a partially different view, see Giovanna Coppola Bisazza, *Dallo iussum domini alla contemplatio domini. Contributo allo studio della storia della rappresentanza* (Milano: Giuffrè, 2008), 133 ff. *Contra*, see Donatella Monteverdi, "Tab. Pom. 7 e la funzione dello *iussum domini*," *Labeo* 42 (1996): 356; Francesca Del Sorbo, "L'autonomia negoziale degli schiavi nella prassi giuridica campana, il dossier di C. Novius Eunus," in Cosimo Cascione and Carla Masi Doria, eds., *Fides Humanitas Ius. Studii in onore di Luigi Labruna* 3 (Napoli: Editoriale Scientifica, 2007), 1408–1435.

21 Keith R. Bradley, "The Problem of Slavery in Classical Culture," *Classical Philology* 92 (1997): 274.

and *liber*,[22] was an *alieni iuris* individual in the same way as a *servus*.[23] Even if the former was intended to become a *sui iuris* individual and the latter could just wish for *libertas* and *civitas*, *iure privatorum* both were definitely excluded from a full "personality," prerogative of a *pater familias*—if one is allowed to use modern categories. Slaves themselves, despite a few episodes of large-scale revolts and naïve daily resistance towards their masters,[24] appeared to

22 *Status civitatis*, for instance, enhanced severe obligations that other *statuses* did not encompass. If slaves, as *res* belonging to their masters, were not considered appropriate for use in war (D. 49.16.11; Plin. *Ep*. 10.29–30), Romans, as *homines liberi et cives*, spent long years risking their own lives on battlefields: see Adrian Keith Goldsworthy, *The Roman Army at War 100 B.C.–A.D. 200* (Oxford: Clarendon Press, 1996), *passim*. Up to the first century B.C., military service constituted a duty embedded at the core of what it meant to be both a *civis Romanus* and a fundamental part of the *populus Romanus*. In the early second century B.C. over fifty per cent of all Roman citizens performed military service for an average of about seven years. Under Augustus, one sixth of all Italian citizens served as soldiers for a standard term of twenty years: See Hopkins, *Conquerors and Slaves*, 30. As Polybius attests (Polyb. 6.19.4), moreover, a young member of the Roman aristocracy could not stand for public office until he had completed even ten years of military service (Hans Beck, *Karriere und Hierarchie: Die römische Aristokratie und die Anfänge des cursus honorum in der mittleren Republik* [Berlin: Walter de Gruyter, 2005], *passim*). Private slaves were not Roman citizens; they belonged to Roman citizens and could be, *in hypothesi*, maltreated by their *domini*: this is incontrovertible. Yet, as such, they were kept far from the 'noble' dangers of the 'bloody' war. On the contrary, a *civis Romanus* belonged to his *populus*, was at its mercy, and had to perform duties inextricably attached to his *status*. Like an everlasting military service.

23 See Eva Cantarella, "Famiglia romana e demografia sociale. Spunti di riflessione critica e metodologica," *Iura* 43 (1992): 99–111. It is important to remark that in her contribution dedicated to *Slavery and Roman Law* Jane F. Gardner never focuses on the plain but fundamental equation between *slaves* and *filii*. Slavery, *qua tale*, naturally creates moral and ideological repulsion and a society based on slavery cannot be wholly at ease with itself. Yet, some historical exaggerations, due to this feeling, are well recognizable and understandable. For instance Keith R. Bradley, *Slavery and Rebellion in the Roman World, 140 B.C.–70 B.C.* (Bloomington: Indiana University Press, 1989), 38, argues: "slavery as an institution was based ultimately on the violent subjection of one person to another that arose from the dominating power claimed when life was spared upon defeat in warfare … So slaves were always at war with their owners." Yet, if this were *in toto* true, the whole knowledge derived from Roman jurists on the use of slaves, as well as on the the legal and economic figures of *peculia*, *tabernae* and *naves* would be false. Actually, a master would not appoint an enemy as a business manager; a master would not grant an enemy part of his wealth to administer (see *infra*).

24 Keith R. Bradley, *Resisting Slavery at Rome*, in Keith R. Bradley and Paul Cartledge, eds.,

generally recognize and accept such a system. Many of them, once set free, prospered, integrated themselves into Roman society, and often became slave-owners themselves.[25]

The following pages will be devoted to a simple sketch of the above-mentioned system entailing the legal *status* of slaves according to Roman law. One will illustrate the principles and the rules created by magistrates and jurists in order to discipline two areas of private law (sale and "agency") that were considered highly relevant in the commercial framework. Indeed, these two areas were strictly connected with one another and sharing a common feature, that is the fundamental presence of slaves. At times (since they lacked the *status civitatis* and *libertatis*) *servi* were considered mere *res*, at times (since they were *homines* exactly like *liberi* and *cives*) they were considered real *personae*, whose legal *status* often corresponded to that of a *filius familias* (since both were not *sui iuris personae*).

To all people of today, this immediately evokes two contrasting and incompatible pictures. On the one hand, the cruel and miserable degeneration permeating the illegal human trafficking and the appalling reification of human beings as objects. On the other hand, the enterprise run by pragmatic, hectic, and busy businessmen having no hesitation in sacrificing their lives and those of their dependents on the altar of outright profits.

By interpreting Roman Law by means of non-Roman or current categories, one cannot avoid seeing a deep contradiction that makes slavery itself a liminal and, thereby, indefinable institution, which would merge the Aristotelian conceptions of *bios*, i.e. political life, and *zoe*, i.e. biological life.[26] On the contrary,

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The Cambridge World History of Slavery 1: *The Ancient Mediterranean World* (Cambridge: Cambridge University Press, 2011), 361–384.

25 See, for the episode of Furius Chresimus, Plin. *nat. hist.* 18.41–43.

26 Arist. *Pol.* 1252 b 27 10. For instance, Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge: Harvard University Press, 1982), 42 ff., maintains that the enigma of slavery supersedes the legal and economic spheres: indeed, slavery marks the threshold between the inside and outside, collapsing both the political and ontological differences between the human and the non-human, between being and non-being. Similarly, Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 109, points out that the concept of 'bare life'—the paradigm of which, in his archaeological reconstruction, is the Roman *homo sacer* (*contra*, see Luigi Garofalo, *Biopolitica e diritto romano* [Napoli: Jovene, 2009], 113 ff.)—, represents "a zone of indistinction and continuous transition between man and beast." As such, it would be the counterpart of the sovereign power on the state of exception and the target of the sovereign violence. In other words, according to Agamben, "bare life" would not overlap the concept of "biological existence," being, on the contrary, the remainder of the

by interpreting Roman slavery in its legal and social context, one is inclined to regard it, in spite of its inner liminality, as a coherent and logical figure.[27]

Slaves and the Roman Law of Sale

Slaves as Res

Since they did not belong to the community of *liberi cives*, slaves were—in some respects—like animals, and consequently, the same legal regime applied to both. For instance, the *lex Aquilia*, enacted in the 3rd century B.C., seems to be concerned only with "unjust" damages to slaves, animals, and other types of property, but not with damages to free individuals. The first and the third *capita* of the statute at issue respectively stipulated: "If anyone shall have unlawfully killed a male or female slave belonging to another or a four-footed animal, whatever may be the highest value of that in that year, so much money is he to be condemned to give to the owner;" and "If anyone shall cause loss to another, by burning, smashing or maiming unlawfully, whatever may be the value of that matter in the next thirty days, so much money is he to be condemned to give to the owner."[28]

Such proximity between animals and slaves, and the consequent legal assimilation is also well attested elsewhere. Nothing makes it clearer that the slaves, as *res* (albeit *sui generis*), could represent the object of ownership, than the legal discussions of the Roman jurists still in the classical period about whether an infirmity, an illness, or a bodily or psychological deficiency amounted to a defect.[29] The contract of *emptio-venditio* (i.e. obligatory sale) provides therefore a good paradigm and testifies the crucial importance of slaves for the Roman economy.

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destroyed political life. Therefore, only 'enslavement' (and not slavery *per se*) could fit such a concept, in my opinion.

27 In accordance with such historical perspective, see Jacques Annequin, "*Formes de contradiction et rationalité d'un système économique. Remarques sur l'esclavage dans l'Antiquité*," *DHA* 11 (1985): 199–236; Luigi Capogrossi Colognesi, "La *summa divisio de iure personarum*. Quelques considérations à propos des formes de dépendance dans la réalité romaine," *Actes GIREA* 20 (1994): 163–177.

28 Gai 3.210; Gai 3.218; D. 9.2.2 pr.–1; D. 9.2.27.5; D. 9.2.29.8. For further details, see Sara Galeotti, *Ricerche sulla nozione di damnum* 1: *Il danno nel diritto romano tra semantica e interpretazione* (Napoli: Jovene, 2015), 97 ff.

29 See Gell. 4.2.1–15; D. 21.1.1–4 with Rosanna Ortu, *Aiunt aediles ... Dichiarazioni del venditore e vizi della cosa venduta nell'editto 'de mancipiis emundis vendundis'* (Torino: Giappichelli, 2008), 94 ff.

Defective Slaves and Ius Civile

During the last three centuries of the Republic, *iure civili* the buyer had normally to take the risk of possible defects that rendered the *merx* (i.e. the good sold) unfit for its ordinary or expected purposes. Therefore, if he wanted a specific warranty that the *merx* was either free from specific defects or that it had certain qualities (*promissum*),[30] he had to ask the seller for a *stipulatio* to that effect. For instance, the parties could enter a *stipulatio* to the effect that the slave was healthy, that it was not a thief, and that it did not rob the corpses of their grave-clothes.[31] Out of this formal and verbal contract, in case of misrepresentation, the *emptor*, in the quality of *stipulator*, could bring an action *ex stipulatu* against the seller-promisor, regardless of the latter's *scientia* or *ignorantia*. The contractual liability under this legal action was strict and limited to the *id quod interest* (that is the purchaser's interest in the truth of the promise). As such, it could go beyond compensation for the lesser value of the object sold.[32] Yet, the buyers ended any consideration of this remedy, its targets, and its sphere of applicability, as unsatisfactory. In an area of the law as important as the sale of slaves, a special liability needed to be introduced in order to increase the protection offered not only against frauds perpetrated by sellers, but also against negligence and unawareness.[33]

For instance, female slaves were not purchased "solely as breeding stock," and they could be sold as healthy even though they were "barren women," unless the infertility was due to a bodily defect, but their fecundity was often a selling point, such as with sheep and cattle. The Severian jurist Paul deals with the sale of the prospective offspring of a female slave (*partus ancillae* as a *res sperata*), although he is concerned with the availability of the legal action

30 D. 18.1.43 pr.; D. 21.1.19 pr.–3.

31 Ulp. 42 *ad Sab.* D. 21.2.31. Vincenzo Arangio-Ruiz, *La compravendita in diritto romano* 2 (Napoli: Jovene, 1956), 356 ff.; Giambattista Impallomeni, *L'editto degli edili curuli* (Padova: CEDAM, 1955), 47 ff.; Riccardo Cardilli, *L'obbligazione di 'praestare' e la responsabilità contrattuale in diritto romano* (*II sec. a.C.–II sec. d.C.*) (Milano: Giuffrè, 1995), 135 ff.; Carlo Augusto Cannata, *Sul problema della responsabilità nel diritto privato romano. Materiali per un corso di diritto romano* (Catania: Torre, 1996), 127 ff.; Letizia Vacca, "Garanzia e responsabilità nella vendita. Tradizione romanistica e problemi dommatici attuali," in Letizia Vacca, *Garanzia e responsabilità. Concetti romani e dogmatiche attuali* (Padova: CEDAM, 2010), 281–312.

32 Mario Talamanca, "Vendita in generale (diritto romano)," *Enciclopedia del diritto* 46 (Milano, 1993): 416 f.; Dario Mantovani, *Le formule del processo privato romano* (Padova: CEDAM, 1999), 113 nt. 630; Christian Baldus, "*Una actione experiri debet?* Zur Klagenkonkurrenz bei Sachmängeln im römischen Kaufrecht," *Orbis Iuris Romani* 5 (1999): 20 ff., 72 ff.

33 D. 21.1.1.2; D. 21.1.37; D. 21.1.44 pr.–1; Plaut. *Capt.* 98–101; Cic. *de off.* 3.17.71; Sen. *Ep.* 80.9.

in contract where the *merx* does not exist and cannot come into existence, thus implying the impossibility of the seller's obligation.[34] Not disclosing to the buyer that the slave was barren, or over fifty years old, represented a typical fraud perpetrated by *scientes* sellers, but it could amount also to a case of *ignorantia venditoris*.

Sales of Slaves in the Marketplace: The Ius Honorarium

Between the third and the second centuries B.C., the *aediles curules*—i.e. minor magistrates responsible for marketplaces[35]—through their edict "*de mancipiis emendis vendundis*" (i.e. "about slaves for sale")[36] introduced a new remedy for latent defects and diseases called *actio redhibitoria*.[37] In cases in which

34 Beside D. 5.3.27 pr. and D. 21.1.14.1–3, see D. 19.1.21 pr. Even if in the passage at issue the jurist does not make it clear whether the seller knows about the defect or not, some scholars maintain that the seller was allowed to start the legal action only if the defendant was aware: Pasquale Voci, "L'estensione dell'obbligo di risarcire il danno nel diritto romano classico," in *Scritti in onore di Contardo Ferrini publicati in occasione della sua beatificazione* 1 (Milano: Società Editrice Vita e Pensiero, 1947), 370 ff.; Mario Sargenti, "Appunti sulla *quasi possessio* e la *possessio iuris*," in *Scritti in onore di Contardo Ferrini* 1, 246; Peter Stein, *Fault in the formation of contract in Roman Law and Scots Law* (Edinburgh—London: Oliver and Boyd, 1958), 79; Andrea Rodeghiero, *Sul sinallagma genetico nell'"emptio venditio' classica* (Padova: CEDAM, 2004), 35; *contra*, see Emilio Betti, *Istituzioni di diritto romano*, 2.1 (Padova: CEDAM, 1942), 147 and nt. 26; Ugo Zilletti, *La dottrina dell'errore nella storia del diritto romano* (Milano: Giuffrè, 1961), 75 e nt. 158; Frank Peters, "Zur dogmatischen Einordnung der anfänglichen, objektiven Unmöglichkeit beim Kauf," in Dieter Medicus and Hans H. Seiler, eds., *Festschrift für Max Kaser* (München: C.H. Beck, 1976), 299.

35 See Éva Jakab, *Praedicere und cavere beim Marktkauf. Sachmängel im griechischen und römischen Recht* (München: C.H. Beck, 1997), 116 ff.; Marel Kuriłowicz, "Zur Marktpolizei der römischen Ädilen," in *Au-delà des frontières: mélanges de droit romain offerts à Witold Wołodkiewicz* 1 (Varsovie: Liber, 2000), 439–456.

36 Impallomeni, *L'editto*, *passim*, Antonio Guarino, "L'editto edilizio e il diritto onorario," *Labeo* 1 (1955): 295–266; Max Kaser, "Die Jurisdiktion der kurulischen Ädilen," in *Mélanges Philippe Meylan* 1 (Lausanne: Imprimerie Centrale, 1963) 164–191, 173 ff.; David Pugsley, "The Aedilician Edict," in Alan Watson, ed., *Daube Noster. Essays in Legal History for David Daube* (Edinbrugh: Scottish Academic Press Ltd., 1974), 255 ff.; Alan Watson, "Sellers' Liability for Defects: Aedilician Edict and Praetorian Law," *Iura* 38 (1987) 172; Talamanca, "Vendita in generale," 414 ff.; Lorena Manna, *Actio redhibitoria e responsabilità per i vizi della cosa nell'editto de mancipiis vendundis* (Milano: Giuffrè, 1994), 95 ff.; Aldo Petrucci, "Osservazioni minime in tema di protezione dei contraenti con i *venaliciarii* in età commerciale (II secolo a.C.–metà del III d.C.)," in Federico M. D'Ippolito, ed., *Philia. Scritti per Gennaro Franciosi* 3 (Napoli: Satura Editrice, 2007), 2082 ff.; Ortu, *Aiunt aediles*, 76 ff.

37 Gell. 4.2.1; D. 21.1.1.1. See Otto Lenel, *Das 'Edictum Perpetuum'. Ein Versuch zu seiner Wieder-*

the seller failed to disclose publicly (*palam pronuntiare*) any latent disease or defect (*morbus vitiumve*), or whether the slave was a runaway (*fugitivus*), a loiterer (*erro*), or a delinquent under noxal liability (*noxae*), the action at issue was indifferent to the defendant's knowledge or good faith (whereas, in contrast, *ignorantia* and *scientia venditoris* were relevant *iure civili*).[38] Since this remedy was not justified by a breach of contract, it looked like an "action in tort," depending on the violation of the aedilian provisions.[39] Moreover, the aedilian remedy was directed to the termination of the contract and not to damages (as, in contrast, the *actiones civiles* were).[40]

If, originally, the aedilian provisions were concerned with the sales of slaves only, later (likely between Cicero and Labeo), the magistrates themselves extended these provisions to the sales of *iumenta*, that is beasts of draught. They also implemented their original system with a new remedy aiming at the reduction of the purchase-price.[41] The aedilian provisions shaped a strong system of protection. Yet, many sellers of slaves were averse to giving such a warranty and, by rejecting *ex contractu* the aedilian provisions, they preferred to be held liable just for the specific diseases and defects in the terms agreed upon by the parties to the contract.[42]

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herstellung[3] (Leipzig: Tauchnitz, 1927), 560 f.; for the application of the edict at issue in *municipia* and *coloniae*, see Francesca Reduzzi Merola, "Per lo studio delle clausole di garanzia nella compravendita di schiavi: la prassi campana," *Index* 30 (2002): 215–226.

38 Cic. *de off*. 3.17.71; D. 21.1.1.2; D. 21.1.4.4; D. 21.1.17.20; D. 21.1.45, 52.

39 Nunzia Donadio, "Azioni edilizie e interdipendenza delle obbligazioni dell'*emptio venditio*. Il problema del giusto equilibrio tra le prestazioni delle parti," in Luigi Garofalo, ed., *La compravendita e l'interdipendenza delle obbligazioni 2* (Padova: CEDAM, 2007), 474, 494 f., 518 ff.

40 D. 21.1.23.1 and D. 41.2.13.2, see Ute Wesel, "Zur dinglichen Wirkung der Rücktrittsvorbehalte des römischen Kaufs," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 85 (1968): 156; Mario Talamanca, "La risoluzione della compravendita e le conseguenti azioni di restituzione nel diritto romano," in Letizia Vacca, ed., *Caducazione degli Effetti del Contratto e Pretese di Restituzione. Seminario ARISTEC per B. Kupisch* (*Roma 20–22 giugno 2002*) (Torino: Giappichelli, 2006), 24 and nt. 62. For the more recent *edictum de iumentis vendundis* (D. 21.1.38 pr.) and the *actio quanti minoris* or *aestimatoria*, see Donadio, "Azioni," 518 ff. A full discussion of such remedy will not be found in the present contribution: it simply aims at presenting and discussing some problems connected with the Roman law of slavery.

41 D. 21.1.38 pr.; D. 21.1.38.7; Gell. 4.2.8 (Impallomeni, *L'editto*, 106). Fur further extensions of the aedilian provisions, see D. 21.1.1 pr.; D. 21.1.38.5; D. 21.1.38.10; D. 21.1.17.19; Arthur De Senarclens, "L'extention de l'édict des édiles aux ventes de toute espèce de choses," *Revue historique de droit français et étranger* 6 (1927): 385–417.

42 Aulus Gellius, quoting the jurist Sabinus, remarks that it was customary to put felt caps on

These aedilian rules were routinely enforced in day-to-day commercial activities affecting relationships among Romans as well as between *cives* and *peregrini*. The system was praiseworthy and helpful, but not exhaustive. What if a slave (as well as an animal of draught, and a *res nec mancipi*) was made an object of a sale, but at the same time the parties entered the contract outside the marketplace? What if the sale was concluded in the marketplace, but either the *merx* was not a slave or the slave had a defect that the *aediles* did not list in their edict? What if the seller falsely assured a quality in the slave or other goods? In these three cases, the aedilian edict was unambiguously unsuitable. Such legal gaps were required to be filled and thus the Roman jurists provided new, more effective forms of legal protections.[43] In other words, the sale of slaves represented the legal and ideological prototype as well as the historical basis for the ancient (and current) remedial systems of buyer—and consumer-protection.[44]

As far as the first two aedilian gaps are concerned, it is important to point out the following points. By the time of the late Republic, the *actio empti* itself starts being conceived of as a remedy available not only if the seller had not performed the contractual *oportere dare facere*, but also if he somehow had acted in conflict with "good faith." Consequently, as we read in Cicero and Valerius Maximus, the buyer of *res mancipi* (or, perhaps, of real estate only) was granted a legal action directly grounded, *iure civili*, on the sale-contract, where the *merx* turned out to have some defects. The classical jurists often attest the subsidiary use of the contractual action against the *dolus venditoris*, as the buyer of the slave was not allowed to start the *actio redhibitoria*.[45]

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the heads of slaves on sale, to pointing out that they were being sold 'without warranty' (Gell. 7.4); see D. 2.14.31.

43 Laura Solidoro Maurotti, "Sulle origini storiche della responsabilità precontrattuale," *Teoria e storia del diritto privato* 1 (2008): 18 e ntt. 26–27, e soprattutto in Nunzia Donadio, *La tutela del compratore tra actiones aediliciae e actio empti* (Milano: Giuffrè, 2004), *passim*; Donadio, "Azioni," 473 f., 510 ff.

44 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1996), 305 ff.; Luigi Garofalo, *Studi sull'azione redibitoria* (Padova: CEDAM, 2000), *passim*; Luigi Garofalo, "Le azioni edilizie tra ordinamento romano e codificazioni latinoamericane," *Roma e America* 13 (2002): 5–19; Éva Jakab, "Diebische Sklaven, marode Balken: Von den römischen Wurzeln der Gewährleistung für Sachmängel," in Martin J. Schermaier, ed., *Verbraucherkauf in Europa. Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG* (München: Sallier, 2003), 43 ff.

45 D. 21.1.1.9–10; D. 21.1.2–4; D. 21.1.38.7.

The action *ex empto* for damages (that is aiming at the *id quod actoris interest*)[46] could be started, in accordance with its new extended targets, if the seller had omitted to disclose any defect known to him.[47] In addition, if any concealment of latent defects could initially amount to a "breach of good faith" only in case of *scientia venditoris*,[48] the classical jurists, following Julian, started to suggest further applications of the same remedy: by the second century A.D., the buyer could start the *actio ex empto* even out of a non-malicious silence. Yet, where the seller was *sciens*, the monetary condemnation was restricted to the reduced value of the objects themselves and to any consequential loss; on the contrary, the buyer could obtain a mere reduction of the purchase price, such as in an aedilian *iudicium aestimatorium* or *quanti minoris*.[49] The contractual action, being at the beginnings just a subsidiary remedy susceptible to be used only where the case failed to meet the conditions required by the *aediles*, ended up overlapping the aedilian protections. Thus, *adiuvandi iuris civilis causa*, it shaped a two-level system characterized by the principle of "flexibility of action and choice of procedure."

As far as the third aedilian gap is concerned, since the last few centuries of the Republic, the buyer was likely allowed to start the contractual action where the seller had assured the buyer, by an informal *dictum in venditione*, that the *merx* was free from certain defects or that it had certain qualities.[50] At first, the buyer could not sue the seller *ex empto*, if both were in good faith. Yet the late classical legal science—as Ulpian, albeit hesitantly, attests—changed such regime. Jurists thought that the informal *dictum* brought about reasonable reliance in the purchaser, whether the *venditor* was *sciens* or *ignorans* of the misrepresentation. Thus, if the slave being sold was a thief, and the seller, albeit unaware, assured the buyer of the contrary in the course of the negotiations, the seller was held liable under *actio empti*.[51]

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46 D. 18.1.78.3; D. 18.6.16; D. 19.1.6.4; D. 19.1.13 pr.–2; D. 18.1.45.

47 Cic. *de off.* 3.16.66; Val. Max. *mem.* 8.2.1 with Cardilli, *L'obbligazione di praestare*, 158 ff.; Laura Solidoro Maruotti, *Gli obblighi di informazione a carico del venditore. Origini storiche e prospettive attuali* (Napoli: Satura, 2007), 61 ff., 89 ff.

48 See D. 19.1.4 pr.; D. 21.1.19–10; D. 21.1.38.7.

49 D. 19.1.13 pr. See Solidoro Maruotti, *Gli obblighi*, 71 ff.; Nunzia Donadio, *Responsabilità del venditore per i vizi della 'res empta': a proposito di D. 19.1.13.1* (*Ulp. 32 'ad ed.'*), in *Index* 33 (2005): 481–511. See, moreover, D. 18.1.45; D. 21.1.51 pr. *Pace* Impallomeni, *L'editto*, 253 and Arangio-Ruiz, *La compravendita* 2, 360 (denying that classical legal science extended the *actio ex empto* in case of *ignorantia venditoris*).

50 D. 19.1.6.4; D. 19.1.13.3; see D. 18.1.45; D. 18.1.78.3; D. 18.6.16; D. 19.1.6.4; D. 19.1.13.2.

51 D. 19.1.13.3; see D. 18.1.78.3; D. 18.6.16; D. 19.1.6.4; D. 19.1.13.2; D. 18.1.45; D. 19.1.6–4; moreover,

This was the situation between the end of the Republic and the beginning of the Principate. A need for higher harmonization, as well as for new reforms, started emerging. Indeed, if a slave sold in the marketplace presented an aedilian defect, the buyer was allowed *iure hononario* to obtain the judicial termination of the contract. By contrast, if a slave (as well as another *merx*), did not present the qualities formally or informally assured, the buyer was allowed *iure civili* to sue the seller just for damages (enforcing either a strict liability in case of *stipulatio*, or a liability for fraud in case of *dictum*). As the aedilian remedies were inspiration for the legal science to attach new applications and tasks to the civilian contractual actions (during the pre-classical and classical period),[52] the casuistic solutions offered by the jurists themselves in the area of the general law of sales encouraged the enactment of new aedilian provisions in the first century A.D. So, if the seller of slaves at the marketplace, through a so-called *dictum promissumve*,[53] misrepresented the *status quo* of the *merx*, he could also be sued by the aedilian action *ad resolvendam emptionem*, whether or not he was aware of his false assumptions.[54] As long as the aedilian conditions (concerning the place and the object of the contract) were met, the buyer's choice

D. 18.1.40.5; D. 18.6.16[15]; D. 18.1.59; D. 18.1.78 pr., 3; D. 19.1.2 e D. 19.1.26; D. 19.1.53; D. 19.1.54.1; D. 21.2.75.

52 For the extraordinary use of the contractual action *ad resolvendam emptionem* (that is "to terminate the sale"), as already supported by Labeo and Sabinus (D. 19.1.11.3), see D. 19.1.11.5: Solidoro Maruotti, "Sulle origini," 18 e ntt. 26–27; Solidoro Maruotti, *Gli obblighi*, 87 f.; Donadio, *La tutela*, 225 ff., 230 ff.; Donadio, "Azioni," 473 f., 510 ff.; Letizia Vacca, "Risoluzione e sinallagma contrattuale nella giurisprudenza romana dell'età classica," in Letizia Vacca, ed., *Il contratto inadempiuto. Realtà e tradizione del diritto contrattuale europeo* (*ARISTEC, Ginevra, 24–27 settembre 1997*) (Torino: Giappichelli, 1999), 51 ff.; Talamanca, "La risoluzione della compravendita," 7; Solidoro Maruotti, *Gli obblighi*, 87 f.

53 Franz Haymann, *Die Haftung des Verkäufers für die Beschaffenheit der Kaufsache 1* (Berlin: Vahlen, 1912), 107 ff.; Raymond Monier, *La garantie contre les vices cachés dans la vente romaine* (Paris: Recueil Sirey, 1930), 50 ff., 134 ff.; Arangio-Ruiz, *La compravendita 2*, 360 ff.; Barry Nicholas, "*Dicta Promissave*," in David Daube, ed., *Studies in the Roman Law of Sale, dedicated to the memory of F. De Zulueta* (Oxford: Clarendon Press, 1956), 91–101; Olde Kalter, *'Dicta et promissa'. Die Haftung des Verkäufers wegen Zusicherungen für die Beschaffenheit der Kaufsache im klassischen römischen Recht* (Utrecht: Utrecht University, 1963), *passim*; Heinrich Honsell, *Quod interest im bonae-fidei-iudicium. Studium zum römischen Schadensersatzrecht* (München: C.H. Beck, 1975), 68 ff., 79 ff.; Watson, "Sellers' Liability," 172 f.; Manna, *Actio redhibitoria*, 95 ff.; Baldus, "*Una actione experiri debet?*," 72 ff.; Jakab, "Diebische Sklaven," 43 ff.; Donadio, *La tutela*, 71 ff., 141 ff.

54 Hor. *epist.* 2.2.1–19, and, above all, D. 21.1.17.20; D. 21.1.64.1. See, moreover, D. 21.1.18.1; D. 21.1.4.4. From D. 21.1.38.10 we learn that the Roman jurists extended this remedy and this target to the sale of draught animals.

could *iure honorario* go beyond the protection granted by the contractual civil action *ex empto* (primarily concerned with fraudulent sellers).[55]

Slaves as Contracting Parties and the Roman Law of Business Agency

Negotiatio *and Representation: The Limits of* Ius Civile

According to pre-classical and classical Roman law, it is undeniable that slaves were conceived of as "private property": they did not belong to the *populus Romanus* (as each *liber civis* did); they belonged to a *liber civis*. On grounds of the *ius utendi abutendi*, a *dominus* could hypothetically do anything he liked with his slaves.[56] Yet, as already pointed out, they were not only *res* or *instrumenta* susceptible to be used as simple and material work-force for degrading and heavy activities.[57] Rome was, in fact, a society that deeply and largely relied on ownership on the one side, and on economic employment of dependents on the other:[58] owners and *patres familias* provided specific training to highly skilled individuals, both *servi* and *filii*, in order to train and to use authentic "managers."[59]

Engaging slaves in business activities was commonplace in Roman society at all levels: epigraphic evidence as well as the Justinian Digest describe slaves buying and selling, acknowledging receipts of money, making loans, and receiving loans. The highly intricate nature which characterizes Roman slav-

55 See, as supporters of the opinion that *actio redhibitoria* for *dicta promissave* was an aedilian remedy just *adiuvandi iuris civilis causa*, Arangio-Ruiz, *La compravendita* 2, 366 f.; Impallomeni, *L'editto*, cit., 258 ff.; Watson, "Sellers' Liability," 172; *contra*, see Nunzia Donadio, "Garanzia per i vizi della cosa e responsabilità contrattuale," in Éva Jakab and Wolfgang Ernst, eds., *Kaufen nach Römischem Recht. Antikes Erbe in den europäischen Kaufrechtsordnungen* (Berlin—Heidelberg: Springer, 2008), 80 ff. (maintaining that the *dicta promissave* could take place even earlier and thereby the aedilian remedies and the *actio empti* were ruled by the principle of subsidiarity too).

56 Gai 1.52. In the Principate the masters' right to mistreat or arbitrarily slay their slaves was restricted by law: see Gai 1.53; D. 40.8.2; D. 48.8.11.2; D. 1.6.2; D. 48.8.4.2; C.Th. 9.12.1; I. 1.8.2.

57 A wide range of occupations is well attested even in legal sources: see D. 6.1.28, 9.2.5.3, 19.2.13.4, 24.1.28.1, 30.34.36, 32.65.3, 33.7.12.32, 38.1.7.5.

58 Bradley, *Slavery and Society at Rome*, 10 ff.; Jean-Jacques Aubert, *Business Managers in Ancient Rome: A Social and Economic Study of Institores, 200 B.C.–A.D. 250* (Leiden—New York—Köln: Brill, 1994), 1 ff.

59 Gunnar Fülle, "The Internal Organization of the Arretine *Terra Sigillata* Industry: Problems of Evidence and Interpretation," *The Journal of Roman Studies* 87 (1997): 111.

ery emerges from two paradigmatic sources. The first is a comment of Paul to Neratius.[60] The jurist makes it clear that a slave was plainly considered to be a "piece of property" (depending on two different opinions, belonging either to the equipment of the *taberna cauponia*, i.e. the inn, or to the resources of the *caupona*, i.e. the lodging business). Yet, at the same time, it was also a "manager" (that is a dependent appointed to carry out the *negotiatio*, i.e. the business). The second source, a Macedonian funerary inscription,[61] well illustrates that a slave was not merely (from the legal and economic perspective) a *res* and an *institor*, but also (from the social perspective) a human being for whom one could have feelings of respect, appreciation, and even love.

Such *status quo* requires some additional explanation. First, obligations were binding *inter partes* only. Out of the "doctrine of privity" and of the absence of a developed "concept of direct representation," two principals (*cives sui iuris*) exclusively could regularly enter a *contractus*. In other words, any contract was, *iure civili*, source of rights and claims *inter partes*, and the intervention of a third party as a representative was regularly excluded.[62] Second, this funda-

60 D. 33.7.13 pr.: Maria Antonietta Ligios, *Nomen negotiationis. Profili di continuità e di autonomia della negotiatio nell'esperienza giuridica romana* (Torino: Giappichelli, 2013), 1ff., 121f.

61 CIL 3.14206.21 = ILS 7479. ILS 7212 goes even further: in a burial *collegium*, slave members reclined at dinner together with free men. Martial (1.101) mourns the incoming death of his secretary and manumits him, so that he can die as a free person. The slave Tiro, the literary assistant of M. Tullius Cicero shared a strong intimacy with his owner and could move at ease among his aristocratic friends and colleagues: Susan Treggiari, "The Freedmen of Cicero," *Greece & Rome* 16 (1969): 195–204; Susan Treggiari, *Roman Freedmen During the Late Republic* (Oxford: Clarendon Press, 1969), 259ff.

62 According to the "doctrine of privity", a contract gives no rights and creates no obligations on any third party or agent except the parties to it; only parties to contracts can bring an action to enforce their rights or to claim damages. But, by virtue of "direct representation", an agent, acting in the name of a principal (so that the third party knows or ought know this), establishes a direct relationship between the principal and the third. As far as Roman law is concerned, a principal had no contractual action if the transaction was concluded by an outsider on his behalf. Regularly he could only sue the agent himself on grounds of "mandate" or "authorized administration." See Renato Quadrato, "Rappresentanza (diritto romano)," *Enciclopedia del diritto* 38 (Milano, 1987): 418ff.; A. Kirschenbaum, *Sons, Slaves and Freedmen in Roman Commerce* (Washington, D.C.—Jerusalem: Magnes Press, 1987), 7ff.; Alan Watson, *Roman Slave Law* (Baltimore—London: John Hopkins University, 1987), 105f. *Contra* Maria Miceli, *Studi sulla rappresentanza nel diritto romano* (Milano: Giuffrè, 2008), *passim* (supporting the existence of direct representation in the area of obligations); Andreas Wacke, "Alle origini della rappresentanza diretta: le azioni adiettizie," in *Nozione, formazione e interpretazione del diritto dall'età romana alle esperienze moderne.*

mental legal principle was balanced by another one concerning acquisitions.[63] Any property and any right acquired by a slave or a *filius* immediately and automatically vested in the *dominus* or the *pater*. Yet, by law, a dependent was only entitled to increase his superior's assets, so that any conveyance implying a patrimonial diminution had to be considered legally ineffective.[64] Therefore, the *liberi cives sui iuris* who wished to enter legal transactions at a distance could theoretically obtain rights by appointing a dependent as a commercial agent and by sending him to a given place. Third, after the first Punic war, the employment of people carrying out commercial ventures and managing businesses functions "on behalf of" others became *de facto* inevitable[65] and constituted—as Ulpian makes clear—a key-area of the praetorian law, as it had intensive and important consequences from the economic point of view.[66] On the one hand, since it is highly unlikely for a *pater familias* to have had a sufficient number of *filii*—natural or adopted—to post as agents, slaves played the most important role in running any business of great scale. On the other hand, the flows affecting the above-depicted system made it very difficult to employ a dependent to carry out a proper and proficient commercial activity.

Without appropriate legal mechanisms for enforcing contracts between trading partners, as well as without means for monitoring agents in remote locations, Roman economy would have quickly collapsed, and the Mediterranean world would not have integrated the Roman markets. If one of the contracting parties was a *servus* or a *filius familias*, in the quality of "agent," indeed the doctrine of privity of contract as well as the principle of representation, needed not be applied in its strictest sense. Moreover, under a contract

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Ricerche dedicate al Professor Filippo Gallo 2 (Napoli: Jovene, 1997), 607 (suggesting the existence of direct representation in Roman law).

63 Ownership and rights could be acquired through slaves, but not *alieno nomine* through extraneous free representatives (See Gai 2.87; Gai 2.95; D. 45.1.38.17; D. 50.17.73.4; I. 2.9.5, 3.19.19).

64 Gai 2.95; D. 50.17.133; D. 46.4.8.4.

65 Andrea Di Porto, *Impresa collettiva e schiavo "manager" in Roma antica.* (*II a.C.–II d.C.*) (Milano: Giuffrè, 1984); Andrea Di Porto, "*Filius*, *servus*, e *libertus*. Strumenti dell'imprenditore romano," in Matteo Marrone, ed., *Imprenditorialità e diritto nell'esperienza storica* (*Erice 22–25 novembre 1988*) (Palermo: Arti grafiche siciliane, 1992), 231–260; Andrea Di Porto, "Il diritto commerciale romano. Una "zona d'ombra" nella storiografia romanistica e nelle riflessioni storico-comparative dei commercialisti," in *Nozione formazione e interpretazione del diritto dall'età romana alle esperienze moderne. Ricerche dedicate al Professor Filippo Gallo* 3 (Napoli: Jovene, 1997), 413–452; Feliciano Serrao, *Impresa e responsabilità a Roma nell'età commerciale* (Pisa: Pacini Editore, 1989), *passim*.

66 D. 14.3.1.

concluded between a *servus* (promisor) and a third-party (promisee), a mere *debitum-creditum* relationship took place (that is a relationship not protected by *actio*); no legal *vinculum* arose.[67] Accordingly, the creditor had no procedural remedy, neither against the slave, nor against the *dominus*. The former had no proprietary capacity (from the substantive perspective), as well as no standing to appear in court as a defendant (from the procedural perspective). The latter, out of the doctrine of privity and the conception of dependents as 'instruments of acquisition', was not liable. Obviously, as long as this was the case, nobody would have dealt with a *servus* or a *filius familias*: such an inequality was excessively detrimental and risky even to those who needed (and not just wanted) to enter a contract with a dependent. Some correction was therefore necessary.

The Praetorian System: the Slave's Duty to Perform and the Master's Liability

The situation changed through the praetorian introduction of legal remedies during the mid or late Republican period.[68] The Roman *praetor* created three actions both allowing the so-called natural creditors to sue the principal of a business under the contractual obligation (or, better, the contractual *oportere*) undertaken by his agent (obviously, if and only if the contract was concluded on account of the business he had been put in charge of).[69]

A first remedy, named *actio exercitoria* (action for shipping), allowed claims against ship-owners (*exercitor*) for contracts concluded with the captain of the ship (*magister*). A second one, that is the *actio institoria*, was susceptible to be

67 Gai 3.119a; D. 35.1.40.3; D. 46.1.16.4.; D. 44.7.10. Carlo Pelloso, "Il concetto di *actio* alla luce della struttura primitiva del vincolo obbligatorio," in Luigi Garofalo, ed., *Actio in rem e actio in personam. In ricordo di Mario Talamanca* 1 (Padova: CEDAM, 2011), 235 and nt. 187, 293 ff.

68 Gai 4.69–74a. Emilio Valiño, "Las *actiones adiecticiae qualitatis* y sus relaciones basicas en derecho romano," *Anuario de Historia del Derecho español* 37 (1967): 339–480; Luuk De Ligt, "Legal History and Economic History: the Case of the *Actiones Adiecticiae qualitatis*," *Tijdschrift voor Rechtsgeschiedenis* 47 (1999): 205–226; Aubert, *Business Managers*, 46 ff.; Joseph Plescia, "The Development of Agency in Roman Law," *Labeo* 30 (1984): 171; Maria Miceli, *Sulla struttura formulare delle actiones adiecticiae qualitatis* (Torino: Giappichelli, 2001), 188 ff.; Andreas Wacke, "Die adjektizischen Klagen im Überblick I. Von der Reeder- und der Betriebsleiterklage zur direkten Stellvertretung," *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 111 (1994): 280–362; Coppola Bisazza, *Dallo iussum domini*, *passim*; Di Porto, *Impresa collettiva*, 35 ff., 196 ff. The problem concerning the chronological order of the praetorian measures at issue is under debate: see Valino, "Las *actiones adiecticiae qualitatis*," 344 ff.; Aubert, *Business Managers*, 78 ff. and De Ligt, "Legal History and Economic History," 212 ff.

69 D. 14.3.5.11; D. 14.1.7; D. 14.3.13 pr.; D. 14.5.1.

started against the principal who had appointed a "commercial agent" (*institor*) in charge of a business, for dealings carried out by the latter. Finally, at least as early as Labeo's age,[70] where the principal had made an invitation (*iussum*)—addressed either to potential third parties or to the dependent[71]—the principal was liable *in solidum*, that is for the total amount of the debt. Litigation, as the praetorian *formulae* attest, involved two fundamental questions. Is there a *debitum-creditum* relationship between the claimant and the dependent?[72] Was the dependent dealing with third parties out of a defendant's *praepositio* or *iussum*? If the answer was yes, the principal was exposed to unlimited liability: had the agents accumulated heavy losses within the terms of the appointment (*praepositio*), the principal would have remained without any protection.[73] Obviously, a principal could satisfy a claim better than his agent could; thus a customer, *de facto*, would have started these *actiones* as first resorts, even if the agent had not been a dependent.

The praetorian remedy constituted the only vehicle of protection for the customer, provided that the agent had been a dependent. As it is well known, a slave, being merely an instrument of a *dominus*, had no proprietary capacity and no standing to appear before magistrates and judges. In classical Roman law, in contrast, a *filius* could personally be bound by the contract; he could appear before magistrates and judges; he could even be condemned. Yet, since he continued to be considered as a free citizen without a very "proprietary capacity," no execution of the possible condemnatory judgment could follow.

Ulpian reports that the *praetor* introduced a further remedy, alongside the creation of the three *actiones* directed to enforce the principal's unlimited liability and Gaius points out the subsidiary and residual nature of the new *actio*.[74] It was based on the *peculium*,—that is a fund granted by a *pater familias*

70 See D. 15.4.1.9 compared with D. 15.3.16.

71 Patricio Lazo, "Contribución al estudio de la *actio quod iussu*," *Revista de Estudios Histórico-Jurídicos* 32 (2010): 83–105; Coppola Bisazza, *Dallo iussum domini*, 155 ff. (against Alfred Pernice, *Marcus Antistius Labeo. Das Römische Privatrecht* 1 [Halle: Buchhandlung des Waisenhauses, 1873], 505); Javier Hernanz Pilar, *El iussum en las relaciones potestativas* (Valladolid: Universidad de Valladolid, 1993), 87 ff., 130.

72 *Pace* Miceli, *Sulla struttura formulare*, 17 ff., 185 ff., 230: see Pelloso, "Il concetto di *actio*," 296 ff.

73 Obviously, if a *dominus* makes it clear that a *servus* is just an employee and not a business manager by means of a *proscriptio*, the liability is not unlimited: see D. 14.3.11.2–4; D. 15.1.47 pr.; D. 15.1.29.1.

74 D. 15.1.1 pr.; D. 14.5.1.

or a *dominus* to a person in his power, either *filius*, or *servus*—, and it did not matter whether or not the former knew of, or consented to, the latter's *negotiatio*.

Indeed, this patrimonial entity named *peculium*—as the jurists maintain—was concretely what a slave kept separate from his master's account, with the latter's initial permission, and after deducing all that the former owes the latter as well as, according to some jurists, all dependants attached to the *familia*.[75] It was composed by any kind of property and commodities, such as movables, real estate, credits, debits, and—as we have already seen—even other slaves (*vicarii* or *peculiares*) could be parts of the "dedicated peculiar assets."[76] All these items were *de iure* property of the principal. Yet, as one can infer from Marcellus, the dependent in charge of them, by means of a general permission,[77] could deal with them as if they were his own: as a human being, a *peculium* could be born, grow, decline, and die.[78] As a result, a slave operating with a *peculium* ended up becoming *de facto* a very independent "business manager" who acted rather independently from his *dominus*, taking on much of the responsibility of the commercial activity.[79] In short, in order to retain the profits generated, a

75 D 15.1.5.4; D. 15.1.4 pr.; D. 15.1.9.2–3; in the definitions of *peculium* put forward by Roman jurists, a key-point emerges: the accounts are kept separately from those for the rest of the owner's patrimony. See Gabriel Micolier, *Pécule et capacité patrimoniale. Etude sur le pécule, dit profectice, depuis l'édit 'de peculio' jusqu'à la fin de l'époque classique* (Lyon: Bosc Frères, 1932), *passim*; Ignazio Buti, *Studi sulla capacità patrimoniale dei servi* (Napoli: Jovene, 1976), *passim*; David Johnston, "Peculiar Questions," in Paul McKechnie, ed., *Thinking Like a Lawyer: Essays on Legal History and General History for John Crook on his Eightieth Birthday* (Leiden: Brill, 2002), 5; Roberto Pesaresi, *Ricerche sul peculium imprenditoriale* (Bari: Cacucci, 2008); Jean-Jacques Aubert, "Productive Investments in Agriculture: *Instrumentum Fundi* and *Peculium* in the Later Roman Republic," in Jesper Carlsen and Elio Cascio, eds., *Agricoltura e scambi nell'Italia tardo-repubblicana* (Bari: Edipuglia, 2010), 167–185; Ulrike Roth, "Food, *Status*, and the *Peculium* of Agricultural Slaves," *Journal of Roman Archaeology* 18 (2005): 278–292; Feliciano Serrao, *Diritto privato, economia e società nella storia di Roma* 1 (Napoli: Jovene, 1984), 298; Serrao, *Impresa e responsabilità*, 27 ff.; Di Porto, *Impresa collettiva*, 42 ss.; Di Porto, "Il diritto commerciale romano," 424 ff.

76 D. 15.1.7.4–7; D. 15.1.17.

77 D. 15.1.7.1.

78 D. 15.1.39. A *peculium* existed out of a master's or a father's permission. It could be modified by means of transactions due to special or general authorisations. Yet, the owner—as Pomponius maintains—had not to know in detail its precise contents and its changes (D. 15.1.4.1–6).

79 Alfons Bürge, "Lo schiavo (in)dipendente e il suo patrimonio," in Corbino, Humbert and Negri, ed., *Homo, caput, persona*, 377 ff., 382 ff.; Emanuele Stolfi, "La soggettività commer-

slave *negotiator cum peculio* was personally interested in running the business accurately: even if this clearly does not mean that, in practice, economic life was regularly structured through the *peculium* (as opposed to a *praepositio* or to a *iussum*) and that economic assets were purposefully and primarily placed in the *peculium* with a view to running the business.[80]

Even if it is true that a *peculium* turned out to be a private fund rather than a way to structure liability, it is equally true that out of it creditors were given recourse against the *dominus* or the *pater familias* for damages.[81] Yet, such a remedy was restricted to the amount of the *peculium*, and not to the full extent of the *creditum* obtained by the dependent, as one can infer from the edictal name of the remedy, that is "*actio de peculio*," later incremented through the clause "*aut de in rem verso*" (according to which the *versio* represented a contributing factor in calculating the liability ceiling, rather than a negative condition).[82] On the one hand, this *actio* was indeed based on the contractual *debitum naturale*[83] entered by a dependent (for instance in the quality of buyer, lessee, borrower etc.), as well as on the preceding grant of a fund of property

ciale dello schiavo nel mondo antico: soluzioni greche e romane," *Teoria e storia del diritto privato* 2 (2009): 1–32.

80 Johnston, "Peculiar Questions," 5: the *peculium* represented an important device of balancing the interests of those involved in trade, both by imposing some liability, and by restricting the liability, otherwise *in solidum*. Obviously, what law provides (that is a limited liability of the owner for slaves running businesses) does not necessarily correspond with what happens in practice.

81 D. 15.1.1.4; D. 15.1.2. See Barbara Abatino, Giuseppe Dari-Mattiacci and Enrico C. Perotti, "Early Elements of Corporate Form: Depersonalization of Business in Ancient Rome," *Oxford Journal of Legal Studies*, 31.2 (2011): 365–389; Barbara Abatino and Giuseppe Dari-Mattiacci, "Agency Problems and Organizational Costs in Slave-Run Businesses," *Amsterdam Law School Research Paper* 4 (2011): https://ssrn.com/abstract=1942802.

82 Gai 4.72, 4.74a; I. 4.7.4. The *praetor* introduced the optional condition that the commercial dealing had determined a patrimonial increment benefitting the owner. Thus, the value of the *peculium* was relevant only if the claimant did not prove that the defendant, *pater* or *dominus*, had obtained a benefit from the transaction. Therefore, regardless of the value of the *peculium*, *iure praetorio*, the natural creditor had recourse to the extent of the benefit that had flowed *in rem*. Tiziana J. Chiusi, *Die actio de in rem verso im römischen Recht* (München: C.H. Beck, 2001); Buti, *Studi*, 155 ff.; De Ligt, "Legal History and Economic History," 215–216; see, moreover, for a different view, Geoffrey MacCormack, "The early history of the *actio de in rem verso* (Alfenus to Labeo)," *Studi in onore di Arnaldo Biscardi* 2 (Milano: Cisalpino–La goliardica, 1982), 319–339; Geoffrey MacCormack, "The later history of the *actio de in rem verso* (Proculus to Ulpian)," *Studia et Documenta Historiae Iuris* 48 (1982): 318–367.

83 See Pelloso, "Il concetto di *actio*," 235 ff., 253 ff. (with bibliography and sources).

(as the *intentio*, which does not refer at all to the *peculium*, makes clear). On the other hand, it was directed to enforce the *reus*' limited liability (as the *condemnatio*, which is expressed in terms, and to the extent, of the *peculium*, attests).[84] The *sui iuris* individual, liable under this action, was at risk up to the value of the assets composing the fund that his slave or his *filius* had been entrusted, even if the former had no idea what the latter was concretely doing. In this vein, therefore, the regular rules concerning bankruptcy proceedings did not apply, as well as the liability—albeit limited—to which the principal was exposed was a strict one, as his *ignorantia* and *scientia* were irrelevant.

Since all these remedies allowed a *creditor* to bring an action against the principal, they enhanced a breach of the rule that the person of *debitor* (i.e. the party that had to perform under contract) corresponded to the person of the *obligatus* (i.e. the party that was sued in case of non-performance). In other words, through these actions praetorian Roman law makes it clear that *Schuld* and *Haftung* turned out to be two separate and divisible aspects of the obligatory phaenomenon.

The **Peculium***, the Independent Slave-Manager and the Multilevel Liability*

A *pater* or a *dominus* could be sued on account of his dependant's dealings for as much as—but no more than—the value of the *peculium*, only *de residuo*. The "principal" incurred "peculiar liability" only if the following two negative

84 David Johnston, "Suing the *Pater Familias*: Theory and Practice," in John W. Cairns and Paul J. du Plessis, eds., *Beyond Dogmatics. Law and Society in the Roman World* (Edinburgh: Edinburgh University Press, 2007), 173–184. Any *peculium*'s value may fluctuate, either increasing, or diminishing, or vanishing its substance. In case of litigation on the *peculium*, according to Ulpian, if the peculiar fund has no assets at the beginning of the proceedings (that is at the time of the *litis contestatio*), but it has some value when the judgment is given, the *actio de peculio* turns out to be grounded (D. 15.1.30 pr.). Moreover, if the *peculium* is insufficient by the time of the judge's *sententia*, but, then, an increment occurs so that the whole debt can be repaid, the creditor, just partially compensated, is allowed to get the first judgment voided and thereby to start anew the *actio de peculio* for the *residuum* (D. 15.1.30.4). If the *servus* dies, is manumitted, or is alienated, the *peculium* ceases *de iure* to exist. Notwithstanding that, the Roman *praetor* allows the creditor to start the *actio de peculio* for a whole year after the events at issue: indeed material losses or gains may still occur and these are fictitiously conceived of as increments and decrements of the *peculium* itself (D. 15.2.1 pr.–1; 15.2.3). Even a malicious removal of the *peculium* by the owner could take place (D. 15.1.21 pr.): the *praetor* imputed to the *peculium* property that ceased to be in it due to the fraud, so that its value had to be taken into account in calculating the cap of the owner's liability (Buckland, *The Roman Law of Slavery*, 218 ff.).

conditions were met. He had not appointed his dependent to carry out business activities (i.e. no *praepositio* took place). He had not permitted a particular transaction or more dealings (i.e. no *iussum* was given). Obviously, liability continued to be limited by the value of the *peculium* if the claimant could not prove (or was not interested to prove) that the defendant had obtained a direct benefit due to the enrichment that had followed the transaction (i.e. no evidence of a *versio in rem* was given). The value of the *peculium* (or, alternatively, the amount of the benefit) represented the legal "ceiling" or "cap" of liability for a Roman citizen that did not want to (or could not) be directly or indirectly involved in the *exercitio negotiationis*.

Accordingly, Gaius explains that nobody could be so thoughtless as to start a subsidiary remedy, such as the *actio de peculio vel de in rem verso*, if the creditor—starting, in contrast, an *actio exercitoria*, or *institoria*, or *quod iussu*—could recover in full (being the *reus* held liable to expectation and restitution damages *in solidum*). Under the "peculiar legal action," on the one hand, the claimant was to demonstrate that either the slave with whom he had entered the contract had obtained a *peculium*, or that a patrimonial benefit accrued to the *dominus*. On the other hand, liability was restricted to patrimonial assets that were ultimately very hard to determine and to prove before the judge.[85]

Sometimes a Roman enterprise could be much more complex and hierarchically structured. For instance, a person (A), being in the power of a *sui iuris* citizen (B), could ordinarily act as a *magister navis* (the captain of the ship) even if he did not own the ship and the equipment. Yet, A—granted with the ship, alongside other goods, such as *servi peculiares* or *vicarii*—could even act as a very *exercitor* (i.e., usually, the shipowner himself), and accordingly appoint one of his "peculiar slaves" (C). This *servus peculiaris*, after the appointment, could undertake natural obligations *ex contractu* with third parties. A dissatisfied creditor (D), without protection *iure civili*, had to bring a praetorian *actio* against B (the owner of the ship) and not against A (the *exercitor*) or C (the *magister*): this is incontrovertible. Nevertheless, was B's liability limited or unlimited? Ulpian provides a satisfactory answer. On the one hand, if A ran the maritime business according to B's *voluntas*, then the latter's liability for contracts concluded by C and D was without limitation. On the other hand, if the business was carried on just by the *voluntas*, and at the initiative, of A, B was exposed to liability just up to, and not more than, A's *peculium*.[86]

85 Gai 4.74. In this vein, some texts point out the importance of *rationes* (accounts), making it clear, that *peculia*'s accounts were kept separately from those for the rest of the owner's patrimony.

86 D. 14.1.1.19: see David Johnston, "Law and Commercial Life of Rome," *Proceedings of the*

In other words, as far as a one-layer business is concerned, the person who appoints a dependent as *magister navis* or *institor* is held liable without limitation (as it is when a *iussum* is concerned). Indeed, the former is the owner of the company assets, and is aware of the *negotiatio* carried on by the latter, that is his *servus ordinarius*. On the contrary, should a *dominus* or a *pater familias* not make any *praepositio*, but give his dependent a *taberna* or a *navis* as mere elements included in the *peculium*, the situation would totally change. Actually, the situation is even more complicated. If the "principal" knows about the commercial operation, and does not forbid it (so that the conditions of *scientia* and *patientia* are met), the creditor can choose to start an *actio tributoria* instead of the *actio de peculio vel de in rem verso*.[87] Under this remedy, the *reus* is exposed to a limited liability (being the *merx peculiaris*, i.e. the amount used for the particular business under litigation, the maximum threshold), and the creditors are not topped by the principal, with regard to the distribution of the *peculium* in case of bankruptcy.[88] If the latter is ignorant, there is only the *actio de peculio*, so that he is liable within the amount of the assets attached to the dependent (or, possibly, within the benefit).

In case of a business articulated on two layers, the liability of the Roman citizen being in the top-level position is limited to the amount of the first *peculium*, if the following conditions occur. The *navis* or the *taberna* just amount to *bona peculiaria*; the dependent appoints a *servus vicarius* of his; the *pater familias* or the *dominus* is not aware of the business. On the contrary, if a

Cambridge Philological Society 43 (1997): 53–65; Di Porto, *Impresa collettiva*, 228 ff.; András Földi, "La responsabilità dell'avente potestà per atti compiuti dall'*exercitor* suo sottoposto," *Studia et Documenta Historiae Iuris* 64 (1998): 183.

87 Tiziana J. Chiusi, *Contributo allo studio dell'editto 'de tributoria actione'* (Roma: Accademia nazionale dei Lincei, 1993), 372 ff.; Tiziana J. Chiusi, "Zum Zusammenspiel von Haftung und Organisation im römischen Handelsverkehr: *scientia*, *voluntas* und *peculium* in D. 14,1,1,19–20," *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 124 (2007): 94–112. *Contra*, see Emilio Valiño, "La *actio tributoria*," *Studia et Documenta Historiae Iuris* 33 (1967): 103–128.

88 Under the *actio tributoria*, liability was limited by the amount of the *peculium* used in relation to the particular business (D. 15.1.8). Gaius suggests that the choice between the *actio de peculio* and the *actio tributoria* is fundamental: if it is true that the *merx peculiaris* might consist just in a small part of the whole *peculium*, it is likewise true that possible deductions in favour of the owner should not always be significant (D. 14.4.11; see D. 14.4.1.2). The claimant's choice does in any case extinguish his claim (D. 14.4.9.1); see D. 14.4.1 pr.; D. 14.4.1.3; D. 14.4.5.11.

commercial operation is carried out by a *servus vicarius* undertaking natural obligations, the praetorian liability cannot go beyond the value of the *sub-peculium*'s assets where the *servus ordinarius* had not appointed the *negotiator* and totally ignores the business.

Servi: *That is, Slaves?*

To conclude, at first Roman law introduced magisterial remedies that, by enforcing obligations *iure praetorio*, overcame *ius civile* and allowed those who needed or intended to do business with dependents-agents to sue their owners or their fathers: *servi*, exactly in the same way as *filii familias*, are conceived of as business managers whose activity the principals disdain and consider worthy passing on. The risk of an economic collapse—connected to the patriarchal structure of the Roman *familia* and the nature of civil *obligatio*—is removed by protecting third contracting parties and making the principals liable without limitation on grounds of their *voluntas*. Indeed, the first three *actiones adiecticiae* seem to be better suited for a local or regional trade, concerning a situation characterized by proximity among commercial partners.[89] For a dependent to be of some utility in commercial activities embedded in a wider space, it was necessary for the principal to incur in some liability, yet not too much. Thus, the praetorian system further eased the employment of dependents in carrying out commercial dealings, both by discouraging the direct involvement of the principal, and making both slaves and *filii familias* loyal independent business agents (through a limitation of the former's liability).[90] Thus, the problem of monitoring was ultimately solved,[91] and at the same time the prototype of

89 *Pace* Jean-Jacques Aubert, "*Dumtaxat de Peculio*: What's in a *Peculium*, or Establishing the Extent of the Principal's Liability," in Paul J. du Plessis, ed., *New Frontiers Law and Society in the Roman World* (Edinburgh: University Press, 2013), 204 (who does not consider D. 40.9.10). See András Földi, "Remarks on the Legal Structure of Enterprises in Roman Law," *Revue Internationale des Droits de l'Antiquité* 43 (1996): 179–211 and 201 ff.

90 For the important role played by virtues such as *probitas* and *fides* in enforcement, see Henrik Mouritsen, *The Freedman in the Roman World* (Cambridge—New York: Cambridge University Press, 2011).

91 For a simplistic view suggesting that, by granting a *peculium* and so, by encouraging slaves to self-enforce the performance of the assigned tasks, masters wanted to lower their costs of supervision, see Hopkins, *Conquerors and Slaves*, 125 ff.; Willem J. Zwalve, "Callistus's Case: Some Legal Aspects of Roman Business Activities," in Lukas De Blois and John Rich, eds., *The Transformation of Economic Life under the Roman Empire* (Amsterdam: Gieben, 2002), 127; see Andreas Fleckner, "The *peculium*: A Legal Device for Donations to *Personae Alieno Iuri Subiectae*?," in Filippo Carlà and Maja Gori, eds., *Gift Giving and the Embedded Economy in the Ancient World* (Heidelberg: Universitätsverlag Winter, 2014), 222.

the Roman noble farmer, as depicted by Columella, was safe: *sui iuris* individuals could keep away from business, under the protection offered by law.

People that one nowadays would define as lacking legal, patrimonial and procedural capacity carved up the economic sphere and business. Wealth and progress were in the hands of people labelled with a term evoking nowadays "outcasts and rejects": slaves.

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