PERSON AND INDIVIDUAL IN ROMAN LAW

A thesis submitted to fulfil the requirements
of the degree of Doctor of Philosophy

Sydney Law School
The University of Sydney

2026

Marco Paoletti

Word count (including abstract, table of contents, body of thesis, and footnotes, but excluding the title page, this page, and the bibliography): **100,000**

I would like to thank my supervisors, Dr Eleanor Cowan and Dr Michael Crawford, my wife Leeor, and my parents, for their invaluable support throughout my doctoral candidacy. I also thank the external examiners, Professor Joshua Getzler and Professor Paul du Plessis, for their comments and corrections.

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This research was supported by an Australian Government Research Training Program (RTP) Scholarship.

Marco Paoletti

11 January 2026

This thesis is dedicated to my son, Raphael James Paoletti.

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ABSTRACT

THIS THESIS POSITS the existence of an individualistic jurisprudence in classical Roman law. That jurisprudence conceives the legal person, rather than a person's clan or other political, social, or familial grouping, as what Henry Maine called the primary 'unit of which civil laws take account'.

It is not argued that the connotations now commonly understood for the word 'individualism' were similarly understood by the Romans, or that they celebrated individualism as a moral or political virtue. Rather, it was in the sphere of private law that the individual – free or sometimes even slave – found identity and freedom in his or her commercial dealings with other individuals.

The individualistic tendency reveals itself in various aspects of Roman law, many of which are examined in this thesis within the now familiar trichotomy of *life* (the protection of one's livelihood through the law of delict), *liberty* (one's freedom of private acquisition through contract), and *property* (the freedom of private disposal of one's own things); all of which individualistic tendencies were rationalised and intensified in the universalisation of Roman law throughout the empire. The *legal* concept of the person constitutes the ancient Roman contribution to the *moral* and *political* concept of the individual.

Introduction

THIS THESIS ADVANCES what the classical scholar Clifford Ando has recognised as 'the vast potential'[1] of scholarship about individualism and Roman law by contributing the first monograph-length treatment of the topic.[2] The key arguments are as follows:

First, that individualism needs to be understood, as far as possible, as neither an objectively good nor bad concept, the better to open the inquiry into the individualistic experiences of risk-prone entrepreneurs, slaves, and women (see Chapter 6), and formally landless tenant-farmers (see Chapter 7), and others whose circumstances would not recommend them as exemplars of individualism in any morally or politically programmatic sense of the term.[3]

Second, that if the individualism evident and encouraged in the history of Roman law must be defined as concisely as possible, it is best defined as *economic individualism*. The individual does indeed emerge from his clan or kin, but the manner and form this takes must be examined and carefully delineated. The hazards of teleology and anachronism are especially strong in this study – which, if handled imprecisely, will only project modern fancies onto ancient habits. It is conceded at the outset that a 'moral', 'cultural', or 'political' individualism, associated with autonomy or personal choice, does not really exist: and any assertion of its existence is especially suspect if it supposes that individuals could and did define themselves

[1] Clifford Ando, 'Self, Society, Individual, and Person in Roman Law' in Maren R Niehoff and Joshua Levinson (eds), *Self, Self-Fashioning, and Individuality in Late Antiquity: New Perspectives* (Mohr Siebeck, 2019) 375, 375.

[2] Francesco De Martino, *Individualismo e diritto romano privato* (G Giappichelli, 1999 [1941]) is topically monographic but all too brief. There also exists an 1895 piece by one P V Delarov, Очерк истории личности в древне-римском гражданском праве: but this is a short essay, all but forgotten, and written in a difficult register of high imperial Russian. I beg the reader's forgiveness for neglecting this text.

[3] Thus, while scholars are right to warn against modern distortions of ancient concepts, the risk can be sensibly managed. At risk of imposing myself too much on the argument of this thesis, I think it is helpful to note that I find much to both praise and criticise in the concept of individualism – legal, moral, political, economic, or otherwise. I therefore have no special interest in 'proving' that individualism is good or bad, or in praising or blaming the Romans for their contribution to its intellectual history. And I consider it more plausible to admit that I find much to both praise and criticise in the concept, than to pretend that I have no feelings on the matter.

against social norms. Whatever insights this thesis yields, the Romans were far from the idea that every human being is 'an unrepeatable being and different from others'.[4] Moreover, the focus on economic individualism means that there is little to be gleaned from the Roman jurists' scattered references to 'dignity' (*dignitas*), which are generally about one's social standing and how this is reflected in personal status.[5]

Third, that Roman law preserved and promoted economic individualism by virtue of its character as an *individualistic jurisprudence*. I define this as a jurisprudence whose primary subject of analysis is the individual, and whose techniques are tailored accordingly: a point elaborated especially in Chapters 4 and 5. This is not quite the same as saying that the legislators and jurists in such a system are 'individualists' in some more capacious sense: it does not necessarily mean that they think that the individual is more important than his or her kinship groups (*gens*) or the needs of the society or state as a whole (*res publica*). It means, rather, that legal problems are framed in terms of the individual (*What does Numerius owe Aulus? What is Aulus' entitlement under the will?*), and that juristic techniques develop within this heuristic. Accordingly, the jurisprudence of ancient Rome did have individualistic tendencies and it often had the effect – even when it might not have the active intent – of preserving and encouraging individualistic tendencies within civil society.

Fourth, that economic individualism, promoted by such an individualistic jurisprudence, is the foundation for later and more robust concepts of moral and political individualism that could not well have developed without it. Most of the visible consequences of this proposition lie outside the scope of this thesis, but the point is no less important for this logistical limitation. The history and character of Roman law do not 'prove', though at the least they certainly suggest, that economic individualism is the basic condition of individualism in

[4] Guido Alpa, *The Right to Be Oneself* (Hart, 2024) 1.
[5] See, eg, D.50.13.5.1.

any other sense; that the purported exercise or encouragement of individualism without this condition is illusory at best; that Ando is thus right to point out that *homo oeconomicus* is not the sole term of reference in Roman law and social theory; and that it yet existed and that economic individualism progressed in uneven measures among different types of people. Here especially, it is critical not to confuse economic *individualism* with economic *equality*: in fact, most measures enacted in history to attain this (collectivisation being only the most obvious and the worst) have tended to extinguish personal autonomy – often cruelly.[6]

It was in the system of private obligations that the Romans jurists developed an individualistic tendency. If Christianity, liberalism, and other great ideologies of the last two millennia have contributed to the 'invention of the individual', they have done so partly by inheriting the Roman legal system which had slowly detached itself from the peculiarities of its archaic Italian origins to become a highly abstract, analytical system transplantable to new contexts.[7] With it came the legal *person* transformed into a civic *individual*. This thesis constitutes the first systematic attempt to understand and argue for a defined type of individualism as a characteristic trait of Roman private law, without which an important contribution of Roman jurisprudence to intellectual history cannot be appreciated. In this way, further, it presents a fresh perspective on Roman private law: one which, perhaps through an understandable caution against anachronism, has not hitherto been appreciated otherwise than in brief, question-begging statements about the 'individualist tendency' of Roman law or in narrower considerations of that tendency in specific areas of law.[8]

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[6] See, eg, Robert Conquest, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (Oxford University Press, 1986).

[7] 'The western world, indeed, has been so influenced by Roman law that in many situations in most countries it is impossible to see law except in Roman terms': Alan Watson, 'Legal Transplants' in *Society and Legal Change* (Temple University Press, 2nd ed, 2001) 98, 99. One student textbook of Roman law also hints at a continuity: 'Relying predominantly on Stoic philosophy … the jurist Ulpian defined justice as "the perpetual and constant will to give to each his or her own". This famous definition … has been largely accepted in Western legal culture into our own day': Rafael Domingo, *Roman Law: An Introduction* (Routledge, 2018) 7.

[8] See, eg, the passages quoted from Reinhard Zimmermann and Fritz Schulz and discussed in Chapter 1.

The thesis is structured as follows:

Chapter 1 considers what is meant by a 'person' and an 'individual' and examines the historiography of this topic.

Chapter 2 surveys ancient law before classical Roman jurisprudence, especially Jewish and Greek law. While only a brief summary of ancient law is possible, this cannot be dispensed without risking an especially distorted view of Roman law. This chapter therefore examines salient aspects of the law and social structure of the Israelites and the Greek *polis* – especially Athens, for which the extant evidence is the most abundant and fruitful.

Chapter 3 then turns to Roman law. This chapter has two functions: first and more simply, to provide the briefest historical introduction to Roman private law to assist the reader in understanding what follows; and second, to begin outlining some of the individualistic tendencies in the jurisprudence of Rome.

The first, short part of Chapter 4 introduces and justifies the heuristic of 'life, liberty, and property' – made especially famous by John Locke and by the Framers and Ratifiers of the American Constitution – as a way of understanding Roman conceptions of individual right. The second, longer part of this chapter begins the analysis with the first element – rights in relation to livelihood – by examining the Roman delicts of wrongful damage to property under the *lex Aquilia* and in the law of *iniuria*, or outrage: two ways in which a person's livelihood was protected by law. These exhibit the characteristics of Rome's individualistic jurisprudence at a level of technical detail unavailable in the documentary survivals of other ancient societies who may also have shown individualistic tendencies, but have not had anything like the same influence in legal and intellectual history.

Chapter 5 continues the study of Rome's individualistic jurisprudence through the modern heuristic of life, liberty, and property. Public and political liberties at ancient Rome were limited by modern standards especially; here the focus is on private liberty, or what is usually now called freedom of contract. Since the right to own things is inseparable in a market economy from the right to sell the things one owns, the heuristics of liberty and property are examined together. A technical examination of the Roman doctrine of the *peculium* – the private fund of fungible and tangible property to which notionally propertyless persons were entitled – illustrates some of the characteristics of Rome's individualistic jurisprudence and how it compares with, and differs from, equivalent concepts in modern legal theory.

Chapter 6 examines some of the ways in which Roman law facilitated the economic individualism briefly described above. As noted earlier, any account of individualism in Roman law will fall short if it focuses only on the *paterfamilias*, the most 'complete' citizen and the fullest right-bearer in republican and imperial Rome. The focus of this chapter is rather on entrepreneurs, women, and slaves, who each found expression of some form of economic individualism, precisely because they did not – or did not always – enjoy the easier economic opportunities afforded to kinship-intensive aristocrats.

Chapter 7 asks how the property rights recognised in legal theory worked in economic practice. The focus is primarily on immovable property (ie, land) in Italy, where the civil law predominantly obtained. Scholars have observed (1) that the *latifundia* seldom existed on the grand scale that has often been imagined, and at any rate that (2) tenant-farmers were often delegated significant responsibility for managing the scattered estates of larger landowners. With significant skill and responsibility came significant bargaining power, which went at least some way to correcting the traditional view of tenant-farmers as lacking any of the independence, power, or wealth of their property-owning counterparts. This chapter argues that because tenancies were a lesser form of property than traditional *dominium*, this paradoxically

gave enterprising Roman males considerable freedom from *patria potestas* and with that, more flexibility to engage personally in tenant-farming, as well as a practical space for exercising their freedom of contract.

Chapter 8 resumes the analysis of the previous chapter in the context of the provinces. While the evidence is sparser for parts of the empire outside Italy, its significance is if anything greater. That chapters considers the periods before and after the imperial grant of Roman citizenship to virtually all free inhabitants of the Empire AD 212, which saw a growing interaction with or displacement of local laws by Roman law and a counter-process of adapting and deflecting that law. It considers the development of a sort of common or universal law, known as the *ius gentium*, that regulated private legal relations between subjects of all nations. The chapter argues that provincial law, as it merged, simplified, standardised, and interacted with the increasingly deracinated Roman law and also came under the theoretical influence of a universal *ius gentium*, played an important part in creating the idea of the individual as legal subject, not least because of the decline of the institution of *patria potestas* in provincial-influenced 'Roman' law.

Chapter 9 analyses two concepts in Roman private law: *bona fides* and *causa*. It posits good faith and the conduct of the person seeking redress before the law as core to Rome's individualistic jurisprudence. *Bona fides* and *causa* were corollaries of the private individual's rights as contracting party, and as bearer of property rights. This departs from the purely economic conception of the juridical individual – the focus of the thesis up to this point – and considers the evidence for a moral, not merely economic individual under Roman law. This chapter is followed by a brief Conclusion.

Chapter 1

Individuals before Individualism

I INDIVIDUALS AND RIGHTS

WE LIVE IN an age of rights.[1] Our world is made of law.[2] Many governments rule, or at least claim to rule, not by custom or convention, nor through a person claiming to be the law, but primarily by laws duly enacted, perhaps leavened with the legal fiction that judges are discovering but never inventing the law.[3] Next to these systems is the global apparatus of public international law, which regulates conduct between sovereign states to whom the existence of that international regime is acceptable.[4] And if the world is made of law, the law is made of rights. The modern citizen says: 'I know my rights.' If she does not know her rights, she will retain a lawyer and ask him: 'What are my rights?'

Modern jurisprudence has put the person at the centre of its priorities.[5] Legal rights means the rights inhering in each individual; this is the basic assumption on which progressive theorists of law operate.[6] At least two legal scholars have already advocated a completely new system of 'personalised law' to solve the problem of 'imprecision' which 'fails to promote the law's goals optimally.'[7] The prospects are frightful on closer inspection: to name only one, any

[1] For the capstone document expressing this worldview, see United Nations, *Universal Declaration of Human Rights* (1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.
[2] The phrase and concept of a 'world made of law' is taken from Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (Penguin, 2003), particularly in his analysis of the Wilsonian global order.
[3] Ie, 'positive law': see H L A Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 185–6.
[4] For a summary of current doctrine, see James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019).
[5] John Finnis, 'The Priority of Persons' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press, 2000) 1. One scholar describes 'person' as 'an unrepeatable being and different from others': Guido Alpa, *The Right to Be Oneself* (Hart, 2024) 1.
[6] See discussion, from a critical viewpoint, in Adrian Vermeule, *Common Good Constitutionalism* (Polity, 2022)164–78.
[7] Omri Ben-Shahar and Ariel Porat, *Personalized Law: Different Rules for Different People* (Oxford University Press, 2021) 19. See also Samuel J M Donnelly, *A Personalist Jurisprudence, The Next Step: A Person-Centered Philosophy of Law for the Twenty-First Century* (Carolina Academic Press, 2003).

such system would be subject to egregious and large-scale abuses by everyone working the system to tailor the law to their own preferences, collectively and individually subverting the legal order.[8] The idea is unlikely to take root fully, but it is indicative of a type of thinking that permeates much legal theory and reform advocacy. Some theorists predict the eventual recognition of the environment as a 'person' deserving legal rights for its own sake,[9] and of artificial intelligences as 'persons' deserving legal rights for their own sake.[10] While not typical of daily legal practice or representative of the views of most people or even most lawyers, these avant-garde examples illustrate the logic of modern law, which always takes the *individual* – either that, or the *public*, but nothing in between – as the unit of analysis.

Justinian's *Institutes*, the foundational textbook of early Byzantine lawyers promulgated in AD 533, opens with this: 'Justice is an unswerving and perpetual determination to acknowledge all men's rights.'[11] The modern citizen who reads this is probably taken aback, not by the brazenness of this statement but by its very obviousness, bordering on the superfluous. The modern citizen may react similarly to this pronouncement by the great Roman orator and politician, Marcus Tullius Cicero: 'The man in an administrative office … must make it his first care that everyone shall have what belongs to him and that private citizens suffer no invasion of their property rights by act of the state.'[12] These may seem obvious to

[8] Anyone with civil litigation experience will already have seen a scaled-down version of this abuse in plaintiffs perpetually appealing 'special disadvantage' or similar equitable doctrines.
[9] Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (Cambridge University Press, 2022).
[10] Visa A J Kurki, *A Theory of Legal Personhood* (Oxford University Press, 2019) 175–90. Note, however, that generative artificial intelligence does not have copyright in its art. See, eg, US Copyright Office, *Compendium of US Copyright Office Practices* (3rd ed, 2021) § 306.
[11] *Iustitia est constans et perpetua voluntas ius suum cuique tribuens*: J.1.1.pr. This translation accords with the *Oxford Latin Dictionary* (Oxford University Press, 2nd ed, 2012), which defines *ius* as, *inter alia*, '[t]hat which is good and just, the principles of law, equity, the right' and as a '[p]osition or standing in respect of the law (especially as regards the enjoyment or exercise of rights)'. That is the sense conveyed in Virgil, *Aeneid* 1.293. On law as a 'mechanism' for the achievement of *iustitia* more broadly, see Michael Peachin, 'In Search of a Roman Rule of Law' [2017] (6) *Legal Roots: The International Journal of Roman Law, Legal History, and Comparative Law* 19, 63–4.
[12] *In primis … videndum erit ei, qui rem publicam administrabit, ut suum quisque teneat neque de bonis privatorum publice deminutio fiat*: Cicero, *De officiis* 2.73. This text is analysed in greater detail in Chapter 5.

modern readers because we are all individuals and that as individuals, of course we have rights. That is the foundation of law, it may be argued; and it may further be argued that any legal system which fails to acknowledge this is not law, but tyranny. The United States of America's 1791 Bill of Rights is an expression *par excellence* of a society made of law and of law made of rights in its absolute prohibitions and open-ended enablement of fundamental social practices; but it is also one of the key documents in the foundation of a modern civil culture which has since taken such ideas for granted. The purpose of this thesis is to demonstrate that Justinian's proposition quoted above is not a truism; that it expresses something distinct about Roman law; and that Roman law contributed something to the idea of individualism which functions as an axiom of modern society. Importantly, this is not something to be found only in the philosophical treatises or private speeches of Cicero, who might be more readily expected to defend his clients' cases with a flourish about his rights against those of a public that has done him an injustice. It is also to be found in the more complex thought of the professional jurists. Any ideas *they* had about individual rights – while not always as obviously stated[13] – constituted elements of a principled jurisprudence free from the ephemeral constraints of saying whatever would win a client's case.[14]

Not, of course, that ancient and modern individualism can be taken as one and the same. Modern individualism is often partnered with the assumption that persons are owed rights so that they can enjoy them, not so that they can be used for a common good. Hence why it is all too common, if understandable, for the distinct concepts of *individualism* and *rights* to be collapsed into each other; likewise the concept of *equality*. But if we recall that they are

[13] For, eg, the difficulties involved in tracing Greek philosophical influences on juristic thought, see in Jacob Giltaij, 'Greek Philosophy and Classical Roman Law' in Paul J du Plessis, Clifford Ando and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) 188.
[14] See Ulrike Babusiaux, 'Legal Writing and Legal Reasoning' in du Plessis, Ando and Tuori (n 13) 176, 182–4.

separate concepts, we will be able to see more clearly, and on their own terms, genuinely ancient ideas about individualism.[15]

In a general history of ancient Greece, Robin Waterfield makes some observations about the growth of individualism in the Hellenistic period (c 323–31 BC) worth quoting at length for their resonance with the question of Roman law:

> [M]any people were uprooted from their traditional collectives and social groups, and forced to face life's challenges on their own [partly a result of the rise of large-scale empires and the decline of the classical *polis*]. Second, there may have been a trickle-down from the cult of personality that grew up around Alexander and the kings that followed him.
>
> … [A] citizen of a Greek community of the classical period would have struggled to understand the value of individualism. We use the term to describe part of a spectrum of possibility … [and] think of ourselves as individuals by contrast with the soulless, faceless apparatus of state control – there lay the difference, because the classical Greek state was not soulless and faceless, but was animated by and wore the faces of each generation of its citizens. Collectivism was a very pronounced characteristic of all Greek states. A citizen had a far more restricted sense of privacy than we do. … But now, under the Hellenistic kings, a pancake model, in which all citizens of a state were theoretically equal, had been replaced by a pyramid model, with powerful individuals occupying the top layers.

[15] I might instead have said 'roots of individualism', but it is necessary to be cautious with metaphors suggesting clear connections or unbroken lines of descent.

> The relative disempowerment of citizens as political agents made it possible for them to see themselves, to a greater extent, as individuals, rather than just as contributors to the greater good.[16]

These observations about the Hellenistic world also point to something unnoticed in prior observations about individualism in Roman law. Notice that Waterfield acknowledges the sense of helplessness that an 'individual' may feel, just as much as a sense of moral or material elevation. The definitions usually assigned to the word *individualism* in modern political thought are each what the American philosopher Charles Stevenson called a 'persuasive definition', or 'one which gives a new conceptual meaning to a familiar word without substantially changing its emotive meaning, and which is used with the conscious or unconscious purpose of changing, by this means, the direction of people's interests'.[17] The concept has defenders and critics of various types, intensity, and motive, from socialists to Roman Catholics,[18] but each usually purports to provide an objective definition of a concept they then proceed to defend or attack, when in fact the process of defence or attack is already embedded in the definition itself.[19] Thus – to give some crude, purely illustrative examples – I am giving you a persuasive definition of *individualism* if I call it 'mankind's helpless impulse to destructive selfishness'; or 'the attitude of a person defending herself against collectivist tyrannies of both Left and Right'. That assumption is often built into historical accounts of

[16] Robin Waterfield, *Creators, Conquerors, and Citizens: A History of Ancient Greece* (Oxford University Press, 2018) 437. See also Christopher Gill, *The Structured Self in Hellenistic and Roman Thought* (Oxford University Press, 2006).
[17] Charles Leslie Stevenson, 'Persuasive Definitions' (1938) 47(187) *Mind* 331, 331. Maurice Cranston uses Stevenson's modality in *Freedom: A New Analysis* (Longmans, 3rd ed, 1967) 31–43.
[18] For one socialist critique of individualism, see G A Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge University Press, 1995). For Roman Catholic critiques, see Vermeule (n 6) and – qualifiedly – Leo XIII's 1891 encyclical *Rerum novarum*, available at <https://www.vatican.va/content/leo-xiii/la/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html>. For something of both, see Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Bloomsbury, 3rd ed, 2013).
[19] This appears to be closely related to 'essentially contested concepts', except that these refer to terms themselves whereas Stevenson is concerned with the definition of terms. See W B Gallie, 'Essentially Contested Concepts' (1956) 56(1) *Proceedings of the Aristotelian Society* 167.

individualism generally,[20] and sometimes in the more specialist studies of Roman legal individualism surveyed earlier.[21]

But ancient individualism must be found also in what the privileged would have considered a misfortune or even a vice: detachment from a family name and absence of both the rights and the duties associated with deep kinship ties. Alexis de Tocqueville famously observed that an aristocrat is naturally circumspect in commercial and other dealings because he has his mind on the interests of those who have long ceased to exist, and those who have yet to exist.[22] Precisely the same aristocratic ethos suffuses the agricultural treatise of Cato the Elder, who says that the qualities of the farmer, rather than the common trader, are the paradigm of good character.[23] Nor is a scion of the landed aristocracy restrained only by his own sense of obligation; often he is held to a certain standard, even by legislation: as with the *lex Julia* prohibiting senators and their male issue from marrying freedwomen, actresses, or even actors' daughters.[24] By contrast, a newly freed slave, or a Romanised Syrian or Greek living in imperial Italy, probably has little or no kinship network either on which he may rely or to whom he is beholden. Consequently, he may seek his livelihood – and through this, his identity – in trades less tied up with social expectations, and more demanding of personal effort and risk-taking. As Dio Chrysostom wrote (however idealistically): 'Whenever … a man is confronted by a perplexing situation and is seeking to discover what is expedient for him, he need not, I believe, call in friends or kinsmen, but rather go to the laws and pose his question'.[25] Thus, this thesis

[20] Eg, Alan Macfarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Blackwell, 1978); Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Allen Lane, 2014); Alex Zakaras, *The Roots of American Individualism: Political Myth in the Age of Jackson* (Princeton University Press, 2022).
[21] On the treatment of legal–sociological questions such as this, see Janne Pölönen, 'The Case for a Sociology of Roman Law' in Michael Freeman (ed), *Law and Sociology* (Oxford University Press, 2006) 400–7.
[22] Alexis de Tocqueville, *Democracy in America*, Harvey C Mansfield and Delba Winthrop (trans) (University of Chicago Press, 2000 [1833]) 483.
[23] Cato, *De agri cultura* 1.1–4.
[24] The jurist Paul quotes the legislation at D.23.2.44. Whatever else was backwards or cruel about Roman society, seeking political guidance from bird entrails is no more absurd than seeking it from actors.
[25] Dio Chrysostom, *Orations* 75.3, quoted in Peachin (n 11) 29.

will also look for individualistic tendencies where Rome's legal structure deliberately or incidentally provided opportunities, or at least certain personal autonomies, for commoners, slaves, and women. Unlike the legal systems of the Hellenistic period – which are relatively poorly documented, at least outside Ptolemaic Egypt[26] – we have abundant surviving evidence of a juristic system based upon the legal subject as individual, which has had a consequently profounder influence on Western political thought.

Individualism is easily intuited, but hard to define. The difficulty is compounded in historical inquiry; still more when considered in the specific context of Roman law.[27] At the outset, however, it is useful to identify a definition of individualism detached from ideology and historical contexts – or more modestly, one largely free of obvious signs of 'persuasive definition'. In his study of the individual in high medieval culture, Colin Morris offers a simple definition that is evidently not confined to medieval circumstances: '[T]he sense of a clear distinction between my being, and that of other people.'[28] It works because it is clear and concise, and because it expresses something common to political individualism, economic individualism, moral individualism, and so on.

In turn, this list of special types highlights the need to clarify which individualism we are concerned with in this thesis. And in refining this definition, it helps to consider those connotations which, however meaningful to us, had no place in classical thought. According

[26] But see, eg, James L O'Neil, 'Royal Authority and City Law under Alexander and his Hellenistic Successors' (2000) 50(2) *Classical Quarterly* 424; Hans Julius Wolff, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats*, vol i, *Bedingungen und Triebkräfte der Rechtsentwicklung*, Hans-Albert Rupprecht (ed) (C H Beck, 2002); Joseph Mélèze Modrzejewski, 'Greek Law in the Hellenistic Period: Family and Marriage' in Michael Gagarin and David Cohen, *The Cambridge Companion to Ancient Greek Law* (Cambridge University Press, 2005) 343.

[27] Geoffrey Samuel, 'Methods of Legal History and Comparative Law' in Mark Van Hoecke and Maurice Adams (eds), *Comparative Methods in Law, Humanities and Social Sciences* (Edward Elgar, 2021) 11, 30–6, who at 31 acknowledges that 'there are texts in the *Digest* that seem conscious of a tension between individuals and the group' (italics in original).

[28] Colin Morris, *The Discovery of the Individual, 1050–1200* (University of Toronto Press, 1987) 3.

to the Roman jurist Florentinus, '[f]reedom is one's natural power of doing what one pleases, save insofar as it is ruled out either by coercion or by law'.[29] The Latin word for 'freedom' or 'liberty', which Florentinus uses in this text, is *libertas*. In the early principate, Tacitus chided those who could not distinguish between liberty (*libertas*) and license (*licentia*).[30] The fact that there were those for Tacitus to chide for confusing them implies that this kind of moral individualism was not the social norm (if also, perhaps, that it did exist somewhere).[31] It is right to accept the scholarly consensus that freedom 'was not the watchword of the individual who tried to assert his own personality against the overriding authority of society',[32] but simply 'the status of non-slavery'.[33]

It was equally difficult for someone living in the Roman Empire to have so strong a sense of his own moral identity that he saw himself as in some way separate from his clan or the *res publica*. Mary Carruthers' study of memory in medieval culture describes the 'common cultural and civic bond, whether that of *civitas Romana* or *civitas Dei*, a bond forged by the memories of people and their texts', which characterised both ancient and medieval society; and it reminds us of 'Aristotle's view of politics as the life of the individual completed in society'.[34] Carruthers recalls the account of Heloïse, the illicit lover of the twelfth-century philosopher Peter Abelard, who bursts out with the same lines spoken by a woman in a similar predicament in Lucan's ancient poem *Pharsalia*, which she had committed to memory. This,

[29] *Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur*: D.1.5.4.pr. This text will be examined more closely in Chapter 5.
[30] Tacitus, *Dialogus de oratoribus* 40.2, quoted in Chaim Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (Cambridge University Press, 1960) 8.
[31] This is one very important difference between classical Roman individualism and modern progressive liberalism: the progressive liberal would refuse to distinguish between liberty and licence because he or she would repudiate any argument that one is morally required to use legally permitted liberties in a specific way.
[32] Wirszubski (n 30) 8.
[33] Valentina Arena, *Libertas and the Practice of Politics in the Late Roman Republic* (Cambridge University Press, 2013) 14. Chapter 5, however, will challenge the simple distinction between freedom and slavery.
[34] Mary Carruthers, *The Book of Memory: A Study of Memory in Medieval Culture* (Cambridge University Press, 2nd ed, 2008) 28 (italics in original). Classical Christianity accorded with Aristotelianism in acknowledging an individual soul before God, albeit each less important than the Christian *community*: see Walter Ullmann, *The Individual and Society in the Middle Ages* (Johns Hopkins University Press, 2019 [1966]).

warns Carruthers, is not self-expression, for that is 'a meaningless term in a medieval [or ancient] context … for there was no concept of an autonomous, though largely inarticulate, individual self, to be defined and given a voice against social norms'.[35] Instead, Heloïse was expressing a common ethic familiar to those who read all the same texts that spoke to each other over time. As with the medieval, so with the ancient world, which shared the same pedagogical method of memorisation and deep learning of canonical literature.[36]

II THE HISTORIOGRAPHY OF INDIVIDUALISM AND ROMAN LAW

It is not the intention of this thesis to posit an anachronistic individual in ancient Rome who had a voice against social norms. But I will argue that there was an individualistic tendency in Roman law. At the most highly conceptual level, we can borrow Sir Henry Maine's observation that this meant treating the individual as 'the unit of which civil laws take account'.[37] Often this is blithely assumed by those whose examination of Roman law is cursory or instrumental to some other purpose. For example, in his study of the connection between property rights and personal liberty, Richard Pipes writes almost in passing of the Romans having been 'the first to formulate the concept of absolute private ownership'.[38] And in a book about the modern theory of legal and corporate personality, the jurist Samuel Stoljar inserts a hurried historical preface in which he says that in Roman law, 'the word "person" became a sort of key-word for describing an autonomous or "private" individual as opposed to the one still submerged in his clan or kindred'; that private law 'had become the law of individuals'; and that by 'the eighteenth century a person's political rights became the "rights of man", whereas his private

[35] Ibid 226.
[36] See, eg, Stanley F Bonner, *Education in Ancient Rome: From the Elder Cato to the Younger Pliny* (Routledge, 1977) 165–249.
[37] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Oxford University Press, 1931 [1862]) 140. Maine is discussed further in Chapter 2.
[38] Richard Pipes, *Property and Freedom* (Vintage, 2000) 11.

legal rights were seen as emanating from his "personality", with the result that a "person" was no longer just a man with legal rights, he had legal rights because he had personality'.[39]

The question of individualism and Roman law is complicated by the interaction of the concepts of *person* and *individual*. Generally, *person* is a word with which lawyers, even ancient lawyers, are comfortable, for it is essentially a legal category.[40] By contrast, the word *individual* usually connotes more political, social, or moral ideas.[41] Thus, one is a *person* before the law, whereas one is an *individual* more generally and it is this anterior fact which justifies one's having rights; in other words, the law constructs the legal category of a person, whereas the individual does not depend for her existence on law. This is why the legal anthropologist Fernanda Pirie can write that 'law demands and produces coherent and consistent forms of personal identity, while individuals' own sense of self may be more fragmentary and inconsistent'.[42] It is also why it sounds perfectly natural for a modern liberal-progressive to say, 'I am an individual'; whereas to say 'I am a person' would fall flat – a truistic statement in a world made of law. At obvious risk of oversimplification: *person* is a lawyer's word, and *individual* is a philosopher's word.[43] Perhaps the best illustration of this is the common law doctrine of the 'corporation sole' – the Crown, a parish priest, etc – which describes the purely legal *personality* of someone who, in the form of the present incumbent (King Charles III, Fr Timothy Newton, etc.), is merely the *individual* who holds the office at a given time.[44]

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[39] S J Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (Australian National University Press, 1973) 5–6.

[40] René Brouwer, *Law and Philosophy in the Late Roman Republic* (Cambridge University Press, 2021) 80–1. Apart from this brief discussion of the law of persons in Gaius (and Grotius), Brouwer's interesting chapter largely compares Hellenistic philosophy with Cicero, rather than with the jurists.

[41] See below and Chapter 2.

[42] Fernanda Pirie, *The Anthropology of Law* (Oxford University Press, 2013) 14.

[43] Cf Robert Spaemann, *Persons: The Difference between 'Someone' and 'Something'*, Oliver O'Donovan (trans) (Oxford University Press, 2006), who nevertheless seems often to use the words 'person' and 'individual' interchangeably.

[44] William Blackstone, *Commentaries on the Laws of England*, vol i, *Of the Rights of Persons*, David Lemmings (ed) (Oxford University Press, 2016 [1765]) 304. Even when Blackstone writes of the advantage of perpetuity 'which in their natural persons they could not have had', he is writing in legal terms about both the corporate perpetuity and the evanescent human.

Often the concept of a person or of an individual arises in association with legal or political ideas of liberty. According to one historical view of liberty identified by Quentin Skinner in early-modern England, where law ends, liberty begins; and the role of law is accordingly to facilitate liberty.[45] Against this, the 'neo-roman' theory of liberty favoured by the parliamentarians during the English Civil Wars held that liberty cannot truly exist where the exercise of freedom depends on some indulgence of the state and its laws.[46] This latter tradition drew more extensively on classical historians, above all Livy; while the exponents of the older view relied more on the writings of the classical lawyers. Skinner cites two of these: Ulpian on law making men good by inducing fear of punishments, and Florentinus describing law (in a rather proto-Hobbesian way) as a restraint on the natural faculty of liberty.[47] These propositions are not contradictory to, but are surely a little in tension with, the statement of Justinian's legal compilers that '[j]ustice is an unswerving and perpetual determination to acknowledge all men's rights.' More lines could be quoted, and will be considered later: we can note for the time being that Roman thought has inspired more than one tradition of individual liberty.

Conversely, Roman law has just as often been regarded as inimical to liberty: as, for example, among Reformation German lawyers who variously regarded it as a manifestation of popery and as naturally inclined to absolutism.[48] Modern scholarship has also taken a critical eye to the legal system as it operated in ancient Rome itself: notably, in Peter Garnsey's early work on social status and legal inequality.[49] This classic work is not concerned directly with

[45] Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 1998) 5.
[46] Ibid 84. Incidentally, this is why there is no contradiction between most contemporary Americans' record-low distrust of government institutions and their abiding admiration for the Constitution and especially the Bill of Rights. See 'Public Trust in Government: 1958–2024', *Pew Research Center* (24 June 2024) <https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/>.
[47] Skinner (n 45) 5, citing D.1.1.1, D.1.5.4. This point is addressed in Chapter 5.
[48] Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton University Press, 2016 [1986]).
[49] *Social Status and Legal Privilege in the Roman Empire* (Oxford University Press, 1970).

individualism but its implications do bear on the question. Garnsey's thesis, in brief, is that the imperial legal order was prejudiced, *de facto* if not always *de iure*, against the indigent or those of lower social status. As far as *de facto* prejudice is concerned, the problem has not disappeared in modern legal systems regulating what we readily accept are individualistic societies: in other words, while Roman society was frequently unjust, that injustice does not mean that its jurisprudence was not individualistic in general character and operation. Such a system is premised only on its focus on the individual as the principal *subject* of its rules and operation, and not on whether individuals are treated *equally*. This is not the same as saying that individuals received a certain treatment from the legal process based on their membership of a particular status group. As far as *de iure* discrimination is concerned, Garnsey points to the rise of the distinction between the privileged class (*honestiores*) and everyone else (*humiliores*), which revived a kind of official legal discrimination in the decades and centuries after almost all free subjects of the Empire had ostensibly achieved equal status as Roman citizens in AD 212. This is an important question in the literature of late classical and late antique social and legal history.

The specific claim that Roman law has individualistic characteristics has been made before. But as we shall see, there is far from a settled view on whether Roman law was 'individualistic' and what that would mean. Perhaps the debate has its modern origins in the rise of the 'Historical School' of German jurisprudence. In a founding text of that movement – and typically of Romantic German thought in the early nineteenth century – Friedrich Carl von Savigny wrote that from earliest times, the law had a 'fixed character', like its people's language and manners, but that 'which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an

accidental and arbitrary origin'.[50] Savigny wrote extensively about Roman law, and Roman legal history was the primary focus both of the historicists' research and of their university curricula. But as the Italian legal philosopher Alexander d'Entrèves has observed, Roman law brimmed with 'categories … derived from the essentially individualistic conception of law which had inspired the Continental law-schools for centuries', such as notions of objective and subjective right, juridical relationships, and personality.[51] The historicists had before them the great task of reconciling these concepts with the quintessentially German 'conception of law as the expression of the organic life of society'.[52] Since at least the Romantic era, then, jurists have openly debated a problem which has been latent in Western legal thought for much longer.[53]

What, then, is supposed to be individualistic about Roman legal concepts and Roman law generally? In an influential paper, John Pocock suggested that Roman jurisprudence made a lasting contribution to the concept of citizenship through its famous tripartite division of legal analysis into *persons*, *things*, and *actions*.[54] Where Aristotle had called man a political animal by nature, Pocock reminds us, the Roman jurists conceived of men principally as 'possessors and administrators of things'.[55] Donald Kelley means the same thing when he writes:

> Through th[e] third member of the juridical trinity [of persons, things, and actions], the ancient legal version of modern 'action theory', individuals extended their wills and

[50] Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, Abraham Hayward (trans) (Littlewood, 1831) 24.
[51] A P d'Entrèves, *Natural Law: An Historical Survey* (Harper & Row, rev ed, 1965) 99.
[52] Ibid.
[53] Eg, in the social contract theories of the later scholastics and their critics. See Conclusion.
[54] J G A Pocock, 'The Ideal of Citizenship since Classical Times' (1992) 99(1) *Queen's Quarterly* 33; on the trichotomy itself, see Chapter 3. Further, in an interesting essay, Henry Goudy combs through Roman law to demonstrate a peculiar numerological fixation: *Trichotomy in Roman Law* (Oxford University Press, 1910). This fails to convince, though three is an important number in many religions and mystic schools, and of course in mathematics.
[55] Pocock (n 54) 9. See also Bruce W Frier, *The Rise of the Roman Jurists: Studies in Cicero's Pro Caecina* (Princeton University Press, 1985) 184–96.

> interests beyond the domestic sphere into the further reaches of society and, however inadvertently, helped to create the substance and forms of civil law.[56]

Ulpian writes of 'those who make some contract or settlement with each other'.[57] Cicero also expresses the idea when he says to a panel of assessors (*recuperatores*): 'If the law is abolished, there can be no means whereby anyone can ascertain what belongs to him and what to other people: there can be no universal and invariable standard.'[58] These examples – and others will be given in the course of this thesis – suggest that Romans from at least the late republican period understood the law as a safeguard for both community *and* individual. Pocock continues:

> The person was defined and represented through his actions upon things; in the course of time, the term 'property' came to mean, first, the defining characteristic of a human or other being, second, the relation which a person had with a thing, and third, the thing defined as the possession of some person. From being *kata phusin zoon politikon* ['by nature a political animal', κατά φύσιν ζῷον πολιτικόν], the human individual came to be by nature a proprietor or possessor of things; it is in jurisprudence, long before the rise and supremacy of the market, that we should locate the origins of possessive individualism.[59]

This is a substantial claim, though Pocock's point is that the contribution of Roman jurisprudence to the idea of citizenship was neither morally lofty nor politically deliberate, and has therefore flown under the radar of intellectual history. Individualism is not just the work of

[56] Donald R Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard University Press, 1990) 51.
[57] [*D*]*e quibus negotii contrahendi transigendique causa consentiunt qui inter se agunt*: D.2.14.1.3. He also writes of contractual consensus as one way of thinking (*sententia*) reached by those who come from different mental inclinations (*ex diversis animi motibus*).
[58] *Etenim* [*iure*] *sublato nihil est quare exploratum cuiquam possit esse, quid suum aut quod alienum sit; nihil est quod aequabile inter omnes atque unum omnibus esse possit*: *Pro Caecina* 70. I have adapted the Loeb translation to avoid rendering '*cuiquam*' as 'the individual'.
[59] Pocock (n 54) 40.

famous philosophers and the product of a conscious exercise in political theory. It also has deep roots in daily life and in the practically oriented writings of the Roman jurists.

As Pocock sees it: 'A "citizen" came to mean someone free to act by law, free to ask and expect the law's protection, a citizen of such and such a legal community, of such and such a legal standing in that community.'[60] He gives the famous example of St Paul chiding the officer who mistreats him and pointing out that he is a citizen by birth, whereas the officer is merely a citizen by acquisition.[61] Social statuses conferred graded levels of right, but also of duty. Thus, in earlier Roman society especially, the individual is a nobody compared to one who has a whole nexus of religious and familial duties by which to define himself or herself. Thus, it makes sense to suppose that a culture of individualism developed as these distinctions levelled off. Just as St Paul declared that there is neither Jew nor Greek, neither slave nor free, neither rich nor poor, for they are all one in Christ;[62] so too, in time, there was neither citizen by birth nor citizen by acquisition, neither patrician nor plebeian, neither native nor peregrine, for they are all citizens and subjects of the emperor.[63] Or to be more precise, those distinctions remained only as social signifiers, not as categories of legal right.[64] Social distinctions therefore remained; but just as social status is as stratified as ever in modern democracies that treat every citizen as theoretically equal, so too did Rome's legal culture direct its society – gradually, imperfectly, and by no means completely – towards a level field between citizens (slaves meanwhile remaining *things* with which *persons* interacted, though they too could interact with other things *as if* they were persons[65]). The practical effect obviously was not to turn society

[60] Ibid.
[61] Acts 22:22–30.
[62] Galatians 3:28.
[63] See Chapter 8. As noted above, there did then arise an invidious distinction between the privileged (*honestiores*) and the majority of the population (*humiliores*). Yet privileges of the former, and disabilities of the latter, while very important, were not directly about substantive private law rights, but more about questions of evidentiary weight or punishments following sentencing (about which the jurists could hardly care less).
[64] Except, importantly, for punishments: but this was a matter for public, not private law.
[65] See Chapter 5.

into a paradise of equality, but to uphold what Finnis called 'the priority of persons' before the law.[66] The views on individualism and Roman law developed in this thesis differ from this primarily in rejecting the tendency, however understandable, to elide the concepts of *individualism* and *equality*.

More recently, Reinhard Zimmerman mentions almost in passing the Romans' 'private law show[ing] many essentially individualistic traits';[67] citing a passage of the great Fritz Schulz; who also wrote that '[t]he individualism of Hellenistic liberalism caused [republican] private law to be developed on a basis of freedom and individualism' – though he overstates it when he waves the matter away as having 'so often been described that no more need be said here'.[68] In an earlier work, Schulz wrote more expansively on this aspect of Roman law. 'The Roman principle of liberty', he observed,

> led to extreme individualism in the domain of private law. It is true that the Romans probably passed through a medieval period of fettered rights, but in the era which we have selected for our investigations, beginning with the second century BC, the individualistic nature of Roman private law is undeniable and has never been denied.[69]

So 'undeniable' is the individualism of Roman law that he quotes a young Theodor Mommsen, who gave a speech during the revolutionary year of 1848 in which he declared that an incipient German nation looking 'to develop a law suitable for free citizens … may rely absolutely as

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[66] Finnis (n 5).
[67] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) 435.
[68] Fritz Schulz, *History of Roman Legal Science* (Oxford University Press, 1946) 84. Schulz also observes that there was little scope in the middle and late republican period, and even less in the classical period, for individualism in the writings of jurists so bound to *auctoritas* as the best guide to valid, empirical judgment: ibid 125. He makes a similar point elsewhere, quoting Savigny's famous appraisal of the jurists as 'fungible personalities': Fritz Schulz, *Principles of Roman Law*, Marguerite Wolff (trans) (Oxford University Press, 1936) 106–7. But this is a question of individualism in professional technique, not in the law itself; it is of course an entirely separate question. See also Aldo Schiavone, 'Singularity and Impersonality in the Thought of the Roman Jurists' in Fara Nasti and Aldo Schiavone (eds), *Jurists and Legal Science in the History of Roman Law*, Peter Christie (trans) (Routledge, 2021) 3, 7–11.
[69] Schulz, *Principles of Roman Law* (n 68) 146.

regards civil law in this respect on the Roman law of the classical era and be certain of discovering therein a spirit which may often conflict with the principle of solidarity as between the citizens, but never with that of the liberty of the individual'.[70] Only a few years after Mommsen's enthusiastic speech, Rudolf von Jhering devoted some pages of his magisterial *Geist des Römischen Rechts* to the interaction of law and freedom, arguing that the individual bolsters his own freedom and that of his fellow-citizens when he asserts his legal rights: that law is not merely about restraint but can be the route to freedom.[71]

Individualistic tendencies, and rights defendable by the individual, are observable in all areas of Roman private law. As Schulz observes in connection with individualism, marriage and divorce were both accomplished easily and without state involvement; even more so than modern courts, who generally require a 'reason' for divorce, even if this amounts to no more than a declaration of 'irretrievable breakdown' of marital relations.[72] More interestingly, Schulz notices that property remains privately owned by husband and wife and that there 'was no question of the right of a wife to contract in household matters'[73] (quite unlike the married Englishwoman's right to own property, which scarcely existed before the late nineteenth century[74]). Conversely, writes Schulz, 'the Roman law relating to private associations' was 'exceedingly meagre'; the overarching motto, in his own formulation, was: '[L]et there be as

[70] Ibid 157–8, quoting Mommsen's speech in turn quoted in Max Weber, *Wirtschaftsgeschichte* (Mohr, 2nd ed, 1924) 292.
[71] Rudolf von Jhering, *Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol ii, part ii (Breitkopf und Härtel, 1854) 122–89. This is interestingly reminiscent of the neo-roman concept of liberty identified by Skinner: see n 45 above. Cf Francesco De Martino, *Individualismo e diritto romano privato* (G Giappichelli, 1999 [1941]) 3: *Ma la libertà … può essere addirittura piegata ai fini più alti di convivenza sociale*.
[72] In the twelfth century, Gratian held that marriage was achieved by the consent of freely willing parties, evidenced by cohabitation or consummation; and in this, he was stating norms of canon law until the Church took full control of marriage in the sixteenth century: Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 227–8. Schulz's example, then, is not perfectly illustrative of the individualism of Roman law, at least as far as marriage is concerned.
[73] Schulz, *Principles of Roman Law* (n 68) 147–8.
[74] *Married Women's Property Act 1888* (UK).

little community as possible and where it exists as little obligation as possible; above all each member must be at liberty to escape from the union and its limitations at any time.'[75]

Schulz says that all this is undeniable. But as we will see, not everyone has agreed. And even if they did, the issue matters because the significance of this fact deserves broader and deeper examination and the implications of that examination are considerable for the history of legal and political thought, and even for our understanding of modern rights. Taking the world and its history as a whole, it is neither foreordained nor the norm for society to be governed by a systemised scheme of law – a legal *system*, as distinct from a legal *order*[76] – still less that that system be organised and developed, consciously or unconsciously, on the principle of individualism. But Roman law really did evolve as what I will call throughout this thesis an *individualistic jurisprudence* (a concept to which I will give some content later in this chapter). Now, it is not at all obvious that the individualistic character of Roman law is 'undeniable' in light of the history of Rome and of the history of classicism and classical humanism in European and American political thought. According to legends dearly cherished by the Romans themselves, but also by French and American revolutionaries and Europe's conservative monarchies alike, Romulus abducted scores of Sabine women to replenish the young city-state with wives; and Lucius Junius Brutus had his own sons executed for participating in a plot to restore the monarchy.[77] The agronomist Columella praised early republican statesmen who prohibited individuals from owning property greater than a prescribed number of hectares.[78] Nor did many freeholders in the Late Republic – including, for a time, the poet Virgil – feel that they enjoyed the fruits of what Mommsen called a 'law

[75] Schulz, *Principles of Roman Law* (n 68) 149, 151.
[76] On this distinction, see Berman (n 72) 49–50, who uses it in his account of the rise of a systematic jurisprudence of canon law amidst the unsystematised, Germanic legal orders of the Early Middle Ages. Every society has a legal *order*, but not all have a legal *system* '"disembedded' from the whole social matrix of which it was a party', with a professional literature, professional class of lawyers, and an 'independent, integrated, developing body of legal principles'.
[77] Livy, *Ab urbe condita* 2.5; Plutarch, *Brutus* 1.2.
[78] Columella, *De re rustica* 1.3; cf Cato, *De agri cultura* 1.7.

suitable for free citizens' when their lands were confiscated and awarded to Octavian's legionaries. These examples all speak to citizen solidarity, not individual freedom. An individualistic society is not less likely to punish high treason, or to condone criminal acts of war; but there is significance in the Romans' choice of their founding myths, which are always about what the citizen can do for his country, not what the country can do for him. If the myth of Roman political culture really contrasts this much with the reality of Roman legal culture, then nothing about it is 'undeniable' and everything about it deserves closer examination to resolve this paradox.

That paradox has shown itself in the most catastrophic episode in modern European history, the Second World War. In Italy, the legacy of ancient Rome figured centrally in fascist art and ideology. Much has been written about *romanità* in fascist ideology, the concept of *mare nostrum* in fascist expansionism and foreign policy, and of course about classicism in fascist art and architecture.[79] Yet while classical imagery easily gave whatever its viewers wanted to see in it, classical law was not so straightforward. In a long essay published before the end of the Second World War, Francesco De Martino – later a distinguished politician in the Italian Socialist Party – considered the question of individualism in Roman law. Latter Italian fascism of the 1930s and '40s underwent a process of Nazification which intensified its antipathy to perceived enemy ideologies. This, according to De Martino, included 'civil principles inherited from Roman law', the essence of which was 'protection of personal freedom', so that Roman law was a problem for the fascists where Roman art and history were opportunities for facile emulation and selective use.[80] And it is certainly true that the fascists

[79] For the use of Roman history in fascist government and diplomacy, see Luciano Canfora, *Ideologie del classicismo* (Einaudi, 1980); Aristotle Kallis, *Fascist Ideology: Territory and Expansionism in Italy and Germany, 1922–1945* (Routledge, 2000). For iconography, see Salvatore Fadda, 'The Refiguring of Ancient Rome in Fascist Italy's National Imagination' (2021) 27(3) *Nations and Nationalism* 721; T Corey Brennan, *The Fasces: A History of Ancient Rome's Most Dangerous Political Symbol* (Oxford University Press, 2022).

[80] [*I*]*l vero motivo ispiratore di questa teoria nazista era la lotta contro i princìpi civili ereditati dal diritto romano, i quali consistevano nella tutela della libera personalità*: De Martino (n 71) ix.

were ambivalent, at best, about the study and teaching of Roman law.[81] De Martino's slim volume makes an important contribution to the topic of individualism in Roman law and, coming as it does from a participant in the most terrible war of modern history, shows the real significance of the question for modern political thought.

De Martino properly does not argue that the individualism of Roman private law yet meant 'the freedom and autonomy of the individual in his relations with other members of the society in which he lives, nor any more as the holder of subjective rights'.[82] In fact, he denies that Roman law was essentially individualistic in the sense that this term suggests to modern readers. 'Individualism' was expressed in the Romans' pride in the institution of *patria potestas* and independent property ownership by that class of persons.[83] De Martino has since tempered his view slightly: there was greater urgency to the argument when originally made, to refute the Nazis and the Italian Fascist Party in their antipathy to Roman law as a perceived justification for individualistic capitalism. Yet he maintains that Roman law was 'not insensitive to social considerations', which already differs markedly from Schulz's easy assumption of 'extreme individualism'.[84]

Aldo Schiavone holds that all ancient attempts to elaborate notions of individualism, from Epicurus to Marcus Aurelius, were confined to interior questions about the soul and were in any event peripheral to mainstream thought.[85] He attributes to the 'aristocratic sociality'[86] of

[81] Aldo Schiavone, *Ius: L'invenzione del diritto in Occidente* (Einaudi, 2nd ed, 2017) 22–3.
[82] *Non già … la libertà e l'autonomia dell'individuo nei rapporti degli altri membri della società in cui vive, e nemmeno l'essere titolare di diritti soggietivi*: De Martino (n 71) 3.
[83] Ibid 8–9, 21–5, 51. These are discussed throughout this thesis, but see especially Chapters 2 and 8. As will be explained, *patria potestas* describes the legal authority – in *principle* most profound – of the patriarch over his household (*familia*), including wife, sons, daughters, other relatives, and slaves.
[84] *Forse vi era qualche esagerazione nel mio studio sull'*Individualismo nel diritto romano*, dovuto all'intento di contrastare le idee del programma del partito nazionalsocialista. Ma ancora oggi ritengo che il sistema romano non era per nulla insensibible a considerazioni sociali e quindi a limitare l'arbitrario del proprietario*: Francesco De Martino, '*Il modello della città-stato*' in Andrea Giardina and Aldo Schiavone (eds), *Storia di Roma* (Einaudi, rev ed, 1999) 119, 144.
[85] Schiavone, *Ius* (n 81) 438–9. Brouwer (n 40) 68–82. An English translation of Schiavone, by Jeremy Carden and Antony Shugaar, is available for the first edition only as *The Invention of Law in the West* (Harvard University Press, 2012). See 457–8
[86] An unavoidably awkward translation of *socialità aristocratica*: Schiavone, *Ius* (n 81) 439.

the Romans a concern with citizenship, which he *contrasts* with individualism.[87] Key to his interpretation is his view that Roman law was always centred more around property than contract.[88] As will be argued, however, it is largely unhelpful to distinguish sharply between property and contract in a unified system of obligations.[89] Schiavone concludes that the apparent evidence for individualism in Roman law betrays modern expectations and biases more than ancient realities.[90] Certainly, the warning is wisely given. But as further explained below, it is not a particular concern of this thesis to champion or demonise individualism as such, but only to discover its origins and the circumstances of its development, and find evidence for an individualist jurisprudence as carefully defined; whereas in Schiavone's faintly tiresome political cant about 'bourgeois actualisation', one detects a Marxian undertone all too common among some Italian Romanists.[91]

Still more recently, Clifford Ando has examined the question of self, society, and individualism in Roman law with a critical eye.[92] In his important article, Ando makes two points which need to be addressed, fortunately not to disagree with them but to show that the aims of this inquiry are different to the conclusions in his own work. First, he observes that while the jurist Gaius, among others, understood citizenship as economic in nature, Pocock's conception of the Roman citizen's economic *persona* is insufficient because it does not tell the full experience of citizenship in imperial Rome; that Romans, for example, 'were deeply worried that differential wealth endowed individuals with discrepant social and legal power, sufficient to distort the experience of citizenship'.[93] Secondly, Ando continues:

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[87] On the connection between citizen, subject, and individual, see Conclusion.
[88] Schiavone, *Ius* (n 81) 439.
[89] See especially Chapter 5, and also Chapter 7.
[90] Schiavone, *Ius* (n 81) 439.
[91] [*A*]*ttualizzazione borghese*: ibid. For De Martino, *Individualismo e diritto romano privato* (n 71) 2, see his reference to 'the struggle against the conservative forces and institutions of Old Europe' (*la lotta contro le forze e gli istituti conservativi della vecchia Europa*). (He did write that in 1941, when the rhetoric was understandable.)
[92] Clifford Ando, 'Self, Society, Individual, and Person in Roman Law' in Maren R Niehoff and Joshua Levinson (eds), *Self, Self-Fashioning, and Individuality in Late Antiquity: New Perspectives* (Mohr Siebeck, 2019) 375.
[93] Ibid 379.

> To speak of *sui iuris* male citizens … as the normative ideal in Roman theory in respect of the law of persons is misleading in another significant respect, because the normative citizen was not an isolated individual, but a head of household and father of a family. … [W]omen, slaves, and kin … were rendered simultaneously legible and invisible – they were both controlled and effaced – by the rules of subordination and principles of deficiency retailed by Gaius.[94]

As to his first point – and this will be elaborated throughout this thesis – it is not argued that the Romans conceived citizenship purely in economic terms, but rather that Roman law, especially private law, was characterised by an individualistic outlook which exercised its profoundest influence in economics. As to his second point, the *paterfamilias* is not taken to be the normative citizen, nor indeed is this thesis concerned with what constitutes a normative citizen, still less what was individualistic about persons belonging to any such sub-category of inhabitants of the Roman Empire. As we will see, individualism is expressed in various forms, not all of them equal; and the powers and privileges of the *paterfamilias* are only a detail of the complete picture.

Ando notes that the jurists were primarily concerned with changes in legal status, not in the static identity of persons; and he examines several pronouncements of public law to demonstrate that 'individuals who move across geographic, political, and juridical boundaries are nonetheless expected to remain imbricated in networks of religious obligations that reach across space, time, and changes in status. No one is an individual, atomized and alone, utterly free to choose from all the market has to offer'.[95] Ando concludes by 'stress[ing] the extent to which Roman law declined to establish the atomized individual as the primary unit of social theoretical analysis'.[96] Ando's own terms of reference are to 'the capacity and willingness of

[94] Ibid (italics in original).
[95] Ibid 378, 387, 389–90.
[96] Ibid 390.

Roman jurists to conceive of individuals as (potentially) autonomous from networks of social relations and forms of social power', and to how Romans themselves experienced or imagined citizenship.[97] Willingness and imagination imply active contemplation. There is much yet to say about individualism and Roman law without denying – indeed, while agreeing with – Ando's conclusion that individualism was not a primary unit of social theoretical analysis, not least because my argument is that Roman law had an individualistic character – or perhaps tendency, to use Schulz and Zimmermann's more cautious word – which encouraged certain kinds of individualism while falling short of proposing some individual- or person-based social theory of law, let alone of government.

In sum, the literature on individualism and Roman law, while not vast, is considerable; and consensus is mostly lacking.

III CONTRACT AND PROPERTY: ELEMENTS OF ECONOMIC INDIVIDUALISM

It is for the following chapters to explore the practical applications of economic individualism, but a working hypothesis is necessary now. Here is a famous passage of John Locke:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. … Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his own *Property*. … For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.[98]

[97] Ibid 375.
[98] John Locke, *Two Treatises of Government*, Peter Laslett (ed) (Cambridge University Press, 3rd ed, 1988 [1692]) 287–8 [2.27] (italics in original).

This passage will be revisited more fully in this thesis.[99]

In an equally famous passage, Aristotle posited that the *polis* was in some ontological sense prior to the individual, because a whole is prior to its parts.[100] This involves Aristotle in philosophical problems beyond the scope of this thesis. But what Aristotle says is not unhelpful as an encapsulation of the ancient attitude to society and the individual, against which developments in Roman legal history may be measured. Relevantly for present purposes, one commentator suggests that when Aristotle speaks of the priority of *polis* before individual, he does not mean that the *polis* is prior in time (which would be nonsense) but that priority is 'somehow to be determined along an axis of worth or value' (which can be made to accord with Aristotle's thought).[101]

As already mentioned, Columella pointed approvingly to old rules about the maximum acreage that each Roman citizen could be permitted to own.[102] Out of Aristotle and Columella, only one was Roman and neither was an authority on law. They are merely indicative of ancient attitudes towards self, society, and liberty, and not authorities on Roman law. But interestingly, Columella's prescription on the ideally sized freehold recalls Locke's famous proviso, 'at least where there is enough, and as good left in common for others'. It offers an insight into a restrained form of possessive individualism that Romans admired themselves for; and if they could not admire themselves personally, they could admire their ancestors for it. Even more interesting is that Columella praised the wisdom of limited freeholds in an era where the richest Romans owned multiple luxury properties. Obviously, the legal system tolerated this: restrained individualism gave way to purely possessive individualism.[103]

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[99] See Chapter 5.
[100] Aristotle, *Politics* 1253a20. In Aristotelian–Thomistic thought, a human hand separated from a human body is no longer a human hand properly speaking, since it had only been a human hand by virtue of its connection to the substance that we call a human.
[101] Christopher Shields, *Aristotle* (Routledge, 2nd ed, 2014) 417.
[102] Columella, *De re rustica* 1.3.
[103] See Horace, *Odes* 2.15.

By operation of economic expansion (and its handmaiden, the law), possessive individualism – to borrow Crawford Macpherson's term[104] – triumphed over whatever communitarian values might once have placed formal restraints on the ownership of movable and immovable things by any one man. That communitarian spirit lived on in other forms; and appreciating this may resolve what would otherwise appear contradictory, or at least slightly hypocritical, about the way that the main beneficiaries of Rome's private law and land economy pursued their acquisitive desires while also practising selective forms of stoicism in their private lives and espousing ideals of generosity, friendship, and humility – and always doing honour to the clan (*gens*) and the state (*res publica*) above all else. Compare, for example, how Cicero writes about the essential union of friend and friend in works like *De amicitia* to how he speaks about individual property rights in his private legal speeches.[105] He would not have understood there to be anything inconsistent: he was a generous host, but few things are more consistent with the legal right to ownership of land and exclusive possession than the pleasure of *noblesse oblige* in extending licence to friends as guests.

IV WEIRDNESS: SOME ELEMENTS OF AN INDIVIDUALISTIC JURISPRUDENCE

The individualistic jurisprudence used in this thesis refers to a tendency in Roman law contrary to the wants and priorities of what anthropologists call kinship-intensive societies. Joseph Henrich, a participant in multiple studies of such societies, describes them as having 'institutions [which] bind communities together by intertwining individuals in webs of shared identity, communal ownership, collective shame, and corporate responsibility'.[106] This

[104] C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 2011 [1962]).
[105] See, eg, Cicero, *De amicitia* 6.20. See also Chapter 5.
[106] Joseph Henrich, *The WEIRDest People in the World: How the West Became Psychologically Peculiar and Particularly Prosperous* (Penguin, 2021) 219. Aspects of Henrich's thesis are anticipated in Jack Goody, *The Development of the Family and Marriage in Europe* (Cambridge University Press 1983), which prompted considerable historiographical debate, some of which is cited below. The controversy, however, concerns the

essentially communitarian social structure and psychological profile is usually characterised by frequent cousin marriages, heightened in-group trust, correspondingly lower trust of strangers, and a preference for decisionmaking based on group interests over analytical thinking and abstraction.[107] By contrast, 'WEIRD' (Westernised, educated, industrialised, rich, and democratic) people are individualistic, analytical thinkers, with greater capacity to relate to less visible, non-kinship societies and less integration with extended family networks. Henrich locates the primary factor in the gradual imposition by the Western Church of various prohibitions on polygyny and cousin marriage, with significant changes in the culture and psychology of Western Europeans – and later, others – tending towards a more analytical and individualistic society amenable to impersonal relationships (commercial or otherwise), smaller and more isolated families, and the abstract rights of the person against those of groups and communities.[108]

Henrich's work belongs to the large and ever-growing genre of '*X* and the Birth of the Modern World' studies which, however convincing they may otherwise be in their own ways, tend to minimise the importance of intellectual developments prior to the Renaissance or (in Henrich's case) the High Middle Ages, by presenting a simplified summary of ancient thought more by way of preface than anything else.[109] It is worth keeping at the back of one's mind that many of the propositions in this thesis – if plausible – would advise changes to the chronology of, and even the substantive factors shaping, various books claiming to explain what the 'modern world' is and precisely where its 'origins' lie.

validity of Goody's thesis in respect of ancient endogamous and exogamous patterns, which falls outside the chronological scope of Henrich's own study.

[107] Eg, a preference for answering questions through the heuristic, 'How would my choice benefit or otherwise affect my community?', rather than the classical economic question, 'What choice would a rational actor make, *ceteris paribus*?'

[108] Isolated, that is, in the sense that newlyweds in WEIRD societies usually move to their own home ('neolocal' residence) to start a family, where most people in most times and places would probably move or stay closer to their family's, usually the husband's father's, home ('patrilocal' residence) and accept more direct support and communal involvement in bringing up the next generation: ibid 106.

[109] For an example of this, see Siedentop (n 20).

Further – and more constructively – Henrich's work on WEIRD societies highlights some hallmarks of individualistic societies. One constant theme is the importance of 'analytic' thinking, whereby 'people zoom in on and isolate objects, or component parts, and assign properties to those objects or parts to explain actions', with the resulting tendency to 'look for strict rules or conditions that permit them to place individuals, including animals or people, into discrete categories with no overlap'.[110] This modality differs fundamentally to the 'holistic' thinking of kinship-intensive societies, where 'law is about restoring harmony and maintaining the peace, not, as it is for more analytical thinkers, about defending individual rights or making sure that abstract principles of "justice" are served'.[111] The Roman contribution to analytic thinking – which, for Henrich, is culturally and psychologically intimate with individualism – lies principally in its jurisprudence. The analytic, casuistic[112] thinking of the Roman jurists advanced economic individualism, but not by inseminating in Roman minds the idea of a fully formed self, owing nothing to society and obliged to think independently. Rather, it did so by both facilitating and creating the conditions in which men and women could act and be acted upon essentially as individuals before the law in various commercial and private dealings, thus shaping at least some of the mental habits of an individualistic society. What Schulz says of property and ownership in particular is true of Roman private law in general: 'It is not the Roman conception of ownership which is individualistic, but the Roman law relating to ownership.'[113] The logic of Roman legal thought was basically one of *analytical* reasoning by reference to a given contest between individuals and not, for example, one of *analogical* or *dialogical* reasoning from the circumstances of the

[110] Henrich (n 106) 53.
[111] Ibid 404. These competing views on the role of law constitute the essence of Chapter 4.
[112] See n 115.
[113] Schulz, *Principles of Roman Law* (n 68) 152. This is not to say that the jurists never made more generalised or theoretical observations about law and justice, including their regard for the rights of individuals: see especially Chapter 5. See also De Martino, *Individualismo e diritto romano privato* (n 71) 3–4.

individual to the fate of his society or the universe at large,[114] or of *holistic* reasoning from the premise that legal issues are to be resolved primarily or perhaps only with the interests of the community in mind.[115] The individualistic jurisprudence thus precedes – perhaps lays the foundations for – the individualistic society.

The analytical modality so characteristic of Roman legal science – once noticed and properly appreciated – prompt the question whether the psychological traits studied by Henrich and his colleagues were not already in evidence among the Romans: and not just Romans familiar with the esoteric techniques of the law but those whose lives and social structures were shaped by its particular rules and overarching ethos. It is not that Henrich expressly refutes the 'WEIRD' tendencies of ancient Romans; nor, likewise, do I deny his proposition that by early medieval times Europeans in post-Roman, Germanic kingdoms had become notably kinship intensive. I only suggest that there were some 'WEIRD' things going on in Europe long before the High Middle Ages. According to the classical account, until about the Middle Republic, cousin marriages up to the seventh degree were prohibited. Then – or so Livy tells us – a patrician married within the prohibited degrees of consanguinity and set new customs in train.[116] Actually, the evidence collected and interpreted by Brent Shaw and Richard Saller suggests that Roman aristocrats had no socioeconomic incentives to regularly practise kin endogamy and that those incentives were satisfied by marrying other wealthy families: what we might call class endogamy.[117] Consistently, there are multiple pieces of Roman imperial

[114] See, eg, Mary Douglas, *Leviticus as Literature* (Oxford University Press, 2000), discussed in Chapter 2.
[115] See, eg, Henrich (n 106) 53–4, 222. Superficially, the Roman jurists' method appears analogical as it proceeds from the statement of a rule to the examination of increasingly minute hypotheticals. Actually, however, their method begins and ends analytically: subsequent examples are not cited simply as further instances of a rule that obtain because they are similar to the previous instances, but to deepen the analysis and indeed to explain, analytically, why the legal position may differ in a different fact pattern. This method – called *casuistic reasoning* – is evident on virtually every page of the *Digest*.
[116] P Krüger and T Mommsen, '*Anecdoton Livianum*' (1870) 4 *Hermes* 371. Cf Simon Corcoran, 'The Sins of the Fathers: A Neglected Constitution of Diocletian on Incest' (2000) 21(2) *Journal of Legal History* 1, 1 n 1, 3–4; R Devlin, 'Livy F 12 (M)' (1986) 45(1) *Latomus* 115.
[117] Brent D Shaw and Richard P Saller, 'Close-Kin Marriage in Roman Society?' (1984) 19(3) *Man* 432. Shaw and Saller observe that many of the superficially attractive arguments for extensive endogamy are illusory: eg, the name Julius was common among Romanised families from Gaul to Greece and does not imply a clan family

legislation reiterating bans on cousin marriages within various degrees of consanguinity;[118] and while this may sometimes imply that the rules were often being ignored – especially after AD 212, when citizenship was extended to almost all free subjects of the Empire and many kinship-intensive peoples may suddenly have found themselves in breach of the unknown laws of the faraway metropolis[119] – it is equally senseless to assume that these laws had been honoured only in the breach, especially at Rome and in Italy.

So, if Henrich's thesis is that legal bans on endogamy are the core stimulus to a set of cultural practices and consequent psychological traits that created the modern, individualistic societies originating in and emblemised by the 'West', the 'First World', or the 'Global North' (according to one's preferred politics and nomenclature), then it may have underestimated the degree to which certain institutions of pre-Christian Europe – including, as argued here, the institution of Roman law – galvanised individualistic tendencies later associated with Western industrialised states. Shaw and Saller do not purport to take the evidence further than the Roman dominate, so it is possible that rates of endogamy – with all that this entailed culturally and psychologically – increased after the fall of the Western Empire among its Germanic successor states. This would simply mean that Henrich's thesis, while basically sound, has not examined so much 'WEIRDness' as may have already permeated the civilisation of classical Rome, not least in the legal system for which it is so famous. This thesis resumes that inquiry.

connection, not even in the way that having the name Stuart or McDonald loosely does; further, freedwomen who married their former masters or another freedman took the man's name, so the multiplication of that name among agnatic and cognatic descendants does not *prima facie* demonstrate a rise in cousin marriage. Shaw and Saller's views are supported, using various other forms of evidence and extending their thesis into late antiquity, by other scholars: see, eg, Douglas O'Roark, 'Close-Kin Marriage in Late Antiquity: The Evidence of Chrysostom' (1996) 37(4) *Greek, Roman and Byzantine Studies* 399.

[118] See C.5.5.

[119] But on citizenship and provincial law, see Chapter 8.

V THE LANGUAGE OF INDIVIDUALISM

Quentin Skinner has written: 'The clearest sign that a society has entered into the self-conscious possession of a new concept is … that a new vocabulary comes to be generated, in terms of which the concept is then articulated and discussed.'[120] This thesis posits an individualistic jurisprudence whose practitioners did not have full comprehension of its implication; still less that broader Roman society 'entered into the self-conscious possession' of this jurisprudence. Yet an individualistic tendency in Roman law was reified in the language of legal texts, and it is helpful at the outset to identify some keywords evidencing its authors' awareness of the functional essence of individualistic law:

Persona. As many have already observed, *persona* in earlier, non-technical Latin was the equivalent of the Greek word for 'mask' (πρόσοπον), of the kind used by actors in the theatre; from there it evolved to mean the person who wore the mask, and persons generally.[121] There are instances in the legal writings of *persona* being used to describe an individual in some particular legal 'aspect'.[122] Mostly, however, it straightforwardly means an individual; so that a slave is described as being a *persona*, specifically as a referent to his status as a human being. The fact, however, that Roman law did not recognise purely legal persons (such as a modern limited liability corporation) does not mean that *persona* simply and only meant 'human being'.[123] In the context of the legal writings, it means something like *an individual being described as a subject of legal rules*. The jurist Papinian writes that servitudes,

[120] Quentin Skinner, *The Foundations of Modern Political Thought*, vol i, *The Renaissance* (Cambridge University Press, 1978) x.
[121] Gellius, *Noctes Atticae* 5.7; Thomas Hobbes, *Leviathan*, J C A Gaskin (ed) (Oxford University Press, 1996 [1651]) 106–7 [16.3]; Siegmund Schlossmann, *Persona und Πρόσοπον im Recht und im christlichen Dogma* (Lipsius & Tischer, 1906) 11–21; P W Duff, *Personality in Roman Private Law* (Cambridge University Press, 1938) 3; Brouwer (n 40) 69–73, who also notices the possible etymological link to the Etruscan *phersu* and *phersuna*.
[122] See entry for *persona* in Marianne Meinhart (ed), *Vocabularium iurisprudentiae Romanae: Auspiciis instituti Savigniani fundatum perspectum per Fridericum Schwarz* (De Gruyter, 2011–) 695–718.
[123] Duff (n 121) 7–8.

functionally equivalent to modern easements and restrictive covenants, 'do not burden individuals but estates';[124] and so a man cannot *personally* acquire freedom from a servitude as this runs with the land. Thus the classical jurist Gaius 'distinguished … between objects of law (*res*) and legal subjects (*personae*)'.[125] The word *person*, then, may signify the role played by legal concepts and terminology in developing the sociological idea of an *individual*.

Privatus. The meaning of *privatus* is generally narrower than *persona*. It tends – certainly in the literature of rhetoricians – to be used for a person in his or her private as distinct from public or official capacity.[126] In that sense, it can relevantly describe someone in their capacity as a legal subject, as when Cicero writes: 'The man in an administrative office … must make it his first care that everyone shall have what belongs to him and that private citizens suffer no invasion of their property rights by act of the state.'[127] In legal Latin, it is most frequently used as an adjective to distinguish law that is *privatus* from *publicus*, following the basic division accepted by the jurist Ulpian.[128] However, it is also used substantively, though more rarely: as when Ulpian says that a magistrate can no longer exercise the powers of his public offers 'once he returns to being a private individual' (*quo privati futuri essent*),[129] or that '[i]t is not right for public property to be held by private individuals'.[130] In the hands of the jurists, the word *privatus* is slightly less important or at least narrower than *persona*, as it is only used to emphasise someone's non-official status or to contrast private personhood with public roles, institutions, or things. Yet it does demonstrate the jurist's easy familiarity with

[124] [*N*]*on personae sed praedia debent servitutem*: D.8.3.34.pr.
[125] Martin Schermaier, 'Without Rights? Social Theories Meet Roman Law Texts' in Martin Schermaier (ed), *The Position of Roman Slaves: Social Realities and Legal Differences* (De Gruyter, 2023) 1, 8, citing G.1.8–9 (italics in original).
[126] Eg, Cicero, *De re publica* 2.46; *In Pisonem* 8.
[127] *In primis … videndum erit ei, qui rem publicam administrabit, ut suum quisque teneat neque de bonis privatorum publice deminutio fiat*: Cicero, *De officiis* 2.73.
[128] D.1.1.1.2. For a typical example of coterminous usage, see D.8.4.13. As an adjective, it can also have the sense of a 'private place', or 'private sale', or something being done 'in private': eg, D.9.2.31.pr., 9.3.1.2, 12.6.67.2.
[129] *Magistratus autem vel is qui in potestate aliqua sit, ut puta proconsul vel praetor vel alii qui provincias regunt, iudicare iubere eo die, quo privati futuri essent, non possunt*: D.2.1.13.1.
[130] *Fines publicos a privatis detineri non oportet*: D.50.10.5.1. Whenever *privatus* is used in this way, the revised Watson version translates it as 'individual'.

the idea that when an individual does not have, or is not being analysed in connection with, some specific status or magisterial role, his most elemental identity as a purely legal subject is revealed – a private citizen.

Singulus.[131] This approximates reasonably close to the English word *individual* – not of course with all the political and moral connotations that our word now bears, but in the sense of describing a single human being *per se*, not as a political *subject* or legal *person*. Seneca, for one, appears to use it in this way.[132] Cicero uses it in the context – among others – of civic constitutions who were founded by one man, such as Lycurgus or Solon, rather than by a whole people.[133] In legal Latin, it appears conspicuously at the beginning of a Byzantine law student's education: in Justinian's *Institutes*, which explains that private law is concerned with the rights of individuals (*singulorum*), and public law with the good of the commonwealth as a whole.[134] As for passages not originally drafted by Byzantine lawyers and not particularly suspect of post-classical interpolation, we have reasonably abundant examples, such as Ulpian describing the legal position of heirs as individuals rather than collectively,[135] or Paul saying that for the purposes of assessing property damages, 'the prices of things are to be taken generally and not according to personal affections nor to their special utility to particular individuals'.[136] We even have a doubling-up, as when Ulpian says that laws are enacted for general application, and not

[131] *Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim*: D.1.1.1.2. I decline to consider the use of *privatus* in D.1.2.2.6 as this comes from Pomponius' *Enchiridion*, and Fritz Schulz is almost certainly correct that next to nothing of the original remains and that what we do have is 'only a miserable post-classical abridgment': Schulz, *History of Roman Legal Science* (n 68) 134.
[132] Seneca, *De beneficiis* 7.4.2. This passage is analysed in greater detail in Chapter 5.
[133] Cicero, *De re publica* 2.2. See also 1.1; *De natura deorum* 393.5. Not all Classical Latin dictionaries notice this substantive application by Golden and Silver Age writers: eg, William Smith and John Lockwood, *Chambers Murray Latin–English Dictionary* (Chambers / John Murray, 1976), which only cites classical authors who use it as an adjective (*singulum video vestigium*) or at most, as nouns used adverbially in the plural (*in singulos*, *singulos filios*). More justifiably, they take no account of its usage in late antique, legal Latin.
[134] *Huius studii duae sunt positiones, publicum et privatum. Publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum iutilitatem pertinent*: J.1.1.4. This passage is analysed in Chapter 5. See also D.1.1.1.2, which says nearly the same thing: perhaps this is the authentic view (and language) of Ulpian which Justinian adapted to the *Institutes*; or perhaps it is the other way around and the *Digest* passage is an interpolation.
[135] [*S*]*i plures sint, a quibus usus fructus relictus est, singulis satisdari oportet*: D.7.1.13.pr.
[136] [*P*]*retia rerum non ex affectione nec utilitate singulorum, sed communiter fungi*: D.9.2.33.pr. See also D.9.2.51.2, 25.3.5.2 50.8.5.pr, and various other examples.

in respect of – to translate it very literally – 'single persons' (*singulas personas*).[137] Perhaps more tellingly, Ulpian uses the phrase *persona singularis* to distinguish a physical person, a real individual – what modern lawyers call a 'natural person' – from the collective personality of bodies such as the *collegia*.[138]

Caput. The literal meaning is *head*, and in legal Latin it only really occurs in a technical phrase, like Gaius' *capitis deminutio* for change of legal status.[139] As Martin Schermaier observes, it does not strictly mean 'person' – nor, obviously, does it literally mean 'head' – but 'the legal categorisation of a person'.[140] But this too connotes individuality, just as in contemporary English we speak of numbers 'per head of population' (deriving, of course, from the Latin *per capita*). This word is notable for the present inquiry: its use is not confined to a limited period of legal history but goes back to the Republic; then and subsequently, it signified an individual as a legal category or legal unit of analysis. It shows the jurists' comfort with the individual as the basic subject of legal inquiry.

Homo. Obviously, this just means 'man', whether literally a male or figuratively as in 'people' or even 'mankind'.[141] It appears in legal Latin, though not with any especially technical meaning. Conspicuously, it is used to establish legal concepts by reference to individuals, as when Gaius writes that 'all men are either free or slaves'.[142] As a quasi-technical term, it is also used very frequently to mean 'slave' in lists, distinctions, and hypotheticals, as well as in the *formulae* drafted by parties to litigation when laying out their claims and defences.[143]

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[137] *Iura non in singulas personas, sed generaliter constituuntur*: D.1.3.8.
[138] D.4.2.9.1.
[139] D.4.5.1.
[140] Schermaier (n 125) 8.
[141] See Virgil, *Aeneid* 1.229 and innumerable further examples in the classical authors.
[142] [*O*]*mnes homines aut liberi sunt aut servi*: G.1.9. See also D.1.1.3, which is analysed in Chapter 5.
[143] Eg, G.2.13; and so used in Otto Lenel's reconstruction of the model edictal *formula* for *actio venditi*: *Das Edictum Perpetuum: Ein Versuch zu seiner Wiederherstellung* (Tauchnitz, 3rd ed, 1927) 299.

Two general points emerge from this linguistic analysis. First, while some of these words have technical legal meanings in at least some of their usage, there is no one word that uniformly means *individual* in the sense we are exploring. Second, and in spite of these changing words and shifting meanings, the texts are replete with references to individuals; and it is with individuals that the jurists are primarily concerned as the subject of their legal analyses, or 'the unit of which civil law takes account'. This is not a merely linguistic point, but linguistic evidence for a key feature of Roman legal thought. It must be stressed, once again, that the characteristics of an individualistic jurisprudence are best evidenced in rules, not words; but as ideas and the words used to express them cannot be entirely detached from one another, the linguistic evidence provides the first index of the aims, techniques, and logic of the legal system constituted by those words. With this, we are equipped with the most basic tools for analysing the juristic and other legal texts of the Romans. Before doing so, however, some more needs to be said about ancient law in general.

Chapter 2

Ancient Law

I INTRODUCTION

THIS CHAPTER BEGINS with a brief examination of the famous 'status to contract' theory of law first proposed by Sir Henry Maine, which has established an important heuristic for understanding ancient law and its historical influence, particularly in the long development of political liberalism and individual rights. The balance of the chapter surveys some ancient, pre-Roman legal cultures without which it will be more difficult to appreciate whatever is genuinely novel about Rome's individualistic jurisprudence already briefly described and to be explored in the rest of this thesis. No single chapter can do real justice to the legal thought of these ancient civilisations, so no attempt is made here to provide more than a bare sketch of their core characteristics.

II THE ANTHROPOLOGY OF ANCIENT LAW

While it must be exceedingly difficult to make any valid general statement about 'ancient law', it is equally difficult to ignore Maine's efforts in this field. Anyone decently acquainted with legal theory will know Maine's famous dictum, first proposed in his 1861 lectures on *Ancient Law* given partly to barristers at the Middle Temple, 'that the movement of the progressive societies has hitherto been a movement *from Status to Contract*'.[1] The 'progressive societies' of which he speaks are essentially those of Western Europe and its New World transplants, while 'static societies' are those which, without the benefit of the formative influence of Roman

[1] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Oxford University Press, 1931 [1862]) 141 (italics in original).

law on their laws and culture, are excluded from the historical trajectory of those societies which 'have steadily moved towards a phase of social order in which all … relations arise from the free agreement of Individuals', thanks to 'the gradual dissolution of family dependency and the growth of individual obligation in its place'.[2] Stripped of its Victorian prose and some of its Georgian–Victorian ideas about uniform 'stages' of social development,[3] this foretells the basic argument of Joseph Henrich's 'WEIRD' thesis: individualism takes precedence over such kinship-intensive imperatives as endogamy and nepotism, and all this is reflected in laws predominantly and increasingly calibrated to the autonomy of individuals and the preference for arm's-length commercial and legal relations.[4] Even critics of Maine's stark proposition have acknowledged, in early and 'primitive' legal orders, various restrictions on freedom of contract and alienability of property that render 'contract' useless as a defining characteristic of such societies.[5]

Sir Frederick Pollock understood Maine's thesis to apply only to property, but 'in its widest sense as inclusive of whatever has a value measurable in exchange': so really, quite a lot.[6] It is trite that we have receded, in some measure, not necessarily from contract back to status as Maine defined it, but from pure freedom of contract to various public safeguards – against low wages, unfair contracts – which circumscribe the nature and extent of pure bilateral relations; a process begun in nineteenth-century Europe and the American 'progressive era' and alive today.[7] But a more pressing issue, for present purposes, is that Maine's identification

[2] Ibid 140. In fairness to Maine, he expressly eschewed any racialist explanation for this: 16–17. Cf Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press, 2009).
[3] For a Georgian exemplar, see Adam Ferguson, *An Essay on the History of Civil Society, 1767*, Duncan Forbes (ed) (Edinburgh University Press, 1966 [1767]).
[4] See discussion of the Henrich thesis in Chapter 1. See also Katharina Isabel Schmidt, 'Henry Maine's "Modern Law": From Status to Contract and Back Again?' (2017) 65(1) *American Journal of Comparative Law* 145, 145.
[5] See Kaius Tuori, *Lawyers and Savages: Ancient History and Legal Realism in the Making of Legal Anthropology* (Routledge, 2015) 156–7.
[6] Frederick Pollock, 'Notes on Maine's "Ancient Law"' (1905) 21(3) *Law Quarterly Review* 274, 291. Other critiques of Maine's thesis are collected and examined in Schmidt (n 4) 158–63.
[7] Aspects of this are revisited in Chapter 4. For a classic account, see Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979). On legal reforms in the 'progressive era', see Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2005) 405–30; Peter Irons, *A People's History of the*

of a transition 'from status to contract' among 'the progressive societies' suffers from a lack of cogent chronology. It is not always clear what are the various aspects of this progress and when they occurred: Roman law appears to be sometimes the incipient factor, at other times the perfect completion, of the treasured phenomenon.[8] It is for the rest of this thesis to appraise the characteristics of Roman law and the extent to which these did treat the individual as what Maine called 'the unit of which civil laws take account'.[9] For now, Maine's ideas about 'status' and 'contract' furnish a useful background for a survey of ancient legal orders other than those of Rome.

III ISRAEL, THE NEAR EAST, AND ANALOGICAL THINKING

A work of the anthropologist Mary Douglas set out to reintegrate Leviticus into the theology of the Five Books of Moses where it seems to beginners to be a strange and prescriptive theocratic rules-list anomalously compiled with the narrative masterpieces of Genesis and Exodus.[10] Seeking to redeem it as a work of literature, Douglas also drew attention to a mode of thought that no study of ancient law should ignore. This is termed 'analogical', as distinct from, say, 'rational–instrumental', thinking. The latter accords with the 'analytical' thinking already described briefly in the context of Joseph Henrich's anthropological research.[11] Analytical thinking takes the individual as the starting point for analysis and makes abstracted, rational, even deracinated constructions out of it, such as *equality* or *rights*.[12] Analogical thinking, by contrast, does not work by induction of principles. There is little scope for the

Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution (Penguin, rev ed, 2006). For an example of contractual safeguards in force to this day, see *Unfair Contract Terms Act 1977* (UK). For a critique of the ongoing use of Maine's concept of 'status' in modern law, see Schmidt (n 4).

[8] On Maine's thematic difficulties, see also Stephen G Utz, 'Maine's *Ancient Law* and Legal Theory' (1984) 16(4) *Connecticut Law Review* 821, 824–5.

[9] Maine (n 1) 140. For example, Chapter 5 will complicate the stark distinction between slaves and indentured servants posited by Maine in his description of social progress.

[10] Mary Douglas, *Leviticus as Literature* (Oxford University Press, 1999).

[11] See Chapter 1.

[12] Douglas (n 10) 15.

development of the individual *as* individual because he is always part of a cosmological configuration; just as, for example, the particulars of consecrating a priest correspond to those for curing a leper and bringing him back into the fold: both of course about cleansing, and paramountly about maintaining the cleanliness of the *entire community*.[13] Every individual's good and bad fortune, his charities and his misdeeds, are correlative to the universe: they are causally related to things far beyond him.[14]

'Leviticus' literary style', writes Douglas, 'is correlative, it works through analogies. Instead of explaining why an instruction has been given, or even what it means, it adds another similar instruction, and another and another, thus producing its highly schematized effect. … Instead of argument there is analogy.'[15] This was a congenial method for lawgiving and seminal to the development of divine and human laws alike. And while it does not follow necessarily, in fact this mode of thinking encouraged the treatment of an individual's legal transgression as a matter for the whole community or for his progeny.

God calls Himself 'a jealous god, reckoning the crime of fathers with sons, and with the third generation and with the fourth, for My foes, and doing kindness to the thousandth generation for My friends and for those who keep My commands'.[16] This sensibility naturally resolves itself into a 'taboo' legal order. We all know that *x* is forbidden, and *y* is forbidden too. Why? Because *y* is like *x*. It is characteristic of a taboo society that 'uncleanness' might permeate the transgressor's immediate family or even his entire community. Where legal observance is sacralised, its obligations are distributed universally or at least through some part of a kindred group, so that it is impossible to say, '*he* did it, so it's between him and the law now'. Thus does God prescribe ritual purifications in which the 'whole community' must

[13] Ibid 20, citing Leviticus 8:23–4, 14:14.
[14] Compare with the study of delict in Chapter 4.
[15] Douglas (n 10) 18.
[16] Deuteronomy 5:9–10.

partake, to correct a transgression by one of its number.[17] According to the modern, positivist, liberal outlook of legal obligation, this appears deeply unfair; but there are two replies to this, one deontological and one consequentialist. As to the first: this principle makes perfect sense for a community whose identity was formed by a covenant with God, to whom as a nation a law has been set down. As to the second: being incumbent upon all, there is a practical and powerful incentive, albeit a harsh one, to regulate and police private crimes with public consequences: 'And those who remain will listen and be afraid, and they will no longer do the like of this evil thing in your midst.'[18]

Nor is there a discernible separation between divine law as so far described on one hand, and human laws on the other:

> Should the matter be beyond you to judge, between blood and blood, between case and case, and between injury and injury, affairs of grievances within your gates, you shall arise and … come to the levitical priests and to the judge who will be in those days, and you shall inquire and they will tell you the matter of the judgment.[19]

Despite the relative lack of other sources, Jewish law is well documented in the Hebrew Bible.[20] And as Yonatan Adler has argued, by the Hellenistic period (c 323–31 BC) Jews – perhaps under Greek influence – came to recognise the Torah as a prescriptive collection of laws, of practical and material as well as of moral and religious significance.[21] This prescriptive law,

[17] See, eg, Numbers 15:22–4. Robert Alter comments: 'A prohibited act performed inadvertently by members of the community incurs guilt on the whole group that must be expiated. (Compare the plagues that descend on Thebes in *Oedipus the King* and *Antigone*.)'
[18] Deuteronomy 19:20.
[19] Deuteronomy 17:8–10. On the phrases 'between blood and blood, between case and case, and between injury and injury' Robert Alter comments: 'These three phrases are meant to mark out the whole range of nonritual law. "Between blood and blood" clearly indicates legal disputes or "grievances" (*rivot*) involving accusations of capital crimes, and murder in particular. The second category, "between case and case" (*beyn din ledin*), uses a general term for a legal case, but sandwiched in between "blood" and "injury" (*negaʿ*), it probably refers to torts involving property or money but not bodily injury.'
[20] For sources, see Tikva Frymer-Kenski, 'Israel' in Raymond Westbrook (ed), *A History of Ancient Near Eastern Law*, vol i (Brill, 2003) 975, 975–81.
[21] Yonatan Adler, *The Origins of Judaism: An Archaeological–Historical Appraisal* (Yale University Press, 2022) 221–3.

divine in origin and eventually of quotidian application, forms a sophisticated body of rules, many relating to crime and public order but also to property, family, and general moral conduct.[22] Some are well known, such as the so-called levirate marriage, which is mentioned several times in the Five Books of Moses and is also a critical plot device in the Book of Ruth.[23] This rule required a widow to marry her dead husband's brother, which has nothing to do with the widow's individual right of association. For its time, however, it was not senseless: for the widow herself, it ensured her continued place in the family, and for that family it preserved a valuable kinship tie. But the mere fact of a legal system securing good order and increasing and safety and prosperity of its subjects does not by itself explain its intended function. The Roman jurist Florentinus characterised bodily harm to another citizen as *nefas*: a Latin word meaning *against divine law*, or *sacrilegious*.[24] Of course, it is not difficult to find injunctions against harming one's fellow man in any legal system.[25] The difference lies in Florentinus' implication that a sacred injunction is enshrined as a civil duty. This makes perfect sense when Roman law is considered in its transition from a sacral to a civil system, yet one bearing clear marks of its early, sacral history.

While the Covenant of Abraham was intended to secure the material prosperity of Israel in this world, adherence to Jewish law is the sacred bargain of a nation and not a guarantee of individual rights. It is not hard to find scriptural passages emphasising this point.[26] More particularly, while Jewish law encouraged every family to have their own property, this comes with conditions that hardly resemble the absolute or near absolute ownership known to later societies. Above all, Israel belongs to God, Who has devolved it to His people; and having done so, He lays down laws on how the land may be used:

[22] Martin Goodman, *A History of Judaism* (Penguin, 2019) 77–80.
[23] *Levirate* marriage is well documented in many cultures and its name has nothing to do with *Levites*.
[24] D.1.1.3, discussed extensively in Chapter 5.
[25] See, eg, Psalm 14 (in the Septuagint–Vulgate ordering).
[26] See, eg, Leviticus 20:26.

> The land must not be sold in perpetuity; it is mine, and you come into it as strangers whom I have settled there. Nothing that is yours may be sold but on the condition that it can be redeemed. If thy brother-Israelite falls on evil days, and must sell thee his little plot of ground, his next of kin, if he will, may redeem what was sold.[27]

None of this is to say that the Mosaic law was not meant to refine and ameliorate the condition of humans; only that social goods were not secured by the advancement of individual liberties and that individualism was not itself a recognised social good.[28] This is not a criticism: the modern credo of individualism would not pay the same regard for the plight of this 'brother-Israelite', on the basis that the seller bought the property 'fair and square' and should not be bound by socio-moral ties to assist the vendor. Good people's solutions to this moral conundrum will naturally differ. But individual freedom of contract and disposal of property were not, in ancient Hebrew society, a primary value towards which its people bent.[29] The significance of divine law is that it is not a law created and maintained by humans for their individual cooperative purposes, but a dictate from heaven, serving a purpose knowable only in heaven.

Douglas' definition of the method in Leviticus – schematised and correlative, working through analogies – exactly describes other legal compilations of the ancient Near East. As Raymond Westbrook observed, the Sumerians and Babylonians were 'incapable of ever giving an exhaustive account of a subject'; their scribes merely 'concretized experience in the form of individual but objectivized cases, extended its scope by analogy and extrapolation … and thus created a critical mass of paradigms which, collected in sequences, could infer, if they could

[27] Leviticus 25:23–6. See also Frymer-Kenski, 'Israel' in Westbrook (n 20) 975, 1015–19.
[28] Reuven P Bulka, 'The Role of the Individual in Jewish Law' (1973) 13(4)/14(1) *Tradition* 124; David Novak, 'The Judaic Foundation of Rights' in John Witte, Jr and Frank S Alexander, *Christianity and Human Rights: An Introduction* (Cambridge University Press, 2010) 47, 57–8.
[29] See Leon R Kass, *Founding God's Nation: Reading Exodus* (Yale University Press, 2020) 274–5.

not express, underlying principles of law and justice'.[30] One of Hammurabi's biographers agrees: 'The phrasing of the laws is not guided by principles of abstraction, seeking to formulate certain rules.'[31]

While countless clay tablets preserve individual commercial and legal transactions in ancient Mesopotamia, there is little evidence that either these records or the loftier pronouncements of the famous 'Laws of Hammurabi' represent the outward forms of a *science* of jurisprudence.[32] Near Eastern scribes filled tablet upon tablet with legal rules. Hammurabi's was neither the first nor the last exercise in this tradition. It was part of scribal training to copy out the laws to numbing repetition. But each was one item on a list that was forever being written. No one asked: What does this all mean? Or if someone had, no one could have answered the question.

Similarly, the Hittitologist Trevor Bryce has observed that the word *handantatar* was 'the closest the Hittites came to designating law as an abstract concept', signifying divine law and the power to enforce that law.[33] Yet insofar as even the Hittites acknowledged some kind of 'theory' of law, there is no attempt at developing an analytical method by which each instant case might be resolved in accordance with general principles; nor a casuistic method by which each case is analysed in accordance with its own fact pattern, yet in a uniformly rational approach. Hammurabi's subjects might breathe a sigh of relief if a literate official could read the stele and assure them that their king is just. But clearly justice reposes in royal whims; it is not a consistent idea and thus not one to which an individual may appeal to protest her rights.

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[30] Raymond Westbrook, 'The Character of Ancient Near Eastern Law' in Westbrook (n 20)) 1, 20, 21. Superficially, this may seem to describe the common law method of judge-made law; but unlike the common law, it lacks the inductive step of inferring from individual cases some general rule; no number of cases invites the ancient judges and scribes to say: '*x*, *y*, and *z* cases are authorities for the proposition *f*.' (Still less is there an ancient Near Eastern equivalent to Bracton's attempted rationalisation of English customary law on the Roman 'Institutional' model.)

[31] Marc Van De Mierop, *King Hammurabi of Babylon: A Biography* (Blackwell, 2003) 102.

[32] My distinction of a science of jurisprudence from mere lawgiving is no different to Harold Berman's distinction between a legal *order* and a legal *system*: see Chapter 1 n 76.

[33] Trevor Bryce, *Life and Society in the Hittite World* (Oxford University Press, 2002) 33.

It is more like a *themis* described by Maine: a judgment, not a law, breathed into a king's ear by the gods without any precedential value.[34] We are far from an articulation of the concept of law – quoting Herbert Hart millennia later – as 'serv[ing] the minimum purposes of beings constituted as men are'.[35]

IV LAW AND JUSTICE IN GREECE

Classical Greek literature speaks to great advancements in the Greek study of law and justice – perhaps especially justice. But did they have a science of law? The ideas of, say, Plato, were the idiosyncrasies of a great thinker, hugely influential in the full span of recorded history but shaping little to nothing of law and policy in his own day. If by science of law is meant the existence of a professional legal class, a legal literature, and, arising from these, a system of principles shaping and shaped by, yet still separate and distinct from the society subject to it, then likely the answer is no.[36] In which case, the individualistic tendencies in Greek law are not to be found in the same places that this thesis intends to find them in Roman law; and the absence of an analytical jurisprudence, preserved in a substantial body of writings, also means that such tendencies were not discernible to subsequent cultures and civilisations, of whom they must therefore have had little influence.

It is not denied that there were indeed individualistic aspects of Greek law, including some directly more so than their equivalent in Roman law. (In contrast to a son under power in the Roman law of *patria potestas* –the legal power that a man exercised over all of his family

[34] Maine (n 1) 3–4.
[35] H L A Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 199.
[36] Cf George M Calhoun, *Introduction to Greek Legal Science*, Francis de Zulueta (ed) (Oxford University Press, 1944). Despite the book's title, Calhoun acknowledges that Athenian law was quite unscientific and did not encourage the development of a systematic law or legal profession. He does, however, suggest that the growth of 'pan-Hellenism' in Hellenistic law did have a more principled and scientific character, akin to the Roman jurists' idea of the *ius gentium* – as to which see Chapter 8.

dependents, male or female, child or adult, until his death[37] – a Greek male who comes of age becomes the master of his own property and his own contractual dealings.[38]) Further, the Greeks certainly had no difficulty with taxonomy, in law as in other fields; but their taxonomies do not correspond to ours, or to the Romans'. Edward Cohen cites several binary distinctions characteristic of Greek law, chief among them commerce on land *versus* commerce on sea. Cohen attributes this to the relative importance of maritime trade in the ancient Greek *poleis*, compared with the modern sale of goods.[39] This is not an entirely satisfactory explanation.[40] Maritime trade continued to be absolutely critical to trade in the Roman '*mare nostrum*', yet the Romans were capable of a generalised account of contract and of obligations more broadly, which did not rely on what appear, abstractly, to be arbitrary distinctions.[41]

Writing of the absence of almost any legalism or technical complexity in Greek law – virtues which, we must assume, also meant a lack of the alternate virtues of legal protection and technical sophistication – Cohen assigns particular importance to 'fundamental Greek belief … that a market transaction attains juridical significance … only through simultaneous payment of the purchase price and delivery of the good being purchased', thus severely limiting the grounds for judicial intervention by not recognising what modern law calls executory contracts, and thus also limiting the scope for the development of a systematic jurisprudence

[37] This institution is described further in Chapter 3, and its decline in Chapter 8.
[38] Alberto Maffi, 'Family and Property Law' in Michael Gagarin and David Cohen, *The Cambridge Companion to Ancient Greek Law* (Cambridge University Press, 2005) 254, 255.
[39] Edward E Cohen, 'Commercial Law' in Gagarin and Cohen (n 38) 290, 290–1.
[40] As at 2021, more than 80 per cent of global trade in goods was by shipping: United Nations Conference on Trade and Development, *Review of Maritime Transport: 2021* <https://unctad.org/system/files/official-document/rmt2021_en_0.pdf>. This is projected to increase: see, eg, International Chamber of Shipping, 'Shipping and World Trade: Driving Prosperity' <https://www.ics-shipping.org/shipping-fact/shipping-and-world-trade-driving-prosperity/>. Cohen (n 39) 291 does acknowledge the continuing importance of maritime trade, but says that 'technological developments and multifaceted mechanisms of communication have reduced marine trade to one factor among many (and in some countries to virtual insignificance)'. It may be true that international trade is not centrally defined by shipping in this sense, but that is not reflected in the vast importance of maritime law as a source of contract law jurisprudence and for sheer mass of contracts actually executed.
[41] See Chapters 5 and 6.

on areas of law affecting critical areas of private and commercial life.[42] For reasons touched on already and to be developed in subsequent chapters, it is central to the Roman conception of individualism – of the essentially economic individualism fostered and sustained by Roman law – that individuals, conceived as 'possessors and administrators of things',[43] enjoy rights and owe obligations coextensive with the nature and range of their dealings with one another. Already in this respect (and not, apparently, for the mere absence of literary and epigraphic evidence), Greek law lacks certain principles that might have been seminal to the development of a classical Greek law of obligations, which could not be remedied even by the various fictional devices that some Greeks used to bring executory contracts within judicial competence (but outside principled analysis by a class of jurists).[44]

The most substantial evidence for Greek law comes from Athens, and specifically from the courts. We know that Athenian jurors were male citizens, volunteers at least 30 years old. They decided questions of fact and law by simple majority, with between 201 and 400 for private cases, and sometimes more than 500 for major public matters – so that a corrupt litigant could not bribe them all.[45] There was no opportunity to analyse the evidence by candlelight, to deliberate, or to reserve judgment: they decided on the single day or morning allotted for the trial, and the only written documents they could refer to were depositions, wills or selections of relevant legislation sealed in jars before the hearing itself.

The Athenian courts were in session approximately 200 days in each year; they were frequent, open places that theoretically provided not only 'open justice', but open access to the

[42] Cohen (n 39) 293. A simple executory contract would be: 'In consideration for your tendering 10 widgets to me by end of month, *I promise* to pay you $10,000 on tender.'
[43] J G A Pocock, 'The Ideal of Citizenship since Classical Times' (1992) 99(1) *Queen's Quarterly* 33, 39.
[44] Cohen (n 39) 293–6.
[45] [?]Aristotle, *Constitution of the Athenians* 53.3.

development of the law.[46] Lanni has argued that these open fora a did play an important role in shaping public norms and of indirectly ensuring public order in Athens.[47] This somewhat redeems the traditional image of the ancient Greek legal system as 'justice' with relatively little 'law'.[48] However, it does not fully refute a critique of the Greek system that goes back at least to Maine, 'that questions of pure law were constantly argued on every consideration which could possibly influence the mind of the judges', and that '[n]o durable system of jurisprudence could be produced in this way'; a critique essentially restated in John Ma's recent study of the *polis*, but with an acknowledgement that this did not mean 'chaos or statelessness'.[49] The sensitivity to norms and the possibility of legal development identified by Lanni are features of an oral, or oratorical, legal order: one incapable of the same durability, consistency, and technical evolution as a system based on a juristic literature at least theoretically consonant with the statutes and edicts on which it comments. In their civic role in the courts, writes Vincent Farenga,

> citizen jurors … would be encouraged to see themselves as apprentices to a repertoire of legal wisdom initiated by a Draco or Solon, a Zeleucus or Charondas, a repertoire whose mimesis induced them to believe they were exercising the abilities of a cognitive superman, the lawgiver as a heroic agent of justice.[50]

If Farenga is right, then he has indeed identified an aspect of civic individualism in Greek law, albeit one which operates in a collective, public way.

Against the traditional interpretations of Athenian law, Edward Harris has attempted to show that a genuine rule of law obtained in classical Athens, characterised by precedent and

[46] Adriaan Lanni, *Law and Order in Ancient Athens* (Cambridge University Press, 2016) 150.
[47] Ibid 150–170.
[48] See Adriaan Lanni, *Law and Justice in the Courts of Classical Athens* (Cambridge University Press, 2006).
[49] Maine (n 1) 62; John Ma, *Polis: A New History of the Ancient Greek City-State from the Early Iron Age to the End of Antiquity* (Princeton University Press, 2024) 185.
[50] Vincent Farenga, *Citizen and Self in Ancient Greece: Individuals Performing Justice and the Law* (Cambridge University Press, 2006) 265.

adherence to statutes and enforced by juror oaths.[51] This, of course, is no place to attempt to resolve the central historiographical debate about ancient Greek law. Even if Harris is right that the Athenian justice system did much more than commonly supposed to achieve procedural and determinative consistency, Athenians did not do so by reference to a permanent and accessible – at least to some people – body of legal literature upon which a genuinely systematic and consistent body of jurisprudence could be preserved, developed, and instructed to posterity. Harris examines the speeches of Demosthenes, Isocrates, and the other great orators for evidence of precedent as a factor in legal argument; but there is a danger in drawing too many inferences from forensic oratory, not least the fact that they – like Cicero – must have used legal precedent when it suited them and avoided it when it did not. Greek legal scholars' reliance on this source is perfectly understandable; but consider how distorted our understanding of Roman law would be if we had only Cicero's forensic speeches, supplemented with a few epigraphic gobbets: nothing left of Ulpian, Papinian, Paul, nor even the elementary textbook of Gaius or the fragments of Scaevola.[52] The difference, of course, is that we would still know that there were jurists and thus what we were missing out on. In the absence even of evidence of a substantial written tradition of law beyond statutes and speeches, it is not possible to recover a Greek individualistic jurisprudence, in the sense of a cogent, systematic body of law intelligible to posterity without participation in the civic life of ancient Greece itself. It is the individualistic jurisprudence of the Romans which will be asserted, examined, and appraised in the balance of this thesis.

[51] Edward M Harris, *The Rule of Law in Action in Democratic Athens* (Oxford University Press, 2013).
[52] These jurists, and the importance of juristic literature, will be explained in Chapter 3.

Chapter 3

The Elements of Roman Law

I INTRODUCTION

BEFORE PROCEEDING TO a concentrated analysis of Rome's individualistic jurisprudence, it is helpful to set out the elements of Roman law at a high level.[1] What follows can only be the briefest summary of its main aspects, with a greater focus on those bearing on the question of individualism or provide useful background for the chapters that follow.

II SOURCES OF LAW

What follows is a discussion of the Roman civil law (*ius civile*), or the secular laws governing Roman citizens. The putative foundation of this was a constitution – one could call it a *Grundnorm*[2] – known as the Twelve Tables and published around 450 BC, initially administered by the college of pontiffs.[3] For nearly a millennium, all legal developments were theoretical interpretations of the basic old *ius civile*, though in practice the substantive law of magistrates and jurists left the old rules far behind.[4]

The sources of Roman law – in the sense of what constituted authoritative statements of law in the classical period (roughly, from the last century BC to the third century AD) – were

[1] There is a helpful summary, with basic socioeconomic context, in Luigi Capogrossi Colognesi, *Le vie del diritto romano* (Il Mulino, 2023) 17–36.
[2] As the concept is developed in Hans Kelsen, *Pure Theory of Law*, Max Knight (trans) (University of California Press, 2nd ed, 1967).
[3] While these were priests, they were also magistrates; a mutually exclusive description as 'sacred' or 'secular' is anachronistic.
[4] Gellius, *Noctes Atticae* 12.13 contains an interesting dialogue between a lawyer and a philosopher about how to interpret and apply an apparently redundant Twelve Tables.

slightly more varied than the standard modern sources of legislation and case law.[5] Gaius, a jurist writing around 160, mentions statutes and plebiscites, senatorial resolutions of the Senate (*senatusconsulta*), imperial enactments, edicts issued by magistrates within their jurisdictional competence, and the opinions of the jurists.[6] Each waxed and waned in importance and legal force throughout the phases of Roman history. Cicero also mentions equity (*aequitas*), custom, and decided cases.[7] Equity is a very difficult concept and Cicero may not have meant by it what others might mean in using the same word: he meant 'fairness' while for others it might mean the flexible legal adaptions developed by the praetors under the formulary system, who purported to merely interpret the Twelve Tables in their legal innovations.[8] As for decided cases, this was a trial lawyer's point: they used anything that could work in a speech, including recent decisions in similar cases.[9] Generally, even imperial constitutions – many of which were rescripts, or responses to legal questions put to the imperial chancery by litigants – were binding on the supplicant or the parties seeking legal adjudication.[10] But then, of course, emperors were not bound by their own earlier decisions or those of their predecessors, damned or deified alike.

Eventually the most important source of law – and the largest and richest body of jurisprudence to survive to modern times – was the writings of the jurists. Apart from one near-complete textbook by Gaius, no single classical juristic text survives in more than fragments, but these were edited and compiled in the mid-sixth century by early Byzantine jurists, by order

[5] In modern common law systems, custom is arguably also a source of law; but arguably only in the subordinate sense that statute makes it so.
[6] G.1.2–7.
[7] O F Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (Routledge, 1997) 26–7.
[8] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Oxford University Press, 1931 [1862]) 36–59.
[9] Robinson (n 7) 27.
[10] G.1.5.

of Justinian I, into the *Digest*.[11] Some, like Gaius, were not the most celebrated legal minds but produced useful teaching manuals (or *Institutes*) which set out the essentials of Roman law with some taxonomical sophistication. Others, like Ulpian and Papinian, wrote prolifically on many topics in private and public law, and extensive (though partly edited) extracts of their writings survive in the *Digest*. As a class, some general observations are possible. Earlier in the classical period, they had no 'formal' education in the law but may have studied 'under' another noted jurist in their own youth.[12] They generally belonged to Rome's educated upper class (or those of the imperial provinces), but they did not form a closed profession with official entry barriers or ethical codes. They seldom participated in actual litigation and if they did, it was by advising the magistrate, judge, or a party's orator behind the scenes. But their writings were influential, and while not officially binding, the views of a jurist with a high reputation would authoritatively state and even shape the law, especially the law of obligations which governed relations between private individuals.[13] Many eventually served as high imperial officials such as praetorian prefect or urban prefect, most notably Papinian and Ulpian under the Severan emperors of the early third century.[14]

III PROCEDURAL LAW

[11] The *Digest*, an introductory textbook (*Institutes*), an anthology of constitutions and other written laws (*Codex*), and some more recent legislation of far lesser importance (*Novels*), together constitute the *corpus iuris civilis*. There are some surviving post-classical textbooks, such as the 'Syro-Roman Lawbook', but these are of little influence and generally of low quality.

[12] Of course, any reference to 'formal' education in the ancient world as denoting a systematic course of study concluding in certification from some chartered or other official body would be a medieval–modern anachronism.

[13] G.1.7. This passage, however, is likely an interpolation by later editors insofar as it says that a consensus view of jurists was binding 'like an act' (*legis vicem optinet*). It is true that Augustus began an imperial tradition of granting certain jurists the *ius respondendi*. But contrary to what had been a long-held belief (due in no small part to the Gaian interpolation), this did not make their legal opinions 'binding' but simply allowed them to give an opinion which had the support of the emperor, which was of course very persuasive but did not have to be followed in any instant case; all consistent with the imperial policy of the principate (ie, before the more autocratic style of later centuries) to rule indirectly and by persuasion under the guise of a preserved republican constitution. See Fritz Schulz, *History of Roman Legal Science* (Oxford University Press, 1946) 112–13.

[14] On their role in imperial advisory councils, see John Crook, *Consilium Principis: Imperial Councils and Counsellors from Augustus to Justinian* (Cambridge University Press, 1955) 30, 32, 36.

Roman civil litigation broadly falls into three overlapping phases.[15] The first is the *legis actio sacramento in rem*, an archaic form of action available to Roman citizens. This originated as a claim for property in a thing: that is, anything capable of ownership, whether it was land (say, your farm) or chattels (your sheep), corporeal (a building) or incorporeal (your legal right to use someone else's land). Plaintiff claims ownership; defendant claims it too and is required to explain his claim; this is then challenged on oath and the judge adjudicates the matter.[16] The problem was that the simple rituals for joining issue and invoking jurisdiction were carefully scripted for specific kinds of actions, which meant that there was little room for plaintiffs to plead a novel cause of action or seek a novel remedy (or defendants to plead a novel defence).[17]

Legis actiones thus prioritised certitude over flexibility. From the Middle or Late Republic, the *formulary system* developed as a solvent on the rigid and closed forms of action. Its characterising feature – and the strangest to us – is its bifurcation of the role of magistrate and judge. The magistrate (*praetor*) might be a jurist, but not necessarily; he was a career politician taking the role for a single year. On taking office, he published his edict: a list of the causes of action that he was prepared to entertain in disputes brought before him.[18] With the litigants' assistance, he would prepare a *formula*, or list of instructions on what the issues were and how they were to be resolved. It was in the edict and *formula* that the limits of the law were defined and its potential expansion tested; the mere finding of facts in, and resolution of, the instant case was left to the judge (*iudex*), a layperson appointed from a list of eligible citizens. Much of the substantive law stated and developed by the jurists appears in commentaries on

[15] For the best introductions to the Roman civil procedure and historical context, see Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 1–59; Andrew M Riggsby, *Roman Law and the Legal World of the Romans* (Cambridge University Press, 2010) 111–19.
[16] G.4.16; Alan Watson, *Rome of the XII Tables: Persons and Property* (Princeton University Press, 1975) 125–33.
[17] Riggsby (n 15) 116–17. For common law parallels, see W W Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline*, F H Lawson (rev) (Cambridge University Press, 2nd ed, 1965) 409–10.
[18] Customarily the praetor (1) would probably be advised by jurists and (2) based his edict on the one issued by his predecessor, with such amendments as he thought appropriate.

the praetorian edict. It was in the formulary procedure, particularly in the latter period of the Late Republic (c 150 to 31 BC), that most innovations occurred in substantive law; later refined, perfected, and authoritatively commented on by the classical jurists of the high imperial era in the first and early second centuries AD.[19]

Fritz Schulz says that any 'account of the fruitful use made by the jurists of this great opportunity [ie, the formulary system] would carry us into every branch of private law'.[20] The transition from established forms of action to edictal actions before the praetor, tailored by the *formula*, is a genuine paradigm shift, in the sense that basic assumptions of the science of jurisprudence were re-examined and a new paradigm was established.[21] Among the superseded assumptions was the pontifical technique of analysing a given problem according to a limited set of established patterns. The praetorian edict set established patterns, but the critical difference is that they changed from year to year and the praetor did not accept that an action must fail simply because it fell outside prescribed forms. The paradigm shift, in short, was from pontifical formalism to magistral flexibility.[22] No single element bears this out more clearly than the *exceptio*, which permitted the defendant to modify the plaintiff's *formula* by the inclusion of – most usually – valid defences.

From the early imperial era, a third system, known as *cognitio*, developed and coexisted for a long time with, until it completely displaced, the formulary procedure.[23] Under the mature *cognitio*, the judge was a professional, imperial official, not a lay arbitrator; he took a more direct and inquisitorial role in litigation (which is why the *cognitio* is frequently cited as the true Roman origin of modern civilian procedure); orators were expected to know the technical

[19] Schulz (n 13) 99–101.
[20] Ibid 50.
[21] Thomas S Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962). Of course, I here use *science* in the older sense of the word, as meaning some systematised body of knowledge, rather than the more specific, modern meaning that achieved currency in the mid-nineteenth century.
[22] Schulz (n 13) 6–7, 15–22, 49–59.
[23] Riggsby (n 15) 118–19.

law and not merely bedazzle a curial audience with rhetoric; and for the benefit of this procedure, many imperial constitutions were issued laying down rules of evidence and procedure – neither of which had particularly interested the republican jurists.[24] As the law became more technical and more attentive to procedure, so too did written material eclipse trial advocacy:[25] a matter about which many arbitration and appellate counsel complain today.

IV SUBSTANTIVE LAW

Before turning to the substantive law – the laws of persons, succession, contract, and delict are summarised here – it should be noted that there is abundant epigraphic and papyrological evidence that Roman subjects in commerce were generally aware of, and did business in accordance with, Roman private law as presented to us by the jurists and other authoritative writings.[26] That is, the rules were not simply the intellectual exercise of the jurists, but are genuinely a guide to the legal system as it operated in practice throughout many parts of the Roman Empire.[27] This should be kept in mind for the balance of this chapter and indeed of this thesis, for it is critical to the interpretation of Rome's individualistic jurisprudence offered in this thesis that it was practically influential in daily life as well as constituting a theoretically cohesive system.

[24] Eg, the constitutions in C.4.20.
[25] Robinson (n 7) 90–9.
[26] Ibid 69–73; FIRA iii.
[27] On Roman 'dispositive legal documents', see Elizabeth A Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge University Press, 2004). On abstract and formal standards to which Romans could and did conform, see Andrew M Riggsby, *Mosaics of Knowledge: Representing Information in the Roman World* (Oxford University Press, 2019).

A *Persons*

The fundamental conceptual layout of Roman law consists in its division into the law of *persons*, *things*, and *actions*.[28] The most important early jurist, Quintus Mucius Scaevola Pontifex, is credited with this trichotomy.[29] Donald Kelley speculates that

> the categories of person-thing-action constitute, first implicitly and later explicitly, what might be regarded as the metaphysical (or metanomical) foundations of Roman social thought … a system rivaling the naturalistic construction of Aristotelianism, as another version of the many-faceted contrast between Physis and Nomos – of primary and second nature. … In the most fundamental way, then, Roman jurisprudence was anthropocentric. Awakened by the Greeks, Psyche became as it were the center and cynosure of Roman social thought; and the conscious 'personality' (*personalitas*) remained the essential focus for perceiving the world of 'reality' (*realitas*).[30]

Thus, to Romans, including the jurists, 'social order in general was not a natural phenomenon but rather the result of human effort'.[31] Customary law was shaped into and developed within the structure of persons, things, and actions. It was positive law – all the talk about natural law came later, under Greek influence[32] – made by and for men and women. From here, it is not great leap in concept or method for that law to be shaped into a law measured by and applied to individual men and women.

Much of this thesis explores the evidence for individualism in the Roman law of *things*: essentially, of delict, property, and contract. The law of *actions* – basically, the procedural law of Roman litigation – has already been described very briefly. What of persons?

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[28] G.1.8; J.1.2.12.
[29] See the tentative reconstruction of the contents of his famous – sadly lost – commentary on the *ius civile* in Schulz (n 13) 95.
[30] Donald R Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard University Press, 1990) 49.
[31] Ibid 50.
[32] On the *ius gentium*, see Chapter 8.

In short, the law of persons referred to the complex body of law governing the legal status of individuals. The most basic division was between the legal statuses of freed and slavery.[33] Any person was potentially subject to a change in status (*capitis deminutio*): say, if they became slaves, or if their fathers died and they achieved full legal independence. The most important subdivision of the law of persons, after slavery, is *patria potestas*. They may be translated literally as 'paternal power' or simply as 'patriarchy'. *Patria potestas* was, in short, the legal reflection of the social recognition that a senior male governed the *familia*, which encompassed not just his nuclear family but those of his extended family who fell under his auspices rather than those of another patriarch, plus slaves.[34] The patriarch (*paterfamilias*) wielded considerable power, including – at least theoretically, though doubtfully even in early times – the power of life and death over his sons.[35] What he definitely did enjoy was a complete control over the private actions of those under his power (*aliena potestate*). If a son or slave entered into a contract, the *paterfamilias* enjoyed the benefits without the liabilities.[36] If a slave committed a wrong, the *paterfamilias* took legal responsibility but could give the slave up to the victim in lieu of paying damages (noxal surrender).[37] Those in the *paterfamilias*' power could keep separate assets (*peculium*), which the patriarch could yet claim at any time.[38] Richard Saller has demonstrated – as far as the demographic evidence can go – that in light of the life expectancy of ancient Romans, the average *paterfamilias* did not live long enough to exercise his powers over sons and daughters beyond minority or early adulthood.[39] Nevertheless, *patria potestas* was in theory, and to a considerable degree in practice, the least

[33] G.1.9. The 'free' comprised *free*men (those born free) and *freed*men (those who were now free but had at some point been unfree): G.1.10. For the exhaustive and still frequently consulted treatise of the Roman law of slavery, see W W Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge University Press, 1970 [1908]).
[34] On the meaning of *familia* and related *domus*, see Richard P Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press, 1994) 80–1.
[35] G.1.55.
[36] Paul J du Plessis (ed), *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed, 2020) 117.
[37] Ibid 97.
[38] Examined in detail in Chapter 5.
[39] Saller (n 34).

individualistic aspect of Roman private law. This thesis will further address this most Roman of institutions at various points.[40]

Of course, by no means every aspect of the Roman personal law was and remained kinship-intensive and anti-individualistic. We have seen that Schulz considered the ease of marriage and divorce to be hallmarks of the 'extreme individualism' of Roman law.[41] In a similar vein, it was long the position in Roman law that a husband was essentially in the position of a usufructuary (that is, enjoying the fruits of another's property rather than owning it outright), and that on insolvency he could not deprive his wife of her dowry (*dos*) by pledging it to creditors.[42] Justinian's innovation – though it was really a consummation of a centuries-long process in favour of wives – was to allow a woman to make a claim at law for protection of the *dos* during her marriage. This is significant indeed: and the wording of Justinian's law is clear that the rationale was not the protection of the wife's familial holdings, but the protection and sustenance of the wife herself. In these discrete rules of the law of marriage, we see the logic of economic individualism that is on greater display in the laws of delict, contract, and property.

B *Succession*

Most of this thesis is concerned with individualism in commercial practice, but any study of the Roman law of persons which does not treat at least the most essential aspects of wills and succession will miss something important about Roman ideas of kinship networks and individual action.

Many ancient cultures had no wills. The Germans, for example, simply divided the decedent's property among his sons, with alternative lines of succession among other relatives

[40] See especially Chapters 5 and 8.
[41] Schulz (n 13) 146. See Chapter 1.
[42] D.6.3.4.1.

if there are no male issue.[43] The modern legal term *intestacy* is inappropriate for many ancient legal orders, since the negative *in*testacy implies that dying without a will was anomalous. In Roman law, what mattered was not the contents of the will – the mere distribution of specific effects here and there – but the process of the testator being succeeded in every conceivable way by the heir or heirs (*haeres*), who took all legal rights *and responsibilities*. As Henry Maine said, the heir took much more – what post-classical jurists would call the *universitas iuris*, or a complete bundle of rights and obligations. This happened because 'the legal clothing of some individual' was entirely passed on to another, who wore it and thus assumed the 'legal personality' of the decedent.[44]

Similarly, Harold Berman says this of preclassical Roman wills:

> Initially, the purpose of the testament was to counteract the rules of intestate succession in instances when those rules were unsuitable to a particular family situation; in other words, the same basic purpose motivated the introduction of the Roman testament that motivated the rules of intestate succession, namely, the continuation of the family household by the transmission of the legal personality of the decedent to his heir (or to coheirs). The primary purpose was not to give individuals the power to effectuate their will after death; the primary purpose was to protect the social unit.[45]

Berman's primary concern is with the originality of the canonists and other medieval jurists in centuries beyond the scope of this thesis. He concedes, however, that certain developments were already underway in the classical period of Roman law, before the elaboration of a distinctly Christian legal philosophy whose primary concern in the law of wills and estates was on the fate of the testator's individual, immortal soul.[46] Among these developments was the

[43] Tacitus, *Germania* 20.3.
[44] Maine (n 8) 148–9.
[45] Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 231–2.
[46] Ibid 232.

increasing use of codicils to effectuate the testator's personal preferences. Every codicil, every bespoke modification of the *universitas iuris*, diminished the position of the heir, who was sharply distinguished in Roman law from mere beneficiaries and was – as Maine pointed out – in every possible respect the legal continuation of the physically dead man.

C *Delict*

Since commercial law was immature and largely undeveloped in the Hellenistic period, the pontifical law which shaped the technique and content of secular, classical law was principally concerned with family and inheritance law, which were central to maintenance of the family cult. It was in delict, contract, and property that the jurists primarily developed Rome's individualistic jurisprudence.[47]

In Roman law, a delict (*delictum*) was an obligation arising from some wrong done to a third party. In that basic sense, it was the Roman equivalent to the common law of torts. The best way to distinguish delicts or torts conceptually from contracts is to consider the modern tort of inducement to breach of contract: Anna breaks her contract with Benjamin, but A did so on Charles' encouragement: thus Benjamin has a claim against Anna in contract (broken agreement) and against Charles in tort (outside interference). Some Roman delicts, like theft (*furtum*), go back at least to the Twelve Tables. This delict is particularly illustrative of the problems in classifying delicts: many things were considered delicts (or equivalent to delicts) in ancient laws, which today would be treated as crimes prosecuted by the sovereign rather than privately sued on the victim's initiative. These often included what would now be called theft, battery, and even murder or manslaughter. Of most present interest is the stress that the Roman jurists placed on the wrongdoer's mental state as an element of the delict.[48] That is, the thief had to have the relevant intention to steal: an apparently obvious point, but only in the

[47] Schulz (n 13) 8.
[48] D.47.2.1.3.

analytical mode of legal thinking to which we are accustomed.[49] As will be shown further with the law of contracts, the jurists' concern with the mental state of the individual – whether inferred objectively or known subjectively – was a critical step in individualistic jurisprudence.[50]

Another delict was as ancient as *furtum* but matured into something quite different. *Iniuria*, often translated as 'outrage', had under the Twelve Tables protected against physical assault, but over the centuries evolved to include, in a single cause of action, what modern common lawyers would recognise as harassment, assault, defamation, invasion of privacy, and others. Another important delict arose in statute: the *lex Aquilia*, a brief text dealing with wrongful damage to property, which begot a rich juristic literature. Both *iniuria* and Aquilian law will be studied in detail.[51]

D *Contract*

It is often said that there was no Roman law of *contract*, only Roman law of *contracts*.[52] By this is meant that rather than setting out general criteria to which any contract must conform to be valid, Roman law recognised different species of contract each with specific criteria, rituals, and functions.[53] This may be explained by the gradual development of different species of contract to meet commercial needs as they arose, where in the earlier law the focus had been on matters of the family such as marriage and succession.[54]

[49] See Chapters 2 and 4.
[50] See Chapter 4. On mental states and the *actio furti*, see Helen Scott, 'Chasing, Lying and Persuading: D.47.2.52.19–24 in Context' in Joe Sampson and Stelios Tofaris (eds), *Essays in Law and History for David Ibbetson* (Bloomsbury, 2024) 17.
[51] See Chapter 4.
[52] This proposition is analysed in Chapter 5.
[53] The modern common law, by contrast, recognises general criteria for the existence of a contract, eg, (1) offer, (2) acceptance, (3) consideration, and (4) intent to create a legal relation, as well perhaps as (5) certainty and (6) absence of vitiating factors.
[54] See Watson (n 16) 111–24 (*nexum*), 134–49 (*mancipatio*).

But that does not mean that there were no unitary concepts.[55] The most important, especially for present purposes, must be the Romans' concern with intention in the creation of legal rights and obligations. The jurist Ulpian writes of a coming together (*conventio*), referring to whatever is agreed to by people dealing with one another to transact matters. Their coming together leads to a sharing of the same idea or intention (*sententia*), without which there is no agreement (*consensus*) and hence no contract.[56] The contractual intention may be inferred by objective circumstances, or may require evidence that the persons in question actually – subjectively – intended the same legal relations, with the same consequences, to arise. While there is no conclusive position on this in the juristic writings, either view demonstrates quite clearly that however obtained by the imperfect methods of interpretation and evidence, it was the individual whose intention – whether inferred objectively or known subjectively – was the unit of legal analysis. It is tolerably clear that the rise of commerce in a market economy, and with it the elaboration of a system of contracts, is intimately connected to the development of an individualistic jurisprudence, more so than older rules of family and succession which – however important and sensible – took shape under an entirely different logic of kinship preservation.[57] Or consider the problem from the perspective of so called 'quasi-contracts', such as *negotiorum gestio*.[58] The very awkwardness of the category of restitutionary obligations *quasi ex contractu* shows that the Romans, no less than the moderns, understood agreement (*conventio*) to be a necessary element of any contract, such that they were uneasy about calling something a contract if it lacked this element; hence they understood, at least in their mature jurisprudence, that there were not just contracts differing in kind from one another, but a generalised idea of contract, differing from other legal categories.

[55] Two important concepts are *bona fides* and *causa*, both discussed in Chapter 9.
[56] 2.14.1.3. See further analysis in Chapter 5.
[57] On the Roman market economy, see Chapter 6 and Peter Temin, *The Roman Market Economy* (Princeton University Press, 2013).
[58] See Chapter 9.

It remains only to briefly describe the main species of the Roman genus of contract, some of which will figure more prominently in the chapters that follow.[59]

First, the jurists' primary distinction was between four modes of *creating* a contract: by delivery of a thing (*re*), by words (*verbis*), by writing (*litteris*), or by consent (*consensu*).[60] This is immediately confusing because we have just been discussing *consensus* as a kind of arch-criterion for any contract, whereas the Roman textbooks describe it as one of the four species (*genera*) of contract. Of course, any contract requires consent; it is as difficult to grasp the idea of a contract without agreement as to grasp the idea of a unicorn without a horn. Of course you will imagine a horse, just as you imagine an obligation without agreement, and thus omit what scholastic philosophers would call a 'necessary accident' of a unicorn and a contract respectively. Here the distinction is between modes of creation: *consensus* really means the creation of obligations by mutual promise to do things in exchange for one another (executory contracts). So, despite some untidiness, there is enough sense in organising contracts this way.[61]

Contracts *re* encompassed the following:

- Loans for consumption (*mutuum*). Titius gives Numerius a quantity of fungible goods on the understanding that Numerius would then give Titius the same quantity of the same kind of fungible goods at a later date. Because Numerius probably cannot return to Titius the *same* bag of coins, barrel of wine, or amphora of olive oil, this is not a loan as such but a sequential exchange of equivalent goods.[62]

[59] I omit discussion of the early debt-bondage contract *nexum*, which plays little to no part in classical contract law. See Watson (n 16) 111–24.
[60] G.3.89; J.3.13.1.
[61] On such questions, see Peter Birks, *The Roman Law of Obligations*, Eric Descheemaeker (ed) (Oxford University Press, 2013) 26–36.
[62] See D.12.1.

- Loans for use (*commodatum*). This is the functional equivalent of the common law of bailment, or contracts for the loan of non-fungible things.[63] It was a gratuitous contract in that the recipient did not pay for it; but he could benefit by use.[64]
- Deposits (*depositum*). This was not quite a bilateral contract, as the depositor physically deposited some corporeal thing (other than land, of course) with the depositee, who safeguarded it gratuitously. If any benefit accrued to the depositee, then it was no long a *depositum* but (usually) a *commodatum*.[65]
- Pledges (*pignus vel hypotheca*).[66] As in modern law, a debtor pledged an asset to his creditor as security for a loan. This was an invaluable commercial contract which facilitated performance, allocated risk, and stimulated private finance.[67] Of course, a promise to repay a loan might later be more conveniently enshrined in a *mutuum*.

Next, the most important form of contract *verbis* was the *stipulatio*, whereby a person bound himself by promising – 'I promise' (*spondeo*) – to do something in response to the promisee's question. Witnesses were usually involved and an obligation arose from the formal invocation of prescribed, ancient words.[68]

Contracts *litteris* were created by writing – that is, where some writing did not merely evidence the existence of a contract other than *litteris*, but was itself the legal speech act. Provided a debtor consented, the creditor acquired a contractual right by writing the amount and terms of a debt in its proper place in a ledger entry.[69]

[63] Eg, the Russian oligarch as bailor who loans his Rembrandt to the State Hermitage Museum as bailee, specifying terms for transport, display, etc.
[64] See D.13.6. The analogy to bailment breaks down because *commodatum* was a gratuitous contract, whereas most bailments are for profit (even the merely notional profit of 'peppercorn consideration').
[65] See D.16.3.
[66] See D.20.
[67] See Chapter 6.
[68] See G.3.92–109; J.3.15.
[69] See G.3.128–34; J.3.21.

Finally, there were bilateral contracts *consensu*, which developed later and form an important part of the technical system of legal relations that facilitated Roman market commerce.[70] There were four types:

- Sale (*emptio venditio*).[71] For sheer number of such transactions that must have occurred, this may be the most important commercial contract.[72] It is impossible to give a full picture of the Roman law of sale, but some features may be noted, including (1) flexibility in creation (orally, in writing, via agent, etc); (2) the requirement of certain terms, such as price – which edges Roman law closer to the modern 'certainty requirement'; (3) rules for the allocation and transfer of risk of loss; and (4) various duties, such as not to supply defective goods – again showing a commercial maturity comparable to modern implied terms.
- Hire (*locatio conductio*). This encompassed both contracts for lease and hire of things, and what would now be called service contracts (ie, the person is the 'thing' being hired, so to speak).[73]
- Commission (*mandatum*). Originally a gratuitous contract between friends whereby a person promised to do something for another, this acquired commercial significance as, eg, the principal mode of appointing agents and managers.[74]
- Partnership (*societas*). While Roman law was restrictive in some aspects of free association, it readily allowed persons to join together for some commercial enterprise. However, this was and remained more commercially immature than some of the

[70] Du Plessis (n 36) 264.
[71] See G.3.139–41; J.3.23.
[72] See Francis de Zulueta, *The Roman Law of Sale: Introduction and Select Texts* (Oxford University Press, 1945).
[73] See G.3.142–7; J.3.24; D.19.2. Chapter 7 treats *locatio conductio* in the context of tenant-farming in Italy.
[74] Du Plessis (n 36) 284. See G.3.155–62; J.3.26.

foregoing types of contract: eg, unlike a modern partnership, the Roman *societas* died with one of the partners and thus had little durability as a quasi-entity of its own.[75]

This briefest of summaries is yet sufficient to intimate the creative possibilities of a legal system facilitating commercial interactions between individuals possessors and administrators of things.

E *Property*

The Roman law of property is vast and complex. This summary considers the most essential aspects of two core concepts: ownership and conveyance.

The highest form of ownership was called *dominium*. Some modern textbooks have described *dominium* – the perfected form of Quiritary ownership[76] – as 'absolute', or 'more absolute' than in other legal systems.[77] Thus, Aulus as owner can eject Numerius as possessor any time by an action of *vindicatio* proving Aulus' ownership; but until such time, Numerius' possession can go undisturbed and there is no interim injunctive relief to say otherwise.[78] In any event, there is now a 'tendency … to regard ownership as having been somewhat less absolute than was once thought'.[79] It is better to think of *dominium* not as an 'absolute' right but rather, in Buckland's words, as 'the ultimate right, that which has no right behind it'.[80] It was the ultimate title, and the only eminent domain was its illegal seizure and redistribution by warring generals or the legalised arbitrariness of imperial edicts.

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[75] See J.3.25; D.17.2.

[76] 'Quiritary ownership' refers to this highest form of ownership enjoyed by Roman citizens (sometimes called *Quirites*, for Romulus' name after his apotheosis) under the *ius civile*.

[77] See, eg, H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 3rd ed, 1972) 140.

[78] Ibid. Of course, this does not mean that Roman ownership was 'procedural' only, and thus somehow not 'substantive': see Chapter 5.

[79] Du Plessis (n 36) 159. See also W W Buckland, *A Textbook of Roman Law: From Augustus to Justinian*, Peter Stein (rev) (Cambridge University Press, 3rd ed, 1963) 186–8. Some students of property theory have focused more on the *ius utendi fruendi abutendi* (a medieval, not classical term) and less on the practical restrictions of Roman ownership, and have therefore tended think of it as purer, so to speak, than in other systems: thus Richard Pipes, *Property and Freedom* (Vintage, 2000) 11, 104.

[80] Buckland (n 79) 188.

As for transfer, the quintessential method was by *mancipatio*.[81] This could only be used to convey *res mancipi*: namely, land in Italy, slaves, beasts of burden, and rustic and praedial servitudes (types of proprietary interest similar to modern easements).[82] The best explanation is that this stately mode of conveyance was used for the most valuable assets in early agrarian society. *Mancipatio* was not irrational; it had a clear purpose in Rome's archaic period, when a conspicuous ritual witnessed by multiple trustworthy citizens would ensure public memory of a title transfer that can now simply be recorded in an official database.[83] Over time, this complex ritual gave way to the simplified conveyance by *traditio*, literally handing over: one more step in the rationalisation of Roman private law as the regime governing interactions between individuals.[84] This thesis will now turn to the particulars of that system viewed through a conceptual lens to be developed in the next chapter.

[81] Others are considered in Chapter 8.
[82] G.1.120, 14a, 2.22. It could also be used to make a will.
[83] James Muirhead, *Historical Introduction to the Private Law of Rome*, Henry Goudy (ed) (A & C Black, 3rd ed, 1916) 54.
[84] See Chapter 8.

Chapter 4

Life as a Right in Roman Law

I LIFE, LIBERTY, AND PROPERTY

NEARLY THREE DECADES after drafting the Bill of Rights, James Madison declared to the Virginia Convention: 'It is sufficiently obvious, that Persons and Property, are the two great subjects on which Governments are to act: and that the rights of persons, and the rights of property are the objects for the protection of which Government was instituted. These rights cannot well be separated.'[1] What might the Romans have made of this proposition?

That question would not be proper to historical inquiry where it would serve only to confound past and present by the application of modern concepts anachronistically to the past, or by the anticipation of modern concepts proleptically from the past.[2] But here it shows the way to a helpful way of examining Roman ideas about the 'rights of persons'.[3] This thesis has

[1] James Madison, Speech in Virginia Convention, 2 December 1829, National Archives <https://founders.archives.gov/?q=speech%20Virginia%20convention%201829&s=1111311111&sa=&r=21&sr=>. See also John Locke, *Two Treatises of Government*, Peter Laslett (ed) (Cambridge University Press, 3rd ed, 1988 [1692]).

[2] 'Histories of modern legal categories … are … the present speaking to the past and while this, on occasions, may be necessary and useful, the historiographical implications should not be dismissed': Geoffrey Samuel, 'Methods of Legal History and Comparative Law' in Mark Van Hoecke and Maurice Adams (eds), *Comparative Methods in Law, Humanities and Social Sciences* (Edward Elgar, 2021) 11, 28–29. There is a general survey of the risks in Jacob Giltaij and Kaius Tuori, 'Human Rights in Antiquity? Revisiting Anachronism and Roman Law' in Pamela Slotte and Miia Halme-Tuomisaari (eds), *Revisiting the Origins of Human Rights* (Cambridge University Press, 2015) 39. Obviously, the problem is not confined to legal history: for the classic account of the dangers of proleptic and teleological approaches to historiography, see Herbert Butterfield, *The Whig Interpretation of History* (W W Norton, 1965).

[3] A similar approach was used in Susan Ford Wiltshire, *Greece, Rome, and the Bill of Rights* (University of Oklahoma Press, 1992); however, while she considers the role of Roman law, this is treated largely as a vehicle for natural law ideas, rather than the economic individualism discussed in this thesis. Michael Peachin, 'In Search of a Roman Rule of Law' [2017] (6) *Legal Roots: The International Journal of Roman Law, Legal History, and Comparative Law* 19, 37–8 abandons the attempt at an *a priori* definition, not in principle but because modern definitions of the concept in question (there, 'rule of law') are themselves too disunited to provide a working hypothesis that can be applied to the circumstances of ancient Rome. But 'rule of law' is, as a linguistic proposition, vaguer even than 'life, liberty, and property'. For a recent exploration of the similarities between ancient Stoic and modern legal concepts of 'human rights', see Bruce W Frier, 'Roman Precursors of Modern Human Rights Doctrine: Cicero and Tertullian' [2024] 20 *Roman Legal Tradition* 1. Frier writes at 12: 'Modern attempts to link legal holdings of the Roman jurists to the modern idea of Human Dignity or Human Rights are

been exploring what Reinhard Zimmermann called the 'individualist tendencies' of classical Roman law, especially private law.[4] In suggesting that the Romans recognised consciously, or that their laws recognised unconsciously, certain rights and liberties that are readily associated with modern political credos of liberalism, it is useful to examine these rights and liberties through the prism of modern rights.[5] Of course, it is critical to reiterate that this is not an invitation to anachronistic thinking or teleological projections, from Madison backwards to Ulpian; or even that there is a traceable line of descent from the writings of the Roman jurists to the modern theorists of republican liberty.[6] The problem and perhaps the opportunity is that today, we can see outside this tripartite structure only with great difficulty. If we wish to appreciate the extent to which Roman law promoted individual rights, then the recognisable structure of modern rights discourse is helpful for us to test the presence of similar strains of thought, or at least similar practical realities, in Rome's legal system and in its juristic commentary which, for any of its other virtues, is short on abstract concepts that help to explain the ancient jurists' thinking as a whole.[7]

unpersuasive, although, to be sure, the jurists' persistence in understanding social interactions through the lens of rights and duties may have had an indirect but more profound influence.'

[4] On Zimmermann's expression and the context in which it is made, see further Chapters 1 and 9.

[5] Conversely, for an original application of ancient ideas to modern American political discourse, see Sam Crane, *Life, Liberty, and the Pursuit of Dao: Ancient Chinese Thought in Modern American Life* (John Wiley & Sons, 2013). To clarify, the English word 'liberty' does not here have all the same connotations as the Roman concept of *libertas*, for which see further the sources in n 7 below and Chapter 5.

[6] As the twentieth century's greatest intellectual historians have already shown, the overt classical influences on modern civic humanism and republican ideas of liberty come from historians (Livy especially), particularly as mediated through such students of classical historiography as Machiavelli, rather than from juristic texts. See Felix Raab, *The English Face of Machiavelli: A Changing Interpretation, 1500–1700* (Routledge & Kegan Paul, 1964); J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 2nd ed, 2003); Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 1999) (though Skinner does acknowledge some juristic sources as influences on the 'neo-roman' theory of liberty).

[7] On the interaction of ancient and modern political ideas, see Valentina Arena, 'Ancient History and Contemporary Political Theory: The Case of Liberty' (2018) 44(6) *History of European Ideas* 641. In his brief analysis of individual liberties under Rome's constitution, Chaim Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (Cambridge University Press, 1960) 30, even describes the average Roman (albeit in passing) as having a reasonably tolerable measure of 'life, liberty, and property'.

The tripartite conception of legal rights – of life, liberty, and property[8] – has sunk deep into Western political thought and is almost as axiomatic in modern legal and political science texts in the Anglophone world as the Roman trichotomy of persons, things, and actions.[9] In the Anglophone world especially, it is difficult for some, and impossible for others, to dissociate rights discourse from the basic proposition in the Fifth Amendment of the Constitution of the United States of America that '[n]o person shall … be deprived of life, liberty, or property, without due process of law', a phrase also used frequently by John Locke the century before. This phrase establishes a schema for this and the following chapter, as well as parts of other chapters that follow. One scholar of American law summarises it well in an introductory textbook for students of contract: '[P]roperty law identifies the rights we have to use and enjoy scarce physical resources, while tort law defines what actions constitute a wrongful interference with the rights of others. In contrast, contracts can be viewed as the means by which people consensually alter their legal relations with others by alienating their preexisting rights.'[10]

The Harvard scholar Lon Fuller is well remembered for stating that the 'principle of private autonomy' is indispensable to the law of contract; 'that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations'; and so that when a court enforces a contract 'it is merely arming with legal sanction a rule or *lex* previously established by the party himself'.[11] Every common law student reads tort, contract, and property in quick succession in the curriculum, not just because they are

[8] Or in the usage of some early-modern writers such as John Locke, 'life, liberty, and estate': Locke (n 1) 323 [2.87].
[9] See Peter Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in Peter Birks (ed), *The Classification of Obligations* (Oxford University Press, 1997) 1.
[10] Randy E Barnett, *The Oxford Introductions to US Law: Contracts* (Oxford University Press, 2010).
[11] Lon L Fuller, 'Consideration and Form' (1941) 41(5) *Columbia Law Review* 799, 806 (italics in original).

'important' but for a reason acknowledged only tacitly if at all: that these are the three interrelated, constituent parts of the modern individual in her legal aspect.[12]

This and the following chapter will argue that Roman law recognised a similar suite of rights, through rules which governed each of life (delict), liberty (contract), and property (ownership).[13] Roman legal thought prioritised individuals' rights to personal property (defined in the broad, Lockean sense as their physical selves and their corporeal and incorporeal property), as well as their right, through contract, to impose upon themselves the obligation to divest that property for valuable exchange (or by gift). I suggest that on closer inspection of the primary sources, the Romans had, and expressed, a more developed theory of rights than is often assumed, and that this theory bears some similarities with modern theories in the liberal tradition.

This chapter begins that analysis of Roman rights with the legal right to the protection of one's *life*, including one's *livelihood* and the security of one's own *person* or *self*. In the Lockean–Madisonian schema, the right of life[14] essentially means the right to live in the manner one chooses, subject only to necessary government interference.[15] Here, however, we will be concerned with a narrower right: the right to legal redress for physical or other interference with one's person – whether upon one's life or one's livelihood – which the Romans accommodated primarily in the law of delict. The following chapter, and parts of others, will be concerned with *liberty* and *property*, which in private law essentially means the right to freely engage with other private persons in the alienation of one's own property in exchange for other things, and the right to legal protection of anything that one owns.

[12] See Randy E Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford University Press, 2nd ed, 2014).
[13] Property as a corollary of contract is a focus of Chapter 5.
[14] I use the slightly more crabbed right *of* life to avoid the phrase right *to* life, which has a more specific and politically sensitive meaning far removed from the present study.
[15] See *Dartmouth College v Woodward*, 17 US 518 (1819).

In this chapter, I argue that the Roman law of delicts – while not necessarily unique in this respect – offers the most extensive evidence for a basic shift in ancient justice from collective redress or punishment to an individualistic jurisprudence. The core characteristics of this jurisprudence can be elucidated by an examination of two important causes of action in Roman delict: for wrongful damage to property under the *lex Aquilia*, and for *iniuria* or 'outrage'.[16] First, it is important to give some account of the function of delict or equivalent legal regimes; only by doing so can we properly appreciate what is distinct about Roman law and other individualist legal systems.

II THE FUNCTION OF DELICT

Retribution is an important function of law. Law is, at least in part, the making of a public matter out of private desires for retribution by regulating and often assuming responsibility for the act of revenge itself.[17] In another aspect, law is about redress, or compensation. In a rescript recorded by the jurists, Marcus Aurelius is supposed to have asked a litigant: '[D]o you think that force is used only if men are wounded?' The emperor's answer to his own rhetorical question does not just expound the rule of duress; it contains the kernel of an entire concept of law: 'There is also force whenever someone demands what he thinks is due to him without going to court.'[18] This is recognisable today, and ever since Max Weber,[19] as the common refrain that law and government enjoy a monopoly on the legitimate use of physical violence.[20]

[16] A summary of delicts more generally has already been given in Chapter 3.
[17] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 260–4, 331.
[18] *Tu vim putas esse solum, si homines vulnerentur? Vis est et tunc, quotiens quis id, quod deberi sibi putat, non per iudicem reposcit*: D.4.2.13.
[19] Max Weber, 'Politics as a Vocation' in *From Max Weber: Essays in Sociology*, H H Gerth and C Wright Mills (ed and trans) (Routledge, 2009 [1919]) 77, 78.
[20] By way of example only, this permeates Thomas Hobbes, *Leviathan*, J C A Gaskin (ed) (Oxford University Press, 1996 [1651]) and John Austin, *The Uses of the Study of Jurisprudence* in *The Province of Jurisprudence Determined; The Uses of the Study of Jurisprudence* (Hackett, 1998 [1832–63]). And Jeremy Bentham, *A Fragment on Government* (Cambridge University Press, 1988 [1776]) 89: '*In whatever persons in any state the supreme power resides, it is the right of those persons to make Laws*.' (Italics in original.)

Even so, this still does not answer *what* a person might demand before a court or other adjudicator. It does not explain why a person, in her own capacity, should be making the complaint. Still less does it explain how the court or adjudicator will respond and why.

Generations of social and cultural anthropologists have written about law, revenge, and justice in premodern and non-Western societies.[21] Field research has shown that many cultures have compensated some wronged individual, or punished a wrongdoing individual, primarily or sometimes exclusively in order to placate immanent forces and preserve the sanctity and safety of the whole community, while the dignity or physical wellbeing of the wronged individual is a second-order or non-problem. Since the psychiatrist Karl Jaspers first proposed the 'Axial Revolution'[22] – a sort of cultural paradigm shift occurring somewhere from the ninth to third centuries BC and affecting civilisations as diverse as Greece, Israel, India, and China – anthropologists have sought to identify and explain fundamental transformations in human modes of understanding the world, from 'analogical' to 'analytical'[23] thinking or from 'immanentism' to 'transcendentism' in religious and metaphysical thought. Marshall Sahlins explained the distinction between immanentism and transcendentism as a distinction between an understanding of the world as 'enspirited', or inhabited by both persons and 'meta-persons', the latter having an invisible yet real and omnipresent influence on everything from the success of the harvest to the efficacy of canoes; and one in which God and any spirits are removed to a supernatural realm outside of physical reality, which is left in the hands of humans to govern and explain in their own terms.[24]

[21] See, eg, E Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press, 2006 [1954]); Napoleon A Chagnon, 'Life Histories, Blood Revenge, and Warfare in a Tribal Population' (1988) 239(4843) *Science* 985; Fernanda Pirie, *The Anthropology of Law* (Oxford University Press, 2013).
[22] Karl Jaspers, *The Origin and Goal of History*, Michael Bullock (trans) (Routledge, 2010 [1949]).
[23] See Chapter 2.
[24] Marshall Sahlins, *The New Science of the Enchanted Universe: An Anthropology of Most of Humanity* (Princeton University Press, 2022).

This matters, in the first place, because the number of stakeholders in the administration of justice in immanentist societies is hugely multiplied by the plurality of gods and meta-persons whose interests are threatened by the behaviour of a human wrongdoer. This is why, as Sahlins says, immanentist justice does not work on the principle that the 'punishment fits the crime', and that 'there may be no necessary or evident proportion between the delict and the effect – as witness the poor Inuit who will suffer a dislocated hip if his wife is unfaithful while he is hunting walrus'.[25] Even in this example, the primary purpose may actually be to help both husband and wife if the dislocated hip has some corrective or restorative effect upon the local community or the natural order; either way, its function clearly was not what common lawyers call 'making the plaintiff whole', still less to exact retribution.[26] Likewise, while critical to the shift away from immanentism as an early discoverer of the transcendent God, Judaism to this day imposes dietary and other strictures for the sake of the *public* covenant between God and the Israelites *as a whole*.[27]

Spirits aside, kinship-intensive societies are anyway less inclined to take individual mental states of flesh-and-blood humans into account in exacting revenge among the living. Among such societies, what modern law calls *strict liability*[28] is the adjudicative norm, in the sense that the wrongdoer need only have done wrong, and neither he nor his kin need to have had ill intent. Thus, it has been said of the Nivkh of the lower Amur River basin in Siberia:

> Every murder, intentional or unintentional, calls for clan vengeance. The closest clansman of the murdered … must … 'raise up the kindred bones', ie, kill the murderer

[25] Ibid 160.
[26] Natalia Loukacheva, 'Indigenous Inuit Law, "Western" Law and Northern Issues' (2012) 3(2) *Arctic Review on Law and Politics* 200, 204.
[27] See Chapter 2.
[28] Technically, strict liability means that a criminal or tortious defendant is guilty or liable solely by proving the *actus reus* or the physical causal link between tortious conduct and harm suffered, without having to prove *mens rea* or other mental state. The classic example is speeding: one is guilty of speeding if one speeds; not, eg, for speeding 'intentionally', 'without good cause', etc.

> *or at least some person of the male sex of his khal'* [clan]. And the wrath of vengeance is so great that not even newborn children are spared.[29]

Clearly, while the Nivkh feel the impulse to revenge like any other people in the right circumstances, the means and ends of retribution are distinct. The state of mind of the actual killer – the one who, in modern analytical jurisprudence, was both 'actual' and 'proximate cause' – is irrelevant because liability is incurred by the clan to which the killer belongs. The Nivkh concept of justice is not concerned with the accountability of one individual for his or her direct acts harming another individual, but with the satisfaction of one clan's need for satisfaction against another clan. Similarly, in so-called 'opacity of mind' cultures of the Pacific, the internal thought processes of others are deemed unknowable and to speculate about them is a solecism; mental states accordingly have diminished importance in establishing moral or legal culpability.[30] In cultures like this, it is not true that 'human beings treat each other as responsible agents, possessed, so the dictionary says, of rationality and free will and hence of the capacity for rational conduct'.[31] This is not an invitation to excessive cultural relativism or a suggestion that the individual is a purely social construct; only that the individual may be conceived and prioritised in different ways. In short, different cultures have, for their own reasons, different rubrics for allocating responsibility and righting wrongs.[32]

The Roman historian Tacitus reported that in the barbarian world of Germania, a husband was allowed to punish his adulterous wife by not only cropping her hair and stripping her clothes, but chastising her with a lash out of the marital home and across the village.[33] The

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[29] L I Shternberg, L Bromwich and N Ward, *Gilyak, Orochi, Goldi, Negidal, Ainu: Articles and Materials* (Dal'giz, 1933) <http://ehrafworldcultures.yale.edu/document?id=rx02-001>, quoted in Cameron M Curtin et al, 'Kinship Intensity and the Use of Mental States in Moral Judgment across Societies' (2020) 41(5) *Evolution and Human Behavior* 415, 416 (italics added).
[30] Curtin et al (n 29) 419–20.
[31] Barry Barnes, *Understanding Agency: Social Theory and Responsible Action* (Sage, 2000) 50.
[32] Max Gluckman (ed), *The Allocation of Responsibility* (Manchester University Press, 1972).
[33] Tacitus, *Germania* 19.1. While Tacitus' account of this practice is not founded on direct knowledge or critical texts, modern scholarship – in light of archaeological finds and of later and better-documented Germanic custom – is inclined to accept its generally accuracy: see commentary in J B Rives (ed), *Tacitus: Germania* (Oxford

full impact of this cruel parade – and thus its real function – cannot be understood without a proper appreciation of the role of shame. Unlike guilt, which addresses itself to personal conscience, shame is the emotion arising from *public* disapprobation, with all its consequences for one's standing in that society. It follows that anyone who is shamed, is punished.[34] While Tacitus does not say so expressly – and while his motives for relating this anecdote are rhetorical and not primarily concerned with historical accuracy or ethnographic authenticity[35] – one infers that the woman's own relatives will see her being whipped naked across the village and know precisely what she did. If one appreciates that the real punishment is not the mere stripping or lashing but the shame engendered by these public acts, one realises that her kindred are actually being held secondarily liable. It is as good as the husband saying, 'Here's what I think of *your* daughter and sister'; and her parents, siblings, and cousins must endure the shame, *and attendant social cost*, of their association with her. What is that, if not punishment?

None of the foregoing is meant to imply that the basic jurisprudential shift among the Romans was away from self-help and towards state-regulated justice. Neither theoretically nor practically would it have been possible to abolish completely the right to self-help: neither would the subject population have allowed it, nor would the Roman state have been able to

University Press, 1999). In sum, however accurate Tacitus is in the details, what he describes does not appear to be in any way alien to ancient Germanic ideas of justice or social norms, notwithstanding that Tacitus' primary purpose in relating this and other anecdotes is rhetorical, to suggest to that the Germans have retained a certain virility and virtue that the ancestors of his own Roman readers once had and ought to reclaim.

[34] Far from being evolutionarily maladaptive, shame (and the fear of shame being incurred by antisocial action) serves a legitimate adaptive purpose in deterring against socially devaluing acts that imperil the individual human surviving in a cooperative society: Daniel Sznycer et al, 'Shame Closely Tracks the Threat of Devaluation by Others, Even across Cultures' (2016) 113(10) *Proceedings of the National Academy of Sciences* 2625. This raises at least one challenge to Martha C Nussbaum's critique of the role of shame in law in *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press, 2004). See also Jörg Wettlaufer, 'The Emergence and Social Usage of Shaming Punishments in the Twelfth and Thirteenth Centuries in Northwestern European Cities' in Jörg Wettlaufer, David Nash and Jan Frode Hatlen (eds), *Honor and Shame in Western History* (Routledge, 2023) 140, in particular the observation at 141 that shaming punishments 'were applied in particular in the context of moral failure against the community bound by oath'.

[35] But see n 33 above on why Tacitus' account is nevertheless plausible. Cf Valerius Maximus, *Facta et dicta memorabilia* 6.3.9 for similar (and similarly violent) conduct among the Romans themselves.

cope without this delegation of justice to the victims themselves.[36] Indeed, it is not until quite late in history that any society was patrolled by a standing police force that justified the total abolition in the legal system of even the theoretical right to self-help.[37] In any case, this necessarily brief ethnographic review demonstrates that for what common lawyers call crimes or torts or what the Romans called delicts, the function of legal regulation is not self-evidently about the protection or compensation of individuals. That imperative exists only in some legal traditions. Of course, there is a public policy element even in the most private wrongs: but in individualistic legal systems, the outlook is always focused on the person because the law is concerned, for example, to order compensation for personal injury, to the benefit of both the plaintiff and every once and future individual who may need like compensation.[38]

The later period of ancient European history witnesses the emergence of delictual systems based around the logic of individual redress. In a recent study of anger and justice in ancient Greece, Joe Whitchurch argues that the idea that 'in Homeric society, responses to offences were exclusively private acts of revenge with little or no regulation from the community is untenable', and posits instead that 'something like a "state" … exercise[d] control over private anger and retaliation and [wa]s able to mobilise the anger of the community in avenging slights against its collective honour'.[39] Importantly, this attitude persisted in the jurisprudence of

[36] Christopher J Furhmann, *Policing the Roman Empire: Soldiers, Administration, and Public Order* (Oxford University Press, 2011) 44–87 also discusses the right to self-help, which continued alongside both official and civilian forms of rudimentary policing.
[37] Wilfried Nippel, *Public Order in Ancient Rome* (Cambridge University Press, 2009). Perhaps one should say nearly total abolition of self-help: eg, many common law jurisdictions recognise a limited right of 'recaption of chattels': *Blades v Higgs* [1865] 11 ER 1474.
[38] In principle, a modern legal system might base its tort regime on nothing but the collective economic effect that ensues from not properly compensating individual litigants. But (1) no society does base its tort regime only on this and (2) in any event, the aggregated economic harm to society is only an abstraction of the same premise that tort law is designed to compensate individuals in the instant case, *and* to deter similar harms to future *individuals* in subsequent cases or at least to ensure that those subsequent individuals are also compensated. On the allocation problems that society faces collectively in response to tragedies suffered individually, see Guido Calabresi and Philip Bobbitt, *Tragic Choices* (W W Norton, 1978).
[39] Joe Whitchurch, *Revenge, Punishment and Anger in Ancient Greek Justice* (Bloomsbury, 2024) 108, 116–19, 124.

classical Athens, where orators frequently enjoined jurors to show anger (provided, of course, that they were first rationally convinced that the defendant had done wrong, and could therefore express appropriately 'dicastic emotion').[40]

Of course, this argument needs to be handled with care since we are concerned with the redress of private, not public wrongs – and many surviving legal speeches are concerned with criminal matters, which can have a different function to purely private suits.[41] Much scholarship on Athenian justice is – and, by the nature of surviving evidence, needs to be – concerned with public prosecutions over questions of murder, treason, and exile. As Danielle Allen writes of criminal and similarly public cases (such as whether a citizen should be exiled from Attica): 'Anger not only led to efforts to punish but also provided opportunities for a public reassessment of the city's distribution of honor.'[42] But if public wrongs were concerned with the redistribution of honour between individuals, we can infer the same for private wrongs, where *only* the honour of the individual litigants is in question. In this sense, what follows about Roman delict is not necessarily unique to Rome among ancient legal cultures; but where Athens offers clues, Rome offers an abundance of technical material in which the full implications of a system of delictual law can be explored. Classical Roman law elaborated a full and well-documented jurisprudence for administering the individualist model of obligations: that is, the allocation of rights and duties between individual plaintiffs and wrongdoers.

[40] Ibid.
[41] Whitchurch duly acknowledges this: ibid 125.
[42] Danielle S Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton University Press, 2000) 61.

III AQUILIAN LAW: LIABILITY FOR WRONGFUL CONDUCT

A large part of the preserved Roman law of delict is concerned with a brief yet enduringly influential statute called the *lex Aquilia*, enacted during the Middle Republic. The *lex Aquilia* is relevantly concerned with wrongful damage to property. It also expresses many traits and illustrates many consequences of an individualistic jurisprudence.

Here is what survives of the first and third chapters of the *lex Aquilia* – the ones relating to wrongful damage to property. The first chapter: 'If anyone kills unlawfully a slave or female slave belonging to someone else or a four-footed beast of the class of cattle, let him be condemned to pay the owner the highest value that the property had attained in the previous year.'[43] According to Gaius (who drops off verbatim quotation at this point), if the defendant denies liability and loses, the damages are doubled.[44]

Here is the third chapter:

> In the case of all other things apart from slaves or cattle that have been killed, if anyone does damage to another by wrongfully burning, breaking, or rending[45] his property, let him be condemned to pay to the owner whatever the damage shall prove to be worth in the next thirty days.[46]

[43] [*U*]*t qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto*: D.9.2.2.pr.

[44] D.9.2.2.1. Incidentally – and without defending the awkward drafting of the *lex Aquilia* – slaves and cattle surely have their own statutory provision because of their social and commercial importance: they are the only two things in the class of *res mancipi* which are both movable and corporeal, and which can therefore be damaged in ways that the *lex Aquilia* was intended to prevent and penalise. That said, imperial jurists did later extend the scope of chapter three litigation to damaged buildings and aqueducts: D.9.2.27.31–2.

[45] For the word *ruperit*, I have followed Bruce Frier in translating as 'rending'. By his own ready admission, this is an artificial translation: Bruce W Frier, *A Casebook on the Roman Law of Delict* (Scholars Press, 1989) xvi. It is, in any event, better or at least no worse than Watson's 'spoiling'.

[46] [*C*]*eterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto*: D.9.2.27.5. The phrase *triginta proximis* could be translated as the 'proximate' or the 'next' 30 days, the latter strictly fixing the time period to the 30 days following.

In sum, Aquilian jurisprudence is concerned with protection of chattels from intentional or unacceptably careless damage or interference by another, and so serves a function rather like the common law of conversion or negligence.[47]

Importantly, the defendant has to be at fault, which may be based on either negligence or intent. As Bruce Frier explains:

> What emerges above all from juristic discussion is the central principle of Aquilian liability, namely that no one can be held legally liable for loss not demonstrably caused by his or her own fault … the principle of 'no liability without fault', which ranks among the greatest intellectual achievements of the Roman jurists, has only come to be seriously questioned in this century.[48]

Aquilian jurisprudence therefore does away with strict liability, as the physical act needs to be a consequence of fault (though *defining* fault is, of course, a moral and juridical problem all of its own).[49] And if it is a consequence of fault, then the subject of the legal analysis – the unit of which the law takes account – is the individual.

Moreover, what Frier alludes to in the 'serious questioning' of modern times must include the modern regimes of consumer protection and product liability, which have invested and besieged the citizen's theoretical right to 'freedom of contract'.[50] Legislative intervention

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[47] Aquilian actions are indeed analogous to common law conversion rather than personal injury and wrongful death; for while much Aquilian jurisprudence is concerned with injury or death of slaves, the plaintiff is always the *dominus* suing on damage to his slave as chattel in chapter one litigation.

[48] Frier, *A Casebook on the Roman Law of Delict* (n 45) 29.

[49] A similar turn to fault in the common law is asserted in James Barr Ames, 'Law and Morals' (1908) 22(2) *Harvard Law Review* 97. Cf Richard A Epstein, 'A Theory of Strict Liability' (1973) 2(1) *Journal of Legal Studies* 151 and Joshua Getzler, 'Richard Epstein, Strict Liability, and the History of Torts' (2010) 3(1) *Journal of Tort Law* 1, which relevantly argue that the schema for establishing liability under the *lex Aquilia* focused on causation, not fault. If Eptstein is wrong, refuting him requires a paper of its own: for now, it suffices to say that Aquilian law – at least as interpreted by some Roman jurists – should not be understood as a simple strict liability regime: consider, eg, Ulpian's example below of the shoemaker rashly putting his pupil's eye out. By seeking to punish rather than to insult his pupil, his liability falls under the Aquilian regime and not that of *iniuria*. So at the very least, intention has some role in assigning an appropriate cause of action to a given wrong. On problems of fault in law generally, see Tony Honoré, *Responsibility and Fault* (Hart, 1999).

[50] Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979). On minimum wage, the leading case whose repeal defines modern American constitutional law on this issue was *Lochner v New York*,

has imposed strict liability for producers and distributers of defective products that harm consumers. Interestingly, in this respect the classical law of delict is more intensely individualistic than the modern Anglo-American systems of tort and product liability, as the purpose underpinning these statutory regimes is still the protection of the *rights* of wronged individuals, but the *duties* of wrongdoing individuals is analysed in terms of public good rather than private accountability. That is, the purpose is not to hold defendants liable for their fault so much as to protect the general public from harmful products.[51] These are not the same thing: if they were, then strict or no-fault liability would not be imposed.[52] Like the Nivkh of eastern Siberia – but for very different reasons, of course – the modern product liability regime is less concerned with the moral fault of natural or corporate persons than with the advancement of some public necessity, such as consumer safety.

The *lex Aquilia* engendered a sizeable juristic literature based on artful and pragmatic interpretation, or what Edward Gibbon called 'artificial jurisprudence'.[53] Within that jurisprudence, a series of sensible praetorian interpretations whittled down the literal wording, according to which even slight 'rending' of another's property could make one liable for replacement of the whole.[54] That interpretive remediation is best understood as one aspect of a general praetorian programme – if that is not too deliberate a word – of identifying and appropriately penalising individual fault. Under the first chapter of the *lex Aquilia*, if a

198 US 45 (1905). Generally, consumer protection laws positively create liability, rather than negatively determining that a tortious harm is not 'excused': see Epstein (n 49). See also Chapter 9.

[51] This is often stated quite explicitly in the congressional or parliamentary readings, and explanatory memoranda, for bills relating to consumer protection or contractual rights. For a similar point about rights of ownership, see Fritz Schulz, *Principles of Roman Law*, Marguerite Wolff (trans) (Oxford University Press, 1936) 153. This need not be the only reason: another function of such a regime may be enterprise liability, or the pragmatic distribution of liability across an industry or group and not just a sole defendant.

[52] But they are: see, eg, NY Pattern Jury Instructions (Civil) § 2-120.

[53] Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, vol ii, David Womersley (ed) (Penguin, 1995 [1776–89]) 791. On the Aquilian regime, see also Wolfgang Ernst, 'The Politics of the Lex Aquilia' (2022) 90(3–4) *Tijdschrift voor Rechtsgeschiedenis / Revue d'Histoire du Droit / The Legal History Review* 315; *Justinian's Digest 9.2.51 in the Western Legal Canon: Roman Legal Thought and Modern Causality Concepts* (Intersentia, 2019).

[54] The absurd results of a *stricti iuris* interpretation of the *lex Aquilia* are wittily described in David Daube, *Roman Law: Linguistic, Social, and Philosophical Aspects* (Edinburgh University Press, 1969) 70–1.

defendant admitted to killing a slave but it later transpired that the slave died of causes unrelated to the defendant's actions, the dominant legal opinion was that the defendant could not be held liable.[55] That preponderant view represents a breaking free of strict legalism: the main juridical issue was not the invocation of legally effective words – an 'I did it' which sets in train an irrevocable process of liability and punishment – but whether the defendant should be held accountable in some substantively moral sense.[56] Thus, for example, Ulpian observed that if a shoemaker strikes a pupil for poor craftsmanship and accidentally puts his eye out, he would be liable on an Aquilian action because he acted rashly (whereas he would not be held liable for *iniuria* or 'outrage' because the intention was to punish, not to insult).[57] The defendant's intent – his own mental state – is critical to both identifying the proper cause of action and determining his liability. This is characteristic of an individualistic jurisprudence governing wrongful conduct.

It is also not out of place in an individualistic jurisprudence that a cause of action under the *lex Aquilia* could be inherited. Importantly, however, only *standing* could be inherited and not *liability*: the reason given by Ulpian is that an action of this kind is punitive (*cum sit poenalis*).[58] This is a terse explanation but is readily explained. As related in the previous chapter, the heir in Roman law did not merely receive the land, tangible effects, and intangible rights of the decedent. The heir succeeded wholesale to the legal personality of the decedent: as far as reality and legal fiat allowed it, the heir *was* now the decedent.[59] The personal right of vindication therefore properly falls to the one who in a juridico-metaphysical sense 'became' the plaintiff. Here, however, symmetry is does not recommend itself to the logic of

[55] D.9.2.23.25.pr.
[56] Hence Ulpian's observation that a man subjected to the outrage of someone punching him has rights against the person who, through ill intent (*dolus*), incited the physical act: D.47.10.11.pr.
[57] D.9.2.5.3.
[58] D.9.2.23.8. Incidentally, this is consistent with the common law view that only rights and not duties are assignable.
[59] See Chapter 3.

individualistic jurisprudence. While it is sensible for the heir to inherit a cause of action, it evidently offended Roman notions of propriety for an heir to also inherit a punishment. The reason for this is not that the Romans thought it 'unfair' for someone to be laboured with the obligations as well as the advantages of the decedent's legal personality; again, we have already seen that they did not.[60] The reason, as Ulpian says, is that it is punitive.[61] It is entirely consistent with a jurisprudence concerned with securing the rights and exacting the obligations of legal persons that a man or woman should not be punished for another's commission of a wrong. The plaintiff-heir assumes the cause of action because his legal personality – conjoined still, in some sense, to the identity of the originally wronged person who now physically exists in his heir – is entitled to *compensation*; but the defendant-heir does not assume liability because he does not deserve *punishment*. In other words, a symmetrical approach would be inappropriate because the symmetry is illusory. The right owed to the victim is different in kind to the duty imposed on the wrongdoer: the former concerned with restoring the victim's condition and the latter with using the compensation of the former as the most convenient and apposite means of punishing the latter. In fact, this rule is proof as good as any other of the moral and personal character of Roman law. The Aquilian delict is a moral pronouncement upon the individual who committed it; naturally, then, it cannot be imputed or passed to another. The same logic holds in the juristic discussion of suits involving more than one defendant. Ulpian says that if several attackers gang up on a slave and slay him, only he who deals the fatal blow is liable; but if the one who 'actually' killed the slave cannot be identified, all are liable. Why? Because, again, it is a penalty (*cum sit poena*).[62] The defendants are all liable, not in obedience to a regime of collective punishment but only in deference to the unattainability of probative facts. Only questions of evidence stand in the way: if the 'real'

[60] In Chapter 3.
[61] D.9.2.23.8.
[62] D.9.2.11.2.

wrongdoer can be found, he alone is liable; otherwise, each must be assumed to be *individually liable for the whole*, which preserves – even while apparently flouting – the principle that a wrong committed by one person cannot be imputed to another.[63]

Likewise, a plaintiff will not succeed where he merely piggybacks off the cause of action properly belonging to another individual. For example, a tenant-farmer has the right to bring an Aquilian action against someone who damages crops on his land; but if he does so, he must promise that the owner will not bring a similar action on the latter's own account.[64] This '*res judicata*' effect fits with the logic of a jurisprudence centred upon personal rights and duties: the defendant's liability is confined to making good on the damage he has done to one plaintiff, while a second plaintiff is barred because his recovery would exceed the 'natural' accountability of the defendant. The defendant has already been punished by compensation which has left nothing for further remedy. This example illustrates perfectly the dual nature of Aquilian damages as compensation for those who are materially wronged, and as punishment for those who trespassed against their neighbours.[65]

The basic moral premise of the Aquilian action is clear, but juristic commentary on the *lex Aquilia* goes even further in centring the action on the moral culpability of the wrongdoer where it is appropriate to do so.

[63] Likewise, the common law doctrine of joint and several liability encapsulates, in comparatively elegant language, the proposition that *all* defendants are *individually* liable *fully*. The common law – another species of individualistic jurisprudence – reaches a strikingly similar solution to the problem of multiple wrongdoers in the doctrine of 'causal overdetermination': see, eg, Robert J Peaslee, 'Multiple Causation and Damage' (1935) 47(7) *Harvard Law Review* 1127. The Roman position appears to invite overcompensation; but again, that is only a restitutionary problem, not a problem where the 'compensation' has an essentially punitive function.
[64] D.9.2.27.14. See further Chapter 7.
[65] Similarly, *lex Irnitana* 62 (the law is discussed in Chapter 8) provides that an official may not unroof or destroy property without replacing it, lest he be held liable to any local citizen *with standing*.

In Aquilian jurisprudence frequent mention is made of *iniuria* as the keyword invoking a defendant's actual or potential liability. But in these cases – as the jurists themselves clarify – *iniuria* does not signify the substantive cause of action for 'outrage' or 'insult' (examined below), but to its literal sense of *unlawfulness* (*in-iuria*) intended in the *lex Aquilia*.[66] A defendant's action is unlawful whether it is slight or severe; whether the consequent damage is minor or major; and whether done negligently or intentionally. As such, *iniuria* is a neutral word and pertains to an objective criterion of conduct. The jurisprudence of unlawfulness is individualistic only insofar as it judges individual legal subjects on whether they comport to the standard of a reasonable person or good patriarch (*bonus paterfamilias*) – so on another view, there is nothing individualistic about this jurisprudence at all.[67]

But where Aquilian jurisprudence takes a more individualistic, moralising turn is in the application of a subjective category of culpability. Something done *iniuria* may be done merely by fault (*culpa*) or with malice (*dolus*).[68] Malicious conduct is appraised by a subjective standard.[69] Sometimes, an action may lie only because malice is present. Quintus Mucius gives the example of a landowner who drives a neighbour's pregnant mare off his land: he is liable under the *lex Aquilia* for the miscarriage of the foal if he had driven its mother off 'too hard or purposely driven her too violently'.[70] Intent is everything, more so than for *culpa*: Ulpian says that a contestant in a boxing match is not liable under the *lex Aquilia* for killing his opponent 'because the damage is seen to have been done in the cause of glory and valour and not for the sake of inflicting unlawful harm';[71] but if a person undertakes some skilled labour knowing

[66] D.9.2.5.1.
[67] Similarly, Roman jurists assessing good faith conduct apply the standard of the *bonus vir*: see Chapter 9.
[68] G.3.211. Meaning, here, that the wrongdoer must have actually had a malicious state of mind at the material time; and while the legal fact-finder might only be able to infer this from objective facts and standards (an evidentiary question which the jurists characteristically ignore), this is not identical to having an objective standard of malice.
[69]
[70] *Si percussisset aut consulto vehementius egisset*: D.9.2.39.pr.
[71] [*Q*]uia *gloriae causa et virtutis, non iniuriae gratia videtur damnum datum*: D.9.2.7.4. Ulpian adds that this does not apply to slaves because only the free play contests for glory.

that he does not have the requisite skill, this is *dolus* because he is, in practical effect, intentionally harming the innocent customer who thought that he hired the right man for the job.[72]

The legal consensus was also that a plaintiff would be defeated if he could have avoided the danger which caused the damage on which he was suing (*si evitare periculum poterit*).[73] This is reminiscent of the common law doctrine of contributory negligence, under which the defendant has a complete defence to liability if the plaintiff negligently put herself in the path of danger such that it would be causally and morally inappropriate to say that the defendant is liable.[74] I said earlier that Aquilian law compensates victims and punishes perpetrators, but the principle of contributory negligence (as we would call it in English) does complicate this slightly. In his prefatory remarks on litigation, Gaius says that we sometimes raise actions to exact compensation; sometimes to exact a penalty; and sometimes for both.[75] He then identifies Aquilian actions as an example of seeking both compensation and penalty.[76] A clear example is the double damages recoverable against a defendant who was found liable under the first chapter of the *lex Aquilia*, having denied liability at the formulary stage. However, Aquilian actions never seek *only* to punish the wrongdoer. Either the plaintiff is compensated and the defendant is punished, or the plaintiff appears to seek compensation only. In this way, compensation for any damage to the life, or livelihood, of the innocent party corrects a wrongdoer's interference with the right to livelihood undisturbed by antisocial behaviour, whether intentional or negligent. The *lex Aquilia* is the achievement, at an impressive level of analytical detail, of an individualistic jurisprudence. But perhaps another delict expresses even

[72] See William Buckland's draft lecture notes in the Appendix to David Ibbetson, 'William Warwick Buckland on the *Lex Aquilia*' in Paul J du Plessis (ed), *Wrongful Damage to Property in Roman Law* (Edinburgh University Press, 2018) 46, 93.
[73] D.9.2.28.1.
[74] See Joachim Dietrich and Iain Field, 'The "Reasonable Tort Victim": Contributory Negligence, Standard of Care and the "Equivalence Theory" (2017) 41(2) *Melbourne University Law Review* 602.
[75] G.4.6.
[76] G.4.9.

more abundantly the Romans' concern for a citizen's right of life unimpeded by external attack: the delict of *iniuria*.

IV INIURIA: THE RIGHT OF PERSONAL HONOUR

Roman society was acutely preoccupied with honour.[77] But where does honour stand in relation to the community? Does law protect collective or individual honour? The question arises because an individual's desire to correct some physical or reputational affront may have a personal or public character. There is no shortage of sources about the Roman virtue of *dignitas*, some of whose connotations correspond to those of the English word 'honour', particularly as it relates to one's public reputation and standing.[78] It is a public virtue in this respect; but it is essentially a personal virtue in that each individual with *dignitas* jealously preserved and sought to enlarge it with all the self-interested drive of an economic mercantilist. Indeed, in politics and public life, the *dignitas* of a conspicuous individual might threaten or be threatened by the *libertas* of the collective population, as the quest to preserve and enhance *dignitas* involved men of high office in ever greater political struggles against the interests of other men of honour and even against the Roman *populus* itself (for sometimes, and as the career of Julius Caesar demonstrates, enhancing was the only way of preserving *dignitas*).[79]

[77] J E Lendon, 'Roman Honor' in Michael Peachin (ed), *The Oxford Handbook of Social Relations in the Roman World* (Oxford University Press, 2011) 376.

[78] See, eg, Caesar, *De bello Gallico* 8.6.2; Cicero, *Ad familiares* 4.4.4; Gellius, *Noctes Atticae* 11.10; J P V D Balsdon, '*Auctoritas*, *Dignitas*, *Otium*' (1960) 10(1) *Classical Quarterly* 43; Brian A Krostenko, *The Voices of the Consul: The Rhetorics of Cicero's De Lege Agraria I and II* (Oxford University Press, 2024) 246–86.

[79] Wirszubski (n 7) 15–16. To conceive of *dignitas* as a threat to public safety may seem facetious, but *iniuria* was certainly connected with *honestas* and *dignitas*. There was a scale of responses to insulting behaviour, with litigation ranking far below violent reaction. As Lendon writes, '[t]hese were the methods employed by élite Romans who could not command armies. But if the very strong felt that their honor could not be defended within the institutions of the city because those institutions were commanded by their enemies, they might resort to civil war': Lendon (n 77) 381–2. But to recognise this is not to say that violence was a normal response to outrage: ibid 383–7.

J E Lendon warns against getting carried away with common notions about Mediterranean male shame and honour, and encourages focusing on their distinctively Roman qualities (*dignitas*, *existimatio*, *honestas*).[80] For example, in contrast to the stereotypical anthropological picture of traditional Mediterranean societies, the Roman concept of honour reserved an important role for good manners and forbearance in the face of indignities and misfortunes.[81] Yet while he is sensitive to those aspects of Roman honour, Lendon also well appreciates that '[a]lthough philosophers might complain about it, Romans expected to take revenge for insults'.[82] Such revenge might yet be satisfied through legal channels.

This is the function of the delict of *iniuria*. Honour and *pietas* might require a son to prosecute those who had betrayed his father by, for example, securing the father's unjust conviction.[83] But that only obtains in matters of public importance such as murder or treason, which belong to the criminal law. In delict, the matter was different: the reverse, in fact. A claimant could seek redress for *iniuria* suffered as a result of offensive words or deeds.[84] Those words or deeds may be directed to himself or to someone in his power, such as his son or slave.[85] In the Twelve Tables, the cause of action was confined to the insult caused by some physical injury and was compensated by a fixed monetary penalty; and only under praetorian law did it develop into the more ample and flexible *actio iniuriarum*. As Jolowicz and Nicholas say: 'It is unlikely that the Romans of the fifth century BC were very susceptible to insult, and, if we imagine that *iniuria* can here refer to the innumerable different kinds of attack on a man's personality which it covered in the later law, it is difficult to explain how they could all be

[80] Lendon (n 77).
[81] Lendon (n 77) 383–8, 396–7.
[82] Ibid 379.
[83] Ibid 380, citing Valerius Maximus, *Facta et dicta memorabilia* 5.4.4 on the case of Marcus Cotta.
[84] Labeo says that *iniuria* can be inflicted by deed or by words (*aut re aut verbis*): D.47.10.1.1. Elsewhere, he (or his reformulation by Ulpian) suggests a different division of the types of action for *iniuria*. On this problem, see Paul J du Plessis, 'An Infringement of the *corpus* as a Form of *iniuria*: Roman and Medieval Reflections' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law* (Hart, 2013) 141.
[85] G.321–2.

punished by the same fine.'[86] Perhaps they mean that the early Romans had too much fortitude to be bothered with mere words of insult – a baseless supposition. The question does not matter, however, because the individualistic jurisprudence only arrives in full display in the classical period, when *iniuria* had developed into a unitary cause of action covering the 'innumerable different kinds of attack on a man's personality'.[87] So, unlike Aquilian law which could not fully escape the text of the original *lex*, the *actio iniuriarum* was all but detached from the Twelve Tables and achieved maximum flexibility in praetorian law as a pure action on the case.[88] That flexibility was needed to account for the many ways in which a man or woman's honour might be offended. Thus Gellius implies that Plato, in his musings on justice in the *Gorgias*, overlooked one of the main reasons for punishing a wrongdoer: namely, 'the preservation of honour, when the dignity and prestige of the injured party must be protected, lest, if the offence is allowed to go by without punishment, he be brought into contempt and his honour be impaired'.[89] Apparently, then, redress for attacks on someone's honour or dignity is a distinctly Roman motive for official sanction: the epitome of an individualistic justice system.[90] Tony Honoré has thus called the *actio iniuriarum* 'a technical remedy … designed to protect bodily integrity, reputation, and human dignity', which could even 'be used to give effect to the principle of respect for natural freedom and equality'.[91]

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[86] H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 3rd ed, 1972) 171 (italics in original).

[87] Fritz Schulz similarly describes the cause of action for *iniuria* as 'modernized … from having denoted only personal assaults, being widened so as to cover any attack on the *moral personality*': *History of Roman Legal Science* (Oxford University Press, 1946) 51 (italics added).

[88] See also David Johnston, *Roman Law in Context* (Cambridge University Press, 2nd ed, 2022) 363–4; Paul Frédéric Girard, *Mélanges de droit romain*, vol ii, *Droit privé et procedure* (Recueil Sirey, 1923), 385–411. Girard holds, however, that this development on and from the enactment of the *lex Cornelia* in the Late Republic foreclosed compensatory actions of *iniuria estimata*: 407–8.

[89] Gellius, *Noctes Atticae* 7.14.3, quoted in Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford University Press, 1970) 1.

[90] Gellius uses the Greek word τιμωρία, but he makes it perfectly clear that he is expressing a Roman view of justice and punishment: Garnsey (n 89) 1–2. I note, however, that Garnsey observes this in the context of his study of legal inequality in imperial Rome: see Chapters 1 and 10.

[91] Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford University Press, 2nd ed, 2002) 85.

Iniuria is often translated as 'outrage', which almost seems too emotive a word to describe a legal cause of action. However, one alternative – namely, a more literal translation such as 'wrong' – is too vague and is apt to be confused with the way *iniuria* is used adverbially in other contexts.[92] But this seemingly overbroad word 'outrage' covers not only instances of *iniuria* that would be recognised in the modern world as defamation, but also acts more akin to assault or battery: like the repeat offences of Lucius Veratius, who allegedly exploited the inflation of currency by slapping people in the Forum and having his slave immediately step forward with the now paltry fine imposed by the Twelve Tables for each assault.[93] As William Buckland observed, *iniuria* as a special action corresponded with *contumelia*, another word that could be translated as outrage or insult; and which was called 'hubris' in Greek (ὕβρις).[94] But more importantly, translating *iniuria* as 'outrage' recognises a fundamental fact about this cause of action: that it arises not from a particular act, but by the effect it creates in the offended party, whatever the offending act may be.[95] In other words, the plaintiff has a cause of action because he is genuinely outraged. Gaius writes:

> Now, outrage[96] is committed not only when someone is struck with a fist or with clubs, or even flogged, but also when a vocal attack is made on him, when his goods are advertised for sale as a debtor's by someone who knows he owes him nothing, when someone writes a defamatory book or poem about someone, or when someone harasses a lady or a youth; and finally in many other ways.[97]

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[92] Eg, as noticed above, *iniuria* in the sense of 'wrongfully' is used by legislators and jurists to describe the culpability of a defendant, such as under the *lex Aquilia*.
[93] Aulus Gellius, *Noctes Atticae* 20.1.13–14.
[94] W W Buckland, *A Textbook of Roman Law: From Augustus to Justinian*, Peter Stein (rev) (Cambridge University Press, 3rd ed, 1963) 589.
[95] This perhaps more essential than whether the action is for *iniuria re* or *iniuria verbis*, or another other more technical taxonomy laid down by the jurists.
[96] Gordon and Robinson translate *iniuria* as 'contempt'; but this feels flat and is apt to be confused with common law contempt.
[97] *Iniuria autem committitur non solum, cum quis pugno puta aut fuste percussus vel etiam verberatus erit, sed etiam si cui convicium factum fuerit, sive quis bona alicius quasi debitoris sciens eum nihil sibi debere proscripserit sive quis ad infamiam alicuius labellum aut carmen scripserit sive quis matrem familias aut praetextatum adsectatus fuerit et denique aliis pluribus modis*: G.3.220.

This does indeed encompass the full range – and more – of common law defamation.[98] Likewise, Gaius deliberately lists off a non-exhaustive set of equally disparate acts, the common denominator of which is an affront to the plaintiff's honour. Many, but not all, of these examples involve some public shaming. Without diminishing the importance of *dignitas* in public life, the critical element for *iniuria* is not that the offensive act occurs in the presence of others, even if this is often an important or aggravating factor;[99] as when a certain Apollos of Roman Egypt, being 'drunk … verbally abused' a certain woman called Taamois 'and stripped her in the presence of many worthy men, whose names … will [be] present[ed] at trial'.[100] But a man may be flogged in closed lodgings; he may be insulted in a private conversation; or a woman may be harassed in the shadows. It follows that the cause of action arises from the personal loss of dignity or honour – from the outrage that the plaintiff feels from this, whoever else, if anyone, happened to see it.[101]

Gaius then says that if Titius' wife is insulted, an action can be brought not only on her behalf, but separately both for her father and for Titius.[102] Substantively, this is an inversion of the legal principle latent in Tacitus' example of the adulterous German woman who was cropped, stripped and flogged out of her home. There, as I have suggested above, the logic of a kinship-intensive society required both her and her kin to be publicly shamed (even if the latter were not specifically described in the punishment). Conversely, there may be multiple plaintiffs in a Roman action for *iniuria*, but these are each vindicated in separate suits that

[98] See libel cases digested in John Baker (ed), *Baker and Milsom: Sources of English Legal History: Private Law to 1750* (Oxford University Press, 2nd ed, 2010) 707–15.
[99] Eg, in a public square or theatre: G.3.225.
[100] P Oxy XXXVI 2758 (Oxyrhynchos, AD 110–12), translated in Ari Z Bryen, *Violence in Roman Egypt: A Study in Legal Interpretation* (University of Pennsylvania Press, 2013) 227.
[101] Hence why the plaintiff really does have to *feel* the outrage and if he reflects on it at length and comes back after a long time to sue on it, the legal presumption is that he cannot feel sufficiently outraged to deserve legal redress: D.47.10.11.1. The *iniuria* suffered by a Roman woman is similar to many modern articulations of the crime of stalking, which of course do not require any public knowledge or shame but only that the victim have felt some (quite genuine and acute) apprehension of harm: see Lorraine Sheridan and Graham M Davies, 'Stalking' in Joanna Adler and Jacqueline Gray (eds), *Forensic Psychology: Concepts, Debates and Practice* (Willan, 2nd ed, 2010) 223, 224.
[102] G.3.221. See also D.47.10.1.3.

happen to arise from a common nucleus of operative fact. In his hypothetical, Gaius is clear that one separate action is brought for each of the offended woman, her father, and her husband Titius. This is not a procedural accident, but is consistent with the function of an individualistic jurisprudence. Since this is about personal honour[103] – and in that respect is different to Aquilian actions, even if both may result in monetary damages – each plaintiff has his or her own right of vindication against the one wrongdoer. They are all bilateral affairs, no one dependent upon another.

While a *paterfamilias* could bring an action for *iniuria* against someone who insulted, say, his son or daughter, they conversely could not sue for an insult to the *paterfamilias*.[104] While this seems to contradict the principles of an individualistic jurisprudence, it really only means that the Romans thought the *paterfamilias* more capable than certain other persons of being personally insulted, because of their position in family and society. And yet, even a slave could sometimes sue for *iniuria* in his own right, without having to prove any outrage to his master. Specifically, praetorian law allowed a slave to bring action provided that the outrage was sufficiently egregious: Ulpian's example is of a slave being unjustly thrashed or tortured.[105] That only his owner (*dominus*) could bring the action on his behalf is simply a consequence of the slave's diminished legal status: the deficiency in procedural rights says nothing about the slave's substantive rights.[106] Conversely, if it was the slave who committed a delict, the master could either pay the price or surrender the slave to the plaintiff (noxal

[103] To quote the solicitor who represented Rebel Wilson in her defamation proceedings, '[i]n my experience, most people who are defamed are not in it for the money. Instead, they're after a correction and an apology': quoted in Catriona May, 'Defamation and Social Media: When Old Laws Meet Modern Tech' (2019) 22 *MLS News* <https://law.unimelb.edu.au/alumni/mls-news/issue-22-november-2019/defamation-and-social-media-when-old-laws-meet-modern-tech>.

[104] J.4.4.2.

[105] D.6.1.15.pr; D.47.10.15.34–5.

[106] I say this despite many Romanists' insistence that Roman law recognised rights to actions rather than substantive rights: this is circular and there is more on it in Chapter 5. On the substance and procedure, see W W Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge University Press, 1970 [1908]) 79–81. Echoing Ulpian, Buckland calls the slave's (relatively limited) right to *actio iniuriarum* 'a recognition of his human character'. It is not abundantly clear from the sources whether a slave could sue on sufficiently egregious outrages other than excessive flogging or thrashing.

surrender).[107] It seems that noxal surrender was the norm in earlier law and that masters only later had the option to pay for the slave's damage himself.[108] At its core, then, noxal surrender acknowledges that the truest righting of wrongs is between the actual perpetrator and victim – or at least, as far as this principle can be actualised in circumstances where the master must still give up a valuable asset.

Why can a slave bring an action for *iniuria*, albeit through his master as the official petitioner? Because as Ulpian writes, 'it is obvious that the slave himself feels such things' (*hanc enim et servum sentire palam est*).[109] A slave has feelings, whatever else he lacks; so naturally, he has legal redress against a personal outrage.[110] This is not the last time that we shall see the surprising measure of Rome's individualistic jurisprudence in the rights permitted to her slaves.[111]

V CONCLUSION

The different responses to wrongdoing, adopted in various legal systems, turns upon how that system understood the nature of the wrong being committed and punished. Thus, for medieval Europe, Harold Berman looks to the concept of sin: 'As St Thomas Aquinas said … both criminal and civil offenses require payment of compensation to the victim; but since crime, in contrast to tort, is a defiance of the law itself, punishment, and not merely reparation, must be

[107] D.9.4.7.
[108] Paul J du Plessis (ed), *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed, 2020) 97.
[109] D.47.10.15.35.
[110] What Richard A Epstein says of the law of torts may well be said of the law of delicts: that its 'language … reveals at every turn its origins in ordinary thought'; though '[e]ven if ordinary language contains most of the concepts the bear on questions of personal responsibility, it often uses them in loose, inexact, and ambiguous ways': Epstein (n 49) 151.
[111] Even if these legal concessions did not live up to practical realities. Cf Marguerite Johnson, 'Bitchy Ladies: Domestic Violence against *Ornatrices* in Latin Poetry – Protest Femininity, Toxic Femininity' and Sarah Levin-Richardson, 'Domestic Violence and Servile Vulnerability in the House of the Vettii, Pompeii' in Eleanor Cowan and Tim Parkin (eds), *Domestic Violence and Vulnerability in the Roman World* (2023) 66(2) *Bulletin of the Institute of Classical Studies* 84, 97.

imposed *as the price for the violation of the law*.'[112] This is rooted in the Roman Catholic concept of sin as a price that must be paid by the sinner – paid, that is, to the *law*. Berman provides some useful terminology: if retributive justice is concerned with vindicating the victim, it is 'special retribution'; if concerned with vindicating the law (or the society it regulates), it is 'general retribution'. Accordingly, St Thomas Aquinas saw the essence of law in procuring happiness for the body politic (*omnis lex ad bonum commune ordinatur*).[113]

In this respect, medieval and modern jurisprudence have much more in common with each other than with ancient, including Roman, ideas of retribution and compensation. One of our modern axioms is that criminal and civil law (the latter including tort) are fundamentally different because criminal law is the instrument of general, and civil law the instrument of special retribution.[114] Roman delicts included both things which, by accident of taste and classification, have come to be regarded in the modern common law as both torts and crimes (assault, battery), and things regarded only as torts (trespass, defamation). I suggest that the Roman law of delict was fundamentally concerned with what Berman called special retribution. And under that typology, where a delict corresponds to a modern crime rather than a tort, to that extent the Roman law is in its own way more intensely individualistic than modern law because the Roman position was still that this was a matter of personal retribution, not public response. This is a useful reminder that individualism takes many forms and that it is not a quality that has gradually and evenly revealed itself on the path to modernity. A person's right

[112] Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 183 (italics in original). In the Roman Rite, the words *delictum* and *peccatum* are used interchangeably to mean 'sin', even in the same passage, surely as instances of 'elegant variation' rather than to signify subtle nuances in meaning. They do not mean 'wrong' on the one hand and 'sin' on the other, but rather they both mean 'error' in the aspect of moral judgment.

[113] Thomas Aquinas, *Summa Theologica* (St Paul, 3rd ed, 1999 [1274]) 1.90.2.

[114] For the common law at least, some might say that most tort actions having nothing to do with retribution – even 'special' retribution as here defined: though against this, one may not that in many American jurisdictions, punitive damages are readily available in tort actions. In any case, and whatever 'public policy' rationales a judge or legislator gives for regulating private wrongs such as defamation or personal injury, the fundamental purpose remains compensating the individual in the instant case and *future individuals in like cases*; whereas the regulation of public wrongs is always about serving a social imperative (and criminologists, politicians, and everyone else differ only in *what* that imperative is: revenge, deterrence, reintegration, or something else).

to his livelihood and even his honour was robustly protected by Rome's individualistic jurisprudence. That jurisprudence, even if not unique in its logic among ancient civilisations, was revolutionary in the extent of its development and in the variety of personal rights that it protected.

Chapter 5

Liberty and Property as Rights in Roman Law

I POSSESSIVE INDIVIDUALISM

THE LAST CHAPTER began the analysis of rights in Roman law through the modern schema of life, liberty, and property, by considering the right of life as primarily expressed through the law of delict. This chapter progresses through that schema to liberty and property. As we are confining the study to individuals' rights in private law, we are not concerned with liberty as, say, a right to some greater or lesser amplitude of political expression. Here, *liberty* stands in for the narrower – but foundational – proposition that private citizens or subjects have a right to enter binding agreements with other citizens or subjects, with relatively little regulation or interference, to buy or sell or otherwise exchange their own labour or property (not to be confused with the word *libertas*, which is obviously the Latin equivalent but carries different meanings).[1] This is the essence of what I have called economic individualism, supported by what I have called an individualistic jurisprudence; and it is foundational because if a citizen or subject does not enjoy a tolerable measure of this liberty, it is hard to see how he could call himself 'free', still less how he could enjoy other rights or that the enjoyment of such other rights could amount to much at all.[2] The last section of this thesis will elaborate and defend

[1] This chapter adopts a modern typology deliberately and for the reasons set out in Chapter 4: in short, not anachronistically but because modern rights discourse furnishes a useful structure in which to examine ancient concepts, especially where these can only be inferred in the ancient sources. The public aspect of *libertas* is not encompassed in 'liberty' as I am using the term here. See Chaim Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (Cambridge University Press, 1960) and Valentina Arena, *Libertas and the Practice of Politics in the Late Roman Republic* (Cambridge University Press, 2013). Importantly, while this chapter does examine the juristic notion of *libertas*, it is not concerned with what Wirszubski at 95 calls '*libertas* as a political watchword' (italics added).

[2] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962).

that proposition; this chapter is concerned not with how foundational this right is but whether and how classical Roman law secured that right.

Property is no less complex a concept than liberty, but its meaning for present purposes requires less explanation. As Sir William Blackstone understood, the right to property essentially means the right to exclusive use of things (mostly real, corporeal things): if not without any external interference, then at least with the law's assurance that it will protect that exclusive use against the incursions of other private persons; which is what he means when he calls property 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'.[3]

Liberty and property – in the sense just outlined for each concept – must be analysed together.[4] Aristotle had already perceived that the liberty to dispose of one's property, by voluntary alienation in a contractual exchange, presupposes the existence of a right to property in theory and a regime that mostly guarantees this in practice.[5] Conversely, only the most tradition-bound society would recognise a right to property with no right of alienation: for example, where a man may (or rather must) inherit his father's land, and the father could neither have disposed of the ancestral land in any other way, nor could the son refuse it, sell it, or give it away.[6]

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[3] William Blackstone, *Commentaries on the Laws of England*, vol ii, *Of the Rights of Things*, Simon Stern (ed) (Oxford University Press, 2016 [1765]) 1. Jeremy Waldron rightly rejects arguments that property is indefinable, and points out that there can be a general *concept* of property of which there are various and particular *conceptions*. His own basic definition of the concept is 'a system of rules governing access to and control of material resources': Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 31.

[4] Compare the sixteenth-century legal humanist Hugues Doneau in *Commentarii de iure civili* in *Opera omnia*, xii vols (Giovanni Riccomini, 1770 [1589–1596]) 2.8, cited in Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge University Press, 2007) 206, who posited that while nature herself had endowed humans with rights to life, security, liberty and reputation, it was the Roman law that secured property. This argument, if taken further, would mean that liberty does not encompass the right to contract, which in turn does not appreciate the inseparability of liberty, contract, and property.

[5] Aristotle, *Rhetoric* 1361a.

[6] In practice, every legal system imposes *some* restrictions on alienation. In early English law, the tenant in demesne could not alienate during his lifetime: this would be regarded as violation of the rights of the heir at law.

The two come together in C B Macpherson's influential concept of *possessive individualism*. Macpherson, a socialist, was anxious to uncover the reductive quality of political liberalism, 'classical' or otherwise. For him, the English liberal tradition of the seventeenth century onwards had its 'central difficulty … in its possessive quality … found in the conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them'.[7] This type of individualism arises in what Macpherson calls the 'possessive market society', whose characteristics relevantly include 'no authoritative allocation of work'[8] and 'no authoritative provision of rewards for work', but conversely the 'authoritative definition and enforcement of contracts', as well as freely alienable property and all the classical economic assumptions about rational self-interest.[9]

Here we are concerned neither with the problems arising in the possessive individualism of English liberalism, nor with proving whether Macpherson's criticisms were well-founded, or justified, or important; but with the usefulness of the phrase in understanding Roman law and society. Macpherson's choice of words is clearly echoed, deliberately or not, in J G A Pocock's phrase 'possessors and administrators of things' quoted at the beginning of this thesis.[10] This, it will be recalled, is how Pocock described the Romans' essentially economic and legalistic conception of the individual (a point to which this chapter will return). Possessive individualism is a useful shorthand for the subject matter of this chapter, and clarifies the connection between liberty and property. It would be bold to say that more than a few

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On medieval English law, see Paul Brand, '*In perpetuum*: The Rhetoric and Reality of Attempts to Control the Future in English Medieval Common Law' in J A Burrow and Ian P Wei, *Medieval Futures: Attitudes to the Future in the Middle Ages* (Boydell & Brewer, 2000) 101.

[7] C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 2011 [1962]) 3.

[8] Obviously, the Roman market economy did not permit a totally unrestricted allocation of work: eg, in the later empire especially, certain artisanal jobs were hereditary and *coloni* (a close equivalent to serfs) might be tied to the land or their choice of spouse restricted by their *dominus*: H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 3rd ed, 1972) 433–8.

[9] Ibid 46–7.

[10] J G A Pocock, 'The Ideal of Citizenship since Classical Times' (1992) 99(1) *Queen's Quarterly* 33, 39. See Chapter 1.

inhabitants of the Roman Empire, if that, were unfettered proprietors of their own persons or capacities – still less that they owed society nothing for them. But then again, it would be bold to so describe most inhabitants of Commonwealth and Restoration England, the subject of Macpherson's own study.[11] But this chapter will argue that even Roman slaves, long assumed not to have even a 'self' that could be owed to anyone, enjoyed certain proprietary rights that deserve the (obviously qualified) description of possessive individualism.

The balance of this chapter considers what is involved in the 'liberty' of being able to enter into contracts, especially those in which a person voluntarily alienates his or her own property or labour; it then examines some of the theories of Roman contract and property rights that are discernible in surviving legal and other writings. Finally, the chapter concludes with a study of the Roman legal concept of the *peculium*, or the private property fund availed to slaves and other persons in some status of legal dependency on another. This is especially important, not only to anticipate obvious objections to the idea of Roman liberty in a slave-owning society, but to draw some unexpected parallels between Roman and modern notions of liberty.

II CONTRACT AS A FORM OF LIBERTY

What kind of liberty is meant by 'liberty' or 'freedom' of contract? The 'negative liberty' implicit in contract law is that one cannot be subjected against one's will to a contract.[12] By its nature, a contract requires the voluntary consent of its parties.[13]

[11] Or even anyone alive today: eg, our notionally free market economy and freedom of contract are bounded by all manner of public interest restrictions such as anti-cartel legislation and unfair contract prohibitions. Cf Macpherson (n 7) 61–2. Of course, what Macpherson says of Stuart England could also be argued for the Roman Empire: 'Government regulation in the seventeenth century presupposed a possessive market society.'

[12] Granted, however, that a person's apparent 'choice' to enter into, say, an exploitative contract of employment may be strongly influenced by such factors as poverty and the state of the job market. The phrase 'negative liberty' is of course taken from Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty* (Oxford University Press, 2nd ed, 2002) 166.

[13] All the vitiating factors at common law – eg, fraud in the inducement – are examples of situations in which there is some defect in the quality of the promisor's consent, ie, that it was not 'real'.

This is important. Emperors certainly influenced the private law of Rome through their edicts, and by the *leges* and *senatusconsulta* effected through more popular instruments of government authority; but the greater part of legislative activity – at any rate in private law – consisted in documents authored by lawyers and responsive to the needs of private suitors seeking clarification of the laws regulating their personal and business affairs or enforcement of their contractual rights.[14] There was no common ownership of the means of production, no behavioural 'nudge', nor any other systematic means by which the state used the Roman law of obligations to its own ends. Tyranny was exercised in other ways, whether by debasement of coinage or political partisanship. Or, in the realm of law, through criminal trials in the quasi-informal high courts of emperor and Senate.[15] Of course, even a tyrannical impulse might be tempered by the perception that an emperor ruled better and more justly if he relied on the good counsel of his courtiers – which, in legal matters, would include his *consilium* of jurists.[16] Romans were not always a very free people, least of all in the generations who suffered the political purges between Sulla and the Second Triumvirate, or the depravities of Domitian. Yet the law of obligations was the 'space', so to speak, in which Romans enjoyed personal autonomy. For the more fortunate at least, Rome's property law was not itself an intrusion upon personal liberty because Rome recognised private ownership. There certainly *were* intrusions upon liberty, but these had extra-legal sources: proscriptions, civil wars, palace coups, and

[14] Consider, eg, that the *Codex* consist mostly of responses to individual private law cases. There were of course *senatusconsulta* that modified some aspect of private law, such as those concerning inheritance and *fideicommissa*; but these were relatively rare, and completely outsized by the mass of rescripts and other jurist-authored documents that fundamentally developed rather than overhauled Roman private law. See Tony Honoré, *Emperor and Lawyers: With a Paligenesia of Third-Century Imperial Rescripts, 193–305 AD* (Oxford University Press, 2nd ed, 1994).

[15] Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford University Press, 1970) 13–178. On the contrast between 'liberal' private law and 'oppressive' public law, see Janne Pölönen, 'The Case for a Sociology of Roman Law' in Michael Freeman (ed), *Law and Sociology* (Oxford University Press, 2006) 406–7.

[16] Jill Harries, 'Jurists as Courtiers from Augustus to Justinian' in Caillan Davenport and Meaghan McEvoy (eds), *The Roman Imperial Court in the Principate and Late Antiquity* (Oxford University Press, 2024) 142, 145–6. Similarly, medieval and earlier modern princes were exhorted to exercise their theoretically untrammelled power in accordance with good counsel and their own cultivated virtues: see, eg, James Hankins, *Virtue Politics: Soulcraft and Statecraft in Renaissance Italy* (Harvard University Press, 2019).

tyrants.[17] The mass exchanges and redistributions of property – whether those agitated by the Gracchi or actually undertaken by Octavian – were effected by public acts, often of dubious or non-existent constitutional standing by institutions, such as the Second Triumvirate, whose legal existence was barely recognised; it was not done by altering the character of Roman law itself.[18] As Chaim Wirszubski says:

> [T]o the lives of ordinary people it was of slight moment whether the Senate was or was not free, or whether the magistracies did or did not conform to the standards of rigorous constitutionalism. It was in the lawcourts and in the smooth working of the rapidly growing system of civil law that the interests of personal liberty really lay, but it was only too obvious that without peace and order freedom became nugatory, or to use Cicero's own words, '*libertas sine pace nulla est*' [freedom is nothing without peace].[19]

This is why it is especially important not to confuse *libertas* as defined by a jurist like Florentinus with *libertas* as a political motto in frequent use during the constitutional crises of the Late Republic. Generally, *nobiles* and emperors did not alter the fundamental rules of contract or property law to further their tyranny, if only because they had better tools for such purposes.[20] This is not a distinction without a difference: the fortunate consequence of this was the development of a sophisticated structure of private rights, which in the centuries after the

[17] Even the emperor in his judicial role was not always and merely an arbitrary and unprincipled power: see Kaius Tuori, *The Emperor of Law: The Emergence of Roman Imperial Adjudication* (Oxford University Press, 2016) 241–91.

[18] '[Emperors] had power to legislate, a power that they exercised freely in public and to some extent in criminal law, but very little in private law. In AD 400 private law, though simplified and improved in some areas, especially civil procedure, remained much as it had been in 200': Tony Honoré, 'Roman Law AD 200–400: From Cosmopolis to Rechtstaat?' in Simon Swain and Mark Edwards (eds), *Approaching Late Antiquity: The Transformation from Early to Late Empire* (Oxford University Press, 2010) 109, 110.

[19] Wirszubski (n 1) 95–6 (italics added). Later, at 135, he says: 'The laws, although not invalidated, proved de facto powerless against the overwhelming power of the Princeps.'

[20] In fact, and certain exceptions aside, generally '[t]he concern of the jurists and the imperial chancery was to promote freedom of contracting by making the legal consequences of contracts as clear and predictable as possible': Dennis P Kehoe, 'Agency, Roman Law, and Roman Social Values' in Dennis P Kehoe and Thomas A J McGinn (eds), *Ancient Law, Ancient Society* (University of Michigan Press, 2017) 105, 129.

fall of the political state that created it was exportable to the most democratic or the most monarchical regimes.[21]

Where it is customary to think of society as consisting of individuals who consent to surrender their rights to a commonwealth (if only speculatively, and not literally), it is concomitantly natural to think of individuals as using so many of the freedoms granted back to them by the state to bind themselves in voluntary acts with the aim of mutual benefit. As a prelude to establishing his contractarian theory of government, Thomas Hobbes writes the following about the equivalent private right:

> Whensoever a man transferreth his right, or renounceth it; it is either in consideration of some right reciprocally transferred to himself; or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some *good to himself*. And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. … The mutual transferring of right, is that which men call CONTRACT.[22]

Hobbes' outline contains what modern lawyers and scholars would recognise immediately as some of the fundaments of contract law: the offer and acceptance of one thing, whether a

[21] The technical aspects of this system are the subject of this thesis and more closely examined in other chapters. For an overview, see Andrew M Riggsby, *Roman Law and the Legal World of the Romans* (Cambridge University Press, 2010) 121–94.

[22] Thomas Hobbes, *Leviathan*, J C A Gaskin (ed) (Oxford University Press, 1996 [1651]) 88–9 [14.8]–[14.9] (italics in original). Hobbes goes on to say that a person 'merits' the thing promised to him in consideration of what he has promised to the other contracting party, but he likewise 'merits' something freely gifted (ie, something given by *grace* rather than by *agreement*): 90–1 [14.17]. Generally, a contractual promise is enforceable at law, whereas an outright gift is not. So, while this 'merit' or 'due' is enforceable in the case of contract but not in the case of gift, Hobbes seems to be saying that a person's 'due' under a contract is both a *moral* and *legal* right; that all contractual rights are merits, but not all merits are contractual rights. Therefore, while a system of contract law is not coterminous with a system of morality, contract – whether we are talking about ancient or modern societies – is one mode for expressing moral right through social arrangements. (Hobbes, however, does go on to identify moral with legal right: 119 [18.10].)

promise of a corporeal or incorporeal thing, or the immediate delivery of a corporeal thing,[23] in consideration of another; the thing clearly defined and the terms of the promise about those things equally clearly articulated, and the promise binding once freely entered; except for those things which are never the legitimate subject of contract, such as a contract to surrender one's life[24] or to take another's. Hobbes' definition is useful because it admits that a voluntary act procures whatever the volunteer considers some good to himself; and therefore, by implication, that the good of another might be the good of the contracting party himself, so that contract can be a mode of advancing an altruistic or other moral end, just as a government command might be another such mode.

But all of this with the proviso, that a contract is necessarily an act entered into by the will of a party to that contract himself, and by no other's will; and the further and more fundamental implication, that a person is assumed to have a will of his own. The social contract is but the same principle writ large. As Hobbes had earlier written in *De corpore politico*, 'right is that liberty which law leaveth us; and laws those restraints by which we agree mutually to abridge one another's liberty'.[25] Just as the subject does this in the public sphere by surrendering sovereignty to the Leviathan, so too does he voluntarily abridge some part of his private arena of liberty in the hope of valuable exchange.

It is important to acknowledge that the Romans did not enjoy unfettered freedom of contract. It is equally important to recall that the subjects of most contemporary legal systems also do not enjoy unfettered freedom of contract, whether because of custom, command economy, or restrictions on the market economy such as anti-cartel or consumer protection laws. As Macpherson well says: 'The possessive market model requires a compulsive

[23] Perhaps also the immediate 'delivery' of an incorporeal thing, eg, a right to a patent not merely promised but actually given as the consideration; but this does rather test the limits of the word 'delivery'.
[24] Literally, that is; not surrender of one's life in the sense of wilful surrender to slavery or 'social death'.
[25] Thomas Hobbes, *De corpore politico* in J C A Gaskin (ed), *The Elements of Law* (Oxford University Press, 1999 [1640]) 179 [29.5].

framework of law. At the very least, life and property must be secured, contracts must be defined and enforced. The model also permits state action much beyond this minimum.' This may include trade embargoes, customs duties, wage laws, or indigent relief: 'What the state does thereby is to alter some of the terms of the equation each man makes when he is calculating his most profitable course of action.'[26]

There are some institutions of Roman law and society which seem to restrict freedom of contract beyond this mere altering of the terms of the equation; these are considered later in this chapter. There are yet others, but these are not radically different to modern limitations on contractual freedom, such as to make any purported equivalence untenable. Consider the capacity of minors to enter into contracts. The jurists agreed that there must be limits on a child's capacity to be bound by contracts, including where a guardian purports to authorise a transaction binding his ward.[27] The Roman provisions are broadly similar to the rule in many common law jurisdictions, whereby contracts entered into by minors – usually below the age of 18 – are voidable at their election, since they are not deemed to have the capacity to be bound to contractual obligations unless they affirm that obligation upon attaining majority.[28] Where the Roman law is odd is in the decade-old chasm between when a child goes through puberty and is thereafter in various ways considered an adult, and when he or she turns 25 and is no longer deemed to require the praetor's special protection over those who are vulnerable in their tenderness to unfair or fraudulent transactions.[29] But while this is odd, it hardly presents much more concern than the modern rules of contractual capacity to any theory of contractual freedom. Likewise, both Roman and modern legal systems place restrictions on capacity to

[26] Macpherson (n 7) 57–8.
[27] D.18.5.7.1; D.19.1.13.29; D.26.8.5.1.pr.
[28] See, eg, NY General Obligations Law § 3-101. There are some exceptions: eg, a minor can be bound to a contract to provide her with 'necessities' such as food or medical care: see, eg, *Sale of Goods Act 1979* (UK) s 3.
[29] D.4.4.1.

contract by reason of mental illness, and both are ambiguous as to whether the counterparty must be able to perceive outward signs of mental incapacity.[30]

Finally, even the position of women is not so different as between Roman and modern Western legal systems. Technically, adult, *sui iuris* Roman women remained under the auspices of a guardian (*tutor*); yet not only did Gaius say that this was a specious rule, but observed that the guardian's authorisation was often a formality and that the praetor would compel the guardian to grant it – especially, one imagines, where a man is 'guardian' to a rich lady of noble lineage.[31] The system of Roman law has exerted great influence that transcends the restrictions it imposed on certain groups of people; yet in the case of women, the restrictions are far less than a cursory reading of the sources, or modern popular assumptions, would suggest.

The next apparent obstacle to permitting the Romans a similar mode of thinking about freedom of contract is the fragmented structure of their law of contracts. It is trite that the Romans had laws of *contracts*, rather than a unitary law of *contract* as defined in the core elements of most modern legal systems. That is, rather than ever defining a general principle of contract as a lawful agreement between A and B (and possibly C and D) to do or not do certain things in return for other acts or forbearances, the Romans knew only of particular types of contracts and the conditions and requirements peculiar to each.[32] Bruce Frier suggests an explanation: '[A]greement alone was never enough; for a contract to be enforceable at law, it had to occur within the preexisting framework of the recognized contract types. In this respect, freedom of contract was far more restricted among the Romans than in modern law.'[33] Yet this

[30] G.3.106–9; *Hart v O'Connor* [1985] AC 1000; [1985] 3 WLR 214.
[31] G.190. See also Jane F Gardner, *Women in Roman Law and Society* (Indiana University Press, 1991) 5–26; Judith Evans Grubbs, *Women and the Law in the Roman Empire: A Sourcebook on Marriage, Divorce and Widowhood* (Taylor & Francis, 2002) 23–46. See also Chapter 6 for further treatment of women in commerce.
[32] Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 165–6; Alan Watson, *The Spirit of Roman Law* (University of Georgia Press, 1995) 22; Paul J du Plessis (ed), *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed, 2020) 257–8; Frier, *A Casebook on the Roman Law of Contracts* (Oxford University Press, 2021) 6.
[33] Frier (n 32) 8.

scholarly catechism – while undeniably true – obscures certain clear expressions of a general theory of contract that *can* still be found in juristic texts.[34]

Take, for a simple example, the following rescript from the early dominate: 'You are demanding, plainly against the rule of law, that the creditors should not sue you, the person who borrowed the money, but the heirs of the one to whom you had loaned this sum.'[35] Now, 'plainly against the rule of law' may seem a daring rendering of the Latin phrase *contra iuris evidenter*; but the translators' choice is quite sensible. The words *contra* and *evidenter* convey the urgency of a basic legal principle being challenged by the questioner and reasserted in the rescript: it is not just a technical rule, but the rule of law itself, which is put on notice by this novel interpretation of a debtor seeking to evade a personal obligation in one direction by transferring all legal obligation to a third party in a separate personal obligation. In other words, the debtor is trying to say that once A contracts with B and then B contracts with C, there is a single nexus of obligation, a triangle of A, B, and C, in which all legal obligation is resolved; rather than two separate, bilateral exchanges of obligations between A and B, then between B and C. Much of Roman (and modern) private law would fall to pieces – or at least be scarcely recognisable to its subjects and practitioners – without the rules of privity that are expressed by another name in this imperial pronouncement.[36] The imperial lawyers, who authored the

[34] Such as the concept of *causa*: see Chapter 9. Frier appreciates that there is eventually no point to this observation about the alleged absence of a 'general law of contract', and shrewdly observes that '[o]n a broad level, Roman contract law resembles, in this respect, the Common Law of torts, with its proliferation of distinct causes of action', presumably implying that it would be equally strange to accuse modern tort law of lacking common features or a theoretical underpinning: ibid 4. Other scholars attribute to the early jurist Scaevola an early systematic treatment of contract: see, eg, David Ibbetson, 'Commerce and Contracts' in Caroline Humfress, David Ibbetson and Patrick Olivelle (eds), *The Cambridge Comparative History of Ancient Law* (Cambridge University Press, 2024) 565, 593–4.

[35] *Non adversus te creditors, qui mutuam pecuniam sumpsisti, sed eius, cui hanc credideras, heres experiri contra iuris evidenter postulas formam*: C.4.2.15. I have omitted the bracketed additional word 'instead' from the revised Blume translation, which is superfluous.

[36] And tellingly, any injustice in the modern common law would be resolved not by reengineering the rules of contract, but by an extraneous remedy such as equitable tracing.

rescript, had rejected this cute argument by reiterating the *personal* nature of contractual obligations.[37]

Evidently, some expressions of general theory do emerge even from these workaday texts of imperial rescripts, and not just in the learned writings of Cicero or Scaevola. Not least of these is the following aphoristic pronouncement of Diocletian and Maximian, which is perhaps as close as any but one or two other surviving Roman legal text gets to stating a rule of law as a rule of morality:

> Just as at the outset each person has the free power of making or not making a contract, in the same way one cannot renounce an obligation once it has been established without the consent of one's counterparty. On account of this you should understand that, once you are bound to a voluntary obligation, you cannot withdraw from it without the consent of the other party whom you have mentioned in your petition.[38]

Notice how a moral obligation arises from the individual's legal right to form contracts; that is, the right is qualified only insofar as the individual has voluntarily subjected himself to a common contractual interest with his counterparty. In this short rescript, the imperial lawyers have expressed what Charles Fried would describe seventeen centuries later as the promise principle, or 'the moral basis of contract law … that principle by which persons may impose on themselves obligations where none existed before'.[39] Significantly, the legal principle

[37] Some other legal texts may seem inconsistent with this general principle, but are reconcilable with it. For example, an heir's right to pursue his father's restitutionary claim (C.4.5.1.pr) arises from the close identity of the decedent with his heir, who assumes (albeit in an incomplete and legal sense only) the personality of the deceased. This is a much more direct relationship, incomparable with the creditor's attempt in C.4.2.15 to simply offload a personal responsibility on a third party connected to him purely by contract.

[38] *Sicut initio libera potestas unicuique est habendi vel non habendi contractus, ita renuntiare semel constitutae obligationi adversario non consentiente minime potest. quapropter intellegere debetis voluntariae obligationi semel vos nexos ab hac non consentiente altera parte, cuius precibus fecisitis mentionem, minime posse discedere*: C.4.10.5. I have substituted 'counterparty' in place of the revised Blume translation's 'adversary' for *adversarius*. The emphasis here is on the parties' mutual obligations *as* parties to the contract, rather than their status, later, as litigious adversaries.

[39] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press, 2nd ed, 2015) 1.

expounded in the rescript assumes that an individual had no obligations before that which he imposed on himself by freely contracting with a fellow-citizen; or that if he did have such obligations – to *paterfamilias*, clan, or community – these play no part in the expression of an abstract and general principle of law for the regulation of private activity between individuals. Hence Gaius' clarification that '[u]nder the designation "creditors", there are understood not only those who have lent money but everyone to whom something is owed for whatever reason' – which summarises in terms familiar to the ancients what Fried has called contract as promise.[40]

Indeed, various technical aspects of Roman contracts show what we may call, in modern diction, an individualistic outlook. Many of these will be considered in the next chapter, but at least one deserves mention in the present discussion of Roman 'theories' of contract. Consider the *actio empti*, the remedy available to Roman legal subjects in the event of breach of a seller's obligations. What damages could the buyer recover? In principle, the jurists allowed damages for consequential losses: that is, damages suffered by the wronged party as a result of the breach, beyond the direct loss measured by the value of the undelivered or imperfectly delivered goods.[41] In practice, however, the jurists were eager to set rational limits on consequential loss claims. In one grim example, the jurist Paul says that in an action for undelivered wheat, damages are measured by the value of that wheat but not the value of the slaves who starve because of the non-delivery.[42] The practical result – and perhaps, we may speculate, the moral purpose of the jurists' rules – is to limit the aggrieved party to remedies

[40] *Creditorum appellatione non hi tantum accipiuntur, qui pecuniam crediderunt, sed omnes, quibus ex qualibet causa debetur*: D.50.16.11. Frier (n 32) 14, quoting this text, then writes: 'The chief characteristic of an obligation is therefore that it creates a claim that is actionable … against a particular individual.' Frier also observes, rightly, that this is a unifying characteristic of the Roman law of contracts and delict. See also D.50.16.12.

[41] Suppose A promises to sell a widget to B and fails to deliver. The price of widget goes up in price, and thedifference between the original price and the market price constitutes B's loss of bargain damages. The consequential losses are, for instance, the $20 of petrol that B had to burn to go buy the widget from someone else.

[42] D.19.1.21.3.

for the broken promise itself, thus ensuring that the scope of the remedy remains focused on the two individuals in dispute, not its wider effect on the wronged party and still less its aggregate effect on society at large.

III ROMAN THEORIES OF CONTRACT AND PROPERTY RIGHTS

Did the Romans, then, have theories of contract and property? This chapter argues that they did, and that perhaps one reason why this is not easily conceived has to do with the difficulty of noticing ideas that have been axiomatic.

In his *Second Treatise of Government*, John Locke wrote: 'The great and *chief end*, therefore, of Mens uniting into Commonwealths, and putting themselves into Government, *is the Preservation of their Property*.'[43] This has been a very successful assumption in Western political discourse since the seventeenth century, especially in America, and even as the chief antagonist of alternative models of society.[44] But it is by their very success that passages like the one just quoted seem trite, and the cause of their authors' fame faintly perplexing.

In fact, it is *not* obvious that the primary purpose of a legal system is to ameliorate the condition of individuals, to protect their property, or to exalt individualism as a principle in itself. Rather, as Fernanda Pirie observes, 'legalism', while a broad category, is nevertheless one particular 'way of thinking and acting; it is what could said to be distinctive about legal, as compared to other schemes of meaning'.[45] And again, within legalism, there is more than one way of thinking and acting.[46] As a brief examination of other ancient legal cultures has suggested, the presence of a sophisticated jurisprudence does not by itself give rise to the legal

[43] John Locke, *Two Treatises of Government*, Peter Laslett (ed) (Cambridge University Press, 3rd ed, 1988 [1692]) 350–1 [2.124].
[44] Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso, 2012) 211–87, 308.
[45] Fernanda Pirie, *The Anthropology of Law* (Oxford University Press, 2013) 131.
[46] Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press, 2017).

culture that is the subject of this thesis. For example, it does not necessarily follow that because a legal system is designed to procure some social good, its focus is the prosperity and liberty of individuals.[47]

It is therefore remarkable, not banal, when Justinian pronounces that the law is divided into public and private law: one concerned with 'the organisation of the Roman state', the other with 'the wellbeing of individuals' (*singuli*), such that one half of the structure of Roman law is concerned with the rights of individuals, as the other half is with the good of the commonwealth.[48] There is nothing universal or inevitable about the ancient Roman conceit,[49] commonly accepted today, that public and private law are hemispheres of one unitary system, each yet serving a distinct function.[50] It is remarkable, not banal, that Florentinus – in a passage examined more closely below – acknowledges the 'relationship of sorts' that nature has established between all humans, while insisting that it is a 'grave wrong' for one life to 'encompass' another. Several classical legal texts – textbooks, juristic treatises, and forensic speeches – bear this out.

Take, first, the following statement of the function of law:

Justinian, J.1.2.12	*Omne autem ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones. ac prius de personis videamus. nam parum est ius nosse, si personae, quarum causa statutum est, ignorentur.*

[47] See Chapter 2.
[48] *Huius studii duae sunt positiones, publicum et privatum. publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum iutilitatem pertinet*: J.1.1.4.
[49] Of course, J.1.2.4 was written in the sixth century, but it is a clear echo of Ulpian (D.1.1.2), and the Roman acknowledgement of a distinction between public and private law is patently obvious many centuries earlier.
[50] Bruce W Frier, *The Rise of the Roman Jurists: Studies in Cicero's Pro Caecina* (Princeton University Press, 1985) 287, attributing 'the long-enduring but somewhat artificial barrier between private and public law' to the Roman juristic focus on private law.

> All our law is about persons, things, or actions. We turn to persons first. There is little point in knowing the law if one knows nothing about the persons for whom it exists.

Justinian of course adopts Gaius' tripartite division of Roman law.[51] The balance of the second passage is more characteristic of Justinian's loftier, even more philosophical tone, which is natural enough coming from an emperor rather than a private law lecturer. Donald Kelley says 'that Justinian, drawing on later classical jurisprudence and rhetorical hyperbole, made larger philosophical claims for the science of law, even claiming for it the status of true wisdom (*divinarum ac humanarum notitia*, the equivalent of the Ciceronian formulation of *sapientia*)'.[52]

Truly, Justinian waxes lyrical in certain passages, in a style that departs in both form and substance from the classical jurists: their prose was less embellished and their propositions rarely as philosophical.[53] Yet it is evident not only from the persons–things–actions trichotomy, but from the order in which it invariably proceeds, that the classical jurists would accept without controversy Justinian's proposition that there is no 'point in knowing the law if one knows nothing about the persons for whom it exists', which has roots at least as far back as the classical jurists of the late principate. Take this definition of justice, appearing at the beginning of Justinian's *Institutes*:[54]

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[51] G.1.8.

[52] Donald R Kelley, '*Gaius Noster*: Substructures of Western Social Thought' (1979) (84(3) *American Historical Review* 619, 626 (italics in original). See also Geoffrey MacCormack, 'Sources' in Ernest Metzger (ed), *A Companion to Justinian's Institutes* (Duckworth, 1998) 1, 16–17.

[53] But see D.1.1.1.

[54] It appears that the Byzantine compilers borrowed Ulpian's almost identical definition at D.1.1.10.pr: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*. This raises the suspicion of interpolation, particularly where the phrase bears no relation to the content or methodology of what follows for the balance of the *Digest*. On the other hand, (1) Ulpian's definition clearly derives from Greek philosophy and it is not improbable that a jurist's education would show in a statement like this; and (2) as I presently suggest, that definition fairly summarises the individualistic jurisprudence into which Roman law had already developed by the classical period. Cf Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford University Press, 2nd ed, 2002) 76.

Justinian, J.1.1.pr — *Iustitia est constans et perpetua voluntas ius suum cuique tribuens.*

Justice is an unswerving and perpetual determination to acknowledge all men's rights.

Examined in isolation, the rendering of *ius suum cuique* as 'all men's rights' is too stately. But Justinian has just spoken of the 'unswerving and perpetual determination' (*constans et perpetua voluntas*) of the law. This is deliberately rhetorical, and deliberately emphatic of a central purpose of the law identified at the outset of the text and indeed of the imperial law student's education. Whether it be a natural or artificial right, it is acknowledged that men – individual men – have rights, accorded to each and protected by the law.

Now, Gaius' own *Institutes* do not start with a flourishing overture. Putting to one side the fact that Gaius' text is probably constituted from his own lecture notes,[55] it may be conceded anyway that it was seldom in the classical jurists' style to spell out any philosophical function of the working legal order. Perhaps this is not as important as what the structure of Roman law tacitly assumes. Nothing in the classical legal texts (duly vetted for interpolations, of course) is inconsistent with the proposition that men and women have rights in their individual capacities, and that the function of the Roman legal system was to vindicate those rights and to hold other individuals to account for infractions of those rights. This will be explored yet further in subsequent chapters but is already evident in the previous chapter's examination of the law of delict, which argued that that component of the Roman law of obligations was essentially concerned with the wrongs and redresses of individuals as against each other. For this reason, Fritz Schulz is not being entirely fair when he calls the Justinian formulation a 'definition of jurisprudence … quite valueless, particularly so as a characterization of Roman

[55] Jill Harries, 'Legal Education and Training of Lawyers' in Paul J du Plessis, Clifford Ando and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) 151, 159.

jurisprudence'.[56] Even an utterance of this brevity is certainly capable of epitomising an entire value system.[57] Certainly it was a cliché of its *Zeitgeist*, but I disagree with the second half of Schulz's statement – that it is valueless as a characterisation of Roman jurisprudence. If the argument of this thesis is at all valid, then the proposition that '[j]ustice is an unswerving and perpetual determination to acknowledge all men's rights' typifies the entire scheme of individualistic jurisprudence.

Perhaps, indeed, the jurists were not quite as taciturn about the philosophical propositions underpinning their profession and the system that they studied and developed as Romanists are always inclined to suppose. They might not articulate these things often; there may be no need to state what the jurists all knew from their common education and to do so too often is out of place in the standard genres of juristic literature. But when they do, there is something for analysis beyond apparent cliché. It is a classical jurist – one of the more obscure ones, in fact, who worked as a teacher and held no role in the imperial bureaucracy – who expresses possibly one of the most important precepts about the rights of individuals at law:

Florentinus, D.1.1.3

[*Q*]*uod quisque ob tutelam corporis sui fecerit, iure fecisse existimetur, et cum inter nos cognationem quandum natura constituit, consequens est hominem homini insidiari nefas esse.*

[W]hatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another.

[56] Fritz Schulz, *History of Roman Legal Science* (Oxford University Press, 1946) 136.
[57] Consider John 8:7: 'He that is without sin among you, let him first cast a stone at her.'

The standard Birks and McLeod translation renders 'grave wrong' for *nefas*; critically, however, *nefas* means the opposite of *fas*, sacred law, so that *nefas* in Roman religious language approaches something close to the word 'taboo'.[58] Florentinus therefore attributes nothing short of sanctity to human life, and interference with human life and liberty as inherently wrong, so that the law cannot but uphold it.

The source attribution is to Book 1 of Florentinus' *Institutes*, which strongly suggests that in its original location, too, it was made by way of a general or prefatory remark about the nature of law.[59] But while it is regrettable that we cannot know the full context in which this remarkable statement was originally made, we know that Florentinus was discussing circumstances in which one has a right to repel violent injuries ([*u*]*t vim atque iniuriam propulsemus*). It is in a like context that Gaius says something similar: that natural reason permits a man to defend himself.[60]

Granted, one is hard-pressed to find a legal system of any age or character which denies anyone the right to self-defence: that is simply what people will do if they are attacked. But there two further points to make, one in Florentinus' texts and one about Roman law more generally. First, Florentinus is writing about *vis atque iniuria*: the standard translation of

[58] That said, Birks and McLeod sensibly avoid confusion – and stylistic oddness – that would come from translating *nefas* as 'taboo'. Incidentally, *insidiari* might have been translated as 'attack' or 'assault', but the choice of 'encompass' – though vaguer in sense – is less awkward in this context.

[59] Again, perhaps the opening passages of a teaching manual such as the *Institutes* – a relatively rare genre compared to the more advanced commentaries that have either survived in fragments or whose names we at least know – is precisely where one might find such a statement, just as Gaius opens his own *Institutes* with some observations about natural and positive law before he must mute his interests in legal theory and history, at which point there is a distinct tonal shift to the standard prose of 'juristese'. In other words, there may be a reason for the jurists' relatively spare attention to matters of legal theory in their writings, in addition to the more standard explanation that they were basically uninterested in such matters and mentioned them only in order to pass over them. Also – to deal with the exhausting issue of interpolations – I do not hold that there is any reason to believe that this passage was subjected to any post-classical tampering: (1) for the reasons given above; (2) because it makes perfect sense in the context of Florentinus' discussion, so that to assume interpolation in the absence of clearly post-classical language would be to flout the rule of Ockham's razor; and (3) because the burden is on the 'interpolation hunters' (this old phrase is used in Garnsey, *Social Status and Legal Privilege in the Roman Empire* (n 15) 8) to prove that post-classical editors would have had any reason to attribute a statement – particularly of this lofty kind, apparently stating something basal about the nature of law itself – to a jurist as obscure as Florentinus.

[60] [A]dversus *periculum naturalis ratio permittit se defendere*: D.9.2.4.pr.

'violent injuries' is only warranted if either the phrase *vis atque iniuria* is a hendiadys (ie, a literary mannerism separating one semantic sense into two grammatical units, such as 'rain and storm' to mean 'rainy storm'); or if *iniuria* is understood only in its more archaic sense of encompassing solely physical harms and not, say, harms to one's public reputation.

We have already considered *iniuria* in the previous chapter but to summarise, the early civil law of the Twelve Tables probably only encompassed physical assaults. Yet middle and late republican praetors and legislators had developed *iniuria* well beyond physical assaults. It evolved to mean some actionable outrage that the words or deeds of one person aroused in another (even a third party to the person to whom the words or deeds were actually directed). And this, of course, paved the way for the development of the cause of action into something even more expansive than modern defamation.[61] Why would Florentinus be thinking only of *iniuria* in the archaic sense of the word, ignoring a good half millennium of jurisprudence? And why does he mention *iniuria* at all if his sole concern in this passage is with physical attacks? I suggest that when Florentinus writes of the 'grave wrong for one human being to encompass the life of another', he may be having particular but not exclusive regard to self-defence against immediate physical harm; and that he is also thinking more generally about the rights of individuals, which the law must grant us *as* individuals because nature has established a relationship of sorts between us (*et cum inter nos cognationem quandum natura constituit*).

On this reading, Florentinus regards the law's central function to be the protection of individuals, because society itself is constituted of individuals whose security or good fortune is potentially compromised by our need to interact with one another – and that he does so in

[61] See generally D.47. For praetorian developments, see Otto Lenel, *Das Edictum Perpetuum: Ein Versuch zu seiner Wiederherstellung* (Tauchnitz, 3rd ed, 1927) 397–403; for general development of the doctrine, see W W Buckland, *A Textbook of Roman Law: From Augustus to Justinian*, Peter Stein (rev) (Cambridge University Press, 3rd ed, 1963) 589–92. See also David Ibbetson, '*Iniuria*, Roman and English' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law* (Hart, 2013) 33; Peter Birks, *The Roman Law of Obligations*, Eric Descheemaeker (ed) (Oxford University Press, 2013) 221–46.

keeping with the juristic conception of *libertas* as the condition of individual freedom from external constraints, rather than the more public, political conception of *libertas* as the motto for resistance to oppressive political factions. More speculatively, Florentinus might have agreed that the legal strictures on a person *in aliena potestate*, such as a slave, are less important than the entitlement of each such person to the law's most basic protections.

Within the broader right of individuals is included the right to contract freely. Here is a famous passage:

> Ulpian, D.2.14.1.3
>
> [*E*]*leganter dicat pedius nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re sive verbis fiat: nam et stipulatio, quae verbis fit, nisi habeat consensum, nulla est.*
>
> Pedius neatly says that there is no contract, no obligation which does not consist of agreement, whether it is achieved by the handing over of something or by the use of certain words.[62] For a stipulation, which is made by the use of certain words, is void unless there is agreement.

As Frier acknowledges, neither Ulpian in this passage, nor jurists elsewhere, engage deeply with what 'agreement' (*consensus*) actually means, or whether there is a distinction between objective and subjective agreement where one is valid and the other not.[63] This may signal a deficiency in Roman contract law, or simply a naivety of its practitioners. This does not matter

[62] This is a ponderous translation of *sive re sive verbis*.
[63] Frier, *A Casebook on the Roman Law of Contract* (n 32) 8. For some excellent (and mutually conflicting) examples of modern writing on the issue of agreement and intent, see, eg, Fried (n 39) 60–2; Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) 15–31; Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2013) 36(1) *Sydney Law Review* 39.

for our purposes because it is clear that the Romans did acknowledge a man or woman's freedom in his or her right to contract freely with other individuals; and they do this by acknowledging that there is no agreement without consensus – that is, without the free will of the persons each involved.

It was stated earlier that nothing in the classical juristic texts is inconsistent with the proposition that men and women have rights in their individual capacity, and that the function of Roman law is to uphold those rights. This may be not only negatively proved by the absence of contrary indications in the juristic texts themselves, but positively corroborated by other legal or by non-legal writings. Take, first, the following passage from Cicero:

Cicero, *Pro Caecina* 38: *Etenim cui non perspicuum est ad incertum revocari bona, fortunas, possessiones omnium, si ulla ex parte sententia huius interdicti deminuta aut infirma sit? si auctoritate virorum talium vis armatorum hominum iudicio approbata videatur … ?*

Who indeed can fail to see that all men's goods, fortunes and tenures are reduced to insecurity if this injunction be in any respect lessened in scope or weakened in power; if the violence of armed men appear, on the authority of men like yourselves, to be sanctioned by a court of law … ?

The reader may be forgiven for seeing only banalities in a passage like this, as also in the most canonical passages of the works of Locke. But if they *are* banalities, it is only because a certain interpretation of the nature and function of law has been in the ascendant for so long. Is Cicero's warning 'that all men's goods, fortunes and tenures are reduced to insecurity … if

the violence of armed men appear … to be sanctioned by a court of law' a banality? Calpurnius Piso, Cicero's opposing counsel in *Pro Caecina*, would not have taken issue with Cicero's proposition about the importance of men's fortunes, goods, and tenure. But there was a close contest of legal principles here.[64] In the property dispute the subject of this oration, Cicero's client attempted to assert his right to land by entering upon it in order to be ritually ejected, thus creating what modern lawyers would call joinder of issue. Piso's cute argument was that because Caecina was threatened by force of arms by his own client, Aebutius, he never reached the land; and that because he never reached it, he could not have been 'ejected' from it (*deicere*) as the relevant legal injunction required. The scope for legal technicalities and semantics is obvious; nor should too much be made of the specific statements of two lawyers seeking to win the case at hand by any means. But the difference in emphasis is significant. For Cicero and Piso alike, security of property is important: it is indeed the whole subject matter of the dispute. But for Cicero only, security of property is threatened by an overly narrow reading of the law. This is not an argument for the superior moral probity of Cicero over Piso or the absence of legal trickery in Cicero's forensic technique. But it is in Cicero's side of the argument – not Piso's – that the underlying function of the law, and not merely the most convenient interpretation of specific provisions in the instant case, shows itself more clearly.

That the law's primary function is to uphold the safety and security of individuals is not so obvious that it goes without saying. We have already seen that it is not the only possible moral foundation for a legal system.[65] Law can also be justified as the system that holds together a particular social structure. That social structure might well be desirable because of the advantages it brings to individual members, but to say it must be so is historically myopic and a *non sequitur*. A legalistic norm might have an entirely different purpose: to strengthen

[64] Frier, *The Rise of the Roman Jurists* (n 50) 111, 121, 129.
[65] See Chapter 2.

the power, public image and divine favour of an Amorite king; to uphold a Brahmanical order of the universe;[66] or to keep and observe God's various covenants with the Israelites.[67] These undoubtedly improve someone or other's position in the world, but their primary function is to keep a timeless religious imperative alive for its own sake, or because divinity understands what is good for the world better than individuals pursuing their self-interest, rational or otherwise. If there is such thing as an anthropological account of law that obtains in all times and places, it would explain the existence of law as a necessity for both preserving order in, and promoting the good of, the community.

Thus, a legal system based on individual rights is but one possible way in which the common good may be served – supposing that the common good is defined as an aggregate of individual benefits. Cicero reiterates the point in his philosophical writings:

> Cicero, *De officiis* 2.73 — *In primis autem videndum erit ei, qui rem publicam administrabit, ut suum quisque teneat neque de bonis privatorum publice deminutio fiat.*
>
> The man in an administrative office, however, must make it his first care that everyone shall have what belongs to him and that private citizens suffer no invasion of their property rights by act of the state.

Special caution is required in quoting from a text like *De officiis*. Cicero's philosophical writings are seldom descriptive.[68] This treatise in particular has the prescriptive style of the later medieval 'mirrors for princes'; neither legal rules nor political practices can be inferred from it. Cicero lived in an era of mass proscriptions and property confiscations; at Mark

[66] See, eg, Patrick Olivelle, 'Introduction' in *The Law Code of Manu* (Oxford University Press, 2004) xxxix.
[67] Genesis 12:1–3; Exodus 20:22–23:19.
[68] Clinton Walker Keyes, 'Original Elements in Cicero's Ideal Constitution' (1921) 42(4) *American Journal of Philology* 309.

Antony's instigation and by Octavian's acquiescence, he paid the ultimate price. It need only be said, however, that Cicero's proposition is not inconsistent, and in fact accords, with the juristic passages quoted above.

There is also a passage from Seneca, which bears out still more expressly the tension between sovereign power and subjective rights:

> Seneca, *De beneficiis* 7.4.2 *Ad reges potestas omnium pertinet, ad singulos proprietas*.
>
> To kings belong the power of all things; to individuals their property.

Seneca says *singulus*: one of the same words that the jurists use to describe an individual. Significantly, the power of the sovereign is compared with the relative position of individual subjects. What is the individual's position, and that of his property, vis-à-vis the sovereign?

Earlier, I quoted Hobbes' definitions of rights and laws, which he defines mutually by reference to liberty: right being 'that liberty which law leaveth us', and laws being 'those restraints by which we agree mutually to abridge one another's liberty'.[69] I do not (and need not) ask whether Seneca would have agreed with Hobbes' thesis that government arises from social contract, but the two are remarkably alike. Both acknowledge a public versus a private sphere. Both acknowledge that the private sphere is subordinate to the public sphere. For Seneca, whose stoic counsels unfold through paradox, this is because the *ius civile* gives all property to the sovereign, and that universal ownership is a dead letter because individuals must each have their own, such that the man who gives a chattel to his king is not simply returning the king's own property but is making a real gift, albeit in an unequal relationship.[70]

[69] Hobbes, *De corpore politico* (n 25) 179 [29.5].
[70] Miriam T Griffin, *Seneca on Society: A Guide to De Beneficiis* (Oxford University Press, 2013) 120–4; '*De Beneficiis* and Roman Society' [2003] 93 *Journal of Roman Studies* 92, 112.

For Hobbes, this is because any man's pretence to do absolutely as he pleases was left behind in the state of nature and every man implicitly accepts power over everything except his own life.[71] And both agree that notwithstanding the subordinate relationship of the private to the public sphere, there yet exists a space for private liberty, defined negatively as the absence of the exercise of sovereign power[72] (*regis potestas*) or that 'which law leaveth us'. Seneca eventually found out what his life and property were worth under Nero, when he was falsely implied in a courtiers' plot and forced to take his own life. But that only demonstrates what was suggested earlier: that the legal regime of individual right failed in practice by political coercion outside the system of Roman private law itself.

There is one more text to consider – again from Cicero. Here, the orator emphasises the need for common adherence to past juridical acts, precisely because they secure the survival and prosperity of individuals in the commonwealth:

Cicero, *Pro Cluentio* 155

Interea quidem, per deos immortales! quoniam omnia commoda nostra, iura, libertatem, salutem denique legibus obtinemus, a legibus non recedamus …

But in the meanwhile, in Heaven's name, since it is the laws that give us all our advantages, our rights, our freedom and our security – let us abide by the laws.

Pro Cluentio is celebrated as one of Cicero's best speeches and one of his most successful cases.[73] The speech is famously light on strict legal argument or admissible evidence. What Cicero says in this extract is therefore all the more interesting, since here he

[71] On the tension and ultimate inconsistency arising from this in Hobbes' political thought, see David Heyd, 'Hobbes on Capital Punishment' (1991) 8(2) *History of Philosophy Quarterly* 119.
[72] There is an important distinction between sovereign power (which, for Seneca and Hobbes alike, is ubiquitous) and the *exercise* of sovereign power (which is not).
[73] See generally John T Kirby, *The Rhetoric of Cicero's Pro Cluentio* (J C Gieben, 1990); Christopher Burnand, 'The Advocate as Professional: The Role of the *Patronus* in Cicero's *Pro Cluentio*' in Jonathan Powell and Jeremy Paterson (eds), *Cicero the Advocate* (Oxford University Press, 2004) 277.

does rely on the blackletter law: his client cannot be charged under the *lex Cornelia* because that legislation applied only to senators (who were to be tried by their peers), whereas his client was a member of the knightly class (*equites*). True, Cicero would have circumvented what the law said if he needed to, but the argument was there for him to use and he used it. He even expanded it into an admonition about the function of law and the dangers to the citizenry of its misapplication. As Christopher Burnand explains, 'Cicero proceeds to assert that he will personally defend anyone else who, as a non-senator, is unfairly charged under this law' and that 'Cicero's promise does approach the idea that the advocate owed some duty to his fellow-citizens'.[74] Burnand is not inviting us to gullibly accept Cicero's *bona fides* or the impeccability of his legal method. He is only pointing out Cicero's self-depiction as an advocate with a 'duty towards individual citizens' as well as to 'the law itself'.[75] Cicero's ingenious technique is to identify the plight of his client with the latent threat that this presents to everyone else: Cicero serves *an* individual client in the instant case, and in doing so he serves *all* individuals subject to the law by appealing to fears about the personal consequences of false accusations, misguided jurors, and misapplied laws. The law is no good unless it protects the liberties of the citizens of Rome in their individual capacities, and the advocate's role is to see that this is done. And in the passage quoted above, Cicero even offers a justification for legal obedience: we should obey the law because it secures our personal rights.

I have said that some of these extracts from philosophical texts must be treated with caution. For the moment, however, we are only concerned with whether the Romans elaborated theories of contract and property rights, and with the extent to which the inferred views of jurists about legal rights and liberties is at all corroborated in non-legal sources. Going by the passages

[74] Burnand (n 73) 287.
[75] Ibid.

quoted above, security of property (and by implication, the right to secure or dispose of property, including by contract) is apparently a right, and one established by law and custom. In the Ciceronian extracts especially, there is a blend of reverence of ancestral wisdom for its own sake, with an appreciation for rational justification of legal rules: civil law bringing the precepts of natural law closer to technical perfection.[76] This accords entirely with John Finnis' conception of natural law as natural *because* rational, and rational *because* it secures or at least promotes the survival, the nominal equality, and accordingly the material and moral wellbeing of every individual as legal subject.[77]

In his own treatment of this topic, Peter Garnsey pays special attention to the jurists' use of the concept of *ius* to determine whether the Romans had a concept of property rights. Garnsey also tackles (and eventually dismisses) the more modern notion of 'subjective rights' in his analysis.[78] His view is 'that the Romans had the concept of the right to property, as one of a number of individual rights', but that '[t]his is not the same as attributing to them the modern concept of subjective rights', which he understands in its essence to signify that 'that the right is lodged specifically in a human subject'.[79] More drastically, Harold Berman opined that 'although there were concepts in Roman law, there was no concept of a concept'.[80] This intellectual stultification (as we might be inclined to regard it) could be described in modern terms as a failure of metacognition by Roman jurists about universalising concepts that were being worked out in their writings – which, as we have already seen, is why we can infer general

[76] This appears to be Cicero's argument at the dawn of the juristic era; but as will be seen in later chapters, juristic writings would imply a gradual movement from the peculiarities of the *ius civile* to the universality of the *ius gentium* or *ius naturale*; a simple example of this being the eventual disappearance of *mancipatio* and its total replacement by *traditio*. Also, it must be granted that Cicero is not always consistent; that he waxes lyrical in other places about the right of property emerging from long occupancy or conquest only; that private did not exist in what later thinkers called the state of nature; and that such property rights as we do have are qualified by our natural duties of generosity: *De officiis* 1.21–2. See also Garnsey, *Thinking about Property* (n 4) 114–15.
[77] John Finnis, 'The Priority of Persons' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press, 2000) 1, 5.
[78] Garnsey, *Thinking about Property* (n 4) 177–95.
[79] Ibid 181.
[80] Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 150.

concepts about contract rights, despite the conceptually fragmentary structure of the Roman law of contracts.[81] Selections quoted in this chapter from the *Digest*, *Codex*, and various forensic and philosophical works evidence the existence of contractual and property rights, without those rights ever being articulated in abstract terms. The objection of a Garnsey or a Berman is that all statements about rights (or equivalently abstract concepts) are made in the context of a specific factual matrix, whether real or hypothetical. I do not wish to depart too far from this position, since it is usually true; but as I have argued for the juristic and literary passages examined above, this is not always so. A Byzantine emperor like Justinian was in fact quite fond of concepts, which give greater scope to stately imperial pronouncements than individual cases; but we have seen instances where an earlier writer, such as Cicero or Florentinus, genuinely perceives some general characteristic of the legal system itself in the case at hand – and more or less tells us what that is.

IV PROPERTY RIGHTS AND THE ROMAN PECULIUM

Still, if the theoretical assumptions of Cicero or Seneca can be taken seriously at all, it would be because the legal system to which they were subject had some efficacy in securing private rights of contract and property in its own terms, even if those rights suffered from external interferences by soldiers and politicians. The next two chapters will examine the Roman law of contract and property itself. First, however, it is necessary to anticipate an obvious objection – a more serious one than mere idiosyncrasies of the law of contractual capacity addressed earlier in this chapter, such as minority or mental disability.

[81] Schulz (n 56) 32 downplays the jurists' taste for theorising but does not deny their talent for developing general, abstract concepts. Here, also, it is worth recalling Schulz's observation that '[i]t is not the Roman conception of ownership which is individualistic, but the Roman law relating to ownership': *Principles of Roman Law*, Marguerite Wolff (trans) (Oxford University Press, 1936) 152.

Any account of Roman law as promoter or enabler of individual liberties, in theory or in practice, comes up against some obstacles. One is of course the existence of slavery; another is the institution of patriarchal authority (*patria potestas*): and the two come together in the subordinate and restricted legal status of those classed as those who are *alieni iuris*, whether because they are the kin or the slaves of the *paterfamilias*. As we have seen,[82] the *paterfamilias* exercised considerable legal powers over all members of his family, so that most subjects of the law – including adult, male citizens, even those holding high office and the power of life and death over armed men – theoretically owned nothing and were legally beholden to their father. Various arguments have been advanced to explain how realities such as mortality rates limited the practical force of this institution or that the slow ascent from legal subjugation to full paternal status has a psychological logic of its own.[83] But for present purposes, demography and psychology cannot make excuses for jurisprudence.

It is common in analyses of 'liberty' or 'freedom' to define these as the absence of something else; in effect, then, to define them negatively, or at least to begin to define them by first asking what they are not.[84] For certain seventeenth-century political theorists and for classical Roman historians alike, it appears that liberty – or *libertas*, for here the meaning of both words is the same – means the absence of the conditions of slavery.[85] At first, this seems to have trained those theorists and historians to think in binary terms only: one has liberty because one is not a slave: if *p* then *q*, thus a slave has no liberty.[86] However, they would also say that citizens are no better than slaves if their liberties are curtailed by an oppressive state,

[82] In Chapter 3.
[83] For the former, see Richard P Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press, 1994) 12–69, 120–1; for the latter, see David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh University Press, 1969) 82–6. As Daube says: 'There is no limit to the hardship people will bear for the sake of status, national or sectional.'
[84] Eg, Hobbes, *Leviathan* (n 22) 86 [14.2]; Maurice Cranston, *Freedom: A New Analysis* (Longmans, 3rd ed, 1967) 3–5, 48–9.
[85] Wirszubski (n 1) 1–3 on classical *libertas*; Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 1997) on the 'neo-roman' theory of liberty.
[86] For a typical account of the legally and socially diminished position of slaves, see Riggsby (n 21) 99–103.

without yet eliminating the distinction entirely between the slave-like citizen and the actual slave, who continues to have constraints, legal qualities, and social roles that even politically downtrodden citizens do not suffer. This lends some support to what was suggested earlier – that political oppression can only do so much to affect the structure of private law itself – but more to the point here, it suggests that liberty is not an absolute condition. A slave may be a slave according to the relevant legal definitions. Thus, for example, unlike free persons (including those under another's power, or *in aliena potestate*), the Roman slave could not enter into a binding obligation on his own account and so could not be a creditor.[87] He could not sue.[88] He could not be a legal guardian (*tutor*), nor could he have one.[89] But insofar as the slave, notwithstanding these and other restrictions, can do some other things because the sovereign (as Hobbes would say) has prescribed no rule that constrains him, then *to that extent* even a slave enjoys the condition of liberty. There were even cases in which a slave could seek legal redress for an *iniuria* against himself, and not just as the proxy for his *dominus*.[90] And as shown in the next chapter, he could effectively own property, sometimes a lot of it. Thus, even a slave – as far as his complete existence is not governed by constraints imposed on him by the law of slavery – is 'free'.

The Roman legal system recognised layers of social status: hence such technical terms as *capitis deminutio*, the loss of the full rights of citizenship by degrees (*minima*, *media*, and *maxima*). In this system, liberty was unevenly distributed, but distributed all the same. This is not to deny that free Roman citizens saw quite clearly the difference between themselves and slaves: to argue that they did not would simply be untenable. Yet Roman social and legal structures alike recognised degrees of liberty. Gaius opens his treatment of the law of persons

[87] D.44.7.43.
[88] D.2.11.9.
[89] D.26.1.14.
[90] W W Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge University Press, 1970 [1908]) 80–81. See Chapter 4.

with the fundamental distinction between slaves and free, but this is only the first of many subsequent divisions between different levels or amplitudes of freedom.[91] It is not difficult for modern minds to appreciate the argument of liberty as the absence of constraint in greater or lesser degrees as between different subjects of the same sovereign. After all, in his classic libertarian text, Robert Nozick provocatively asserted that taxation is forced labour, and that any taxpayer who must surrender more than required to maintain the 'minimal state' is quite literally a slave.[92]

The problem is borne out more clearly in another juristic definition of slavery:

Florentinus, D.1.5.4.pr, 1. *Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.*

> Freedom is one's natural[93] power of doing what one pleases, save insofar as it is ruled out either by coercion or by law. Slavery is an institution of the *ius gentium*, whereby someone is against nature made subject to the ownership of another.

While I have a more specific reason for quoting this passage, I pause to note that Florentinus' definition contains what would eventually become two influential articulations of the core tenet of modern liberalism. One we have already seen: Hobbes' definition as that 'which law leaveth us', and Locke's definition as 'the power a Man has to do or forbear doing any particular

[91] G.1.9.
[92] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 169.
[93] The philosophic bent of the word *naturalis* seems to be Wirszubski's basis for speculating that this passage is an interpolation: Wirszubski (n 1) 2 n 1. This is an excellent example of how stultifying the quest for interpolations can be. Are we to ignore this passage because it *might* be an interpolation? And if it is an interpolation, what if only the word *naturalis* was interpolated? Suppose this were the case (because it is hard to see why Justinian's compilers would put an entirely new and alien passage into Florentinus' mouth in particular), fortunately the word *naturalis* is not the keyword on which my argument (nor, for that matter, Wirszubski's) hangs.

Action, according as its doing or forbearance has the actual preference in the Mind, which is the same thing as to say, according as he himself *wills* it'.[94]

I suggest that Florentinus' wording judiciously avoids a serious problem. In the text above, the first and second sentences could be viewed as the definition of opposites. On that view, a free person is one who does as he or she pleases, subject only to coercion or law; while a slave is one who does not (because he is owned by another person). In fact, these definitions are not opposites. Unlike Hobbes or Locke, a Roman jurist had to be careful not to define slavery in a way that would conflate it with the condition of anyone *in aliena potestate* – which would create a plainly false legal equivalence between Spartacus and Crassus (at least when Crassus' father was still alive and accordingly exercised the legal rights of *patria potestas*). Florentinus (or his Byzantine editor) handles properly the transition from his definition of liberty to his definition of slavery. Liberty is a 'power' (*facultas*) of doing as one pleases in the absence of coercion or law;[95] and slavery is implied to be a condition in which liberty is significantly reduced (which is true), rather than a condition defined by the absence of liberty *simpliciter* (which is not true). The definition achieves this by avoiding the issue of *libertas* altogether, and sticking solely to the point that a slave is one who is owned. Nothing further is said about whether a slave enjoys any kind of *libertas* – which, in theory, he could to the extent that he is not coerced or legally obliged in some way. Any unity between slaves and free persons under power of the head of household lies in conflating the distinction between slaves and free but in appreciating that they both form part of the household (*domus*), which in Classical Latin usage generally means not just a physical house or houses, but those whom the

[94] John Locke, *An Essay Concerning Human Understanding* (Awnsham and John Churchill, 4th ed, 1700) 128 [2.21.15] (italics in original).
[95] On the inadequacy of defining freedom or liberty as the 'power' or 'faculty' to do something (in which respect Florentinus' definition is identical to Locke's), see Cranston (n 84) 17–19.

paterfamilias has under his power; that is, those whose liberty is constrained, to a greater or lesser degree, by their legal relationship to the family head.[96]

As discussed further below, recent classical scholarship has questioned how absolute the unfreedom of slaves really was, without suggesting that the Romans' own basic distinction between slaves and those who are free can be abandoned. This is not incompatible with the proposition that slaves enjoyed certain liberties, while others enjoyed those same liberties and then some. Is liberty, then, what the philosophers call a vague predicate? The sorites paradox asks: If one has a mound of sand, and one removes a single grain at a time from this mound, when does it cease to be a mound and become merely 'some grains' of sand? Liberty may be likened to the mound; sand may be removed by degrees until none is left. It may even be possible that there is a real but unknowable point at which the mound objectively ceases to be a mound.[97] Likewise, there is a point at which a free Roman becomes a slave, except that unlike the philosophers' sand this turning point is knowable because the jurists furnish us with definitions (which we can accept, because law is an artificial system not subject to ontological problems). But whether a mound of sand ceases to be a mound of sand is not identical to the question: How much sand is there? Likewise, and since the distinction between slave and free should not simply be done away with, whether a person is a slave or non-slave is not identical to the question: How much liberty does he have?[98]

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[96] Classical sources are not consistent in usage, but whether the term *domus* or *familia* is used, generally it means something closer to what 'family' meant in early-modern English: namely, anyone who lived under the same roof, be it wife, children, or servants. Ulpian's definition of *familia* appears to be a little more restrictive (D.50.16.195.2), but other legal and non-legal sources vary in their meaning – as many vague terms do in their different contexts. But generally, and to use the language of formal logic, *familia* is a subset of the superset *domus*. See Saller (n 83) 80–1.

[97] Timothy Williamson argued this in *Vagueness* (Taylor & Francis, 1994).

[98] Quentin Skinner reminds us that a common trope in Roman comedies (and in centuries of theatre to follow) is that of the slaves who outwits their masters and thus manage 'to evade the implications of their own servitude'. This apparent paradox, he continues, is solved by recalling that '[w]hile such slaves may as a matter of fact be able to act at will, they remain at all times *in potestate domini*, within the power of their masters': Skinner (n 85) 40–1 (italics in original). This could only be accepted if we also accept that adult Romans *in aliena potestate* – even senators, consuls, and tribunes – are also slaves as long as their *paterfamilias* is still alive. Maybe that is a tenable position, except that (1) it is clearly not what Skinner intended to say, and (2) *aliena potestas* and *servitus* do not mean the same thing.

Before continuing, it is important to address another view on the freedom–slavery distinction in recent Roman law scholarship. Martin Schermaier has argued that it was only in the fourteenth century that civil lawyers established the 'absolute' conception of *dominium* – ie, the right of ownership enjoyed by full Roman citizens under the civil law – as entailing complete discretion to dispose of a thing, rather than the classical notion of property as a right to bring an action against third parties.[99] According to this interpretation of the classical definition,[100] if I have a right to sue you to vindicate my right over a thing (*cuius vindicandi ius habeo*), then that is what makes it my property.[101] Schermaier argues that this only changed with the later medieval jurists' emphasis on will theory, in turn influenced by Roman Catholic theology. For the Italian lawyer Bartolus of Saxoferratus, being able to dispose of one's things as one wishes is what constitutes ownership. In advancing this interpretation of the Roman sources for his definition of property, Bartolus does not refer to the more obvious candidate: namely, Florentinus' definition of *libertas* that we examined earlier. Why? Because, as Schermaier holds it, Bartolus understood this text in the same way it was understood in antiquity: namely, that *libertas* is defined as the opposite of slavery.[102] But I have argued that Florentinus did not draw this distinction. In any event, whatever role will theory plays in philosophical or theological defences or articulations of property right, the argument is already won in the legal analysis. To argue that classical law understood ownership as a vindicative rather than a substantive right – often repeated by Romanists[103] – is circular: if I can vindicate

[99] Martin Schermaier, 'Without Rights? Social Theories Meet Roman Law Texts' in Martin Schermaier (ed), *The Position of Roman Slaves: Social Realities and Legal Differences* (De Gruyter, 2023) 1, 14 and n 80.
[100] A problem that has bedevilled centuries of interpreters of classical Roman law, especially because of the jurists' alleged avoidance of general definitions: Berman (n 80) 149.
[101] D.6.1.49.1. See also D.44.7.5.1.
[102] Martin J Schermaier, 'Dominus actuum suorum*: Die willenstheoretische Begründung des Eigentums und das römische Recht*' (2017) 134(1) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 49, 81–2.
[103] 'The Roman administration of justice was based on the principle that an individual with a "right" (*ius*) should have a remedy ie, the ability to pursue that claim through some kind of formalised process': Caroline Humfress, 'Thinking through Legal Pluralism: "Forum Shopping" in the Later Roman Empire' in Jeroen Duindam et al, *Law and Empire: Ideas, Practices, Actors* (Brill, 2013) 225, 234 (italics in original).

my ownership over a thing in a civil action, it can only be because I own it.[104] The fact that Roman jurists never seemed to have thought about the 'will' like later theologians and lawyers does not unloop this circularity.[105]

Fortunately, we need not rely on Schermaier's (or Bartolus') interpretation of the classical sources. As we have seen, while it would be false to say that slaves were not owned, in a 'liberty analysis' it is still possible to speak of both slaves and free persons as enjoying more or less liberty on a sliding scale:[106] otherwise, what do we make of manumitted slaves who are now citizens but continue to owe their former masters various obligations (*obsequium*)? Are they free or unfree, these citizens burdened with more restrictions on their right of testation than various non-citizens?[107]

Slavery of course existed, but it is reasonable to say that slaves in principle could (and plenty of evidence shows that some did) exercise personal autonomy and share in what were once thought of as shibboleths of the free, non-servile person. Curiously, then, classical Roman law permitted a kind of individual right to property even where it recognised graded conditions of dependence and servitude. Those conditions (quite rightly) do not feature in the writings of Locke. Yet it is something, that the concept of a person as one capable of admixing his labours with things around him, and thereupon having a moral and legal claim to those things – if only

[104] A property right can be (1) *absolute* or (2) *relative* and (3) *substantive* or (4) *procedural*, so that even absolute rights must be litigated in order for their priority to be established. But to accept this distinction between (3) and (4) only defers the problem and does not break the circularity, since (1) and (2) still exist. It gets us no closer to demonstrating that Roman jurists recognised *only* a 'procedural' ownership right and it is rightly observed (despite the mixed metaphor) that 'a procedural tool is empty without a substantive right that gives it content': Francesco Giglio, 'Roman *dominium* and the Common-Law Concept of Ownership (2022) 86(1) *Rabels Zeitschrift für ausländisches und internationales Privatrecht / Rabel Journal of Comparative and International Private Law* 91, 94; Peter Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' [1985] *Acta Juridica* 1.

[105] A point which holds irrespective of the view one takes of the role played by the 'will' (which I myself have accepted in my discussion of will theory in contract, near the beginning of this chapter).

[106] Of course, while there are infinite degrees on this *x*-axis of liberty (in a manner of speaking), that does not mean that these various degrees do not pass through distinct legal categories. Thus, there is a point at which the metric passes through a line that separates persons who are owned from persons who are not owned.

[107] See, eg, G.3.56–8. It is not insignificant, for present purposes, that this was a *personal* obligation not inherited by freedman's issue (it would be perverse if that were the *only* thing they could inherit).

through subsidiary forms of ownership like the *peculium* – is recognisable already in an ancient legal system both lionised for its inspiration of liberty, and denounced for its subjection of millions to conditions of servitude.

The way through this difficulty is to consider what Roman lawyers did begrudge slaves who were otherwise regarded as 'socially dead'.[108] The personal funds available to slaves – called by Roman lawyers the *peculium* – offers a useful point of comparison between ancient jurisprudence and what we have thought of, since Locke, as distinctly modern ideas of individual right. As we will see, the *peculium* was a practical solution to the technically non-existent personhood of the slave and the restricted personhood of the man or woman *in aliena potestate*, which goes some way to reconciling the strictures of Roman law with principles of individual right that are latent in other aspects of Roman law and patent in the writings of some Roman thinkers. (And the fact that the *peculium* had to be invented both for slaves and for free Roman citizens under the power of their *paterfamilias* – even if they are a 40-year-old consul – is yet more demonstration of the existence of liberty in degrees, not as an absolute quality in Roman law.)

To better understand what we are comparing between ancients and moderns, consider the following two passages from Locke's *Second Treatise of Government*.[109] The first follows his brief sketch of the 'state of nature':

[108] The idea that slavery is a form of 'social death' goes back to the juristic texts: D.50.17.209. Modernly, the phrase is associated with Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press, 2018 [1982]). See further Chapter 6.

[109] For a broader study of Locke's ideas of self, person, and personal identity, see Galen Strawson, *Locke on Personal Identity: Consciousness and Concernment* (Princeton University Press, 2011). See also Robert Spaemann, *Persons: The Difference between 'Someone' and 'Something'*, Oliver O'Donovan (trans) (Oxford University Press, 2006) 138–42.

> But though this be a *State of Liberty*, yet it is *not a State of Licence*, though Man in that State have an uncontrollable Liberty, to dispose of his Person or Possessions, yet he has not Liberty to destroy himself, or so much as any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it. The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wiser Maker; all the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property …[110]

The second passage is probably the most discussed of all Locke's writings:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. … Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his own *Property*. … For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.[111]

Peter Laslett notices that the latter passage almost contradicts 'his first principle that men belong to God, not themselves'.[112] But it only appears a contradiction, for the opening sentence of the second passage quoted above does not really oppose the theological argument

[110] Locke, *Two Treatises of Government* (n 43) 270–1 [2.6] (italics in original).
[111] Ibid 287–8 [2.27] (italics in original). Perhaps Locke's meaning is clarified in the relatively overlooked passage of the *First Treatise* where he writes of '[*j*]*ustice* giv[ing] every Man a Title to the product of his honest Industry', and '[*c*]*harity* giv[ing] every Man to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise': 170 [1.42] (italics in original).
[112] Peter Laslett, 'Introduction' in Locke, *Two Treatises of Government* (n 43) 101.

set out in the first passage: in fact it is a reaffirmation of Genesis 1:26[113] (an axiom of Judaeo-Christian thought).[114]

Now, that is the theological foundation of this key idea in social thought; but it also sets the tradition of political individualism on an economic path.[115] This is because it is in labour and the fruits of that labour that man finds his proprietary claim; more so than – in fact, without – owning himself. But in this economic aspect, it also echoes the Roman concept of the individual. Strangely, the man who does not own himself but does own his land and labour recalls the Roman slave who obviously did not own himself but might, by sufferance of law, own the money in his *peculium* and even own other slaves.[116] In an important passage, D.9.2.13.pr, Ulpian observes that for injury done to himself, a freeman may have an action on the case only analogous to the cause of action under the *lex Aquilia*, because no one is regarded as the owner of his own limbs. Under Roman law, a person's 'self' was defined more by the things external to him that he could personally control, exclude others from using, or dispose of at his will, than by his self-ownership as such. This is no trivial point. It is important not to forget that most of the population of the Roman Empire comprised such people: men and women under the control of their father or grandfather who still had to get on with the business of living day by day; or slaves who had even less self-ownership but could buy and sell things on others' behalf or even – as the law permitted in its roundabout way – for themselves. The relevant legal device was the *peculium*.

[113] 'And God said, "Let us make a human in our image, by our likeness, to hold sway over the fish of the sea and the fowl of the heavens and the cattle and the wild beasts and all the crawling things that crawl upon the earth."'
[114] See also Genesis 2:19.
[115] See Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge University Press, 2002) 151–87.
[116] Slaves owning slaves is not uniquely Roman: see, eg, 2 Samuel 16:4. Ulpian says that no one is to be regarded as the owner of his own limbs ([*D*]*ominus membrorum suorum nemo videtur*): D.9.2.13.pr. This would put to rest any theory of complete self-ownership in Roman law; but this thesis argues for a qualified form of ownership by those who do not own themselves, somewhat like Locke's freeholder 'owned' ultimately by God.

Broadly conceived, the *peculium* is not unique to, nor even was first devised in, Roman law. Early Jewish law appears to have recognised something similar to it in the *segullah*. This signifies a precious possession, most often used in the context of God's special – indeed, His *peculiar* – affection for His chosen people, the Israelites. In fact, this and its Assyrian cognate derive from a word for cattle, and St Jerome's Vulgate renders it as *peculium*, which has an equivalent etymology (*pecus*).[117] This is an interesting example of a juridical term later developing theological connotations rather than the other way around, for its original meaning was closer to personal property and its rendering as *peculium* intimates a translator's sensitivity to the conceptual similarity of Hebrew and Latin terms of art.[118] There is evidence, Biblical and other, that women and slaves could own property in various phases of Jewish history before the Roman conquest.[119] However, it is not as clear that a Jewish slave, for example, could accumulate savings beyond those needed for personal maintenance, sufficient to buy his freedom as a Roman slave could do.[120]

Something akin to the Roman *peculium* might also have existed in classical Athens. There is no (surviving) evidence of a legal term of art, but Deborah Kamen has inferred the existence of something like a *peculium* from close readings of literary sources, including references to some slaves being 'wealthy' and the fact that masters enjoyed a 'profit' (ἀποφορά) from the earnings of their slaves.[121] However, the evidence is circumstantial and inconclusive; and as Kamen acknowledges, working slaves probably had their freedom bought for them by their slave-foremen rather than amassing savings beyond *per diem* maintenance.[122]

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[117] See also Varro, *Rerum rusticarum* 1.19.3; Isidore of Seville, *Etymologiae* 5.25.5.
[118] Boaz Cohen, '*Peculium* in Jewish and Roman Law' [1951] (20) *Proceedings of the American Academy for Jewish Research* 135, 141, 147–53. On the influence of Roman legal language on the Vulgate, see Walter Ullmann, *The Church and the Law in the Earlier Middle Ages: Selected Essays* (Variorum Reprints, 1975).
[119] Cohen (n 118) 154–234.
[120] Ibid 176–9.
[121] Deborah Kamen, 'Manumission and Slave-Allowances in Classical Athens' (2016) 65(4) *Historia: Zeitschrift für Alte Geschichte* 413, 414–19.
[122] Ibid 416 n 17, citing Peter Acton, *Poiesis: Manufacturing in Classical Athens* (Oxford University Press, 2014) 284.

In other words, we just do not have the evidence for more than a few Greek slaves having a '*peculium*' beyond what a modern American would recognise as the equivalent of 'food stamps'. In sum, there is little evidence at Athens either for *peculium*-equivalent earnings above subsistence, and none for the formal existence of this institution in Athenian law.[123] The Roman example therefore remains the most illustrative (even if not unique) case study for the proprietary autonomy of ancient legal dependents.

The classical analysis of the *peculium* suggests little to nothing about its capacity as an instrument of servile autonomy.[124] For the jurists, the *peculium* is a device for serving the interests of a slave's master, and any apparent freedom that the slave enjoys is an accident arising from the way in which this legal fiction is construed. In purely legal terms, a *peculium* is what a slave keeps that is separate from the master's accounts, less whatever the slave owes his master.[125] It exists because the master permits it but importantly, the master need not know precisely what or how much is in it, nor even how it is being used.[126] Analogies to modern legal devices such as bailment, agency,[127] or resulting or express trusts, are best avoided: what the *peculium* was, and why it abides no analogy to modern legal fictions, are best illustrated by an example. Although a *peculium* could be terminated at any time by the master's will,[128] a slave could use the funds in the *peculium* to purchase his freedom.[129] It was granted by a *paterfamilias* to anyone under his power and could comprise any kind of property (including other slaves). It was always the legal property of the *paterfamilias* 'but in practice the person in power had charge of it and could deal with it as if it were his own'.[130] Most juristic texts are

[123] Kamen (n 121) 425–6 speculates why her inferred slave-allowance is never mentioned in ancient sources.
[124] For a start, see J.3.28.
[125] Technically the master owns everything, but anything due to the master's account must go to that account, and anything else is still the master's but practically in the slave's possession.
[126] D.15.1.5.4.
[127] Interestingly, however, Ulpian's comment that one can be liable for the actions of one genuinely thought to be one's slave is reminiscent of the common law doctrine of agency by apparent authority: D.15.1.6.
[128] D.15.1.8.
[129] Henrik Mouritsen, *The Freedman in the Roman World* (Cambridge University Press, 2011) 159–80.
[130] David Johnston, *Roman Law in Context* (Cambridge University Press, 1999) 100 (italics in original).

unhelpful for present purposes, because they shy from the proposition that slaves 'owned' things in any connotation of the word 'ownership'.[131]

The *peculium* was useful in business, and this is the focus of most legal writings.[132] It allowed (in most cases[133]) a slave to purchase things which vested automatically in the master, however far the master may be from the slave, so that the itinerant slave could pursue commerce with the master's funds.[134] The relevant *Digest* title opens with actions on the *peculium*, and the abiding question is whether and for how much the master is on the hook for the deeds of the person *in aliena potestate*.[135] The present concern is not with the rights of the master but those of the dependent, but some of these technical rules require attention.

First, the classical lawyers effectively acknowledge that a *peculium* is not just the sum of its contents; that a *peculium* exists of itself.[136] Of course, the *peculium* exists at the master's pleasure, but it is not insignificant that the *peculium* describes a specific fund or repository. Pomponius makes the apparently mundane observation that if the master gives his slave clothes for permanent use – and not just, say, a servant's uniform for special occasions – then those clothes *ipso facto* form part of the *peculium*.[137] There is an obvious distinction between a person's permanent clothes and his 'work' clothes and even if nothing in the *peculium* is the slave's property, the slave has *de facto* ownership over something and thus has his own

[131] Papinian shows how different Roman possession was to that of the common law when he says that a person *in aliena potestate* can never really 'possess' a *peculium* because possession is a matter of both fact and law: D.41.2.49.1.
[132] On the *peculium* as a commercial device essentially serving the master's interests, see 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* (Brill, 2002) 5; 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, 2014) 192.
[133] Especially after the *senatusconsultum Macedonianum*, which prohibited loans to sons *alieni iuris*, lest they resort to murdering their fathers to inherit money and pay off debts. Thus, most commercial activity via *peculium* was carried out by slaves, not relatives of the *paterfamilias*.
[134] Johnston, *Roman Law in Context* (n 130) 100–2. This achieved, by other means, what the law of agency achieves in the common law.
[135] See, eg, D.15.1.3; D.15.1.4.3; D.15.1.5.
[136] D.15.1.4.5. Any comparison with a trust (which does not exist independently of the trust property) is therefore quite misleading.
[137] D.15.1.25.

acquisitive potential. By loose analogy, most modern residential tenants develop a psychological perception of an apartment as 'theirs', engendered by their near-exclusive right of entry, even though they do not 'own' it or at most 'own' a temporally bound right of tenancy while the landlord 'owns' the reversion.[138] One jurist, Florentinus, comes very close to defining the contents of a *peculium* as the property of the slave, at least practically speaking, and in doing so gives us a more socially informed definition of the *peculium* than the one formulated by the republican lawyers: 'A *peculium* is made up of anything a slave has been able to save by his own economies or has been given by a third party in return for meritorious services or has been allowed by his master to keep as his own.'[139] Again, not even here does Florentinus say that a slave owned his private funds or effects; he says rather that he keeps it as his own (*velut proprium*).[140] Moreover, it is not clear that it would have been practical for a master to withdraw his slave's *peculium* as a matter of course. As Max Kaser observed, the juristic texts have very little to say about the legal problems arising from a father withdrawing his son's *peculium*, and that this is in itself evidence of how seldom it was pursued.[141] Perhaps it is not warrantless to suggest the same in respect of slaves.[142]

In the analysis that we have pursued, *what* the slave keeps as his own goes some way to explaining *why* he keeps it: it is what he earns by his own economies (*parsimonia sua*), or what he has been given for meritorious services (*quis paravit vel officio meruerit a quolibet*

[138] This corresponds with the 'liberal concept of ownership' defined by Tony Honoré: see A M Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, 108–9. See also George L Gretton, 'Ownership and its Objects' (2007) 71(4) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 802, 831–2.

[139] *Peculium et ex eo consistit, quod parsimonia sua quis paravit vel officio meruerit a quolibet sibi donari idque velut proprium patrimonium servum suum habere quis voluerit*: D.15.1.39. See also D.15.1.49.

[140] This seems to have some kinship with the labour theory of value: see Lawrence C Becker, *Property Rights: Philosophic Foundations* (Routledge, 2014 [1977]) 33–56.

[141] Max Kaser, 'Der Inhalt der *patria potestas*' [1938] 58 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 71, 86, cited in Saller (n 83) 124.

[142] I suggest this only tentatively, as I concede that the reasons may be different: to withdraw a son's *peculium* may create too many legal problems to have been worth doing more than rarely, whereas to withdraw a slave's *peculium* may by contrast have been so easy that the jurists do not bother discussing it. On the difficulties of knowing the practical effect of the law of *peculia* in relation to sons, see John Crook, '*Patria Potestas*' (1967) 17(1) *Classical Quarterly* 113, 119–20.

sibi donari). Does this sound familiar? The slave's *de facto* belongings sound like that which the slave – recalling Locke – 'hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his own *Property*.' Lawrence Becker and Jeremy Waldron have each argued that Locke's theory of ownership turns not so much on ownership of oneself (understood capaciously to include one's labour and possessions), but on the merit or desert that comes from the mixing of labour with external things.[143] Macpherson's idea of possessive individualism does not fit with the condition of most ancient Romans (let alone ancient Roman slaves), who of course did not 'own themselves'. Yet even slaves might have understood that they had things because they had earned them by their effort. Neither then, nor now, does this account of ownership depend on *self*-ownership.

Florentinus' account of the *peculium* corroborates Pocock's argument that Roman law conceived persons principally as 'possessors and administrators of things', and takes this argument to its radical conclusion.[144] Ulpian clarifies that a *paterfamilias* can no more be spoken of as having a *peculium* than a slave can be of having possessions (*bona*).[145] To infer a conceptual symmetry from that text alone would be glib; but at least it shows that the *peculium* had an abiding existence beyond providing a cause of action in the law courts, and that it existed to give slaves their own category of quasi-proprietary right. So, even slaves, who apparently lack the *same* legal entitlements as free men *sui iuris*, are yet 'possessors and administrators of things',[146] or 'individuals extend[ing] their wills and interests beyond the domestic sphere into the further reaches of society'.[147] To possess and use things is the common denominator of all

[143] Becker (n 140) 33–56; Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 177–207; Lorenzo Sabbadini, *Property, Liberty, and Self-Ownership in Seventeenth-Century England* (McGill–Queen's University Press, 2020) 220.
[144] Pocock, 'The Ideal of Citizenship since Classical Times' (n 10) 39. See also Chapter 1.
[145] D.50.16.182.
[146] On ownership and possession, see Michael J R Crawford, *An Expressive Theory of Possession* (Hart, 2020) 51–3. On classical *possessio*, see especially D.41.2.12.
[147] Donald R Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard University Press, 1990) 51.

legal subjects, slaves and free alike. Some kinds of ownership were better than others, of course: the law merely accepted that a slave owned things, though he had no recourse against a master who decided otherwise. Yet the proprietary rights of a slave were recognised at law, complete with their own technical terminology; and must have been good rights against third parties even if not against the master who allowed the slave his *peculium* to begin with.[148] Only this can explain the abundant epigraphic evidence for rich slaves, such as 'the imperial freedman Publius Aelius Onesimus, who died during Hadrian's reign and bequeathed the substantial sum of 200,000 *sesterces* to his hometown';[149] or some legal sources which speak of sons or slaves selling land to their fathers or masters,[150] or even slaves being allowed by their master to leave some of the contents of their *peculium* to other slaves without ever being manumitted.[151]

Scholars more interested in the social realities of the *peculium* rather than its device as a form of action against parents and masters have uncovered a great deal more about the life of slaves than a blackletter analysis of the *actio de peculio* would suggest (which is what I meant when I said that a classical analysis of the *peculium* can only take us so far). In her study of the entitlements of agricultural workers, Ulrike Roth suggests the *peculium* of agrarian slaves would 'have provided a reliable basis for family life' and was necessary for a slave to provide for his nuclear family.[152] From the literary and archaeological evidence, Roth infers more and

[148] See, eg, D.32.79.1.
[149] Richard Gamauf, '*Peculium*: Paradoxes of Slaves with Property' in Schermaier, *The Position of Roman Slaves* (n 99) 87, 102, citing *CIL* 3.6998. See also Barbara Abatino and Giuseppe Dari-Mattiacci, 'Agency Problems and Organizational Costs in Slave-Run Businesses' in Giuseppe Dari-Mattiacci and Denis P Kehoe (eds), *Roman Law and Economics*, vol ii, *Exchange, Ownership, and Disputes* (Oxford University Press, 2020) 273; Ulrike Malmendier, 'Law and Finance "at the Origin"' (2009) 47(4) *Journal of Economic Literature* 1076, 1084.
[150] D.6.1.41.1.
[151] Pliny the Younger mentions doing this: *Letters* 8.16. 'By allowing slaves to dispose of their *peculia* in *quasi testamenta*, humane masters enabled slaves who were not manumitted before they died to act – at least in this regard – in a similar way to free Roman citizens': Richard Gamauf, 'Slaves Doing Business: The Role of Roman Law in the Economy of a Roman Household' (2009) 16(3) *European Review of History / Revue européenne d'histoire* 331, 331 (italics in original).
[152] Ulrike Roth, 'Food, Status, and the *Peculium* of Agricultural Slaves' (2005) 18 *Journal of Roman Archaeology* 278, 283.

larger family units among the agrarian slave population than previously assumed, taking the archaeological evidence as far as it can go to demonstrate that agrarian slaves subsisted not only on grain allowances but on a diet of meat sourced from their *peculia* – that is, raised by slaves for their own and their families' use.[153] This is what she means when she writes: 'To have *was* to be.'[154] And that aphorism works equally well for the argument advanced here. Similarly, and more recently, Richard Gamauf stresses the *peculium* not as the basis for legal remedies, but as 'property available to persons *alieni iuris* to use according to their own wishes'.[155] The *peculium* benefited not only individual masters or slaves but the public as a whole, by allowing slaves 'unlimited acquisitions without unpredictable losses or the necessity of daily supervision'[156] In other words, slaves need motivation beyond fear; carrots as well as sticks. Similarly, Edward Cohen calls the *peculium* 'an element of economic reality that Roman law, as a consequence of the existential centrality of its doctrinal commitment to the legal nullity of slaves, could not explicitly embrace', but had to embrace at least tacitly.[157]

This thesis suggests that while the jurists certainly were reluctant to acknowledge expressly that slaves enjoyed legal rights, those which they possessed explicitly (such as to sue for *iniuria* under certain circumstances[158]) or implicitly (such as to use property in their *peculium* in most circumstances as if they owned it) put considerable strain on the view that even the jurists really did regard slaves as a 'legal nullity'.[159] But Cohen is certainly correct that it benefited society to begrudge slaves a kind of property right to certain things; and at some point between the republican lawyers and Florentinus, the jurists also acknowledged –

[153] Ibid 284–7.
[154] Ibid 279 (italics in original).
[155] Gamauf, '*Peculium*' (n 149) 89. Gamauf, at 106, agrees that 'Florentinus's analysis differed fundamentally from Tubero's and Ulpian's concept in D. 15.3.3.4'.
[156] Ibid 114 (italics in original).
[157] Edward E Cohen, *Roman Inequality: Affluent Slaves, Businesswomen, Legal Fictions* (Oxford University Press, 2023) 50.
[158] See Chapter 4.
[159] Even their ability to effectively function as agents of their masters, mainly through the device of noxal liability, proves that they were not a legal nullity.

sparingly, but quite expressly – the existence of the *peculium* as a substantive property right of slaves. This is not liberalism as we understand the concept; but it was a kind of pragmatism that saw the value in allowing individual legal rights even to those who were otherwise thought to lack real legal personhood.

If Genesis, Locke, and Roman private law share any moral premise, it would have to be stated at a sufficient level of generality, which might go something like: A man is what he makes. Adam is God's creature, but God gives Adam dominion of all flora and fauna to make his own.[160] Locke, taking his cue from this basic conception of man and nature, conceives of the free man as one who owns what he mixes with his labour. Likewise, the *peculium* seems to serve a similar function in the more prosaic world of Roman law. All people *in aliena potestate* were human beings, whatever the law said; so, the law had to find a way to give effect to the proposition that even as he does not own himself or is defined by another's fuller legal status, he must be allowed a means of doing, dealing, and acquiring. Otherwise, he is not merely an owned or subsumed person, but no person at all.

It is not suggested that classical Roman law posited a view of private property rights as expansive as Locke's. What matters is that by developing effective ownership through such devices as the *peculium*, Roman law recognised proprietary rights even for slaves; just as they had certain rights to vindication of their dignity in the face of egregious physical or even verbal affronts.[161] A qualified form of possessive individualism, as it turns out, is the universal quality of Rome's legal subjects.[162]

[160] Genesis 1:29–30.
[161] See Chapter 4.
[162] So much so, in fact that the possessor takes the duties as well as the rights: eg, when a son remains liable to a creditor even if his father has taken away his *peculium*: D.15.1.45.

V CONCLUSION

After examining some varieties of the political theory of possessive individualism in seventeenth-century England, Macpherson identifies this as one of its seven core propositions: 'Although the individual cannot alienate the whole of his property in his own person, he may alienate his capacity to labour.'[163] Roman ideas of individual right are not beholden to those of early-modern England for their validity, but it helps us to appreciate how advanced the Roman concept of individual liberty was, by considering how it measures up against this proposition.

The results are surprising. It was suggested in this chapter, and will be further demonstrated in the next, that slaves – at least the ones with education, commercial skills, and sufficiently lucky circumstances in which to prove them – had more personal liberties than stereotypical conceptions of slavery would permit.[164] Their liberty falls short of Macpherson's possessive individual as essentially the proprietor of his own person or capacities, owing nothing to society for them; yet it does not count for nothing that even Roman slaves had some liberty to alienate their own labour (including, as we will see, by selling themselves into slavery for commercially beneficial reasons). *A fortiori*, free citizens under the power of their *paterfamilias* never lacked the freedom to alienate their own capacity to labour. How a man or woman might choose to alienate his own capacity to labour varied considerably, from undertaking risky maritime adventures to tenant-farming on the great estates of Roman Italy. These are among the subjects of the next two chapters.

[163] Macpherson (n 7) 264.
[164] This is addressed further in Chapter 6.

Chapter 6

Contract and Enterprise: Entrepreneurs, Women, and Slaves

I INTRODUCTION

THE PREVIOUS CHAPTER examined Roman ideas of legal rights to own and alienate property and the fruit of one's labour: a cornerstone of Roman individualistic jurisprudence. Those whom the law permitted these rights had opportunities to pursue commercial ventures for profit and thereby improve their personal conditions and social standing. This chapter examines some of the specific legal regimes under which businesspeople accustomed to risk, and slaves with the right education and experience, found economic opportunities: men and women engaged in long-distance trade, slaves taking advantage of their servile status, and the free finding surprising benefits in the institution of slavery. These provide valuable case studies for the working of rights theories in the realities of Roman everyday life: that is, empirical examples of the rights examined through the Lockean–Madisonian prism established in the last two chapters.

These were not the opportunities generally pursued by or available to higher-born and more economically secure Romans. Rather, they are not about those who relied on the inheritance of family wealth and dwelt on its maintenance, but those who took on riskier enterprises or entered sectors of private business and public administration in which the luckiest slaves predominated. These were not the risk-averse activities of the more clan-conscious Romans; they were opportunities for individuals seeking a fortune in their own, otherwise obscure, lifetimes. In his middle republican treatise on agriculture, Cato the Elder praised

farming while admitting, with an air of aristocratic superiority, 'that to obtain money by trade is sometimes more profitable, were it not so hazardous; and likewise moneylending, were it as honourable'.[1] As we will see, the individualism of Roman market economics, and its framework of private law, were an encouragement more to the search for profit than for honour in this narrow, patrician sense.[2]

II MARITIME COMMERCE AND ECONOMIC OPPORTUNITY

Away from the arable fields that dominated economic life in Roman Italy, opportunities abounded for those prepared to dive into the sea or sail on its waves. Actually, in the modern popular imagination, Romans are more readily associated with one maritime delicacy in particular: oysters. The progenitor of Rome's large-scale cultivation of oysters in artificial beds was a man named Sergius Orata.

Orata is an elusive character, despite being named in multiple and disparate classical literary sources.[3] It is unclear whether he is Roman or Campanian; whether he was born into money; whether any of his ancestors held the high magistracies of the Republic.[4] He certainly did become someone who 'exhibited behaviour typical of socially and economically powerful men at Rome', buying friends and influence, buying real estate for redevelopment and resale,

[1] *Est interdum praestare mercaturis rem quaerere, nisi tam periculosum sit; et item fenerari, si tam honestum sit*: Cato, *De agri cultura* pr.1.

[2] See Luigi Capogrossi Colognesi, *Law and Power in the Making of the Roman Commonwealth*, Laura Kopp (trans) (Cambridge University Press, 2014) xxx.

[3] Including Cicero, *De finibus* 2.70, *De officiis* 3.67, *De oratore* 1.178; Columella, *De re rustica* 8.16.5; Pliny, *Natural History* 9.168–9; Valerius Maximus, *Facta et dicta memorabilia* 9.1.1; Varro, *Rerum rusticarum* 3.3.10, 3.17.3.

[4] Cynthia Bannon, 'C Sergius Orata and the Rhetoric of Fishponds' (2014) 64(1) *Classical Quarterly* 166, 166–8, 173–4. Bannon suggests at 174 (italics in original):

> If he had been a low class Campanian, Cicero and his audience would not have been surprised by sharp dealing and self-indulgence, since it fulfilled their expectations. His behaviour is reprehensible because he is *not* a low-class hustler from the sticks. Thus, an appreciation of Cicero's rhetorical elaboration of 'Orata' provides a clearer view of the man Orata as a member of the elite and, additionally, further evidence for diversity among the Republican elite.

This is a compelling argument. For present purposes, however, it is not necessary that Orata had been a 'low class Campanian'; only that he was a sufficiently 'new' man to have to find his fortune in personal business enterprise rather than through generational maintenance and expansion of traditional landed patrimony.

and taking the genius step of farming oysters in artificial beds in the Lucrine Lake.[5] Possibly the obscurity around his origins is itself revealing about the former social status of Rome's oyster king. He *may* have been a knight (*eques*), though this does not in itself prove that he was a genuine plutocrat,[6] above one who simply met the financial threshold for admittance to the equestrian order.[7]

While he certainly entered the circles of the élite by the accumulation of wealth and connections, Orata did not imitate the great patrician and equestrian houses in either how he made his money or even – in at least one important way – how he used it. In other words, he was neither a country squire, nor did he use his wealth to enter politics and pursue magisterial appointments. Even the fictional Trimalchio (whom we will examine in turn[8]) deferred to the customs and lifestyle of the traditional landed élite by forsaking the trades that made him his fortune and settling into the security of landed income. Orata did no such thing. Now, it is a myth of their own making that the nobility neither by law and custom could, nor as a matter of pride ever did, enter business and trades.[9] It is trite to notice that any social or even legal prohibitions were ignored;[10] especially by Roman nobles acting as silent partners in any number of business ventures, including none other than the arch-traditionalist Cato the Elder, who fronted money for shipping schemes but certainly did not undertake any of the logistics or assume the physical dangers personally.[11] So, while many nobles were involved in business enterprises as investors,[12] it was men of lower social orders who operated front of house, so to speak; they personally chartered ships, procured goods, or supervised building works, and

[5] Ibid 173.
[6] Ie, one whose power is derived from his or her wealth.
[7] Annalisa Marzano, 'A Story of Land and Water: Control, Capital, and Investment in Large-Scale Fishing and Fish-Salting Operations' in Paul Erdkamp, Koenraad Verboven and Arjan Zuiderhoek, *Capital, Investment, and Innovation in the Roman World* (Oxford University Press, 2020) 275, 279.
[8] See further in this section.
[9] Cf Cicero, *Ad Atticum* 14.12.3.
[10] Peter Temin, *The Roman Market Economy* (Princeton University Press, 2013) 102–3.
[11] Plutarch, *Cato the Elder* 21.6.
[12] It was trite at Roman law that a *socius* could join a partnership as an investor only: C.4.37.1.

probably came up with the ideas to begin with, in order to attract investors; much as the early Dutch East India Company relied on the contributions of monied burghers who took no actual part in the dangerous enterprise of sailing to and acquiring goods in the East Indies.[13] There were few upper-class Romans who were actively involved in commodities trades and real estate development, and who did *not* also have the agricultural great estates in their wealth portfolios. In short, and returning to our case study, Orata was a relatively humble man (humility is always relative) who, lacking the criteria of 'old money', exploited the opportunities of Roman law and commerce to make a considerable fortune on his own name.

Sergius Orata is mentioned by several sources with praise, or at least with grudging respect for his business acumen. Cicero too mentions Orata in several works, including in an episode of the *De officiis* intended to contrast the proper, publicly minded use of the law, with use of law for tactical, personal gain.[14] It is revealing about the way that the law could be used to uphold what we often now call 'sharp practices' in business, with Orata himself standing as emblem for this personal, selfish, individualistic use of legal processes over the nobler use of law to serve the common good. Cicero has just explained that the duty of good faith requires a vendor of land to disclose defects to the purchaser, and then gives an example of the misuse of this principle. Marius Gratidianus had purchased a house on the Lucrine Lake from Orata, the latter having decided that commercial stakes in the lake had diminished with the diminution of certain fishing rights.[15] Eventually, however, Orata decided to buy the property back from Gratidianus – for he always had it in him to turn a profit in real estate. At all material times, the land had been encumbered with a praedial servitude (rather like a modern negative easement), likely related to water use and hence valuable to Orata's oyster-cultivating

[13] Oscar Gelderblom and Joost Jonker, 'Completing a Financial Revolution: The Finance of the Dutch East India Trade and the Rise of the Amsterdam Capital Market, 1595–1612' (2004) 64(3) *Journal of Economic History* 641.
[14] See below.
[15] Andrew R Dyck, *A Commentary on Cicero, De Officiis* (University of Michigan Press, 1996) 579.

enterprises.[16] Obviously Orata had known about it already as the previous owner, but he exploited Gratidianus' failure to restate the obvious in the second sale to contend that Gratidianus was liable to make good the undeclared defect – which would avoid Orata dropping dead money in circumstances where, as it turned out, there were local restrictions against his introducing an oyster farm after all.[17]

And the moral of Cicero's story? That 'our forefathers did not countenance sharp practice' (*non placuisse maioribus nostris astutos*).[18] As Cynthia Bannon observes, 'Cicero seems to have identified a real problem since Orata's approach to the law was typical of Roman élites, entrepreneurial and otherwise, who expected to be able to manipulate the legal system to their own advantage'.[19] A combination of Roman law's technical commercial rules, and the scope for abuse of its procedures, presage the individualistic *homo oeconomicus* in both his guises: as creative entrepreneur generating wealth for both himself and his community, and as selfish litigator using money, influence, and legal technicalities to reclaim inches of personal advantage.

Some time after this lawsuit, Orata moved his oyster-farming operations from the Lucrine Lake, perhaps to the nearby *Acherusia Palus* (now Lake Fusaro):[20] The jurist Celsus says that while the shores belong to the Roman people and the sea is for use by all mankind, one who sinks piles (*moles*) into the sea owns the piles themselves, provided they have not impaired the common enjoyment.[21] In the next passage in Justinian's ordering, no less an

[16] Annalisa Marzano, *Harvesting the Sea: The Exploitation of Marine Resources in the Roman Mediterranean* (Oxford University Press, 2013) 187–8.
[17] Cicero, *De officiis* 3.67.
[18] Ibid 3.68.
[19] Bannon (n 4) 170.
[20] Marzano, *Harvesting the Sea* (n 16) 176. This is an odd assertion, as the classical sources cited by Marzano say no such thing: see Pliny, *Natural History* 9.54; Columella, *De re rustica* 8.16. Nevertheless, Orata would indeed have had a commercial impetus to move his operations if he could find a suitable body of water which – unlike the Lucrine Lake – was not designated common property and subject to a taxation by fishermen who exploited its natural resources: Marzano *Harvesting the Sea* (n 16) 176, 187.
[21] D.43.8.3.pr, 1.

authority than Scaevola says that under the *ius gentium*, building on the seashore is allowed provided that this does not impede the common use.[22] All up, these passages are unclear: do the jurists agree that a private citizen can enclose any part of a body of water? If so, are lakes excluded? Either the answer is yes; or if not, entrepreneurs prepared to pay a tax could at least become concessionaires over a body of water and effectively enclose it – or part of it – for commercial operations. But it is clear enough that Roman private law was structured to encourage private enterprise, with due regard to public benefits.

Orata ruled a commercial empire of lakes and coasts. Others sought their fortune on the high seas. For lack of any biographical details about more than a chance handful of Roman businessmen, the most famous shipping entrepreneur is a fictional character, though one clearly based on a familiar social type. This is Trimalchio, a character in Petronius' *Satyricon*. Trimalchio's garish feast is best remembered for its opulent and absurd dishes and the antics of its guests and slaves. But in a boastful moment (one of many), Trimalchio recalls his trials and successes as a shipbuilder and owner. Taking a windfall of money, he invests in the construction of five ships. Undeterred by the destruction of this miniature merchant navy, he builds another fleet – and this time he cleans up. The number of Trimalchio's ships feels like more of an exaggeration than the fortune he alleges to have made: 10 million *sesterces* in one trip. Most revealingly, he gives up this game and invests in the certitude of land; and after a career of financing freedmen, he retires as a great landowner and semi-professional thrower of gaudy parties.[23] For one who stuck it out longer in commercial shipping – whether as the trader working with shipowners to consign goods or the shipowner himself – risk and natural disaster were incorporated into the business model itself. Legal institutions, however, developed

[22] D.43.8.4.
[23] Petronius, *Satyricon* 76.

sophisticated rules for risk allocation in contracts for the carriage of goods by sea.[24] For Ulpian, careful articulation of these rules was necessary because marine trade was a matter of maximum public concern.[25] The unstated reason is clear: maritime and fluvial trade routes were – and still are – quicker and cheaper to use than overland routes.[26]

The marine archaeologist Peter Campbell has coined the term *contingent movement* to describe 'the way in which ships travel dependent on external forces and the inherent risks therein, a negotiation with the marine environment subject to chance and changing circumstances'.[27] The contingent element of decisionmaking lies above all in the necessity of sailors to recalculate their movements even with slight changes in wind and other natural factors, and to follow routes which an observer unconcerned with the wind factor, and unfamiliar with sailing techniques, appear hopelessly digressive. The common divergence in route and duration between two ships leaving the same port at the same time, and headed to the same destination, makes sea travel so unpredictable and risky as to make it inherently unlike travel by land. That qualitative difference justifies the development and adaptation of a system of private law especially concerned with managing unpredictability.[28]

Upper-class Romans relied on extensive agricultural landholding to sustain their wealth. Farms, too, are forever at the mercy of bad weather and failed crops, but the landlords managed this to a considerable degree by deriving their income not directly from farming, but from the income provided by tenant-farmers (obviously this did not change the weather but did

[24] See especially D.14.2; D.22.2.
[25] D.14.1.20.
[26] Jesse M Lane and Michael Pretes, 'Maritime Dependency and Economic Prosperity: Why Access to Oceanic Trade Matters' (2020) 121 *Marine Policy* 104180. For a geographical outline of the Iberian peninsula's ancient maritime and fluvial trade routes, see Paul Reynolds, *Hispania and the Roman Mediterranean, AD 100–700: Ceramics and Trade* (Bloomsbury, 2010) 7–10. Many critical trade routes passed through this area.
[27] Peter B Campbell, 'Contingent Movement: Seafaring, Contracts and Law' in Peter Candy and Emilia Mataix Ferrándiz (eds), *Roman Law and Maritime Commerce* (Edinburgh University Press, 2022) 23, 25.
[28] Such as may have happened when over 15,000 *modii* (1 *modius* ≈ 8.73 L) of wheat, originally from Africa Proconsularis were shipped from Ostia to Pompeii, which also included a product sample (*exemplar*) indicating lack of trust: see discussion in 'A Shipment of Grain for Pompeii' <https://www.ostia-antica.org/dict/topics/grain-for-pompeii/grain-for-pompeii.htm>. For a contract on fluvial transportation, see FIRA iii, 477–9.

shift the burden of making good any loss from owner to tenant).[29] Maritime commerce was not the favourite investment of old money; if they were involved, it was at a distance, indirectly, and as silent partners. The risk and the effort therefore fell on those more prepared to undergo them; such persons did not have the luxury of steady incomes and often inherited wealth, and hoped to make their fortunes by the huge cargoes that only ships could sustain. In a word, they were like Trimalchio when he was yet to make his huge fortune.

The title of the *Digest* most relevant to this sector of the Roman economy is about transmarine loans (*pecunia traiectitia*). Modestinus defines these as loans where the goods purchased with the lent money are shipped at the lender's risk.[30] But upon safe arrival of cargo, says Scaevola, the creditor 'may recover what he has given and something else besides money'; while Paul says that the creditor can sue for both the principal and interest upon completion of the voyage.[31] Finally, the jurists recognised certain rational bounds on lenders' privilege, as for example where a penalty could not be levied if through the creditor's fault repayment was not accepted within the prescribed time.[32]

A hypothetical in the *Digest* describes one Callimachus taking a transmarine loan from the slave Stichus (the latter acting on behalf of his master Seius) to fund an anticipated 200-day commercial voyage from Berytus to Brentesium.[33] The lender charged his security interest (*pignus vel hypotheca*[34]) on the goods that Callimachus would buy on arrival at Brentesium to bring back to Berytus.[35] The loan provided that when Callimachus reached Brentesium, by the

[29] See Chapter 7.
[30] D.22.2.1, 3.
[31] D.22.2.4, 7.
[32] D.22.2.8.
[33] Modern Beirut and Brindisi, respectively.
[34] *Pignus* is the classical term; *hypotheca* is a Byzantine interpolation.
[35] The flaw in this hypothetical is of course that the lender has charged his security interest on goods that would end up at the bottom of the ocean in the worst-case scenario against which the security interest was supposed to insure the lender.

thirteenth of September next he would set sail back to the Levant having sold some goods or bought others, or else stay put and be liable for immediate repayment of the full loan.

Such arrangements were not unknown in other ancient societies; it is no surprise, for example, that some contracts of similar sophistication, and with similar arrangements, survive from Classical Greece, that great seafaring civilisation.[36] But no systematic treatment of transmarine loans, and of their special rules of risk allocation, survives outside the Roman juristic texts, which has made them so bequeathable to later legal cultures. In any event, careful drafting was needed to ensure the proper allocation of risk in line with typical juristic interpretation – an institutional framework, again, with no real comparison in Greek society.[37] Such terms of art included the use of *salva nave*, signifying the safe arrival at destination and the consequent risk swap.[38] Moreover, 'maritime interest' (*usuris maritimis*) invariably meant higher interest than would be charged on less daring enterprises, to say nothing of the hypothec that usually encumbered any goods purchased with the loaned money, as was the case with our Callimachus.[39] This all favoured the lender – but if the lender did not feel he or she were being favoured, then far fewer borrowers would have got the money they needed to do these things. While the story is a little short on details, the contract of Callimachus shows clearly enough to what extent, and on what economic basis, the lender enjoyed the privileges he did; and on the other side of the same coin, why someone in Callimachus's position would reasonably accept those terms for the capital he needed, and which someone else had to front. Over the republican and imperial periods, 'the right of pledge evolved from a single possessory pledge over a

[36] Some are discussed in Edward E Cohen, 'Commercial Law' in Michael Gagarin and David Cohen, *The Cambridge Companion to Ancient Greek Law* (Cambridge University Press, 2005) 290.
[37] With perhaps the partial exception of the 'Rhodian Sea Law': D.14.2. This is the relatively late, Roman source for the provisions of the *lex rhodia* which Lord Mansfield over-excitedly called the 'ancientest laws in the world': *Luke v Lyde* (1759) 2 Burr 882; 97 ER 614, 619.
[38] In much the same way, modern contracts for the sale of goods use 'Incoterms' published by the International Chamber of Commerce to stipulate risk allocation in universal shorthand.
[39] Éva Jakab, 'Loans and Securities: Tracing Maritime Trade in the Archive of the Sulpicii' in Candy and Ferrándiz (n 27) 137, 141; D.22.2.6.

specific physical thing to a highly versatile security interest that could be granted multiple times over the same asset, as a non-possessory pledge, over receivables, and even over an entire fluctuating patrimony':[40] that is, what is now known as a hypothecation. As Hendrik Verhagen has shown, Roman commercial law had institutions ranging from the ostentatious *mancipatio* (a ceremonial form of conveyance attended by many witnesses) to a widespread practice of recording contracts in writing; which, he argues, went some way to compensating for the lack of a modern-style title and personal property security registers.[41] The flexibility of loans and pledges, generally well documented by the relevant parties, ensured a legal framework in which individuals could pursue risky commercial enterprises, whether over land or on the high seas.

III WOMEN IN COMMERCE

The legal historian Edward Cohen has noticed that about one quarter of the rescripts preserved in the *Codex* dealing with private law matters are addressed to female petitioners.[42] Moreover, some women did not have a guardian (*tutor*) having to sign off on their business and other affairs and many who did either had a hands-off *tutor* or one who could be easily ignored or even compelled by a sensible magistrate to leave the lady to her own affairs. Accordingly, much of the legal regulation of women did not restrain them in practice.[43] This opens a further route of inquiry.

The older view that Roman women either did not engage in commerce or that they engaged only in prostitution has been overhauled by more recent epigraphic research. These

[40] Hendrik L E Verhagen, *Security and Credit in Roman Law: The Historical Evolution of Pignus and Hypotheca* (Oxford University Press, 2022) 367.
[41] Hendrik L E Verhagen, 'Secured Transactions in Classical Roman Law' in Giuseppe Dari-Mattiacci and Denis P Kehoe (eds), *Roman Law and Economics*, vol ii, *Exchange, Ownership, and Disputes* (Oxford University Press, 2020) 113, 138–45.
[42] Edward E Cohen, *Roman Inequality: Affluent Slaves, Businesswomen, Legal Fictions* (Oxford University Press, 2023) 132–3.
[43] Gaius at one point is quite explicit about this: see G.1.190.

reveal women working as medical practitioners and midwives; as hairdressers and perfume retailers; and literate women working as scribes.[44] Their lives – so far as the evidence goes for them – have already been documented by various specialists in Roman women's studies, including in Cohen's recent study of *Roman Inequality*.[45] Our concern here is with the connection between women in commerce, both slaves and free, and the individualistic jurisprudence of classical Rome.

For such an inquiry, there is less to learn from the high-status women who bought and sold valuable estates, such as the Vestal Virgin Licinnia who sold property to Crassus,[46] or Caesennia whose land formed the basis of the dispute in Cicero's *Pro Caecina*. It is more striking that there is evidence of some women owning ships and others owning their commercial cargo.[47] This matters for the reasons already outlined in the above discussion of commercial law. Rich women trading land from one wealthy family to another tell us less about economic individualism than women of slightly or considerably lower social standing, who like men in similar circumstances took advantage of the risk allocations under Roman contract law to pursue high-risk, high-return ventures in the sale of goods. Scholars such as Cohen have expertly revealed the extensive role of women in commerce and refuted older assumptions about their exclusion from fields such as banking or their purported discrimination in others.[48] Indeed, it has been concluded that for shipping contracts in particular, 'women actually appear overrepresented in the few preserved texts'.[49] What we can helpfully add to his analysis is that

[44] Cohen (n 42) 129–30.
[45] The remainder of this section draws extensively on sources collected in Cohen and his interpretation of those sources.
[46] Plutarch, *Crassus* 1.2.
[47] See examples collected in Cohen (n 42) 131 nn 33–4.
[48] Ibid 127–63.
[49] Verena Halbwachs, 'Women as Legal Actors' in Paul J du Plessis, Clifford Ando and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) 443, 452. That conclusion, the work of much epigraphic research, is already latent in Ulpian's statement at D.14.1.1.16 that in maritime commerce the legal position of women is the same as that of men. To make a point of saying this suggests strongly that it was worth saying: ie, that many women were involved in the business.

it provides further evidence of the individualistic tendency in Roman jurisprudence. Non-élite women (and men) in commerce were not operating in a kinship-intensive world; at least not in the sense that their commercial ventures were undertaken for or profited anyone but themselves; only their names are mentioned in some epigraphic survivals and it is unnecessary to infer that they were operating in family businesses.[50] Reinforcing the conclusion drawn in the previous section, we can see the extent of the individualist legal system's influence in advancing the economic individualism of women, not just men, in the Roman market economy.

Éva Jakab has examined the role of women in commerce using evidence from the archive of the Sulpicii in Puteoli, an important port town in the Bay of Naples area affected by the Vesuvius eruption of AD 79.[51] Of this archive, Jakab notices, about one quarter are concerned with legal transactions performed by women.[52] In a closer reading of several tablets, Jakab finds women ranging from freed slaves to noblewomen transacting business with the moneylending Sulpicii; and notices, in particular, that despite formal rules to the contrary, most of these women appear to have transacted their business without the involvement of a male guardian (*tutor*).[53] If Cato the Elder was disdainful of moneylenders at the best of times, one expects that his estimation of them would not have improved knowing that in generations to come, moneylenders would both deal with, and themselves sometimes be, women.[54] All that aside, Roman commercial law was perhaps less concerned even with its own technical restrictions than it was in promoting a general principle of freedom of contract. This is a fine example of the unconscious development of the individualistic tendency in Roman law: it is not that anyone in particular was interested in advancing the role of women in business as an

[50] In fact, it would be an imprudent inference, given the unlikelihood that a family operation would trade in a female members' name. There is no reason to think that this would benefit them or that they would have any other reason to do so.
[51] Éva Jakab, 'Financial Transactions by Women in Puteoli' in Paul J du Plessis (ed), *New Frontiers: Law and Society in the Roman World* (Edinburgh University Press, 2014) 123.
[52] Ibid 130.
[53] Ibid 135–49.
[54] Cato, *De agri cultura* 1.1–4.

end in itself. Rather, economic imperatives won out.[55] Take the Sulpicii: if it was in their interests to secure as many clients as possible, then they were evidently not concerned to deal only with men.

Many businesswomen, then, learned their trades in prior conditions of servitude or at least did business once they were free.[56] For present purposes, this is the most important fact to emerge from the study of women in the Roman market economy. The other side of the coin for those of lower social standing was that it mattered little whether they were men or women; this meant that the law treated them the same, setting aside the peculiarities of guardianship which mattered more to noblewomen and had little practical effect outside contexts that did not depend on the preservation of family patrimony.[57] What I argued earlier about the *peculium* applies as much to female as to male slaves.[58]

But that is not the full extent of the opportunities that could be pursued by slaves, despite their otherwise unenviable status, within the structure of Rome's individualistic jurisprudence.

IV 'A Clear Field for Future Effort': Slavery and Opportunity

If maritime commerce and women in the Roman economy demonstrate anything about the economic opportunity, we can learn even more from the study of the Roman slave economy: not slaves as the subject of economic activity, but as its operators. The focus here, therefore, is

[55] On emergent orders and law, see Michael J R Crawford, *An Expressive Theory of Possession* (Hart, 2020) 86–121.
[56] Cohen (n 42) 132.
[57] G.2.81; D.14.3.7.1. In fact, the default position of the jurists was that a reference to 'someone' or 'anyone' means either a man or a woman: 50.16.1. So, unless by necessary operation of some other legal principle or unless expressly stated, what the jurists say about private law applies equally to women.
[58] See Chapter 5.

not on the great majority of Roman slaves who serviced the labour- and care-intensive primary industries and domestic service – essentially, those who performed the menial and purely physical work – but rather on those more privileged individuals – better educated, even somewhat socially respected – who were able to emerge from slavery, or even move between free and servile status, coming out wealthier.

Slavery provided unexpected opportunities for certain kinds of people. This is obviously surprising: slavery is not typically associated with opportunity of any sort. Indeed, the jurists described it metaphorically as a sort of juridical death.[59] In fact, it was not entirely metaphorical as it had very real consequences upon a person's legal status. The clearest and most colourful evidence for this comes from the rules for admission to the cult of Vesta: even after the daughters of freedmen were allowed to be offered as Vestal Virgins in the early principate, the father cannot have been emancipated *after* his daughter's birth as this would make her legally an orphan, thus ineligible.[60]

If a dead man has no rights,[61] likewise 'no obligation can bind a person in servitude'.[62] It could even serve the interests of a man or woman to enter slavery and later emerge from servile status. These possibilities were especially characteristic of the Roman institution of slavery and those institutions based upon it.[63] The Biblical injunction to release slaves upon their seventh year of service was scarcely if ever observed, but in any case there is little

[59] D.50.17.209. On social death as a misleading term, see Martin Schermaier, 'Without Rights? Social Theories Meet Roman Law Texts' in Martin Schermaier (ed), *The Position of Roman Slaves: Social Realities and Legal Differences* (De Gruyter, 2023) 1, 5.
[60] Jane F Gardner, *Women in Roman Law and Society* (Indiana University Press, 1991) 22.
[61] Not even as a testator, for any litigation over a will is brought by and for the benefit of the living.
[62] [*I*]*n personam servilem nulla cadit obligatio*: D.50.17.22.pr. This was the Roman doctrine, though it may be noted that while rights correlate to duties, the absence of rights does not necessarily mean the absence of duties. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Walter Wheeler Cook (ed) (Lawbook Exchange, 1964 [1913/17]).
[63] For the Early Middle Ages, see Alice Rio, *Slavery after Rome, 500–1100* (Oxford University Press, 2017) 42–74.

comparison with the peculiar features of Roman slave law.[64] Likewise, there is scant evidence for the rates of manumission in the Greek *poleis*; when it happened, freedmen seldom prospered like many of their later Roman counterparts; a freedman's own children would likely remain slaves; and most importantly, manumission was not a path to citizenship of the *polis*, but rather confined freedmen to the status of metics – the same as foreigners – who were excluded from such core citizen liberties as property ownership and political participation.[65] But under Roman law, quite astoundingly, a manumitted slave jumped straight to the top of the ladder – if rather in legal than social terms – and became a full Roman citizen.[66] Apparently, then, the socially dead could at least be brought back to the land of the living.

A free person's liabilities were not merely suspended during slavery – this is critical – but might even be wiped clean and not resurface in the ensuing period of liberty, which is really the whole point of voluntary self-sale in any slave society, ancient or medieval. Scaevola says that a 'person who was made a slave is not regarded as returning to his obligations to creditors on the ground that he afterward recovered his liberty by permission of the emperor.'[67] The phrasing is a little unclear as to whether debts are only cleared upon manumission of a particular type,[68] but the phrase 'by the permission of the emperor' (*indulgentia principali*) appears to be

[64] For the Biblical injunction, see, eg, Exodus 21:2. On manumission in Jewish slavery, see Catherine Hezser, *Jewish Slavery in Antiquity* (Oxford University Press, 2006) 304–17.

[65] Understandably, Peter Hunt's comparative study of Greco-Roman slavery leans on the Roman evidence for high rates of manumission: Peter Hunt, *Ancient Greek and Roman Slavery* (John Wiley & Sons, 2017) 118–20. Cf Sara Zanovello, *From Slave to Free: A Legal Perspective on Greek Manumission* (Edizioni dell'Orso, 2023). As Gardner rightly observes, 'in Roman society, unlike in Greek, there was no sharp discontinuity between slave or freed on the one hand and citizen on the other, and much of the Roman servile population was ultimately of servile descent': Gardner (n 60) 2.

[66] Cf Rachel Zelnick-Abramovitz, *Not Wholly Free: The Concept of Manumission and the Status of Manumitted Slaves in the Ancient Greek World* (Brill, 2005) 307–34 (which also notes that so far as the deficient evidence reveals, slaves in some *poleis* seem to have enjoyed a better social status than in Athens).

[67] *Servus effectus non idcirco, quod postea indulgentia principali libertatem consecutus est, redisse dicitur in obligationem creditorum*: D.44.7.30. Some scholars are careful in the relevant context to translate *indulgentia principali* as imperial *permission*, rather than *pardon* or the possible false friend, *indulgence*: see, eg, Clifford Ando, *Law, Language, and Empire in the Roman Tradition* (University of Pennsylvania Press, 2011) 122, and the revised Blume translation of C.8.47.2. I prefer this interpretation of the phrase *indulgentia principali* and have substituted for the phrase 'by grace of the emperor' used in the revised Watson translation.

[68] That is, by imperial pardon, which is what the phrase *indulgentia principali* seems to mean in, eg, Justinian's passage about restoring a citizen to his former *alieni iuris* status upon his return from an island to which he had been exiled: J.1.12.1. How often would this happen, and why would a jurist purport to give the terms of a pardon

no more than a mannerism here to describe manumission of any kind.[69] Moreover, there is of course a difference between a debtor and a judgment-debtor, and the rule described by Scaevola might only apply to the former.[70] According to juristic theory, then, the slave once freed is a new person; and that freedman once re-enslaved is once again a slave, but not the *same* slave that he was prior to manumission.[71] That is what is meant by juridical death.[72]

The Romans manumitted many more slaves than most or perhaps any other slave-owning society in history, for a multitude of reasons and by a great variety of methods.[73] All that we can know, however imprecisely, is that there were many freedmen throughout the empire and that they constituted a significant minority of the population of Rome itself.[74] Thus,

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that are for the emperor to decide? Alternatively, it stands synecdochally for a state grant of manumission. C.7.13 enumerates a few circumstances in which the state will reward a slave with freedom as a matter of right: these are avenging one's master's murder and reporting counterfeiters, kidnappers of virgins, and military deserters. Obviously, these are rare or relatively rare occurrences with the air of chance about them; of the state weighing up the public utility of, say, preventing debasement of currency against maintaining a reasonably stable slave population. No slave could plan to win his freedom in these ways; the state was happy enough to liberate a few on a scale that would hardly have led to manumission of most of the slave population overnight. Then there was manumission in the church in late antiquity; but whatever this was about, it was not about maximising the social choices and economic opportunities of the emancipated: Kyle Harper, *Slavery in the Late Roman World, AD 275–425* (Cambridge University Press, 2011) 471–85. Finally, there is evidence of later emperors confiscating slaves from one private owner and transferring them to another; but this was less a matter of legal mechanics than of imperial policy (that is, imperial whim): Luke Hagemann, 'The Roman Emperors as Slave Traffickers' (2021) 75(3–4) *Phoenix* 304. In any event, and as is about to be explained, the better interpretation is that *capitis deminutio maxima* clears debts for good.

[69] This interpretation is supported by evidence within and outside the *Digest*. Within it, consider again the dictum that slavery is a kind of judicial death (D.50.17.22.pr), and Paul's observation that a slave's legacy is not revived because a slave who is freed and then re-enslaved is considered a 'new' slave (D.34.4.27.1). Outside it, consider that debt-bondage had been abolished by the Middle Republic (and further, the clear restatement of the law in C.4.12). This removes what would otherwise have been a serious logical impediment: namely, how could a man suffering *capitis deminutio maxima* be cleared of the debts which he, as a debt-slave under *nexum*, is required to repay?

[70] Penalties for judgment-debtors *did* of course survive into Byzantine law, but with the creditors' right to things substituting for his right to bondage over the debtor himself: see D.42.1.34 and C.7.71.1.

[71] This is also the position W W Buckland takes: *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge University Press, 1970 [1908]) 3, 131.

[72] This is also consistent with other juristic texts that are careful to distinguish acts done in servitude from those done following manumission: see, eg, D.3.5.16.

[73] I Weiler, *Die Beendigung des Sklavenstatus im Altertum: Ein Beitrag zur vergleichenden Sozialgeschichte* (Franz Steiner, 2003); W V Harris, 'Demography, Geography and the Sources of Roman Slaves' in *Rome's Imperial Economy: Twelve Essays* (Oxford University Press, 2011) 88.

[74] Henrik Mouritsen, *The Freedman in the Roman World* (Cambridge University Press, 2011) 120–205.

any proposal for the scale of manumission by one particular method can only be expressed in terms of proportion – not absolute figures – and impressionistically at that.[75]

Actually, the Roman law of slavery is surprisingly reminiscent of modern bankruptcy regimes. There has been an understandable focus on the social and legal restrictions of freedmen, above all his ongoing obligations to his patron.[76] But as the foregoing shows, those who laundered their legal obligations through slavery, so to speak, had second chances to gain. Clan or kin expectations play no role in the calculus; this is arguably one of the purest expressions of economic individualism. It affords a curious comparison with the modern law of personal bankruptcy and corporate insolvency. A primary function of bankruptcy legislation is to relieve oppressive debt. As a judge of the Supreme Court of the United States famously wrote:

> This purpose of the [*Bankruptcy Act*] has been again and again emphasized by the courts as being of public, as well as private, interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.[77]

This comparison with bankruptcy – especially American bankruptcy, which has cultural resonances about individual opportunity – allows us to see slavery from a different angle; as a redemptive opportunity for individuals escaping the consequences of their economic misfortunes. Naturally a stigma attached to anyone who had been a slave, but this stigma is not likely to have mattered to someone whose social standing was such that the option was desirable from an economic point of view; or say, to a provincial for whom emancipation meant

[75] Lily Ross Taylor, 'Freedmen and Freeborn in the Epitaphs of Imperial Rome' (1961) 82(2) *American Journal of Philology* 113.
[76] See, eg, Harper (n 68) 366–90, emphasising the exploitation of patron–freedman obligations by newly-minted provincial citizens after the Antonine Constitution.
[77] *Local Loan Co v Hunt*, 292 US 234 (1934), 244 (Sutherland J).

elevation directly to the status of citizenship.[78] Neither a poor-born entrepreneur nor a palace-trained servile bureaucrat was likely to be much bothered by the fact of their actual or prospective slavery, any more than a well-paid prostitute is bothered by the huge dent that their full-time career puts in their prospects of going into politics or joining a country club.[79] To think otherwise is simply to impute the wrong social goals and expectations to the subject of analysis.

Second, the institution of slavery offered not just a loophole for those down on their luck, but might in itself be a path to material success for those who could not hope for prosperity by more socially acceptable means. Cohen cites the touching epitaph of a slave who described himself as impoverished in his wallet, but wealthy in spirit (*peculio pauper, animo divitissimus*).[80] But there also survive many other funerary monuments to slaves who seemed to have prospered material in this world, big-spirited or otherwise. For the Roman institution of slavery was more dynamic than most modern equivalents. In the American South – even in those parts where rates of manumission were a little higher than many would assume[81] – there was a permanent racial division between slave and free, sufficient to require a constitutional amendment during the Reconstruction period prohibiting discrimination by the States or voting restrictions on the basis of 'previous condition of servitude', which of course was routinely

[78] See Rose MacLean, 'Manumission, Citizenship, and Inheritance: Epigraphic Evidence from the Danube' in Myles Lavan and Clifford Ando (eds), *Roman and Local Citizenship in the Long Second Century CE* (Oxford University Press, 2021) 140, which is concerned with the advantages of formal manumission for the manumitter but which includes helpful statistics, based on the epigraphic evidence, on testators with freed heirs.
[79] Indeed, the servile bureaucrat was like other slaves free of *patria potestas* and further enjoyed the *peculium castrense* (a fund available for the sole use of legionaries, beyond the reach of a *paterfamilias*) on the legal fiction that civil servants were soldiers.
[80] *CIL* 6.8012, quoted in Cohen (n 42) 31.
[81] See, eg, T Stephen Whitman, *The Price of Freedom: Slavery and Manumission in Baltimore and Early National Maryland* (University Press of Kentucky, 1997); Howard Bodenhorn, 'Manumission in Nineteenth Century Virginia', National Bureau of Economic Research, Working Paper 15704 (January 2010) <https://www.nber.org/system/files/working_papers/w15704/w15704.pdf>. Cf Frank D Lewis, 'The Transition from Slavery to Freedom through Manumission: A Life-Cycle Approach Applied to the United States and Gaudeloupe' in David Eltis, Frank D Lewis and Kenneth L Sokoloff (eds), *Slavery in the Development of the Americas* (Cambridge University Press, 2004) 150.

ignored for decades.[82] By contrast, in the ancient Roman world, '[t]he disproportionately high representation of freedmen among funerary inscriptions from Italian cities reflects the fact that ex-slaves were better placed to make a success of themselves in the urban economy than the freeborn poor: upon manumission many of the ex-slaves started with skills and a business'.[83]

Not only that, 'freedmen of the great houses could hope for continuing support from wealthy *patroni*'.[84] This is interestingly reminiscent of the modern sociological shift from a lay to professionally educated economy. Tacitus mentions that the freedmen at the top of the imperial bureaucracy were equal with the emperor and with the law – to the annoyance of the senatorial class.[85] Even today, in most high-paying sectors outside academia and science, employees with little or no tertiary education have been ousted by younger competitors with at least a college degree and, more often, a graduate professional degree and a suite or certificates, diplomas, specialist accreditations, guild or association memberships, and other professional embellishments.[86] Public and business administration were taught by experience in ancient Rome, and often it was slaves or former slaves who had the best opportunity, with the master or patron's backing, to gain those skills and either rise in an administrative hierarchy or profit from business ventures.[87]

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[82] Fourteenth Amendment, Section 1 (Equal Protection Clause); Fifteenth Amendment, Section 1.
[83] Richard Saller, 'Status and Patronage' in Alan K Bowman, Peter Garnsey and Dominic Rathbone (eds), *The Cambridge Ancient History*, vol xi, *The High Empire, AD 70–192* (Cambridge University Press, 2nd ed, 2000) 817, 835.
[84] Ibid.
[85] Tacitus, *Annales* 12.60.
[86] See, eg, V Irwin et al, *Report on the Condition of Education 2022*, NCES 2022-144, US Department of Education (National Center for Education Statistics, May 2022), especially that between 2010 and 2021, 25 to 29 year old Americans have seen a considerable increase in the percentage of high school completion and tertiary and graduate professional degrees: 30 <https://nces.ed.gov/pubsearch/ pubsinfo.asp?pubid=2022144>; Cadence Economics, *The Graduate Effect: Higher Education Spillovers to the Australian Workforce*, Report for Universities Australia (May 2016), 12: 'The data shows that [in Australia] employment for those in the 20 to 24 age bracket with university degrees has grown at an annual rate of 2.8 per cent compared with 0.08 per cent for those without university degrees.'
[87] Simonetta Segenni and Cesare Letta, *L'amministrazione romana: Stato e città in età repubblicana e imperiale* (Carocci, 2023) 45.

Based on a close reading of Statius' poetry, Paul Weaver reconstructed the administrative career of the father of Claudius Etruscus (his own name is unknown) and revealed one such freedman success story: a man who rose from servitude in the reign of Tiberius to head the financial administration as an equestrian under Vespasian.[88] Most slaves did not rise to such heights, but the relatively small number who did formed a distinct class. Etruscus' treatment was not unusual: imperial freedmen were frequently admitted to the equestrian order, the natural home of plutocrats and meritocrats without the distinction of an ancient family name.[89] 'The gratitude of men of this class towards the emperor for their advancement is revealed by a statue from Pola of Septimius Severus, erected by M Aurelius Menophilus, the son of a freedman', who goes on to praise 'the most indulgent emperor'.[90] Roman law had always been relaxed about servile status: it was restrictive but the routes out of it were many.[91] This legal flexibility laid the foundation for a major social transformation. As Caillan Davenport has remarked, 'equestrian rank was conceived as a status that could be achieved through hard work, business sense and the right connections at court'.[92] These are the qualities of the meritocrat who seeks advancement through personal qualities rather than kinship connections, for even his connections at court or elsewhere are for the most part acquired by personal acumen and charm. But these are also the virtues and rewards prized by an individualistic society. Alexis de Tocqueville's most famous observation of early American society was about its tendency to individualism: paradoxically, the tyranny of the majority emerges once most individuals depend upon the state and all other mediating institutions, from

[88] P R C Weaver, 'The Father of Claudius Etruscus: Statius, *Silvae* 3.3' (1965) 15 *Classical Quarterly* 145, 145.
[89] Caillan Davenport, *A History of the Roman Equestrian Order* (Cambridge University Press, 2019) 145–8, 204–52.
[90] Ibid 246–7.
[91] G.1.16–24; Buckland (n 71) 397–675; Andrew Lewis, 'Slavery, Family, and Status' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press, 2015) 151, 154–5. This point is excellently illustrated by the provision of the *lex Aelia Sentia* of AD 4 whereby Junian Latins (ie, irregularly manumitted slaves) who marry a female Roman or Latin and beget a son who survives his first year can go to the praetor to be himself admitted to full citizenship: G.1.29.
[92] Davenport (n 89) 251.

family to church, wane in importance.[93] We can detect the same pattern in imperial Roman society. Davenport continues:

> Over the course of the first century AD equestrian rank came to be recognised as a benefaction from the emperor himself, a change consolidated by the permanent investment of the censorship in the imperial office from the reign of Domitian onwards. … In the monarchical *res publica* membership of the *ordo equester* was not only a state honour – it was an imperial one.[94]

And just as Roman law opened this social route by its lenient attitude to manumission and other modes of social-status transfer, so too did a suite of legislation – piecemeal, but tessellated into a full structure of class-based privileges – entrench the social position of freedmen who made it into the equestrian order by such trappings as sumptuary rules and reserved seats in the theatre.[95]

Many slaves did not even have to wait until manumission to enjoy real success. There are bountiful examples, in both the literary and epigraphic evidence, of the considerable wealth of slaves of various types, in various times, and from various pursuits in business, education, and imperial bureaucratic service. Some of the most successful owned palaces, libraries, and silverware; some were great public benefactors, and some even owned their own slaves, and many voluntarily entered servile status to pursue lucrative careers.[96]

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[93] See generally Alexis de Tocqueville, *Democracy in America*, Harvey C Mansfield and Delba Winthrop (trans) (University of Chicago Press, 2000 [1833]).
[94] Davenport (n 89) 252 (italics in original).
[95] Ibid.
[96] Many examples, including some colourful ones, are collected in Cohen (n 42) 31–8. This includes the extraordinary meta-example of slave-owning slaves, an idea over which the jurists seem to have agonised very little: see, eg, D.14.1.1.22.

One the most interesting case studies from the more recent epigraphic evidence is that of Hesuchus, a slave of one of the emperor Tiberius' freedmen. He operated as a private banker on his master's behalf and while such men could only have constituted a fraction of the slave population, they served an important function, formally recognised at law.[97] We learn of this Hesuchus loaning one Eunus 10,000 *sesterces* in AD 37, secured (in modern units of measurement) by close to 100,000 litres of wheat and dried legumes. The loan comprised a suite of contracts: the *mutuum* itself[98] and a separate contract of interest, which yielded Hesuchus and his freedman master some 1,130 *sesterces* which they vigorously pursued. As Andrew Lintott explains, 'Hesuchus [wa]s acting as an agent first for the emperor's freedman and then for the emperor himself, but he is apparently not acting on specific instructions but rather as a commercial entrepreneur, encouraged to make money for his principal and himself'.[99] In fact, a slave might have such latitude as to diversify into multiple economic activities of which his master might not even be aware, yet still be found in some general sense to have authorised the business ventures.[100]

Cohen argues that on one hand, Roman law failed to develop anything resembling a corporation or other purely legal personality; while on the other hand, it enabled a form of agency – in practice, if not in theory – by which slaves, as dependents under the power and therefore in the family of their master, could enter business transactions on his behalf. Cohen may exaggerate the extent of the jurists' failure to recognise corporations of some kind.[101] However, it makes little difference to his argument, which is that an informal law of agency

[97] D.2.13.4.3.
[98] A *mutuum*, or 'consumption loan', was a Roman contract for the transfer of fungible goods (oil, wine, grain, etc) in consideration of the transfer back of an equivalent quantity of the same kind of fungible goods: see D.12.1. It is like a bailment except that the exact same goods obviously cannot be returned.
[99] Andrew Lintott, 'Freedmen and Slaves in the Light of Legal Documents from First-Century AD Campania' (2002) 52(2) *Classical Quarterly* 555, 557.
[100] D.14.5.8. See also Ulrike Malmendier, 'Law and Finance "at the Origin"' (2009) 47(4) *Journal of Economic Literature* 1076, 1084.
[101] See, eg, D.3.4.2.

allowed Romans to operate firms, in the economic sense of the term, without the aid of either corporate or partnership structures, since several slaves could acquire rights and incur obligations on their master's behalf, in many places at once, merely by their status *as* his slaves.[102] Cohen takes the argument one step further. Many masters preferred, or were pressured by the dignity of their rank, not to pursue business enterprise beyond the socially acceptable pursuits of agriculture that we will see in the case study of Pliny the Younger.[103] Moreover, their legal liabilities could be limited only by not knowing about, let alone authorising, the commercial activities of their slaves. Thus, in Cohen's words, did wealthy freeman perfect the art of 'limiting liability by empowering slaves'.[104] Curiously, then, the law permitted commercially experienced slaves a surprising latitude of commercial activity and contractual freedom. This, of course, did not mean freedom to buy and sell one's own property, since the contractual rights and obligations incurred by a slave were of course imputed to the master; but to recall the case study given above, it was the slave Hesuchus who made the business decisions, and who doubtless kept a cut of the profit in his *peculium*.[105]

A key insight of Cohen's study is that the economic opportunities available to slaves belied their nominally low juridical status; it can hardly be said that Roman law favoured slaves, which is only to say that no legal system favours slaves by definition. Yet a wealthy slave might have cared little what the law thought of him – let alone the jurists who wrote that treatises he need never have read. This is hardly anomalous in the history of legal taxonomies: consider, for example, the tenuous nature of common law 'ownership', compared with what any layperson might reasonably think it means to 'own' their own house.[106] Of course, while

[102] Cohen (n 42) 41–2.
[103] See Chapter 7.
[104] Ibid 42–8.
[105] D.2.13.4.3; Lintott (n 99) 558; Jean Andreau, 'Capital and Investment in the Campanian Tablets' in Erdkamp, Verboven and Zuiderhoek (n 7) 417, 420.
[106] Eg, the 'allodial ownership' of the Crown under English law, or private ownership of property in the United States of America subject only to eminent domain under the Takings Clause of the Constitution's Fifth Amendment.

the theoretical disposition of a legal system to certain members of society are not unimportant – it has considerable bearing, for example, on their dignity and social perception – it is less important than what the system enables in practice. Slaves are an especially useful example: the successes of the most fortunate slaves show just how pragmatic Roman law could be, within the apparent confines of its formal structure.

There is a social reason for the relative social flexibility, and attendant prosperity, of skilled slaves in the Roman society. The Roman Empire was an 'open' society: not in the sense made famous by Karl Popper, but in the anthropologist James Watson's distinction between 'open' and 'closed' slave societies. Using the classical counterexample, Antebellum America was a 'closed' system in which the stigma of slavery remained after manumission – largely for racial reasons – so that, for example, a manumitted slave continued to be legally and socially barred from use of public amenities, marrying whites, and so on.[107] In this 'open–closed' modality, the Roman Empire was comparatively 'open'. One could look back to Trimalchio to see this; there was simply no equivalent in nineteenth-century America, no black freedman who made a fortune in business and was invited to Henry Adams' famous breakfasts or to Manhattan's social clubs. As already noted, Roman slaves could be wealthy enough to own other slaves, to be great benefactors, and to occupy posts in the imperial bureaucracy that required good literacy and numeracy skills. They also participated in profitable economic enterprises, as bankers or as fishing entrepreneurs.[108] And because of the openness of Roman slavery – not only the rates of manumission and their relatively favourable treatment under Roman law, but also social acceptance and trust – slaves and freedman had flexible opportunities. As Walter Scheidel explains, 'closed' systems with low manumission rates (such as Antebellum America) prioritise effort-intensive over care-intensive slave labour, while the

[107] James L Watson, *Asian and African Systems of Slavery* (Basil Blackwell, 1980).
[108] Marzano, *Harvesting the Sea* (n 16) 288 n 57.

ancient Romans could allocate slave labour in more diverse ways without disrupting social conventions.[109] Social conventions – reflected in and maybe shaped by generous accommodations in the legal rules – allowed slaves and freedmen to enter and compete in the same care-intensive fields. In other words, they had the job options typically available, *ceteris paribus*, to skilled workers in the society of any place or time.

Few sources attest to the creation of a freedman 'dynasty', if by that is meant some great if newly minted family name akin to a Rockefeller in the age of Adamses and Vanderbilts: they prospered, rather, as individuals in the imperial bureaucracy, or as the most active member of informal business associations, or as provincial élites, rather than as scions of great houses in Italy or Rome itself. State-sponsored myth held that some of the legendary kings had servile origins, but this was hardly any consolation to men and women of no name who made fortunes in their own lifetimes. Horace was famously the son of a freedman, who refused like others to be ashamed of it;[110] and while this by no means prevented his entry into the highest literary and courtly circles, there are no generations of Horatii acting like the old noble families on great estates.

Slaves and freedmen, of course, had to take a different approach. Kostas Vlassopoulos applies what are known as *categorial* and *relational* identities to his study of ancient slavery. In short, categorical identity designates an individual as a member of a category, so that a blonde Thracian slave belongs to the categories of people who are blonde, people who are Thracians, people who are slaves, and many others; whereas relational identity defined an individual by the social relationships peculiar to her, so that the blonde Thracian slave's

[109] Walter Scheidel, 'The Comparative Economics of Slavery in the Greco-Roman World' in Enrico Dal Lago and Constantina Katsari, *Slave Systems: Ancient and Modern* (Cambridge University Press, 2008) 105, 114.
[110] Horace, *Satires* 1.6.89–92.

relational identity includes her relationship with her master and other slaves in the same household (*familia*). Vlassopoulos explains that such relationships are not 'determined solely by the respective social roles of master and slave, but by a wider range of features and factors'.[111] So, once we recognise our Thracian slave's – or any slave's – relational identities as well as her categorical identity as a slave, we have a fuller picture of an individual better described as an *enslaved person*, rather than categorically as a *slave*.[112] So far as the non-literary evidence shows fragments of a slave's life – such as an inscription about her character or deeds[113] – to that extent we can see a real individual. Thus, 'it was the struggle for the recognition of esteem, alongside emotional recognition, that attracted the energy and initiative of enslaved persons'.[114] As I have argued in this chapter, that was the end for which the structure of Roman slavery law was one of the means.

Slaves had no family interests of the kind that the well-born had. They might even suffer legal restrictions on how they disposed of their wealth on intestacy. This promoted a culture of individual wealth-maximisation over family or other communal interest. So, for all the legal and commercial flexibility permitted slaves and explored in this chapter, we come back to two basic truths.

First, it took time for a slave to become a freedman, and for a freedman to build a patrimony; clearly only some of them could achieve this, while the rest lived out the hard life in the world of unskilled labour and inhumanity. Second, and once again, insofar as the Romans thought about 'individualism' beyond perhaps its purely economic form, it was a pejorative notion and certainly not one that merited its own abstract noun. The freedman was the perfect 'individual' in this sense: he emerged from a legal death, new and with nothing behind him,

[111] Kostas Vlassopoulos, *Historicising Ancient Slavery* (Edinburgh University Press, 2021) 95.
[112] Ibid 92–112.
[113] Eg, ibid 95.
[114] Ibid 112.

and hard prospects to earn something from his progeny. Insofar as he had a community around him – and it was community, not individualism, that defined a successful Roman – it was the legally restrictive and socially ambivalent relationship of freedman and patron.[115]

V CONCLUSION

Despite its critics, the Roman economy, scaffolded by a sophisticated legal system, ramified into diverse sectors that presented opportunities for the lowborn as much as the rich noble interested in dabbling. This is not how it has always been perceived, then or now. As Richard Saller has it, 'Pliny [the Elder] thought of the dominant culture of individual and state enrichment primarily in terms of trade, rent-seeking, and predation, rather than in terms of innovation and capital investment in manufacturing'.[116] Where the Romans did innovate in the practical arts (most famously in engineering) it was at times of necessity – as with its impressive naval innovations during the First Punic War – and not during the *pax Romana*.[117] Thus, it has been argued by contrast that the Hellenistic kingdoms encouraged scientific and technological progress because competition between the many and warlike states from Macedon to Ptolemaic Egypt and the Seleucid Empire necessitated it.[118]

But Pliny's appraisal may be too bleak, coming as it does from a famously cantankerous critic of the acquisitive traits of Roman society. The Roman Empire may not have had either the political conditions (constant warfare between smaller states) or the formal institutions (a

[115] On the system of *patroni* and *clientes*, see various contributions in Andrew Wallace-Hadrill (ed), *Patronage in Ancient Society* (Routledge, 2024).
[116] Richard P Saller, *Pliny's Roman Economy: Natural History, Innovation, and Growth* (Princeton University Press, 2022) 77.
[117] See, eg, Marc G DeSantis, *Rome Seizes the Trident: The Defeat of Carthaginian Seapower and the Forging of the Roman Empire* (Pen & Sword, 2016).
[118] Saller, *Pliny's Roman Economy* (n 116) 70, citing Taco Terpstra, 'Roman Technological Progress in Comparative Context: The Roman Empire, Medieval Europe and Imperial China' (2020) 75 *Explorations in Economic History* 101300 and William H Stahl, *Roman Science: Origins, Development, and Influence to the Later Middle Ages* (University of Wisconsin Press, 1962) 29.

developed intellectual property regime) to promote innovation in civilian applications of science and technology.[119] But as this chapter has attempted to show, social necessities prompted economic activities that the institutions of Roman private law accommodated.[120] So perhaps it was a pioneering economy, in the sense at least of individual business enterprise if not of technological innovation.

Though he was fictional, there was a bit of Trimalchio in all the entrepreneurs examined in this chapter, whether man or women, slave, free, or freed. As Judith Perkins observes:[121]

> Trimalchio presents himself as a man of energy, confident and resilient, even in the face of disaster. He describes his reaction when his first commercial venture failed and all his ships sank: 'Do you think I panicked? No, by God, I was no more licked by my losses than if nothing had happened. I built others, bigger, better and luckier, so that no one could say I wasn't brave' (76.5). Brave (*fortis*, 71.12) is one of the adjectives Trimalchio wants carved on his grave monument. His self-presentation confirms his claims to this designation. … In this episode Petronius, even as he satirizes their gaucherie, conveys the desire and energy of these self-made freedmen who have created new lives for themselves in spite of their dismissal by the upper stratum … express[ing] a drive and openness to changing the status quo and creating a social place for themselves …

Courage and drive are decent substitutes for vast inherited wealth. The Roman entrepreneur was less secure, perhaps less patriotic than his Greek predecessors in and around the classical *polis*, but more open to the challenges and vagaries of a complex economy of tenants,

[119] See, eg, Ian Morris, *War! What is it Good For? Conflict and the Progress of Civilization from Primates to Robots* (Farrar, Straus and Giroux, 2014).
[120] See also Erdkamp, Verboven and Zuiderhoek (n 7).
[121] Judith Perkins, *Roman Imperial Identities in the Early Christian Era* (Routledge, 2008) 137, 139.

subtenants, partnerships, commodities, contracts, charterparties, risk calculus, and travel by land and sea. Perhaps he is more like the American hustler who goes through three bankruptcies before becoming an iconic businessman, lecturing his children about the privileges they have and which he never enjoyed while growing up. Maybe Horace heard such stories from his father. Setting aside his great fame as a poet, Horace belongs to that vast class of persons broadly described in this chapter, who were beneficiaries in various ways of Rome's individualistic jurisprudence, and not always merely the victims of a juristic class with aristocratic priorities. It is in this way that the legal concept of the *person* contributed to the Romans' – or at least to some Romans' – moral concept of the *individual*.

Chapter 7

Contract and Property in the Roman Land Economy

I INTRODUCTION

Turning from the entrepreneurs of the previous chapter, it is time to consider what species of economic individualism existed within the laws that regulated Rome's more traditional economy: the agrarian economy. Continuing the theme that Rome's individualistic jurisprudence accommodated the economic activities of non-aristocratic and non-plutocratic citizens and subjects, the focus of this chapter is less on the wealthy landed classes – whose individualism is perhaps more self-evident and in any case the subject of earlier studies[1] – and more on the legal position and economic activities of tenant-farmers who constituted a substantial portion of the free agrarian workforce and worked for them. In essence, this chapter argues that while tenant-farmers were seldom wealthy and of course did not own the farms that they cultivated, they enjoyed a measure of individualism in their ability to negotiate contracts with landlords. While this necessarily involved more uncertainty than outright landownership, this was at least partially offset by the freedom that comes with being a tenant and not being bound to a patrimony.[2] Moreover, this thesis has not argued that individualism is in itself a good; only that Roman law promoted economic individualism, including among the less fortunate.

[1] Eg, Francesco De Martino, *Individualismo e diritto romano privato* (G Giappichelli, 1999 [1941]).
[2] See discussion of de Tocqueville in Chapter 1.

The evidence and analysis that follows in this chapter is primarily concerned with the law and economics of the Late Republic (c 133 to 31 BC) and through to the early to high Empire (ie, up to about the end of the third century AD); by late antiquity, even the modest economic freedoms of individual farmers is increasingly hard to find. For example, many of the dominate's response to the crises was to institute a command economy that favoured supply over quality of goods (let alone liberty): thus were many craftsmen legally bound to enter the same trade as their fathers. No one should bother trying to construe this as one of the inevitable symptoms of a social hierarchy that will exist in even the most egalitarian society. This was simply a regression from the legal landscape that had permitted economic opportunity in more prosperous times.

The subject of this chapter is property law and the opportunities afforded to economically defined individuals who were neither great landowners, nor mere serfs in penury. This chapters compares and contrasts the position of the free farming classes of Greece and Rome. It then examines the 'great estates' (*latifundia*) of late republican and imperial Rome, and the legal system governing the relationship between those who owned these estates and their tenants who actually farmed the land. Finally, the legal concept of *dominium* is discussed for the specific purpose of comparing 'absolute' ownership with the position of tenant-farmers who, though free, did not own real property and operated instead through contracts to lease and work 'their' land.

II THE ECONOMIC INDIVIDUALISM OF GREECE AND ROME

Golden Age Latin literature brims with romantic pastoralism. But there is also a recurring worry about the baleful economic and social consequences of land monopoly. Horace laments

the showy unproductivity of the great estates and their 'celibate plane trees', easy on the eye but literally fruitless.[3]

An older civic culture – of landowners sensitive to communal interest – had degraded into a culture of possessive individualism in the poet's own lifetime. Ironically, Cato the Elder was himself a landowner on a scale unknown to the early Italian yeomanry. Whatever its accuracy, Horace's lament is interesting insofar as it reveals a middle-class concern about the loss of the small (but not too small) farming landholder,[4] the patriot tied to his soil and ready to take up arms to defend it. In the Late Republic and into imperial times, individualism – though there was no precise term for it – was associated either with the selfishness of those who could afford to indulge decorative fancies in their multiple houses in Rome and villas across Italy, or with those too undistinguished to have a name beyond themselves.[5] Neither impression was positive.

Yet the idealised scene held up against this is more reminiscent of the *polis*-era Greek agrarianism than the reality of Roman land economy, perhaps at any time in its history. This reconstruction of the foundations of early Greek democracy is expounded in Victor Davis Hanson's *The Other Greeks*.[6] Hanson argues that the period commencing roughly with the commission to writing of the *Iliad* and *Odyssey* in the late eighth century, down to Alexander the Great in the late fourth century, was misleadingly divided into an 'archaic' and a 'classical' phase by earlier historians; that in fact the period from circa 700 to 300 BC is a cogent whole

[3] See Horace, *Odes* 2.15.10–16 (translated by Colin Sydenham, Bristol Classical Press, 2005); cf Pliny, *Letters* 1.3: '[Your] delightful country house, with that portico of eternal springtime, the big shade of the plane tree …' (*quid suburbanum amoenissimum, quid illa porticus verna semper, quid platanon opacissimus*).
[4] And in this sense, quite unlike the other, self-indulgent strain of 'Golden Age' pastoral romanticism. For Cato's advice about the ideal farm size, see *De agri cultura* 1.7.
[5] See, eg, Clifford Ando, 'Self, Society, Individual, and Person in Roman Law' in Maren R Niehoff and Joshua Levinson (eds), *Self, Self-Fashioning, and Individuality in Late Antiquity: New Perspectives* (Mohr Siebeck, 2019) 375, 379, citing Thomas A J McGinn, '*Cui Bono*? The True Beneficiaries of Roman Private Law' in Dennis P Kehoe and Thomas A J McGinn (eds), *Ancient Law, Ancient Society* (University of Michigan Press, 2017) 133.
[6] Victor Davis Hanson, *The Other Greeks: The Family Farm and the Agrarian Roots of Western Civilization* (University of California Press, 2nd ed, 1999). Other works have corroborated aspects of Hanson's thesis: see, eg, Eric W Robinson, *The First Democracies: Early Popular Government outside Athens* (Franz Steiner, 1997); Robin Osborne, *Greece in the Making 1200–479 BC* (Routledge, 2nd ed, 2009).

witnessing the rise and fall of an idiosyncratically Greek form of agrarian constitutionalism, a social and political ethos that defined the farmer-hoplite class and itself laid the foundations of *polis* culture; that this both succeeded and preceded eras of serfdom and large aristocratic landlordship, first under Mycenean palace culture and Dark Age lordships, and later under the mega-states of the Hellenistic period;[7] and that the '*polis* period' is therefore a more apt description for the half-millennium of Greek history in between. In most *poleis*, be it Athens, Thebes, Corinth, or the innumerable smaller states,[8] the middle-class landed interest essentially dominated Greek democracy before its significant modifications in classical times, especially at Athens. In fact, evidence suggests that when the productive[9] farmer-hoplite predominated, there were at least as many voting citizens – as a proportion of the *polis*' total population – as under the radical democracy of the later Athenian naval empire.[10] Thus did Aristotle recognise the 'agricultural population' as the 'best people', despite (or perhaps because of) the decline of this system between the Persian War, the rise of Macedon, and the growing numbers of foreign merchants and mercenaries in mainland Greece and Asia Minor.[11]

The constituent unit of agrarian democracy was the rural propertied family, the *oikos* (οἶκος). The predominance of a rural middle class certainly encouraged a kind of individualism, not least in the political fact that one vote went to one citizen, and each farmer-citizen or *geôrgos* (γεωργός) was, for the duration of his own life, the custodian and chief worker on his family property, and the one who kept a hoplite panoply for joining his phalanx in bloody yet deliberately short, infrequent, and limited border wars.[12] This type of agrarian constitutionalism

[7] Compare with the Roman system of late antiquity: Boudewijn Sirks, *The Colonate in the Roman Empire* (Oxford University Press, 2024).
[8] Excepting the ever-idiosyncratic Sparta and other 'atypical' regions such as Thessaly and Crete: Hanson (n 6) 103–4, 289–90, 333, 385.
[9] By which is meant above subsistence-level farming, ie, capable of supplying food to everyone within the *polis* itself.
[10] Ibid 207.
[11] Aristotle, *Politics* 1319a, quoted in Hanson (n 6) 199.
[12] Hanson (n 6), especially 219–318.

set both cultural norms and legal strictures to prevent either fissile or aggregative landholding. Thus, to preserve plots of land of approximately equal size and productivity, each family was encouraged to bequeath its property to a single heir, rather than create a gradually impoverished class of brothers all inheriting ever smaller and more agriculturally useless plots.[13]

Two things about these 'other Greeks' matter for present purposes. First, that the Greek agrarian constitutionalism of circa 800 BC to 300 BC is *not* the world that the Romans knew, probably at any time in their history, and makes a useful point of comparison. Second, that while this was a stable system politically, with great advantages in food supply, social cohesion, egalitarianism and restrained militarism, its economy was relatively undynamic; whereas the very different economy and civic ethos of the Romans, while not as edifying as the romantic picture of Greek *polis* life, afforded far greater opportunities for creative entrepreneurialism.[14] All of this may tend to sound ideologically charged, but it is quite the opposite: there is nothing inherently good about an economic system being stable and static on one hand, or volatile and dynamic on the other. Economies of each kind have prevailed at different places and times in history, and each has its advantages according to the different criteria by which they might be judged. The relevant difference is that while the Greek *polis* culture emphasised the primacy of the landholding citizen as a member of the *oikos*, the complexities of Roman private law presented a more unstable, but also freer landscape of economic opportunity for those prepared to find their own way. The difference is between two kinds of economic individualism.

Greek *geôrgoi* were encouraged to have families, but as already noted, were relatively unusual as a productive class that preferred having only one son to either splitting inheritances or imposing primogeniture. Roman law took a different course, most conspicuously in

[13] Ibid 202. Hanson likewise postulates 'an enforced code of the Greek *polis*, a social ethic at work that discouraged the accumulation of property': 186, 188.
[14] See Chapters 5 and especially 6.

Augustus' legislation for the promotion of fruitful marriages.[15] One could go further and suggest that even legal norms opposed to Augustus' agenda procured a similar effect: namely those that secured easy divorces under Roman law.[16] Inevitably, each subsequent son in a nuclear family, or the son by a different mother, might then have to strike out on his own, but he had the variegations of Roman private law to help him find a path of his own. This offered imperial Romans – including its many free but non-citizen subjects – little of the civic dignity of the *geôrgoi*. Yet it undoubtedly encouraged individual enterprise, in a more dynamic but less stable economy.

That commercial culture was encouraged by some developments in Roman property law. In short, non-Quiritary proprietary interests and semi-proprietary contractual rights such as leases (*locatio conductio*), though more tenuous than ownership (*dominium*), also gave more latitude to individual enterprise in commerce; or at least to individual lifestyles, in the decision to live alone as a tenant rather than as a member of a clan *domus*, to move from one property to another, or to dispose of a usufruct as one pleased.[17] Perhaps even more significant was the concept of property in all parts of the Roman world beyond Italy, which is to be explored in the next chapter. First, however, it is appropriate to examine the economic and then the legal landscape of Italy itself, which establishes the terms of references and for which the evidence – both economic and legal – is more abundant.

[15] Cf Gregory Clark, *A Farewell to Alms: A Brief Economic History of the World* (Princeton University Press, 2007) 73–5, which argues that upper-class norms trickled through the rest of modern European society because aristocrats were more fecund. Clark also notes, at 78–9, that the evidence from Roman Egypt suggests is for fertility rates inhibited by certain social practices despite frequent early marriage.

[16] Augustus did not condone divorce for its own sake but if a person of marriageable age was no longer married for whatever reason (divorce or death of spouse), they were expected to *re*marry: Richard I Frank, 'Augustus' Legislation on Marriage and Children' (1975) 8 *California Studies in Classical Antiquity* 41.

[17] Subject, of course, to the appropriate authority of a *tutor*.

III PROPERTY IN ITALY: THE MYTH OF THE LATIFUNDIUM

As the focus of this chapter is on land subject to Roman law – so land located in Italy – the first thing is to broadly understand the size and structure of productive agrarian properties. The traditional account held that from the Late Republic, more and more land concentrated in the hands of the very richest, so that apart from public land and lands allotted to veterans of the bloody civil wars, most arable land had formed into the *latifundia* or great estates, cultivated mostly by slave labour.[18] The consequences of this must of course have been momentous, as agriculture formed the largest sector by far of the Roman (or indeed any ancient) economy, which allowed plutocrats and aristocrats alike to vaunt their rustic credentials.[19] All this was bound to have an effect on the nature and significance of property and contract law.

Scholars are now duly cautious about the word *latifundium*. There is consensus neither in ancient nor in modern agronomy about criteria (which must always be arbitrary anyway) such as the minimum size of *latifundia* or whether *latifundia* are always conjoined or may simply describe the scattered landholdings of a plutocrat standing well above the senatorial monetary threshold.[20] Doubtless this makes it much easier to take a contemporary critic of the great estates – whether a Horace or a Columella – on their word.[21] In fact, Columella's observations in his agricultural treatise are even more interesting than Horace's in the *Odes*. For while the poet derided the pleasure-gardens of the wealthy landowner, the agronomist cautioned something more sinister. Columella thought, not only that a larger plot of land, say

[18] See, eg, M Cary and H H Scullard, *A History of Rome: Down to the Reign of Constantine* (Palgrave, 3rd ed, 1975) 187–8; H H Scullard, *From the Gracchi to Nero: A History of Rome 133 BC to AD 68* (Routledge, 5th ed, 1982) 172–5, 322–4. Pliny the Elder raises his complaint about this in *Naturalis historia* 18.35. On the land distributions of the Late Republic, see Andrew Lintott, *Judicial Reform and Land Reform in the Roman Republic: A New Edition, with Translation and Commentary, of the Laws from Urbino* (Cambridge University Press, 1992) 34–58, 171–286.

[19] Cicero, *Pro Roscio* 50–1.

[20] Peter Garnsey and Richard Saller, *The Roman Empire: Economy, Society and Culture* (Bloomsbury, 2nd ed, 2014) 93–4.

[21] Horace, *Odes* 2.15; Columella, *De Re Rustica* 1.3.

50 *iugera*,[22] was more vulnerable to degrading than the good old-fashioned 7 *iugera*.[23] Worse yet, he warned if all the land in Italy concentrated into fewer hands, then Roman citizens who might otherwise have bought their own plots instead tilled those of others, which degraded not only the land they tilled, but also their own moral and economic status.[24] Much later in history, the same logic would motivate antitrust legislators who believed that too much opportunity for some destroyed the opportunities of others.[25] Columella certainly believed in private ownership,[26] but also believed that the *res publica* ought to cap the landholdings of every citizen to a level that neither corrupted him nor reduced his fellow-citizens to bondage. He even hints at ethical doubts about landowners employing too many servile chain-gangs,[27] and exhorts landowners to leave the effective management of their more scattered holdings to their tenant-farmers.[28] These argument were as much moral as economic.

Columella's basic argument is plausible: or it would be if the facts fit the complaint. It matters greatly that most *latifundia* were not as described by poets and satirists, and that the plight of the tenant-farmer was at least not as doleful as Columella supposed. One of the most useful literary sources for this, as with so many related problems, is the letters of Pliny the Younger. His letters are useful not just because they are extant sources for the study of Roman landowners, but also because Pliny appears to have been a reasonably typical landholder of his class, in the type, location, management of his properties, and the consumption of their income.

[22] 1 *iugum* ≈ 0.25 ha ≈ 0.623 ac.
[23] Columella 1.3.9–10.
[24] Ibid 1.3.12. Interestingly, this is still only half the size of the ideal farm opined by Cato in *De agri cultura* 1.7.
[25] John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (Prometheus, 1997 [1936]) 220–1, 372–83.
[26] Columella opines that 7 *iugera* is the optimal amount of private ownership for one household unit, after which there are only diminishing returns in virtue and communal benefit: *De Re Rustica* 1.3.9. There were very few genuine communists in the Graeco-Roman world, whether in theory or in practice. Even Plato has been misunderstood as advocating the abolition of property as such: Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge University Press, 2007) 6–30
[27] This was a genuine ethical quandary among the propertied classes. Pliny, for example, never chained his slaves: *Letters* 3.19.
[28] Columella 1.7.6–7.

In one letter, Pliny expresses doubts about purchasing a large estate adjoining his own. This reveals more than a personal dilemma. It illustrates not only the advantages of landownership, but also its perils. Writing to Calvisius Rufus, Pliny outlines the obvious economic advantages in concentrating the necessary resources in one place to serve a larger property. On the other hand, he acknowledges the risks inherent in concentrating capital investment, whereas 'it might be safer to meet the hazards of fortune by having estates in different localities'.[29] Here Pliny corroborates the non-literary evidence that single great estates were rarer than scattered holdings among the wealthier landowners (for even with the purchase of the adjoining estate, Pliny's landholding was not confined to this area alone, which were diffused throughout the area around his native Comum,[30] and also in Rome, Campania, and elsewhere). So far from all land in Italy being divided into a few great estates, each covering one contiguous mass, upper-class Romans' landholdings were more often parcelled out.[31] These were not cultivated by press-gangs, but by smaller numbers of slaves under the auspices of – but also working alongside – free tenant-farmers with resources sufficient to lease and manage the plot of land from which the owner derived a reasonably steady income.[32]

Two other observations stand out for present purposes. First, Pliny reports that the prior landowner had sold his tenants' possessions several times, which reduced their arrears but worsened their condition in the long run. [33] The word he uses for 'possessions' is *pignora*, a *pignus* being a pledge or secured thing.[34] So while these particular tenants, at this particular time, were clearly in financial straits, so too apparently was their landlord. But this is also a hint about the things that tenants owned, albeit encumbered by a contract of security. In the

[29] [*T*]*utius videtur incerta fortunae possessionum varietatibus experiri*: Pliny, *Letters* 3.19.
[30] Modern Como.
[31] Annalisa Marzano, 'Agriculture in Imperial Italy' in David Hollander and Timothy Howe (eds), *A Companion to Ancient Agriculture* (John Wiley & Sons, 2020) 431, 439–40.
[32] Dennis P Kehoe, *Investment, Profit, and Tenancy: The Jurists and the Roman Agrarian Economy* (University of Michigan Press, 1997) 189–90.
[33] Pliny, *Letters* 3.19.
[34] D.20.1; C.8.13.

same letter, Pliny mentions his costs in maintaining the farmhouse itself, including furniture, staff, and slaves. Usually, the tenants owned the equipment necessary for agricultural output (except of course for fixtures on the landlord's property). Labeo mentions the pledge of a tenant's movable property as security for the lease; which, if this was an agrarian property, indicates that this had been the norm since at least the reign of Augustus and probably in the Republic;[35] while Ulpian discusses it explicitly two centuries later.[36] The standard or at least a common arrangement in imperial tenant-farming may therefore have been one in which the rural landlord provided the land for both work and tenancy; the tenants supplied a mixture of labour and capital goods; and landlords and tenants shared the profits of their joint capital investment, with the tenant paying a fixed rent in cash or perhaps by sharecropping.[37] *Ceteris paribus*, where tenants owned the capital goods, including tools and slaves, their responsibility for the management of the estate, and their corresponding bargaining power, was greater to that extent.[38] For while evidently the capital was often pledged to the lease, any farmer who was diligent and lucky enough in the harvest had in principle the option to take his business – and his tools of the trade – elsewhere.[39] Pliny mentions that to ameliorate both the condition of the tenants and the profitability of the estate, he would have to supply unchained slaves, which would be costlier. But as Pliny acknowledged, where a landlord was prepared to make that investment, it benefited his tenants as well. And besides, the jurists also do refer to tenant-

[35] D.20.6.14.
[36] D.43.33.2.
[37] D.19.2.25.6.
[38] Wim Broekaert and Arjan Zuiderhoek, 'Capital Goods in the Roman Economy' in Paul Erdkamp, Koenraad Verboven and Arjan Zuiderhoek, *Capital, Investment, and Innovation in the Roman World* (Oxford University Press, 2020) 99, 102; Kehoe (n 32) 189–90, 233–4.
[39] Sir Moses Finley acknowledges that debt-bondage would not have been the norm among the tenant-farmers, even if he considers that they broadly represented an underclass of freemen or freedmen who could not afford their own farms: M I Finley, 'Private Farm Tenancy in Italy before Diocletian' in M I Finley (ed), *Studies in Roman Property* (Cambridge University Press, 1976) 103, 116–17. On worker mobility, see also Paul Erdkamp, 'Seasonal Labour and Rural–Urban Migration in Roman Italy' in Luuk de Ligt and Laurens Ernst Tacoma (eds), *Migration and Mobility in the Early Roman Empire* (Brill, 2016) 33.

farmers who own slaves, which we can assume was true for at least some members of that class.[40]

Second, the asking price for the adjoining estate tempting Pliny was three million *sesterces*,[41] down from five million, since 'this scarcity of tenants and the general bad times have reduced the income from the land and brought down its value'.[42] Again, these 'bad times' seem to have hit everyone hard, with the landlord calling on security to recoup liquidity, and his tenants paying down debt at the cost of long-term investment in movable capital. But the 'scarcity of tenants' (*penuria colonorum*) is an important phrase and easily overlooked. It is a rather different complaint to scarcity of slaves. The ratio of supply to demand made no difference to the slaves' condition in the market;[43] by contrast, a tenant in short supply could make demands that a slave could never make. Perhaps he could insist on a higher ratio in a sharecropping arrangement. Or he could oblige the landlord to accept less rent. Or perhaps – which Pliny's letter suggests, even if it does not say so directly – landlords did not always choose to increase slave labour but might find this was a condition of their tenants' continued services.

IV PROPERTY IN ITALY: THE REALITY OF TENANT-FARMING

In his study of investment, profit, and tenancy in the Roman land economy, Dennis Kehoe skilfully uses the extensive juristic texts to reconstruct the main features of upper-class Roman economics. Far from encouraging risky enterprises in others or undertaking such enterprises

[40] Eg, D.9.2.27.11.
[41] For context, the property qualification for senators at this time was one million *sesterces*: Augustus, *Res gestae* 8.
[42] [*V*]*erum … hac penuria colonorum et communi temporis iniquitate ut reditus agrorum sic etiam pretium retro abiit*: Pliny, *Letters* 3.19.
[43] Not including the privileged few educated slaves discussed in Chapter 6, who would perhaps have enjoyed bargaining power during labour shortages.

themselves,[44] larger Roman landholders[45] sought mostly to maintain and, where possible, increase income derived from the primary source of economic output, which they held in disproportionate quantities as the landlord (*dominus*). The form of income was either rent, sharecropping, or a combination of both.[46] Whichever it was, the landholders derived their income not from direct participation in agricultural activity – like Hanson's 'other Greeks' or Odysseus' father working the fields alongside his own slaves – but from the lessee farmers like those which Pliny mentions in his letter to Calvisius, whose rent provided the landlord with a steady and reliable income so necessary to both maintaining their wealth and status and to ensuring cashflow for the public munificence which the wealthiest were socially obliged to support.[47] This is consistent with the logic of kinship-bound landed élites in more times and places than ancient Rome.[48]

Kehoe's overarching point is that the Roman jurists elaborated a system of property and contract law that had as its focus, and thereby encouraged, the socioeconomic habits of the landowning class.[49] But while the law was above all a friend of that class, the consequent reliance on tenant-farmers – who lived on and effectively ran, even if they did not own, the property in question[50] – promoted a contract-based economic system. Contrast this with alternative systems: say, a command economy like New Kingdom Egypt, where the labour force comprised only slaves or technically free persons in a closely equivalent economic and legal position, and the labouring class was probably paid with fixed amount of staples such as grain, rather than negotiating cash wages to use as they pleased in the market;[51] or early

[44] See Chapter 6.
[45] Specifically, larger Roman landholders of good birth – freedmen under Augustus were subject to restrictions on what they could pass on to their own children.
[46] Kehoe (n 32).
[47] Ibid 25–6.
[48] See Chapter 1, especially on the observations of Cato and Tocqueville.
[49] Kehoe (n 32) 1–21, 237–40.
[50] D.19.2.39. See Saskia Roselaar, 'Agriculture in Republican Italy' in Hollander and Howe (n 31) 417, 424, who points to the existence of a 'middle class' that makes a simple distinction between 'rich' and 'poor' untenable.
[51] Jac J Janssen 'On Prices and Wages in Ancient Egypt' (1988) 15(1–2) *Altorientalische Forschungen* 10.

medieval Europe, where the primary agrarian labour force comprised serfs freer than slaves in certain ways, but legally tied to the land and thus deprived of a critical wage-bargaining drawcard.[52] So again, while the legal texts brim with rules derived from the jurists' assumptions about upper-class social and economic behaviour, this did not mean that the tenant classes had no autonomy at all.[53] Indeed, it is the defining characteristic of any contractarian economy that the law guarantees at least a theoretical freedom of choice.[54] This all but dismantles the older historiography ascendant in the time of Sir Moses Finley, who held that there was no real labour market because slaves or quasi-slaves comprised almost the entire labour force in ancient Rome.[55] On the contrary, a free and mobile labour force and a system of contract law – the essential ingredients for a genuine labour market – evidently did not have to wait until the era of Smith and Ricardo to come into existence.[56]

All of this had ramifications for both the legal status and social position of tenant-farmers.

First, the great landowners' need for competent agrarian management promoted a market of free, contracting individuals. It has been noted before, and should be stressed again, that individualistic tendencies do not necessarily mean that those individuals are more prosperous: but economic individualism does mean that individuals are treated as such by legal

[52] Chris Wickham, *Framing the Early Middle Ages: Europe and the Mediterranean, 400–800* (Oxford University Press, 2005) 259–61; Alice Rio, *Slavery after Rome, 500–1100* (Oxford University Press, 2017).
[53] Noting, however, that the situation changed over the course of the late dominate, when the rights of the tenant were greatly restricted: see, eg, C.2.50.2.3 and Sirks (n 7).
[54] See, eg, the outline models for 'simple' and 'possessive' market societies in C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford University Press, 2011 [1962]) 51–61.
[55] M I Finley, *The Ancient Economy* (University of California Press, 1999 [1973]); Keith Hopkins, *Conquerors and Slaves* (Cambridge University Press, 1978) 109; cf Peter Temin, *The Roman Market Economy* (Princeton University Press, 2013) 114–38; Annalisa Marzano, 'The "Many Faces" of the Roman Economy: Modern Preconceptions and Some Considerations on Capital, Technology, and Labour' in Marcella Frangipane, Monika Poettinger and Bertram Schefold (eds), *Ancient Economies in Comparative Perspective: Material Life, Institutions and Economic Thought* (Springer, 2022) 187, 190–3, which summarises the material evidence refuting Finley's thesis that slave-reliant landlords had no incentive to, and therefore did not, invest in agricultural technology such as watermills.
[56] Temin (n 55) 115.

rules and categories. Thus, while the tenant-farmers obviously did not have *dominium* over the land they tilled, they had legal rights concomitant with their bargaining power.

Leases, says the jurist Paul, are recognised in the universal *ius gentium*, for which reason they are valid if formed by mere agreement and not by formal words.[57] Hence, tenants were not subject to the formalities which would continue to burden Quiritary ownership well into late imperial society. In fact, it appears that the only indispensable term for a valid lease (*location conductio*)[58] was the rent.[59] It could hardly have been otherwise: many of Pliny's tenant-farmers, for example, were both longstanding residents and were working scattered, non-contiguous plots of land. In a letter describing his daily routine while summering in Tuscany, Pliny mentions giving some of the day over 'to my tenants (they think it should be more) and the boorishness of their complaints gives fresh zest to our literary interests and the more civilised pursuits of town'.[60] Town-and-country snobbery aside, evidently Pliny could only give concentrated attention to the tenant-farmers wherever he was residing at a given point in time; absent more serious complaints, it was – as will be shown in a moment – a crucial expedient for both landlord and tenant that leases were easily formed and renewed on essential terms. In another letter, Pliny apologises to a friend that he is detained and cannot return to Rome; he must negotiate long leases with some tenants. This might have caused little grief in the normal course of things, but this case was bad because, despite steady rent reductions, the tenants were still in arrears which they apparently had lost hope of ever satisfying in full. They had 'even seize[d] and consume[d] the produce of the land in the belief that they [would] gain nothing themselves by conserving it'.[61] Pliny's foreshadowed solution is to replace a fixed cash

[57] D.19.2.1. See also C.4.65.24.
[58] The type of *locatio* referred to here is the *locatio* of a *res* (here, land) by the *locator* (lessor/landlord) to the *conductor* (lessee/tenant-farmer).
[59] D.19.2.2.pr.
[60] [*D*]*atur et colonis, ut videtur ipsis, non satis temporis, quorum mihi agrestes querelae litteras nostras et haec urbana opera commendant*: Pliny, *Letters* 9.36.
[61] [*R*]*apiunt etiam consumuntque quod natum est, ut qui iam putent se non sibi parcere*: ibid 9.37.

rent with sharecropping.[62] No doubt this solution would have kept the tenants more honest, so to speak, and checked their recklessness; but it suggests more a compromise of interests than a sharp asymmetry in bargaining power.[63]

So much for tough cases in tough times. Where no such issues arose, tenant-farmers would stay in possession and the lease would persist. At the end of an agreed term, if neither party said anything and the tenant stayed where he was, the legal assumption was that the parties had tacitly agreed to renew the lease for another year, and this could go on year to year.[64] From an economic perspective, there is no need to labour the point: default renewals are obviously efficient and long-term tenancy security was the only way to incentivise farmers to cultivate labour-intensive crops that needed a long time to grow.[65] From a legal perspective, it is also significant how the jurists construed party agreement. Unlike an executory contract (ie, one where the parties agree that they will each do something in the future), a party's continuing to dwell on or otherwise use land is by definition available as reasonably certain and even more efficient proof of intention. Ulpian's statement that the parties 'are considered to agree by the very fact of their remaining silent' may seem a truism in the circumstances.[66] In fact, there are no similar assertions made in the surviving legal texts of any other ancient civilisation.[67] It is an important moment in the history of contract. A modern empirical study has shown that consumers interpret silence regarding warranty and return policies for iPods consistently with the legal meaning of silence in that context, which is to imply a warranty of merchantability.

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[62] Ibid.
[63] A N Sherwin-White, *The Letters of Pliny: A Historical and Social Commentary* (Oxford University Press, 1998) 255.
[64] D.19.2.13.11.
[65] Dennis P Kehoe, *Law and the Rural Economy in the Roman Empire* (University of Michigan Press, 2007) 96.
[66] [*H*]*oc enim ipso, quo tacuerunt, consensisse videntur*: D.19.2.13.11. Reaffirmed in C.4.65.16, using the phrase *tacito consensu* and clarifying that goods pledged under the expressly agreed lease are duly repledged.
[67] To take one example, Code of Hammurabi §60 speaks of a person giving over his land to a gardener to cultivate for four years, and in the fifth year the land is divided between them. But there is nothing about the gardener merely leasing the land *and* remaining as lessee for so long as the parties' conduct, however passive, indicates objectively that the lease should continue.

As most consumers intuit this arrangement, both they and the seller are spared the expense of formalising this in their contract.[68] Ulpian's maxim starts to look sophisticated, even rather modern: the juristic rule on silence in leases anticipates the parties' likely intention, which spares them the transaction cost of having to spell it out. Thus the law shapes itself to contracting individuals' unspoken wishes; the law gains in elegance and simplicity; and the individual gains by efficiency and a sense of economic security.[69] Thus our Pliny is spared unnecessary piles of periodic, repetitive paperwork on top of the usual 'boorish' complaints that he must answer during his property inspections.

The second consequence of this legal structure has to do with the social position of tenant-farmers. Many things are unknowable about this class of Roman:[70] we are dependent on indirect sources, such as the abstractions of the jurists who wrote about *locatio*, or the letters of Pliny in which he is by turns sympathetic, businesslike, and snobbish. Some social observations, however, can be inferred from facts. Tenant-farmers obviously did not own the land they worked; they could not develop the same civic outlook or sense of propriety or family legacy as the 'Other Greeks' of Hanson's study. They might still have prospered, of course: they might be skilled farmers; they might own much of the capital on the land;[71] they may have leased long tracts of fertile land and managed a sizeable workforce of their own or of their landlord. They could even bring an action under the *lex Aquilia* against an interloper who damaged the property, which moreover would preclude a similar action being brought by the

[68] Yair Listokin, 'The Meaning of Contractual Silence: A Field Experiment' (2010) 2(2) *Journal of Legal Analysis* 397.
[69] 'Tenancy came with the risk of exploitation, but also benefits, particularly as landowners were typically responsible for providing their tenants with capital infrastructure such as presses and cellars and bore some of the burden of risk in the event of bad harvests': Candace M Rice, 'Comparative Advantage, Specialized Viticulture, and the Economic Development of Gallia Narbonensis' (2023) 36(2) *Journal of Roman Archaeology* 261, 289.
[70] See Finley, 'Private Farm Tenancy in Italy before Diocletian' (n 39) 112–13.
[71] Note, however, that any movable things that a tenant brings onto the leased farm is held under right of pledge by the *locator*: C.4.65.5.

landlord – and a tenant having such rights may rightly feel at a certain level that it is 'his' land he is defending, as well as his economic rights that he is vindicating.[72]

But it was inherently harder for a tenant-farmer to build up a patrimony. His son might inherit savings and tools of the trade, and he might reinvest this into his father's trade or leave the *latifundia* and pursue work elsewhere. It is hard to say what exactly he might do. We have seen that Roman private law promoted a kind of economic individualism by emphasising the role of consent to economic relations between contracting individuals, in this case between landlord and tenant. But the other aspect of ancient individualism is that the individual does not have a patrimony to feel responsible to. There is no family farm to bequeath, nor disposable income to apply as social and political largesse. The ancient individual is both liberated from the obligations of higher classes defined more by their communal and kinship obligations; but also defined more by what he does from year to year, lease to lease, by agreement in the market during his own lifetime, than by any legacy to the next generation. This is no attempt to romanticise the unpropertied classes of the rural Roman empire; only to identify some of the legal and economic circumstances that shaped the individualistic behaviours of their time.

V DOMINIUM, LEASE, AND POSSESSION

That said, even the tenant's property interest appears securer once it is admitted that the Roman legal concept of *dominium* – the ownership right enjoyed by the landlord – has been overstated.[73] In a broader discussion of 'rights' and 'freedoms', Friedrich Hayek briefly acknowledges 'the Roman conception of property as a right to use or abuse an object as one pleases' but added that this was hardly practicable in reality, and merely illustrated the

[72] D.9.2.27.14.
[73] Max Kaser, *Eigentum und Besitz im älteren römischen Recht* (Böhlau, 2nd ed, 1956) 17–18, 28–9. See also Chapter 3.

arbitrariness of any definition of property beyond certain universal characteristics.[74] Peter Birks gives a simple example of the limitations of 'absolute' ownership: just because someone is on your property (even without permission) does not mean you can treat him as you please, for the law of delict (like modern tort and criminal law) implicitly restricts the otherwise pristine right of *dominium*.[75] It has never been possible under any legal order to do whatever you want on your own land, without limitation of any kind. Building on Birks' article, Helen Scott has observed that in practice, it was generally easier for a landowner to prove possession immediately prior to a third party, than to bring a suit of *vindicatio* proving his *dominium*; the latter was overkill for the usual purpose of defeating someone who was obviously not a legitimate possessor let alone owner.[76] Similarly, the legal doctrine of the possessory interdict involved an action against a dispossessor and thus could be brought by a possessor who did not have to hold *dominium* at all.[77] Other examples can be found in the *locatio* relationship under present consideration: that a lessee may sublet the property if the original lease permits or is even silent on the point;[78] that if the parties disagree about the rent but the landlord thinks it is lower, the rent is capped at that rate;[79] and that the landlord cannot rescind a lease on the bare argument that the rent is too low.[80] The imperial chancery advised a suitor that 'in leasing and hiring the terms of the contract are especially to be observed, if nothing specific should be expressed against the custom of region'.[81] True, this differs from the typical position in modern

[74] F A Hayek, *The Constitution of Liberty* (Routledge, 2006 [1960]) 138.
[75] Peter Birks, 'The Roman Law Concept of Dominium and the Idea of Absolute Ownership' [1985] *Acta Juridica* 1, 19.
[76] Helen Scott, 'Absolute Ownership and Legal Pluralism in Roman Law: Two Arguments' [2011] *Acta Juridica* 23, 26–31.
[77] See Raffaele Caterina, 'The Evolution of Possessory Actions in France and Italy' in Eric Descheemaeker (ed), *The Consequences of Possession* (Edinburgh University Press, 2014) 95, 95–6.
[78] C.4.65.6.
[79] D.19.2.52.
[80] D.19.2.23.
[81] [*C*]*irca locationes et conductiones maxima fides contractus servanda est, si nihil specialiter exprimatur contra consuetudinem regionis*: C.4.65.19.

law, whereby express party intention prevails over evidence of custom and trade usage.[82] But it is striking enough to see a general rule of party intention stated so clearly, especially when we are told so often in modern textbooks that there was no unitary Roman concept of *contract*, only technical rules about specific *contracts*.[83] Note however the wording in the original Latin: regarding leasing and hiring (*circa locationes et conductiones*) as a category, the terms of the *contract* are especially to be observed (*maxima fides contractus servanda est*): that is, once the specific subject matter of leasing and hiring is introduced, the maxim is stated with respect to *contracts* (*contractus*). This is an important maxim about the weight to be given to parties' intentions and is therefore more than a mere clarification or restatement of the one unifying (if truistic) concept of Roman contracts begrudged by modern scholars, that every contract is an agreement between contracting parties.

Lastly, an imperial rescript of 239 even acknowledges that leases are heritable, whether they are perpetual or have not exhausted their fixed term at the testator's death.[84] Then, doubtless the same rule applies that silent continuation of the arrangement upon expiry is taken as the landlord and the successor-in-lease's mutual consent to extend by one year.[85] This is hardly a durable family patrimony. A Roman lease was (as also in some modern common law jurisdictions[86]) a contract, but one which created a proprietary interest, for what that was worth and notwithstanding that its survival from year to year depended on the will of the *dominus* and his successors in title.

While no jurist had the radical impulses or motivation to ever seriously disturb the proprietary interests of someone like Pliny or another comparably wealthy and connected

[82] See, eg, *Uniform Commercial Code* § 2-202 (where evidence of trade usage does not override but may only 'explain[] or supplement[]' party agreement).
[83] I have said my peace on this in Chapter 5.
[84] C.4.65.10.
[85] D.19.2.13.11.
[86] See, eg, *Willmott Growers Group Inc v Willmott Forests Ltd (recs and mgrs apptd) (in liq)* [2013] HCA 51; 251 CLR 592.

landowner, those interests seldom needed to do more than ensure heritability, ultimate control, and reliable income. Beyond this, it seems, the jurists – and the *domini* they doubtless advised – were happy for tenants to act and feel like they owned the properties they leased. The latter had contractual rights as legal persons, which resonated psychologically with their sense of individualism.

VI CONCLUSION

Nearly everyone who writes about Roman law cannot resist quoting Gaius' famous boast that 'there are virtually no other peoples who have such power over their sons as we have over ours'.[87] Richard Saller has demonstrated that legal rules about *patria potestas* are misleading about demographic realities. Romans, with an average life expectancy at birth of around 25 years, did not live long enough to dominate the affairs of their adult family dependents.[88] But the evidence examined so far tends to go further: it suggests that by the last years of the Western Empire, Roman jurisprudence bequeathed to its medieval and modern successors a complex system of private law. Complex though this was, many of its complexities were stripped out when the social circumstances which gave rise to them no longer obtained. Thus it was with many aspects of the law of persons, such as slavery, the agnatic–cognatic distinction, and of course *patria potestas*, as well as all the peculiarities of Quiritary ownership, including the increasingly burdensome modes of acquisition by *mancipatio* or *in iure cessio*. These – or at least the formal rules that endorsed and regulated these concepts – slowly disappeared over the

[87] [*F*]*ere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus*: G.1.55. But see, among other commentators, John Crook, '*Patria Potestas*' (1967) 17(1) *Classical Quarterly* 113. Richard P Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press, 1994) 102–3 helpfully reminds us that the absolutist perception of *patria potestas* owes at least as much to the conquered Greeks' perception of Roman myth and manners as it does to oversimplified readings of Gaius and other jurists.

[88] Saller (n 87) 120–1. Note that this is expectancy *at birth*: the average life expectancy already increases significantly for those who survive the particularly deadly first year of their lives. But this does not mean that Romans lived the flourishing part of their public lives under the shadow of their fathers: consider, eg, that a man had to be at least 39 (later 30) to assume the praetorship.

course of later European history. What did survive virtually intact was the Roman law of *things*: the sophisticated layering of proprietary and contractual rights of so many types, all of which might inhere in the same property or activity, and which therefore multiplied opportunities for individual economic enterprise. In other words, both Pliny as *dominus–locator* and his tenants as *conductores* had opportunities and felt a proprietary stake in the same plot of land.

So, Gaius' boast is hardly the most important legacy of Roman private law. The greater legacy was the individual *homo oeconomicus*: more bounded than his counterparts in the world of business that we examined in the previous chapter, yet also participating in that discovery of a self, however humble they were. They are not so different in the end to the modern type of the farmer who labours to keep foreclosure at bay, and through it sustains the family farm, a more predictable and stable life, and by the end of it only a little more money than his father had left him. But for all his humility, this is the type who has been lionised in centuries of modern political speeches as the model of the private citizen.

Chapter 8

Roman Law, the Law of Nations, and the Imperial Provinces

I INTRODUCTION

The last four chapters have studied individualistic aspects of Roman law by reference to the legal rules known to, indeed largely elaborated by, the classical jurists. The Roman Empire, however, was never governed solely by one set of laws. This chapter turns the inquiry to the provinces: that is, to all those parts of the Empire outside of Rome and Italy and subject to its rule or hegemony. That inquiry starts with the options available to provincial subjects to have their legal matters adjudicated according to their own laws or according to the laws of Rome. It then turns to the period following AD 212, after the imperial grant of Roman citizenship to virtually all free inhabitants of the Empire, which saw a growing interaction with or displacement of local laws by Roman law and a counter-process of adapting and deflecting that law. Finally, it considers the development of a sort of common or universal law, known as the *ius gentium*, that regulated private legal relations between subjects of all nations. For reasons to be elaborated, it is argued that provincial law, as it merged, simplified, standardised, and interacted with the increasingly deracinated Roman law and also came under the theoretical influence of a universal *ius gentium*, played an important part in creating the idea of the individual as legal subject.

II A NOTE ON THE PRAETOR

First, a note on the main magistral authority in provincial law, the peregrine praetor. In addition to the old office of urban praetor dating back to 367 BC,[1] a peregrine praetor was created to deal with the growth in legal and commercial intercourse of Romans with both foreigners and non-Roman subjects of imperial law (both called *peregrini*).[2] This praetor had jurisdiction[3] over these mixed disputes and over disputes between *peregrini* only.[4] The jurist Gaius wrote a commentary on the provincial edict, so we at least know that the provincial praetors developed a body of jurisprudence designed to accommodate these interactions; and that this jurisprudence was sufficiently extensive and sophisticated to merit juristic analysis.[5] Moreover, it is possible that because the *imperium* of a praetor – that is, his power as a magistrate – allowed him to make legal innovations around or between the preexisting rules of the *ius civile*, it would follow that the peregrine praetors enjoyed considerable creative scope in the elaboration or harmonisation of legal rules based on notions of good faith (*bona fides*) and universal law (*ius gentium*).[6]

[1] This is the standard account: Livy, *Ab urbe condita* 6.42.
[2] For the urban praetor, see Chapter 3 and generally, T Corey Brennan, *The Praetorship in the Roman Republic*, ii vols (Oxford University Press, 2000).
[3] D.1.2.2.28.
[4] David Daube, 'The Peregrine Praetor' (1951) 41(1–2) *Journal of Roman Studies* 66 has shown that the former was not part of the peregrine praetor's original competence in the Middle Republic, but this applies only to a period preceding the classical law from which the technical evidence for an actual peregrine jurisprudence is drawn, and therefore does not affect the present inquiry.
[5] Fritz Schulz, *History of Roman Legal Science* (Oxford University Press, 1946) 191–2. Schulz, however, says that the provincial edict must have accorded with the perpetual edict developed by the urban praetor. Of course, harmonisation does not mean that the works were identical and we need not take Schulz to be implying that.
[6] See C C Turpin, '*Bonae Fidei Iudicia*' (1965) 23(2) *Cambridge Law Journal* 260.

III CHOICE OF LAW

From the acquisition of its first provinces in the Middle Republic, Rome administered its own laws and also permitted the continued use by conquered or annexed peoples of their own laws.[7] Not even the near-universalisation of Roman citizenship in the high imperial period necessarily meant that provincial subjects – now legally Romans – did or could not continue using their own laws; nor even that this had necessarily initiated an inevitable (if gradual) process of complete Romanisation. Legal pluralism was always a part of Roman imperial governance, in one form or other. The methods for dealing with this fall into two kinds in modern legal taxonomy. The first is choice: by private autonomy, parties to a legal transaction can choose their own law: this is called choice of law, a technical legal term which happily if unusually means more or less what it says.[8] The second is by adjudication: where there is a law to a transaction or dispute, either a prevailing law dictates which shall apply or, if the issue is not so clear, a process is followed for resolving it before else can proceed. This is called conflict of laws or, in certain contexts, private international law.[9]

One simple device for effective choice of law was to add a stipulation clause to a document otherwise prepared in accordance with local legal norms: that is, some wording to the effect of 'and he promised that *x*'. Since a *stipulatio* was a species of binding promise in Roman law, the inclusion such wording might have functioned like a governing law clause.[10]

[7] See Clifford Ando, *Law, Language, and Empire in the Roman Tradition* (University of Pennsylvania Press, 2011) 4–6 for a discussion of the administration of local laws in Sicily, citing Cicero, *In Verrem* 2.2.32.
[8] Obviously, the doctrines and technical rules are more complex. Moreover, even if the parties agree on a choice of governing law, other rules and problems may come into effect, such as the application of different laws to different aspects of a dispute (*dépeçage*) or a chosen Law A operating in such a way that the matter is referred back to Law B of the court deciding whether to apply Law A or B (*renvoi*).
[9] For the elements of the modern doctrine, see Kermit Roosevelt III, *Conflict of Laws* (Foundation Press, 3rd ed, 2022).
[10] Virtually every sophisticated contract now contains a clause along the lines of: 'This agreement is governed by and shall be construed in accordance with the laws of New York.'

This did not necessarily commit the parties to Roman law; rather, it left them the choice to seek enforcement or other legal redress before either the local tribunals or the Roman governor.[11]

This invites comparison with other treatments of legal pluralism in imperial polities. Timur Kuran has argued that Jewish and Christian subjects of nineteenth-century Islamic empires fared better economically than their socially privileged Islamic peers, precisely *because* of these social privileges.[12] During this century, religious minorities such as Armenians and Greeks opted for courts applying Western legal systems to regulate commercial matters. This choice was available to them where Muslims could only use the Islamic courts, thus depriving them of access to Western laws that were developing structures for efficiently dealing with modern economic problems. In short, the choice of law advantage of religious minorities gave them an institutional advantage that translated to rising economic prosperity.[13] Now, it is not my purpose to prove that *peregrini* had choice-of-law advantages over Roman citizens that gave them a competitive economic advantage, but simply that *peregrini* did indeed have choice-of-law options, at least before the near-universalisation of Roman citizenship in AD 212.[14] This in turn means that individual imperial subjects, based on their personal status, had control over a foundational question in the adjudication of their legal rights; or at the very least, that even if there were modes of determining the applicable law beyond his or her choice, that determination was at least made by reference to the subject's personal status and equitable merits.

[11] See Kimberley Czajkowski, *Localized Law: The Babatha and Salome Komaise Archives* (Oxford University Press, 2017) 85–6.
[12] Timur Kuran, 'The Economic Ascent of the Middle East's Religious Minorities: The Role of Islamic Legal Pluralism' (2004) 33(2) *Journal of Legal Studies* 475. Kuran's thesis is more fully expounded in *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton University Press, 2012).
[13] This also relieved religious minorities of certain legal disabilities, such as the relative probative weight of Muslim and non-Muslim testimony in the Islamic courts: Kuran, 'The Economic Ascent of the Middle East's Religious Minorities' (n 12) 497–500.
[14] Discussed below.

Some general propositions can be gleaned from specific, local examples in the surviving epigraphic evidence. We know from the *lex Irnitana* – a body of local legislation for the Roman Spanish town of Irni – that absent an express statutory prescription to the contrary, the non-Roman citizens shall use the *ius civile* in disputes as between themselves.[15] The language is slightly difficult, but it appears to be prescriptive rather than permissive: *ceteris paribus*, non-Romans in Irni *must* use Roman law.[16] Still, we may infer that there were situations where a statute may well set down use of the local law, or even of a universal *ius gentium*, rather than the *ius civile*. We may also infer – more speculatively – that some such statutes enacted from time to time in this particular township offered a choice of law. In any case, that choice did exist in towns beyond Irni, certainly in much of the Greek-speaking eastern provinces.[17]

There is an imperial constitution of the eastern emperor Arcadius, dated AD 398, which confirms an interesting choice-of-law rule in Roman Judaea. For well-known reasons,[18] the position of Judaea is often unique in Roman imperial governance, just as Egypt is for reasons

[15] *Lex Irnitana* 93. The text is published with a translation in Julián González and Michael H Crawford, 'The Lex Irnitana: A New Copy of the Flavian Municipal Law' (1986) 76 *Journal of Roman Studies* 147.

[16] The relevant passage says (table reference omitted):

> *Quibus de rebus in h(ac) l(ege) nominatim cautum{ue} scriptum<ue>*
> *non est, quo iure inter se municipes municipi [Flaui]*
> *Irnitani agant, de iis rebus omnibus ii inte[r se]*
> *…*
> *agunto, quo ciues Romani inter se iure civili*
> *agunt agent.*

Michael Crawford's translation reads:

> On whatever matters there is no explicit provision or rule in this statute, concerning the law under which the municipes of the Municipium Flavium Irnitanum should deal with each other, they are to deal with each other in all these matters … under the civil law under which Roman citizens deal or will deal with each other.

González and Crawford (n 15). It seems that the *lex* is not charitably granting non-citizens a choice-of-law option but anticipating conflict of laws problems by resolving them prospectively in favour of Roman law.

[17] Peter Garnsey, 'Roman Citizenship and Roman Law in the Late Empire' in Simon Swain and Mark Edwards (eds), *Approaching Late Antiquity: The Transformation from Early to Late Empire* (Oxford University Press, 2010) 134, 139; José Luis Alonso, 'The *Constitutio Antoniniana* and Private Legal Practice in the Eastern Empire' in Kimberley Czajkowski, Benedikt Eckhardt and Meret Strothmann (eds), *Law in the Roman Provinces* (Oxford University Press, 2020) 44.

[18] Above all, the Romans' anxiety, after the destruction of the Second Temple, to keep order in Judaea by allowing the Jews, exceptionally, to practise their monotheism and to exempt them from any participation in the Roman state religion.

all its own; yet it seems to typify the Romans' preferred imperial practice, in Judaea as much as anywhere else, of respecting local customs as far as possible: to govern, that is, by permitting a certain level of self-government.[19] The constitution says:

> Jews living under the general law of Rome [*Romano communi iure*] shall, in cases pertaining both to their superstition and questions of venue, laws, and rights, appear in court in the customary manner and shall commence and defend all actions according to the laws of the Romans [*Romanis legibus*]. 1. If any of them decides to litigate before Jews, after the fashion of arbiters [*ad similitudinem arbitrorum*] in civil cases only, they are not forbidden to obtain a decision from them by public law.[20]

It also confirms that decisions rendered by Jewish tribunals will, like arbitral awards, be enforced as if they were judgments of the municipal authority.[21] Presumably, the tribunals principally in question were the Great Sanhedrin and the lesser tribunals within its competence, and perhaps other bodies not described in rabbinical literature and thus beyond more than reasonable conjecture.[22]

Arcadius may only have been formalising a longstanding practice: Kimberley Czajkowski reminds us that 'it was only the late antique state and court bureaucracy that felt the need to formalize the previous working pragmatism'.[23] Thus, it is not unreasonable to

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[19] Pliny, *Letters* 10.113. On use of Roman law by Jewish subjects, see Czajkowski (n 11) 88–106.

[20] *Iudaei Romano communi iure viventes in his causis, quae tam ad superstitionem eorum quam ad forum et leges ac iura pertinent, adeant sollemni more iudicia omnesque Romanis legibus conferant et excipiant actiones. 1. Si qui vero ex his communi pactione ad similitudinem arbitrorum apud iudaeos in civili dumtaxat negotio putaverint litigandum, sortiri eorum iudicium iure publico non vetentur*: C.1.9.8.pr–1.

[21] C.1.9.8.2. In modern legal terms, this would be done by operation of a *lex arbitri*.

[22] Lester L Grabbe, 'Sanhedrin, Sanhedriyyot, or Mere Invention?' (2008) 39(1) *Journal for the Study of Judaism in the Persian, Hellenistic, and Roman Period* 1, 9–15, who accepts its likely existence but doubts that it was constituted and functioned in precisely the way described in the ideological and temporally removed rabbinical literature. As to jurisdiction, see T A Burkill, 'The Competence of the Sanhedrin' (1956) 10(2) *Vigiliae Christianae* 80; and on rabbinical jurisprudence partly on the Roman model, see Yair Furstenberg, 'Rabbis as Legal Experts in the Roman East' in Catherine Hezser (ed), *The Routledge Handbook of Jews and Judaism in Late Antiquity* (Routledge, 2024) 185, 189–92.

[23] Kimberley Czajkowski, 'Law and Romanization in Judaea' in Czajkowski, Eckhardt and Strothmann (n 17) 84, 84. Also, the constitution purports to be issued to the praetorian prefect at Caesarea Maritima by Gratian, Valentinian, and Theodosius. All of this makes one more reason, apart from interpolations, why it is so difficult to establish when a legal rule first came into force.

speculate that this chancery document reflected a policy of centuries' standing, well before the beginning of the dominate (c 285). Indeed, given imperial policy, maybe this existed even before 212 for the benefit of Jews who happened to be Roman citizens – such as, most famously, St Paul.[24]

IV THE GROWTH OF ROMAN LAW AFTER CARACALLA

In his study of citizenship in the Roman Empire, Claude Nicolet aptly compared the rights of a Roman citizen to a common law right to the writ of *habeas corpus*: if he or she were being abused by the overreach of local authority, he could appeal personally to the emperor by rescript and may eventually get relief.[25] How did provincial subjects assert their own rights?

Caroline Humfress has explored some of the ways in which Rome's provincial subjects might have seen their rulers' law not only as 'as a top-down "Imperial" structure' but also as 'something that they could attempt to negotiate their own way around', arguing that 'numerous litigants went to great lengths in their attempts to place their cases strategically in specific legal venues'.[26] She mentions 'hearings conducted before the Senates of Rome and Constantinople and before the higher-ranking imperial bureaucrats', governors' jurisdictions, and '"special jurisdictions", including those relating to the army … and fiscal matters'.[27] There may be overlap between, say, the plenary jurisdiction of a Roman provincial governor and a military tribunal, or between an ordinary court and a senatorial court constituted to hear a high-profile matter.[28] But we might be uncertain about the amount of forum shopping actually available in

[24] Acts 25:10, 21.
[25] C Nicolet, *The World of the Citizen in Republican Rome*, P S Falla (trans) (Batsford, 1980) 19, cited in Garnsey (n 17) 139.
[26] Caroline Humfress, 'Thinking through Legal Pluralism: "Forum Shopping" in the Later Roman Empire' in Jeroen Duindam et al, *Law and Empire: Ideas, Practices, Actors* (Brill, 2013) 225, 226.
[27] Ibid 234.
[28] Ibid 235 gives examples based more on *location* than on the *type* of jurisdiction being exercised. Ibid 236 considers litigants framing a claim in a way to place it in either a civil or criminal jurisdiction. This may be forum

the provinces from the third century onward *outside* of Roman law, even if we concede – as Humfress convincingly shows – that provincials did have options to transfer cases between different jurisdictions *within* the Roman imperial system and that they preserved certain localised practices by making Roman law 'work' for them.[29]

Recent scholarship, like that of Humfress, challenges the absolute picture of legal Romanisation after 212 or even into the late antique, but it is not seriously doubted that a uniform legal system gained ever increasing traction over the course of imperial history. It is this phenomenon and its consequences for individualism in Roman jurisprudence that we must now consider.

In AD 212,[30] the emperor Caracalla enacted the 'Antonine Constitution', which granted Roman citizenship to virtually all free men in the Roman Empire and concomitant rights to all free women.[31] Peter Garnsey says that it was neither 'an act neither of necessity nor, if we follow Dio, of statesmanship'.[32] He makes an even more important observation, whose obviousness

shopping, but it is not pluralism. The evidence relating to disputes involving bishops at 241–3, however, is convincing.

[29] Especially wealthy élites with the clearest motives for seeking remedies under Roman law: Caroline Humfress, 'Laws' Empire: Roman Universalism and Legal Practice' in Paul J du Plessis (ed), *New Frontiers: Law and Society in the Roman World* (Edinburgh University Press, 2014) 73, 80–1.

[30] The precise date of 212 is not absolutely settled, but this detail is not critical to the present inquiry.

[31] Dio Cassius, *Historia Romana* 77.9–10. The Antonine Constitution is also mentioned in passing by Ulpian at D.1.5.17. The text of the 'Giessen Papyrus', a partial preservation of the constitution itself, is published in the Appendix to Alex Imrie, *The Antonine Constitution: An Edict for the Caracallan Empire* (Brill, 2018) 139–40. The grant did not extend to *dediticii* (being (1) foreigners who submitted to Rome in war or (2) freedmen who were disgraced during their period of slavery: G.1.13).

[32] Garnsey (n 17) 137. For a less cynical interpretation of imperial motive, see, eg, Greg Woolf, *Rome: An Empire's Story* (Oxford University Press, 2nd ed, 2022) 247 (which emphasises binding all subjects to the Roman state religion); Paul J du Plessis (ed), *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed, 2020) 103 (which restates the taxation argument but suggests a further motive in fostering civic unity in the face of growing foreign threats); Imrie (n 31) (which addresses the paradox of Caracalla's tyranny and magnanimity, and suggests an attempt at political expatiation of his recent fratricide). Consider, also, that by making almost all free subjects citizens, the imperial court lost the ability to leverage specific grants of citizenship for patronage and influence, which one may treat as circumstantial evidence either of the unlikelihood that the grant was as extensive as traditionally assumed, or of the surprising magnanimity of the emperor: see Brent D Shaw, 'Rebels and Outsiders' in Alan K Bowman, Peter Garnsey and Dominic Rathbone (eds), *The Cambridge Ancient History*, vol xi, *The High Empire, AD 70–192* (Cambridge University Press, 2nd ed, 2000) 361, 371–2; Arnaud Besson, 'Fifty Years before the Antonine Constitution: Access to Roman Citizenship and Exclusive rights', in Lucia Cecchet

is striking only when pointed out: that the universal grant of citizenship did not mean the universalisation of Roman law and that to assume it did is, on closer inspection, a *non sequitur*.[33] 'It was long-established practice to permit local customs and institutions to continue where they did not clash with Roman principles and interests.'[34] In that spirit, Cicero writes to Atticus of 'the stipulation which the Greeks hold as the salvation of their freedom, that Greek cases are to be settled according to Greek law'.[35]

Of course, the fact that all non-Roman law was not legislated out of existence overnight does not mean that the Antonine Constitution, and with it the growing bureaucratisation of the Roman Empire, did not have an effect on the legal landscape in the provinces. Consider, for example, a piece of legislation preserved in the *Collatio*, which provides that the only valid marriages are those under Roman law; it goes even further and says that all subjects 'should be mindful of the need to conform themselves to the lifestyle and laws of Rome and should know that only those marriages are licit that are permitted in Roman law' (*Romano iure*).[36] Quoting this passage, Clifford Ando acknowledges a certain imperial 'schizophrenia, working at once to universalize norms but also along multiple axes to fragment the empire'.[37] So his point is not that Roman law straightforwardly displaced local laws, still less local customs and manners.

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and Anna Busetto (eds), Citizens in the Graeco-Roman World: Aspects of Citizenship from the Archaic Period to AD 212 (Brill 2017) 199, 202. See also Fergus Millar, *The Roman Empire and Its Neighbours* (Duckworth, 2nd ed, 1981) 89–90 for a plausible argument that somewhat less than all free subjects except disgraced freedmen actually did enjoy the fruits of what is commonly called Caracalla's 'universal' grant of citizenship – although Ulpian states that the grant applied to virtually every free person, and that coming from a contemporary (assuming, as usual, no interpolations) in the imperial chancery. On the survival of local legal traditions after 212 (a different matter to who became a Roman citizen), see Josephe Mélèze-Modrzejewski, *Droit impérial et traditions locales dans l'Égypte romaine* (Routledge, 1990). On exceptions to the universal grant, see A N Sherwin-White, *The Roman Citizenship* (Oxford University Press, 2nd ed, 1973) 380–94. For an appraisal of Caracalla's rescript activity, see Elsemieke Daalder, 'Tradition and Innovation in the Rescript Practice of the Emperor Caracalla' in Sven Betjes, Olivier Hekster and Erika Manders (eds), *Tradition and Power in the Roman Empire: Proceedings of the Fifteenth Workshop of the International Network Impact of Empire* (Brill, 2024) 211.

[33] The 'Giessen Papyrus' expressly preserves customary law.

[34] Garnsey (n 17) 146.

[35] [*I*]*n iis illud, in quo sibi libteratem csensent Graeci datam, ut Graeci inter se disceptent suis legibus*: Cicero, *Ad Atticum* 6.1.

[36] *Sed posthac religionem sanctitatemque in conubiis copulandis volumus ab unoquoque servari, ut se ad disciplinam legesque Romanas meminerint pertinere et eas tantum sciant nuptias licitas, quae sunt Romano iure permissae*: *Collatio* 6.4.6, quoted in Ando (n 7) 23 (with modification). See FIRA ii, 560.

[37] Ando (n 7) 23.

But it is difficult not to accept the evidence for a growing uniformity in the provinces, if only by various means. We saw earlier that the *lex Irnitana* facilitated the expansion of Roman law in that part of Roman Spain where it applied, and the *lex* is not unlike other municipal laws discovered elsewhere in Spain and the western provinces generally: indeed, it appeared to be common and even a source of prestige for a township (*municipium*) to display its own bronze tablets setting out laws generally uniform with those of other townships and effectively subjecting locals to the sole competence of Roman law – a membership card to the club of *Romanitas*, so to speak.[38] So, where provincials had once had their own laws, and then a choice of local and Roman laws around the time of Caracalla (and long after in the case of the eastern provinces), in the high imperial period local law took a different course in the western provinces. In short, Roman law gradually replaced local laws – very gradually, and by different means, over different timespans and in different provinces.[39] The process may not have been complete even by the fall of the Western Empire, but it is the characteristic trend at least from the beginning of the dominate.[40] Nor is this simply a result of top-down bureaucratisation or imperial policy: Humfress' research discussed above clearly shows provincials using Roman law and jurisdiction to their advantage, while Herwig Maehler notes the phenomenon, in

[38] Werner Eck, 'The *leges municipales* as a Means of Legal and Social Romanization of the Provinces of the Roman Empire' in Czajkowski, Eckhardt and Strothmann (n 17) 315, 315–16, 327–8. Cf, in the same collection, Georgy Kantor, 'Navigating Roman Law and Local Privileges in Pontus-Bithynia' 185. For examples of municipal statutes, see FIRA i, 163–221. On the Romanisation of provincial élites, see Greg Woolf, *Becoming Roman: The Origins of Provincial Civilization in Gaul* (Cambridge University Press, 1998). See also Clifford Ando*, Imperial Ideology and Provincial Loyalty in the Roman Empire* (University of California Press, 2006); Myles Lavan, Richard E Payne and John Weisweiler, *Cosmopolitanism and Empire: Universal Rulers, Local Elites and Cultural Integration in the Ancient Near East and Mediterranean* (Oxford University Press, 2016); Myles Lavan and Clifford Ando, *Roman and Local Citizenship in the Long Second Century CE* (Oxford University Press, 2021).

[39] Eck (n 38) 323–8.

[40] 'The presence of increasing numbers of Roman citizens in Egypt inevitably led to a slow expansion of Roman legal ideas and practice, already prior to the introduction of the *Constitutio Antoniniana* in AD 212': Herwig Maehler, 'Greek, Egyptian, and Roman Law' (2005) 35 *Journal of Juristic Papyrology* 121, 136. Maehler also notes, at 137, that while this did not amount to a simple displacement of local legal customs, there is evidence from the late antique of juristic literature being copied on Egyptian papyrus for local use.

Roman Egypt as in other provinces, of using (even if, in the process, distorting) traditional Roman forms of contract such as the *stipulatio*.[41]

This invites an interesting perspective on the history of Roman legal pluralism and individualistic jurisprudence: in particular, how individuals, including those of provincial or low social status, use a legal system that seemed to function largely for Roman élites. What did provincial subjects hope to get for themselves out of the Roman law that was now more readily available to them, or even positively mandated in their legal affairs?

V THE ELABORATION OF THE CONCEPT OF THE IUS GENTIUM

We have seen how choice of law options – sometimes confirmed legislatively, more qualifiedly in the *lex Irnitana* and quite expressly in the constitution applying to Judaea – gave non-citizens, or just citizens outside of Rome and Italy, an individualistic legal right *par excellence*. More so even than Romans in Rome, they enjoyed the possibilities of an individualistic jurisprudence that enabled litigants, in certain circumstances, to choose under what jurisdiction their legal issues would be resolved. But the earlier and deeper inroads of Roman law in the western provinces secured a greater transformation, beyond the ad hoc granting of the right of specific areas of land to be treated, in the jurists' favourite fictional formula, 'as if it were' (*si esset*) land in Italy.

In a closely studied passage, the jurist Gaius wrote of provincial land being 'held by the Roman people or by the emperor'[42] (the distinction being between senatorial and imperial provinces, an administrative division of labour dating back to Augustus[43]). This laid the

[41] Ibid 137–40. Also, '[w]omen would have preferred the relative gender equality afforded by Roman juridical rules governing property and obligations': Edward E Cohen, *Roman Inequality: Affluent Slaves, Businesswomen, Legal Fictions* (Oxford University Press, 2023) 20. On the transformation of Roman law by interpretation in local contexts, see further Woolf, *Becoming Roman* (n 38) 67.
[42] [*I*]*n eo solo dominium populi Romani est vel Caearis*: G.2.7. See also Strabo, *Geography* 17.3.24.
[43] Strabo, *Geography* 17.3.25.

foundation for Theodor Mommsen's influential thesis that apart from privileged communities (*civitates*) that constituted islands of legal autonomy throughout the Roman Empire,[44] provincial land belonged to the Roman state and so there was no private right of 'absolute' ownership (*dominium*) outside Italy.[45] Georgy Kantor notes the subsequent scholarship challenging the existence of an overwhelming and absolute imperial demesne.[46] However, in seeking to understand why Gaius made what appears on a bare reading to be a false statement, Kantor imputes to Gaius' statement a concern among Romans generally with property as a principal means of conceptualising 'imperial space': that is, there was Rome and Italy, and then there were the provinces, and that was the basal division according to which (non-religious) property rights were understood.[47] There were, too, various ways by which provincial law was displaced by Roman law, albeit in disparate and ad hoc ways; or even analogised to it, for example, by the introduction in some Greek-speaking provinces of local terms of art for absolute ownership that had the same legal effect as Roman *dominium* without constituting a legal right under the *ius civile*.[48]

But the real transformation goes beyond the simple mimicking of Roman law by adaptive legal systems: namely, the endeavour to integrate Roman law with foreign laws in the search for a common denominator. In an endlessly quoted passage, Gaius defined the 'law of nations' (*ius gentium*) as 'the law which natural reason makes for all mankind [and which] is

[44] Sherwin-White (n 32) 360–79.
[45] Theodor Mommsen, *Römisches Staatsrecht*, vol iii, part i (S Hirzel, 1887) 728–31.
[46] Georgy Kantor, 'Property in Land in Roman Provinces' in Georgy Kantor, Tom Lambert and Hannah Skoda (eds), *Legalism: Property and Ownership* (Oxford University Press, 2017) 55, 59–63. A leading sceptic of the Mommsen position was A H M Jones, '*In eo solo dominium Populi Romani est vel Caesaris*' in *Studies in Roman Government and Law* (Frederick A Praeger, 1960) 143, who says at 143 that '[t]he doctrine that *dominium* in provincial soil was vested in the Roman people or in Caesar has been taken far more seriously in modern, than it ever was in ancient, times' (italics in original). The way in which provincial property is described by some scholars, ie, as property in all but name – see, eg, Max Kaser, '*Die Typen des römischen Bodenrechts in der späten Republik*' (1942) 62(1) *Zeitschrift der Savigny-Stiftung für Rechtsgeschicte: Romanistische Abteilung* 1, 80 – invites comparison to common law land technically 'held of the Crown' but in most senses belonging to the owner who holds immediately of this sovereign 'ur-owner', so to speak.
[47] Kantor, 'Property in Land in Roman Provinces' (n 46) 66.
[48] Ibid.

applied in the same way everywhere'.[49] The entrée to this legal technique was to acknowledge that '[t]he law of the Roman people is also partly its own and partly common to all mankind'.[50] As one historian of natural law has observed:

> Under the stress of the growing intercourse with foreign peoples, the Roman jurists found in [*ius gentium*] the practical means for overcoming the limitations and extending the boundaries of municipal law; until in due time it developed into a theoretical principle expressing the common element in all legislation.[51]

Of course, the jurists used their own methods, not those of the philosophers, to explain and develop the *ius gentium* as a living body of law.[52] Their most reliable method, Ando explains, was the legal fiction; along with others 'developed precisely in order to accommodate before the law persons and things notionally excluded by jurisdictional rules'.[53]

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[49] [*Q*]*uod … naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur*: G.1.1. For a short introduction to the *ius gentium* in its Roman phase, see Rafael Domingo, *The New Global Law* (Cambridge University Press, 2010) 3–11; also Peter Stein, *Roman Law in European History* (Cambridge University Press, 1999) 12–13. Note also that modern references to the *ius gentium* usually mean the early-modern 'law of nations' which, while derived ultimately from Roman law, begins with Hugo Grotius' *De iure belli ac pacis* (1625), almost universally credited as a founding text of public international law along with Alberico Gentili's *De legationibus libri tres* (1584).

[50] *Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur*: G.1.1.

[51] A P d'Entrèves, *Natural Law: An Historical Survey* (Harper & Row, rev ed, 1965) 29. '[N]one of these [theories about *ius gentium*] was new, of course; but none had been made to do such heavy lifting before, nor had any been so robustly characterized at any point in the Roman past': Ando (n 7) 22.

[52] Evidently, the *ius gentium* was better understood when contrasted with the *ius civile* than defined on its own terms: Eleanor Cowan, 'The Individual and International Law in Antiquity' in Anne Peters and Tom Sparks (eds), *The Individual in International Law: History and Theory* (Oxford University Press, 2024) 31, 34–5. On the *ius gentium* as a *philosophical* idea, see, eg, Cicero, *De officiis* 3.16.69. Whereas Cicero seems to say that the *ius gentium* is a normative, moral law, the jurists take a more descriptive approach (ie, the difference between saying 'the *ius gentium* is what everyone ought to follow' and 'the *ius gentium* is what everyone naturally does). Thus, Cicero would not seem to distinguish the *ius gentium* from the *ius naturale*, whereas the jurists readily accepted that slavery was against the *ius naturale* but universally practised in the *ius gentium*: W W Buckland, *A Textbook of Roman Law: From Augustus to Justinian*, Peter Stein (rev) (Cambridge University Press, 3rd ed, 1963) 53; Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford University Press, 2nd ed, 2002) 80 (though Ulpian nearly united natural law and the law of nations when he says that the *ius gentium* has no form of manumission because there is no slavery in nature: D.1.1.4). Or consider G.2.65, where Gaius describes *traditio* as the form of conveyance which falls under natural law (*naturali iure*), which is obviously intended to be synonymous with *ius gentium*. So where the jurists do, like Cicero, identify the natural law with the law of nations, they do so from a completely different viewpoint: natural law is what people happen to do, not what they ought to do, which is what Gaius is on the verge of saying expressly in D.41.1.1.pr. Isidore of Seville's definition at *Etymologiae* 5.9, among others, is closer to that of Gaius than to Cicero: perhaps Isidore is located too early in Christian intellectual history for the great flowering of *ius naturale* scholarship more usually associated with medieval scholastic, Romanists, and Decretists.

[53] Ando (n 7) 1.

The most important development for present purposes was the effective incorporation of the *ius gentium* into Roman law.[54] By this I mean that *ius gentium* no longer meant only the law that applied to non-Roman citizens, whether foreigners or non-citizen subjects of the Roman Empire: rather, it came to denote various aspects of Roman law not peculiar to the characteristics and requirements of the *ius civile*.[55] These were not merely leftovers of a functional core of Roman civil law: many kinds of consensual agreements were recognised as elements of the *ius gentium*, including various commercially useful devices to be examined presently. Through this process, the hitherto philosophical concept of *ius gentium*, often associated one way or another with natural law (*ius naturale*),[56] was lawyerised, so to speak, and became a portmanteau term for various technical rules in a 'move towards positive law'.[57] In other words, *ius gentium* was no longer just a referent in philosophical discussions of the nature of law, but a description of an actual and functioning legal system that required harmonisation with foreign customs and legal traditions. The mechanism by which this occurred was for the praetors to request a defendant to fictitiously concede a debt, conditional upon the respective merits of claimant and defendant, rather than simply pleading an action on the traditional civil law forms. 'By this means, the institutions of *ius gentium* received the

[54] J A Crook, *Law and Life of Rome* (Thames & Hudson, 1967) 29–30.
[55] Peter Stein, 'The Roman Jurists' Conception of Law' in Andrea Padovani and Peter G Stein (eds), *The Jurists' Philosophy of Law from Rome to the Seventeenth Century* (Springer, 2007) 1, 7–8. See also the famous opening passage of Gaius' treatise at G.1.1.
[56] It was common among philosophers and lawyers from Cicero to Gaius to identify *ius gentium* with *ius naturale*. Cf D.1.1.4, where Ulpian says that *ius naturale* means simply whatever is prescribed by the natural instincts of humans *and animals*. As important as Ulpian is in recording for us what classical Roman law was, this must be – and generally is, despite its billing in the opening passages of the *Digest* – regarded as an eccentric interpretation of the meaning of natural law, if it is even an authentic passage: see, eg, d'Entrèves (n 51) 24–5, 28. Maine agrees, but bizarrely calls Gaius 'a much higher authority' than Ulpian: Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Oxford University Press, 1931 [1862]) 43. If anything, Ulpian's has more in common with Hobbes' definition of natural law, which enjoins against doing that which is destructive of one's life – which is arguably tantamount to the definition of 'instinct' common to humans and other animals: Thomas Hobbes, *Leviathan*, J C A Gaskin (ed) (Oxford University Press, 1996 [1651]) 86–7 [14.3]–[14.4].
[57] Dante Fedele, '*Ius gentium*: The Metamorphoses of a Legal Concept (Ancient Rome to Early Modern Europe)' in Edward Cavanaugh (ed), *Empire and Legal Thought: Ideas and Institutions from Antiquity to Modernity* (Brill, 2020) 213, 220.

protection of the institutions of *ius Quiritium*.'[58] Moreover, by its assimilation into 'Roman law' broadly speaking, the law applicable to non-citizens were recognised by the Romans themselves as part of a single, not a pluralist system of law.[59] The use of legal fictions to accommodate non-citizens 'as if' they had Quiritary rights and obligations is but one piece of circumstantial evidence that the jurists were finding ways to integrate non-Roman law into Roman law because provincial subjects, not as part of any imperial 'programme' but because provincials wanted to use Roman law.[60] As Humfress has stated, 'the reasons why they did so need to be sought from below'.[61]

But before turning to the content of the *ius gentium* itself, it should be noted that Roman legal authorities also made efforts to reconcile the legal status of Roman citizens and non-citizen subjects, so that there was no other law to incorporate, nor multiple laws to harmonise. 'There is a fiction of Roman citizenship for a foreigner who is raising or defending an action established by our statutes, provided that it is equitable for that action to be extended to a foreigner.'[62] The *lex Irnitana* uses the same technique: certain matters are to be decided 'as if' the urban praetor were deciding a matter, at Rome, between Roman citizens.[63] That confirms

[58] Roberto Fiori, 'Contracts, Commerce and Roman Society' in Paul J du Plessis, Clifford Ando and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) 581, 585 (italics in original). The *ius Quiritium* is synonymous with the *ius civile*, *Quirites* being an old name for Roman citizens derived from the name Quirinus, which Romulus received at his apotheosis.

[59] For a recent critique of the idea of pluralism as a genuine challenge to legal monism, see Caroline Humfress, 'Legal Pluralism's Other: Mythologizing Modern Law' (2024) 42(2) *Law and History Review* 155. As to how the Romans would have seen the issue: if a jurist were asked how *ius gentium* and *ius civile* could be regarded as parts of a unitary legal order, perhaps he might have responded that it is only a more expansive version of a feature of the *ius civile* itself. Eg, the fact that a non-citizen can convey by *traditio* but not by the more formal, citizens-only method of *mancipatio* is no different to the fact that while Titius and Numerius are both Roman citizens and both have *conubium* (ie, the right to marry another Roman citizen), Titius, as a senator cannot marry a citizen who used to be a slave or who works as an actress; conversely, because he is a patrician, Titius can marry by *confarreatio* (the most ancient marriage ceremony before the *pontifex maximus*) whereas Numerius, an equestrian, cannot.

[60] On which see Ando (n 7).

[61] Humfress, 'Laws' Empire' (n 29) 80, 83–4, 93–4. Of course, there were also principled reasons why *peregrini* should be treated as Roman citizens against their own will, as in Gaius' example of the gold bowl to be shortly discussed.

[62] [*C*]*ivitas Roman peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi*: G.4.37. 'By masking revision or replacement, the fiction in such cases worked to preserve the legitimacy of the varied sources of law operational at Rome in the classical period': Ando (n 7) 8.

[63] *Lex Irnitana* 91.

only for Irni and other towns in Roman Spain with similar laws when a *peregrinus* will be treated as a Roman citizen. But by its nature, Gaius' more general statement leaves some questions unanswered, perhaps deliberately they are only to be resolved in each instant case. For example, when he speaks of raising or defending an action 'by our statutes' (*nostris legibus*) does he literally mean only by specific *leges* (eg, the *lex Aquilia*), or would it include actions on the case established under praetorian law?[64] Even more importantly, when is it 'equitable' (*iustum*) for an action to be extended to a foreigner? Gaius offers an example, but it is but one example and it easily appeals to basic notions of justice: a *peregrinus* shall be treated 'as if' he were a Roman citizen in an action for theft (*actio furti*) brought against him for stealing a gold bowl, lest he not pay the damages he fairly owes and therefore enjoy a discount on the punishment of his misdeed simply for not being a Roman citizen; likewise, and in the interests of symmetry and fairness, he can bring an action for theft, or for wrongful damage under the *lex Aquilia*, against someone else, 'as if' he were a Roman citizen.[65] But what else is *iustum*? Does magistral discretion alone decide what constitutes equitable circumstances for a *peregrinus* to be treated as a Roman, even if this leaves inconsistencies?

It is not that the question does not matter, but it is even more important what the Roman magistrates treated as a matter of *ius gentium*, so that presumably the legal fiction would not need to be invoked in the first place. In this connection, one could cite – among others – gratuitous contracts where one asks another to do something for oneself or a third party such as standing for surety (*mandatum*),[66] and acquisition of unowned things such as wild birds or

[64] The question is not resolved by Gaius' subsequent examples of *actio furti* and wrongful damage of property, since these are both statutory actions *stricto sensu*: one under the Twelve Tables and the other under the *lex Aquilia*. A plausible answer is that it means whatever is strictly of the *ius civile*, even though some important quiritary doctrines, such as *in iure cessio*, are not (or at least not clearly and expressly) derived from the Twelve Tables or from another known statute or *lex regia*.
[65] G.4.37.
[66] G.3.155–61. *Mandatum* fits uneasily into the matrix of *ius civile* contracts, which are all bilateral (for Ulpian's general statement of this principle, see D.2.14.1.3).

bees (*occupatio*).[67] But the best illustration of this development – and the most important – is the fate of *mancipatio*, a formal contractual ritual going back at least to the Twelve Tables and never abolished until well after the fall of the Western Empire in the late fifth century, and its virtual replacement by the simpler mechanism of *traditio*.[68] *Mancipatio* was, by definition, a form of ritual conveyance that had to be used only for *res mancipi*, a privileged class of alienable things relevantly including land in Italy.[69] So, even if a Roman vendor is selling land in, say, Spain to a Roman purchaser, the subject matter cannot be conveyed by *mancipatio*. As noted earlier,[70] this form of conveyance had its uses in archaic times, when a conspicuous ritual attended by many witnesses did the work of modern centralised title registration systems.[71] But when Rome had become a vast empire with a complex market economy, *mancipatio* had already become inconvenient. The same may be said of conveyance *in iure cessio*, whereby the purchaser claimed the property as his own; the vendor said nothing; and a magistrate declared it duly transferred. Though not as cumbersome as *mancipatio*, it was nearly as old, was available only to Roman citizens, and relied on a legal fiction that a matter was being 'litigated' in purely transactional circumstances, which in an increasingly rationalised system must have had the air of slothful archaism about it.[72] Both this and the older *mancipatio* yielded to the circumstances of imperial law: the effective waning of the importance of *mancipatio* and *in iure cessio* – the work not of legislation or conscious policy, but simply a consequence of more and more transactions occurring outside Italy – signals more clearly than any other

[67] J.2.1.12.
[68] On early *mancipatio*, see Alan Watson, *Rome of the XII Tables: Persons and Property* (Princeton University Press, 1975) 134–49. It was abolished by Justinian.
[69] G.1.120, 14a, 2.22. It was also used for other purposes, such as making wills; here, however, we are concerned with conveyance of real property.
[70] See Chapter 3.
[71] James Muirhead, *Historical Introduction to the Private Law of Rome*, Henry Goudy (ed) (A & C Black, 3rd ed, 1916) 54.
[72] 'Since *in iure cessio* was in form an action it could be used only by parties who were competent to take part in *legis actiones*, that is to say, Roman citizens': Watson (n 68) 149 (italics in original).

example the rationalising effect of the *ius gentium* on Roman private law.[73] And this, in turn, reshaped the essential characteristics of Roman law as a law for the regulation of individuals rather than of families and clans.

By the time of Justinian, and the method of conveyance most widely used outside Italy was the simple form of *traditio* (literally, 'handing over'). It was the only form specifically suitable for *res nec mancipi*,[74] and Gaius and Justinian each describes it expressly as an element of the *ius gentium*.[75] In technical terms, *traditio* was delivery *iusta causa*: that is, possession did not equate to ownership without a valid legal ground for the delivery occurring.[76] Eventually, and importantly, delivery came to mean little or nothing, which made it practically and conceptually easier for *traditio* to be adapted to commercial life outside Italy by substituting for *mancipatio* and *in iure cessio* as the primary means of conveying land.[77] Long abandoned were ritual delivery methods such as a clod of earth from the land to be sold;[78] Papinian's example of surrendering the keys to a warehouse as a condition of transfer is more practical than symbolic, and it resonates with every owner or renter down to this day.[79] Paired

[73] That said, there is a technical distinction in that the subject matter of *mancipatio* needed to be *res mancipi*, whereas *in iure cessio* depended on the quiritary status of the parties themselves. Thus, *in iure cessio* was not as vulnerable as *mancipatio* to desuetude in circumstances of imperial expansion and growing contact with foreigners, though both were clearly more complicated than *traditio*. Also, the foregoing applies only to *in iure cessio* as a mode of conveyance: not, eg, in its use in the manumission of slaves (which is what manumission *vindicta* technically was).

[74] *Res nec mancipi* meant anything capable of being bought and sold except land in Italy, slaves, beasts of burden, and rustic and praedial servitudes: G.2.14a–17.

[75] G.2.65; D.41.1.9.3; J.2.1.40. In their respective *Institutes*, Gaius and Justinian use the term *naturali iure* but they could equally have said *gentium iure*; in the *Digest* passage, Gaius does in fact say *iure gentium* (see also, eg, D.41.1.1.pr). Not only is this unlikely to be an interpolation but even if it were, it would not indicate that Gaius had a different view that was obscured. Rather, both he and the Byzantine compilers identified *ius naturale* for all practical purposes with *ius gentium*: see n 52.

[76] D.41.1.31.pr. Eg, Aulus' receiving Numerius' bushels of wheat would constitute *traditio iusta causa* because Numerius earlier promised that he would deliver the wheat in return for an agreed monetary payment.

[77] Along with *usucapion*, addressed presently. Paul gives an excellent example of the transition, by degrees, away from the importance of physical delivery. He says that if marble columns are to be delivered to a buyer, then it is enough for the seller, on account of the great weight of the goods, to indicate to the buyer where the columns are: D.41.2.1.21. This is reminiscent of the concept of 'tender' in modern sale of goods law, eg, at *Uniform Commercial Code* § 2-503(1): 'Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.'

[78] A ritual in both old Roman law and the common law 'livery of seisin'.

[79] D.18.1.74.

naturally with *traditio* was a much older form of conveyance, *usucapio*. Although there is some debate about its structure and function in earlier law, this conveyance seems to go back to the Twelve Tables and accounts for a person coming into ownership of something after, eg, acquiring land (less often chattels) from a vendor who had no right to sell it, provided that the purchaser acted in innocently of any knowledge of impropriety (*bona fide*) in undertaking an otherwise regular conveyance (*iusta causa*). After two years in the case of land (one for chattels), title was clear of defects.[80] What this means, for present purposes, is that there had always been a form of informal conveyance where circumstances of irregularity required. Later, as the formal conveyance like *mancipatio* declined, *traditio* and *usucapio* remained as a kind of retrospectively logical pairing: one for the simple transfer of regular ownership, the other for the simple rectification of the transfer of irregular ownership; the former of the *ius gentium*, the latter of the *ius civile* but now united in a logic transcending this once much more important distinction.

Beyond the formal and informal methods of conveyance treated in juristic literature, it is arguably implied in some juristic texts that certain forms of acquisition occur *only* under the *ius gentium*.[81] Outside the world of the jurists, too, there is evidence that general or essential principles of law, known by laypersons and naturally appealing to common sense and commercial acumen, become more important than conforming to the specific requirements of any one municipal legal system as such. There is preserved a certain contract, which by general agreement appears to have been drafted in accordance with Egyptian commercial customs rather than in conformity with the *ius civile*, even though the parties to the contract were Roman citizens.[82] This is not *ius gentium* as the jurists understood it, but it reveals the priorities of

[80] See H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 3rd ed, 1972) 151–5, including his discussion of the interpretation of Max Kaser.
[81] See, eg, D.41.1.7, where Gaius says that we acquire land on riverside properties by the accretion of alluvial soil in accordance with the *ius gentium*.
[82] FIRA iii, 383–7. The editor describes the contract as a *pignus iure peregrino conventum*.

individuals in commerce. If it was easier to use Egyptian custom, then they used it: it was not a matter of using *ius civile* simply as a birthright. Nowhere do such people use the term *ius gentium*, which was popularised by Cicero and bandied around by jurists.[83] But in based their arrangements on the essentials of commercial law and practice they were, in a way, living the *ius gentium* of which the jurists occasionally wrote.

Beyond Cisalpine Gaul,[84] then, the special qualities of Quiritary ownership no longer applied, or simply dwindled in importance. It is in the Roman law of all Roman subjects, simplified and standardised for harmonious interaction between citizens and non-citizens, that the real Roman law of modern legacy developed: a rationalised legal system in which the critical constituent unit was not the *paterfamilias* with his network of family, slaves and agents, but the individual of any position, and in his own capacity.

For reasons that will become apparent, it is critical to understand (as far as the sources take us) what happened to *patria potestas* outside of Italy itself.[85] In an old study, Rafael Taubenschlag stepped outside the traditional, published legal sources – where much commentary on *patria potestas* is abstract[86] – and sought to understand, through papyrological evidence, what happened to the rights and powers of the *paterfamilias* in the provinces.[87] His research has been accepted in the few studies that have bothered with this important topic.[88] These scholars accept certain inferences from indirect yet abundant evidence: for example, that

[83] Buckland (n 52) 53 notices that Cicero did not coin the phrase.
[84] Since Augustus, this had become part of Italy.
[85] The legal rights and powers reserved to the male head of the household: see Chapter 3.
[86] Especially Gaius, whose observations, if taken literally (and perhaps they were not meant to be), indicate that the legal authority of the *paterfamilias* both was very powerful and never changed over the centuries: G.1.55.
[87] Rafael Taubenschlag, '*Die* Patria potestas *im Recht der Papyri*' (1916) 37(1) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 177.
[88] Naphtali Lewis, 'On Paternal Authority in Roman Egypt' (1970) 17 *Revue Internationale des Droits de l'Antiquité* 251, reprinted in Naphtali Lewis, *On Government and Law in Roman Egypt: Collected Papers of Naphtali Lewis* (Scholars Press, 1995) 120; Antti Arjava, 'Paternal Power in Late Antiquity' (1998) 88 *Journal of Roman Studies* 147.

the number of claims and arm's-length transactions between a father and a daughter do not suggest the existence of a relationship between *paterfamilias* and a woman *aliena potestate* at all resembling its description in the classical juristic sources; and contracts and other legal documents attesting to a son's apparent right to personal property (not just a *peculium*[89]), and even to sell it to his father.[90] Much of this evidence may predate the Antonine Constitution, but it shows what legal practices obtained, which – whether as a matter of pragmatism or policy – were not erased overnight.

Of greater importance is the fate of *patria potestas* among those who were subject to or used Roman law itself. Antti Arjava's view is that 'not a few documents convey the idea that while the children acted through the father they were themselves selling, renting, or buying something, that is, they were the owners of the property'.[91] At the very least, there is clear evidence of a social reaction against a legal rule, a bristling against its most inconvenient strictures. Arjava's suggestion seems to be that at least in some cases, legal subjects paid lip service to a *paterfamilias* while getting on with a more rational commercial intercourse between autonomous individuals.[92] Even as *patria potestas* persisted as an institution, then, its full character could not be pristinely preserved without the motive to do so, or without sufficient dissemination of 'pure' Roman legal knowledge, or unless it were enforced by imperial authorities: which it was only passively, when a rescript was issued correcting local applications of Roman law.[93] In short, the evidence indicates that *patria potestas* (1) did not

[89] A kind of fund for persons who technically owned no property of their own, including dependents of the *paterfamilias* and slaves. This institution is discussed in detail in Chapter 5.
[90] Taubenschlag (n 87) 177–207; Arjava (n 87) 155.
[91] Arjava (n 88) 157–8.
[92] The example of a certain Aurelius Thonios supports this point particularly well. The father seems to have been there to sanction the sale only as a formality, or to appease local authorities: ibid. See also Lewis (n 88) 121–3, which collects and interprets papyrological texts that contradict each other as to the legal status of *patria potestas*. Moreover, the examples concern fathers' legal relationships with their daughters, so it should not be assumed that the rules governing sons were the same in Egypt as they were at Rome, where *paterfamilias* reigned equally over sons and daughters (and of course further issue of both sexes). Besides, Lewis' own conclusion at 127 is that the stronger power over daughters declined over time.
[93] See examples of such rescripts collected at ibid 56 n 4.

exist in Roman Egypt, or (2) was ignored, (3) was not well understood, or (4) that its meaning was extensively modified, and the power of the *paterfamilias* significantly attenuated.[94] This may have nothing to do, at least directly, with the parallel development of a *ius gentium* as a kind of common denominator of legal rules. But they all point to a critical development in the history of Rome's individualistic jurisprudence: namely, its deracination from the social structures of archaic Rome in which it had originally been created, and its gradual abandonment of those characteristics – most obviously *patria potestas* – about which there was nothing individualistic at all and which preserved rules that had served the logic of Roman society in its earlier, kinship-intensive phases.

Within this mosaic of unitary and pluralistic laws often scarcely meeting the description of a *system*, we might finally ask: Was there a Roman rule of law? Is the question even meaningful?

Michael Peachin suggests that there is, provided one meets 'a Roman rule of law' on its own terms and acknowledges that the ideal of legal equality often did not translate into reality.[95] He posits a typical provincial court before which 'the nature of the resolution being sought by all the parties involved would probably better be called "just" than punctiliously "legal"', including because the adjudicator would realistically 'decide a case based on law which was, in purely formalistic terms, a curious admixture distilled from, or at least taking

[94] That said, there is enough use of a Greek word functionally equivalent to *patria potestas* (ἐξουσία) that (1) and (2) must be ruled out: Arjava (n 88) 156. On the other hand, the word ἐξουσία is not used as a legal term of art in the New Testament, whereas in Latin *patria potestas* meant only *patria potestas*, with all that this entailed legally. So even in the search for translations, provincials knowingly or unknowingly distorted the full import of a foreign legal concept. (By analogy, consider how many legal cultures untouched by the common law might struggle to find different terms to distinctly and separately define 'murder', 'manslaughter', and 'wrongful death'. Even if they did, it is a different and far more difficult task to attach to those terms the same precise meanings, informed by centuries of jurisprudence, that they only carry in English.

[95] Michael Peachin, 'In Search of a Roman Rule of Law' [2017] (6) *Legal Roots: The International Journal of Roman Law, Legal History, and Comparative Law* 19, 33–9.

into account, multiple discrete systems of law'.[96] He offers plenty of evidence of unfair or unequal treatment before the law.[97] But as noted earlier, *individualism* is a different concept to *equality* and their ready identification is a product of modern ideas of what individualism ought to mean in legal terms.[98] Peachin's concern is with equality before the law, which is the common denominator of most but not all definitions of the 'rule of law'.[99]

But there were no *ex-cathedra* promises to imperial subjects of a 'rule of law'.[100] Still less were subjects promised a specific legal system, or combination of them, that would secure this rule of law.[101] In practice, however, even the jurists had for some time recognised that the *ius gentium*, as they understood and defined it, could be accommodated to or even absorbed by Roman law, while incorporating universal legal rules. In this sense, the *ius gentium* – a body of universal laws governing commercial interactions between private individuals in their treatment and disposal of contracts and property – pointed to something like a 'rule of law' by appealing to what any subject might regard as the 'natural' rule to which they were and ought to be subject.

VI CONCLUSION

Roman law remains influential to this day, as the foundation of all civilian legal systems in Western Europe and in many other places that have fallen under the influence of Roman jurisprudence. But no one seeking practical wisdom from it pays attention to its more archaic

[96] Ibid 57. 'Actual' Roman law would still supply indispensable input to this process: thus, as noted in Chapter 3, it is still the case that Roman law as written by legislators and jurists bears a meaningful relationship to daily practice.
[97] See also Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford University Press, 1970).
[98] See Chapter 1.
[99] See, eg, Tom Bingham, *The Rule of Law* (Penguin, 2011) 4, 55–9. Of course, the rule of law may simply mean absolute conformity to a positive legal system which expressly discriminates between different subjects.
[100] Cf Augustus, *Res gestae* 34.2. Of course emperors promised *iustitia* but that was an even vaguer promise than *rule of law*.
[101] Peachin (n 95) 56–7, quoting Czajkowski, *Localized Law* (n 11) 200–1.

features, such as the kinship-intensive requirements of *patria potestas* or the now almost universally illegal institution of slavery. The elaboration of an imperial *ius gentium*, and the development of Roman law outside of Italy, played an important role in the creation of a modern law of obligations deracinated from its Roman peculiarities and assuming an altogether more individualistic character than one bound by rules of paternal power and archaic conveyancing involving multiple witnesses. In a sense, the imperial provinces completed Rome's individualistic jurisprudence and even made Roman law what we today understand it to be.

Chapter 9

Good Faith: A Corollary of Private Autonomy

I INTRODUCTION

Good faith (*bona fides*) was integral to the Roman law of obligations and especially to contractual dealings. Its existence also presents a counterpoint to the argument so far, which is that Roman law advanced a specifically economic form of individualism, through its regulation of a society of individuals who conceived of each as interacting with all others, and with the corporeal and incorporeal objects contained in the physical and conceptual world, through a nexus of contract, property, and other legal obligations. The counterpoint is that good faith seems to take a step further: it is not just about an individual's economic rights, but how those rights are to be appraised by reference to his or her personal character and conduct. This could mean that the Roman legal system recognised – and, by recognising, reified and legitimised – the morally autonomous individual, by taking the individual's moral conduct into account in determining his or her legal rights and duties.

One difficulty, which is explored in this chapter, is reconciling overarching, even aspirational commentary on good faith with its technical, sometimes fragmentary rules. As to the former, one rescript of Diocletian and Maximian, preserved in the *Codex*, sets forth this general rule of good faith: 'It is fair that good faith be considered in connection with contracts.'[1]

[1] *Bonam fidem in contractibus considerari aequum est*: C.4.10.4. Ulpian indicates that rescripts issued by the imperial chancery are universally enforceable: D.47.12.3.5. Cf O F Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (Routledge, 1997) 36–7, who thinks that rescripts were not 'suitable … as authoritative statements of the law, because they were normally dependent on the truth of the facts alleged by the party seeking an imperial ruling', though she admits that '[s]ometimes … they had a general character almost like an edict'. In any event, Robinson's reasoning is wrong if she thinks that the validity of a legal rule depends on the truth of the facts in the particular case in which that rule is expounded. Modern appellate courts often have jurisdiction over questions of law only, but questions of fact are generally off bounds only for the sake of finality and certainty, efficiency in the administration of justice, deference to the trial courts, etc; but not out of

This is a broad if rather anodyne statement, especially coming from a compilation of legislation seldom cited for its enunciation of abstract or general principles. On a closer view, the Roman idea of good faith is more complicated, and more variegated in how and where it applies. Yet it may be possible to discern a moral precept animating all these rules, which in turn says something important about Roman law as a system for the regulation of private individuals.

This chapter begins by examining the broader notion of *fides*, a core tenet of civic culture in ancient Rome, as the origin of the narrower, more legalistic concept of *bona fides*. It then reviews theories of good faith in both modern and ancient law, and surveys its application in Roman legal disputes. Good faith is an elusive concept, but this does not mean that it was (or is) incoherent or lacking cogent philosophical foundations. In fact, this chapter posits good faith as an important element of Rome's individualistic jurisprudence, less for encouraging autonomy or idiosyncrasy than for measuring each actor by his personal qualities and assessing his legal rights and obligations by those criteria: or as Franz Wieacker described it, '[t]he constant looming contradiction between the personal ethical standard expected from those party to a legal action and the general interest in the enforcement of the imperative legal order'.[2] The chapter concludes with a brief examination of the Roman legal concept of *causa*, which, as a defence to contract claims, also looks to the relevant conduct of the individual claiming some right at law.

some pseudo-philosophical conviction that trial judges always find the truth (still less that whatever a trial judge finds *is* the truth).

[2] Franz Wieacker, 'Stillschweigende Hoferbenbestimmung?' (1956) *Deutsche Notar-Zeitschrift* 115, 121, quoted and translated in Hans-Peter Haferkamp, '"Byzantium!" – *Bona Fides* between Rome and Twentieth-Century Germany' in Kaius Tuori and Heta Björklund (eds), *Roman Law and the Idea of Europe* (Bloomsbury, 2019) 145, 145.

II WHAT DID FIDES MEAN TO THE ROMANS?

Cognitive science research indicates that humans would not function the way they are supposed to without their propensity to abstraction.[3] This may be why social concepts can be useful even when they verge on oversimplification; and this is especially true of those words – like the Roman idea of faith (*fides*) – that can seem like the key to explaining the sociology of an entire civilisation. As Raymond Williams observed, keywords are 'a shared body of words and meanings in our most general discussions … of the practices and institutions which we group as *culture* and *society*'.[4] To illustrate the sense in which I am using it here, other keywords in other times and places might include *liberté* in Revolutionary France, *manifest destiny* in Antebellum America, and *omertà* in post-*Risorgimento* Sicily.[5]

The only keyword that would rival or exceed *fides* for its importance in classical Roman society itself is *pietas*: a word made famous by the hero's epithet, *pius Aeneas*, in Virgil's epic poem, and signifying loyalty to the pantheon of public and household gods, but also to one's family – especially the patriarch (*paterfamilias*) – and to the state (*res publica*) itself.[6] It is noteworthy that the respective meaning of both words – *fides* and *pietas* – narrowed over time,

[3] Florian Sandhaeger et al, 'Abstract Perpetual Choice Signals during Action-Linked Decisions in the Human Brain' (2023) 21(10) *PLOS Biology* e3002324, which reports on laboratory studies indicating abstract neural choice signals in the cortex, even when linked to a physical action. While the idea is yet to be tested, this seems to lend great support to Platonic ideas of Form.

[4] Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (Fontana, 2nd ed, 1983) 15.

[5] The literature on *liberté* is vast, but see Alexis de Tocqueville, *L'ancien régime et la révolution* (Éditions Gallimard, 1967 [1856]) 191–205; but taking care to note that by the Bourbon Restoration, 'liberty' was once again a partisan word distinguishing one half of the Chamber of Deputies from 'conservatives'. For manifest destiny, see Amy Greenberg, *Manifest Destiny and American Territorial Expansion: A Brief History with Documents* (Bedford/St Martin's, 2nd ed, 2018); and on the concept as an ideological prompt to imperial projects in other parts of the continent, see Michel Gobat, *Empire by Invitation: William Walker and Manifest Destiny in Central America* (Harvard University Press, 2018). For *omertà*, see Francesco Benigno, 'Rethinking the Origins of the Sicilian *Mafia*: A New Interpretation' (2018) 22(1) *Crimes, Histoire & Sociétés* 107, 109; Raymond Angelo Belliotti, *The Godfather and Sicily: Power, Honor, Family, and Evil* (State University of New York Press, 2021) 50–2.

[6] The best source is the *Aeneid* itself. Even in its wider sense, a religious core always inhered in the word: Cicero, *De natura deorum* 1.116. For useful discussions of the concept in Roman society and especially political rhetoric, see J Rufus Fears, 'The Cult of Virtues and Roman Imperial Ideology' in Wolfgang Haase (ed), *Heidentum: Römische Götterkulte, Orientalische Kulte in der römischen Welt* (De Gruyter, 1981) 827, 864–5; Henryk Kowalski, '*Pietas* and *Impietas* as the Characterisation of "Good" and "Bad" Citizens and Politicians in Rome during the Decline of the Republic' (2021) 58(2) *Klio* 67, 73–6.

so that while they remained core concepts in late antique and Christian culture, the words 'faith' and 'piety' have long held narrower, theological connotations that belie the scope of their application in earlier times. Further, to dissociate these dual monarchs of Roman social thought can be misleading. As Rufus Fears has noticed, Polybius – an astute Hellenistic observer of Roman society – perceived that Roman 'piety towards their gods resulted in their meticulously respecting their oaths and treaties'.[7] This is an opportunity for judging a man or woman by their personal qualities. Of course, this is not the individualism of modern self-determination. Rather, the individual demonstrates that he or she is better or more reliable than other individuals by truer fidelity to a common moral code. To deny this as an expression of individualism is to assume that individualism cannot exist in tandem with generally accepted moral assumptions.

In a well-known passage of his *De officiis*, Cicero is ready as ever to both tout an ancient national virtue and lament its present decline. He recalls the story of Marcus Atilius Regulus, who is said to have been released by the Carthaginians during the First Punic War, upon being made to take an oath to return to his captors if he failed to sue for peace among his compatriots. Putting country before self, Regulus is supposed to have advocated a continuation of the war but – true to his oath – returned to Carthage, where he was duly tortured to death. Cicero writes: 'For the fact of his returning may seem admirable to us nowadays, but in those times he could not have done otherwise. That merit, therefore, belongs to the age, not to the man.'[8] Earlier, in a letter to Atticus, Cicero makes passing mention of a provincial edict of Quintus Mucius

[7] Fears (n 6) 864–5, citing Polybius, *Histories* 6.56.7, 24.13.3.
[8] *Nam quod rediit, nobis nunc mirabile videtur, illis quidem temporibus aliter facere non potuit; itaque ista laus non est hominis, sed temporum. nullum enim vinculum ad astringendam fidem iure iurando maiores artius esse voluerunt. Id indicant leges in duodecim tabulis, indicant sacratae, indicant foedera, quibus etiam cum hoste devincitur fides, indicant notoines animadversionesque censorum, qui nulla de re diligentius quam de iure iurando iudicabant*: Cicero, *De officiis* 3.111.

Scaevola which provided – sweepingly, it must be said – that agreements must not contravene good faith.[9]

Good faith was a norm for assessing the conduct of individuals. If good faith belonged to the man, he found favour in the law; if it did not, then the law penalised or disfavoured him in actions where good faith was a criterion for determining who had done the right thing and therefore, what are the attendant legal entitlements. There are no communal rewards or punishments, but there is a universal moral standard, against which each citizen, slave, or foreigner is individually measured and appraised.

As already hinted, abstractions such as 'faith' and 'liberty' can mislead: Daniel Burge, for example, has collected and interpreted strong evidence against 'manifest destiny' as a defining national idea among many nineteenth-century Americans.[10] Having taken this appropriate cautionary note, however, it is equally unhelpful to deny that some concepts have taken deeper root among peoples of certain times and places. *Fides*, for one, can be shown to have had great influence on – indeed, to have shaped and defined – such an honour-bound and clannish society as ancient Rome; and to have left traces even in the transformation of the Roman Empire into a multicultural, deracinated market economy. The point is not to prove Cicero right or wrong about whether earlier Romans were more faithful and loyal people, but to show that good faith remained a real criterion for judging individuals, legally as much as morally.

The remainder of this chapter will attempt to show: first, that the sociological concept of *fides* was preserved – albeit in a narrowed form – in the legal concept of *bona fides*; and second, that *bona fides* created an important space for the individual as the primary unit of

[9] *Extra quam si ita negotium gestum est, ut eo stari non oporteat ex fide bona*: Cicero, *Ad Atticum* 6.1.
[10] Daniel J Burge, *A Failed Vision of Empire: The Collapse of Manifest Destiny, 1845–1872* (University of Nebraska Press, 2022).

analysis for legal decisionmakers. An examination of Roman religious and social ideas will reveal that this is not a great conceptual leap: as one legal scholar has it, 'acts of worship of Fides, notably the offering, resembled more the acts of commerce, of exchange between deities and humans, than acts of piety'.[11] Cicero believed that if men ceased to honour the gods, then each man's sense of *fides* to each other man would wither and vanish – an earnest version of Voltaire's famous quip that if God did not exist, then it should be necessary to invent him.[12] Yet again, the point is not to test the validity of Cicero's belief, but to appreciate what this tells us about Roman social expectations.

What, then, is *fides*? Gérard Freyburger has called it a polysemy: a sign capable of multiple meanings.[13] It was a portmanteau encompassing faith, duty, trust, and confidence: and as Fraenkel observed, it was always used in the older Latin texts as faith *to someone*, or *among others* (*alicui*, *apud*), including in 'a certain legal relationship between one person and another'.[14] It was also closely associated with the concept of *amicitia*, whose social importance is attenuated by translating it merely as 'friendship'. Indeed, Peter Brunt observes that *amicitia* is based on *fides*.[15] Or as Sir Ronald Syme relates in his Tacitean style: 'In evil days Roman aristocratic loyalty acknowledged the ties of family, of *fides*, of *amicitia*.'[16] The author of a work traditionally attributed to Caesar describes besieged Lusitanians asking the general for a guarantee of their life if they agree to surrender: as a Caesar, he promises to keep his faith.[17]

[11] Remus Valsan, '*Fides*, *Bona Fides*, and *Bonus Vir*: Relations of Trust and Confidence in Roman Antiquity' (2017) 5(1) *Journal of Law, Religion and State* 48, 53, citing Georges Dumézil, *Idées romaines* (Éditions Gallimard, 1st ed, 1969) 56–59.
[12] Cicero, *De natura deorum* 1.2.
[13] Gérard Freyburger, *Fides: Étude sémantique et religieuse depuis les origins jusqu'à l'époque augustéenne* (Les Belles Lettres, 1986), 9.
[14] [*E*]*inem bestimmten rechtlichen Verhältnis von Personen zu einander*: Eduard Fraenkel, '*Zur Geschichte des Wortes* Fides' [1916] 71 *Rheinisches Museum für Philologie* 187, 187, quoted in Freyburger (n 13) 20.
[15] P A Brunt, '"Amicitia" in the Late Roman Republic' (1965) 11 *Proceedings of the Cambridge Philological Society* 1, 7.
[16] Ronald Syme, *The Roman Revolution* (Oxford University Press, 1960 [1939]) 424 (italics in original).
[17] [*S*]*e Caesarem esse fidemque praestaturum*: Caesar, *De bello Hispaniensi* 19.

But while *fides* and *amicitia* are indices of personal virtue, they are supposed to promote a common good. The virtuous man does for his friend what the friend cannot do for himself. As usual, Cicero says that the ancestors knew better, which is why they treated breach of an agreement to do something on another's behalf (*mandatum*) as no less actionable than if the man had stolen from his friend.[18]

As should be already apparent in the Caesarean anecdote, these virtues did not function as guides for private conduct only. The political value of *fides* is obvious: the Flavian dynasty showed a special partiality to the word in the coins that they minted. But this was not a top-down political institution. Rather, *fides* already had social credit among Romans looking for constancy after a string of unstable rulers and the Year of the Four Emperors; and Vespasian was eager to promote *fides* as a 'declar[ation] that Rome was on a good-faith footing, under the care of a family able to promote the public good over private interests, and – through the loyalty of its armed forces and its reconciliation of the factions – to secure stability and peace following an extreme period of civil conflict'.[19] Appropriately, the Capitoline temple of Fides, who was already worshipped as a goddess in regal times,[20] served as the repository of Rome's treaties with foreign powers.[21] And the word for treaty – *foedus* – was of course a cognate. Celebrating the fruits of peace in the Augustan age, Velleius Paterculus announces that faith, or credit – depending on how one wishes to translate it – has been restored to the Forum (*revocata in forum fides*), here a metonym for the *res publica*.[22] In this short, finely-crafted phrase, Velleius calls to mind the treaty-emblazoned temple of Fides which sat above the Forum.

[18] Cicero, *Pro Roscio* 111.
[19] Antony Augoustakis, Emma Buckley and Claire Stocks, 'Introduction' in Antony Augoustakis, Emma Buckley and Claire Stocks (eds), *Fides in Flavian Literature* (University of Toronto Press, 2019) 3, 3.
[20] Livy, *Ab urbe condita* 1.21.4.
[21] Augoustakis, Buckley and Stocks (n 19) 4.
[22] Velleius Paterculus, *Historiarum libri duo* 2.126.2.

Fides, then, was not confined to matters of private or of public concern only. The private–public dichotomy, though far from non-existent in Roman social thought,[23] signified nothing for a concept that was supposed to inform human behaviour at all levels, from helping a family client to discharging magistral duties; so that a private contract and a public treaty were really the same, because the same code of conduct regulated both agreements.[24] As Freyburger explains: '*Fides* designates, at one and the same time, an individual's interior disposition, a "belief" which is personal to him (cf *opinio*); and an aspect of his social prestige (cf *fama*) …'[25] The most powerful form of regulation was the danger of *ignominia*, which in the worst-case scenario might be declared formally by the censor against an individual – in other words, a kind of government-stamped social disgrace. In a word: *fides* mattered.

Now, the legal sources do not generally speak of *fides* but of a more specific term of art from which it is derived: *bona fides*, or good faith.[26] In their origins, legal actions based *bona fide* can be understood as a substantive ground of obligation, or as the measure of discretion allowed to a judge in determining matters of this kind.[27] Brunt has said that 'the prevalence of *fides* in business life explains many of the institutions of Roman law',[28] and Frier calls *bona fides* one of the 'central concept[s] of developed Roman contract law' and 'a powerful quasi-ethical principle in the jurists' further development of contract law'.[29] While *bona fides* cannot be

[23] See, eg, D.1.1.2.
[24] That said, contractarian theories of public international law also enjoy currency in contemporary jurisprudence: see, eg, Francisco Orrego Vicuña, 'Of Contracts and Treaties in the Global Market' (2004) 8(1) *Max Planck Yearbook of United Nations Law* 341; Curtis J Mahoney, 'Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties' (2007) 116(4) *Yale Law Journal* 824. On *fides publica* as the magistral version of the basic and more general idea of *fides*, see Marc de Wilde, '*Fides Publica* in Ancient Rome and Its Reception by Grotius and Locke' (2011) 79(3–4) *Tijdschrift voor Rechtsgeschiedenis* 455.
[25] *Fides désigne à la fois un disposition intérieure d'individu, une 'croyance' qui lui est personelle (cf* opinio*), et un aspect de son prestige social (cf* fama*)*: Freyburger (n 13) 15.
[26] Ibid 10 expressly declines to address *bona fides*. For a brief survey of attempts to trace the origins of good faith actions, see C C Turpin, '*Bonae Fidei Iudicia*' (1965) 23(2) *Cambridge Law Journal* 260.
[27] Ibid 266.
[28] Brunt (n 15) 7.
[29] Bruce W Frier, *A Casebook on the Roman Law of Contracts* (Oxford University Press, 2021) 9.

understood without *fides*, they are of course not the same thing. Roberto Fiori reminds us that *bona fides*, as a commercial concept, was a novelty, 'a fictitious and conventional fides, based on the behavioural paradigm of the respectable, "good" people (*boni*)', an 'abstract parameter' which served the needs of international trade.[30] *Fides* was a sociological notion enforced outside the law: that is, by the threat of alienation from a closed society of trust. *Bona fides* was a legal notion enforced by the praetors: an exportation of trust to arm's-length commercial dealings, which supplanted the formulary action *dare oportere* ('he ought to give') by giving the judge a moral yardstick for assessing party conduct.[31]

The Romans endowed modern society with one of the most important bodies of positive law, but the law of the Romans was not purely 'positive' law in the sense we understand it, namely a legal system that depends for its legitimacy only on its own existence, and not on its merits or conformity to morals.[32] The jurists never say in as many words that *bona fides* was a rule of natural law. Yet *bona fides* appeals to a moral standard external to law: specifically, it measures the personal conduct of a legal subject against a moral standard.[33] Perhaps the foundational proposition comes from the jurist Javolenus, who wrote that *bona fides* requires that that which was agreed be done.[34] This is a brief, almost circular proposition: but one can see its implications clearly. It does not simply mean that *bona fides* is a term for enforcing an agreement (which really would be circular); it means that some ethical standard, founded on

[30] Roberto Fiori, 'Contracts, Commerce and Roman Society' in Paul J du Plessis, Clifford Ando and Kaius Tuori (eds), *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) 581, 586 (italics in original).
[31] Martin Josef Schermaier, '*Bona Fides* in Roman Contract Law' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000) 63, 74–5.
[32] H L A Hart's famous definition of legal positivism is 'the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so': *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 185–6, and more generally for his 'rule of recognition'. Cf John Austin, *The Uses of the Study of Jurisprudence* in *The Province of Jurisprudence Determined; The Uses of the Study of Jurisprudence* (Hackett, 1998 [1832–63]).
[33] This may appear to simply give the victory to positive law, since any moral law is an enforceable law only because it is a positive law. This is wrong because it misses the point, which is only to say that the positive law coincides with the natural law, which it may do in some particular rule but not in another. It is not an argument for the 'enforceability' of natural law.
[34] [*B*]*ona fides exigit, ut quod convenit fiat*: D.19.2.21.

the core Roman virtue of *fides*, must guide the legal decisionmaker in understanding what the agreement truly means and therefore what is required of each of its parties.

This, however, is the point at which one is in danger of taking the point too far. As Fiori observes in the passage just quoted, the networked market economy needs 'an objective and abstract parameter'. On the other hand, Remus Valsan does not think that *bona fides* lacks a unitary conceptual basis, simply because the sanctions for different forms of bad faith differed according to the legal issue. As Valsan puts it: '*Bonae fidei iudicia* turned *fides* into a legal concept by consecrating it as a standard of judicial reasoning (the interpretation of facts and the individualization of punishment as a *bonus vir* would have done), and as a source of implicit obligations (the obligations that the social *fides* attached to a relation or position).'[35]

III GOOD FAITH IN ROMAN LAW

While the Romans had no word for individualism that would meaningfully correspond to its modern connotations, they recognised a person's moral duty, *as* an individual, to act in good faith. In other words, there is another individualistic ethic to consider: not the individual as rationally self-interested, but the individual whom society expects to serve ends beyond self-interest, even as he exercises his private autonomy and makes bargains for personal gain (which right is seldom seriously challenged in Roman history).

Before proceeding, it must be appreciated that any comparison of the duty of good faith in different legal systems must take care not only of how the duty is defined in radically divergent places and times, but also that some things are similar in substance but may differ in form. For example, in *De officiis*, Cicero recalls the case of Tiberius Claudius Centumalus, who proposed to sell his prime real estate on the Caelian Hill to a certain Publius Calpurnius

[35] Valsan (n 11) 81 (italics in original).

Lanarius. What he did *not* tell Lanarius before the sale was: first, that the state augurs had issued a notice to Centumalus to pull down parts of the house that obstructed a view that they needed to take observations for their divinations; second, that this is why Centumalus had decided to sell.[36] Following the sale, Lanarius duly received the same notice from the augurs. Lanarius – enraged, we may presume – took Centumalus to court and sued him to make good the loss occasioned by this unexpected cost.[37] Cicero credits the judge in this matter, Marcus Cato, with 'establish[ing] the principle that it was essential to good faith that any defect known to the vendor must be made known to the purchaser': that is, extending the rule in the Twelve Tables against false declarations to include omission of a material fact: in other words, that failing to tell the truth is a form of lying.[38]

Ulpian discusses the same principle sketched by Cicero, in more technical detail. He considers what should happen if a seller fails to disclose a servitude on the property he intends to sell to the buyer. This is not the same as what happens in Cicero's story, which was concerned with a failure to disclose a notice from the augurs rather than a legal encumbrance on the property. But this is the point: for as Ulpian says, 'anything done contrary to good faith comes under the action on purchase'.[39] In good faith, Ulpian explains, the seller cannot knowingly conceal the servitude; still less can he deny its existence if asked about it. He is also liable if he takes steps to prevent the buyer finding out about the servitude.[40] So, it is not a narrow question of what the seller did and whether this compels the action or not; it is a broader

[36] Cicero, *De officiis* 3.66.
[37] Presumably the costs of pulling down part of the house, and perhaps also losses reflecting the diminution in the value of the property.
[38] [*A*]*d fidem bonam statuit pertinere notum esse emptori vitium quod nosset venditor* : Cicero, *De officiis* 3.67. Of course, Francis de Zulueta is right to observe that the 'importance' of such a rule of disclosure 'is considerably reduced by the fact that the buyer will have to prove the seller's knowledge: *The Roman Law of Sale: Introduction and Select Texts* (Oxford University Press, 1945) 49. About a century earlier, Cato's agricultural treatise states no such legal principle but simply advises that it is better to purchase a rural property from someone who is a good farmer and a good builder: Cato, *De agri cultura* 1.4. See also Cicero, *Pro Roscio* 111.
[39] [*O*]*mnia enim quae contra bonam fidem fiunt veniunt in empti actionem*: D.19.1.1.
[40] Ibid.

question – essentially an examination of conscience – as to whether the seller 'behaved reprehensibly in concealing a servitude', and that this reprehensibility might take any number of forms deserving legal correction.[41] There is clearly a space carved out here for judicial discretion. Importantly, the focus of this judicial discretion is the probity of the contracting party – his quality as a moral agent.

Despite all this, the presentation of good faith in the legal texts is often technical and seems to lack the character of a general principle. We are told in Justinian's *Institutes* that '[s]ome actions are based on good faith, some on strict law'.[42] The specific terminology appears to be Byzantine but it reflects a distinction drawn in the earlier, classical law.[43] What it basically meant was that in deciding a case brought under a good faith action, the judge (*iudex*) could exercise more discretion by having regard to principles of good faith beyond strict contractual requirements: specifically, he could consider any good faith defence, even if the defendant had not actually raised it in his written response (*exceptio*), which signals a triumph of individualistic jurisprudence in this area of law by giving the judge full latitude to examine the relevant personal qualities of the litigants before him.[44] The quintessential good faith defence in civil law is that of the defendant who escapes what would otherwise be his contractual obligations by pleading and proving that he was fraudulently induced to enter the contract. This classic scenario is helpful in illustrating the progression from strict enforcement (*sorry, but it says here you signed the contract*) to moral adjudication (*yes, I signed it, but you tricked me*).

[41] [*S*]*i improbato more versatus sit in celanda servitute*: ibid.
[42] *Actionum autem quaedam bonae fidae sunt, quaedam stricti iuris*: J.4.6.28.
[43] W W Buckland, *A Textbook of Roman Law: From Augustus to Justinian*, Peter Stein (rev) (Cambridge University Press, 3rd ed, 1963) 687.
[44] Ibid 679; Ernest Metzger, 'Actions' in Ernest Metzger (ed), *A Companion to Justinian's Institutes* (Duckworth, 1998) 226.

The *Institutes* lists out all the good faith actions, which includes, among a few others, the following:[45]

1. *Emptio venditio*, or contracts for the sale of goods.
2. *Locatio conductio*, which encompasses (a) contracts for lease and hire and (b) service contracts.[46]
3. *Negotiorum gestio*, a type of action *quasi ex contractu* to compensate one who has performed a gratuitous act that benefited the principal.[47]
4. *Mandatum*, or a contract in which the *mandator* secured from his counterparty a contractual promise to do something on the *mandator*'s behalf. This has been said, with the benefit of hindsight, to achieve many of the same goals as the modern law of agency.[48]
5. Partnerships. Here, of course, each *socius* (ie, a partner in the *societas*) has a legitimate interest in the honest and fair disposal of his own contributions to his partnership, or at least to the proportion of commonly owned assets to which he is personally entitled.[49]
6. Guardianships. Socially these were very important, since the number and type of persons subject to rules of guardianship – including *alieni iuris* adults, male and female – goes well beyond the modern scope of guardianship laws applying to those with what the law considers to be mental incapacity to enter contractual arrangements alone, such as minors and the mentally disabled.

[45] Ibid. The following list excludes some actions listed in the *Institutes* but not germane to the argument that follows. Notably, inheritance claims are included but the text itself acknowledges the uncertainty of this prior to confirmation in recent legislation. There is a similar but tighter list in G.4.62.
[46] *Locatio conductio* was examined in Chapter 7, and more briefly in Chapter 3.
[47] Conversely, the principal has an action against the *gestor* to the extent of improper management of her own affairs: D.3.5.2. *Negotiorum gestio*, a novelty of Roman law, has been an important inspiration for unjust enrichment jurisprudence in modern England: see P B H Birks, '*Negotiorum Gestio* and the Common Law' (1971) 24(1) *Current Legal Problems* 110; Duncan Sheehan, '*Negotiorum Gestio*: A Civilian Concept in the Common Law?' (2006) 55(2) *International and Comparative Law Quarterly* 253.
[48] Paul J du Plessis (ed), *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed, 2020) 286–7.
[49] The *societas* was examined briefly in Chapter 3.

7. *Pignus*, or a contract for the division of ownership and possession between the debtor and the creditor respectively, the latter taking assets the subject of the *pignus* as a pledge.[50] This shares the same underlying obligation as the contract of *commodatum*, under which a person can borrow corporeal property under certain terms and is obliged at the appropriate time to return the property.[51] Both contemplate property moving around between different possessors and then coming home, so to speak, once the transaction justifying the movement of property is completed.
8. Partition of an estate and division of common property. These are separate actions but both involve sharing out of property, whether formerly another's property (estate) or owned jointly by the beneficiaries (division).

Notice that most if not all of these actions have in common one party's entrustment of another with her property, with all the notions of care and fidelity that appeal to basic cooperative instincts before legal rules even cross the entrusting party's mind.[52]

Notions of good faith protect the entrusting party's likely expectations of the terms on which she is parting, even temporarily, with possession or other legal access to her property.[53] It has been said that 'principles of property are encoded in the human brain'; and so there is even room to argue, in the fields of biology and sociobiology beyond the scope of this thesis, that moral rules built into legal rules supply critical further protection to instinctive proprietary interests in persons who would part only reluctantly, and under well understood terms, with what they call their own.[54] In other words, by protecting an individual's retention, use, and

[50] Robin Evans-Jones and Geoffrey MacCormack, 'Obligations' in Metzger (n 44) 133.
[51] Ibid 130.
[52] Of course, some of these involve entrustment of property in only a figurative or analogous sense at best, as in the case of *negotiorum gestio*, which will be examined below. As will be seen, good faith naturally applies here too because it serves the same function of protecting individuals' legitimate expectations about the use of their own property.
[53] Metzger in Metzger (n 44) 226 observes that the 'most important' of the good faith actions 'were actions contracted by agreement, and those contracted by conduct, with the exception of *mutuum*' (italics in original).
[54] Jeffrey Evans Stake, 'The Property "Instinct"' (2004) 359(1451) *Philosophical Transactions: Biological Sciences* 1763, 1763.

disposal of her own property on terms reflecting her legitimate expectations, the doctrine of good faith (among other rules) serves in organised human societies the same functions as the instincts of all vertebrates on this planet – as the scientist Edward Wilson famously observed – to 'conduct their lives according to precise rules of land tenure, spacing, and dominance'.[55] But there are also precise rules in the disposal of corporeal things, not just land. Like the squirrel who hides his acorn or the dog who conceals his bone, humans own moveable things and expect either to keep and use them unmolested, or to part with them only on terms which – again – reflect their legitimate expectations about what they can do with their property and what others can do with it too.

IV AGREEMENTS FOR THE SALE OF PROPERTY

One of the most important good faith actions was the action on sale of goods (*emptio venditio*).[56] Good faith permitted a more practical interpretation of a contract beyond words and strictures: for example, by allowing a contract for the sale of goods to be interpreted in accordance with the customs obtaining in the industry for buying and selling the goods in question.[57] Modern law also takes this into account where appropriate; there is the obvious advantage in sparing merchants or other repeat players the transaction cost of drafting known industry standards.[58]

This is an important aspect of *iudicia bonae fidae*, but not especially important to the question of how good faith emphasises the behaviour and intentions of contracting individuals. More relevant are the good faith principles that addressed a party's conscience, so to speak.

[55] Edward O Wilson, *Sociobiology: The New Synthesis* (Harvard University Press, 2nd ed, 2000) 256–7.
[56] For the basic principles, see J.3.23.
[57] D.21.1.31.20. Buckland infers from Ulpian's words in this fragment the more general proposition that good faith actions permitted consideration not only of custom, but also of implied terms 'and so forth': Buckland (n 43) 680. This could be a stretch, but it is consistent with a general principle of good faith.
[58] See, eg, *Uniform Commercial Code* § 2-208.

This goes to issues of trust. The quintessential good faith defence against parting with one's own property – whether this is the goods sold or the purchase price – is that the defendant would never have made the contract had she known some fact which the counterparty deliberately concealed from her to enter the contract, or been disabused of some falsehood which the counterparty deliberately told her. I call it the quintessential case because the defendant's question, 'How can you expect me to be bound to this contract when I was tricked into it?', would elicit a near if not universally sympathetic response, since the counterargument that 'rules are rules' – whatever utilitarian justification could be mounted for signed contracts being enforceable under all circumstances – rings hollow against this basic moral appeal.

In the most egregious cases,[59] the theoretical justification for this at common law is that by being 'tricked' into the contract by false premises, the contracting party never really assented and so there has been no 'meeting of the minds' necessary for the contract to have been formed, which is why the tricked party can validly terminate the contract and seek damages. The common lawyers call this fraud in the inducement. Conceptually, this makes more sense than the kindred doctrine that there has been no meeting of the minds when duress – especially economic duress – is applied to someone to procure their signature to a contract; for as Patrick Atiyah famously said, that a 'victim of duress does normally know what he is doing, does choose to submit, and does intend to do so'.[60] We have already seen broadly similar principles in Cicero's story of the house on the Caelian Hill. It was a fraud (*dolus*) to fail to disclose a material defect (including defects as to legal status, not just physical defects).[61]

[59] Ie, those where the contract is void *ab initio*, and not merely at the aggrieved party's election.
[60] P S Atiyah, 'Economic Duress and the "Overborne Will"' (1982) 98(1) *Law Quarterly Review* 197, 200. Arguably Atiyah begs the question, because by saying that since a person under economic duress is still freely entering into a contract there should be some other basis for the law to order rescission, he has not explained what *would* qualify as real absence of will.
[61] D.18.1.43.2.

One of the other characteristics of the good faith actions listed above is that they are all concerned with bilateral contracts.[62] Importantly, *emptio venditio* rationalised the Roman law of sale by replacing the clunkier model of two concurrent stipulations. In summary, the seller stipulated unilaterally that he had delivered the goods to the buyer, while the buyer separated stipulated that he had paid the price for them. Going beyond the obvious, Barry Nicholas explains why this is not only more rational a system, but permits judicial scrutiny of the parties' behaviour and intentions in a way not practical in awkwardly paired, one-way contracts:

> The idea of good faith does inevitably fit more easily with bilateral contracts … For in a bilateral contract the duties of one party are the counterpart of the duties of the other. In arriving at his decision the judge must strike a balance, and in doing so he can readily take account of matters of good faith. In a unilateral contract, on the other hand, the duty of the defendant has no counterpart in a duty of the plaintiff. The judge has no balance to strike.[63]

As explained further below, good faith bilateral contracts are naturally more appropriate to systems of law in which individual contracting parties are held to account for their intentions and behaviour. And as Nicholas shrewdly notices, this means that Roman law is as concerned with individual responsibility as it is with individual right.

V AGREEMENTS FOR THE USE OF PROPERTY

Sale of course means the complete disposal for value of one person's ownership and possession of a thing to another's.[64] Clearly, the moral and instinctual bases for good faith precepts considered above must apply equally to arrangements where things are not disposed of, but are

[62] Again, excepting *negotiorum gestio*, considered below.
[63] Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 164.
[64] D.18.1.1.pr, D.18.1.1.1. See also Frier (n 29) 188–9. The jurists were uncomfortable about treating barters as contracts of sale: a price (*pretium*) should be involved.

lent or otherwise entrusted to another for temporary use and safekeeping; for if the law fails to also protect a person's property in these circumstances, then to that extent it does not protect a person's legitimate expectations about the use of her own property.

Under Roman law, *commodatum* was the appropriate contract for lending goods. This included fungible goods, which meant that equivalent rather the same goods could be returned at the appropriate time, so that *commodatum* could function as a contract for personal loans of money.[65] Obviously, this made it an important vehicle of commerce.

The rationale of protecting a person's legitimate expectations about the use of her own property imposed some notable strictures on a person who had borrowed or leased that same property. The jurists held, unsurprisingly and quite fairly, that a borrower could not be held responsible for damage to or loss of the owner's property in circumstances beyond his control. If a fire breaks out in town and the borrower loses his entire house and its contents – including the borrowed thing – the lender has no action against him; not here, nor in any other situation where the borrower was the victim of matters beyond his control.[66] Where the law gets strict is in what it does consider to be matters beyond the borrower's control. Suppose that the borrower was in his house when the fire spread to it, and he has a chance to retrieve some items before he retreats outside to safety. Ulpian says that if he chooses his own items over those he borrowed from another, then he will be liable for the borrowed items lost to the flames.[67] This may seem harsh, but it is consistent with other rules that do not shock anyone's expectations, such as the rule that a borrower is responsible for the careful safekeeping of the thing borrowed.[68] Who, after all, would side with the man who borrows a horse for the weekend, returns it with a broken leg from his reckless riding, and says 'not my problem'?

[65] D.13.6.4.
[66] D.13.6.5.4.
[67] Ibid.
[68] D.13.6.5.5.

Some may intuit, on the other hand, that it is unfair for the man in the house fire to pay for borrowed tools that he left to burn while retreating in the nick of time with his life and perhaps some of his own jewellery. But it is consistent with the logic of Roman law in protecting a person's legitimate expectation that she, and only she, can treat her own property as she pleases; and that anyone who asks to be loaned that property should be held to an especially stringent standard of care and responsibility to protect those legitimate expectations. Another species of individualism would argue that in a choice between saving his own property or the borrowed property of another, a person is perfectly entitled to prefer his own and that if the law penalises him for it, then that is state interference with personal property by another name. But as should be quite clear by now, the Roman conception of individuality – rather than individual*ism* as such – prioritises the individual as the proper subject of moral appraisal, rather than simply as the cherished object of legal protection.

VI NEIGHBOURLY ACTION AND INDIVIDUAL RESPONSIBILITY

What if someone deals with another's property without their invitation or assent, yet that action conforms to society's legitimate expectations of the use and limits of private property and is therefore properly subject to the moral precept of good faith? Here Roman law tidies up the conceptual incoherence (as it sometimes fails to do elsewhere) by supplying an action for *negotiorum gestio*, often rendered into English – a little disapprovingly – as *unauthorised* or *uninvited administration*.[69] This stands out among the other good faith actions as it is based not on a contract but on some unilateral act – by a person other than the legal owner of the property being dealt with – that the law decides it is fair to compensate.

[69] The latter is used in the revised Watson translation, though Watson himself – a subject of the Scottish law which adopted *negotiorum gestio* wholesale from Roman law – might have taken a more sympathetic view than some of his Anglo-American colleagues in the translation project.

Essentially, the action allows the *gestor* – the person doing something outside the usual scope of her own right or responsibility, or using someone's property in some way – to sue a principal who has been unjustly enriched by failing to compensate the *gestor* for managing the principal's affairs. Unlike agency or various forms of contractual delegation or division of action and responsibility, *negotiorum gestio* covers scenarios occurring outside the realm of contract – that is, where a principal is unaware that the *gestor* is doing something for her benefit, and so cannot have agreed to it according to the classical definition of a contract. Conversely, the action allows the principal to sue the *gestor* for things done inadequately or beyond the scope of what a judge would later hold to be an appropriate act of uninvited administration,[70] which is just an extension of the instinctive idea that if one is using another's property or interfering in her affairs, he had better do it properly.[71] The action falls under the Roman classification of actions arising 'as if' from a contract (*quasi ex contractu*): for on the one hand, there is no contract being sued on, but on the other hand the action does not arise from a delict or civil wrong, so the Roman jurists tidied up their classification – perhaps inadequately – with the fiction that the action arises analogously to a breach of contract.[72]

Justinian's *Institutes* acknowledges that, as a matter of good public policy, the action came into being 'to ensure that the affairs of the absent were not left untended if they suddenly had to set off abroad without having time to make proper arrangements'.[73] Going still further, there is a sound rationale for having this action available even if the principal did have time to make proper arrangements for all foreseeable needs. Suppose that Juno commands Aeolus,

[70] Obviously, there is no 'scope' of uninvited administration in the way that there is for, eg, agency, whose scope is that which the principal and agent agree on. Here, I mean a retrospective judicial determination of reasonable action.

[71] In other words, the possessory instinct would only allow interference with one's own property that actually benefits the owner and thus preserves her legitimate expectation to what is hers. For use of the action by principal against *gestor*, see D.3.5.2.

[72] J.3.27.pr.

[73] [*I*]*dque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti nulli demandata negotiorum suorum administratione peregre profecti essent, desererentur negotia*: J.3.27.1.

king of the winds, to summon a storm which wreaks havoc to the property of both the principal and the *gestor*, on adjoining plots of land in rural Italy.[74] Here, the *gestor* could recoup the reasonable expense of making urgent temporary repairs not only to his own structures but to those of the principal, if those repairs are necessary to prevent still greater damage.[75] Or consider another scenario: the jurist Julian relates the real-life case of a *curator* of a municipal council appointed to buy high-quality wheat, but the assistant appointed to him cuts the stockpile with inferior produce, so that the curator was only able to get a lowered price for it. Here an action lies in *negotiorum gestio* because the *gestor* – here, the assistant – has acted on his initiative to manage the curator's affairs but has done a bad job; and just as the action is intended to incentivise proactive neighbourly assistance, so too must it penalise meddlesome assistance that harms the principal's interests.[76] Further, the action – this is more speculative – might have been intended to protect social benefits beyond *gestor* and principal, for the *gestor*'s defective assistance has not only cost the principal a profit but has harmed a municipal project that the principal, as *curator*, was carrying out for the community.

So, the action exists only to incentivise administration of another's affairs if it is beneficial; consistently with any legal rules that preserves an owner's legitimate expectations about the use of property. An alternative to this approach, however, is to discourage administration of another's affairs altogether, thus avoiding the issue of whether the administration proved helpful or detrimental. Reinhard Zimmermann observes that there is no doctrine of *negotiorum gestio* in English law.[77] This is true (though English law cannot be said to have failed to develop a suite of quasi-contractual obligations[78]). It is Zimmermann's next observations that draw more interest. For him, the absence of *negotiorum gestio* in English law

[74] Virgil, *Aeneid* 1.65–123.
[75] The *gestor* will only recover *necessary* expenses: D.3.5.24.
[76] D.3.5.29.
[77] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) 435.
[78] See, eg, Peter Birks, *Introduction to the Law of Restitution* (Oxford University Press, 2nd ed, 1985).

characteristically reflects its individualism and distrust of unsolicited meddling. But for the Romans, while liberty 'was one of the basic principles inspiring the Roman jurists, and their private law showed many essentially individualistic traits',[79] individualism was not a social ideal and notions of mutual obligation superseded ideas of individual right and self-ownership. Good faith had a function in holding individuals to a public moral standard.

True, *negotiorum gestio* is most definitely not the expression of a liberal-individualistic society: neither the libertarian type that excludes as much external interference as possible,[80] nor the statist type that expects the government to take intrusive measures to protect each individual's self-expression, even to the detriment of the harm principle.[81] Nor, however, is *negotiorum gestio* simply an expression of paternalism, which in modern political discourse usually serves as the antagonist of liberalism.[82] So far from requiring the individual to accept the help of the state, submit to its commands, and give it the resources needed to maintain this role, the Roman state instead expected individuals to help each other – to take their own initiative – and would step in only to vindicate one man's gratuitous assistance of another. The critical difference is that unlike in legal relationships formed expressly or even tacitly between two individuals,[83] the *gestor* is under no obligation to assist his neighbour, *but* if he does, *and* the neighbour is enriched in some way, *and* the neighbour does not compensate him for his neighbourly duty, then an action may lie for unjust enrichment.[84]

[79] Zimmerman (n 77) 435–6 (italics added). See also W W Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline*, F H Lawson (rev) (Cambridge University Press, 2nd ed, 1965) 334–6; Baha Yiğit Sayın, '*Negotiorum Gestio* as a Source of Obligation: From Roman Law to Modern Codes' (2023) 73 *Annales de la faculté de droit d'Istanbul* 261, 262 n 3. See also n 2 on the existence of only a restrictive functional equivalent in Islamic law.

[80] One of the most libertarian rules in the common law is the famous 'no duty to rescue'.

[81] See Patrick J Deneen, *Why Liberalism Failed* (Yale University Press, 2019) 144–7.

[82] The literature is vast, but see John Stuart Mill, *On Liberty and Other Essays*, John Gray (ed) (Oxford University Press, 2008 [1859–69]); Bertrand Russell, *Authority and the Individual* (Routledge, 2009 [1949]).

[83] Eg, *mandatum* or agency.

[84] If any analogy is appropriate, it is to the bystander in modern Anglo-American tort law, who – absent any 'Good Samaritan' legislation to the contrary, which is rare – is not obliged to help another out of a calamity in which the bystander had played no part *but if he does*, will take upon himself a duty of care to the appropriate standard when assisting someone in need.

It is not difficult to imagine the conditions in which *negotiorum gestio* actions arose. It might have come about in earlier times when each person or family depended on one's neighbour for assistance, as the neighbour in turn depending on them.[85] And indeed, this does not exhibit the kind of 'individualism' that appeals to the modern mind: one emphasising each person's freedom neither to interfere or to be interfered with. *Negotiorum gestio* makes sense in a time long before standing emergency services, when it was prudent to incentivise mutually protective behaviour.

But this is not to suggest that the conditions originally giving rise to *negotiorum gestio* must be irrelevant to the conditions of modern societies or inimical to liberal values. Today as in any age, situations arise where a person who is abroad for any length of time would be grateful for her neighbour's uninvited assistance in the case of some emergency: not every occasion requiring neighbourly assistance can be predicted and accounted for by appointing agents.[86] There is an obvious social benefit in incentivising A, the Good Samaritan, who finds B's sick child in some isolated place and need of care, to nurse the child to health. A sense of religious charity or moral duty might be enough to compel someone like A to do the right thing in the circumstances, but A would then be left without just compensation or indeed, might only be 'decent enough' to help if he knew he would not be left in the lurch. A would be incentivised by an assurance of an action in unjust enrichment rather than having to rely entirely on contractual promise by B, especially if B is not available to give that promise.[87] In this scenario, (1) the harm principle remains intact because one cannot see, objectively, how B could regard A's reasonable expenses in caring for the sick child in an emergency as an intrusion upon the

[85] There is basically no evidence of a functional equivalent before its introduction into praetorian law: H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 3rd ed, 1972) 298. However, Buckland points out that if the praetors promised an action in their edict for it, then 'there must at one time have been an alternative formulation *in factum*': Buckland (n 43) 537 (italics in original).
[86] See J A Crook, *Law and Life of Rome* (Thames & Hudson, 1967) 236–7.
[87] J.3.27.1. In fact, by necessity B would not be available to give that promise, which is why *negotiorum gestio* exists.

proper scope of B's autonomy; (2) even if, subjectively, B secretly desired that the sick child should die unaided, only a foolish kind of libertarian would consider there to be a morally or legally defensible claim on B's behalf; and (3) the scenario in (2) might well expose B to tortious or criminal liability anyway.

At first glance, *negotiorum gestio* appears the odd one out in the good faith actions in Roman law. But this would miss what the principle of good faith is intended to achieve, whether the good faith action is one under a contract or not. It protects any person who pursues some activity honestly, whether in performing her contractual duties or going beyond the scope of contractual relationships to help a neighbour. Indeed, it reveals a defining feature of Roman legal individualism: for the Romans, the emphasis was as much on individual *responsibility* as it was on individual *autonomy*. This even shows itself in the rules on *usucapio* through a slave,[88] since not only must the master have been in good faith when he was aware of the taking of another's property; so too must the slave have been in good faith in the taking: that is, the slave's own subjective intent is a necessary element of the legal claim even where he is carrying out his master's will.[89] And while an emphasis on either responsibility or autonomy seems often to reflect the priorities of very different political creeds, they are alike in reducing legal analysis to the state of mind of each individual that has performed an action that a decisionmaker has to consider in attributing rights, liabilities, and apportionment of compensation. This ethos does not square with modern legal and moral principles: but that does

[88] At risk of oversimplification – but adequately for present purpose – *usucapio* is the Roman equivalent to a common law action for adverse possession, where a person without title to land acts as if it were her property and goes unchallenged by the real owner long enough for title to pass to her. Roman law allowed *usucapio* over any corporeal thing not only by the direct action of the *usucaptor* but by that of a slave acting on the *usucaptor*'s behalf. Tellingly, the subjective intentions of the slave might play a part in a judge's decision on whether the *usucaptor* had acted properly.

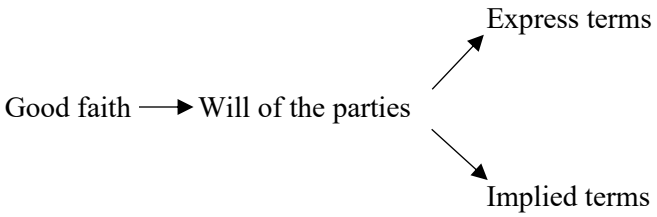
[89] D.41.4.2.11.12; W W Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge University Press, 1970 [1908]) 135. See also D.3.5.7.

not mean that Roman law was unconcerned with the character, rights, and responsibilities of men and women in their own right.

VII Bona Fides as a General Rule

Max Kaser argued that good faith loosened the strictures that characterised early Roman contracts, and helped to develop it into a regime suitable for the international market economy.[90] In the title of the *Digest* dedicated to actions on sale, Ulpian writes: '[N]othing better conforms to good faith than that the contracting parties be held responsible for what they arranged. But if nothing was agreed on, then they are held responsible for the duties naturally inhering in the scope of this action.'[91]

Ulpian's text can be mapped like this:



Good faith reflects the will of the parties, first insofar as they should be held to what they agree expressly to do; and second in that by signing up to, say, a contract of sale, the parties signal to each other that they are persons who can live up to, and accordingly are happy to be bound by, certain standards of behaviour, whether that entails not hiding crucial information which if known would turn the buyer immediately away or – in this case – to diligently perform the sale of the goods in question.

[90] Max Kaser, *Das römische Privatrecht* (C H Beck, 1971) vol i, *Das altrömische, das vorklassische und klassische Recht*, 474–5, 485–7.
[91] [*N*]*ihil magis bonae fidei congruit quam id praestari convenit, quod inter contrahentes actum est. quod si nihil convenit, tunc ea praestabuntur, quae naturaliter insunt huius iudicii potestate*: D.19.1.11.1.

The second limb needs some further analysis. I have used the phrase 'implied terms' because Ulpian himself has furnished an excellent definition – 'duties naturally inhering in the scope of this action'. Now, even if *bona fides* were only a behavioural paradigm, it was one that bound a contracting party to some obligation of moral probity. Curiously, this approach prefigures more than one strain of the liberal individualist tradition, and the key to this is what the contracting party is assumed to know about the applicable legal rules before making a contract. Charles Fried explains that his theory of contract as promise and the law and economics analysis pioneered by Richard Posner both 'concern themselves with general rules and proceed *ex ante*', hence 'why the two methods arrive at similar, if not identical conclusions'.[92] How so?

> Legal regimes by their nature are concerned with institutional design, and both the Kantian and utilitarian perspectives focus on maximizing the preferences of individuals *ex ante*; that is, the two perspectives focus on the design of legal regimes and doctrines that collaborating individuals would themselves see as furthering the purposes they hope to achieve in furthering their collaboration.[93]

The Romans filled gaps in specific contracts by furnishing general standards of conduct which not only reflected how others in similar circumstances had acted but – more critically – how they *ought* to act and – still more critically – how a person pursuing his own interest would *want* to act and would *want* his counterparty to act, especially if they are repeat players in the game of buying and selling goods in the Roman market economy. In other words, abstract rules might be abstract, but they are intended to capture and supplement the will of the parties by

[92] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press, 2nd ed, 2015) 140 (italics added).
[93] Ibid (italics added).

imposing rules that a rational actor, having regard to his rational self-interest as an individual player in the game, would want included in any contract she was signing.[94]

So, while the standard of conduct is abstract, it is not completely deracinated: it represents standards built on the aggregate of market behaviour and more significantly still, it is one to which an individual voluntarily subscribes: the wilful holding oneself as a person deserving communal approbation and social credit. Further, and unlike modern thinkers from Holmes[95] to the school of law and economics,[96] the Romans had no notion of 'efficient breach', which is so distinctly modern in its economic appraisal of cost and benefit; Romans accepted that people would breach their contracts, but their jurists never conceived of this as an 'option' that a 'rational actor' might legitimately take. *A fortiori*, then, classical Roman law assumed that by signing up both to the rules expressly agreed on and the implied rules of good faith, a contracting party was holding himself out as a man who could and would perform his obligations honestly and in good faith.

By now it looks a little more plausible to square the individual good faith actions with that more general precept on good faith quoted from the *Codex* at the beginning of this chapter. Again, the imperial chancery stated: 'It is fair that good faith be considered in connection with contracts.'[97]

Here it is important to recognise the limits of the individualistic tendency that some of these maxims on good faith seem to encapsulate. For example, the above maxim could apply not only in situations where a litigant's legal entitlements are to be determined by reference to

[94] With the bonus that unspoken rules are effectively drafted into the contract free of charge.
[95] Oliver Wendell Holmes, Jr, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 462. Cf Daniel Friedmann, 'The Efficient Breach Fallacy' (1989) 18(1) *Journal of Legal Studies* 1; Joseph M Perillo, 'Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference' (2000) 68(4) *Fordham Law Review* 1085.
[96] Richard A Posner, *Economic Analysis of Law* (Little Brown, 1st ed, 1973) 55–61; Gregory Klass, 'Efficient Breach' in Gregory Klass, George Letsas and Prince Saprai, *Philosophical Foundations of Contract Law* (Oxford University Press, 2015) 362.
[97] *Bonam fidem in contractibus considerari aequum est*: C.4.10.4.

his *bona fides*, but where the expected standards of a *bonus vir* are to be applied by the decisionmaker himself. *Bonus vir* can be translated in a few ways – the honest man, the upright man, or even simply the commonsense man. If anything, arguably, this is anti-individualistic, since the judge or arbitrator is called upon to exercise his discretion *as if* he were an honest or sensible man, thus conforming to a recognised universal standard of honest conduct (to say nothing of the litigants themselves, whose individual moral qualities are neither here nor there). Ulpian gives an example of this in the sale of a slave, which may only occur upon the master's satisfaction that he has settled his accounts. Do we ask the actual master in the instant case, or does the arbitrator decide based on whether the abstract and omnipresent *bonus vir* would be satisfied? Ulpian says the latter, apparently following the republican lawyers – which of course meant that the master is objectively satisfied in the law's eyes, even if the master himself objects.[98] Nor is the reference to the early republican jurists irrelevant: it betrays an older ethic according to which one should conform oneself to communally-accepted standards. Actually, this is not a distinctly 'ancient' or 'modern' legal principle: modern tortfeasors and trustees are held to the standard of similarly abstract *boni vires*, whether they are called the 'reasonable man' or the 'prudent investor'.[99]

VIII CAUSA

In addition to good faith, the Roman jurists developed a concept called *causa* to keep the analysis of each party's legal rights centred on the underlying purpose of some agreement being sued upon. Unlike *bona fides*, for which 'good faith' is a decent translation, the word *causa* is better left in Latin and not translated – directly, but uninformatively – as 'cause'.

[98] D.18.1.7.pr. See also D.33.1.3.
[99] National Conferences of Commissioners on Uniform State Laws, *Uniform Prudent Investor Act* (1995) s 2(a).

The two concepts are quite distinct and are replete with their own technical rules; but they share a preoccupation with the behaviour of a party claiming some right from the law; so that as Donald Kelley observes, through legal acts such as claims (*actiones*) or defences (*exceptiones*), 'individuals, as agents, exercised not only their liberties *but also their wills*, so long as they had legal "cause" … and good faith.[100] But a party could only exercise his will if his personal conduct had not tainted his own cause of action.[101]

Before examining this aspect of *causa*, a summary of the primary doctrine is required. *Causa* refers to the purpose for which a contract is entered into.[102] Specifically, it gains legal force when the contract – which would otherwise be valid by the fulfilment of the relevant conditions – is expressed to be a *condition* for some contractual entitlement. If Aulus agrees with Numerius that 5,000 *sesterces* will be paid if the cargo is delivered at Puteoli by the Kalends of this month, the ship's arrival by that time has become a condition, failure of which nullifies Numerius' entitlement to the 5,000 *sesterces*. Conversely, a condition that cannot be fulfilled will compromise the validity of the agreement altogether: as Gaius says, if a stipulation depends on someone touching the sky with his finger, then there is no *causa* because the underlying purpose of the contract – its 'cause', if you must – is impossible.[103]

But what if Aulus secretly directed the ship's captain to make an unscheduled trip to Baiae, and the ship does not make it to Puteoli by the Kalends? Can he deny Numerius his 5,000 *sesterces*? *Causa* becomes interesting to our inquiry when it is invoked as a legal defence. Or take this example: I have stipulated for delivery of one slave. My counterparty can deliver

[100] Donald R Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard University Press, 1990) 51 (italics added and in original).
[101] This bears some resemblance to the English equitable maxim that one must 'come to equity with clean hands': a doctrine far more often invoked in legal pleadings than genuinely understood.
[102] Despite the superficial attraction of doing so, *causa* is better not equated in any serious way with the narrower (and unfortunate) common law doctrine of consideration: Joseph Drake, 'Consideration v *Causa* in Roman–American Law' (1904) 4(1) *Michigan Law Review* 19; B S Markesinis, 'Cause and Consideration: A Study in Parallel' (1978) 37(1) *Cambridge Law Journal* 53.
[103] G.3.98.

either Dama or Eros. He tenders Dama, but I default in accepting him, and Dama dies. Can I sue for delivery of Eros? The jurist Javolenus thought I could not.[104] One does not need juristic reasoning to intuit that this is correct: the layperson would reasonably ask why I should be entitled to put the counterparty out and demand his second slave? Javolenus provides a technical explanation for a natural intuition: the counterparty *defaulted*, but that default is not the real *cause*.[105] The very logic of the contract has been defeated by my poor conduct, so my contractual entitlements go down with it.

Causa essentially introduces a functional analysis into the law of contracts. What did the two contracting individuals agree, *and why*? If the *causa* – the 'why' – is subverted by one individual's claim, then that individual is not entitled to what would otherwise have been a good claim. Following Ulpian's explanation: suppose there is a stipulation that Aulus pays Numerius 1,000 *sesterces*. If that is all that is said, then Aulus owes Numerius 1,000 *sesterces*, end of story. But if they agree that Aulus will pay Numerius that sum *because* Numerius will lend Aulus 1,000 *sesterces*, then the underlying *causa* is revealed and simultaneously made the condition on which the whole arrangement hinges. Clearly Aulus' stipulation functions as the repayment of the money that Numerius will have lent Aulus beforehand. No loan, no *causa*: no 1,000 *sesterces* for Numerius, otherwise he is making that money off Aulus precisely by failing to honour the purpose for which Aulus is indebted to him.[106] That, according to the reasoning of the jurists, is morally *and therefore legally* perverse.

[104] D.45.1.105.
[105] Ibid. Incidentally, while this is an issue of contract rather than delict, Roman jurists' reasoning clearly would not have led them into the problems that common lawyers put on themselves in tort law by requiring both an 'actual' and a 'proximate' cause (with all the hassle and superfluity of passing the 'but for' test before the real causal link can be determined). Here – again, by contractual analogy to tort – Javolenus looks straight to the 'proximate' cause, which is my failure to take timely delivery of Dama (or in the other example, Aulus' nefarious direction to the ship's captain).
[106] D.44.4.2.3. Frier (n 29) 99.

Granted, there is an air of truism about all of this; if there is, it is a compliment to Roman law, as an example of a positive law expressing natural law. What is not truistic is the individualistic analysis involved in the doctrine of *causa*. As with good faith, personal motives and conduct become central to the assessment of legal entitlement. It is not purely a factual inquiry: the factual inquiry serves the deeper question of who committed the real wrong. Not only is the Roman law of obligations about the interactions between individual 'possessors and administrators of things';[107] the very rights of those possessors and administrators is conditioned upon the proprietary of their behaviour, at least within the factual confines of the case at hand.[108] Examples have already been given in this thesis of the totally different logic of kinship-intensive legal orders: in such systems, it would not necessarily make sense to look to the personal motives and conduct of someone buying or selling or doing some other thing with another individual; the default rather than the cause is what triggers the legal consequences. In Rome's individualistic jurisprudence – like the individualistic jurisprudence of the common law – an individual's dishonesty will play a role in the assessment of her legal entitlements.

IX CONCLUSION

By the time of the rescript of Diocletian and Maximian quoted above, the principle of good faith – more so than *causa* – had become a generalised rule, detached from any one form of action and applying universally to the resolution of legal disputes.[109] As Valsan puts it, *bona fides* eventually 'lost its technical sense and was again conceptualized in an ethical sense'.[110]

[107] J G A Pocock, 'The Ideal of Citizenship since Classical Times' (1992) 99(1) *Queen's Quarterly* 33, 39. See Chapter 1.
[108] In other words, Numerius is denied the 1,000 *sesterces* because of his dishonest conduct in the case at hand, not because a factual inquiry reveals that he is generally not a good person or even that he is generally bad to Aulus.
[109] In fact, it has been suggested that good faith was already being considered in *stricti iuris* actions as early as the first century BC: see Nicholas (n 63) 22 n 1, 164.
[110] Valsan (n 11).

On one view, *bona fides* had evolved from a set of technical rules to a basic assumption for appraising and regulating the behaviour of individual subjects in their business and social interactions with one another;[111] just as its older sibling, *fides*, held individuals accountable to the whole Roman community for the consequences and moral probity of their actions.[112] At the very least, and as Raymond Williams might have said, *bona fides* had become a keyword.[113]

Bona fides may be evidence of a more just and less technical system; for others it may be a sign of diminished legal sophistication, even of slackness in the application of legal rules.[114] For others, it is worse still: anxious at the prospect of tyranny in 1920s Germany, Fritz Pringsheim looked back to both *bona fides* and *aequitas* as expressions of imperial will above mere law (*ius*).[115] Since Tocqueville, critics of individualism have feared its propensity to weaken and sever intermediary institutions between each subject and the state: without strong ties of local community, church, extended family, and so on, there is only the individual and the state, and nothing in between.[116] For Pringsheim, noble-sounding concepts like *bona fides* were really an invitation to arbitrary pronouncements from the imperial throne, issued under the guise of doing justice between individual parties.[117] This chapter has suggested that *bona fides* had a longer pedigree: that it was not always and only a rhetorical device for the advancement of princely power. But whatever its political dangers, the discretion afforded to

[111] María Salazar Revuelta, '*Formación en el derecho romano y en la tradición romanística del principio de la buena fe y su proyección en el derecho comunitario europeo*' (2015) 14 *Revista internacional de derecho romano* 111, 130–1. See also James Gordley, 'Good Faith in Contract Law in the Medieval *Ius Commune*' in Zimmermann and Whittaker (n 31) 93, 100–6.
[112] Eleanor Cowan, 'The Individual and International Law in Antiquity' in Anne Peters and Tom Sparks (eds), *The Individual in International Law: History and Theory* (Oxford University Press, 2024) 31, 40–1.
[113] Williams (n 4).
[114] The Theodosian Law of Citations is the commonest flashpoint of debates over the alleged decline or health of postclassical law under the dominate: cf Nicholas (n 63) 37 and Alan Watson, *The Spirit of Roman Law* (University of Georgia Press, 1995) 6.
[115] Fritz Pringsheim, '*Jus aequum und jus strictum*' (1921) 42 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 643, 668, quoted in Haferkamp (n 2) 149.
[116] See Chapter 1.
[117] As Haferkamp summarises this strain of German legal thought, '[b]ehind the deceptive appeal to individual justice was the will of the totalitarian ruler': Haferkamp (n 2) 149–50.

legal decisionmakers by the quasi-moral doctrine of good faith does place the individual at the centre of the legal process.

Conclusion: From Citizen to Subject

> The perfect equality of men is the point in which the extremes of democracy and despotism are confounded; since the majesty of the prince or people would be offended, if any heads were exalted above the level of their fellow-slaves or fellow-citizens.
>
> —Edward Gibbon[1]

Most of this thesis has been little concerned with the rights of Romans under public law,[2] or the involvement of Romans in politics.[3] The individualistic jurisprudence argued for here was developed in Rome's private law of obligations: the nexus of rights and duties under delict, contract, and property which linked individuals together in commercial exchange. As the political power of Romans waned, the system of private law to which they had access continued to grow and be refined. This may be described, in a word, as the transition from citizen to subject.

This will appear odd, especially after the analysis in the chapter before last of the *growth* of citizenship in the Roman Empire from the early third century, particularly after Caracalla's edict of 212. But the expansion of the legal category of citizenship did not translate to increased political participation, and to assume it did would be a *non sequitur*. What did occur was a gradual atomisation of individual citizens in a long process of diluting political power. Aldo Schiavone locates the start of this process quite early in Roman history: to the reforms of King Servius Tullius, which linked wealth to military service and organised Roman society into clan-

[1] Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, vol ii, David Womersley (ed) (Penguin, 1995 [1776–89]) 806.
[2] For the classic study, see Theodor Mommsen, *Römisches Staatsrecht*, iii vols (S Hirzel, 1887).
[3] See Chaim Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (Cambridge University Press, 1960).

based assemblies, but based on the votes of individual citizen-electors.[4] But the most important developments took place in the imperial era. As Peter Garnsey writes:

> In Caracalla's time [early third century] … the citizen's public, political role in Rome itself had long since vanished. With the transition from republican government to monarchy more than two centuries earlier, Roman politics, progressively reduced to the level of administration and public service, became the preserve of the very few men who were advanced into the Roman senate and into equestrian posts by the emperor with the assistance of his close associates. Citizenship under the Principate was a qualification for promotion into the higher orders, but a very basic one, necessary but not in itself sufficient.[5]

One writer asks: 'Did Roman citizenship become transformed from a practice of political engagement to a judicial status that provided protection but little voice, from active to passive membership in a political community?'[6] Tony Honoré holds that by about the year 400, the average artisan or minor official – those who in later times would be called the *petite bourgeoisie* – were better protected than in the early third century. He does not argue that they enjoyed more political participation, but they did have 'better access to legal advice and to the courts', above by all their right of appeal to the emperor, whose chancery published rescripts which fill many pages of Justinian's *Codex*, the *Codex Theodosianus*, and other attested compilations of imperial law.[7]

[4] Aldo Schiavone, *Ius: L'invenzione del diritto in Occidente* (Einaudi, 2nd ed, 2017) 72–5.
[5] Peter Garnsey, 'Roman Citizenship and Roman Law in the Late Empire' in Simon Swain and Mark Edwards (eds), *Approaching Late Antiquity: The Transformation from Early to Late Empire* (Oxford University Press, 2010) 134, 137.
[6] Frederick Cooper, *Citizenship, Inequality, and Difference: Historical Perspectives* (Princeton University Press, 2018) 34. It is a good question, but disappointing that the author inaccurately speaks of the Antonine Constitution as having 'exclud[ed] … women from citizenship'.
[7] Tony Honoré, 'Roman Law AD 200–400: From Cosmopolis to Rechtstaat?' in Swain and Edwards (n 5) 109, 110.

Economic individualism did even not guarantee equality in all spheres, let alone political enfranchisement.[8] Garnsey's classic study of privilege and legal inequality in the Roman Empire drew particular attention to the invidious distinction between the 'better' kind of person (*honestiores*) and, in a word, everyone else (*humiliores*).[9] The term *humiliores* signifies far too many people in the Roman Empire to be evidence of a return to non-individualistic, kinship-based social norms and legal regulation (not that this is what Garnsey argues). Basically, it meant there was a privileged magisterial-aristocratic class constituting about 1 per cent of the entire population, and then everyone else. There have always been 'one-percenters', including to this day, whose privileges are officially or unofficially recognised. And when they are unofficial, they are no less real, even in such an individualistic democracy as modern America. The distinction certainly demonstrates a degeneration of older Roman values, but not necessarily of the individualistic approach in law. True, there were strictly legal inequalities between the two status groups, beyond natural and economic inequalities: for example, *humiliores* being barred from various magisterial offices or subject to harsher criminal sentences.[10] But this thesis has not argued that the Romans did developed a rights theory based on equal legal status – after all, this thesis has identified slaves as the beneficiaries of some measure of individualistic legal thinking.[11] Further, the main driver of individualism was Roman private law, not the constitutional law which was the preserve of politicians or criminal law in which formal inequalities were maintained and even expanded. In fact, timocratic groups – like the *honestiores* – were more bound by their status and social responsibilities to follow familiar paths,[12] and the less well-born always had the opportunity to

[8] As noted in Chapter 1, *individualism* does not mean *equality*, even if the two are often collapsed in modern political discourse.
[9] Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford University Press, 1970) 221–76.
[10] Ibid 103–78.
[11] See Chapters 5 and 6.
[12] See Chapter 1.

take greater personal risks to make personal fortunes one or other way, and perhaps to find their way into the ranks of the *honestiores*.

The Roman jurists – insulated from political interference by the emperors' disinterest from private law – got far enough to conceive of individuals as having rights to own things and to dispose of them by contract.[13] But that is not to say that there were no political implications at all in the jurists' studies of private law. In a fascinating study of Ulpian, Tony Honoré claimed that the great jurist was by philosophical outlook predominantly Stoic and that in accordance with the precepts of that school, he believed (it sounds like he is describing Rousseau) 'that we are born free and equal and should live according to nature'; and that while this belief reflects an ideal towards which men should take a moral and civic pilgrimage, a major step was attempted in that direction by the near-universalisation of Roman citizenship in 212.[14] Slaves, too, were at least naturally equal to free men, even if they were fettered by social customs and legal rules. Honoré does not seem to suggest that Ulpian advocated or even expected, on any timescale meaningful to his society, that slavery would be abolished. But he does admit the dignity of slaves: for Ulpian, the 'equality' is a qualified one in that all have dignity *but in varying degrees*.[15] This thesis has argued something similar, by reference to other factors: notably, the limited contractual and proprietary rights tacitly permitted by Roman law through the *peculium*, and the economic opportunities presented by sale into and purchase out of slavery.[16]

On the whole, the legalistic Roman brand of individualism was not as robust as the modern version which enlarged contract rights into a political theory of social contract: which

[13] See Chapter 5.
[14] Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford University Press, 2nd ed, 2002) 80–1.
[15] Ibid 85.
[16] See Chapters 5 and 6 respectively. Honoré, *Ulpian* (n 14) 87, 88 mentions the *peculium* in passing.

is what Frederic Maitland meant in calling contract 'that greediest of legal categories, which once wanted to devour the state';[17] or Henry Maine in saying that the 'Social Contract … is a theory which, though nursed into importance by political passions, derived all its sap from the speculations of lawyers'.[18] If one were to view the achievement of Roman jurists backwards from the modern era of social-contract theories and the political rights of men collectively and as individuals, it is easier to dismiss Roman intellectual history as having failed to develop any kind of individualism, when in fact they only failed to develop a kind of individualism that became fashionable after Grotius and ever more so after the American and French Revolutions. So when John Pocock focused his attention on the legal rights of contracting individuals in ancient Rome – and while Clifford Ando is right to point out that this is only part of the story[19] – it is nevertheless true that Roman law developed an individualistic jurisprudence, and one on which later thinkers, politicians, and practitioners drew. It is even arguable that without this more rudimentary concept of the individual as contracting party in his private interactions with other individuals, there would either be no modern ideas of a right-bearing individual who enters into 'social contracts' and is the ultimate 'sovereign' of the body politic, or at least those ideas would look very different and would have been articulated in other ways altogether. The achievement of Roman law, then, was to have furnished the preconditions to, and much of the language of, medieval and modern natural rights theories; not because it was stage one in an inevitable, teleological process, but because it was possible for medieval and modern thinkers to read into modern jurisprudence various ideas that were beyond the intellectual universe of the Romans themselves.

[17] In his 'Introduction' to Otto von Gierke, *Political Theories of the Middle Age*, Frederic William Maitland (trans) (Cambridge University Press, 1987 [1900]) xxiv–v.
[18] Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Oxford University Press, 1931 [1862]) 256.
[19] See Chapter 1.

It goes beyond the bounds of this thesis to explore how deeply the idea of individual citizens as 'possessors and administrators of things' has sunk into Western thought.[20] Its most convenient exposition, with the most accessible structure and endlessly citeable principles, was Roman law, from which political theorists could or would not escape for many centuries.[21] Much of the economic individualism argued for in this thesis is borne out by empirical and non-literary evidence to which such thinkers had no access or regard.[22] On the other hand, most of it is implicit in the juristic and other classical texts. The assumptions of Rome's individualistic jurisprudence inculcated an axiom of Western thought, that economic individualism is the point of departure for more expansive theories about the relationship of the individual to society and the state; about the individual's right of political participation; about the individual's right to personal opinions, expressions, and modes of living. Few if any of these things are easily conceived without the basic assumption that everyone has a right to acquire and dispose of property. Indeed, that was not merely a right but – for those who could achieve it – a prerequisite for political representation until modern democracy did away completely with property qualifications for suffrage.[23] The *person* was the unit to which Roman law had regard: the legal aspect of the *individual* who has emerged as something greater than the legal category from which he or she originated.

[20] J G A Pocock, 'The Ideal of Citizenship since Classical Times' (1992) 99(1) *Queen's Quarterly* 33, 39.
[21] John Austin makes this point in *The Uses of the Study of Jurisprudence* in *The Province of Jurisprudence Determined; The Uses of the Study of Jurisprudence* (Hackett, 1998 [1832–63]) 376–8.
[22] Especially as discussed in Chapter 6.
[23] John Dunn, *Setting the People Free: The Story of Democracy* (Princeton University Press, 2nd ed, 2019) 59–60.

Bibliography

NOTE

This thesis follows the formatting and citation conventions of the *Australian Guide to Legal Citation* (Melbourne University Law Review Association, 4th ed, 2018), with minor modifications.

NOTE

This thesis follows the scholarly convention for citing the *corpus iuris civilis* and the *Institutes* of Gaius: 'G' for Gaius's *Institutes*, 'J' for Justinian's *Institutes*, 'D' for the *Digest* (or *Pandects*) and 'C' for the *Codex* (the *Novels* are not cited in this thesis). Thus, *Digest*, Book 1, Title 5, Fragment 4, *principium* is cited as D.1.5.4.pr; and *Digest*, Book 9, Title 2, Fragment 1, Section 1 as 9.2.1.1. Similarly, a single citation of the *Collatio* is a reference to the version of the *Mosaicarum et Romanarum legum collatio* contained in FIRA iii.

NOTE

This thesis generally uses translations from Latin, Greek, and modern languages cited in the sources below. Where a translation is given and the original text quoted in the footnote without further reference, the translation is my own. Where another author's translation has been modified, the modification is explained in the footnotes, except for (1) silent amendments of American to English spelling in frequently cited works, such as the revised Watson translation of the *Digest*, and (2) inconsequential changes of capitalisation, e.g., 'emperor' for 'Emperor'. While this thesis has otherwise followed the Latin texts listed below, they have been amended by (1) capitalising the first letter of the first word of a sentence and (2) rendering *u* as *v* where that letter is being used as a consonant (e.g., *velut* for *uelut*).

NOTE

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	Rhetoric	J H Freese (trans), 1926
[?]Aristotle	*Constitution of the Athenians*	H Rackham (trans), 1935
Augustus	*Res gestae*	Frederick W Shipley (trans), 1924
Caesar	*De bello Gallico*	Cynthia Damon (trans), 2025
	De bello Hispaniensi	A G Way (trans), 1955
Cato	*De agri cultura*	W D Hooper and H B Ash (trans), 1934
Cicero	*Ad Atticum*	D R Shackleton Bailey (trans), 1999
	Ad familiares	D R Shackleton Bailey (trans), 2001
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Valerius Maximus	*Facta et dicta memorabilia*	D R Shackleton Bailey (trans), 2000
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Varro	*Rerum Rusticarum*	W D Hooper and H B Ash (trans), 1934
Virgil	*Aeneid*	H Rushton Fairclough (trans), G P Goold (rev), 1916–18

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