

## PAUL, GAIUS, AND THE ‘LAW OF PERSONS’: THE CONCEPTUALIZATION OF ROMAN LAW IN THE EARLY CLASSICAL PERIOD\*

In the seventh chapter of his letter to the Romans, Paul of Tarsus wrote the following words: *ὁ νόμος κυριεύει τοῦ ἀνθρώπου ἐφ’ ὅσον χρόνον ζῇ*. While the apostle Paul may seem an unlikely point of departure for a study of Roman jurisprudence, these nine words, as I hope to demonstrate, provide invaluable information regarding the process by which Roman law was conceptualized and systematized. It is my contention that these words, properly interpreted, yield the first occurrence of the phrase ‘law of persons’ as well as the first evidence of a general theory of *alieni ius*, or legal governance by another, in the Western legal tradition. I will begin by examining the evidence from Roman legal literature for the origin of the phrase ‘law of persons’. Then I will turn to Paul’s statement, offering a new interpretation and providing an account of its connection with Roman law. Finally, I will suggest how this new understanding of Paul contributes to the current scholarly discussion on the extent to which Roman law was organized into conceptual categories in the early classical period.<sup>1</sup>

### ‘LAW OF PERSONS’ IN ROMAN LAW

The phrase ‘law of persons’ first appears in extant Roman legal sources in Gaius’ four-volume *Institutes* near the middle of the second century A.D. Following a brief preface on the nature of law, and immediately following the famous division of law into persons, things, and actions, Gaius identifies his topic for the remainder of Volume One as *ius personarum*.<sup>2</sup> While scholars of legal history still debate Gaius’ role in the creation of the threefold *Institutionensystem*, which has so fundamentally shaped legal traditions in the West, there is no particular reason to believe that he coined the phrase *ius personarum*. In fact, there are several indications he did not.

First, Gaius uses *ius personarum* without any explanation or introductory remark, a sign, perhaps, that his audience was already familiar with the phrase from elsewhere. Second, even though Gaius’ presentation is divided into the categories persons, things, and actions, he has no corresponding term for ‘law of things’ or ‘law of actions’. This is particularly noticeable at the beginning of Book 2, where he makes the transition

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<sup>1</sup> The following books are cited more than twice in this study and will be referred to in abbreviated form: C. E. B. Cranfield, *A Critical and Exegetical Commentary on the Epistle to the Romans*, 2 vols (Edinburgh, 1975–9); J. A. Fitzmyer, *Romans* (Garden City, NY, 1993); Manfred Fuhrmann, *Das systematische Lehrbuch* (Göttingen, 1960); F. Stanley Jones, *‘Freiheit’ in den Briefen des Apostels Paulus* (Göttingen, 1987); Detlef Liebs, ‘Rechtsschulen und Rechtsunterricht im Prinzipat’, *ANRW* 2.15 (1976), 197–286; Peter Stein, ‘The development of the institutional system’, in P. G. Stein and A. D. E. Lewis (edd.), *Studies in Justinian’s Institutes* (London, 1983), 151–63; Alan Watson, *Law Making in the Later Roman Republic* (Oxford, 1974); Franz Wieacker, *Römische Rechtsgeschichte* 1 (Munich, 1988); id., ‘Über das Verhältnis der römischen Fachjurisprudenz zur griechisch-hellenistischen Theorie’, *Iura* 20 (1969), 448–77.

<sup>2</sup> Gai. *Inst.* 1.9; also at 1.48 and 2.1 (see next note).

from *ius personarum* to simple *res*.<sup>3</sup> If Gaius had originated the former expression, we would have expected this manner of terminology to continue into his consideration of both *res* and *actiones*.<sup>4</sup>

Third, the organizational structure of the *Institutes* varies considerably throughout the work.<sup>5</sup> The section covering *ius personarum* (1.9–200) is more explicit and unified in its structure than those covering *res* (Books 2 and 3) and *actiones* (Book 4), being divided into dichotomies and trichotomies that stand in hierarchical relations to one another. The treatment of *res*, by contrast, consists of three discrete units that are introduced and arranged variously. The first unit (2.1–96) begins with several fundamental definitions, including the distinction between corporeal and incorporeal property and a *summa divisio*, none of which, however, bear directly on the structure of this unit. The discussion then moves, without benefit of any clear transition, to a lengthy consideration of the acquisition of individual things, a topic explicitly identified only in the transition to the second unit (2.97). Both this and the second unit (2.97–3.87), which covers the acquisition of complete holdings, adhere largely to a sequential ordering of items, with little hierarchical structure. Obligations (3.88–225), on the other hand, begins with a transition that is 'very abrupt and hard', but then follows 'an especially clear architecture'.<sup>6</sup> A *summa divisio* begins this unit (3.88), arranging the material into two distinct genera (cf. 3.182). Each of these is further divided into four genera (3.89, 182), the last genus of the first fourfold division being subdivided into four (3.135), the first genus of the second fourfold division being subdivided into two (3.183). Lastly, the treatment of *actiones* in Book 4 arranges items into traditional groupings and deals with them sequentially, with no overarching schema and little use of hierarchy.

A widely held explanation for this diversity in organizational structure is that Gaius' presentation of private law brings together various patterns of conceptualization that go back prior to the *Institutes*.<sup>7</sup> Thus his treatment of *ius personarum*, which displays a coherency noticeably more advanced than his treatment of things and actions, may have been conceptualized, at least in part, by jurists before Gaius; and if this is true, it is a small step to suggest that the name also existed before Gaius.

Given these indications that *ius personarum* may not have been coined by Gaius, the question arises as to how far back before Gaius we may reasonably postulate its existence. My own view, as I will make clear in the next two sections, is that the phrase was current at least as early as the mid-first century A.D. For now, however, I would like to prepare the way for that argument by reviewing the evidence from late Republican and early classical legal literature.

To begin with, we know that the process of grouping civil laws *generatim* began in the early first century B.C. with the publication of Q. Mucius Scaevola's *ius civile*. We

<sup>3</sup> *Superiore commentario de iure personarum exposuimus; modo uideamus de rebus* (cf. 4.1). This is an emended text, based on *Inst. Iust.* and Gai. *Epitome* 2.1 pr. It is the reading proposed by Götschen and followed by all subsequent editors.

<sup>4</sup> Gerhard von Beseler, 'Einzelne Stellen', *ZRG* 46 (1928), 268 even suggested bracketing *de iure* at 1.9 on grounds that it was 'stylistically a foreign element'.

<sup>5</sup> For this and what follows see Fuhrmann, 104–15.

<sup>6</sup> Fuhrmann, 108, n. 1 and 109; cf. Reinhard Zimmermann, *The Law of Obligations* (Cape Town and Boston, 1990; repr. 1992), 26.

<sup>7</sup> So Fuhrmann, 118, 183–6; H. L. W. Nelson (with M. David), *Überlieferung, Aufbau und Stil von Gai Institutiones* (Leiden, 1981), 376–8, 381–94; id., review of *Ius civile in artem redactum* by H. J. Mette, *Mnemosyne* 14 (1961), 371; Stein, 154–6; Wiesław Litewski, review of *Gaius noster* by O. Stanojević, *ZRG* 108 (1991), 463–5; cf. Liebs, 235; Zimmermann (n. 6), 1–26.

also know that Mucius' use of genera was taken up and refined by his younger contemporary Servius, as well as many prominent lawyers after him, and that Mucius' student Cicero advocated the creation of an *ars iuris civilis*, wherein the entire civil law code would be organized hierarchically into categories and subcategories.<sup>8</sup> One could postulate, therefore, that in this intellectual climate a conceptual principle or generic heading such as 'law of persons' might well have arisen.

Against this, however, we must take into account the prevailing scholarly opinion that, overall, Roman jurists made only minimal use of genus as an organizing tool in their writings. According to Wieacker, Mucius' genera are of the fourth and fifth level, without any possibility for subcategories below them; and likewise, Watson finds no use of species in Republican law.<sup>9</sup> Moreover, there is no hard evidence that Mucius or any lawyer before Gaius created an overview of civil law using broad concepts or headings on the order of 'law of persons'. Accordingly, many scholars, perhaps the majority, have argued for the originality of Gaius, maintaining that the systemization of private law, in any meaningful sense of that word, begins with the *Institutes*.<sup>10</sup>

Yet this objection may skew the evidence, for it focuses only on the upper echelon of Roman legal literature. Gaius' *Institutes*, by contrast, is literature of a very low order: a textbook or primer, not for lawyers or even law students, but for students receiving formal legal instruction as part of a liberal education.<sup>11</sup> In turn, Gaius' pedagogical concerns, which may have included an organized presentation of his subject accessible to those outside the legal profession, would not have been shared by prominent legal writers such as Mucius, Servius, Alfenus, Sabinus, or Neratius.<sup>12</sup> Moreover, as Frier has made clear, Mucius' larger agenda for transforming the legal profession actually militated against the use of genera and the creation of a grand system of civil law such as Cicero envisioned.<sup>13</sup> Thus, Cicero's efforts to promote an *ars iuris civilis* should not be seen as a failed attempt to extend Mucius' innovation to its natural conclusion in the professional legal literature, but as a new direction altogether, aimed at the classroom.

In light of this, it is at least plausible to postulate that running alongside the

<sup>8</sup> For current research on these issues, see Wieacker (n. 1, 1988) 1.597–638; id. (1969), 463–9; Watson, 123–95; Bruce W. Frier, *The Rise of the Roman Jurists* (Princeton, 1985), 155–71; Maximilian Herberger, *Dogmatik: Zur Geschichte von Begriff und Methode in Medizin und Jurisprudenz* (Frankfurt, 1981), 46–57; and Stein, 151–4.

<sup>9</sup> Wieacker (1988), 1.634–5; id. (1969), 465–6; and Watson, 183–4, 191–2. Cf. Sen. *Ep.* 58.8–12, where Seneca discusses the use of genus and species as a curiosity. But see also Elizabeth Rawson, 'The introduction of logical organisation in Roman prose literature', *Papers of the British School at Rome* 46 (1978), 27–9, who attempts to qualify these impressions.

<sup>10</sup> See especially A. M. Honoré, *Gaius* (Oxford, 1962), 63–5, and the authors listed in Liebs, 231, n. 186.

<sup>11</sup> Franz Wieacker, 'Griechische Wurzeln des Institutionensystems', *ZRG* 70 (1953), 102–3; Liebs, 235; cf. W.W. Buckland, *A Text-Book of Roman Law* (Cambridge, 1963<sup>3</sup>), 60.

<sup>12</sup> Wieacker (1988), 1.635; id. (1969), 467; cf. Fuhrmann, 187–8; and Watson, 108–9. See also Cic. *De Or.* 1.85–91, where Crassus states explicitly that the creation of a systematic presentation is necessary for outsiders and beginners, but insiders and advanced students have no particular need for one.

<sup>13</sup> Frier (n. 8), 169: 'concentration on isolated hypothetical cases deters the inherent striving of legal science toward systematic dogmatism, by keeping law firmly oriented to concrete legal relationships with which doctrine is always obliged to deal. Already in Q. Mucius' writings there emerges an avoidance of grand system, an avoidance that will characterize later Roman jurisprudence except in introductory texts.' See also Herberger (n. 8), 55–76, 106–20; Ferdinando Bona, 'L'ideale retorico ciceroniano ed il "ius civile in artem redigere"', *Studia et documenta historiae et iuris* 46 (1980), 333–66; Bruno Schmidlin, 'Horoi, pithana und regulae—Zum Einfluß der Rhetorik und Dialektik auf die juristische Regelbildung', *ANRW* 2.15 (1976), 104–5; and Rawson (n. 9), 29–31.

professional legal literature, in which genus plays such a minor part as an organizing feature, there was a more popular, pedagogical tradition which aimed at organizing helpful topics of private law under broad conceptual headings or even by genus and sub-genus. Indeed, this may have begun in Cicero's day or shortly thereafter, for not only does he articulate the plan for this venture, but the rise of jurists about this time and their promotion of a 'legal science' began to open up the law to a wider audience, providing the demand for such an innovation. And since legal scholarship at this low level would have been an oral tradition,<sup>14</sup> it is no surprise that it is not documented until Gaius, whose *Institutes* may themselves derive from a student's classroom notes rather than deliberate publication by the author.

To be sure, there is nothing necessary or inevitable about this suggested development. As Honoré has observed, the oral exposition of law need not give rise to system or be dependent on it.<sup>15</sup> Nevertheless, I find this hypothesis of a lower-level, oral tradition attractive inasmuch as it is able to explain how an advanced systemization of the civil code could appear seemingly out of nowhere in the mid-second century A.D., without appealing to the genius and originality of an otherwise obscure 'Gaius'. It may also provide the most satisfying explanation as to why this singular achievement, despite its popularity (as attested by the papyri and its very survival), had no discernible impact on the legal profession for more than two and a half centuries after its publication.<sup>16</sup>

Returning to the phrase *ius personarum*: if, as I am suggesting, Gaius' work belonged to a minor, oral tradition, isolated from the interests of mainstream lawyers, then the appearance of this phrase in his *Institutes* may not mark a dramatic development in second-century legal science. Rather, it may be the product of an evolving tradition of advanced liberal education.<sup>17</sup> Thus, especially in view of our earlier observations about the existence of *ius personarum* prior to Gaius, it seems not at all unreasonable to leave open the possibility that this phrase was used in private law, even as early as the first century A.D., to designate either a legal principle or a genus of law. With this, let us turn to the evidence provided by Paul's letter to the Romans.

#### 'LAW OF PERSONS' IN ROMANS 7.1

By most accounts, Paul's letter to the Romans was written c. A.D. 55–60 from the Greek city of Corinth to a Christian community at Rome. In the seventh chapter of this letter, in the midst of an explanation of Christian salvation, Paul introduces a legal principle, gives an example of how it works, and then applies both the principle and the example to his ongoing argument. The verse containing the legal principle (7.1) reads: "Ἡ ἀγνοεῖτε, ἀδελφοί, γινώσκουσιν γὰρ νόμον λαλῶ, ὅτι ὁ νόμος κυριεύει τοῦ ἀνθρώπου ἐφ' ὅσον χρόνον ζῇ. Throughout the history of Christian

<sup>14</sup> Liebs, 229–30, 235; cf. Wieacker (1988), 1.616. H. von Arnim, *Hierokles ethische Elementarlehre* (Berlin, 1906), xvi–xvii describes a second-century A.D. Stoic primer on ethics.

<sup>15</sup> T. Honoré, review of *Überlieferung, Aufbau und Stil von Gai Institutiones* by H. L. W. Nelson, *Revue d'Histoire du Droit* 58 (1990), 473.

<sup>16</sup> T. Honoré, 'Gaius (2)', *OCD*<sup>3</sup>, 620 suggests that Gaius' status as a provincial accounts for this lack of recognition. Naturally, these explanations are not mutually exclusive.

<sup>17</sup> This also makes intelligible why *ius personarum* appears prominently in Gaius as the organizing head for his first major division of law and then not again until the sixth century in Justinian's *Institutes*, and there only in passages dependent on Gaius. It was part of an oral tradition whose efforts at making the law accessible to a wider audience were given their due by the legal establishment only during Justinian's reforms.

biblical interpretation this has been consistently translated along these lines: 'Or, do you not know, brothers—for I speak to ones who know law—that the law has jurisdiction over a person as long as he lives?' Yet, if this is correct, a problem arises in the next two verses, for the example that Paul gives does not illustrate this principle. In Romans 7.2–3 he writes:

ἡ γὰρ ὑπανδρος γυνὴ τῷ ζῶντι ἀνδρὶ δέδεται νόμῳ· ἐὰν δὲ ἀποθάνῃ ὁ ἀνὴρ, κατήργηται ἀπὸ τοῦ νόμου τοῦ ἀνδρός. ἄρα οὖν ζῶντος τοῦ ἀνδρός μοιχαλὶς χρηματίζει ἐὰν γένηται ἀνδρὶ ἐτέρῳ· ἐὰν δὲ ἀποθάνῃ ὁ ἀνὴρ, ἐλευθέρα ἐστὶν ἀπὸ τοῦ νόμου, τοῦ μὴ εἶναι αὐτὴν μοιχαλίδα γενομένην ἀνδρὶ ἐτέρῳ.

For the married woman is bound by law to the living husband. But if the husband dies, she is released from the law of the husband. Thus, while the husband lives, she will be considered an adulteress if she marries another man;<sup>18</sup> but if the husband dies, she is free from the law, to the end that she is not an adulteress if she marries another man.

Thus even though 7.2–3 is quite obviously intended to illustrate the legal principle in 7.1 (as indicated by the introductory γάρ), the principle, in this understanding, speaks of a person being governed by the law as long as *that person* lives, while the illustration speaks of a *wife* being bound to her husband for as long as *her husband* lives. To put the matter another way, the 'person' in 7.1 does not correspond to any of those mentioned in 7.2–3: not the husband, the wife, or the 'other man'.

This inconsistency has long been recognized, and over the centuries several solutions have been offered, none of which is very satisfying. These include an allegorical interpretation of the passage in which the law is understood to be the first husband, the wife the redeemed self, and so on; several attempts to smooth over or ignore the difficulty by focusing attention on Paul's 'overall meaning' or describing 7.2–3 as a 'corollary' or *tertium comparationis* to the principle in 7.1; efforts to identify different types of analogical thinking used by Paul, such as 'sequential analogy'; and, finally, the simple admission that the passage just does not make sense on any level.<sup>19</sup>

Rather than choosing from among these competing solutions, concerning which there is no scholarly consensus in sight, I would like to suggest that the problem may be solved by translating the legal principle in 7.1 in a different manner. Instead of the traditional reading, I propose we translate ὁ νόμος κυριεύει τοῦ ἀνθρώπου ἐφ' ὅσον χρόνον ζῇ as, 'the law of the person has jurisdiction as long as he [the person] lives'. In this rendering the verb is taken to be intransitive and its subject is 'the law of the person', a phrase that carries a technical ring, as if referring to a specific aspect of a legal code.<sup>20</sup> This avoids the problem of inconsistency with the next two verses, for the law can now be understood as having jurisdiction over *others* during a person's lifetime. That is what 7.2–3 illustrates: the law, now identified expressly as 'the law of the husband' (7.2), has jurisdiction over a *wife* during the husband's lifetime.

In considering the merits of this interpretation—beyond, that is, its principal merit, that it makes sense of the argument in 7.1–3—we may note that it provides an explanation for other aspects of this passage beyond what the traditional translation can offer. First, it brings into focus the deliberate emphasis that one sees in the phrases ἡ ὑπανδρος γυνή and τοῦ νόμου τοῦ ἀνδρός in 7.2 in a way that the traditional

<sup>18</sup> For this idiom see below, n. 36.

<sup>19</sup> See the discussions in Herbert M. Gale, *The Use of Analogy in the Letters of Paul* (Philadelphia, 1964), 189–98; Cranfield 1.331–5; Joyce A. Little, 'Paul's use of analogy', *Catholic Biblical Quarterly* (1984), 82–90; Fitzmyer, 454–7; and J. D. Earnshaw, 'Reconsidering Paul's marriage analogy in Romans 7.1–4', *New Testament Studies* (1994), 68–88.

<sup>20</sup> For the syntax, see below, especially nn. 31 and 53.

interpretation cannot. If Paul's point is simply that the law governs a person only during his own lifetime, then not only (as we have said) is the example in 7.2–3 misconceived, but his description of the wife as 'under a husband' and released from 'the law of the husband' adds nothing to his argument.<sup>21</sup> If, however, he intends to show that law can govern *others* during a person's lifetime, then these phrases fit in perfectly, for they underscore the legal limitations imposed on the wife by her husband's being alive. We might add that the phrase 'the law of the husband' parallels 'the law of the person', thereby solidifying the continuity in thought between 7.1 and 7.2–3, a continuity now based on 'law' rather than, as in the traditional translation, on the impossible task of identifying the 'person' in 7.1 with one of the persons in 7.2–3.

Second, regarding Paul's own style, if this author had wanted to say, 'the law has jurisdiction over a person', we should have expected simply *ἀνθρώπου*, not *τοῦ ἀνθρώπου*. This is because, when Paul uses *ἄνθρωπος* in examples elsewhere to refer to 'a person', he does so without the article.<sup>22</sup> To the extent that this Pauline usage also holds true in 7.1, the article before *ἀνθρώπου* is another indication that Paul intended this noun as an adnominal genitive dependent on *ὁ νόμος*, not as the genitive object of *κυριεύει*.

Third, my translation explains why Paul introduces the legal principle in 7.1 with the words 'for I speak to ones who know law'. In the traditional reading there would seem to be no reason for this elaborate introduction (found only here in Paul), for the principle that law governs people only during their own lifetimes is common sense. Moreover, not only has Paul already begun the verse with an introduction that would appear sufficient for this ('Or, do you not know, brothers . . .'<sup>23</sup>), but he has introduced a similar notion without comment earlier in 6.7–14.<sup>24</sup> Beyond this, in Galatians 3.15 he uses a more complex example involving the ratification and annulment of a person's will, introducing it simply as 'common knowledge' (*κατὰ ἄνθρωπον λέγω*); and in Galatians 4.1–2 he makes reference to inheritance law and the age of majority without any explanatory introduction. If, however, we adopt the suggestion that 'the law of the person' is a piece of legal jargon, then Paul's elaborate introduction would serve to alert his audience to the fact that a certain degree of legal expertise is required to appreciate his argument.

In sum, there seems to be ample reason to reject the traditional understanding of Romans 7.1 in favour of the one offered here. When Paul wrote *ὁ νόμος κυριεύει τοῦ ἀνθρώπου*, he meant 'the law of the person has jurisdiction . . .', not 'the law has jurisdiction over a person'.

Finally, let me return to my proposal above that 'the law of the person' has a technical legal ring to it. This notion is suggested by the distinctiveness, or one might

<sup>21</sup> Indeed, the latter phrase has been fairly mysterious to some biblical scholars. C. K. Barrett, *A Commentary on the First Epistle to the Corinthians* (New York, 1968), 136 even suggests reading *τοῦ νόμου* in apposition to *τοῦ ἀνδρός* ('of the law, i.e. the husband'), an idea first proposed by Origen, *Commentarii in evangelium Joannis* 13.44–5.

<sup>22</sup> Namely Romans 1.23, 2.9, 3.28, 7.24; 1 Corinthians 2.9, 2.14, 4.1, 6.18, 7.1, 7.26, 11.28; 2 Corinthians 12.2, 12.4; Galatians 2.6, 2.16, 3.15, 6.1, 6.7; Philippians 2.8; and 1 Thessalonians 4.8. (These passages exclude Paul's use of *ἄνθρωπος* with a preposition or other modifiers, which are constructions governed by different syntactical conventions.) 1 Corinthians 2.11 might seem to be an exception, but the construction *τὰ τοῦ ἀνθρώπου* is determined by its parallelism with *τὰ τοῦ θεοῦ*, a factor not relevant to Romans 7.1.

<sup>23</sup> This and variations on it are standard introductory formulae in Paul: Romans 1.13, 6.3, 11.25; 1 Corinthians 10.1, 12.1; 2 Corinthians 1.8; 1 Thessalonians 4.13.

<sup>24</sup> Namely that death frees one from enslavement to sin, which is the result of law.

say awkwardness, of the phrase itself; by its rarity,<sup>25</sup> which is often an indication of technical jargon; and by Paul's introduction to it, 'for I speak to ones who know law'. It is further supported by the words *κυριεύει . . . ἐφ' ὅσον χρόνον ζῇ*, which are interwoven with *ὁ νόμος . . . τοῦ ἀνθρώπου*, for these words have good parallels in a wide range of legal materials. The use of *κυριεύω* in the sense of 'having legal jurisdiction over' is attested from the fourth century B.C. and occurs frequently with this meaning in the Hellenistic and Roman periods.<sup>26</sup> Sometimes it is paired with adverbs of time, like Paul's *ἐφ' ὅσον χρόνον ζῇ*. These include *κατ' ἔτος*, *ἕως*, *ἕως ἄν*,<sup>27</sup> and *μέχρι τοῦ νῦν*.<sup>28</sup> In a papyrus from Tebtunis at the end of the second century B.C., moreover, we have a very close parallel:

. . . καὶ προσυποδεδειχότων ἀπὸ τῶν τῶν συγγραφῶν χρόνων κεκυριευκέναι τοὺς γονεῖς αὐτῶν ἐφ' ὅσον περιῆσαν χρόνον.

. . . and having demonstrated that from the time of the written contracts their parents had legal jurisdiction, as long as they were alive.<sup>29</sup>

Not only does this text use an adverb of time practically identical to Paul's,<sup>30</sup> but the verb *κυριεύω*, which usually takes an object, is intransitive, as in my proposed translation.<sup>31</sup>

Beyond this evidence, the legalese of Paul's language in 7.1 is confirmed by the next two verses. The same technical awkwardness that I have attributed to 'the law of the person' is also palpable in 7.2 in the phrase *τῷ ζῶντι ἀνδρί*, 'the living husband'.<sup>32</sup> This is probably the forensic twin of a phrase like 'the deceased husband', as it is one of three expressions in 7.1–3 whose function is to specify, for legal purposes, that a person is living rather than dead. The other two are *ἐφ' ὅσον χρόνον ζῇ* in 7.1, whose legal provenance we have just discussed, and *ζῶντος τοῦ ἀνδρός* in 7.3, which may well be the Greek equivalent of *vivo marito*, a phrase found in early classical law.<sup>33</sup> Both *τῷ ζῶντι ἀνδρί* and *ζῶντος τοῦ ἀνδρός* are, moreover, rare expressions, which, as in the case of *ὁ νόμος τοῦ ἀνθρώπου*, is another potential sign of jargon.<sup>34</sup>

<sup>25</sup> Elsewhere only at 2 Samuel 7.19 (LXX); see below.

<sup>26</sup> See Aeschines, *In Timarchum* 1.35; Hyperides, *Epitaphius* col. 9, line 5 (Jensen) (= Stob. *Flor.* 4.23.35.2); Raphael Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri* (Warsaw, 1955), 230–2; and Diod. Sic. 1.27.2 (re Egyptian marriage contracts).

<sup>27</sup> *PTeb* 105.47; *POxy* 3.910.24–5, 8.1124.6–7.

<sup>28</sup> *PTorChoach* 11 bis 56; 12 V.19–20 (= *UPZ* 2.161.56, 162 V.19–20).

<sup>29</sup> *PTorChoach* 12 IX.15–17 (= *UPZ* 162 IX.15–17). This is from the Hermias suit over a building owned by the Theban Choachytes.

<sup>30</sup> Also found in *PTorChoach* 11.11, 11 bis 12–13, 12 I.22–23 (= *UPZ* 2.160.11, 161.12–13, 162 I.22–3); and *PTeb* 771.8–9.

<sup>31</sup> The intransitive use of *κυριεύω* is uncommon but well documented. Aside from the two references in n. 28, see: *PEleph* 14.22; Polybius 8.18.6, 11.6.3; Philo, *Leg. Alleg.* 3.220; *Cher.* 74 (= Exod. 15.9); 1 Maccabees 7.8; and Sirach 44.3. See also Sext. Emp. *Math.* 8.97, which may derive from the early Stoa or the Dialectical school, according to Theodor Ebert, *Dialektiker und frühe Stoiker bei Sextus Empiricus* (Göttingen, 1991), 88, n. 12.

<sup>32</sup> Because of its awkwardness the phrase is almost always glossed as if the participle was circumstantial ('while the husband is alive') rather than attributive.

<sup>33</sup> Only in *Dig. Iust.* 24.1.11.3 (= Ulp. *Sabinus* 32, citing Marcellus); 35.1.61 pr. (= Ulp. *Lex Julia et Papia* 8); and 42.1.23 pr. (= Paulus, *Plautius* 6).

<sup>34</sup> The first occurs only here; the second is found only here and at Plut. *De mul. vir.* 257 F 4; and Cass. Dio, *Hist. Rom. (Xiph. ep.)* 93.30 (Dindorf–Steph.). Cf. Philo, *De Spec. Leg.* 1.105, 129; 3.27, 30.

## ROMANS 7.1 AS A REFERENCE TO THE ROMAN LAW OF PERSONS

Thus far we have argued that the phrase 'law of persons' existed in Roman law before Gaius; that Paul used the expression 'the law of the person' in Romans 7.1; and that this expression derives from a legal context. We are now in a position to ask whether there is any connection between Paul's *ὁ νόμος τοῦ ἀνθρώπου* and Gaius' *ius personarum*.

To begin with, we should recognize that most New Testament scholars rule out this possibility altogether, contending that *νόμος* in 7.1 refers to Mosaic Law, or Torah, rather than Roman (or Greek) law. They note that *νόμος* usually has this meaning in Paul, and that in 7.4–6, where Paul applies the principle of 7.1, *νόμος* clearly means Torah. In their view, it is unreasonable to think that Paul would move so casually from one system of law to another in the space of so few verses.<sup>35</sup>

The weakness of this argument is twofold. First, it is dependent on the traditional translation of the principle in 7.1, 'the law has jurisdiction over a person as long as he lives'. While this principle is not found in the Torah *per se*, these scholars assume that it is of such an obvious and general nature that Paul could easily attribute it to the Torah without further ado. Yet not only does this assumption fit poorly with Paul's address to his readers as 'ones who know law', which seems to presuppose more than just general knowledge (see above), but if, as I have argued, the principle in 7.1 should be translated as 'the law of the person has jurisdiction . . .', then its absence from the Torah becomes very problematic, for there is nothing obvious about it (and hence Paul's illustration of it in 7.2–3).

Second, the argument overlooks Paul's use of *νόμος* in 7.2–3, where it surely means something other than Torah. This becomes clear if we compare 7.2–3 to Deuteronomy 24.1–4 (LXX). In that passage we are told that if a woman is divorced by her husband, marries another man (*γέννηται ἀνδρὶ ἑτέρῳ*), and then is released from the second marriage by divorce or the death of the second husband, she may not remarry the first husband. The assumption here is that a woman may lawfully marry a second time while her first husband is still alive, an assumption not contradicted elsewhere in the Torah. This, however, is the opposite of what Paul claims in Romans 7.2–3, namely that a wife is 'bound by law to the living husband', and that 'while the husband lives, she will be considered an adulteress if she marries another man' (*γέννηται ἀνδρὶ ἑτέρῳ*). Since Paul uses the same Hebrew idiom for marrying as does the Mosaic passage, it is quite possible, moreover, that the wording of Romans 7.2–3 is an allusion to the Mosaic ruling and was actually formulated *in opposition* to it.<sup>36</sup>

Indeed, the most likely provenance of the tradition in 7.2–3 is not the Torah but Jesus' prohibition of divorce as found in the Gospels. Like 7.2–3, Jesus' prohibition

<sup>35</sup> See e.g. Fitzmyer, 455–7 for discussion and references. A notable exception is E. Käsemann, *Commentary on Romans* (Grand Rapids, 1980), 187.

<sup>36</sup> It is not necessary, of course, to assume that Paul formulated the wording of Romans 7.2–3. It may depend on an older tradition, as several Jewish and Christian discussions of divorce around this time allude to Deuteronomy 24.1–4 in an attempt to modify or replace it. See Matthew 5.31 and Mark 10.4; and John J. Collins, 'Marriage, divorce, and family in Second Temple Judaism', in Leo G. Perdue *et al.* (edd.), *Families in Ancient Israel* (Louisville, 1997), 117–18.

For the meaning of the Hebrew idiom, see its recurrence at 7.4; Cranfield, 1:333, n. 5; and cf. Jones, 119, n. 44. To my knowledge, before the third century it is attested outside of the Septuagint and Paul only in Philo, who is also commenting on Deuteronomy 24.1–4 (*De Spec. Leg.* 3.30).



also characterizes a wife's remarriage as an act of 'adultery' and is presented as a corrective to Deuteronomy 24.1–4.<sup>37</sup> That Paul was familiar with some form of this tradition is confirmed by 1 Corinthians 7, where he even seems to elevate it to the status of a 'commandment of God' (ἐντολή θεοῦ) over against the Mosaic commandments.<sup>38</sup> Thus, despite its popularity among New Testament scholars, there is no validity to the notion that νόμος in 7.1 must refer to the Torah simply because the word has this meaning in 7.4–6, for already in 7.2–3, which provides the illustration for the principle in 7.1, Paul uses νόμος three times with a decidedly non-Mosaic meaning.<sup>39</sup>

Returning to ὁ νόμος τοῦ ἀνθρώπου and its possible connection to *ius personarum*, it would appear that Roman law is the best candidate for the source of Paul's words. While Paul knew Torah and may have been acquainted with certain features of Greek law, and while both Jewish and Greek traditions developed private law pertaining to persons, there is no evidence that these traditions ever systematized private law or developed broad conceptual categories.<sup>40</sup> There is not even a Hebrew equivalent for ὁ νόμος τοῦ ἀνθρώπου; and outside of Romans 7.1 it occurs in Greek only in the Septuagint translation of 2 Samuel 7.19, where it refers to God's 'will for the people' or 'purpose for humanity', not a legal system.<sup>41</sup> By contrast, ὁ νόμος τοῦ ἀνθρώπου would be a logical way to render *ius personarum* into Greek, especially given that the more literal translation, ὁ νόμος τῶν ἀνθρώπων, was already in use by Greek writers as a way to refer to 'human law' over against 'divine will'.

Apart from *ius personarum* being the only legal term from these three traditions that might correspond to Paul's phrase, it suggests itself as the Latin counterpart to ὁ νόμος τοῦ ἀνθρώπου in another important way as well. As several scholars have remarked, under *ius personarum* Gaius understands not rights and duties of persons, but the rules governing how a person attains and loses various positions of status in Roman society.<sup>42</sup> In fact, *ius* often means 'legal position' or 'authority' in Gaius, and thus *ius personarum* could be fairly translated as 'the legal position of persons'.<sup>43</sup> Paul, by

<sup>37</sup> Matthew 5.31; Mark 10.4.

<sup>38</sup> See 1 Corinthians 7.10–11, 19, and my discussion in *Paul on Marriage and Celibacy* (Cambridge, 1995), 169–73.

<sup>39</sup> Another possibility, favoured by a few scholars, is that Romans 7.2–3 is dependent on extra-canonical 'Jewish law' from this period, as practised in the synagogue and later codified in the Mishnah around A.D. 200. These scholars contend that the distinctive legal feature of Romans 7.2–3 that earmarks it as 'Jewish law' is that it denies a wife the right to divorce, a stipulation found in Josephus and the Mishnah but not in Greek or Roman law. See e.g. James D. G. Dunn, *Romans* (Dallas, 1988), 359–60, 368. The problem with this is threefold. First, outside the Torah there is no normative body of Jewish law in the first century A.D. such that Paul could make reference to it in passing and expect his audience in Rome, most of whom he had never met, to recognize the reference. Especially on the issue of a wife's right to divorce, there may have been a number of legal views—see Collins (n. 36), 119–21; and David Instone Brewer, 'Jewish women divorcing their husbands in early Judaism', *Harvard Theological Review* 92 (1999), 349–57. Second, it is not at all clear why Paul would prefer a synagogue tradition to a widely disseminated teaching of Jesus on the same topic. And finally, a wife's right to divorce does not appear to be the defining issue in 7.2–3, but rather the indissolubility of marriage until her husband's death (see esp. verse 3). As this appears to exclude the husband's right to divorce as well, the closest parallel is with the Jesus tradition, as I have argued above—see also P. J. Tomson, *Paul and the Jewish Law* (Assen and Minneapolis, 1990), 111, 120–1.

<sup>40</sup> For Jewish law, see Boaz Cohen, *Jewish and Roman Law* (New York, 1966), 1.126.

<sup>41</sup> The underlying Hebrew is corrupt.

<sup>42</sup> Stein, 158; Buckland (n. 11), 58–9; H. F. Jolowicz, *Roman Foundations of Modern Law* (Oxford, 1957), 66–9; A. M. Prichard, *Leage's Roman Private Law* (London and New York, 1961), 63.

<sup>43</sup> Wieacker (1988), 1.270–1, 491–3; Stein, 161; id., 'The fate of the institutional system', in *The*

comparison, is concerned with an aspect of this same subject, namely the general theory of how a person's legal status changes when the legal governance of that person by another ends. The apostle illustrates this, as we have seen, with the example of a woman who is at first *ὑπανδρος*, 'under a husband's (legal) authority', but then is relinquished from *ὁ νόμος τοῦ ἀνδρός*, 'the law (legal authority?) of the husband', by his death. In Gaius these matters are addressed in a lengthy discussion of persons 'subject to another's authority' (*alieni iuris*), which is the second major division of the *ius personarum* (1.48–123), and in a discussion of the ways in which those in another's authority are freed from it (*quo modo ii qui alieno iuri subiecti sunt eo iure liberentur*, 1.124ff.). The first way Gaius mentions is death, as in Paul, followed by loss of citizenship, which is the legal equivalent of death (1.127–9).<sup>44</sup>

In all, there seems to be sufficient correspondence between Paul's 'the law of the person' and Gaius' 'law of persons' to conclude that they both have reference to the same nexus of ideas in Roman law, albeit at different stages in the development of this nexus. What Paul knows as a principle of law Gaius knows as a formulation that lies somewhere between a principle and the designation of one of three divisions of civil law.

As for the supposed problem with Paul's varied use of *νόμος* in 7.1–6—Roman legal principle (1), Christian prohibition (2–3), and Mosaic law (4–6)—I would argue that this is comprehensible inasmuch as Paul is attempting to demonstrate the *legal abrogation* of one system of law (Mosaic law) by setting it in another, larger legal framework. Beginning with the principle 'the law of the person', which he and his contemporaries may have understood as a universal principle of law rather than an exclusively 'Roman' principle, Paul illustrates this principle with a legal pronouncement attributed to Jesus, and then applies it to the Mosaic law code. I find nothing particularly unlikely or extraordinary in this.

#### THE LAW OF PERSONS IN CORINTH AROUND A.D. 50

At this point it remains to ask how Paul might have learned of the Roman law of persons. One might speculate that as a Roman citizen Paul received an overview of civil law as part of his education. But since Paul was probably born in Tarsus in the first two decades of the first century A.D., this would require the existence of elementary legal instruction in Tarsus already in the early part of the century. While this is not impossible, given our theory of an oral pedagogical tradition and given the moderate educational resources in Tarsus at this time, it is nevertheless highly speculative.<sup>45</sup>

A more promising hypothesis, which does not necessarily exclude the first, is that

*Character and Influence of the Roman Civil Law* (London and Ronceverte, 1988), 74. This fact may help in explaining why Gaius has no corresponding 'law of things' or 'law of actions'.

<sup>44</sup> Admittedly, his discussion here pertains to persons *in postestate parentis*; but according to the likely reconstruction of a badly damaged passage, Gaius holds that the situation is the same for wives under the power of husbands (137–137a).

<sup>45</sup> For education in Tarsus, see Jerome Murphy-O'Connor, *Paul* (Oxford, 1996), 34–5. It should also be taken into account that our one source which identifies Paul as a Roman citizen also indicates that he took his advanced studies not in Tarsus but Jerusalem (Acts 16.37–8, 22.3), an altogether unlikely setting for instruction in Roman jurisprudence. The reliability of this information has been questioned by some, however. See e.g. Raymond E. Brown, *An Introduction to the New Testament* (New York, 1997), 423–6; and W. Ward Gasque, 'Tarsus', *Anchor Bible Dictionary* 6 (1992), 334.

Paul became acquainted with various aspects of Roman law through his contact with Roman courts in the provinces. As I have shown elsewhere,<sup>46</sup> it is quite likely that Paul's congregation in Corinth became involved in a lawsuit over the marital status of one of its members. While the details of the case are not always clear, it seems that following the death of his father a man had married or taken up sexual relations with his stepmother. This was seen by some in the congregation as immoral, and since the man would not change his ways they took him to court. They lost their case, however, and so the matter was left unresolved by the court decision, at least as far as the losing side—and Paul—were concerned. Thus in 1 Corinthians, written around A.D. 55, Paul steps in to arbitrate the case himself, on moral rather than legal grounds.

We do not know why the court ruled in favour of the immoral man (or maybe simply refused to hear the case), or even if it was a Roman court. But if it was a Roman provincial court,<sup>47</sup> and the charge against the man was adultery or incest—all of which is well within the bounds of current scholarly opinion—then he might have exonerated himself by arguing that, as his father was no longer alive, his stepmother was no longer his mother in any legal sense.<sup>48</sup> In other words, the *potestas* or *ius* of his father over his stepmother had ended with his father's death. Thus, the principle that Paul recites in Romans 7.1, 'the law of the person has jurisdiction as long as he lives', may have been something he learned through his efforts at sorting out this controversy.

While there are a fair number of 'ifs' in this hypothesis, the derivation of Paul's knowledge of 'the law of the person' from the Corinthian situation seems to explain why, in Romans 7.2–3, he illustrates the principle with an example concerning remarriage, even though this example fits poorly with his application of the principle in 7.4–6.<sup>49</sup> Further, a Corinthian origin gains considerable support from yet another text in 1 Corinthians. This is 7.39, where Paul gives his advice on the remarriage of a widow:

Γυνή δέδεταί ἐφ' ὅσον χρόνον ζῇ ὁ ἀνὴρ αὐτῆς· ἐὰν δὲ κοιμηθῇ ὁ ἀνὴρ, ἐλευθέρα ἐστὶν ᾧ θέλει γαμηθῆναι, μόνον ἐν κυρίῳ.

A woman is bound as long as her husband lives. But if the husband dies, she is free to be married to whom she wants, only in the Lord.

Like Romans 7.1–3, this passage contains legal jargon, namely ἐλευθέρα ἐστὶν ᾧ θέλει γαμηθῆναι, which is a standard element in divorce documents,<sup>50</sup> and ἐφ' ὅσον χρόνον, which we have seen in the papyri. It also has word-for-word parallels to the Romans text. Thus γυνή δέδεταί and ἐφ' ὅσον χρόνον ζῇ are common to both passages, and ἐὰν δὲ κοιμηθῇ ὁ ἀνὴρ, ἐλευθέρα ἐστὶν in 1 Corinthians differs by only one word from the ἐὰν δὲ ἀποθάνῃ ὁ ἀνὴρ, ἐλευθέρα ἐστὶν in Romans. Since Romans elsewhere shows a pattern of Paul using phrases and ideas from the

<sup>46</sup> Will Deming, 'The unity of 1 Corinthians 5–6', *Journal of Biblical Literature* 115 (1996), 289–312.

<sup>47</sup> A provincial setting would explain the presence in Romans 7.1–3 of parallels to Greek law (see above). Further, according to Acts 18.12–17, Paul had had dealings with the Roman court in Corinth previous to this.

<sup>48</sup> This would not have been a good defence in Gaius' day, of course (*Inst.* 1.59, 63), but see the report in Philo, *Legat.* 71–2.

<sup>49</sup> On the logical inconsistency of Paul's argument in 7.2–6, see Käsemann (n. 35), 190; Jones, 119; and Fitzmyer, 455.

<sup>50</sup> For example P. W. Pestman, *Marriage and Matrimonial Property in Ancient Egypt* (Leiden, 1961), 73–4, 181.

Corinthian situation as the basis for examples and paraenetic material,<sup>51</sup> the simplest explanation for this correspondence is that Romans 7.1–3 derives from Paul's experiences in Corinth.<sup>52</sup>

In an attempt to tie together these observations, let me suggest the following scenario. In sorting out the aftermath of a lawsuit between members of his Corinthian church, Paul inquires into aspects of Roman law relevant to the case, including a principle known as 'the law of the person'. This was a principle current among solicitors and legal advisors practising law at a fairly low level, having been developed in the context of elementary legal studies, and may have been familiar to Paul through his own education. Paul has opportunity to use this knowledge in both 1 Corinthians 7.39 and Romans 7.1–3. The main difference between these passages is that in Romans he underscores the technical nature of his knowledge with such phrases as 'I speak to ones who know law', 'the law of the person', 'bound *by law*', 'the living husband', 'released from the law of the husband', and 'free *from the law*'. He does this because he sees a rhetorical advantage in complimenting his Roman audience as 'ones who know law' and then employing legal jargon that might impress them and lend weight to his argument. He is, moreover, particularly interested in showcasing the clause 'the law of the person has jurisdiction as long as he lives'<sup>53</sup> because it brings together, in an authoritative formulation, key notions of his discussion in chapters 6 and 7 (namely *κυριεύω*, *νόμος*, and death).<sup>54</sup> In this manner he capitalizes on a legal phrase that focuses and advances his theological argument.<sup>55</sup>

## CONCLUSION

The foregoing study has inquired into the origins of the phrase *ius personarum*, which first appears in Gaius' *Institutes* in the mid-second century A.D. I have shown on grounds both internal and external to the *Institutes* that this phrase may have existed before Gaius; that the Christian writer Paul used a similar phrase in Greek in his letter to the Romans; and that there is good reason to suppose that both have reference to the same basic entity within Roman civil law. Finally, I have put forth a hypothesis that explains how Paul came to know of this phrase. I have postulated that he became familiar with it through his involvement in a lawsuit between members of his Corinthian church, as documented in 1 Corinthians 5–7.

I conclude from this that the phrase *ius personarum* was used in Roman law, at least in classroom instruction, as far back as the mid-first century A.D., and possibly earlier. If Paul was familiar with it through his congregation's involvement with a provincial court around A.D. 55, and he wrote to Christians in Rome, which he had never visited, expecting that a reference to this phrase in Greek would add weight to his argument among 'ones who know law', then it is logical to suppose that the phrase had acquired

<sup>51</sup> For example Cranfield, 2.691–3.

<sup>52</sup> Cf. the analysis in Jones, 119–20, 121.

<sup>53</sup> Both by his pointed introduction and by the emphatic separation of *ὁ νόμος* from *τοῦ ἀνθρώπου*. This separation also moves *τοῦ ἀνθρώπου* closer to the end of the sentence, thereby clarifying the subject of *ζῆν*. The alternative, which is not pretty, would be *ὁ νόμος τοῦ ἀνθρώπου κυριεύει ἐφ' ὅσον χρόνον ζῆν*.

<sup>54</sup> *κυριεύω* occurs in 6.9, 14; *νόμος* occurs in 6.14, 15 and throughout ch. 7; and death is a theme in 6.1–11, 23, and most of ch. 7.

<sup>55</sup> Paul's citation of Mosaic law (Deuteronomy 27.26) in Galatians 3.10 functions in a similar way, bringing together the concepts of 'law' and 'curse' in an authoritative legal formulation. See E. P. Sanders, *Paul* (Oxford, 1991), 57–8.

a wide currency by this time. Perhaps it had already achieved an authoritative standing in some of the more humble circles of legal education. From this we could infer that its origins lie somewhere in the first half of the first century A.D. Alternatively, it may have only recently become a subject of discussion. In this case we could understand Romans 7.1 as a reference to one of the latest advances in legal pedagogy, and we could locate the origins of *ius personarum* toward the middle of the first century.

To the extent that this conclusion seems reasonable, it holds important implications for the history of the conceptualization of Roman law, and perhaps also for the development of the *Institutionensystem*. By comparing Paul and Gaius we have determined that a principle entitled *ius personarum*/ὁ νόμος τοῦ ἀνθρώπου existed at least a century before its appearance in the *Institutes*. Moreover, it was used at that time to conceptualize the logic of private laws—potentially a broad range of these laws—that pertained to the legal status of one person during another's lifetime. Thus, there is evidence that elements of the civil code were being systematized by means of legal principles already in early classical law. When *ius personarum* finally surfaces in Gaius, this tendency is even more pronounced. Here the phrase stands somewhere between a principle and a category of law, a situation made possible by the ambiguity of *ius* in Gaius' day. Thus Gaius uses *ius personarum* in the same way he uses the simpler designations *res* and *actiones*, as titles for the three divisions of civil law.

At minimum, this reading of the evidence raises questions about the pace at which the systemization of law took place between these two points, Paul and Gaius, and hence also about Gaius' own creativity and contribution to the process. In the face of such questions, it will be more difficult for scholars to defend the view that Gaius' systemization of Roman civil law was entirely original. In turn, those holding the more cautious view, that the *Institutionensystem* was the creation of 'Gaius or an unknown predecessor',<sup>56</sup> will find it incumbent upon them to explore more explicitly the possibility that this predecessor belonged not to Gaius' century but to the one before.

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<sup>56</sup> For example Wieacker (1969), 466–7, 477.