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JURIDICAL IMPLICATIONS OF ATHENIAN SLAVES' COMMERCIAL ACTIVITY

At Symposion 2007, Alberto Maffi and the late Mario Talamanca presented conflicting, valuable papers concerning masters' legal liability for debts incurred in businesses operated by slaves. Maffi argued from Roman law principles[1] that Athenian slaves operating businesses were not personally liable for obligations arising from such commerce (as I had contended[2]) but rather that their masters were solely and invariably so obligated. When a slave was sold, the new master became liable for these obligations.[3] In response to Maffi, Talamanca insisted that evidence from Greek sources – and not Roman conceptions – must govern our interpretation of the legal and economic aspects of Athenian business practices, and that "*le fonti parlano con molta nettezza contro, non a favore della ricostruzione (di Maffi)*." Prof. Talamanca concluded (brilliantly), "*sono d'accordo con Edward Cohen*."[4]

Central to this conflict is the dispute chronicled in Hypereidês' *Against Athênogenês* (delivered between 330 and 324) involving the only domestic Athenian business "deal" known in detail – the purchase and sale of a retail perfume business operated by a slave, Midas, with his two sons.[5] Athênogenês, an Egyptian resident at Athens, sold Midas and his sons to Epikratês, an Athenian citizen, who assumed, by written agreement, liability for the shop's debts. The buyer claims to have undertaken these liabilities only because he was misled by the seller, who had claimed that the business's obligations were minimal. But in the course of narrating Epikratês' version of the facts, the Greek text repeatedly and explicitly reports the slave-businessman Midas as personally owing the debts, remarkable evidence that

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1 He insists, correctly in my opinion, on "diritto commerciale romano" as "*util(e) anche per lo studio del diritto ateniese dell'economia*" (Maffi 2008, p. 206).

2 Cohen 1992, p. 90-101.

3 Maffi 2008, p. 212. According to Maffi, however, a buyer and seller might by contract exclude the transfer of liability for the debts by excluding the transfer of the assets of the business ("*in termi romani, un acquisto degli schiavi senza peculio*," p. 213).

4 Talamanca 2008, p. 225.

5 See Lanni 2006, p. 163-64; Zelnick-Abramovitz 2005, p. 217-18, 220; Scafuro 1997, p. 61-64. The absence from our corpus of other cases involving sales should not be interpreted as establishing that legal disputes relating to property were in fact rare at Athens. Harrison has identified no less than 15 additional forensic presentations whose contents have not been preserved, but whose titles suggest a focus on issues involving property (Harrison 1968-71, I, p. 200 n. 1).

the *douloi*, and in particular the father, Midas, were at least primarily liable for these commercial obligations. At § 10 the purported language of the actual purchase agreement provides that the buyer will be liable for whatever obligations the slave "Midas owes to anyone." Section 6 describes how the seller persuaded the buyer to be responsible for "whatever money" Midas and his sons "owe," and Section 9 refers to "the creditors to whom Midas was indebted" (literally, "to whom it was owed by Midas"). In § 2, the buyer complains that the seller actually knew of "Midas owing (this money)."[6]

Against the clarity of this Athenian evidence (set forth by Hypereidês, in Talamanca's phrase, "*con molta nettezza*") stand silence and Roman legal theory. The "silence" is not only the absence of any effort by Maffi to explain (away) Hypereidês' characterization of the slaves' debts, but also the absence of an Athenian law governing responsibility for debts incurred by *douloi* operating businesses. Under a statute attributed to Solôn, a slave's master was clearly liable for non-contractual wrongs ("*torts*") committed by a *doulos*. When a slave was acquired by a new owner only after occurrence of a delict, the law (cited in *Against Athênogenês*) appears even to have specifically placed liability for such damage on the person owning the slave at the time that a tortuous wrong was committed.[7] But this law is entirely silent about a master's liability for contractual obligations incurred by slaves. Since the debts at issue in the Athênogenês case arose entirely from business commitments, Gernet has pointed out that an owner's liability for such debts was not addressed by this or any other statutory law:[8] otherwise the litigant would have appealed to such legislation, instead of utilizing the early law dealing with slaves' wrongful "actions," at most applicable only by analogy to "contractual obligations." The absence of provisions relating to slaves' contractual debt is not surprising: the independent operation of businesses by *douloi* represented a commercial reality of the fourth century that could not have been anticipated by an earlier law enacted in a period prior to the monetization of the Athenian economy.[9]

But in many instances, on a number of theoretical bases (characterization of the *doulos* as agent for his owner, joint liability for joint undertakings, reliance on owners' representations), a master could have been held liable for contractual obligations incurred by his slaves, even in the absence of an owner's general

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[6] § 6: ὅσον μέντοι ὀφείλουσιν ἀργύριον. § 9: οἱ χρῆσται οἷς ὠφείλετο παρὰ τῷ Μίδᾳ. § 10: καὶ εἴ τῳ ἄλλῳ ὀφείλει τι Μίδας. § 20: ὀφείλοντα Μίδαν τὰ χρήματα ταῦτα.

[7] § 22: [Σόλων] εἰδὼν ὅτι πολλαὶ ὠναὶ [γίγνον]ται ἐν τῇ πόλει ἔθηκε νόμον δίκαιον … τὰς ζημίας ἃ ἂν ἐργάσωνται οἱ οἰκέται καὶ τὰ ἀ[ ]ατα διαλύειν τὸν δεσπότην παρ᾽ᾧ [ἂν ἐργάσ]ῶνται οἱ οἰκέται. For ζημίαν ἐργάζεσθαι as descriptive of a slave's non-contractual wrongdoing, see Wyse 1904, p. 506.

[8] Gernet 1950, p. 161-62.

[9] For the extraordinary impact of the dissemination of coined money and the resultant fourth-century monetization of the Athenian economy, see Schaps 2004; 2008; Shipton 2001; Picard 2008, p. 147-51.

liability for the contractual commitments of a *doulos*. Master's liability, for example, would easily and clearly have arisen from conventional banking operations by a free proprietor and his staff of slaves. In other cases, a master's responsibility for, or lack of liability for, a slave's contractual commitments would have been (in barristers' parlance) an evidentiary issue. Despite his insistence that his only involvement with Midas's business was the receipt of monthly accountings, Athênogenês – as an alleged owner of three perfumeries, an habitué of the fragrance area of the *agora*, and a successor to his parent(s) and grandparent(s) as a seller of scents – would have found it difficult to persuade arbitrators or jurors of his non-involvement in Midas's fragrance *ergasia*.[10] The uncertainty of a court's ultimate decision on his involvement explains Athênogenês' insistence on Epikratês' explicit assumption of the loans pertaining to the bankrupt business operated by the slaves whom Epikratês was acquiring – a nugatory and unnecessary effort if Maffi were correct in his contention that when a slave was sold, the new master became liable for the obligations of the business, and the old master was freed from liability.[11]

Masters' potential liability also explains bankers' entry into leases (*misthôseis*) with their own slaves. Thus the *douloi* Xenôn, Euphrôn, Euphraios and Kallistratos – while still enslaved – as principals operated the largest bank in Athens, that of Pasiôn. Only upon completion of the lease term did their owners "set them free" (*eleutherous apheisan*) "being quite satisfied" with how they (the owners) had been treated (Dem. 36, 13-14).[12] During the ten years in which the leasing arrangement had been in force (Dem. 36, 37), the slaves' only involvement with their owners appears to have been annual payment of a sizeable fixed rental (an entire talent per year) in return for the slaves' retention of the net income resulting from operation of the bank. Although all assets under the slaves' control, including all of the *trapeza*'s assets, would have remained exposed to creditors, the bank owner's other assets would have been protected from banking obligations incurred after commencement of the lease.[13] Furthermore, a formal lease would have eliminated any inference that a slave was acting as agent for his master in entering into a banking commitment, or that they were co-venturing, possible bases for finding a master legally responsible

[10] § 19: οὗτ[ος] δέ, ὁ ἐκ τριγονίας [ὢν] μυροπώλης, καθ[ήμε]νος δ' ἐν τῇ ἀγο[ρᾷ] ὅσαι ἡμέραι, τρία [δὲ μυ]ροπώλια κεκτη[μένος], λόγους δὲ κατὰ μῆνα λαμβάνων, [οὐκ] ᾔδει τὰ χρέα. ἀλλ' ἐν μὲν τοῖς ἄλλοις οὐκ ἰδιώτης ἐστίν, πρὸς δὲ τὸν οἰκέτην οὕτ[ως ε]ὐήθης ἐγένετο... § 12: καταλαβόντες αὐτὸν πρὸς τοῖς μυροπωλίοις.

[11] "*L'acquisto di uno schiavo che esercita un'attività commerciale comporta anche l'acquisto dell'azienda da lui gestita, in particolare del passivo inerente allo svolgimento di quell'attività*" (Maffi 2008, p. 212).

[12] Dem. 36, 13-14: ἐμίσθωσεν Ξένωνι καὶ Εὐφραίῳ καὶ Εὔφρονι καὶ Καλλιστράτῳ, ... τὰς παρακαταθήκας καὶ τὴν ἀπὸ τούτων ἐργασίαν αὐτὴν ἐμισθώσαντο ... καὶ ἐλευθέρους ἀφεῖσαν ὡς μεγάλ' εὖ πεπονθότες.

[13] Of course, the owner would still have been liable for repayment of deposits left with him prior to effectiveness of the lease: Athenian law's non-recognition of businesses as juridical persons insured that liability.

for a slave's contractual debts, even in the absence of general legislation mandating this obligation. In contrast, such a rental arrangement between a bank owner and slave would have lacked economic justification if the master had remained potentially liable for bank obligations incurred after the lease had become effective: the owner would then have limited his right to receive income while retaining unlimited liability for losses. But the slaves of Apollodôros and Pasiklês, the bank owners, paid their masters exactly the same rent as the free person who had previously leased the *trapeza* (Dem. 36, 12), not an increased sum, as might be expected if their status as slaves had in fact increased their masters' liability for contractual obligations incurred by the bank during the period of their lease.

Like the testimony of Hypereidês *Against Athênogenês* regarding an unfree businessman's personal liability for debts, the evidence offered by Demosthenes 36 and 45 for lease arrangements between master and slave contradicts prevailing academic dogma, and here too scholars have sought to athetize the ancient sources rather than to abandon modern doctrine. Klees, for example, argues that the bank lease between owners and slaves reported at Demosthenes 36, 13-14 does not offer a "reliable basis" ("*gesicherte Grundlage*") for concluding that unfree bankers could actually enter into trapezitic leases with their masters. He finds Demosthenes' explanation for the manumission suspect (viz. the owners were "quite satisfied" with how they had been treated [36, 14]). Klees reasons that since a slave has a duty to serve his master, an owner need not feel appreciative of slaves' service – presumably even when slave tenants, according to Demosthenes, had paid their masters a total of 10 talents (perhaps Six Million Dollars on a purchasing power parity basis). According to Klees, the passage is clearly idiosyncratic ("*ohne Parallele*") and should therefore be disregarded.[14] Todd, in contrast, does not urge outright disregard of the text, suggesting rather that the phrase *eleutherous apheisan* does not really mean "set them free." He offers an alternative translation: the owners "bindingly declared that they (the slaves) were free of legal claims",[15] a release rather than a manumission, thus eliminating the need to attribute slave status to the lessees who, on Todd's reading, were not being freed after termination of the lease and therefore need not have been unfree during the term of the lease. But Todd's translation is impossible: the phrase *eleutherous apheisan* is formulaic Greek for manumission of slaves,[16] and is routinely translated as "set them free" or "enfranchised them" (French: "*ils les ont affranchis*"). Harrison explicitly taught more than 40 years ago that the phrase does "*not*" mean "'released them from their obligations'," a lesson that has also been proffered by Gernet and MacDowell.[17] Yet

[14] Klees 1998, p. 153-54.

[15] Todd 1994, p. 137 n. 31.

[16] Cf. Hyper. *Athên*: εἶθ' ὕστερον ὅτε ἄν σοι δοκῇ, ἀφῇς αὐτοὺς ἐλευθέρους (§ 6); Dem. 57, 34: ἢ ὡς ἐδούλευσεν ἢ ὡς ἀφείθη ἐλευθέρα.

[17] Harrison 1968-71, I, p. 176 n. 2 (emphasis added). Likewise, Gernet 1954-60, I, p. 209 n. 2; 1950, p. 175 (= 1955, p. 163); MacDowell 2004, p. 157-58 n. 27.

efforts to nullify this evidence persist. Maffi does not challenge the manumission, but does claim that the *misthosis* is not really a "*misthôsis*": it should be treated rather as an *apophora*-arrangement.[18] Characterization of this lease as an "apophora," however, is precluded by the text of Demosthenes 36 which explicitly characterizes the arrangement with the slaves not as a "sharing arrangement" (*apophora*) but as the "lease of the deposits (*parakatathêkai*) and the operation (*ergasia*)" arising from these deposits.[19]

Yet contractual arrangements with slaves, including extensions of credit directly to unfree persons operating businesses and banks on their own, would have been juridically meaningful (because legally enforceable) only if such unfree persons could be parties to commercial litigation. Although slaves were in general totally devoid of legal capacity – deprived of the right even to be witnesses in legal proceedings[20] – it has long been generally accepted that slaves did have full access to Athenian courts as parties and as witnesses in at least one category of cases, the important "commercial maritime" suits (*dikai emporikai*) where "standing" was accorded without regard to the personal status of litigants.[21] Analogously, I have further suggested that unfree persons independently operating their own businesses could also be parties in commercial cases involving banking (*dikai trapezitikai*) – a "sphere," in Harrison's words,[22] "allied" to maritime commerce – and mining (*dikai metallikai*).[23] Maffi, however, insists that Demosthenes 37, a mining case, "confirms"[24] that slaves could not participate for their own account in such cases. Here again the actual evidence speaks, in Talamanca's words, "*con molta nettezza contro, non a favore della ricostruzione (di Maffi)*."

Demosthenes 37 deals with loans involving a mining business – a mine and a workshop (*ergastêrion*) employing 30 slaves who processed the silver obtained underground – operated by Pantainetos.[25] During Nikoboulos's absence from Athens – according to Pantainetos – because of an alleged default on a loan advanced in part by Nikoboulos, Antigenês, Nikoboulos's slave, had seized the *ergastêrion*, taking control over Pantainetos' property and improperly seizing

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[18] Maffi 2008, p. 213: "*la* misthosis […] *deve essere interpretata, se si tratta davvero di schiavi, come una apophora*."

[19] τὰς παρακαταθήκας καὶ τὴν ἀπὸ τούτων ἐργασίαν αὐτὴν ἐμισθώσαντο (Dem. 36. 13).

[20] For slaves' general inability to bring lawsuits, see Plato, *Gorg.* 483b; Dem. 53, 20. Their testimony could be utilized only to the extent that it was extracted under formalized torture, a form of proof that emphasized the normal evidentiary incapacity of the *doulos*. See Thür 1977; Humphreys 1985, p. 356 n. 7.

[21] Maffi 2008, p. 214; Garlan 1982, p. 55; Paoli 1974, p. 107; Gernet 1938, p. 162-64; Cohen 1973, p. 121.

[22] Harrison 1968-71, I, p. 176.

[23] On the *dikai trapezitikai*, Gernet 1938, p. 176-77; *dikai metallikai*, MacDowell 2006.

[24] Maffi 2008, p. 215.

[25] On Dem. 37, see Harris 2006, p. 190-99; Carey-Reid 1985, p. 105-59.

silver.[26] Pantainetos has sued Nikoboulos, but Nikoboulos insists that on these facts, Pantainetos instead – in MacDowell's translation – "should have initiated the case against the slave."[27] Once again, the clear language of the text asserts the possibility (the speaker actually insists on the juridical necessity) of suit against a slave operating a business on his own – in this case the *ergastêrion* that has been seized by the slave Antigenês. Gernet, in his 1954 edition of Demosthenes' Private Speeches ("*Plaidoyers Civils*"), sees the passage as demonstrating that "when the slave has acted at the master's direction, it's the master who should be sued; when he has acted on his own, the slave himself should be sued."[28]

Other texts confirming the availability of Athenian courts to slaves in commercial disputes similarly have evoked determined resistance from modern scholarship defending modern theses threatened by the ancient evidence. In Demosthenes 55, a case set in the context of rights to real property, a plaintiff (according to the defendant) has concocted false contracts and has sued the defendant's slave: the litigant argues that the suit should not have been brought against the slave since the *doulos* was not acting independently of his master's direction.[29] Todd, however, insisting on the modern dogma that a slave "could be neither plaintiff nor defendant," dismisses the evidence as "obscure."[30] And Pankleôn, engaged in commercial pursuits in a fuller's shop, seeks to avoid a court action (Lysias 23) on the grounds that he is a Plataian, only to be met by the plaintiff's introduction of evidence that he is in fact a slave. Of course, the plaintiff's presentation of proofs of servitude would justify pendency of the case only if slaves actually could be parties to business-oriented lawsuits. Todd, however, objects to "the assumption that the speaker's aim in convincing the court of Pankleon's slave status is to continue with the case."[31] Todd's counter-assumption – that the plaintiff is really trying to lose the case which he has initiated – seems methodologically less desirable than an effort to understand the text as transmitted.

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[26] § 25: καταστήσας Ἀντιγένην τὸν ἑαυτοῦ οἰκέτην εἰς τὸ ἐργαστήριον τὸ ἐμὸν τὸ ἐπὶ Θρασύμῳ κύριον τῶν ἐμῶν... § 22: ἀφελέσθαι κελεύσας Ἀντιγένην τὸν ἑαυτοῦ οἰκέτην τὸ ἀργύριον τοῦ ἐμοῦ οἰκέτου.

[27] Dem. 37, 51: ἔδει ... λαχόντ' ἐκείνῳ τὴν δίκην.

[28] Gernet 1954-60, I, p. 228: "*lorsque l'esclave a agi sur l'ordre du maître, c'est le maître qui est actionné: lorsqu'il a agi de son chef, c'est lui-même*."

[29] Dem. 55, 31: συνθήκας οὐ γενομένας ἀπήνεγκεν ... Καλλάρῳ τὴν αὐτὴν δίκην δικάζονται. (32) καίτοι τίς ἂν οἰκέτης τὸ τοῦ δεσπότου χωρίον περιοικοδομήσειεν μὴ προστάξαντος τοῦ δεσπότου ;

[30] Todd 1993, p. 187, text and n. 35.

[31] Todd 1994, p. 131 n. 18.

Understanding the Evidence

"*L'acquisto di uno schiavo che esercita un'attività commerciale comporta anche l'acquisto dell'azienda da lui gestita, in particolare del passivo inerente allo svolgimento di quell'attività*."[32]

No Athenian evidence confirms Maffi's belief that on the sale of an Athenian slave operating a business, legal liability for that business's obligations is automatically transferred from the slave's former owner to the slave's new owner. Against the Athenian evidence that argues "with considerable clarity" (in Talamanca's words) against his hypothesis, Maffi turns to Roman commercial law. Although, in my opinion, Roman theory and/or practice should not be employed to refute Athenian sources, I do not agree with Talamanca that Maffi's resort to Roman parallels is inherently deleterious,[33] for the Roman economy, like the Athenian, was heavily dependent on the operation of businesses by unfree persons.[34] In fact, Roman law treatment of a slave's *peculium* (the commercial assets granted by a master for a *servus*'s use in commercial transactions) provides a useful example of how a slave's legal nullity can be reconciled with legal recognition of a slave's direct responsibility for business obligations in a system, whether Roman or Greek, in which economic activity gave prominence to slaves operating businesses autonomously.[35] But Romanists' treatment of the *peculium* also illustrates the inadvisability, if not the impossibility, of seeking to impose Roman law analogies mechanically on Athenian business procedure in defiance of the actual Athenian evidence, for – beyond the very different circumstances of a very different civilization – these Roman law principles are themselves often based on highly disputed and fragmentary source material. Not surprisingly, then, of those Roman slave-businessmen referenced by Maffi as most analogous to the Athenian *douloi khôris oikountes*, the Roman *gestores* and *institores*, "direct evidence is scarce."[36] Yet it is generally accepted that the *institor* was a mere agent of the Roman master, while the *gestor* functioned as an independent businessman.[37] Analogously to Athenian owners of slaves autonomously operating businesses, Roman masters (*domini*) were not responsible for the debts of slave *gestores*: creditors could collect only from the *gestor*'s own *peculium*,[38] Although the "peculium" is sometimes

[32] Maffi 2008, p. 212.

[33] "*Inutile*": Talamanca 2008, p. 228.

[34] Maffi 2008, p. 206-207. Cf. Chiusi 1991; Di Porto 1984. On slaves' autonomous operation of financial businesses at Rome, see Petrucci 2002, p. 105-14, 118-27.

[35] In Harris' succinct formulation, "Roman law had regulations limiting the liability of masters for their slaves' debts" (Harris 2002, p. 48). On the *peculium*, see Cerami *et al*. 2002, passim; Andreau 1987, p. 613-15, 631-32.

[36] Aubert 1994, p. 5.

[37] Berger 1953, s.v. *negotiorum gestio*. On the *gestor*, an individual undertaking *negotium gerere* for another, see *Dig*. 49, 1, 24 (Scaevola); 3, 5, 30, *pr*. (Papinian); Watson 1965, p. 206-7; Seiler 1986.

[38] Aubert 1994, p. 414; Andreau 1999, p. 68.

described as a "legal fiction,"[39] it was a legal fiction on which creditors could rely: in the entire surviving vast juridical corpus of Roman legal material, there is not a single example of a master ever attempting to withdraw a *peculium* as to which an action at law was pending.[40] Maffi, however, arbitrarily chooses to analogize the Athenian slave businessman not to the independent Roman slave businessman, the *gestor*, but to the Roman agent, the *institor*, whose master, he believes, was fully liable for debts incurred by his slave "manager."[41] This is a false analogy, because as Gernet pointed out sixty years ago, there is absolutely no evidence for the existence at Athens of anything like the *actio institoria* which imputed to masters liability for the debts of Roman *institores*.[42] Fortunately, however, students of ancient Athens need not dispute Roman law, debating which category of Roman slave is actually analogous to the Athenian *doulos khôris oikôn*. The actual Athenian structure of credit, as presented by Hypereides, offers far greater insight into Athenian commercial law than suggestions based on the functioning of another economy at another time:

Under Maffi's formulation, the original master could avoid all liability for his business-related debts merely by selling the unfree business operator to a third party, even to a person entirely lacking assets. As Talamanca asks,[43] how could credit ever be reasonably extended under the Maffi hypothesis – since the borrower/slave owner can free himself of obligation without the lender's consent or even knowledge?

In contrast, the actual content of the Greek text – loans made directly to a businessman/*doulos* for the repayment of which the slave is responsible (*opheilei*) – accords well with the known structure of Athenian credit. Even if an unfree person had no other assets, a loan to a slave independently operating a business could be, and was, fashioned as a loan made against, and secured by, the assets of that business – a conventional form of credit extension at Athens. In fact, at Athens credit was seldom extended *without* underlying security. Large numbers of surviving *horoi* throughout Attika attest to financing secured by real estate. Numerous court cases deal with conflicts over the assets of a business (especially wholesale and retail merchandise) pledged in whole or in part as security for a loan. Even so-called "friendly loans" (*eranoi*) were generally collateralized by valuable property.[44] And given the opacity of personal assets at Athens, which seem largely

39 Andreau 1999, p. 68.

40 Watson 1987, p. 43.

41 Maffi peremptorily rejects analogy to the Roman law treatment of the *gestor*: "*ad Atene, contrariamente a quel che pensa Cohen, l'attivo del 'peculio' non costituisce un limite alla responsabilità del padrone*" (Maffi 2008, p. 214 n. 36).

42 Gernet 1950, p. 162: "*il n'y a pas, à Athènes, l'équivalent de l'*actio institoria *du droit romain*."

43 Talamanca 2008, p. 226-27.

44 Finley 1985, p. 85, 100-106.

to have been held in the so-called *aphanês ousia*, the "invisible economy,"[45] how could a would-be creditor ever obtain reliable knowledge of an individual's credit-worthiness? How could a lender ever collect against assets held in obfuscated forms intended to frustrate creditors (and tax collectors)? But the assets of a business *were* ascertainable, and lenders in the fourth-century had developed sophisticated and effective techniques to control such property once encumbered.[46] In the context of Athenian business practices and social structures, there is no inherent barrier to the direct and primary liability for commercial debts of Athenian slaves autonomously operating businesses – and no need for a rule imposing concomitant or exclusive liability on the slave/businessman's master. Scholars accordingly need not disregard, or dispute, the plain meaning of the ancient sources.

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[45] Gabrielsen 1994, p. 54-56; Cohen 1992, p. 191-215.

[46] See Cohen 1992, Chapters 4-5.

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