The Sins of their Fathers: *Si pater filium ter venum duit*

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The origins of the *Lex Duodecim Tabularum* are shrouded in mystery and the historical reports concerning the activities of the *Decemviri legibus scribundis* (1), can at best be taken as containing only a germ of the truth (2). Modern scholarship therefore fails to find agreement on even the most basic of issues such as: Did the *Lex* introduce sweeping reforms and impose a new legal order on both patricians and plebeians alike (3)? Or,

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1) Cf. Livy, 3.31, 3.34.6, 3.37.4; Dionysius, 10.1-60, 11.1-46; Diodorus Siculus, 12.23-25; Cicero, *de legibus*, 2.23, 2.25 et seqq; Cicero, *de republica*, 2.36.61, 2.37.62; Tacitus, *Annales*, 3.27; Pliny, *Epistulae*, 8.24.4; Pomponius D.1.2.2.3 et seqq.

2) F. WIEACKER, *Römische Rechtsgeschichte. Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur*, Erster Abschnitt, München 1988, 287.

3) Following Livy, 3.34.6: *decem tabularum leges perlatae sunt, qui nunc quoque .... fons omnis publici privatique est iuris*: O. BEHRENDS, *Der Zwölftafelprozeß. Zur Geschichte des römischen Obligationenrechts*, Göttingen 1974, 1; L. WENGER, *Die Quellen des römischen Rechts*, Wien

did the *Lex* only canonize certain legal principles which, at that stage, formed part of the legal system (4)? And, in the case of the last question being answered in the affirmative, did it also amend the existing law and introduce new provisions at the behest of the populace (5)?

The same divergence of opinion characterizes the interpretation of the (approximately) one third of the *lex* that has been handed down and preserved piecemeal. Apart from problems concerning the authenticity of these fragments (6), there remains the more perplexing question as to the meaning of the individual provisions of the *Lex*. One of these controversial clauses, is the following:

1953, 357; G. CRIFÒ, "La Legge delle XII Tavole. Osservazioni e Problemi", in H. TEMPORINI (ed.), *Aufstieg und Niedergang der Römischen Welt*, vol. I, part 2, Berlin / New York 1972, 115-133, esp. 119-122. A. GUARINO, *Storia del Diritto Romano*, Milano 1969, 133 consider the XII Tables as the "*fons omnis privati* (ma non *publici*) *iuris*...".

4) Advocated by M. KASER, "Die Beziehung von Lex und Ius und die XII Tafeln", in: *Studi Donatuti*, vol. 2, Milano 1973, 523 et seqq.; P. STEIN, *Regulae Iuris*, Edinburg 1966, 9 et seqq; R. WESTBROOK, "The nature and origins of the Twelve Tables", *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, romanistische Abteilung* (= *SZ*) 105 (1988), 74-121, 101; F. DE MARTINO, "Certezza del Diritto in Roma antica", *Fondamenti* 91 (1987), 6-34, 9; A. WATSON, *The State, Law and Religion. Pagan Rome*, Athens (Georgia) 1992, 15.

5) Cf. A.M. RABELLO, *Gli effetti personali della 'patria potestas'. Dalle origini al periodo degli Antonini*, part I, Milano 1979, 81-86 arguing in favour of the *Lex* introducing such legal principles as well.

6) On which see F. WIEACKER, 290 et seq.; L. WENGER 360 et seqq.

"*Si pater filium ter venum duit, filius a patre liber esto*" (7).

The classical authors did not go to great pains to enlighten their readers as to the history or exact meaning and purport of this provision. Dionysius appears to be noticeably uncomfortable about the origins thereof:

> τοῦτον τὸν νόμον ἐν ἀρχαῖς μὲν οἱ βασιλεῖς ἐφύλαττον εἴτε γεγραμμένον εἴτε ἄγραφον (οὐ γὰρ ἔχω τὸ σαφὲς εἰπεῖν) ἁπάντων κράτιστον ἡγούμενοι νόμων (8).

The original scope and meaning of this provision failed to rouse the interest of the classical jurists. Gaius simply mentioned it *en passant*, as a convenient vehicle to explain *emancipatio* and *adoptio* (9). The ancient disinterest as to the original meaning of

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7) *Tabula* 4.2. Text in S. RICCOBONO (ed.), *Fontes iuris Romani anteiustiniani* 2 I (*Leges*), Firenze 1941 (reprint 1968), 35.

8) Dionysius, 2.27: "This law, whether written or unwritten, - I cannot say positively which, - the kings observed in the beginning, looking at it as the best of all laws". (Translated by E. CARY, *The Roman Antiquities of Dionysius of Hallicarnassus*, The Loeb Classical Library, London 1948, 391). M. KASER, "Der Inhalt der patria potestas", *SZ* 58 (1938), 62-87, 70, describes this report by Dionysius as "nur eine der beliebten Vorwegnahmen späterer Gesetze, hier des bekannten XII-Tafelsatzes".

9) Cf. Gaius 1.132: *Praeterea emancipatione desinunt liberi in potestate parentum esse. sed filius quidem tribus mancipationibus, ceteri vero liberi sive masculini sexus sive feminini una mancipatione exeunt de parentis potestate: lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis: 'si pater ter filium venum duit, a patre filius liber esto'....* 134. *Praeterea parentes etiam liberos in adoptionem datos in potestate habere desinunt. et in filio quidem, si in adoptionem datur, tres mancipationes et duae intercedentes manumissiones proinde fiunt, ac fieri solent, cum ita enim pater potestate dimittit, ut sui iuris efficiatur...* The principle is repeated in Gaius 4.79 and Reg. Ulp. 10.1.

the rule seemingly continues until today. Accordingly, it is simply taken for granted that the *pater familias* thrice 'sold' his son by means of *mancipatio* and that these sales were so undesirable and also occurred so frequently, that the *Decemviri* had to intervene (10).

The scenario presented is that of the *pater familias* who, driven by extreme poverty and misery, sold his son in order to acquire from the proceeds of the sale an immediate means of survival. With the meagre yield of his next harvest or share in war-booty, he would thereafter rush to ransom his child, only to sell him yet again, when the famine became unbearable (11). To such an extent did the *Decemviri* regard this *obbrobriose commercio del proprio sangue* (12) as obnoxious and abusive (13), that they only allowed the *pater familias* two such sales. Upon the third sale (still according to the *communis opinio*), his *potestas* over the son had been summarily terminated. The implication being that the *pater familias* either had to find other means of survival (for example, by improving his efficiency as farmer or by securing for his family a greater share in the war-spoils) or that he had to leave his sons at home and sell himself or, failing

10) See n. 17 below.

11) G. DE SANCTIS, *Storia dei Romani*, vol. II, Firenze 1960, 65.

12) G. DE SANCTIS, 289.

13) Cf., for instance, A. GUARINO, *Diritto privato romano*, Napoli 1992, 548: "La scandalosa frequenza con cui i *patres familiarum* ... non solo vendevano e rivendevano i loro figli in caso di bisogno, ma tornavano a venderli dopo averli riacquistati in potestà...".

the aforementioned possibilities, that he and his family simply had to perish.

The treatment accorded this provision by Gaius is then explained by pointing to the role of the priests who were responsible for the subsequent application of the prohibition. Through their *interpretatio*, and deliberate twisting or adaptation of the original prohibition of the *Lex*, they made *voluntariae mancipationes* (14) possible and as a result thereof also *emancipatio* and *adoptio* (15). To this I will return later, but it may be stated from the outset that there can be no doubt about the later application of the prohibition and about the pontifical influence which can clearly be seen in the "artificial formalism" of both *emancipatio* and *adoptio* (16).

A massive *communis opinio* accepts the above as gospel and takes as point of departure that the provision aimed at "Bestrafung des hartherzigen und habgierigen Vaters, der seinen Sohn dreimal zu Geld macht" (17). In the light of the evil that is

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14) See Gaius 4.79.

15) H. LÉVY-BRUHL, *Nouvelles Études sur le très ancien droit romain*, Paris 1947, 81; M. KASER, "Zur altrömischen Hausgewalt", *SZ* 67 (1950), 482; A.M. RABELLO, 108.

16) A.M. RABELLO, 108.

17) M. KASER, *Das römische Privatrecht* I, Munich 1971, 70. This view (hereafter referred to as the *communis opinio*) is advocated in broad outline, *inter alia*, by F. WIEACKER, 331; W. KUNKEL, "Auctoratus", *EOS* 48 (1956), 207-226, 210; H. KAUFMANN, *Die altrömische Miete*, Köln 1964, 45; G. FRANCIOSI, *Famiglia e Persone in Roma Antica. Dall'eta Arcaica al Principato*, Torino 1989, 51; H. HONSELL, Th. MAYER-MALY, W. SELB, *Römisches Recht aufgrund des Werkes von Paul Jörs, Wolfgang Kunkel, Leopold Wenger*, Berlin 1987, 412; A. GUARINO, *Diritto privato romano*, 548; G. PUGLIESE, F. SITZIA, L. VACCA, *Istituzioni di diritto romano*,

being addressed, it is also accepted that the provision applied to both the *filius* as well as the *filia* (18). Yet, one of the problems that has faced romanists, is the sheer improbability that such a significant number of *patres familias* would have had the habit of selling their sons, of buying them back prior to selling them again, and so on, that it would have prompted the *Decemviri* to take such drastic punitive action. BIRKS was therefore most probably not exaggerating when he stated: "not one scholar has ever believed, or not with full-hearted consent, that there was a real danger of paternal abuse by multiple sale" (19).

BIRKS himself tried to explain the provision in *Tabula* 4.2 as referring to three sales, not necessarily of the same son but of anyone that might happen to be *in potestate*. After the third sale of

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Torino 1991, 100; M. TALAMANCA, *Istituzioni di diritto romano*, Milano 1990, 127; A. STEINWENTER, "Mancipium", in: *Paulys Real-Encyclopädie der classischen Altertumswissenschaft* (hereafter cited as *RE*), vol. 14, 1012, followed by E. SACHERS, "Potestas Patria", in: *RE* vol. 22/1, 1097-1098; H.F. JOLOWICZ, *Historical Introduction to the Study of Roman law*, Cambridge 1972, 90. Also see A.M. RABELLO, 94 who cites further literature. R. YARON, "Si pater filium ter venum duit", *Tijdschrift voor rechtsgeschiedenis* (= *TvR*) 36 (1968), 57-72, 57 agrees with the traditional viewpoint but attempts to describe the provision in the *Lex*, not as a form of punishment but simply as a legal result that will come about after the third sale. How not to regard the "curtailment of powers which existed at an earlier stage" (R. YARON, 65) as a form of punishment, is difficult to see.

18) Cf. H. KAUFMANN, 45 et seqq; F. SCHULZ, *Geschichte der römischen Rechtswissenschaft*, Weimar 1961, 35. *Contra*: F. WIEACKER, 331; G. FRANCIOSI, 51; R. YARON, 61 et seqq.; A. STEINWENTER, *RE* vol. 14, 1012 and H. LÉVY-BRUHL, *Nouvelles Études*, 64 (all accepting the fact that the provision originally applied only to the selling of a *filius*).

19) P. BIRKS, "3 X 1 = 3. An Arithmetical Solution to the Problem Threefold Mancipation", *IURA* 40 (1989), 55-63 at 60.

a child, the son who had thus been sold, would have been freed from the *patria potestas* ([20]). BIRKS's interpretation certainly doesn't lack ingenuity. Yet, the wording of the *Lex*, as transmitted to us, is quite clear and nothing therein supports such an interpretation. BIRKS also failed satisfactorily to address the one fundamental question - namely that of the nature of the abuse that the *Decemviri* sought to curb. According to him it should simply be accepted that "...there was a real danger of paternal abuse by multiple sale. It has had to be taken on trust. The Twelve Tables legislated to curb that abuse, hence that abuse must have existed" ([21]). With this rather simplistic explanation, BIRKS more or less echoed the *communis opinio* that exists in this regard as well. It is taken for granted that, in the eyes of the *Decemviri*, "Handel mit der Arbeitskraft des Sohnes zu treiben widerspricht der Sitte" ([22]).

Attempts have also been made to explain the underlying motivation for the provision in *Tabula* 4.2 differently. S. PEROZZI placed the provision in its historical context and referred to the ancient society that had been organized strictly along lines of *gentes* who treated a son, sold by means of *mancipatio*, as a slave. Later on, as the *gentes* moved closer to each other, such sons sold by means of *mancipatio*, ceased to be regarded as

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20) P. BIRKS, 63.

21) P. BIRKS, 60.

22) A. PERNICE, *M Antistius Labeo*, Halle 1873 (reprint Aalen 1963), Teil A, Band 1, 169.

slaves but stood *servi loco*. The *Decemviri* intervened in *Tabula* 4.2, and only allowed three such sales (23).

PEROZZI possibly shed more light on the structure of the society to which the provisions of the *Lex* applied, but he never came close to a satisfactory explanation of the motives that had prompted the *Decemviri* to introduce the prohibition on more than three 'sales' of the *filius familias*. An attempt to explain this has been made by H. LÉVY-BRUHL (24) and M. KASER (25). LÉVY-BRUHL effectively identified the weaknesses of the *communis opinio* (26) and also rejected the idea that the sales were real. According to him the sale of children at that stage must have been a rare occurrence (27) and the provision therefore must have been designed to allow for the *noxae deditio* of a *filius familias*; the three *mancipationes, uno actu*, were simply intended to publicize the seriousness of the act (28).

LÉVY-BRUHL's theory can be questioned. In the first place, the sources themselves would seem to indicate that the sale of

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23) S. PEROZZI, *Istituzioni di diritto romano*, Vol. I, Milano 1947, 289 et seqq.

24) H. LÉVY-BRUHL, *Nouvelles Études*, 80-94, and also in *Festschrift Lewald*, 1953, 93 et seqq.

25) M. KASER, *SZ* 67 (1950), 474-497.

26) For a detailed discussion of H. LÉVY-BRUHL's thesis, see R. YARON, *TvR* 36 (1968), 57-72; M. KASER, *SZ* 67 (1950), 474-483.

27) H. LÉVY-BRUHL, *Nouvelles Études*, 85.

28) H. LÉVY-BRUHL, *Nouvelles Études*, 88.

children (as slaves) did in fact occur ([29]). Also, LÉVY-BRUHL based his hypothesis upon sociological factors that cannot simply be accepted as valid. It cannot, for instance, be taken for granted that *noxae deditio* took place so regularly that it would have prompted the *Decemviri* to intervene. As H. KAUFMANN ([30]) pointed out, the nature of society at that early stage (in the absence of mechanization) made it highly improbable that such damage could have been done to third parties that this would normally have resulted in the *pater familias* surrendering his *filius* instead of compensating the injured party. It should also not simply be assumed ([31]) that the *deditio* of the *filius* conferred upon the injured party a perpetual right or power over such *filius*. Logically such power over the son that had been surrendered as *noxa* would rather have been temporal ([32]). Moreover, the period that he could be held as *noxa* should to some extent have been commensurate with the seriousness of the damage caused by him.

KASER accepts LÉVY-BRUHL's theory as possible but adds that the *Decemviri* perhaps also intended the provision to facilitate

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29) In particular see A.M. RABELLO, 99 et seq.; Th. MAYER-MALY, "Das Notverkaufsrecht des Hausvaters", *SZ* 75 (1958), 116-155. Also see the discussion below.

30) H. KAUFMANN, 47.

31) As is done by H. LÉVY-BRUHL, *Nouvelles Études*, 9 and M. KASER, *SZ* 67 (1950), 475.

32) Cf. A.M. RABELLO, 98 who also cites further literature.

the later institutions of *emancipatio* and *adoptio* (33). KASER rejects the idea that *Tabula* 4.2 aimed at punishing the father, since a father who sold his son's labour, "wenn [der Verkauf] in Not geschieht", does not deserve punishment. He finally points out that it would have been highly exceptional if the *Lex* introduced a punishment that only affected the private law status (not of the father) but of the son (34).

KASER's explanation is certainly more convincing than the view propounded by the *communis opinio*. What makes his theory particularly attractive is the fact that in terms thereof it would still have been possible for the *pater familias* to freely dispose of his son's labour force (35). As will be shown later, there exist cogent reasons to accept that the poor in the city had to work and that the labour force of the *filius familias* was vital to guarantee their survival in archaic Rome. Nevertheless, it is possible to express some doubts. Apart from the fact that KASER also *a priori* accepts the fact that the 'sale' took place by means of *mancipatio*, his view that the Decemviri only regarded the conduct of the father's selling his son as innocuous where it happened out of necessity (36), presents serious difficulties.

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33) M. KASER, *Das römische Privatrecht*, I 70 et seq.; M. KASER, *SZ* 67 (1950), 479 et seqq.

34) M. KASER, *Das römische Privatrecht*, I 70.

35) Cf. M. KASER, *SZ* 67 (1950), 482 et seq.: "...der einmalige Verkauf [könnte] in größeren Zeitabständen beliebig oft wiederholt werden, ohne daß beim dritten Mal die *p.p.* endgültig erlosch".

36) M. KASER, *Das römische Privatrecht*, I 70. In this sense also, F. LEIFER, "*Mancipium* und *auctoritas*", *SZ* 56 (1936), 136-235 at 178.

When would the need have been sufficient to permit the father to sell his son's labour with impunity? Extreme poverty? A great demand for the son's labour? Inability on the part of the father himself to make his own labour available? Furthermore, as F. WIEACKER points out: "Singulär wäre auch die Bezugnahme der Dezemvirn auf ein bereits ausgebildetes artifizielles Umgehungsritual" (37).

C.G. BERGMANN (38) added a somewhat novel twist to the interpretation of *Tabula* 4.2. According to him, the provision should be seen as an attempt by the *Decemviri* to come to the aid of the father who found himself in desperate economic circumstances with no other choice left than to sell his son. *Tabula* 4.2 made it possible for the *pater familias* after the third sale, to extinguish his *potestas* over the *filius*, thereby also relieving him of the burden of caring for and maintaining the *filius*. A precursor of LÉVY-BRUHL, BERGMANN also saw in the provision a fictitious sale by the *pater familias* (39).

From the above it would appear as if there is absolute agreement on the fact that the *Lex* envisaged three sales (in the form of *mancipatio*) by the *pater familias* before the *patria potestas* was terminated. This use of *mancipatio* has been

37) F. WIEACKER, 331 n. 112.

38) C.G. BERGMANN, *Beiträge zum römischen Adoptionsrecht*, Lund 1912 (reprint Rome 1972).

39) C.G. BERGMANN, 128.

questioned by J.M. KELLY ([40]) who draws attention to the fact that nothing in the *Lex* points to three separate *mancipationes* that had to take place. According to him, *venum duit* does not mean an "...outright conveyance such as *mancipatio* might be; [but] it is equally possible to understand it as meaning a temporary letting-out of a son's labour, something which the exact usage would qualify with the further word *operarum*" ([41]).

J.M. KELLY also made a gallant attempt to try and explain the motive behind the provision in *Tabula* 4.2. According to him, the *Lex* curbed a universal and well known evil, namely the exploitation of child-labour. As support for his interpretation, KELLY *inter alia* relied on a report that appeared in *The Times* of 16 September 1970 concerning a syndicate that operated in Apulia (some 2420 years later) and whose members were prosecuted for dealing in child labour ([42])!

In essence, KELLY also subscribed to the *communis opinio*. Yet his interpretation deserves special mention, not only because he stressed the economic motives behind the provision in the *Lex*, but more importantly, because in stressing the absence of any reference to *mancipatio*, his interpretation goes a long way towards a proper interpretation and understanding of the contents of *Tabula* 4.2.

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40) J.M. KELLY, "A Note on 'Threefold Mancipation'", in: A. WATSON (ed.), *Daube Noster. Essays in Legal History for David Daube*, London 1974, 183-186.

41 J.M. KELLY, 185.

42) J.M. KELLY, 185.

Both pillars that support the *communis opinio* have thus been sufficiently eroded to warrant a complete re-examination of the original scope and purport of the provision in the *Lex*. Such an examination should include a proper investigation into all the relevant social and economic conditions that existed during the first half of the 5th century and secondly, into the meaning of the words *venum dare*. Such an investigation, it is hoped, would lead to a greater understanding of the true meaning and intent of the words *si pater filium ter venum duit, filius a patre liber esto* and also provide the answer to the question raised by LÉVY-BRUHL, namely, how it could make sense "que les Romains aient limité et puni le *ius venumdandi*, alors qu'ils laissent subsister, dans toute sa force, le *ius vitae necisque*" (43).

As far as the general economic climate during the fifth century B.C. is concerned, I shall only set out the most important factors that could shed light on the prohibition contained in the *Lex*. The use of bronze and iron in Europe since 800 B.C. (44) stimulated the development of specialized professions. Most of these professions required a long period of training or special skills and tools that normally put them outside the reach of the ordinary populace (45). From the permanence of the inhabitants

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43) H. LÉVY-BRUHL, *Nouvelles Études*, 81; M. KASER, *SZ* 67 (1950), 477.

44) Cf. H. KAUFMANN, 102.

45) Cf. S. SOLAZZI, "Il lavoro libero nel mondo romano", in: *Scritti di diritto romano*, vol 1, Napoli 1955, 141 at 142.

on the *Palatium* since the 8th century B.C., it would follow that these early Romans were able to make a living primarily out of trade and industry. The latter constitutes an essential requirement for the existence of an "urban community" (46). N. PURCELL explains: "Working with wool, leather, astringents and dyes, metal, clay, timber and straw, oil, wine, grain and fresh produce was not an accident of city life, an opportunity available to those who found themselves in city life, as a secondary thing; it was city life itself, the behaviour without which the city would not have been, except as a symbolic meeting-place of the elite" (47).

During the hegemony of the Etruscan kings, Rome experienced growth and wealth (48). Workers and craftsmen from other parts of Latium and Asia Minor came to Rome to assist in the building activities and to participate in trade and industry (49). The importance of trade and industry during this period is

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46) Cf. M. WEBER, *The City*, D. MARTINDALE, G. NEUWIRTH (eds.), Glencoe 1958, 55 et seqq.

47) N. PURCELL, "The city of Rome and the *plebs urbana* in the late Republic", in: *The Cambridge Ancient History*, vol. 9, Cambridge 1994 (= *CAH*^{2}), 644-688 at 659.

48) Cf. F. DE MARTINO, *Storia Economica di Roma antica*, Firenze 1980, 1-18; G. DE SANCTIS, 1 et seqq.; A. DRUMMOND, "Rome in the fifth century I: The social and economic framework", *Cambridge Ancient History*, vol. 7/2, 1989 (= *CAH*^{2}), 113-171.

49) Cf. Livy, 1.56.1: *[Tarquinius] intentus perficiendo templo, fabris undique ex Etruria accitis...* On this text see J. MACQUERON, *Le travail des hommes libres dans l'antiquité romaine*, Aix-en-Provence 1955, 38 et seqq. Also see F. DE MARTINO, 8; T. FRANK, *An Economic History of Rome*, New York 1927, 32; G. ALFÖLDY, *The social history of Rome*, London 1985, 3 et seqq.

indicated by the historical reports. According to Plutarch ([50]), the Etruscan king, Numa Pompilius, identified the following professions that were accordingly organized into eight separate *collegia*: flute players (*tibicines*), goldsmiths (*aurifices*), builders (*fabri tignarii*), painters (*tinctores*), workers in leather (*sutores*), tanners (*coriarii*), coppersmiths (*fabri aerarii*) and potters (*figuli*) ([51]). All other craftsmen were classed into a ninth *collegium*. Archaeological evidence confirms the accuracy of these historical reports and further underscores the importance of workers in archaic Rome who had to ensure their survival by relying primarily on their specialized skills and labour ([52]).

Livy links the first *secessio plebis* to the economic climate that existed during the 5th century ([53]). His interpretation appears to be well founded ([54]). The *plebs* (craftsmen and workers) stood

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50) Plutarch, *Numa*, 17. Also see Livy, 1.43.3 and Cicero, *de republica*, 2.22.40.

51) Also cf. Pliny, *Naturalis Historia*, 34.1.1: ... *a rege Numa collegio tertio aerarium fabrum instituto...*; Pliny, *Naturalis Historia*, 35.46.159: *Numa rex septimum collegium figulorum instituit*; Livy, 1.43.3: ... *Additae ... duae fabrum centuriae*; Florus, *Epitome*, 1.6.3; Dionysius, 2.62.5. On the Roman *collegia* the work by J.P. WALTZING, *Étude historique sur les corporations professionnelles chez les Romains depuis les origines jusqu'à la chute de l'Empire d'Occident* (4 vols), Louvain 1895-1900, is still authoritative.

52) H. KAUFMANN, 57 et seqq.; F. DE MARTINO, 154; F.M. DE ROBERTIS, *La organizzazione e la tecnica produttiva. Le forze di lavoro e i salari nel mondo romano*, Napoli 1946, 37 et seqq.; J. MACQUERON, 44.

53) Cf. Livy, *Libri II Periocha: Plebs cum propter nexos ob aes alienum in Sacrum montem secessisset...* Also see Livy, 2.23 et seqq.; Dionysius, 6.23 et seq.

54) A. DRUMMOND, "Rome in the fifth century II: The citizen community", in *CAH*^{2} vol. 7/2, 172-242, 212 et seqq. appears to be sceptical but accepts the fact that economic problems could have played a role

separate from the patricians and that accorded them the opportunity, in modern parlance, to strike ([55]). The success of the *plebs* during the so-called struggle of the orders, is therefore a striking testimony of their economic importance as well.

The expulsion of Lucius Tarquinius Superbus and the creation of the Republic ([56]), brought economic disaster. Rome became isolated in the field of commerce and was in a state of hostility with the neighbouring tribes and cities ([57]). The absence of major military victories and the concomitant lack of opportunity to share in war-booty might have been important factors that contributed to the economic stagnation during the 5th century ([58]).

Rome possibly reflected the general economic decline that manifested itself elsewhere in Latium. Difficult as it might be to draw firm conclusions on the basis of the little archaeological evidence available (and capable of being ordered chronologically)

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in the *secessio*. Economic motives led to the *secessio plebis* of 287/6 B.C. and there can be no reason to doubt that it could have been the case in 494 B.C. as well: T.J. CORNELL, "The conquest of Italy", *CAH*^{2} vol. 7/2, 351-419, 400; G. DE SANCTIS, 6.

55) Cf. CICCOTTI, *Il tramonto della schiavitù nel mondo antico*, 1940 (reprint Roma 1971), 302.

56) The historical narrative is mainly contained in Livy (Books 2-5), Dionysius (Books 5-13), Cicero, *de republica*, 3.53-63, and Plutarchus (*Publicola, Coriolanus* and *Camillus*).

57) F. DE MARTINO, 12 et seqq; T. FRANK, 44.

58) A. DRUMMOND, *CAH*^{2} vol. 7/2, 133.

([59]), the economic stagnation is confirmed by firm evidence of a general decline in goods imported from Greece and the East, the deterioration of the harbour facilities at Ostia, and the fact that the importation of iron ore from the mines on Elba had come to an abrupt end ([60]). There also appeared to be an acute shortage of land as can be deducted from the fact that no less than 20 *leges agrariae* dated from the period 486-467 B.C. ([61]).

Needless to say, these circumstances led to poverty and decline on most levels of life ([62]). Pestilence and famine during the period 463 B.C. to 452 B.C. exacerbated the economic ills that befell the fledgling Republic ([63]). It would seem more than likely that, some decades prior to, and even during the enactment of the *Lex Duodecim Tabularum*, the inhabitants of Rome were locked in a battle to survive economically ([64]). The numerous references by Dionysius ([65]) and Livy ([66]) to the problem of debt

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59) A. DRUMMOND, *CAH*^{2} vol. 7/2, 128 et seq.

60) Cf. F. DE MARTINO, 12 et seq.; T. FRANK, 44.

61) F. DE MARTINO, 16. For a list of the *leges agrariae*, see G. ROTONDI, *Leges Publicae Populi Romani*, Milano 1912 (reprint Hildesheim 1962), 194-220.

62) Cf. the repeated references in Livy to famine and a shortage of grain: Livy, 2.9.6 (508 B.C.), 2.34.2-7 (492-1 B.C.), 2.51.2 (477 B.C.), 2.52 (476 B.C.), 3.31.1 (456 B.C.), 3.32.2 (453 B.C.), 4.12.6-11 (440 B.C.), 4.25.4 (433 B.C.), 4.30.7-11 (429 B.C.), 4.52.4-6 (411 B.C.), 5.31.5 (392 B.C.), 5.48.2 (390 B.C.).

63) Livy, 3.6 (pestilence: 463 B.C.), 3.32.2 (pestilence and famine: 453-452 B.C.). See A. DRUMMOND, *CAH*^{2} vol. 7/2, 133 et seq.

64) Also see A.J. TOYNBEE, *Hannibal's Legacy*, Oxford 1965, 371.

65) Cf. Dionysius, 5.53.2, 5.63.1-2, 5.64.2, 5.65.1, 5.65.5, 5.66.1, 5.67.5, 5.68.1-2, 5.69.1-3, 6.22.1-2, 6.23.3, 6.24.1, 6.27.3, 6.28.3, 6.29.1, 6.34.2, 6.37.1-2, 6.38.2-3, 6.40.3, 6.41.2-3, 6.43.1, 6.43.3-4,

during the first half of the 5th century B.C. add weight to the view that the period preceding the Twelve Tables, was indeed one of crisis and economic hardship (67).

At cultural and religious level, Rome at that stage, has already made firm contact with Greece and was experiencing the full force of the Greek cultural heritage that, for all practical purposes had swept the entire peninsula. From the Greek colonies in the south of Italy, traders and craftsmen spread Greek merchandise as well as culture throughout Rome and Etruria (68). Rome was so receptive to Greek ideas and notions, that it was decided in c. 454 B.C. to send a delegation to Athens with the instruction to copy the laws of Solon, and to further study the institutions, habits and customs of the other states in Greece (69).

It has been stated above that the resulting legislation, the *Lex Duodecim Tabularum*, as codification of the law at that time,

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6.44.3, 6.46.3, 6.58.1, 6.58.3, 6.59.2-3, 6.60.3, 6.61.2, 6.63.3, 6.64.3, 6.67.2, 6.68.4, 6.79.2, 6.81.1, 6.81.3-4, 6.82.2, 6.83.4-5, 7.30.2, 7.49.2, 7.52.3, 9.44.6, 10.13.3, 10.15.1. (List compiled by L. PEPPE, *Studi sull'esecuzione personale, I. Debiti e debitori nei primi due secoli della repubblica Romana*, Milano 1981, 41).

66) Livy, 2.23.1-8, 2.23.10, 2.24.6-7, 2.25.3, 2.27.1, 2.27.9, 2.27.10 (for the year 495 B.C.), 2.29.7-8, 2.30.6, 2.31.7-8 (for the year 494 B.C.). Cf. L. PEPPE, 41.

67) Cf. F. DE MARTINO, 13.

68) Cf. in general W. DURANT, *The Life of Greece*, New York 1939, 169, 667.

69) L. WENGER, 358 et seq.; F. WIEACKER, 288.

possibly also expressed principles that have already been accepted as part of the private law. The power of the father over his children *in potestate*, that included the *potestas vitae necisque* (70), as well as the possible limitation of that power, should therefore be evaluated in the light thereof.

It is a truism that we may never be able to define with clarity the content and juridical nature of the *patria potestas* during the archaic period (71). Beset by the almost insurmountable problem of a scarcity of primary sources and being confined to the use of legal terms and concepts of later epochs (72), we can hardly do better than simply to compare the power of the *pater familias* over his *filii familias* with that of the subjection of the individual to the sovereignty of the State (73). The family in this sense may appropriately be described as *quasi seminarium rei publicae* (74).

The *patria potestas* was characterized by the almost disproportionate powers it conferred upon the *pater familias* (75),

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70) Cf. Dionysius, 2.26.4; Gellius, *Noctes Atticae*, 5.19.9; Cicero, *pro domo*, 77; Coll. 4.8. Also see E. SACHERS, *RE* vol. 22/1, 1084 et seqq.

71) See P. DE FRANCISCI, "La communità sociale e politica romana primitiva", *Studia et documenta historiae et iuris* (=*SDHI*) 22 (1956), 1-86, 61, 66.

72) A.M. RABELLO, 62.

73) P. BONFANTE, *Corso di Diritto Romano*, vol. I, Roma 1925 (reprint Milano 1963), 18, 91 et seqq. On the various theories concerning the original character and structure of the roman *familia* see A.M. RABELLO, 1-23.

74) Cicero, *de officiis* 1.17.54.

75) Cf. Gaius 1.55: *quod ius proprium civium Romanorum est: fere enim nulli alii sunt homines, ubi talem in filios suos habent potestatem*. On this see F. SCHULZ, *Classical Roman Law*, Oxford 1951, 150.

as well as by the fact that it was exercised by the *pater familias* until his death (76). The weal and woe of children *in potestate* (77) were completely in the hands of the *pater familias*. He ruled over his family like an absolute monarch and neither the state nor other family groupings, as a general rule, intervened with the exercise of his powers (78). Restrained only by social and religious considerations (79) and (as far as his relationship with his children was concerned) placed on a par with the gods (80), his power was sovereign, absolute, unlimited and undivided (81). He, and he alone, had the capacity to own property (82); he could only profit and not be held liable as a result of transactions entered into by his children (83). Children *in potestate*, more particularly *filii familias*, were originally incapable of binding themselves or their *pater familias* contractually to third parties (84). They owed their

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76) In contrast, for example, with the law of Athens, where the power of the father only extended over his children that were under the age of majority. See E. SACHERS, *RE* vol. 22/1, 1052.

77) On this see M. KASER, *Das römische Privatrecht*, I 58.

78) E. SACHERS, *RE* vol. 22/1, 1054.

79) On this (and especially in respect of the role of the *pontifices* and *censores*), see in general A.M. RABELLO, 105 et seqq.; M. KASER, *SZ*, 58 (1938), 72 et seqq.; E. SACHERS, *RE* vol. 22/1, 1063 et seq.

80) Cf. Cicero, *pro Planctio*, 12.29: *ut vivat ... primum cum parente ... quem veretur ut deum.*

81) E. SACHERS, *RE* vol. 22/1, 1056.

82) Cf. M. KASER, *Das römische Privatrecht*, I 64; E. SACHERS, *RE* vol. 22/1, 1053; P. BONFANTE, 119 et seqq.

83) E. SACHERS, *RE* vol. 22/1, 1135 et seqq.

84) E. SACHERS, *RE* vol. 22/1, 1145; A. PERNICE, *Labeo*, 103 et seqq.

pater familias absolute obedience (85). The son who struck his father became *sacer*: "*...Si parentem puer verberit, ast olle plorassit, puer divis parentum sacer esto*" (86).

However, the enormity of the *patria potestas* becomes discernable only when the powers of the *pater familias* over the persons of his children are considered. Apart from being able to expose his children with impunity (87), he could also sell them into slavery *trans Tiberim* (88). Even this awesome power of the *pater familias* has been permitted to continue unfettered save for one circumstance: according to Plutarchus "[Numa] made an exception of married sons, provided they had married with the consent and approval of their fathers. For he thought it a hard thing that a woman who had married a man whom she thought free, should find herself living with a slave" (89).

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85) G. DE SANCTIS, 61 et seq.; N.D. FUSTEL DE COULANGES, *La cité antique*, Paris 1900, 97, 109.

86) Festus, s.v. *Plorare*. On this see A.M. RABELLO, 46.

87) In early law this held true at least for daughters and weaker male offspring who were of lesser importance in a society where survival was the main consideration of the head of the family; it was only with the rise of Christianity that *expositio infantis* became a crime. Cf. E. SACHERS, *RE* vol. 22/1, 1091.

88) E. SACHERS, *RE* vol. 22/1, 1097. Moreover, upon his return, such child did not have the *ius postliminii*. See Cicero, *pro Caecina*, 34.98; *de oratore*, 1.40.181: *P. Rutilius, M. filius, tribunus plebis, de senatu iussit educi, quod eum civem negaret esse; quia memoriam sic esset proditam, quem pater suus, aut populus vendidisset ... ei nullum esse postliminium* (referring to an episode that took place as late as 136 B.C.).

89) Plutarchus *Numa* 17 (Translation by B. PERRIN, *Plutarch's Lives*, in: The Loeb Classical Library, London 1959). Also see Dionysius, 2.27.

The *pater familias* could also give his child as pledge to secure an existing or future debt (90), hand him or her over (*noxae deditio*) in lieu of the payment of a fine payable as a result of a delict committed by the child (91) and also give his child in marriage (and thereafter dissolve such marriage) at will (92).

Apart from the above, the Roman *pater familias* literally held the lives of his children *in potestate* (as well as that of his wife *cum manu*) in his hands. He had the power to punish the child for any misdeed or crime even on pain of death (93). Our sources tell us of a wife who was, *quod vinum bibisset e dolio, fusti a marito interfect[a]* (94), and of children that could be exposed (95). And the examples can easily be multiplied (96). The *potestas vitae*

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90) In terms of *nexum*: P. BONFANTE, 94. On the possibility of the *pater familias* giving his children as *nexi*, see F. LEIFER, *SZ* 56 (1936), 136-235 at 176 et seqq.; M. KASER, *Eigentum und Besitz im älteren römischen Recht*, Weimar 1943, 149. W. KUNKEL, *Eos* 18 (1956), 207-226, 220 argues that *nexum* only applied to the *homo sui iuris*. W. KUNKEL is followed by G. MACCORMACK, "The *Lex Poetelia*", *Labeo* 19 (1973), 306-317 at 307.

91) M. KASER, *Das römische Privatrecht*, I 164; G. DE SANCTIS, 62. In view of the importance of the *filius* as far as the family is concerned (see the discussion below), *noxae deditio* would mostly have taken place solely in cases where the child committed a serious delict: A.M. RABELLO, 90.

92) E. SACHERS, *RE* vol. 22/1, 1103 et seqq.; M. KASER, *SZ* 58 (1938), 83.

93) E. SACHERS, *RE* vol. 22/1, 1084 et seqq.

94) Cf. Pliny, *Naturalis Historia*, 14.14.89; Valerius Maximus, 6.3.9; Plutarchus, *Moralia*, 265.6. Also see G. FRANCIOSI, 34.

95) Cf. Dionysius, 2.15.2. Also see G. FRANCIOSI, 55 et seqq.; A.M. RABELLO, 37 et seqq.

96) See the inventory compiled by E. SACHERS, *RE* vol. 22/1, 1086 et seqq. as well as A.M. RABELLO, 117 et seqq.

ac necis found confirmation in the *Lex Duodecim Tabularum* (97) and continued to exist into the classical period (98). Only with the dawn of the post-classical period, did the father who exposed his child, loose his *patria potestas* (99) and face punishment for murder (100).

Of considerable importance is the fact that, whereas the son (or other persons subjected to the power of the *pater familias*) could have been *de facto* or physically transferred from one *pater* to the other, the *patria potestas* itself was originally characterized by its intransmissibility (101). It could neither be transferred by an act *inter vivos*, nor *mortis causa* (102). The only possibility being the transfer of the *potestas* in terms of a *lex* (103).

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97) Cf. Coll. 4.8: ... *cum patri lex regia dederit in filium vitae necisque potestatem, quod bonum fuit lege comprehendi, ut potestas fieret etiam filiam occidendi.* The *Lex Duodecim Tabularum* allowed the killing of a deformed child at birth (Cicero, *de legibus* 3.8.19: ... *cito necatus tamquam ex XII tabulis insignis ad deformitatem puer...*).

98) M. KASER, *SZ* 58 (1938), 78 et seq.

99) Valentinianus, Valens et Gratianus C. 8.51.2 (a. 374); Justinianus C. 8.51.3 (a. 529).

100) Valentinianus, Valens et Gratianus C. 9.16.7(8) (a.374); Constantinus C. 9.17.11 (a. 318-319).

101) A.M. RABELLO, 65; F. WIEACKER, 331.

102) L. CAPOGROSSI COLOGNESI, "Ancora sui poteri del 'Pater Familias'", *Bullettino dell'istituto di diritto romano* (=*BIDR*) 73 (1970), 357-425, 397.

103) S. PEROZZI, 438-9. Too restrictive perhaps L. CAPOGROSSI COLOGNESI, 381-382: "...Si potrebbe persino ammettere che, anteriormente al formarsi dell'*emancipatio* e quindi dell'*adoptio*, rapporti quali la *patria potestas* fossero irriproducibili al di fuori della situazione d'origine".

Prior to the *Lex Duodecim Tabularum*, the selling of the *filius familias* into slavery *trans Tiberim* therefore constituted the only way in which the *pater familias* was able to terminate the *potestas* over his son (104). Although LÉVY-BRUHL (105) and KASER (106) question the value of the evidence of Plutarchus and Dionysius and insist that, like the killing of a *filius*, the selling of a son *trans Tiberim* would have been highly exceptional, the fact that it did occur cannot be denied (107). The *pater familias* would (possibly as a rule) only sell his *filius* as slave under extreme (economic) circumstances (108) or as a form of punishment where the *filius* made himself guilty of serious misconduct. E. SACHERS (109) accepts that this sale took place by means of *mancipatio*. Apart from the fact that there is no direct textual evidence that could support him (110), it would logically have been most improbable. Assuming that *mancipatio* existed in the same form as it did during the period following the Law of the Twelve Tables, it had

104) E. SACHERS, *RE* vol. 22/1, 1167; P. BONFANTE, 78 et seqq.

105) H. LÉVY-BRUHL, *Nouvelles Études*, 85.

106) M. KASER, *SZ* 67 (1950), 476.

107) Cf. Th. MAYER-MALY, *SZ* 75 (1958), 116 et seqq.

108) E. SACHERS, *RE* vol. 22/1, 1097; Th. MAYER-MALY, *SZ* 75 (1958), 125.

109) E. SACHERS, *RE* vol. 22/1, 1097.

110) Dionysius, 2.27.4; Plutarchus, *Numa*, 17 only refers to the act of selling without so much as a hint to *mancipatio* or any formalities that were required. Πιπράσκειν simply means "to sell beyond the seas": cf. H.G. LIDDELL & R. SCOTT, *A Greek-English Lexicon*, Oxford 1968, s.h.v.

to be entered into between Roman citizens ([111]). Participation by *peregrini* in transactions *per aes et libram* (as is suggested by *Tabula* 6.4: *adversus hostem aeterna auctoritas esto*) ([112]) was most probably only possible after an agreement had been concluded to that effect with the Roman state ([113]). We can, I think, assume that trafficking in children must have been part of the dark side of life in archaic Rome. Moreover, it is extremely unlikely that the Romans, in such a treaty, would have included their own children as part of the merchandise. This fact, as well as the formalism of the act itself, (which *inter alia* required the presence of 5 Roman citizens above the age of puberty who were formally summoned to act as witnesses) ([114]), would oppose the notion that *venditio trans Tiberim* took place *per aes et libram.*

Apart from the above, the sale of a son by means of *mancipatio* and *noxae datio*, irrespective of the number of times that it took place, would have had no effect on the *potestas* of the *pater familias* ([115]). As long as the son remained *in mancipio* or as *noxa*, the *patria potestas* was suspended, only to be restored

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111) As would appear from the formular in the case of a sale as it appears in Gaius 1.119: *ex iure Quiritium meum esse aio isque mihi emptus esto hoc aere aeneaque libra.* On this see M. KASER, *Das römische Privatrecht*, I 44.

112) Cicero, *de officiis*, 1.12.37.

113) F. WIEACKER, 266.

114) M. KASER, *Das römische Privatrecht*, I 42.

115) On this see M. KASER, *SZ* 67 (1950), 480, 483; H. LÉVY-BRUHL, *Nouvelles Études*, 86 et seq.; A. PERNICE, *Labeo*, I 169.

to its original scope the moment the son again acquired his freedom ([116]).

This original indissolubility of the *patria potestas* may be explained by the importance of the *filius* as far as the continuation of the family and the family cult (*familiae sacra*) was concerned ([117]). The Roman family was a religious entity with its own cult, altars, ceremonies and auspices ([118]). The continuance of the *sacra familiae* was a matter of paramount importance and an aspect that affected the public weal ([119]). All sons, as well as grandsons, were of equal importance in this regard, since anyone could be required to step in and continue the family when the others had died ([120]). It was originally the duty of the son to make the offerings and sacrifices to the *manes* of his father and his ancestors. If the son failed in this duty, his conduct was in a sense tantamount to the crime of parricide - and the victims of impiety all the ancestors in the *familia* ([121]). In turn, the father was the sole and absolute interpreter of the domestic religion. As priest of the family, he alone knew the rituals, the prayers

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116) M. KASER, *Das Altrömische Ius. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer*, Göttingen 1949, 151 et seq.; M. KASER, *SZ* 67 (1950), 486.

117) On this see N.D. FUSTEL DE COULANGES, 31 et seqq.; M. KASER, *SZ* 67 (1950), 484. For a negative view on the current opinion regarding Roman religion before 200 B.C. see J.A. NORTH, "Religion in Republican Rome", in: *CAH*^{2} vol. 7/2, 573-624, esp. 573-582, 605.

118) N.D. FUSTEL DE COULANGES, 31 et seqq.

119) A.M. RABELLO, 48; J.A. NORTH, 587, 605.

120) M. KASER, *SZ* 67 (1950), 484.

121) N.D. FUSTEL DE COULANGES, 33.

and hymns of the family cult ([122]) and only he could teach them to his son. Moreover, the domestic religious rites, prayers and hymns were sacred and shared only by the father and his son; it was forbidden to reveal these to foreigners ([123]).

The *plebs urbana* stood outside the original Roman *gentes* ([124]). What tied them to the city and placed them on a par with the patrician *gentes*, was their participation in the *collegia* that also allowed them to share in a common religious cult ([125]). It may therefore safely be assumed that even the slightly more sophisticated urban population of the early Republican period would also have adhered to the old religious *mores* ([126]). A remnant of this belief is possibly still portrayed by Lucian who explained that the man who has died without leaving a son, will receive no offerings and would suffer eternal hunger ([127]).

Accordingly the father had a direct interest in keeping his son in the *familia* and it was in the interest of the son to remain so. In sum, religion demanded that the family remain intact and religion

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122) Cf. Varro, *de lingua latina*, 7.88. On the ceremonies that accompanied the family religion, see Macrobius, 1.10; Cicero, *de legibus* 2.1

123) N.D. FUSTEL DE COULANGES, 36 et seq. Also see J.A. NORTH, *CAH*^{2} vol. 7/2, 592. The later development is discussed by A. WATSON, *State, Law and Religion*, 80.

124) Cf. Livy, 10.8.9: *...gentem non habent.*

125) O. BEHRENDS, "Die Rechtsformen des römischen Handwerks", in: *Das Handwerk in vor- und frühgeschichtlicher Zeit (Teil I), Abhandlungen der Akademie der Wissenschaften zu Göttingen*, Göttingen 1981, 141-203, 162.

126) J.A. NORTH, 578, 606.

127) Lucian, *de Luctu* 9.

stipulated that only the son could maintain the domestic cult. It can be assumed that the *pater familias*, during the time of the Twelve Tables, would not lightly have expelled his son from the *familia*, nor would he have suffered the termination of his *potestas* over the *filius* except for cogent reasons.

It may thus be concluded that the *patria potestas* during the time of the *Decemviri* permitted the *pater familias* to completely govern the lives of his children. The state normally did not intervene in this family relationship and where it did so, it might be suspected that it had a religious motivation ([128]) or that it was necessitated by the seriousness of the matter that it set out to regulate ([129]). This implied some control over the actions of the *pater familias* and would lend support to the view that the *ius vitae necisque* had to be exercised *ex iusta causa* and not in an arbitrary manner ([130]). The killing of a child must universally have been regarded as an extreme measure, and in Rome especially so, in view of the importance of the *filius* for maintaining the *familia*.

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128) E.g. the involvement of the *pontifices* in matters such as adoption and the making of wills, since these matters affected the maintenance of the *sacra familiaria*. Cf. J.A. NORTH, *CAH*^{2} vol. 7/2, 586 et seq.

129) Cf. A.M. RABELLO, 19-23, 35 et seq.

130) Which is suggested in Gaius, *Inst. Augustod.*, 85 86. On this see: W. KUNKEL, "Das Konsilium im Hausgericht", *SZ* 83 (1966), 219-251, 241 et seqq.; R. YARON, "*Vitae necisque potestas*", *TvR* 30 (1962), 243-251; A.M. RABELLO, 88 et seqq.; M. KASER, *SZ* 67 (1950), 485. *Contra*, A. GUARINO in his rubric "Tagliacarte", *Labeo* 22 (1976), 124.

In Rome, especially during the 5th century, the family had to supply its own labour and if needs be, had to obtain it from neighbouring families. Slaves could not meet the demand for labour: it was only approximately 200 years later, after the Punic Wars, that the importance of slaves significantly increased (131). In a society where the use of slaves was not widespread, the *filius* must have been the most important source of labour (132). As I have already indicated, the historical evidence, consisting of literary as well as archaeological data, makes it credible that the *plebs urbana* from the regal period onwards, had to rely on their capacity to work to ensure their survival. The existence of a number of professions as early as the 8th century B.C. can also be accepted as a matter of fact. It would logically follow from this that most of the working men would have been part of the *plebs*. Any provision that would have had the effect of discouraging labour relations would have hit them, as *proletarii qui nihil rei*

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131) Cf. M. FINLEY, *Ancient slavery and modern ideology*, London 1980, 83; T.J. CORNELL, *CAH*^{2} vol.7/2, 234; F.M. DE ROBERTIS, *La organizzazione e la tecnica produttiva. Le forze di lavoro e i salari nel mondo romano*, Bari 1946, 126 et seqq.

132) H. KAUFMANN, 48, 71; G. FRANCIOSI, 50; A. DRUMMOND, *CAH*^{2} vol. 7/2, 113-171, 126. Even during the high classical period (when it could at best be expected) no restriction was placed on the use of child labour: F.M. DE ROBERTIS, *I rapporti di lavoro nel diritto romano*, Milano 1946, 139 and also cf. Paulus D. 6.1.31. The only limitation appears in Ulpianus D. 7.1.12.3 and Ulpianus D. 7.7.6.1: no value could be placed on the services of children below 5 years of age. Moreover, the use of child labour was common in other countries. Cf. R. TAUBENSCHLAG, "Die materna potestas im gräko-ägyptischen Recht", *SZ* 49 (1939), 115-128, 117 et seq.

publicae exhibeant, sed tantum prolem sufficiant (133), very hard indeed (134).

The interpretation of the prohibition contained in *Tabula* 4.2 should therefore be evaluated against the background of the following: first, the enormity of the powers conferred on the *pater familias* over persons *in potestate* (that included, apart from the *ius vitae necisque* also the right to surrender the child by means of *noxae deditio* or to sell him as a slave) (135), secondly, the importance of the son as far as the *familia* (and ultimately the state) was concerned and, finally, the vital role of labour as a means of survival in archaic Rome.

Seen in the light of the aforementioned, it can be doubted that the *Decemviri* suddenly would have thrown all caution to the wind and effectively prohibited the *pater familias* from temporarily handing over his son or making his son's skills or labour available to third persons. In this regard it should also be remembered that the *filius*, irrespective of his age, would have remained *in potestate*, as long as his *pater familias* was still alive

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133) Nonius Marcellus, *de compendiosa doctrina*, s.v. "*Proletarius*".

134) Ironically, H. KAUFMANN, 195, relies on this provision in the *Lex* to prove the existence and importance of labour contracts in ancient Rome. If the traditional view is correct (which H. KAUFMANN maintains must be the case) the provision in the *Lex* tends to point in the opposite direction, namely that labour contracts were not indispensable and in fact had to be discouraged.

135) The *Lex Fabia de Plagiariis* prohibited the selling of a Roman citizen into slavery as late as the first century B.C.: G. ROTONDI (ed.), *Leges Publicae Populi Romani. Elenco cronologico con una introduzione sull'attività legislativa dei comizi romani*, Milano 1912 (reprint Hildesheim 1962), 258; G. WISSOWA, "Fabius", in: *RE* vol. 6, 1743.

([136]). It would not have made any sense, in a hypothetical case, had the *Decemviri* expected of the (possibly aged) *pater familias* that he make his own services available to third persons while his sons spent their days at home, protected by a law that frowned on the exploitation of their most important asset, their labour force. It should also be borne in mind that, in early Rome, big families were no exception to the rule. Names such as Septimus, Sextus, Quintus and Tertius graphically testify to this fact ([137]).

For the same reason it does not make sense that the *Lex Duodecim Tabularum* would only have allowed the *pater familias* to bind his *filius* as *nexus* for two consecutive times. Highly controversial as this institution might be ([138]), perhaps as simplified is the view that can suffice for the present purposes: *Nexum* served as a form of security for an existing debt ([139]). Through *nexum mancipiumque* a free person subjected himself, or persons in his power ([140]) to the authority of the creditor until

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136) J.M. KELLY, 183 et seqq., who tries to explain the existence of this provision as an attempt to stamp out the use of child labour, doesn't seem to take full cognizance of this fact.

137) An example of such a large family consisting of, *inter alia* 16 adult males that all stayed in one house is the Aelii Tuberones: Valerius Maximus, 4.4.8; Plutarchus, *Aemilius Paulus*, 5.4, 28.7. Cf. G. FRANCIOSI, 12.

138) Cf. R. ZIMMERMANN, *The Law of Obligations. Roman foundations of the civilian tradition*, Cape Town 1990, 4; M. KASER, *Das römische Privatrecht*, I 166 et seqq.; M. KASER, *Das altrömische ius*, 119 et seqq., 233 et seqq. The existence of *nexum* as an independent legal transaction has recently been denied: O. BEHRENDS, "Das *nexum* im Manzipationsrecht oder die Ungeschichtlichkeit des Libraldarlehens", *Revue internationale des droits de l'antiquité* (=*RIDA*) 21 (1974), 137-184.

139) Cf. M. KASER, *Eigentum und Besitz*, 148.

140) See n. 90 above.

such time as the debt had been repaid and the *nexi liberatio* had been performed (141). The position of the *nexus* differed from that of the *addictus* and the *iudicatus* in so far as the *nexus* could not be killed or sold in slavery (142). The pure commercial advantages of this institution are obvious (143). It would therefore have been strange if the *Lex Duodecim Tabularum* regarded it as an abuse of the *patria potestas* if the *pater familias* bound his *filius* as *nexus* more than twice. The improbability of such an interpretation of the provision in *Tabula* 4.2 increases if one bears in mind that the *pater familias* would then (albeit indirectly) have been forced to bind himself and not one of his children.

It would also not have made any sense if the *Lex* addressed those cases where the *pater familias* even temporarily sold his *filius familias* (144). The mere fact that the *pater familias*, after each sale bought his son back (although this type of transaction would conceivably have been so rare that it would have been surprising if it attracted the attention of the lawmaker) (145), the conduct of such *pater familias* should have been deserving of praise and not condemnation. Surely his motives would have

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141) Cf. M. KASER, *Das altrömische ius*, 240.

142) M. KASER, *Das altrömische ius*, 243 et seq.; A. WATSON, *Rome of the XII Tables. Persons and Property*, London 1975, 115.

143) R. ZIMMERMANN, 4. Livy regarded the fact that the poor bound themselves by means of *nexum* (*inire nexum*) as a common occurrence: 2.23.5, 7.19.5, 8.28.2.

144) "Kauf auf Zeit"; an interpretation given to *Tabula* 4.2 by Th. MAYER-MALY, *SZ* 82 (1965), 406-416, 410 (review of H. KAUFMANN, *Altrömische Miete*).

145) Also cf. A. WATSON, 118 and especially n. 19.

been sentimental and his conduct indicative of a desire to keep the family intact. The possibility that the *Lex* would have stepped in under such circumstances in an inapposite attempt to curb such 'speculation' by *patres familias* of their sons, can be summarily dismissed.

The harmless commercial nature of all of the above transactions (which in most cases probably implied that the son would work for the 'buyer'), militates against the possibility of the *Decemviri* abandoning their policy of non-involvement in family-affairs (146), and enacting a measure that would have meant the disintegration of many agnatic families or (in order to avoid that) ruin to large numbers of the *plebs*. Apart from having a negative effect on the free supply of labour, the provision in the *lex* would (if the three sales were *quoad certas operas*) (147) also have had an adverse influence on the existing trades and occupations (148). The long term effect of this effective prohibition on the *pater familias* to exploit his son's labour force, would therefore have been felt not only by the *plebs*, but also by the *patricians* themselves (149).

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146) E. SACHERS, *RE* vol. 22/1, 1064; M. KASER, *SZ* 58 (1938), 62-86.

147) An interpretation given to the provision in *Tabula* 4.2 by O. BEHRENDS, *Zwölftafelprozeß*, 157 as well as H. KAUFMANN, 48 et seqq.

148) On the existence of trade and industry during the fifth century, see H. KAUFMANN, 58 et seqq.; H. GUMMERUS, "Industrie und Handel", *RE* vol. 9, 1440 et seqq.

149) As was the case with the first *secessio plebis* when part of the debts of the *plebs* was cancelled: Livy 2.23 et seqq.

Two final objections can be raised against the *communis opinio*. First, as appears from *Tabula* 6.1 (150), *mancipatio* was already well known during the time of the *Lex Duodecim Tabularum*. If the provision contained in *Tabula* 4.2 was intended to be used for the purpose of *noxae deditio*, surely the *Decemviri* would have made that intention better known (151)? *Si pater filium ter noxam duit* or *si pater filium ter mancipium duit* would have conveyed the meaning of the *Decemviri* better than the rather enigmatic, *si pater filium ter venum duit*. In fact, if the *Decemviri* intended to introduce a principle that would have constituted a radical break with the principle of the indissolubility of the *patria potestas* it is to be expected that they would have delimited its scope of application clearly (152).

Secondly, the view that the provision in *Tabula* 4.2 refers to an instance of "Kauf auf Zeit", is opposed by Gaius 1.140:

> *Quin etiam invito quoque eo cuius in mancipio sunt, censu libertatem consequi possunt, excepto eo quem pater ea lege mancipio dedit, ut sibi remancipetur...* (153).

If the provision in the *Lex* concerned the temporary 'sale' of the son's labour, it would have made little sense that the labour

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150) *Tabula* 6 1: *cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto* (cf. S. RICCOBONO, 43).

151) J.M. KELLY, 184.

152) J.M. KELLY, 184.

153) On this text see M. KASER, *ZS* 67 (1950), 475, 481.

contract could only be concluded up to the next *lustrum* since at that stage, the *filius* could, even *invito quoque eo cuius in mancipio [est]*, have terminated the labour relationship (154).

The inevitable conclusion to be drawn from the above is the following: The *communis opinio* as well as the other possible interpretations of the prohibition expressed in *Tabula* 4.2 should be rejected as unconvincing. I do agree that the aim of the provision must have been to punish the "cruel misuse of his rights by the father" (155), but to arrive at the correct meaning of the provision, the words used by the *Decemviri* must be considered (156). The key lies in the words *venum duit.*

It is generally accepted that the consensual *emptio et venditio* did not yet exist during the time of the Twelve Tables (157). Even though all *res in patrimonio* could originally have been sold and transferred by means of *mancipatio* (158), practical considerations demand that (especially) things of lesser value, such as consumable items (wine, oil, grain etc.), had to change hands informally, pursuant to a mere agreement between the parties

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154) M. KASER, *ZS* 67 (1950), 482.

155) H.F. JOLOWICZ, 90.

156) A method also suggested by H. LÉVY-BRUHL, *Nouvelles Études*, 81-82.

157) On the various theories concerning the origin of the contract of sale, see the overview by A. GUARINO, 884 et seqq. The economic development of the contract of sale from the original barter agreement, is set out by Paulus in D. 18.1.1.pr.

158) M. KASER, *Das altrömische ius*, 310 et seq.

([159]). In practice, during the time of the Twelve Tables, the informal exchange of a thing for an amount of money ([160]), has for some time been established as being part of everyday commerce ([161]). Yet, originating from the *ius civile novum* ([162]), the consensual *emptio et venditio*, only appeared during the third century B.C. ([163]). Roughly from that period onwards, the verb *vendere*, meaning "to sell", came to the fore in the works of Naevius, Plautus and Cato ([164]). Accordingly, just as the word *emere*, when used in the context of the Twelve Tables, should not simply be assigned the meaning of "buying" ([165]), so the word *venum dare* should not automatically be taken as referring to a sale only. *Venum* (only the accusative form *venum* and the dative form *venui* is attested) ([166]), derives from words such as

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159) Cf. M. KASER, *Das altrömische ius*, 310.

160) Or rather, bronze (*aes rude*). Coins were introduced into Rome considerably later than the 5th century, possibly only as late as 300 B.C.: H. CHANTRAINE, "*Aes grave*", in: *Kleine Pauly* vol. 1, 101.

161) M. KASER, *Das altrömische ius*, 312; M. KASER, *Eigentum und Besitz*, 170.

162) I.e. the *ius gentium*. On this see A. GUARINO, *Diritto privato romano*, 116 et seq.

163) V. ARANGIO-RUIZ, *La compravendita in diritto romano*, vol. I, Napoli 1961, 82; M. KASER, *Das römische Privatrecht*, I, 546.

164) Cf. A. WALDE & J.B. HOFMANN, *Lateinisches Etymologisches Wörterbuch*, Heidelberg 1954, s.v. *venus*.

165) Cf. Festus, s.h.v.: *Emere, quod nunc est mercari, antiqui accipiebant pro sumere*. On this text see A. WATSON, *Legal origins and legal change*, London 1991, 149.

166) A. ERNOUT & A. MEILLET, *Dictionnaire étymologique de la langue latine. Histoire des mots*, Paris 1959, s.v. *venum*.

the Indo-germanic word **vesno-* (merchandise) ([167]), Sanskrit *vasnám* (price), and even old Slavonic *věno* (price of a fiancée, dowry) ([168]). *Dare*, in turn, need not necessarily have implied the transfer of ownership ([169]), but could also mean "give", "hand over", "make available" et cetera ([170]). Finally, the use of the original form of *venum dare* instead of *vendere* ([171]) as well as the archaic *duit* instead of *dat*, suggest that this clause has been preserved more or less in its original form ([172]).

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167) A. WALDE & J.B. HOFMANN, s.v. *venus*.

168) Cf. A. ERNOUT & A. MEILLET, s.v. *venum*; A. WALDE & J.B. HOFMANN, s.v. *venus*. It is tempting to relate the word *venum* to *venus* (love). As a matter of fact, it is quite conceivable that the buyer of an object would buy it because he finds it desirable. The seller, in turn, hands over an object that is 'desired'. As such, a strong link between *venus (-us)* and *venus (-eris)* may be suspected. However, I could not find any evidence of such a link. The nearest form is that of the old Slavonic word '*věno*' (price of a fiancée, dowry).

169) Cf. the theory advanced by MOMMSEN, "Die römischen Anfänge von Kauf und Miethe", *SZ* 6 (1885), 260-275, 263 n. 2. *Dare* in the sense of "als Grundbedeutung zwingend die Eigenthumsübertragung" is of a considerable later date. Cf. H. KAUFMANN, 305 n. 303.

170) Cf. *Oxford Latin Dictionary* Oxford 1982, C.T. LEWIS & C. SHORT, *A Latin Dictionary*, Oxford 1869, s.v. *Do*.

171) Cf. A. WALDE & J.B. HOFMANN, s.v. *venus*. The form *vendere* appears only from Naevius (c. 265 B.C.) onwards.

172) J.M. KELLY, 184. For the archaic form *duit*, see A. WALDE & J.B. HOFMANN, s.v. *do*.

Apart from its usual interpretation "to sell" ([173]), *venum dare* has another meaning as well. Tacitus uses *venum dare* in the sense of "to prostitute oneself":

> *[Seianus] et prima iuventa Gaium Caesarem divi Augusti nepotem sectatus, non sine rumore Apicio diviti et prodigo stuprum veno dedisse* ([174]).

Approximately 200 years after the introduction of the *Lex Duodecim Tabularum*, Plautus referred to the 'red light area' of Rome in the following terms: "*...in Tusco vico ibi sunt homines qui ipsi sese venditant*" ([175]). Who were these people and what did they trade in? Were they hardworking citizens, participating in trade and industry and trying to scrape a living out of the proceeds obtained from making their labour and skills available to others ([176])? The contents of the *Lex Fannia*, enacted in 161 B.C. (some 40 odd years after the death of Plautus), may shed some light on this question. Macrobius ([177]) reported that the law had been introduced:

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173) Cf. *Oxford Classical Dictionary*, s.v. *Vendo* 1.

174) Tacitus, *Annales*, 4.1.2: "[Sejanus] became in early youth a follower of Gaius Caesar, grandson of the deified Augustus; not without a rumour that he had prostituted himself to Apicius, a rich man and a prodigal".

175) Plautus, *Curculio*, 482. *Venditant* from *vendito* "to prostitute oneself": *Oxford Latin Dictionary*, s.v. "*vendito*" b.

176) Suggested by F. DE MARTINO, 94. E. COSTA, *Il diritto privato romano nelle commedie di Plauto*, Torino 1890 (reprint Roma 1968), 324, 331, also sees this as a reference to ordinary merchants.

177) Macrobius, *Saturnalia* 3.17.4.

> "...*cum res publica ex luxuria conviviorum maiora quam credi potest detrimenta pateretur, si quidem eo res redierat, ut gula inlecti plerique ingenui pueri pudicitiam et libertatem suam venditarent...*" ([178]).

The *Lex Fannia* had been enacted because of the (presumably) real danger that *plerique ingenui pueri pudicitiam et libertatem suam venditarent*. The use of the words *ingenui pueri pudicitiam...venditarent* ([179]), leaves little doubt that male prostitution was the evil that had to be corrected. Is this the meaning that should also be given to the *homines qui sese venditant* that had been mentioned by Plautus? H. BOSSCHER ([180]) did not doubt that Plautus referred to prostitutes who were busy with their trade in the *vicus Tuscus*. He wrote: "'*Homines qui ipsi sese venditant' ...illi homines se venditant vel ut vortant vel ut se praebeant ut vorsentur. Quod quomodo intelligendum sit, mihi non dubium videtur: in obscaenam partem illa verba adhiberi persuasum mihi est*" ([181]).

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178) Macrobius, 4.27.4: ...témoins du préjudice incroyable que causait à la république le luxe des repas. De fait, on en était venu à ce point que, pour satisfaire à leur gourmandise, de très nombreux jeunes gens de naissance libre sacrifiaient leur vertu et leur liberté. (Translation by: H. BORNECQUE, Macrobe, *Les Saturnales*, vol. 1, Paris s.d, 388).

179) Cf. the meaning of *vendito*: n. 175 above.

180) H. BOSSCHER, *De Plauti Curculione disputatio*, Lugduni-Batavorum 1903, 90.

181) In this sense also D.F. SCHMIEDER, *Commentarius in M. Accii Plauti quae supersunt comoedias*, in: *Commentarii perpetui in classicos romanorum scriptores*, vol. 5, Gottingae 1804, 129: "*lenones, scorta, unde Horat.: Tusci turba inpia vici* [Horace, *Saturae* 2.3.228]". Also see Plautus, *Cistellaria* 2.3.20; Varro, *de lingua latina*, 5 46; Livy, 2.14.9.

Again, Rome displayed some of the characteristics found in most of her neighbours. Homosexualism was a common occurrence. It was tolerated in Athens as well as in Sparta and Crete; in Thebes homosexuality was viewed as a sign of bravery and an ability to take command in military matters. Plato, talking about love in the *Phaedrus*, referred to homosexual love ([182]). Homosexualism was also practised in other parts of Asia Minor. *Genesis* 19.4-5 clearly illustrates this fact:

> "Before they had gone to bed, all the men from every part of the city of Sodom - both young and old - surrounded the house. 5 They called to Lot, "Where are the men who came to you tonight? Bring them out to us so that we can have sex with them"".

The prohibition against homosexualism contained in *Leviticus* 18.22 "Do not lie with a man as one lies with a woman; that is detestable" and *Leviticus* 20.13: "If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their own heads" ([183]), is a further indication of the widespread occurrence thereof.

As for Rome, due to the scarcity of sources, it is not possible to tell with certainty to what extent homosexualism and prostitution had been prevalent during the period of the Etruscan

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182) Cf. W. DURANT, 302 who lists more examples.

183) Translations from the scriptures taken from: *The Holy Bible. New International Version*, Michigan 1985.

kings. In fact, it is difficult to state with certainty that the Etruscans did in fact practise homosexualism or prostitution ([184]). We have to rely on indirect evidence to try and form an idea of the customs and ways of Etruria. In the eyes of the Romans, the promiscuity of the Etruscans was proverbial. Livy describes the Etruscan men as lazy and lustful ([185]). In A.D. 200, the Greek writer, Athenaios, describes the habits and morals of the Etruscans as follows:

> "It is no shame for Etruscans to be seen having sexual experiences ... for this too is normal: it is the local custom there. And so far are they from considering it shameful that they even say, when the master of the house is making love, and someone asks for him, that he is 'involved in such and such', shamelessly calling out the thing by name.
>
> When they come together in parties with their relations, this is what they do: first, when they stop drinking and are ready to go to bed, the servants bring in to them - with the lights left on! - either *hetairai*, party girls, or very beautiful boys, or even their wives.
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> When they have enjoyed these, they then bring in young boys in bloom, who in turn consort with them

184) Cf. J. SERVAIS & J. LAUREND, *Histoire et Dossier de la Prostitution*, Paris 1965, 97.

185) Cf. his description of the rape of Lucretia (Livy, 1.58) and the *vindicatio in servitutem* of Verginia (Livy, 3.44 et seqq.).

> themselves. And they make love sometimes within sight of each other....
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> And indeed they like to keep company with women: but they enjoy the company of boys and young men even more" (186).

It hardly needs mention that this report must be exaggerated (187). Still, Athenaios is regarded as an important historical source (188) and his report must have contained a measure of truth. On the strength of his evidence, we can at least accept the fact that homosexualism was practised by the Etruscans. It is those very same Etruscans that went to Rome as craftsmen and traders to assist in the ambitious building projects of the kings; it is those profligate Etruscans who had such a profound influence on Italy and its inhabitants (189).

As for Rome, the picture becomes blurred. No direct evidence exists that would point to lasciviousness, promiscuity or homosexualism in Rome during the fifth and fourth centuries B.C. Our most important source, Livy, was bent on glorifying the early days of Rome and, as spokesman of the *pietas* and

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186) Athenaios, Δειπνοσοφιστοί (Translation by L. BONFANTE, *Etruscan Life and Afterlife. A Handbook on Etruscan Studies*, Detroit 1986, 235).

187) Also see the hesitant approach by A.J. TOYNBEE, 355.

188) J. WERNER, "Athenaios" (3), in: *Der Kleine Pauly*, vol. 1, 702.

189) Cf. A.J. TOYNBEE, 354.

mores maiorum, would have preferred to ignore this side of the *veteres* (190). Yet, from the absence of direct evidence it cannot simply be assumed that these practices did not occur. Occasional glimpses and casual references by Livy allow us to form some idea of the darker side of Roman society - homosexualism and prostitution were most certainly no strangers to them. Livy's remark (191) that the amount of money, collected from prostitutes during the war against the Samnites (second half of the fourth century B.C.), had been enough to build a temple to Venus, constitutes proof that prostitution was widespread during the beginning of the Republic (192). It is simply inconceivable that prostitution would have started all of a sudden at the beginning of the fourth century B.C. and became so established within a few years, that the state would look on prostitutes as a possible source of income. Logically, prostitution had to exist as a general practice before the episode mentioned by Livy and was sure to have been practised in Rome at least 100 years previously during the second half of the fifth century.

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190) Cf. J. MACQUERON, 37.

191) Livy, 10.31.

192) Prostitution was common in the later history of Rome. Cf. V. BULLOUGH & B. BULLOUGH, *Women and Prostitution: A Social History*, New York 1978, 48 et seqq. Since the following remark by M. FINLEY, 170 (n 14): "I have been unable to find any reasonable account of slaves among ancient prostitutes, or, for that matter, of prostitution itself", the interest in the study of prostitution has increased drastically. Cf. the literature cited by A. SICARI, *Prostituzione e tutela giuridica della schiava. Un problema di politica legislativa nell'Impero Romano*, Bari 1991, 24.

As far as homosexualism is concerned, one report from the year 326 B.C. acknowledges the existence thereof:

> *L. Papirius is fuit, cui cum se C. Publilius ob aes alienum paternum nexum dedisset, quae aetas formaque misericordiam elicere poterant, ad libidinem et contumeliam animum accenderunt. Florem aetatis eius fructum adventicium crediti ratus, primo perlicere adulescentem sermone incesto est conatus; dein, postquam aspernabantur flagitium aures, minis territare atque identidem admonere fortunae; postremo, cum ingenuitatis magis quam praesentis condicionis memorem videret, nudari iubet verberaque adferri. Quibus laceratus iuvenis cum se in publicum proripuisset, libidinem crudelitatemque conquerens feneratoris, ingens vis hominum cum aetatis miseratione atque indignitate iniuriae accensa, tum suae condicionis liberorumque suorum respectu, in forum atque inde agmine facto ad curiam concurrit* (193).

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193) Livy, 8.28.8: "[It was] Lucius Papirius, to whom Gaius Publilius had given himself up for a debt owed by his father [whose] youth and beauty, which might well have stirred the creditor's compassion, did but inflame his heart to lust and contumely. Regarding the lad's youthful prime as additional compensation for the loan, he sought at first to seduce him with lewd conversation; later, finding he turned a deaf ear to the base proposal, he began to threaten him and now and again to remind him of his condition; at last, when he saw that the youth had more regard to his honourable birth than to his present plight, he had him stripped and scourged. The boy, all mangled with the stripes, broke forth into the street, crying out upon the money-lender's lust and cruelty; and a great throng of people, burning with pity for his tender years, and with rage for the shameful wrong he had undergone, and considering, too, their own condition and their children's, rushed down into the Forum, and from there in a solid throng to the Curia". (Translation

The law that was passed following the agitation by the people, was none other than the famous *Lex Poetelia Papiria de nexis* (194). This law lessened the harsh consequences of personal execution by providing that, in future, only those held pursuant to *noxae deditio*, might be bound and kept in fetters (195). It should be noted that the law was passed, not because it had *per se* been viewed as immoral or undignified for the *filius* to be bound as *nexus*. Livy makes it clear that the law had been introduced as a result of the possibility of abuse that existed: ... *tum suae condicionis liberorumque suorum respectu.*

It can therefore safely be accepted that homosexualism was quite common during the first half of the second century B.C. (196). Plautus lucidly expresses the Roman morality as follows: "*... dum ted abstineas nupta, vidua, virgine, iuventute et pueris liberis, ama quidlubet*" (197). Accordingly, the Roman indulgence towards homosexualism was a qualified one. Contrary to what

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by B.O. FOSTER, "Livy", in: *The Loeb Classical Library*, Cambridge, 1975). Also see, Varro, *de lingua latina* 7.105; Dionysius, 1.6.4; Valerius Maximus, 6.1.9.

194) 326 B.C. Cf. G. ROTONDI, 230.

195) G. ROTONDI, 231; F. DE MARTINO, "Riforme del IV Secolo", *BIDR* 78 (1975), 29-70, 39 et seqq.

196) E. EYBEN, *De Jonge Romein volgens de literaire bronnen der periode ca. 200 v.Chr tot ca. 500 n.Chr*, Brussel 1977, 175; E. CANTARELLA, *Secondo natura. La bisessualita nel mondo antico*, Roma, 1988, 129 et seqq.

197) Plautus, *Curculio*, 37-8.

was acceptable in Greek society (198), that tolerance was restricted to homosexual relations between a free person and a slave (199). Homosexualism between free persons was frowned upon (200) and even strictly censured (201). During Republican Rome, the sexual abuse of a male was regarded in a more serious light than immoral conduct towards women (202). *Nefanda libido* or *monstrosa Venus* offended the *pudicitia* and was regarded as *stuprum* (203). The *veteres* even regarded the violation of an *ingenuus* as a crime deserving the death penalty (204) and one that

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198) For the Greek's view on homosexualism, cf. W. DURANT, 302; E. CANTARELLA, 35 et seqq.

199) Cf. D. DALLA, *"Ubi Venus mutatur". Omosessualità e diritto nel mondo Romano*, Milano 1987, 154 et seqq.; E. EYBEN, 475 et seqq. The relationship between Catullus and Iuventius (cf. Catullus, 15, 16, 21, 24, 48, 81, 99) and Tibullus and Marathus (cf. Tibullus, 1.4, 1.8, 1.9) may serve as convenient examples.

200) Of course, it is not possible, due to the paucity of the sources, to find concrete evidence for this statement. However, a number of factors would point in that direction: apart from a law such as the *lex Fannia* 161 B.C. that specifically aimed at curbing homosexualism, in the education of young men, care was later taken not to expose them to homosexual influences: see Plinius, *Epistulae*, 3.3.3 et seqq.; Quintilianus, *Inst. Orat.* 2.2.14-15; Roman authors laud the *mores* of the early times when homosexualism was still regarded as abnormal. Notwithstanding this, the popular attitude changed and non-legal literature became impregnated by references to homosexualism and homosexual love. On the latter as well as on the above see: D. DALLA, 9.

201) E. CANTARELLA, 138 et seqq.; D. DALLA, 73 et seqq.; E. EYBEN, 476.

202) Th. MOMMSEN, *Römisches Strafrecht*, Leipzig 1899 (reprint Graz 1955), 703.

203) See Festus, s.v. *Stuprum*: "*Stuprum pro turpitudine antiquos dixisse apparet*"; Nonius Marcellus "*Stuprum ... veteres pro adulterio et vitio ponunt*". D. DALLA, 71 et seqq.

is more serious than sacrilege (205). The *pater familias* also had the right to punish (and even kill) his son on account of his *dubia castitas* or *impudicitia* (206).

The oldest known case of prosecution for paederasty dates from the year 326 B.C. and concerned the trial of L. Papirius on account of his attempted debauchment of C. Publilius. (The facts of this case have been mentioned above). Papirius had been prosecuted by the tribunes and was sentenced to death (207). From the same period dates the trial of one C. Laetorius Mergus who committed suicide after he had been accused of making homosexual advances towards the soldiers under his command. Despite the fact that he took his own life before the verdict could be passed, he was nevertheless sentenced to death (208). In the year 289 B.C., C. Cornelius was sentenced to death "*quod cum*

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204) *Rhetorica ad Herennium*, 4.8.12: *In iis qui violassent ingenuum, matremfamilias constuprassent... maxima supplicia maiores consumpserunt...*

205) *Rhetorica ad Herennium*, 2.30.49: *dicemus maius esse maleficium stuprare ingenuum quam sacrum legere...* On this see D. DALLA, 72.

206) Cf. D. DALLA, 78 et seqq.; Gaius 3.220: *Iniuria autem committitur ... sive quis matrem familias aut praetextatum adsectatus fuerit...* This prohibition possibly dates from the second century B.C. See E. CANTARELLA, 133, 152 et seqq.

207) Valerius Maximus, 6.1.9; Dionysius, 16.9. See W. REIN, *Das Kriminalrecht der Römer. Von Romulus bis auf Justinian*, Leipzig 1844 (reprint Aalen 1962), 864 et seqq.; Th. MOMMSEN, *Römisches Strafrecht*, 703 et seq.

208) Dionysius, 16.8; Valerius Maximus, 6.1.11.

ingenuo adulescentulo stupri commercium habuisset" (209). Finally, the *lex Scantinia* (of uncertain date) (210) punished *stuprum cum masculo* and imposed a penalty of 10 000 *serstertii* (211). *Impudicitia in ingenuo crimen est, in servo necessitas, in liberto officium*; with these words, Seneca (212) encapsulates the Roman attitude.

The rationale behind the Roman negativism regarding homosexual acts between *ingenui*, could possibly be found in their emphasis on freedom and the importance of the liberty of the individual. Homosexualism implies the subjection of one male to another and could, in that sense be regarded as a form of slavery. Since slavery also implied the sexual subjection of the slave to his or her master, it probably gave rise to, or at least, reinforced the taboo placed on a free person (*homo liber*) to voluntary subject himself sexually to another. D. DALLA explains this as follows: "Il ruolo del servo implica sottomissione, il dover soggiacere, anche letteralmente, alle pretese del padrone. Ruolo passivo e sottomissione si identificano. Il *vir* che non voglia incorrere nella riprovazione deve astenersi dal ruolo del servo. Di qui il disprezzo per chi libero soggiace al ruolo passivo nel rapporto

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209) Valerius Maximus, 6.1.10.

210) Cf. D. DALLA, 86 et seqq.; E. CANTARELLA, 141 et seqq.

211) Mentioned by Cicero, *ad familiares*, 8.12.3, 8.14.4; Juvenal, *Saturae*, 2.44-45; Suetonius, *Domitianus*, 8; Tertullianus, *de monogamia*, 12; Ausonius, *Epigrammae*, 91; Prudentius, *Peristephanon*, 10.201-205. On this law, see D. DALLA, 95; REIN, 863, Th. MOMMSEN, 703.

212) Seneca, *Controversiae*, 4, *praefatio* 10. See D. DALLA, 37 et seqq.; E. CANTARELLA, 131.

omosessuale, che implica sottomissione, e quindi scarsa virilità, debolezza, travestimento" (213).

Tabula 4.2 in the *Lex Duodecim Tabularum* should be interpreted in the light of the aforegoing. Unemployment and natural disasters during the beginning of the Republic wreaked havoc amongst the poor working class at Rome. Under such dire economic circumstances, the Roman populace had to resort to drastic measures to keep body and soul together. Exploiting his own as well as his children's labour force was the obvious manner the *pater familias* could have ensured the survival of the family. In the most extreme of circumstances, the *pater familias* possibly sold his children as slaves *trans Tiberim*. When it was not possible to derive any income from these sources and faced perhaps with the choice between starvation and survival for a few more days, some *patres familias* even resorted to prostituting their children.

With the exception of the latter, all of the aforementioned were permitted. The letting and hiring of services and work was at that stage already firmly established as a feature of Roman society (214) and the selling of children into slavery also took place. Prostitution most probably occurred on a wide scale but Roman society did not tolerate the misuse of the *patria potestas*

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213) D. DALLA, 15. Macrobius, 3.17.4: ...*libertatem suam venditarent*, could refer to this aspect of homosexualism.

214) See H. KAUFMANN, 22 et seqq.

by the *pater familias* who prostituted his son. It might well be that in some of these cases, the child, driven by the shame of his defilement, committed suicide or absconded from home. In the later *declamationes*, the theme of young men who are driven to suicide for that reason, is a recurring theme (215).

It is to be expected that where the *pater familias* prostituted his son and thereby effectively relegated such son to the *de facto* position of a slave, Roman society would express its disapproval. An offence against the *pudicitia* of a son effectively dishonoured the *familia* (216). In view of this negative attitude towards homosexualism between free Roman citizens, as well as the possible effect such practices might have had on (possibly unconsenting) *filii* (both young, and especially the old amongst them), the *Decemviri* intervened and tried to curb this misuse of the *patria potestas*.

The fact that this prohibition in the *Lex* impacted only on the sphere of the private law, should therefore come as no surprise, since it is in this sphere that the abuse could most effectively be combatted. As I have explained above, the prostitution of children probably had been motivated by economic needs. The proceeds obtained from the prostitution of *filii* went to the *pater familias* in view of the inability of children *in potestate* to own property (217). However, once the child was free from the

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215) Cf. Quintilianus, 4.2.69. E. EYBEN, 478.

216) D. DALLA, 78.

217) M. KASER, *Das römische Privatrecht*, I 343.

potestas, the *pater familias* would no longer obtain the proceeds from the sexual exploitation of his children. Furthermore, the *filius* thereafter would not owe his father any obedience and hence did not have to submit to such sexual exploitation any longer. By removing the *filius* from the *potestas* of the father, the *Decemviri* therefore not only removed the very economic basis that led the father to prostitute his son but they also empowered the son by making it possible for him to resist any further attempts by his father to sexually exploit him. In my opinion, the correct interpretation of the prohibition contained in *Tabula* 4.2, is therefore as follows:

> "If the *pater familias* prostituted his son thrice, the son will be freed from the *patria potestas*".

I therefore agree (albeit on different grounds) that the prohibition in the *Lex* had been entirely 'masculine'. In early Rome, the prostitution of women was tolerated ([218]). It would not, however affect my thesis to interpret the reference to *filius* in *Tabula* 4.2 wider to include daughters as well. The prohibition in the *Lex* would then only have aimed at preventing the prostitution of all children *in potestate*.

The practice whereby *patres familias* resorted to prostituting their children probably originated during the regal period. Since this practice served to fulfil an economic need, it would have

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218) As appears from Livy, 10.31.

been more prevalent amongst the *proletarii*, who had no wordly possessions but only children. In the absence of coined money and with the relative scarcity of metals that could serve as payment for commodities on a daily basis, the poor had no means to save or to provide ahead for their family ([219]). They were most vulnerable to economic changes and it is for that reason not surprising that the prostitution referred to by the later authors ([220]), took place in the *Vicus Tuscus*. In this part of Rome, the Etruscan workers that assisted with the building of the temple of Jupiter Capitolinus, found their abode ([221]). With the suspension of building activities and the decline in trade and industry, they must have found it desperately difficult to survive.

It is also to be expected that an improvement in the economic position of the *plebs* would have made it unnecessary to resort to the drastic steps set out above. It is therefore significant that with the increase in wealth since the start of the Punic Wars (264 B.C.) ([222]), the prostitution of children by their fathers, ceased to

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219) G. DE SANCTIS, 1 et seq.

220) See n. 181 above.

221) Tacitus, *Annales* 4.65. The presence of the Etruscans in this part of Rome, has been explained differently as well. One explanation is that they comprised of refugees that came to Rome following the defeat of Porsenna (Festus, s.v. *Tuscus*; Livy, 2.14.9). Another possibility is that these Etruscans came to Rome to render assistance against Titus Tatius (Varro, *de lingua latina* 5.46; Propertius, *Elegiae* 4.2). Even if one of the aforementioned explanations should be preferred, it would still imply that the inhabitants of that area would have consisted of the *proletarii* who would have been the most vulnerable in times of scarcity and who would have been compelled to resort to drastic measures.

222) Cf. G. ALFÖLDY, 42 et seqq.; T. FRANK, 90; F. DE MARTINO, 69; DE SANCTIS, 471 et seqq.

be a social evil of major proportions. (That, incidentally, seems to me to be the only sensible explanation why the original intent and goal of the *Lex* had been completely overshadowed by its later use). Yet, the prostitution of children was probably everpresent and largely tied up with the economic climate and social conditions of the populace. It is therefore highly significant that the problem of the selling (223) and prostitution of children again took on major proportions - amidst the pressing poverty of the post-classical period. The prostitution of children occurred on such a scale and probably caused such misery and unhappiness, that the emperor Theodosius II deemed it necessary to enact the following constitution on 21 April 428:

> *Lenones patres et dominos, qui suis filiis vel ancillis peccandi necessitatem inponunt, nec iure frui dominii nec tanti criminis patimur libertate gaudere. Igitur tali placet eos indignatione subduci, ne potestatis iure frui valeant neve quid eis ita possit adquiri... non amittant solum eam quam habuerant potestatem, sed proscribti poenae mancipentur exilii metallis addicendi publicis...* (224).

Theodosius prohibited the prostitution of children (and slave women) (225). The analogy with the *Lex Duodecim Tabularum* is striking. As was the case in the *Lex*, the *pater familias* who

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223) Cf. Th. MAYER-MALY, *SZ* 75 (1958), 122.

224) C. Theod. 15.8.2.

225) It would appear as if no prohibition against the prostitution of slaves existed during the period of the *Lex Duodecim Tabularum*. Cf. A. SICARI, 28 et seqq.

prostituted his child lost his *patria potestas* and thereby also his ability to benefit economically from such abuse of his children. In keeping with the state's interference in all spheres of life, a criminal sanction was added as well. The prostituting father was severely punished. Apart from loosing his *potestas* over such child, he was also sentenced to work in the mines.

There remains the later interpretation of the prohibition contained in *Tabula* 4.2. It has already been mentioned that the *patria potestas* was originally characterized by the enormous power the *pater familias* wielded over children *in potestate* and by its indissolubility. Apart from this, it should also be remembered that children *in potestate* had no proprietary capacity. This latter aspect was alleviated to some extent with the introduction of the practice whereby such children were granted *peculia* that were for all practical purposes regarded or treated as their own property. Yet, this would have constituted only a small step towards the independence of children and towards allowing them to fully participate in trade and commerce. In a basic self-sufficient agricultural society such a social system might not clash with the demands of commerce and an expanding society. However, from the third century onwards the face of Roman society changed drastically. Urbanization and the availability of job opportunities in the city, the colonization of conquered territory and perhaps also the new form of execution against the estate of the debtors, required self-sufficiency and financial independence. These novel demands exposed the rigidity and shortcomings of the traditional

position of the *filius familias* which entailed that "adult, married *filii familias*, who had held the highest offices in the state, who clearly had their separate domicile and conjugal family, could yet not own a penny and could acquire only for their *pater*" (226).

The ideal situation would have been to grant the same private law status to the *filius* that his *pater familias* had (227). This could effectively be done by removing the *filius* from the *familia*. Where such a move would have been considered impossible or even sacrilegious two centuries before, the changed religious *mores* made such a step possible. The disintegration of the *gentes* together with a change in religious sentiments led to the decline of the importance of the family cult (228) and the motivation for keeping the son in the family disappeared after it became customary for the person or persons who succeeded to the property upon the death of the *pater familias* to maintain the family cult (229). A concomitant factor was the increase in the importance of the cults of the gods as well as the centralization of religious control in the hands of state institutions (230).

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226) J.A. CROOK, "*Patria Potestas*", *Classical Quarterly* 17 (1967), 113-122, 119.

227) H. LÉVY-BRUHL, *Nouvelles Études*, 93. Also cf. J.A. CROOK, *Classical Quarterly* 17 (1967), 119.

228) N.D. FUSTEL DE COULANGES, 301 et seqq.

229) On the latter aspect, see A. WATSON, *State, Law and Religion*, 80.

230) J.A. NORTH, *CAH*^{2} vol. 7/2, 598 et seqq.

Originally the *patria potestas* could only be terminated by death, the sale of a child into servitude or, as a form of punishment, where the father had prostituted his son three times. Accordingly, a novel means had to be created. The Romans were masters at making use of existing institutions and putting them to different use. That is also what happened in the case of the provision contained in *Tabula* 4.2. After the enactment of the Law of the Twelve Tables, the *ius civile* was still locked away and known only to the priests (231) as *iudices atque arbitri rerum divinarum humanarumque* (232). It was accordingly not only their task to tend to sacral matters but, more important, theirs was the daunting task of *interpretatio* of the *leges* that were in existence. Though this *interpretatio* by the priests was most probably as a rule characterized by literalism (233), they displayed some creative ability. An example of the latter is their use of this provision in the Twelve Tables. Through the pontifical *interpretatio* of the *Lex*, a legal result was arrived at that was

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231) Cf. Valerius Maximus, 2.5.2 [*ius civile*] ... *per multa saecula... inter sacra caerimoniasque deorum immortalium abditum solisque pontificibus notum.*

232) Festus, s.v. *Ordo sacerdotum*: "*pontifex maximus... iudex atque arbiter habetur rerum divinarum humanarumque*".

233) As is evidenced by Gaius 4.11: *Actiones quas in usu veteres habuerunt, legis actiones appellabantur vel ideo quod legibus proditae erant (quippe tunc edicta praetoris quibus conplures actiones introductae sunt nondum in usu habebantur), vel ideo quia ipsarum legum verbis accommodatae erant et ideo inmutabiles proinde atque leges observabantur. Unde eum qui de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est rem perdidisse, quia debuisset arbores nominare eo quod lex XII tabularum, ex qua de vitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.*

completely different from what had originally been intended by the Decemviri (234).

As I have explained, the words *venum dare* (or its later form *vendere*) had a dual meaning. Apart from "selling yourself" or "selling someone else" (i.e. prostituting yourself or someone else) it more commonly means "to sell". The priests who were charged with interpreting the law, exploited the dualism in the meaning of the word. They simply took the provision in the *Lex* at face value and made it possible for the *pater familias*, when he so wished, to emancipate his son by means of three fictitious sales, concluded *uno actu*.

Emancipatio brought about a fundamental change in status of the erstwhile *filius familias*, the consequences of which impacted far beyond the father-son-relationship. The purpose thereof was in the first place to improve the position of the child and not to punish him or her (235). It also affected third parties and for that reason it comes as no surprise that the priests required the fictitious sales to be concluded by means of *mancipatio*. Thereby, they ensured that the act receive the publication it deserved. I want to stress this point, the *Lex* (in *Tabula* 4.2) nowhere uses

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234) F. WIEACKER, 331 et seq.; A.M. RABELLO, 108.

235) M. KASER, *SZ* 67 (1950), 495; H. LÉVY-BRUHL, *Nouvelles Études*, 80, 94. In view of the grave consequences flowing from *emancipatio* (the *emancipatus* left his *familia* and *gens*; if patrician he became a member of the *plebs*: P. BONFANTE, 83), it could also have been used as some form of punishment. E. EYBEN errs in maintaining that *mancipatio* originally only served as a form of punishment. It is hardly credible that the *pontifices* would have concocted this rather elaborate ritual simply to effect another form of punishment. Cf. M. KASER, *SZ* 67 (1950), 495.

the word *mancipatio* when referring to the 'sale' of the *filius*. The requirement of three *mancipationes* must therefore be of later origin.

The *veteres* also realized that, apart from *emancipatio*, the same provision could be employed to make *adoptio* possible and it is this use (both in the sphere of family law) of the provision contained in *Tabula* 4.2 that stood the test of time. Prostitution of children must have become exceptional - *emancipatio* and *adoptio* almost everyday occurrences ([236]). In the light thereof, it is to be expected that the original intention and meaning of the provision contained in *Tabula* 4.2 of the *Lex Duodecim Tabularum* could have become obscure and finally lost.

If the above is true, the provision in *Tabula* 4.2 poses no problem. The intrusion of the *Decemviri* into the traditional domain of the sacral law was rather restricted. Their prohibition of prostitution was clearly circumscribed and would have had no negative effect on trade and industry. They would not have incurred the wrath of the *patres* which would undoubtedly, under the prevailing economic circumstances have been the case had they tried to regulate the disposing of the labour of *filii*.

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236) The frequency of emancipation is attested to by the fact that the praetor had to make special provision for emancipated children to share in the inheritance *ab intestato* with children who were still *in potestate*. Cf. J.A. CROOK, *Classical Quarterly* 17 (1967), 120; H. LÉVY-BRUHL, *Nouvelles Études*, 80.

There remains another interesting problem. Why did the *Decemviri* allow the *pater familias* to prostitute his son thrice? One possible explanation is the importance of the 'sacred' number 3 in ancient religion and folklore (237). The importance of the number 3 is also reflected in the law. GOUDY (238) indicated 19 cases where the "trinity" played a role. In the Twelve Tables it appears no less than eight times: *Tabula* 2.3 (*tertiis diebus*); 3.5 (*tertiis nundinis*); 3.6 (*tertiis nundinis*); 4.2 (*ter venum duit*); 6.4 (*trinoctio abesset*); 8.3 (*trecentorum*); 8.15 (*poena ... tripli*); 10.3 (*tribus riciniis*).

Apart from the possible religious undertone, it also makes a lot of sense to require three separate acts. It is possible that the *Decemviri* simply required three cases of prostitution in an attempt to eliminate any doubt or evidential problems that otherwise might have existed. To rely on the proof of one case of prostitution could be dangerous. Two would be better. Three was preferable.

Another (perhaps less plausible) explanation of the motives that led to the *Decemviri* allowing the triple prostitution of the *filius* might perhaps be found in the prevailing economic circumstances. An absolute prohibition would have hit the poorest of poor the hardest. To come to some kind of compromise they permitted it two times and after the third, the

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237) On this see H. LÉVY-BRUHL, *Nouvelles Études*, 87.

238) GOUDY, *Trichotomy in Roman Law*, 1987, 24-52 (only known to me through H. LÉVY-BRUHL, *Nouvelles Études*, 87).

son was set free and given the opportunity to resist such demands made on him by the *pater familias*.

Apart from these, rather speculative, explanations it could also further serve to underline the reluctance of the *Decemviri* to regulate family matters. The law only stepped in after three cases of abuse by the *pater familias*.

The above incidentally also illustrates the danger of interpreting the *Lex Duodecim Tabularum* relying exclusively on the evidence of the classical jurists (239). Their interpretation of the contents of the *Lex* frequently aimed at interpreting or justifying a legal rule that was being applied under radically different circumstances. One cannot but agree with the following statement by R. WESTBROOK: "[B]eing unaware of the conditions of early Roman society, [the classical writers] could only interpret the ancient texts in the light of their own experience. Far from trying to penetrate the thought-process of their ancestors, they imposed their own conceptions upon them" (240). It is perfectly understandable that writers such as Dionysius and Gaius could only refer to the well-known and frequent use to

239) A method proposed by, *inter alia*, E. VOLTERRA, *Diritto Romano e Diritti Orientali*, Bologna 1937, and followed by A. WATSON, *Rome of the Twelve Tables*, 8: "When the direct evidence for archaic Roman law is inconclusive we often have a safer guide.... namely, developed Roman law... [T]he law of the later Roman Republic and of the classical period is the immediate descendant of the law of the early Republic and the XII Tables".

240) R. WESTBROOK, "The nature and origins of the Twelve Tables", *SZ* 105 (1988), 80.

which the prohibition contained in *Tabula* 4.2 had been put. It should be remembered that both wrote approximately four to six centuries after the *Lex* had been enacted and can for that reason hardly be considered as authoritative interpreters thereof. There are other examples that also illustrate the fact that the classical writers were in some cases totally oblivious of the true meaning of archaic Latin words and institutions (241).

Classical Roman legal science, as influenced by Greek philosophy, may be regarded as a vertical system: the legal material was in the first place placed in general and abstract categories that were conceptually distinguished from one another; the general categories were thereafter further sub-divided into smaller, terminologically separate units until the individual *casus* has been reached. In contrast to this, early legal science is characterized by an absence of general principles, abstract concepts and definitions. Legal science originally had to move horizontally with the aid of concrete examples along the cumbersome road to establish legal rules and principles (242).

The provision in *Tabula* 4.2 illustrates the above. Instead of the *Lex* laying down a general principle that provided for the termination of the *patria potestas* or which served as a vehicle for

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241) Cf. R. WESTBROOK, 80. On the unreliability of the classical jurists as interpreters of the *lex Duodecim Tabularum*, see the remarks by J. ZLINSZKY, "Arbeit im archaischen Rom", *RIDA* 36 (1989), 423 et seq.; A. WATSON, *TvR* 34 (1966), (review of H. KAUFMANN, *Altrömische Miete*), 109-112, 111; R. YARON, *TvR* 36 (1968), 60 n. 9; F. SCHULZ, *Geschichte*, 35; F. WIEACKER, *Römische Rechtsgeschichte*, 295.

242) Cf. F. SCHULZ, *Geschichte*, 38, 70 et seqq.

the emancipation of the *filius familias*, it concerned itself with one problem that was identified as a social evil: the prostituting of sons. *Tabula* 4 2 was simply intended to address the sins of their fathers.(**)

**) I would like to express my sincere gratitude to Professor J.A. ANKUM for reading a draft of this article and making valuable comments thereon. It hardly needs mention that the responsibility for any error remains mine.