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# Communication and the Capability Problem in Roman Law: Aulus Gellius as *Iudex* and the Jurists on Child-Custody

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My article focuses on a potentially important aspect of the challenge of communication in Roman law<sup>1</sup>. This turns on what scholars often describe as capability problems or - less often - as litigation incapacities. These are systemic impediments to “correct” or “just” decisions. Often they form part of the background of unstated assumptions about a court system and are invisible as such to many or most of the participants. Many so-called capability problems concern the kind and quality of information available to finders of fact and how this availability influences their verdicts. The Roman jurists were notoriously unconcerned about such questions. Was this because they discounted the seriousness of such challenges? Or did they assume that the Roman court system could successfully manage them? Is it possible that they were, in the end, a bit more interested in “facts” than is sometimes assumed?

Capability problems have thus been identified in broad terms as a nexus of difficulties that hinder, or even thwart, attempts to advance a society’s values through its legal system<sup>2</sup>. Perhaps the most popular image used to describe them is that of a road in bad repair, so that

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<sup>1</sup> A version of this paper was given at the 64<sup>th</sup> annual meetings of the SIHDA in Barcelona. I would like to thank Prof. Teresa Giménez-Candela and the other organizers of the conference for their excellent hospitality.

<sup>2</sup> The genesis of the “capability method” analysis lies with R.DANZIG, *The Capability Problem in Contract Law: Further Readings on Well-Known Cases*, (1<sup>st</sup> ed.), New York 1978, now in its second edition as R.DANZIG and G.R.WATSON, *The Capability Problem in Contract Law: Further Readings on Well-Known Cases*, (2<sup>nd</sup> ed.), New York 2004.

they emerge as potholes on the great superhighway of justice<sup>3</sup>. Legal scholars tend to regard capability problems as endemic to judicial mechanisms that are adversarial in nature<sup>4</sup>. The focus in their analysis is on process, rather than on doctrine, though, as we shall see, the line can sometimes be a thin one to draw between procedural and substantive issues. In concrete terms, such problems include differences between litigants in rank and resources, problems with witnesses and other forms of evidence, biases of judges and juries, and other structural aspects of the system of adjudication, such as propensities to delay in resolving law suits, as well as collusion between the parties. The “capability method” has been described as an alternative to the case study approach utilized by some historians of the common law in recent years, who advocate a kind of “legal archaeology” aimed at unearthing the facts surrounding a case as a means of better understanding the law made from them, though it has also been argued that the two methods can complement each other<sup>5</sup>.

Does this method of analysis have anything to tell us about Roman law? The subject is interesting but potentially enormous, so I plan to limit my discussion largely to two texts, one literary and one legal in nature. First, let me point out a few challenges that arise in the context of capability problem analysis. One is the lack of precision or clear definition as to what constitutes a capability problem. It has been argued that, however defined, “the concept is of limited value because it gives no guidance as to the relative importance, frequency, amenability to correction, and the like of specific problems<sup>6</sup>”. One

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<sup>3</sup> To give the oft-quoted description by DANZIG and WATSON, *The Capability Problem*, *op.cit.*, p.1: “If values are the quiet engines of our legal system, the capability problems are the frictions, the ruts and biases of the road. The machinery of Justice responds as much to the road as to the engine.”

<sup>4</sup> D.L.THREEDY, *Legal Archaeology: Excavating Cases, Reconstructing Context*, Tulane Law Review 80 (2006), pp.1207-1210; G.CAPLAN, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, Albany Law Review 73 (2009), p.6. Thus the alternative descriptive tag for capability problems as “litigation incapacities”: J.L. MAUTE, *The Unearthed Facts of Peevyhouse v. Garland Coal & Mining Co.*, in D.G.BAIRD (ed.), *Contracts Stories*, New York 2007, p.297.

<sup>5</sup> Compare THREEDY, *Legal Archaeology*, *op.cit.*, 1206, who calls attention to the concinnity between analysis of capability problems and legal archaeology projects, and CAPLAN, *Legal Autopsies*, *op.cit.*, pp.4-7, who emphasizes difference between them.

<sup>6</sup> CAPLAN, *Legal Autopsies*, *op.cit.*, p.6.

way of addressing such objections is to develop the identification of subcategories, examining whether there are clusters of such problems with shared characteristics<sup>7</sup>. Another possible solution is to explore the origins of capability problems to see whether there are particular factors that lead to their occurrence. Both of these approaches have barely been touched upon in the scholarship, and it is fair to describe the method overall as under-theorized. I hope to escape at least some of the implications of these difficulties by focusing on one specific aspect of “the capability problem”, namely, that concerning the communication of information relevant to disposing of cases, though other types of capability problems will enter into the discussion as well.

A fairly useful illustration of how capability problems might have arisen in Roman law is offered by the familiar episode recounted by Aulus Gellius concerning his service as a *iudex privatus*<sup>8</sup>. Gellius tells us that, upon his appointment to the jury panels, he scrupulously hunted down books in both Greek and Latin in order to attempt to fill a gap in his legal education<sup>9</sup>. He dug up the text of a *lex Iulia*, apparently the *lex Iulia de iudiciis privatis*<sup>10</sup>, and commentaries written by Masurius Sabinus and other jurists, which provided a wealth of technical detail, but little by way of practical information. As he explains, “books of this sort did not offer me any help at all” (“*nihil quicquam nos huiusmodi libri iuverunt*”), in disentangling

<sup>7</sup> Both this and the following solution are advanced by THREEDY, *Legal Archaeology*, *op.cit.*, pp.1208-1209.

<sup>8</sup> Gellius 14.2. In what follows, I translate *iudex* as both “judge” and “finder of fact” (and even as “juror”), while recognizing that the *iudex* not only determined the facts of a case but also often decided questions of law as these were defined by the Romans: see M.KASER and K.HACKL, *Das römische Zivilprozessrecht*, (2<sup>nd</sup> ed.), Munich 1996, p.357.

<sup>9</sup> Most scholars accept that, at this date, the works in Greek cannot have been juristic but were instead philosophical and/or rhetorical in nature: see A.STEINWENTER, *Rhetorik und römischer Zivilprozeß*, ZRG 65 (1947), p.87 n.60; P.DE FRANCISCI, *La prova giudiziale (a proposito di Gellio, N.A. 14.2)*, Helikon 1 (1961), p.594 n.22; D.NÖRR, *L'esperienza giuridica di Gellio (Noctes Atticae XIV 2)*, in D.NÖRR, *Historiae Iuris Antiqui* 3, Goldbach 2003, pp.2149-2172 (at p.2153) (= *Filellenismo e tradizionalismo a Roma nei primi due secoli dell'Impero*, [Rome 1996] pp.33-56); J.ZABLOCKI, *Appunti sull'officium iudicis nelle Noctes Atticae*, in M. ZABLOCKA ET AL. (eds.), *Au-delà des frontières: Mélanges de droit romain offerts à Witold Wołodkiewicz* 2, Warsaw 2000, p.1117.

<sup>10</sup> So, for example, ZABLOCKI, *Appunti sull'officium iudicis*, *op.cit.*, p.1117.



the complicated and highly contested cases that often come to court<sup>11</sup>. Gellius is convinced that, although a judge ought to form his opinion from the case before him, there are certain general principles and guidelines of a preparatory nature (“*praemonita et praecepta*”) that ought to inform him before he confronts a difficult case.

It seems clear that such principles and guidelines did not form the subject of juristic writings, or at least Gellius’ diligence was unable to uncover them. At first glance, this would appear to support the gist of the famous pronouncement of Cicero’s “good friend” (“*Gallus noster*”) the jurist Aquilius Gallus, when he apparently disavowed any professional interest in situations of fact by declaring of them: “*nihil hoc ad ius; ad Ciceronem*<sup>12</sup>”. But even if this is the correct understanding of Gallus’ remark, which is very far from certain in my view<sup>13</sup>, the jurists could very well take an interest in the facts of a case when it suited them<sup>14</sup>. Nor is it true that they were utterly averse to supplying *iudices* with the *praemonita et praecepta* that Gellius deemed so vital to the discharge of their duty. All the same, it does become clear that they did not provide precisely the kind of help he

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<sup>11</sup> Gell.14.2.1-2 (quotation at 2).

<sup>12</sup> Cic. *Topica* 51: ‘*Nihil hoc ad ius; ad Ciceronem*’, *inquirebat Gallus noster si quid ad eum quis tale rettulerat ut de facto quaeretur*. (“‘This has nothing to do with law - it’s Cicero’s concern’, my good friend Gallus used to say if anyone brought him some issue that turned out to be a question of fact.”).

<sup>13</sup> To my mind, the remark is quite possibly a piece of sarcasm, originally directed by Gallus at Cicero, who returns the favor in part by implicating Trebatius and other jurists in it. It is perhaps an error in any case to attach too much weight to this comment, in no small part because the roles of jurist and trial lawyer were not as neatly distinguishable as an earnest, literal reading of Cicero might be taken to imply: see F.WIEACKER, *Römische Rechtsgeschichte: Quellenkunde, Rechtsbildung, Jurisprudenz, und Rechtsliteratur* 1, Munich 1988, p.667 n.27; T.REINHARDT, *Cicero’s Topica*, Oxford 2003, p.305; cf., for a recent, rather speculative analysis, O.TELLEGEN-COUPERUS and J.W.TELLEGEN, *Nihil Hoc ad Ius, ad Ciceronem*, RIDA<sup>3</sup> 53 (2006), pp.381-408. Few would perhaps agree that the roles of jurist and trial lawyer were so close as to identify Cicero himself as a jurist, but see L.MICELI, *La prova retorica tra esperienza romanistica e moderno processo penale*, Index 26 (1998), p.288.

<sup>14</sup> The jurists occasionally shy away from offering a definite holding on the ground that the question put is one of fact, not law: see Iul. D.39.5.2.1; Marcell. D.45.1.94. As NÖRR, *L’esperienza giuridica, op.cit.*, p.2161 points out, however, Julian in the first text is careful to set forth what implications at law different sets of facts might have. See further U.BABUSIAUX, *Id quod actum est: Zur Ermittlung des Parteiwillens im klassischen römischen Zivilprozeß*, Munich 2006, for example, pp.79-82, pp.113-114, pp.234-237.

was seeking<sup>15</sup>. On balance, we find that the jurists were indeed interested in questions of fact, when they regarded these facts as legally relevant, but that otherwise they seem to have been content to leave the question of the standards of forensic proof to the rhetoricians, offering only the most rudimentary assistance in this regard to finders of fact<sup>16</sup>. More than a hint emerges here that the adversarial nature of the Roman system of justice, rather than inevitably serving to advance the just solution of cases, might in some instances have impeded this result. So various capability issues already loom large in this account.

Gellius then turns to a case for which he found himself inadequately prepared, despite his efforts, involving allegations of a loan of money, so presumably an *actio certae creditae pecuniae*<sup>17</sup>:

Gellius 14.2.4-8:

*Petebatur apud me pecunia, quae dicebatur data numerataque, sed qui petebat neque tabulis neque testibus id factum docebat et argumentis admodum exilibus nitebatur. 5. Sed eum constabat virum esse firme bonum notaeque et expertae fidei et vitae inculpatissimae, multaque et industria exempla probitatis sinceritatisque eius expromebantur; 6. illum autem unde petebatur hominem esse non bonae rei vitaeque turpi et sordida convictumque volgo in mendaciis plenumque esse perfidiarum et*

<sup>15</sup> One can question whether Gellius was being realistic: see the considerations of NÖRR, *L'esperienza giuridica*, *op.cit.*, pp.2158-2159.

<sup>16</sup> For the dominant role of rhetoric in this area, see the classic study by G.PUGLIESE, *La preuve dans le procès romain de l'époque classique*, in *Scritti giuridici scelti* 1, Naples 1985, pp.339-412 (= *Recueils de la Société Jean Bodin* 16 [1964], pp.277-348). A version published in Italian is G.PUGLIESE, *La prova nel processo romano classico*, Jus n.s. 11.3 (1960), pp.386-424. In Pugliese's view, this dominance was virtually complete during the Republic and early Principate: only toward the end of the first century A.D. did jurists begin to take an interest in the matter of forensic evidence. U.BABUSIAUX, *Id quod actum est*, *op.cit.*, esp. pp.8-9, p.18, pp.137-138, pp.255-256 allows us to trace juristic interest in questions of fact to an earlier period in the context of an examination of the intentions of the parties to acts in the law. She persuasively argues, however, that though it had obvious implications for the conduct of the case before the *iudex*, this concern was directly addressed to the litigants, not to the finder of fact. Regarding the latter's role, the part played by rhetoric evidently remained strong and juristic interest in providing direct assistance in the evaluation of evidence relatively modest beyond the (themselves rather simple and straightforward) rules for the burden of proof (below). For more bibliography on this subject, see R.BASILE, *Onere della prova, possesso e procedimento interdittale (profili storici e comparatistici)*, in C.CASCIONE ET AL. (eds.), *Parti e giudici nel processo: Dai diritti antichi all'attualità*, Naples 2006, p.510.

<sup>17</sup> So, for example, NÖRR, *L'esperienza giuridica*, *op.cit.*, p.2150.

*fraudum ostendebatur. 7. Is tamen cum suis multis patronis clamitabat probari apud me debere pecuniam datam consuetis modis, "expensilatione", "mensae rationibus", "chirographi exhibitione", "tabularum obsignatione", "testium intercessionem", 8. ex quibus omnibus si nulla re probaretur, dimitti iam se sane oportere et adversarium de calumnia damnari, quod de utriusque autem vita atque factis diceretur, frustra id fieri atque dici; rem enim de petenda pecunia apud iudicem privatum agi, non apud censores de moribus.*

4. A claim for (a loan of) cash was brought before me, cash which - it was claimed - had been counted and paid. But the plaintiff was arguing that this had been done without documents or witnesses and was relying on very slender evidence. 5. It was undisputed, however, that he was a thoroughly good man of a trustworthiness that was known and tried and of a life that was absolutely blameless. Many conspicuous instances of his honesty and uprightness were being cited. 6. The defendant, however, was being revealed as a person of poor substance, base and low life, commonly proven to be a liar, and full of treachery and fraud. 7. Yet he, along with his numerous representatives at trial, kept insisting before me in a loud voice that it ought to be proven that the money had been paid in the customary ways, by an "entry for money paid", by "banker's accounts", by the "production of signed evidence of an obligation", by "documents under seal", by the "intervention of witnesses"<sup>18</sup>. (He kept saying) that if it (the loan) could be proven in no particular from any of these means, then he (the defendant) ought by all means to be released and his opponent convicted of malicious prosecution. (He continued to the effect) that, moreover, the evidence that was being introduced about the life and behavior of the two litigants was irrelevant, since the issue concerned a claim before a *iudex privatus* for recovering cash, not a question of morals before the censors.

The case turns on a claim for repayment of a loan. The plaintiff is a solid citizen, the defendant anything but<sup>19</sup>. The plaintiff, however, can cite no material evidence to support his claim. Gellius turns for

<sup>18</sup> For discussion of these diverse sources of evidence see DE FRANCISCI, *La prova giudiziale, op.cit.*, pp.597-598; ZABLOCKI, *Appunti sull'officium iudicis, op.cit.*, p.1119.

<sup>19</sup> C.S.TOMULESCU, *An Aristocratic Roman Interpretation at Aulus Gellius*, RIDA<sup>3</sup> 17 (1970), pp.313-317, argues that the case turns precisely on the relative wealth of the parties, since "the roman law is a law of the rich" (p.317). But there is no more reason to draw a distinction between the litigants in this case on the basis of wealth, "class", or social status than there is in the principal legal text discussed below. The contrast Gellius develops is moral, that is, one of character, and we should not assume that the parties are from different social strata.

advice to his *consilium*, composed, it seems, of experienced trial lawyers (or “advocates<sup>20</sup>”), who are his friends (“*amici mei*<sup>21</sup>”). They all hold, without hesitation, because, as he characterizes them, they are always in a hurry, for immediate acquittal of the defendant, on the ground that there is no proof to support the plaintiff’s claim of a debt<sup>22</sup>. But our *bonus iudex* feels he cannot so easily ignore the evidence presented about the characters of the litigants<sup>23</sup>, and so he declares a postponement in order to consult the philosopher Favorinus about the responsibilities of a judge in a private lawsuit<sup>24</sup>. Favorinus, who seems remarkably well-prepared for this enquiry, proceeds to rattle off a series of challenges confronting these judges, some or all of which are not irrelevant to a consideration of capability problems,

<sup>20</sup> ZABLOCKI, *Appunti sull’officium iudicis*, *op.cit.*, p.1120 sees also a reference to experienced *iudices*, which is possible, but unproven. There is certainly no trace of a jurist: NÖRR, *L’esperienza giuridica*, *op.cit.*, p.2155.

<sup>21</sup> Gell.14.2.9.

<sup>22</sup> The (to all appearances) unanimous opinion of the trial lawyers on the *consilium* merits some emphasis. Presumably they were all well-trained in rhetoric, meaning precisely rhetorical theory pertaining to the character and status of litigants and witnesses: see, for example, V.SCARANO USSANI, *Caratteristiche delle persone e criteri giurisdizionali nell’età di Antonino Pio*, Ostraka 1.2 (1992), pp.241-248 (at pp.244-245) (= *Fraterna Munera: Studi in onore di Luigi Amirante*, Salerno 1998, pp.391-404; pagination in the citations below follow the original); NÖRR, *L’esperienza giuridica*, *op.cit.*, p.2155. Their swift and decisive rejection of such arguments, however, leads one to wonder whether their professional expertise was precisely what led them to discount these so readily.

<sup>23</sup> Some scholars, not without reason, detect a concern on Gellius’ part with the not unlikely consequence, issuing from an acquittal, of a prosecution for *calumnia* directed against the demonstrably respectable plaintiff: DE FRANCISCI, *La prova giudiziale*, *op.cit.*, p.598; B.W.FRIER, *The Rise of the Roman Jurists: Studies in Cicero’s Pro Caecina*, Princeton 1985, p.213 n.68; G.POLARA, *Autonomia ed indipendenza del giudice nell’evoluzione storica delle forme processuali: Iuravi mihi non liquere*, in *Scritti in ricordo di Barbara Bonfiglio*, Milan 2004, p.340; W.KEULEN, *Gellius the Satirist: Roman Cultural Authority in Attic Nights*, Leiden 2009, p.222.

<sup>24</sup> J.PARICIO, *Sobre la administración de la justicia en Roma: Los juramentos de los jueces privados*, Madrid 1987, pp.103-109; J.PARICIO, *Iurare sibi non liquere*, in *Atti del III seminario romanistico gardesano*, Milan 1988, pp.418-422 argues that the postponement, on the basis of *nondum liquere*, was accomplished under oath. So also F.LAMBERTI, *Tabulae Irnitanae: Municipalità e ius Romanorum*, Naples 1993, pp.194-195; NÖRR, *L’esperienza giuridica*, *op.cit.*, p.2167 (more tentatively); E.METZGER, *A New Outline of the Roman Civil Trial*, Oxford 1997, p.145 (for retrospective adjournment); R.SCEVOLA, *La responsabilità del iudex privatus*, Milan 2004, pp.229-230. Contra, A.M.RABELLO, *Non Liquet: Dal diritto moderno al diritto romano*, AG 185 (1973), p.50.

but which cannot detain us here<sup>25</sup>. He is also able to cite bibliography to Gellius, first, a treatise by the jurist Q. Aelius Tubero precisely on the subject of the *officium iudicis*<sup>26</sup>, and then a speech by the elder Cato in which it is claimed that, where probative evidence is lacking, the relative character of the litigants should determine the outcome (and where they are equally good or bad the defendant should prevail<sup>27</sup>). Favorinus advises following Cato's lead, but Gellius, though appreciative of the philosophical value of this counsel,

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<sup>25</sup> Favorinus canvasses the following situations, about which he says there is constant discussion. If a *iudex* has knowledge of a case beyond the evidence presented to him at trial, should he act on that knowledge or ignore it? Should a *iudex* postpone his *officium* temporarily and attempt to act as an ombudsman between the parties? Should he raise issues in favor of a litigant when that litigant fails to do so? Disagreement also reigns as to whether a *iudex* ought to clarify the issue(s) before him at various turns, even to the point of tipping his hand as to how he reads the evidence. Some *iudices* are very active, constantly interrupting and questioning the litigants, while others are relatively passive, allowing the case to unfold before them without reacting to it. So Gell. 14.2.14-19. These observations suggest both a broad freedom for the *iudex* and the co-existence of different styles of judging, quite possibly from an early date: see the next note.

<sup>26</sup> It is debated as to whether the elder or the younger Q. Aelius Tubero is meant here: Frier, *The Rise of the Roman Jurists*, *op.cit.*, p.217 n.79. It is also uncertain as to how helpful Tubero's work might have been in deciding questions of fact: see Ulp. D.5.1.79.1 (such assistance deemed inappropriate); Call. D.22.5.3.1-4 (rather rudimentary guidelines for evaluating evidence provided by Hadrian, including the summary instruction not to rely on one type of proof). On the other hand, some of the practical advice it contained may be alluded to by Favorinus in his advice to Gellius (at 14-19: see previous note): so DE FRANCISCI, *La prova giudiziale*, *op.cit.*, p.600; FRIER, *op.cit.*, p.217. The contents and even the nature of this work remain all the same uncertain: G.BROGGINI, *Iudex Arbiterve: Prolegomena zum Officium des römischen Privatrichters*, Cologne 1957, p.219 n.8; DE FRANCISCI, *op.cit.*, p.601; NÖRR, *L'esperienza giuridica*, *op.cit.*, p.2156, for example, hold that it was a philosophical/ethical treatise heavily indebted to Stoicism. Overall, there appears to have been a lack of technical juristic assistance in written form available to finders of fact: STEINWENTER, *Rhetorik und römischer Zivilprozeß*, *op.cit.*, p.87 n.60.

<sup>27</sup> Cato's speech (the *pro L. Turio*) is paraphrased (Gell. 14.2.21) and then quoted in part (26 = H.MALCOVATI, *ORF*, [4<sup>th</sup> ed.], Turin 1976, no.206). DE FRANCISCI, *La prova giudiziale*, *op.cit.*, p.602 acutely observes that Cato delivers this view in the context of a forensic speech, so that presumably it had some utility for his client, while, one might well think, potentially reducing its value as a general precept for judging cases.

demurs, on the basis of his youth and *mediocritas*<sup>28</sup>, and issues his famous verdict, accomplished under oath, of *non liquet*<sup>29</sup>.

We cannot be certain how typical this case is, of course, especially since our detailed knowledge of the judge's behavior here is unusual to the point of being singular<sup>30</sup>. In any case, a few actual or potential capability problems arise in this context. First, there is the adversarial system on which the Romans relied to generate information for their finders of fact to evaluate in arriving at a verdict<sup>31</sup>. It was perhaps not always successful in producing just outcomes, even on their terms. Another is the quality of some of that information, above all, that provided about the characters of witnesses and, in this case, especially, of litigants. While many a modern court might find this material legally irrelevant, it was deemed of vital importance by the Romans in both civil and criminal forensic contexts<sup>32</sup>. A third is Gellius' decision to grant a postponement in the case, however temporary this may have been<sup>33</sup>. His motive was grounded above all

<sup>28</sup> Gell. 14.2.25. *Mediocritas* is surely at minimum a self-deprecating reference to Gellius' social position (which was anything but humble, given his qualifications to be a *iudex*), but might signify more than this: below.

<sup>29</sup> T.MAYER-MALY, *Iurare sibi non liquere und Rechtsverweigerungsverbot*, in O.J.BALLON and J.J. HAGEN (eds.), *Verfahrensgarantien im nationalen und internationalen Prozeßrecht: Festschrift Franz Matscher zum 65. Geburtstag*, Vienna 1993, pp.351-354 holds that the oath was necessary to avoid liability for "making the suit his own" (*litem suam facere*), through Gellius' refusal to find for one of the parties.

<sup>30</sup> See STEINWENTER, *Rhetorik und römischer Zivilprozeß*, *op.cit.*, p.85; P.GARNSEY, *Social Status and Legal Privilege in the Roman Empire*, Oxford 1970, pp.210-211. Even if we accept Gellius' behavior itself as unusual, as I think we must, this does not mean that the challenges he faced were atypical: below.

<sup>31</sup> See KASER and HACKL, *Das römische Zivilprozessrecht*, *op.cit.*, pp.363-364.

<sup>32</sup> For criminal law, see T.A.J.MCGINN, *Law & Order*, *Journal of Roman Archaeology* 22 (2010), pp.572-582; also on criminal law but even more broadly, perhaps, see Mod. D.22.5.2; Call. D.22.5.3pr. (the reliability of witnesses depends on their status, character, wealth, and possible personal bias: these are very rudimentary guidelines); for private law specifically, see FRIER, *The Rise of the Roman Jurists*, *op.cit.*, pp.123-124, p.214. For a defense of Gellius on this point, see J. HARRIES, *Law and Crime in the Roman World*, Cambridge 2007, p.51.

<sup>33</sup> It was legally permissible for a *iudex* to postpone, under oath, giving judgment in a quest for clarity, to judge from the rules established for the *arbiter ex compromisso*: Ulp. D.4.8.13.4. For the oath, see the literature cited at n.24 above, and for the justification for the adjournment, see POLARA, *Autonomia ed indipendenza del giudice*, *op.cit.*, p.354; SCEVOLA, *La responsabilità del iudex privatus*, *op.cit.*, p.238. Presumably Gellius learned the procedure from his preparatory study of the juristic commentaries and the text of the *lex Iulia de iudiciis privatis* (14.2.1: above). See

in what we might describe as an asymmetry of information, in that what he was told about the characters of the litigants (itself radically asymmetrical in nature) pointed in one direction, while the (lack of) evidence for the loan itself led in another. Though his intentions appear to have been noble (and he certainly perceives them as such), we may well ask whether in principle justice delayed was justice denied.

Finally, there is the verdict itself<sup>34</sup>. Was it just? The answer might depend on whether one were ask this question of a jurist, a trial lawyer, or a philosopher, but there is reason to believe that none of these might have believed it to be such<sup>35</sup>. In his staking out an ideal median point by triangulating among these groups Gellius attempts to establish his true *mediocritas*<sup>36</sup>. But the difficulties posed to a legal system by a verdict of *non liquere* are not to be underrated, and it is

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T.GIMÉNEZ-CANDELA, *Los llamados cuasidelitos*, Madrid 1990, pp.20-21; LAMBERTI, *Tabulae Irnitanae*, *op.cit.*, pp.191-195; METZGER, *A New Outline*, *op.cit.*, esp. pp.81-82, pp.92-107, pp.142-153, who argues persuasively that the judge who adjourned a civil trial was obliged to reconvene it, in other words, the adjournment Gellius describes was of necessity a postponement.

<sup>34</sup> I think it correct, from a Roman perspective, to treat *non liquere* as a verdict, though some might regard it as the failure to reach one. The Romans were not always prepared to tolerate such verdicts, for reasons that should be obvious. Under the epigraphically attested extortion law from the late second century B.C. (the “*lex Acilia Repetundarum*”), a juror who persisted in voting *non liquet* might be fined heavily: *FIRA* 1<sup>2</sup> 7.46-48. For (tendentious) praise of jurors casting such a vote, see Cic. *Chuentio* 76, 106. It seems possible that the verdict of *non liquere* presented a different order of challenge in the sphere of criminal law than in that of private law, at least from a capability perspective. See the remarks of PUGLIESE, *La preuve*, *op.cit.*, pp.381-382 n.4.

<sup>35</sup> SCARANO USSANI, *Caratteristiche delle persone*, *op.cit.*, p.247 views Gellius’ verdict as arising exclusively out of the cultural, legal, and political milieu of the reign of Antoninus Pius and argues that it aligns, as part of a “circuito perfetto tra politica, sapere, e propaganda”, with important policy choices made by that Emperor and his legal experts. Gellius, however, very clearly chooses to go his own way, and in fact celebrates his independence from the contemporary claims of law, rhetoric, and even philosophy. There is a fundamental difference between his approach and that of Julian in a roughly contemporary opinion, as we will see below. Gellius’ position, for all of its idiosyncrasy, should nonetheless be viewed as the manifestation of a deeply-rooted Roman tradition that attempted to manage the tension between law and justice in the issuance of court verdicts: below.

<sup>36</sup> See NÖRR, *L’esperienza giuridica*, *op.cit.*, p.2171.

unsurprising to find that it is not commonly tolerated in modern contexts<sup>37</sup>.

Central to these capability problems is the Roman preference for a *iudex* who was not necessarily knowledgeable about the law and skilled in its ways, meaning that in actual fact, as far as we can tell, typically he was *not* very knowledgeable about or skilled in this field<sup>38</sup>. One might profitably view this as part of the trade-off Roman society attempted to manage in an attempt to reconcile an autonomous system of law with popular demands for justice<sup>39</sup>. A judge ignorant in the law might very well seek expert advice of course, and we expect that many of them did<sup>40</sup>. What is striking about this episode is its

<sup>37</sup> See RABELLO, *Non Liquet*, *op.cit.*, pp.31-55; PARICIO, *Sobre la administración*, *op.cit.*, pp.89-97; PARICIO, *Iurare sibi non liquere*, *op.cit.*, pp.418-422; MAYER-MALY, *Iurare sibi non liquere*, *op.cit.*, pp.349-354; POLARA, *Autonomia ed indipendenza del giudice*, *op.cit.*, pp.362-364, pp.374-389. The phenomenon of the “hung jury” in the modern U.S. legal system, though not a precise parallel, offers some similarities to the Roman *non liquet*. A hung jury, meaning a jury that fails to reach a verdict (with the result that a mistrial is declared and the case can be retried), is especially likely in contexts, whether criminal or civil, where the unanimity of the jurors is required. This result, though not without its defenders, is widely thought in principle to threaten the pursuit of justice: see the discussion in K.S.KLEIN and T.D.KLASTORIN, *Do Diverse Juries Aid or Impede Justice?*, *Wisconsin Law Review* (1999), pp.553-569.

<sup>38</sup> See, for example, STEINWENTER, *Rhetorik und römischer Zivilprozeß*, *op.cit.*, p.85; A.WACKE, *Zur Beweislast im klassischen Zivilprozeß: Giovanni Pugliese versus Ernst Levy*, *ZRG* 109 (1992), p.443 n.90; KASER and HACKL, *Das römische Zivilprozessrecht*, *op.cit.*, p.358. See also M.PEACHIN, *Iudex Caesaris: Deputy Emperors and the Administration of Justice during the Principate*, Stuttgart 1996, pp.33-65 generally on *imperitia* and its implications in the administration of justice. MAYER-MALY, *Iurare sibi non liquere*, *op.cit.*, pp.353-354 argues that it was precisely the prospect of amateurish (or worse) judges that made the verdict of *non liquere*, accomplished under oath, advisable as an option.

<sup>39</sup> On the autonomy of law at Rome in this context, see NÖRR, *L'esperienza giuridica*, *op.cit.*, p.2166, with literature. See in particular FRIER, *The Rise of the Roman Jurists*, *op.cit.*, pp.184-196.

<sup>40</sup> It was evidently considered socially responsible for those involved in deciding cases to seek expert advice, and not just on legal points: see Pliny 1.10; Gell. 12.13. Ideally, and, as far as we can tell, typically as well, the *consilium* was composed of men distinguished by rank, probity, forensic experience ripening into expertise, as well as ties of friendship with the *iudex* who chose them. At any rate, the description seems to fit the *consilium* in this case. Their counsel offered the judge and his decision a certain authority, legitimacy, and sometimes political cover. See the useful discussion by M.DUCOS, *Le juge et le consilium*, in P.DEFOSSE, (ed.), *Hommages à Carl Deroux* 3, Brussels 2003, pp.460-469. It defies belief that many *iudices* rejected the opinion, especially the unanimous opinion, of their *consilia*, and it is not least in this respect that Gellius' behavior emerges as idiosyncratic.



suggestion that an inexperienced and exceptionally diligent finder of fact might emerge as no less problematic than an inexperienced and lazy one. But no matter what specialists in the law may have thought (or may still think) about Gellius' performance in this case, it is a not unlikely outcome of a series of cultural and political choices made long beforehand by the Romans about how to manage their system of justice<sup>41</sup>.

There is, moreover, no indication that Gellius acted inappropriately as a judge in issuing this verdict, under oath, precisely for the reasons he gives<sup>42</sup>. Here it is important to make a distinction, not in order to defend, justify, or excuse his decision, but instead in order to attempt to understand it better. The case turns not so much on the issue of the burden of proof, as is sometimes thought<sup>43</sup>, but on that of the standard

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<sup>41</sup> For an argument that Gellius is concerned to point out the inadequacies of various sources of authority, and this in a satirical manner, see KEULEN, *Gellius the Satirist*, *op.cit.*, pp.175-178, pp.221-229. One notes that in this episode he first rejects the authority of the jurists, in the form of the commentaries by Masurius Sabinus and others, then that of the rhetoricians, in the form of the verdict suggested by the trial lawyers on his *consilium*, and finally that of the philosophers, in the form of the advice given by Favorinus. So he achieves a "triangulation" represented by the *mediocritas* he asserts for himself, in a paradoxically self-deprecating assertion of moral superiority: see above.

<sup>42</sup> DE FRANCISCI, *La prova giudiziale*, *op.cit.*, pp.602-603 expresses contempt for the verdict, but concedes it was within the ambit of the *iudex privatus*. NÖRR, *L'esperienza giuridica*, *op.cit.*, pp.2168-2170 evinces serious misgivings over the decision, though in the end he accepts that Gellius did not act wrongly - character and reputation were legitimate elements in forming a judicial verdict. This is the dominant opinion; see, for example, SCEVOLA, *La responsabilità del iudex privatus*, *op.cit.*, p.238. For an overall defense of Gellius, see L.HOLFORD-STREVEN, *Aulus Gellius: An Antonine Scholar and His Achievement*, (Rev. Ed.), Oxford 2003, p.295. In the final analysis, the finder of fact was not bound by fixed rules but instead operated with some guidelines regarding the standard of proof that were rather loose at that: NÖRR, *op.cit.*, pp.2171-2172, and below.

<sup>43</sup> See H.LÉVY-BRUHL, *Recherches sur les actions de la loi*, Paris 1960, pp.216-219 and V. GIUFFRÉ, *Necessitas Probandi: Tecniche processuali e orientamenti teorici*, Naples 1984, pp.135-153, who, while they have very different ideas on the existence of a burden of proof, fail to distinguish this from the standard of proof. See also POLARA, *Autonomia ed indipendenza del giudice*, *op.cit.*, pp.344-347, pp.355-362, pp.368-374 and SCEVOLA, *La responsabilità del iudex privatus*, *op.cit.*, pp.377-388, who attempt to escape from the difficulty by arguing for an historical development, meaning that the judge in the formulary procedure was free to ignore the rules governing the burden of proof but the judge in the *cognitio* was absolutely bound by them, certainly by the time of the Severans. In my view, this both exaggerates the freedom enjoyed by the first and the constraints placed upon the second. The trial lawyers on Gellius' *consilium* may have been guilty of conflating the two concepts, or

of proof, where the *iudex* enjoyed much greater discretion. It has been decisively demonstrated that the Roman courts in the classical period operated on a theory of burden of proof that placed this in principle on the plaintiff, who must prove his or her claim, while shifting it to the defendant in some circumstances, such when he or she raises an affirmative defense<sup>44</sup>. This makes it all the more important to recognize the distinction between such rules and those, evidently much looser, for the standard of proof, which has implications that are especially relevant for the Roman system in general and for our passage in particular<sup>45</sup>.

The rules for the burden of proof represent an obvious attempt to manage capability problems that are routine in nature, or at least predictable. They play a vital role in reducing legal uncertainty<sup>46</sup>. In a modern context that does not allow for verdicts of *non liquere* this means that the two sets of rules would typically be reconciled so that, whether the standard were beyond a reasonable doubt, preponderance of the evidence, prevailing probability, or any other, the burden of proof falls on the plaintiff; if he or she fails to meet this, the defendant is acquitted. Gellius, however, is able to view the contrast presented by the lack of evidence for the loan presented by the plaintiff with the

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they perhaps felt that they could and should make a choice between two competing versions of the facts at issue, and so chose the version that seemed more probable to them, which is not quite the same thing. POLARA (*op.cit.*, pp.344-347) holds that the freedom of a *iudex* to issue a verdict of *non liquere* derived from the *formula*, and in particular from the verbs *paret/non paret*, which he analogizes to *liquet/non liquet*: somehow, on his view, they must be equivalent and at the same time mean something slightly different. But the freedom granted by the *formula* better explains the broad scope of discretion *iudices* enjoyed with respect to the standard of proof than the constraints imposed on them by the rules for the burden of proof. The important thing is to draw a clear distinction between the two in this case.

<sup>44</sup> This is the view sustained persuasively against ERNST LEVY by G.PUGLIESE, *L'onere della prova nel processo romano per formulas*, in *Scritti giuridici scelti* 1, Naples 1985, pp.178-252 (= RIDA<sup>3</sup> 3 [1956], pp.349-422). It has been defended, with great force and nuance of argument, by WACKE, *Zur Beweislast*, *op.cit.*, pp.411-449. For a recent discussion, with bibliography, see BASILE, *Onere della prova*, *op.cit.*, pp.495-496, pp.510-513. For another view, see D.-A.MIGNOT, *Les obligations du juge et de l'arbitre dans le cadre de la procédure formulaire d'après les témoignages de Pline le Jeune et d'Aulu-Gelle*, DHA 34.2 (2008), esp. p.86 n.17.

<sup>45</sup> For this distinction in the Roman context, see PUGLIESE, *L'onere della prova*, *op.cit.*, pp.243-245; WACKE, *Zur Beweislast*, *op.cit.*, pp.445-446; cf. pp.436-437; more generally, see M.TARUFFO, *Rethinking the Standards of Proof*, *American Journal of Comparative Law* 51.3 (2003), pp.672-673.

<sup>46</sup> See the comments by WACKE, *Zur Beweislast*, *op.cit.*, p.445.

dramatic difference in the characters of the litigants as signifying not that the plaintiff has failed to prove his case, but that the contradictions in the evidence are so great that he cannot make sense of it<sup>47</sup>. In favor of this argument may be the fact that if the case were all that obviously - to the Roman mind - pitched in favor of the defendant it ought to have been refused by the Praetor in the first place and not referred to a *iudex*<sup>48</sup>. By itself, it suggests that the Romans may not have viewed the *non liquet* verdict, as a general capability problem, in quite the same light as we might regard it.

A similar point holds for this particular invocation of the verdict of *non liquere*. Some Romans might have sympathized with Gellius' assertion of ethical principles against a rise in the authority of legal norms and of legal professionals that was especially characteristic of the period in which he wrote<sup>49</sup>. A few perhaps might have even agreed that in principle at least this was a question of morality, not law<sup>50</sup>,

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<sup>47</sup> In this regard Gellius conforms to Hadrian's instruction, given in a rescript, that finders of fact not rely on only one type of evidence: Call. (4 *cogn.*) D.22.5.3.2. Although it is far from clear that a *iudex privatus* would have been bound by this rule at this date, the content of the Hadrianic rescript reported by Gai.1.7 suggests that this was at least possible.

<sup>48</sup> See WACKE, *Zur Beweislast*, *op.cit.*, p.436.

<sup>49</sup> Recent studies have dated the publication of the *Noctes Atticae* to just before or just after the death of Marcus Aurelius in 180: HOLFORD-STREVENSON, *Aulus Gellius*, *op.cit.*, pp.18-21; KEULEN, *Gellius the Satirist*, *op.cit.*, pp.320-321. The trial itself, which most scholars believe to have been actual, and not fictional, is strictly undatable, falling at some point in the decades preceding publication. Gellius describes himself as *adulescens* at the time of his appointment to the jury panels (14.2.1) and refers to his youth in the context of the verdict (*mea aetas*: 25), suggesting that the trial followed soon after (see also *tunc*: 3). If we accept 125-128 for the approximate date of his birth (see HOLFORD-STREVENSON, *op.cit.*, p.16) and age 25 or slightly older for his enrolment in the *album iudicum* (see PARICIO, *Sobre la administración*, *op.cit.*, p.92) we can date the trial to the early to mid 150s. But the date of publication is more important for the arguments made in the text.

<sup>50</sup> See NÖRR, *L'esperienza giuridica*, *op.cit.*, p.2160; KEULEN, *Gellius the Satirist*, *op.cit.*, p.226. One wonders whether Gellius does not by his verdict intend an oblique comment on the jurists' recognition of the validity of a contract independently of any requirements for proof. Legal doctrine here had the potential to create serious capability problems that lie at the heart of Gellius' concerns as a *iudex*. To mitigate these, ordinary Romans seem to have routinely overlaid contracts for loans (i.e., *mutua*, as well as other types of agreement) with stipulations, evidently to provide the creditor a choice of liability (and thus of suit), and then reduced both the loan agreements and the stipulations to writing, to judge from the evidence of the archive of the Sulpicii: see TPSulp. 50, 51, 52, 53, 54, 55, 56 (a *fideipromissio* in place of a *spensio*), 57, and E.A.MEYER, *Legitimacy and Law in the Roman World: Tabulae in*

whatever the views of sundry jurists and trial lawyers, not to say philosophers, to the contrary.

That was most likely not the end of the case. The Praetor, upon plaintiff's request, would have appointed another *iudex privatus* and, if one had to speculate, the defendant probably emerged victorious in the end<sup>51</sup>.

The legal texts that raise potential capability problems are indeed numerous, so I am forced to be selective. The principal legal text I would like to discuss in this context concerns the recognition of the rights of *patria potestas* and the related grant of two interdicts, the first for production of a child in court, that *de liberis exhibendis*, and the second for custody of the child in question, that *de liberis ducendis*<sup>52</sup>. Proceedings took place before the Praetor, so *in iure*<sup>53</sup>.

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*Roman Belief and Practice*, Cambridge 2004, pp.150-152; P.GRÖSCHLER, *Die Konzeption des Mutuum cum Stipulatione*, TR 74 (2006), pp.261-287; É.JAKAB, *TPSulp. 48 e 49: Contratti e operazioni bancarie a Puteoli*, in *Fides Humanitas Ius: Studi in onore di Luigi Labruna* 4, Naples 2007, pp.2595-2621 for recent discussion. An analogy, in terms of capability issues, may be seen with the legal rules for marriage: below.

<sup>51</sup> See NÖRR, *L'esperienza giuridica*, *op.cit.*, p.2152, p.2172.

<sup>52</sup> I am fortunate to rely on a series of important studies by A.BERGER, *Interdictum*, RE 9.2 (1916), cols.1609-1707; L.CAPOGROSSI COLOGNESI, *Interdetti*, ED 21 (1971), pp.901-928; A.M.RABELLO, *Sui mezzi concessi al paterfamilias per il libero esercizio della patria potestas in diritto romano classico*, in A. WATSON (ed.), *Daube Noster: Essays in Legal History for David Daube*, Edinburgh 1974, pp.265-288; A.M.RABELLO, *Effetti personali della patria potestas I: Dalle origini al periodo degli Antonini*, Milan 1979, pp.259-292; A.TORRENT, *Interdicta de liberis exhibendis item ducendis y cognitio pretoria*, Index 36 (2008), pp.425-460. The reader is referred to these studies for the history and typology of the interdicts, various technical details not relevant here (including other means of asserting *potestas*), and the scholarship, with particular reference to assertions of interpolation in the texts under discussion, about which these authors for the most part display skepticism, certainly over matters of substance. The now dominant opinion is that these were two distinct interdicts, but even this has been doubted: RABELLO, *Sui mezzi concessi*, *op.cit.*, p.270; TORRENT, *op.cit.*, p.425, p.429, pp.445-446; cf. O.LENEL, *Das Edictum Perpetuum: Ein Versuch zur seiner Wiederherstellung*, (3<sup>rd</sup> ed.), Aalen 1964 (= Leipzig 1927), p.488; A.BISCARDI, *La protezione interdittale nel processo romano*, Padua 1938, pp.41-42. For an entirely different view on the relationship between the two, see M.MARRONE, *Actio ad exhibendum*, AUPA 26 (1957) esp. p.500 n.151. For more on interdicts, see D.DAUBE, *Concerning the Classifications of Interdicts*, in D.COHEN and D.SIMON (eds.), *David Daube: Collected Studies in Roman Law* 1, Frankfurt am Main 1991, pp.403-446 (= RIDA<sup>3</sup> 6 [1951], pp.23-78); S.RICCOBONO, *Interdicta*, NNDI 8 (1962), pp.792-798; E.SACHERS, *Exhibere*, RE Suppl. 10 (1965), cols.191-221; M.LEMOSSE, *Ad exhibendum*, Iura 34 (1983), pp.67-73.

Let me begin by pointing out some limitations important for understanding our text. First, in classical law only the holder of *patria potestas*, as far as we know, could request these interdicts<sup>54</sup>. Second, neither interdict, it seems, was granted against the child him- or herself. A child challenging a claim of *patria potestas* was heard without the order for production and the order for custody would only be granted against someone sheltering him or her, that is, a third party willing to assert custody, not against the child him- or herself<sup>55</sup>. An adult, or perhaps even an older minor, could evade the custody of a *pater familias* if he or she chose, even if said *pater* had a recognized right to paternal power<sup>56</sup>.

If a mother, following a divorce, was deemed to have a superior claim to custody, the father's attempt to secure this for himself could be denied without prejudice to his assertion of *patria potestas*, a principle established by Antoninus Pius in a court case and confirmed by Marcus Aurelius and Septimius Severus in rescripts<sup>57</sup>. This was

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<sup>53</sup> RABELLO, *Sui mezzi concessi*, *op.cit.*, p.270; TORRENT, *Interdicta*, *op.cit.*, p.438. It has been debated whether the Urban Praetor or the Praetor with jurisdiction over suits for freedom (*causae liberales*) is meant: RABELLO, *op.cit.*, p.266, p.268, p.270; TORRENT, *op.cit.*, p.427. One might perhaps ask whether Ulpian means to refer in fact to any official with civil jurisdiction: below.

<sup>54</sup> BERGER, *Interdictum*, *op.cit.*, col.1641. For later classical law (a possible change) and beyond (a certain change), see below in the notes.

<sup>55</sup> See Paul. D.22.3.8; Ulp. D.43.30.3.3. The usual explanation is that the father could assert his *patria potestas* in other ways. See RABELLO, *Sui mezzi concessi*, *op.cit.*, pp.265-266, p.269, pp.273-274; RABELLO, *Effetti personali*, *op.cit.*, pp.259-262; P.VOCI, *Storia della patria potestas da Augusto a Diocleziano*, in *Studi di diritto romano* 2, Padua 1985, pp.397-463 (at pp.445-448) (= *Iura* 31 [1980], pp.37-100); A.DE FRANCESCO, *Giudizio alimentare e accertamento della filiazione*, in C. CASCIONE and C. MASI DORIA (eds.), *Diritto e giustizia nel processo: Prospettive storiche, costituzionali, e comparatistiche*, Naples 2002, pp.106-108; TORRENT, *Interdicta*, *op.cit.*, p.427. Africanus D.43.30.4 appears to allow an exception where sizeable property (an inheritance) was at issue. For another view of this text, see R.MARTINI, *La cognitio praetoria in tema di tutela della patria potestas*, SDHI 39 (1973), pp.521-522. Ant. C.8.8.1 (212) appears to support my view of it (an interdict is possible against a son with significant property). For the general point, it does seem that a protection exclusively designed to protect the interest of the *pater* was transformed into a protection of the child in the classical period: below.

<sup>56</sup> Venul. D.43.30.5, with RABELLO, *Sui mezzi concessi*, *op.cit.*, p.276.

<sup>57</sup> Ulp. D.43.30.1.3; Ulp. D.43.30.3.5 (the divorce is implied). Presumably custody of a minor or perhaps a very young adult was at issue; see Ulp. D.43.30.3.6, which discusses arrangements for temporary custody that can involve not only *feminae* and *praetextati* but those described as *proxime aetatem praetextati accedere* ("those who are nearest in age to a *praetextatus*"), and so defined as having already reached

accomplished in part through a procedural change, the grant of an *exceptio* to the mother, evidently now possible in the context of either interdict, though Pius made a substantive innovation as well<sup>58</sup>. Pius was also responsible, again in a court decision, for ending the unabridged power of a *pater familias* to dissolve the happy marriage of his *filia* by claiming custody of her with these interdicts<sup>59</sup>. The father's request was apparently again met with an *exceptio*, arguably

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puberty. This text mentions as custodian a third party, specifically, a respectable woman described as a *mater familias*, but presumably the point held for mothers and other custodians, such as guardians, at least in exceptional cases. Evidently, the mother had to have (informal) custody of the child at the start, that is, she was not entitled to request the interdict for production if the father already enjoyed custody: see Paul. D.47.2.38pr. (the jurist denies a mother a suit on theft of a child) and L.CAPOGROSSI COLOGNESI, *Patria Potestà (diritto romano)*, ED 32 (1982), p.246. For a different view, see M.G.ZOZ, *Scioglimento del matrimonio: Riflessioni in tema di affidamento e mantenimento dei figli*, Iura 56 (2006-2007), pp.127-129.

<sup>58</sup> We have no direct evidence on the law before Pius, but it seems that almost anyone with a notionally valid claim to *potestas* received the interdict for production and, if he could validate this assertion, in virtually (if not actually) all cases that for custody as well. See, for example, A.MASI, *Interdictum de liberis ducendis (exhibendis)*, NNDI 8 (1962) 801 (rightly, in my view) interpreting Ulp. D.43.30.1.2. See also Ulp. D.25.4.1.1 and R.BONINI, *Criteri per l'affidamento della prole dei divorziati in diritto romano*, in *Problemi di storia delle codificazioni e della politica legislativa*, Bologna 1973, p.7. The invention of the *exceptio* allowed a mother with an obviously strong claim to defeat an application for the first interdict, that for production, thus frustrating the *pater's* attempt to assert custody on the front end. Even when this did not succeed, her hand was strengthened by the grant of an *exceptio* in the context of the second interdict, for custody. Beyond this procedural innovation, Pius established a substantive ground for denying a *pater's* claim to custody, namely, his "depravity" (*nequitia*): Ulp. (71 *ad edictum*) D.43.30.3.5. By the time of the Severans, this standard had evidently broadened into that of "a very convincing reason" (*iustissima causa*): Ulp. (71 *ad edictum*) D.43.30.1.3. So BONINI, *op.cit.*, pp.9-15, who argues on the basis of Dioclet., Maxim. C.5.24.1 (293 or 294), which allows custody to be allotted between father and mother on the basis of the children's gender, that the standard was by then even more flexible, and assignment to the mother more routine.

<sup>59</sup> Ulp. D.43.30.1.5; PS 5.6.15. I view the denial of custody as tantamount to denial of the privilege of ending the marriage through termination of *pater's* consent, but see RABELLO, *Sui mezzi concessi, op.cit.*, p.273 for another view. Paul. FV 116 suggests at most a juristic controversy on the matter. Some believe that this was not an innovation of Pius': see A.D'ORS and X.D'ORS, *Socer nuntium mittens*, in *Mélanges offerts à Jean Dauvillier*, Toulouse 1979, p.606, with literature; J.URBANIK, *D. 24.2.4: ...Patrem tamen eius nuntium mittere posse: L'influsso della volontà del padre sul divorzio dei sottoposti*, in T.DERDA ET AL. (eds.), *Εὐεργεσίας χάριν: Studies Presented to Benedetto Bravo and Ewa Wipszycka by Their Disciples*, Warsaw 2002, pp.293-336 (on the basis of provincial evidence that in my view is not probative for this point); ZOZ, *Scioglimento del matrimonio, op.cit.*, pp.127-130.

for the same reason<sup>60</sup>. In all of this we can see a tendency, evidently a tendency that was on the rise in the high to late classical period, to separate *potestas* from custody when there was reason to do so, namely, protection of the best interests of the child<sup>61</sup>.

Before pursuing this point further, a few brief remarks about the procedure seem indispensable. As with other interdicts, the Praetor was not obliged to verify in their totality the arguments put forward by the parties<sup>62</sup>. His order was designed to protect a state of fact, and as such it had a certain provisory or non-definite aspect to it. The interdict was in a sense temporary or time-limited, its effectiveness enduring unless and until some definitive judgment was reached or the passage of time rendered it otiose<sup>63</sup>. In the case of our interdicts, that would occur at the latest when the child whose status was in dispute eventually reached a state of *sui iuris* adulthood, that is, without a living *pater familias*. As we will see, the advent of adulthood is precisely when the jurists thought it best to determine an award of *potestas* when this was disputed under certain conditions. The provisory quality of the interdicts did not mean of course that a grant of one would necessarily go unchallenged.

Once a definitive determination of *potestas* - as opposed to an

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<sup>60</sup> The resort to an *exceptio* in the context of interdicts has occasioned a lively discussion in the scholarship: see, for example, BERGER, *Interdictum*, *op.cit.*, cols.1688-1689; G.GANDOLFI, *Contributo allo studio del processo interdittale romano*, Milan 1955, pp.66-76; CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, p.912; N.PALAZZOLO, *Potere imperiale ed organi giurisdizionali nel II secolo d.C.: L'efficacia processuale dei rescritti imperiali da Adriano ai Severi*, Milan 1974, p.172; RABELLO, *Sui mezzi concessi*, *op.cit.*, pp.271-272; RABELLO, *Effetti personali*, *op.cit.*, pp.279-282; A.BISCARDI (R.MARTINI ed.), *La tutela interdittale e il relativo processo: Corso di lezioni 1955-1956*, Rivista di diritto romano 2 (2002), pp.48-52; BASILE, *Onere della prova*, *op.cit.*, pp.497-498, pp.514-515. In these cases, it was probably the invention of the Antonine jurists, aimed at reconciling the denial of custody in these cases to a true *pater familias* with the legitimacy of *patria potestas* itself. For another instance in which the claim of a true *pater* might be thwarted by an *exceptio*, see below.

<sup>61</sup> For a discussion, see TORRENT, *Interdicta*, *op.cit.*, pp.441-445. Concern with the best interests of the child as a principle may be traced to Hadrian and earlier in another context: see below.

<sup>62</sup> G.I.LUZZATTO, *Il problema d'origine del processo extra ordinem I: Premesse di metodo - I cosiddetti rimedi pretori*, Bologna 1965 (repr. 2004), pp.187-192; CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, pp.901-902, p.906, pp.912-914; TORRENT, *Interdicta*, *op.cit.*, pp.437-438.

<sup>63</sup> See BERGER, *Interdictum*, *op.cit.*, cols.1611, 1691; CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, pp.901-902, pp.914-915; TORRENT, *Interdicta*, *op.cit.*, p.449, p.456.

award of custody - was made, the matter could not be revisited. Remarkably, Ulpian informs us that even if the issue of *patria potestas* has been adjudged wrongly, specifically with the result that the child is declared not to be in anyone's power, the true *pater* finds his request for an interdict met with the *exceptio rei iudicatae*<sup>64</sup>. This result is all the more striking if we reflect that, in all of these cases, we have very much to do with a zero-sum game<sup>65</sup>. In the words of David Daube, “[i]n antiquity, the party who is out is out; no legal guarantee of access, shared holidays or the like<sup>66</sup>”. Proving one's title to *potestas* must have been difficult in some cases, a point repeatedly recognized in the modern scholarship<sup>67</sup>. One can easily see how capability problems and their solution might play an important role in the grant of these interdicts.

These reflections help clarify that we are witnessing an historical development concerning these interdicts that originates in the

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<sup>64</sup> Ulp. D.43.30.1.4, with RABELLO, *Sui mezzi concessi*, *op.cit.*, p.271. This is consistent with the use of the *exceptio* in the cases discussed above, though this instance is probably earlier in origin. The holding is another illustration of the degree to which the courts were dependent on representations by the litigants for information vital to their decisions. While Ulpian mentions only the case of someone being declared *sui iuris* in error, the same result would have obtained for an erroneous assignment of *potestas*: see DE FRANCESCO, *Giudizio alimentare*, *op.cit.*, pp.127-130, p.135; K.HACKL, *Statusurteile im römischen und im modernen Prozessrecht*, in J. SONDEL ET AL. (eds.), *Roman Law as Formative of Modern Legal Systems: Studies in Honour of Wiesław Litewski*, Cracow 2003, pp.171-175. HACKL notes an exception in cases of collusion. This held for challenges to freeborn status, where, interestingly enough, delay might be invoked in order to serve the child's best interests. Ulpian, interpreting a *constitutio* of Marcus Aurelius on rehearing cases on freeborn status where collusion has been discovered post-judgment, suggests postponing resolution until after the child reaches adulthood (at minimum): Ulp. D.40.16.2.2. This point is developed below.

<sup>65</sup> One may compare this holding with a rescript, evidently (though not securely) from Marcus Aurelius and Lucius Verus, hesitating to recognize the claims of a *pater familias* who has allowed his role to be usurped by *tutores* named in a mother's will: Divi Fratres (?) C.8.46.1 (*anno incerto*), with MARTINI, *La cognitio praetoria*, *op.cit.*, p.523.

<sup>66</sup> D.DAUBE, *Dividing a Child in Antiquity*, in COHEN and SIMON, *David Daube*, *op.cit.*, 2, pp.1097-1105 (at p.1098) (= *California Law Review* 54 [1966], pp.1630-1637). DAUBE (*op.cit.*, p.1099) explains the lack of an official interest in dividing access to the child in terms of what we might describe as capability problems. Informal arrangements may have been customary, but we know nothing about them.

<sup>67</sup> RABELLO, *Effetti personali*, *op.cit.*, p.277; TORRENT, *Interdicta*, *op.cit.*, p.440. For difficulties in proving freeborn status, see, for example, PUGLIESE, *La preuve*, *op.cit.*, p.383.



Antonine period, develops under the Severans, and continues in the post-Severan period<sup>68</sup>. Before the middle of the second century, specifically the reign of Antoninus Pius, these two interdicts were used routinely, or even exclusively, as far as we can tell, to protect the interests of the *pater familias*<sup>69</sup>. The strongly patriarchal interests represented by *patria potestas* meant that, more or less inevitably, questions of custody were decided in his favor. In the mid-second century, however, we begin to discern a change, to all appearances grounded in a realization that children, particularly those of “tender years”, were often best raised by their mothers, that some parents were unfit to act as custodians for their children, that children themselves may have had a strong preference in the matter, and, above all, that the “best interests of the child” ought to be closely observed and were at times not satisfied by automatic preference of one parent over another - a powerful concept that refocused attention

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<sup>68</sup> For the Antonine origins, see above. For later developments see MARTINI, *La cognitio praetoria*, *op.cit.*, p.524; RABELLO, *Sui mezzi concessi*, *op.cit.*, p.283, p.288; RABELLO, *Effetti personali*, *op.cit.*, p.276, p.290, p.292. Under Diocletian, at the latest, a mother or a husband could request both interdicts: Dioclet., Maxim. C.5.4.11 (*anno incerto*), C.8.8.2, 3 (both 293); Hermogenian. D.43.30.2 (the husband perhaps, but not certainly, through a new pair of interdicts that were modeled on the ones under discussion: see LENEL, *Das Edictum Perpetuum*, *op.cit.*, p.488 n.4; M.LEMOSSE, *Les réformes procédurales de Marc-Aurèle*, Labeo 36 (1990), p.10, who dates them early in the reign of Marcus Aurelius). Though it does not mention an interdict, the holding of Divi Fratres C.5.25.3 (162), which concerns a claim of child support (and so *potestas*) raised by a mother against an alleged father, makes it seem possible, though unproven, that a mother might request the interdict for production (and of course that for custody as well) under the high to late classical law (here the mother evidently already has informal custody). See also Alex. C.5.49.1 (223) and Dioclet., Maxim. C.5.49.2 (294), which concern awards of custody (to a mother or others in the first, to a grandmother or paternal uncle in the second), though with no mention of resort to an interdict, presumably because there is no claim of *potestas* in play.

<sup>69</sup> It is possible to theorize a different narrative for these interdicts, namely, that they were originally introduced for a reason parallel to that which motivated the introduction of the possessory interdicts. On this theory, just as the latter were introduced, at least in part, to create a set of rights for possessors of property that were distinct from those accruing to owners, the former from the start served to create a set of rights for the children distinct from those accruing to *patres familias*. Unfortunately, the parallel is not exact, and evidence is utterly lacking to support such a view, so the version given in the text is to be preferred. Worth noting too is that the purpose of the possessory interdicts was not in every case free from controversy: FRIER, *The Rise of the Roman Jurists*, *op.cit.*, pp.171-183.

on the child rather than on the parents<sup>70</sup>.

As a consequence of these developments, custody was no longer awarded automatically, or virtually so, to a recognized *pater familias*. Instead it might be granted to a mother or even, in certain cases where the status and identity of the *pater familias* were in doubt, to a guardian, as we shall see. All the same, it should be noted that, at least in the classical period, in most cases the holder of *patria potestas* would almost certainly have obtained custody after raising a challenge and a *pater familias* already in possession of it would have been difficult, at the very least, to displace.

The grant of custody was firmly in the grip of the Praetor and other officials with civil jurisdiction<sup>71</sup>. A hearing on the facts might be held before and/or after the grant of the first interdict, on production<sup>72</sup>. Both parties to the dispute were supposed to be present<sup>73</sup>. This requirement and resort to the interdict on production itself were

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<sup>70</sup> Consistent with all of this is the termination of the unrestricted privilege, to all appearances enjoyed by a *pater familias* precisely until the reign of Pius, of ending the happy marriage of his daughter-in-power: above. These developments may have been in part inspired by a weakening of the legally-recognized authority of the *pater familias* in other respects, a trend that traces its roots to developments in the reign of Hadrian and before: see RABELLO, *Sui mezzi concessi*, *op.cit.*, pp.274-276; VOCI, *Storia della patria potestas*, *op.cit.*, pp.412-432; DE FRANCESCO, *Giudizio alimentare*, *op.cit.*, pp.127-130; A.TORRENT, *Patria potestas in pietate non atrocitate consistere debet*, Index 35 (2007), pp.159-174.

<sup>71</sup> This means above all Praetors and provincial governors: BERGER, *Interdictum*, *op.cit.*, col.1610; CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, p.904, p.915. On developments in the period of the later classical law suggesting a broadening of official authority regarding interdicts and similar matters, see A.A.SCHILLER, *The Jurists and the Prefects of Rome*, BIDR n.s. 16-17 (1953), pp.60-97 (prefects in Rome); T.SPAGNUOLO-VIGORITA, *Imperium mixtum: Ulpiano, Alessandro e la giurisdizione procuratoria*, Index 18 (1990), pp.113-166 (procurators); F.NASTI, *Un nuovo documento dalla Siria sulle competenze di governatori e procuratori provinciali in tema di interdetti*, Index 21 (1993), pp.365-380 (procurators with specific reference to interdicts); F.ARCARIA, *Oratio Marci: Giurisdizione e processo nella normazione di Marco Aurelio*, Turin 2003 (various reforms under Marcus Aurelius). The picture of confusion, opportunism, and rapid development drawn for this period by PEACHIN, *Iudex Caesaris*, *op.cit.*, pp.51-65 has its attractions. The evidence of the *lex Irnitana* for the (albeit limited) competence of municipal officials regarding interdicts suggests this broadening may well in fact have had earlier roots: see D.NÖRR, *Zum Interdiktenverfahren in Irni und anderswo*, in *Iuris Vincula: Studi in onore di Mario Talamanca* 6, Naples 2001, pp.73-117.

<sup>72</sup> See RABELLO, *Sui mezzi concessi*, *op.cit.*, pp.269-270, and below.

<sup>73</sup> CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, p.904, p.910.

obviously designed to address capability issues concerning the identity and status of the child<sup>74</sup>. Like other interdicts, those for production and custody were designed to protect someone's entitlement to a right, originally the unitary right of *patria potestas* and custody, as we have noted. Once these two came to be regarded as separable, it seems that, whereas earlier the question of title to *patria potestas* was routinely delegated to a private finder of fact<sup>75</sup>, by the time of the Antonines or at any rate by the Severan period the Praetor himself might decide this issue, just as he decided whether to grant either of the two interdicts<sup>76</sup>. The difference was that the proceeding over *patria potestas* was not of the same summary nature and the decision was, by and large, final.

To be clear, there was the possibility of conducting three separate proceedings in connection with these interdicts<sup>77</sup>. One was a hearing

<sup>74</sup> See CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, p.905.

<sup>75</sup> This seems to have been the routine procedure when an interdict was contested through an *actio ex interdicto*: CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, p.919. There is occasional language in the sources relevant to our interdicts that suggests its existence apart from this eventuality. See Ulp. (71 *ad edictum*) D.43.30.1.4 (“*iudicatum*” occurs three times; see also “*exceptio rei iudicatae*”); Iul.-Ulp. (71 *ad edictum*) D.43.30.3.4 (*lis* occurs three times, evidently as a synonym for *cognitio*, which points to the Praetor's new role). How do we reconcile such terminology with a change in procedure in this period? It is possible that the novelty consists in the fact that the Praetor's new role was an option, so that the two procedures existed side-by-side. Or, the language may be a holdover from prior practice. The Severan jurists are known to have employed the terminology of the formulary procedure in a generic sense: see S.SEGNALINI, *L'editto Carboniano*, Naples 2007, p.161. It is less likely that, even in Julian's case, it reflects the situation before the change in procedure for which I argue. Ulpian evidently depends on a passage from the 49<sup>th</sup> book of Julian's *Digesta*: O.LENEL, *Palingenesia Iuris Civilis* 1, Rome 2000, (= Leipzig 1889) col.448. This part of the work - if not the whole work - dates to the period after 148: see H.FITTING, *Alter und Folge der Schriften römischer Juristen von Hadrian bis Alexander*, (2<sup>nd</sup> ed.), Halle 1908, pp.27-29; E.BUND, *Salvius Iulianus, Leben und Werk*, ANRW 2.15 (1976), p.434. In fact, the text suggests, in other key respects, that Julian was writing in the spirit of the changes introduced by Pius; he may even have played a role in their introduction, as we will see below.

<sup>76</sup> See the various considerations of CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, pp.915-916; MARTINI, *La cognitio praetoria*, *op.cit.*, *passim*; TORRENT, *Interdicta*, *op.cit.*, pp.434-435; BASILE, *Onere della prova*, *op.cit.*, pp.496-500, pp.513-517. DE FRANCESCO, *Giudizio alimentare*, *op.cit.*, p.140 proposes that the Praetor decided not the issue of status, but an obligation of maintenance that would, in her view, obtain until the question of status was resolved.

<sup>77</sup> There is a broad similarity with the procedure used in connection with the *Edictum Carbonianum*, where it perhaps emerges more clearly from the sources. First, a hearing was held as to whether to grant to the minor whose status was challenged the

of a summary nature held in order to decide whether to grant the first interdict, for production of the child. Once the child was produced before the Praetor, a second summary hearing might be held in order to decide whether to grant the second interdict, for custody, and to address the question of whether and when to hold a third proceeding, namely, a trial to determine the status of the child. It is important to note that in deliberations over the granting of interdicts plausibility ruled; in trials it was (ideally) truth<sup>78</sup>. This continued to be true, even after the change in procedure for which I argue.

Herewith our principal text<sup>79</sup>:

Iul.-Ulp. (71 *ad edictum*) D.43.30.3.4:

*Iulianus ait, quotiens id interdictum movetur de filio ducendo vel cognitio et is de quo agitur impubes est, alias differri oportere rem in tempus pubertatis, alias repraesentari: idque ex persona eorum, inter quos controversia erit, et ex genere causae constituendum est. nam si is, qui se patrem dicit, auctoritatis prudentiae fidei exploratae esset, usque in diem litis impuberem apud se habebit: is vero, qui controversiam facit, humilis calumniator notae nequitiae, repraesentanda cognitio est. item si is, qui impuberem negat in aliena potestate esse, vir omnibus modis probatus, tutor vel testamento vel a praetore datus pupillum, quem in diem litis apud se habuit, tuetur, is vero, qui patrem se dicit, suspectus est quasi calumniator, differri litem non oportebit. si vero utraque persona suspecta est aut tamquam infirma aut tamquam turpis, non erit alienum, inquit, disponi, apud quem interim puer educeretur et controversiam in tempus pubertatis differri, ne per collusionem vel imperitiam alterutrium contententium aut alienae potestati pater familias addicatur aut filius alienus patris familiae loco constitutur.*

(Ulpian, in the seventy-first book on the Edict). Julian says that whenever this interdict granting custody of a child is invoked, or when a judicial hearing is held, and the person whose status is in dispute is a minor, sometimes the matter ought to be deferred until the child becomes

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*bonorum possessio ex Edicto Carboniano*. If this was granted, a second hearing would be held to decide whether to move forward immediately with the trial that would determine the status of the minor or to defer this. See SEGNALINI, *L'editto Carboniano*, *op.cit.*, pp.176-177.

<sup>78</sup> See the useful and persuasive exposition by CAPOGROSSI COLOGNESI, *Interdetti*, *op.cit.*, pp.914-915.

<sup>79</sup> The passage has been vigorously criticized as interpolated in various parts, but the problems are at worst formal, rather than substantive, in nature: see RABELLO, *Sui mezzii concessi*, *op.cit.*, p.275, whose skepticism toward this criticism I more than fully share.

an adult, and at other times it ought to be dealt with right away. This issue should be determined on the basis of the character of the parties to the dispute and the nature of the case. For if the person claiming to be a *pater familias* is someone of proven respect, judgment, and trustworthiness, he will keep the minor child in his custody until the day the lawsuit is decided, but if the man challenging his claim is a low<sup>80</sup>, false accuser of known depravity, a hearing should be held at once. Likewise, if the person who denies that the minor child is actually in someone else's power is a man upright in every way, say, a *tutor* appointed by will or by the Praetor, he will look after his minor ward, whom he has had in his custody, until the day of the lawsuit; but if, however, the person who claims to be a *pater familias* is thought to be making a false accusation, the suit ought not to be postponed. If, to be sure, both parties are deemed to be of unsound or bad character, it will not be inappropriate, he (Julian) says, for an arrangement to be made in which the child is brought up in the temporary custody of a third party and for the dispute to be postponed until the time of majority, so that a person of independent status (a *pater familias*) not be bound over to the power of another person, nor someone else's son-in-power be granted independent status through collusion or the inexperience of either of the litigants.

The text deals with a very basic issue: the effectiveness of a father's claim to custody and how this claim was handled by Roman law when what we might describe as the best interests of the child were directly at stake<sup>81</sup>. The issue here is not paternal as against maternal custody but the claim of a notional *pater familias* against a third party, such as a guardian. The jurists, meaning here Ulpian and, through him, Julian, grapple with a succession of capability problems or litigation incapacities. These include delays, collusion and

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<sup>80</sup> SCARANO USSANI, *Caratteristiche delle persone, op.cit.*, pp.242-243 claims that the adjective *humilis* here bears an exclusively social significance, meaning literally a lower-status person. It is difficult, however, to disentangle the social from the moral implications of *humilis*. It is not impossible for a *humilis* to be wealthy, for example, though that is not necessarily the case here. The import of the word in this passage is primarily, if not exclusively, moral. In other words, we should not assume that the parties are from different social strata. For a discussion of *humilis* in legal contexts, with bibliography, see T.A.J.MCGINN, *The Legal Definition of Prostitute in Late Antiquity*, *Memoirs of the American Academy in Rome* 42 (1997), pp.82-83. For a more recent survey, see S.GIGLIO, *Humiliores*, in *Studi per Giovanni Nicosia* 4, Milan 2007, pp.149-165, not all of whose conclusions I share.

<sup>81</sup> See RABELLO, *Effetti personali, op.cit.*, pp.286-288, emphasizing substance over procedure.

inexperience on the part of the litigants, as well as the kind and quality of information available to the legal authorities in making their decision. The text makes a clear distinction between hearings on the grant of the interdict(s) and the trial that decides the issue of *potestas*; in fact, the jurists manipulate the difference between the two types of proceeding.

Even given the broad discretion enjoyed by the Praetor in these matters<sup>82</sup>, what is perhaps most striking is the degree of flexibility that this holding permits. According to Julian, the procedure followed under the interdicts *de liberis exhibendis* and *ducendis* would vary according to the circumstances. In other words, different sets of facts had different consequences at law. At least in the wake of his opinion, it would not have been unusual to defer a decision on who - if anyone - held *potestas*, and along with this a definitive grant of custody, until the child reached the age of majority, meaning of course fourteen (or so) for boys, twelve for girls. It is reasonably clear why this might be regarded as an opportune time for the issue of the child's legal status to be decided<sup>83</sup>. This time-frame would also place him or her beyond a reasonable conception of "tender years", from a more purely custodial perspective. In the end, the jurists place great weight not only, as we would expect, on the determination of who, if anyone, wields *potestas*, an issue with obvious implications for rights of ownership and inheritance, but also on deciding custody, which had important consequences for the child's lifestyle and development.

What emerges with reasonable clarity here is how jurists and public officials managed a system of temporary custody. Presumably, under the original, pre-Antonine, usage of these interdicts, custody was granted once and for all to the person determined to be the *pater familias*, and that was that<sup>84</sup>. Here we can see the influence of the new direction at work. According to the text, if the man claiming to be the father is a well-respected person, he may retain custody until the issue

<sup>82</sup> On this point, see TORRENT, *Interdicta, op.cit.*, pp.458-459.

<sup>83</sup> Elsewhere, Ulpian (D.43.30.3.6) suggests that there were situations in which the decision about *potestas* might be deferred even beyond this point, if only for a short period: see n.57 above.

<sup>84</sup> As noted above, it is possible that in extraordinary cases custody might be denied to a *pater familias* in the period before Pius' reign, but we have no information about this. One might postulate that Julian is simply restating earlier law, but such speculation seems entirely baseless to me, especially given what we know about the various legal changes surveyed in this article.

is decided at the time of the child's majority, but if he is not, or if he is challenged by a potentially false claim, the hearing should be held at once. The threat to the child's interests posed by the potentially false claim explains the need for haste. The emphasis on character and reputation is remarkable. Unless there is a perceived threat, the jurists are loathe to disturb existing custody arrangements, presumably out of a concern precisely with the best interests of the child.

The jurists here and elsewhere tend to assume that the father, that is, the *pater familias* or, perhaps, the person with the best claim to be this, has custody as a matter of course. If this is not so, a challenge is not unthinkable. We see this in the text in the case of the guardian who is challenged by a supposed *pater* who does not enjoy custody. Character and reputation play a role here too, in the sense that the same rules hold for both types of claimant, whose interests are, of course, diametrically opposed. If the man acting as *tutor* is well-respected, the jurists say the child can stay with him until the age of majority, unless the man asserting *potestas* is thought to be making a false claim. Then the matter should be decided at once. Otherwise, there is no hurry, because there is no perceived threat to the child's interests. Here again we see the distinction between custody and *potestas* that seems to have played a crucial role in some cases dating from this period<sup>85</sup>.

If both parties are deemed unsuitable for reasons of character, a third party must be found who will raise the child until decision of the matter at majority<sup>86</sup>. The justification for the delay is a concern that an erroneous decision over *potestas* might be made "through collusion or inexperience of either of the litigants"<sup>87</sup>. This suggests much about the practical limits on the ability of a finder of fact, whether a public official or a *iudex privatus*, to acquire good information about a case before him, and just how dependent he was on the representations of

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<sup>85</sup> See Ulp. D.43.30.3.5 and the other texts discussed above at nn.57-61.

<sup>86</sup> See Ulp. D.43.30.3.6, discussed in n.57 above.

<sup>87</sup> One reason why decisions over *status familiae* were to be postponed where this was otherwise advisable was because once decided, even in error, they could not be revoked: n.64 above. An exception to this principle of irrevocability, as we have seen, might have applied where collusion was detected after the fact. Ulpian does not say that this principle held true here, but, even if it did, as does not seem unlikely, collusion, as a capability problem, was better avoided in the first place than remedied after the fact - if indeed it were discovered at all.

parties to a suit<sup>88</sup>. The child's interests are protected, at least in the short term. The implicit justification for the outcome is that the passage of time may help clarify matters. The party with the worse reputation may actually have a better claim. The possibility that the two are in collusion cannot be excluded, however.

Other distortions that might be expected to erode with the passage of time arise from the inexperience of one or the other parties to the suit. Again, the dependency of the courts on the representations of the litigants plays a key role in the juristic holding. In fact, the issue could not have arisen without a lawsuit; there was no independent government agency to protect children. Further, the relationship between the determination of the facts and the application of the law seems to have been rather complex, to say the least<sup>89</sup>. The text shows that the jurists were perfectly capable of taking an interest in the facts of a case when they deemed these to be legally relevant, meaning here not just relevant to the deciding of a case but to the making of legal rules.

Another way of viewing the matter is to ask whether the option of deferring the question of status was preferred when this gave the minor a better chance of defending his or her own interests. This emerges as the principal rationale for postponing resolution of status-challenges under the *Edictum Carbonianum*, a measure dating, evidently, to the late Republic<sup>90</sup>. The *Edictum Carbonianum* granted a particularly defined mode of *bonorum possessio* (under any of the three basic categories, meaning *contra tabulas*, *sine tabulis*, and even, though perhaps not from the start, *secundum tabulas*) to a minor whose claim to rank among the *liberi* (as defined by this measure) of a decedent *pater familias* was impugned (and who had not been validly disinherited). This grant of *bonorum possessio* was designed to safeguard the property in question against dissipation, to provide

<sup>88</sup> This is a point of general application, especially (but not only) regarding the grant of interdicts: BERGER, *Interdictum*, *op.cit.*, col.1611. Our text provides a striking illustration all the same.

<sup>89</sup> See WIEACKER, *Römische Rechtsgeschichte*, *op.cit.*, p.667 n.27; KASER and HACKL, *Das römische Zivilprozessrecht*, *op.cit.*, p.357.

<sup>90</sup> Our understanding of this measure has been considerably enhanced by the recent monograph of SEGALINI, *L'editto Carboniano*, *op.cit.*, pp.197-200 (for the date). I remain in her debt for much that follows. See also S.SEGALINI, *Sui rapporti tra l'editto Carboniano ed i tre tipi fondamentali di bonorum possessio*, Index 36 (2008), pp.127-158.



material support for the child, and to avoid prejudice to the latter's pursuit of his or her interests at law<sup>91</sup>. It was from an early date routine, and at all times possible, to defer consideration of the issue of status in order, above all, better to enable the minor to defend his or her interests as an adult, even as a young adult<sup>92</sup>.

There is no reason to believe that a similar broad concern was not in play with the postponement of consideration of the issue of status in the context of our interdicts, insofar as it did not conflict with the motives for expediting the issue given in the principal case. It is true that, to judge from the sources, questions of the character of the litigants seem to have intruded less often with the *Edictum Carbonianum*, given the sheer amount of juristic discussion that has survived on this subject, than we might be led to expect from our principal text on the interdicts<sup>93</sup>. If this is indeed a fair reflection of reality, it might be explained at least in part by the fact that the adversaries of the minor in the case of the *Edictum Carbonianum*, meaning those who made the challenge to his or her status, were typically actual or potential heirs under a will or on intestacy with a notional claim to the estate or part of it, whose interests were to some extent protected by the very same measure until resolution of the status-question. Other, more tangible, differences with the regime on the interdicts are that with the *Edictum Carbonianum* the *pater familias* was as a rule deceased<sup>94</sup>, and we find a strong, explicit concern with property, meaning the estate of the decedent, aiming both to prevent its material degradation and to protect the minor's interests in it at law.

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<sup>91</sup> See Scaev. D.5.2.20. One particular advantage enjoyed by the minor was that in the determination of status, provided a guaranty was offered, he or she played the role of defendant, meaning that the burden of proof fell on the adversary impugning that status: Paul. D.37.10.6.6, with SEGNALINI, *L'editto Carboniano, op.cit.*, p.174.

<sup>92</sup> On the question of a connection between postponement and the minor's ability to defend his or her interests, see Ulp. D.37.10.1.11; Ulp. D.37.10.3.5. Concern with relying on a *tutor* either to undertake necessary litigation or to authorize his ward to do so might lead to the appointment of a *curator*, but had perhaps broader implications: see SEGNALINI, *L'editto Carboniano, op.cit.*, p.21, p.171.

<sup>93</sup> But see Iul. D.25.4.2; Ulp. D.37.9.1.14 (reporting a rescript of Hadrian; see also Ulp. D.43.4.3.3); Iul.-Ulp. D.37.10.1.5 (reporting a rescript of Antoninus Pius); Ulp. D.37.10.3.4; and perhaps Pap. D.38.2.42.2.

<sup>94</sup> See, however, Ulp. D.37.10.1.4.

The strongest link, in fact, between the regime on the interdicts for production and custody and that for the *Edictum Carbonianum* lies precisely with the question of deferring resolution of a challenge to a minor's status until adulthood. With regard to the latter measure, Ulpian reports an important innovation made by Hadrian<sup>95</sup>:

Ulp. (41 *ad edictum*) D.37.10.3.5:

*...divus etiam Hadrianus ita rescripsit: "Quod in tempus pubertatis res differri solet, pupillorum causa fit, ne de statu periclitentur, antequam se tueri possint. ceterum si idoneos habeant, a quibus defendantur, et tam expeditam causam, ut ipsorum intersit mature de ea iudicari, et tutores eorum iudicio experiri volunt: non debet adversus pupillos observari, quod pro ipsis excogitatum est, et pendere status eorum, cum iam possit indubitatus esse."*

(Ulpian in the forty-first book on the Edict). ...The deified Hadrian also laid down in a rescript as follows: "With regard to the fact that the issue is typically postponed until adulthood, this is done in the interest of minor wards, so that they not suffer risk to their status before they can defend themselves. But if they have suitable persons to protect them and a case that is so ready for trial that it is to their advantage that it be heard promptly, and their *tutores* are willing to litigate the matter, a measure that has been devised to benefit minor wards ought not to be turned to their disadvantage, and their status ought not to be left uncertain at the point when it can be rendered free from doubt."

The text makes clear that the policy goal of protecting the best interests of the child predates Pius in an area of the law apart from our interdicts. In this same passage (before the part quoted above) Ulpian recites a series of factors encouraging a prompt consideration of the issue of status: if it is deferred, witnesses might change their tune, die, or lose credibility before being heard (he expresses a particular concern that the midwife and female slaves involved with the child's birth might be getting on in years)<sup>96</sup>; documents are already available making a clear case on behalf of the minor; if the minor has not been

<sup>95</sup> Worth noting is that Hadrian extended, through rescript, the regime of the *Edictum Carbonianum* to unborn children: Ulp. D.37.9.1.14; Ulp. D.43.4.3.3. A. TORRENT, *Intervenciones de Adriano en el edicto 'ordinatum' por Juliano (En tema de bonorum possessio Carboniana)*, AHDE 54 (1984), pp.163-177 argues that the measure came after Julian's revision of the Edict.

<sup>96</sup> Ulpian appears to assume that an accusation of introducing a suppositious child was routinely difficult to evaluate and so a judicial hearing to deal with it was likely to be accelerated: see below.

able to exclude his or her adversaries from possession by giving security, they might degrade its value during a potentially lengthy postponement. His rather casual introduction of Hadrian's rescript belies its importance, which is guaranteed by the Emperor's own words. What this measure did was to take the policy goal behind this regime, that of protecting the child's best interests, and refine it further, so that the Praetor no longer simply assumed that it was an advantage to delay resolution of the status-question, but was prepared to evaluate whether expediting it would better serve this aim.

We know that, among jurists, Julian played a key role in the development of the rules for the *Edictum Carbonianum*<sup>97</sup>. It is perhaps worth attempting to "connect the dots" and propose Julian as the force behind both Hadrian's innovation and the evidently later change in the way our two interdicts were handled, with this difference, perhaps, that in the first instance he transformed a set of rules in which deferral was the norm and in the second he introduced the principle of delay to a regime where an immediate decision on status had been routine. It is perhaps not too far-fetched to see Julian as a protagonist as well in the other cases discussed above that innovated in the service of the best interests of the child, namely, those involving provision for maternal custody and limitations on the ability of a *pater familias* to end his daughter-in-power's happy marriage.

In the case of our interdicts the idea of delay, or time management, becomes a ductile instrument in the hands of the jurists in pursuit of justice or something close to it<sup>98</sup>. Here we can see this principle operating in a manner divorced from the interests of either litigant. This suggests a broader analysis might also have been at work regarding the procedural matters we have just discussed. One might think that a certain measure of efficiency and dispatch was in the interest of all or most parties concerned, as well as that of the court system itself. In any case, when this ideal conflicted with a certain

<sup>97</sup> See SEGNALINI, *L'editto Carboniano*, *op.cit.*, pp.184-185, pp.190-195.

<sup>98</sup> Ulp. D.40.12.27pr. reports a rescript of Marcus and Verus conditionally approving a request by a child's mother, made with the assent of his *tutor*, to defer a challenge to his free status until he reaches adulthood. Together with the other evidence adduced above, this suggests that such a postponement was possible, by the time of the late classical period, in the context of any type of challenge to a child's status. So Ulp. D.37.9.7.1, in a discussion of protecting the interests of an unborn child whose status has been questioned, should, in my view, be understood, not that such deferral was automatic or inevitable.

core value, the process might be put on hold, and not necessarily for a brief period. The procedural niceties point up this key issue of substance in play, namely, the protection of the best interests of the child.

To be clear, it is worth pointing out that such a postponement would have presented in principle more of a burden to the plaintiff than to the defendant. Delay, as we have noted, is a notorious capability problem. The conventional wisdom is that it typically benefits defendants and disadvantages plaintiffs. The reason is obvious. The plaintiff sues because s/he believes, rightly or wrongly, that s/he has suffered an injustice. The status quo favors the defendant as a rule; otherwise, one would assume, s/he would sue for redress. Delay perpetuates this status quo, denying the plaintiff's quest for justice<sup>99</sup>. Again, the jurists privilege the interests of the child whose status is in dispute over those of either litigant.

In support of these considerations we may introduce the following text:

Imp. Ant. C.9.22.1 A. Severino:

*Si partus subiecti crimen diversae parti obicitis, causa capitalis in tempus pubertatis pueri differri non debuit, sicut iam pridem mihi et divo Severo patri meo placuit. Neque enim verisimile est eam quae arguitur non ex fide causam suam defensuram, cum periculum capitis subeat. PP. non. Mart. duobus Aspris cons.*

Emperor ANTONINUS (CARACALLA) Augustus to Severinus. If you accuse your adversary of the crime of introducing a suppositious child, the trial, on a capital charge, ought not to be postponed until the time the boy reaches puberty, just as some time ago I myself and my father, the deified Severus, ruled. For it is unlikely that she, who is under accusation, will not argue her case sincerely, since she faces the risk of the capital penalty. *Posted March 7, in the consulship of the two Aspri (212).*

We see play out in this text a mix of pessimism and confidence similar to that shown by the jurists in the principal case<sup>100</sup>. The

<sup>99</sup> See, for example, J.M.KELLY, *Roman Litigation*, Oxford 1966, p.118.

<sup>100</sup> The assimilation of the offense of introducing a suppositious child to the crime of falsification (*falsum*), punished under the *lex Cornelia de falsis*, is of uncertain date and therefore disputed: see A.TORRENT, *Suppositio partus - Crimen falsi*, AHDE 52 (1982), pp.223-242. The logic for the extension is fairly obvious. Such an act was regarded as tantamount to forging a will in that it induced a *pater familias* to leave all

emphasis on expediting the case is strictly determined by the fact that a question of liability under the criminal law is at stake; deferral was an option only in matters of the private law<sup>101</sup>. Caracalla's optimism that someone facing a serious penalty can be counted on to plead her case "sincerely" (*ex fide*) is striking, precisely because one might easily assume the opposite to be true<sup>102</sup>. His confidence mirrors that of the jurists at managing the capability problems discussed above in the context of the principal case<sup>103</sup>.

Accusation of status as a suppositious child is only one of those mentioned by the sources in connection with motivating the application of the *Edictum Carbonianum*<sup>104</sup>. Others include allegations that an adoption by a notional *pater familias* was invalid, that a notional *pater familias* had in fact given a child in adoption, that such a *pater* had emancipated a child or been emancipated himself, leaving the child in the *potestas* of his or her grandfather, that the marriage in question was invalid or the child was otherwise illegitimate<sup>105</sup>. Conceivably, any of these issues might have arisen in the context of the issuance of the interdicts under discussion<sup>106</sup>. Each of them presents potential capability problems<sup>107</sup>.

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or part of his estate to someone he would not have chosen as a recipient but for the fraud, with the difference that it would have had a similar effect even on intestacy.

<sup>101</sup> See Ulp. D.37.10.3.5 (discussed above; Ulpian seems to assume cases involving allegedly suppositious children were routinely difficult and so prime candidates for an expedited hearing even in a private law context); Ulp. D.37.10.1.11; Marci. D.37.10.2.

<sup>102</sup> Writing not long after the death of Caracalla, Marcian gives as penalties under the *lex Cornelia de falsis* capital exile (*deportatio*) and confiscation of all property for free persons and death for slaves: Marci. D.48.10.1.13.

<sup>103</sup> But see precisely Ulp. D.37.10.1.11.

<sup>104</sup> See SEGNALINI, *L'editto Carboniano*, *op.cit.*, p.50, p.160.

<sup>105</sup> See SEGNALINI, *L'editto Carboniano*, *op.cit.*, pp.51-54, p.149, pp.186-187, p.189.

<sup>106</sup> We do know that the interdicts might be invoked in the wake of a divorce: Ulp. D.25.4.1.1.

<sup>107</sup> To take one example, which parallels an issue with the law of contracts discussed above, Roman marriage was by no means "self-proving" as a legal institution. In other words, similar capability problems evidently might arise regarding the identification of a relationship as a legitimate marriage: a well-known representation in literature is Vergil's account of Dido and Aeneas in Book 4 of the *Aeneid*. On the general problem, see L.CALDWELL, *Nuptiarum Sollemnia?: Girls' Transition to Marriage in the Roman Jurists*, in M.PARCA and A.TZANETOU, (eds.), *Finding Persephone: Women's Rituals in the Ancient Mediterranean*, Bloomington 2007, pp.209-227 (bibliography at pp.291-316). Specifically on the episode in Vergil, see L.CALDWELL, *Dido's Deductio: Aeneid 4.127-65*, *Classical Philology* 103.1 (2008),

A body of evidence consisting chiefly of two texts must encourage caution in generalizing from them. We can see plainly enough that capability problems, certainly in the area of communication, were not unfamiliar to the Romans. The asymmetries and deficits of information that bedeviled Gellius were not unlikely to appear in other cases, though perhaps in less extreme form<sup>108</sup>. The Romans in the classical period were content to address this problem by leaving a very broad discretion regarding the application of the standard of proof to the finder of fact in private law cases, to the point of tolerating a verdict of *non liquere*. The case Gellius describes could have been, and probably was, retried, entailing, inevitably, some amount of delay. Such delay, as we have seen, would have presented in principle more of a burden to the plaintiff than to the defendant. This outcome might all the same have encouraged lenders not to neglect documenting the loans they made, a bulwark against future capability problems of this kind, though not without its own costs.

Asymmetries and deficits of information play a role in the passage of Ulpian as well. From a modern perspective, the willingness of the jurists to rely on information about the character of the litigants in developing legal rules is of deep interest. We can, to be sure, detect a degree of pessimism on their part in the capacity of the adversarial system of justice to provide finders of fact with the information necessary to arrive at a just decision. This makes their failure to provide *iudices* with, as far as we can tell, anything but the most rudimentary assistance in evaluating such evidence worth emphasizing. At the same time, the jurists show a remarkable confidence in their ability to manage this kind of problem, chiefly by insisting on expediting a hearing where an imbalance existed, a tack very different from the one taken by Gellius, who resorts to delay in the face of a similar challenge.

On the other hand, when the characters of the claimants were both respectable - or suspect - the matter could safely be deferred. What

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pp.423-435. A system for registering the birth of legitimate children had been in place since Augustus, though it was not compulsory: see J.GARDNER, *Proofs of Status in the Roman World*, Bulletin of the Institute of Classical Studies 33 (1986), pp.1-14. It is difficult to argue that this was the intent of the jurists, but making a *pater* wait for resolution of his claim to *potestas* might have encouraged more of them to resort to registration in the first place.

<sup>108</sup> Similarly, NÖRR, *L'esperienza giuridica, op.cit.*, p.2167.

this option to delay resolution suggests is that while modern categories of analysis, such as the capability problem, can be useful in illuminating ancient attitudes, there is no guarantee that the two will automatically coincide in important respects. In part this is because the Romans (like moderns) were not always of one mind, as we see precisely with the contrast between Gellius and the jurists. It is also true that different legal cultures can show different ways of evaluating and dealing with capability problems. What matters in the principal case is the juristic perception of the child's best interests. In the service of protecting these it seems that for the Romans justice delayed was not inevitably justice denied.