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Incomplete Organizations: Legal Entities and Asset Partitioning in Roman Commerce

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Abstract

In this chapter we analyze ancient Rome's law of business entities from the perspective of asset partitioning, by which we mean the delimiting of creditor collection rights based on the distinction between business assets and personal assets. Asset partitioning, which is an essential legal attribute of modern business forms such as the partnership and the business corporation, reduces borrowing costs by simplifying creditrisk assessment and expediting insolvency proceedings. We find that ancient Roman business arrangements, such as the societas (very loosely, "partnership") and the slave-run business endowed by the slaveowner with a peculium (a sum of capital), did not give business creditors the first claim to business assets, making these forms of organization non-entities according to the criterion of asset partitioning. It appears that the only true legal entity used to form profit-seeking firms was the societas publicanorum, which roughly resembled the modern limited partnership. But use of that form was generally limited to firms providing services contracted out by the state. Moreover, the societas publicanorum was largely a creature of the Republic, and was largely abandoned during the Empire. Although Rome had a complex economy and sophisticated commercial law, and was familiar with most of the types of asset partitioning we see in modern legal systems, it ultimately failed to develop legal entities for general use in commerce. Apparent reasons include the Roman aristocracy's disparagement of commerce, the emperors' wariness of strong organizations outside the state, and the society's continuing reliance on the family -- a durable and complex legal entity in its own right – to handle many of the needs of commerce.

Keywords: asset partitioning, entity shielding, limited liability, legal history, Ancient Rome, business organizations, corporations

JEL Classifications: K22, N80

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INCOMPLETE ORGANIZATIONS:

LEGAL ENTITIES AND ASSET PARTITIONING IN ROMAN COMMERCE

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Abstract

In this chapter we analyze ancient Rome's law of business entities from the perspective of *asset partitioning*, by which we mean the delimiting of creditor collection rights based on the distinction between business assets and personal assets. Asset partitioning, which is an essential legal attribute of modern business forms such as the partnership and the business corporation, reduces borrowing costs by simplifying credit-risk assessment and expediting insolvency proceedings. We find that ancient Roman business arrangements, such as the *societas* (very loosely, "partnership") and the slave-run business endowed by the slaveowner with a *peculium* (a sum of capital), did not give business creditors the first claim to business assets, making these forms of organization non-entities according to the criterion of asset partitioning. It appears that the only true legal entity used to form profit-seeking firms was the *societas publicanorum,* which roughly resembled the modern limited partnership. But use of that form was generally limited to firms providing services contracted out by the state. Moreover, the *societas publicanorum* was largely a creature of the Republic, and was largely abandoned during the Empire. Although Rome had a complex economy and sophisticated commercial law, and was familiar with most of the types of asset partitioning we see in modern legal systems, it ultimately failed to develop legal entities for general use in commerce. Apparent reasons include the Roman aristocracy's disparagement of commerce, the emperors' wariness of strong organizations outside the state, and the society's continuing reliance on the family -- a durable and complex legal entity in its own right – to handle many of the needs of commerce.

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Economic activity in modern societies is dominated by organizations. In nearly all commercial transactions, at least one party is a firm organized as a distinct legal entity such as a corporation, trust, or limited liability company. The Roman economy was strikingly different. Across its millennium of history, ancient Rome saw the rise of both sophisticated legal institutions and a vibrant economy. With scattered exceptions, however, Roman commerce managed to flourish without the benefit of entities that were legally distinct from their human owners. While Romans were familiar with all the legal and economic building blocks of workable commercial entities, they surprise the modern observer for generally failing to take the next developmental step of assembling those blocks into the types of organizations that dominate economies today.

In this chapter we examine the structure of the various legal forms through which the Romans conducted business, emphasizing their rationales and economic consequences. For an analytic framework, we draw on recent scholarship (by us and others) that seeks to identify the defining elements of a legal entity and the dimensions along which entities can differ -- topics that, despite a voluminous literature on business organizations since the 19th century, have remained surprisingly vague. An important aspect of our analysis is the relationship between Rome's *legal* institutions and its *commercial* structures. The question that drives our analysis is this one: why did the ancient Romans not develop the law of commercial entities that we might expect given the sophistication of their legal system and the complexity of their economy?[1]

An important caveat: our object here is not to bring to light previously unknown facts about business in ancient Rome or the legal environment that governed it. Classicists (which we are not) have already unearthed a rich body of facts for us to draw upon. Our aim is instead to examine what is known through the lens of modern theory, employing the law and economics of enterprise organization to clarify our understanding of those institutions and the forces affecting their development. Of necessity, our characterization of Roman institutions is schematic and summary, as we highlight those refinements, ambiguities, and temporal variations that appear to us most important to the questions we hope to answer.

I. The Family

If business organizations are like molecules, then in modern economies it is individual humans who serve as the atoms. Our legal systems grant each adult the right to own (and hence control) property and to bind herself by contract. Contracts are credible because a person's property backs her promises unless the contract says

[1] In this chapter, we draw heavily on the discussion of Roman law and practice in our earlier article on the historical evolution of the law of legal entities over the last two millennia (Hansmann et al. 2006). We are aware of little subsequent scholarship that inclines us to deviate from the facts and analysis we offer there. The major exceptions are the important recent work of Dufour (2010, 2012) and Fleckner (2010, 2011, 2014).

otherwise. If she fails to perform the contract as promised, the other party can sue her for damages and then seize enough of her assets to satisfy the judgment.

In our terminology, these legal rules make each individual a distinct "legal entity," meaning that she has the authority to enter into contracts in her own name, and that she owns a pool of assets (her property) that bonds her performance of those contracts. Indeed, "contracting entity" might be a more appropriate name than "legal entity" (or "juridical person"), as the critical factor is the entity's ability to enter into contracts in its own right. Today, it is common to reserve the term "legal entity" (or "juridical person") for "artificial" persons -- such as business corporations, limited liability companies, nonprofit corporations, or municipalities -- as opposed to "natural" persons. But there is nothing inevitable about endowing individual human beings with the powers to own assets and make contracts. Rather, individuals have these powers only if the law recognizes them. And often it has not. Ancient Rome is an example.

In ancient Rome, it was the family rather than the individual that was the most basic legal entity—the "atom" from which larger arrangements might be constructed. The Roman *familia* was, moreover, much broader than today's simple "nuclear" family, extending from the oldest living male in the male line of descent (the *paterfamilias*) to include his minor children, his slaves, and all his adult male descendants and their households. Formally, the *paterfamilias* owned all of the family property, even if others in the family acquired it.[2] And he alone had the authority to approve, and thus make effective, contracts that his family members had negotiated. Only if he specifically delegated that authority would the family's property bind contracts made by other family members, and his delegation power was tightly circumscribed by law (Andreau 2013: 193; Johnston 1999: 31-2).

These attributes made the Roman family both large and, from the point of view of someone who might make contracts with it, robust. It had an indefinitely long lifespan, remaining intact over multiple generations. There was great clarity as to who did and did not have authority to commit the family to contractual obligations. And those people to whom family members might be most tempted to convey property to keep it away from creditors – close relatives and especially descendants – were themselves part of the same legal entity and thus already liable for its debts.

The wealth of a single, prosperous Roman family appears to have been sufficient to finance the typical commercial enterprise (Crook 1967: 229; Frank 1927: 222).[3] Thus, most Roman industry was small in scale, with the production of ceramic lamps, ironware, lead pipes, jewelry, and clothing occurring in small workshops or the homes of craftsmen (Frank 1927: 220-44, 261-64; Aubert 1994: 301). To be sure, large-scale

[2] Under the most common form of marriage, however, the wife's assets, including those she brought into the marriage and those subsequently acquired, were not merged with those of the *paterfamilias* of her husband's family except for the dowry; technically, they still belonged to her father's family (Frier and McGinn 2004:121-38; Kirschenbaum 1987: 12).

[3] Wealth seems to have been concentrated in particular in families that owned large plantations. (Aubert 1994: 301).

production was not unknown: brickmaking, bronze smelting, glass blowing, and copperware manufacturing often happened in extensive urban factories (Frank 1927: 223-38).[4] But even these factories appear to have derived their scale economies from labor specialization rather than from capital intensity (Frank 1927: 227). For this reason, most of the large workshops in the more capital-intensive metalworking and brickmaking industries were located on the estates of landowning families that had made fortunes in agriculture and then diversified (Toutain 1930: 302).

This evidence suggests that the legal attributes of the patriarchal *familia* made it an effective legal entity for conducting the typical Roman business. And its capacity to finance and manage enterprise was enhanced by Rome's peculiar rules for slave-managed businesses, a subject to which we will turn after considering Rome's version of a more modern legal form, the partnership (Harris 2011: 284-285).

II. The Societas

Beyond the family, ancient Rome's principal legal arrangement for organizing businesses was the *societas,* a term commonly translated as "partnership" because it described an arrangement between two or more citizens to share the profits and losses from a joint enterprise (Buckland 1921: 504-07). Beyond an agreement to share the fortunes of a business, however, the *societas* had little in common with the modern partnership. Most importantly for our purposes, it lacked both of the principal attributes of a legal entity: (1) a partitioned pool of assets; and (2) a well-defined delegation of authority to pledge those assets. We discuss these attributes in turn, illuminating them by comparing the *societas* with the modern partnership.[5]

a. Asset Partitioning

A legal entity as we have defined it (Hansmann and Kraakman 2000) must have a pool of assets that serves to bond its contractual obligations. To be meaningful, this requires that persons who transact with the entity must, if the entity breaks its contract, have a claim on the pool of assets that is prior to the claims of people who transact with the entity's owners in their individual capacities. We see this quality in the general partnership as it took form in the Middle Ages and has continued to the present day.

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[4] In particular, certain producers of pottery that specialized in tableware exported their products throughout the Mediterranean. (Toutain 1930: 302-303). See the study of the Roman terracotta lamp industry in Harris (2011: 113, 134-135).

[5] In this chapter, we emphasize the role of legal entities in organizing the claims of creditors. Legal entities also offer the important advantage of permitting transfer (assignment), from one person to another, of the benefits and burdens of a whole class of related contracts without having to obtain approval for the transfer from the counterparties to those contracts (Ayotte and Hansmann 2013). Ancient Rome seems to have endowed the limited shares in the *societas publicanorum* with this capacity by making them tradable, as discussed below. We will not further pursue here, however, the Roman law on contract assignability and its relationship to Roman legal entities.

A modern partnership has a designated pool of assets, contributed by the partners and augmented by retained earnings, that it holds in its own name. Pursuant to the partnership agreement, the partners can enter into contracts that bind the partnership and thus commit this pool of partnership assets. This asset pool is "partitioned" in the sense that it must be used for paying the partnership's debts before it can be claimed by creditors who transacted with partners in their personal affairs (or in their other business activities, which may involve other firms in which they have invested). Put another way, partnership creditors have priority over partners' personal creditors in the division of partnership assets. We have elsewhere termed this form of asset partitioning "entity shielding," because it shields the assets of business entities (such as partnerships) from the creditors of business owners (such as partners), at least until the entity's own creditors have been paid in full (Hansmann et al. 2006).

In contrast to the modern partnership, the Roman *societas* seems not to have featured entity shielding. Assets held by the *societas* were simply considered to be owned in common by the partners (Buckland 1921: 504-07), and creditors of the *societas* were treated just like personal creditors of the partners (or their families). If, for example, two persons A and B formed a *societas* to which A contributed 1/3 of the assets and B contributed 2/3, A would continue to be considered the owner of his 1/3 of the partnership's assets. Creditors of the *societas* and A's personal creditors could claim on equal footing against both A's 1/3 share of the *societas's* assets and A's personal assets.

Lacking the form of asset partitioning – namely, entity shielding – that characterizes a legal entity, the *societas* could not offer the important benefits that entity shielding affords. The principal benefits are reductions in the information costs of creditors and in the administrative costs of bankruptcy. Entity shielding can also have offsetting costs, principally in the form of creditor opportunism. We discuss each of these in turn.

Informational Benefits. Asset partitioning, and particularly entity shielding, can allow creditors to economize on their *information costs*, meaning the costs they incur when evaluating a debtor's creditworthiness. (Posner 1976; Hansmann and Kraakman 2000: 399-402). Because unpaid creditors compete for a debtor's assets, the nonpayment risk that each creditor bears is a function of the value of the debtor's assets and the amount of its other liabilities. When a firm fails and its creditors are paid pro rata regardless of which was first to give credit—the default payout rule in most contemporary bankruptcy systems, as it was in ancient Rome (Abatino and Dari-Mattiaci 2011: 29) —the ratio of assets to liabilities determines how much each creditor recovers on his claim.[6] Creditors are willing to bear some default risk so long as they are compensated for it, typically through the interest rate they charge when extending credit. Thus, in order to know what interest rate to charge (and other forms of protection to insist upon), a creditor must evaluate the debtor's existing and expected assets and liabilities.

[6] However, when one of several creditors of a slave doing business with a peculium chose to sue the master introducing an action ***on the peculium*,** the rule applied was " first come first serve" (Aubert 2013: 198-199, 202-03).

Without entity shielding, recoveries for business creditors would depend heavily on the assets and liabilities not only of the firm but also of all its individual owners. By giving the firm's creditors priority over personal creditors in the division of the firm's assets, entity shielding allows the firm's creditors to focus their appraisal efforts principally on the firm's own balance sheet. By making it cheaper for creditors to lend, entity shielding reduces the interest rate that creditors can charge and still expect to turn a profit. In this way, the informational benefits of entity shielding can reduce a firm's borrowing costs, thereby increasing returns for its owners.

Bankruptcy Efficiencies. A further benefit of asset partitioning is that it can simplify the bankruptcy proceedings that many legal systems – including the Roman (Solazzi 1937-43; Arangio Ruiz 1966: 145-47; Crook 1967: 174-78) -- employ when an individual or business firm becomes insolvent. As noted above, the default payout rule in modern legal systems is the pro rata rule, which pays each of a debtor's creditor a percentage of his claim equal to the ratio between the debtor's total assets available to creditors and the debtor's total liabilities. This is a slow rule to administer, because it means that no assets can be distributed to creditors until the total, legally enforceable amount of the debtor's liabilities is known. Entity shielding, by contrast, allows a bankruptcy court to distribute the entity's assets to its creditors once the amount of its liabilities are known, regardless of the amount of the owners' personal liabilities (Hansmann et al. 2006: 1346; Squire 2009: 835).[7]

Creditor Opportunism. As against these potential forms of economic efficiency, asset partitioning can also generate costs. In particular, while asset partitioning can reduce creditors' informational costs, it can also increase their costs of *supervision*, meaning the costs they incur from debtor misconduct and from efforts to deter that misconduct (Posner 1976: 507-08; Hansmann et al. 2006: 1351-52).

For example, if one or more partners in a partnership face a strong probability of personal bankruptcy, while the partnership remains relatively solvent, they may be tempted to invest their remaining liquid assets in the partnership, thereby giving the partnership creditors priority in those assets over the claims of the owners' personal creditors. They can then use those assets as collateral for further borrowing by the firm on better terms than they could have received from personal creditors. By thus increasing their total leverage, they may increase the chances that firm profits will be high enough to pay off their personal creditors, while leaving their personal creditors with lower priority claims and a higher risk of nonpayment.

[7] As an example, consider the partnership. When a partnership becomes bankrupt, its partners typically become bankrupt as well. With entity shielding, the partnership's assets will be divided among the partnership creditors without concern for the partners' various personal creditors. If, as is usual in bankruptcy, the partnership does not have enough assets to pay off all of its creditors, then it will be dissolved and its bankruptcy proceeding finished. Unsatisfied partnership creditors then become creditors in the partners' individual bankruptcy proceedings, which can proceed on their own. Absent entity shielding, it would be necessary to resolve all of the claims of the partnership's creditors as well as those of the partners' personal creditors before any payouts could be made (Squire 2009: 835).

The example illustrates a general point: any asset partition invites opportunistic smuggling of assets across it (as well as other types of debtor misconduct). Smuggling is particularly likely if the same persons control, or have equity claims to, the assets on both sides of the partition. The implication is that the optimal amount of asset partitioning—that is, the optimal size of the asset pool that unpaid creditors can recover from—reflects a context-specific tradeoff between informational and bankruptcy benefits on the one hand, and the costs of creditor opportunism on the other.[8] That trade-off limits the amount of asset partitioning that is efficient within any given economy and legal system. But, given the overall level of economic development in ancient Rome, it seems odd that, for the principal business unit beyond the family, the efficient amount of partitioning – and, in particular, entity shielding – should have been none.

b. Delegated Authority

The other respect in which the Roman *societas* fell short of being a legal entity concerns the delegation of authority. As we have said, for an organization to be a distinct legal entity requires that there be at least one person with the authority to enter into contracts that legally bind the entity, and in particular with the authority to commit the assets of the entity to bond those contracts. That is, there must be someone who can act as the entity's agent. In the modern general partnership, each partner has this authority when acting within the ordinary scope of the partnership's business activities unless creditors are on notice that such authority has been specifically withheld.

The Roman *societas,* by contrast, lacked the mutual agency among partners that characterizes the modern partnership. No member of the *societas* had authority to bind other members – and hence their share of the business assets – to contracts. Rather, each member had to endorse a contract to be bound by it.[9] The result was necessarily higher transaction costs in contracting -- indeed, costs that must have been about the same as if the firm did not exist and each of its members had to be dealt with individually.

c. The Role of Law

In sum, the Roman societas was essentially just an agreement between two or more persons to do business together. It thus did little to facilitate the ability of those persons to do business with third parties, which is the important role of true legal entities.

But, we might ask, why was a special legal form necessary for the creation of an effective legal entity? Couldn't partners simply add onto a *societas* by contract the attributes of entity shielding and delegated authority? The answer is no, because both entity shielding and delegated authority affect the interests of third parties who are not,

[8] Over time, legislatures have created devices – such as the rules against fraudulent transfers – designed to deter debtor misconduct and hence decrease supervision costs.

[9] As Roman law developed, members of a *societas* eventually could act for each other, although for most of Roman history this innovation applied only to large banking firms, and may not have applied to the regular *societas* until the sixth century A.D. under the Eastern (Byzantine) Emperor Justinian (Buckland 1921: 507; Crook 1967: 233).

initially, in privity of contract with the firm or its members (Hansmann and Kraakman 2000).

First, consider authority. Suppose that a vendor wishes to enter into a supply contract to deliver goods to a three-member firm organized as a *societas* . The default rule is that all three members must sign a contract to be bound by it. Suppose one member, however, tells the vendor that he and his two co-venturers have agreed that all three are bound by supply contracts made by any of them individually, so long as the contract is related to the firm's business. Such an agreement among the members has obvious advantages if effective, as it would eliminate the bother of obtaining three signatures on many supply contracts. But will the vendor be willing to rely on it? If the vendor is being deceived and the agreement does not in fact exist, the vendor may lack recourse against two of the three partners. And even if the agreement does exist, the vendor is not a party to it, and thus may not be able to use it to force the other members to pay their share of the vendor's bill. It requires a legal rule to establish that agreements to delegate authority—what we call agency agreements and partnership agreements—create enforceable rights for people who are not parties to them.

Second, consider entity shielding. As we have said, the default legal rule in ancient Rome was that, when a person entered into a contract, all property belonging to that person served as collateral to bond his performance of the contract. And this rule was extended to creditors of the *societas*: a member of a *societas* in effect entered into a contract on the same terms that would apply to any other contract. In particular, the counterparty to a contract with the *societas* would have a claim on the member's personal assets equal to that of the member's personal creditors, and vice versa: the member's personal creditors would have a claim on the member's share of the firm's assets equal to that of the firm's creditors.

To alter that rule by contract so as to give firm creditors priority over personal creditors with respect to firm assets would be complicated. It would require that each member of the firm insert into each personal contract a provision by which the counterparty agreed to subordinate, to all firm creditors past and future, his claim to the member's share of the firm's assets. The cumulative transaction costs to the members of securing these subordination clauses would have been high—prohibitively so in a firm with any substantial number of members. Moreover, there would be an inescapable problem of moral hazard: each member would have faced a strong temptation to omit the clauses from personal creditors, especially when the member was near insolvency, when the waiver would be most important. And the firm's creditors would find it extremely difficult – often impossible -- to know if the firm's members had in fact secured such waivers. Nor would a damage action for breach of contract provide a sufficient remedy against a member who omitted a waiver clause from a personal contract. Absent entity shielding by legal rule, the damage claim awarded by a court would presumably lack seniority with respect to the member's assets.

Again, the underlying problem is to align of the expectations of third parties. Here, in contrast to the case of authority to bind the firm, the problem is not to coordinate the expectations of third parties with those of the firm and its members, but rather to

coordinate the expectations of third parties who contract with the firm with the expectations of third parties who contract with the members of the firm as individuals. This coordination can be provided only by a legal rule. In this important respect, organizational law is property law (Hansmann and Kraakman 2002). It establishes rules that create common expectations about who has the right to use assets and who has the right to transfer use rights in assets – that is, who owns assets, in whole or in part. In particular, organizational law coordinates expectations as to who can transfer to a creditor a contingent claim on an asset – in effect a security interest, representing partial ownership of the asset – that can be converted to full ownership if the claimholder's debt goes unpaid.

III. Types of Legal Entities

The general partnership did not become part of European law until the Middle Ages (Hansmann et al. 2006), after which it served as the basic entity form for organizing commercial firms through the Industrial Revolution and up to the late 19th century, when it began to be replaced -- ultimately for small as well as large firms – by the business corporation.

The undeveloped status of the Roman *societas,* in comparison with these subsequent organizational forms -- the general partnership and the business corporation – was compensated for in part by reliance on other forms of organization for general business activity. Chief among these alternatives was an intra-family business arrangements termed the *peculium*, and a limited-use quasi-corporate form termed the *societas publicanorum.* These entities featured forms of asset partitioning, beyond simple entity shielding, that we summarize next.

Owner Shielding. We referred above to entity shielding, our term for legal rules that give a business's creditors priority over the owners' personal creditors in the division of the business's assets. By definition – in our terminology – all legal entities provide entity shielding. Most modern entities also feature what is effectively the reverse rule: that each owner's personal creditors have a claim on the owner's personal assets that is prior to the claims of the firm's creditors. This rule is a form of asset partitioning that we call *owner shielding* because it shields a firm owner's personal assets from the claims of the creditors of the firm.

For example, in Anglo-American law the general partnership has featured owner shielding as well as entity shielding for most of the past three hundred years (Hansmann et al. 2006). The consequence is that if, as is common, a partnership and its partners go bankrupt at the same time, the partnership creditors get the first claim to partnership assets, and the personal creditors of each partner get the first claim to the partner's personal assets.

Owner shielding has economic benefits analogous to those of entity shielding. First, it economizes on the information and monitoring costs facing the personal creditors of a firm's owners, and further reduces those costs for the firm's creditors as well. Second, it

adds further economies to resolution of claims in bankruptcy. In particular, in a partnership with both entity shielding and owner shielding, if each of the individual partners, and the partnership itself, all have debts that exceed the value of their assets, then the bankruptcies of the individual partners and of the partnership can all be settled separately from each other. Each partner's remaining assets can simply be divided up among the individual partners personal creditors, while the partnership assets can simultaneously be divided among the partnership creditors. If one of the bankruptcies proceedings becomes especially time-consuming to resolve, it need not hold up the others.

In sum, entity shielding and owner shielding are complementary, working together to reduce the cost of credit for firms endowed with these features. The Roman *societas* evidently lacked both forms of asset partitioning, and thus could not offer their associated efficiencies.

Strong Asset Partitioning. The type of asset partitioning described above and found in the modern partnership is what we term "weak" asset partitioning. Other types of asset partitioning are found in other legal entities. In particular, the modern business corporation replaces the "weak" entity shielding and "weak" owner shielding of the partnership with what we term "strong" entity shielding and "strong" owner shielding.

Strong entity shielding features the same rule of priority in firm assets for firm creditors that constitutes the "weak" entity shielding of the partnership but also prohibits the individual owner of a firm and her personal creditors from seizing her share of firm assets even if she is personally insolvent. Thus, the creditors of an insolvent shareholder in a business corporation can only seize the shareholder's shares in the firm, supplanting her as a shareholder. Nor can an individual shareholder herself force the firm to pay out her pro rata share of the firm's assets. The result is that runs on the firm's assets by anxious shareholders are avoided, that individual shareholders cannot hold up their fellow shareholders by threatening to dissolve their investment in the firm at a time when the firm itself is highly illiquid, and that creditors of the firm have assurance that their claims on the firm will not be compromised by an untimely liquidation.

Strong owner shielding, in turn, is simply the rule of limited shareholder liability that is a familiar characteristic of the modern business corporation. It provides that personal creditors of an owner of the firm have a claim over the owner's personal assets that is not only prior to that of the firm's creditors, as in weak owner shielding, but that is exclusive. That is, creditors of the firm have no claim on the personal assets of the firm's owners.

Weak and Strong Entities. There is a clear complementarity among forms of asset partitioning. In modern legal entities, weak entity shielding is generally accompanied by weak owner shielding, as in the partnership, while strong entity shielding is generally accompanied by strong owner shielding, as in the business corporation. There are important efficiencies underlying this complementarity (Squire 2009). As we have seen, when weak owner shielding is added to weak entity shielding, administration of

bankruptcy proceedings is greatly simplified, and creditor information costs are greatly reduced.

Likewise, strong entity shielding pairs well with strong owner shielding (limited liability). Strong entity shielding serves to lock in a firm's capital by preventing individual owners and their creditors from forcing partial or complete liquidation of the owner's share in the firm. In so doing, however, strong entity shielding in itself makes the owner's investment illiquid. Strong owner shielding restores liquidity by making the value of an owner's share in the firm independent of the owner's personal wealth, and hence more easily traded.

By contrast, in a partnership or other firm with weak entity shielding, the value of a share depends on the personal wealth of the owner: rich individuals place more personal wealth at risk when buying into the firm and thus will be less willing to do so. We can thus predict that shares in such a firm will tend to be transferred to poorer investors. But the partners have a collective incentive to prevent such transfers, which reduce the total assets backing the firm's contracts and thus will drive up the firm's cost of credit. Consequently, shares in a general partnership are not usually tradable; a partnership is an association among specific individuals, each of whose personal identity is important to the others.

Table 1 displays the Roman *societas*, the modern partnership, and the modern business corporation together with their respective degrees of asset partitioning (entity shielding and owner shielding). These three types of organization are arrayed along the diagonal of the matrix formed by the Table: the *societas* with no entity shielding and no owner shielding; the partnership with weak entity shielding and weak owner shielding, and the business corporation with strong entity shielding and strong owner shielding. The correlation between degrees of owner and entity shielding allows us to classify these organizational forms, respectively, simply as "non-entities," "weak entities," and "strong entities," as shown in the Table.

This is not to say that all legal entities lie on the diagonal of the matrix in Table 1. Among modern entities, for example, the general partnership in the United States was stripped of its weak owner shielding through bankruptcy reform in 1978, so that it lies off-diagonal as shown in Table 1. But these asymmetric entities are unusual. For example, the general partnership has become largely vestigial in the United States in recent decades, having been almost entirely displaced by a variety of very flexible strong entities such as the Limited Liability Company and the Business Trust. The result is that it is employed only in unusual circumstances (Hansmann et al. 2006), and even then the efficiency of its asymmetry is subject to debate (Squire 2009). It is therefore of particular interest that commercial firms in Rome so commonly took the form of a slave-managed *peculium* business --- a distinctly asymmetric entity which we analyze below.

Super-Strong ("Autonomous" or "Complete") Entities. Table 1 also displays a "super-strong" (or "complete") level of asset partitioning, which takes the specific forms of super-strong entity shielding and super-strong owner shielding.

In an organization with super-strong entity shielding, personal creditors of the organization's owners have no claim on the organization's assets whatsoever: they cannot establish a right to appropriate future distributions that an indebted beneficiary might receive from the organization, nor can they appropriate, even after the dissolution of the organization, any portion of the net assets that might remain after all of the organization's creditors have been repaid. Super-strong owner shielding, in turn, is close to strong owner shielding (limited liability), but goes even further in protecting the personal assets of the organization's owners by eliminating exceptions to limited liability such as the doctrine of veil-piercing.

A familiar contemporary example of a legal form for establishing super-strong entities is the U.S. nonprofit corporation (or the European foundation), which is characterized, not by an inability to earn a profit from its activities, but rather by a "non-distribution constraint" that bars distribution of any such profit to persons who control the organization, such as directors or managers. The persons who control a nonprofit corporation can receive from the organization nothing more than compensation that is reasonable for the services they render and that is not tied to the organization's net earnings. The reason for the nondistribution constraint is to deprive managers of an incentive to take advantage of customers or donors who are poorly situated to determine the quality or quantity of services provided to or for them, and hence are vulnerable to exploitation by a proprietary provider (Hansmann 1980).

By its nature, a nonprofit corporation has no true owners, since owners are by definition persons who have (some share in) both the right to control the organization and the right to appropriate its net earnings. Rather, in a nonprofit the attributes of ownership are divided between trustees and managers (who control the organization) and a designated class of beneficiaries who receive the goods or services produced by the organization (such as the patients in a nonprofit hospital or the storm victims who receive aid from the Red Cross). The nonprofit form provides some assurance, where information is radically asymmetric, that donations to the organization will ultimately aid their intended beneficiaries, and that amounts paid for services rendered by the organization will not opportunistically be diverted by those who control the organization.

In short, there is no one associated with the organization who has a claim on the organization's net assets, much less whose personal creditors can establish such a claim. In a sense, a super-strong organization owns itself. Hence these "super-strong" or "complete" entities might more intuitively be termed "autonomous" entities.

Autonomous entities appear in the lower right-hand cell of the diagonal in Table 1. As reflected there, ancient Rome appears to have had several well-established institutional forms for autonomous entities. One of these, quite close to the modern nonprofit corporation, was the *collegium*, which was used by guilds, social clubs, or burial societies.[10] Others were a mixed class of religious and charitable organizations

[10] "[I]t is almost certain that the property of a corporate college was protected against the creditors of individual members . . . ." (Duff 1971: 152, 155-58; Berger 1953).

(Duff 1971: 177-79), as well as the municipal corporation (*municipium*) (Duff 1971: 70-94).

The most important autonomous entity in ancient Rome, however, was one we have already discussed: the patriarchal *familia*. The Roman family was a fully autonomous legal entity with no outside owners, much less owners having their own personal creditors with contingent claims on the assets of the *familia*; direct creditors of the *familia* were the sole outside claimants on the entity's assets. Analogously, as reflected in Table 1, the individual adult is the basic autonomous legal entity in modern economies.

As Table 1 shows, the forms of business organization that have dominated commercial activity for the better part of a millennium – the general partnership and, subsequently, the business corporation – involve weak and strong entities, respectively. Ancient Rome, in contrast, principally employed organizations at the extremes of asset partitioning: either none or complete. If Rome could create successful super-strong (autonomous) entities, why couldn't – or didn't – it develop general-purpose weak and strong entities as well?

Part of the answer presumably lies in the structure of the *familia*. As we've noted, the patriarchal Roman family was a large entity which -- unlike a partnership -- could survive over generations as individual family members were born and died. Moreover, the economic reach and flexibility of the *familia* was importantly enhanced by the *peculium.*

IV. The Peculium

Slaveholding was extensive in ancient Rome, and it was to their slaves that Roman families frequently delegated the responsibility for managing commercial activity. The slave-run business was congenial to Roman social mores, under which trade was considered demeaning. Moreover, Rome's slaves often exhibited substantial commercial talent, in important part because they frequently were captured in colonial wars with societies, such as Greece, in which commercial activity was held in less disdain.

It was common practice for a master to provide his slave (or his own son) with a set of assets, termed a *peculium*, for use in a business venture (Kirschenbaum 1987: 33-37). The *peculium* and any profits it generated formally remained the property of the master. A slave was not permitted to dispose of *peculium* assets for personal benefit, and upon his death these assets reverted entirely to the master (Fleckner 2014: 216-217). To incentivize the slave who managed such a business, the master would sometimes promise manumission if the slave grew the *peculium* by a specified amount (Kirschenbaum 1987: 33). In theory, multiple masters who jointly owned a slave could also create a co-owned peculium business. Whether peculia were commonly used to create joint ventures of this sort is a contested issue in the literature (compare Fleckner (2014: 221-223) with Di Porto (1992: 231-60).

The assets comprising the *peculium* were partitioned to a degree from the master's other assets. Although default on *peculium* debt enabled creditors of the *peculium* enterprise to sue the managing slave's master, the master's liability was capped at the value of the *peculium*, plus any distributions or benefits he had received from it, so long as he had not participated actively in the management of the enterprise (Abatino et al. 2009, Crook 1967: 187-89; Serrao 2002: 60-64). That is, a *peculium* business provided a version of strong owner shielding (like corporate-type limited liability, except that corporate shareholders usually are not liable for lawfully-received distributions).

On the other hand, the typical *peculium* business, like the *societas,* appears not to have provided even weak entity shielding. That is, the personal creditors of a slaveholder seem to have enjoyed a claim to all his assets, including those managed by his slaves as *peculia*, equal in priority to the claims of the *peculium* creditors. The available sources are unclear on the issue (Di Porto 1984: 52 at n. 41; Fleckner 2010: 420-441). We only know for certain that a special type of peculium first introduced during Emperor Augustus' reign (27 BCE to 14 CE)--the *peculium castrense* – *did* provide a degree of entity shielding to peculium creditors.[11]

The *peculium castrense* initially consisted of all sums earned or otherwise acquired by a son in active military service – creditors of the *peculium* evidently *did* enjoy a prior claim on *peculium* assets over the creditors of the *paterfamilias* (Solazzi 1940: 200-03).[12] The son was initially a quasi-owner of his *peculium castrense* in the sense that he had the legal power to dispose of its assets while he remained in active service and the power to provide for their distribution by will if he died in the course of his service (Fleckner 2014: 228). Thus the *peculium castrense* in its Augustinian incarnation provided something more than weak entity shielding.[13] This explicit recognition of priority for the creditors of a son's *peculium castrense* suggests that the background rule for *peculium* creditors in general was the contrary. If that inference is correct,[14] then slave-managed *peculium*-financed businesses, which were a mainstay of Roman commerce, were endowed with a highly anomalous form of asset partitioning: strong owner shielding (limited liability) but no entity shielding at all.

This is a pattern of asset partitioning that, to our knowledge, cannot be found in the organizational law of modern economies. The pattern is unusual because, in general, entity shielding lays a necessary foundation for owner shielding, and particularly for the strong owner shielding reflected by limited liability. Providing for limited liability alone,

[11] A privilege similar to the *peculium castrense*-- the *peculium quasi castrense*-- was extended by the Emperor Constantine to a son active in civil service; see Mastrangelo (2005)..

[12] We are particularly indebted to Bruce Frier for help in researching this issue.

[13] Legal power to dispose of *peculium castrense* assets was extended to retired military veterans during Hadrian's reign (117 CE- 138 CE), giving creditors the full protection of strong entity shielding. (Fleckner 2010: 230).

[14] Both Di Porto and Solazzi speculate that *peculium* creditors had priority of claim in ordinary *peculia* as well as in the *peculium castrense*, evidently because they feel that the result would be logical (Di Porto 1984: 52-53; Solazzi 1940: 200-03). But they do not confront the contrary logic we offer here.

without even weak entity shielding, requires that business creditors share their claims on the business assets (the *peculium*) with the (perhaps numerous and difficult to monitor) personal creditors of the owner of the business (the *paterfamilias*), while at the same time renouncing to those creditors any recourse against the *paterfamilias's* assets beyond those constituted by the peculium In short, the pattern of asset partitioning provided for peculium businesses appears to create a sort of anti-entity that puts business creditors in a worse position than they would be without any asset partitioning at all.[15]

Absence of entity shielding in Roman *peculium* businesses may nonetheless have made sense in the Roman context, reinforcing the inference that this may well have been the rule. The fact that the typical *peculium* business had a single owner would have increased the risk of opportunism toward creditors because a single owner need not coordinate with others the transfer of assets into and out of the entity. If the *peculium* had provided entity shielding, a *paterfamilias* facing potential insolvency may have been tempted to assign personal assets to *peculia* and to encourage his slaves (or sons) to borrow further against those assets and invest in speculative ventures. Success in such ventures would have redounded to the ultimate benefit of the *paterfamilias* while the cost of failure would have fallen on his personal creditors.[16] The *peculium castrense* may have been a less tempting vehicle for such opportunism, and hence endowed with entity shielding, because it was principally comprised of the son's own earnings and not those of his *paterfamilias* (or more accurately, the latter's slaves).

In addition, the single-owner nature of a *peculium* business would have limited the benefits that entity shielding could have offered in reducing creditor monitoring costs. As we note above, the absence of entity shielding in a multi-owner firm requires a prospective firm creditor to evaluate the personal creditworthiness of each firm owner. A prospective creditor of a slave's *peculium* business, however, needed to evaluate only the creditworthiness of the single slaveholder who owned it to establish appropriate terms of credit.

The limited liability that *peculium* businesses exhibited, moreover, would have provided each of those businesses with de facto strong entity shielding against the creditors of the master's other peculium businesses. Limited liability in one *peculium* business would have prevented the creditors of that business from levying upon assets committed to other *peculia* of the same slave-holder. The result would be, in effect, a privileged claim for creditors of one *peculium* business, in the assets comprising that particular *peculium*, over the creditors of other peculia established by the same *paterfamilias* (Hansmann et al. 2006).

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[15] Indeed, if the master had no knowledge that his slave was using a *peculium* for business purposes, then the master's credits against the *peculium* had to be paid before the claims of other creditors (Abatino et al. 2009).

[16] Roman law did provide creditors with a remedy for fraudulent conveyances, though how effective that remedy was in contexts such as the *peculium* is unclear (Serrao 2002: 26; Getzler and Macnair 2005: 267, 272).

Such de facto entity shielding would have been only partial, since it would not have excluded creditors of businesses in which the master played an active managerial role, or debts incurred directly by the *paterfamilias*. It is quite possible, however, that it was rare for a slaveholder to engage actively in businesses managed by his slaves. Moreover, while it was evidently not uncommon for prosperous Romans to incur substantial debts directly, and for those debts sometimes to lead to bankruptcy, such borrowing was typically used to finance campaigns for political office rather than business ventures. And for that special purpose the borrower may well have found it advantageous to pledge as much of his commercial wealth as was feasible. This means that there would be an advantage to giving his personal creditors a claim on his commercial assets -- including particularly amounts he had invested in *peculia* -- that was equal to the claims of his various commercial *peculium* creditors. The latter creditors, in turn, might not have suffered much from such parity in claims, since it would presumably be public knowledge that a given rich Roman was engaged in, or was likely to engage in, an expensive political campaign, thus making him and all of his peculium businesses less attractive as credit risks.

The usefulness of the de facto entity shielding enjoyed by creditors of slave-managed businesses was reinforced by the fact that Roman law would further partition a peculium for liability purposes if a slave used it to manage multiple businesses.[17] The implications of this rule of weak entity shielding intra-peculium is that the Romans often took a practical approach to their creditor priority rules, and that they were aware of the costs of forcing creditors to bear losses resulting from risks the creditors could not easily monitor. Interestingly, Ancient Rome's rule of business-specific asset partitioning anticipated a similar rule developed in medieval Italy whereby the business creditors of a merchant who operated in multiple locations enjoyed the first claim to the assets at the specific location where they had transacted. (Hansmann et al. 2006).

In sum, the partial, de facto entity shielding Roman law provided for slave-managed businesses, although technically falling short of rendering those businesses true legal entities, might have been well suited to the particular needs of prosperous and prominent Romans.

The three business forms we have surveyed here – the family (a super-strong entity), the *peculium* (a *de facto* weak entity), and the *societas* (a non-entity) – were evidently the principal organizational forms employed in Roman private commerce. For

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[17] See Albatino and Dari-Mattiacci (2011: 29) (internal citations omitted):

> The principle expressed [by the jurist Ulpian] is that creditors of one business should be allowed to seize the assets pertaining to that business prior to the creditors of the other business, and vice-versa. The same principle applied to a business run in two different locations. The reason given [is that] it is "fairest to have separate distributions; otherwise, some people might be able to satisfy themselves out of the assets of others and so shift their losses to them."

the purpose of executing public contracts, however, a fourth form was deployed – the *societas publicanorum* – which appears to have been more like a modern business entity than any of its private counterparts.

V. The Societas Publicanorum

The *societas publicanorum* was an apparent exception to the general lack of legal entities in Roman commerce beyond the extended family. Dating from the third century B.C., the *societas publicanorum* consisted of a consortium of investors, known as *publicani*, who assembled to bid on and perform state contracts. Regrettably, little is known for certain about the rules governing these organizations. Firms organized as *societates publicanorum* flourished during the years of the Roman republic, and then fell into desuetude under the Empire. But it is from the late Empire, rather than the Republic, that most of our knowledge of Roman law derives. Consequently, what is known of the *societas publicanorum* comes largely from references in private correspondence and other non-legal sources.

Under the Republic, the Roman state contracted out to private parties a substantial portion of its activities, such as the construction of public works, the provision of armaments, the operation of state-owned mines, and tax collection (Badian: 1983: 68-69).[18] The contracts were awarded by bid at auction. The consortia that bid on these contracts – presumably following requirements set by law – were organized as *societates publicanorum*. Similar forms were evidently employed in other sectors of private commerce such as banking, shipping, and trading in slaves. We focus here principally on the public works contractors formed as *societates publicanorum.*

From the available sources, these organizations appear to have had roughly the characteristics of a modern limited partnership with tradable shares. The lead investor in the group, the *manceps*, pledged his landed estates as security for performance of the contract (Malmendier 2002: 273-74).[19] Other investors could act either as "general partners" (*soccii*), who exercised control and were fully liable for firm debts, or as "limited partners" (*adfines* and *particeps*), who lacked control but enjoyed limited liability (that is, liability limited to specific assets, such as estates, that they pledged to the organization) (Malmendier 2002: 261-68). Consequently, the societas publicanorum – like the modern limited partnership – was, as reflected in Table 1, a hybrid entity in our terms: a strong entity for the limited partners, and a weak entity for the general partners.

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[18] Dufour (2012: 53-130) provides a chronological survey of the Publicans' business activities. The societates publicanorum were evidently numerous (see the Table in Dufour 2012: 681-82), though it seems that the actual contract of association for only one such firm has been found (Badian 1983: 68-69; Vighi 1900: 38-46).

[19] A short description of the *societas publicanorum* is also provided in Malmendier (2005). Fleckner (2010) provides a detailed review of the historical sources on the *societas publicanorum.* Dufour (2012: 399-683) provides a detailed compilation of the surviving sources from the time of the Republic, when the *societas publicanorum* played its largest economic role.

The *societas publicanorum* reached its peak in the first century B.C. It is unclear how many members the largest of them had. Some sources suggest widespread investment among Romans in these firms, which seems to imply large membership for at least a subset of them. However, Fleckner (2010: 214) reports that, in all the surviving documents, the largest explicit figure for the number of full members (i.e., *socii*) is 19, and it is unclear whether that figure is the number of members of a single *societas publicanorum* or the aggregate membership of three such firms. We can safely conclude, therefore, only that participation in a single *societas publicanorum* reached at least as high as seven "general partners.[20] There is no evidence bearing on the number of limited partners that might have been associated with a large *societas publicanorum* (Nicolet 2000: 301-04).

There is substantial evidence that shares of limited partners in a *societas publicanorum* were tradable (Malmendier 2002: 249-51), although there is no direct historical evidence supporting the existence of an institutionalized market for trading shares (Poitras 2011: 100-03; Fleckner 2010: 471; Dufour 2012: 359-76). While we lack direct evidence of the form of entity shielding provided by the *societas publicanorum*, tradability of shares would in turn imply strong entity shielding with respect to the limited partners: as we emphasize above, tradability of shares is difficult to sustain without strong entity shielding, while tradability in turn provides the liquidity that strong entity shielding would otherwise deny to the firm's shareholders by depriving them of the ability to withdraw the funds they've invested before the entity is dissolved. Less contested evidence of strong entity shielding is that, unlike a simple *societas*, a *societas publicanorum* survived the death of any of its members (i.e., "general partners"). Indeed, Fleckner conjectures that it could even survive the death of its lead investor whose name appeared on the contract with the state (Fleckner: 2010: 383). When a member other than the *manceps* died, his heir assumed his financial rights and obligations, although he became a full member only if there was a prior agreement to that effect (Malmendier 2002: 243-47; Crook 1967: 234; Duff 1971: 160). Still further evidence for strong entity shielding is that the *societas publicanorum* appears to have had the capacity to own property and transact in its own name, although this privilege may have been used only by the larger firms (Badian 1983: 69).[21]

In sum, there is substantial reason to believe that, by the last days of the Republic, the Romans had developed and used widely a type of legal entity rather similar to the modern limited partnership (Dufour 2012: 695), which is characterized by strong entity shielding and limited liability (strong owner shielding) for the limited partners, and weak entity shielding and weak owner shielding for the general partners. This is a hybrid form of entity that is reasonably close to the modern business corporation, and in fact was widely used in France through the 19th and into the 20th century as an alternative to the business corporation by large-scale enterprises such as railways (Lamoreaux and Rosenthal 2002). The last days of the Republic, however,

[20] Dividing 19 members across three firms in the manner that minimizes the membership of the largest firm results in firms with 6, 6, and 7 members, respectively.

[21] Fleckner (2010: 413) notes the lack of evidence for the claim that the *societas publicanorum* could own property as a matter of law, but argues that legal protection of the firm's common property was unnecessary for social reasons (2010: 418).

also marked the beginning of the end for the *societas publicanorum* (Malmendier 2009: 1090-92) By the time that the Empire collapsed several centuries later, the *societas publicanorum* had largely disappeared from Roman law and practice (Dufour 2012: 139-143).[22]

This leaves us with two broad questions. The first is why the Romans failed to develop a weak entity such as the general partnership, the legal workhorse throughout Europe during its period of economic development from the Middle Ages through the Industrial Revolution. The second is why the Romans failed to maintain the *societas publicanorum*, much less develop it into a full strong entity like the modern business corporation.

To address these questions, it helps to situate Roman law and the Roman economy in a broader developmental context.

VI. Perspectives and Problems

In primitive societies, the family, clan, or other kinship-based organization was apparently the main organizational unit for commerce as for other activities. Viewed in terms of legal entities, evolution toward a sophisticated, modern market economy has involved two basic developments. The first is the creation of legal entities that can combine the talents and wealth of individuals from more than one family or clan. The second is to liberate individuals from forced economic membership in the extended family by making the individual, not the family or clan, society's basic legal entity.

These developments typically take place in tandem, and in stages. Innovation in commercial entities begins with weak entities, such as the general partnership, in which a degree of personal liability continues to be borne by the active members of the business to avoid opportunistic transfers of assets across the boundary that partitions business assets from personal assets. Only later do strong commercial entities such as the business corporation emerge, in response to demand by private, capital-intensive firms that own large fixed assets that are not easily dissipated, making the firms' creditors willing to part with their claims to the owners' personal assets. Subsequent improvement in capital markets then permit strong entities to displace weak entities even in smaller-scale firms and firms that have highly liquid assets.

In Western Europe, we see these two developments taking place simultaneously from the Middle Ages to the present. For an Italian merchant in the early Middle Ages, the household – rather like the patrilineal family in ancient Rome – constituted the basic entity for commercial purposes. This entity included the merchant's workplace –usually located in his home – plus servants and apprentices who (as was common) also lived in the merchant's home. This arrangement gradually evolved into one in which a merchant's adult sons were effectively treated as autonomous entities on their own,

[22] The chronology of the demise of the *societas publicanorum* is controversial, as surveyed in Dufour (2012: 139-143).

while two or more merchants who (post-apprenticeship) worked together in a trade were considered partners in a general partnership with the attributes of a weak entity. With minor exceptions, strong commercial entities did not emerge until the early seventeenth century, with the governmental chartering of the joint stock companies that were the precursors of the modern business corporation.

This evolution was not rapid. The modern business corporation emerged in England and Continental Europe as a well-formed legal entity that could be established without a discretionary governmental charter only in the late 19th century, and recent decades have brought further experimentation with much more flexible types of strong entities. Meanwhile, although adult men gained autonomy from their fathers as legal persons by the time of the Renaissance, it is only more recently that adult women have generally come to be treated as autonomous legal entities separate from their fathers or husbands.

Viewed from this perspective, Roman commercial entities seem paradoxical. Despite the sophistication of Roman law, and the scope and prosperity of Roman commerce, the Romans continued to rely upon the patriarchal extended family as their basic commercial entity. Indeed, they embedded it deeply in formal law, and elaborated on it by providing for multiple, subsidiary slave-managed peculium businesses that were apparently endowed with an idiosyncratic anti-entity type of asset partitioning. In contrast to this complex legal structure for the family, the Romans did not take the seemingly straightforward step of providing for a general partnership, or any other weak entity that could be used in creating a business entity outside the family. Yet for large projects of special types the Romans seem to have created a hybrid weak/strong (or "semi-strong") entity with the attributes of a modern tradable limited partnership. And then, instead of taking the next – seemingly modest – step and developing strong commercial entities such as the business corporation, the Romans went the other direction and abandoned the form.

We have seen that there was substantial internal logic to the forms of asset partitioning exhibited by each of ancient Rome's best-developed enterprise forms: the *familia*, the *peculium*, and the *societas publicanorum*. What is odd is the entity forms that were missing.

Although the broadly conceived Roman family, supplemented with slave-managed *peculia*, may have been an adequate vehicle for much of Roman commerce, it is hard to imagine that developing the *societas* into a general partnership with weak entity shielding would not have been advantageous. The costs seemingly would have been modest. If Roman courts were capable of sorting out creditors and assets based on the distinction between a slave's *peculium* and the other affairs of the master, as was required by the limited liability that came with the *peculium*, then presumably they could

have done the same with the creditors and assets of a partnership and those of its various partners.[23]

It is difficult to believe that the development of legal entities in Rome was inhibited by lack of imagination.[24] For example, limited liability (strong owner shielding) has often been described as an inspired invention of recent centuries that was vital to the sustained economic growth characteristic of modern societies. But limited liability is not a complicated concept, and the Romans were not only aware of it but made clear use of it in both the *peculium* and the *societas publicanorum*. More importantly, the Romans clearly understood the concept of a legal entity, and employed entity shielding in all its principal forms. Thus, late in the first century BC, the Romans evidently employed a kind of weak entity shielding in the *peculium castrense*,[25] strong entity shielding in the *societas publicanorum*, and super-strong (complete) entity shielding in extra-family noncommercial legal entities such as the *collegium* and the *municipium*.

Nor did the Romans lack experience with the other major law-created element of a legal entity, namely delegated authority to bind the firm contractually. Although the Romans famously lacked a general concept of contractual agency, they developed specific forms of agency when necessary. Thus, a slave could bind his master by contract up to the extent of his *peculium*. And the *manceps* of a *societas publicanorum* apparently could bind the entity and the invested assets of all of its members in contracts with the state.

Evidently one must turn to noncommercial aspects of Roman culture to understand the paradoxical characteristics of Roman commercial entities. While this is not our area of expertise, we can offer some conjectures.

Roman society seems to have had substantial disdain for personal participation in commercial activity. In this respect, it contrasted dramatically with the later Italian society of the Middle Ages and Renaissance, which was dominated by merchants. This may explain the strongly contrasting development of the family in these societies. As we observed above, the medieval Italian household, already conceived as a productive

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[23] To be sure, ancient Rome lacked double-entry bookkeeping, a development which—along with the replacement of Roman numerals with Hindu-Arabic digits (including the zero)—contributed to the development of sophisticated forms of commercial asset partitioning in Renaissance Italy (Hansmann et al. 2006:1367). Abatino, Dari-Mattiacci and Perotti (2009: 21-22) cite the lack of sophisticated accounting methods as one of the main reasons that Ancient Rome did not develop general-purpose business entities resembling the modern corporation.

[24] Finley (1999: 144)draws, in more general terms, a similar conclusion.

[25] Rome also had a law of secured transactions sophisticated enough to handle floating liens on commercial assets (Leage 1937: 190-96). Because it generally bonds only named creditors, and not a shifting group of creditors, a security interest is a much more restrictive device than a legal entity (Hansmann and Kraakman 2000: 418). But floating liens certainly signify a system of commercial law with a sophisticated approach to creditors' rights. (At the same time, we note that the availability of floating liens might have reduced somewhat the demand for weak entities, for which they can serve as something of a substitute.)

.commercial unit, had by the 15th century evolved into three different[26]types of entities – the individual, the general partnership, and the limited partnership – that provided even further flexibility in organizing entrepreneurial activity. Roman law, in contrast, seems to have been designed to keep Roman citizens *out* of active participation in commerce, and to protect the stability and status of prominent Roman families from the vicissitudes of economic activity.

Hence Roman law concentrated all power over a family's wealth in the hands of the paterfamilias and limited his capacity to delegate it – for example by providing for no general form of agency. The persons whom the paterfamilias could make agents – sons, slaves, and the managers of a *societas publicanorum* – could commit only the specific assets placed in their possession. The lack of mutual agency among participants in a *societas* is consistent with this more general pattern. Perhaps the same conservatism about committing family wealth that seems to have been reflected in ancient Rome's limits on agency authority discouraged a grant of priority to business creditors over other family creditors with respect to *any* family assets. For the Romans, the risks of commercial credit may have been more salient than its advantages, and hence they were not eager to facilitate it.

The Romans seem to have viewed commerce as a means of reinforcing the extended family, while the Italians of the Middle Ages, though much in awe of Roman culture, took the reverse approach by viewing the family as an institution for promoting commerce. While Roman law provided business entities – the *peculium* and *societas publicanorum* – for investing a family's wealth with limited liability, unlimited liability came only if the *paterfamilias* actively engaged in management of a business (Johnston 1995). Thus the family could prosper from business investments without the stigma of engaging in commerce -- much as the French nobility did with the limited partnership in the 17th century (Kessler 2003). At the same time, families less concerned with social status were free to engage in commercial activity, though the entity forms available to them were not as convenient as they might otherwise have been.

Rather different considerations arguably explain why the Romans not only failed, after the fall of the Republic, to go beyond the *societas publicanorum* and develop a strong entity form on the model of the business corporation, but in fact went in the other direction and gradually abandoned the *societas publicanorum* itself. When Rome transformed itself from republic to empire, the wealth and influence of the *publicani* drew jealous attention from the emperors, who responded by having the state take over activities, such as the construction of public works, that it had previously contracted out. The *publicani* persisted for a time as tax collectors, but repeated clampdowns eliminated them from even this role by the end of the second century A.D. (Crook 1967: 234).

[26] This is not to imply that the limited partnership had only the household as a predecessor; its origins lay, in important part, in the *commenda* and related earlier commercial forms (Hansmann et al. 2006).

By the last years of the Republic, Roman law and the Roman economy had arguably evolved to the point where they were quite capable of establishing commercial legal entities of the character found in 18th-century England. And perhaps if Rome had evolved further toward an open society, its economic institutions would have taken that direction. But social and political developments ultimately blocked Rome's evolution from dependence on the family as the basic legal entity to a society with legal entities suited to efficient general commerce and freedom of enterprise.

To be sure, the family continues to play a strong role today in the organization of enterprise. Even in the most economically advanced societies, the family's affective bonds, continuity, and reputation commonly provide a strong foundation for successful commercial firms. The important difference in this respect between Roman society and contemporary society is that, while the latter provides a number of general legal entity forms that can be used to create an effective business firm comprising any desired combination of family and non-family members, Roman law compelled the family to act as a commercial entity, providing very limited alternatives and ultimately abandoning even the best of those.

TABLE 1

LEGAL ENTITIES ORGANIZED BY ASSET PARTITIONING

Roman organizational forms are indicated in italics; other forms are modern.

		ENTITY SHIELDING			
		NONE	**WEAK**	**STRONG**	**SUPER-STRONG (OR "COMPLETE")**
OWNER SHIELDING	**NONE**	**<u>NON-ENTITIES</u>** *Societas*	U.S. Partnership after 1978		
	WEAK		**<u>WEAK ENTITIES</u>** *Societas Publicanorum* – *Socii*; Limited Partnership – General Partners; General Partnership		
	STRONG	*Peculium?*		**<u>STRONG ENTITIES</u>** *Societas Publicanorum* – *Adfines* and *Participes*; Limited Partnership – Limited Partners; Business Corporation; Limited Liability Company; Cooperative Corporation	
	SUPER-STRONG ("COMPLETE")				**<u>COMPLETE ("AUTONOMOUS") ENTITIES</u>** *Familia*; *Collegium*; Individual; Nonprofit Corporation (European Foundation)

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