1. The reception of Roman law, main theme of this collection of essays, nearly always had an ideological basis. In the Middle Ages it was the idea of *translatio imperii*¹ and later, in the 17th and 18th centuries, it was the idea that the main part of Roman law was the *ratio scripta*.² One of the implications of the reception of Roman law has further been that the profession of a jurist has always been modeled after the example of Roman jurists. Also here a hidden agenda or at least an implicit ideology could easily have played a role. An interesting article, in which this last hypothesis was dealt with, was published last year by the Finnish Romanist Kaius Tuori.³ In Tuori’s view, the idealization of Roman jurists, especially that of Quintus Mucius Scaevola, had since the 19th century had an at least implicit ideological purpose and reflected by no means necessarily a historical reality. The “invented tradition” of a founding father of the legal science could strengthen the position of the legal science amidst sciences with better paradigmatical equipment.

These assertions go against some of our own earlier conclusions and are not in accordance with well-established research by academics such as Schulz,⁴ Wieacker,⁵ Behrends,⁶ Nörr⁷ and Talamanca.⁸ Tuori’s views also contradict, at least in my view, one of the earliest treatises ever on legal history, the *Enchiridium* by Pomponius, of which fragments are handed down to us in *Digest* 1,2,2,41. Here Pomponius says:

*Post hos Quintus Mucius Publii filius pontifex maximus ius civile primus constituit generatim in libros decem et octo redigendo.*

---

² See G.C.J.J. van den Bergh, *Geleerd recht* (2000), 85–90, where further references are given.
If there is an “invented tradition” about Mucius Scaevola being the first “scientific” jurist, it is certainly a very old one! The Amsterdam School of Roman Law, guided by Hans Ankum, and of which both Eric Pool and I formed part for so many years, always emphasized the individuality of each Roman jurist and never adhered to the Historical School’s paradigm that Roman jurists were “fungible personen”. It is therefore worthwhile to continue the discussion on Quintus Mucius with Tuori and formulate a few provisional conclusions.

In doing so, I came across a few interesting texts on which my dear friend Eric Pool and I have both written earlier. It is needless to say that we came to different conclusions. Our debate may also reflect a period of seventeen years, during which we shared a room at Amsterdam University. It is with great pleasure that I dedicate the following thoughts to him at the occasion of his retirement from Amsterdam University and the Free University in Brussels.

2. Tuori is well aware that the sources of our knowledge of Quintus Mucius’ accomplishments in jurisprudence are rather scarce, being limited to Cicero and Lenel’s Palingenesia. However, Tuori did not deal with the details of concrete examples. It is therefore questionable whether the two chosen examples could be used as sustainable arguments in favour of Tuori’s opinions.

3. We start with the fact that according to Pomponius, Quintus Mucius Scaevola was the first jurist who used the scheme genus–species. This is generally conceived as the first application in the legal sphere of this scheme which had its origin in Aristotelian philosophy. This topic has extensively been dealt with in the works of Wieacker, Talamanca and Nörr referred to above and may be substantiated by Quintus Mucius’ division of the genera possessionis. This appears from a passage of Paul where he criticizes Quintus Mucius in an unusually vehement way. Shortly before, in his commentary on the Edict, Paul had made the division between possession in good faith and in bad faith. Then he continued as follows:

    Digest 41,2,3,23: quod autem Quintus Mucius inter genera possessionum posuit, si quando iussu magistratus rei servandae causa possidemus, ineptissimum est,

9 See, for earlier views, the Roman jurists as “fungible Personen”, F.C. von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, (1892), 18 and 96 (in the 1814 edition: 29–30, resp. 157); see also F. Schulz, Prinzipien des römischen Rechts, (1934/1954), 72–73.
Earlier I have tried to show that the order of the *causae possessionis* in the titles of book 41 of the Digest (pro emptore, pro herede vel pro possessore, pro donato, pro derelicto, pro legato, pro dote and pro suo) still reflects an order established by Quintus Mucius. Paul’s sharp criticism of Quintus Mucius is caused by the fact that in classical Roman law, apparently after Quintus Mucius Scaevola, a sharp distinction was made between *possessio civilis* and mere *detentio*, something to which Mucius referred. Eric Pool briefly analyzed this same text in his book on *causa*, where he started with the following text:

Digest 41,2,3,4 Paulus XLI ad Edictum. Ex pluribus causis possidere eandem rem possimus, ut quidam putant et eum, qui usucaperit et pro emptore et pro suo possidere: sic enim et si ei, qui pro emptore possidebat, heres sim, eandem rem et pro emptore et pro herede possideo: nec enim sicut dominium non potest nisi ex una causa contingere, ita et possidere ex una dumtaxat causa possimus.

An ingenious and meticulous translation of this text brought him to the conclusion that nearly every preceding Romanist was wrong, either by assuming interpolations or by assuming a divergence of opinions between Roman jurists. He further showed that Paul wanted to stress that property could only have one *causa* whereas *possessio* can have more *causae*. This insight has various consequences, also for our text in which Quintus Mucius is criticized. The interpretation by Eric Pool is fully convincing and makes what I have written earlier on both these texts at least partly “zu Makulatur”. But regarding Digest 41,2,3,23 one may say that even if Paul’s criticism is appropriate, we clearly see here one of the first attempts at a legal application of the differentiation between *genus* and *species*. This was an accomplishment in the history of the development of legal science in accordance with Pomponius’ fragment where it was said that Mucius was the first to deal generatim with legal phenomena.

4. Another example of Scaevola’s systematic innovation could be his being responsible for the first application of the three standards of liability: *dolus* – *culpa* – *casus*. Kübler has drawn the attention to the fact that most

12 L.C. Winkel “Usucapio pro suo” 217.
14 B. Kübler “Der Einfluß der griechischen Philosophie auf die Entwicklung der Lehre von den Verschuldensgraden im römischen recht” in: “Rechtsidee und Staatsgedanken”, Beiträge zur Rechtsphilosophie und zur politischen Ideengeschichte, Festgabe für Julius
Quintus Mucius Scaevola once again probably this distinction goes back to the Greek scheme ἀδικία-ἀμαρτία-
ἀτυχία. In its turn this scheme may be found in the anonymous *Rhetorica ad
Alexandrum*, and Aristotle took it up in the fifth book of the *Nicomachean
Ethics*. David Daube\(^{15}\) has doubted these parallels with the Greek, mainly because the Greek scheme has a background in criminal law, whereas the
Roman context is private-law liability, more specifically, in the law of delict. As
far as I can see these criticisms by Daube are not fully convincing and it is not
without reason that scholars like Crook\(^{16}\) and Schofield\(^{17}\) criticized this part of
Daube’s brilliant book. References to Quintus Mucius Scaevola’s attempts at
systematization are found in:

*Digest* 9.2,31 Paulus X ad Sabinum. *Si putator ex arbo re ramum cum
deieceret vel machinarius hominem praetereuntem occidit, ita tenetur,
si is in publicum decidat nec ille proclamavit, ut casus eius evitari
possit. Sed Mucius dixit, etiam si in privato idem accidisset, posse de
culpa agi; culpam autem esse, quod cum a diligent e provideri poterit,
non esset provisum aut tum denuntiatum esset, cum periculum evitari
non possit.*

The important point in the text is that the application of this scheme *dolus –
culpa – casus* is incongruent with *iniuria* as found in the first and third chapters
of the *Lex Aquilia*, a Roman *plebiscitum* traditionally dated 286 BC. Elsewhere
I have tried to argue that a date about 200 BC would be more in accordance
with economic history.\(^{18}\) Quintus Mucius Scaevola apparently classifies liability
for *iniuria*, literally without a right, with reference to the new standards of
liability, as liability for *culpa*. According to our text, liability in such cases
(before Quintus Mucius) was dependent on the criterion whether the gardener
was on his own or on public premises. Only on public ground there was liability
for *iniuria*, when tree branches were dropped. Quintus Mucius Scaevola makes
the gardener only liable when there is an objectified form of *culpa*: The
measure being the careful gardener. This is also the case in Aristotle, who
defines liability with reference to objective standards of good behaviour. The
interpretation of Scaevola has prevailed in classical Roman law, which follows

---

Society* (19), 66-70.
\(^{18}\) L.C. Winkel, ”Das Geld im römischen Recht”, in: *Roman Law as Formative of Modern
Legal Systems, Studies in Honour of W. Litewski*, II, J. Sondel e.a. (eds.) (2003), 251-
258.
from a much later text by Ulpian in which *iniuria* is explained according to its etymology\(^{19}\) and is explained as synonymous with *culpa*:

> *Digest* 9.2.5,1 Ulpianus XVIII ad ed. Iniuriam autem hic accipere nos oportet non quemadmodum circa iniuriarum actionem contumeliam quandam, sed quod non iure factum est, hoc est contra ius, id est si culpa quis occident: et ideo interdum utraque actio concurrunt et legis Aquiliae et iniuriarum, sed duae erunt aestimationes, alia damni, alia contumeliae. Igitur iniuriam hic damnum accipiemus culpa datum etiam ab eo, qui nocere noluit.

An obvious difficulty with the equation *iniuria* = *culpa* is that not *culpa*, but *dolus* is the normal standard of liability in the Roman law of delict. Hence expressions like *sciens prudensque, sciens dolo malo, ope consiliove* that play a role in liability: for example in the case of *furtum*.\(^{20}\) However, liability for *furtum* is not based on a written statute like the *Lex Aquilia*, but on older, partly unwritten, customary law articulated by the Roman jurists with some very imprecise provisions of the *Law of the XII Tables* as a starting point.\(^{21}\) Therefore the problems of interpretation of the terms of the *Lex Aquilia* do not occur in cases of *furtum*. Honsell showed that a rather strict interpretation of statutes has been the dominating tendency in classical Roman law.\(^{22}\)

A secondary problem here relates to the history of the way in which we learnt something of the original text of the *Lex Aquilia*. We know it only indirectly through the commentaries of Ulpian in the 18th book on the *Edict*, incorporated in *Digest* 9.2, through Gaius in the third book of his *Institutes* (G. 3,210ff.) and incidentally from other, always indirect, sources. It cannot be totally excluded therefore that the word *iniuria* has been added later through interpretation of the first and third chapters of the *Lex Aquilia*. Hausmaninger, however, is of the opinion that the word *iniuria* already appeared in the original text of the first and the third chapters.\(^{23}\)

Interesting is Quintus Mucius' definition of *culpa*, namely not to foresee what an intelligent man should foresee. According to Kunkel\(^{24}\) there is a clear

---


\(^{21}\) *Leg. XII Tab.* 8, 14–17.


\(^{24}\) W. Kunkel, “*Diligentia*” 45 *SZ Rom.Abl.* 266, 344.
Quintus Mucius Scaevola once again parallel here with Aristotle’s expatiations on the ἀνήρ σπουδαῖος (EN 1113 a 29). We hesitate to follow Kunkel here. The time in which Quintus Mucius lived was too early to assume a direct influence in Rome of Aristotle’s third book of the *Nicomachean Ethics*. Elsewhere we have tried to make plausible that most of Aristotle’s ethical theory became accessible in Rome only in the course of the first century BC, and not at the beginning of this century. This influence was then possible, first through the *Rhetorica ad Herennium*, secondly through a survey of ethical theory by a philosopher at the court of August, Arius Didymus, and thirdly by a paraphrase of the *Nicomachean Ethics*, sometimes attributed to Andronikos of Rhodos.25

Moreover, the Aristotelian influence is not the only possibility here. Stoic influence cannot be excluded either. Kunkel26 already referred to a text by Stobaeus, *Ecloga* II, 99, a text generally considered as Stoic.27 However, this text is not very different from Aristotle and without raising all the difficult problems of the Aristotelian textual transmission it is difficult to say whether Scaevola’s definition is indeed purely Aristotelian or mixed with Stoic thought. Kunkel assumed an interpolation here.28 According to him, the compilers of Justinian in this case would have added the whole explanation of culpa. We are, however, nowadays much more reticent in assuming interpolations, especially “additive” interpolations.29 It is not completely sure whether Mucius Scaevola or Paul is explaining culpa. In the first case the text could well reflect Mucius’ Stoic education,30 in the latter case the text could also be genuine and in accordance with the history of the transmission of Aristotle, because there is at least one more text by Paul in which there is possibly an Aristotelian influence, namely *Digest* 22,6,9,2 and 3.31

Yet there is room for more doubt. Daube refers to a text in the *Institutes* of Justinian in which we find another explanation of iniuria (*Inst*. 4,4pr.):

---

25 See my book *Error iuris nocet*, Rechtsirrtum als Problem der Rechtsordnung, I: Rechtsirrtum in der griechischen Philosophie und im römischen Recht bis Justinian, (1985), 72-73 esp. nn. 29 and 31; this Paraphrasis was printed in 1607 (not: 1617 as I wrote earlier) by Daniel Heinsius, a friend of Hugo Grotius; Grotius wrote to Heinsius on this matter on November 11, 1606; see P.C. Molhuysen, *Briefwisseling van Hugo Grotius I* (1928) n° 87, 73.


27 Hence H. von Arnim took it as *Stoicorum Veterum Fragmenta* III, 567.


29 E.H. Pool *Een kwestie van titels* 19, with further references.

30 See O. Behrends *Wissenschaftslehre*, 19ff., 281ff.

31 L.C. Winkel *Error iuris nocet*, 68ff.
Generaliter iniuria dicitur omne quod non iure fit: specialiter alias contumelia, quae a contemnendo dicta est, quam Graeci ἁμάρτημα appellant, alias culpa, quam Graeci ἁδικημα dicunt, sicut in lege Aquilia damnun iniuria accipitur, alias iniquitas et iniustitia, quam Graeci ἁδικημα vocant ...

In the second meaning of iniuria = culpa, a reference to ἁμάρτημα instead of ἁδικημα would have been correct. So Daube says that when the scheme dolus – culpa – casus is wrongly equated with the Greek equivalents even in the time of Justinian, there is no reason for the assumption that Quintus Mucius would have adopted the Greek scheme. The correctness of Daube’s opinion depends heavily on the assumption that Justinian’s compilers, like some earlier classical jurists, were acquainted with Aristotelian ethical treatises. This assumption is denied by Kübler. On the one hand, the 6th century is the golden age of the commentators of Aristotle’s Ethics, and on the other hand there is a parallel of the equation of culpa with ἁδικημα in the Collatio legum Mosaicarum et Romanarum (2,5,1)32 and in the Paraphrasis of the Institutes by Theophilos. Although there still remain valid reasons for doubt, this cannot be further elaborated on here.

5. However, it is important to note that in a later decisive stage of classical Roman law we see with even more probability the introduction of non-legal, philosophical distinctions. Two hundred years after Quintus Mucius Scaevola, after renewed attempts at systematization by Masurius Sabinus,33 Gaius, in his Institutes, divides the obligations into obligationes ex contractu and obligationes ex delicto.34 It has been remarked earlier already that this division must stem from the Aristotelian distinction between voluntary and involuntary synallagmata.35 In humanist jurisprudence Grotius already saw this in De iure praedae.36 In the neo-humanist approach to Roman law one may refer here to Fritz Schulz.37 He writes: “Gaius probably read Aristotle’s text either in Aristotle’s work or in an intermediate source.” An important remark indeed, albeit that the history of the textual transmission of the fifth book of the Nicomachean Ethics is far less complicated than the transmission of the text of

---

32  From this fragment we know that Paul was the author of the whole text which is similar to the fragment of the Institutes of Justinian, (libro singulari et titulo de iniuriis).
33  Cf. O. Lenel, Das Sabinussystem (1892).
34  Gaius III 88.
35  See Aristotle, Nic. Ethics V 1131 a 1ff.
36  Hugo Grotius, De jure praedae, ed. Hamaker (1868), 15. I have not yet been successful in tracing back this observation to the humanistic literature of the 16th century. It could not be found in Cujaci, Observationes et Emendationes. It may possibly be attributed to Donellus.
Quintus Mucius Scaevola once again

the third book. Anyhow, this division has had a far-reaching influence in every codified system of private law. It is a well-known fact that this division did not fit perfectly into legal reality, hence the eventual introduction of obligations quasi ex contractu and quasi ex delicto in Justinian’s Institutes. It should be borne in mind that already Gaius created an extra category in his Res cottidianae. All attempts at systematization in the law of obligations attempt to harmonize two fundamentally different grounds for an obligation with mixed forms of liability in legal reality (see e.g. problems of delictual or contractual liability in pre-contractual situations). Only in the development of modern private law – according to some scholars – do we see an approach between the liability for contracts and liability for delicts.

Nevertheless, these examples may suffice to show that coherent philosophical theory, if introduced in law at all, has always been “patchwork” and has hardly led to a systematic approach to all legal phenomena. Even Leibniz in the 18th century was not able to present legal science in a completely systematic (axiomatic) system. Maybe this explains why nowadays in the Netherlands the scientific basis of legal science is questioned from time to time.

We may conclude that Quintus Mucius Scaevola, even if he was not beyond criticism, possibly was responsible – as far as textual evidence can be given – for at least one major attempt at systematization which is still visible in modern law. This, in my view, is not in accordance with the previously mentioned opinions of Tuori. Although Tuori did thorough research, especially collecting older 19th century literature on the history of Roman legal science from Gustav Hugo onwards, he runs the risk of reviving the old, mostly abandoned, idealization of the independent genius of the Roman jurist as was done in the Historical School. As far as I am concerned we are left here with only two options: Either one follows this old opinion or one admits that Roman science, also legal science, developed by following Greek philosophical and rhetorical

38 See L.C. Winkel Error iuris nocet, 68ff.
39 Cf. the problems of classification of cases of culpa in contrahendo as delictual or as contractual obligations, on which my article “Culpa in contrahendo in Roman law and in some modern Dutch court decisions” in: Viva Vox iuris Romani, Essays in Honour of Johannes Emil Spruit, L. de Ligt e.a. (eds.) (2002) 149-157.
models. Regarding the latter, and bearing in mind the process of acculturation, one may rightly ask: "Who was the first Roman jurist?" Already Pomponius was curious about this question.

I trust that this conclusion will fit into a collection of essays devoted to the problems of the reception of Roman law. May it please a scholar who so systematically and thoroughly analyzed basic problems of classical Roman law – Eric Pool.