11-1-1996

Roman Slave Law: An Anglo-American Perspective

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The most influential secular system of law in the West has been Roman private law. This is true even of its slave law, which was received not only in states of Europe where slavery survived, but also in European colonies in America, whether those of Spain, Portugal, France, or the Dutch West India Company. Though slavery had died out in France and the Dutch Republic, when slavery appeared in the colonies, recourse was had above all to Roman law.[1]

The immediate surprise in this is that the social institution of slavery was fundamentally different in the Americas from that which existed in Rome. Slavery in the New World was essentially based on race—in Rome it was not.[2]

When one looks at Roman slave law from an Anglo-American perspective, what is striking is the apparent disinterest or lack of concern in the subject on the part of the state and the corresponding freedom of action allowed to slave owners. My claim is not that there was little law—indeed there was a great deal—but that the state did not get overly involved in laying down what owners could do with their slaves. For instance, though law decreed the methods by which slaves could be freed,[3] the state imposed very few restrictions on manumission. This is all the more striking in that manumission gave citizenship as well as freedom. Roman citizenship was highly prized, giving economic advantages as well as status.

The basic restrictions on manumission were introduced as late as the time of Augustus by the *lex Aelia Sentia* of 4 A.D. and the *lex Fufia Caninia* of 2 B.C. It is appropriate to quote the account in Gaius' *Institutes*, book 1:

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1 For thorough details on Roman slave law, see W.W. BUCKLAND, THE ROMAN LAW OF SLAVERY (1908); *see also* ALAN WATSON, ROMAN SLAVE LAW (1987).

2 I am not claiming that Romans were not racist, only that enslavement there was neither based on, nor justified by, the racial characteristics of the victims.

3 The methods themselves were not created by the state. *See, e.g.*, WATSON, *supra* note 1, at 24.

36. Not everyone who wishes to manumit is allowed to do so. 37. For if a man manumits in order to defraud his creditors or his patron, his act is void, because the *L. Aelia Sentia* prevents the liberation. 38. By the same *lex* also a master under 20 is not permitted to manumit except *uindicta* and with adequate motive for manumission shown before a council. 39. There is adequate motive for manumission where, for instance, a master manumits his father or mother, or his teacher or foster-brother. Moreover, the motives we mentioned above in the case of a slave manumitted under 30 may be adduced in the present case, just as, conversely, those we have specified for the case of a master under 20 may be applied also to that of a slave under 30. 40. A limitation being thus imposed by the *L. Aelia Sentia* on manumissions by masters under 20, the result is that, though a master who has reached the age of 14 can make a will and therein institute an heir and leave legacies, he cannot (therein) grant freedom to a slave. 41. And though the master under 20 is seeking to make his slave a Latin, he must nevertheless show adequate motive before a council, and only then manumit before friends (informally).

42. Furthermore, a limitation has been set on the manumission of slaves by will by the *L. Fufia Caninia*. 43. For a master who has more than 2 and not more than 10 slaves is allowed to manumit up to half their number; one who has more than 10 and not more than 30 is allowed to manumit up to a third; one who has more than 30 and not more than 100 is allowed to manumit up to a quarter; lastly, one who has more than 100 and not more than 500 is allowed to manumit not more than a fifth; nor is he allowed, even if he has more than 500, to manumit any more, the *lex* enacting that no one may manumit more than 100. On the other hand, a master who has only one or two slaves is not affected by this *lex*, and consequently has unrestricted power of manumission. 44. Nor has the *lex* any application to masters manumitting otherwise than by will. Hence a master manumitting *uindicta* or by the census or before friends (informally) is allowed to free his whole household, provided of course that there be no other impediment to their freedom. 45. The rules we have stated with regard to the number of slaves who may be manumitted by will must be taken with the qualification that, where only half or a third or a fourth or a fifth of the actual number may be manumitted, it is always permissible to manumit not fewer than could have been manumitted under the preceding scale. This is laid down by the *lex* itself, for it would indeed have been absurd that a master of 10 slaves should be allowed to manumit 5, as being allowed to manumit up to half, whereas a master of 12 should not be allowed to manumit more than 4; on

> the contrary, one who has more than 10, *but less than 15, may manumit 5, though this exceeds a third of his actual number* . . . . 46. Similarly, if the names of the slaves manumitted by the will are written in a circle, none of them will be freed, since no order of manumission is discoverable. For the *L. Fufia Caninia* and also certain special senatusconsults nullify anything contrived to evade the *lex*.[4]

So, under Augustus, an owner under twenty could not manumit, nor could a slave under thirty be freed, *unless* adequate cause was shown. Otherwise no cause need be shown for manumission! Good cause for manumission by a youngster is set out more fully in Justinian's *Institutes*, 1.6.5:

> Good causes for manumission are, for example, if one is manumitting one's natural father or mother, son or daughter, brother or sister, or one's teacher, nurse, or the person who brought one up, foster brother or foster sister, or someone suckled at the same breast, or a slave in order to have him as one's general agent, or a slave woman in order to marry her, provided, however, she is taken as wife within six months unless a good reason prevents this: and the master manumitting to have a procurator must not be less than seventeen.[5]

The persons who could thus be freed would be those that an owner was likely to want to free, so the practical restrictions on even young owners were minimal.

The *lex Fufia Caninia* imposed restrictions on the proportion of slaves who could be freed, but again we should stress the qualification: the restrictions applied only to manumission *by will*. An adult owner who wanted to free his slaves during his lifetime could free them all without hindrance.

There were no limitations on the education an owner could give his slaves, or the work his slaves could do, or his slaves' religious observances, or where his slaves resided. Of course, a slave had no ownership rights, but again this legal fact requires expansion. It was common for an owner to allow a slave—and a son, too—the use of a fund called the *peculium*. The *peculium*, of course, belonged to the owner (or father), and there is a great deal of law on the subject.

What could the slave do with the *peculium*? The answer is, anything the owner allowed, except that the owner could not bestow on the slave the right to make a gift. So the slave's powers of

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[4] G. INST. 1.36-46, *translated in* 1 THE INSTITUTES OF GAIUS 13 (Francis de Zulueta trans,. 1946).

[5] J. INST. 1.6.5.

administration were no more and no less than those granted by the owner, rather than any set down by the state.

What could the owner do with the *peculium*? Within the limits of fraud, he could do anything. There could be no contract between owner and slave, and at any time for any reason (or none at all) the owner could take away all or any part of the *peculium*.[6] Where then was all the law I have just mentioned? It consisted in determining what counted as a gift, in relations between the owner and outsiders, and in estimating the *peculium* when a slave was freed with a grant of it. One example of a gift may illustrate the complex nature of the issues:

> If my slave who had a free administration of his *peculium* made an agreement not on account of a gift with a person who stole a thing from the *peculium*, this seems a valid compromise. For although the action on theft is procured (*quaeratur*) for the owner, nonetheless still the matter concerns the slave's *peculium*. But even if the whole double penalty of theft was paid to the slave there is no doubt the thief would be released. It is in harmony (*consequens est*) with this that if it happened that the slave received from the thief what appears satisfactory on that account, there seems to be a real compromise.[7]

Someone stole from a *peculium*, and the slave made a compromise with the thief. The issue is whether the compromise is valid; if so, it bars the owner's action for theft. The basic answer in the text is that the compromise is valid if the slave did not intend to make a gift by it. The words "but even if" introduce a more difficult case. Why should the case be more difficult if the slave had received the full penalty from the thief? The answer is that the amount of the compromise falls into the *peculium*—and some outside party might have a claim on the *peculium*. Whereas, if the owner had recovered by the action, the proceeds would not have been in the *peculium*.[8]

The main issue for estimating the *peculium* with the respect to an outsider arose from the *praetor's* Edict.[9] In early Roman law, a contract made between a slave and an outsider bound the outsider to the slave's owner, but the owner had no liability on the con-

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[6] For a complete discussion of the *peculium*, see BUCKLAND, *supra* note 1, at 187-206; WATSON, *supra* note 1, at 90-101.

[7] DIG. 47.2.52.26.

[8] For a fuller discussion of the text, see Alan Watson, *Thinking Property at Rome*, 68 CHI.-KENT L. REV. 1355, 1363-66 (1993).

[9] OTTO LENEL, DAS EDICTUM PERPETUUM 273 (3d ed. 1956).

tract.[10] This was obviously undesirable even for owners—few would contract with slaves on such terms. So the *praetor* introduced actions, most likely in the first century B.C., which made the owner liable to some extent and in some circumstances. One of these actions was the *actio de peculio et de in rem verso*, "the action on the *peculium* and on property turned to account."[11] This made an owner liable on a contract up to the amount of a slave's *peculium*, and to the extent he had benefited.

Interestingly, what was—I am convinced—the main advantage of a *peculium* to the slave is never mentioned in the legal sources (or elsewhere) because it concerns a matter of fact, not an issue of law. It would be a common practice, I believe, for an owner to make a bargain with his slave to free him once the slave could pay him his value from his *peculium*. The bargain would be unenforceable, but it would be in the owner's interest to keep it: the slave (and his fellows) would work harder for the reward of freedom and would be more docile. The owner could use the price paid by the slave for his freedom to replace the slave with another of the same value.

At no time did Roman law demand that an owner punish a slave for any offense.[12] On the other hand, during the whole of the Republic there were no restrictions on an owner punishing or ill-treating his slaves.[13] Some restrictions were introduced during the Empire. The most interesting instance is recorded in Justinian's *Institutes*:

> Therefore slaves are in the power of their masters. This power indeed comes from the law of nations; for we can see that among all nations alike masters have power of life and death over their slaves, and whatever is acquired through a slave is acquired for the master. 2. But nowadays, it is permitted to no one living under our rule to mistreat his slaves immoderately and without a cause known to the law. For, by a constitution of the deified Antoninus Pius, whoever kills his slave without cause is to be punished no less than one who kills the slave of another. And even excessive severity of masters is restrained by a constitution of the same emperor. For when he was consulted by certain provincial governors about those slaves who flee to a holy temple or to a statue of the emperor, he gave the ruling that if

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10 *Id.*

11 *See, e.g., id.*

12 Nor did it ever require an owner to pay a reward to a captor of a runaway slave, though rewards for catching a runaway were, of course, common. *See, e.g.*, David Daube, *Slave-Catching*, 64 JURID. REV. 12 (1952).

13 *See, e.g.*, BUCKLAND, *supra* note 1, at 533.

> the severity of the masters seems intolerable they are compelled to sell their slaves on good terms, and the price is to be given to the owners. For it is to the advantage of the state that no one use his property badly. These are the words of the rescript sent to Aelius Marcianus: "The power of masters over their slaves should be unlimited, nor should the rights of any persons be detracted from. But it is in the interest of masters that help against savagery or hunger or intolerable injury should not be denied to those who rightly entreat for it. Investigate, therefore, the complaints of those from the family of Julius Sabinus who fled to the statue, and if you find they were more harshly treated than is fair or afflicted by shameful injury, order them to be sold so that they do not return to the power of the master. Let Sabinus know that, if he attempt to circumvent my constitution, I will deal severely with his behavior."[14]

The text is taken from Gaius who, however, does not quote the rescript and who gives a rather different explanation for it: "for the same reason prodigals are interdicted from the administration of their property."[15]

The reasons given for restricting the masters' power are revealing. Not a word is said about the well-being of slaves, and this is true also for the texts that refer to earlier restrictions.[16] But Gaius makes a correlation with prodigals. They are interdicted from administering their property in the interest of the relatives who will inherit their estate and who will suffer if it is squandered.[17]

Likewise, masters who mistreat their slaves reduce their value, and this should be prevented in the interest of their relatives. The rescript of Antoninus Pius, who died in 161 A.D., that is thought worthy of quotation by Justinian in the *Institutes*,[18] and again in the *Digest*,[19] actually stresses that masters should have unlimited power over their slaves. The claim in the rescripts is that it is in the interest of masters that help against savagery should not be denied to those who entreat for it. Presumably, "masters" here means the slave-owning class in general rather than the individual masters who abuse their slaves. If this is so, then Antoninus Pius is referring to an eternal tension in slave-owning communities—between

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14 J. INST. 1.8.1.
15 G. INST. 1.53.
16 *See* WATSON, *supra* note 1, at 115.
17 G. INST. 1.53.
18 J. INST. 1.8.2.
19 DIG. 1.6.2.

protection of slaves from cruel masters and the authority of masters, which will be discussed shortly.[20]

There is, incidentally, an interesting sidenote on the rescript of Pius. Protection was afforded a mistreated slave if he fled to the statue of the emperor. But it was standard practice in buying a slave to demand a guarantee that he had not fled to the statue.[21] Such a slave was obviously thought not to be the kind one wanted to buy.

There was, moreover, the problem of proving that an owner murdered his slave. Four texts from the Christian empire, recorded in the *Theodosian Code*, may stand for all:

> 9.12.1 (A.D. 319). If a master beat a slave with a rod or whip or put him in chains to guard him, and the slave dies, the master need have no fear of prosecution. Distinctions of time and questions of interpretation are abolished. He should, of course, not use his right immoderately, but he will be charged with murder only if he killed the slave intentionally, by a blow from the fist or a stone, or, by using a weapon, he inflicted a lethal wound, or ordered him to be hanged by a noose, or by a wicked order instructed that he be thrown from a high place, or administered the virus of a poison, or tore his body by public punishment, that is, by tearing through his sides with the claws of wild beasts, or by burning him with fire applied to his limbs, or if, with the savagery of monstrous barbarians, he forced the slave to leave his life almost in the tortures themselves, with the destroyed limbs flowing with black blood.
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> 9.12.2 (A.D. 329). Whenever such chance accompanies the beatings of slaves by masters that they die, the masters are free from blame who, while punishing very wicked deeds, wished to obtain better behavior from their slaves. Nor do we wish an investigation to be made into facts of this kind in which it is in the interest of the owner that a slave who is his own property be unharmed, whether the punishment was simply inflicted or apparently with the intention of killing the slave. It is our pleasure that masters are not held guilty of murder by reason of the death of a slave as often as they exercise domestic power by simple punishment. Whenever, therefore, slaves leave the human scene after corrections by beating, when fatal necessity

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20 Another tension, which is outside the scope of this Article, is the danger of slaves' reaction to ill-treatment. For a discussion of the *senatus consultum Silanianum*, the main Roman vehicle for a safeguard, see WATSON, *supra* note 1, at 134-38.

21 DIG. 21.1.19.1.

> hangs over them, the masters should fear no criminal investigation.[22]
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> 9.5.1.1 (A.D. 320-23): Also in the case of slaves or freedmen who try to accuse or inform against their masters or patrons, the assertion of such atrocious audacity shall be repressed at the very outset . . . a hearing will be denied them, and they will be crucified.[23]
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> 9.6.2 (A.D. 376): When slaves thunder forth as accusers of their masters, none of the judges is to await the outcome; it is settled that no inquiry is to be made, no investigation to be heard, but the authors of the wicked accusations are to be burnt along with the statements of the accusation, with all the instruments of the writing and of the intended criminal charge. We make an exception of attempted high treason in which betrayal is honorable even for slaves, for this crime too is directed against *domini* [i.e., the Emperors].[24]

If we take these rescripts together, a general picture emerges. Masters who murder their slaves are guilty of crime. But, if a slave dies during a beating, there will be no investigation, even if it appears that the owner intended to kill the slave. If, however, the owner employed means such as poison or threw the slave over a cliff, the owner will be charged with murder. Even in this latter case, slaves and freedmen cannot accuse their owner. It is suspect that Roman owners were seldom convicted of murdering their slaves.

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22 CODE TH. 9.12.1-2.

23 *Id.* at 9.5.1.1.

24 *Id.* at 9.6.2.