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Morality, Slavery and the Jurists in the Later Roman Republic

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The problem I wish to discuss is the moral attitude of the later Republican jurists to slavery. The prominent jurists of the time belonged to the upper classes and, although it would be wrong to generalize from the jurists to other members of the aristocracy, we shall have a certain glimpse into the social attitudes of the period if we can gain a reasonably clear picture from the jurists. I will deal only with juristic discussion, and not with the statutes and edicts which concern slavery. No doubt the jurists would play a part in shaping these, but public political acts are less instructive for the outlook of the jurists than their legal opinions which would not be subject to the same publicity.[1] And for the purposes of this article I will say nothing about the factors which influenced the attitude of the jurists.

To begin with a very obvious point, we must not expect to find the jurists questioning the moral propriety of the institution of slavery. They were too involved in the mental attitudes of their times to speculate on that abstraction. All we can hope for is that, from their discussions of legal problems concerning slavery, certain moral perspectives will become apparent. In order to judge these discussions we must set the scene. How free were the jurists in their interpretation of the law? Were they bound to interpret provisions in laws, edicts, wills and so on in a strict way? How far could they influence the development of the law in a way which might seem contrary to logic but was consonant with their ideas of good sense? The answer to these questions is that their freedom to interpret, their power to develop, was very great indeed. A few instances will make this plain. There was an *interdictum quod vi aut clam*. This ran: "You should restore to its previous condition whatever has been done by force or by stealth and which is the subject of the present dispute, if it is not more than a year since

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* With the addition of notes this is the text of a lecture delivered in the University of Oxford, England, on May 16, 1967.

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[1] There seem, in any event, to be no relevant statutes. Only two edicts, so far as I am aware, throw any light on moral attitudes in regard to slaves and slavery. One of these, the edict on *operae* introduced by Rutilius, was sympathetic, the other, *de bonis libertorum*, was not: *cf.* A. Watson, The Law of Persons in the Later Roman Republic 229-36 (1967). The edict which granted an *actio iniuriarum* to a master whose slave was beaten *adversus bonos mores* or tortured without the master's authority may or may not be recognizing the humanity of the slave. The injury or insult may be to the owner.

the power of objection arose."[2] "By force or by stealth," *vi aut clam,* was the object of interpretation. Quintus Mucius Scaevola, who was consul in 95 B.C.,[3] said that something was done *vi,* by force when a person did it who had been told not to.[4] This obviously covers situations where by no stretch of the imagination can one reasonably say that force has been used. But Scaevola wishes the interdict to have a wide scope and so *vi,* by force, is deliberately given an unnatural meaning. It would be hard to imagine a case of wider interpretation. But in fact the jurist Servius Sulpicius Rufus, consul in 51 B.C.,[5] gives an even more extreme interpretation of *clam,* by stealth. *Clam* involves deliberate secrecy. But Servius held that a person acts *clam* when he does not inform someone whom he ought to think will object to what he is doing[6] "lest," says the text, "the position of fools be better than that of wise men." So Servius is prepared to change the basis of liability under the interdict. The interdict apparently envisaged only deliberate wrongful conduct, but Servius will have it given even for negligence. Another instance of extremely wide interpretation can be found in connection with the *actio aquae pluviae arcendae.* This gave a remedy to a person whose land was injured by work done on neighboring land which diverted rain water on to his property. It is hardly surprising that Quintus Mucius held that rain water meant any water which was increased by rain.[7] But Trebatius—young friend and protégé of Cicero, legal adviser of Julius Caesar and Augustus[8]—holds that the action will lie where the damage is caused by hot springs. The classical jurist Ulpian disagrees with him "for," he says reasonably, "hot springs are not rain water."[9]

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[2] *"Quod vi aut clam factum est, qua de re agitur, id, si non plus quam annus est cum experiendi potestas est, restituas:" cf.* O. Lenel, Das Edictum perpetuum 482 (3d ed. 1927).

[3] *Cf., e.g.,* W. Kunkel, Herkunft und soziale Stellung der römischen Juristen 18 (1952).

[4] D.50.17.73.2 (Quintus Mucius *lib. sing. horon*). *"Vi factum id videtur esse, qua de re quis cum prohibitur, fecit . . . ."* Stein suggests that the definition derives from Scaevola's observation of the various cases in which the praetor granted the interdict. P. Stein, Regulae iuris 37 (1966).

[5] *Cf.* W. Kunkel, *supra* note 3, at 25.

[6] D.43.24.4 (Venuleius *2 interd.*) *"Servius etiam eum clam facere, qui existimare debeat sibi controversiam futuram, quia non opinionem cuius* [*cui*-Mommsen] *et resupinam existimationem esse oporteat, ne melioris condicionis sint stulti quam periti."* The first part of the text, as far as *futuram,* never seems to have been held interpolated. See further on the text my forthcoming, The Law of Property in the Later Roman Republic, chapter 10.

[7] Cicero, *top.*9.38.

[8] *Cf.* W. Kunkel, *supra* note 3, at 28.

[9] D.39.3.3.1 (Ulpian *53 ad ed.*). *"Idem Trebatius putat eum, cui aquae fluentes calidae noceant, aquae pluviae arcendae cum vicino agere posse: quod verum non est: neque enim aquae calidae aquae pluviae sunt."* It is possible that Trebatius is thinking of artificially heated water. On the text see my forthcoming, The Law of Property in the Later Roman Republic, chapter 7.

Thus, the jurists of the later Republic had great freedom of interpretation. They were free even to interpret literally if they wanted. For instance, the edict *Ne quis in suggrunda*[10] gave an action against one who suspended an object from eaves or a projecting roof, where the fall of the object might cause damage. The jurist Servius refused to give this action where a painter—no doubt in the hope of making a sale—hung a painting or a shield on a booth and it fell and injured someone "because the painting was placed neither on the eaves nor on a projecting roof."[11] But he did give an *actio ad exemplum huius actionis*, an action created on analogy with the action in question.

The first problem we shall examine in slavery concerns the usufruct of a slave-girl. If there was a usufruct, the usufructuary was entitled to use the object and he became the owner of any fruits, *fructus*. Cicero, *de fin.*1.4.12, tells us of a dispute between the leaders of the state:

> There was a discussion among the leaders of the state, Publius Scaevola and Manius Manilius whether a child should be included among the fruits. Marcus Brutus disagreed with them.[12]

Of these three prominent jurists, Publius Scaevola was consul in 133 B.C.;[13] Manius Manilius was consul in 149 B.C.;[14] and Marcus Brutus was praetor in 142 B.C.[15] Why should there be any doubt on this point of law? It seems difficult to find a logical reason for holding that the child was not *fructus*. A reason is given by a Digest text of Ulpian, D.7.1.68pr:

> There was an old question whether a child belonged to the usufructuary. But the opinion of Brutus prevailed, that the usufructuary had no right to the child: for a human being cannot be included in the fruits of a human being. On this

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[10] *Ne quis in suggrunda protectove supra eum locum, quo vulgo iter fiet inve quo consistetur, id positum habeat, cuius casus nocere cui possit. Qui adversus ea fecerit, in eum sestertiorum decem milium nummorum in factum iudicium dabo. Si Servus insciente domino fecisse dicetur, [aut noxae dedi iubebo].*

Cf. O. Lenel, *supra* note 2, at 174.

[11] D.9.3.5.12 (Ulpian *23 ad ed.*) . . . *nam et cum pictor in pergula clipeum vel tabulam expositam habuisset eaque excidisset et transeunti damni quid dedisset, Servius respondit ad exemplum huius actionis dari oportere actionem: hanc enim non competere palam esse, quia neque in suggrunda neque in protecto tabula fuerat posita.*

On the text see now, A. Watson, The Law of Obligations in the Later Roman Republic 268-70 (1965).

[12] *An partus sitne in fructu habendus, disseretur inter principes civitatis, P. Scaevolam, M'que Manilium ab iisque M. Brutus dissentiet. . . .*

[13] W. Kunkel, *supra* note 3, at 12.

[14] *Id.* at 11.

[15] *Id.* at 12.

> account, the usufructuary will not have even a usufruct in him. . . .[16]

It is not clear from the Latin whether the reason given in the text for the decision is to be attributed to Ulpian or to Brutus.[17] Some light may be shed on the meaning of "for a human being cannot be included in the fruits of a human being" by a text of the jurist Gaius,[18] D.22.1.28.1.:

> But the child of a slave-woman is not included in fruits and so it belongs to the owner of the property: for it seemed absurd to include human beings among fruits since nature procured the fruits of all things for the sake of human beings.

"For it *seemed* absurd &c," *absurdum enim videbatur*, shows that Gaius thinks that this was the original reason for the decision. Indeed, I suggest, the reason for the rule would have to be along such philosophical lines. Otherwise it is difficult to imagine how the Republican jurists could ever have reached the decision—which seems contrary to principle—that a child was not among the fruits of a slave-woman.[19] We must accept, I think, that it was on the basis

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[16] (Ulpian *17 ad Sab.*). *Vetus fuit quaestio, an partus ad fructuarium pertineret: sed Bruti sententia obtinuit* [ius—*insert*, Mommsen] *fructuarium in eo locum non habere: neque enim in fructu hominis homo esse potest. hac ratione nec usum fructum in eo fructuarius habebit. quid tamen si fuerit etiam partus usus fructus relictus, an habeat in eo usum fructum? et cum possit partus legari, poterit et usus fructus eius.*

[17] It is in the indicative but Ulpian frequently repeats arguments with which he agrees in the indicative. *Cf. e.g.*, Magdelain, Les actions civiles 9 (1954).

[18] (2 rer. cott.). "*Partus vero ancillae in fructu non est itaque ad dominum proprietatis pertinet: absurdum enim videbatur hominem in fructu esse, cum omes fructus rerum natura hominum gratia comparaverit.*"

[19] For a view of Kaser on the concept of fruits behind the reason, *see* "*Partus ancillae*," ZSS lxxv (1958) at 156-57. *But see* my forthcoming, The Law of Property in the Later Roman Republic, chapter 9.

A different explanation of the final decision reached, also based on the idea of a Roman concept of fruits, could be brought forward on account of D.5.3.27 pr. (Ulpian *15 ad ed.*), "*Ancillarum etiam partus et partuum partus quamquam fructus esse non existimantur, quia non temere ancillae eius rei causa comparantur ut pariant, augent tamen hereditatem: . . . .*" In this it is said that offspring of slave-girls are not fruit because slave-girls are not lightly bought for the purpose of producing young. Hence, it might be argued that only those new creations are fruit for whose production the bearer is typically kept (*cf.*, *e.g.*, Kaser, *supra*); or even that only those new creations are fruit whose production can be counted upon as a normal and standard recurring event. But I think it is unlikely that such a concept of fruit (in whichever form it is expressed) explains the attitude of the Republican jurists to the question of *partus ancillae*. First, the only expression of any idea of this sort is in this text and there is no indication that it is older than Ulpian, or was shared by anyone. Secondly, there is some evidence that the Romans thought that in early times at least the birth of a baby to a slave-girl was an annual, standard event: thus, Festus says that *vernae* are those born in the spring from the slave-girls of Roman citizens because that time of year is the most natural for birth—"*vernae appellantur ex ancillis civium Romanorum*

of the noble idea that a human being could not be treated as fruit for the benefit of other humans that this decision was reached. But before we give the jurists credit for their idealism, three points must be made. First, the decision is isolated and, considering the total acceptance of the social fact of slavery, moral concern on this point looks a trifle artificial. After all, masters legally had complete power of life and death over their slaves.[20] Secondly, the child born to the slave, it is held, is not fruit—but this does not mean that the child is free. It means only that it belongs to the mother's owner and not to the usufructuary. There is a certain emptiness in the application of the philosophical principle. Thirdly, and this is the most important point of all, the natural result of the decision is the immediate separation of the mother and child. The mother is under the control of the usufructuary. The child does not belong to the usufructuary who does not even have a usufruct in him. The child does not form part of the usufruct and hence the usufructuary, as such, has no liability for him. He would seem to have no legal responsibility to look after the child in terms of the guarantee normally given by the usufructuary to the owner at the beginning of the usufruct. The usufructuary, moreover, has no legal right to retain custody of the child. The person with the legal right of custody is the owner. So, looked at in legal terms, the result is that the mother stays with the usufructuary, the child goes to the owner. The consequences of the decision can fairly be said to be appalling. Of course, we cannot tell how frequently in practice the usufructuary might nonetheless keep the child in his household at his expense. But it must often or even usually have been the case that the child would be sent back to its owner. Apart from the

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vere nati, quod tempus anni maxime naturalis feturae est;" and elsewhere, "*vernae, qui in villis vere nati, quod tempus duce natura feturae est &c.*" (*cf.* 2 H. Wallon, Histoire de l'esclavage dans l'antiquite 17 (2d ed. 1879). Incidentally there is a certain paradox in Ulpian's argument in that certainly in the Empire the bearing of children by a slave woman was regarded as advantageous. Thus, for instance: (1) the writers on agriculture say that the fecundity of female slaves is to be encouraged; *e.g.*, Columella, 1.8.19 (cf. H. Wallon, *supra*): (2) Horace counts the swarm of young slave children among the wealth of a house; *epod.*2.65f; *serm.*2.6.65ff. Ulpian himself indicates in D.7.7.6.1 (45 *ad ed.*) that work could be extracted from slaves at five. See now above all for the view that in the Empire the Romans did not regard slave-breeding as unprofitable, Brunt, JRS xlviii (1958) at 166, and the references he gives. One cannot meaningfully say that Ulpian's point in D.5.3.27pr is that *ancillae* were not *primarily* kept for the production of young. Animals, such as sheep, could give a number of different products but nowhere is it suggested that only those things for which they were primarily kept were *fructus*. All in all, it is difficult not to agree with Buckland that the reason given by Ulpian in D.5.3.27pr expresses "somewhat obscurely, the real reason, which is respect for human dignity, rather than any legal principle.": F. Buckland, The Roman Law of Slavery 21 (1908). The respect for human dignity is, of course, limited: it does not extend to abolishing slavery.

[20] *Cf.* F. Buckland, *supra* note 19, at 36.

initial misery of the separation of mother and child, there is the further consideration that the owner would often regard it as troublesome to have to bring up a slave child without its mother. One would imagine that, inevitably, it would sometimes happen that the child would simply be exposed and left to die and that it would often happen that the child would be sold to a slave owner who was prepared—on account of the later profits—to buy it and bring it up. If it had just been accepted without question that the child was *fructus*, there would still have been a question of separation of mother and child when the usufruct came to an end when the mother would return to her owner and the child would not. But under this rule the separation might not occur for many years, the usufruct in the slave-woman would frequently end only with the death of the slave-woman herself, and the chances of the slave-child being reared would be considerably enhanced.

The conclusion to be drawn from these three points, and particularly from the second and third, is that the jurists' decision was based on abstract philosophical principle and did not take into account the practical moral questions of the welfare and happiness of the slave-mother and child.[21] Incidentally, the decision which holds in an artificial way that children of slave-women are not fruit is in itself an example of the freedom which the Republican jurists had to develop the law.

I should mention before we leave this topic that it is from time to time suggested, with differing emphasis, that the real reason for the decision is economic.[22] Thus for instance, Arangio-Ruiz says, "Much more probably, the decisive reason was that, in the conflict between the proprietor and the usufructuary of the slave, it appeared that the little slave was too valuable to be given to the latter." And, of course, as I have stressed, it is by no means certain that we have textual evidence for the philosophical or moral argument in the Republic. Still, I think a short answer can be given to those who take this economic viewpoint. In the discussion which Cicero mentions between the leaders of the state, arguments for the different opinions must have been given. The jurists cannot have relied simply on their authority. And these arguments must have been juristic in nature. And it is not a juristic argument to say in a dispute that the property must be attributed to one party rather than to the other because it is so valuable. The arguments adduced must have been different. This is not to suggest, of course, that

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[21] *Cf., eg.,* O. Lenel, *supra* note 2, at 538; 1 M. Kaser, Das römische Privatrecht 378-79 (1955).

[22] *Cf., e.g.,* V. Arangio-Ruiz, Instituzioni di diritto romano 166 (14th ed. 1960); G. Grosso, Usufrutto e figure affini nel diritto romano 202 (2d ed. 1958).

behind the arguments adduced there may not have been an unexpressed economic viewpoint, but the discussion did not turn on that and its existence can only be a matter of conjecture. Further, if this economic viewpoint was important in the decision, the decision would still show—though in a different way—a totally heartless and callous attitude to slaves.

The second problem I want to look at concerns a legacy left to a slave by his master.

> D.35.1.40.3 (Iavolenus *2 ex post. Labeonis*). An owner left a legacy of five *aurei* to his slave: "Let my heir give to my slave Stichus, whom I have ordered in this will to be free, the five *aurei* which I owe him according to my account books." Namusa writes that the reply of Servius was that nothing was given as a legacy to the slave, because a master could not owe his slave anything. I think that following the intention of the master a natural rather than a civil debt is to be looked for. And that is the law in force.[23]

It may be that the text has not come down to us absolutely in its pristine form[24] but the accuracy of the substance, especially for the view of Servius, cannot really be doubted. Justinian's compilers, certainly, would never have invented the opinion of Servius which they would then be dismissing as erroneous. And one cannot really allege that a careless scribe was responsible for the view attributed to Servius, which is then contradicted by a later jurist in the text. Thus, we have Servius holding that a legacy by his master to a slave whom he has freed under the will of the five *aurei* owed to him according to the master's account books is void because a master can owe his slave nothing. Technically, a master could owe his slave nothing. But the master's intention is clear. There can be no dispute about what the master wanted. And Servius' decision is totally against the master's intention. There are about 139 texts concerning legacies which can be isolated as going back to Republican decisions. The great majority of these concern the question of the content and extent of provisions of the will. Not one other of these 139 shows a decision contrary to the master's clear intention.[25] We have even a text where Servius himself says that regard must be had for the intention of the testator.

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[23] *Dominus servo aureos quinque eius legaverat: "heres meus Sticho servo meo, quem testamento liberum esse iussi, aureos quinque, quos in tabulis debeo, dato." nihil servo legatum esse Namusa Servium respondisse scribit, quia dominus servo nihil debere potuisset: ego puto secundum mentem testatoris naturale magis quam civile debitum spectandum esse, et eo iure utimur.*

[24] *Cf. Index Itp.*

[25] D.32.29pr. (Labeo *2 post. a Iavoleno epit.*) does not: *cf.* for the reasoning behind the decision, G. Garrido, Ius uxorium 125-26 (1958). Neither does D.30.63 (Celsus *17 dig.*): Servius there excludes the dead slave-woman's child from the legacy because he regards the child *accessionis loco legatus.*

> D.33.10.7.2 (Celsus *19 dig.*). Servius declares that the intention of the person who left the legacy must be examined to see the category in which he placed the object in question: but that if someone is accustomed to ascribe something of which there is no doubt but that it belongs to a different category, for instance, silver tableware or woolen cloaks or togas, to the category of furniture, these things ought not on that account to be contained in a legacy of furniture. For words should be understood according to common usage, not according to the idea of individuals.[26]

The text goes on to say that Tubero disagrees with Servius but that Celsus himself agrees with Servius. Servius' principle is one accepted today: the intention of the testator must be examined but words which are generally unambiguous are to be given their ordinary meaning. Even before Servius the principle was established that the testator's intention was to be taken into account. Thus, we are told that Quintus Mucius knew a Roman senator who wore women's dinner dresses. If he were to leave a legacy of "women's clothing," it is said, he would not be thought to have intended those which he wore as if they were men's clothing.[27]

Thus, Servius' decision in D.35.1.40.3 that the legacy to the slave of the five *aurei* which the master owed him is void is very strange. I do not know how one can explain it other than on the basis that Servius is being unfair to the freed slave. He is stressing the social difference between the master and his slave. The master cannot be in the debt of the slave.

The third instance also involves Servius. It concerns a rule, to which we will be returning, that if a slave was ordered by will to be free, but under a condition, and the heir obstructed the fulfillment of the condition, the *statuliber*—that is the name given to a slave conditionally to be freed—would get his freedom. The text, D.40.7.3.2, comes from Ulpian's 27th book *ad Sabinum.*

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[26] *Servius fatetur sententiam eius qui legaverit aspici oportere, in quam rationem ea solitus sit referre: verum si ea, de quibus non ambigeretur, quin in alieno genere essent, ut puta escarium argentum aut paenulas et togas, supellectili quis adscribere solitus sit, non idcirco existimari oportere supellectili legata ea quoque contineri: non enim ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere.*

Cf. now on the text, 2 Voci, Diritto ereditario romano, parte speciale 835 (2d ed. 1963).

[27] D.34.2.33 (Pomponius *4 ad Quintum Mucium*). *Inter vestem virilem et vestimenta virilia nihil interest: sed difficultatem facit mens legantis, si et ipse solitus fuerit uti quadam veste, quae etiam mulieribus conveniens est. itaque ante omnia dicendum est eam legatam esse, de qua senserit testator, non quae re vera aut muliebris aut virilis sit. nam et Quintus Titius [Mucius—S] ait scire se quendam senatorem muliebribus cenatoriis uti solitum, qui si legaret muliebrem vestem, non videretur de ea sensisse qua ipse quasi virili utebatur.*

For an explanation of this passage see L. Wilson, The Clothing of the Ancient Romans 172 (1938).

> Hence the question arises, if by chance money is owed to this slave either by the heir, because he had spent money on behalf of his owner, or by a third party, and the heir does not wish to sue the debtor or pay the money to the *statuliber*: ought the *statuliber* to get his freedom on the score that he suffers delay due to the heir? Now the *peculium* was either left to this *statuliber* as a legacy or it was not. Servius writes that if there was a legacy of the *peculium* he has suffered a delay in achieving liberty on this score because something was owed to him under his master's accounts and was not given to him by the heir. Labeo also accepts this opinion. Servius holds the same even if the heir causes a delay because he does not exact the money from the debtors. For he says he will get his freedom. I also think that what Servius says is correct. Since, therefore, we think the opinion of Servius is correct, let us see whether the same should be said even if there was not a legacy of the *peculium* to the slave. For it is settled that a *statuliber* ordered to pay to the heir or another can pay from the *peculium* and if the heir stops him giving it, the *statuliber* will get his freedom.[28]

For Ulpian in such circumstances, it is irrelevant whether or not the slave was left a legacy of the *peculium*. But a distinction had been drawn between the case where there was a legacy of the *peculium* and where there had been no such legacy; and it was apparently drawn or accepted by Servius. We are only given Servius' opinion for one side of the distinction but whether he explicitly stated his opinion on the other part or not, we can deduce from the text that according to Servius the *statuliber* would not in the circumstances here become free if he had not been left a legacy of his *peculium*. This means that where a slave was left his freedom on condition of paying a certain sum to the heir—a common situation—but was not left a legacy of his *peculium*, he could not pay from his *peculium*. This seems rather strange and it was certainly not accepted later. It means in effect that most slaves in that position would never get their freedom. Only if some indulgent outsider paid the money to the heir would the slave become free. Again we

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[28] *Inde quaeritur, si forte debeatur pecunia huic servo vel ab herede, quod in domini rationem plus erogaverat, vel ab extraneo, nec velit heres debitorem convenire vel statulibero solvere pecuniam: an debeat ad libertatem pervenire, quasi moram per heredem patiatur. et aut legatum huic statulibero fuit peculium aut non: si legatum peculium fuit, Servius scribit moram eum libertatis passum ob hoc ipsum, quod ei aliquid ex ratione dominica deberetur nec ei ab herede praestaretur: quam sententiam et Labeo probat. Idem Servius probat et si in eo moram faciat heres, quod nolit exigere a debitoribus: nam perventurum ad libertatem ait. mihi quoque videtur verum quod Servius ait. cum igitur veram putemus sententiam Servi, videamus, an et si non fuerit praelegatum* [*legatum*—Mommsen] *peculium servo, idem debeat dici: constat enim statuliberum de peculio posse dare vel ipsi heredi iussum vel alii: et si eum dare impediat, perveniet statuliber ad libertatem.*

The text has been held interpolated in substance, but see now A. Watson, *supra* note 1, at 204-05.

have a Republican decision which is very hard on the slave. It is, one might think, also contrary to the intention of the testator, though this is perhaps not so clear as in D.35.1.40.3.[29]

The fourth case comes from Alfenus Varus, who was a pupil of Servius and who was *consul suffectus* in 39 B.C.[30] It concerns a different matter and I cite it for a very different purpose.

> D.44.7.20 (2 *dig.*). Not in all situations is a slave who obeys his master free from penalty, for instance if a master ordered his slave to kill a man or to steal from someone. Therefore, although it was at the order of his master that a slave committed piracy, an action ought to be given against him after he has been freed. And he ought to pay the penalty for whatever he did by force, where the force was connected with evil-doing. But if some quarrel arises from a law-suit and controversy, or some force was used for the sake of retaining a right and villainy was absent from these occasions, then it is not right for the praetor, since the slave acted at the order of his master, to give an action on that account against him when he is free.[31]

The text originally formed part of Alfenus' discussion of the *lex Aquilia*[32] and it is mainly concerned with civil, not with criminal, liability. Since the master had power of life and death over his slaves it was reasonable enough to develop a rule that a slave who, acting under the instructions of his master, committed a delict would at times not civilly be liable after he became a free man. The examples given in the text where the slave, now a free man, is not accountable are a brawl developing from a law-suit, presumably one to which the master who gives the command was a party, and violence for the sake of retaining a right. The principle underlying these examples seems to be that in these cases the slave is ordered to do something for what may appear to be the protection of the master and also to be not unreasonable. [Incidentally, the choice as an example of the brawl developing from a law-suit is evidence of the text's genuineness, which has been doubted. It has a slightly

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[29] It may be worth observing that where the *peculium* was the object of a legacy to the slave, Servius could regard as due to it what had been paid out for the master: *cf.* A. Watson, *supra* note 1, at 208.

[30] *Cf.* W. Kunkel, *supra* note 3, at 29.

[31] *Servus non in omnibus rebus sine poena domino dicto audiens esse solet, sicuti si dominus hominem occidere aut furtum alicui facere servum iussisset. quare quamvis domini iussu servus piraticam fecisset, iudicium in eum post libertatem reddi oportet. et quodcumque vi fecisset, quae vis a maleficio non abesset, ita oportet poenas eum pendere. sed si aliqua rixa et litibus et contentione nata esset aut aliqua vis iuris retinendi causa facta esset et ab his rebus facinus abesset, tum non convenit praetorem, quod servus iussu domini fecisset, de ea re in liberum iudicium dare.*

On the text, now see A. Watson, *supra* note 1, at 174-77.

[32] *Cf.* 1 O. Lenel, Paligenesia iuris civilis 40 (1889).

comic flavor, a human interest element. It is one of Alfenus' characteristics that his legal discussions are often based on cases which have elements which will appeal to his readers. Thus, we find in the same book of his *Digesta*, a breach of servitude resulting from planting pots and kettles in land,[33] a man making a dung-heap against his neighbor's wall,[34] a groom having his leg broken when his stallion sniffed a female mule which kicked out,[35] a brawl over a lantern which a shopkeeper (or probably better, tavern or brothel keeper) placed on a stone to light customers to his place of business and which was removed by a passer-by whose eye was put out in the struggle,[36] and a *servus dispensator* spending his master's money on a "little woman."[37] The proportion of this kind of case in the book cannot be due to chance.[38]] The first point to notice about our present text is that it was only in very limited circumstances that at this time a freed slave would avoid being subject to an action for delicts committed at his master's command. The second point to notice—and this is, I think, more significant—is the phrasing of the opening of the text: *Servus non in omnibus rebus sine poena domino dicto audiens esse solet*, "Not in all situations is a slave who obeys his master free from penalty." So in a few cases, it implies, he will be liable to a penalty. The phrasing of the text suggests that the general rule was that a civil action did not lie against a freed man who, when a slave, had committed a delict at the order of his master. In fact, as we learn from the text, the position was very different. Except in limited circumstances the freed slave would be liable. The form of the text implies great magnanimity toward the slave, and an understanding of his weak position in respect of his master's commands. The substance of the text shows a much harsher attitude. The difference between the form and the substance is illuminating for the attitude of the jurist—he thinks that the slave is very generously treated.

Other texts—indeed the great majority—show a logical approach to problems involving slaves. Sometimes the decision is logical but harsh. When we remember the freedom to interpret and to develop the law which I mentioned at the beginning of this lecture we might feel that the jurists were not prepared to put themselves out to help the underdog. One example, again from Alfenus Varus, is particularly clear.

D.40.1.6 (*4 dig.*). A slave agreed on a sum of money for his freedom and he gave it to his owner. The owner died before

[33] D.8.5.17.1.
[34] D.8.5.17.2.
[35] D.9.1.5.
[36] D.9.2.52.1.
[37] D.11.3.16.
[38] On all this see A. Watson, *supra* note 1, at 174.

> he manumitted him, and by his will he ordered him to be free, and he left him a legacy of his *peculium*. He asked whether or not the heirs of his patron should return to him the money which he had given to his owner for liberty. He [*who may be Alfenus or his master Servius*][39] replied that if the owner after he received the money entered it in his own accounts, it had immediately ceased to be part of the *peculium*; but if, in the meantime, until he manumitted him, he had returned it to the slave it was regarded as part of the *peculium* and the heirs ought to restore the money to him when he was manumitted.[40]

The decision seems to turn on the idea of the *peculium* as a fund separate from the accounts of the master, so that if the master considered the money among his own funds it immediately ceased to be part of the *peculium*. The decision seems to be legally unimpeachable, but it is very rigid. If they had wished, the jurists would have been able, without too much trouble, to reach a decision more sympathetic to the slave.

At times, though, the jurists may seem to pass over an opportunity to deal hardly with a slave. Thus, Alfenus Varus himself in D.33.8.14 (*5 dig.*):

> A person had written thus in his will: "When I die let my slave Pamphilus have his *peculium* and be free." The question was raised whether there seemed to be a proper legacy of the *peculium* to Pamphilus, because he was ordered to have the *peculium* before he was free. He [*again this may be either Alfenus or his master Servius*] replied that there was no order in things conjunct, and it did not matter at all which of them was said or written first. Therefore the legacy of the *peculium* seemed valid just as if he were first ordered to be free, then to have his *peculium*.[41]

But it should not be thought that Alfenus or Servius is leaning over backwards to be generous to the slave. It would have been

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[39] *Cf.* U. von Lubtow, 3 Studi Betti 369.

[40] *Servus pecuniam ob libertatem pactus erat et eam domino dederat: dominus prius quam eum manumitteret, mortuus erat testamentoque liberum esse iusserat et ei peculium suum legaverat. Consulebat, quam pecuniam domino dedisset ob liberatatem, an eam sibi heredes patroni reddere deberent necne. respondit, si eam pecuniam dominus, posteaquam accepisset, in suae pecuniae rationem habuisset, statim desisse eius peculi esse: sed si interea, dum eum manumitteret, acceptum servo rettulisset, videri peculii fuisse et debere heredes eam pecuniam manumisso reddere.*

See now on the text, A. Watson, *supra* note 1, at 178-80.

[41] *Quidam in testamento ita scripserat: "Pamphilus servus meus peculium suum cum moriar sibi habeto liberque esto." consulebatur, rectene Pamphilo peculium legatum videretur, quod prius quam liber esset peculium sibi habere iussus esset. respondit in coniunctionibus ordinem nullum esse neque quicquam interesse, utrum eorum primum diceretur aut scriberetur: quare recte peculium legatum videri, ac si prius liber esse, deinde peculium sibi habere iussus est.*

difficult to reach the decision that the legacy was void. To do that, one would have had to hold, first, that the provisions were disjunct, not conjunct as they obviously are, secondly that provisions in a will are not to be interpreted with regard to one another, thirdly that the position of provisions in a will is to be understood as having a temporal significance and fourthly, that the testator's intention, even where it is obvious, is not important.[42]

At this point one question demands to be put, namely are there no texts which show the late Republican jurists giving even a slightly strained interpretation in order to help a slave? The answer, so far as I am aware, must be that there are none. There should perhaps be a qualification to that. The texts show that in the later Republic there was a rule that if it was due to the heir that a *statuliber* could not fulfil the condition set upon his freedom the *statuliber* was to become free.[43] This may be a generalisation by the jurists of a provision of the XII Tables that a slave who was ordered to be free on condition that he paid a certain sum to the heir, if he were sold by the heir, gained his liberty by paying the sum to his purchaser.[44] But it should be observed, first, that the provision of the XII Tables may itself reflect the already existing rule that the *statuliber* becomes free if it is due to the heir that he is unable to fulfil the condition. The XII Tables' provision may be explaining the working of the rule in a particular and slightly complicated situation which might otherwise give rise to difficulties. Difficulties such as, did the very fact of the sale mean that the heir was bringing it about that the *statuliber* could not fulfil the conditions? Even if the *statuliber* had no money? Or had the sale no effect on the status of the *statuliber* who still had to pay the heir to gain his freedom?[45] Secondly, if the rule is a generalization of the XII Tables' provision, it is a very natural generalization and

[42] Exactly the same arguments apply to the more complex D.32.30.2. (Labeo *2 post. a Iavoleno epit.*): *"Cum testamento scriptum esset: 'Sticho servo meo heres quinque dato et, si Stichus heredi meo biennium servierit, liber esto', post biennium legatum deberi existimo, quia in id tempus et libertas et legatum referri deberet: quod et Trebatius respondit."* ["Let my heir give five to my slave Stichus and, if Stichus serves my heir for two years, let him be free." When such a clause had been written in a will, my opinion is that the legacy is due after two years because both the freedom and the legacy should be referred to that time. And Trebatius replied the same.] See now on both these texts, 2 Voci, *supra* note 26, at 807.

[43] D.40.7.3.2, 11 (Ulpian *27 ad* Sab.): *cf.* A. Watson, *supra* note 1, at 204-08.

[44] XII Tab.7.12: *Epit. Ulp.*2.4; D.40.7.29.1; *h.t.* 25: *cf.* M. Kaser, Das altromische Ius 160-61 (1949). Doubts on the accuracy of the tradition are expressed in 1 Voci, Diritto ereditario romano, introduzione, parte generale 73 (1960).

[45] For silence on important topics in the XII Tables and provisions on less usual ones see Daube, *Texts and Interpretation in Roman and Jewish Law*, 3 Jewish Journal of Sociology 3 (1961).

it would have been surprising if it had not occurred. Thirdly, the generalization might have been much earlier than the period we are concerned with. Fourthly, the classical law was much more favorable towards the *statuliber*. There the general rule was that the *statuliber* was to be free where it was not due to him that the condition was not fulfilled.[46]

This fourth observation brings us on to a rather different point of general application. In classical law there was a well established rule of *favor libertatis*. Where a provision in a will was doubtful, it was to be interpreted in favor of liberty. There is not the slightest sign of the existence of *favor libertatis* in the decisions of the jurists of the later Republic despite the richness of the surviving sources on the *statuliber*.

A striking contrast to the attitude of the jurists here can be found in certain old rules of procedure. Under the *legis actio* procedure one could not sue on behalf of another, except in a very few cases. One of these few cases was the *vindicatio in libertatem*,[47] an action brought on behalf of someone whom, it was alleged, was wrongfully held as a slave. Again, one of the peculiarities of this action was that the rule *ne bis de eadem re sit actio* did not apply: any number of *adsertores libertatis* could sue in succession.[48] Moreover, in such an action the praetor ordered that the object of the dispute be considered a free man until the final decision.[49] These three provisions are certainly very old. A fourth rule in favor of the person treated as a slave was in the XII Tables. Under the *legis actio sacramento*, the two parties gave a penal oath of either 500 or 50 *asses*: 500 where the suit concerned matters worth 1,000 *asses* or more; 50 in matters of lower value. But where what was in dispute was a man's freedom, the XII Tables provided that the *sacramentum* would be for 50 *asses*, no matter how great the value of the man might be.[50] The explanation of the generous approach of these rules is that the person treated as a slave may turn out not to be a slave at all, but a free man.

To conclude: the attitude of the jurists in the later Roman Republic in developing and interpreting the law when it affected slaves was unsympathetic. There is no indication that they ever went out of their way to find an interpretation helpful to the slave but, on the other hand, we have a few texts which show that at

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[46] D.40.7.3.10 (Ulpian *27 ad* Sab.).

[47] G.4.82; J.4.10pr: *cf.* G. Franciosi, Il processo di libertà in diritto romano 150 (1961); M. Kaser, Das römische Zivilprozessrecht 46 (1966).

[48] Cicero, *de dom.* 29.78.

[49] Livy, 3.44.5.12; D.1.2.2.24; (Pomponius *lib. sing enchiridii*); *cf.* now, M. Kaser *supra* note 47, at 74.

[50] G.4.14.

times they took up a position positively contrary to the interest of the slave. In the one situation which we know of where moral issues were raised as such in connection with slavery, the discussion was apparently purely abstract and not concerned at all with the welfare of the slaves.[51]

[51] A very different matter—which cannot be gone into here—is that of the protection by the praetor of slaves who were informally manumitted. This protection almost certainly dates from the Republic though it is not directly evidenced; *cf.* A. Watson, *supra* note 1, at 196-98.

Probably D.28.5.21pr. (Pomponius *1 ad* Sab.) is not relevant to this paper. Though in circumstances where Labeo holds valid the appointment of a slave as heir, Trebatius regards the appointment as void, Trebatius' decision almost certainly is not influenced by the fact that the person named is a slave; *cf.* my forthcoming, The Law of Succession in the Later Roman Republic, Chapter 4.