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Alan Watson

University of Georgia School of Law, wawatson@uga.edu

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ESSAYS

The scope of animal rights is much broader than the vast majority of individuals believe. People spend little time considering how our legal system's treatment of animals affects society. The law, created to protect beings from harm, has time and again proven itself a stubborn, static creation. However, through the efforts of people who have recognized the law's shortcomings and have sought to correct them, justice may eventually prevail. Unfortunately, the best means by which to accomplish justice for animals is not clear, and disagreements inevitably arise. The essays which follow are written by experts from various interdisciplinary fields at the request of Animal Law. Our hope is to give the reader a broader understanding of the need for animal protection, the complexities of the movement, and the historical context and current legal framework underlying the position of non-human animals.

RIGHTS OF SLAVES AND OTHER OWNED-ANIMALS

By
ALAN WATSON*

I chose the title with deliberation. My concern in this paper is not with moral theory, but with the law that has given rights to owned-animals, and the extent to which these rights have been enforced.

I believe that there is a three-fold hierarchy as to the extent of these rights in accordance with the animal that is their object. At the top of the hierarchy are rights accorded to slaves under a legal system that is not based on race. As the paradigm for this level I have chosen ancient Roman law. In the middle of the hierarchy are rights accorded to slaves under a legal system that is based on race. I have selected English-speaking America as an example of race-based slave law. Rights in this context are more restrictive because owners have a feeling of natural superiority—slaves are slaves because they are not fit to be anything else; slaves are slaves not only because the law dictates as such, but because it is

* Ernest P. Rogers Professor of Law at the University of Georgia. His many books include *LAW MAKING IN THE LATER ROMAN REPUBLIC*, *THE MAKING OF THE CIVIL LAW*, *THE EVOLUTION OF LAW*, and *SLAVE LAW IN THE AMERICAS*. He is also the editor of the four-volume translation of *THE DIGEST OF JUSTINIAN*.

believed that there is a large natural gulf in intellect and moral being between them and the owner-class. However, law makes manumission difficult. Even when slaves are freed, they and their descendants are not treated as equals in the community: they may be denied citizenship and have restricted access to education. At the bottom of the hierarchy are legal rights accorded to non-human owned-animals. They have fewest rights because of speciesism. They are inferior to us, and are owned for our purposes.

I

In ancient Rome slaves had few rights. A good illustration of this fact is that in the vast surviving legal sources there is not one mention of sexual abuse of a slave (male, female, or infant) by the owner. Such behavior was beyond the concern of the law. Yet anyone might be a slave, irrespective of merit or mental capacity. The most common causes of slavery were birth to a slave mother or capture in a foreign war. One topic, *postliminium*, discussed little by modern scholars, is revealing.¹ With brutal, but compelling legal logic, the Romans held that a Roman citizen captured in war ceased to be a citizen, and became a slave in the enemy state. The Romans were not concerned with slave rights under the foreign law. But, complicated legal issues could arise in Rome especially if the captive returned with dignity. The end result was, very briefly, as follows: if the prisoner died in captivity, his will was executed as if he had died at the moment of capture (as if he was still a Roman citizen). Marriage, but for two exceptional cases, did not revive on the captive's return. However, if the captive returned, his property rights did revive. While he remained in captivity, a father's power over descendants was in an uncertain state: if he died in captivity, his descendants were regarded as having been free from paternal power from the moment of capture; but if he returned, they were regarded as always having been in *patria potestas* ("power of the father").

I stress *postliminium* because it shows that enslavement could happen to anyone; even to a Roman citizen. Being a slave was no indication of moral or intellectual inferiority. Becoming free could restore or give legal rights. Slavery might be, and often was, a temporary condition. Manumission was easy, almost entirely under the control of the owner, with little intervention from the state.² Manumission gave, in general, the coveted Roman citizenship.

The recognition by the Roman state that slavery was a misfortune which could befall anyone, was no indication of natural inferiority, and was a status that could easily be rescinded, should not mislead. Slaves did, of course, suffer from political and social disabilities. Above all, slaves were property. As already indicated at the opening of this section,

¹ See L. AMIRANTE, *CAPTIVITAS E POSTLIMINIUM* (1950); ALAN WATSON, *Captivitas and Manumission*, in *STUDIES IN ROMAN PRIVATE LAW* 37 (1991); MARIA F. CURSI, *LA STRUTTURA DEL POSTLIMINIUM* (1996).

² See, e.g., ALAN WATSON, *ROMAN SLAVE LAW* 23 (1987).

the state preferred not to get involved in questioning the authority of the owner over a slave.

Throughout the Republic there is no sign that any remedy was available when an owner mistreated a slave.³ Although there are a few isolated episodes from the early Empire, they do not seem to be based on any obvious legal principle. Augustus, Seneca relates (accurately or not), was dining with Vedius Pollio when one of the latter's slaves broke a crystal cup. Vedius ordered him to be fed to his lampreys. Although he probably had no legal authority to do so, Augustus ordered the slave to be released, Vedius' crystal cups broken, and his fish pond to be filled in.⁴ Still, in general, Augustus chose not to intervene in issues of owners punishing or disciplining slaves. His famous statute, the *lex Aelia Sentia* of 4 A.D., which deals with slavery, has a double-headed provision. Slaves who had been put in bonds, branded by their owner, or tortured by the state for a crime and found guilty of it would not, if subsequently freed, become citizens, but have the lowly status of *peregrini dediticii* ("surrendered enemies").⁵ The distinction is fundamental. For the refusal of normal status on a freed slave, conviction was needed if torture had been applied by the state. But, where slaves had been put in bonds or branded by the owner, their guilt or innocence was quite irrelevant; it was enough that the owner had taken private action against them.⁶

A ruling, a rescript, of the Emperor Antoninus Pius (died 161), though given for an individual situation, was treated as of general importance. It is discussed in the *Institutes of Gaius* 1.53 and is even quoted in the *Institutes of Justinian* 1.8.1:

Slaves are in the power of their masters (which power, indeed, comes from the law of nations: for we can observe that among all nations alike masters have the power of life and death over their slaves) and anything acquired through a slave is acquired by his master. But nowadays, no one who is subject to our sway is allowed to treat his slaves with severity other than for a cause recognized by the laws. For, by a constitution of the divine Antoninus Pius, anyone who kills his own slave without cause is to be punished in the same way as one who kills the slave of another. And even excessive harshness of masters is controlled by a constitution of the same Emperor. For, on being consulted by certain provincial governors about those slaves who flee to a sacred temple or to a statue of the Emperor, he ruled that, if the severity of the masters appear insupportable, they are bound to sell the slaves on favorable terms and the price is to be given to the masters—and rightly: for it is in the interest of the state that no one should abuse his property. These are the words of the rescript dispatched to Aelius Marcianus: "The power of masters over their slaves should be unlimited nor should any man's rights be detracted from. But it is in the interest of masters that relief against cruelty, starvation or unbearable savagery should not be denied to those who rightly complain. Adjudicate, there-

³ See, e.g., *Id.* at 115.

⁴ SENECA, *DE IRA* 3.40.1-3.

⁵ G. Inst. 1.13; WATSON, *supra* note 2, at 118 (the translation in Watson omits a vital clause).

⁶ Yet, it should be noted that the slaves in question were later thought worthy of being freed.

fore, on the complaints of those of the household of Julius Sabinus who take refuge at the statue and, if you find them treated more harshly than is seemly or affected by shameful harm, bid them be sold so that they do not return to the power of their master. And, if he seeks to circumvent my constitution, let this Sabinus know that, on my learning of it, I shall be severe with my dealing with him.⁷

In restraining cruelty to a slave, no mention is made of the slave's well-being. "[I]t is in the interest of the state that no one should abuse his property."⁸ If we were to consider this statement from a modern point of view, we might conclude that the Emperor was involved in economic analysis. But probably we should see him as concerned with the specific issue of slaves as property. It was to the benefit of the state that slaves were not so ill-treated that they would murder masters or mount a rebellion. The remedy proposed by the Emperor is also significant. The ill-treated slave is not to respond in kind. Rather, he is to flee to the protection of a state of the Emperor. The punishment of the owner is then noteworthy, the slave is to be sold, and the proceeds paid to the owner who is not banned from purchasing fresh slaves.

Although the rescript of Antoninus Pius made it murder for an owner to deliberately kill a slave, this law was largely ineffective. A rescript of A.D. 329 of the first Christian Emperor, Constantine evidences the futility of the law:

Whenever such chance accompanied 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 correction by beating, when fatal necessity hangs over them, the masters should fear no criminal investigation.⁹

Another rescript of 376 of the Emperor Valens, Gratian and Valentinian suggests that the reality of the protection offered to slaves was grim:

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 held, but the authors of the wicked accusations are to be burnt along with the statements of the accusations, 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).¹⁰

⁷ J. INST. 1.8.1.

⁸ *Id.*

⁹ CODE THEOD. 9.12.2. See also WATSON, *supra* note 2, at 126.

¹⁰ CODE THEOD. 9.6.2

Also noteworthy is the *senatus consultum Silanianum* of A.D. 10 whose main provision was that when a master was murdered all his slaves who lived under the same roof were to be tortured then put to death.¹¹ The rationale was that slaves had a duty to protect their owner at all costs.

II

Although the above is a mere sketch of the position of the slave at Roman law, it is obvious that even at the top of the three-fold hierarchy the rights of slaves are extremely restricted, scarcely enforceable, and largely in the interests of the owner.

When we look at the middle tier of the hierarchy, rights of slaves in a legal system based on racism, the picture is not all that different. The rights are only those of welfarism, intended to prevent the worst excesses and abuses of owners. The main difference is that the necessary inferiority of the slave compared with the owner is stressed, as is his inferiority to all members of the slave-owning class.

In order to illustrate the emphasis placed upon the degradation of a slave, it is helpful to quote early judicial opinions. In *State v. Caesar*, Justice Pearson writes:

I think the same rules are not applicable; for, from the nature of the institution of slavery, a provocation which, given by one white man to another, would excite the passions and "dethrone reason for a time," would not and ought not to produce this effect when given by a white man to a slave. Hence, although, if a white man, receiving a slight blow, kills with a deadly weapon, it is but manslaughter; if a slave, for such a blow, should kill a white man, it would be murder; for, accustomed as he is to constant humiliation, it would not be calculated to excite to such a degree as to "dethrone reason," and must be ascribed to a "wicked heart, regardless of social duty."

That such is the law is not only to be deduced, as above, from primary principles, but is a necessary consequence of the doctrine laid down in Tackett's case, 8 N.C. (1 Hawks) 217. "Words of reproach, used by a slave to a white man, may amount to a legal provocation, and extenuate a killing from murder to manslaughter."

The reason of this decision is that, from our habits of association and modes of feeling, insolent words from a slave are as apt to provoke passion as blows from a white man. The same reasoning, by which it is held that the ordinary rules are not applicable to the case of a white man who kills a slave, leads to the conclusion that they are not applicable to the case of a slave who kills a white man.¹²

The precise importance of the above quotation is that it comes from a decision in which Justice Pearson was showing his humanity. He was arguing, with Ruffin, C.J. to the contrary, that when a slave was beaten by a white man who was not his owner and another slave killed the assailant to aid his fellow without showing great wickedness or cruelty the killer was guilty only of manslaughter, not murder.

¹¹ See, e.g., Dig. 29.5.1.1 (Ulpian, Ad Edictum 30); Watson, *supra* note 2, at 134.

¹² *State v. Caesar*, 31 N.C. (9 Ired.) 391, 400 (1849).

Thomas Ruffin, often termed one of the great U.S. judges, puts the status of rights of slaves in a nutshell in the famous case of *State v. John Mann*.¹³ While speaking of the right to punish a free youth, he states:

With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person and his posterity, to live without knowledge and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being to convince him what it is impossible but that the most stupid must feel and know can never be true—that he is thus to labour upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can; and as a principle of moral right every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery.

III

I need not here investigate the legal rights accorded to other owned-animals in the bottom tier of the hierarchy. The inefficacy of those has been amply demonstrated by Gary L. Francione.¹⁴ What I hope I have shown, especially from the sketch of Roman slave law, is that when animals are regarded as property, adequate legal protection is impossible.

¹³ *State v. Mann*, 13 N.C. (1 Dev.) 263, 266 (1829).

¹⁴ See GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995); GARY L. FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* (1996).