ROMAN SLAVE LAW AND ROMANIST IDEOLOGY

ALAN WATSON

HISTORICAL OBJECTIVITY is no easy task. David Daube has shown there is no scholarly effort independent of fashion (by which he understands a cultural trend) and idiosyncracy (by which he understands a personal bent).[1] A further element obscures the truth: the self-selection of scholars. Independently of fashion and idiosyncracy, those scholars who choose to work in a particular field will share some common features. Scholars who choose to specialize in Roman law will tend to admire the Romans and their achievement in law-making. They will want to approve of the rules they find in the legal sources, hence they become blind—or at least excessively short-sighted—to some obvious blemishes.

I should like to discuss three aspects of the law of slavery which have been widely misunderstood, and where the misunderstanding makes Roman law more decent than it was. Roman slavery may be condemned by later scholars but they neglect or misinterpret information on some of its most distressing features.

I

The starting point for the first example is W. W. Buckland's famous book, *The Roman Law of Slavery* (Cambridge 1908). He says (36): "During the Republic there was no legal limitation to the power of the *dominus*: *iure gentium* his rights were unrestricted. It must not, however, be supposed that there was no effective protection. The number of slaves was relatively small, till late in that era, and the relation with the master far closer than it afterwards was. Moreover, the power of the Censor was available to check cruelty to slaves, as much as other misconduct." Others, too, write of censorian intervention as protecting slaves against cruel masters. Thus A. H. J. Greenidge simply writes: "The slave was unprotected by the civil law, and until the introduction of the *Lex naturalis* into Roman jurisprudence, there were no rights of men as such which might safeguard him. But the cruel punishment of a slave was visited from the earliest times by the censors."[2] But how effective was the protection of the censors? It should be stated straight away that it is mentioned by Dionysius of Halicarnassus in his comparison of Athens and Rome. At Athens, he says, any man was free to act inside his own home as he liked. At

[1] "Fashions and Idiosyncracies in the Exposition of the Roman Law of Property," *Theories of Property*, ed. A. Parel and T. Flanagan (Waterloo, Ont. 1979), 35 ff.

[2] *Infamia: Its Place in Roman Public and Private Law* (Oxford 1894) 63 f. He cites no evidence. See also M. Kaser, *Zeitschrift der Savigny-Stiftung* 58 (1938) 73 ff.; *Das römische Privatrecht*[2] (Munich 1971–75) 1.114, 284; at 284 he says that censorian intervention is credible, even if there is no sure evidence for it; J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam 1976) 393.

PHOENIX, Vol. 37 (1983) 1.

Rome, in contrast, every house, even the bed chamber, was open to the authority of the censor: "For the Romans believed that neither should a master be cruel in the punishments doled out to his slaves, nor a father be too severe or gentle in training his children, nor a husband unjust in his partnership with his wife, nor children disobedient to their aged parents" (*Roman Antiquities* 20.13), and so he goes on. It is not obvious that much weight should be attributed to this passage. In the first place, Dionysius gives no specific example of censors' punishing cruel masters. We need take out of the passage only that censors could punish cruel masters—which no one would doubt—not that they actually did so. Secondly, how much Dionysius really understood of the work of the censors may be doubted. He mentions as if open to the censors' authority children who were disobedient to their parents. But the nature of the censorian mark of disapproval was such that it could be used only against a *paterfamilias*, a male who had no living male ancestor to whose power he was subject.[3] Thus, children who disobeyed their aged father could not be disciplined by the censors and any mark of censorian disapproval would be put against the aged father who was held responsible for the children's behavior. At the very most, sons in power might be rebuked by the censors. If Dionysius could be misleading here, it is not clear that he would necessarily know much about censorian disapproval of cruel masters. Perhaps more significant than this weak passage of Dionysius is the total silence of the Roman writers on any specific instance of censorian intervention against a cruel master, a silence that can scarcely be the result of chance.[4] One might add that the Romans relished stories about rigid censors, so the silence here is particularly noteworthy.

The issue, of course, is not whether the censors could, or even occasionally did, punish cruel masters. It is whether the censors' power could and did effectively check cruelty to slaves. The answer must be a resounding no.

First of all, censors were appointed only at intervals of four or five years, five being more usual, and at times there were much longer gaps. The maximum period for which they could hold office was fixed according to tradition in 434 B.C. by the *lex Aemilia* at eighteen months.[5] This means that in general for three and a half years out of every five there were no censors to mark their disapproval of cruelty. Only the most notorious instances would even have a chance of being remembered.

Secondly, slaves had no access to censors, or other elected public officials or judges. They had no standing, and no legally recognized avenue of approach to anyone in authority. No machinery was created by which their complaints could be heard. In addition, they were in the physical control of the master who could ill-treat even more those who might be tempted to complain of ill-treatment. If any complaint was to be made to the censors it would have to be

[3]Kaser (above, n. 2) 75.

[4]See T. Mommsen, *Römisches Strafrecht* (Leipzig 1899) 24 n.1.

[5]See, e.g., T. Mommsen, *Das römische Staatsrecht*[3] (Leipzig 1887) 2.349.

made by a citizen. It seems impossible to believe that such complaints could ever have been frequent or meaningful. To begin with, unless the cruel treatment of a slave was public and blatant, another citizen would have had no direct experience of it. Again, class or group solidarity, a component in every society, would make it very rare for one citizen to inform on another for ill-treatment of his slaves. However kind and close to his own slaves a citizen might be, outside of his family his ties were with the other citizens (especially those of similar wealth and social standing), not with the slaves of other people. Further, unless the cruelty was public, evidence of it would be almost impossible to obtain. Slaves would not be questioned by the censors about their masters; and if they were their word would be suspect.

Three apparently unconnected details will illuminate the difficulties for believing that the censors' *regimen morum* could have been effective in controlling cruelty to slaves.

The first relates to the *lex Aelia Sentia* of A.D. 4 in the reign of Augustus. Gaius in his *Institutes* (1.13) tells us:

> By the *lex Aelia Sentia* it is provided that slaves who have been put in bonds by their masters by way of punishment or who have been branded, or who on account of wrongdoing have been questioned under torture and who have been found guilty of that wrongdoing or who have been handed over to fight in the arena with sword or with wild beasts or who have been cast into a gladiatorial school or prison, and are subsequently manumitted, whether by the same master or another, become free men of the same status as surrendered enemies.[6]

Under the statute some freed slaves are not to acquire citizenship but are to be placed in the lowest possible category of free non-citizens, and these slaves are those who have been severely punished by their master or tortured by the state. But the statute draws an express distinction: where the freed slave had been questioned under torture he now has this lowly status *only if he had been found guilty*; where the freed slave had been put in bonds or branded by his master he now acquires this status *whether he had been at fault or not*. Whatever else we may conclude from the distinction, there could be no greater evidence of a lack of interest in the rightness or wrongness of a master's savage treatment of his slave. To his dying day the slave, if freed, would carry the burden of his punishment, merited or not. The law dates from the early Empire, but it is unlikely to incorporate changed attitudes to cruelty by masters. D.20.1.27 (Marcellus, 5 *dig.*) also illustrates this same lack of concern. A master pledged a slave, then put him in chains for a very trivial offense (as we are expressly told). It is made obvious that for the jurist the slave's market value has been

[6] *Lege itaque Aelia Sentia cauetur ut qui serui a dominis poenae nomine uincti sint, quibusue stigmata inscripta sint, deue quibus ob noxam quaestio tormentis habita sit et in ea noxa fuisse conuicti sint, quiue ut ferro aut cum bestiis depugnarent traditi sint, inue ludum custodiamue coniecti fuerint, et postea uel ab eodem domino uel ab alio manumissi, eiusdem condicionis liberi fiant, cuius condicionis sunt peregrini dediticii.*

reduced. The sole question is whether the creditor has an action for the harm done to his security.

The second detail—which I have never seen mentioned—encompasses both the Empire and the Republic. To the best of my knowledge, not one single surviving legal text refers in any way whatever to sexual abuse of slave children by a master. This cannot be accidental and requires explanation. The leading alternatives must be either that such abuse did not occur or was rare, or that it was not a matter that interested the law or the jurists. General knowledge of human nature might suggest that the former alternative is implausible. This is supported by D.47.10.25 (Ulpian, 17 *ad ed.*) which gives the master the action for damage to property against a person who raped (or seduced?) his immature virgin slave girl. But if sexual abuse of slave children by the master did not excite juristic comment, it seems unlikely that ill-treatment of slaves by masters would often in the Republic attract the moral indignation of the censors. I hope to show later in this paper that legislation, when it came, which protected slaves was not primarily moral in character.

The third instructive detail is found in the well-known, even famous, text of Seneca, *De Ira* 3.40.1–3:

> To chide a person who is angry is only to incite his rage. You should approach him with various gentle appeals, unless you are such an important person that you can reduce his anger just as the deified Agustus did when he was dining with Vedius Pollio. One of his slaves had broken a crystal cup. Vedius ordered him to be seized and to be put to death in an unusual way. He ordered him to be thrown to the huge lampreys which he had in his fish pond. Who would not think he did this for display? Yet it was out of cruelty. The boy slipped from the captors' hands and fled to Caesar's feet asking nothing else other than a different way to die: he did not want to be eaten. Caesar was moved by the novelty of the cruelty and ordered him to be released, all the crystal cups to be broken before his eyes, and the fish pond to be filled in.

Apparently Vedius Pollio believed masters could treat a slave as they wished, and he did not expect to be interfered with for feeding a slave to his lampreys. Augustus' response was extra-legal but was permitted by his position of power. Augustus, it may be recalled, was later to restore the censorship.

II

The next example of the failure of scholars of Roman law to appreciate the cruelty in the Roman law sources is found when we link two well-known and universally accepted propositions. The first is that slaves were widely used in commerce to the great financial advantage of their masters. The second is that, even in a civil suit, slaves could only give evidence after torture. When the two propositions are put together, it emerges that when a slave's evidence was permissible at all in connection with a contract that he made, then he could only testify to the existence of the contract or any aspect of it under torture.

Suddenly the widespread use of slaves in business that has seemed to indicate, among other things, a recognition of slaves as human beings is revealed as having horrifying undertones. I do not recall ever seeing the two propositions linked in any textbook of Roman law. Indeed, the two Roman texts which expressly show for contract law that slaves could be interrogated—under torture, of course[7]—are not mentioned in the best-known current textbook, that of M. Kaser,[8] or the most outstanding recent one in English, that by J. A. C. Thomas.[9]

Pauli Sententiae 5.16.1: Reasons of equity show that a slave can be interrogated about his own act. For it ought not to be an obstacle to someone who lent for use or deposited something through a slave without a written document.[10]

C.9.41.15. (Diocletian and Maximian, A.D. 294): There is no doubt that slaves can be interrogated about their own act not only in a criminal case, but even in one involving money (for example when things are delivered by them to other people on account of deposit or loan for use or in other cases recognized by law).[11]

The reason given in the first text for torturing a slave, namely fairness, should be noticed. The contracts specifically mentioned are deposit and loan for use, and in both texts delivery has been made by the slave. Since these contracts are imperfectly bilateral and the action lies to the depositor or lender it follows—as, indeed, is express in *P.S.*5.16.1—that it is the slave's owner who is the plaintiff. In other words, the slave's owner, suing to recover the value of his property can and will in the absence of other fully satisfactory evidence, submit his slave to interrogation by torture. The slave is tortured as a witness for his master. We have no textual evidence as to whether in contract cases a slave could be a witness against the master, but general principle evidenced for other matters indicates the answer is negative.[12] The wording of *P.S.*5.16.1 might but need not be taken as implying that the contract was directly made by the master and the slave was merely used as a delivery man, but the wording of C.9.41.15 clearly shows that torture could be applied where the contract was made by the slave. Slaves were not competent witnesses in all kinds of civil law suits and we have direct evidence, from these texts, only for *depositum* and *commodatum* among contracts. But in both texts *depositum* and *commodatum* are

[7]A few of the texts that make it plain that slaves' evidence was allowed only under torture are: C.9.41.12 (A.D. 291); 9.41.18 (529); D.22.5.22.1 (Arcadius)

[8]*Das römische Privatrecht*[2] (above n. 2).

[9]Above, n. 2.

[10]*Servum de facto suo in se interrogari posse ratio aequitatis ostendit; nec enim obesse ei debet, qui per servum aliquid sine cautione commodat vel deponit.*

[11]*Interrogari servos de facto suo non solum in criminali causa, sed etiam in pecuniaria (veluti quando per eum depositi vel commodati nomine vel in aliis causis legibus cognitis res praestitae sunt) posse non ambigitur.*

[12]See, e.g., C.9.41.1; h.t.2.

expressly given only as examples and it is difficult to see why slaves' testimony would be permissible here, but not in other cases of contract.

What is revealed by those texts is of great practical importance. Slaves were extensively used in commerce. Their testimony was permitted only for some types of action, but always only if there was otherwise insufficient evidence. A slave making a contract, therefore, would have the greatest possible incentive to make sure that there was always good evidence for it and for its terms. The master, too, would have an incentive to ensure that the slave appreciated the need for good evidence: it would be difficult to trade successfully when it was known one tortured one's slaves. If the slave could not be a witness against his master, the other contracting party would have a practical burden imposed on him and would insist on a sufficiency of witnesses or written evidence. The outcome is that there is a gulf—to the best of my knowledge also overlooked by modern Romanists—between the famed ease with which a Roman contract could be made, and the practical requirements that would be insisted on when one of the parties was a slave.[13]

The very small number of texts on torturing a slave for evidence of a contract may indicate that in practice the use of slaves for evidence was rare. But equally it may simply be indicative of the Roman jurists' well known indifference to all questions of what actually went on in court, including how issues of fact were proved.

Interrogation of slaves in civil suits was not restricted to contract cases nor need they have been active parties. One text will suffice:

C.9.41.12 (Diocletian and Maximian, A.D. 291): Whenever it is a question of ownership of slaves, if the truth cannot be uncovered by other proofs, the legal authorities approve the view that the slaves themselves can be interrogated, with torture.[14]

Finally on this issue I will raise but not answer the question why the Romans insisted that slaves' testimony be always accompanied by torture. It was not because they believed that in this way, and this way alone, would truth be elicited. Thus, from the field of criminal behavior:

D.48.18.1.23 (Ulpian, Book 8 of the *Duties of the proconsul*): It is declared in imperial rescripts that not always, but also not never, should trust be given to torture. For it is a delicate and dangerous business and one that may be deceptive. For many people by reason of endurance or toughness are so contemptuous of torture that the truth can in no way be extracted from them: others have so little endurance that they will tell any lies

[13]In modern French law, for instance, the formalities required for proving some contracts are different from and more rigorous than those for the making of the contracts. Of course, informality in business dealings is not particularly desirable.

[14]*Quotiens de dominio mancipiorum tractatur, si aliis probationibus veritas illuminari non possit, de se ipsa esse cum tormentis interroganda iuris auctores probant.*

rather than suffer torture; thus it happens that they confess in various ways so that they incriminate not only themselves but also others.[15]

The answer to the question must lie in the psychology of slave states in general or of Rome in particular. Certainly it is difficult to believe that the Romans regarded as trustworthy evidence elicited by torture from a slave, with respect to a contract made on behalf of the master by the slave, when the torture was applied with the approval of the master, and when the evidence was needed on behalf of the master, and when the master was the plaintiff.[16]

III

For the third example we will return to the issue of restraints on the master's power to ill-treat his slaves, this time specifically to the question whether from the time of Constantine this power was more restricted. It is widely held that from this time legal limits on the master's power to punish were more strictly imposed,[17] and C. Dupont goes so far as to suggest that this was possibly due to the influence of Christianity.[18]

Restrictions were first introduced in the early Empire. The *lex Petronia*, of uncertain date but before the eruption of Vesuvius in A.D. 79, took from masters the right to give their slaves to the beasts without the approval of the judge.[19] The law was not entirely satisfactory and *senatus consulta* and a rescript were passed in support.[20] Close in time was an edict of the Emperor Claudius, which is reported by Suetonius[21] and to which we will return, apparently to the effect that if sick and worn out slaves were exposed by their master they became free and did not revert to his control if they recovered; but if a master killed rather than exposed his slave this was murder. Domitian forbade the castration of slaves,[22] and so later did Hadrian.[23] Hadrian also, we know, expelled from the country for five years a matron called Umbra who had atrociously treated

[15]*Quaestioni fidem non semper nec tamen numquam habendam constitutionibus declaratur: etenim res est fragilis et periculosa et quae veritatem fallat. nam plerique patientia sive duritia tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit: alii tanta sunt inpatientia, ut quodvis mentiri quam pati tormenta velint: ita fit, ut etiam vario modo fateantur, ut non tantum se, verum etiam alios criminentur.*

[16]For the facilities for torturing slaves, at the order of private master or public magistrate, to be provided by the holder of the public office of funeral undertaker, see lines 8–14 of the inscription from Pozzuoli published by L. Bove in *Labeo* 13 (1967) 22 ff.

[17]See e.g. Mommsen (above, n. 4) 617; Kaser, *Privatrecht* (above n. 2) 2. 126.

[18]*Les constitutions de Constantin et le droit privé au debut du IVe siecle: les personnes* (Lille 1937) 31 ff.

[19]D.48.8.11.1.2 (Modestinus).

[20]D.48.8.11.2 (Marcian).

[21]*Claudius* 25.2; D.40.8.2 (Modestinus); C.7.6.1.3 (A.D. 531).

[22]Suetonius *Domitian* 7; D.48.8.6 (Venuleius Saturninus).

[23]D.48.8.4.2 (Ulpian); 48.8.3.4 (Marcian); *P.S.* 5.23.13.

her slave woman for slight reasons.[24] Of more general importance was a rescript of Antoninus Pius which is recorded in Justinian's *Institutes*:

J.1.8.1: 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 ill treat 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 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."[25]

The text is taken from Gaius who, however, does not quote the rescript[27] and who gives a rather different explanation for it: "for the same reason prodigals are interdicted from the administration of their property."

[24]*Coll.* 3.3.4.

[25]*In potestate itaque dominorum sunt servi. quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animadvertere possumus, dominis in servos vitae necisque potestatem esse, et quodcumque per servum adquiritur id domino adquiritur. (2) Sed hoc tempore nullis hominibus qui sub imperio nostro sunt licet sine causa legibus cognita et supra modum in servos suos saevire. nam ex constitutione divi Pii Antonini qui sine causa servum suum occiderit, non minus puniri iubetur quam qui servum alienum occiderit. sed et maior asperitas dominorum eiusdem principis constitutione coercetur. nam consultus a quibusdam praesidibus provinciarum de his servis qui ad aedem sacram vel ad statuas principum confugiunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos bonis condicionibus vendere, ut pretium dominis daretur: et recte; expedit enim rei publicae, ne quis re sua male utatur. cuius rescripti ad Aelium Marcianum emissi verba haec sunt: 'Dominorum quidem potestatem in suos servos illibatam esse oportet nec cuiquam hominum ius suum detrahi. sed dominorum interest, ne auxilium contra saevitiam vel famem vel intolerabilem iniuriam denegetur his qui iuste deprecantur. ideoque cognosce de querellis eorum qui ex familia Iulii Sabini ad statuam confugerunt, et si vel durius habitos quam aequum est, vel infami iniuria affectos cognoveris, veniri iube, ita ut in potestatem domini non revertantur. qui Sabinus, si meae constitutioni fraudem fecerit, sciet, me admissum severius exsecuturum.'*

[26]G.1.52.53; D.1.1.6.1.

[27]But Ulpian does: D.1.6.2.

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. 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. Likewise masters who ill-treat their slaves reduce their value and this should be prevented in the interest of their relatives. The rescript of Antoninus Pius that is thought worthy of quotation by Justinian in the *Institutes* and again in the *Digest* actually stresses that masters should have unlimited power over their slaves, and the claim 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 protection of slaves from cruel masters and the authority of masters—which will be discussed shortly.[28]

There is, incidentally, an interesting sidelight on the rescript of Pius. Protection was afforded an ill-treated 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.[29] Such a slave was obviously thought to be not the kind one wanted to buy.

To come now to Constantine:

C.Th.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....[30]

[28]On this rescript see also W. Williams, "Individuality in the Imperial Constitutions," *JRS* 66 (1976) 67 ff., at 76 f.

[29]D.21.1.19.1 (Ulpian, 1 *ad aed. cur.*).

[30]*Si virgis aut loris servum dominus adflixerit aut custodiae causa in vincla coniecerit, dierum distinctione sive interpretatione depulsa nullum criminis metum mortuo servo sustineat. Nec vero inmoderate suo iure utatur, sed tunc reus homicidii sit, si voluntate eum vel ictu fustis aut lapidis occiderit vel certe telo usus letale vulnus inflixerit aut suspendi laqueo praeceperit vel iussione taetra praecipitandum esse mandaverit aut veneni virus infuderit vel dilaniaverit poenis publicis corpus, ferarum vestigiis latera persecando vel exurendo admotis ignibus membra aut tabescentes artus atro sanguine permixta sanie defluentes prope in ipsis adegerit cruciatibus vitam linquere saevitia immanium barbarorum.*

The rescript is retained in Justinian's *Code*, 9.14.1. "The claws of wild beasts" appear to have been instruments of torture which were made out of metal. The reference to "distinctions of time," etc., suggests that there had been earlier rulings which drew distinctions based on the space of time that elapsed between the punishment and the death. A decade later the same Emperor issued another rescript on the subject:

C.Th.9.12.2: 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 correction by beating, when fatal necessity hangs over them, the masters should fear no criminal investigation.[31]

It is these two rescripts that are cited to demonstrate that the law was becoming more humane to slaves.[32] Against that view it is enough, I believe, to point to the rescript of Antoninus Pius which has already been quoted. But Dupont, for instance, draws two distinctions.[33] First, under the rescript of Antoninus a master is guilty who kills his slave without cause; under that of Constantine the question is different, namely it is enough to know if the master used or did not use punishments which were prohibited and barbarous. Secondly, she says that the main innovation of Constantine lies in the use of the phrase "then he will be charged with murder." She admits that under Antoninus the master who killed without cause suffered the same penalty as one who killed another's slave and that the owner of a slave whom someone had killed could ask for a criminal prosecution which carried the capital sentence. But, she says (with others), the courts were indulgent in such cases, more so than if the victim had been a freeman.

We may dispose of part of Dupont's second point fairly quickly. It is reasonable to assume that the courts would be more indulgent to the killer where the victim was a slave, but we cannot tell whether this attitude changed once the

[31]*Quotiens verbera dominorum talis casus servorum comitabitur, ut moriantur, culpa nudi sunt, qui, dum pessima corrigunt, meliora suis adquirere vernulis voluerunt. Nec requiri in huiusmodi facto volumus, in quo interest domini incolume iuris proprii habere mancipium, utrum voluntate occidendi hominis an vero simpliciter facta castigatio videatur. Totiens etenim dominum non placet morte servi reum homicidii pronuntiari, quotiens simplicibus quaestionibus domesticam exerceat potestatem. Si quando igitur servi plagarum correctione imminente fatali necessitate rebus humanis excedunt, nullam metuant domini quaestionem.*

[32]But M. I. Finley does cite them as rulings protecting masters who had beaten their slaves to death: *Ancient Slavery and Modern Ideology* (London 1980) 122.

[33](Above, n. 18) 33.

Empire became Christian. In other respects, the two rescripts of Constantine and the interpretation of them that has just been described raise serious questions—also for Roman law in general—not all of which can be answered.

We may begin with the assertion that for the first time it has become murder to kill one's slave. The earlier rescript of Antoninus does not name the offense and whether or not it was called murder does not seem of great significance. What matters is the treatment of the crime and its punishment. We are told that the penalty is the same as for killing another's slave. What is in issue cannot possibly be the civil action for damages: the master cannot be suing himself. Hence it must be the crime, for which the punishment is capital. If this argument is correct then Constantine's rescripts do not necessarily seem to mark an advance towards a more humane regard for slaves. Actually Suetonius, discussing the edict of the Emperor Claudius (above, 59 with n. 21), does in fact say *caedis crimine teneri* ("liable to the charge of murder") of masters who kill their slaves. It is sometimes suggested[34] that Suetonius, not being a very precise writer, may have given too early a date for the rule that it was murder to kill one's own slave. Perhaps the reason for this view is the contrast between the two parts of the edict: one that permits a master to allow a slave to die; one that charges with murder a master who kills a slave. But there is no psychological conflict: the absence of a duty to provide care may easily co-exist with a duty not to kill.

Secondly, Dupont's argument in favor of the increased mildness of the law towards slaves under Constantine is that the question is whether or not the master used forbidden means of punishment. This is inaccurate even if we consider only C.Th.9.12.1. According to the rescript two questions must be asked. First, were prohibited modes of punishment employed? If the answer to that question is positive, but only then, does one ask the second question, did the master kill intentionally? Thus, for criminal prosecution of the master, Constantine in C.Th.9.12.1. is adding an extra requirement.

A third problem is whether the two rescripts of Constantine, C.Th.9.12.1 and C.Th.9.12.2, are to be taken as a unitary statement of the law or whether the latter may be regarded as a substantial modification. C.Th.9.12.2 could be read as excluding all criminal investigation where a slave dies at the hands of his master even when there was evidence of a deliberate killing; or it could be understood as being restricted to deaths following upon permitted punishment. The rescript does not say that there will be an investigation if forbidden punishment is applied and the slave dies. The problem for removing the ambiguity comes from the nature of imperial rescripts as a legal source. Until rescripts were issued as a collection, as in the *Theodosian Code*, it was not easy

[34]For instance by Buckland, *Slavery* (above, 53) 37, who accepts that Antoninus Pius' ruling on the subject restated existing law.

for persons other than the addressee to know their contents. This was so even when, as here, the rescripts were apparently issued to public officials.[35] The office of Maximilianus Macrobius, the addressee of C.Th.9.12.2, is unknown, and we cannot tell whether he could have had knowledge of the contents of C.Th.9.12.1. Even if it can be assumed he had, we still would not know whether in the later rescript Constantine was adopting a modified stance. Since the compilers of the Theodosian Code were instructed by Theodosius II in 429 to collect all general laws enacted from the time of Constantine and were expressly told to retain obsolete laws (C.Th.1.1.5), we cannot tell even for the early 5th century whether or not the two rescripts are thought to be in harmony. It may be significant that C.Th.9.12.2 with its—at least apparently—more lenient view towards masters does not reappear in Justinian's *Code*. It is certainly significant that C.Th.9.12.1 does at C.9.14.1, and that the rescript of Antoninus Pius is also retained, even more prominently in J.1.8.2, and in D.1.6.2. For Justinian at any rate, the rescript of Antoninus Pius and the first rescript of Constantine are to be regarded as being in harmony.

A final question, perhaps the most important of all, admits of no easy answer. How, in practice, were cruel masters to be brought to justice? There is an inevitable tension, in states where the slave population is extensive, between protection of the slaves from cruel masters and the authority of masters. Protection of slaves is not just a humanitarian issue: it is also important for the state. The rescript of Antoninus Pius claims that it is in the interest of slave owners—presumably as a whole—that cruelly treated slaves have the possibility of relief. Otherwise slave frustration may lead to slave revolt. On the other hand, masters would find it intolerable if slaves could continually challenge their authority by threatening to haul them into court for misbehavior. The Roman solution was to deny the slaves access to the courts except where the action was a claim that a slave was really free, and (by the rescript of Hadrian in *Coll.* 3.34) where the slave's complaint was that he had been castrated. In addition, as we have seen, if the slave took refuge at a shrine or imperial statue, then by the rescript of Antoninus Pius the slave's complaint would be investigated but the slave was not regarded as an accuser. If the slave was killed, obviously he was in no position to bring a criminal charge against his master; nor—at least from the time of Constantine—could his fellow slaves be of assistance since it was forbidden under pain of death to act as informer against one's master:

C.Th.9.5.1.1 (A.D. 320–323): Also in the case of slaves or freedmen who try to accuse or inform against their masters or patrons, the assertion of such atrocious

[35]See, e.g., H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*[3] (Cambridge 1972), 371 ff.

audacity shall be repressed at the very outset ... , a hearing will be denied them, and they will be crucified.[36]

Nor is much improvement to be found in the next half century of Christianity:

C.Th.9.6.2. (Valens, Gratian, and Valentinian, 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].[37]

Consequently masters who killed a slave deliberately would be brought to justice only if fellow citizens laid complaint or if there was spontaneous investigation by the authorities. Neither practice seems likely to have been common.[38]

The above examples are from the Roman law of slavery. But the problem of the self-selection of scholars leading to a bias in interpreting the materials of their chosen field must be general.

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[36]*In servis quoque vel libertis, qui dominos aut patronos accusare aut deferre temptaverint, professio tam atrocis audaciae statim in admissi ipsius exordio per sententiam iudicis conprimatur ac denegata audientia patibulo adfigatur.*

[37]*Cum accusatores servi dominis intonent, nemo iudiciorum expectet eventus, nihil quaeri, nihil discuti placet, set cum ipsis delationum libellis, cum omni scripturarum et meditati criminis apparatu nefandarum accusationum crementur auctores: excepto tamen adpetitae maiestatis crimine, in quo etiam servis honesta proditio est, nam et hoc facinus tendit in dominos.*

[38]Though a failed prosecution after a complaint by a fellow citizen seems to be the background of a rescript of Diocletian of 285: *Coll.* 3.4.1.