BOOK REVIEW

ROMAN SLAVE LAW: A REVIEW

HANS W. BAADE†

William Alexander Jardine (a.k.a. Alan) Watson is one of the leading authorities on Roman law today. His specialty is the Republican period, but he has also earned the gratitude of the English-speaking world by editing a definitive translation of Justinian's Digest.

For some time now, Professor Watson has taken an active interest in comparative law, which, for him, is the study of borrowings and transplants between legal systems that have some relationship to each other. "Borrowing," he argues, has been the "most fruitful source of legal change" in the Western world. By examining a number of related systems over centuries, patterns of legal development can be explained.

† Hugh Lamar Stone Professor of Civil Law, The University of Texas. A.B., Syracuse; LL.B., LL.M., Duke; Dr. iur., Kiel.


4 A. WATSON, LEGAL TRANSPLANTS, supra note 3, at 95; see also R. SCHLESINGER, H. BAADE, M. DAMASKA & P. HERZOG, COMPARATIVE LAW 309-10 (5th ed. 1988) [hereinafter COMPARATIVE LAW] (description of Professor Watson's views on comparative law).

5 According to Professor Watson, civil systems such as the Roman and the French Civil Code frequently served as the best "quarry" for those outside the immediate European civil systems that seek to borrow law. See A. WATSON, THE EVOLUTION OF THE LAW 118 (1985).

(1547)
Drawing on his superb knowledge of Roman law, Professor Watson has concentrated his comparative law studies on civil law systems, defined by him as those that have accepted Justinian's *Corpus Iuris Civilis* in whole or part. There is, in his view, a definitive civil-law tradition that has a vast importance in legal growth and that is usually grossly underestimated. His particular claim in this regard is profoundly pessimistic: "Legal rules are frequently and for long stretches of time dysfunctional; ill-adapted to meet the needs and desires of the society at large, its ruling elite or any recognizable group . . . ."

*Roman Slave Law* does not follow the pattern established by the author's previous studies. As a study of Roman law, it does not contain a detailed analysis of all the sources, and it is not written for Roman law specialists. Nor does it attempt to draw comparative insights from the study of slavery law in a civil law context as, for instance, in Cuba or in French or Spanish Louisiana. His interest was kindled by the "different configuration of the law of slavery in the American South and at Rome." In a nutshell, and sharply put into comparative perspective by Judge A. Leon Higginbotham's insightful foreword, Roman slavery was a misfortune suffered irrespective of race, while slavery in the American South was quintessentially racist.

As Professor Watson puts it, his book "is about the Dred Scott case without his name being mentioned." Its primary descriptive summary of the Roman law of slavery from the Twelve Tables (circa 451 B.C.) to Justinian's Codification will serve, I am informed, as the point of departure for later, comparative studies of slavery as a legal transplant in Latin America and the Caribbean and possibly—venturing into areas yet unchartered by the author's published works—the common law states of the American South.

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7 Professor Watson argues that while the Roman impact on civil law jurisdictions is well known, "[w]hat has been consistently underestimated is the fact that the Roman Law influence on the legal system as a whole . . . played the decisive role in the features of these systems." *Legal Transplants*, supra note 3, at 179.

8 See *Comparative Law*, supra note 4, at 309.


11 A. Watson, supra note 9, at xvii (1987).

12 Higginbotham, *Foreword* to A. Watson, *supra* note 9, at x.

Given this limited purpose, detailed review is out of place here. Suffice it to say that in nine chapters ranging from enslavement to punishment, Professor Watson lucidly discusses the Roman law of slavery, while quoting extensively from the original sources in unaffected English translation. A chronology, a glossary, and an index facilitate ready orientation. There are, however, a few points of special interest to more general readers.

First, on a fundamental level, Professor Watson emphasizes that the Roman jurists considered slavery to be contrary to the laws of nature and therefore based on the general positive law of mankind (ius gentium). Slavery was a misfortune Romans associated with capture by the enemy and being "spared" death; hence possibly the derivation of servus. Natural law thus did not, in Roman legal thinking, prevail over positive law, and, remarkably, this thinking remained essentially unchanged after Christianity became the state religion in the reign of Emperor Constantine (306-37 A.D.).

Enslavement appears to have occurred primarily by capture in the period of Rome's expansion to a world empire and mainly by operation of law (most importantly maternal descent) thereafter. The ratio of the slave population to the Roman population as a whole was very high: thirty-five to forty per cent at the beginning of the first millennium. Since Rome was not a police state and lacked an extensive bureaucracy, the Romans had to control this large slave population by a careful mixture of penalties and rewards, ranging from automatic torture and death of all house slaves for failing to prevent the murder of their master at home to the expectation of negotiated freedom purchased with the slave's own savings after about six years' hard work.

Although Professor Watson fully develops the foundations of Ro-

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14 The nine chapters of ROMAN SLAVE LAW are captioned as follows: Enslavement; Manumission and Citizenship; Freedmen, Patrons, and the State; The Slave as Thing; The Slave as Man: Noncommercial Relations; The Slave as Man: Slave's Contracts and the Peculium; The Master's Acquisitions Through Slaves; Punishment of the Slaves; and Senatus consultum Silanianum.
15 See A. WATSON, supra note 9, at 6.
16 In fact, during this period, not only did positive law prevail over natural law, but the empire was unusually harsh in enforcing the difference between Roman citizens and slaves. For example, slaves who informed on their masters were crucified. Id. at 83. Similarly, a woman caught having sex with her own slave was given the capital sentence and the slave "delivered to the fire." Id. at 15.
17 See id. at 2, 8.
18 See id.
19 The S.C. Silanianum dates from A.D. 10 and states that when a master is murdered, all slaves under the same roof are subjected to torture and then condemned to death. See id. at 134-38 (text of S.C. Silanianum).
20 See id. at 23.
man slave law, he never definitively answers the question that he posed at the outset: to what extent, and at what stages of its development, did Roman law serve the slave owner efficiently, i.e., "maximizing the profit (economic, social, and political) and . . . minimizing the risk (economic and physical)?" Essentially, the study is too brief, and too remote from economic and demographic historical literature, to afford a definitive answer. His closing chapter devoted to the chilling subject of the *S.C. Silanianum* is effective dramatically, but might well have been followed by a detailed summary. In particular, how does the author's comparative law scheme apply to Roman law? Did Roman slave law, as a cultural phenomenon, become "dysfunctional" and ill-adapted to meet the needs of even the ruling elite during the eleven centuries of its development? If so, or even more importantly, if not, how did Roman law and legislation provide for flexibility and adaptation to changed circumstances?

Secondly, the author might have given us a few more insights on that most peculiar element of the "peculiar institution": the slave's quasi-ownership of property, quite appropriately called *peculium*. This is discussed, along with slaves' contracts, in a general context with the reminder that, during the lifetime of the *pater familias*, even his adult sons' property was technically *peculium*, thus subject to the father's legal ownership. Yet in real life, this factor might have been of limited significance, given an average male life expectancy of about twenty-five years in urbanized Rome. The death of the *pater familias* turned the sons' *peculium* into full ownership, while the slaves (unless manumitted by or pursuant to testament, as was not uncommon) merely acquired a new master with greater life expectancy.

Most importantly, it would have been fascinating to find out how Roman law protected the slave's *peculium* against his own master, especially when it was to be used to purchase the freedom of the slave. Professor Watson informs us that there appears to be no reported instance of the confiscation of a slave's *peculium* by his own master. Yet, even in the late eighteenth century, slave owners in New Granada (Venezuela) are reported to have attempted resorting to this device, only to be foiled by the judicial recognition of an enforceable right of self-purchase. According to conventional wisdom, unchallenged by

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21 *Id.* at 1.
22 *See id.* at 46-47.
Professor Watson, this right was not recognized by Roman law. Perhaps this conventional wisdom needs critical examination.

Finally, there is the related but dogmatically distinct issue of the master's acquisition of property through slaves, discussed in chapter 7. Today, we see the essence of agency in the power of A to conclude a contract on the behalf of P with T in such a manner that only P and T are parties to it. Yet, Roman law did not reach that level of refinement, focusing instead on the seemingly pedestrian question of the nature and consequences of the relationship between principal and agent. The reason for this was slavery. Since the slave was merely the instrument, not the representative, of his owner in commercial and other proprietary transactions, he could operate, as a practical matter, on his master's behalf as a commercial agent and effectuate property transfers between his master and third parties.

Professor Watson notes, however, that the use of slaves as de facto agents in commercial transactions "cannot be a full explanation" for the failure of Roman law to develop the legal concept of direct agency. Given his expertise on this subject, one might hope that he will return to it at greater length soon.

In conclusion, all those who take an interest in the legal history of slavery would benefit from a close and repeated reading of Alan Watson's *Roman Slave Law*. There is much to be learned from him now, but there will be even more (so we hope confidently) when he presents us with his eagerly awaited study of Roman slave law as a "legal transplant" in the New World.

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24 See A. Watson, supra note 9, at 43.
25 See id. at 102-114.
26 See id. at 104-107 (explaining how notions of *mancipatio* and delivery of res nec *mancipi* made slaves in commerce more valuable than a free person).
27 See id. at 90, 107-08.
28 Id. at 108.
29 See, e.g., A. Watson, CONTRACT OF MANDATE IN ROMAN LAW (1961).