Ancient Rome (Property and Freedom)

If Plato's work testifies to how profoundly the moral confusion introduced by debt has shaped our traditions of thought, Roman law reveals how much it has shaped even our most familiar institutions.

German legal theorist Rudolf von Jhering famously remarked that ancient Rome had conquered the world three times: the first time through its armies, the second through its religion, the third through its laws.[91] He might have added: each time more thoroughly. The Empire, after all, only spanned a tiny portion of the globe; the Roman Catholic Church has spread farther; Roman law has come to provide the language and conceptual underpinnings of legal and constitutional orders everywhere. Law students from South Africa to Peru are expected to spend a good deal of their time memorizing technical terms in Latin, and it is Roman law that provides almost all our basic conceptions about contract, obligation, torts, property, and jurisdiction—and, in a broader sense, of citizenship, rights, and liberties on which political life, too, is based.

This was possible, Jhering held, because, the Romans were the first to turn jurisprudence into a genuine science. Perhaps—but for all that, it remains true that Roman law has a few notoriously quirky features, some so odd that they have confused and confounded jurists ever since Roman law was revived in Italian universities in the High Middle Ages. The most notorious of these is the unique way it defines property. In Roman law, property, or *dominium*, is a relation between a person and a thing, characterized by absolute power of that person over that thing. This definition has caused endless conceptual problems. First of all, it's not clear what it would mean for a human to have a "relation" with an inanimate object. Human beings can have relations with one another. But what would it mean to have a "relation" with a thing? And if one did, what would it mean to give that relation legal standing? A simple illustration will suffice: imagine a man trapped on a desert island. He might develop extremely personal relationships with, say, the palm trees growing on that island. If he's there too long, he might well end up giving them all names and spending half his time having imaginary conversations with them. Still, does he *own* them? The question is meaningless. There's no need to worry about property rights if noone else is there.

Clearly, then, property is not really a relation between a person and a thing. It's an understanding or arrangement between people concerning things. The only reason that we sometimes fail to notice this is

that in many cases—particularly when we are talking about our rights over our shoes, or cars, or power tools—we are talking of rights held, as English law puts it, "against all the world"—that is, understandings between ourselves and everyone else on the planet, that they will all refrain from interfering with our possessions, and therefore allow us to treat them more or less any way we like. A relation between one person and everyone else on the planet is, understandably, difficult to conceive as such. It's easier to think of it as a relationship with a thing. But even here, in practice this freedom to do as one likes turns out to be fairly limited. To say that the fact that I own a chainsaw gives me an "absolute power" to do anything I want with it is obviously absurd. Almost anything I might think of doing with a chainsaw outside my own home or land is likely to be illegal, and there are only a limited number of things I can really do with it inside. The only thing "absolute" about my rights to a chainsaw is my right to prevent anyone *else* from using it.[92]

Nonetheless, Roman law does insist that the basic form of property is private property, and that private property is the owner's absolute power to do anything he wants with his possessions. Twelfth-century Medieval jurists came to refine this into three principles, *usus* (use of the thing), *fructus* (fruits, i.e., enjoyment of the products of the thing), and *abusus* (abuse or destruction of the thing), but Roman jurists weren't even interested in specifying that much, since in a certain way, they saw the details as lying entirely outside the domain of law. In fact, scholars have spent a great deal of time debating whether Roman authors actually considered private property to be a right (*ius*),[93] for the very reason that rights were ultimately based on agreements between people, and one's power to dispose of one's property was not: it was just one's natural ability to do whatever one pleased when social impediments were absent.[94]

If you think about it, this really is an odd place to start in developing a theory of property law. It is probably fair to say that, in any part of the world, in any period of history, whether in ancient Japan or Machu Picchu, someone who had a piece of string was free to twist it, knot it, pull it apart, or toss it in the fire more or less as they had a mind to. Nowhere else did legal theorists appear to have found this fact in any way interesting or important. Certainly no other tradition makes it the very basis of property law—since, after all, doing so made almost all actual law little more than a series of exceptions.

How did this come about? And why? The most convincing explanation I've seen is Orlando Patterson's: the notion of absolute private property is really derived from slavery. One can imagine property not

as a relation between people, but as a relation between a person and a thing, if one's starting point is a relation between two people, one of whom is also a thing. (This is how slaves were defined in Roman law: they were people who were also a *res*, a thing.)[95] The emphasis on absolute power begins to make sense as well.[96]

The word *dominium*, meaning absolute private property, was not particularly ancient.[97] It only appears in Latin in the late Republic, right around the time when hundreds of thousands of captive laborers were pouring into Italy, and when Rome, as a consequence, was becoming a genuine slave society.[98] By 50 BC, Roman writers had come to simply assume that workers—whether the farmworkers harvesting peas in countryside plantations, the muleteers delivering those peas to shops in the city, or the clerks keeping count of them—were someone else's property. The existence of millions of creatures who were simultaneously persons and things created endless legal problems, and much of the creative genius of Roman law was spent in working out the endless ramifications. One need only flip open a casebook of Roman law to get a sense of these. This is from the second-century jurist Ulpian:

> Again, Mela writes that if some persons were playing ball and one of them, hitting the ball quite hard, knocked it against a barber's hands, and in this way the throat of a slave, whom the barber was shaving, was cut by a razor pressed against it, then who is the person with whom the culpability lay is liable under the Lex Aquilia [the law of civil damages]? Proclus says that the culpability lies with the barber; and indeed, if he was shaving at a place where games are normally played or where traffic was heavy, there is reason to fault him. But it would not be badly held that if someone entrusts himself to a barber who has a chair in a dangerous place, he should have himself to blame.[99]

In other words, the master cannot claim civil damages against the ballplayers or barber for destroying his property if the real problem was that he bought a stupid slave. Many of these debates might strike us as profoundly exotic (could you be accused of theft for merely convincing a slave to run away? If someone killed a slave who was also your son, could you take your sentimental feelings toward him into account in assessing damages, or would you have to stick to his market value?)—but our contemporary tradition of jurisprudence is founded directly on such debates.[100]

As for *dominium*, the word is derived from *dominus*, meaning "master" or "slave-owner," but ultimately from *domus*, meaning "house"

or "household." It's of course related to the English term "domestic," which even now can be used either to mean "pertaining to private life," or to refer to a servant who cleans the house. *Domus* overlaps somewhat in meaning with *familia*, "family"—but, as proponents of "family values" might be interested to know, *familia* itself ultimately derives from the word *famulus*, meaning "slave." A family was originally all those people under the domestic authority of a *paterfamilias*, and that authority was, in early Roman law at least, conceived as absolute.[101] A man did not have total power over his wife, since she was still to some degree under the protection of her own father, but his children, slaves, and other dependents were his to do with as he wanted—at least in early Roman law, he was perfectly free to whip, torture, or sell them. A father could even execute his children, provided he found them to have committed capital crimes.[102] With his slaves, he didn't even need that excuse.

In creating a notion of *dominium*, then, and thus creating the modern principle of absolute private property, what Roman jurists were doing first of all was taking a principle of domestic authority, of absolute power over people, defining some of those people (slaves) as things, and then extending the logic that originally applied to slaves to geese, chariots, barns, jewelry boxes, and so forth—that is, to every other sort of thing that the law had anything to do with.

It was quite extraordinary, even in the ancient world, for a father to have the right to execute his slaves—let alone his children. No one is quite sure why the early Romans were so extreme in this regard. It's telling, though, that the earliest Roman debt law was equally unusual in its harshness, since it allowed creditors to execute insolvent debtors.[103] The early history of Rome, like the histories of early Greek city-states, was one of continual political struggle between creditors and debtors, until the Roman elite eventually figured out the principle that most successful Mediterranean elites learned: that a free peasantry means a more effective army, and that conquering armies can provide war captives who can do anything debt bondsmen used to do, and therefore, a social compromise—allowing limited popular representation, banning debt slavery, channeling some of the fruits of empire into social-welfare payments—was actually in their interest. Presumably, the absolute power of fathers developed as part of this whole constellation in the same way as we've seen elsewhere. Debt bondage reduced family relations to relations of property; social reforms retained the new power of fathers but protected them from debt. At the same time, the increasing influx of slaves soon meant that any even moderately prosperous household was likely to contain slaves. This meant that

the logic of conquest extended into the most intimate aspects of everyday life. Conquered people poured one's bath and combed one's hair. Conquered tutors taught one's children about poetry. Since slaves were sexually available to owners and their families, as well as to their friends and dinner guests, it is likely that most Romans' first sexual experience was with a boy or girl whose legal status was conceived as that of a defeated enemy.[104]

Over time, this became more and more of a legal fiction—actual slaves were much more likely to have been paupers sold by parents, unfortunates kidnapped by pirates or bandits, victims of wars or judicial process among barbarians at the fringes of the empire, or children of other slaves.[105] Still, the fiction was maintained.

What made Roman slavery so unusual, in historical terms, was a conjuncture of two factors. One was its very arbitrariness. In dramatic contrast with, say plantation slavery in the Americas, there was no sense that certain people were naturally inferior and therefore destined to be slaves. Instead, slavery was seen as a misfortune that could happen to anyone.[106] As a result, there was no reason that a slave might not be in every way superior to his or her master: smarter, with a finer sense of morality, better taste, and a greater understanding of philosophy. The master might even be willing to acknowledge this. There was no reason not to, since it had no effect on the nature of the relationship, which was simply one of power.

The second was the absolute nature of this power. There are many places where slaves are conceived as war captives, and masters as conquerors with absolute powers of life and death—but usually, this is something of an abstract principle. Almost everywhere, governments quickly move to limit such rights. At the very least, emperors and kings will insist that they are the only ones with the power to order others put to death.[107] But under the Roman Republic there was no emperor; insofar as there was a sovereign body, it was the collective body of the slave-owners themselves. Only under the early Empire do we see any legislation limiting what owners could do to their (human) property: the first being a law of the time of the emperor Tiberius (dated 16 AD) stipulating that a master had to obtain a magistrate's permission before ordering a slave publicly torn apart by wild beasts.[108] However, the absolute nature of the master's power—the fact that in this context, he effectively *was* the state—also meant that there were also, at first, no restrictions on manumission: a master could liberate his slave, or even adopt him or her, whereby—since liberty meant nothing outside of membership in a community—that slave automatically became a Roman citizen. This led to some very peculiar arrangements. In the first

century AD, for example, it was not uncommon for educated Greeks to have themselves sold into slavery to some wealthy Roman in need of a secretary, entrust the money to a close friend or family member, and then, after a certain interval, buy themselves back, thus obtaining Roman citizenship. This despite the fact that, during such time as they were slaves, if their owner decided to, say, cut one of his secretary's feet off, legally, he would have been perfectly free to do so.[109]

The relation of *dominus* and slave thus brought a relation of conquest, of absolute political power into the household (in fact, made it the essence of the household). It's important to emphasize that this was not a moral relation on either side. A well-known legal formula, attributed to a Republican lawyer named Quintus Haterius, brings this home with particular clarity. With the Romans as with the Athenians, for a male to be the object of sexual penetration was considered unbefitting to a citizen. In defending a freedman accused of continuing to provide sexual favors to his former master, Haterius coined an aphorism that was later to become something of a popular dirty joke: *impudicitia in ingenuo crimen est, in servo necessitas, in liberto officium* ("to be the object of anal penetration is a crime in the freeborn, a necessity for a slave, a duty for a freedman").[110] What is significant here is that sexual subservience is considered the "duty" only of the freedman. It is not considered the "duty" of a slave. This is because, again, slavery was not a moral relation. The master could do what he liked, and there was nothing the slave could do about it.

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The most insidious effect of Roman slavery, however, is that through Roman law, it has come to play havoc with our idea of human freedom. The meaning of the Roman word *libertas* itself changed dramatically over time. As everywhere in the ancient world, to be "free" meant, first and foremost, not to be a slave. Since slavery means above all the annihilation of social ties and the ability to form them, freedom meant the capacity to make and maintain moral commitments to others. The English word "free," for instance, is derived from a German root meaning "friend," since to be free meant to be able to make friends, to keep promises, to live within a community of equals. This is why freed slaves in Rome became citizens: to be free, by definition, meant to be anchored in a civic community, with all the rights and responsibilities that this entailed.[111]

By the second century AD, however, this had begun to change. The jurists gradually redefined *libertas* until it became almost

indistinguishable from the power of the master. It was the right to do absolutely anything, with the exception, again, of all those things one could not do. Actually, in the *Digest*, the definitions of freedom and slavery appear back to back:

> Freedom is the natural faculty to do whatever one wishes that is not prevented by force or law. Slavery is an institution according to the law of nations whereby one person becomes private property (*dominium*) of another, contrary to nature.[112]

Medieval commentators immediately noticed the problem here.[113] But wouldn't this mean that everyone is free? After all, even slaves are free to do absolutely anything they're actually permitted to do. To say a slave is free (except insofar as he isn't) is a bit like saying the earth is square (except insofar as it is round), or that the sun is blue (except insofar as it is yellow), or, again, that we have an absolute right to do anything we wish with our chainsaw (except those things that we can't.)

In fact, the definition introduces all sorts of complications. If freedom is natural, then surely slavery is unnatural, but if freedom and slavery are just matters of degree, then, logically, would not *all* restrictions on freedom be to some degree unnatural? Would not that imply that society, social rules, in fact even property rights, are unnatural as well? This is precisely what many Roman jurists did conclude—that is, when they did venture to comment on such abstract matters, which was only rarely. Originally, human beings lived in a state of nature where all things were held in common; it was war that first divided up the world, and the resultant "law of nations," the common usages of mankind that regulate such matters as conquest, slavery, treaties, and borders, that was first responsible for inequalities of property as well.[114]

This in turn meant that there was no intrinsic difference between private property and political power—at least, insofar as that power was based in violence. As time went on, Roman emperors also began claiming something like *dominium*, insisting that within their dominions, they had absolute freedom—in fact, that they were not bound by laws.[115] At the same time, as Roman society shifted from a republic of slave-holders to arrangements that increasingly resembled later feudal Europe, with magnates on their great estates surrounded by dependent peasants, debt servants, and an endless variety of slaves—with whom they could largely do as they pleased. The barbarian invasions that overthrew the empire merely formalized the situation, largely eliminating chattel slavery, but at the same time introducing the notion that the

noble classes were really descendants of the Germanic conquerors, and that the common people were inherently subservient.

Still, even in this new Medieval world, the old Roman concept of freedom remained. Freedom was simply power. When Medieval political theorists spoke of "liberty," they were normally referring to a lord's right to do whatever he wanted within his own domains. This was, again, usually assumed to be not something originally established by agreement, but a mere fact of conquest: one famous English legend holds that when, around 1290, King Edward I asked his lords to produce documents to demonstrate by what right they held their franchises (or "liberties"), the Earl Warenne presented the king only with his rusty sword.[116] Like Roman *dominium*, it was less a right than a power, and a power exercised first and foremost over people—which is why in the Middle Ages it was common to speak of the "liberty of the gallows," meaning a lord's right to maintain his own private place of execution.

By the time Roman law began to be recovered and modernized in the twelfth century, the term *dominium* posed a particular problem, since it had come, in ordinary church Latin of the time, to be used equally for "lordship" and "private property." Medieval jurists spent a great deal of time and argument establishing whether there was indeed a difference between the two. It was a particularly thorny problem because, if property rights really were, as the *Digest* insisted, a form of absolute power, it was very difficult to see how anyone could have it but a king—or even, for certain jurists, God.[117]

This is not the place to describe the resulting arguments, but I feel it's important to end here because in a way, it brings us full circle and allows us to understand precisely how Liberals like Adam Smith were able to imagine the world the way they did. This is a tradition that assumes that liberty is essentially the right to do what one likes with one's own property. In fact, not only does it make property a right; it treats rights themselves as a form of property. In a way, this is the greatest paradox of all. We are so used to the idea of "having" rights—that rights are something one can possess—that we rarely think about what this might actually mean. In fact (as Medieval jurists were well aware), one man's right is simply another's obligation. My right to free speech is others' obligation not to punish me for speaking; my right to a trial by a jury of my peers is the responsibility of the government to maintain a system of jury duty. The problem is just the same as it was with property rights: when we are talking about obligations owed by everyone in the entire world, it's difficult to think about it that way. It's much easier to speak of "having" rights and freedoms. Still, if freedom is basically our right to own things, or to treat things as if we own

them, then what would it mean to "own" a freedom—wouldn't it have to mean that our right to own property is *itself* a form of property? That does seem unnecessarily convoluted. What possible reason would one have to want to define it this way?[118]

Historically, there is a simple—if somewhat disturbing—answer to this. Those who have argued that we are the natural owners of our rights and liberties have been mainly interested in asserting that we should be free to give them away, or even to sell them.

Modern ideas of rights and liberties are derived from what, from the time when Jean Gerson, Rector of the University of Paris, began to lay them out around 1400, building on Roman law concepts, came to be known as "natural rights theory." As Richard Tuck, the premier historian of such ideas, has long noted, it is one of the great ironies of history that this was always a body of theory embraced not by the progressives of that time, but by conservatives. "For a Gersonian, liberty was property and could be exchanged in the same way and in the same terms as any other property"—sold, swapped, loaned, or otherwise voluntarily surrendered.[119] It followed that there could be nothing intrinsically wrong with, say, debt peonage, or even slavery. And this is exactly what natural-rights theorists came to assert. In fact, over the next centuries, these ideas came to be developed above all in Antwerp and Lisbon, cities at the very center of the emerging slave trade. After all, they argued, we don't really know what's going on in the lands behind places like Calabar, but there is no intrinsic reason to assume that the vast majority of the human cargo conveyed to European ships had not sold themselves, or been disposed of by their legal guardians, or lost their liberty in some other perfectly legitimate fashion. No doubt some had not, but abuses will exist in any system. The important thing was that there was nothing inherently unnatural or illegitimate about the idea that freedom *could* be sold.[120]

Before long, similar arguments came to be employed to justify the absolute power of the state. Thomas Hobbes was the first to really develop this argument in the seventeenth century, but it soon became commonplace. Government was essentially a contract, a kind of business arrangement, whereby citizens had voluntarily given up some of their natural liberties to the sovereign. Finally, similar ideas have become the basis of that most basic, dominant institution of our present economic life: wage labor, which is, effectively, the renting of our freedom in the same way that slavery can be conceived as its sale.[121]

It's not only our freedoms that we own; the same logic has come to be applied even to our own bodies, which are treated, in such formulations, as really no different than houses, cars, or furniture. We own

ourselves, therefore outsiders have no right to trespass on us.[122] Again, this might seem an innocuous, even a positive notion, but it looks rather different when we take into consideration the Roman tradition of property on which it is based. To say that we own ourselves is, oddly enough, to cast ourselves as both master and slave simultaneously. "We" are both owners (exerting absolute power over our property), and yet somehow, at the same time, the things being owned (being the object of absolute power). The ancient Roman household, far from having been forgotten in the mists of history, is preserved in our most basic conception of ourselves—and, once again, just as in property law, the result is so strangely incoherent that it spins off into endless paradoxes the moment one tries to figure out what it would actually mean in practice. Just as lawyers have spent a thousand years trying to make sense of Roman property concepts, so have philosophers spent centuries trying to understand how it could be possible for us to have a relation of domination over ourselves. The most popular solution—to say that each of us has something called a "mind" and that this is completely separate from something else, which we can call "the body," and that the first thing holds natural dominion over the second—flies in the face of just about everything we now know about cognitive science. It's obviously untrue, but we continue to hold onto it anyway, for the simple reason that none of our everyday assumptions about property, law, and freedom would make any sense without it.[123]

Conclusions

The first four chapters of this book describe a dilemma. We don't really know how to think about debt. Or, to be more accurate, we seem to be trapped between imagining society in the Adam Smith mode, as a collection of individuals whose only significant relations are with their own possessions, happily bartering one thing for another for the sake of mutual convenience, with debt almost entirely abolished from the picture, and a vision in which debt is everything, the very substance of all human relations—which of course leaves everyone with the uncomfortable sense that human relations are somehow an intrinsically tawdry business, that our very responsibilities to one another are already somehow necessarily based in sin and crime. It's not an appealing set of alternatives.

In the last three chapters I have tried to show that there is another way of looking at things, and then to describe how it is that we got