

Introduction

On August 9, 1659, Ana María de Velasco filed a complaint in Lima's ecclesiastical court against her owner, the cleric Pedro de Velasco.¹ Ana asked the court to impose an obligatory transfer of ownership on the grounds that Pedro had deflowered her and punished her cruelly. In addition, Ana requested a new appraisal of her purchase price and restitution of back wages. Her complaint reveals a cleric obsessed with his young domestic slave, a man who stalked and beat her and forced her to live in isolation with their two young children to cover up their sinful cohabitation. When she tried to leave Pedro, he raised her purchase price so that her meager earnings as a laundress were inadequate to make the monthly payments toward her freedom. Then Pedro limited her day-wage earning potential by denying her any opportunity to seek live-in employment, which also had the effect of keeping his nocturnal access to her intact.

Desperately trying to avoid returning to Pedro, Ana filed a lawsuit. Fearing reprisal, Ana asked the court to protect her from the wrath that would surely be unleashed once he learned of her complaint to his religious superiors. Ana requested that she and the two children be placed in protective custody (*depósito*), which would prevent Pedro from locating them until the magistrate had a chance to investigate the charges and find her another owner. Ana further asked that the court grant her request for a new day-wage arrangement that would give her at least two hours a day to attend to her litigation, which was the amount of time customarily allotted to slaves who were pursuing legal claims. Despite Ana's enslaved status, she sought legal recourse against her master – a high-ranking cleric – and tried to control the terms of her enslavement by both changing owners and lowering her purchase price. Months later, Ana secured a partial victory in her case when the ecclesiastical court granted her many of the concessions she sought.

Cases like Ana's raise a set of questions that animate this book. How could a young enslaved woman assert claims to personhood, wages, and virtue when

her legal status was that of mere property? How did the dynamics of gender, status, sexuality, and religious virtue shape the contours of Lima's slaveholding society? How did the civil law of slavery enable enslaved litigants to access justice from the same legal institutions that simultaneously enforced the laws of property, succession, and contract that legitimated their enslavement?

I situate enslaved women like Ana de Velasco as legal protagonists who occupied multiple identities as mistresses, street vendors, wives, mothers, wet nurses, religious servants, and domestics, and explore how these experiences within the urban labor market conditioned their identities as bondswomen. In addition to and often in tandem with legal action, enslaved women used channels of affect and intimacy to attain freedom and prevent the generational transmission of enslavement to their children. Although attentive to the overarching oppressive structures of slavery, this book reveals instances in the lives of enslaved women when they acted as subjects rather than human property. More broadly, a review of the voluminous amount of slave litigation demonstrates that access to courts and the power of the Catholic Church shaped early modern Iberoamerican slaveholding societies, constrained the repressive behavior of slave owners, and afforded the enslaved a measure of autonomy over their lives in bondage. A retrospective look at these proceedings tells us how litigants and their advocates strategically exploited the rhetorical power of liberty within the courts, even when their lived realities were decidedly *unfree* and *unequal*.

Readers may reasonably ask whether the appeal to law was not after all proof of Ana's ultimate disempowerment. Ana had no one else to turn to: she seemingly led an isolated and sequestered life in religious enclosure with her owner's co-conspirators or in servitude with Pedro. It is true that those who seek legal recourse are often among the most powerless and that they unwittingly reify patriarchal structures through their appeals rather than undermine them. Others may challenge the very words that struck me as I first read through Ana's folio nearly a decade ago. "He importuned me repeatedly to enter into illicit relations, persuading me to leave the convent. As a result of his tender caresses and entreaties, I gave myself to him."² The tenor of the words she uses to describe the persistence with which Pedro seduced her and convinced her to leave the convent where she was interned strikes us as chaste, circumspect, and confessional. Though Ana was not illiterate, her words were mediated through her notary's (and perhaps her confessor's) pen. As José Jouve Martín argues, these utterances were polyphonic, in that both litigants and notaries collectively shaped and produced the scripted narratives we read today.³

Ana de Velasco appears fleetingly in the archival record on three other occasions. Twice, we see her name in the parish sacramental ledgers as the enslaved mother of Juan Asunción and Petronila – who were freed at the font by Pedro de Velasco in 1653 and 1656 respectively.⁴ The baptismal register is formulaic and discreet on the subject of the children's paternity, simply reciting that each child was born to Ana de Velasco, slave of Pedro de Velasco, and an

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unknown father. See Figure 4.5. Were it not for Ana's lawsuit in 1659 in which she named Pedro as the children's father, their paternity would have remained unrecorded like that of countless illegitimate children of Spanish fathers and enslaved mothers. We know that Pedro died in 1666 and that the following year Ana married Francisco Mexía.⁵ The marriage of Ana de Velasco, *mulata libre*, and Francisco Mexía a free *cuarterón*, is recorded on August 3, 1667.⁶ What transpired between Ana and Pedro in the seven years following her lawsuit is not clear, and unfortunately, Pedro de Velasco's last will and testament did not survive the passage of time. Given the proximity of Pedro's death and Ana's marriage, we surmise that Pedro either freed her by testament or that she negotiated a lowered purchase price prior to Pedro's death.

Fortunately for historians, Ana's archival footprint is felicitously large (though not oversized). Aspects of Ana's case are found in other change of ownership (*variación de dominio*) lawsuits, although some were unique to her situation.⁷ Ana appealed to the judges to find a suitable owner for her whom they deemed moral and honorable. Ana denounced her owner's sexual improprieties to his superiors, using a judicial forum to expose their illicit relationship and Pedro's obsession with her. This was more powerful than parish gossip about a lascivious priest.⁸ Her actions subjected Pedro to disciplinary sanctions by his superiors.⁹ Pedro had to respond to the accusations in front of an ecclesiastical panel, even if all he did was refute the charges in a defensive manner. Given his family's prominence, Pedro's obsession with his young slave was socially indiscreet and imprudent. Though Ana was presumptively dishonorable as an enslaved young woman, Pedro's behavior transgressed the boundaries of prescriptive masculinity that derived from the honor of his office as well as the social expectation that he would behave as a respectable patriarch.

How could Ana convincingly allege that enslaved litigants were allotted two hours a day to devote to their legal matters? Were these arguments based on law or custom? Comparative law scholars typically address these questions under the rubric of legal transplants.¹⁰ Undoubtedly, Ana reiterated what every aggrieved subject knew – litigation was slow and time consuming. Recalcitrant parties had to be personally served before they were legally required to respond to a complaint, interrogatories had to be drafted, witnesses had to be summoned and questioned, and judicial panels had to weigh evidence before ruling on even the most mundane issues before the court. Prosecutors, procurators, lawyers, judges, and notaries were occupied with high-volume caseloads; Iberoamerican litigation was characterized by heavy evidentiary burdens, prolonged delays, and uneven judicial representation. Thus, it seems reasonable that pursuing a case would take two hours a day. What is more remarkable, perhaps, is the expectation that Ana would be entitled to those two hours from her workday to seek a legal resolution to her situation.

Slaves' access to courts was primarily a continuation of legal practices developed on the Iberian Peninsula beginning in the High Middle Ages. Indeed,

many arguments made in New World slave litigation echoed those made by enslaved litigants on the peninsula.¹¹ This represents the view of legal transplants from comparative legal scholars that a somewhat seamless transition of legal processes and institutional practices unfolded between Castile and the *ultramar* (Spain's overseas possessions). Lima was severed geographically but joined spiritually and administratively to Spain – undergirded by the crown's indefatigable efforts to maintain the illusion of spatio-legal contiguity within its realm.

In this book, I look broadly at the juridical and social currents that unfolded at the time of Spain's imperial expansion to the Americas to contextualize the normative legal tradition in which slaves litigated their claims. As scholars have repeatedly shown, colonial subjects quickly acquired an avid appetite for litigation. Iberian litigiousness – already notorious on the peninsula – became a constant feature of life in the New World.¹² Barriers to court entry for legal dependents (widows, slaves, children, unhappy wives, indigenous subjects) were low, replicating a peninsular pattern of expedited legal recourse through direct appeal to the crown from *desamparados* or *miserables*.¹³ Court-appointed protectors assiduously took on the cases of *desamparados*. Instrumental motives undergirded this zealous representation – many aristocratic creoles (*criollos*) sought nomination to the ecclesiastical court as an accelerated step to securing a coveted administrative career.¹⁴ Appointments to the ecclesiastical court were segues into the higher echelons of the viceregal or the Archbishopric administration that were limited exclusively to members of the peninsular nobility.

Careerist notions aside, the absolutist discourse of good government (*buen gobierno*) and the king's political authority enveloped the viceregal bureaucracy and those with aspirations to join it. This meant that judicial actors and institutions were invested in litigating on behalf of slaves and other legal dependents – even if the substance of their complaints was of less interest than upholding and exalting the king's authority. Justice – rooted in the idea of *buen gobierno* – provided Iberoamerican subjects with a vernacular with which to express their claims. The ideal of “good government” created an expectation that a remote and benevolent sovereign existed, “onto whom all manner of protective policies could be projected.”¹⁵

Justice, legality, and law were articulated in early modern notions of loyalty and benevolence.¹⁶ Archbishops and viceroys were appointed on the basis of their “wisdom, piety, and liberality”; they were counseled and exhorted to be men of justice and clemency.¹⁷ Justice and legality were vigorously debated not only on the Iberian Peninsula but also in Lima's ecclesiastical and city councils by viceroys, judges, prelates, priests, and parishioners alike. The mutuality of justice and abjection created an expectation of intervention and, in some cases, resolution by a more powerful remote intercessor, who delegated his authority to locally appointed officials.

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Here we have the essential scaffolding of the early modern Iberoamerican system of justice or what we might call the architecture of paternalism. This rendition is by no means a triumphal narrative of the civil law of slavery: this book describes modest demands for liberty decorously veiled in a paternalistic discourse of protection and abjection. Nevertheless, the demands resonated within a judicial system that operated on clientelism and personal patronage. Although we may quibble among ourselves as to how much agency slaves really exercised given these parameters, very few would argue that legal action was devoid of protagonism.

A further consideration that explains the volume of litigation among colonial subjects is related to the creolization of Iberian practices of law. Both civil and ecclesiastical courts encompassed a bifurcated system in which procurators and *letrados* (university-trained professionals) assumed various duties in litigation. Procurators had no formal legal training.¹⁸ Like notaries, procurators could purchase their office, while others garnered their training through apprenticeships to more senior personnel. Procurators drafted briefs (*escritos*) and complaints, ushering necessary paperwork through the lower rungs of the legal ladder, and entered written pleas on behalf of the complainant. In essence, industries of procurators and notaries provided legal advice and representation to those who would not ordinarily have access to crown-appointed protectors and to litigants of modest means.¹⁹

How did slaves and other colonial subjects construct networks through which to transmit legal knowledge? How did Ana become a savvy legal actor? Ana's legal sophistication makes sense when we consider that she was enslaved within a distinguished ecclesiastical household and that she was raised for sixteen years in the Monasterio de la Encarnación, one of the largest and most prestigious convents in colonial Lima.²⁰ Many of the litigants whom I discuss were attached to prominent households of viceregal and ecclesiastical administrators, curates, judges, and magistrates. Others toiled as religious servants (*donadas*) in the elegant cloistered quarters of abbesses and elite laywomen, women who often mobilized their relationships with powerful magistrates, magnates, and notaries to minister their legal affairs.²¹

Slaves garnered reputational knowledge about the legal acumen of procurators, judges, and notaries and could learn about the outcome of pending cases by listening to professional gossip in their households.²² Not infrequently, married slaves who belonged to different owners instrumentally used the professional relationships between their owners to shore up their conjugal rights. Many enslaved litigants within elite households besmirched their owner's reputation by airing their grievances in court. Slaves constructed and circulated legal knowledge among themselves, spreading the word of the protective powers of the church and its courts for plebeians, in the plazas as they ran errands, washed clothes, and sold foodstuffs and in the city's ubiquitous *pulperías* (small shops that sold food, wine, and dry goods), bakeries (*panaderías*), and

religious spaces wherein they labored and worshipped. The records also show that litigants frequently borrowed arguments that were successful in similar cases (*pleitos*), importing them into their own legal repertoire.²³

Slaves learned about protective legal provisions and mobilized them in court, preventing them from becoming dead letters. Legal mobilization was most pronounced in the area of family unification and conjugal rights. When an owner's travel plans threatened to separate a married couple, spouses quickly sought court intervention to prevent such separation by claiming their marital rights. Similarly, hundreds of male slaves raced to hallowed ground to protect themselves from secular prosecution by claiming sanctuary.²⁴ Other areas of legal action were pursued: divorce, annulment, inheritance, enforcement of self-purchase contracts, clarification of testamentary and baptismal bequests of manumission, and remedy for battery, assault, and extreme cruelty (*sevicia*). However, in none of these areas was success as pronounced as it was in cases pertaining to family unification and ecclesiastical immunity.

This raises the practical question why enslaved litigants pursuing claims other than spousal unification demonstrated such willingness to engage with the law when the chances of favorable outcomes were negligible. My sense from reading through these records is that a successful outcome was never foreclosed. From a top-down perspective, the crown and church devoted extensive resources to establishing a judicial system to adjudicate complaints of *mis-erables* and *desamparados* throughout the Americas. Most cases were resolved by split decisions, derived from the canon law's preference for conciliation between the parties.²⁵

From the litigant's perspective, we need to expand our views of what constituted "success" or legal efficacy. An exclusive focus on the "law" or even the tribunal does not take into account the importance of early stages of claims making: seeking advice from a procurator, drafting a complaint before a notary, or coming to the notary armed with witnesses that enabled a litigant to draft an interrogatory. If success is viewed too narrowly, we lose sight of the power of *censuras hasta anatema* that were read by priests at high mass at the behest of enslaved litigants. These *censuras* threatened the malfeasant parties with excommunication. Errant parishioners would not be able to partake in the body and blood of Christ. Moreover, *censuras* were posted on the church doors (*tablillas*) for all to see, alerting everyone to a parishioner's iniquities and violation of the law.

Thousands of *censuras* were read in Lima's churches every year. *Censuras* were powerful shaming mechanisms with real consequences for recalcitrant parties in legal claims, especially when issued within the context of a religious society. *Censuras* were an equally compelling means of summoning witnesses, functioning as a sort of spiritual subpoena. These extralegal measures and pre-trial motions may seem like petty wrangling on the lower end of the judicial scale, but they built up a powerful momentum that compelled courts to rectify wrongs and that recalibrated the equilibrium between enslaved peoples and their owners.

SLAVERY, COMPARATIVE SLAVERY STUDIES, AND THE LAW

Fractional Freedoms is part of a veritable boom in studies examining slaves' entanglement with the law in colonial Latin America.²⁶ Legal records provide the most complete picture of the daily life of urban Hispanic American enslaved peoples. North American scholars draw richly on slave narratives, letters, novels, and abolitionist treatises, but Iberoamerican scholars have comparatively little access to the voices and experiences of Latin American slaves, especially during this early period. There is, however, a prolific legal record at our disposal.

Slaves quickly assimilated their owners' litigiousness, zealously claiming rights and airing grievances that were read before magistrates in daily court sessions. Even incomplete or unresolved case records abound with interrogatories and witness statements. Exhorted by priests intoning *censuras* at mass and by public calls for witnesses (*publicación de testigos*) posted by judges, Limeños traipsed steadily into notaries' offices to relieve their consciences or attest to what they knew about a particular case. Though parties never faced their adversaries in courtrooms, their complaints were the grist for parish sermons, feast-day gossip, and hushed conversations in the city's numerous *pulperías*. Not infrequently, slave complaints were heard in the important sessions of Lima's city council (*cabildo*), diocesan synods, and in the high court (*Real Audiencia*).

Of course, legal records are not perfect sources. Neither are they unmediated texts. And they reflect an Iberian rather than an African sensibility.²⁷ Yet because of the pervasive tension between agency and structure in slavery studies, we are drawn to litigation as evidence of agency and resistance. Venturing away from the early legocentric/textualist examination of slave codes and royal decrees, scholars today pay close attention to court records in the hope of providing an intimate look at the individual experience of enslavement. This rich body of archival sources demonstrates how slaves actively created legal norms and customs and pressed for rights far beyond their legislative intent.

The law of slavery is undeniably about power. This stark realist view is readily apparent in laws that authorized and legitimated human ownership. Slaves did not possess conventional sources of political or economic power that would sway courts in their favor. But slaves repeatedly recruited courts to redress their grievances and, despite their situational disadvantage vis-à-vis their owners, often prevailed in their complaints. If we embrace only the realist or biopolitic vision of law, we overlook counterhegemonic processes of resistance and negotiation and minimize the power of early modern debates about justice. Our scholarly development in the law of slavery reflects realist sensibilities, as well as the enduring question of how the law can be simultaneously wielded in the name of liberty, salvation, and bondage.

MANUMISSION, QUASI EMANCIPATION, AND GENDERING THE TANNENBAUM THESIS

Every two decades or so, the study of slavery and the law shuttles between agency and resistance, reflecting the trends in slavery scholarship more generally.²⁸ Early historians of the laws of slavery focused almost exclusively on the promulgation of written codes, royal decrees, and viceregal proclamations, and linked the redaction of ameliorative slave codes to theological and philosophical dilemmas of human bondage.²⁹ Earlier generations of Latin American historians studied the institutions of law, governance, and the church, and the men who were appointed to run them. Indeed, much of colonial Latin American historiography was synonymous with the history of legal institutions.³⁰ These studies were not focused on subaltern resistance or agency; rather they traced the transfer of legal and religious institutions, or the consolidation of economic and political systems. Slaves, Andeans, and subalterns only figured into such works as objects of studies of grand rebellions, uprisings, or acts of capitulation.

On the agency side of the pendulum, scholars were drawn to study those without history, shifting the focus away from celebrated revolutionaries or maligned traitors toward tool breakers and dilatory workgang members (hitherto denounced as lazy, shiftless, and undisciplined) as cultural and political agents. As scholars palpated the complex textures of resistance, they became more interested in cultural brokers: those comparatively obscure figures who converted, cooperated with, slept with, and negotiated with social superiors in order to secure better deals for themselves, their children, or communities within the structures of slavery, religious conversion, and colonialism.

Inevitably, a new generation of historians began to fret about the enchantment with resistance, exceptionalism, and the absence of attention to coercive state power. As the pendulum swung back toward structure, it collided spectacularly with the forceful thesis of slavery as social death and its axiomatic denial of personhood. However, there was too much empirical evidence of agency and resistance (particularly from Latin America and from gender history) to capitulate completely to the social death thesis. Instead, there was convergence around negotiation and accommodation. Latin Americanists who had been constrained by futile efforts to prove the mildness of slavery or to demonstrate disputed racial democracies found the resistance-accommodation continuum quite congenial. The continuum also paved the way for an incipient rapprochement between Latin American legal history of slavery and sociolegal history.³¹

By my own chronology, we should have headed back to structure (or at least gravitated ineluctably in that direction) a decade ago. However, this has not happened. Rather, recent accounts interrogate the often comfortable coexistence of accommodation and resistance in the lives of enslaved peoples. Many scholars attribute the current state of the field to the reliance on local records as historiographical tools, fueled by the cultural turn, the attention to gender

and race, and the attraction to microhistorical and biographical methods.³² Local records reveal a great deal more about daily contestations and pragmatic accommodations than royal proclamations and imperial decrees. The reliance on (or turn to) microhistories is not without its critics. The somewhat muted critique relates to the lack of an overarching comparative model or “big question.” As one scholar commented, “We are left wondering how to generalize or integrate these cases into larger narratives about slavery ... beyond the [cumulative] examples of the diversity of each.”³³

With this grand theory desideratum, unsurprisingly, we have returned to the comparative questions posed by Frank Tannenbaum nearly fifty years ago in *Slave and Citizen*. Tannenbaum claimed that the influence of Roman law on Iberian slave laws, combined with the pervasive authority of the Catholic Church, endowed slaves with a legal and moral personality and created greater paths to manumission than the common law.³⁴ Alejandro de la Fuente led the charge in Latin American legal history, revisiting the Tannenbaum debate in a symposium during which he asked what Tannenbaum can still teach us about the law of slavery. Like de la Fuente, I find the first part of the Tannenbaum thesis useful for thinking through slave litigation and “claims making.” Tannenbaum’s faith in the Iberian laws of slavery has been the subject of deserved critique. As de la Fuente points out, Tannenbaum gave laws “a social agency that they did not have.”³⁵ Indeed, it was litigants like Ana de Velasco who pressed their claims in courts and secured important gains against their owners. Nevertheless, it was significant that Ana litigated a claim against her master within a normative framework that denounced the condition of enslavement as contrary to natural law. Apertures – or fissures – in slavery’s legal edifice could be wedged open when claims were brought within a jurisprudential framework that valued liberty.³⁶

Alfonse the Wise, drafter of the *Siete Partidas*, pronounced slavery to be “the vilest and most contemptible thing in the world,” in contrast with liberty, which was “honorable and precious.”³⁷ Slaves were brought to the Iberian Peninsula through capture and trade throughout the High Middle Ages and the early modern period: historical epochs characterized by a militant Catholicism that framed the legal conditions for emancipation and bondage.³⁸ By the age of imperial expansion in the sixteenth century, Iberians had developed an expansive body of laws to regulate status and set conditions for ownership and emancipation. Borrowing heavily from the Justinian code, the *Siete Partidas* had extensive provisions for manumission compared to the British Atlantic common law tradition. Tannenbaum erroneously equates the *Partidas*’ legal provision for manumission with its nearly automatic guarantee. Moreover, he controversially claims that the moral personality of slaves under the civil law created more harmonious postemancipation societies than chattel slavery systems that were marked by hostile racial segregation and rigid exclusion.

Critics dispute the relevance of either Justinian or Iberian legal codes in their appraisal of slave systems and slave experiences and the construction of

postemancipation societies in Latin America.³⁹ Royal edicts exhorting masters to Christianize, feed, shelter, and clothe their slaves were largely ignored unless masters were convinced that their enforcement would increase their slaves' productivity or quash rebellion. Scholars of slavery in Louisiana query the veracity of the claim that the civil law tradition was favorable for slaves.⁴⁰ Empirical scholarship reveals that Louisiana's large population of free blacks coexisted seamlessly with racial subordination and repressive master-slave relations despite Louisiana's civil law tradition and its Latin heritage. Rejecting both Tannenbaum's thesis and the "exceptionalism" of Louisiana within US slavery, scholars have concluded that slavery continued to be harsh and brutal, showing little preference for manumission or evidence of egalitarian race relations.⁴¹ Consonant with arguments in legal realism and Critical Legal Studies, Tannenbaum's critics deemphasize the importance of law, challenge the autonomy of the legal institution, and unmask its collusion in perpetuating socio-racial hierarchies, and reiterated the racial subordination of Latin American postemancipation societies.

These various scholarly approaches have had a chilling effect on the comparative conversations of slavery and the law in the Americas. Today, Tannenbaum invariably surfaces in any discussion conducted by Latin American historians of the law and slavery like the proverbial uninvited guest. Chastened by decades of skeptical materialist scholarship, we gingerly ask, what do we want to do with Tannenbaum? Can we use him to support our case studies with (yet) more empirical evidence that slaves made use of the law, or should we discredit the thesis on the basis of its proven shortcomings and outdated assumptions? Whether the Tannenbaum thesis is used as a signifier of agency or refuted on materialist grounds depends on one's scholarly orientation in sociolegal history. In her work examining the legal maneuvers of the royal slaves of El Cobre (Cuba), María Elena Díaz rejects the opportunity to use Tannenbaum's thesis, explaining that she worries that his "static, anachronistic, and even reductionistic approach to the realm of the law may obstruct the formulation of more sophisticated and challenging questions along new lines in [the] field."⁴² Notwithstanding these valid reservations, it seems reasonable that we use Tannenbaum's thesis to understand the legal framework adopted by subalterns and situate it within broader sociolegal conversations about law, legality, and legal mobilization.

Despite the controversy generated by the Tannenbaum debate (or perhaps because of it), comparative approaches came to frame the historiography of slavery and racial formations in the Americas during the 1980s and 1990s. Much of the scholarship has been focused on Brazil and the United States, with Cuba coming in as a third site of research.⁴³ Concurrently, parallel developments in legal history and sociolegal studies converged to reinvigorate the fields of comparative law and slavery studies and Latin American legal studies. Moving away from formalist analyses of legal codes – or handwringing over the inefficiency and tenuous reach of the law (the infamous breach