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Favor libertatis: Slaveholders as Freedom Fighters

Favor libertatis is a principle of jurisprudence according to which, in cases of doubt, the decision has to be made in favour of the freedom of the slave. This principle is a contradiction and a menace to slavery itself, an institution that stood at the very basis of Roman society. *Favor libertatis* is so strong that it has precedence over all kinds of rules, its only limit being third party interests. A principle with such momentum cannot be simply the product of jurisprudence. Indeed, it must have had a stronger legal basis. But which legal basis could it be? This question has never been posed, and scholarship has simply taken the *favor libertatis* for granted. As a form of redress for this situation, therefore, the main purpose of the present study is to establish a group of legislative acts, especially the *lex Iunia Petronia* and the *lex Iunia Norbana*, as the sources from which the momentum of the *favor libertatis* was derived. The methodological stance taken here can be described as a re-legification of Roman law; that is, to give more importance to the phenomenon of *leges publicae* previously neglected due to a policy to minimise their presence in the Digest.

1 A Peculiar Institution

Favor libertatis is the name of a guiding principle in Roman jurisprudence concerning slaves, according to which in cases of doubt, decisions are to be made 'in favour of liberty'.[1] This principle called into question slavery itself – the most important means

1 Some scholars have taken the *favor libertatis* to be a Justinianic interpolation, for example Fritz Pringsheim, "Ius aequum und ius strictum," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 42 (1921): 643–55, n. 5. but in Gaius' *Institutions* there is a text (Gai. 4.14) that argues against this, the authenticity of which can hardly be doubted: [. . .] *eadem lege [XII tabularum] cautum est favore scilicet libertatis, ne onerarentur adsertores* ('this [Law of Twelve Tables] showed a disposition to favour freedom, so that those who claimed him to be free should not be burdened', transl. W.M. Gordon and O.F. Robinson, *The Institutes of Gaius* [London: Duckworth, 1988]: 409). On the authenticity of this text see now Dario Mantovani, *Les juristes écrivains de la Rome antique: Les œuvres des juristes comme literature* (Paris: Les Belles Lettres, 2018): 185. It ought to be mentioned that Fritz Schulz, a stalwart 'interpolationist', probably on the basis of this

Note: The present article is part of the project 'The Temple of Justice. A Foundation of a Systematic Interpretation of the Digest', 2020/38/A/HS5/00378, funded by the Narodowe Centrum Nauki, Poland.

https://doi.org/10.1515/9783110987195-008

of production in the Roman economy[2] and one of the fundamental institutions underpinning its legal system.[3] What was behind this initiative? Who authorised the jurists to act in this fashion? Did they themselves devise the principle, or were they implementing a legal mandate? This raises the question of the legal basis of *favor libertatis*.

An even greater riddle is the question of what motivated the creators of *favor libertatis*, whether this was the emperor, the jurists or even the Roman people. Why did it exist at all? Romans accepted slavery (*servitus*), but at the same time they developed a principle according to which the law had to be aligned with liberty. It is intriguing to imagine the coexistence of *servitus* and *favor libertatis*.

To understand *favor libertatis* properly, it is important to be aware of two features of Roman *servitus*: The legal relationship of the master and his slave (women could, of course, own slaves as well) is that of ownership.[4] The master can, in theory, do whatever he pleases with the slave who is considered a chattel (*res mancipi*).[5] Ownership also entails the ability to enfranchise a slave (*manumissio*), an act that makes the slave a *libertus* or *liberta*, a free person with limited political and civic rights.[6] During the Republic, three forms of manumission existed: *vindicta, censu, testamento*.[7] All three were formal and cumbersome. The first took place before the praetor; the second consisted in inscribing the former slave into the list of citizens; the third was a clause in a will such as, 'Stichus, my slave, shall be free' (*Stichus servus meus liber esto*).[8] The formalities of wills were intricate,[9] and all the hazards that befell a will could befall these clauses (see the case in D. 28.4.3 under 5.5). A safer and common alternative was developed at the beginning of the empire, the *fideicommissum*, in which a master 'entrusted' a friend to enfranchise a slave after his death (which could be done in one of the previously mentioned procedures).[10] At the same time, the *praetor* granted freedom if he had come to the conclusion that

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and other passages, considered this guiding principle to be authentic; Fritz Schulz, *Principios de derecho romano*, transl. Manuel Abellan Velasco (Madrid: Universidad Complutense, 1990): 240.

2 Francesco de Martino, *Storia della costituzione romana*, vol. 4, 2nd ed. (Naples: Jovene, 1974): 337.

3 The unsurpassed study on Roman slavery as a legal institution is still William Warwick Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1908). From the perspective of social history, the classical work is Geza Alföldy, *Römische Sozialgeschichte*, 4th ed. (Stuttgart: Franz Steiner Verlag, 2011). A new overview has been provided by Richard Gamauf, "§ 36: Sklaven (servi)," in *Handbuch des Römischen Privatrechts*, ed. Ulrike Babusiaux et al. (Tübingen: Mohr Siebeck, 2023): 914–84.

4 Gaius 1 *inst* D. 1.5.1.

5 Gai. 2.13; Max Kaser, *Das Römische Privatrecht*, vol. 1, *Das altrömische, das vorklassische und das klassische Recht* (Munich: C.H. Beck, 1971): 284.

6 On this and the following Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 293–97.

7 On the republican era see Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 115–19.

8 Gai. 2.267.

9 An overview can be found in Jakob Fortunat Stagl, "Das 'testamentum militare' in seiner Eigenschaft als 'ius singular'," *Revista de Estudios Histórico-Jurídicos* 36 (2014): 129–57.

10 Gai. 2.263–66.

the master had had the volition (*voluntas*) to enfranchise the slave, *inter amicos*, for example, or *per epistulam*.[11] Initially, these factual *liberti* enjoyed no protection at all if their master claimed them back, but already in the republican era the praetor began to acknowledge these informal liberations as legally valid.[12] This situation was fully recognised by a *lex Iunia Norbana* from 19 CE,[13] which we will discuss further on.

There has been no full-length scholarly investigation of *favor libertatis* since the work by Ivo Pfaff from the late nineteenth century,[14] although scholars have published important shorter works on the subject,[15] especially Hans Ankum[16] and Andreas Wacke.[17] But they all approach *favor libertatis* as a given, as though it came out of nowhere and was essentially based on nothing. An exception to this lack of investigative *élan* and a particularly meticulous and astute work is the essay by Liselot Huchthausen,[18] a classical philologist whose East German background gave her a much more political perspective on this subject which is, of course, of prime importance for Marxist theory.[19]

11 On the former see Gai. 1.41;44; on the latter Fr. Dos. 15; Iul. D. 41.2.38pr.

12 A. Steinwenter, "Latini Iuniani," in *Paulys Realencyclopädie der classischen Altertumswissenschaft*, vol. 12 (1925) (Stuttgart: J.B. Metzler, 1925): 911.

13 The main source is I. 1.5.3.

14 Ivo Pfaff, *Ein Beitrag zur Lehre vom favor libertatis* (Vienna: Manz, 1894).

15 See the studies by Gérard Boulvert and Marcel Morabito, "Le droit de l'esclavage sous le Haut-Empire," in *Aufstieg und Niedergang der römischen Welt*, pt. 2, *Principat*, vol. 14, *Recht*, ed. Hildegard Temporini and Wolfgang Haase (Berlin: De Gruyter, 1982): 98, 119–23; Jacob Giltaij, *Mensenrechten in het Romeinse recht?* (Nijmegen: Wolf Legal, 2011): 49; Jean Imbert, "Favor libertatis," *Revue historique de droit français et étranger* 26 (1949): 274; Pfaff, *favor libertatis* (n. 14); Olís Robleda, *Il diritto degli schiavi nell'antica Roma* (Rome: Pontificia Universita Gregoriana, 1976): 96; Pia Starace, *Lo statuliber e l'adempimento fittizio della condizione. Uno studio sul favor libertatis fra tarda Repubblica ed età antonina* (Bari: Cacucci Editore, 2006): 23; Andreas Wacke, "Der favor libertatis: Skizze eines Forschungsvorhabens," in *Vorträge gehalten auf dem 28. Deutschen Rechtshistorikertag Nimwegen 23–27 September 1990*, ed. Paul Nève and Chris Coppens (Nimwegen: Gerard Nood Instituut, 1992): 21–23; Andreas Wacke, "Favor libertatis," in *Handwörterbuch der antiken Sklaverei*, vol. 1, ed. Heinz Heinen et al. (Stuttgart: Franz Steiner Verlag, 2017): 923.

16 Hans Ankum, "Der Ausdruck favor libertatis in den Konstitutionen der römischen Kaiser," in *Sklaverei und Freilassung im römischen Recht: Symposium für Hans Josef Wieling zum 70. Geburtstag*, ed. Thomas Finkenauer (Berlin/Heidelberg: Springer Verlag, 2006): 1–17.

17 Wacke, "Der favor libertatis" (n. 15): 21–23; Wacke, "Favor libertatis" (n. 15): 923.

18 Liselot Huchthausen, "Zum Problem der Freiheitsbegünstigung (favor libertatis) im römischen Recht," *Philologus* 120, no. 1 (1976): 47–72.

19 Robert A. Padgug, "Problems in the Theory of Slavery and Slave Society," *Science & Society* 40, no. 1 (1976): 3–27; Friedrich Vittinghoff, "Die Theorie des historischen Materialismus über den antiken 'Sklavenhalterstaat'," *Saeculum* 11 (1960): 89–131. Georg Prachner, "Zur Bedeutung der antiken Sklaven- und Kolonenwirtschaft für den Niedergang des römischen Reiches (Bemerkungen zur marxistischen Forschung)," *Historia: Zeitschrift für Alte Geschichte* 22 (1973): 732–56.

Having touched on the sensitive issue of ideology, it might be appropriate to remind readers of how ancient slavery has been assessed in modern times.[20] From the already mentioned Marxist point of view, slavery is a mode of production and could only be overcome by changing production itself. The law regulating slavery is just the superstructure, while something like *favor libertatis* is a narcotic that pales into insignificance in the inherent, un-redressable cruelty and blight of bondage. Slavery becomes a metaphor for the condition of the workers and Spartacus a 'proletarian hero'. The opposite view is based on the doctrine of natural law and has its base in another kind of materialism, that of the sources. Florentinus states at the beginning of the Digest (D. 1.5.4pr.-1), 'Freedom is one's natural power of doing what one pleases, save insofar as it is ruled out either by coercion or by law. Slavery is an institution of the *ius gentium* [the law of nations or peoples], whereby someone is against nature made subject to the ownership of another.'[21] From this point of view, slavery was not rooted in the production process but rather in the law: it could be redressed, and there loomed the possibility of abolishing it altogether since it was 'against nature'.[22] From the latter point of view, *favor libertatis* was not so illogical even though everybody involved was, as a member of the *élite*, necessarily a slaveholder:[23] 'Natural law', the set of rules derived from nature which we will discuss later, is the basic legal and ideological tool for some kind of reform policy consisting in a piecemeal alleviation of the slaves' condition. From the opposite point of view, however, it is simply absurd to own slaves and to fight for their welfare, an endeavour which must ultimately result in the abolition of slavery. Those who do so must

20 In the scholarly debate about the absolute versus the relative evil of slavery, the former position was argued by Moses I. Finley, *Ancient Slavery and Modern Ideology*, 2nd ed. (New York: Markus Wiener, 1980), the latter by Joseph Vogt, *Sklaverei und Humanität: Studien zur antiken Sklaverei und ihrer Erforschung* (Wiesbaden: Franz Franz Steiner Verlag, 1983). For this debate see Johannes Deissler, "Cold Case? Die Finley-Vogt-Kontroverse aus deutscher Sicht," in *Antike Sklaverei: Rückblick und Ausblick. Neue Beiträge zur Forschungsgeschichte und zur Erschließung der archäologischen Zeugnisse*, ed. Heinz Heinen (Stuttgart: Franz Steiner Verlag, 2010): 77.

21 *Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur* (transl. MacCormick in Alan Watson, *The Digest of Justinian*, vol. 1–4 (Philadelphia: University of Pennsylvania Press, 1998).

22 Still fundamental is Wolfgang Waldstein, "Entscheidungsgrundlagen der römischen Juristen," in *Aufstieg und Niedergang der Antiken Welt*, pt. 2, *Principat*, vol. 15, *Recht*, ed. Hildegard Temporini and Wolfgang Haase (Berlin: De Gruyter, 1982): 3, 78. Ample references can be found now in Gamauf, "Sklaven (servi)" (n. 3): 7; see also Jakob Fortunat Stagl, *Camino desde la servidumbre* (Madrid: Editorial Dykinson, 2021): 42–46.

23 On the interaction of masters and servants see Paul Veyne, "Vie de Trimalcion," in *Annales: Economies, sociétés, civilisations* 16 (1961): 213–47 and Keith R. Bradley, "Roman Slavery and Roman Law," in *Historical Reflections/Réflexions Historiques* 15, no. 3 (1988): 477–95, on the lifestyle of the *ordo senatorius* and *equester* from a sociological point of view see Alföldy, *Sozialgeschichte* (n. 3): 150–69.

be diagnosed with a 'false consciousness'; they are strange and have no real place in history. The only redress for slavery is abolition, not only of slavery but of the production process which engenders it. Any intent to make slavery more humane is ridiculous insofar as this is impossible and pernicious, for the reason that it hampers the drive to root out the evil completely.[24] What is at stake with *favor libertatis* is nothing less than the question of whether we have an inbuilt moral compass that is independent of whichever conditions we happen to live under, or whether these conditions determine everything. Just consider the latest truly comprehensive description of Roman slavery by Richard Gamauf: He mentions the *favor libertatis* only occasionally and considers *ius naturale* to be a revery about a fictitious past that has no repercussions whatsoever for the law of slavery.[25] This stance appears to be peculiar given the sheer amount and force of the sources which we will encounter in the course of this investigation.

The two central questions of this study are, accordingly, firstly, 'What is the legal basis for the tendency to privilege liberty?' and secondly, 'What is the rationale of this privilege?'

2 The Morphology of the *favor libertatis*

In Justinian's institutions, there is a reference in I. 2.7.4 to 'liberty, in favour of which the ancient legislators enacted in many instances manifestly against the common rules' (*libertas cuius favore et antiquos legislatores multa etiam contra communes regulas statuisse manifestum est*). This definition tells us that *favor libertatis* concerned exceptions to the general rule and that these exceptions were based on formal legal provisions like *leges publicae*, *senatus consulta* etc.[26] Flowing from a legal directive, this guiding principle for the administration of justice is clearly expressed in Pomp. D. 50.17.20: 'Wherever there is a doubt in interpreting liberty, an interpretation shall be given that enhances liberty' (*Quoties dubia interpretatio libertatis est, secundum libertatem respondendum erit*). A comparison between these two texts illustrates the central point of the present investigation: whereas the emperor, who since the reign of Augustus had the constitutional authority to create law,[27] states that his predecessors had legislated in favour of liberty (*legislatores* [. . .]

24 On these two attitudes concerning slavery as a historical problem see Stagl, *Camino* (n. 22): 124–26.

25 Gamauf, "Sklaven (servi)" (n. 3): 24 and 27.

26 As indicated by Herman Gottlieb Heumann and Emil Seckel, *Handlexikon zu den Quellen des römischen Rechts*, 9th ed. (Jena: G. Fischer, 1914): s.v. legislator 2, indicate, this word can also mean 'jurist', but together with *statuere* it should mean the creation of a formal source of law.

27 Ulp. 1 *inst.* D. 1.4.1pr.: *Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.*

regulas statuisse), Pomponius states that a jurist should 'respond' in favour of liberty; giving one's opinion, *respondere*, is the quintessential activity of a jurist.[28] Both pursue the same goal, and both remain within their respective spheres; the only difference is the scope of their authority: one acts as a *legifer*, a creator of the law; the other gives *responsa*, that is to say acts as an interpreter of the law.

There are forty-three instances in the sources where the *favor libertatis* (or linguistic variants thereof) is explicitly cited as the basis for a decision;[29] a further four passages speak of a *humanior* or *benigna interpretatio* with regard to slaves, which amounts to the same thing.[30] Another question are the texts where decisions are based on *favor libertatis* without explicit reference to it.[31] There are many possible reasons for the absence of a referential explanation. The first is literary: the original author may have been very succinct or wanted to avoid repetition. Then there is the question of textual transmission, both in the pre-Justinianic period and in the compilation itself. Based on my experience with the not unrelated phenomenon of *favor dotis*,[32] I would assume that we should multiply the extant cases by a factor of ten to arrive at the total *corpus* of texts that feature *favor libertatis*, that is to say about 500. Under these premises, it is no exaggeration to say that we are dealing with a phenomenon of the utmost importance since 5% of the total of 9,139 texts in the Digest refer to it. Given the fact that about a quarter of all the fragments in the Digest, that is to say about 2,250 texts, address aspects of slavery,[33] this estimate seems probable.

28 Adolf Berger, *Encylopaedic Dictionary of Roman Law* (Philadelphia: American Philosophical Society, 1953): s.v. Responsa.

29 Gai. *inst*. 4.14; I. 3.11.1; Gai. *ad ed. prov*. D. 4.7.3.1; Paul. 13 *ad ed*. D. 4.8.32.7; Paul. 5 *quaest*. D. 18.7.9; Ulp. 61 *ad ed*. D. 29.2.71; Marcell. 12 *dig*. D. 29.5.16; Paul. 4 *ad Vitell*. D. 31.14; Maec. 9 *fideicomm*. D. 35.2.32.5; Iul. 39 *dig*. D. 36.1.26.2; Iul. 42 *dig*. D. 40.2.4; Ulp. 4 *ad Sab*. D. 40.4.1; Ulp. 4 *ad Sab*. D. 40.4.10.1; Iul. 36 *dig*. D. 40.4.16; Iul. 42 *dig*. D. 40.4.17.2; Marcian. 1 *reg*. D. 40.4.26; Scaev. 23 *dig*. D. 40.4.29; Ulp. 60 *ad ed*. D. 40.5.4.16; Ulp. 5 *fideicomm*. D. 40.5.24.10; Ulp. 5 *fideicomm*. D. 40.5.26; Paul. 5 *ad Sab*. D. 40.7.4.6; Ulp. 28 *ad Sab*. D. 40.7.9.3; Ulp. 14 *ad ed*. D. 40.7.19; Ulp. 14 *ad ed*. D. 40.7.20.3; Iav. 6 *ex Cass*. D. 40.7.28; Paul. 5 *quaest*. D. 40.8.9; Iul. 5 *ex Minic*. D. 40.12.30; Paul. 15 *resp*. D. 40.12.38.1; Ulp. 71 *ad ed*. D. 43.29.3.9; Marcian. 2 *inst*. D. 48.10.7; Tryph. 4 *disp*. D. 49.15.12.9; Tryph. 18 *disp*. D. 49.17.19.5; Paul. l. *s. ad reg. Caton*. D. 49.17.20; Pomp. 7 *ad Sab*. D. 50.17.20; Gai. 5 *ad ed. prov*. D. 50.17.122; Paul. 16 *ad Plaut*. D. 50.17.179; Diocl. y Maxim. C. 4.6.9; Gord. C. 7.2.6; Valer. and Gallien. C. 7.4.10; Diocl. y Maxim C. 7.22.2; PS. 2.23.2; PS. 2.24.2.

30 Ulp. 6 *disp*. D. 34.5.10.1; Ulp. 12 *ad Sab*. D. 38.17.1.6; Ulp. 6 *fideicomm*. D. 40.5.37; Scaev. 4 *resp*. D. 40.5.41.10; Marcell 29 *dig*. D. 28.4.3; Ant. C. 6.27.2.

31 E.g. Lab. *post. a Iav. epit*. D. 32.29.4; Pomp. 3 *ad Sab*. D. 40.4.5; Ulp. 27 *ad Sab*. D. 40.7.3.16; further examples in Huchthausen, "Freiheitsbegünstigung" (n. 18): 49.

32 Jakob Fortunat Stagl, *Favor dotis: Die Privilegierung der Mitgift im System des römischen Rechts* (Vienna/Cologne/Weimar: Böhlau, 2009): 91–234; this explains the silence regarding Frg. Vat. 106. to which Rolf Knütel drew attention in his "Uxores constrictae," *Fundamina* 20, no. 1 (2014): 467–74.

33 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 98, 154.

Bearing in mind these numbers should impede any attempt at marginalizing the *favor libertatis*: it is, in fact, a central feature of a central institution of Roman law.

One example for such an implicit application of *favor libertatis* is Pomp. D. 40.4.11.2: *Quum testamento servus liber esse iussus est, vel uno ex pluribus heredibus institutis, adeunte hereditatem statim liber est*. The inheritance 'rests', as the jurists say, until the formal *aditio*.[34] This requires an answer to the question of how to proceed when several persons have been appointed as heirs, but not all have acceded to the inheritance at the same time. Does the slave have to wait until all the heirs have taken possession of their inheritance, or would it suffice for one to have done so? Under ordinary conditions, all co-heirs would have needed to accede in order to activate the inheritance;[35] but in our case, one *aditio* suffices. This decision is made *in favorem libertatis*, even though Pomponius does not explicitly say so. Here now is an explicit example for *favor libertatis*, Iul. 36 *dig*. D. 40.4.16:

> D. 40.4.16 (Iulian 36 dig.): Si ita scriptum fuerit: 'quum Titius annorum triginta erit, Stichus liber esto, eique heres meus fundum dato', et Titius, antequam ad annum trigesimum perveniret, decesserit, Sticho libertas competet, sed legatum non debebitur; nam favore libertatis receptum est, ut mortuo Titio tempus superesse videretur, quo impleto libertas contingeret; circa legatum defecisse conditio visa est.
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> D. 40.4.16 (Julian, Digest, book 36): If it has been written in the will, "when Titius reaches the age of thirty, let Stichus be free and let my heir give him a farm", and if Titius has died before reaching his thirtieth year, freedom belongs to Stichus, but the legacy will not be due. For by the principle favoring freedom, it has been accepted that after Titius's death a period of time evidently remained on whose expiry freedom accrued; regarding the legacy, the condition is thought to have failed.[36]

The testator wrote in his will: 'When Titius reaches the age of thirty, let Stichus be free and let my heir give him a farm.' Titius dies before he turns thirty, but in favour of freedom for Stichus – *in favorem libertatis* – it is assumed that he lived, although this fiction does not extend to the estate; in this respect, Titius did not reach the age of thirty. The heir, accordingly, lost ownership of the slave but kept the estate undiminished; the slave obtained his freedom but not a means of subsistence.

We might characterise *favor libertatis* as a guiding principle according to which, when in doubt, the decision is to be made in favour of the slave, regardless of

34 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 715, 720.
35 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 716.
36 Transl. Brunt in Watson, *Digest of Justinian* (n. 21).

whether the question is one of interpreting a will or applying a regulation extensively or even analogously. From a methodological point of view, *favor* is a fertile and dynamic principle naturally prone to extension;[37] so by referring to *favor*, the jurist appeals to the reader's obedience to the emperor and his legislative acts, an obedience that includes broad interpretations or analogies.[38] The topos of *favor* oscillates between the jurist's rhetorically construed self-justification for his bold interpretation and the implied argument that it is methodically correct to pay attention to the spirit as opposed to the letter of the law.[39] When the jurists speak of *favor liberatis*, which requires this or that decision overturning the established rules, they justify themselves as being in accord with the emperor and his forbears who did likewise.

Impressive as it was, the scope and power of *favor libertatis* were not boundless. It seems that there was a general principle according to which one was allowed to diminish one's own or rather one's heirs' estate, but not a third person's. This conclusion can be drawn from a text by Paul, D. 40.1.3: *Servus pignori datus, etiamsi debitor locuples est, manumitti non potest*.[40] A debtor had pledged a slave, but later wanted to set him free, which would have resulted in the pledgee losing his pledge, since a free man cannot be a pledge. The manumission would have the *de facto* effect of the loss of a surety which the parties had agreed upon previously, and thereby would have endangered the creditor's position who wanted to secure the payment due to him. His interests in this regard are stronger than those of the slave, even in the case that the debtor is creditworthy, which implies that the pledge is more of a formal than a substantial value.

37 Antonio Palma, *Humanior interpretatio: 'Humanitas' nell'interpretazione e nella normazione da Adriano ai Severi* (Turin: Giappichelli, 1992): 46 with regard to *humanitas*.

38 See the observations by Pfaff, *favor libertatis* (n. 14): 3; and esp. Huchthausen, "Freiheitsbegünstigung" (n. 18): 60.

39 In general D. 1.3.17 (Cels. 26 dig.): *Scire leges non hoc est verba earum tenere, sed vim ac potestatem*. ('Knowing laws is not a matter of sticking to their words, but a matter of grasping their force', transl. MacCromick in Watson, *Digest of Justinian* [n. 21]). Due to its palingenetical context the text originally maybe referred only to stipulations.

40 'A slave in pledge cannot be manumitted, even if the debtor can provide security for repayment.', transl. Brunt in Watson, *Digest of Justinian* (n. 21). See also D. 40.9.4 (Ulpianus libro tertio disputationum): *Servum pignori datum manumittere non possumus* ('We cannot manumit a slave given in pledge.', transl. Brunt in Watson, *Digest of Justinian* [n. 21]).

3 The Legal Basis of *favor libertatis*

3.1 Constitutional Requirements for Laws Changing Slavery

Favor libertatis disrupts Roman slave law and transgresses one of its fundamental principles:[41] above all the qualification of the relationship between master and slave as one of ownership.[42] It is difficult to imagine how the jurists could have changed this institution on their own, given the fact that they could not have created it, 'for a civilian ratio may degrade civilian rights, but with natural rights, this, indeed, cannot be done' (*quia civilis ratio civilia quidem iura corrumpere potest, naturalia vero non potest*), as Gaius proclaims.[43] The same holds true for the departure from slavery, *manumissio*, as we are told by Ulpian (1 *inst*. D. 1.1.4):

> D. 1.1.4 (Ulpian 1 inst.): Manumissiones quoque iuris gentium sunt. est autem manumissio de manu missio, id est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, manumissus liberatur potestate. quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis.
>
> D. 1.1.4 (Ulpian, Institutes, book 4): Manumissions also belong to the *ius gentium*. Manumission means sending out of one's hand, *de manu missio*, that is, granting of freedom. For whereas one who is in slavery is subjected to the hand (*manus*) and power of another, on being sent out of hand he is freed of that power. All of which originated from the *ius gentium*, since, of course, everyone would be born free by the natural law, and manumission would not be known when slavery was unknown. But after slavery came in by the *ius gentium*, there followed the boon (*beneficium*) of manumission.[44]

Ius gentium was a law common to all peoples that allowed the Romans to cut out the deadwood in their own legal system, expand Roman law *imperio rationis*[45] and justify awkward institutions like slavery.[46] What Ulpian and other lawyers had in mind here was a sort of legal 'rock paper scissors': natural law is stronger than civil law; slavery

41 Pfaff, *favor libertatis* (n. 14): 15.
42 Flor. D. 1.5.3.1.
43 Gai. 1.58.
44 Transl. MacCromick in Watson, *Digest of Justinian* (n. 21).
45 Fritz Sturm, "Ius gentium. Imperialistische Schönfärberei römischer Juristen," in *Römische Jurisprudenz – Dogmatik, Überlieferung, Rezeption. Festschrift für Detlef Liebs zum 75. Geburtstag*, ed. Karlheinz Muscheler (Berlin: Duncker & Humboldt, 2011): 663–69.
46 Max Kaser, *Ius gentium* (Cologne/Vienna: Böhlau, 1993); Jacob Fortunat Stagl, "Eine Flucht nach Rom: Der geistige Weg Ernst Rabels," *Tijdschrift voor Rechtsgeschiedenis* 79, no. 3–4 (2011): 533, 545–48.

is against natural law and cannot, therefore, be regulated by civil law; but the law of nations is so strong that it can overcome civil law. From this, we can conclude that the stakes concerning slavery are high: anybody who wanted to tamper with this institution, and be it by means of *manumissio*, had to have a solid mandate.

As these deliberations prove, an antithetical guiding principle like *favor libertatis* cannot be simple jurisprudence: there must be a normative source[47] and a societal belief from which it draws its validity and momentum.[48] Enfranchising a slave is significant for the public interest in so far as it creates a new Roman citizen.[49] Nevertheless, manumission was treated during the republic as merely an act of private law.[50] Olís Robleda, one of the great authorities on the law of slavery, observes that legislation to curb manumission restricts this freedom in the interests of *status rei Romanae*,[51] and in consequence, transforms what was originally a category of *ius privatum* into *ius publicum*.[52] As a result, slavery as a whole is transformed into an institution of public law,[53] a phenomenon typical for the Augustan age, which also saw a transformation of the – originally wholly private – family into an institution of public law.[54] Given the public-law nature of slavery, it is clear that this institution cannot be changed merely by means of simple *responsa prudentium*, since this is the weakest form of legal source, while the *lex publica* is the strongest, as we can see from this list in Gaius:[55] *Constant autem iura populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium*.[56] Only a *lex publica*

47 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 121: 'Where the lawyers do not dare to go, the emperors will go'.

48 See Carlo Castello, "'Humanitas' e 'favor libertatis'. Schiavi e liberti nel I secolo," in *Sodalitas. Scritti in onore di Antonio Guarino*, vol. 5, ed. Antonio Guarino and Vincenzo Giuffrè (Naples: Jovene, 1984): 2175–89, 2183, with regard to the *lex Iunia Petronia*; see in general, Stagl, *Camino* (n. 22): 317–36.

49 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 294.

50 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 293.

51 Ulp. 1 *inst*. D. 1.1.1.2.

52 Robleda, *Il diritto* (n. 15): 149–153.

53 Antonio Fernández de Buján, "Conceptos y dicotomías del ius," *Revista Jurídica Universidad Autónoma de Madrid* 3 (2000): 9, 42; in general see Juan Manuel Blanch Nougués and Carmen Palomo Pinel, "Ius publicum y ius priuatum en la experiencia histórica del derecho. Un ejemplo insólito en las distinciones de Bártolo expuestas a través de esquemas," *Revista General de Derecho Romano* 18 (2012): 1–68.

54 See also Paul. 60 *ad ed*. D. 23.3.2; Pomp. 15 *ad Sab*. D. 24.3.1; Stagl, *Camino* (n. 22): 295 ss.

55 Gai. 1.2.

56 Álvaro D'Ors, *Los romanistas ante la actual crisis de la ley* (Madrid: Ateneo, 1952): 9; Dario Mantovani, "Mores, leges, potentia. La storia della legislazione romana secondo Tacito (Annales III 25–28)," in *Letteratura e civitas. Transizioni dalla Repubblica all'Impero. In ricordo di Emanuele Narducci*, ed. Mario Citroni (Pisa: ETS, 2012): 353–404.

can derogate or modify[57] a *ius publicum* because only a *lex publica* can claim to be, in the words of Papinian, *communis rei publicae sponsio*.[58]

The politicization of private law under Augustus occurs in the legal form of a *lex publica*, the adequate form for implementing a 'public interest.' Justinian obscures this tendency through the de-legislating process recently identified by Dario Mantovani:[59] we have lost this precise component of Roman law because Justinian either left it out altogether or manipulated the passages which he did include. The main argument for a greater presence of *leges publicae* in the original writings of the jurists is the comparison between Gaius and the Digest. Whereas Gaius' Institutes, which were not tampered with by Justinian, mentions 39 *leges publicae*, the Justinian Digest only knows 23, and this is the case even though the Digest is sixteen times the size of the Institutes. How little do we really know from our legal sources about a law like the *lex Iulia et Papia*, which was after all so important that Julian devoted at least eighteen complete *libri* of his *digesta* to it? Justinian's 'de-legislating' obscures the 'juridification' under Augustus; the methodologically correct answer must be a 're-legislation' of the study of Roman law. And this is precisely what we are attempting here.

3.2 *Lex duodecim tabularum*: Republican *favor libertatis*

The first normative basis of this Roman custom seems to go back to a provision that is found in the Twelve Tables. We are told this in a passage in Gaius (Inst. 4.14) which states,

> But if the subject in dispute was a man's freedom then, even if he was a highly valuable slave, the same law provided that the action in oath was for a fine of fifty. This showed a disposition to favour freedom, so that those who claimed him to be free should not be burdened [text missing].[60]

There are special features to the manumission proceeding as part of a *legis actio*: the *vindicia* are given *secundum libertatem*, i.e. the presumptive slave is not transferred

57 D. 1.3.28 (Paulus libro quinto ad legem Uliam et Papiam): *Sed et posteriores leges ad priores pertinent, nisi contrariae sint, idque multis argumentis probatur*. ('But later laws also refer to earlier ones, unless they contradict them; there are many proofs of this.', transl. MacCromick in Watson, *Digest of Justinian* [n. 21]).

58 Pap. *def*. 1 D. 1.3.1.

59 Dario Mantovani, *Legum multitudo: La presencia de las leyes públicas en el derecho privado romano* (Valencia: Tirant Lo Blanch, 2022): 39–75.

60 *At si de libertate hominis controversia erat, etiamsi pretiosissimus homo esset, tamen ut l assibus sacramento contenderetur, eadem lege* [*XII tabularum*] *cautum est favore scilicet libertatis, ne onerarentur adsertores*, transl. Gordon and Robinson, *The Institutes of Gaius* (n. 1): 409.

to either party for the duration of the trial,[61] and the Twelve Tables provided that the *sacramentum* should be merely fifty asses, which according to Gaius is due to *favor libertatis*, so that the *adsertor libertatis* should not be unduly burdened.[62]

It is likely that behind this pre-Augustan *favor libertatis* stood the fact that in fifth-century Rome, the status of slavery could befall anybody who suffered financial collapse. A rule that favoured freedom might well one day benefit its creators – a sort of wager for one's liberty. It seems probable, however, that the term *favor liberatis*, i.e. the general principle of favouring liberty which is being constituted and generalised in this term, dates to the post-Augustan period.[63] The phenomenon of jurists who are no longer aware of the *ratio legis* of an old *lex* – and so in the position to invent one – is widespread.[64] Nevertheless, the idea of *favor libertatis* found the first expression in this provision of the Twelve Tables.

As slavery changed over the course of Roman history, the presumed rationale of republican *favor libertatis* increasingly lost its capacity to explain and sustain rules that favoured slaves: it had been devised for a certain kind of society and had to evolve as society itself evolved.[65] Enslaving the debtor in the course of personal execution fell out of use, and the right of a father to sell his children as slaves required a sale outside the city of Rome (*trans Tiberim vendere*).[66] There were few chances even in the high republican era of Romans being enslaved at Rome. On the other hand, the Roman conquest of the Mediterranean produced an influx of slaves from totally different nations[67] for whom the rustic chivalry of the Twelve Tables was out of place.[68] Varro Reatinus (116–27 BCE) refers in his treatise on agriculture to a common classification of slaves as 'talking equipment' for farm work,[69] and the jurist Labeo, who lived

61 Max Kaser and Karl Hackl, *Das römische Zivilprozeßrecht* (Munich: C.H. Beck, 1996): 74, 83, 101. For the archaeology of *favor libertatis* and this text cf. Huchthausen, "Freiheitsbegünstigung" (n. 18): 51.

62 Kaser and Hackl, *Römisches Zivilprozeßrecht* (n. 61): 103; now Gamauf, "Sklaven (servi)" (n. 3): 57.

63 See Buckland, *Law of Slavery* (n. 3): 438.

64 Iul. 55 *dig*. D. 1.3.20: *Non omnium, quae a maioribus constituta sunt, ratio reddi potest*. ('It is not possible to find an underlying reason for everything which was settled by our forebear.', transl. MacCromick in Watson, *Digest of Justinian* [n. 21]).

65 Alföldy, *Sozialgeschichte* (n. 3): 85–95.

66 Kaser and Hackl, *Römisches Zivilprozeßrecht* (n. 61): 145; Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 291.

67 Concrete data, Siegfried Lauffer, review of *Struktur der antiken Sklavenkriege*, by Joseph Vogt, *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* 46, no. 3 (1959): 395.

68 On the actual living conditions of rural slaves, their inclination to flee and the corresponding repression by the authorities, Heinz Bellen, *Studien zur Sklavenflucht im römischen Kaiserreich* (Stuttgart: Franz Steiner Verlag, 1971): 5.

69 Varro. rust. 1.17.

in the times of Augustus, considered slaves to be 'self-moving things'.[70] No other fact illustrates better the massification of slavery, and the estrangement between master and servant it entailed, than the slave revolts of 120–71 BCE.[71] Whereas in the good old days, *favor libertatis* was a wager on one's own freedom, it became a wager on the survival of Rome: it had become clear that slaves had to be treated differently if Rome wanted to evade the dangerous humiliation and even critical military situation such revolts or 'wars' brought about.[72]

3.3 *Lex Iunia Petronia*: Imperial *favor libertatis* I

As stated above, only a *lex publica* or another law in the broader sense can be considered to be the source of force of *favor libertatis*. In an analogy to the *favor dotis*, which can be traced back to the *lex Iulia et Papia Poppaea*,[73] I believe that the second normative basis of the *favor libertatis* is, among others, the *lex Iulia Petronia de servis*,[74] which probably dates to 19 CE.[75] The most important factor characterising scholarly work on this law is how very little we know about it. The reason for this aridity of our sources is the already mentioned 'de-legislating' (*delegificazione*) that happened under Justinian.

The first of our two sources about this law is Hermogenianus D. 40.1.24pr.-1: *Lege Iunia Petronia, si dissonantes pares iudicum existant sententiae, pro libertate pronuntiari iussum* (The *lex Iunia Petronia* ordains that in the case of two contradicting votes on an equal footing, the decision must be made in favour of liberty). In the case of a tied vote in a *causa liberalis*, the *lex Iunia Petronia* recommends that the result be freedom for the slave.[76] This should be interpreted as a decision *in favorem libertatis*. The term used here, *iussum*, is frequently found in descriptions of the content of *leges*

70 Ulp. 1 ad ed. aedil. curul. D. 21, 1, 1pr.: *Labeo scribit edictum aedilium curulium de venditionibus rerum esse tam earum quae soli sint quam earum quae mobiles aut se moventes* (transl. Thomas in Watson, *Digest of Justinian* [n. 21]).

71 Joseph Vogt, *Struktur der antiken Sklavenkriege* (Stuttgart: Franz Steiner Verlag, 1957); John Pentland Mahaffy, "The Slave Wars against Romen," *Hermathena* 7, no. 16 (1890): 167–82.

72 Good on this point, Barry Baldwin, "Two Aspects of the Spartacus Slave Revolt," *The Classical Journal* 62, no. 7 (1967): 289, 293–94.; see also Jean Christian Dumont, *Servus: Rome et l'esclavage sous la république* (Rome: École française de Rome, 1987): 102–205.

73 Stagl, *Camino* (n. 22): 27.

74 This opinion is shared by Castello, "'Humanitas'" (n. 48): 2183.

75 Pierangelo Buongiorno, "Lex (Iunia?) Petronia de servis," in *Handwörterbuch der antiken Sklaverei*, vol. 2, ed. Heinz Heinen et al. (Berlin: De Gruyter, 2017): 1763–64. Gilbert Bagnani's theories in *Arbiter of Elegance: A Study of the Life and Works of C. Petronius* (Toronto: University of Toronto Press, 1954) are unconvincing; cf. Robert Browning, review of *Arbiter of Elegance: A Study of the Life and Works of C. Petronius*, by Gilbert Bagnani, *The Classical Review* 6, no. 1 (1956): 45–47.

76 Buckland, *Law of Slavery* (n. 3): 36; Kaser and Hackl, *Römisches Zivilprozeßrecht* (n. 61): 121, 199.

publicae,[77] which can be explained by the manner in which they were passed. The presiding magistrate asked the popular assembly, *velitis iubeatis*?,[78] i.e. a given law.[79] This *iussum* by the *populus Romanus* can explain why *favor libertatis*, assuming it to derive from a *lex*, is strong enough to override all other rules or principles of *ius commune*. So Tomasz Giaro's observation that decisions in *favorem libertatis* are enthymemic,[80] i.e. that they presuppose a premise that is not explicitly stated, is correct: this premise of *favor libertatis* is the sovereignty of the Roman people. The second text is Mod. 6 *reg*. D. 48.8.11.1–2: 'If a slave be thrown to the beasts without [having been before] a judge, not only he who sold him but also he who bought him shall be liable to punishment. 2. Following the *lex Petronia* and the *senatus consulta* relating to it, masters have lost the power of handing over at their own discretion their slaves to fight with the beasts; but after the slave has been produced before a judge, if his master's complaint is just, he shall in this case be handed over to punishment'.[81] By the same *lex Petronia*, the slave's owner can no longer sell the slave *ad bestias* without the consent of a judge.[82] This means that the 'state' assumes control over the slave, and this, in turn, means that it is no longer correct to say that the master is the proprietor of the slave in the fullest sense of the word.

The *lex Petronia*, which I believe is identical to the *lex Iunia Petronia*,[83] likewise decrees in favour of the slaves, albeit not *in favorem libertatis*. Improving a slave's living conditions is not necessarily the same as *favor libertatis*, although they are related. It is, however, conceivable that this law was a sort of general provision for servile legal relationships and that the jurists arrived at *favor libertatis* by way of inductive reasoning from the law's general tendency. I assume that these *leges publicae*, the most important source of law for the Romans,[84] were the basis on which

77 Heumann and Seckel, *Handlexikon* (n. 26): s.v. '*iubere*' a).

78 Gell. 5.19.9.

79 Antonio Guarino, *Storia del diritto romano* (Naples: Jovene, 1998): §§ 133.

80 Tomasz Giaro, *Römische Rechtswahrheiten Ein Gedankenexperiment* (Frankfurt am Main: Klostermann, 2007): 320, cites as an exception to the rule Marcian. 7 *inst*. D. 40.5.50, which however also presupposes *favor libertatis*.

81 *Servo sine iudice ad bestias dato non solum qui vendidit poena, verum et qui comparavit tenebitur. Post legem Petroniam et senatus consulta ad eam legem pertinentia dominis potestas ablata est ad bestias depugnandas suo arbitrio servos tradere: oblato tamen iudici servo, si iusta sit domini querella, sic poenae tradetur.* (transl. Robinson in Watson, *Digest of Justinian* [n. 21]). See also Pomp. 22 *ad Sab*. D. 12.4.15 and Marcian. 1 *inst*. D. 18.1.42.

82 Buckland, *Law of Slavery* (n. 3): 36; Robleda, *Il diritto* (n. 15): 84.

83 Some scholars have contested the identity of the laws mentioned in these sources; but on balance the reasons in favour of identity are better, although they are too intricate to be discussed here. This view has been supported by Otto Karlowa, *Römische Rechtsgeschichte*, vol. 1 (Berlin: Von Veit, 1885): 624; Jean-Louis Ferrary, "La législation augustéenne et les dernières lois comitiales," in *Leges publicae. La legge nell'esperienza giuridica romana*, ed. Jean-Louis Ferrary (Pavia: IUSS Press, 2012): 569, 583–85.

84 Arg. Gai. 1.2 and Pap. 2 def. D. 1.1.7.

emperors enacted further rules in favour of slaves in the form of *constitutiones*. An allusion to this can be found in one of the two texts on the *lex Petronia* cited above: 'After the *lex Petronia* and other decrees of the Senate belonging to the same *lex*, the power was taken away from the master [. . .]' (*Post legem Petroniam et senatus consulta*[85] *ad eam legem pertinentia dominis potestas ablata est* [. . .]).[86] In this context, we must also consider a rescript by Antoninus Pius (138–161), which prohibits the killing of a slave without just cause, and masters are obliged to sell a slave in the case of maltreatment.[87] Another trace of the wider repercussions of this law can be found in a text from Marcian's *Institutes* (D. 18.1.42): 'Owners can, neither directly nor through procurators, sell their recalcitrant slaves to fight wild animals. The deified brothers [161–169 CE] so provided by rescript'.[88] This looks like a radicalization of *lex Petronia*.[89]

3.4 *Lex Iunia Norbana*: Imperial *favor libertatis* II

The other legal basis of *favor libertatis* seems to be the *Lex Iunia Norbana*.[90] The sources on this statute are scarce, and dating it is a most intricate problem.[91] As I have mentioned above, it grants freedom but not citizenship to those who were informally freed by their masters. The main sources concerning its content are I. 1.5.3 and Gai. 3.56: 'Subsequently, however, as a result of the Junian Act, all those whose liberty the praetor protected came to be free and were called Junian Latins: [. . .]'.[92]

85 The most recent work on this law, Buongiorno, "Lex" (n. 75): 1764; identified the *senatus consulta* mentioned in SHA Hadr. 18.7: *servos a dominis occidi vetuit eosque iussit damnari per iudices, si digni essent*, as well as the passage already cited in D. 48.11.1.1 and the *Edictum divi Claudii* about medical care for seriously ill slaves; Suet. *Claud*. 25.2. For this edict see Pierangelo Buongiorno, "Edictum divi Claudii," in *Handwörterbuch der antiken Sklaverei*, vol. 1, ed. Heinz Heinen et al. (Berlin: De Gruyter, 2017): 764.

86 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 285.

87 Gai. 1.53. On this text see Gamauf, "Sklaven (servi)" (n. 3): 34 with n. 209; and Richard Gamauf, *Ad statuam licet confugere: Untersuchungen zum Asylrecht im römischen Prinzipat* (Frankfurt am Main: Peter Lang Verlag, 1999): 81–84.

88 *Domini neque per se neque per procuratores suos possunt saltem criminosos servos vendere, ut cum bestiis pugnarent. et ita Divi Fratres rescripserunt* (transl. Thomas in Watson, *Digest of Justinian* [n. 21]).

89 Gamauf, "Sklaven (servi)" (n. 3): 34, seems to consider it to be rather a restatement, which is also possible.

90 This opinion is shared by Castello, "'Humanitas'" (n. 48): 2185, 2187.

91 A comprehensive study is now available by Luigi Pellecchi, "Loi Iunia Norbana sur l'affranchissement," *Leges Populi Romani*, 15.04.2020, http://telma.irht.cnrs.fr//outils/lepor/notice490/ [accessed 01.09.2022].

92 [. . .] *postea vero per legem Iuniam eos omnes, quos praetor in libertate tuebatur, liberos esse coepisse et appellatos esse Latinos Iunianos* [. . .] (transl. Gordon and Robinson, *The Institutes of Gaius* [n. 1]: 293); See also Fr. Dos. 5.

The dominant interpretation of this source is that only those slaves who were formally manumitted – a cumbersome procedure and in the case of a testamentary manumission littered with pitfalls – gained freedom and full citizenship (with, however, limited political participation), whereas those slaves who were informally manumitted did not obtain citizenship but only freedom; they belonged to a group which was called *Latini Iuniani*.[93] Concerning the dating, we do not have the slightest reason to mistrust Justinian's denomination of it as *lex Iunia Norbana*. This being the case, the *lex* must have been past in the year 19 CE for the simple reason that only in this precise year was there a pair of magistrates (consuls in this case) with the *nomen gentilicium* Iunius and Norbanus respectively.[94] From this we can conclude that both *leges Iuniani*, the Petronian and the Norbanian, share a common origin. And the *lex Iunia Norbana*, just like its sister law, gave rise to more legislation to mend loopholes, contradictions and *lacunae*: López Barja de Quiroga, the scholar who most exhaustively studied the *latinitas* of slaves in recent years, counts three *leges publicae* concerned with manumission (we will discuss the other two below), twelve *senatus consulta* (the type of formal legislation which replaced the *lex publica* during the empire) and fourteen *rescripta* (informal imperial legislation), with one case being dubious.[95]

3.5 *Cognitio principis*: Imperial *favor libertatis* III

This legislation does not address the *favor libertatis* as such; its aim is rather to alleviate the life and lot of slaves, yet there is a *tertium comparationis*, namely the principle of humanity. Both of these *leges publicae* are based on a recognition of slaves as fellow human beings. The most successful expression of this idea is to be found in Petronius' *Satyricon*,[96] that is to say, during the early Principate: 'slaves are also humans, and they drank the same mother's milk even though a hex will torment them'.[97] The idea that slaves and their masters had the same foster mother in common can also be read as an allusion to Romulus and Remus, to the very founding myth of Rome and the *nutrix lupa*[98] which fed them. The suckling future slave and

93 Steinwenter, "Latini Iuniani" (n. 12): col. 911; Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 296. Now Gamauf, "Sklaven (servi)" (n. 3): 76; Pedro Manuel López Barja de Quiroga, "Latinus iunianus una aproximación," *Studia Historica. Studia Antigua* 4–5 (1986–1987): 125–26; Pellecchi, "Loi Iunia" (n. 91): passim.

94 Steinwenter, "Latini Iuniani" (n. 12): col. 910.

95 López Barja de Quiroga, "Latinus iunianus" (n. 93): 126–28.

96 Michael von Albrecht, *Geschichte der römischen Literatur: Von Andronicus bis Boethius und ihr Fortwirken*, 3rd ed. (Berlin: De Gruyter, 2012): 1028–50.

97 Sat. 71.1: *et servi homines sunt et aeque unum lactum biberunt etiam si illos malus fatus oppresserit*, transl. Michael Heseltine.

98 For example in Aug. civ. Dei. 22.6.28.

master repeat the founding myth of Rome and imply a *fraternitas*[99] among all its inhabitants.

Just as the emperors developed further the idea of brotherhood by enacting norms in favour of slaves,[100] so the jurists developed this notion further by *interpretatio*.[101] The emperors set a shining example, as in the following case (Marcell. 29 dig. D. 28.4.3[102]): a testator had invalidated a will by blotting out the names of the heirs, whose appointment was fundamental for the validity of wills in general. But the will also contained legacies in favour of the heirs and third persons, as well as the order to enfranchise slaves to both categories of legatees. In a dramatic session at the imperial council, the counsellors exchanged arguments for and against the validity of the will. If the will was considered valid, it would entail a severe breach of the fundamental rule of the Roman law of succession: 'and accordingly the institution of an heir is deemed the beginning and foundation of a will' (*caput et fundamentum intellegitur totius testamenti heredis institutio*).[103] If the testament is void, the treasury will benefit from it but, of course, the legatees will receive nothing, which would be a breach of the principle of justice: 'Justice is the constant and enduring will to give everybody what is due to him' (*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*).[104] Put before this dilemma, the emperor secludes himself from the quarrelling councillors in order to ponder the alternatives: (*Antoninus Caesar remotis omnibus cum deliberasset et admitti rursus eodem iussisset*). After having called back his council, he pronounces his decision: This case requires a 'very humane decision' (*causa praesens admittere videtur humaniorem interpretationem*) which respects the will of the deceased; therefore, the legacies have to remain intact. Concerning the original disposition by which the testator had manumitted a certain slave whose name he later blotted out, the emperor decrees that the slave should be free: *quod videlicet favore constituit libertatis* ('what is obviously to be derived from the *favor libertatis*').

99 Ps. Quint. decl. 16.4.

100 See Gamauf, "Sklaven (servi)" (n. 3) and Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 285, with references and literature.

101 Mantovani, *Legum multitudo* (n. 59): 76–86.

102 On this text see recently Martin Avenarius, "Marc Aurel und die Dogmatik des römischen Privatrechts. Kaiserliche Rechtspflege im System der Rechtsquellen und die Ausfüllung von Gestaltungsspielräumen in einer Übergangszeit der Rechtsentwicklung," in *Selbstbetrachtungen und Selbstdarstellungen*, ed. Michael van Ackeren and Jan Opsomer (Wiesbaden: Reichert, 2012): 216; Thomas Finkenauer, *Die Rechtsetzung Mark Aurels zur Sklaverei* (Stuttgart: Franz Steiner Verlag, 2010): 17; Tony Honoré, *Emperors and Lawyers* (Oxford: Clarendon Press, 1994): 17; Jakob Fortunat Stagl, "Glanz der Rhetorik und Finsternis der Logik in einer Entscheidung Marc Aurels (Marcell. D. 28, 4, 3 pr.–1)," in *Meditationes de iure et historia: Essays in Honour of Laurens Winkel*, = *Fundamina: A Journal of Legal History* 20, ed. Rena van den Bergh et al. (Pretoria: Unisa Press, 2014): 871–80.

103 Gai. 2.229 '[. . .] the force of the will flows from the heir's appointment, which is its foundation or corner-stone', transl. Gordon and Robinson, *The Institutes of Gaius* (n. 1): 239.

104 Ulp. 1 reg. D. 1.1.10.

In a first step, Marcus Aurelius overrides an intricacy of Roman law of wills and testaments which declared the testator's volition the supreme consideration. The application of this principle, though, would lead to the slave not acquiring freedom since the testator had blotted out his name. So, in a second step, which blatantly contradicts the first, the emperor declares the *favor libertatis* to be a principle which is even stronger than the testator's volition. In Marcus Aurelius' heart, the *favor libertatis* had borne fruit.

3.6 *Legum fertilitas*

The defining feature of a slave's legal status is that they were their master's property, meaning, as was already pointed out, that he could do with them whatever he wanted. This consequence of legal logic is unacceptable in a society where anybody could become a slave due to debt. Even at the time of Twelve Tables, therefore, there had been a necessity to favour liberty. This is how the republican *favor libertatis* came into being. The later republic saw a substantial influx of slaves from all over the Mediterranean to Italy, a massification that changed slavery – a phenomenon we shall discuss further on. The next legislative initiative about which we know are the *leges Iunia Petronia* and *Iunia Norbana*, the first of which openly restricted a master's legal competencies over a slave, while the second radically changed the *régime* of manumission from a cumbersome formal into an effective informal procedure, thereby significantly promoting servile chances of gaining freedom. In retrospect both of these *leges publicae* were the starting point for an ever-growing avalanche of legislation in the more modern forms of *senatus consulta* and *rescripta* by the emperors *in favorem libertatis*. I would be inclined to call this phenomenon *fertilitas legum* since the impression is of one initial legal idea engendering a whole family of legislative acts[105] such as, for example, the Augustan legislation on marriage: This legislation dates from around the same time as the legislation on slaves, and also deals with demographic policy: essentially aiming to increase both the numbers and the morals of the old Roman stock.[106] The starting point was the *lex Iulia de maritandis ordinibus* 18 BCE,

105 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 104: 'jurisprudence, sénatus consultes, lois, constitutions impériales [. . .] un véritable code de l'esclavage'.

106 The classical studies are Dieter Nörr, *Recht und Gesellschaft. Festschrift für H. Schelsky zum 70. Geburtstag* (Berlin: Duncker & Humbolt, 1978): 309 [= *Historia iuris antiqui: Gesammelte Schriften*, 3 vols., ed. Tiziana J. Chiusi, Wolfgang Kaiser and Hans-Dieter Spengler (Goldbach: Keip, 2003): vol. 2, 1093], and Leo Ferrero Raditsa, "Augustus' Legislation Concerning Marriage, Procreation, Love Affairs and Adultery," in *Aufstieg und Niedergang der römischen Welt*, pt. 2, *Principat*, vol. 13, *Recht*, ed. Hildegard Temporini and Wolfgang Haase (Berlin: De Gruyter, 1980): 278; Spagnuolo Vigorita, *Casta Domus. Un seminario legislazione matriminiale augustea* (Indiana: Indiana University Press, 2002). A recent bibliography can be found in Anna Dolganov, "Imperialism and Social Engineering: Augustan Social Legislation in the Gnomon of the Idios Logos," in *Studien zum 'Gnomon des Idios Logos':*

followed by the *lex Iulia et Papia Poppea* 9 CE; both were seen already in antiquity as a unit and may be referred to as the *lex Iulia et Papia*.[107] These two were accompanied by the *lex Iulia caducaria* as well as the *lex Iulia de fundo dotali* (both probably initially a chapter of the *lex Iulia et Papia*) and *lex Iulia de adulteriis* (18 CE).

Why does it have to be a *lex publica* or a *senatus consultum*, though, which brought about the *favor libertatis*? It is obvious that any fundamental change to property and formal procedures like *manumissio* could only have been brought about by a legal act strong enough to change *ius civile*, the ancient common law of the City of Rome, of which property is the basic legal framework.[108] The early empire is known for strict observance of the republican constitution even though it was considered only a form.[109] From this perspective, the only alternative to a *lex publica* or a *senatus consultum* is that the *favor libertatis* was a legal creation by the praetor.[110] The praetor, however, had no authority over measures of such magnitude,[111] especially not an issue of political importance;[112] and after the slave revolts any changes to the regulations of slavery doubtlessly were considered to be of such political import. Exaggerating only slightly, we might say that *favor libertatis* transforms the ownership of a slave, which is by definition perpetual,[113] into a temporary institution by creating something like a default rule according to which it is presumed that the master wanted to enfranchise his slaves after his death.[114] He may do otherwise, but in this case, the burden of expressing himself clearly rests on him. This kind of temporary ownership is a violation of the principles of *ius civile* just like a testament without an

Beiträge zum Dritten Wiener Koloquium zur Antiken Rechtsgeschichte, ed. Thomas Kruse (Vienna: Holzhausen, 2022): 1–39.

107 On both as a *lex* see Philippe Moreau, "Loi Iulia de maritandis ordinibus," *Leges Populi Romani*, 12.03.2020, http://www.cn-telma.fr/lepor/notice449/ [accessed 01.09.2022].

108 On the old *ius civile* see Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 198–202.

109 Franz Wieacker, *Römische Rechtsgeschichte*, vol. 2, *Die Jurisprudenz vom frühen Prinzipat bis zum Ausgang der Antike* (Munich: C.H. Beck, 2006): 3–13.

110 This is the opinion of Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 119.

111 Wolfgang Kunkel, *Die Magistratur*, vol. 2, *Staatsordnung und Staatspraxis der römischen Republik* (Munich: C.H. Beck, 1995): 235.

112 Franz Wieacker, *Römische Rechtsgeschichte*, vol. 1, *Einleitung, Quellenkunde Frühzeit und Republik* (Munich: C.H. Beck, 1989): 413.

113 Pap. D. 8.1.4; Iust. C. 6.37.26 with regard to legacies. Diocl. u. Max. Frg. vat. 283; Pasquale Voci, *Diritto ereditario romano*, vol. 2 (Milan: Giuffre, 1967): 204.

114 This conclusion has indeed been drawn. Other scholars interpret the relationship between master and slave more as an issue of the 'law of persons' (*ius personarum*), from this point of view the rules mentioned above would imply a limitation to an originally unlimited status-related power of the slave. The text is ambiguous in this respect: Flor. 9. *inst*. D. 1.5.4.1 speaks of *dominium* but under the heading of 'De statu hominum' just as Marc. 1 inst. D. 1.5.5.1. Ownership is certainly a primordial juridical category and the 'law of persons' seems to be a rather later construction by jurists in order to find a common category for all kinds of dependency of a *pater familias*. On the evolution of and significance of the 'law of persons' see now Stagl, *Camino* (n. 22): 21–46; on the aforementioned discussion see Gamauf, "Sklaven (servi)" (n. 3): 97–102.

heir in the case of Marcus Aurelius discussed above. The emperor may turn the law upside down, but certainly not the praetor,[115] especially not under the empire. By the logic of Roman constitutional law, we may conclude that *favor libertatis* cannot be simply the invention of *iuris consulti* advising the praetor, who then turned their advice into jurisprudence (*Juristenrecht*). Since we have two *leges publicae* from the same year decreeing fundamental rules in favour of slaves and their offspring in the guise of *senatus consulta* or *rescripta* we are not only allowed but even compelled to consider them as the fountainhead of *favor libertatis*.

4 *Ius singulare*: A Theoretical Clarification

The mode of action of *favor libertatis*, in so far that it limits the scope of general rules and contradicts them, is something which must have been developed after the general rules had been established – otherwise, they would have been drafted in a way which incorporated the exceptions from the beginning. This makes it difficult to believe that this principle was just the product of the praetor who, even if he had the authority to 'correct' law for the sake of public interest on such a scale.[116] This kind of irruption from the outside as produced by the *favor*, a form of *utilitas publica*, which will tend to express itself in the form of a *lex publica*,[117] is what the Romans call *ius singulare*. The term describes a guiding principle which was decreed a) against the grain of common law, i.e. against that which would have been the rational solution from its perspective (*contra tenorem rationis*); b) for the sake of the public interest and related policies (*propter aliquam utilitatem*); and c) on the solid basis of formal authority (*auctoritate constituentium introductum*).[118] This last category, which was only descriptive, nevertheless served one important purpose: it tried to insulate the normal 'common' law (*ius commune*) from the destructive power of the 'special' law, the *ius singulare*. The exception had to be prevented from becoming the rule, as Julian (27 dig.) says in D. 1.3.15: 'From those [provisions] which have been constituted against the reason of

115 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 121.

116 Pap. 2 def. D. 1.1.7.1: *Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam* [. . .] ('Praetorian law [*jus praetorium*] is that which in the public interest the praetors have introduced in aid or supplementation or correction of the jus civile [. . .]', transl. MacCormack in Watson, *Digest of Justinian* [n. 21]); Ulrike Babusiuax, "Die Rechtsschichten," in *Handbuch des Römischen Privatrechts*, ed. Ulrike Babusiaux et al. (Tübingen: Mohr Siebeck, 2023): 114–91, 128.

117 Jakob Fortunat Stagl, "Die Funktionen der utilitas publica," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 134 (2017): 514–23; and Jakob Fortunat Stagl, "El pueblo del derecho es también el pubelo de las leyes?," in *Legum multitudo: La presencia de las leyes públicas en el derecho privado romano*, ed. Dario Mantovani (Valencia: Tirant Lo Blanch, 2022): 123–58.

118 D. 1.3.16 Paul. l. s. de iure singulari.

law we are not supposed to draw legal rules' (*In his, quae contra rationem iuris constituta sunt, non possumus sequi regulam iuris*).[119] Otherwise the entire system of Roman law would have imploded. Ultimately, *ius singulare* represented a technique for incorporating new rules without having to change the old ones.

There are two sources that confirm the qualification of the rules produced by *favor libertatis* as *ius singulare*, the first being D. 40.5.24.10 (Ulp. 5 fideicomm.):

D. 40.5.24.10 (Ulpian libro quinto fideicommissorum): Si quis servo pignerato directam libertatem dederit, licet videtur iure suptili inutiliter reliquisse, attamen quasi et fideicommissaria libertate relicta servus petere potest, ut ex fideicommisso liber fiat: favor enim libertatis suadet, ut interpretemur et ad libertatis petitionem procedere testamenti verba, quasi ex fideicommisso fuerat servus liber esse iussus: nec enim ignotum est, quod multa contra iuris rigorem pro libertate sint constituta.

D. 40.5.24.10 (Ulpian, Fideicommissa, book 5): If someone has directly given freedom to his pledged slave, the slave may, even though by a strict interpretation of the law his manumission is void, claim liberty as if he had been given fideicommissary liberty, so he may be free due to the *fideicommissum*. For liberty's sake (*favor libertatis*) the text of the testament is to be interpreted in such a way as to render possible the claim of liberty, [that is to say] as if the slave had been given fideicommissary liberty: For it is not unknown that many rules have been established against the rigour of the law for the sake of liberty.[120]

A debtor manumits in his will a slave to whom he has previously pledged liberty. This manumission is void insofar as it would diminish the creditor's position, but it can be reinterpreted as a *fideicommissum* with the consequence that the slave can claim liberty after his master's death, 'because', as the text says literally 'the *favor libertatis* requires' this reinterpretation. 'Since it is not unknown that many rules have been established against the rigour of the law in favour of liberty (*favor libertatis*)'.

Surprisingly the second text (Pap. 9 resp.) is from the same title, 'On fideicomissarial liberties', D. 40.5.23.3, a text which echoes the above mentioned case of Julian in D. 40.4.16:

D. 40.5.23.3 (Papinianus libro nono responsorum): Etiam fideicommissaria libertas a filio post certam aetatem eius data, si ad eam puer non pervenit, ab herede filii praestituta die reddatur: quam sententiam iure

D. 40.5.23.3 (Papinian, replies, book 9): Moreover, fideicommissary freedom, which is due from the son when he reaches a certain age, should be granted as due on the fixed day by the son's heir, if the boy did not live to that age; but this principle is regarded as conveying an

119 Stagl, *Camino* (n. 22): 318, 327; *contra* Mario Varvaro, "La dote, il ius singulare e il 'sistema didattico' di Gaio," *Seminarios Complutenses de Derecho Romano* 39 (2016): 409. A reply can be found in Jakob Fortunat Stagl, "Caesars Koch oder das Schweigen der Quellen: Zur Kritik Varvaros am didaktischen System des Gaius," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 135 (2018): 582–91.

120 Transl. Brunt in Watson, *Digest of Justinian* (n. 21).

singulari receptam ad cetera fideicommissa relicta porrigi non placuit.	exceptional right, and it has been decided that it does not extend to other fideicommissary gifts.[121]

If liberty has been given to a slave after the son has reached a certain age and the son does not reach that age, the heir taking the son's place must nevertheless manumit the slave.

5 The Rationale of *favor libertatis*

Having explained the origin of *favor libertatis* from a family of *leges publica*, of which the *lex Iunia Petronia* and the *lex Iunia Norbana* are two conspicuous exponents, we have not yet explained the intellectual and social reasoning behind this legislation, nor why it was implemented – apparently willingly.[122] Otherwise, it would never have gained its momentum, remembering Horace's famous observation: *Quid leges sine moribus / vanae proficient*.[123]

As a starting point for our disquisition, we should turn to the legal consequences of giving freedom to a slave. As stated above, the slave acquired either limited citizenship or just the status of *Latinus Iunianus*, depending on the formality of the manumission; only their children were *ingenui*, that is to say, Roman citizens in the full meaning of the word. These were ramifications in the sphere of *ius publicum*. In the sphere of *ius privatum* the status of liberty was also ambiguous. The *libertini* (a term describing the status in general) were not simply *liberi*; rather, they owed *obsequium* to their former masters who now had become their *patroni*; with regard to these obligations they are called *liberti*. Slaves could, incidentally, purchase their freedom with the help of their *peculium*.[124] The *obsequium* owed by freedmen to their *patroni* consisted not just in respectful behaviour, but above all in the legal obligation to work a certain amount of time each year for the *patronus* (*operae*),[125] and to leave a part of their inheritance to the *patronus* or his heirs (*bona libertorum*).[126] Manumitting a slave created, in other

121 Transl. Brunt in Watson, *Digest of Justinian* (n. 21).

122 An example is D. 40.5.50 Marcian. 7 inst.: [. . .] *in obscuro libertatem praevalere. quae sententia mihi quoque verior esse videtur* ('[. . .] but that if it were unclear [. . .] the grant of freedom takes precedence. In my view, too, this opinion is more correct.', transl. Brunt in Watson, *Digest of Justinian* [n. 21]). On this see Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 121.

123 Hor. carm. 3.24 ('What use are all these empty laws/without the behaviour that should accompany them', transl. A.S. Kline, "Horace: The Odes, Book 3," *Poetry in Translation*, 2003 https://www.poetryintranslation.com/PITBR/Latin/HoraceOdesBkIII.php#anchor_Toc40263869 [accessed 01.09.2022]).

124 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 297 at n. 83.

125 Carla Masi Doria, *Civitas Operae Obsequium. Tre studi sulla condizione giuridica dei liberti* (Naples: Jovene, 1993): 18–26.

126 Masi Doria, *Civitas* (n. 126): 27–54; Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 113.

words, just a new form of dependency[127] and therefore was not such a big loss for the heir; being *patronus* of a *libertus* was an asset.[128] Due to this situation, there existed a enhaced form of manumission, which was freedom without freedman status (*ius anuli aurei*[129]). More radical was the option of *natalium restitutio*,[130] a fictional declaration that conferred freeborn status. Another feature distinguished a will from any legal act *inter vivos;* its defects only appeared *post mortem*, when they could no longer be redressed. The fact that the bulk of three books in the Digest is dedicated only to the interpretation of legates and *fideicommissa* (D. lib. 30–32 'De legatis et fideicommissis') shows that it was precisely in this field that the art of the jurists was needed most. For these reasons, wills are the legal transactions where *favor libertatis* was most likely to be necessary to mend a knotty situation. And the death of the master was, as we saw above, the moment where the idea of temporal property could best be implemented.

5.1 Interest

The interest in enfranchising slaves is first and foremost that of self-preservation (Marcell. D. 29.5.16):

> D. 29.5.16 (Marcellus libro 12 digestorum): Domino a familia occiso servus communis necem eius detexit: favore libertatis liber quidem fieri debet, pretii autem partem sibi contingentem socium consequi oportet.
>
> D. 29.5.16 (Marcellus, Digest, book 12): Where a master was killed by his household slaves, a slave held in common exposed his murder; he certainly must be freed in order to favor freedom (favor libertatis), but the co-owner ought to obtain the value of the share which falls to him.[131]

This text should be understood in the context of the *senatus consultum Silanianum*,[132] which stipulated that all the slaves of a household were to be put to death if one of them had killed the master.[133] We know from Tacitus that this law was enforced in the case of a household of more than 400 slaves, albeit not without a prior

127 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 100.

128 This explains Gaius' lengthy disquisition on this topic in inst. 3.39–54.

129 Ulp. 5 *ad ed*. D. 2.4.10.1; Ulp. 40 *ad ed*. D. 38.2.3 pr.

130 Ulp. 40 *ad ed*. D. 38.2.3.1.; Diocl. C. 6.8.2; for these phenomena see Theodor Mommsen, *Römisches Staatsrecht*, vol. 1 (Leipzig: Hirzel, 1877): 398; Robleda, *Il diritto* (n. 15): 172.

131 Transl. Gordon in Watson, *Digest of Justinian* (n. 21).

132 Otto Lenel, *Palingenesia iuris civilis*, vol. 1 (Leipzig: Bernhard Tauchnitz, 1887): col. 650.

133 Danilo Dalla, *Senatus Consultum Silanianum* (Milan: Giuffrè, 1994); Jill Diana Harries, "The Senatus Consultum Silanianum: Court Decisions and Judicial Severity in the Early Roman Empire," in *New Frontiers: Law and Society in the Roman World*, ed. Paul J. du Plessis (Edinburgh: Edinburgh University Press, 2013): 51–72.

debate in the senate.[134] The fear felt by masters of their slaves was proverbial: *totidem servi, tot hostes* ('one has many foes as one has slaves').[135] The truth of this proverb was proved beyond doubt during the slave revolts.

Servile peaceableness and obedience were achieved not only by means of punishments and threats but also benefits: above all, the promise of freedom after long and honourable service. Our text looks at the question of how to act when the crime committed against the master is being exposed by a slave held in common: he is to be enfranchised in accordance with *favor libertatis*; the heir must compensate the co-owner. We may deduce from this that the idea behind *favor libertatis* was the creation of an incentive for slaves not to seek to kill their masters[136] or to develop behaviour like a tendency to escape or to commit suicide, both of which are detrimental to a slave's performance from an economic point of view. In a rescript from Antoninus Pius (86–161 CE), there is direct proof for this kind of reasoning (Coll. 3.3):[137]

> Coll. 3.3.5–6: [. . .] Servorum obsequium non solum imperio, sed et moderatione sufficientibus praebitis et iustis operibus contineri oportet. Itaque et ipse curare debes iuste ac temperate tuos tractare, ut ex facili requirere eos possis, ne, si apparuerit vel inparem te inpediis esse vel atrociore dominationem saevitia exercere, necesse habeat proconsul, ne quid tumultuosius contra accidat, praevenire et ex mea iam auctoritatem te ad alienandos eos conpellere.
>
> Coll. 3.3.5–6: [. . .] The obedience of slaves must be maintained not merely by the exercise of authority, but by reasonable treatment satisfaction of their necessities, and a fair apportionment of tasks. You should, on your part, therefore, take care to treat your slaves fairly and with moderation, so that you may without difficulty be able to claim them back. Otherwise, on it transpiring that their maintenance is beyond your resources, or that you exercise authority with revolting cruelty, the Proconsul may be under the necessity of preventing the mischief of a possible outbreak by forcing you, with my sanction, to part with your slaves'.[138]

A lesser evil for the master but nonetheless a great preoccupation, even a 'visceral fear' in the words of Boulvert and Morabito, was the possibility that slaves might

134 Tac. *ann*. 14.44.

135 Probably a simplification of *totidem hostes esse quot servos*. Sen. *epist*. 47.5.

136 Huchthausen, "Freiheitsbegünstigung" (n. 18): 62; Ettore Ciccotti, *Il tramonto della schiavitù nel mondo antico* (Turin: Bocca, 1899): 270. For the public interest in legislation, see Jakob Fortunat Stagl, "Utilitas publica, ius naturale y protección de la natura," *Revista General de Derecho Romano* 33 (2019).

137 On this text see Gamauf, "Sklaven (servi)" (n. 3): 92–135: on 126–29 there is a discussion of the rationale behind this legislation which Gamauf interprets in a purely pragmatic way while rejecting any ideological, philosophical or ethical considerations.

138 Transl. H. Hyamsom, *Mosaicarum et romanarum legum collatio* (London/New York: H. Frowde/Oxford University Press, 1913).

escape, and all kinds of countermeasures were taken against this, *sit venia verbo*, 'natural' tendency.[139]

5.2 The Link with Augustan Demographic Policies

The *lex Iunia Petronia* must be seen in connection with the demographic measures adopted by the Julio-Claudian emperors, especially their legislation to restrict manumissions, because there is, superficially at least, a contradiction between *favor liberatis* on the one hand and restrictions on manumission on the other.

The *lex Fufia Caninia de manumissionibus*[140] of 2 CE and the *lex Aelia Sentia de manumissionibus*[141] of 4 CE, both of which were passed under the aegis of Augustus, imposed massive restrictions on the manumission of slaves and prescribe severe sanctions for transgressions.[142] In order to understand that both the *lex Iunia Petronia* and the *leges Fufia Caninia* and *Aelia Sentia* are closely related to them,[143] we must call to mind another, much better-known and arguably more significant law: the *lex Iulia et Papia*. This pivotal piece of Augustan social policy sought to confine Roman citizens in marriages so as to raise the number, the quality and the morals ('Zahl, Niveau und Moral', as Max Kaser wrote) of Rome's citizenry.[144] It mainly targeted the *élite*, i.e. senators and knights.[145]

If we keep this prime concern of Augustus in mind, the individual parts combine effortlessly to forge a harmonious whole. Let us look first at the motivation for the abovementioned *senatus consultum Sillanianum* in Tacitus (*ann*. 14.44):

> Tac. annales 14.44: Suspecta maioribus nostris fuerunt ingenia servorum etiam cum in agris aut domibus isdem nascerentur caritatemque dominorum statim acciperent. postquam vero nationes in familiis habemus, quibus diversi
>
> Tac. annales 14.44: To our ancestors the temper of their slaves was always suspect, even when they were born on the same estate or under the same roof, and drew in affection for their owners with their earliest breath. But

139 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 106; for details see Gamauf, "Sklaven (servi)" (n. 3): 39–42.

140 Paul. *lib. sing. ad leg. Fuf.* D. 35.1.37; Paul. *lib. sing. ad leg.* D. 50.16.215; and P. Hamb. 1.72r l. 6 (II–III d. C.); Paul. Sent. 4.14.3; Mantovani, *Legum multitudo* (n. 59): 43.

141 Tit. D. 40.9; Alex. C. 7.2.5; 7.11.1; Mantovani, *Legum multitudo* (n. 59): 43.

142 Robleda, *Il diritto* (n. 15): 149–153.

143 As is argued by Schulz, *Principios* (n. 1): 143 and Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 297.

144 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 318.

145 Jochen Bleicken, *Lex publica: Gesetz und Recht in der römischen Republik* (Berlin: De Gruyter, 1975): 508.

ritus, externa sacra aut nulla sunt, conluviem istam non nisi metu coercueris.

now that our households comprise nations – with customs the reverse of our own, with foreign cults or with none, you will never coerce such a medley of humanity except by terror.'[146]

The masters had become suspicious of the slaves who had 'other customs', 'foreign cults or 'none at all': the first emperor did not want such people to intermingle with the citizens of Rome whom he had restored, and so he legislated against manumissions. This concern plagued him to the end: in his political testament, he urged Tiberius to prevent Rome from filling up with such a 'motley crowd' (ἵνα μὴ παντοδαποῦ ὄχλου τὴν πόλιν πληρώσωσι).[147]

Favor libertatis and the laws to curb manumissions are two sides of the same coin.[148] But is there not a contradiction between the *lex Iunia Petronia* and the restrictions on manumission?[149] No, – quite the contrary;[150] manumission as such was needed to control the 'motley crowd': it was the carrot that complemented the stick.[151] But in order to fulfil its purpose, only deserving slaves could be manumitted, and not large numbers.[152] The limit placed on *manumissio* served the interests not only of the masters – for whom it was a means of retaining control over citizenship – but also the freedmen, who were thus enabled in terms of holding on to the exclusivity of their position. A freedman such as M. Antonius Pallas, who under the emperor Claudius had amassed one of the empire's largest private fortunes,[153] would hardly wish to share his status with too many others. *Favor libertatis* did not come to the aid of slaves in general: only to those for whom it was right that they should enjoy freedom, i.e. the deserving slaves whose manumission would be a just reward for their life-long labours. If there arose difficulties that were primarily of a technical nature, *favor libertatis* helped to overcome them. Denying a slave his freedom after a lifetime of honourable service merely on the grounds of a *subtilitas iuris* would have violated the implicit agreement between master and slave. Such disloyalty

146 Transl. John Jackson, *The Annals*, vol. 4, *Tacitus* (London/Cambridge: William Heinemann/Havard University Press, 1956): 179.

147 Cass. Dio 56.33.3.

148 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 285, 296; Schulz, *Principios* (n. 1): 143.

149 Both Huchthausen, "Freiheitsbegünstigung" (n. 18): 53 and Imbert, "Favor Libertatis" (n. 15): 277 n. 2, argue that there is.

150 Schulz, *Principios* (n. 1): 240.

151 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 118.

152 Huchthausen, "Freiheitsbegünstigung" (n. 18): 59.

153 Stewart Irvin Oost, "The Career of M. Antonius Pallas," *The American Journal of Philology* 79, no. 2 (1958): 113; Alföldy, *Sozialgeschichte* (n. 3); Paul Veyne, *La société romain* (Paris: POINTS, 2001); Aloys Winterling, "'Staat' und 'Gesellschaft' in der römischen Kaiserzeit: Zwei moderne Forschungsprobleme und ihr antiker Hintergrund," *Zentrum für interdisziplinäre Forschung der Universität Bielefeld, Mitteilungen* 3 (1998): 5.

would have destabilised the entire system of slavery, which, as I said above, was held together by both the use of the stick and the carrot.

In this way, *favor libertatis* achieved a balance between the need for manumission – whether for loyalty or self-preservation –, the need to control citizenship, and – for the freed – the desire to defend their status *vis-à-vis* those further down the ladder.[154]

From a sociological point of view, we must distinguish between the 'patriarchal' household slaves and those slaves used for agricultural or industrial production. They served different purposes – convenience and profit, respectively – and the way their masters related to them was wholly different: household slaves were humanised, while slaves in agriculture and industry were treated like cattle.[155] *Favor libertatis* concerns the household slaves, while the ban on manumission targets the slaves who are a mere means of production.

5.3 Equity and Humanity

It would, however, simplify matters unduly if we were to reduce such laws merely to the selfish interests of the masters:[156] *favor libertatis* is also the consequence of a humane approach towards slavery, or *humanitas* in Roman terms.[157] The high regard in which the Roman jurists held *humanitas* is well attested,[158] especially in Ulpian.[159] This arch-Roman concept is in essence a 'vehicle' for stoic anthropocentrism.[160] Take, for example, Ulp. D. 34.5.10.1:

> D. 34.5.10.1 (Ulpianus libro sexto disputationum): Plane si ita libertatem acceperit ancilla: 'si primum marem pepererit, libera esto', et haec uno utero marem et feminam peperisset,
>
> D. 34.5.10.1 (Ulpian, Disputations, book 6): It is clear that if a female slave has received freedom on the following terms, "let her be free if the first child she bears is male" and she gives

154 Bleicken, *Lex publica* (n. 145): 511, underscores the elite's need for safety.

155 Padgug, "Problems" (n. 19): 26; Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 118, 126–36.

156 A point that spoils the otherwise brilliant book by Ciccotti, *Il tramonto della schiavitù* (n. 136).

157 Castello, "'Humanitas'" (n. 48): 2175–89.

158 Heinz Haffter, "Die römische Humanitas," *Neue Schweizer Rundschau* 21 (1953/54): 719 = Hans Oppermann, ed., *Römische Wertbegriffe* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1967): 468; Carlo A. Maschi, *Humanitas come motivo giuridico con un esempio nel diritto dotale romano* (Trieste: Universita di Trieste, 1949); Wolfgang Schadewaldt, "Humanitas Romana," in *Aufstieg und Niedergang der römischen Welt*, pt. 2, *Principat*, vol. 4, *Philosophie und Künste*, ed. Hildegard Temporini and Wolfgang Haase (Berlin: De Gruyter, 1973): 43–62.

159 Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford: Oxford University Press, 2002); *contra* Aldo Schiavone, *Ius. La invención del derecho en Occidente* (Buenos Aires: Adriana Hidalgo, 2012): 451.

160 Henryk Kupiszewski, "Humanitas et le droit romain," in *Scritti minori*, ed. Henryk Kupiszewski (Naples: Jovene, 1997): 335–45.

si quidem certum est, quid prius edidisset, non debet de ipsius statu ambigi, utrum libera esset, necne; sed nec filiae, nam, si postea edita est, erit ingenua. Sin autem hoc incertum est, nec potest nec per subtilitatem iudicialem manifestari, in ambiguis rebus humaniorem sententiam sequi oportet, ut tam ipsa libertatem consequatur, quam filia eius ingenuitatem, quasi per praesumtionem priore masculo edito.

birth at the same confinement to two children, one male and one female, then, provided that it is certain which child was born first, there is no reason for doubt to arise either about her status, that is, whether or not she is free, or about that of the female child, since, if she was the second to be born she will be of free birth. However, if there is uncertainty as to the order of the births and no clarification can be secured even by careful judicial investigation, then, since the circumstances are controversial, the more humane view should be adopted whereby the slave obtains her freedom and her daughter the status of being freeborn on the presumption that the male child was the firstborn.[161]

A female slave is to be manumitted on the condition that the first child she gives birth to is a boy – if she meets the condition, this child will be freeborn (*ingenuus*[162]). It should be pointed out here that freeborn status was preferable by far, which was why there existed a separate *favor ingenuitatis*.[163] Our slave gives birth to a boy and a girl; the order of the births is known. In this case, there can be no doubt about the status of the mother as a freedwoman and the freeborn status of her daughter, the younger twin. But what if we cannot determine the order of the births? In such uncertain cases, the jurist's opinion runs, we should adopt the 'more humane view' and assume that the first-born child was the boy. The decision ultimately amounts to this: for the sake of *humanitas*, in the case of twin birth, the mother is to be granted liberty and her children freeborn status.[164]

The value of *humanitas* cited here as a motive for the decision is a quintessentially Roman idea[165] and pervaded the whole of Roman law, as Fritz Schulz pointed out.[166] 'Humaneness', as we might translate it, is inextricably related to nature, and in consequence to natural law for the reason that humanity is a part of nature:

161 Transl. Tuplin in Watson, *Digest of Justinian* (n. 21).

162 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 298.

163 Diocl. and Max. C. 8.50.15; also Ulp. 12 *ad Sab*. D. 38.16.1.4; for this phenomenon, see Buckland, *Law of Slavery* (n. 3): 312.

164 Constantin Willems, *Justinian als Ökonom: Entscheidungsgründe und Entscheidungsmuster in den 'quinquaginta decisiones'* (Cologne: Vandenhoeck & Ruprecht, 2017): 312.

165 Waldstein, "Entscheidungsgrundlagen" (n. 22): 3, 89; and Aldo Schiavone and Dario Mantovani, eds., *Testi e problemi del giusnaturalismo romano* (Pavia: IUSS Press, 2007); Stagl, *Camino* (n. 22): 96.

166 Schulz, *Principios* (as above, n. 1): 201–203; whose historical scope includes the Christian era, Jean Gaudemet, "Des 'droits de l'homme' ont-ils été reconnus dans l'Empire romain?," in *Labeo* 33 (1987): 5–23.

D. 1.1.1.3 (Ulp. 1 inst.): Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri.

D. 1.1.1.3 (Ulpian, Institutes, book 1): *Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals-land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law.[167]

The difference between *humanitas* and *ius naturale* consists, we could conclude, in that the former is by definition restricted to human beings whereas the latter comprises all living creatures. There are several instances where *favor libertatis* is presented as an upshot of *humanitas*:

First case: What if a fugitive slave becomes by chance a praetor? Are his legal deeds as praetor valid? Ulpian's answer is affirmative: 'This [solution] is more humane: Since the People of Rome could bestow this function upon him [not knowing he was a slave], it would have set him free had it known he was a slave' (*hoc enim humanius est: cum etiam potuit populus Romanus servo decernere hanc potestatem, sed et si scisset servum esse, liberum effecisset*).[168] In other words, the humane interpretation is that the Roman People would have set him free when they wanted him as a magistrate.

Another case: Mother and son die in a shipwreck; it is important to know who died first in order to establish who is the heir of whom; which in turn is the precondition to establish the share of the surviving relatives in the inheritance. 'Granted the impossibility of determining which of them died first, it is more generous to regard the son as having lived longer'.[169] This reasoning is based on the – natural – course of events that children outlive their parents.[170]

A direct link between *humanitas* and *favor libertatis* can be found in the third example:

167 Transl. MacCromick in Watson, *Digest of Justinian* (n. 21).

168 D. 1.14.3 Ulp. 38 ad Sab. On this case see Natale Rampazzo, *Quasi praetor non fuerit. Studi sulle elezioni magistratuali Roma repubblicana tra regola ed eccezione* (Naples: Satura Editrice, 2008): 357–552; and Rolf Knütel, "Barbatius Philippus und seine Spuren," in *Ausgewählte Schriften: Rolf Knüttel*, ed. Holger Altmeppen, Sebastian Lohsse, Ingo Reichard and Martin Josef Schermaier (Heidelberg: C.F. Müller, 2021): 871–91.

169 D. 34.5.22 Iav. 5 ex Cass: cum explorari non possit, uter prior exstinctus sit, humanius est credere filium diutus vixisse (transl. Tuplin in Watson, *Digest of Justinian* [n. 21]).

170 Theophilus Gaedke, *De iure commorentium ex disciplina Romanorum* (Rostock: 1830): 38; Palma, *Humanior interpretatio* (n. 37): 35.

D. 48.23.4 (Paulus libro 17 quaestionum): In metallum damnata mulier eum quem prius conceperat edidit, deinde a principe restituta est. humanius dicetur etiam cognationis iura huic restituta videri.

D. 48.23.4 (Paul, Views, book 1): A woman who had been condemned to the mines gave birth to a child whom she had conceived beforehand and was then reinstated by the emperor. It will be more humane to say that the rights of blood relationship [to the child] appear to be restored to her also.[171]

The persons who were condemned to the mines (*in metallum*) became *servi poenae*, a special type of slave. In this case the woman had conceived before her sentence, she gave birth while being a *serva poenae*.[172] At that point, her sentence was overturned. Since her child was born by a slave, it was to be considered a slave.[173] But it was 'more humane' to consider not only herself personally free but also her kinship relations like those of a free person, with the consequence that her child was considered to be freeborn. Out of humaneness, the child was to share freedom and kinship with its mother.[174] Justinian finally states that slaves in a certain context are entitled to freedom 'for liberty's sake and with regard to humanity' (*libertatis favore et humanitatis intuitu*).[175] *Favor libertatis* can, therefore, be understood as an emanation of the Roman doctrine pertaining to natural law, which amounts to the same thing as saying that it is a requirement of *humanitas*.[176] As we established above, the Roman jurists held that slavery was against natural law since man is born free and the deprivation of liberty and the ensuing subjection to another person 'against nature';[177] from the point of view of nature, 'all men are created equal' – an echo of Ulp. D. 50.17.32:

D. 50.17.32 (Ulpianus libro 42 ad Sabinum): Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt.

D. 50.17.32 (Ulpian, Sabinus, book 43): As far as concerns the civil law slaves are regarded as not existing, not, however, in the natural law, because as far as concerns the natural law all men are equal.[178]

171 Transl. Robinson in Watson, *Digest of Justinian* (n. 21).

172 Aglaia McClintock, *Servi della pena. Condannati a morte nella Roma imperiale* (Naples: Edizioni Scientifiche Italiane, 2010): 13–58.

173 Gai. 1.89–91.

174 Jacques Cuiacius, *Opera omnia in decem tomos distributa*, vol. 5 (Prato, 1838): col. 1810; the new literature can be found in Alice Cherchi, "Riflessioni sulla condizione giuridica delle metallariae nel tardo impero. A proposito di C. 11.7(6).7," *Annali del seminario giuridico dellauniversità di Palermo* 59 (2016): 223–25; McClintock, *Servi della pena* (n. 172): 109.

175 C. 3.31.12.2b Iust.

176 Essential commentary in Robleda, *Il diritto* (n. 15): 96, 102; see also Wacke, "Der favor libertatis" (n. 15): 926.

177 Gai. 1.89 (but see also 2.69 where slavery is justified with *naturalis ratio*); Ulp. 1 inst. D. 1.1.4; Flor. 9 inst. D. 1.5.4 pr-1; I. 1.2.2; I. 1.5 pr.

178 Transl. Crawford in Watson, *Digest of Justinian* (n. 21).

On a theoretical level, the jurists tried to overcome the apparent contradiction between natural freedom and societal slavery by blaming slavery on *ius gentium*, which amounts to saying, 'Everybody else does it, why shouldn't we?' But neither the emperors nor the jurists stopped at that rather feeble justification; instead they revived a concept stemming from Halcyon days, namely *favor libertatis*. By doing so, they created a compromise[179] between an institution without which life in antiquity simply was on the one hand not imaginable – it is commonly held that Spartacus and his comrades wanted to abolish their condition as slaves and not the institution as such[180] – and which on the other hand produced fear in some,[181] uneasiness in others and even pangs of bad conscience in very sensitive individuals – it was nothing but a 'hex' that condemned one of the suckling babies to serfdom. This discomfort was inserted into the theory by jurists who had probably been inspired by stoicism,[182] which thus claimed an initial and natural state of freedom, against which slavery then offended. By establishing this theoretical basis, they not only helped the emperors in their legislative activity *in favorem libertatis*, but also justified their own extensive interpretation of statutes and wills. *Favor libertatis* is a compromise between slavery and the abolition of slavery; between an institution deeply ingrained in Roman society, economy and law on the one hand, and philosophical ideas pointing towards a brotherhood of man as symbolized by the two suckling twins Romulus and Remus on the other. And this compromise was not static but dynamic, which can be deduced from the emperors' legislation to alleviate the condition of the slaves: I have already mentioned the *lex Iunia Petronia* and a rescript against maltreatment. Those slaves abandoned due to their frailty were given Iunian status, as we have seen;[183] Claudius and Hadrian intervened against the killing of slaves by their masters;[184] killing the slaves of others was also made punishable,[185] as was castration;[186] the slave who had bought his freedom can force his master by law to manumit him;[187] the *praefectus urbi* takes care of the

179 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 119 speak of a 'true policy' ('véritable politique').

180 There is something like a *consensus sapientium* on this point see Baldwin, "Two Aspects" (n. 72): 294; Bellen, *Studien* (n. 68): 156; Gamauf, "Sklaven (servi)" (n. 3): 7; Alfred Heuss, "Das Revolutionsproblem im Spiegel der antiken Geschichte," *Historische Zeitschrift* 216, no. 1 (1973): 1, 51.

181 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 103.

182 Tony Honoré, "Ulpian, Natural Law and Stoic Influence," *Tijdschrift voor Rechtsgeschiedenis* 78, no. 1–2 (2010): 199–208. A sound discussion of this problem can be found in Jakub Urbanik, "On the Uselessness of It All: The Roman Law of Marriage and Modern Times," *Fundamina* 20, no. 2 (2014): 948–54.

183 Mod. D. 40.8.2; Iust. C. 7.6.1.3.

184 Suet. Claud. 25.2; SHA Hadr. 18.7.

185 Gai. 3.213; Marci. D. 48.8.1.2.

186 Ven. Sat. D. 48.8.6; Hadr-Ulp. D. 48.8.4.2.

187 Divi fratres/Ulp. D. 40.1.4pr.

slaves who justly claim to be maltreated by their masters.[188] This tendency of imperial legislation continues after the Barracks Emperors, that is to say, in the third century CE.[189]

To neglect the importance of *favor libertatis* as a phenomenon of legislation and legal practice, and to ridicule its philosophical underpinning in the form of *ius naturale*, is a projection of modern ideas into antiquity and must be rejected as methodologically unjustified. It is based first on a more or less overt rejection of the concept of *ius naturale*, even though the authenticity of the texts featuring this concept can no longer be put into doubt.[190] It is impossible for historians to neglect the testimony of the texts reviewed in this paper, and the testimony of *ius naturale* as a rationale for the legislation and ensuing interpretation by jurists which cannot be sidelined[191] – whether or not this seems convincing from a modern point of view. The opinion that the Scipionic Circle, where *humanitas* was introduced into the mindset of the Roman ruling class, must be an invention by Cicero for the reason that Scipio Africanus was capable of harsh measures to maintain discipline in the field[192] is nothing more than a projection of one's own prejudices and craving for a world without contradictions onto the sources – which is the antithesis of what a historian can and should do. The fact that the result of the compromise between *servitus* and *libertas* is not clear-cut, and the existence of contradictions, are probably very 'human', as well as a characteristic of Roman law[193] which developed not by revolution but by evolution.[194] And it this second characteristic which is the other hidden motive for neglecting *favor libertatis* and marginalizing natural law. As a compromise, *favor libertatis* is a sort of vehicle for a slow, tantalisingly slow evolutionary process, the polar opposite of 'revolution', which has been the shibboleth of political thinking and legal doctrine since the eighteenth century.[195] Roman law is instead characterised by its traditionalism, by rejecting the new: for that sort

188 Ulp. D. 1.12.1.8.

189 Kaser, *Das Römische Privatrecht*, vol. 1 (n. 5): 125–29.

190 Fundamental in this respect is Waldstein, "Entscheidungsgrundlagen" (n. 22): 78–88; for confirmation see the results of the Cedant-seminar on natural law: Mantovani and Schiavone, *Testi e problemi* (n. 165).

191 Palma, *Humanior interpretatio* (n. 37): 151 ('no trascurabile'); see also Sebastiano Tafaro, "Schiavitù," in *Festschrift für Rolf Knütel zum 70. Geburstag*, ed. Holger Altmeppen, Ingo Reichard and Martin Josef Schermaier (Heidelberg: C.F. Müller, 2009): 1227–68.

192 See the references in Schadewaldt, "Humanitas" (n. 158): 52.

193 Jakob Fortunat Stagl, "L'ambiguïté existentielle du droit romain: Une faille de la codification justinienne," *Revue historique de droit français et étranger* 95, no. 4 (2017): 455–65.

194 Tomasz Giaro, "Dogmatische Wahrheit und Zeitlosigkeit in der römischen Jurisprudenz," *Bullettino dell'istituto di diritto romano Vittorio Scialoja* 29 (1987): 1–105.

195 Just consider Marx's phrase that revolutions are the 'locomotives' of history; Karl Marx, "Die Klassenkämpfe in Frankreich 1848 bis 1850," in *Marx-Engels-Werke*, vol. 7, ed. Institut für Marxismus-Leninismus beim ZK der SED (Berlin: Dietz, 1973): 9, 85. On the acceleration of the perception of time, especially after the French Revolution, see Rainer Kosseleck, "'Erfahrungsraum' und

of legal thinking this kind of compromise, of not changing things outwardly, was just adequate: treating *favor libertatis* as *ius singulare* served exactly this purpose. Just think of Jhering's dictum that progress in Roman law hobbled on the 'crutches' of fictions,[196] that is to say, a legal technique bringing about change, even revolution, without having to change one iota in the authoritative texts. It is simply a hermeneutical error to project one's own philosophy of history or one's own craving for a world of logical order free of contradiction onto sources that have nothing to do with this. If Roman emperors and lawyers based themselves on natural law as the theoretical basis of their doing, we have to accept this and not try to brush it aside.

6 *Opus legis scriptum in cordibus*

Tryphoninus calls a decision which does not respect *favor libertatis* 'unjust and contrary to the favour of liberty established by our forebears' (*iniquum et contra institutum a maioribus libertatis favorem*),[197] the word *aequum* refers to natural law, especially to the idea of equality,[198] and consequently, anything *iniquum* is against natural law.[199] But natural law acts as a political and philosophical doctrine, not as a legal principle capable of overriding established law, not even partially – and especially not a *lex publica*.[200] We do not know of even a single case of Romans believing that natural law was powerful enough to supersede established law; instead we have testimonies according to which *ius*, even if it is *iniquum*, that is to say against natural law, is valid under the condition that it was created by due process.[201] That does, of course, not prevent those who, as the Apostle Paul wrote, carry the 'work of the law written in

'Erwartungshorizont': Zwei historische Kategorien," in *Vergangene Zukunft*, ed. Rainer Kosseleck (Berlin: Suhrkamp, 1979): 349.

196 Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 3/1 (Leipzig: Breitkopf und Härtel, 1865): 305.

197 Tryph. 4 disp. D. 49.15.12.9.

198 Isid. orig. 10.7; on this see Dario Mantovani, "L'aequitas romana: Una nozione in cerca di equilibrio," in *Antiquorum Philosophia: An International Journal* 11 (2017): 1–22.

199 Jakob Fortunat Stagl, "Die Ausgleichung von Vorteil und Nachteil als Inhalt klassischer aequitas," in *Testi e problemi del giusnaturalismo romano*, ed. Aldo Schiavone and Dario Mantovani (Pavia: IUSS Press, 2007): 675–713.

200 Even Waldstein, "Entscheidungsgrundlagen" (n. 22): 86, must concede that natural law was not strong enough to prevail against slavery, and cites no example where it overrides a statute. *Ius singlare*, which by definition is *contra rationem iuris*, i.e. natural law, by its mere existence excludes such a possibility.

201 Paul. 14 ad Sab. D. 1.1.11: [. . .] *praetor quoque ius reddere dicitur etiam cum inique decernit, relatione scilicet facta non ad id quod ita praetor fecit, sed ad illud quod praetorem facere convenit.* ('The praetor is also said to render legal right [jus] even when he makes a wrongful decree, the

their hearts' (*opus legis scriptum in cordibus*)[202] from battling to see their convictions transformed into law, a 'general compact of the body politic' (*communis rei publicae sponsio*) as Papinian's definition of *lex publica* goes, which renders unto Caesar that which is Caesar's, and unto God those things that are God's.[203] We may conclude that the strange species of slaveholders fighting for the freedom of slaves existed;[204] the human heart is full of contradictions and eludes attempts at categorisation by overzealous philosophers, past and present.

reference, of course, being in this case not to what the praetor has done, but to what it is right for a praetor to do.', transl. MacCormack in Watson, *Digest of Justinian* [n. 21]); Gai. 1.83: *Animadvertere tamen debemus, ne iuris gentium regulam vel lex aliqua vel quod legis vicem optinet, aliquo casu commutaverit* ('Yet we must consider whether there are any circumstances in which some statute or other thing having the force of statute has modified the rule of the law of all peoples', transl. Gordon and Robinson, *The Institutes of Gaius* [n. 1]: 63) refers to *ius gentium*, which is not exactly the same.

202 Vulg. Rom. 2.15. On this see D'Ors, *Los romanistas* (n. 56): 17 '*ius naturale catholicum*'; Cf. Lucia di Cintio, *'Ordine' e 'Ordinamento': Idee e categorie giuridiche nel mondo romano* (Milan: LED Edizioni Universitarie, 2019): 36–39.

203 Vulg. Mt. 22.21. On the abolition of slavery, see Stagl, *Camino* (n. 22): 103, 141.

204 Boulvert and Morabito, "Le droit de l'esclavage" (n. 15): 115, speak of 'la fraction la plus éclairée des esclavagistes'.