When Law Goes off the Rails: or, Aggadah Among the iurisprudentes

Ari Z. Bryen*

Abstract

The Roman jurists still tend to be read in isolation from their surrounding milieu. This article suggests a way of thinking about them as being in conversation with different constituencies within the Empire who competed with jurists to offer their own contributions to the body of law. In this article, I outline some select moments when jurists acknowledged those competing voices, if only to reject them. To do so, I adapt some recent work from the study of Talmud to read these moments as interruptions within an otherwise staid world of jurisprudence. Specifically, I argue that we might productively think of these moments as “aggadah.”

I. Juristic Reason and Its Discontents

The Roman jurists must have had tremendous Sitzfleisch. Even a cursory flip through the Digest reveals a world of highly sophisticated interlocutors, reasoning through legal problems with tremendous attention to detail and categorization, tracing the edges of legal concepts by stretching hypothetical facts across a grid of possible remedies. Even when they disagree, juristic disputes are structured around a set of argumentative moves easily recognized as juristic: the emphasis on concrete “fact patterns,” the deployment of analogies, the respect for consistency and rationality, and the careful weighing of alternatives, to name just a few. The Roman jurists are rightly famous for bringing this mode of reasoning to a high level of refinement, deploying it to create elegant, balanced, and parsimonious redescions of a remarkable variety of behaviors. The rationality that pervades the world of jurisprudence is also seductive, enticing readers to imagine themselves

* Assistant Professor of History and Law, West Virginia University, Morgantown. This article was composed during my time as a fellow of the American Council of Learned Societies and as a member of The Institute for Advanced Study in Princeton, NJ, with support from the Mellon Foundation Fellowship for Assistant Professors. Parts of this research were completed at Oxford University as a visitor at the Faculty of Classics, and other parts while in residence at the American Bar Foundation and the Kommission für Alte Geschichte und Epigraphik in Munich. I am grateful to all of the above institutions for their support. I am similarly grateful to the editors for hosting a workshop to present an early version of this paper, and in particular to Clifford Ando, Natalie Dohrmann, and Kim Welch for feedback on the manuscript. Ancient texts are cited by the conventions of Simon Hornblower et al., The Oxford Classical Dictionary (4th ed. 2012).

within a seemingly timeless conversation. Indeed, if such a discourse invites first our interest and eventually our participation—if we feel it strikingly contemporary in form if not in content—then this is because contemporary legal practice is ultimately its descendant, and we have habituated ourselves to its aesthetic.²

But this was also a discourse that had its limits, its outer boundaries where these cautious, deliberate modes of thinking through problems fell off the rails. At crucial moments in the preserved juristic texts we can see the jurists confronted with those limits: moments, that is, where they brought their analysis to its outer boundaries and attempted to wrestle with the limits of juristic reason, with limitations imposed by language, by history, or by the rough world of empirical materiality.³ At these moments, their tone shifts, revealing consternation, absurdity, humor, frustration, and the occasional history lesson.

My contention, in what follows, is that we can learn a lot about the jurists, their intellectual project(s), and their relations to the world in which they wrote, from these moments when they get rattled and, in a sense, break character.⁴ At the very least, we can learn just as much from looking at these various cruxes in their texts as we can by looking at the relations between jurists and certain privileged abstract nouns, such as ius or aequitas or fides, from following the logic of individual legal doctrines, or from tracing jurists and their literary outputs biographically.⁵ In particular, I argue, it is in these moments when the standard discourse of jurisprudence chokes in consternation or is forced to wrestle with competing understandings of law, that we can see an otherwise normally coherent system of reasoning acknowledging and negotiating its boundaries.

² Simon Stern, Effect and Technique in Legal Aesthetics, 2 CAL 497 (2015); cf. Richard Neer, Connoisseurship and the Stakes of Style, 32 Crit. Inq. 1 (2005). On elegance, with reference to the interface between Roman and modern ideas, see Peter Stein, Elegance in Law, 77 Law Q. Rev. 242 (1961). The “reception” of Roman legal reasoning into English law is far too complex to detail here, and anyhow this is not the point: on the reception of legal methods and ultimately aesthetics derived from Roman and Canon law (and ultimately, therefore, ancient Roman jurisprudence) into English law, see 1 Frederick Pollock & Frederick William Maitland, The History of English Law before the Time of Edward I, 111-35 (2d ed. 1899).


⁴ In this I follow in the footsteps of Yan Thomas, L’extrême et l’ordinaire: Remarques sur le cas médiéval de la communauté disparue, in Les Opérations du Droit 207 (Marie-Angele Hermitte & Paolo Napoli eds., 2011); see also Clifford Ando, Roman Social Imaginaries: Language and Thought in the Contexts of Empire 36-40 (2015); Marta Madero, The Servitude of the Flesh from the Twelfth to the Fourteenth Century, 3 CAL 133 (2016).

In emphasizing these moments, I seek to bring together two strains in current scholarly discourse. First, I seek to complement some recent work by Clifford Ando, whose *Law, Language, and Empire in the Roman Tradition* (2011) sought to understand the operations by which the jurists reasoned and how they understood the empire that they helped to govern. Ando’s work focused on the intellectual mechanisms by which jurists made sense of the diversity of their political world (mechanisms such as the legal fiction); I wish to focus, in an analogous way, on how they understood their project in light of actors who may have competed with it: that is, with rival claims by emperors, provincials, intellectuals, and others about what law could or should be, what anchored it, and who had the privilege of interpreting it. The grist for my mill will therefore be different: it will be moments in the juristic texts when a close reading will find bits of dissonance where intellectual sparks go flying.

To achieve this, I suggest that we might draw profitably on a second body of work by thinking of these moments in the Roman texts as “aggadic.” Here I take inspiration from some recent work in the study of Talmud that seeks to better understand the interface between the “halakhic” parts of the Talmud, which preserve binding legal rulings and their explication, and the “aggadic” parts, which preserve narratives, dicta, and, in a sense, everything else. To be sure, I do so guardedly: *aggadah* can be an unhelpfully vague concept, not so much an analytical category as a dumping ground for things not readily recognizable as “law.” As Barry Wimpfheimer has argued in his study of Talmudic legal narratives, the division of the Talmud into these two registers is at times an exercise in question-begging. What is more, it has historically ended up privileging halakhic materials by treating these passages as the “real” work of a lawyer (or Rabbi). Accordingly, it is *halakhah* that, in certain circles, demands the attention of the best and brightest young men (its study has become gendered) who develop their rational faculties in the service of solving “actual legal problems.” Such a distinction conjures into existence a distinctive account of law’s being, and one that is often analytically unhelpful.

Here Wimpfheimer’s approach to the Talmud is particularly instructive. Eschewing any clear-cut distinction between “law” and “not law,” he instead points to a set of stories interwoven through the text of the Talmud. On his reading, these intrusions of narrative material into the Talmud demand that we, as readers, cast aside our presumptions of what a legal text had ought to look like—consistent, authoritative, and

---


7 Wimpfheimer, supra note 6, at 32-36. “Actual legal problems” is taken from Winkel, supra note 5, at 9; crucially, this does not mean “the actual legal problems of real people.” I look forward to the publication of Chaim Saiman’s book (Halakhah: The Rabbinic Idea of Law (forthcoming)), which hopefully will shed light on labels such as “real” and “actual” in Jewish law. On the reception of the Talmud as a source for Jewish legal practice, see Talya Fishman, Becoming the People of the Talmud: Oral Torah as Written Tradition in Medieval Jewish Cultures (2011).
imperative—and instead imagine two registers of legal discourse, one that strives to look more like a statute (the “monological” strain in Wimpfheimer’s terminology), and another that recognizes the messiness of actual everyday life and the fact of competing voices (the “dialogic” strain). The way that Talmud negotiates—or in places fails to negotiate—these two legal registers is, for Wimpfheimer, a standing challenge, both for the Rabbis and for us.8

Wimpfheimer would like to overcome the distinction between aggadic and halakhic materials; at the risk of doing violence to his arguments, I shall endeavor to preserve it. I do so for three reasons. First, it resonates with a particular thread of the reception history of Roman jurisprudence. In reconstructing the corpus of ancient Roman law in the late nineteenth and early twentieth centuries, scholars were faced with a similar problem of deciding what ought, and what ought not, to be considered a text of ancient jurisprudence. Armed with an image, or rather an ideal type, of what a legal text ought to look like, these scholars engaged in a similar process of dividing up the ancient texts, or even parts of ancient texts. At their most extreme, when confronted with something that sounded cacophonous (perhaps something “dialogic”), some modern scholars of Roman law chose to scrub it from the texts—attributing it to “foreign” influences in Roman jurisprudence, incompetent later editors, or “rhetoric.” Though this mad dash to athetize bits of our ancient texts is happily largely over, what we are left with is only a détente, in which things deemed somehow non-legal are at best politely ignored.9

Second, this distinction is worth retaining because the Romans themselves had no native terminology for the phenomenon that I seek to recover. Certainly they recognized a distinction between law and reality (which they might frame as a difference between *ius* and *natura*).10 There similarly exists, in particular in the literature of the Roman provinces, a category that largely resembles Wimpfheimer’s “legal narratives”—stories of emperors and governors giving judgment, told as a way to frame the nature of their power and authority.11 Yet the Romans never developed an analytical vocabulary for talking about law itself, or issues of law’s legitimacy: both of these kinds of inquiries were just parts of a

---

8 Wimpfheimer, supra note 6, at 45, 53-54.


10 Yan Thomas, L’institution juridique de la nature: Remarques sur la casuistique du droit naturel à Rome, in Les opérations du droit 21 (Marie-Angèle Hermitte & Paolo Napoli eds., 2011); Ando, supra note 4, at 66-69.

broader discussion of *ius*, and even then, they remained quite undeveloped in the early Empire (c. AD 1-250), a historical period not given to sophisticated political theorizing.\(^\text{12}\) What attempts there were often feel like inchoate rumbles, as authors push against generic constraints.\(^\text{13}\) The term *aggadah*, then, might be used to signal their very strangeness.

Third, there is something of a social-structural parallel between the late antique Rabbis (and their predecessors) and the Roman jurists. They moved across similar geographical spaces, at broadly similar times. To be sure, they had very different relationships to political power, but in both cases it would be correct to say that neither group of jurists were ever really legislating for the worlds that they lived in. They both sat at complex tangents to actual political power, and both groups of thinkers had ample need for—if not actual success in—developing a mode of thinking about the status of their interpretive commitments. As scholars are increasingly realizing, these two groups deserve to be considered together more often.\(^\text{14}\) Though one must not push the comparison too far, one might still fairly say that, so far as the Roman jurists go, they lived in a world in which their authority was unstable, and in which jurisprudence offered only an incomplete tool for redescribing their world. When they were faced with the limits of that project, they had to look up from their careful reasoning and picayune distinctions to gesture, or even swat contemptuously, at others who wished to claim interpretive authority over law. As I take it in what follows, these moments might productively be labeled aggadic, and it is this register that allows the jurists to gesture at competing discourses or to raise doubts that their intellectual toolbox may be inadequate to its task.

Obviously, in the space of an article I can only offer a taste of this material, a few choice moments that illustrate how jurists confronted the outer boundaries of their project. I shall focus on two examples, both drawn from the law of inheritance. These are not the only aggadic moments in the *Digest*, but they are some of the ones that I have managed to reason through so far. I hope to return to these moments, and to some others as well, in greater detail in the future.\(^\text{15}\) My first example treats a text that speaks to popular

---

\(^\text{12}\) On the political thought of the first three centuries, see, for an overview, Carlos Noreña, The Ethics of Autocracy in the Roman World, in A Companion to Greek and Roman Political Thought 266 (Ryan K. Balot ed., 2012).

\(^\text{13}\) Cf. the attempt of Dieter Nörr, Rechtskritik in der römischen Antike 70-73 (1974), to find such subaltern perspectives. Nörr’s approach is inadequate, however, for it relies on too narrow an understanding of “critique.”

\(^\text{14}\) For some bibliographic highlights, see Catherine Hezser, Rabbinic Law in its Roman and Near Eastern Context (2003); Naftali S. Cohn, Rabbis as Jurists: On the Representation of Past and Present Legal Institutions in the Mishnah, 60 J. Jewish Stud. 245 (2009); Hayim Lapin, Rabbis as Romans: The Rabbinic Movement in Palestine, 100-400 C.E. (2012); Natalie B. Dohrmann & Annette Yoshiko Reed, Jews, Christians, and the Roman Empire: The Poetics of Power in Late Antiquity (2013); Natalie B. Dohrmann, Means and End(ings): Nomos Versus Narrative in Early Rabbinic Exegesis, 3 CAL 30 (2016). It is a pity that Roman historians have largely avoided these texts, even in their accounts of provincial law and administration. The work of Fergus Millar stands as an important exception. See, e.g., 3 Fergus Millar, Rome, the Greek World, and the East (2006).

\(^\text{15}\) Some others that deserve consideration: *Dig*. 1.14.3 (Ulpian, *ad Sabinum* 38); *Dig*. 4.2.13 (Callistratus, *de Cognitionibus* 5); *Dig*. 33.10.7 (Celsus, *Digesta* 19); Labeo, apud Aul. Gell. *NA* 20.1.13, which has a doublet in
culture and its insistence that jurists have no monopoly on the thoughtful solution to legal problems. My second example treats a text that tries to use a story to reflect on law’s foundations, and where one might find them—namely, whether they are grounded in nature or in political authority, with all the latter’s attendant pitfalls. In both cases, I will begin with what a contemporary reader might recognize as a traditional legal problem, and provide something of an exegesis of the passage in question. From there, I will turn to the ways that the passages might be taken as aggadic, and will try to offer some evidence to make us suspect that the reasoning in the text is not nearly as straightforward as it may at first glance appear. The leitmotiv that links the two sections that follow is the instability of the jurists’ control over legal knowledge and interpretation. What sought to be a system marked by grace, balance, and elegance always threatened to come apart when others—that is, those who were not jurists—tried to add their voices to the mix. In other words, when the jurists were brought to the edges of their analysis, when they fell off the rails, it was often because they were being pushed.

II. The Jurist and the Crafty Slave

My first text is drawn from the writings of the jurists on the interpretation of wills. Complex rules and ceremonies governed the making of Roman wills. Problems of formality were compounded by substantive rules concerning who could receive what. Two further issues were also relevant: first, just as with a literary text, the proper decipherment of a will posed a challenge, not least because it involved reconstructing the testator’s intentions; second, even when those intentions could be deciphered, they had to be squared with legal requirements and at times with subsequent developments. To think through this constellation of problems, the jurists trained their attention on postumi, that is, children who were born within ten months of the death of their father and who stood in the line of succession. A careful lawyer would, when drafting a will, anticipate what to do with such children and provide for them accordingly. But at times the unforeseeable happened:

If a will was drawn up as follows, “if a son is born to me let him be heir in respect to two-thirds, let my wife be heir in respect to the remaining part; but if a daughter is born to me, let her be the heir to the extent of a third; let my wife be heir in respect of the remaining part,” and both a son and a daughter were born the decision must be that the whole inheritance should be divided into seven parts, so that the son gets four of them, the wife two, and the daughter one; for in this way, in accordance with the wishes of the testator, the son will have as much more again as the wife and the wife as much more again as the daughter; for although it was agreed that according to the punctilious reading of the legal rules the will was broken (suptili iuris regulae conveniebat ruptum fieri testamentum), yet, as the testator wished his wife to have something against both children, humanity


(humanitate) suggested that a decision of this kind should be reached, which very clearly even had the approval of Juventius Celsus.17

The basic outlines of the argument are easy enough to follow: thinking about the problem of postumi, a man (no doubt a hypothetical man) wrote a will providing for them: he would provide a son with two thirds, leaving one third to his wife, or a daughter with one third, leaving the remaining two thirds to the wife again. He had not foreseen the problem of twins, one boy and one girl, and his sexist instincts giving a daughter less than a son created a mathematical problem. The easy solution would be to conclude that the will had failed, leaving the estate to be divided according to the rules of intestacy.18 But this would pose a different sort of problem: under the rules of intestacy, the children would each receive a share of the estate (half), but nothing would be left for their mother.

Thus the problem confronting Julian and his contemporary and rival, Celsus. Julian’s solution is ingenious: he parses the logic inherent in the bequests. Accordingly, he looks to proportionality, arguing that this was the best guide to acting according to the testator’s true intentions (secundum voluntatem testantis), and concludes that the deceased wished that his wife receive at least something (aliquid). Since there is no way of looking outside the bequest to make a fair determination of what that something might be, he allows her to become a common denominator. Since the father wanted a potential son to have twice the mother’s share, and a potential daughter half the mother’s share, the estate can then be broken into fractions: four-sevenths for the son, two-sevenths for the wife, and one-seventh for the daughter. Even a rival jurist would have to nod his approval for such a solution.

Leave aside that this solution puts the daughter in a far worse position (receiving only fourteen percent of the inheritance) than she would be in under the rules of intestacy (where she would have received fifty percent) or if she had not had a brother (where she would have received thirty-three percent); the jurists were plenty sexist, too. What is important is that the jurists understand that such a thing is in no way evident in the will, nor in the civil law itself. One way to locate this tension would be to trace it jurisprudentially, through a set of discourses where the “subtlety” of the law (i.e., its strict application) came into tension with what William Sullivan calls the Roman commitment to “substantive justice.”19 To the rigor of the law, the jurists bring humanitas, equity, generosity, or decency. In this case that means reconstructing a version of the testator’s wishes, even though the testator himself did not know that these were his wishes.20

17 Dig. 28.2.13.pr (Julian, Digesta 29); cf. Dig. 28.5.48(47) (Africanus, Quaestiones 4) (reporting the same material from Julian); Dig. 28.5.82(81).pr (Paulus, Quaestiones 9) (proposing a similar problem with a testator named Clemens Patronus).

18 Cf. Dig. 35.1.16 (Gaius, ad Edictum Praetoris Urbani 1): “In respect of matters arising outside a will an equitable interpretation is permissible; but that which springs from the will itself must be carried out in compliance with strict law (secundum scripti iuris rationem).”


20 The literature on humanitas in Roman jurisprudence is huge. A starting place is Antonio Palma, Humanior Interpretatio: “humanitas” nell’interpretazione e nella normazione da Adriano ai Severi (1992).
But the derisory attitude towards these rules is striking: to follow them would be to apply *subtilis iuris ratio*, a merely perfunctory application of legal rules to a given fact pattern. This is a clue to the difficult position that the jurists find themselves in, a sign that the text is running against a tension. In Latin literature as a whole, *subtilitas* is a concept that is imbued with positive value. It is the quality of being careful or thorough. It is, crucially, a category of aesthetic evaluation: something *subtilis* is pleasurable because it is refined. Yet while such a designation might be a gracious compliment when describing a modern lawyer, Julian evidently took it in a different sense. Reasoning that was *subtilis* was defective, marked by an overreliance on rule-following, and mechanistic as a result.22

Again, Julian:

A slave who had been wounded so gravely that he was certain to die of the injury was appointed someone’s heir and subsequently was killed by a further blow from another assailant. The question is whether action under the *lex Aquilia* lies against both assailants for killing him. The answer was given as follows . . . if someone wounds a slave mortally and then after a while someone else inflicts a further injury, as a result of which he dies sooner than would otherwise have been the case, it is clear that both assailants are liable for the killing . . . But in the case we are considering, the dead slave will not be valued in the same way in assessing the penalty to pay for each wound. The person who struck him first will have to pay the highest value of the slave in the preceding year, counting back three hundred and sixty-five days from the day of the wounding; but the second assailant will be liable to pay the highest price that the slave would have fetched had he been sold the year before he departed this life, and, of course, in this figure the value of the inheritance will be included. Therefore, for the killing of this slave, one assailant will have to pay more and the other less, but this is not to be wondered at because each is deemed to have killed him in different circumstances and at a different time. But in case anyone think we have reached an absurd conclusion, let him ponder carefully how much more absurd it would be to hold that neither should be liable under the *lex Aquilia* or that one should be held to blame rather than the other. Misdeeds should not escape unpunished, and it is not easy to decide if one is more blameworthy than the other. Indeed, it can be proved by innumerable examples that the civil law has accepted things for the general good that do not accord with the logic of the schoolroom (*multa autem iure civili contra rationem disputandi pro utilitate communis recepta esse*). Let us content ourselves for the time being with just one instance: When several people, with the intent to steal, carry off a beam which no single one of them could have carried off alone, they are all liable to an action for theft, although by subtle reasoning (*subtili ratione*) one could make the point that no single one of them could be liable because in literal truth (*verum*) he could not have moved it unaided.23

To reason subtly, then, is to use rules in a sneaky way—to try to weasel out from responsibility by engaging in ruthless literalism, and to treat rules as an end in themselves. In contrast, jurists aspired to honor not the integrity of rules themselves, but to interpret them in accordance with the demands of justice more broadly: with the broad understanding, in the case of the passage above, that “misdeeds should not go unpunished” (*neque impunita maleficia esse oporteat*). When reasoning in this way, jurists can overcome the ratio

---

21 OLD, s.v. “subtilis.”

22 Cf. Herbert Hausmaninger, Subtilitas iuris, in Iuris Professio: Festgabe für Max Kaser zum 80. Geburtstag 59 (Hans-Peter Benöhr et al. eds., 1986), who does not discuss these passages.

23 Dig. 9.2.51 (Julian, Digesta 86).
disputandi—the form of reasoning that applies to merely academic arguments—for the
good of the community as a whole (pro utilitate communi). This is a markedly different un-
derstanding of the nature of legal rules from that prevalent in society as a whole in the
period of the Principate (on which more below). It speaks, in some measure, to the ways
that jurists sought to create a disciplinary jargon that would anoint them as specialists, ex-
cluding others who tried to reason through similar problems.24

In other words, from a hypothetical problem in inheritance law this passage slips
from focused casuistry and expands its claims to deal with three meta-problems in juris-
prudence: the nature of juristic authority, the interpretation of problematic language, and
the perils of rule-based reasoning. This would be interesting, but not necessarily “agga-
dic,” were it not for an important intertext. In what follows, I will argue that this intertext
might shed some light on why jurists like Julian chose to use a hypothetical like this prob-
lematic will as the grounds on which they chose to have these particular arguments.25

The text in question is included in the collection of Latin fables written by Phae-
drus, a freedman of Augustus writing in the first century AD. Like the passage from Julian
above, it too turns on a will and its proper interpretation:

A certain man at his death left three daughters. One of them was a beauty and sought to
capture men with her eyes; the second, however, was a spinner of wool, frugal, and a
country girl; the third was addicted to wine and exceedingly ugly. Now the old man had
made the mother of these girls his heir on condition that she should divide the entire for-
tune equally (aequaliter) among the three, but in the following manner: “Let them neither
possess nor enjoy that use of what has been given to them,” and again, “As soon as they
shall have ceased to hold the property they have received, let them bestow upon their
mother a hundred thousand sesterces apiece.” Athens was filled with gossip about this.
The mother went about diligently consulting jurists (mater sedula iuris peritos consulit). No
one succeeded in explaining how the heirs could avoid possessing what might be given
them, or reaping the benefit of it; nor, moreover, could anyone explain how heirs who re-
tained nothing were to bestow money.26

In addition to the sexism, the story shares with the text of Julian the emphasis on a seem-
ingly impossible condition in a will, and the challenge of correctly interpreting its contents
in order to honor the status of a mother who would otherwise receive nothing. It is also a
send-up of the jurists, and their claims to having the correct hermeneutic keys to solve
complex social problems. (It is no accident that the jurists spent a great deal of time think-
ing about the nature of impossible conditions; even more, Gaius’s introductory textbook
points out that the viability of impossible conditions in a legacy was a topic on which the

24 A theme that emerges in other jurists as well. See, e.g., Dig. 35.2.88 (Africanus, Quaestiones 5); Aul. Gell.
N.4 9.15.

25 A long tradition of discussions of how to interpret written words preceded Julian: see discussion in Dario
Mantovani, Lingua e diritto: Prospettive di ricerca fra sociolinguistica e pragmatica, in Il linguaggio giuridico:
Prospettive interdisciplinari 17, 19-20 (Guiliana Garzone & Francesca Santulli eds., 2008).

26 Phaedrus 4.5 (trans. Loeb, with minor modifications). On the politics of Phaedrus’s fables, see John
Henderson, Telling Tales on Caesar: Roman Stories from Phaedrus (2001).
two “schools” of Roman jurisprudence divided.\textsuperscript{27} The mother, on Phaedrus’s telling, runs about Athens (always a stand-in for Rome in the imaginative literature of the Empire), consulting jurists whose job it was, in theory, to find a legal means to allow the poor mother not to starve. Their failure is conspicuous, however, and rumors fill Athens. It would not be a stretch to imagine a jurist like Julian bristling at such a caricature.

But just as the mother gets ready to give up her hope of finding a favorable legal opinion, a solution is found. From the perspective of a jurist it is much worse. (I give the typically “legal” Latin words in the text in parentheses):

\begin{quote}
After much time had been spent in delay (\textit{longi mora}), and still the meaning of the will (\textit{testamenti . . . sensus}) could not be deduced, the parent, ignoring the letter of the law (\textit{iure neglecto}), had recourse to equity (\textit{fidem advocavit}). For the meretricious daughter she sets aside garments, articles for a lady’s toilet, bathing vessels made of silver, beardless eunuchs; for the spinner of wool, the fields, sheep, farmhouse, laborers, oxen, beasts of burden, and farming equipment; to the drinker, a cellar full of casks of old wine, a luxuriously furnished house, and charming little gardens. When she was about to distribute to each the things marked out for them, and the people generally approved (\textit{et adprobaret populus}), since they knew the girls, Aesop suddenly stood forth in the midst of the crowd and exclaimed:

“Oh, if the buried father still were conscious, how would it grieve him that the men of Athens could not interpret his will (\textit{quod voluntatem suam interpretari non possunt Attici})!”

Then, when asked about it, he explained how they had all gone astray: “Give the house and the fine furniture, along with the lovely gardens and the old wines, to the spinner of wool, who lives in the country; assign the garments, the pearls, the attendants, and so on, to the one who lives her life in dissipation; and as for the fields, the farmhouse, and the sheep along with the shepherds, give these to the meretricious girl. Not one of them will be able to endure the possession of what is alien to her taste. The ugly daughter will sell the wardrobe in order to provide herself with wine; the meretricious daughter will dispose of the farmland in order to buy fine clothes; and she who delights in flocks and is given to the spinning of wool will hand over her luxurious house for any price. Thus no one will have possession of what has been bequeathed to her, and they will severally bestow upon their mother the sum specified from the money received in exchange for the things they have sold.”
\end{quote}

Shocked that the Athenians cannot understand the will (\textit{voluntas}) of the testator, Aesop proffers a solution to the will’s riddle to ensure that the mother received her share too: he proposes a division that goes against the character of each of the daughters (\textit{moribus . . . alienum suis}), such that they would each immediately liquidate their share, thus leaving sufficient money for them to pay their mother her share. In offering this solution, Aesop both undoes the errors of the lawyers (\textit{solvit errorem}) and receives the praise of the citizens of Athens. A final barb is added by the moral of the story:

\begin{quote}
Thus did the sagacity of one man (\textit{unius hominis . . . sollertia}) find the answer to a problem that had eluded the inadequate understanding of many (\textit{quod multorum fugit inprudentiam}).
\end{quote}

Not only has jurisprudence failed to solve the problem, it must suffer being mocked as \textit{imprudentia}. A bit of \textit{sollertia}, rather, was just what was needed.

\textsuperscript{27} Gai, \textit{Inst.} 3.98. The relevant modern bibliography on impossible conditions is collected by Leesen, supra note 9, at 177, 182-83.
To understand how these two texts speak to one another, some background is necessary. The choice of the ugly, misshapen Aesop as an interpreter of testaments is in no way innocent. Traditions (not all of them consistent) about Aesop stretched back into the 5th century BC, and had dispersed broadly throughout the Greek-speaking world in the Hellenistic and Roman periods. Phaedrus would certainly have known a variety of these traditions. But there is one particular tradition that seems of great importance, namely the tradition in which the figure of Aesop serves as a symbol of traditional, popular wisdom—wisdom that juxtaposed itself to the “learning” of elite intellectuals. As Leslie Kurke explains in an important recent study, the wisdom of Aesop constituted a “little tradition” that juxtaposed itself to a “great tradition” of solemn men like Julian.  

For Kurke, the figure of Aesop is “simultaneously parodic and ambiguous, verbally aggressive and flattering to the powerful. But this also accounts for Aesop as a kind of culture hero of the oppressed, and the Life as a how-to handbook for the successful manipulation of superiors.”

Aesop’s ability to spin fables gave him a means of speaking more freely to those in power, and this was a technique for which he was remembered in much of the tradition of high literature. Phaedrus himself wrote many of his fables in this tradition. But he also must have been aware of a parallel tradition, namely, the tradition that cast Aesop as a shrewd interpreter of rules—something of a poor man’s lawyer. As described by the Suda, Aesop “became a _logopoios_, that is, a creator of stories and _responsa_. . . . He wrote the story of what happened to him in Delphi in two books. But others say that Aesop only wrote a single book of _responsa._”

As we can tell from the reference, the compiler(s) of the Suda had not read these books, but their designation as _responsa_ had been a mainstay of juristic literature from the early Principate. The “right to give _responsa_” was similarly a coveted status of jurists. The jurists would, however, have bristled at being called _logopoioi_ (storytellers), and this is surely part of the joke. (One might

---

28 Leslie V. Kurke, Aesopic Conversations: Popular Tradition, Cultural Dialogue, and the Invention of Greek Prose (2010). The depiction of Aesop’s physical deformities in the introduction to the Vita G (1) must be an echo of the portraits of justice described by rhetoricians of the second century. See Aristid. _Or._ 24.43-44; Aul. Gell. _NA_ 14.4; Dio Chrys. _Or._ 1.74-75. It is important to note that in all of these tellings, justice is imagined to be a human figure, not an abstraction.

29 Id. at 12-13.

30 E.g., Aul. Gell. _NA_ 2.29.1; Julian. _Or._ 8.207c = B. E. Perry, Aesopica 228 (1952).

31 Suda, s.v. Αἴσωπος (= id. at 215): ἐγένετο δὲ λογοποίος, δ ἔστιν εὑρετὴς λόγων καὶ ἀποκριμάτων . . . ἐγέρσε τὰ ἐν Δέλφοις αὐτῷ συμβάντα ἐν βιβλίοις β’. μᾶλλον δὲ τίνας φασὶ τὸν Αἴσωπον ἀποκριμάτα γεγραμμένα μόνον.

add that in colloquial Greek, the verbal counterpart of logopoios is logopoeisthai, a euphemism for “to get into an argument.”

This “lawyerly” tradition about Aesop is evident in the so-called Life of Aesop (Vita G), the subject of the first part of Kurke’s study. This section of the Vita G turns on Aesop’s life as a slave, and his interactions with his master, Xanthos, a professor of philosophy and a tiresome pedant, whom (like the iuris periti in Phaedrus’s tale) Aesop takes great pleasure in embarrassing, usually through deliberate misinterpretation of his words. Tired of Aesop’s constantly deflating him in public, Xanthos instructs Aesop to do precisely what he is told—no more and no less—or suffer violence. So when they head off to the baths, he tells Aesop to bring an oil flask and towels, but neglects to tell Aesop to bring oil. When Xanthos finds himself without oil at the baths, he asks Aesop where it is—at home, Aesop explains, since he wasn’t told specifically to bring it. Enraged, Xanthos readies himself to beat Aesop. But Aesop replies, “‘You ordered me to do nothing more than you said, and if I failed to obey your law (nomou), I would be beaten.’ At this, Xanthos relented (hesychasen).”

A similar set of interactions a few paragraphs later leads to an identical result:

Aesop said, “Well, you shouldn’t have made this law (nomon) for me, or I would have served you in a noble way. But don’t feel sorry about it, master. The way you stated the rule for me will turn out to your advantage, for it will teach you not to make mistakes in the classroom. Statements that go too far in either inclusion or exclusion are no small errors.” Xanthus, finding no pretext for whipping Aesop, held his peace (hesychasen).

Four things stand out in the interactions in this text: first, the command of Xanthos to his slave is understood to be a nomos—a law, that is, a formally binding command that must be carried out at the risk of physical punishment. Second, the purpose of making laws, in this case, is to allow stronger people the opportunity to punish their weaker counterparts. Third, the correct response to a problematic law, by those who are bound to obey it, is to adhere to it with literalness, which will create a breakdown in otherwise functional social relations but which will also forestall violence. Fourth, the response of those who are called out for having made an unjust law is to relent or hold their peace: hesychazein.

These phenomena have echoes in the legal culture of the eastern Roman provinces. Without going into painstaking detail, I note just a few points. First, provincial litigants repeatedly emphasized the importance of imperial laws (nomoi) in making claims upon their social superiors. They dredged them up from the archives, carved them into elaborate stone monuments, recopied them in their petitions, and took their promises seriously. Second, they took part in an ongoing conversation about how to interpret legal

33 E.g., P.Mich. V 228 (AD 47), P.Amh II 142 = Chr.Mitt. 64 (AD 341).
35 Vita G 43. For discussion of the social context of these arguments, see Keith Hopkins, Novel Evidence for Roman Slavery, 138 Past & Present 3 (1993).
36 Clifford Ando, Imperial Ideology and Provincial Loyalty in the Roman Empire 362-85 (2000).
texts, that is, whether they ought to be interpreted literally or whether their interpretation ought to be guided by some sort of underlying “spirit.” This is a debate most evident in texts that we now tend to think of as being primarily “religious,” but such a category is plainly anachronistic. If we jettison it, we begin to see traces of this debate over legal hermeneutics across various genres, and, I would suggest, in the Vita G as well. 37 Finally, the response of Xanthos to this kind of discourse—being knocked speechless—is precisely what eastern provincials imagined to happen when someone was outwitted by a solid legal argument, and “refusing to hold one’s peace” (οὐ δυνάμενος ἡ συχάζειν, vel sim.), a phrase found in multiple papyri, can be roughly translated, “having a reasonable legal claim.” 38 It is no wonder that in the Roman provincial context where such discourse flourished, Aesop was also a popular figure. 39

In other words, what we have here is a competing tradition concerning the interpretation of legal language, in this case, the language of a will. These competing traditions point, in differing ways, to a broader set of disagreements over what sort of people should be regarded as possessing such knowledge—a disagreement over who will get to interpret law, under what circumstances they must either follow or be entitled to depart from rules, and what sort of person they should be in order to do so in a legitimate fashion. 40

There is not, of course, any evidence of a connection between the two texts—no reason to think that Julian was directly addressing the text of Phaedrus. Even if he somehow knew it, references in the jurists to other bodies of literature (aside from a few Greek classics) are remarkably rare—part of the reason that modern authors are often tempted to think that the jurists wrote in a timeless vacuum. 41 My point is not that there is a direct connection, but rather that there is an echo, a sense that this struggle for interpretive control was an issue that loomed constantly in the background of the jurists, precisely because others in their milieu were capable of making similar claims. That those claims were placed in the mouths of slaves like Aesop, a figure emblematic of an alternative interpretive tradition, is important, and explains why Julian and Celsus might be forced, in proposing a solution to their hypothetical, to present an indictment of those who tried to use law’s “subtle” reasoning to turn a situation in their favor.

A final point regarding Julian and his Aesopic interlocutors. Phaedrus’s emphasis on Aesop’s “sagacity” (sollertia) speaks to the depth of the dialogue between these competing interpretive traditions. For Phaedrus, Aesop’s sollertia is unabashedly positive, a sort of

37 The most obvious source is the Pauline epistles, on which see Daniel Boyarin, A Radical Jew: Paul and the Politics of Identity (1994). The problem of literally applying unfair laws is dramatized, inter alia, in the Martyrdom of Pionios (e.g., 8).

38 E.g., P.Oslo II 22 (AD 127); P.Tebt. II 230 (AD 196/8); BGU XIII 2240 (AD 138-42), καθησυχάζειν; see also Ari Z. Bryen, Dionysia’s Complaint: Emotion, Truth, and Language in the Courtroom, in Emotional Display, Persuasion, and Rhetoric in Papyri (Chrysi Kotsifou ed., forthcoming).

39 On the papyrological evidence for Aesop and his Ζήμε (sollertia), see kurke, supra note 28, at 17.

40 A problem dramatized in “real life” in an important papyrus, SB V 7696 (AD 249).

folk wit that allows him to solve tricky problems. Folktales about such street-smart characters and the shrewd judgments of simpler folk even made it into the Digest itself. But like subtilis ratio, a display of sollertia left the jurists feeling ambivalent. Thus in his discussion of “evil intent” (literally, “bad trickery,” or dolus malus), Ulpian would later write:

Moreover, the praetor is not content to say trickery (dolus) but added the word “evil,” (ma-
lus) since the old jurists described even trickery as good and held this expression to stand for sagacity (sollertia), especially where something was devised against an enemy or robber.

In other words, the jurists (at least the “old ones”, the veteres) were prepared to accept common people’s sagacity, but only when it was directed at those who were not members of the civic community; within the community, it remained unacceptable, even though—or especially because—it was the mark of a folk hero, one whose virtuosic interpretation of an impossible will might make a good jurist wince.

III. Gaius Tells a Folktale

In the previous section I argued that there was an unappreciated tension in Julian’s text, one that sought to reach from the more immediate juristic problem into larger, second-order problems in jurisprudence, and that the reason for making such an argument on those grounds was that Julian was staking his ground against certain other understandings of the operation of law in the Roman Empire. My second example (also a question of postumi), follows in the same vein. In this example, a notionally juristic question quickly opens up to reveal something of a folk motif—a set of traditions, prevalent in the Hellenistic period and in the early Empire, about prodigious births. At the risk of a terrible pun, in what follows I shall argue that these popular traditions about multiple births provided a fertile space for thinking through a different set of second-order questions about law’s foundations.

The narrow legal question that prompts this aggadic moment is part of a discussion of the circumstances under which a posthumous child will receive his or her share—specifically, does the child have to be simply born, or must it be born alive? This seems at first a picayune question, but it might be of consequence in particular situations—for instance, if the deceased had produced children from one marriage, then remarried, and died leaving a pregnant wife; in that case, the issue might really matter: if the posthumous child was stillborn, would his share go immediate to the children of the first wife, or would it follow a different path of succession? Gaius, a contemporary of Julian, rules very quickly on the issue before he digresses:

A question arises: does the posthumous child only get its share if born alive, or does it also get it if it is not? I consider it more appropriate to hold that if the posthumous child is not born alive, it does not get its share and the whole sum in question belongs to you, just as if it had been left to you in the first place, but that if it is born alive, both parties should receive what was left to them, so that if there is one child, you will be entitled to half the estate; if two, to a third; if three, for triplets do occur, to a quarter. In our own time, in fact, an Alexandrian woman called Serapias was presented to Hadrian with

---

42 Digest 32.79.1 (Celsius, Digesta 9); Digest 1.16.6.3 (Ulpian, de Officio Proconsulis 1).
43 Digest 4.3.1.3 (Ulpian, ad Edictum 11).
five children she had borne in one confinement. However, where more than three chil-
dren are born at once, the event is regarded as almost sinister (fere portentosum).44

Having solved the question of the stillborn posthumous child, Gaius continues by follow-
ing the logic of the normal Roman patterns of intestate succession: estates are split
between living children, and among more than two children the estate will be divided
equally ad infinitum. The discussion could have ended there; the intrusion of Serapias is
both unexpected and logically unnecessary.

It is striking that we are given both the name and the citizenship of Serapias. The
tendency in the texts of the jurists is to argue through stock characters, naming only peo-
ple of highly elevated status. Similarly striking is the reference to the “presentation” of
Serapias: she was brought before Hadrian (perducta est) “in our own time” (nostra quidem
aetate). This usage is unparalleled among the jurists. It is also the only biographical refer-
ence that Gaius ever makes. Gaius gives the impression that he saw this with his own
eyes, and the result is that the experience causes a shudder of revulsion or anxiety. If tri-
plets are almost sinister (fere portentosum), Serapias is all the more so. Our text, then, has
slipped from a traditional, doctrinal discussion of posthumous children; empirical reality
has intruded.

Such an odd biographical detail would be cause enough to pay attention, but we
would have trouble making sense of the stakes were it not for a parallel passage preserved
in the writings of Julian. Julian’s text, a commentary on the first century AD jurist Urseius
Ferox, approaches the issue from a different angle:

Suppose that my head of household die, leaving his wife pregnant, and that as heir, I
claim all that was due to my father; there are those who think that I have made an end of
nothing, if no issue be born, and that I acted correctly because, in the nature of things, it
is true that I am sole heir. Julian notes: The more correct view is that I will have lost the
share for which I was instituted before it was certain that there would be no further issue;
or a quarter, since triplets can be born, or a sixth, since there could be quintuplets. For
Aristotle says that a woman’s private parts can accommodate as many; further, there is a
woman at Rome, who hails from Alexandria in Egypt, who bore five children, at one
birth, who survived, and this too was confirmed for me in Egypt.45

This story about miraculous births was not only a topic of discussion for Gaius and Julian,
but also for another second century jurist whose work is not otherwise preserved, Laelius

44 Dig. 34.5.7(8).pr (Gaius, Fideicomissa 1).
45 Dig. 46.3.36 (Julian, ad Urseium Feroxem 1). The Watson translation adapts the conjecture of Mommsen of
hic for hoc, suggesting that there was a woman of the same condition both at Rome and at Alexandria, and
translates “who hails from Alexandria in Egypt, who bore five children, at one birth, who survived, and in
Egypt. I received confirmation of this.” I have no problem accepting that Julian might have gone to Egypt
at some early point in his career. We know little of his early life, save that he attracted Hadrian’s attention
and was made quaestor with a double salary (CIL 8.24094 = Dessau, ILS 8973). The arguments of Dieter
Nörr that he accompanied Hadrian to Egypt strike me as highly plausible in their broad outlines, if not in
their details. See Dieter Nörr, Drei Mizellen zur Lebensgeschichte des Juristen Salvius Julianus, in Daube
see Theodor Mommsen, Salvius Julianus, in 2 Gesammelte Schriften 1 (1905); Antonio Guarino, Salvius
Julianus: Profilo Biobibliografico (1946); Kunkel, supra note 5, at 164-65.
By the third century AD, it was already considered a strange, if not unseemly topic for juristic discussion. Thus the jurist Julius Paulus:

The ancients (antiqui) looked to the interests of a free, unborn child by keeping all his rights intact until the time of his birth, as is clear from the law of inheritance. Agnates of a degree remoter than that of the child in the womb are not admitted to an inheritance while there is uncertainty about the possibility of his birth. When the rest are of the same degree as the child in the womb, the question they then asked was: What share ought to be kept in suspense? The reason for the question being that they could not know how many children may be born. For on a matter of this sort, there are many beliefs so different and incredible that they should be classed as fiction (ideo nam multa de huiusmodi re tam varia et incredibilia creduntur, ut fabulis adnumerentur). There is a story of as many as four girls being born to a matron at the same time. Again, good authorities have reported that in the Peloponnese a woman five times produced quadruplets, and that many women in Egypt have produced seven children at one birth. Furthermore, we have seen triplets in senatorial garb, the Horatii. Furthermore Laelius writes that he saw on the Pala-tine a free woman, brought from Alexandria to be shown to Hadrian, with five children, of whom, he said, it was reported that she had produced four at the same time and the fifth forty days later.

I will return to Paul below; for present purposes, I wish just to understand the perspectives of Julian and Gaius, and their second-century context, and in particular, why Gaius would betray such a distinctly emotional (or is it an aesthetic?) reaction to a character like Serapis. At first blush, both of their texts appear to be doing similar things. Both are ostensibly worried about the nature of human limitations, specifically, the capacity of the body to produce children. They are similarly worried about where legal analysis needs to stop—they worry, that is, about how far a jurist must worry. And to crystallize the issue they both point to an empirical fact from contemporary society as proof that one must worry only so far (up to the fifth child), but no farther. In Julian’s case (we will return to Gaius), this fact is admittedly something unusual (since Julian is concerned to demonstrate that he has had the existence of this woman confirmed), but nothing that one should be that surprised by—at least, not if one has read one’s Aristotle.

Julian’s reference to Aristotle is indicative of his approach. Stories about Egyptian fecundity stretch back at least to the 4th century BC, and were told as part of what we might call a “natural science” tradition of discussing multiple births. Stories of such births were indeed told by Aristotle, and when Julian cites him he must be referring to a passage in the History of Animals that discusses this very matter. But Aristotle himself was writing in a larger tradition, which we can deduce from the fact that Herophilus tells a

46 Cf. the verdict of Schultz (supra note 9, at 204), who confidently assures us that “the reference occurs in the middle of a long passage which certainly does not come from the pen of a classical writer. Laelius is there appealed to, not on a point of law, but as recording a case of five children being born in one birth.” For this reason, he “remains doubtful” whether Laelius’s commentary was “juristic in character or antiquarian and anecdotal.”

47 Dig. 5.4.3 (Paulus, ad Plautium 17); cf. Tert. De anim. 6.

48 Much of the evidence has been helpfully collected in Veronique Dasen, Multiple Births in Greco-Roman Antiquity, 16 Oxford J. Archaeology 49 (1997), though she misses the Julian reference.

49 Hist. an. 9(7).584b26-585a3 (Loeb).
similar story, though he was writing in Ptolemaic Alexandria as part of a medical tradition evidently uninfluenced by Aristotle. But other writers, perhaps less independent witnesses (such as Pompeius Trogus), preserve analogous stories. But in Julian’s case it is Aristotle who is decisive. As a good jurist does when finding a gray area, Julian goes back to an authoritative Greek source, something that Gaius himself was also willing to do in other circumstances. But the tone of his explanation in this case is rather different from Gaius’s, and references a key point that distinguishes the natural science tradition: the cap on the number of children that can emerge is not a function of anything else but the fact that the uterus has only a given number of places in which fetuses can fit (totidem receptacula).

There is, for Julian, nothing particularly portentosum about a woman like Serapias—she has merely maximized her biological capacity. In that sense, she fits precisely within what the normal Hellenistic “natural science” paradigm would anticipate. On this understanding there is also nothing especially relevant about the fact that she was “presented” (perducta est) to Hadrian, and accordingly this features not at all in Julian’s account. The key fact is that she exists, and that the fact of the births was confirmed (adfirmatum). There is, to adapt a modern term, a solid chain of custody for this piece of evidence, and that validates it as a fact—something more than the speculations of scientists.

Whereas Julian relied on an old and reliable “natural science” tradition concerning prodigious births, a second tradition had begun to develop in his own age. In this tradition, prodigious births were not a scientific problem of the nature of feminine biology, but rather a political problem. Specifically, these stories were being told, in learned discourse, as a way of thinking about the nature of the emperor’s benefaction and authority. We might call this the “imperial” tradition of quintuplets. Thus we see it told in the Mirabilia of Phlegon of Tralles, himself a freedman of Hadrian (and therefore a contemporary of Julian and Gaius):

There was another woman in the same city [i.e., Alexandria] who gave birth in a single parturition to five children, three male, and two female. The emperor Trajan ordered that they be brought up at his private expense. Then a year later the same woman gave birth to another three children.

Aside from the obvious difference in emperors, the difference between this account and that of Julian is that the practice of imperial patronage has been introduced. No longer does the story turn merely on scientific facts of a potentially astounding sort (but which

---

51 Pompeius Trogus, apud Plin. HN 7.3.33.
52 To quote Solon’s legislation: Dig. 47.22.4.1 (Gaius, XII Tabularum 4); Dig. 10.1.13 (Gaius, XII Tabularum 4).
53 Ann Ellis Hansen & Monica H. Green, Soranus of Ephesus: Princeps Medicorum, in II.37.2 Aufstieg und Niedergang der römischen Welt 983 (Hildegard Temporini & Wolfgang Haase eds., 1994).
54 Mir. 29. There is a version of this story (albeit one which produces a different conclusion) in the Jewish legal tradition as well: Leviticus Rabbah 25.5. See Galit Hasan-Rokem, Tales of the Neighborhood: Jewish Narrative Dialogues in Late Antiquity 86-135 (2003).
can be easily processed by human reason). It turns instead on the link between prodigious or exaggerated capacity and the way that such capacity creates access to the emperor. It similarly turns on the financial beneficia that such access provides. It is, in this sense, grotesque in the Bakhtinian sense: a discourse that lingers on bodily exaggeration (the many children), and the possibilities for consumption (the imperial beneficia) that accompany it.\textsuperscript{55}

In the telling of yet another contemporary, the second-century antiquary Aulus Gellius, a prodigious birth is worthy not only of imperial benefaction, but even of monumental recognition:

\begin{quote}
The philosopher Aristotle has recorded that a woman in Egypt bore five children at one birth; this, he said, was the limit of human multiple parturition; more children than that had never been born at one time, and even that number was very rare. But in the reign of the deified Augustus the historians of the time say that a maidservant of Caesar Augustus brought forth five children, and that they lived for a few days; that their mother died not long after she had been delivered, whereupon a monument was erected to her by order of Augustus on the via Laurentina, and on it was inscribed the number of her children, as I have given it.\textsuperscript{56}
\end{quote}

Just as in the previous section of this article, we might distinguish between a “high” and a “low” tradition in telling this story. Gellius, despite his refinement, tells a “low” version. To begin with, the woman in question was a slave (ancillam); still, her personal status was no bar to imperial benefaction or monumental commemoration. The reversal of roles is key: imperial benefaction, and its commemoration in stone monuments, was normatively understood to be firmly in the hands of the elite. The literature of the first and second centuries AD amply documents the intense competition among the Roman elite for imperial honors and recognition, for even a seat at the emperor’s table. The number of imperial beneficia was so large, and the task of operationalizing them so complex, that imperial freedmen were placed in charge of the compilations of them.\textsuperscript{57} What dissonance—what chagrin—must have been felt by such elites when an emperor (Augustus, no less!) erected a stone monument to his slave girl, on a major road, merely for a biological event. Were he not an otherwise ideal monarch, such behavior might cross the line that distinguished a generous emperor and benefactor from one who was contemptible: one, that is, who flirted with undermining the social hierarchy.

The line dividing a virtuous emperor from a grotesque prince was fine indeed. The potential for transgressing this boundary permeates the air of second century literature, most vividly in Suetonius’s claim that he divided his \textit{Life of Caligula} into two separate narratives, one about a princeps and another about a monstrum; it is also evident in Tacitus’s insistence on the treacherous gap between lofty imperial appearances and vile imperial


\textsuperscript{57} Their title was simply \textit{a commentariis beneficiorum}. See Vincenzo Scarano-Ussani, \textit{I “beneficia principalia” in un dibattito fra primo e secondo secolo}, 27 Labeo 315, 318 (1981).
realities. It is a theme that would eventually get its most sophisticated treatment only in late antiquity, namely, in the Historia Augusta’s *Vita Elagabali*. But this problem of the grotesque prince would have been clear to Gaius and Julian’s contemporaries. It was, after all, within their living memory that there had emerged in the provinces, to great fanfare, no fewer than three false Neros—Nero being popular, as Dio Chrysostom explained, for his prodigality, and his willingness to bestow things upon people regardless of their social status.

For Nero was the only man who was utterly regardless of money both in giving and in taking. It was solely on account of this wantonness of his, however, that he lost his life—

I mean the way he treated the eunuch. For the latter in anger disclosed the Emperor’s designs to his retinue; and so they revolted from him and compelled him to make away with himself as best he could. Indeed the truth about this has not come out even yet; for so far as the rest of his subjects were concerned, there was nothing to prevent his continuing to be Emperor for all time, seeing that even now everybody wishes he were still alive.

But the problem ran deeper than a grotesque Emperor and his penchant for upending social relations; it was instead that such a political ruler was, at the same time, a source of law, and might soil the body of law with traces of his contemptibility—to adopt Michel Foucault’s language, he might be “both statutory and discredited,” and produce his power thereby.

This might be fine for the crowds in Asia who followed the false Neros as the true emperors, or for the Rabbis of the Babylonian Talmud who portrayed Nero as a Jewish proselyte and the ancestor of Rabbi Me’ir; it was not acceptable for jurists. Jurists looked on in detached disgust, for instance, when the normal laws governing incest were ignored to allow the emperor Claudius to wed his niece, an act that opened this possibility to the community as a whole (though he allowed that one could only marry his brother’s daughter, not his sister’s—a fine example of imperial restraint). They had to account for the nature of imperial *beneficia* in court when someone, perhaps someone reprehensible, asserted their privileges. This was not an abstract problem or a mere legal hypothetical.

In other words, this choice between rival traditions of explanation was in no way innocent, and speaks directly to how Julian and Gaius understood law to be grounded: for Julian, the limits of what a jurist must concern himself with were fixed by nature, accessible empirically, and part of the normal institutional world in which jurists were expected to work. By contrast, Gaius shudders at the portentousness of Serapis because he understood the ways in which imperial power might intersect with the grotesque, with the

---

61 bT.Gitt. 56a; Champlin, supra note 59, at 27-28.
63 E.g., *Dig*. 28.6.43.pr (Paulus, *Quaestiones* 9), wherein Paulus tries to naturalize a *beneficium* within a hermeneutic frame determined by jurists. See further Scarano-Ussani, supra note 57.
64 Thomas, supra note 10, at 25.
ever-present threat that the grotesque might be an object of appeal, fascination, or even, in the case of a false Nero, legitimacy itself.

This is a radically different understanding of the foundations of law than that which supports Julian’s arguments. Gaius understands those foundations as being based in humans, as being political in the worst sense of the word, that is, about what particular humans—in this case humans with political power—choose to recognize. It is, in other words, the emperor, not nature, who gets to decide what is a *portentum* and what is a human achievement—to choose what should be considered a threat to the community as a whole and what should represent or encapsulate its values. And there is always the anxiety that the emperor will choose incorrectly.

An incorrect choice is both a problem for the community and a problem for law, and for jurisprudence *a fortiori* the boundaries of what is possible, both actually and legally, cannot be fixed by nature, they must be fixed politically, by human judgment, and by the judgment of a human who always walked a perilous line between the magnificent and the grotesque.65 This is why Scarpia makes him quiver, why the birth of a large group of children is *fere portentosum*, and why he ultimately cannot accept the story in the same way that Julian can: for he runs risk that the emperor will make him naturalize, in the detached language of juristic reason, something that is potentially to be taken as a sign that the peace between the gods and the community has been ruptured and is in need of repair.66

A final word here is necessary: the word *portentosum* is itself important, and speaks to the ways that jurists might articulate their concerns. *Portenta* (also *ostenta* or *prodigia*) were categories of a bygone era. The interpretation of such supernatural phenomena was primarily of interest in sorting out the politics of the Republic, when it made more sense to speak of a *pax deorum* between the gods and the political collectivity. This discourse fossilized in the early Empire, and was not of particular interest to jurists. When seeking to define *ostentum*, in the Severan period, Ulpian had to look back as far as Labeo, who wrote some two hundred years earlier, around the turn of the millennium.67 The vocabulary of jurisprudence as a whole had taken shape in the Republic as well, at which point it too fossilized, leaving jurists with a wildly impoverished political vocabulary, one scarcely capable of dealing with contemporary realities. That is to say, when Gaius sought to register these political concerns, he had to reach out from the language of jurisprudence and cross into the realm of *aggadah* because he quite simply had no other political vocabulary of which he could avail himself.68 It is another reason why such passages deserve to be treated with close attention.

---

65 For an example, probably from just after Gaius’s lifetime, see *Dig*. 24.4.1 (Ulpian, *ad Edictum* 24), a constitution of Marcus.

66 For an analogous example, see *Dig*. 4.4.38.pr (Paulus, *Decretorum* 1).


68 The attempt of Honoré, supra note 5, at 117–25, to find passages the *Institutes* where Gaius expresses doubt or irony about the role of imperial lawmaking is admirable, but probably not convincing in its particulars. It speaks eloquently, however, to the level of sensitivity that needs to be applied to these
IV. Conclusions

Emperors and provincials were not, of course, the only people in the imperial landscape claiming the ability, or even the authority, to contribute to the body of law as a whole. But they are certainly two important constituencies with whom the jurists struggled for control. Normally they could be ignored, or their voices integrated in some way that made their ultimate contributions seem natural, or like the seamless extension of principles of reasoning already immanent within the *ius civile*. But at times their contributions could not be overlooked: they demanded to be answered. The instinct of Paulus, discussed above, was simply to ignore them when possible. Commenting on multiple births, in the passage discussed above, he simply adopts the authority of Theophrastus: “As Theophrastus says, ‘Lawgivers can overlook those things that only happen once or twice.’”69 Interestingly enough, this passage of Paulus is quoted twice in the *Digest* once to point out that one must not make too much of folktales or take excessive interest in strange and rare *portenta* like multiple births. But the sixth century lawyers who compiled the *Digest* also bent Paulus’s text to a different purpose, placing it in the first book of the *Digest*, the book dealing with basic principles of law. The compilers, in so doing, raised it to the level of a universal hermeneutic principle. They joined his text to a series of other one-off quotations, ripped from their context, and made it speak monologically:

- Pomponius (*ad Sabinum* 25): Rules of law should be established, as Theophrastus said, in the matters which happen by way of general occurrence, not for those which happen abnormally (*ἐκ παραλόγου*).

- Celsus (*Digesta* 5): Out of those matters whose occurrence in one kind of case is a bare possibility, rules of law do not develop.

- Celsus (*Digesta* 17): For the law ought rather to be adapted to the kinds of things which happen frequently and easily, than to those which happen very seldom.

- Paulus (*ad Plautium* 17): For, as Theophrastus says, a thing that happens once or twice is passed over by the lawgivers.70

The ability to ignore competing voices, and to assume an identity between political authority and legal structure—these are features of the world of Late Antiquity, a world with a confident state and much less confident jurisprudence. The jurists of the earlier Principate were not so privileged. We should not be surprised when we see them look up from their sometimes pedantic problems to survey the political and social landscape, to see a world of people engaged in similar practices, and to try to muster some vocabulary for framing their activities in the political context of that world. Their aggadic register is the way that they did this. Its presence in the preserved texts of jurisprudence may be fleeting, but it is no less a part of the vocabulary of ancient law.

seemingly apolitical texts if one is to divine their underlying political orientations. For a different attempt, cf. Nörr, supra note 13, at 97-98.

69 *Dig*. 5.4.3.pr; 1.3.6.pr (Paulus, *ad Plautium* 17).

70 *Dig*. 1.3.3-6.