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LIBERTAS IN THE REPUBLIC

I. Some rival modern views: the supposed contrast of *libertas* and *eleutheria*; in fact to both Greeks and Romans freedom conceptually and in practice meant different things to different people. **II.** *Libertas* basically opposed to legal servitude, but also to lesser forms of private subjection; hence it admitted of degrees. The acceptance of slavery generated conceptions of the superior morality and social dignity of the free man, and inhibited development of the notion of freedom as an inalienable natural right. **III.** Ambiguity in the ascription of *libertas* to communities; either independence of external control or the freedom of citizens from internal despotism; in either case both for Greeks and Romans it admits of degrees. **IV.** Personal *libertas* rests on positive laws; though not identical with citizenship; not an abstract idea, but (as in England) a set of rights gradually acquired. **V.** The contrast drawn by Constant between ancient and modern concepts of freedom not wholly satisfying. (i) Greeks and Romans did not oppose the state, as an impersonal entity, to the individual: the state was the citizens. (ii) Many of the individual liberties comprised in Constant's ideal belonged to the Romans, more or less unchallenged and unrestricted, and therefore not consciously valued as liberties. Freedom of thought, of worship; attempted regulation of private morals (which could be regarded as detracting from freedom); individualism inherent in private law; freedom of association; economic *laissez-faire*. **VI.** Negative and positive sides to both Roman and Greek freedom (positive freedom equivalent to power). 'Doing what you please' not the only aspect of *eleutheria*, but a view of freedom even more abundantly illustrated in Latin usage. Freedom of speech at Rome. **VII.** Both Romans and Greeks could treat laws as at once restrictions and guarantees of freedom; nothing peculiarly Roman in the conception that freedom rests on the laws, which in any case derive at Rome from the people's will. **VIII.** Moderation or self-restraint can qualify *libertas* and is therefore not inherent in it; partisan distinctions between *libertas* and *licentia*. **IX.** Falsity of view that *libertas* comprises respect for *auctoritas* in popular conceptions; Cicero himself, who speaks for the aristocracy and does not express 'the Roman' conception (as if there were one), regards the liberty of the people and the authority of the senate as countervailing forces and wishes the former to be a mere sham. **X.** He values the liberty, i.e. the power, of senators, but senatorial liberty also excludes the preponderant *auctoritas* of individuals. **XI.** The *libertas*, i.e. particular rights—even 'sovereignty'—valued by the people generally. Protection of the citizens from

magistrates. **XII.** Equal liberty before the laws (with comparison of Athens). **XIII.** The *ius suffragii*; elections. The people's jurisdiction. **XIV.** Legislation. The connection of legislative power with the people's *commoda*. **XV.** Possibility that *libertas* could connote economic independence. **XVI.** Obstacles to democratic freedom. Extinction of political freedom in the Principate.

I

IN the political struggles of the late Republic frequent appeals were made on all sides to *libertas*. For Syme they were essentially fraudulent. 'Liberty and the laws are high-sounding words. They will often be rendered, on a cool estimate, as privilege and vested interests.' The name of liberty was usually invoked in defence of the existing order by the minority of rich and powerful oligarchs. 'The ruinous privilege of freedom' was extinguished in the Principate for the higher good of 'security of life and property'.

Other scholars, sometimes perhaps writing under Hegelian influence, and taking more account of the individual rights guaranteed to citizens by the laws, have idealized 'the Roman' concept of freedom, limited by law and morality, and inseparable from Roman respect for authority and discipline, which they admire in the Roman way of life; they can represent it as wholly reconcilable with obedience to the will of a small ruling class or even of the emperor held by their inferiors in due esteem; they sometimes contrast it with the wild licence supposedly inherent in the Greek concept of *eleutheria*, the right of men to live as they please.¹

Both types of analysis take too little account of the predominantly aristocratic character of our literary sources and pay insufficient attention to evidence that shows liberty as a term that could express the interests and views of the common people, as well as of feuding oligarchs. Moreover, though Syme was right in holding that on the lips of the nobility it often veiled their selfish attachment to power and its perquisites, he was wrong in my judgement in suggesting at least by insinuation that it was no more than a catchword, proclaimed in conscious cynicism, and that some, perhaps most, of them did not sincerely believe that the liberty or power they possessed under the Republican constitution was essential to the public good. In the same way the common people were surely attached to the different personal and political rights which their spokesmen subsumed under the name of liberty by sentiment and tradition, as well as by consciousness of the

¹ See *RR* 2, 59, 154-6 ff., 513. Contrast accounts of Kloesel, Schulz and Bleicken, discussed later. Wirszubski's treatment is more balanced, and I seldom disagree with it. De Ste Croix 366-8 has some admirable remarks.

concrete advantages which these rights secured to them. But the liberty or liberties of the aristocracy and of the plebs were not always congruent with each other. The very notion of liberty (whatever word be used to denote it in any language) is full of self-contradictions. Both conceptually and in practical application *libertas* meant different things to different people. So did *eleutheria*. There was, and could be, no single Roman and no single Greek idea of freedom, though to a very large extent the same range of meanings or applications is to be found in the thought and practice of both Romans and Greeks. In particular there is nothing peculiarly Roman in the beliefs that freedom within society is at once based on, and restricted by, law, while the contention that deference to the authority of a superior is inherent in the very definition of Roman *libertas* is perverse.

II

In Rome, as in Greece, freedom is primarily the legal status opposed to slavery. Already in the Twelve Tables the free man and the slave are sharply distinguished, and in all legal writings *libertas* generally means the status of one who is not a slave, but sometimes the actual grant to a slave of free status.²

Most philologists agree that *liber* and its Greek equivalent *eleutheria* have the same Indo-European root, **leudheros*. Yet the terms for slave in Indo-European languages have no common root. Both *doulos* and *servus* seem to be borrowings. Normally men did not enslave their own countrymen; for example, in the earliest Roman law, long obsolete in historic times, though a citizen could be sold into slavery for debt, he had to be sold outside Roman territory (Gell. xx. 1. 46 f.). Perhaps early Greek and Latin speakers borrowed the terms for slaves from the alien peoples among whom they made slaves. In Sanskrit the term used is actually taken from that of a foreign people in north-west India (*Dasa*); the Germans once called their slaves *wealh* (cognate with Welsh); our 'slave' and its equivalents in other modern European languages recall the importation of 'Slav' bondsmen from the Black Sea into medieval Italy. It seems to be beyond doubt that the term *liberi*, the free persons of the household (*familia*) subject to its head (the *paterfamilias*), is the plural of *liber*; but if the facts are as stated, it cannot

² *FIRA* i². 23 ff. (II, 1a, v, 8, VII, 12, VIII, 3, 14, XII, 2a). F. de Martino, *St. econ. di Roma antica*, 1979, 69 ff., denies that slavery existed in primitive Rome, since there are no reliable records of its existence, as if there are any reliable records for any social institutions earlier than the XII Tables. As in Homeric Greece, one would expect to find slaves as domestic servants from the earliest times. Slavery was already of vital economic importance in the Hannibalic war (*IM* 66 f.), and no doubt furnished more and more of the labour force as Roman dominion in Italy expanded.

have denoted in origin the free members of the household as distinct from the slaves. On a frequently but not universally accepted view the common root of *liber* and *eleutheros* is to be connected with a group of words in Indo-European languages, to which the German *Leute* (people) belongs: the *liberi* are the natural increase of the family, and the god Liber was once a numinous power of natural growth. Of course these etymological speculations were unknown to the ancients. Whatever had been the most primitive sense of *liber* or *eleutheros* was long forgotten. The man so designated was simply not a slave.³

The slave was in almost all respects a piece of property, to be bought and sold, given away, or bequeathed, like any other animal. The owner could force him to work, chain him, flog him, put him to death at his own discretion, allow him to breed or not as he chose. The children of the slave mother belonged to the mother's owner. Slave parents had no assured marital or family life. Under the Principate the law was to give slaves a little protection against brutality from their masters, but that is no more than the laws of other states have done in forbidding cruelty to animals. Slaves had of course always been protected from ill-treatment by third parties: the owner could sue for reparation, just as when he sustained wrongful damage to any other property.⁴

Not all the disabilities of the slave were peculiar to him. The *paterfamilias* was in law arbiter of life and death over his *liberi*. Like slaves, they could own no property. They could at one time be sold like slaves, and it was still possible in the second century AD if they committed a civil wrong, for which the *pater* was necessarily liable, for him to avoid paying damages by handing them over to the aggrieved party (*noxae datio*): they were then said to be 'in eius mancipio' (in his ownership) and to be 'in the position of slaves' (*servorum loco*). The poor man, who had no means to pay compensation, might have no choice

³ *TLL* s.v. *liber*; so P. Chantraine, *Dict. de la langue gr.* and H. Frisk, *Gr. etym. Wörterbuch*, s.v. *ἐλεύθερος*, and Walde-Hoffmann, *Lat. etym. Wörterbuch* s.v. *liber*; J. Pokorny, *Indogerm. Wörterbuch*, 1959, 684 f.; the kinship of *liber* and *eleutheros* is doubted by Ernout-Meillet, *Et. dict. de la langue lat.*, s.v. *liber*, and denied by Pohlenz, 1966, 181 n. 4. I derive other suggestions in the text from E. Benveniste, *RÉL* x 429 ff., xiv 51 ff., and *Le Vocabulaire des inst. indo-eur.* i, 1969, 321 ff.; for the origin of *schiaivo* etc. see Ch. Verlinden, *L'Esclavage dans l'Europe médiévale*, ii, 1977, 999 ff.; the thesis concerning *servus* is doubted by Chantraine, and Ernout-Meillet favour the implausible connection made in antiquity with *servare* (Just. *Inst.* i. 3. 3).

⁴ Finley, 1980, ch. 2, esp. 70 f. Note Sen. *de clem.* i. 18. 2: 'cum in servum omnia liceant, est aliquid quod in hominem licere commune ius animantium [!] vetet' (cf. 17. 1), and Pius' rescript (*Coll.* iii. 3. 2): 'dominorum quidem potestatem in suos servos inlibatam esse oportet nec cuiquam hominum ius suum detrahi: sed dominorum interest, ne auxilium contra saevitiam vel famem vel intolerabilem iniuriam denegetur his, qui iuste deprecantur', circumscribing the rights of individual masters for the common interests of all and of public order (cf. Posid. *FGH* no. 87 fr. 108 c, f on the causes of the first Sicilian slave revolt). For imperial protection of slaves in general see Buckland 36-8.

but to surrender a son in this way. These quasi-slaves could be emancipated, as slaves could be. Indeed the *pater* himself could emancipate sons in his power; it is significant that they are then said, in the Twelve Tables, to be 'free'. Complete subjection, even to one's own father, hardly seemed compatible with freedom.⁵

In the early Republic the poor would enter into a contract (*nexum*) which somehow made them the debt-bondsmen of their creditors. Livy supposed that these *nexi* could be kept like slaves in a private prison, chained, and flogged. According to the annalists, their condition occasioned the first secession of the plebs and the establishment of the tribunate. For long, however, nothing was done to end the servitude of the *nexi*. The annalists held that M. Manlius in 385 used his own resources to deliver debtors from their bonds, claiming to be a champion of liberty, but was actually accused by the tribunes of aiming at tyranny and put to death as an enemy of freedom. Two more generations passed before the contract of *nexum* was abolished by the *lex Poetelia*, and those then in bondage were released. Livy describes this reform as a new beginning of freedom; the first had been the overthrow of absolute monarchy.⁶

In reality this was not the end of bondage for debt. Under Roman law it always remained possible for the creditor to obtain a judgement of the court whereby he could take into custody the debtor who had not made repayment.⁷ This *addictio* was a useful mode of coercion

⁵ The XII Tables declared: 'si pater filium ter venum duit, filius a patre liber esto' (Gaius i. 132); cf. *Dig.* xxxii. 50. 1; *CJ* v. 4. 18, viii. 49, ix. 51, 13. 4; Sen. *Controv.* vii. 4. 4. In general see Gaius i. 123-41, esp. 138-41, iii. 104, 114, iv. 75-80; Papinian in *Coll.* ii. 3. 1. By Justinian's time *noxae datio* of free persons was no longer allowed (*Inst.* iv. 8. 7).

⁶ Livy viii. 28. 1; Varro, *LL* vii. 105; Cic. *de rep.* ii. 59. Varro shows that the nature of *nexum* was already a matter of doubt and dispute for the jurists M'. Manilius (*cos.* 149) and Mucius (presumably Q. Scaevola, *cos.* 95); it is unlikely that the highly coloured accounts of the plight of *nexi* in Livy (ii. 28. 7, vi. 14. 3, and 10, 17. 2, 27. 8, 37. 7, viii. 27) and Dionysius rest on more than the vaguest recollections transmitted orally; they probably reflect later experience of the condition of some *addicti* (n. 7), and cannot be used to define the archaic legal institution. Analogies from other social systems suggest that the *nexi* were not, like *addicti*, defaulters under court judgements, but men who had bound themselves to service in return for a loan which it was not expected that they would repay. Cf. Finley, 1981, ch. 9. The modern literature is immense.

⁷ Livy xxiii. 14. 3; Cic. *II Verr.* ii. 63, *Flacc.* 45, 48; *FIRA* i². no. 19. xxi f., 21. LXI; F. von Woess, *SZ* 1922, 485 ff., 523 ff.; Schulz, 1951, 26, remarks that some rules of classical law are unintelligible if *addictio* is forgotten (see his sections 78, 372, 529 f., 700, 792, 880). Quint. *Inst.* vii. 3. 26 refers to the 'addictus, quem lex servire donec solverit iubet'; cf. v. 10. 60; Ps.-Quint. *Declam.* 311; *HA. Hadr.* 18; and Sallust and Columella cited in the text. The jurists never mention this, perhaps because a pact between creditor and *addictus* was (despite Quintilian's 'lex') informal, or because it would never give rise to a suit in court; the *addictus* would have no means to sue for non-fulfilment, and the creditor had the sharper remedy of returning him to bonds. Varro's testimony (*RR* i. 17) may be explained as in the text, or by the hypothesis that he meant by *obaerarii* a class of persons in contractual bondage for labour service, like the *nexi* of old (n. 6). It is probable that the rich always preferred slave labour when cheap and plentiful; the increased supply of slaves (other Italians) resulting from Rome's conquests in the late fourth century may help to explain why they then were ready to concede the abolition of *nexum*. See also ch. 1 n. 107 with text.

against the debtor who was solvent but refused to discharge his obligation. However, since the creditor had to maintain such an *addictus* (Dig. xlii. 1. 34), it would have involved futile expenditure in the case of the man with no resources, unless he could be made to work. Quintilian and another rhetorician (Ps.-Quint. *Declam.* 311) indicate that *addicti* were 'in servitude' until they had worked off their debts, and Columella says that they were kept in prisons (*ergastula*) while labouring on the great estates (i. 3. 12). He actually designates them by the old name of *nexi*. Livy indeed often treats the *nexi* of old times as *addicti* (e.g. vi. 14. 3 and 10); his pictures of their plight are probably drawn from what was known in historic times of that of *addicti*. In 63 indebted peasants complained that through the savagery of the money-lenders and the praetor they had lost their personal freedom as well as their property (Sall. *Cat.* 33). The stock of slaves in Italy must have been temporarily diminished in the 60s by the losses owners had sustained in Spartacus' revolt, and they may have been the more tempted to fill the gaps in their labour force by reducing debtors to a kind of servitude. Varro (*RR* i. 17. 2) in the 30s writes as if there were then no debt-bondsmen (*obaerarii*) in Italy, as there were in some lands overseas. The explanation cannot lie in any change in the law, since *addictio* was always permitted; moreover, Columella again attests forced labour for debt in the Italy of the Principate. It may be that the huge demand for legionaries in the years from 49 made it impracticable for creditors to detain debtors, who could easily escape by enlistment; whereas by the time of Columella and Quintilian there was little recruiting in Italy, and indeed the emperor Tiberius had been reluctant to allow the penniless and vagrants to join up (Tac. *Ann.* iv. 4).⁸

Some citizens would also bind themselves by contract as *auctorati* to serve as gladiators and submit themselves to servile discipline by their employers.⁹

We cannot tell how commonly poor men fell into servitude in one of these forms. But numerically such bondsmen were far less important than chattel slaves. As early as the Hannibalic War there must have been adequate slave labour to keep up the production of necessary supplies, with perhaps 11 per cent of the citizen population serving in the legions. In the late Republic slaves *may* have comprised three sevenths of the inhabitants of Italy.¹⁰

Chattel slavery was not only the most common, it was also the most perfect form of servitude in Roman society. There was some justifica-

⁸ *IM* 413-5; more fully, Brunt, *Scripta Class. Israelica*, 1974, 90 ff.

⁹ Sen. *Ep.* 37. 1; Petron. 117; other evidence in Mommsen, *Ges. Schr.* iii. 9 n. 4.

¹⁰ *IM* 67 and ch. x (highly conjectural estimates).

tion for saying that men who were not chattel slaves, though subject to the power of another, were in some sense free. The *liberi* in the power of their *paterfamilias* had most of the rights and obligations of citizens *sui iuris*. They could vote and hold office; they could serve in the army, as slaves and even freedmen normally could not; they could marry, and their children were of free birth. Marriage was permitted also to those *in mancipio* (Gaius i. 135), and presumably to *addicti* and *auctorati*; and perhaps these classes had, like the *liberi in potestate*, protection as citizens against arbitrary punishment by magistrates. The *liberi* automatically acquired full independence (if males), becoming *sui iuris* once death removed the *paterfamilias*; the *filius in mancipio* would be freed by the praetor, when he had worked off his debt, and the *addictus* may have had some chance of securing freedom by his labour;¹¹ the *auctoratus* was free, if he survived to the end of the period for which he had bound himself to fight. The slave who was manumitted enjoyed as a freedman only limited citizen rights: the liberation of other bondsmen restored to them the title of free birth.

Thus there could be degrees of freedom or servitude. This was true of communities as well as individuals. Aphrodisias was granted freedom by Rome 'on the same basis as a community with the best right and legal status which has freedom and immunity bestowed by the Roman people' (n. 31). By analogy with the *paterfamilias* a state can be entirely free if it is '*sui iuris ac mancipi*' (n. 25). The *paterfamilias* had total control over his *familia*: Rome is the freest of states because of its imperial dominion (n. 30). Liberty is independence and, indeed, power (nn. 70-2).

The existence of slavery and other forms of servitude coloured the thinking of both Romans and Greeks about freedom in various ways. (1) The degradation of many slaves made it natural to connect freedom with morality: a free man was, or should be, a better kind of man than a slave. (2) Freedom as a legal status raised the dignity of its possessor, however poor, over that of the slave; it gave him some compensation for the superiority of material conditions that some slaves might enjoy, and inhibited the growth of any sense of common interest in the labouring class, which included both slaves and free men. (3) It was manifest that freedom of status depended on the positive law of a man's own state; the notion that freedom was a natural right due to human beings as such, though sometimes suggested, could gain little credence and had no practical effect.

(1) We read in Homer that when a man is enslaved he loses half that excellence (*aretē*) which makes him truly a man (*Od.* xvii. 322 f.). For

¹¹ Papinian in n. 5; cf. n. 7.

Aristotle the natural slave, one who deserves to be a slave, is a man whose intellectual and moral quality assimilates him to an animal, and who needs in his own interest to be under the perpetual tutelage of a master.¹² This doctrine was no doubt partly founded in experience. Most slaves known to Aristotle were barbarians who seemed immeasurably inferior to Greeks. In any case enslavement doubtless tended to debase a man. Hence slaves were depicted as typically low-spirited, cowardly, idle, shy, dishonest and mendacious. A free man of low moral quality was called in Greek '*aneleutheros*', unfree, a term not used of actual slaves. *Eleutheria* and *eleutheros* occasionally denote the excellence in character expected of a free man;¹³ Terence uses '*liberum ingenium atque animum*' (*Ad.* 828) in the same way, probably translating from the Greek, for Romans more naturally say 'worthy of freedom'. The Greek *eleutheros* and Latin *liberalis* have the same sense, along with their derivatives, though both come also to mean 'liberal' or 'munificent', virtues which the slave, having no property, had no means to practise. By contrast *servilis* is a term of moral opprobrium. The slave might, indeed, display qualities above his station, and for Aristotle himself he was then entitled to freedom; Terence makes someone say 'I have converted you from my slave into my freedman, because you served me with the character of a free man [*liberaliter*]' (*Andr.* 38). In sum, for both Greeks and Romans freedom could acquire moral overtones. The subjection of a whole people could be defended on the ground that it was unfit for independence, and merely lost the licence to do wrong,¹⁴ while imperialists could justify their dominion on the ground that they were worthy to rule (e.g. Thuc. i. 76). However, though the manumission of slaves could be justified by their worth, it was not suggested that a free man should be deprived of his legal status because he was morally unfit for it.

(2) Kunkel somewhere remarked that the contrast between master and slave was omnipresent and vivid in Roman daily life: this was no less true in that of a Greek city. This must have made a man more intensely conscious of the value of whatever freedom he possessed. His own rights were more precious by contrast with the rightlessness of the slaves around him. No doubt this gave a special emotive force to 'freedom' and 'slavery', when they were employed as political slogans. In Rome society was always hierarchical. Senators or Equites had their own privileges, for instance their own form of dress and reserved seats at the games. But even the humblest citizen had his own social esteem

¹² *Politics* i. 2, 5, etc.

¹³ Pohlenz, 1966, 47 ff. Dem. viii. 51, xviii. 242 show this view to have been familiar to the general public.

¹⁴ Cic. *de rep. ap. Aug. Civ. Dei* xix. 21.

and rank (*dignitas*), which set him at least above the slaves. This doubtless explains why it was that the free poor gave but little aid to slaves when they rose in revolt, and why their champions were reluctant to seek servile support, though both classes may appear to us victims of a common exploitation.¹⁵

(3) The Founding Fathers of the United States declared: 'We hold these truths to be self-evident, that all are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' Sophistry reconciled these affirmations with the ownership of slaves.¹⁶ ('How is it', asked Dr Johnson, 'that we hear the loudest yelps for liberty among the drivers of negroes?'). Greeks and Romans hardly ever embarrassed themselves with the notion that freedom was a natural or divine right, which their acceptance of the institution of slavery denied.

Slaves could indeed not be treated entirely as if they were things, not human beings. The law recognized their humanity in making them liable to punishment for crimes, in accepting their evidence (given under torture) in the courts, and in permitting their masters to manumit them; by a peculiarity of Roman law, unparalleled in the Greek world, manumission by due legal process gave them the status of citizens, subject to certain disabilities which did not extend to their descendants born in freedom. All this made it evident that there was a certain artificiality in slave status. So did the mere fact that men of free birth, Romans included, could be enslaved through war, piracy, and kidnapping. Roman law prescribed that the captive would, on return to the territory of Rome or of a friendly state, normally recover freedom and citizenship.¹⁷ Enslavement might be just bad luck (*Plaut. Capt.* 302 ff.), and it was a commonplace, which the orator could take over from philosophers, that fortune, not nature, made men free or slaves;¹⁸ not that this is likely to have made free men in general entertain any real doubts about the justice of their own superiority to slaves.

Some Greek thinkers had asserted that all men were born free, and that slavery was unjust as an institution, though without demanding its actual abolition: slavery was so deeply rooted in the economic organization and traditions of the Graeco-Roman world that this was

¹⁵ During the Sicilian slave revolts the free poor gloated at the misfortunes of the rich and plundered on their own account but did not join the rebels (*Posid. ap. Diod.* xxxiv. 2. 48, xxxvi. 6, 11). A few free men joined Spartacus (*App. i.* 116. 540, 117. 547; other texts cited ad loc. by Gabba prove nothing); this was hardly significant. Catiline would not enlist slaves (*Sall. Cat.* 56. 5), though governments did so in crises, e.g. Rome in the Hannibalic war.

¹⁶ For an explanation see J. P. Grene, *All Men are Created Equal* (inaugural lecture, Oxford, 1976).

¹⁷ *Postliminium*; see e.g. Buckland 302 ff.; anyone who redeemed the captive had a lien on his person till the cost was repaid, and presumably would exact labour from him.

¹⁸ *Sen. Controv.* vii. 6. 18; *Quint. Inst.* iii. 8. 31.

never thought of. Roman jurists of the imperial period were also to say or imply that all men were free by the law of nature.¹⁹ This is apparently the law that nature has taught to all animals, which leads them to procreate and rear their young, and also to desire freedom instinctively.²⁰ Freedom can be defined by one jurist as 'a natural faculty of doing that which everyone wished to do, unless there is some hindrance in force or law.'²¹ We shall see that this concept of freedom as *per se* unrestricted is no more alien to Romans than to Greeks. Law itself imposes limitations on it. It does not of course follow that any of the limitations were unjustified. Slavery is for the jurists an institution of the *ius gentium*, the law of nations, and that law can be viewed not only as the body of rules that all peoples use, but as established by natural reason. Now instinct is common to all animals, but reason is peculiar to man.²² In affirming that slavery was contrary to the instincts of nature, the jurists were not then suggesting any moral condemnation of it, nor were they implying that the law of nature in this sense was what the Stoics held it to be, the rational and divine regulation of the world, a conception that does indeed appear in other juristic texts. And even Stoics accepted slavery; ubiquitous as it was, how could it not be part of the providential order determined by reason?²³ It is another matter if the teaching of the Stoics, who recognized that the divine reason was immanent in every man, and that the slave was as capable of virtue as the free man, perhaps conduced to some amelioration of the legal status of slaves. This development in any case belongs to the Principate, and it was then (if at all) that Stoic influence could have affected it. And at no time was the abolition of slavery proposed, even by those Greek thinkers who had challenged its justice and to whose theoretical objections Aristotle had offered a theoretical reply. They alone had suggested that freedom was a natural human right, without drawing any practical conse-

¹⁹ Greek theoretical criticisms of slavery are chiefly known from Aristotle's reply in *Pol.* i. For natural freedom in Roman jurisprudence see *Dig.* i. 1. 4 *pr.* (Ulpian), xii. 6. 64 (Tryphoninus); xl. 11. 2 (Marcian); l. 17. 32 (Ulpian); nn. 21 f.

²⁰ *Dig.* i. 1. 3 (Ulpian) xli. 1. 1-5 (chiefly Gaius); *Cic. de leg. agr.* ii. 9, *de rep.* i. 55; *Tac. Hist.* iv. 17. 5: 'libertatem natura etiam mutis animalibus datam, virtutem proprium hominum bonum [as of rational beings]'.
²¹ *Dig.* i. 5. 4 *pr.*: 'libertas est naturalis facultas eius <faciendi> quod cuique facere libet, nisi si quid vi aut iure prohibetur. (1) Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.' Florentinus goes on to accept the etymological connection of *servus* with *servare* (n. 3), and he may have thought that the 'natural faculty' to kill one's captives at one's pleasure was rationally limited, 'iure gentium', by the practice of preserving their lives and exploiting their labour.

²² *Dig.* i. 1. 9 (Gaius); i. 1. 4 (Ulpian).

²³ Stoic natural law: *Dig.* i. 3. 2 (Marcian quoting Chrysippus); cf. i. 1 *pr.*: 'ius est ars boni et aequi' (Celsus), i. 1. 1, 10 (Ulpian), i. 11 (Paul). Stoic acceptance of slavery: *SVF* ii. 1118, iii. 351-3; *Cic. de offic.* i. 41.

quences, and this was not a notion that had any significant part in Greek or Roman thinking.

Of course in any state that recognized slavery the free man who was illegally enslaved had to be given means of redress. At Rome a person *de facto* in slavery normally had no access to the courts, but a free man could appear on behalf of one who claimed entitlement to liberty, and under the Twelve Tables he was subject to less pecuniary risk than in other litigation; Gaius (iv. 14) explained this on the ground that the law favoured the restoration of his rights to the free man wrongfully held as a slave. Many later rules of Roman law exhibit the same *favor libertatis* to slaves who had a legal claim to manumission under a will or contract,²⁴ but were in danger of being defrauded of their rights by an inequitable interpretation of the law. In principle all these rules were designed to uphold a man's legal title to freedom, which he had been unjustly denied, and do not illustrate any lurking belief that freedom was due to every man under the law of nature. Manumission too was regarded as a *beneficium*, and it was a mark of virtue to bestow *beneficia* on those, including slaves, who deserved them by their individual merits. But an admission that some slaves should be freed implied no condemnation of slavery.

III

Communities, like individuals, could be described as free or 'sui iuris ac Mancipi'.²⁵ The application of the term was ambiguous. It might refer either to their external relationships or their internal organization. A state could be regarded as free if it were not subject to the rule of another state, or if the citizens had rights against their own rulers and were not enslaved to their despotic will. In both applications freedom might be more or less complete. No distinction between Greek and Roman ideas on these matters can be drawn.

Peoples who were subject to the arbitrary will of a single man or a small group of men were held to be deprived of freedom, as their condition was analogous to that of slaves. Thus for the Greeks the subjects of the absolute Persian king were his slaves. Romans contrasted *libertas* with both *regnum* and the *dominatio* of a faction. No matter if the despot was benevolent: 'freedom consists not in having a just master, but in having none' (*Cic. de rep.* ii. 43). On this view the fall of the monarchy at Rome was the beginning of freedom.²⁶ The

²⁴ e.g. sale 'ut manumittatur', Buckland 628 ff.

²⁵ *Cic. ad Brut.* 24. 4; cf. *Sen. de benef.* iii. 20. 1.

²⁶ *Sall. Cat.* 6 f.; *Livy* ii. 1; *Tac. Ann.* i. 1 all connect the institution of the annual and collegiate consulship with liberty.

very name of king was detestable;²⁷ and Sulla and Caesar could be seen as 'kings' and destroyers of liberty. Some nations indeed loved their chains: 'few desire freedom, the greater number prefer just masters'. For Greeks that was a mark of barbarism; Cicero too could contemptuously say that Jews and Syrians were 'born to servitude'.²⁸ But the Romans could pretend that they were conferring a boon on Macedonians (as Greeks) in abolishing their popular and national kingship and dividing them into four artificial republics. 'All nations were to know that the arms of the Roman people were not employed to enslave free peoples but to liberate others from slavery.'²⁹

Internal freedom admitted of degrees. It could be predicated of a community whose citizens had only a limited share in their own government, provided that they had some rights guaranteed by their laws. Thus the Spartans boasted of their freedom (Hdt. vii. 104). Roman internal freedom, traditionally associated with the foundation of the Republic, admittedly increased as ordinary citizens acquired further rights. Cicero could claim that oratory flourished in 'every free people', as it did at Rome (*de orat.* i. 30); it was the mark of a truly free state that decisions were taken after public discussion, which was influenced by the arts of persuasion (p. 45).

National freedom may also consist in independence of foreign rule. From this standpoint Sallust could say that in their struggles for independence under royal government the Romans were already fighting for liberty (*Cat.* 6. 5 f.); in the next breath he makes them win liberty by overturning the monarchy (7. 3). Similarly Herodotus could speak of the Persians as not being slaves to others, since they had a national king (ix. 122). Freedom from arbitrary rule at home and freedom from foreign domination did not necessarily go together, as Livy observed (ii. 23. 2). The enemies of imperial Athens in the fifth century claimed that she had enslaved her allies, Athenian apologists that she not only protected their freedom against the barbarians but enlarged it by conferring on them the democratic freedom in their internal affairs which she enjoyed herself (n. 32).

The independence of a state had to be fought for (e.g. Sall. *Or. Lepidi* 4). It rested on power. According to Cicero, 'Rome far excels other

²⁷ e.g. Cic. *de rep.* ii. 53: 'pulso Tarquinio nomen regis audire non poterat [populus Romanus]'; there is no contrary testimony. When Cicero refers (i. 54 f.) to men's affection for kings, he has in mind their patriarchal position in some other societies (cf. Plato, *Laws* 680e, 690a) or the conception of the ideal monarch of Greek political theory, whose rule was secure because his outstanding virtue won the love or consent of his subjects (see e.g. M. Griffin, *Seneca*, 1976, 144). 'Sullanum regnum': e.g. Cic. *de har. resp.* 54, *Att.* viii. 11. 2; Sall. *Or. Lepidi*. Whether or not Caesar aspired to the title, he had in effect made himself *rex* for Cicero (*de offic.* iii. 83 etc.).

²⁸ Sall. *Ep. Mithr.* 18; Livy xxxvii. 54. 24; Cic. *de prov. cons.* 10.

²⁹ Livy xlv. 18. 1. None the less Romans did not scruple to acknowledge and protect vassal kings.

states in the prerogative of freedom'; she 'alone is and has always been in the highest degree free'. What meaning can be found in this rhetoric? Only that Rome's power made her uniquely free of any external constraint. 'Other nations can bear servitude, but liberty is proper to the Roman people', since by divine will Rome rules over all other races.³⁰ This was the freedom that some Greeks are said to have pined for in 192: Greek 'honour [*dignitas*] consists in that freedom which rests on its own strength, not on the will of others' (Livy xxxv. 32. 11). Very different was the freedom that Rome had just bestowed on the Greeks: unable, as Rhodian envoys are made to acknowledge, to defend it with their own arms, they relied on those of Rome (xxxvii. 54. 25).

Freedom of a community from external control also admitted of degrees. It could be restricted by treaty obligations and power relationships. Hellenistic kings would recognize the 'freedom' of cities that accepted their 'friendship' or 'alliance', and often specify the rights comprised within this all-embracing term: free cities would have their own constitutions, laws, and courts, would be immune from taxes, and have no governors or garrisons imposed on them. The cities which had acquired hegemonies in fifth- or fourth-century Greece had often given similar undertakings. None of these promises held good when the suzerain had the power and need to disregard them. Rome bound herself in the same way to respect the freedom of cities within her dominions by contracting formal treaties with them or by unilaterally conceding privileges to them by law or decree of the senate. As freedom was vague and undefined in itself, it did not necessarily include all the specific rights that might be associated with it. Free cities, for example, might be subject to taxation; or their right to impose their own taxes might be curtailed by exemptions for Roman or Italian residents. Aphrodisias enjoyed freedom *optimo iure*: by implication other free cities had less. But all which had a treaty relationship with Rome or possessed a charter conferred by people or senate were, at least in theory, exempt from arbitrary interferences in their own internal affairs by the holders of Roman *imperium*. In practice even unprivileged cities must normally have enjoyed local self-government. The Roman governor had not time or staff for frequent interpositions of his authority. In Cilicia Cicero gratified the Greeks by promising them autonomy, the use of their own laws and courts. It is not to be supposed

³⁰ Cic. *de leg. agr.* ii. 29, *Rab. Post.* 22, *Phil.* vi. 19, cf. II *Verr.* v. 164, *Cat.* iv. 24; Brunt, *Laus Imperii* iv-vi. In 52 the Gauls allegedly hoped to obtain 'imperium libertatemque' (*BG* vii. 64). On coins *Libertas* wears a diadem (*RRC* no. 391. 3), or is crowned by Victory (391. 1), or appears on the obverse with Victory crowning Rome on the reverse (449. 4; Crawford's interpretation seems to me mistaken).

that his predecessors had taken all or most cases into their own jurisdiction, but only that they had intervened whenever it suited them; Cicero promised, as a matter of principle, that he would not do so. This was a matter for his own discretion, where unprivileged cities were concerned; treaties and charters guaranteed the favoured communities against the governor's intrusion. But even this freedom was precarious; if in the judgement of the Romans a free city misbehaved, a treaty could be denounced and a law or senatorial decree rescinded. The ambassador of the free Achaeans remarked in 184 that their treaty afforded them no security, since *imperium* belonged to Rome (Liv. xxxix. 37. 13).³¹

Moreover, no less than Athens, 'the tyrant city', and Sparta, the professed champion of Greek liberty, Rome tended to insist that her subjects or 'allies' adopted the forms of internal government that she approved. In the fourth century many Greeks had come to identify freedom with democracy; instances still occur in Roman times, but Rome did not tolerate democracy except in outward forms.³² It is thus not true, as Last said (*CAH* xi. 436), that the 'free' cities in her empire were merely 'deprived of untrammelled control of international relations, with the right to declare peace and war at will'. For Tacitus they were only nominally free (*Ann.* xv. 45. 1), and Pliny writes of the 'remaining shade and surviving name of freedom' still left to Athens and Sparta (*Ep.* viii. 24. 4). In their time the scale of Roman supervision over the cities' internal concerns was marginally increasing, but it had always been true that the Greeks had never had more freedom than their Roman rulers conceded; Romans would naturally have concurred in Plutarch's comment (824 c) that more might not have been good for them.

The imperial jurist Proculus, after saying that a free people is one

³¹ See generally Jones, 1940, chs. vi, vii; freedom divorced from tax immunity, ch. vii nn. 33, 35. Rights associated with freedom: Tod, *Greek Hist. Inscriptions* 123, 15 ff.; Polyb. iv. 84, xv. 24. It was the mark of all free peoples to live under their own laws, adopting Roman only by their own choice: Cic. *Balb.* 20-2, but the *lex Antonia* allows free Termessus use of its own laws and presumably courts only 'quod adversus hanc legem non fiat' (*FIRA* i². 11. 8), and probably few had, like Chios, jurisdiction over Romans (*SIG*³ 785). Aphrodisias: Sher 28B. 7. Cilicia: Cic. *Att.* vi. 1. 5, 2. 4).

³² Sparta: Thuc. i. 19, 144. 2, v. 82. 1; cf. Spartan actions after the King's Peace. Athenian apologists often represented their support of democracy in 'allied' cities as championship of freedom: Lysias ii. 55-7; Isocr. iv. 104-6, xii. 68; Plato, *Menex.* 242a, 243a, 244c; I do not believe that Athenian politicians ever admitted what was in Thucydides' view the truth, that their rule was tyrannical. Alexander fulfilled his promise to liberate the Greeks of Asia by installing democracies (Arrian, *Anab.* i. 18; cf. Diod. xvi. 91, xvii. 24); in fact they were his subjects. For freedom as democracy see Jones, 1940, ch. x esp. pp. 170 ff.; in *ILS* 31 (Lycia) *libertas* translates democracy, and Pergamum, a free city, honoured a Roman governor in 46 for restoring 'its ancestral laws and unenslaved democracy' (ibid. 8879; cf. Magie 156, 417). On the decay of democracy under the influence of the kings and of Rome see de Ste Croix, 1982, App. iv.

not subject to the power of another people, adds that it may none the less be bound by treaty 'alterius populi maiestatem comiter conservare' — 'to respect loyally the greatness of another people'. This clause appeared, for example, in the treaty made by Gades with Rome, and Cicero construed it as marking the subordination of Gades to Rome (*Balb.* 35-7). Proculus comments that though it does indeed imply the superiority of one party, the other is none the less free, just as clients are free, though unequal to their patrons in influence, rank, and sheer strength.³³ Some scholars suppose that the limited and precarious freedom that Rome granted was rooted in typically Roman social structure and ideas, and was so unfamiliar to the Greeks that they misunderstood what the Romans meant when they professed to be upholding the freedom of Greek cities. There is no warrant for this view. Centuries earlier the Spartans had professed to maintain the freedom of their allies without scrupling to impose on them oligarchic control when they had the opportunity, just as much as Rome did (n. 32). 'Perhaps all kings', wrote Polybius (xv. 24. 4), 'begin their reigns by making nominal offers of freedom to everyone'. Such professions had once been made for deception, but long experience had exposed the harsh truth that no power would readily leave full independence to states that it could dominate. Local self-government was probably all that most Greek beneficiaries of royal or Roman grants of freedom had come to expect, and all that Rome would accord.

For their part Romans were perfectly conscious that such freedom was not freedom in the fullest extent, and they could also use that ambiguous word, *libertas*, to designate the sovereignty that they sought to abridge. Cato, for instance, said that the Rhodians were to be excused for not wishing to see Rome utterly subdue Macedon, in the fear 'that under our single rule they might be in servitude to us: I consider that it was for their own *libertas* that they adopted this view' (Gell. vi. 3. 15). Caesar does not hesitate to admit that the Gauls who resisted him were fighting for freedom, even the Aedui (*BG* vii. 37), who were allies of Rome by treaty (i. 33): 'all men have a natural urge for liberty and hate a condition of servitude' (iii. 10). The very reason why Proculus had to insist that the inferiority of a dependent ally or client did not involve loss of freedom was that the restraints that flowed from such inferiority were naturally conceived to be inconsistent with freedom. There is no ground for holding that the grants of liberty made to dependent cities by Rome embody a peculiarly Roman concept that liberty as such is a status properly limited by some higher authority.

³³ xlix. 15. 7. 1: 'etiāmsi neque auctoritate neque dignitate neque viribus pares sunt' (codd. 'neque viri boni nobis praesunt').

They show only that for Romans, as for Greeks, 'liberty' could be convenient shorthand for privileges that fell short of that full independence which both the Greek and Latin terms also connote.

IV

Freedom, as we have seen, could never be for Greeks and Romans, who accepted slavery, an inalienable right inhering in the human personality: it necessarily denoted privileges that reposed on positive law, including custom. Misleading statements made by Cicero have induced the thesis that for the Romans it was actually coterminous with citizenship,³⁴ not necessarily that of Rome, since the Romans of course acknowledged that foreigners could be free, but also of any other state recognized by Rome. This thesis has been refuted: in Levy's formulation 'liberty was the precondition of citizenship, and citizenship its guarantee'.³⁵ Suffice it to note here that the Campanians, who were deprived of Roman citizenship for some time after 211, and the Junian Latins under imperial law, were both free, though stateless.³⁶ However, for Romans and for Greeks, liberty came to mean more than the legal status of a man who was not in some kind of bondage. If a community was said to be free when its citizens had some share in determining their own civic obligations, this freedom can be resolved into the rights of the citizens. Political freedom of the individual citizen can indeed be equated with his citizenship; Romans often associated their right or rights (*ius* or *iura*) with their *libertas*, or used the terms interchangeably. Thus Cicero apostrophizes the personal security guaranteed to Romans by the Porcian and Sempronian laws with the words: 'O nomen dulce libertatis! O ius eximium nostrae civitatis'. The latter phrase in itself illustrates how this or any other right which Romans identified as liberty did not belong to a man as such but was the special right ('*ius eximium*') of a Roman citizen.³⁷ The rights of

³⁴ See endnote 1.

³⁵ S^Z 1961, 142 ff.

³⁶ See e.g. Sherwin-White, 1973, 211, 329 ff.

³⁷ Cic. II *Verr.* v. 163 ('dulce': *Cat.* iv. 24, *Att.* xv. 13, 27; Pollio in *Fam.* x. 31, 3; Livy i. 17, 3, xxiv. 21, 3); for '*ius eximium*' cf. n. 30. *Ius* (or *iura*) *libertatis* and the collocation of *ius* or *iura* with *libertas* refer to protection of the citizen's person (e.g. II *Verr.* i. 7, ii. 16, v. 143, *Rab. perd.* 11 f., *Sest.* 30; Livy iii. 56, 8–10), electoral rights (*de leg. agr.* ii. 29), participation in comitial trials of political offenders (Livy xxxvii. 52, 5), free speech (*Planc.* 55; cf. 33), and eligibility for office (Sall. *Cat.* 37, 9). Sallust contrasts '*ius a maioribus relictum*' with '*hoc a Sulla paratum servitium*', and refers to the tribunes, who are always connected with freedom (n. 109), as '*vindices omnis iuris*' of the citizens (*Or. Macri.* 1, 22); in *Bj* 31, 16 f. *libertas* and *ius (populi)* are mere variants; freedom to vote on legislative proposals of tribunes is here to the fore; cf. section xiv. Cf. Cic. *ap.* Ascon. 76–8 C.; where he first describes the origin of the tribunate and other *iura* (cf. Sall. *Hist.* i. 11), and cites 'Porciam [legem] principium iustissimae libertatis [protection for the person; cf. endnote 8], Cassiam qua lege suffragiorum ius potestasque convaluit [cf. n. 103], alteram Cassiam quae populi iudicia firmavit [pp. 340 f.] *iura populi* is a term equivalent to *libertas* in Sall. *Cat.* 38, 3, *Or. Lepidi* 11, 16, 23.

Roman citizens were of course not entrenched in a written constitution any more than those of British citizens,³⁸ since at Rome, as in this country, there was no such constitution: they rested on particular customs and statutes, which could be modified or repealed by new legislation, in accordance with the rule of the Twelve Tables that whatever the people last enacted was binding in law.³⁹

The legal rights that Romans most explicitly and commonly subsumed under the title of freedom are of two types: immunity from arbitrary coercion and punishment by magistrates, and some degree of participation in political power. Neither derived from any abstract conception of freedom and its value, such as that which underlies, for instance, the American Bill of Rights: indeed they both originated in early times innocent of political theorizing. Specific liberties were sought and obtained to protect their holders against oppression and to secure their material interests. It does not follow that an appeal to liberty was never anything but a cloak for such advantages. The 'name of liberty was sweet', if only because men instinctively wish to live as they please. The right of citizenship was the more prized because it was 'eximium', setting the Roman above the slave and the foreigner. His freedom made him less subject to the will of others or better able to enforce his will on them. Independence, power, superiority to the less privileged were enjoyed most of all by the aristocracy, but the humblest citizen had some share in them. Without ever formulating any more or less coherent notion of freedom as an ideal, and least of all the doctrine that the individual has a right to develop his own personality as he thinks best, within the limits of social order and justice, Romans could value liberties they possessed for these reasons, as well as for the concrete material interests they might assume; and they could seek new rights, like the secret vote, in the name of freedom, by analogy with or extension of those which they already enjoyed. Bleicken (1972, 38) suggests that the significance of appeals to liberty at Rome was the less because they were made in particular situations by men acting from personal motives, and embodied no abstract idea of liberty. The motive of those who invoked the name of liberty is not very material to judging the effect of the appeal on those to whom it was made, and the absence of an abstract idea of liberty will not seem of much importance to Englishmen.

A limited similarity may be seen between the Roman experience and our own. It could be boasted in 1816 that 'liberty is the chief distinction of England from other European countries'. However, then (as now) it consisted only of a bundle of legal or customary rights with

³⁸ See endnote 2.

³⁹ Livy vii. 17, 12, ix. 34, 6; Cic. *Balb.* 33, *Att.* iii. 23; cf. n. 34.

no constitutional guarantee (n. 38). Even the Bill of Rights passed in 1689, 'our greatest constitutional document since Magna Charta',⁴⁰ enumerates only those rights which had recently been infringed by royal prerogative, to the disadvantage of interests which preponderated in Parliament. Freedom of worship, and of religious belief and expression, are certainly regarded as important elements in our liberty, but they were secured in full over a long period, and not so much from recognition of the principle that men ought to be free to hold, propagate, and practise whatever religious faith answers to their own convictions, as because it became politically expedient to make concessions to those who would not conform to the established religion. This is characteristic of the way in which English freedom 'slowly broadened down from precedent to precedent'.

V

It is of course true that our concept of freedom has ultimately come to embrace many activities to which it was not consciously related by the Romans, or indeed by the Greeks. This was partly at least because in medieval and early modern times the individual had been subjected to restraints which were not imposed effectively or at all in antiquity, or not felt as limitations of freedom, because consciously or unconsciously they were taken to be inevitable; the effect of social tradition may be in this respect as strong as that of physical laws which constrict the power of a man to do as he pleases, but are not normally seen as limiting his freedom. It was when changes in conditions made these restraints irksome that their removal in modern Europe was demanded in the name of liberty. New restraints, imposed by law, are always naturally opposed as infringements of liberty by those who suffer from them. So it was at Rome. Although in general Roman freedom is political in character, novel attempts to control private behaviour could be denounced as inimical to freedom.

Benjamin Constant observed that the mere size of the modern state made it impossible for men to enjoy that continuous and direct part in government which Greeks and Romans were prone to identify with liberty, and that his own contemporaries were more concerned than the ancients to limit the intrusion of the state into private life; political liberty itself, in the sense of the power that citizens could now exercise only in periodic elections, was for him chiefly valuable because it could

⁴⁰ D. Ogg, *England in the Reigns of James II and William III*, 141 ff. Note the use of 'liberties' in English to denote 'privileges, immunities or rights enjoyed by prescription or grant' (*Oxford Dict. s.v.*, whence the quotation of 1816).

be used to obtain institutional guarantees for private freedom.⁴¹ At first sight Constant's view of ancient liberty may seem hardly applicable to Rome, since most Romans in the middle and late Republic could take no direct and continuous part in public affairs. But they had had more opportunity to do so in earlier times, when Rome's territory and population were relatively small, and that was surely the formative period when Roman ideas of freedom evolved. However, Constant's comparison between ancient and modern ideas of liberty, though not devoid of truth, is not satisfying.

(i) Neither Greeks nor Romans conceived the state as an impersonal entity which could be sharply contrasted with the individual citizen. Aristotle represented what they all thought in describing it as a kind of partnership between the citizens or free men (*Pol.* 1252^a1, 1279^a21). Officially Athens was 'the Athenians', and Rome 'the Roman people of the Quirites'. The Latin words 'civitas' or 'res publica' may be translated as 'state', but fundamentally the former means 'the quality of being a citizen' or 'the body of citizens', and the latter 'that which belongs to or concerns the people'; it may best be rendered 'commonwealth'. 'To be free' and 'to possess a commonwealth' are for Cicero (*Sest.* 81) equivalent expressions.⁴² The citizen was, as it were, a shareholder in the state, and at Rome, as at Athens, men thought it quite proper to take dividends from its property: the state lands and revenues, Cicero tells the people, belong to them.⁴³

Of course the state laid heavy burdens on the persons and sometimes on the property of the citizens. Romans could treat conscription and taxation as marks of servitude. But it was more manifest than it has often been in the modern era that the defence of the community in war, for which these burdens were imposed, conduced to the safety of the citizen, when the consequences of defeat might be massacre or enslavement; in his own interest and in that of all who were dear to him the individual might feel a more unconditional commitment to his community. This devotion was indeed diminished or obliterated if he considered that the organization of his community was injurious to him. This was the origin of the internal conflicts (*stasis*) so prevalent in Greek cities, and therefore of the development of Greek political theory, which was not primarily concerned with the nature and validity of the citizen's obligation to his state, the question which has

⁴¹ *De la liberté des anciens comparée à celles des modernes*, 1819.

⁴² Hellegouarc'h 545 n. 2 assembles texts connecting *libertas* and *res publica*; note esp. Cic. *Phil.* x. 7 f., where 'ius rei p.' is *libertas*. Officially the Romans state remained a *res publica* even in Justinian's usage (Brunt. *JRS* 1977, 116); Tacitus occasionally uses both terms to mean the Republic (*Hist.* i. 16, 50, *Ann.* i. 3, 4, 33, ii. 82); cf. Suet. *Aug.* 28. 1 (contrast 2).

⁴³ Cic. *de leg. agr.* ii. 48, 55, 80-2, 85; C. Gracchus *ap. Gell.* xi. 10. 3. Badian, 1967, brings out how the empire was exploited to meet the cost of 'popular' measures.

tended to dominate modern political theory, but rather with the form of state which would best guarantee his welfare. It is indeed obvious that once Rome had acquired imperial power the individual Roman would not have had cause to identify his own good with the survival of his state, which was no longer in peril; but in the formative period of Roman history he must have been subject to the same apprehensions as Greek citizens, and the outlook thus engendered could have persisted after the conditions that created it had passed away.⁴⁴ The annalists of early Rome did in fact suppose that civic burdens, which were always resented as marks of servitude when imposed by an autocrat or a foreign power, had been grievous to the poor in the fifth and fourth centuries; perhaps they were importing into that period feelings aroused in the time of overseas wars (see endnote 3). At any rate Romans as well as Greeks apparently felt no tension between the freedom of the individual and the authority of the state, provided at least that the individual had some share in that authority, and was not oppressed by it.

(ii) In actual fact the Roman state interfered much less in the private activity and beliefs of individuals than did the authorities of both state and Church in the subsequent periods to which Constant looked back, or than states do in our time. Romans could practise some activities in ways later regarded as essential to individual freedom, without themselves prizing such freedom as a right, perhaps just because it had never been contested. Moreover, the effective power of the state, even under the Principate, to curtail men's private liberty was very limited.

In the late Republic freedom of philosophical, religious, and even political speculation was unchecked.⁴⁵ Any supposed attempt to substitute monarchy for the Republic could be treated as a crime worthy of death, but there was nothing to hinder Cicero from making a case in his *de republica* for the thesis that ideally it was the best form of government. By contrast in the Principate, if the relative merits of different constitutions were discussed at all, it became necessary to decide in favour of rule by a single man of supreme wisdom, such as the emperor could be deemed to be; and though the old teaching that monarchy could easily degenerate into tyranny, the worst kind of government, could not be forgotten, it was unsafe, at times when the emperor could fit any delineation of the tyrant to his own head, to expose its evils or even to represent as tyrannical the conduct of a

⁴⁴ Eur. fr. 360 Nauck, esp. 39 f.; Democ. 252 D. (in Diels-Kranz, *Fr. der Vorsokratiker*, ii); Thuc. ii. 60. 2-4; cf. Sall. *Cat.* 6 on early Rome: 'libertatem patriam parentesque armis tegere'.

⁴⁵ For I. Berlin, *Four Essays on Liberty*, 1969, 118, remarks that the studies of social and political theory 'spring from, and thrive on, discord'. In suppressing discord the Roman Principate dried up their sources.

former ruler, which too closely resembled that of the reigning prince. Books were to be burned for containing such seditious views and their authors put to death, and philosophers who gave them currency were expelled from Rome. Such restrictions on freedom were almost unknown in the Republic.⁴⁶

It is true that in 92 the censors banned the teaching of Latin rhetoric within Rome, but it was soon flourishing without further impediment (Suet. *de rhet.*, esp. 1). In 155 old Cato persuaded the senate to dismiss as rapidly as possible an Athenian embassy composed of philosophers, whose lectures (he thought) were turning the aristocratic youth of Rome away from their old respect for laws and magistrates; the chief offender was presumably the Academic sceptic, Carneades. Both philosophers and rhetoricians were expelled from the city in 161 and 154 (or 173).⁴⁷ But in Cicero's time there was no restriction on philosophic speculations. He himself adopted Carneades' views. Epicureanism he abhorred, refuting its doctrines and denouncing its tendency to corrupt morals, but it never entered his head that it should be legally proscribed. It may be relevant that theoretical beliefs did not necessarily affect the practice of men who embraced them. Epicurus inculcated political quietism, but his teaching was ignored by such followers as L. Piso (*cos.* 58) and Caesar's assassin, C. Cassius.⁴⁸ The traditional cults presupposed the beliefs that gods existed, and in human form, that they would afford men aid and protection, that their favour could be procured by prayers and sacrifices, and that they gave signs, which men might acquire the skill to interpret, of their approval or disapproval of proposed actions, and so made it possible to avert disasters; in various ways all the philosophic schools impugned these conceptions. The Epicureans denied that the gods intervened in human affairs. Stoics tended to assert the ineluctability of fate. Most philosophers decried anthropomorphism. The sceptics of the Academy doubted everything; Cicero, an augur himself, would expose divination in particular to devastating criticisms. But such subversive discussions were confined to small circles; though they were published in books, we can assume that the circulation was restricted by their price, the lack of

⁴⁶ Tac. *Ann.* i. 72, iv. 34 f., *Agr.* 2 f., etc.; book-burning was first authorized under Augustus ('res nova et inusitata de studiis', Sen. *Controv.* x. pr. 3-5); cf. F. H. Cramer, *Journ. Hist. Ideas* 1945, 157 ff.). Men were not free to write candidly of reigning emperors (*Ann.* i. 1, *Hist.* i. 1), and indictments of past tyrants could be treated as aspersions on the current ruler, if his conduct were similar; even ideal comparisons of the true and virtuous monarch with the tyrant could be dangerous. The expulsions of philosophers from Rome under the Flavians belong to this context.

⁴⁷ A. E. Astin, *Cato the Censor*, 1978, 174 ff., for full discussion.

⁴⁸ Cf. Lucret. ii. 1-61. A. Momigliano, *JRS* 1941, 149 ff., collects evidence for Epicureans in politics; his suggestions that they were active as Epicureans and that the ex-Pompeian Cassius was simultaneously converted to Epicureanism (Cic. *Fam.* xv. 16) and to the cause of Republican freedom are quite implausible. See also O. Murray, *JRS* 1965, esp. 173 and 178 ff.

literacy, and the complexity of the subject matter. Philosophy, as Cicero remarked (*Tusc. Disp.* ii. 4), 'was content with a few judges and shunned the multitude', and Lactantius was surely right in glossing this (*Div. Inst.* iii. 25) with the observation that it required so much preliminary study that it was beyond the reach of women, slaves, artisans, and workers on the land. Even under the Principate it was only the speculations of political theory that were curbed. It could indeed be felt that the very diversity of theological systems, to say nothing of the impiety of some, might undermine faith in the cults among the vulgar,⁴⁹ but there was all the less risk of this, since the enlightened were one and all ready to conform externally and set their inferiors an improving example; as the efficacy of traditional forms of worship was thought to depend on the exactitude of their performance and not on the mental attitude of the worshippers, it was unnecessary 'to make windows into men's souls'.

In public even Epicureans and sceptics would practise the cults, and sceptics would actually affirm the truth of the beliefs implied, for which they could find no rational justification; they were of course equally unable to refute them. For such conformity there might be various explanations. Those who adopted a spiritual conception of divinity might regard acts of conventional worship as symbolizing their genuine reverence for it. The Epicureans too claimed a true piety, though their enemies alleged that at heart they were atheists, and that fear of popular opprobrium made them hypocrites. In some minds there was doubtless a lurking suspicion that the generally received beliefs were true; it was then a kind of insurance to act as if they were. But it was probably a common view among the élite that, however erroneous the superstition of the masses might be, it served a necessary social purpose. Cicero sometimes stressed, and exaggerated, the utility of the state religion for purely political ends (ch. 1 n. 51). In public he asserted the age-old and long-enduring claim that it was by Rome's special devotion to her gods that she had acquired by divine favour her imperial dominion (ch. 1 n. 98). We can hardly estimate the effect of this conviction on the morale of Roman soldiers. It could also be held that religion was the indispensable basis for social morality (ch. 1 n. 101). It is hard for us to see the connection, since in most of the cults there was no moral implication, and no explicit ethical instruction was attached to any; for instance, no dogmas warning the wicked of eternal punishment. Perhaps it was felt that if the force of tradition were weakened in the religious sphere it would also be undermined in every other. At any rate Varro, who adhered to a philosophic theology

⁴⁹ Varro *ap. Aug. Civ. Dei* vi. 5; hence philosophic theology is not for the *forum*; cf. Cic. *de nat. deor.* i. 61, *de div.* ii. 28.

remote from that which he himself could regard as prevalent superstition, was none the less anxious that all the traditional rituals should be kept up and revived. In the same way Cicero, after expounding a sort of Stoic pantheism in the first book of his *de legibus*, inconsequentially proceeds in the second to prescribing a code of sacred laws modelled with only minor amendments on Roman tradition. In his later works he reverted to Academic scepticism, but Cotta, his mouthpiece in *de natura deorum*, still insists on the necessity of maintaining the established religion, and even (as later sceptics would do) his acknowledgement of its truth; while in *de divinatione*, after traversing all the arguments in favour of the official Roman modes of divination or of any claims that the gods revealed their will or the course of future events to men, he declares at the end that there must be no change in the ancestral institutions.⁵⁰

Cicero made no provision for censorship of speculative beliefs in his ideal code of laws, unlike Plato (whom he had in mind), perhaps because they had so little effect on practice. But he did not allow freedom of worship. Foreign cults were to be admitted only if the state sanctioned them.⁵¹ There was in fact a long tradition of naturalizing them, and then in such ways that they were harmonized with Roman modes of worship (Dion. Hal. ii. 19). In 186 secret and presumably orgiastic Bacchanalian rites had been repressed on avowedly moral grounds. Occasional efforts were made in the late Republic and Principate to ban the introduction of certain oriental religions, though in course of time they all obtained the sanction of the state. With the exception of Judaism and Christianity they were all compatible with the continued recognition of the ancestral gods. Not indeed that the state enforced any worship on private individuals; conformity only became necessary if men accepted offices which entailed sacral functions; it was not until Decius made the first systematic attempt to root out Christianity that all men were required to sacrifice to the gods as proof that they had not defected to the new faith. In any case, in comparison with medieval and modern rulers even the emperors lacked the machinery to impose religious uniformity. They were best able to undertake this task when abetted by the zeal and organization of the Church. One may recall Tacitus' remark on astrologers, 'a class of men which our state will never tolerate or forego' (*Hist.* i. 22). Toleration was not a principle of government, except in so far as each subject people could normally retain its own ancestral religion; in practice there was a large measure of freedom for men to worship, as well as to believe, as they chose.

⁵⁰ See endnote 4.

⁵¹ Latte, 1960, 270–84, 342 ff. (for earlier reception of foreign religious practices, ch. vii). Cf. also J. A. North, *Proc. Camb. Phil. Soc.* 1979, 85 ff., on the Bacchanalia.

Cicero's code also gives the censors power to prohibit celibacy and to regulate the morals of the people (*de leg.* iii. 71); he actually exhorted Caesar, who had assumed the unfitting role of *praefectus morum*, to encourage procreation and repress sexual misbehaviour (*Marc.* 23), and Augustus was to attempt to carry out this programme. However, in the period of the Republic for which we have evidence, men were not compelled to marry and have children, and the supervision over morals that traditionally belonged to the censors was not exercised continuously, nor did it compare in strictness with the control imposed in later times by ecclesiastical jurisdiction; in any case it chiefly affected (as did Augustus' marriage laws) the upper classes. It was their luxury that a series of sumptuary laws, attested from 217 to Augustus' reign, sought to curtail. None seems to have proved enforceable.⁵²

Of course these enactments, like the intermittent severity of censors, represent attempts by the state to regulate private life. But it is an error to suppose that no one ever protested against them as infractions of liberty. In 195 when it was proposed to repeal the Oppian law that prohibited displays of female finery, according to Livy, Cato, in defending the law, had to meet the claim that its repeal was justified in the name of liberty; in his view it could more properly be styled licence. This is one of the texts sometimes adduced to prove that 'the Roman conception of liberty' comprised the principle of due restraint and moderation (p. 320). It is relevant that the people did not endorse Cato's judgement: they repealed the law.⁵³ In 97 the tribune Duro-nius, urging the repeal of another sumptuary law, is represented as saying: 'you have been bound and restrained by the bitter bonds of slavery, by the law that commands you to live soberly . . . What use is freedom, if we are debarred from ruining ourselves with luxury, if we wish?' He was expelled from the senate by the censors. Here again proof is found that the Romans rejected so anarchic a conception of freedom. But the voters had adopted Duro-nius' proposal (*Val. Max.* ii. 9. 5). Moreover, the inefficacy of sumptuary laws which remained on the statute book shows that they were not in sufficient accord with the real sentiments of the citizens. The emperor Tiberius pronounced their futility (*Tac. Ann.* iii. 53 f.). For Tacitus any kind of moral legislation, however well justified by degeneration in social behaviour, is coercion

⁵² Laws of 217, 215, 182, 161, 143, 115; a Licinian law before 103, and Antian of 68 (?); Sulla, Caesar, and Augustus all legislated in this matter (evidence in Rotondi, *Leges publicae populi romani*). Cf. ch. 1. n. 74. *Cic. Att.* xiii. 7 shows, *contra* Dio xliii. 25. 2, that Caesar's measure was ineffective. Augustus' marriage laws: *IM*, App. 9.

⁵³ Livy xxxiv. 1-8, esp. 2. 13. According to Livy the advocates of repeal were in fact arguing for the liberty of fathers and husbands to keep women under their subjection without state intervention (7. 11-13)!

(*Ann.* iii. 26. 1); even Numa had 'bound the people down by religious cults and divine law', (26. 4), and the enactments by which Augustus visited childlessness with financial pains and penalties, to say nothing of his harshness towards adultery, constituted 'stricter bonds' (28. 3).

Hence, it is not true, as Schulz held, that 'freedom to the Romans never meant the capacity to do or leave undone what one pleased, to live at one's own sweet will' (my italics);⁵⁴ this was certainly a view of freedom that some Romans entertained; and we shall see that this meaning was often inherent in usages of *liber* and its derivatives. It may seem the stranger that Schulz should have fallen into this error, since he himself delineated 'the extreme individualism' that pervaded Roman private law, for example the law of marriage, of associations (when there was any community of rights and obligations, as between coheirs or business partners, each person concerned 'must be at liberty to escape from the union and its limitations at any time'), of ownership, and of succession: he depreciated those obligations which did restrict a man's absolute control over his property. In analysing the classical law concerning contracts of hire, he remarked that it corresponded to social and economic conditions in which the *beati possidentes* preponderated, with the result that the rules of law suited their interests: 'parties were perfectly free to form the contract as they liked, which in this case means as the capitalist liked.' A 'generous freedom of disposition' was accorded to the testator: it seems to have been more generous under the Twelve Tables than it became as a result of praetorian and legislative modifications, some doubtless introduced to prevent men from exercising their rights in ways which had never been envisaged when the fifth-century code was drawn up, and which remained offensive to general opinion.⁵⁵ Still, one may question whether Schulz should have subsumed under liberty legal rules in which, though the modern theorist can detect its operation, the Romans themselves failed to enunciate it explicitly; they were not clearly conscious of it as a 'principle' to be respected, perhaps because it was so little infringed. To some modern thinkers the right to private property has appeared to be an essential part of freedom, perhaps its guarantee. Cicero, who thought that it was one of the chief purposes of social and political organization to ensure that each man 'retained his own', and who

⁵⁴ Schulz, 1936, 140 f.

⁵⁵ Schulz, 1936, 146 ff., 1951, 102 ff. (eulogizing the 'purely humanistic law of marriage . . . as a free and freely dissoluble union of two equal partners for life'). Law of hire: *ibid.* 542-6. Praetorian restrictions on testator's freedom: 266 ff.; cf. also provisions of *leges Voconia* (169) and *Falcidia* (40) and of Augustan marriage laws. The praetor also limited the testamentary rights of freedmen in the interest of patrons. The spendthrift could be deprived of disposal of his property (*ibid.* 200-2). In old days the censors could penalize a man who farmed his land badly (*Gell.* iv. 12). See n. 3 for restraints on slave-owners.

deplored some measures of land distribution or relief of debtors as assaults on property (though their advocates certainly never attacked it in principle), only hints at a connection between property and freedom; it may be that *populares* argued that the poor were not truly independent if they owned nothing.⁵⁶

The Twelve Tables allowed citizens to form associations (*collegia*) with what rules they pleased, provided that they did nothing deleterious under public law. In the late Republic they were active at riots in Rome, and the senate dissolved them in 64. This was an usurpation of legislative authority. Clodius' law of 58 reasserted and perhaps extended the right of association. He could have appealed, as Cicero so often did, to ancestral custom, but also, as for his other measures, to liberty, a word ever on the lips of *populares* like himself. Men could have become aware that the right was part of their freedom, once they had been deprived of it. Caesar and the emperors were to impose new restrictions. *Collegia* now required a governmental licence granted only on certain conditions. It may be doubted if the rules were invariably operative, but the change illustrates the abridgement of freedom under the Principate.⁵⁷

The *collegia*, though some consisted of men following the same trade, seem to have served primarily social and religious purposes; unlike medieval guilds they had no legal power to monopolize production, determine standards, or fix wages and prices. In general the state too made no attempt to regulate economic activity.⁵⁸ *Laissez-faire* prevailed, though it was not an axiom of economic theory, of which there was virtually none,⁵⁹ nor grounded on doctrines of personal freedom.

For example, though the state imposed port dues and taxes on sales, it was only to raise revenue. Protection of trade and industry was almost unknown. When the state did intervene, it was with little success. Prohibitions or limitations of lending money at interest were of small or transient effect.⁶⁰ The apparatus for economic controls did

⁵⁶ *de offic.* i. 20 f., 51, ii. 73, 78, iii. 21–4, *de rep.* i. 49 on property rights; see endnote 3 and *Phil.* xiii. 1 for faint association with *libertas*; cf. pp. 347 ff.

⁵⁷ XII Tables: Gaius, *Dig.* xlvii. 22. 4. Numa was supposed to have instituted *collegia* of artisans (Plut. *Numa* 17; Pliny, *NH* xxxiv. 1, xxxv. 159), and the tyrant Tarquinius Superbus to have dissolved numerous associations as seditious (Dionys. iv. 43). *SC* of 64 and Clodius' law: Cic. *Pis.* 9; Ascon. 7 f. C.; Dio xxxviii. 13; for Clodius and *libertas* see nn. 142, 158; Caesar and Augustus: Suet. *Caes.* 42, *Aug.* 32. For exhaustive treatment see F. M. de Robertis, *Il diritto associativo rom.*, 1938.

⁵⁸ See also ch. 3 pp. 176 ff.

⁵⁹ Finley, 1985, ch. 1.

⁶⁰ Cato, *de agric. pr.*: 'maiores nostri sic habuerunt et ita in legibus posiverunt, furem dupli condemnari, feneratorum quadrupli.' Allegedly interest rates were limited and finally prohibited by the XII Tables (Tac. *Ann.* vi. 16) and plebiscites of 357, 347, 342 (Livy vii. 16, 27. 3, 42. 1); a *lex Marcia* of unknown date was passed 'adversus faeneratores, ut si usuras [perhaps at an excessive rate] exegissent, de his reddendis per manus iniectionem cum eis ageretur' (Gaius iv. 23). For contentions on the question in the second century Astin (n. 47), pp. 319–23 App. i. 54.

not exist. The state was strong enough to perform the vital functions of mustering troops and raising money to pay for them, but for very little else. It did not even assist the plaintiff in bringing a defendant to court or in executing the court's judgement.⁶¹ The penal laws were dormant, unless private citizens would come forward to prosecute offenders. No doubt it was on this account that sumptuary laws were inoperative. Rome itself was unpoliced before the Principate. But the administrative feebleness of the state persisted even then. For instance Domitian could not carry out his restrictions on viticulture (Suet. *Dom.* 7. 2). With a larger bureaucracy fourth-century emperors did seek to regiment economic life. Diocletian set maximum prices for virtually all goods and services; infraction was to be visited with death; the empire (it is said) was deluged with blood; but in the end his edict had to be withdrawn. Many sorts of men were to be bound to their hereditary vocations, but the laws were often evaded, and we cannot be sure how effective they were.⁶² The autocrats of this time had an army of officials to do their will, which the Republican government had lacked, but they could not keep these very officials under control.⁶³ As for Republican times, there was no need at Rome for any agitation to sweep away in the name of freedom the innumerable regulations of economic activity which characterized the medieval and early modern periods: they did not exist.

No doubt social pressures restricted the individual far more than the state did. To J. S. Mill they represented the most insidious danger to liberty. Of this most Romans in all probability would hardly have been conscious. Following Panaetius, but as always exercising his own judgement, Cicero actually laid down that the 'decorum' required of a good man was to be found in conduct that met with the approbation of his fellows (*de offic.* i. 99); in illustrating this doctrine, he takes examples from Roman proprieties, which could differ from the Greek examples Panaetius would have given, for instance the ban on nudity (*ibid.* 127, 129); and it is he, no less than Panaetius, who holds that the established customs and conventions of a society are binding rules, and that we may not treat as exemplary the deviations of a Socrates or an

232 says that a ban on usury stood in the statutes in 89; it had clearly become obsolete on the principle that laws could be repealed 'tacito consensu omnium per desuetudinem' (Julian, *Dig.* i. 4. 32. 1); Caesar's law 'de modo credendi possidendique intra Italiam' similarly fell into abeyance (Tac. *I.c.*), as had the law *de modo agrorum* partially revived by Tiberius Gracchus. Cf. ch. 3 nn. 106–11 with text.

⁶¹ Kelly, 1966, ch. 1.

⁶² *Lact. de mort. persec.* vii. 6. 7; A. H. M. Jones, *Later Roman Empire*, 1974, ch. xxi.

⁶³ See e.g. *Cod. Theod.* viii. 5 *passim*; the more scattered evidence from the Principate (S. Mitchell, *JRS* 1976, 106 ff.) indicates the earlier prevalence of similar abuses. Nero and later emperors could also not make effective rules to prevent extortions by publicans (Tac. *Ann.* xiii. 51; Ulpien, *Dig.* xxxix. 4. 12 *pr.*).

Aristippus (ibid. 148). His tone is not polemical, and he doubtless counted on general assent. Of course eccentricity was far from uncommon among the high aristocracy, of whom we happen to know more than of the rural and municipal gentry, to say nothing of the mass of the population, and the most open contravention of traditional rules of behaviour does not seem to have injured nobles in their political careers. How often, if at all, they asserted their right as free men to set these rules aside we cannot tell.

VI

I now turn to modern claims that the Romans had their own distinctive conception of freedom, as not merely subject to necessary restraint but comprising restraint as an element inherent in its very nature, and far different from the Greek conception of *eleutheria*.

Wirszubski remarks that 'freedom, comprising as it does two different concepts, namely "freedom from" and "freedom to", neither of which admits of any but general definitions, is a somewhat vague term'.⁶⁴ A man would be absolutely free if he were (a) free *from* all human restraints and (b) free *to* realize all his desires, subject only to physical limitations. Since such absolute freedom is obviously unattainable, he will think it enough if he is (a) free *from* all human restraints except those which he consciously or unconsciously accepts, and (b) free *to* realize his desires so far as they are compatible with those restraints. It is clear that these 'negative' and 'positive' conceptions of freedom to a great extent overlap. The slave owner is free *to* make his slave work for him as he pleases in proportion as he is free *from* any constraints of law or public opinion. But the 'positive' conception may go further. Ancient thinkers, however far they exalted the authority of the state, had not indeed evolved the notion of some moderns that the liberty of the real self can be promoted when the state compels the individual to do for his own true good what he does not consciously wish to do. But it is also a positive conception of freedom which identifies it with a share in political power. Both Greeks and Romans held that in one sense it did consist in the exercise of political rights; of course this sort of liberty might also be the guarantee of negative liberty, e.g. freedom from arbitrary punishment. It is no less clear that the freedom, negative or positive, of one man or set of men may be the slavery of another man or set of men. The freedom of the master is correlative with the servitude of his chattel. Political rights may signify power for some, subjection for others. The underprivileged may

⁶⁴ Wirszubski 1; cf. Berlin (n. 45), ch. III.

complain in the name of liberty if they suffer restraints from which others are exempt or if they lack power which others enjoy. Thus a connection arises between freedom and equality. Romans spoke of *aequa libertas*. Equally the privileged may claim that their own liberty is abridged by new restrictions, which may actually enlarge the liberty of the rest. In practice liberty means different things to different people, and becomes the battle-cry of opposed sections of the community. It would be extremely surprising if all Greeks or all Romans had agreed even among themselves on the specific rights through which freedom negative or positive was to be realized. Living in a multitude of cities with varying social structures and political systems, each of which was liable to bitter civil conflicts, the Greeks could hardly be expected to have any single and concordant view. But Romans too, who lived through the struggles of the early and late Republic, are no more likely to have been in agreement. Those who contrast Greek and Roman ideas seem to be really contrasting Athenian democratic ideas, which they sometimes misunderstand, with those held, not by all Romans, but by Roman aristocrats. Of course, since the Roman political system was very different from Athenian democracy, it is easy enough to show that there were differences in the rights that Romans and Athenians saw as constituents of freedom. I may give one paradoxical instance. It was Romans, not Athenians, who treated personal protection against magisterial power as an important element of freedom. This was because the *imperium* of Roman magistrates made them potentially oppressive, as magistrates could not be in the Athenian democracy. Athenians did not need the *ius provocacionis* or the tribunician *auxilium*. Particular forms of liberty are valued most when they become necessary in practice to protect men from some kind of coercion inimical to their desires and interests.

As we have seen, Schulz denied that *libertas* ever meant doing as you please. He held that limitations were inherent in the Roman conception; this is a very different matter from acknowledging that different Romans saw the necessity of limiting their own freedom in different ways, and still more that of others. He also claims that '*libertas* is a truly Roman conception, clear, limited, practical, somewhat matter-of-fact' (n. 54). Yet neither he nor anyone has been able to delineate this clear, unitary conception with any precision. He and others delight in contrasting it with the licence supposed to characterize Greek *eleutheria*. For instance, Hellegouarc'h set off the egalitarian and democratic view of freedom supposedly prevalent in Greece, which he took to be essentially negative (as if belief in the sovereign power of the people could be so construed), against the positive view of the Romans, positive apparently because it included the notion that free men owe

deference to their superiors! It will be seen later that Romans of all ranks could treat deference to the authority of others as antithetic to their own *libertas*, and it may be suspected that scholars who cannot discern this are foisting on the admired Romans their own ideal.

Schulz specified one particular limitation inherent in *libertas*, which would illustrate how Romans moralized the concept: they recognized that 'one symptom of the liberty of a human being is that he grants liberty to others'. Kloesel (pp. 134 f.) and Wirszubski (p. 8) more or less agreed. Of course such recognition of human rights by slave-owners is quite unthinkable. Schulz adduced only one text in support of this absurdity, and he misunderstood it.⁶⁵

Certainly the conception that in Hobbes' words 'a free man is he that . . . is not hindered to do what he hath the will to do' was current in Greece. Thus at Delphi manumitted slaves were entitled 'to do what they wish and run off wherever they want' (e.g. Collitz, *GDI* 1685-7). In his *Republic* Plato portrayed a democratic city full of liberty and of freedom of speech, in which everyone was allowed to do whatever he wished; he would then satisfy every desire without regard to law and morals in a society unrestrained by any authority (557 f., 562-4). In the *Laws* again he censured the 'total' freedom at Athens in much the same way (698-701), while conceding that some degree of freedom, or some compromise between freedom and complete subjection, is beneficial (701e; cf. 694a, 697c). On the same footing Aristotle once suggested that Sparta alone had grasped the necessity of forming the character of her citizens; elsewhere men lived as they pleased (*EN* 1180^a24 ff.). He says that this was one, (not the only), democratic conception of freedom (*Pol.* 1310^a27 ff., 1317^b11). It is obvious that Plato disapproved of freedom as he describes it, while Aristotle indicates that true freedom is not to be found in mere absence of restriction; there are hints that he regards the free man as one obedient to the law or reason in his breast (*EN* 1128^a32, *Met.* 1075^a19). But we need not doubt that 'doing as you like' was one conception of freedom common among the Greeks. We shall see that this was just as true of the Romans.

⁶⁵ Schulz, 1936, ch. viii. Livy xxxvii. 54. 6, from a *Rhodian* speech to the senate: 'rerum natura disiungit [the Rhodians from king Eumenes], ut nos liberi etiam aliorum libertatis causam agamus, reges serva omnia et subiecta imperio suo esse velint'; Schulz says that only the second half of the sentence comes from Polyb. xxi. 22, but the first half is simply a rhetorical antithesis to the second, and the ideas are Greek. The Rhodians are not granting freedom to others, but arguing that the Romans in conformity with their general policy of liberating Greeks should not subject any Greek cities to Eumenes; they are pleading the cause of other *Greeks*, as distinct from barbarians (ch. 54. 11), who can properly be handed over to a king. The argument is also reminiscent of the *topos* on the common interest of democratic and therefore free cities in Dem. xv. 18-21. Respect for others' freedom is approved in Livy vii. 33. 3, xxiii. 12. 9, but these and other texts cited by Wirszubski 8 n. 5 do not show that it was conceived as part of one's own. Cf. also Kloesel 128 ff.; Wirszubski 35, 112; Hellegouarc'h 542 ff.

The Stoics took the negative sense of freedom and gave it a different twist. Cicero writes, in formulating their views: 'What is freedom but the power to live as you wish? Who then lives as he wishes, except the man who lives aright?' He whose life is not directed by moral principles is a slave to material things outside his own control and to his own passions. Only the wise man is free, because in accordance with the divine reason within him he conforms himself to the dispensations of a beneficent providence and does not see them as constraints, like the Christian submitting to God, 'in whose service is perfect freedom'⁶⁶ The Cynics inculcated the doctrine that in order to be free a man must rid himself of all desire for material goods or anything that fortune could deny.

Throughout lands of Greek culture, perhaps including Italy, popular preachers disseminated such ideas.⁶⁷ Now Ennius wrote (fr. 300-3 V.):

sed virum virtute vera animatum addeceat
fortiterque innoxium stare adversus adversarios;
ea libertas est, qui pectus purum et firmum gestitat;
aliae res obnoxiosae nocte in obscura latent.

It is proper for a man to live inspired by true manliness and to stand against his adversaries strong and blameless; it is freedom when he bears a pure and steadfast heart; all else is servile, hidden in the darkness of night.

Kloesel held that this cannot be a mere translation from Ennius' Greek model, Euripides' *Phoenix*, for then the Greek lines would have been preserved by an excerptor, like so many other Greek aphorisms on freedom! Kloesel inferred that Ennius was setting out a truly Roman conception of freedom in which the limits imposed by moral rectitude are inherent. But there is no other clear instance of this loaded sense of *libertas* in Latin, except in writers who were subject to Stoic or Christian influence;⁶⁸ it is in fact a more natural usage for Greek *eleutheria*. There is not the slightest objection to supposing that Ennius reflects the moralizing of Greek teachers of his day. Similarly the apophthegm recommended to orators that he must be deemed free who is no slave to vice (*ad Her.* iv. 23), is clearly one of several borrowed from the Greek schools.

⁶⁶ *Parad. St.* 34; *de offic.* i. 70. Freedom often has this sense in Seneca and Marcus Aurelius; see esp. Epict. iv. 1.

⁶⁷ See e.g. Diog. Laert. vi. 71; Dio Chrys. xiv. lxxx. However, Cynicism hardly penetrated Rome in the Republic (D. R. Dudley, *History of Cynicism*, 1937, ch. vi). Epicurus too said that 'the greatest fruit of self-sufficiency was freedom' (Bailey, fr. 77), and Epicureans claimed to free men from (superstitious) fear (Cic. *de nat. deor.* i. 56), but freedom is not prominent in Epicurean teaching.

⁶⁸ Kloesel 126 ff. But see *TLL* s.v. *libertas* 1315. 70-1316. 43.

Greeks also took a positive view of freedom. Admitting that it was fundamental to democracy, Aristotle identified it in effect with the sovereignty of the majority.⁶⁹ Jacqueline de Romilly observed that Greeks could regard dominion over others as an extension of freedom.⁷⁰ Romans could share this way of thinking. As we have seen, the unqualified freedom that Rome possessed as a state derived from her imperial strength. Within the state too power and liberty are assimilated. Scipio Aemilianus could say that *dignitas* (worth and rank) sprang from integrity, *honor* (office and distinction) from *dignitas*, *imperium* from *honor*, and *libertas* from *imperium*. In other words a man was most free when he had the fullest right to enforce his own will. Similarly the emperor Tiberius spoke in the senate of the great and unrestricted ('tam libera') power with which he had been vested. He could be charged with destroying the liberty of the magnates, when he curtailed their influence in the courts.⁷¹ Cicero refers to the people's 'ius potestas libertasque' in one breath. You will not satisfy the people's desire for *freedom*, he argues, by giving them only a little *power*. Catiline is made by Sallust to adjure his associates to reclaim their freedom: he means a share in the influence, power, offices, and riches of which they had been deprived.⁷² Livy represents the favourites of Tarquin as complaining that their loss of power amounts to servitude (ii. 3. 3). The 'excessive liberty' of the people, of which aristocrats complain in his story, is identical with their 'excessive power' (iii. 57. 6, 59. 1 f.). So too in private life the 'freedom' of the husband consists in his control over his wife (xxxiv. 2. 2).

It is indeed power that enables men, within the bounds that they possess it, to do as they like. But this anarchic conception of freedom cannot be seen as typical of Greek democratic thinking. Plato merely produced a model of the conditions that would result if men acted on this principle, and in sheer prejudice made it the principle of democracy. His 'never-never' world is not even a caricature of the Athenian system, which imposed heavy and unchallenged obligations on the citizens to serve the city with their persons and property. It is ludicrous to find 'the Greek conception' of freedom, as if there were any unitary Greek conception of it, in his account, and then to contrast it with the

⁶⁹ *Pol.* 1317^a 40 ff. Here and elsewhere (e.g. 1261^a 32, 1275^a 22, 1275^b 2, 18, 1279^a 8) Aristotle stresses that free citizens take turns in ruling and being ruled; in fact at Athens neither this principle nor the concomitant use of sortition and payment of officials applied to those with the highest responsibilities, which they might exercise for years on end, while real power often belonged rather to 'orators', who also might guide the assembly for long periods; all were men of property.

⁷⁰ *Thucydides and Athenian Imperialism*, 1963, 81.

⁷¹ *ORF*², fr. 32 (p. 132); *Suet. Tib.* 29; *Tac. Ann.* i. 75 (on which see Kelly, 1966, ch. 1; de Ste Croix, 1982, 366 f.).

⁷² *Cic. de leg. agr.* ii. 29, *de rep.* ii. 50; *Sall. Cat.* 20. 5 ff.

ordered liberty approved at Rome. It was a share for all citizens in political rights that Greek democrats prized above all as constituting their freedom, and Romans too subsumed such rights, naturally not the same as in Athens, under liberty.

In fact, however, to judge from linguistic usage, the purely negative sense of freedom was more congenial to the Roman mind than to the Greek. Unlike their Greek equivalents, *liber* and its derivatives denote mere absence of restraint in a great variety of contexts. A few illustrations will suffice. In Republican Latin arms and shoulders may be free to carry weapons (*Caes. BG* vii. 56. 4), houses are free of occupiers (*Plaut. Cas.* 533), and a bed free of a wife (*Cic. Att.* xiv. 13. 5); access is free, if unimpeded (*Bell. Alex.* 30. 5); a man is free, when unoccupied (*Cic. Fam.* vii. 1. 4), and then his time too is free (*de orat.* iii. 57); Seneca complains that a throng of clients leaves the patron no freedom (*Brev. Vitae* 2). Men can be liberated from hope, fear, and bias.⁷³ On some philosophical views death frees the mind from the body, and the mind then comes 'in liberum caelum'; for then its vision is unclouded. Or again, the philosophical sceptic is free from the laws of dogmatic systems. Similarly the writer or orator can be free from rules of diction or rhythm.⁷⁴ In law land can be free of servitudes or easements (and other obligations); *libertas* is a technical term in this sense. If condemned to death, a man may receive 'liberum mortis arbitrium', the right to choose how he will die (*Suet. Dom.* 8. 4). For a lawyer a man's *arbitrium* or *voluntas* is free when he may act without instructions from another.⁷⁵ The *filiusfamilias* or slave may receive free, i.e. unrestricted, power to manage his *peculium*.⁷⁶ According to Severus Alexander 'libera matrimonia esse antiquitus placuit': that meant that no limitations could be placed on the right of the spouses to divorce.⁷⁷ There were precise rules for the making of a valid will, but Trajan confirmed the privilege of soldiers to make wills 'in any manner they wish'; this was called 'libera testamenti factio', a term also used when freedmen were exempted from their normal testamentary obligations to their patrons.⁷⁸ For Caesar the Suebi enjoyed 'freedom in life: from boyhood they are altogether unaccustomed to duty and discipline and act entirely as they please' (*BG* iv. 1. 9).

This negative sense of freedom is perfectly apparent in Roman political usage. The protection for the person which the laws secured to Roman citizens was regarded as liberty, because it freed them *from* certain forms of coercion. The ballot enabled voters to exercise 'that

⁷³ *Sall. Cat.* 4. 2: 'mihi a spe, metu, partibus rei publicae animus liber erat'.

⁷⁴ *Cic. de senect.* 80, *Tusc. Disp.* i. 51, v. 33; cf. *TLL*. s.v. *liber*, 1284. 20 ff.

⁷⁵ e.g. *Dig.* i. 7. 28, iii. 5. 18 (19). 2.

⁷⁶ e.g. *Dig.* vi. 1. 41. 1.

⁷⁷ *CJ* viii. 38. 2.

⁷⁸ *Dig.* xxix. 1. 1, xxxviii. 2. 47. 2.

freedom which consists in doing whatever they wish'. These words of Cicero (*Planc.* 16) show that 'doing as you like' was at least one sense of *libertas* perfectly acceptable to Romans in a political context. A *libera legatio* entitled a senator to travel abroad on his private business 'sine procuratione . . . sine mandatis, sine ullo rei publicae munere' (without charge, restrictions, or public duty): i.e. he could do as he pleased.⁷⁹ Freedom of speech for a senator meant that he could speak what he felt without being subject to fear or pressure; Cicero would certainly have concurred with Tacitus that it existed 'when you are allowed to think what you please and to say what you think'.⁸⁰ Liberty of speech merges into a more general independence, proper to senators at least, which means that a man must be free to choose his own course of action. Valerius Maximus groups 'libere dicta aut facta' in a single chapter (vi. 2).

A 'free tongue' is an expression used by Naevius (*com.* 112 R²) and by others after him. Plautus writes of 'libertas orationis' (*Bacch.* 168). There is no necessity to multiply testimonies to this kind of usage in Latin; they are extremely common.⁸¹ Some have thought that as the Romans did not feel the need of a single word, like the Greek '*parrhesia*', to denote freedom of speech, they valued it little.⁸² It seems to me more striking evidence of the importance they attached to it that the word *liber* can be used *tout court* to mean 'speaking one's mind', unlike equivalent words in Greek, English and other languages; thus Horace has '*liber amicus*' for 'candid friend',⁸³ and Quintilian can refer to the Athenian comic poets as '*liberrimum genus hominum*'.⁸⁴ Such freedom of speech can go too far, and may then be stigmatized as licence; it is, however, significant that even in excess it can still be described as liberty.⁸⁵ Admittedly in most cases where *libertas* corresponds to '*parrhesia*', the specific reference is made clear in the context.⁸⁶

Freedom of speech is most often claimed as a due to senators, and vital to them, but that is perhaps an accident of our evidence: Cicero and other upper-class authors were most concerned with senatorial rights. However, in his defence of Plancius, Cicero answers the prosecutor's complaint that Plancius' father had made too 'rough' a

⁷⁹ *de leg.* iii. 18, disapproving of the privilege.

⁸⁰ *Tac. Hist.* i. 1; cf. *Agr.* 2 f.; cf. *Cic. Phil.* i. 27, iii. 5, xi. 3, etc.

⁸¹ *TLL*, s.v. *libertas* 1314. 70 ff.

⁸² Nepos, *Timoleon* 5. 3 renders *parrhesia* as 'talem libertatem . . . in qua cuius liceret de quo vellet impune dicere'. On the Greek ideal see A. Momigliano, *Dict. of Hist. of Ideas* ii. 1973, 256 ff.

⁸³ *Sat.* i. 4. 132; cf. 3. 51: 'at est truculentior et plus aequo liber: simplex fortisque habeatur';

4. 90.

⁸⁴ *Inst.* xii. 2. 22; cf. x. 1. 65; *Hor. Sat.* i. 4. 1-5.

⁸⁵ *Hor. Ep.* ii. 1. 145 ff., on Fescennine farces; *Ars Poet.* 281 f. on Old Comedy. Cf. *Quint. Inst.* xi. 1. 67, xii. 9. 11 ff., on forensic abuse.

⁸⁶ e.g. *Cic. Rosc. Amer.* 9, *Sest.* 123, *Planc.* 33, *de orat.* iii. 4.

remark by saying that though he had perhaps spoken with too much freedom, if the prosecutor, Juventius, were to contend that that was intolerable, he would rejoin that it was intolerable for men not to respect the freedom of a Roman Eques. 'Where is our famous tradition, where that equity in rights, where the ancient freedom which, though oppressed by the evils of civil strife, ought by now to have raised its head and to have at last revived and set itself erect?' Freedom of speech is an ancient right, which he can illustrate by the gibes made by the auctioneer Granius (whose occupation was not very respectable) against men of the highest eminence in the generation before the Social war; the elder Plancius was at most too keen on sticking to equestrian rights and freedom.⁸⁷ Cicero does not indeed assert that the humblest plebeian properly had the same liberty as a Plancius or even a Granius: that was not necessary to his argument (and would not have accorded with his own prejudices). But in law the Eques can have had no peculiar title to say what he thought, which the poorer citizen lacked, and we simply do not know that humble people would themselves never have claimed the right. Of course persons of higher rank would have objected, just as Juventius objected to Plancius' behaviour. Valerius Maximus thought it improper that the son of a freedman should have freely inveighed against Pompey as 'carnifex adulescentulus' (a teenage hangman). Pompey had indeed to endure insults ('*licentia*') from all sorts of people; Valerius views this as a conflict between his massive '*auctoritas*' and their '*libertas*'. Quintilian held that what would be freedom of speech in persons of high degree would be licence in others. The remark is evidence only of upper-class prejudice.⁸⁸ Moreover, Valerius and Quintilian both wrote under the Principate, when popular rights had vanished.

Admittedly the citizen had no right to address the people on public affairs. Meetings (*contiones*) at which they were debated could be summoned only by a magistrate, and no private person could speak at them except on his invitation. This did not mean that all sorts of views on controversial issues were not freely ventilated, even though it is likely that magistrates seldom chose to call on humble citizens to give their opinions, which most of them would doubtless have been unable to do. However, the people at large could declare their sentiments in collective acclamations, and Cicero lamented that they, as well as the

⁸⁷ *Planc.* 33, 55. For 'too freely' *Hor. Sat.* i. 4. 103, ii. 8. 37 (cf. n. 83). Cato's '*lingua acerba et immodice libera*' (*Livy* xxxix. 40. 10) did not injure his career.

⁸⁸ *Val. Max.* ix. 6. 8, vi. 2. 4; *Quint. Inst.* iii. 8. 48. Cf. *Cic. Font.* 40 on Gallic '*ad male dicendum licentiam*'. The '*maledicus*' was too readily taken to be '*liber*', *Quint.* ii. 12. 4 f. *Licentia* is also a technical term of rhetoric for reproaches '*cum apud eos quos aut vereri aut metuere debemus, tamen aliquid pro iure nostro dicimus*' (*ad Her.* iv. 48 f.; cf. *Quint.* ix. 2. 27); cf. *Thuc.* iii. 38; *Dem.* ix. 3 f.

leading men, had lost their freedom, when it had allegedly become unsafe for them to express themselves in this way.⁸⁹

Thus it is untrue that in the Republic freedom of speech was not associated with the Roman conception, or rather with some Roman conceptions, of *libertas*, nor is it legitimate to argue *e silentio* that it was properly confined to men of rank.⁹⁰ We simply cannot tell that it was not valued by ordinary commoners. Of course it would often have been imprudent for them to exercise it in a manner adverse to those with the power to hurt or help them. But that is no less true in every society, including those which in principle prize freedom of speech most highly.

Nor is it significant that freedom of speech was subject to certain legal limitations, as it usually is. In our own country, for instance, it is limited in various ways, notably by the law on defamation, but we do not conclude that the right does not exist at all. A clause in the Twelve Tables was understood in antiquity to have made it a capital offence to defame a man with opprobrious songs (*carmina*); it would be characteristic of early Roman law if this was interpreted in a literal and restrictive sense, and therefore did not cover defamation of any other kind.⁹¹ But the capital penalty must have fallen into desuetude, when the poet Naevius (c.200) was merely imprisoned for his abusive lampoons on leading men, and only released by the tribunes after he had apologized (Gell. iii. 3. 15). Horace supposed that the ribaldry of Fescennine verses attracted a flogging (n. 85). No cases are recorded. Persons defamed from the stage could sue for damages. Lucilius was notorious for the bitterness with which in his satirical verses he assailed men of note: Horace thought that he escaped with impunity because he was a man of substance himself and protected by Scipio Aemilianus and his friends.⁹² There is no proof that the Sullan law *de iniuriis* covered libel or slander before imperial times. The praetor gave a civil action against anyone who uttered or instigated *convicium*, but *convicium* was not any kind of abuse: it seems to have meant originally the concerted shouting of insults, and always denoted chanting or bawling in public.⁹³ One may doubt if such suits were ever at all common;

⁸⁹ *Contiones*: *Str* i³. 197 ff. Acclamations: *Cic. Sest.* 123, *Phil.* ii. 64 (the people only free to groan); *Val. Max.* vi. 2. 6; A. Cameron, *Circus Factions*, 1976, 157 ff., for popular demonstrations at the Games, even in the Empire.

⁹⁰ *Cic. Fam.* ix. 16. 3 treats it as integral to *libertas*, and we cannot be sure that many of low rank would not have thought the same.

⁹¹ *FIRA* i². p. 52. esp. *Cic. de rep.* iv. 12, *Tusc. Disp.* iv. 4.

⁹² *Sat.* ii. 1. 65 f. (note 79 ff. for libel actions of his own time); Trebonius *ap. Cic. Fam.* xii. 16. 3; A. Watson, *Law of Obligations in the Later Roman Republic*, 1965, ch. 16.

⁹³ *Convicium*: *Dig.* xlvii. 10. 15. 2–12. Cf. H. Usener, *Kl. Schr.* iv. 356 ff.; Lintott, 1968, 8–10; Kelly, 1966, 21–3. E. Weber, *Peasants into Frenchmen*, 1977, ch. 22, discusses similar practices surviving in 19th cent. France, which served to enforce obedience to traditional *mores*. General

there would be safety in numbers when a crowd shouted maledictions, and the responsibility of the organizer might be hard to prove. Moreover, the praetor could refuse a suit unless he judged the insults to be ‘adversus bonos mores’, against accepted standards. The procedure gave no remedy for written libels, nor probably for the mellifluous slanders of orators like Cicero. The praetor’s general edict allowing suits for injury to a man’s personality did no doubt cover defamation,⁹⁴ yet Cicero’s invectives, and some of Catullus’ poems, suggest that there was virtually no fear among men of standing in the Republic that they might have to compensate the victims of their most mendacious abuse; at worst their language might be censured as ‘too free’ (n. 87). It would be servitude, said Cicero (*Sulla*, 48), if you could not speak against anyone you wished. As for the poor, to sue them would have been futile: they had no means of paying damages. Under the Principate indeed things changed; defamation was more strictly repressed, and if directed against the emperor or leading men, assimilated to treason.

VII

It is often held that for the Romans, unlike the Greeks, the limits imposed by law were of the essence of freedom. This is yet another false contrast between Roman and Greek ideas. Certainly Greeks could write as if there was an antithesis between freedom and law; thus Herodotus said of the Spartans that ‘though free, they are not free in all respects: above them is set a master in the law’.⁹⁵ If the jurist Florentinus also opposes law to freedom (n. 21), that is written off as a borrowing from Greek theory. But other Romans expressed themselves in similar fashion. Sallust describes a primitive people as ‘without laws or government, free and unconfined’ (*Cat.* 6. 1). A character in Plautus’ *Trinummus* (1032 f.) complains that nowadays no one cares what the laws sanction: corruption is approved by custom and ‘free from the laws’. A dictator is ‘free and released from the bonds of the law’ (Livy iv. 11. 3). For Cicero the people at large or the Equites are ‘free from’ a law, when it is binding on senators alone (*Cluent.* 151, *Rab. Post.* 12).

To be sure the Romans did not see laws as necessarily constricting freedom. On the contrary the liberties they prized were themselves

edict *de iniuriis*: Gaius iii. 220; *Dig.* xlvii. 10. 25 ff., which also concerns the special edict (Augustan?) ‘ne quid infamandi causa fiat’.

⁹⁴ *Tac. Ann.* i. 72. Cf. the Augustan extension of the Sullan *lex de iniuriis* to cover libels against anyone, *Dig.* xlvii. 10. 5. 9–11, 6; *Suet. Aug.* 55.

⁹⁵ *Hdt.* vii. 104; cf. *Eur. Hec.* 864 ff.; Plato, *Laws* 698b, 699b. Berlin (n. 45) 148 quotes Bentham’s view that every law is an infraction of liberty.

based on the laws. They could therefore speak of liberty and laws in the same breath (n. 96). It was obvious enough that the alternative to the rule of law was that of sheer force. For Cicero the violence of Clodius' gangs subverted both freedom and laws (*Mil.* 77). So did the tyrannic power (*regnum*) that Caesar usurped. But laws might either guarantee or deny men the right to act as they wished, and it cannot be concluded that all Romans accepted that legal restraint was inherent in the very idea of freedom. Scholars who believe this lay too much weight on Cicero's argument: 'in a state held together by laws' it is essential that the laws be scrupulously observed by the courts; that is the bond that secures the *dignitas* of senators and Equites (whom he was addressing), and the basis of liberty and the source of justice: 'we are all slaves of the laws in order that we may be free'. It is in the laws that the privileges of the orders and the competence of the courts have their origin; 'it is by the laws that we obtain all our blessings, rights, liberty, and our very survival'. His aim was to persuade the jury that the terms of the statute under which his client was accused must be strictly respected, however inequitable this might seem, and for this purpose he introduced the generalities in which he no doubt expected their ready concurrence and from which he drew his more controversial conclusion. But it cannot be inferred that his audience regarded true liberty as in its very nature limited by law. The point was that the positive laws provided the guarantee of the specific rights in which Romans discerned their liberty, and he particularly emphasized not so much liberty *tout court* as the privileges of the higher orders.⁹⁶

In this there was, moreover, nothing peculiarly Roman. Cicero was embroidering the same theme as a Greek orator, who, after proclaiming the necessity of law for human society in terms to be quoted with approval by a Roman jurist (*Dig.* i. 3. 2), illustrates this by showing how various Athenian institutions rest on the laws ([*Dem.*] xxv. 15–27). Though that orator does not indeed explicitly make freedom depend on the laws, he remarks that if everyone were permitted to do as he liked, Athenian life would resemble that of wild beasts (20; cf. 25). And Aeschines did remind a court of what they had *often* heard, that it is the laws that preserved the persons and polity of citizens in a democracy, as distinct from a tyranny or oligarchy (i. 4 f.), while Demosthenes opined that no one would gainsay the proposition that Athens owed to the laws all her blessings, her democratic system, and her freedom (xxiv. 5). One may also recall the claim that Thucydides imputes to Pericles, that in the Athenian democracy private differences

⁹⁶ *Cluent.* 146–55. For association of law(s) and liberty see also n. 37 and e.g. *Mil.* 77, *Phil.* xi. 36, *de offic.* ii. 24, iii. 83; *Sall. Or. Lepidi* 4, *Or. Philippi* 10; *Livy* ii. 1, iv. 15. 3, xxxiv. 26. 7, xxxix. 27. 9, xlv. 31. 4, 32. 5. See n. 151 (Cato).

are settled in accordance with the laws under which all are equal (this is the *aequum ius* of the Romans), and that for all their freedom the citizens are law-abiding in public affairs, obedient to magistrates and laws, principally from fear and 'not least to the laws prescribed for the assistance of victims of wrong-doing, and to those which are unwritten, whose violation brings social disapproval'.⁹⁷ The innumerable indictments for illegal proposals (*graphai paranomon*) at Athens confirm the importance of respect for the laws in Athenian democracy. Cicero was echoing a commonplace of the Athenian courts, a commonplace because it was manifestly true at Athens and Rome alike, as in every civilized state which possesses any measure of freedom.

We must also bear in mind that to a Roman lawyer a *lex* (or *plebiscitum*) is 'what the people [or plebs] commands and establishes' (*Gaius* i. 3); according to Julian (*Dig.* i. 3. 32), 'the laws are binding on us only because they have been accepted by the judgement of the people'. These dicta come from the second century AD, when much of the substantive law in force had actually been made by emperor or senate, without formal concurrence by the people: they preserve Republican theory, when it had ceased to have practical significance. Indeed imperial jurists grounded the legislative competence of the emperor himself on the basis that he had received his *imperium* from the people.⁹⁸ In the same way the decemvirs, according to tradition, had power to legislate delegated to them by the people; likewise Sulla, though he preferred to obtain comitial ratification for his enactments. For the most part the powers of the magistrates and some other institutions of public law had never been established by statute; they rested on immemorial convention; but in this case, as Julian held, their validity could be supposed to depend on tacit and universal consent (*loc. cit.*). As for the important modifications in statute law due to Republican praetors, had they not corresponded to the general will, they would hardly have outlasted the innovator's own year of office, if they had escaped a veto when made. No Roman actually said, as Swift did, that 'freedom consists in a people's being governed by laws made with their own consent', but this principle is implicit in the Roman system, under which the people could not in perpetuity be bound by the laws that it had enacted or the conventions it had accepted, but had in general the power to set them aside by new legislation (n. 39); the conception that law is a divine ordinance, which men may not

⁹⁷ *Thuc.* ii. 37, iii. 37. 3 with Gomme's notes. The sentiments expressed by orators in court are more probative of what ordinary Athenians actually thought; cf. K. J. Dover, *Greek Popular Morality*, 1974, 8–10; on their attitude to law see further 184–7, 306–9. Similarly what Cicero says in speeches reflects the views of his audience (or reading public).

⁹⁸ Brunt, *JRS* 1977, 107 ff.

tamper with, appears in philosophical and even in juristic theory (*Dig.* i. 3. 2), but it has no place in the Republican constitution.

VIII

Again, according to Kloesel (128 ff.) and others, moderation is part of the very idea of *libertas* and distinguishes it from licence. Now Roman writers certainly commend the moderate use of freedom and reprobate its excess, but the very texts concerned often employ *libertas* as a neutral term (like Plato's *eleutheria*), describing a condition that is to be approved or condemned according to the use men make of it; to qualify freedom as moderate or excessive implies that moderation is no part of the meaning of the term.⁹⁹ It could be argued that men who were unaccustomed to freedom or at a primitive stage of their development were unfit for it; they needed to be kept under tutelage, or to be given freedom only in a modest measure.¹⁰⁰ However, since *libertas* was a 'dulce nomen' (n. 37), and most men craved for it, and yet recognized that a total relaxation of all restraints was incompatible with the social order, the term could undoubtedly be used, like its equivalents in other languages, to refer to that degree or kind of freedom which was acceptable; anything beyond those limits could be denigrated as 'licence', a term which itself originally meant only what is permitted, and which is sometimes used in this neutral sense; in that case it too denotes a right which can be abused (*Dig.* iii. 5. 37) or carried to excess (*Gaius* ii. 228). Thus Livy certainly identifies *libertas* as freedom subject to just restraints when he writes (xxiv. 25. 8) that 'it is the nature of the masses to serve abjectly or to lord it with arrogance; freedom lies between, but they do not know how to establish it with moderation or to maintain it.' Elsewhere he notes that it is not only the masses that may miss the golden mean: 'to show moderation in guarding freedom is a hard task; professing to desire equality, each man lifts himself up to press his fellows down; to avoid living in fear themselves, men deliberately make themselves the objects of fear, and in repelling wrongs, we inflict them on others, as if we must either do or sustain injury' (iii. 65. 11).

However, what was true liberty and what was licence depended on a man's point of view; Republicans or popular spokesmen could predi-

⁹⁹ e.g. *Cic. Qu. fr.* i. 1. 22 ('tam immoderata libertas'), *Cael.* 43, *Planc.* 43; *Livy* iii. 57. 6, 67. 6, xxiii. 2. 1 ('licentia plebis sine modo libertatem exercentis' at Capua), xxiv. 4. 1, xxxiv. 49. 8, xlii. 14. 8; *Bell. Afr.* 54; nn. 83-8.

¹⁰⁰ *Cic. de rep.* ii. 55 ('modica libertas'); *Livy* xlv. 18. 6 ('libertatem salubri moderatione datam'). Peoples unready for freedom: *Livy* ii. 1. 3-6 (Romans under the monarchy), xxiv. 24. 2, 27. 5, xxxix. 23. 13. Cicero suggests that on the fall of Tarquin the Romans abused liberty, being unaccustomed to it, *de rep.* i. 62 (cf. *Sall. Hist.* i. 29: 'insueti libertatis').

cate licence of the abuse of power by kings and their agents or favourites, by the holders of *imperium*, or by the nobility;¹⁰¹ aristocrats, the excesses of democratic assemblies or of seditious tribunes, or simply of popular sovereignty.¹⁰² For men of high degree it is licence if they are insulted by their inferior (n. 88), if the voters demand a secret ballot,¹⁰³ if the plebs insist on bringing their oppressors to trial (n. 114). For some males it is found if women wish to be released from restrictions (n. 53).

What some classed as licence, others claimed as indispensable liberty, e.g. the ballot (n. 103). Clodius persecuted Cicero on the ground that he had violated the personal security in which citizens saw their liberty; he dedicated a shrine to Libertas on the site of Cicero's town house. For Cicero his own condemnation, and the violence by which Clodius dominated the streets, were breaches of liberty, and the shrine was an honour to Licence (n. 142). An apologist for the tranquillity of the Principate, when there was no need for debate, since the all-wise autocrat determined everything (*Tac. Dial.* 41. 4), could explain the decline of oratorical eloquence on the basis that it had always been 'the nursling of licence, which fools call liberty' (40. 2), another statement that has been seriously adduced to show the Roman conception of freedom; one might wonder if Tacitus really disagreed with Cicero's dictum that 'eloquence has always flourished and reigned most of all in every free state, and especially in those which enjoy peace and order' (*de orat.* i. 30).

IX

Again serious misconceptions arise from the doctrine advanced by Schulz that 'the Roman state never omitted to uphold the principle of

¹⁰¹ Kings etc.: *Livy* ii. 3. 3, xxvii. 31. 5 ff., xxxiv. 48. 2, xlv. 32. 5; *Sall. Cat.* 6. 7. Magistrates etc.: *Livy* ii. 37. 8; *Sall. BJ* 31. 22 (cf. 'lubido' in 31. 7, 40. 3, 41. 5, 42. 4); *Or. Macri.* 16.

¹⁰² *Cic. Flacc.* 16, *de rep.* i. 44, iii. 23 (democracy 'dicitur libertas, est vero licentia'); *Livy* ii. 27. 12, 29. 9, iii. 53. 6, v. 29. 9, vi. 40. 7, xxiii. 2. 1, 4. 5, xlv. 18. 6; *Phaedrus* i. 2. 1 ff.

¹⁰³ *Cic. Sest.* 103. For ballot laws constituting freedom see *de leg. agr.* ii. 4, *Planc.* 16, *de leg.* iii. 34 ff., *de amic.* 41; *RRC* nos 266. 1, 292. 1, 403, 413, 426. 2, 437; *Ascon.* 78 C. (n. 37). Bleicken, 1972, 38, urges that we cannot deduce from these laws that they were motivated by an 'abstract idea of equal political liberty'; secret voting was not treated as a 'new norm', but gradually introduced for different kinds of comitial business; this indicates that each law was designed to suit particular circumstances. So too in this country it was on the principle of the right of the middle class to representation that the Reform Act of 1832 was advocated; the principle was applied in 1835 to the government of boroughs, but not until 1888 were the counties administered by representative bodies. Cf. Endnote 2; it is an unwarranted assumption that a principle is not operative if it is brought into operation slowly and piecemeal. Neither in Rome nor in England indeed was the principle that resulted in the creation of new liberties an 'abstract idea', even though such an idea as equality of rights could be invoked *ad hoc* to support what was desired for more practical reasons.

authority; and, truly, individual freedom is impossible in the long run without authority', or in the words of Biondi, which he quotes with approval: 'Liberty and authority are not mutually exclusive; each presupposes the other; liberty is more effective in proportion to the strength of authority; without authority it is anarchy, in the same way as authority without liberty is tyranny.' For Kloesel, whom Wirszubski more or less followed, 'in every conception of freedom, so far as true freedom, not *licentia*, is involved, the concept of authority has its place, and this is true with altogether special strength of the Roman concept', since 'an aristocratic valuation of personality dominated the whole of public and social life at Rome', excluding equality and requiring social gradations. Hellegouarc'h held authority at Rome to be the guarantor of freedom.¹⁰⁴ All these writers seem to be suggesting not simply that in any ordered political society, and specifically in the Roman, we must expect respect for law and government, whereby some liberties are preserved, but that there is no incongruity between liberty, at least as the Romans perceived it, and submission to higher power, and that this submission is inherent in the very concept of *libertas*, or in any just notion of freedom. It will, however, become apparent that Romans, like everyone else, could discern an incongruity between the 'principles' of liberty and authority, and seek to establish a balance between them.

Heinze's famous essay on *auctoritas* is of course always cited. He described it as the influence that belonged to those whose opinions and advice were sought and usually prevailed, especially to the *principes* distinguished for the offices they had held, and for their age, experience, ability, and services to the state. But he was content to remark that *auctoritas*, which he sharply differentiated from *potestas* or *imperium*, did not infringe freedom, since anyone could still decide for himself whether to seek and adopt the advice of those who possessed it; this of course does not imply that you take the advice simply because you think it reasonable; you defer to the views of a man with *auctoritas* because he is the man he is.¹⁰⁵ But Schulz mixed this up with submission to superiors, some of whom had the legal power to enforce their will; Romans would conform to the directions of the *paterfamilias* (he forgot that the son might be 'freed' from his power), the magistrates, the senate, the emperor, the jurists of eminence: the consequences of *auctoritas* 'are obedience, order, discipline; reasons for its dictates are not required, nor could many people check or understand

¹⁰⁴ Schulz, 1936, 165, 187 f.; Kloesel 8 ff.; Wirszubski 35; Hellegouarc'h 543.

¹⁰⁵ R. Heinze, *Vom Geist des Römertums*, 1960, 43 ff. However, the early *patrum auctoritas* and that of the *tutor* were legal powers; and *senatus auctoritas* meant more than mere advice. See also p. 43 and ch. 1 endnote 4.

them, if given.' Through such conformity the Romans 'combined liberty with bondage'!

Last too claimed that '*libertas* was not, like *eleutheria* according to some accounts, an unfettered freedom, but rather, like *principatus*, which was one of its constitutional counterparts, freedom from arbitrary rule' (CAH. xi. 436). Both he and Schulz referred to the denomination of cities as free when their freedom was really limited by the paramount authority of Rome. But, as we have seen (p. 293), this freedom was qualified, and inferior to that of a city like Rome herself, which was fully independent; such cities were free only in so far as Rome did leave them to act as they chose. Both also held that Roman *libertas* was compatible with the regime established by Augustus; this of course accords with the claims made by or on behalf of many of the emperors; Seneca, for instance, flattering Nero, could write of 'the happiest form of the commonwealth, in which there is nothing wanting for the most perfect freedom but licence to destroy ourselves' (*de Clem.* i. 1.). Tacitus himself allows that Nerva at last combined '*res olim dissociabiles, principatum ac libertatem*' (*Agr.* 3); yet in fact the rights in which Cicero and his contemporaries had thought liberty to consist were attenuated, or disappeared, under the Principate, and *libertas* could be used to designate the Republican system with the implication that it had been lost in the new order (n. 42).

Let us, however, revert to the Republic. In the *Philippics* Cicero continually claims to be representing the cause of the authority of the senate, the liberty of the people, and the preservation of the commonwealth from Antony's designs of domination. We know from his political programme in the *pro Sestio* that he held that all good men should defend the ancestral constitution under which the senate was to rule with the magistrates as its executive servants; ideally the senate would protect and extend the liberty and interests of the common people.¹⁰⁶ Such statements do not, however, show that even Cicero supposed that respect for authority was inherent in the very notion of

¹⁰⁶ *Sest.* 137; our ancestors '*senatum rei p. custodem, praesidem, propugnatorem, conlocaverunt; huius ordinis auctoritate uti magistratus* [cf. *Phil.* vii. 12; and Pompey *ap. Fam.* viii. 4. 4. 8. 9] et quasi ministros gravissimi consilii esse voluerunt; senatum autem ipsum proximorum ordinum splendorem confirmare, plebis libertatem et commoda tueri atque augere voluerunt'; cf. *ad Her.* iv. 47 for the view that '*senatus est officium consilio civitatem iuvare, magistratus est officium opera et diligentia consequi senatus voluntatem; populi est officium res optumas* [sc. in legislation] et homines idoneos maxime suis sententiis diligere et probare'. Texts cited by Kloesel (e.g. *Phil.* iv. 5, x. 23, xiii. 33, 47, *de div.* i. 27) which link *auctoritas senatus* with *libertas populi* do not justify his claim that even on an optimistic view the former guarantees the latter, but only that they are compatible. In *de Dom.* 130 Cicero contrasts the tranquil time when popular freedom was combined with senatorial direction ('*gubernatio*') of affairs with the Clodian terror, which (he alleges) had destroyed both. This is of course *ex parte*, and Clodius would have had a partially plausible reply.

liberty, still less that Romans in general shared the same view. Authority and liberty might be consonant, but Romans could detect conflicts between them.

Cicero himself adopted the theory that the ancestral constitution was of the 'mixed' kind, or rather balanced fairly between monarchical, aristocratic, and democratic elements. In his *Republic* he sketched the evolution of this system. Already under the monarchy, not only the senate but the people too had limited political rights.¹⁰⁷ This was only a mere taste of liberty in the sense of power, enough to titillate the appetite and not satisfy it (ii. 50). Once Tarquin had been overthrown, they demanded more. It was prudent on the part of Valerius Publicola to make some concessions to them; by granting the people freedom in moderation, he more easily maintained the authority of the leading men.¹⁰⁸ Most decisions were taken by the senate, whose control was fortified by the *patrum auctoritas*, the rule that every act of the *comitia* required the sanction of patrician senators (ii. 56). (In the ideal code Cicero later proposed (*de leg.* iii. 28) he would have gone further, giving decrees of the senate the force of law.) The people were still not content; the proper balance between the power of magistrates, the authority of the aristocratic council, and the freedom of the people, which would secure stability, had not yet been attained (*de rep.* ii. 57). Hence the further agitation for the creation of the tribunate designed 'to reduce the power and authority of the senate' (59). Not that this aim was achieved immediately; the senate continued to enjoy the highest authority, with the compliance and obedience of the people (61). In his later half-hearted defence of the tribunate as an essential element in the mixed constitution, Cicero remarks that it was originally devised as a compromise 'to make the humbler citizens believe that they were on a level with the leading men', and that although some real measure of freedom had to be granted, there were then many excellent institutions (he was probably thinking again primarily of the *patrum auctoritas*) which still made the commons yield to the authority of the leading citizens (*de leg.* iii. 24 f.). It is implicit of course that the tribunate was, as it is elsewhere described, a bastion of Roman freedom;¹⁰⁹ and it is therefore to be noted that Cicero should say that

¹⁰⁷ A system can be mixed without being balanced (*de rep.* i. 69, ii. 43). Rome, which was the model (i. 70), evolved towards a balance of the different elements present from the first (ii. 2, 37). For the senate under the monarchy, ii. 23; for the people's right to elect or confirm a new king, 24, 31, 33, 35, 37 f., and to hear appeals, 54. Cicero accepts the tradition that Ser. Tullius devised the centuriate assembly, 39 f. Servius' supposed dependence on popular support (Dionys. iv. 40) probably explains Accius' words (*ap. Sest.* 133): 'Tullius qui libertatem civibus stabiliverat'.

¹⁰⁸ *de rep.* ii. 53-5; contrast i. 62, perhaps drawn from an annalistic presentation of an extreme patrician view.

¹⁰⁹ *Cic. de leg. agr.* ii. 15 ('tribunum quem maiores praesidem libertatis custodemque esse vulerunt'), *Rab. perd.* 1-14, *Sest.* 30, *de orat.* ii. 199, *Sall. Or. Lepidi* 13, *Or. Macri* 26 (cf. p. 345);

it made men think that they were equal to the aristocrats; liberty implied some degree of equality. Deference to one's superiors is no part of the freedom they wanted, even by his account. The increase in popular liberty which the tribunate was thought to secure was tolerable for him, only in so far as it was inoperative, either because the senate could still baulk the tribunes, or because the tribunes themselves might calm rather than excite popular demands (*ibid.* 23). In the same spirit Cicero's ideal code defeats the purpose of the ballot, which the plebs prized as a constituent of freedom (n. 103), but 'which had deprived the best men of their *auctoritas*' (*ibid.* 34), by providing that men of rank may inspect the votes; he explains (39) that this 'grants the appearance (*species*) of freedom, and preserves the *auctoritas* of the aristocrats (*boni*). Livy expresses the same outlook in saying of the timocratic organization of the centuriate assembly (p. 343) that while no one appeared to be barred from voting, all power lay with the leading citizens (i. 43. 10).

So far from thinking of *libertas* as inherently moderated by respect for superior authority (or moral principles), Cicero did not hesitate to use the term (*de rep.* i. 67) to translate *eleutheria* in paraphrasing Plato's denunciation of democratic licence (*Rep.* 565 ff.). No democrat, he rejects the democratic contention that all citizens should have equal rights; it contravenes the principle that equality is itself inequitable, because it excludes distinctions of degree, and in any case equality is never realized, as the people itself creates inequalities by grants of special powers and honours to particular persons. On this principle he approves of the timocratic organization of the centuriate assembly; it accorded with the rule, always to be observed, that the greatest number should not have the greatest power; the preponderance of voting strength lay with those who had the greatest interest in ensuring that the state was in 'the best condition'. One is reminded of the contempt he expressed in a speech for the 'uncontrolled freedom and licence' of Greek assemblies dominated by ignorant men, 'artisans, shopkeepers, and all that scum'; how different from the Roman *comitia* organized in classes, which voted only after they had heard *auctores*, the men with *auctoritas* who would advise on the business duly laid before them.¹¹⁰ Greek critics of democracy had condemned the power vested in the lower class by the Athenian system just as strongly, and Cicero's insistence on proper gradations of rank echoes the preference of many

Diod. xii. 25. 2; Livy iii. 37. 5 ('tribuniciam potestatem, munimentum libertatis'), 45. 8 ('tribunicium auxilium arx tuendae libertatis'; cf. endnote 8 with text). Cf. pp. 21 ff. and esp. Polyb. vi. 16. 4 f. and ch. 1 n. 39.

¹¹⁰ *de rep.* i. 43, 53 (*contra* 49), ii. 39 f., iv. 2, *de leg.* iii. 44; cf. Livy i. 43. 10: 'sed gradus facti, ut neque exclusus quisquam suffragio videretur et vis omnis penes primores civitatis esset', and n. 164 with text; *Cic. Flacc.* 15-18 (where he ignores the the tribal assembly!)

Greek thinkers for 'geometric' equality, in which men enjoyed rights proportionate to their excellence, whether excellence were to be defined in terms of birth, property, or moral attributes.¹¹¹

Cicero's views are not then peculiarly Roman, but representative of attitudes common to both Greek and Roman aristocrats. It is obvious that they were not shared by all Romans; had that been so, the accretions to the power of the people which are examined later, and the line taken by the *populares* of the late Republic, would be incomprehensible. Cicero himself alludes to a very different Roman conception, when he makes the advocates of democratic liberty argue that unless the people are in effective control of the state, there can be no *res publica* that satisfies the meaning of that term as *res populi* (*de rep.* i. 39). This argument cannot come from a Greek source, because it derives from the literal sense of a Latin term for which there was no Greek equivalent.¹¹² To Cicero no doubt full democratic liberty was licence (*de rep.* iii. 23). The liberty conceded to the people at Rome was tolerable only in so far as it was specious. But even in his conception of the Roman system the liberty of the people and the authority of the senate are countervailing forces, which must be balanced in such a way as to content the people but permit the senate to preponderate. All this is totally incompatible with Kloesel's inference from his views (p. 125) that '*libertas* without *auctoritas* founded on *dignitas* as its correlative is unthinkable to the Roman'. Not only must we reject the assumption that Cicero speaks for 'the Roman': in his own way of thinking popular respect for *auctoritas* is indeed essential to a well-ordered state, but it is not inherent in *libertas*, by which it is actually threatened.

Except in harangues when he is deliberately appealing to popular sentiments, Cicero is no witness to Roman views on liberty which prevailed outside his own class. Just as one-sided are the opinions that Livy puts into the mouths of patrician spokesmen contending against the development of plebeian rights. Thus, we are told, they resisted a proposal that the plebs should usurp the senate's prerogative by granting a triumph, on the ground that the state would be free and the laws operate 'equally', only if each order kept its own 'majesty', and an agitation against prolonged military service aroused their ironical comment that Roman liberty was being construed as involving disrespect for senate, magistrates, laws, ancestral customs and institutions, and military discipline. This *ex parte* statement has actually been

¹¹¹ See e.g. Aristotle, *Pol.* iii. 5, 8-10, 7, 1-6, v. 1, 2 f.; F. D. Harvey, *Cl. et Med.*, 1965, 101 ff.; C. Nicolet *ap.* *La filosofia greca e il diritto romano*, i (Acc. Lincei, 1976), 111 ff.

¹¹² In *de rep.* i. 47 f., Cicero's mouthpiece Scipio allows that the people can hardly possess freedom under an aristocracy any more than under a monarchy, however beneficent (cf. ii. 43). Cf. Tac. *Ann.* vi. 42.

adduced to show that the true Roman conception of liberty comprised such respect.¹¹³ With imaginative plausibility the annalists made out that the patricians would long resist any additional right which the people demanded, but once they had been forced to concede it, they would accept it as constituting liberty, but argue that anything more would be licence. Thus 'equal liberty' had been secured by the publication of the law code, but it would be licence if the people were enabled to bring magistrates to account for violating the laws. Admittedly freedom involved the right of the people to elect whom it wished, but it was deplorable that this freedom should not be subject to the constraint of open voting. What Livy says of the attitude of the patricians of old was not less true of optimates in the late Republic: 'they thought that any provision for the liberty of the plebs detracted from their own power' (iii. 55. 2). Naturally, however, they would appeal to popular notions of liberty when it suited their own ends. According to Livy, the sovereign electoral power of the people (which could be invoked to justify infringements of the legal conditions for eligibility in the interest of popular figures like Marius, or for the conferment of extraordinary commands in the late Republic) was held by the patricians to warrant the electors returning two patrician consuls in defiance of the law. Adopting a 'popular' standpoint, Cicero in 63 could criticize a 'popular' agrarian bill for its derogation from their electoral rights, and contend that his own banishment by the people in 58 was a violation of the liberty due to every Roman citizen.¹¹⁴

X

Of course Cicero too was passionately attached to liberty, the liberty of the senators. The authority of the senate was itself a nullity if it could not take decisions without fear or pressure.¹¹⁵ Every member should be able to voice his genuine opinions with some chance of swaying the issue. Senatorial freedom was indissolubly linked with senatorial *dignitas*. Cicero could say in 63 that the enactment of Rullus' agrarian bill would place the senate at the mercy of his land commissioners and their followers and that the senate would therefore lose both *libertas* and *dignitas*.¹¹⁶ This kind of apprehension was frequently realized from the time of the formation of the first 'triumvirate'. The military force at the disposal of the 'triumvirs' and the street gangs organized by

¹¹³ Livy iii. 63. 10, v. 6. 17 (Kloesel 144); cf. perhaps viii. 34. 7-10.

¹¹⁴ Impeachments: Livy iii. 53. 6-10 (cf. Dionys. vii. 22. 2, 50); Elections: vi. 40. 15-41. 3; cf. endnote 5.

¹¹⁵ See endnote 6.

¹¹⁶ *de leg. agr.* i. 22; cf. nn. 117, 118. The *dignitas* of the senate is often on his lips (e.g. i. 27). So too the *dignitas* of the *res publica* can be associated with its *libertas* (*Phil.* iii. 19); cf. n. 30 with text.

Clodius rendered the senate helpless. In such conditions Cicero could say that the commonwealth (*res publica*) no longer subsisted,¹¹⁷ since in his judgement it was properly vested in the direction of the senate (n. 106). In 57 senators deterred from attendance by riots complained that the house had no freedom of judgement. In 55 Cicero could write to Lentulus Spinther that 'the objective on which we had been set, after holding the highest offices and performing the greatest exertions, of exhibiting *dignitas* in stating our opinions and *libertas* in administering public affairs, has been totally eliminated; I have suffered no more than everyone else; there is no choice but to fall in with the dynasts, whom we cannot influence, or to express dissent to no effect'.¹¹⁸ Caesar and Hirtius could play on the same theme by alleging that in January 49 the senate was deprived of freedom by terror of Pompey's soldiers.¹¹⁹

Under Caesar's autocracy Cicero lamented that 'if *dignitas* consists in holding sound opinions on public affairs, with which good men agree, mine is intact, but if it lies in the ability to realize them or at worst to advocate them freely, not a vestige of it is left'. At the same time Servius Sulpicius averred that the regime deprived men of their 'freedom' in promoting the interests of their friends. Pollio's claim that he had learned in these circumstances 'how delightful liberty is and how wretched is life subject to a master' rings true.¹²⁰ As Cicero pointed out in 43 to Calenus, under a despot even his partisans could not count on continuing influence (*Phil.* viii. 12). Many prominent Caesarians were among the 'Liberators' who killed Caesar or joined them later (p. 500). But soon the menaces of Antony subverted the independence of the senate.¹²¹ Cicero was to pretend then that he had always exercised the freedom required of a senator (*Phil.* i. 27). The facts belie him (p. 486). In 62 he had declared that it was his practice 'to speak his mind freely in the senate, to have regard rather to the interest than to the will of the people, to give way to none and to stand in the path of many'. From 63 to 59 he exhibited such independence, not least in his relationship with Pompey, and after his return from exile he hoped to resume it, but he was soon reduced to silence or subservience. Admittedly he was speaking in 62 as a consular and one of the *principes*.¹²² His *dignitas* was superior to that of most senators. It was legitimate to seek 'to be equal in freedom to the rest, but first in

¹¹⁷ e.g. *Att.* ii. 21. 1, *Qu. fr.* i. 2. 15 (59), iii. 4. 1, 5. 4 (54). Cf. n. 42 for connection of *resp.* and *libertas*.

¹¹⁸ *de dom.* 10, *Fam.* i. 8. 3 f. (cf. *Att.* iv. 6. 1 f.), ii. 5. 2.

¹²⁰ *Fam.* iv. 14. 1, 5. 3, x. 31. 3 (Pollio's avowal of his love for Caesar shows that he was not simply ingratiating himself with Cicero).

¹²¹ *Att.* xiv. 14. 3 f., *Fam.* xi. 7. 2, *Phil.* iii. 6, etc.

¹²² *Sulla* 25; for Cicero's independence in 62-59 and later loss of it (despite his protestations in *Planc.* 91-4) see pp. 478 f., 486 f. *Principes*: Gelzer, 1969, 44 ff.; more fully, L. Wickert, *RE* xxii. 2014 ff.

honour'. But here the first proposition is as significant as the second.¹²³ And the freedom of a senator to take the political line he chose could be compromised by binding commitments to others. Cicero could allege that the consuls of 58 had lost their liberty of action by their infamous bargain with Clodius, while Clodius could suppose that by accepting an extraordinary command Cato had barred himself from denouncing any others of the same kind.¹²⁴

The liberty prized by senators was of course incompatible with the domination of a faction like the first 'triumvirate' or the despotism of a single man. It meant an effective share in political power. In this sense it was indeed associated with *auctoritas*, that of the senate as a whole, and for many of its members their own personal influence. But there is no sign that senators themselves felt that their individual liberty involved respect for the *auctoritas* of others.

A true senator, said Cicero, was one whose mind was not determined by an *auctor* but was respected for himself. Tiberius surely understood this kind of feeling when he gave out that he wished to be called *suasor*, not *auctor*; senators liked to think that they were prepared to make decisions on the basis of advice.¹²⁵ This did not of course imply that they would not on occasion rely on the judgement of leading men they esteemed as distinct from mere argumentation. They were called on to speak by rank, and doubtless the junior members commonly followed the guidance of one or more of the *principes*. But this was not invariably so. On 5 December 63 the senate was successively swayed by the oratory of Caesar and Cato, who were respectively only praetor and tribune designate. In 61 it was none of the consulars but the praetorian Q. Cornificius, a man of little note, who first stimulated the senate to take cognizance of Clodius' alleged incest. In 50 the great majority rejected the lead given by the chief optimates and voted for a compromise between Pompey and Caesar.¹²⁶ *Auctoritas* was sinister if it required mere submission. Brutus and Cassius told Antony that 'to free men no authority belongs to one who utters threats'; they would not object to his being a great man in a free commonwealth, but set their own liberty at a higher rate than his friendship. Brutus would later write that he and his associates could have obtained benefits and honours from Antony as 'a kind master', but that this would not have been consonant with freedom; no one should have more power than the laws and senate. Few senators of his generation would readily have tolerated the pre-eminent *auctoritas* of which Augustus was to boast.¹²⁷

¹²³ *Phil.* i. 34; cf. Cato (quoted in n. 149-).

¹²⁴ *Sest.* 69; cf. 60, *de dom.* 22.

¹²⁵ *Cic. de leg.* iii. 40; *Suet. Tib.* 27.

¹²⁶ *Sall. Cat.* 50 ff.; *Cic. Att.* i. 13. 3; ch. 9 n. 94.

¹²⁷ *Fam.* xi. 3. 3, *ad Brut.* 24. 4 f.; in his commentary Shackleton Bailey impugns the authenticity of the latter letter, but with no compelling reasons as against 25. Brutus had

In the Republic superiority of talents and achievements tended to evoke jealousy. It was only on an aristocratic conception that liberty could be said to have originated in the fall of the monarchy, which in the Roman tradition resulted in but a small accretion to the political rights of the people; but the royal power was now shared equally between the annual consuls,¹²⁸ and in consequence the direction of affairs passed to the senate. The subsequent multiplication of offices, the restrictions on re-election, the aversion to prolonged prorogations and to extraordinary commands, all illustrate the proclivity of the senate to deny any of its own members to acquire too manifest a pre-eminence. If the *cursus honorum* in itself created distinctions of degree, it was a derogation from liberty, as Servius Sulpicius implied,¹²⁹ that under the Caesarian regime men would no longer be able to seek office in due sequence. Within the limits that these distinctions imposed, the senators showed some regard for that connection between liberty and equality which, as we shall see, coloured the popular conception, though it was only a measure of equality in their own number that they valued. The new servitude of the Principate was manifest in AD 14, 'when all, casting off equality, awaited the orders of the prince' (Tac. *Ann.* i. 4).

XI

But attachment to liberty, including liberty in the sense of political rights, was not the exclusive concern of senators in the Republic. It was also the watchword of 'popular' politicians, and must therefore have had some appeal to the masses. Cicero himself played on it, when for his own ends he wooed their support. Very probably it was slogans and arguments of *populares* from the Gracchi onwards that annalists retrojected into their accounts of the early struggles between patricians and plebeians. *Populares* sought to show that it was their ideas of liberty that had triumphed in the times of 'our wise ancestors', and that it was optimates who deviated from the traditions by which Rome had grown great.¹³⁰ It would be a gross error derived from our excessive dependence on the partisan opinions of Cicero to suppose that *populares* did not make as much play with *mos maiorum* as their opponents. The

proclaimed his devotion to liberty as moneyer in 54 (*RRC* 433) against Pompey's dominance; cf. Quint. *Inst.* ix. 3. 95. On *RG* 34 see Syme, *RR* 320-2.

¹²⁸ Note Livy iv. 5. 5: 'quod aequandae libertatis est, in vicem annuis magistratibus parere atque imperitare licet'; cf. Dionys. iv. 74; Cic. *de leg.* iii. 5; n. 69.

¹²⁹ *Fam.* iv. 5. 3. Access to office, at least for those with the census qualification (Nicolet, *JRS* 1976, 20 ff.), is represented in the annals of the early Republic as an element in equal liberty (p. 337).

¹³⁰ See endnote 7.

ius provocationis, the tribunician prerogatives, the legislative supremacy of the assemblies independent of senatorial authority, all belonged to ancestral usage, and were contravened by, for example, repression under cover of the *senatus consultum ultimum* or by the legislative innovations of Sulla effected by force. It is characteristic that in 58 Clodius restored the right of free association, which was supposed to go back to Numa and which the senate had abrogated in 64 by sheer usurpation of legislative power (n. 57). Tiberius Gracchus could claim that his agrarian law implemented an old enactment forced through in response to popular demands and then set at naught (App. i. 8), and that it embodied a traditional policy of keeping up the stock of soldiers by settlements of the poor on the land. The rights and material interests of the common people could all be subsumed under, or closely associated with, *libertas*. Thus while optimates could raise the cry of liberty in danger when they saw or affected to see the prospect of despotism, *populares* could do so more regularly, because popular liberty was continuously threatened by oligarchic dominance. It was probably because of the more distinctly popular nuance of the term in most of the great conflicts of the late Republic that Cicero omits it from his catalogue of the principles on which all 'good' men could agree, especially as the freedom he prized himself was inherent in the *senatus auctoritas*, whose maintenance is for him the most vital of all these principles (pp. 55 f.).

In the popular conception liberty consisted partly in protection under the laws for the ordinary citizen against arbitrary punishment by magistrates. Their unfettered *imperium* is represented as 'excessive and unendurable in a free state', as was the very *cognomen* 'Imperiosus', assumed by T. Manlius Torquatus.¹³¹ The palladium of freedom in this sense was thought to reside in the right of appeal to the people (*ius provocationis*) from sentences of execution, flogging, and heavy fines, and in the right of the tribunes to intervene between the magistrate and a citizen whom he sought to coerce (*ius auxilii*). The origins and development of these rights are swathed in obscurity. The former, established by tradition as early as the foundation of the Republic, still needed confirmation at least by a *lex Valeria* of 300, which was in Livy's view necessary because hitherto the great resources (*opes*) of the few had counted for more than the freedom of the commons, and even this law merely declared an infringement to be wrongful, without prescribing any sanction; it was only in the early second century that three Porcian laws were passed, of uncertain date and content, which not only supplied this deficiency but seem first to have made the right

¹³¹ Livy iii. 9. 2-5, vii. 4. 2. A contrast between *libertas* and *imperium* recurs in his history.

operative outside the city of Rome, and to have prohibited the use of rods (but not of canes) for flogging in the army; in my view generals were never debarred from inflicting the death penalty on soldiers under their command. Even then the right was sometimes violated and needed further strengthening by a law of Gaius Gracchus (ch. 4, section VI).¹³²

At one time the real guarantee of personal security probably lay in the readiness of the plebs in the city to give physical aid to the citizen in danger,¹³³ later in respect for the legal prerogative of the tribune to intervene, or (since he could act only within the city) in the possibility that a tribune would impeach the offender before the people after he had demitted office; the people could doubtless condemn him at its discretion for wrongdoing, even if no specific sanction had been appointed by law. Even Sulla left the tribunes with their *ius auxilii*, but he may have deprived them of the right to bring charges before the assembly; this might explain Macer's complaint in 73, as given by Sallust, that citizens in the country had no protection from magistrates. If so, it was restored in 70 by the *lex Pompeia Licinia*, since it was exercised in 63 by the tribune Labienus against Rabirius.¹³⁴

'O nomen dulce libertatis! O ius eximium nostrae civitatis! O lex Porcia legesque Semproniae! O graviter desiderata et aliquando reddita plebi Romanae tribunica potestas': Cicero's famous apostrophe in arraigning Verres' execution of a citizen (II *Verr.* v. 163), while it indicates the value that was set on liberty in the sense of personal protection under the law, must not be taken as suggesting that such protection exhausted the popular conception of liberty. It is significant that Cicero appeals to laws that the people had enacted. The tradition made it perfectly clear that it was only the sovereignty of the people in legislation that had secured them liberty in this form.

The *ius provocationis* presents us with a puzzle. There is no certainly authentic instance of trial on appeal by the people, except for the archaic proceedings against Rabirius.¹³⁵ Otherwise we know only of

¹³² See endnote 8.

¹³³ See endnote 9.

¹³⁴ Sulla deprived tribunes of their power 'iniuriae faciendae' (Cic. *de leg.* iii. 22), removing their right to initiate legislation (*per.* Livy lxxxix), at any rate without the senate's sanction, and limiting (we do not know how) the *ius intercessionis* (Cic. II *Verr.* i. 155; Caes. *BC* i. 5, 7), perhaps too debarring them from bringing impeachments before the people; that would explain why citizens outside Rome, where the *ius auxilii* did not extend, were defenceless (Sall. *Or. Macri* 26); this may also explain Cicero's words quoted in the next paragraph; the need for tribunician impeachments was felt because in its absence there was no guarantee of observance of the Porcian and Sempronian laws.

¹³⁵ Gelzer, *Kl. Schr.* ii. 202 f., Cicero 76–8, right against R. A. Bauman, *The Duumviri in the Roman Criminal Law and the Horatius Legend*, 1969. The appellate proceedings that followed Rabirius' capital condemnation by *duumviri* had terminated; Cicero was defending Rabirius on a charge brought by Labienus, for which the penalty was a fine; Cicero's suggestions that Rabirius' *caput* was in danger when he spoke need be taken no more seriously than expressions in *Quinct.* 8, 49.

trials by the people in the first instance on impeachment. In the pre-Gracchan period non-political criminal charges were tried by magistrates with their *consilia*, and citizens they condemned were apparently unable to seize at a straw of escape through the people's clemency (ch. 4, section VI). It seems to follow that the supposed right of appeal was continually infringed. How then could it have been regarded as the palladium of Roman freedom? An analogy may be found in our own Habeas Corpus Act. Most persons who are arrested have no need to resort to it, because the very existence of the procedure it provides inhibits their indefinite detention without trial. In the same way the *ius provocationis* probably deterred *arbitrary* punishments of citizens; on the other hand, tribunes would not intervene at the time, or seek retribution later, if a citizen were punished after fair trial for a common crime, or if in their judgement he was manifestly refusing to obey lawful commands, e.g. by resisting conscription, given that the levy was being equitably administered.¹³⁶ On the other hand, when charges were political, magistrates and their assessors (a *consilium* composed of men of their choice) could not be trusted to decide impartially on the life or status of defendants who might be their political adversaries, and only the people were competent to decide, acting not on appeal but in the first instance. It was then only political charges that Polybius had in mind, when in his analysis of the balance of the Roman political system he twice asserts that the people alone could pass capital sentences; the repression of common crimes would not have come within his purview.¹³⁷ The *ius provocationis* and the *ius auxilii* safeguarded this system. The arbitrary repression of Tiberius Gracchus' partisans by the consuls of 132 was a deviation from accepted practice. As a result Gaius Gracchus entirely prohibited the capital condemnation of any citizen (whatever the charge, and whether or not he appealed) except by authority of the people, i.e. except after trial by the people or (as became more usual) by a court established by statute.¹³⁸ This Sempronian law was now in turn the chief guarantee of freedom. Because Verres held it in contempt, all Romans, Cicero could aver, thought that 'their rights, interests, protection, and indeed their entire liberty' depended on his condemnation. No matter that he was not on trial for this crime, for Roman courts did not necessarily decide either by the law or the facts relevant to the specific charge; moreover, Cicero promised that if Verres

¹³⁶ Bleicken, 1955, 78–83; Taylor, *JRS* 1962, 19 ff.

¹³⁷ Polyb. vi. 14. 6, 16. 2: it was only political offenders who would regularly escape death by voluntary exile.

¹³⁸ The banishment of Popilius (GC 32) shows that he was deemed to have broken the existing laws. Cf. Clodius' actions against Cicero.

escaped condemnation by the court, he would as aedile impeach him before the people for his violation of citizen rights.¹³⁹

Cicero often paid lip-service to liberty in this sense, and indeed incorporated the *ius provocationis* and *ius auxilii* in his ideal code of laws.¹⁴⁰ But it was of prime importance to the humbler citizens: aristocrats were seldom at risk from the *imperium* of magistrates. The action of the consuls in 132 is only one case in which the ruling class demonstrated their lack of respect for the principle involved. Even after Gaius Gracchus' law, they were able to set it aside under cover of the *senatus consultum ultimum* (cf. p. 16). It was obviously reasonable that the magistrates should repress by force as public enemies men who had taken up arms against the state, but in 121 the consul Opimius then proceeded to execute those who had already surrendered; and his acquittal on impeachment before the *comitia centuriata*, dominated by the well-to-do, who prized order above freedom, gave his action the strength of a precedent, which was more than once followed.¹⁴¹ The prosecutions of Rabirius in 63 (n. 135) were 'popular' attempts to deter such violations of liberty in the future. To no avail: in the same year Cicero executed the Catilinarian conspirators without trial. Hence Clodius could assail him as 'a tyrant and thief of liberty', secure his banishment by the plebs, and dedicate the site of his house to Libertas.¹⁴² In my view Cicero remained thereafter unpopular with the plebs.¹⁴³ Of course he complained bitterly of his own banishment without trial (*de dom.* 80), but in 44 he was just as ready as before to approve of the summary execution of low-class rioters.¹⁴⁴

XII

Cicero himself taught that it is the very essence of law (*lex*) that it binds all alike (*de leg.* iii. 44), though he did not concede the democratic contention that all citizens must have equal political rights (n. 10). However, 'the private man should live with his fellow citizens in accordance with a fair and equal system of law [*aequo et pari iure*], not in grovelling submission to others nor lifting himself above them', and the wise statesman will see to it that 'each man keeps his own with equal legal rights [*aequitate iuris*], and that the weaker citizens are not defrauded on account of their low status, while the rich are not

¹³⁹ II *Verr.* i. 13 f., v. 163, 172 f. Schulz, 1936, 174, is perverse.

¹⁴⁰ *de leg.* iii. 6; cf. n. 132.

¹⁴¹ GC 44-7, 50 f., esp. Cic. *Part. Or.* 104.

¹⁴² For Cicero they were not entitled as *hostes* to the protection of citizens under the law, *Cat.* iv. 9 f. Clodius' dedication: *Sest.* 109, *de dom.* 108-11, *de leg.* ii. 42 (really to Licentia).

¹⁴³ Ch. 9 n. 76.

¹⁴⁴ *Fam.* ix. 14. 7 f.; one may doubt if it was welcome 'infimo cuique'. For the circumstances see Weinstock, 1971, 364 f.

prevented by unpopularity from retaining or recovering what is theirs'.¹⁴⁵ In Roman tradition this ideal was largely realized by the decemvirs' codification of the laws in the Twelve Tables. Cicero's account implies that the greater part of the code was based on the principle of equality, when he refers to the two last tables as unfair, citing the prohibition on marriage between patricians and plebeians, a derogation from that principle removed almost at once (*de rep.* ii. 63). He does not bring out that the codification was supposed to have been the product of prolonged popular agitation and to have marked a further stage in liberty. This is clear in the annalists.

Livy, evidently following an 'optimate' source, held that after the overthrow of the monarchy the commands of the laws were already more potent than those of men, and that both freedom and equality of rights (*ius aequum*) had been attained. Dionysius even makes Servius Tullius uphold the latter ideal; however, in his account the kings had discretion in interpreting the laws, which were not published nor fully known to the citizens in general, and the consuls retained this discretion; hence popular spokesmen still had to agitate for equality under the laws, which he calls indifferently *isegoria* and *isonomia*, as a security for freedom.¹⁴⁶ Granted that men could no longer trample on the rights of others because they stood high in the favour of a king, a state of affairs that was allegedly observable later in regal Macedonia,¹⁴⁷ the annalists themselves supposed that the plebs could still be unfairly treated. Hence the work of the decemvirs could be described as that of equalizing 'freedom' or legal rights. Equality in freedom and in legal rights clearly has the same meaning.¹⁴⁸ The fragments of the Twelve Tables show that in general this principle was realized in form, as far as the private rights of citizens were concerned, though admittedly those without property were at a grave procedural disadvantage (Gell. xvi. 10. 5). It is noteworthy that under the code only the people was authorized to pass *privilegia* against named individuals.¹⁴⁹

We are reminded of the famous statement of the Athenian democratic ideal in Euripides' *Supplikes* (430 ff.): 'first of all, when the laws are not common to all, but one man rules and keeps the law to himself, there is no equality; but once the laws are written, the weak and the

¹⁴⁵ *de leg.* iii. 44; cf. *de offic.* i. 124: 'privatum autem oportet aequo et pari cum civibus iure vivere', ii. 85: statesmen should provide 'ut iuris et iudiciorum aequitate suum quisque teneat et neque tenuiores propter humilitatem circumveniantur neque locupletibus ad sua vel tenenda vel recuperanda obsit invidia', a principle reaffirmed by a third-century jurist (*Dig.* i. 18. 6. 2).

¹⁴⁶ Livy ii. 1. 1-6; cf. n. 147; Dionys. iv. 9. 9, 11. 2, 72. 3, x. 1, 29. 4 f.

¹⁴⁷ Livy ii. 3. 3; cf. xxxix. 27. 8 f., xlv. 32. 5.

¹⁴⁸ Livy iii. 31. 7, 34. 3, 56. 9, 61. 6, 67. 9; Tac. *Ann.* iii. 27. Cf n. 37.

¹⁴⁹ Cic. *de leg.* iii. 44, *de dom.* 43, *Sest.* 65. Dispensations from the law were at first granted by the people, later by the senate (Ascon. 58 C.; *StR* iii³. 337).

rich have the same right, the weaker when abused can reply in kind to the man of fortune, and with justice on his side the inferior triumphs over the great man. Freedom is found in this too: "Who wishes to bring before all some useful plan he has?"'; then he who desires to do so wins fame, while he who has no such wish holds his peace. What is fairer for a city than these things?' The second of these constituents of Athenian 'equal freedom' never existed at Rome, but the first is enshrined in the Twelve Tables. Perhaps later writers placed the achievement of the code in a conceptual framework borrowed from the Greeks; perhaps the legislators themselves were influenced by models from the Greek cities in the west (rather than from Athens);¹⁵⁰ Nepos was certainly following a Greek source when he made Timoleon say that under the system he had created at Syracuse 'it was a form of liberty, if everyone were permitted to resort to the laws in accordance with his own desires' (*Tim.* 5. 2). But in any event it seems plausible to hold that the codification itself, and the equality between citizens which on the whole the code upheld, sprang from conditions similar to those which had produced similar effects in Greek cities, and that Romans, who found liberty inherent in the *ius provocationis* and the *ius auxilii*, institutions peculiar to themselves, were capable of independently discerning it in what the Greeks called *isonomia*. The insoluble question of derivation is of lesser importance, compared with the undoubted fact that Romans adopted the view that equality before the law was essential to their freedom. This view is probably implicit in Cato's dictum that 'we should have common enjoyment of right, law, freedom, and the commonwealth, but of glory and honour in accordance with the individual's own achievement'. The most liberal or egalitarian society might not object to the distinction that this dictum allows.¹⁵¹

Finley, commenting on 'the boldness and rarity' of the Athenian ideal expressed by Euripides, says that the Romans never attained it in the Republic and that the emperors rejected it.¹⁵² He has traduced the Republic, though not the Principate. The *idea* was accepted, even by Cicero.

In *practice* men of wealth and standing had many advantages. Even when the laws had been published, the modes of procedure were not, until the aedile Cn. Flavius rectified this in 304. The forms of process most usual in early Roman law required litigants to wager a sum of

¹⁵⁰ So F. Wieacker, *Vom röm. Recht*² 1961, 46 ff.

¹⁵¹ *ORF*², fr. 252: 'iure, lege, libertate, re publica communiter uti oportet, gloria atque honore, quomodo sibi quisque struxit' (cf. Cic. *Phil.* i. 34). Ter. *Ad.* 183 'libertatem aequam omnibus' might come from a Greek source.

¹⁵² Finley, 1981, 84.

money which the poor can hardly have afforded; they were only gradually superseded in the late Republic by the formulary system in which there were no wagers. At all times in the Republic, the plaintiff had to bring the defendant to court, and the successful litigant to execute the court's judgement, without assistance from the state. This must have made it hard to obtain justice from a more powerful adversary, unless he were sensitive to the censure of public opinion. Freedmen were severely limited in the claims they could make against their former owners, though not against other citizens. (In Athens they were not even citizens.) Courts might be open to the influence and power of magnates and to bribes from the rich. Men of rank and wealth were best able to retain the services of the most learned jurists and most eloquent advocates. However, Finley himself allows that at Athens too the principle of equality before the law was for similar reasons not always realized in practice. As in modern democratic societies, wealthy litigants enjoyed substantial advantages. At Rome they were no doubt still better able to exploit their superiority.¹⁵³

Bleicken remarks that the idea of legal equality could not become 'the engine of historical development' because of the inequalities that prevailed in Roman society.¹⁵⁴ These inequalities surely increased as Roman dominion and wealth expanded. No doubt ideas contribute most to promote political and social changes when they harmonize with material changes; at Rome those changes accentuated disparities in property and power. But that does not mean that the ideal of 'equal liberty', once it had been, however imperfectly, embodied in equality before the law, was more or less submerged in Roman consciousness by that respect for rank, authority, and patronage which Bleicken is apt to think to have been commonly preponderant among inferiors in Roman society; his evidence is valid only for what their superiors expected. He himself has to allow that some measure of 'equal liberty' in a political sense was obtained by plebeians in the struggle of the orders.

We do not of course know how they actually argued their case; annalistic representations necessarily mirror the ideas of their own age. By their account spokesmen for the plebeians contended for their eligibility to the highest offices on the basis that they should be open to all men of ability for the purpose 'aequandae libertatis' (Livy iv. 5. 5); it was contrary to 'aequum ius' if plebeians were denied the chance of *imperium* (vi. 37. 4), and it was a remarkable evidence of plebeian

¹⁵³ Kelly, 1966, chs. 1-3, illustrates the various advantages of the rich in litigation. He conjectures that *convicium* (n. 93) may have restrained the powerful from disobeying the law; hardly, if they lived in Rome and wreaked injustice through agents and slaves in distant parts (cf. *IM App.* 8). Freedmen: p. 418.

¹⁵⁴ Bleicken, 1972, 24 ff. As always he overestimates the significance of clientship.

liberty, when one of their number for the first time dedicated a temple, defying the arrogance of the nobility (ix. 46. 5–8). No doubt it was also in recollection of Italian claims in 90 that a Latin representative in 340 was made to claim that one consul each year should be a Latin, in the name of liberty and 'aequatio iuris', since 'ubi pars virium, ibi et imperii pars est' (viii. 4. 3). All this may also remind us of complaints in the late Republic of 'paucorum dominatio', and of Cicero's assertion, appropriate to a parvenu, that office was open to the 'virtue and industry' of all citizens (*Sest.* 137). Naturally Cicero knew very well that it was accessible only to men of substantial property (n. 129) though he might well have said that that could be acquired by virtue and industry, and that the nobility had a preponderant share; but we must beware of supposing that an ideal which had very limited effect is of no importance at all; and we may recall that even in democratic Athens the poor were not eligible for all offices, and certainly lacked the leisure and education required for the political leadership that the 'orators' supplied. The ideal reappears in the justification probably advanced for C. Gracchus' extension of judicial rights to the Equites: it conducted 'ad ius libertatis aequandae' (Florus ii. 1). The reservation of the best seats at games to senators in 194 was also resented as a diminution of equal liberty, and so probably was the similar privilege restored to Equites by the *lex Roscia*.¹⁵⁵ It was in the Principate that the ideal was discarded; the hierarchical order was then strengthened, and eventually equality before the law was lost.

XIII

In the early Republic Rome also took halting steps towards democratic freedom in virtue of the electoral, judicial, and legislative rights of the assemblies, which were also to be swept away in the Principate; these rights, as Sallust would make Macer say (see below), constituted the *ius* and *maiestas* of the people. *Maiestas* is a vague term and may be rendered in this context by such equally vague terms as sovereignty or supremacy. In its electoral capacity the people was the fount of honour,¹⁵⁶ and could even assert its right to choose magistrates not qualified by law for office (n. 114). It could pardon offenders who appealed to it (n. 133), and itself determine capital charges including those of *perduellio* or *maiestas*, a crime so ill-defined that the assembly

¹⁵⁵ Livy xxxiv. 54. 5; Plut. *Cic.* 13; Pliny, *NH* vii. 117. The Roscian law 'restored' the privilege (*Cic. Mur.* 40; Vell. ii. 32), or 'confirmed' it (Ascon. 78 C. where Cicero's claim that the people demanded both this and the Aurelian law of 70 is implausible).

¹⁵⁶ 'Omnis potestates, imperia, curationes ab universo populo Romano proficisci convenit': *Cic. de leg. agr.* ii. 17; cf. 27 f. See endnote 10.

could construe it by its own pleasure. Its legislative competence was unbounded (n. 39); Polybius remarked that it could pass laws depriving the senate of traditional prerogatives and dignity and damaging to senators' property (vi. 16); the Gracchi and later *populares*, without claiming for it the normal direction of affairs on the pattern of a Greek democracy, would in fact propose enactments affecting every public concern. It is true that it could act only on the initiative of a magistrate and that there were various ways of obstructing its will. However, on a traditional view accepted by Polybius (vi. 16), the tribunes were expected to elicit or express that will, and *populares* would be ruthless in overriding obstructions on the ground that it should be decisive (pp. 21 ff.). When a tribune was accused of violating the people's *maiestas* by employing violence to pass a law, it was argued in his defence, on the footing that the law had the people's approbation, that '*maiestas*, which consists in a kind of grandeur of the Roman people in the retention of its power and right, was rather increased [by his action] than diminished'.¹⁵⁷ Not surprisingly Clodius carried a measure in 58 designed to ensure the people's freedom to reach its decisions unimpeded by vetoes or religious obstruction.¹⁵⁸

This popular liberty entailed the *ius suffragii*. This constitutes another reason for rejecting the view that it was coterminous with citizenship (p. 296), seeing that from the fourth to the second centuries there were citizens (whom Mommsen called half-citizens) *sine suffragio*, possessed of only the private rights of citizens. We may reasonably guess that it was at the demand of the communities concerned that they were gradually raised to equality (pp. 104 f., 136 ff.). Intermittent proposals to abolish the rule whereby freedmen, or most of them, were registered only in one or all of the four urban tribes and to transfer those resident outside Rome to the appropriate rural tribes, in which their votes could have more weight, were also probably advocated (for whatever motive) in the name of 'equal liberty', while a plan to remove them from the tribal rolls altogether and thus to deprive them of the vote was abandoned on the objection that it was tantamount to taking away *both* their citizenship *and* their liberty.¹⁵⁹ The liberty sought by the Italians in 90 was also a share in the political rights of Romans, and

¹⁵⁷ *Cic. Part. Or.* 105; cf. J.-L. Ferrary, *CRAI* 1983, 556 ff.

¹⁵⁸ *Cic. Sest.* 56: 'eam legem quae omnia iura religionum, auspiorum, potestatum, omnis leges quae sunt de iure et de tempore legum rogandarum, una rogatione delevit'; cf. *de har. resp.* 58 (note 'intercessionem removit') etc.; the vague rhetoric in all Cicero's allusions does not reveal (any more than Ascon. 8 C.; Dio xxxviii. 37) the precise purport of the law, which evidently did more than restrict the use of religious obstructions.

¹⁵⁹ Livy xlv. 15. 4; Treggiari, 1969, 37 ff. The first to attempt this, Ap. Claudius the censor, is portrayed as a demagogue (Livy ix. 46. 10 ff.), and the later proposers, P. Sulpicius Rufus, Cinna, Manilius, and Clodius, ranked as *populares*. Cf. n. 169.

it must have been on the plea of equal liberty that the newly enfranchised allies took up arms in 88–87 to resist the attempt to confine them to tribes whose votes would count for little. Obviously neither the centuriate nor the tribal organization fulfilled the ideal of equal voting power for all citizens, but an ideal can be entertained, though realized very imperfectly.

The second board of decemvirs infringed liberty, according to Dionysius (xi. 1–3), not only by its oppressive administration but by retaining office without elections. Cicero argues that the provision in his model code of laws that the senate should consist of ex-magistrates and not be chosen by censors is ‘popular’, since it ensures that the senate is recruited indirectly by election (*de leg.* iii. 27). It corresponded to practice in the post-Sullan period, but even earlier those who had held certain offices were entitled to attend the senate before they had been formally enrolled by censors, and censors were expected not to pass them over at the next enrolment without good reason. After Sulla censors could still eliminate men from the roll; it was characteristic of the popular standpoint that Clodius legislated in 58 to institute safeguards against their making arbitrary judgements.¹⁶⁰

Political liberty meant the right of the citizens to vote *as they chose*. When adopting an insincerely popular stance, Cicero could declare that it was for the whole people alone to confer every kind of magisterial power, and that any derogation from this right was a diminution of liberty: citizens must be free to vote for whom they pleased (n. 114). It is clear that in elections candidates had to woo the suffrages of people of all sorts (ch. 8, section V). The introduction of the ballot by a series of laws was thought to free their votes from influence and pressure (n. 103).

Of these ballot laws that which, according to our information, was most strongly resisted by the nobility was the Cassian law of 137, which extended secret voting to popular trials, except those for treason; the exception was not removed until 106, when the tribune C. Coelius apparently thought that he was most likely to secure the conviction of C. Popillius Laenas for *maiestas* (*ad Her.* i. 15. 25), if the voting were secret (*Cic. de leg.* iii. 36). The trial of Popillius was the first of a series in the next few years of impeachments before the people of generals who were held to have disgraced Roman arms. Among them was Q. Servilius Caepio, whom the people first deprived of his command (*Ascon.* 78 C.), an act, it is said, without precedent since the deposition of Tarquin (*Per. Livy* lxvii); it was followed by another Cassian law excluding from the senate anyone so deprived or convicted by the

¹⁶⁰ *StR* ii³. 418 ff.; *Ascon.* 8 C. etc. for Clodius’ law, which was repealed in the optimate reaction of 52 (*Dio* xl. 57).

people. Cicero, giving the ‘popular’ view, lists both Cassian laws as notable accessions to the power of the people; by the first ‘suffragiorum ius potestasque convaluit’, while the second ‘populi iudicia firmavit’; and he collocates them with the Porcian law, ‘principium iustissimae libertatis’ (*Ascon. loc. cit.*). In Polybius’ view the people’s right to try political offenders was an important democratic element in the constitution (n. 137). According to Valerius Antias, the accuser of Scipio Africanus in 187 maintained that ‘no citizen should be so eminent that he could not be questioned by the laws, and that nothing served so much to promote equal freedom as the liability of the greatest men to stand trial’; his story of the affair is suspect, but none the less it reflects first century ideas of popular freedom.¹⁶¹ The accountability of ex-magistrates to the people on impeachment, normally by a tribune, was not only the guarantee of the private citizen’s personal security from arbitrary coercion, but was essential to that ultimate control by the people which the *populares* championed, as the leaders of the plebs were supposed to have done in the time of the struggle of the orders. In those days, according to the annalists, it had been keenly contested; to the plebeians it was liberty, to the patricians licence (n. 114). The patricians had indeed succeeded in ensuring that capital charges could be heard only by the centuriate assembly, and not by the tribes, which could only impose fines. This was to prove a safeguard in later times for nobles like L. Opimius in 120 (ch. 1 n. 25), who was thought to have acted in the interest of the whole propertied class.

Despite the flurry of impeachments in the last decade of the second century, the procedure was by then falling into abeyance with the constitution of permanent courts, or of courts constituted *ad hoc* to deal with political offences such as that established by the Mamilian law for misconduct in the Jugurthine war. But these courts were themselves set up by the people, and sometimes as in this case, on the motion of ‘popular’ tribunes. Another ‘popular’ law, the Appuleian, created a permanent court to hear charges of *maiestas*, before which the younger Caepio could be indicted for obstructing by violence the will of the people, while Norbanus, prosecuted for his own resort to violence in the ‘popular’ interest, could be exonerated on the ground that he was fulfilling that will. The *iudices* under both the Mamilian and Appuleian laws were Equites; their attitude might not be very different from that prevalent in the centuriate assembly, and it may have been supposed that they would be less susceptible to the influence of the nobility, especially in the circumstances of the time. It was also an advantage that prosecution in such courts did not depend on the initiative of a

¹⁶¹ *Livy* xxxviii. 50. 5–8 (see Scullard, 1973, App. iv); cf. xxvi. 2. 16.

tribune.¹⁶² In the absence of a public prosecutor almost any male citizen, and not merely one aggrieved by the alleged delinquent, could prefer a charge on behalf of the state. Men who made a business of this activity, stimulated by financial and other rewards, could acquire an infamous reputation as delators (Cic. *de offic.* ii. 50), especially in the Principate, like the sycophants of democratic Athens, where the same system had been adopted. We may, however, recall that the author of the Aristotelian *Constitution of Athens* (9. 1), who ascribed the origin of the practice there to Solon, regarded it as one of his three most democratic innovations. It is of course unlikely that at Athens, any more than at Rome, accusers were often humble people. At Athens indeed the jurors were paid and might be poor men; in Rome there was always a property qualification. Still, it remains true that the judicial system of the late Republic ensured that members of the ruling class could be brought to account either before the people or before courts not composed of their own peers. It was only under the Principate that senators became free of such control by their inferiors. The ideal of *aequa libertas* had then been abandoned altogether.

XIV

Of all the rights of the people in their assemblies the most momentous, though at times little exercised, was that of legislation, since it was by passing laws that the commons could gain material benefits; to say nothing of popular enactments in the late Republic, it was by earlier legislation that *nexum* was abolished and the *ius provocationis* secured. Dionysius thought that from the first the people, then voting by *curiae*, had had the power to enact laws (ii. 14); by removing this power, Tarquin the Proud destroyed liberty (iv. 81. 2 f.); it was restored with the Republic (iv. 75. 4, v. 2. 2 f., vii. 56. 3); indeed the new system was approved by an assembly (iv. 84. 3). Although in his view it was aristocratic, he makes a patrician 'lover of freedom' declare that freedom consists in government by consent (xi. 11. 2; cf. 15. 3), and another acknowledge that the right to legislate was proper to free men (ix. 44. 6). I take it that these and other similar texts in Dionysius and Livy¹⁶³ relating to the early Republic, whether or not the facts they purport to give are authentic, derive from annalists writing after the Gracchi and reflect the sentiments current in the late Republic, especially among the *populares*, a term that Livy uses of spokesmen for plebeian rights during the struggle of the orders, and that Dionysius

¹⁶² J.-L. Ferrary (n. 157) has an interesting discussion. Cf. ch. 4 for qualifications of *iudices*. The plebeians qualified under the *lex Plautia* of 89 probably had to be persons of some substance.

¹⁶³ Livy iv. 5. 2; cf. vi. 27. 6 ff.

renders by *demotikoi*; thus, he so characterizes the consuls of 449, Valerius and Horatius (xi. 43), whose tenure of office in Livy's view was 'popularis', because they passed laws for the freedom of the plebs (iii. 55).

Popular liberty in this sense was restricted under patrician ascendancy. No decisions could be taken by the *curiae* or centuries without ratification by the patrician senators (*patrum auctoritas*). Dionysius supposed that originally the tribunes of the plebs were themselves elected by the *curiae*; it was therefore of great advantage to the plebs when the elections were transferred to the tribes, which were also not liable to obstruction by patrician augurs (ix. 41, 49). Legislation, however, belonged in the Republic only to the centuriate assembly of the whole people; the tribes could do no more than pass *plebiscita* which had no binding force. This meant that legislation could be initiated only by the patrician magistrates who presided over the centuries, not by the tribunes who represented the plebs. Moreover, as Dionysius frequently observes, the common people had almost no power in the centuriate assembly, which was dominated by men of property, with whose support (he thought) the patricians were able so long to maintain control (xi. 45. 3). Originally 18 centuries of Equites and 80 of the first property class had an absolute majority of the 193 centuries; when they concurred, citizens of the middling sort would not even be called to vote, and the very poor, the *proletarii*, were brigaded in a single century, which would vote last, if at all, although on Dionysius' estimate they comprised perhaps half of the citizenry; probably this estimate was not far wrong for the time of the Hannibalic war, and the disproportion must have increased thereafter. In fact the centuriate assembly never lost this timocratic character; though there was a 'democratic' change, which can be dated between 241 and 218, of which Dionysius was aware, it did not amount to much; henceforth the centuries of the first class voted before the Equites, and they now numbered only 70, two for each of the thirty-five tribes, with the result that an absolute majority required at least some votes of the second class.¹⁶⁴ Nor would it have made any significant difference if proposals attributed to Gaius Gracchus and put forward later had been carried, whereby the centuries would

¹⁶⁴ iv. 20. 5, vii. 59. 7, viii. 82. 6, x. 17. 5; xi. 45. 3. *Proletarii*: iv. 18. 2, vii. 59. 6 (cf. Livy i. 43. 11); *IM* 24, 64-8. Democratic change: iv. 21. 3; cf. Brunt, *JRS* 1961, App. II. For the subsequent system cf. Cic. *de rep.* ii. 39. In elections a candidate needed an absolute majority to be returned; Cic. *Phil.* ii. 81 proves that this was attainable once the second class had voted. Cicero's boast that he was unanimously returned as praetor and consul (*de imp. Cn. Pomp.* 2, *de leg. agr.* ii. 4) means only that he had the votes of the Equites and the first two classes. Of his competitors in 64, C. Antonius beat Catiline only by a few votes; on this occasion all or nearly all the centuries must have been called to decide between them.

have been called in a random order and not in the rank of property classes.¹⁶⁵

Hence it was vital, if the true will of the whole people was to prevail, that the right of legislation should be granted to the tribes, which at one time were more truly representative than the centuries, and which could vote on bills that the tribunes laid before them, and that the enactment of laws should not be subject to ratification by the patrician senators. Livy makes tribunes argue that 'equal liberty' means the right of the people to legislate as it chooses (n. 163); in the context this demand relates to the tribal assembly.¹⁶⁶

The actual development is obscure. The *patrum auctoritas*, though never abolished, was reduced to a formality (Livy i. 17. 9) by a *lex Publilia* of 339, the work of a 'popularis' dictator, and a *lex Maenia*, probably later than 292; Sallust makes Macer say that this freed the people's votes.¹⁶⁷ *Plebiscita* were given binding force, we are told, by a *lex Valeria Horatia* of 449, by another *lex Publilia* of 339, and by the *lex Hortensia* of c.287. The last of these measures is unquestionably historical, though the circumstances in which it passed are largely veiled from us by the loss of the narratives of Livy and Dionysius. Whether the earlier laws are mere inventions or their purport has been inexactly transmitted, a matter of endless scholarly dispute, it is enough for our purpose to note that Livy conceived that the 'popular' consuls of 449, whom he credits with the reform, promoted the cause of liberty by putting the sharpest of weapons into the hands of the tribunes (iii. 55), a weapon, as Sallust's Macer was to say, to be used for liberty (see below). Dionysius took the view that they gave power to the 'plebeians and the poor'.¹⁶⁸

The tribal assembly itself cannot have been fully representative of the people in 287, and must have become increasingly less representative;¹⁶⁹ in the last century of the Republic it seems to have been

¹⁶⁵ If we credit Sall. (?) *Ep. ad. Caes.* ii. 8, C. Gracchus considered this scheme, anticipating Manilius in 66 and Ser. Sulpicius in 64 (Cic. *Mur.* 47, testifying to the indignation of the municipal gentry).

¹⁶⁶ See n. 163. Livy iii. 55, viii. 12. 14 f. also treats any increase in the power of the tribal assembly as popular.

¹⁶⁷ *Or. Macri* 15; cf. Cic. *Planc.* 8 (*ius populi*). Publilian law: Livy viii. 12. 12 ff.; the Maenian is after 298 (Cic. *Brut.* 55) and was presumably noticed in Livy's third decade.

¹⁶⁸ Livy iii. 55 (cf. Dionys. xi. 45), viii. 12, *Per.* xi: 'plebs propter aes alienum post graves et longas seditiones ad ultimum secessit in Ianiculum, unde a Q. Hortensio dictatore deducta est'; cf. Dio, fr. 37 on the preceding agitation for a moratorium in repayment of debts; Gaius i. 3 etc. briefly record the law giving *plebiscita* the force of *leges*. For later jurists this was the operative law; moreover, the relevant events would still have been remembered in outline by the earliest annalists, writing some three generations or less afterwards.

¹⁶⁹ Taylor, 1960, Part 1 (with maps). The 14 rural tribes created between 387 and 241 had larger territories and ultimately at least more registered citizens than the first 17 rural tribes close to Rome, except for those among the latter which (especially Pollia) acquired substantial

dominated by the urban plebs (p. 25 f.), while the centuriate assembly continued to reflect the views of the more affluent. But not even opponents of the power or liberty of the people ever took the point that neither assembly could truly be regarded as the people. And they too, while always seeking to curb or nullify the exercise by the 'people' of its rights, were bound by respect for constitutional convention, on which the authority of the senate was itself based, to pay lip-service to its sovereignty; thus in 106 Lucius Crassus, cajoling a popular audience, could acknowledge that 'we [senators] can and ought to be subject [*servire*] to you all', i.e. to the people as a whole (Cic. *de orat.* i. 225). This conception of popular sovereignty was identified by *populares* with liberty. Thus the Gracchi, according to Sallust, sought to reassert the people's liberty (*BJ* 42. 1); it must have been as clear to him as it is to us that they had claimed its right to legislate without restriction on matters of every sort (p. 33). This is a leading theme in speeches which he attributes to 'popular' spokesman. They stand at least in name for the people's rights (*Cat.* 38) acquired in the early Republic and therefore sanctioned by *mos maiorum*, the Roman equivalent to constitutional law. Thus Memmius reminds the people of the *ius* and *maiestas* won in the secessions of old (*BJ* 31. 17); both had been violated by oligarchic tyranny (31. 1 and 9); the people must throw off 'slavery' and resume their liberty by asserting their rights in the interest of the commonwealth (*passim*), in the particular instance by overriding the senate in its conduct of relations with Jugurtha. The Gracchi, falsely accused of aiming at regal power, had been the people's true champions (31. 2, 7 f.). Lepidus declares that under Sulla's despotism the people has been stripped of *imperium* (!), glory, and right, with the result that the citizens are exposed to illegal entrenchments on their private rights; they are enslaved (*Or. Lep.*, esp. 11). Macer again, in agitating for the restoration of the rights that Sulla had taken from the tribunes (n. 134), laments the people's loss of liberty under the domination of his successors (1 and 6). Liberty is not simply the right to vote—for they can still at elections designate their masters (6), nor security against arbitrary ill-treatment, which had supposedly been secured by the first secession (1); though Macer suggests that even this had been lost by citizens outside Rome itself (n. 134), he treats with contempt the notion that personal security constitutes sufficient free-

exclaves. The distribution of the enfranchised Italians among the rural tribes after 90 only produced new inequalities. We must suspect gerrymandering, but do not know how it worked nor in whose interest. The number of citizens voting in an urban tribe was evidently greater than that of those voting in a rural tribe, and individual votes therefore less valuable; this must be the explanation of attempts to allow freedmen to be registered in rural tribes of their residence (which of course also presuppose that some freedmen lived in towns other than Rome or had farms); cf. n. 159.

dom (26). What is required is the restoration of the tribunician power as a weapon ('telum'; cf. Livy iii. 55) to be used for freedom (12), which must not be bartered for the meagre corndole with which the senate had tried to assuage discontent (19). In 63 Cicero himself, suiting his sentiments to those of a mass audience, would speak of the 'ius potestas libertasque' of the people, which was not to be abated by any surrender of its own prerogatives or of those of tribunes (*de leg. agr.* ii. 29 f.). Once again liberty cannot be dissociated in the eyes of its possessor from power.

XV

Liberty in the sense of popular power, whether that which formally belonged to the plebs at least after the Hortensian law, or that which the plebs was believed to have exerted by agitations before its legislative rights had even in the annalistic tradition been conceded, was certainly the means by which the unprivileged extracted material advantages (*commoda*) from the ruling class, and it is not surprising that *libertas* and its *commoda* are sometimes associated.¹⁷⁰ Some of these *commoda* were undoubtedly subsumed under the concept of liberty in other senses; the *ius auxilii* and *ius provocationis*, 'equal liberty' under the laws, whose codification and publication were thought to have been forced on the patricians by popular clamours, the abolition of *nexum*, and (we may add) the freedom of clients from oppressive demands by patrons, which was secured by legislation of the late third century (ch. 8 nn. 108 f.). It was also by the power of the people that 'equal liberty' was obtained for plebeians in office-holding, and that the introduction of balloting gave them greater freedom to vote as they pleased. Naturally the various measures of relief for the poor ascribed to plebeian leaders of the early Republic, or promoted by Flaminius' agrarian distributions, and by the Gracchi and their successors, were at least products of that *libertas* which could be identified with popular sovereignty. Moreover, it could be held that the property and revenues of the Roman state were the possessions and income of the citizens (cf. Cic. *de leg. agr.* ii. 55, 80-2); Tiberius Gracchus urged that it was just that the land of the community should be distributed in common, sc. that individual citizens should be given shares in what belonged to them, and Gaius probably deployed a similar argument for the application of public funds to grain distributions (Florus ii. 1); it may well be that they contended that the people was free to dispose of its own. Since the freedom of Rome as a state was connected with its imperial strength (n. 30), Tiberius might also have contended that his agrarian law, designed to ensure that more land should

¹⁷⁰ Hellegouarc'h 556.

be in the possession of free men available for service in the army, whose numbers guaranteed that strength, instead of being cultivated by slaves, was conducive to Roman freedom.

But is there yet another possibility, that distributions of land and grain or the relief of debtors were actually seen as enhancing or creating freedom? It could have been said that grain distributions at Rome made the recipients less dependent on bounties from the great houses, while limitations on the rate of interest, moratoriums on the repayment of loans, or reductions of the capital due to be repaid, freed debtors from creditors; the last claim was unquestionably made on behalf of those who had fallen into a condition of bondage analogous to that of the *nexi* of old (n. 7).

Kloesel thought that this conception did emerge in relation to the establishment of peasant proprietors on the land (n. 171). He cited a speech of Servius Tullius in Dionysius (iv. 9. 8), in which that king proposed to share out public land among the poor 'in order that, free men as you are, you may not labour as hirelings for others, but farm your own land and not that of others'. This is redolent of the notion of upper-class Greeks that it was servile to earn one's livelihood by taking wages, since the wage-earner had no true independence. Cicero repeats this idea, but in a passage in which he *may* be simply following the Greek Panaetius. I am not aware of any other explicit statement of it in Latin. It is quite another matter that upper-class Romans commonly shared the contempt expressed by their Greek peers for manual labour, including in my view the actual cultivation of the soil, as distinct from landowning; this contempt was felt for 'banausic' occupations of all kinds (retail trading too), irrespective of the legal or economic status of the persons engaged in them.¹⁷¹

Still, Kloesel may have been right.¹⁷² As he remarks, Sallust says that the Gracchi began to champion freedom and expose the crimes of the oligarchs (*BJ* 42. 1); now, though it is true that Gaius Gracchus

¹⁷¹ De Ste Croix, 1981, 179-208; for reasons given in *JRS* 1982, 160 f., I do not think that the upper-class opinion that wage-labour was servile in itself does anything to show that it was not of considerable economic importance, if only because the poor can have often had no alternative to accepting wages when offered, even though they too felt that it was a loss of independence. In *JRS* 1980, 99 f., I sought to refute the view that Roman law assimilated *mercennarii* to slaves; were this true, it would of course prove that men gained freedom by being taken out of the class of wage-earners. It is also clear that those engaged in 'banausic' work either did not share the upper-class prejudice against it (so F. M. de Robertis, *Lavoro e lavoratori nel mondo rom.*, 1963, 21-41), or at any rate had no choice but to live by means they despised. On Cic. *de offic.* i. 150 f., see Brunt, *Proc. Camb. Phil. Soc.* 1973, 26 ff.; on contempt for cultivation of the soil, *ibid.* 11-13.

¹⁷² Kloesel 42 ff., discounted by Wirszubski 44 ff., and Bleicken, 1972, 35 n. 58, for lack of evidence. There is indeed no force in Kloesel's suggestion that opponents of agrarian distributions were answering the claim of reformers that they made for liberty by taxing them with the design of aiming themselves at despotic power; this imputation surely countered the assertion by reformers of *libertas* in the sense of the people's sovereignty.

fortified the *ius provocationis* and that his famous judiciary reform could be represented as an extension of 'aequa libertas' (Florus ii. 1), his brother was especially associated with agrarian reform, and he himself continued the work and also instituted the grain dole, while the context in which Sallust sums up their achievement is that of a description of the miseries of the poor: the freedom they stood for should be related to their efforts to alleviate social distress. Appian tells that the poor feared that in the event of Tiberius' death 'they would no longer enjoy equality in citizen rights but would be forced into being the slaves of the rich' (i. 15). Lepidus' speech links the loss of freedom under Sulla with the ejection of the poor from their homes (4, 12, 24) and with the abolition of the corn dole, which left the people destitute, deprived even of slave rations (11), as well as with disregard of the rule of law. Tiberius Gracchus also lamented that men who had fought for Rome had lost their own homes (Plut. *Ti. Gr.* 9), and Cicero himself was to mention in the same breath 'private hearths' and 'the rights of liberty' (*Phil.* xiii. 1). All this is little to show that *libertas* could connote economic independence, but we must recall how little the sources preserve of the sentiments to which *populares* appealed.

In any case, *libertas* as the sovereignty of the people was not just the instrument by which the people had secured various benefits: it had also been sought, according to annalistic tradition, for the sake of those benefits. This is written large in the accounts of the struggle of the orders in Livy and Dionysius. Cicero draws on this tradition when he suggests that there would have been no pressure to create the tribunate, had the senate provided relief for debtors who were being reduced to bondage (*de rep.* ii. 59), and Sallust when he explains the first secession of the plebs and the institution of the tribunate and other rights for the plebs by cruel and oppressive administration of the patricians (*Hist.* i. 11). No doubt the tradition was in large measure the product of annalistic imagination, but the very nature of the tribunate and of the organization of the plebs, as a kind of state within a state, virtually implies a bitter class conflict. At least the secession of c.287, and the circumstances that provoked it, must have been in the recollection of the earliest annalists, if not recorded in the pontifical annals at the time, and we can then safely say that the *lex Hortensia*, which finally established popular sovereignty, was the issue of a debt agitation (n. 168). In the late Republic too restoration of the full tribunician power was demanded in the 70s for the sake of freedom, but, according to Cicero (*I Verr.* 45 f.), it gained its force from discontent with provincial misgovernment (which is perhaps not easy to credit) and judicial corruption, for which no remedies could be expected unless tribunes recovered their former rights to initiate

reforms; we may perhaps think that the masses were more concerned with the abolition or inadequacy of the corn dole and indeed the failure of the government to maintain supplies of grain for the market (Sall. *Hist.* ii. 45), and by the lack of protection for citizens outside Rome (*Or. Macri* 27).

We may then well believe that ordinary citizens valued their political rights in the consciousness that they had afforded, and might continue to afford, all sorts of other benefits, just as senators must have valued the liberty that inhered in the senate's authority for the power and perquisites that they individually derived from it. But in neither case need we assume that liberty had not also come to be regarded as a good *per se*, partly by its association with other advantages, penetrating men's minds at a deeper level than that of conscious calculation, and partly for the *dignitas* that it bestowed on its possessors. Senators enjoyed general respect and deference, but the common people could also rejoice that these grandees had to humble themselves in soliciting their votes. Each citizen had his share in the *maiestas* of the people.

XVI

If all this be true, we cannot say that there was no Roman conception of *libertas* that did not comprise democratic ideas. It is of course obvious that the seeds of democracy sown in the early Republic never came to fruition. The extension of Roman territory and the growth of citizen numbers, to say nothing of the peculiar defects of the Roman assemblies, were insurmountable hindrances, given that no one so much as thought of introducing the representative principle. The 'strength of the plebs', as Sallust observes, was 'disunited and dispersed' (*BJ* 41. 6). The people could act under the constitution only on initiatives from above, and though these were forthcoming they were for long infrequent, and always intermittent; there was no organized party with a continuous existence, ever intent on enabling the people to give effect to its will. Most aristocrats were always at one in desiring to keep real power in their own circles and the people, which was bound to commit the exercise of government to persons within a limited class qualified by property, education, training, and tradition, seldom had the chance to choose for office members, either nobles or new men, who would act against the common interests of that class, still less to fill the senate with them. We need not doubt that most citizens felt a respect passed on from generation to generation for the senatorial order under whose direction Rome had grown great, but such respect did not always outweigh all other interests and passions, nor was it thought to be inherently connected with *libertas*. *Auctoritas* was a restriction on *libertas*, and the

abuse of aristocratic power inspired ebullitions of protest and hatred. It was aristocrats who then spoke of popular licence.

These ebullitions resulted in violence on both sides and ultimately in civil wars, in which the antagonists could all claim to be defending freedom, which they conceived in different ways. Seneca was to observe that it was futile for Brutus to hope that it could be restored in a state where so much was to be gained from both ruling and submitting to slavery, and which could no longer be brought back to its former condition, once the old morality had been lost; there could never again be equality of civic rights and a stable system of law, when so many thousands of men were ready to fight not for their liberty but for subjection to a particular individual (*de benef.* ii. 20). He implied that political liberty, taken to depend on sound morality and respect for law, was doomed before the institution of the Principate and was incompatible with it (cf. n. 42). Of course Tacitus and others could admit that liberty, in the attenuated sense of freedom for men of rank to think and speak as they chose, could be maintained by a benevolent prince; but even this measure of freedom was precarious: it reposed on the will of one despot and might be revoked by his successor.¹⁷³ For Tacitus too loss of equal rights was important: in AD 14 'all men [he is thinking of men of rank] abandoning equality awaited the orders of a ruler' (*Ann.* i. 4). Like Seneca, he saw that Romans in effect prized other things more than freedom; the plebs were won over to the new system by cheap food, the soldiers by rewards, all by the desire for *otium*; even the survivors of the old nobility were seduced by prospects of offices and wealth (i. 2). However, while the higher orders retained a share in the government, if only as servants of the monarch, and the new system respected their material class-interests, the people forfeited not only its electoral, judicial, and legislative rights, but eventually 'equal liberty' before the laws. It is symptomatic that Caesar himself abrogated that freedom of association which Clodius had confirmed, and that Augustus (or Tiberius) would invest the consular prefect of the city with arbitrary powers of coercion not only over slaves but over 'that disorderly element among the citizens whose audacity could be deterred only by force' (*Ann.* vi. 11). This was one step along the path that would lead to the imposition on the humble of penalties once thought appropriate only to slaves, and bind them to the soil in the interests of treasury and landowners. The optimate critics of the Gracchi were proved right; attempts to 'restore' the power of the people led on to monarchy, and monarchy destroyed popular freedom more completely than senatorial.

¹⁷³ Wirszubski 167-71.