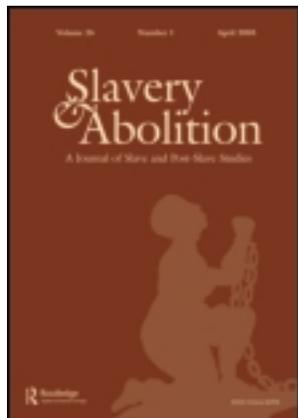


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An Equity Against the Law: Slave Rights and Creole Jurisprudence in Spanish America

Bianca Premo

There exists a long-standing historiographical mystery concerning the legal origins of the practice of Spanish American slaves suing their masters for freedom in royal courts. This essay highlights the importance of working judges' judicial philosophy in the formulation of this customary 'right'. A close reading of two rare eighteenth-century judicial opinions from Lima, Peru, exposes the rationale of the judges, particularly the Creole judges, who admitted slave cases. High court minister Pedro José Bravo de Lagunas y Castilla considered two legal issues that made slavery distinctive in the region: the right to self-purchase and grants of conditional liberty. In a 1746 letter, the judge rendered a relatively liberal opinion on slaves' legal rights by reading Creoles' own political 'liberty' into freedom suits. But as Lima's slaves increasingly entered the secular court system, his judicial philosophy would contract.

In 1748, three high court judges in the Spanish colonial city of Lima, Peru, upheld a lower court decision that, in essence, awarded freedom to a slave woman. In the original case, slave Tomasa Rayo had sued her owner, Doña Inés, and had won the right to purchase herself. Upon appeal, the judges of the Real Audiencia (the Royal Tribunal) agreed that Tomasa possessed this right based on the promise her prior owner, a nun, had made to free the slave if she complied with certain conditions. This sale, the court determined, could proceed against the wishes of her new owner, Doña Inés.¹

On their way to the verdict, the labyrinthine details of the case led the judges (*oidores*) of the Real Audiencia down paths connecting several pressing contemporary legal questions about slavery. Did a slave possess a civil legal personality sufficient to bring a suit? What were the legal parameters of conditional liberty – that is, the freedom an owner bestowed upon a slave under certain conditions such as the master's death? Could the court compel owners to sell slaves who offered to buy themselves for their market price?

Given the weighty legal matters that Tomasa Rayo's case entailed, we might imagine a great deal of thought went into the high court's ratification of the lower court ruling in favour of the slave. But if it did, the traces are not to be found in Tomasa's legal file. This is because magistrates in the Spanish Empire usually did not explain their

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decisions, whether they were interim judgments or final sentences.² Instead, they placed curt mandates in the margins, such as '[do] as the party asks'. Or they issued formulaic, simple verdicts: 'we find that the claimant proved her case and the defendant did not prove his'. We sometimes can glean ruling rationales from recommendations made by the high court Crown's attorney (*fiscal*) and, at the lower court level, from the opinion of an educated *asesor*, usually a lawyer in residence called upon to assist an unlettered judge. But, as in Tomasa's 1748 case, most decisions were devoid of judicial justification.

No matter to the residents of the capital city of the large viceregal jurisdiction of Peru. The ruling in this 1748 slave suit probably did not need much explanation since it was not unique. In fact, one of the judges who signed the verdict would later remark that other, similar suits were being processed by the Real Audiencia's clerk, and their numbers would only climb throughout the century. The same was true in the lower courts, at least according to the number of cases surviving today in Peruvian national archival holdings. As this article will demonstrate, by the end of the century, one in every 10 cases aired in the city's Cabildo (first-instance civil court) was brought by slaves seeking freedom or transference to a new owner.

What is unusual here is that one of the three high court judges who signed the verdict in Tomasa Rayo's case did leave a written record of his legal philosophy on slaves' legal rights. This was the *oidor* Don Pedro José Bravo de Lagunas y Castilla, a supernumerary judge of the Audiencia of Lima. In 1761, after he had retired from the bench and entered a monastery, Bravo de Lagunas published a compendium of his legal opinions entitled *Colección legal de cartas, dictámenes, y otros papeles de derecho* (*Legal collection of letters, rulings, and other law papers*; see Figure 1).³ The collection is a particularly rich artefact of legal thought since Bravo de Lagunas possessed a deep legal education as well as experience in various positions in the colonial judiciary.

This Lima-born jurist has received some scholarly attention based on the publication of his pro-Creole commentary, the 1755 'Voto consultativo', in favour of state regulation of the grain trade to benefit Peruvian hacendados.⁴ The 'Voto consultativo' earned Bravo de Lagunas notoriety in his own time as well as in modern scholarship, and was reprinted in the 1761 *Colección legal* as an appendix. Yet the other items in the compendium have received far less attention.

The main body of the book contains six opinions or sentences. Most are formulated as letters written in response to queries from various Lima luminaries, especially other high court judges who were, like the jurist, Creoles. Bravo de Lagunas's letters are preceded by a letter of 'receipt' from his correspondent praising the quality of his opinions. High-minded delineations of the limits of ecclesiastical jurisdiction and defences of the long reach of the Spanish king are the subject of several epistles and opinions. Three other opinions treat more specific points of law of the type that commonly appeared on the docket of a city judge. Critically, two concern the rights of slaves.

These two opinions dealt with unique legal features of Latin American bondage and manumission: slaves' civil right to self-purchase and the prevalence of conditional liberty, the contractual practice in which an owner freed a slave pending death or the completion of a certain service. The titles of the letters, long though they are,

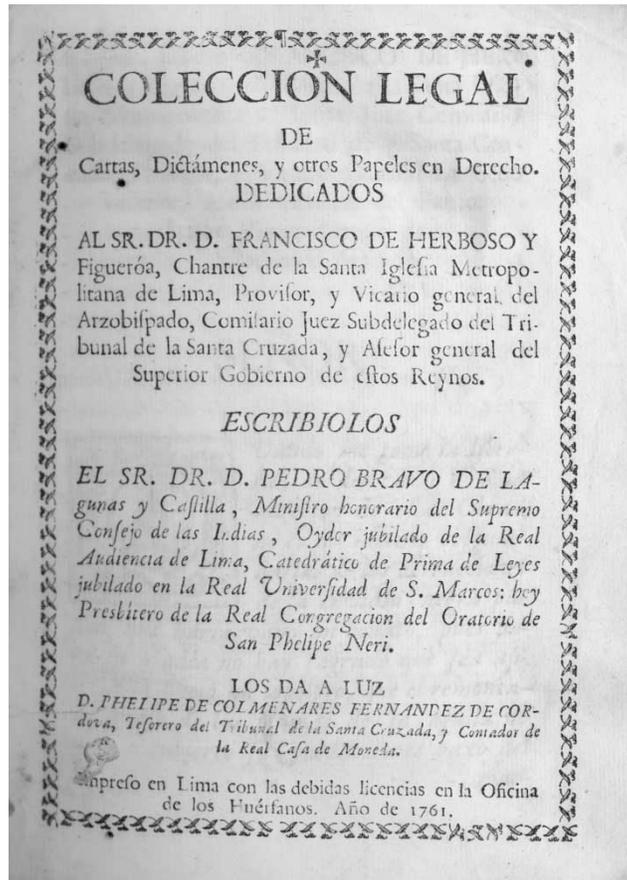


Figure 1. Title page of Bravo de Laguna's compilation of legal opinions, *Colección legal de cartas, dictámenes, y otros papeles*, published in Lima in 1761. Courtesy of the Newberry Library.

merit repeating in full since they reveal the complexity of the legal questions over which Bravo de Lagunas and judges like him puzzled during the century. The first letter on slavery, dated 1746, was the 'Carta en que se trata: si por el favor de la libertad pueda obligarse el Señor, a que reciba el precio de su siervo' ('Letter in which it is considered: if, because of the favour of liberty, a master can be obligated to receive the price of his servant').⁵ The second, written 12 years later in 1758, was entitled 'Carta en que se trata: si lo que nace de la *statulibera*, sea libre, o esclavo; y si pueda ser *statulibera* la manumitada desde cierto tiempo' ('Letter in which it is considered: if one born from a woman who has received conditional liberty, is free or slave: and if a woman manumitted after a certain time can be in the state of conditional liberty').

To unfold Bravo de Lagunas' two 'letters on freedom' is to open the otherwise hidden judicial philosophy of ruling judges in the Spanish American colonies.⁶ But these letters reveal even more than a rationale for sentences. Placed in their appropriate social-historical and intellectual context, Bravo de Lagunas' writings cast light on how

the changing epistemologies and legal philosophies of an eighteenth-century Creole elite conspired with slaves' legal practice to shape 'customary' features of Spanish American law – particularly the growing judicial acceptance of a slave's right to self-purchase (*coartación*)⁷ or to seek sale to a new owner (*papel*) who might offer freedom.

Indeed, Bravo de Lagunas penned his reflections on slave law just as old ways of judging cases, rooted in the scholastic method and tethered to the glossators and commentators of Roman civil law, gave way to a kind of Creole judicial eclecticism.⁸ By this, I mean a manner of judging cases that combined elements drawn from humanism, natural law theory from the School of Salamanca and the early stirrings of anti-Jesuit enlightened regalism. Bravo de Lagunas' legal writings on slavery were stuffed with these various inspirations, as well as a patriotic sense of custom and occasional forays into questions of precedent that strained the seams of Spanish civil law tradition.

All his experimentation had unforeseen consequences. As Bravo de Lagunas was busy pulling together diverse methods and sources to fashion his Creole judicial eclecticism, slaves were becoming especially litigious in the royal courts of Lima. The two phenomena were related. In his 1746 letter, Bravo de Lagunas ultimately renders a relatively liberal opinion on slaves' right to sue for freedom in the courts. Twelve years later he presents a decidedly more conservative view in light of the zeal with which slaves were turning themselves into civil litigants. The methodological and philosophical similarities between Bravo de Lagunas' reflections in 1746 and 1758, when contrasted to his divergent decisions about the rights slaves possessed in Spanish colonial law, suggest that the concepts of freedom he had tossed around in his first letter had begun to slip out of the hands of judges and into the hands of the city's most subordinate subjects. Bravo de Lagunas would grasp to regain control of these freedoms by the time he wrote the second letter in 1758.

These letters on slavery and freedom add to our ever growing understanding of how people of African descent in Latin America actively engaged the legal system. But this article reads the letters in a slightly different light. It seeks out connections between what are too often taken as distinct histories: the social history of slavery, intellectual history and the history of law. Until recently, 'Latin American slave law' was portrayed as a set of static rules to be compared with slave law elsewhere; this article instead joins an emergent historiography of Latin American law that places actual courtroom practice against a moving intellectual backdrop of Spanish American jurisprudence.⁹ As Bravo de Lagunas' letters reveal, slave law was not a thing but a dynamic process with a history of its own.

Letters and papers: slave litigants in historiography and numbers

The law has long been foundational to contemporary understandings of Latin American slavery, particularly for scholars based in the United States. This is, in part, for historiographical reasons. One of the earliest and most comprehensive assessments generated from the United States concerning the nature of Latin American slavery built its arguments upon the written laws governing Spanish and Portuguese colonial

society. Frank Tannenbaum's 1947 work *Slave and Citizen* advanced the comparative argument that Latin America's Roman-based legal tradition and canonical recognition of slaves' personality for sacramental purposes facilitated manumission.¹⁰ The long-term result for the region was a suppler modern colour regime than that which sprang from the property-obsessed slave society of the United States. Such a sweeping claim inspired debates for years to come – not only about the substance of his arguments, but also about the validity and political consequences of comparing slave regimes in the first place.¹¹

Historians of Latin America have drawn from the well of law to understand slaves and free people of African descent not only for historiographical but also practical methodological reasons. Lawsuits reflect back, albeit imperfectly, the images of subjects who otherwise are submerged in the historical record. Blacks in bondage appeared in lawsuits aired before secular and ecclesiastical judges with a frequency that shocks those more familiar with British and US slave regimes. Often – most often – slaves in colonial Latin America appear as objects of lawsuits. But they also appear as litigants, suing to keep their families together and to force their masters to permit them to marry, even bringing charges when they had been victims of crimes. And, sometimes, to the delight of historians searching for slave agency, they sued for freedom in cases over 'letters of freedom' (*cartas de libertad*) and the ability to acquire a sale paper (*papel de venta*) to find a different owner, potentially one amenable to manumission.¹²

It is notable that, when reading lawsuits, historians strain to hear slave 'voices' beneath the din of the bureaucratic language of scribes and lawyers, yet many let a more piercing silence go unexamined – that of judges.¹³ Why judges admitted slave cases to courts remains a mystery. We only know that, when they did, the magistrates failed to register 'surprise, amazement, or confusion' at the prospect of a litigious slave hauling his or her master into court.¹⁴ But to say that judges in colonial Spanish America failed to balk when slaves placed cases on their docket is not to say that it is clear in Spanish law – or in the historiography of slave law – that slaves possessed the right to do so.

In Spanish America, civil laws on slavery had multiple points of origin and sprang from shifting ground. They emanated, in part, from a complex and evolving corpus of 'Spanish' law, including the Castilian codification of the thirteenth-century *Siete Partidas* (which drew heavily from Justinian's sixth-century *Corpus Juris Civilis*); from Iberian regional law (*fueros*); and, finally, from more contemporary royal edicts issued for the Americas, some of which appeared in compilations.¹⁵ Where civil legislation was vague or absent – which was often the case given the unprecedented style and scale of human bondage that developed during the Spanish colonial period – legal practitioners and jurists turned to the Romans themselves and to a dizzying array of commentators and glossators.¹⁶ Of course, when slaves brought matters related to marriage or when they sued a member of the clergy or a nun who was also a master, they entered ecclesiastical jurisdiction, and thus were governed by canon law, which, with its attendant notions of free will and sacramental subjectivity, long had provided slaves with spaces for autonomy.¹⁷ Slaves also were subject to and

utilised the tribunal of the Inquisition.¹⁸ Finally, and critically, slave law was forged in practice and was often understood to be a matter of local customary law.¹⁹

While some historians debate the overall significance of customary law in the empire, it clearly had a stronger influence in the colonies than on the peninsula, particularly in governing America's indigenous populations according to their *usos y costumbres* (ways and customs).²⁰ Its importance to colonial administrators and judges is manifest in their occasional rejection of metropolitan mandates that might otherwise defy local practice, captured in the oft cited phrase '*Obedezco pero no cumplo*' ('I obey but I do not comply').²¹ Still, our understanding of the operation of customary law remains partial because, in the words of the leading Latin American legal historian Víctor Tau Anzoátegui, 'it is born from below, it originates in small situations, it is defended in restricted circles, and it lacks expansive pretensions.'²²

Seeking to cut through this legal maze of custom and *fueros*, of glossators and canonists, some historians of slavery view the development of legal practices surrounding slaves in the New World, particularly the right of *coartación*, as the logical offshoot of written Spanish laws issued prior to the conquest and colonisation of the Americas or of the Roman civil tradition.²³ Yet it is critical to note that neither the *Corpus Juris* nor the *Siete Partidas* explicitly endowed slaves with many of the rights they claimed in royal courts, such as the ability to force owners to accept payment for them or to appear in court to haggle over the details of conditional liberty.

Other scholars of Latin America look elsewhere for the origin of a slave's 'right' to *coartación* or to litigate over the contractual obligations associated with conditional liberty. Rather than to emphasise the importance of Roman tradition or Spanish law, they signal the decisive influence of nineteenth-century liberalism on slave litigation. Equality, rights, freedom from tyranny – the liberal lexicon could not help but to translate well for Spanish American slaves who, in crossing the threshold of the courts to register their claims one by one, collectively trampled on the very foundation of the entire slave system until emancipation was the law of the land.²⁴

But just when some scholars began to conglomerate in the nineteenth century, others told us we are looking in the wrong places and times for the development of Spanish American slave legal subjectivity. Warning us away from an overly secular, positivistic notion of engagement with the law, these historians remind us that, beginning only shortly after conquest, the church and canon law played a crucial role in shaping the legal actions and sacramental identities and practices of peoples of African descent in the New World.²⁵

Nonetheless, it is clear that something transpired between the seventeenth-century church cases that these historians explore and the flood of cases that entered the independence-era secular courts in the 1800s. As Sherwin Bryant concedes for colonial Quito: 'the extant record contains far more civil cases [brought by slaves] after 1750, especially in the area of *sevicia*, or the excessive cruelty of masters.'²⁶ Quito's litigation rates are repeated elsewhere in the empire and, for our purposes, they are consonant with the impressive increase in cases that Lima's slaves brought against masters in the second half of the eighteenth century.

My research in the civil suit series of Lima's court of first instance, the Cabildo, demonstrates that the percentage of extant cases that slaves brought against masters increases notably in the 1770s and soars during the last two decades of the 1700s (see Table 1). In the Real Audiencia of Lima, the high court in which judge Bravo de Lagunas sat, the middle of the eighteenth century similarly marked a transformative moment for slave litigation. While this high court heard proportionally fewer slave cases than did the first-instance court, the percentage of suits brought by enslaved litigants among all the extant civil cases from this tribunal climbed from 1.7 per cent for the period 1735–1749 ($n = 5$) to 2.3 per cent for the period 1750–1775 ($n = 18$), coming to constitute 10 per cent of the court's docket by the end of the century.²⁷ This increase in slaves standing before *oidores* becomes more impressive if we consider the prestige of the court, its increasingly full docket, and the relative difficulty in getting an appeal, or even more, a hearing with *pro bono* representation based on slaves' legal status as 'miserables'.²⁸ Increasingly, these cases were over *sevicia*, or excessive punishment.

Thus, we can pinpoint the mid eighteenth century as a moment when some of Lima's slaves began to concentrate their efforts to gain freedom or autonomy in royal courts and, in doing so, settled into the role of secular legal subjects at all levels of the civil judicial system.²⁹ While a close consideration of slaves' entrance into the world of civil litigation is beyond the scope of this article, suffice it to say that it was more than a shift of forums from church to royal courts. Whereas in church courts, slaves displayed their adherence to Christian norms, in the civil courts, their accusations against civil owners centred on owners' breaches of secular, contractual obligations and on questions of violence, tugging their expressions of legal agency away from their origins in Christian law, even though the shift never completely deracinated slaves' discourses from religious bases.

The periodisation of slaves' secular legal activity pulls us into the orbit of the Spanish Bourbon monarchy, towards the centre of the swirl of sweeping enlightened reform in

Table 1 Slave cases brought before the Cabildo (first-instance civil court), Lima, in the eighteenth century.

Decade	Total cases	Slave versus master		Master versus slave		Other slaves		Total slave cases	
1700s	29	1	3.4%	0	0	1	3.4%	2	6.9%
1710s	30	0	0	0	0	1	3.3%	1	3.3%
1720s	36	2	5.6%	0	0	0	0	2	5.6%
1730s	66	2	3%	0	0	3	4.5%	5	7.6%
1740s	68	1	1.5%	0	0	0	0	1	1.5%
1750s	102	1	0.98%	0	0	5	4.9%	6	5.9%
1760s	88	4	4.5%	1	1.1%	5	5.7%	10	11.4%
1770s	373	33	8.8%	2	0.5%	9	2.4%	44	11.8%
1780s	490	49	10%	0	0	22	4.5%	71	14.5%
1790s	359	33	9.2%	4	1%	27	7.5%	64	17.8%
Total	1641	126	7.7%	7	.42%	73	4.4%	206	12.6%

Source: Archivo de la Nación del Perú, Cabildo, Causas Civiles.

both the peninsula and in Spain's colonies, which included the expulsion of the Jesuit order in 1767 and several administrative and social measures.³⁰ It certainly seems possible that these royal reforms undergirded some of the 'rights' that slaves began to invoke in the royal courts – particularly those captured in the so-called Spanish Bourbon 'Black Codes,' which were designed to provide slaves with certain guarantees in terms of treatment by masters in an effort to stanch possible rebellion.³¹ For example, Carlos IV's 1789 'Instruction on the Education, Treatment and Occupation of Slaves' reiterated the medieval law found in the *Siete Partidas* which held that any owner found to have committed excessive cruelty could be forced to sell the slave.³²

Surely the royal imprimatur on any piece of legislation warning of the dangers of tyrannical masters could only abet slave fantasies of using the courts to ameliorate their condition or gain freedom.³³ But to draw a line directly from His Majesty in Madrid to litigant in Lima is a tricky task. The so-called 'Black Codes' did not radically innovate on the slave legislation that the Crown had issued for its American colonies since the late sixteenth century, and the 1789 'Instruction' was repealed shortly after promulgation based on the outcry of the planter classes in places such as Cuba and Louisiana.³⁴ Critically, as Table 1 shows, slaves' increased judicial activity in the civil court of first instance in Lima clearly pre-dates the law and continued unabated after its repeal.

What is more, as Alejandro de la Fuente has argued, actual human beings must breathe 'concrete social significance [into] the abstract rights regulated by positive law.'³⁵ In his work on the development of customary practices concerning slave rights in nineteenth-century Cuba, de la Fuente makes it clear that 'neither *coartación* nor the possibility of changing masters appeared as slave rights in Castilian legal codes. Rather, it seems that these prerogatives emerged as a pragmatic response to the frequent litigation initiated by slaves themselves.'³⁶ De la Fuente's assertion that Cuban slaves themselves produced customary legal understandings of rights in the courts – and that Spanish slave codes tagged along behind legal practice – applies to Peru and other regions of Spanish America as well. Historians entering into the archives of church, local and high courts throughout Spanish America are invariably struck by the creativity and perseverance of enchained litigants; they uniformly leave convinced of their ability to shape the practice of law.

Nonetheless, the increase in slave lawsuits in royal courts over the course of the eighteenth century also implicates other figures in the transformation in legal culture. Put simply, slaves did not act alone. In order to sue their masters, they needed notaries and legal counsel, and, most critically, they needed judges to admit their cases to the Spanish colonial courts in the first place.

Letters and papers: 1746

Bravo de Lagunas had his own ideas on why legal professionals in mid eighteenth-century Lima would support slaves' legal claims. 'Law professors who protect the attempts [of slaves to win freedom in court], more than redeeming slaves from servitude, solicit another kind of liberty in their discourses', he wrote. This was a liberty

‘with which they might release themselves from that noble servitude that, according to Aristotle, we have to the laws, in order to be rationally free.’³⁷ Here, Bravo de Lagunas indicated that behind slave cases entering the Real Audiencia – specifically those in which slaves sued for the right to force owners to accept their purchase price – lurked lawyers (and perhaps even judges) who fundamentally misunderstood the law.

Bravo de Lagunas certainly knew the law well in all of its forms – academic as well as practised, civil as well as canon. He had begun his legal studies in 1717 at the age of 13 when he entered the distinguished Jesuit-run Colegio Real de San Martín. After earning his degree as a *licenciado* and then a doctorate, he spent another 13 years as rector at the equally distinguished Colegio Real y Mayor de San Felipe, and there occupied the chair dedicated to the teaching of Justinian’s *Digest*. In 1729, only shortly after being accepted as an *abogado*, or educated attorney licensed by Lima’s Real Audiencia, he was thrust into the position of Fiscal General de los Naturales, or the Crown’s Attorney for Natives. By the mid 1730s, he had been named Attorney General of the viceroyalty, or Crown’s attorney, and had been elected to a highly prestigious chair at the New World’s first university, San Marcos University in Lima.³⁸

In 1742, Bravo de Lagunas put himself forward as a candidate for appointment to the high court as an *oidor*, and he achieved this honour a few years later, when the viceroy for whom he had served as Asesor General retired.³⁹ Taking a supernumerary seat on the high court’s bench, he found no less favour with the new viceroy. José Manso de Velasco, later the Conde de Superunda, had great faith in the jurist and appointed him to various prominent ad hoc positions, including membership of a junta established after the capital city suffered a devastating earthquake in 1748, chief investigator into a conspiracy of indigenous inhabitants in Lima, and analyst of the forced sale of goods to native Andeans (*reparto*).⁴⁰

The early twentieth-century Peruvian historian José Antonio de Lavallé y Arias de Saavedra described the never married Bravo de Lagunas as wed to the study of law and devout in his loyalty to the viceroy. The *oidor* was, in Lavallé’s imaginative description, possessed of a ‘virginal continence’ that ‘produced in him a nervous disorder which first manifested as a profound hypochondria and later a religious monomania.’⁴¹ Perhaps fearing death, Bravo de Lagunas retired from the bench in 1756 and entered the Congregation of San Felipe de Neri, a society for priests which was quite democratic in its governance. There, he quietly compiled his writings for publication.⁴² He also undertook philanthropic endeavours and continued as a patron of the fine arts, adding to a personal collection that displayed a taste for the French, with works by painters Charles Le Brun and Nicholas de Larguillière and portraits of Louis XVI.⁴³ In 1752, he had paid Lima’s renowned painter Cristóbal Lozano 100 pesos to immortalise him (see Figure 2).

Lozano’s portrait shows him clad in the wig and the robe of the *oidores* of the Audiencia, standing before a library filled with the great commentators of Roman and Spanish law. Quills and inkpot stand near him, ready for service, and he clasps a watch in his left hand, making it seem, according to Lavallé, as if the minister would dash off to the Audiencia at any moment.⁴⁴ As a newly appointed high court judge a decade earlier – his black toga flapping as he rushed down the Audiencia’s

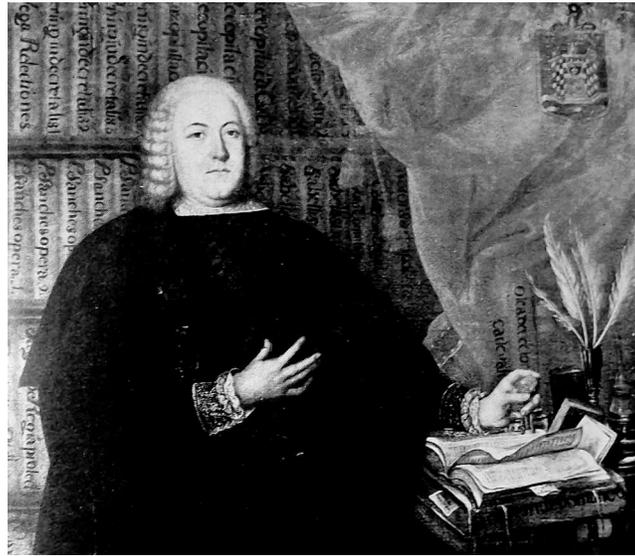


Figure 2. Cristóbal Lozano's portrait of Bravo de Lagunas. From Guillermo Lohmann Villena, *Los ministros de la Audiencia de Lima (1700–1821)* (Sevilla: Escuela de Estudios Hispano-Americanos, 1974), Lámina II.

corridors, which were lined with the fresh-faced lawyers who there established their *estudios públicos* (public offices) – Bravo de Lagunas must have found inspiration for his 1746 letter on slavery.

The letter was ostensibly prompted by a query about the rights of slaves to force masters to accept payment for their freedom posed by a fellow *oidor*, Manuel de Gorena. From the outset, Bravo de Lagunas framed the response as an indictment of young lawyers who too readily brought slave cases forward. There were, as he saw it, two reasons for their willingness to take on such cases. The first was that they lacked proper training and instruction, moving hastily through their coursework and setting up shop in the halls of the Audiencia, where they sold themselves out as ‘Apollos, dictating from their desks as if it were from the Tripod’ or the three-legged bench of the Greek god.⁴⁵ But the second and, according to Bravo de Lagunas, more pernicious reason that lawyers took on these cases and judges admitted them was rooted in what I have previously quoted: his sense that, as much as they sought liberty for slaves, they sought liberty for themselves in their judicial philosophy and in the very methods they used to prove cases and reach verdicts. Rather than going to the source of Lima’s laws on slavery, rather than piecing through the bulky Castilian codes of the *Siete Partidas* or the complex Roman laws compiled in Justinian’s *Digest* or *Institutes*, immature advocates threw themselves ‘into a jungle of indexes’. They ‘hunted for doctrines’ not among laws but among *arbitristas* and commentators, or in manuals such as Alfonso de Villadiego’s *Instrucción política y práctica judicial* (1612).⁴⁶

This was more than a typical case of an elder jurist clucking his tongue at the younger generation. Prefacing Bravo de Lagunas’ 1746 ‘Letter ... of liberty’ in the

Colección legal was fellow *oidor* Gorena's introductory, laudatory 'receipt'. This correspondent commented that Bravo de Lagunas' indictment of young lawyers was not quite the heart of the matter. Nor was the specific question of slaves' rights to self-purchase. Rather, the true thrust of the opinion was an epistemological one: in determining justice, how much weight should be given to the laws themselves and how much should be given to the interpretations of the authors so venerated in the late medieval scholastic tradition of early modern Spanish imperial juridical thought?⁴⁷

By insisting that the practitioners of the law go directly to the sources themselves rather than to commentators, Bravo de Lagunas expressed his clear philosophical affinity with the jurist-humanists of the late seventeenth and early eighteenth century who operated in the *mos gallicus*, or French method or style. This developing approach to law had formed in opposition to the long tradition, embraced in most of the Iberian Peninsula and elaborated in the American colonies, of *mos italicus* or *interpretatio* – the reliance on (sometimes flawed) sources that the jurist-humanists viewed as possessing only complementary but not primary value in administering justice.⁴⁸ Bravo de Lagunas lamented that the lawyers standing before the Audiencia acted 'as if Jurisprudence did not have fixed laws' and did not understand that 'the authorities on Law are not [themselves] laws [and their] words should not be taken as rules'.⁴⁹

Legal historians who have investigated the sources used in Spanish American cases suggest that *mos italicus* dominated in the courtrooms of the colonies, and Bravo de Lagunas' criticism confirms this.⁵⁰ The method of *mos italicus* was closely related to the ethical and legal form of casuistry, or case-based knowledge. Dominant among Jesuits and particularly pertinent in the confessional, the casuist method emphasised the importance of the particularities of an individual case or circumstance in determining its moral correctness or justice. Given the Jesuit control of education in colonial Spanish America until the expulsion of the order in 1767, it should come as little surprise that this case-based method of reasoning was standard among colonial lawyers and jurists. What is more, the method had harmonised nicely with the Creole colonial condition, where emphasising the particular needs of each region and the importance of local custom could provide legal independence from metropolitan domination.⁵¹ Indeed, Margarita Eva Rodríguez García, who considers Bravo de Lagunas's writing on the grain controversy to be the work of a quintessential Creole, believes that he used an essentially casuistic method to arrive at his conclusions in the 'Voto consultativo'. It was this kind of 'casuistry proper to Spanish American law (*derecho indiano*)' that, according to her, 'played an important role in the development of *criollismo*'.⁵²

But to reduce Bravo de Lagunas to a 'transitional' figure in colonial jurisprudence who used old methods to arrive at new outcomes misses the point. As we shall see in examining the jurist's second letter on slavery, written in 1758, not every use of a 'case' as a starting point for considering method and meaning in law should be understood as casuistry. And, in his 1746 'Letter . . . of liberty', Bravo de Lagunas reveals the existence of methodological alternatives, of a more critical strain of colonial juridical thought. Here, the jurist found inspiration in the natural law schools of Luis de Molina, one of the founders of the School of Salamanca, and the critical method of

Pietro Marcellino Corradini, author of the 1707 *Crítica e interpretación*, both of whom he cites in his 1746 letter.⁵³ Beyond his humanist sources and *mos gallicus* methods, Bravo de Lagunas's political inspiration was rooted in a sense of the importance of Creole jurisprudence.

Thus, in addition to emphasising the close study of the laws rather than the interpretations of commentators, Bravo de Lagunas was intent on deflecting the Jesuits' casuist arrow. Justice was not to be found in each individual case, but rather in the eighteenth-century goal of discovering a 'universal' legal system through which individual cases could be solved. Within this system, Creole jurisprudence could be a central cog. The Creole jurist used his legal treatise on whether slaves possessed the right to force owners to accept their purchase price as an opportunity to, in essence, systematise custom and enshrine Creoles' place in the system of laws.

The main body of his 1746 'Letter . . . of liberty' explored the diverse arguments that commentators had used to prove that slaves legally possessed the ability to force masters to accept payment for their freedom. But hanging over all the laws was a much invoked phrase: '*el favor de la libertad*' ('the favour of liberty'). The concept came from the pen of Justinian himself: 'The favour of liberty is great', the emperor wrote, 'and for it much have emperors done against common law (*ius comune*)'.⁵⁴ How to balance the great emperor's injunction to rule on the side of liberty, Bravo de Lagunas wondered, with what he understood to be the 'universal law' which held that no person could be forcefully dispossessed of his property?⁵⁵

The magistrate from Lima pursued a variety of different arguments in favour of slaves' right to purchase their freedom, and in each he found that revered *tratadistas* or commentators had essentially misunderstood the *Corpus Juris*. They had, in short, overfavoured liberty when the laws protected property. Many commentators had pointed to various circumstances that limited owners' property rights to argue that the laws stated that slaves could force masters to accept payment to manumit them. But in Bravo de Lagunas' mind, these limiting circumstances only proved the rule that a subject cannot be forced (against his will) to sell his property. 'The exceptions to general rule in each case', he passionately argued, 'do not limit the rule, they confirm it.'⁵⁶

Some of the exceptions that Bravo de Lagunas – and the commentators – had considered on the matter were arcane and not in use in the early modern Spanish world, such as the Roman practice of *libertad Latina*, by which a slave was freed until death, when an owner regained the legal prerogatives of a master over the slave's property. Presumably based on his experience with the kinds of cases that reached the Audiencia in Lima, Bravo de Lagunas judged other limiting circumstances 'more practical' and germane to the legal question at hand, and turned his attention to these.⁵⁷

Among the 'practical' matters was whether a slave could make a pact with a potential buyer who promised to manumit him or her. Could a judge force the original master to accept payment in such an instance, for 'the favour of liberty'? Bravo de Lagunas admitted some dissent within the Roman laws on this matter, since some laws specifically referred to the power of a judge to exhort an owner to accept payment 'extra-judicially' (*extraordinariamente*). Ultimately, however, he concluded that even this did not mean that a master could be forced to sell a slave against his will.⁵⁸

On the more abstract question of justice in extending the favour of liberty, Bravo de Lagunas delivered another blow to casuists, who sought to elevate the concept of 'equity' above iron-clad rules in judging cases of diverse conditions.⁵⁹ 'They proclaim equity', Bravo de Lagunas sneered:

when the price [is] received, and the slave is given freedom, which is so favourable; but this is an equity that is against the Law (*Ley*), and against reason, on which it is founded; which is totally outside true equity . . . The Professors reserve this [equity] for when the Crown is on their head and the sceptre in their hand, so that they can pronounce along with the Emperor Valentinian, *Oportet duritiam legum nostrae humanitati incongruam emmendiari* (Our compassionate (*incongruam*) humanity must amend harsh laws).⁶⁰

Bravo de Lagunas reserved particular condemnation for Spanish writers who got their own monarchs' laws wrong, especially the *tratadista* Bautista Valenzuela Vázquez and commentator Antonio de Azevedo. Valenzuela and Azevedo had, he claimed, misinterpreted a specific law on slavery in the Americas. 'Where the Roman laws cast doubt on the matter', he wrote, 'the Royal Law in the *Recopilación de Indias* makes it clear'. This law privileged fathers who wanted to buy their slave children, giving them the first right of purchase.⁶¹ Yet, rather than a general endorsement of the ability to force a master to sell, Bravo de Lagunas pointed out that the wording of the law restricted it to Spanish fathers who had children with slave women and to cases in which the owner was willing to sell.

Given the amount of ink that Bravo de Lagunas spilled in dousing legal arguments in favour of a slave's right to force a master to accept payment for freedom, the end of his 1746 letter comes as a surprise. The twist came when the jurist turned to the question of whether a slave had the right to purchase himself. 'This has been a very frequent controversy', he explained, 'because I have no knowledge of precedent.'⁶² He concluded that, indeed, a slave did possess this right, but only in a very specific case: that of *sevicia*, or the abuse of slaves by masters. Both Roman laws and the Castilian code, the *Siete Partidas*, expressly stated that a master convicted of mistreating or prostituting his slave would suffer the punishment of being compelled to sell the slave, losing all rights over the slave.⁶³ But there was nothing in this law that specifically gave a slave whose master was convicted of such abuse the right to purchase freedom for him- or herself or to find a new owner who would make a pact for freedom with the slave. Bravo de Lagunas nonetheless decided that, in this narrow instance, the law did favour slaves by permitting them to search for a legal avenue toward freedom. The basis of his determination is critical since it reveals that it derived from a particularly Creole deployment of precedent and custom within the humanistic *mos gallicus* framework.

First, he considered a customary practice in Naples discussed by Italian civil law commentator Corradini and extended to the (other)⁶⁴ Spanish realms. When the king wanted to sell a town that he owned, Bravo de Lagunas explained, the laws held that the town had a right of *prelación* or 'precedence' in purchasing its own independence from control by another nobleman or prince.⁶⁵ Based, therefore, on the privilege of a pueblo to purchase its liberty, in cases of abuse Bravo de Lagunas conceded to slaves the right to purchase freedom against their owner's will.

In addition to viewing a slave's right as parallel to a pueblo's right, Bravo de Lagunas drew from a source of legal authority that is not normally afforded much attention in scholarship on the development of Latin American law: the legitimating weight of precedent. For this, he turned to Juan Bautista Larrea, a late sixteenth-century Spanish *decisionista* whose compiled opinions on diverse legal matters gained popularity in Spanish America during the second half of the eighteenth century.⁶⁶ Larrea had been a staunch advocate of the influence of *letrados*, or university-trained lawyers, on the Spanish monarchy.⁶⁷ But it was not any particular decision in Larrea's compilation that captivated Bravo de Lagunas or lent weight to his opinion of favouring slaves in cases of abuse. It was merely that 'decisions' in and of themselves could be sources of authority. 'The style of judging in Superior Tribunals, [when] justified', he proclaimed, 'is the best interpreter of the law.'⁶⁸

This led Bravo de Lagunas to his final, and most radical, opinion in the 'Letter . . . of liberty', which concerned the issue of a master's intent to sell a slave. Since, like pueblos, slaves had the right of *prelación*, or 'precedence', in purchase, they also had precedence if a master intended to sell a slave but only resisted because the slave had made arrangements to purchase liberty. In this, as in many of the humanist writings that inspired Bravo de Laguna, the question of the owner's will and intention was paramount. If it could be shown that a master, 'after having placed a price on a slave and undertaken his sale resists selling him when offered the price in order to free him', then it was legitimate for a judge to compel the master to sell.

The basis for his opinion was simple: precedent – 'According to the practice of our Tribunals, the serious intention of a master of a servant it is sufficient [to force a sale]'. This could be proved if the master had engaged in 'putting a price on the slave, which is regularly done on paper that is given to the slave in order to solicit [a new] master, or when he enters a settlement with someone who intends to buy him'.⁶⁹ The jurist went on to consider earlier practice in Peru that might have better served as precedent, such as the custom described to him by an elder judge of forcing the *tasación*, or assessment of the official price, of slave brides in order to free slaves as a kind of 'dowry', but, he said, 'I don't have an example before me'. Nonetheless, for this jurist, local practice was enough to anchor his decision on the customary legality of two emerging points of slave law: *coartación* and *papel*.

Thus, precedence and precedent, both favouring customary law, were the twin pillars of this Creole's jurisprudence. These concepts made Bravo de Lagunas' 1746 'Letter . . . of liberty' was a multilayered piece of jurisprudence, an eclectic mix of humanism and early Enlightenment notions of law as a universal system. It was a rejection of the commentator-obsessed casuistic Jesuit juridical and ethical method that had long supported customary, local colonial control. But it was not intended to undermine local, customary legal rights. Indeed, Bravo de Lagunas worked into his decision on slave rights an endorsement of a 'pueblo's' right to liberate itself and, in the final instance, he elevated the practices of his home tribunal and the judicial history of his city above the commentators and glossators long revered by his counterparts.

It may appear that, in many ways, his opinion had less to do with slaves than with the lofty exchanges of theologians and philosophers, with ethical and epistemological

debates between metropolitan commentators and Creole jurists. In the broadest sense, Bravo de Lagunas offered a restrictive interpretation of slaves' right to force their masters to accept payment for their freedom. But by analogising the pueblo to the slave and by defending the Audiencia's traditional practices related to bondage and freedom, Bravo de Lagunas endowed slaves with a basic civil, secular legal subjectivity that would permit them to purchase freedom in cases of *sevicia* or in cases when they could prove that their masters had intended to sell or free them. Not surprisingly, it was precisely over *sevicia*, self-purchase and prices that slaves increasingly sued in Lima's civil courts during the coming decades.

Letters and papers: 1758

Two years after he penned the 1746 'Letter . . . of liberty', and only months before a massive earthquake and tidal wave would strike Lima, washing away lives and documents, including slaves' lawsuits and free papers, *oidor* Bravo de Lagunas signed the verdict in the suit that opened this article.⁷⁰ Tomasa Rayo had sought refuge in the increasingly accepted idea that she had a right to purchase her own freedom after suffering mistreatment at the hand of a new owner. But she also pushed the limits of another aspect of legal practice in Latin American slavery – that of conditional liberty.

Tomasa's original owner, a cloistered nun, had specified in her will that the slave would be freed, but only after the nun had died and only after paying 280 pesos. Upon the nun's death, Tomasa had struck a deal with a new buyer, Doña Inés, who supplied her with the necessary 280 pesos in exchange for her 'domestic services'. Tomasa claimed that because of the 'harshness and rigours' heaped on her by Doña Inés, she was unable to work for her new mistress for 10 months, and instead supported herself and lived with her husband. Tomasa approached the lower court, arguing that the money she had spent on her own upkeep, the harshness of her mistress and, most of all, the fact that her original owner's estate had been paid the necessary 280 pesos were all circumstances that conspired for her freedom. The original judge who heard the case and then the panel of three judges who heard the case upon appeal ruled that Tomasa's price should be reduced. Eight pesos per month would be deducted from her value for the 10 months she lived away from her owner, and whether she wanted to or not, Doña Inés would have to accept the remaining 200 pesos as payment for Tomasa, if the slave could find a way to provide it (it is unclear whether she was ever able to do so).

Bravo de Lagunas was one of the appeal judges who rendered the sentence, a sentence in many respects in keeping with the judicial philosophy he had advanced in his 1746 'Letter . . . of liberty'. Doña Inés had implicitly expressed her intention to free Tomasa since she purchased the slave knowing about the conditional contract. What is more, Tomasa's (light) accusations of mistreatment justified the forced sale and privileged Tomasa's attempts to garner 'the favour of liberty'. But the case, and others like it, presented a legal conundrum that Bravo de Lagunas would contemplate only later after retiring from the bench. Was a slave who had been granted conditional liberty a slave, free or some state in between? And, if the conditionally freed subject was a woman, were her children born during the conditional period enslaved or free?

Thus, over a decade later, the ex-judge Bravo de Lagunas reloaded his quill with ink and set about writing a new letter. As in the 1746 'Letter . . . of liberty', in the 1758 'Letter consider[ing] . . . conditional liberty' the question of slavery was only in part the subject at hand. His correspondent, *oidor* Domingo José de Orrantía, put it bluntly. 'I've found in this letter much more than that which at the outset was planned', he wrote, as he praised Bravo de Lagunas for establishing a 'fixed rule that could remain from here forward.'⁷¹

The larger implications were, again, philosophical. In the 1758 'Letter consider[ing] . . . conditional liberty', Bravo de Lagunas continued his assault on the old epistemological order and reintroduced his invective against the legal profession of the city. He specifically challenged the Jesuit moral system of probabilism. Related to casuistry through their shared Jesuit genealogy, probabilists maintained that an argument could be proven valid as long as a sufficient number of written authorities supported it, no matter the size or strength of arguments advanced by an opposing group of authoritative experts. In his anti-probabilist posture, Bravo de Lagunas anticipated much of the drama that would accompany the early flurry of reform following the expulsion of the Jesuits in the Viceroyalty of Peru.⁷² At the Third Lima Conciliar Assembly held in 1772, a younger generation of anti-probabilists, who were dedicated to the rising regalism of the Bourbon monarchy, sought a statement condemning the Jesuits' moral system in an effort to eradicate all traces of the society's independence from the king, inspiring a rash of publications defending probabilism and satirical works condemning it.⁷³

The evils of probabilistic argumentation among Lima's lawyers, and, more specifically, its effects on slave cases, were evident to Bravo de Lagunas as he reviewed the arguments an attorney had advanced in a case aired before the Audiencia in 1748, the exact same year as Tomasa's suit. The slave María Josefa's case bore many resemblances to Tomasa's in that it included a nun, a promise of freedom made in a will and the question of the financial responsibility for a slave's upkeep. But the sticking point in this case was not María Josefa's freedom but rather the status of her children, who had been born after her original owner had left a conditional grant of freedom in her testament.

Bravo de Lagunas recounted the arguments of María Josefa's lawyer, whom he reported to be of distinguished reputation but never named.⁷⁴ The lawyer made a clever argument, only loosely based on the jurisconsult Paulo, who wrote on the legal status of conditional liberty. On behalf of María Josefa, the lawyer manifested doubt about whether the laws ever specified how long, precisely, the condition of slavery lasted in such circumstances. When an owner offered freedom in a last will and testament, the advocate reasoned, it was not precisely a 'condition' as much as a 'moment' in which the slave would be freed, regardless of other conditions attached. After all, we all will eventually die. In essence, the lawyer reasoned that it was possible that the condition of slavery could 'expire' along with masters.

Such a line of reasoning, Bravo de Lagunas sniffed, 'would hardly be tolerable' during mock trials of law school. Basing his arguments on the Institutes as well as the natural law theories of *derecho de gentes*, the retired judge claimed that there were only two states in which men could find themselves: 'all men are either free or

not free, and there cannot be a third type, since free and servant are not contrary as much as they are contradictory, and they admit no middle ground'.⁷⁵ He again sprinkled the pages of his letter with diverse references, ranging from the Dutch humanist Hugo Grotius to John Locke, from his enlightened contemporaries Benito Jerónimo Feijóo and Gregorio Mayans to the writings of a Spanish jurist in the Philippines, Fray Juan de Paz. This time, however, Bravo de Lagunas's eclecticism did not lead him to a liberal interpretation of freedom. There were no surprises in this letter as there had been in the 'Letter . . . of liberty' in 1746. He concluded that a child born to a woman in the status of conditional liberty was, irretrievably, a slave.

Conclusion

What turned Bravo de Lagunas away from 'the favour of liberty' that he had gravitated toward, however reticently, in his 1746 opinion on slavery? His methods had not been altered; he had only become less tolerant of the traditional casuistry of Lima's legal practitioners and more suspicious of the Jesuit approach to questions of truth. Nor had his sources changed. He continued to find inspiration in a wide range of authors, including the natural law theorists of the Salamanca School and his enlightened Iberian counterparts.

The 'recipient' of the letter, fellow Creole *oidor* Domingo José de Orrantia, provides us with our best clue as to what caused Bravo de Lagunas's change of heart. He pointed out that the jurist's indictment of the legal profession no longer centred on young lawyers, since the 'grey haired too feign their probabilities'. The problem was to be found not only in the classrooms but also in the courtrooms of the city, where lawyers and judges 'take every question as a probability . . . their genius finds doubt in every suit . . . In this way, the [number of cases] grow, and the Republic suffers the malady bemoaned by all of a multitude of suits'.⁷⁶

Indeed, lawsuits of all types were on the rise. Cases before the high court took years to reach conclusion, and many of these were appeals from lower courts or jurisdictional challenges. Thus, as early as the late 1750s, the *oidores* Orrantia and Bravo de Lagunas undoubtedly were already riding the first waves of a flood of civil suits, including slave suits. Bravo de Lagunas noted in a postscript to his 1758 letter that just prior to publication in 1761, the Audiencia had ruled on two more cases like María Josefa's. In a decade on the bench during the 1710s or 1720s, judges at all levels of civil jurisdiction would have encountered one or two slave suits; they were ruling on twice that number in a single year by the 1770s and 1780s. And half of these slave cases involved the right to find a new owner or purchase freedom in *sevicia* cases.

Thus, by the late 1750s, Creole jurists like Orrantia and Bravo de Lagunas no longer approached the question of freedom as one that reflected back on the rights of the pueblo or the venerable customs of their city. Lima's *oidores*, Orrantia reported, were awaiting a remedy for the 'many and slow suits' that had begun to fill the dockets of their tribunals. The solution could not, he was sure, come from the

judges themselves but rather ‘must come from a hand superior to ours, [that of the] the monarch’. The Creole *oidores* wanted royal reform.

To be fair, Bravo de Lagunas had always expressed a certain fear of emboldened litigants and lawyers who grabbed at the emperor’s sceptre. But by 1758, he had lost his tone of confidence in the ability of Lima’s judges to maintain law and order. In his 1746 ‘Letter . . . of liberty’, the jurist had condemned young lawyers for risking their clients’ respect for the justices of the high court by assuring them that their suits had a basis in law.⁷⁷ By 1758, the retired judge worried that the problem had even more far-reaching implications. ‘This is a free country’, he fretted, ‘where one comes without fear of running into a Law that might subject him or a doctrine that might contain him’. Here, he said, ‘every one makes himself a Judge and establishes himself as Sovereign’.⁷⁸

Facing the consequences of his earlier opinion on slave rights in the rising number of cases heard in the city, in 1758 Bravo de Lagunas sacrificed his faith in the customs of the tribunal on which he had proudly sat for the stability offered by a rising regalist order. Only the king could save the courts of his city from becoming forums for a multitude of litigants, including slaves, who did not regard as insurmountable the distance between themselves and their masters, their judges and even their kings. But in some ways it was too late. As they streamed into the royal courts, slaves had already begun to constitute themselves as, in Bravo de Lagunas’ words, ‘sovereign’ – or, as we might say, as sovereign subjects of a new legal order.

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Notes

- [1] ‘Autos seguidos por Tomasa Rayo, negra libre, con Doña Inés de la Barrera sobre que se le otorgue Carta de Libertad’, Archivo de la Nación del Perú, Real Audiencia, Causas Civiles, Legajo 108, Cuaderno 914, 1748.
- [2] M.C. Mirow, *Latin America Law: A History of Private Law and Institutions in Spanish America* (Austin: University of Texas Press, 2004), 27; Richard Kagan, *Lawsuits and Litigants in Early Modern Castile* (Chapel Hill: University of North Carolina Press, 1981), 27; Charles Cutter, *The Legal Culture of Northern New Spain, 1700–1810* (Albuquerque: University of New Mexico Press, 1995), 36, 130. In 1768, the Spanish king reaffirmed this legal tradition and expressly forbade judges from explaining sentences. Abelardo Levaggi, ‘La fundamentación de las sentencias en el derecho indiano’, *Revista de Historia del Derecho* 6 (1978): 45–73.
- [3] José Pedro Bravo de Lagunas y Castilla, *Colección legal de cartas, dictámenes, y otros papeles de derecho* (Lima: Los Húerfanos, 1761).
- [4] Scholars have portrayed the judge as everything from a Francophile peacock to a proto-nationalist, from a typical colonial casuist to an example of new criticism. See Margarita Eva Rodríguez García, *Criollismo y patria en la Lima ilustrada (1732–1795)* (Buenos Aires: Miño y Dávila, 2006), 101–

- 121; Ruth Hill, *Hierarchy, Commerce and Fraud in Bourbon Spanish America: A Postal Inspector's Exposé* (Nashville: Vanderbilt University Press, 2005), 297, *passim*; Guillermo Lohmann Villena, 'Criticismo e ilustración como factores formativos de la conciencia del Perú en el siglo XVIII', in *Problemas de la formación del estado y de la nación en Hispanoamérica*, ed. Inge Buisson, Klaus Müller, and María Jesús Rodero (Cologne: Böhlau, 1984), 24; Pablo Macera D'Orso, *Tres etapas en el desarrollo de la conciencia nacional* (Lima: Ediciones 'Fanal', 1955), esp. 23–32.
- [5] This 1746 opinion is the only one he was able to rescue from his home after Lima suffered a devastating earthquake in 1748 that destroyed most of his papers. José Pedro Bravo de Lagunas y Castilla, 'Al que leyerá', in *Colección legal*, 2; José Antonio de Lavallé y Arias de Saavedra, 'Don Pedro José Bravo de Lagunas y Castilla (apuntes sobre su vida y sus obras)', in *Estudios históricos* (Lima: Gil, 1935), 185–186.
- [6] My phrasing invokes *cartas de libertad*, the Spanish equivalent of 'free papers'.
- [7] The term *coartación* comes from the reflexive verb *coartarse* or *cortarse* (to cut oneself [free]) and was in use in the seventeenth century. Alejandro de la Fuente, 'Su único derecho: los esclavos y la ley', *Debate y Perspectivas* 4 (2004): 56.
- [8] While I use this term loosely, Bravo de Lagunas's approach shared common elements with the resurgent philosophical eclecticism employed in the natural law theory of the German Enlightenment School of Thomasius and 'court philosophy' of its monarchies. See Knud Haakonssen, 'Christian Thomasius (1655–1728)', in *Routledge Encyclopedia of Philosophy*, vol. 7, *Nihilism to Quantum Mechanics*, ed. Edward Craig (New York: Routledge, 1998), 376–379; Damiano Canale, Enrico Pattaro, Paolo Grossi, Hasso Hoffman, and Patrick Riley, eds., introduction to *A Treatise of Legal Philosophy and General Jurisprudence*, vol. 9, *A History of the Philosophy of Law in the Civil Law World, 1600–1900* (New York: Springer, 2009), 9.
- [9] Scholars of Cuban slavery have formed the vanguard of this trend. See, for example, Rebecca J. Scott and Michael Zeuske, 'Le "droit d'avoir des droits": les revendications des ex-esclaves à Cuba (1872–1909)', *Annales: Histoire, Sciences Sociales* 3 (2004): 521–545. For a fascinating study of what might be called 'Atlantic jurisprudence' on slave rights, see Rebecca J. Scott, "'She . . . Refuses to Deliver up Herself as the Slave of Your Petitioner": Émigrés, Enslavement and the 1808 Louisiana Digest of Civil Laws', *Tulane European and Civil Law Forum* 24 (2009): 115–136.
- [10] Frank Tannenbaum, *Slave and Citizen* (1947; New York: Beacon Press, 1992).
- [11] For a fine summary of the debate, see Michelle A. McKinley, 'Fractional Freedoms: Slavery, Legal Activism, and Ecclesiastical Courts in Colonial Lima, 1593–1689', *Law and History Review* 28, no. 3 (2010): 749–790. On the continued resonance of Tannenbaum's thesis, see 'Forum: What Can Frank Tannenbaum Still Teach Us about the Law of Slavery?', *Law and History Review* 22, no. 2 (2004), particularly Alejandro de la Fuente, 'Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited', 339–369, and María Elena Díaz, 'Beyond Tannenbaum', 371–376.
- [12] My reference to 'agency' takes into consideration the incisive critiques of scholars like Walter Johnson, who points out that the concept itself is 'saturated in liberalism' and 'smuggles a notion of the universality of a liberal notion of selfhood'. Walter Johnson, 'On Agency', *Journal of Social History* 37, no. 1 (2003): 115. Yet, rather than focus on how scholars make 'modern' liberal categories today, this article examines how slaves, together with legal agents, created these categories in their own times.
- [13] See José Ramón Jouve-Martín, *Esclavos de la ciudad letrada: esclavitud, escritura y colonialismo en Lima (1650–1700)* (Lima: Instituto de Estudios Peruanos, 2005); Michael Zeuske and Orlando García Martínez, 'Notarios y esclavos en Cuba (siglo XIX)', *Debate y Perspectivas* 4 (2004): 127–170. The same is true even within the study of the history of Latin American law. See Javier Barrientos de Grandón, who calls for the need to study the sources cited in the opinions of *fiscales*: 'Derecho común y derecho indiano en el Reino de Chile', in *Memoria del Congreso del Instituto Internacional de Historia del Derecho Indiano*, vol. 1 (Mexico City: Universidad Nacional Autónoma de México, 1995), 158–159.

- [14] De la Fuente, 'Su único derecho', 15.
- [15] Theoretically, more recent Castilian law such as the *Leyes de Toro* (1505) was privileged in the order of Spanish law, but the medieval *Siete Partidas* was the most widely used in civil cases throughout the empire. Mirow, *Latin American Law*, 49–50.
- [16] Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989), 46; Javier Barrientos Grandón, *La cultura jurídica en la Nueva España* (Mexico City: Universidad Nacional Autónoma de México, 1993), 72–74.
- [17] See, especially, Herman L. Bennett, *Colonial Blackness: A History of Afro-Mexico* (Bloomington: Indiana University Press, 2010), chap. 6.
- [18] Technically, freedom suits were to be heard by the Audiencia, but slaves nonetheless used the Inquisition courts creatively. See Frank Trey Proctor, 'Afro-Mexican Slave Labor in the *Obrajes de Paños* of New Spain, Seventeenth and Eighteenth Centuries', *Americas* 60, no. 1 (2003): 33–58; Brian Owensby, 'How Juan and Leonor Won Their Freedom', *Hispanic American Historical Review* 85, no. 1 (2005): 39–79.
- [19] On customary law in the development of modern law in Latin American countries, see Víctor Tau Anzoátegui, *El poder de la costumbre: estudios sobre el derecho consuetudinario en América hispana hasta la Emancipación* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 2001). Also see Ricardo Levene, 'El derecho consuetudinario y la doctrina de los juristas en el desarrollo del derecho indiano', *Hispanic American Historical Review* 3, no. 2 (1920): 144–151.
- [20] See Mirow, *Latin American Law*, 51.
- [21] On *costumbre criollo* ('Creole customary law'), see Antonio Dougnac Rodríguez, *Manual de historia del derecho indiano* (Mexico City: Universidad Nacional Autónoma de México, 1994), 259.
- [22] Tau Anzoátegui, *El poder*, 11.
- [23] See, for example, Herbert Klein, *African Slavery in Latin America and the Caribbean* (Oxford: Oxford University Press, 1996), 194. María Elena Díaz here stands as an exception: she argues that the practice of *coartación* originated in Cuba, and traces it to a 1673 Crown law issued for the island. See María Elena Díaz, *The Virgin, the King, and the Royal Slaves of El Cobre: Negotiating Freedom in Colonial Cuba, 1670–1780* (Stanford: Stanford University Press, 2001), 175, 361n2. Still, it also is notable that this royal law was not used as proof of the legality of *coartación* in the courts of Lima.
- [24] For this historiography in Peru, see Carlos Aguirre, *Agentes de su propia libertad: los esclavos de Lima y la desintegración de la esclavitud, 1821–1854* (Lima: Pontificia Universidad Católica del Perú, 1993), 184; Fernando de Trazegnies, *Ciracio de Urtecho: litigante por amor* (Lima: Pontificia Universidad Católica del Perú, 1981); Peter Blanchard, *Slavery and Abolition in Early Republican Peru* (Wilmington, DE: Scholarly Resources, 1992), 41–42; Christine Hünefeldt, *Paying the Price of Freedom: Family and Labor among Lima's Slaves, 1800–1854* (Los Angeles: University of California Press, 1994), 118, 7. Also see Seth Miesel, 'The Fruit of Freedom: Slaves and Citizens in Early Republican Argentina', in *Slaves, Subjects and Subversives: Blacks in Colonial Latin America*, ed. Jane Landers and Barry M. Robinson (Albuquerque: University of New Mexico Press, 2006), 273–306.
- [25] Herman L. Bennett, *Africans in Colonial Mexico* (Bloomington: Indiana University Press, 2003), 34; Bennett, *Colonial Blackness*, 11; Sherwin K. Bryant, 'Enslaved Rebels, Fugitives, and Litigants: The Resistance Continuum in Colonial Quito', *Colonial Latin American Review* 13, no. 2 (2004): 9–10. Also see McKinley, 'Fractional Freedoms'.
- [26] Bryant, 'Enslaved Rebels', 9.
- [27] By my count, in the Real Audiencia Causas Civiles series of the Archivo de la Nación del Perú, slave cases against owners number five out of 291 for the years 1735–1749, 18 out of 727 during the period 1750–1775, and 54 out of 508 for the period 1791–1804.
- [28] On slaves as 'miserables', see Bianca Premo, *Children of the Father King: Youth Authority and Legal Minority in Colonial Lima* (Chapel Hill: University of North Carolina Press, 2005), esp. chaps. 1 and 7. Also see Lyman Johnson, 'A Lack of Legitimate Obedience and Respect:

Slaves and Their Masters in the Courts of Late Colonial Buenos Aires', *Hispanic American Historical Review* 87, no. 4 (2007): 631–657.

- [29] A few cases based on testamentary liberty were aired in secular courts prior to the 1770s, but they, along with *sevicia* cases, were primarily a late eighteenth-century phenomenon. See Frank T. Proctor III, *'Damned Notions of Liberty': Slavery, Culture, and Power in Colonial Mexico, 1640–1769* (Albuquerque: University of New Mexico Press, 2011), chap. 6. It should be remembered that the overall number of slaves able to gain freedom through legal challenges over issues such as *sevicia* or contractual obligations related to *coartación* would remain quite small, even if their significance was great in shaping the legal culture of slavery in Spanish America. See Rebecca Scott, *Slave Emancipation in Cuba: The Transition to Free Labor, 1860–1899* (1985; Pittsburgh: University of Pittsburgh Press, 2000), 14, 74–77.
- [30] On the Enlightenment in slave cases, see Bernard Lavallé, *Amor y opresión en los Andes coloniales* (Lima: Instituto de Estudios Peruanos, 1999), chap. 7; Camila Townsend, "'Half My Body Free, the Other Half Enslaved': The Politics of the Slaves of Guayaquil at the End of the Colonial Era", *Colonial Latin American Review* 7, no. 1 (1998): 105–128; Johnson, 'Lack of Legitimate Obedience'; Renée Soludré-La France, "'Los esclavos de su magestad!": Slave Protest and Politics in Late Colonial New Granada', in Landers and Robinson, *Slaves, Subjects and Subversives*, 175–208; Pierre Tardieu, *El negro en la Real Audiencia de Quito (Ecuador): ss. XVI–XVIII* (Quito: IFEA, 2006), 318–320.
- [31] See Manuel Lucena Salmoral, *Los códigos negros de la América Española* (Alcalá: Universidad de Alcalá, 1996). On other Bourbon reform legislation affecting the lives of peoples of African descent, see Bennett, *Colonial Blackness*, 198, 202.
- [32] The code is reprinted in Richard Konezke, ed., *Colección de documentos para la historia de la formación social de Hispanoamérica, 1493–1810*, vol. 3 (Madrid: Consejo Superior de Investigaciones Científicas, 1962), 643–652.
- [33] For slaves and expressions of loyalty to Spanish royalty, see Bennett, *Colonial Blackness*, 31n21; Díaz, *Virgin*, 14, *passim*.
- [34] On the innovations in the 1789 'Real Instrucción', see Premo, *Children*, 216. For repeal, see Lucena Salmoral, *Los códigos negros*, 21, 112–123.
- [35] Alejandro de la Fuente, 'La esclavitud, la ley y la reclamación de derechos en Cuba', *Debate y Perspectivas* 4 (2004): 42; Alejandro de la Fuente, 'Slaves and the Creation of Legal Rights in Cuba: *Coartación* and *Papel*', *Hispanic American Historical Review* 87, no. 4 (2007): 663.
- [36] De la Fuente, 'Slaves and the Creation', 661.
- [37] José Pedro Bravo de Lagunas y Castilla, 'Carta . . . si por el favor de la libertad', in *Colección legal*, 194–195.
- [38] Lavallé, 'Don Pedro', 147–194. On the growing penchant for electing state functionaries to prestigious chairs such as the 'Cátedra de Primas Leyes', see Ruben Ugarte del Pino, *Historia de la Facultad de Derecho* (Lima: Universidad de Nacional Mayor de San Marcos, 1968), 20–21.
- [39] There is a discrepancy in the sources concerning the date when Bravo de Lagunas was appointed as a supernumerary judge to the Audiencia. Guillermo Lohmann Villena has him appointed in 1746 and taking possession of the office in 1747 in *Los ministros de la Audiencia de Lima (1700, 1821)* (Seville: Escuela de Estudios Hispano-Americanos, 1974), 18. Lavallé claims he was named in 1742 but took the office in 1745, in 'Don Pedro', 154–155.
- [40] Alfredo Moreno Cebrián, ed., *Conde de Superunda, Relación de gobierno, Peru (1745–1761)* (Madrid: Consejo Superior de Investigaciones Científicas, 1983), 231, 248, 256, 259.
- [41] Lavallé, 'Don Pedro', 184.
- [42] During this period, he also might have ghostwritten the Viceroy Conde de Superunda's 'Relación de gobierno', according to Alfredo Moreno Cebrián in the introduction to *Conde de Superunda*, 135.
- [43] Rodríguez García, *Criollismo*, 120.
- [44] Lavallé, 'Don Pedro', 194.

- [45] Bravo de Lagunas, 'Carta . . . si por el favor de la libertad', 199.
- [46] *Ibid.*, 197.
- [47] Manuel de Gorena, in Bravo de Lagunas, *Colección legal*, 2.
- [48] See Rogelio Pérez Perdomo, *Latin American Lawyers: A Historical Introduction* (Stanford, CA: Stanford University Press), 12; Alejandro Guzmán Brito, 'Mos italicus y mos gallicus', *Revista de Derecho de la Universidad Católica de Valparaíso* 2 (1978): 11–40; Maximiliano Hernández-Marcos, 'Conceptual Aspects of Legal Enlightenment in Europe', in Canale et al., *Treatise of Legal Philosophy*, 87–88.
- [49] Bravo de Lagunas, 'Carta . . . si por el favor de la libertad', 196, 197. For a study of the rise of modern notions of legal 'systems' in Spanish America, see Víctor Tau Anzoátegui, *Casuismo y sistema* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 1992), 184–201.
- [50] Mirow, *Latin American Law*, 53; Barrientos Grandón, *La cultura jurídica*, 111. Cf. Pérez Perdomo, *Latin American Lawyers*, 12–13.
- [51] On custom and casuistry in the colonies, see Francisco Tomás y Valiente, *Manual de historia del derecho español* (1979; Madrid: Tencos, 1986), 328–329.
- [52] Rodríguez García, *Criollismo*, 112.
- [53] Macera also underscores Bravo de Lagunas's affinity for the works of Pufendorf and especially Hugo Grotius, whom he openly cited despite an Inquisition ban. Macera, *Tres etapas*, 25.
- [54] 'All creatures of the world love and desire liberty', *Siete Partidas* 4:22:1; Bravo de Lagunas, 'Carta . . . si por el favor de la libertad', 204.
- [55] Bravo de Lagunas, 'Carta . . . si por el favor de la libertad', 203.
- [56] *Ibid.*, 226–227.
- [57] *Ibid.*, 222.
- [58] His somewhat strained logic for this was that if the laws always favoured liberty, there would be no need for the slave to appeal to the judge to influence an owner in the first place (*ibid.*).
- [59] On casuistry and equity, see Tau Anzoátegui, *Casuismo y sistema*, 530.
- [60] Bravo de Lagunas, 'Carta . . . si por el favor de la libertad', 226.
- [61] *Recopilación de las leyes de Indias* 7:5:6. The original edict was issued in 1563.
- [62] Bravo de Lagunas, 'Carta . . . si por el favor de la libertad', 228.
- [63] *Siete Partidas* 4:22:11.
- [64] Corradini was referring to a practice that took place during the Spanish Habsburg rule of Naples, which ended in 1714 when the Bourbon dynasty assumed the throne in Madrid.
- [65] On the meaning of 'town liberty' and local municipalities' appeals to the Habsburg kings for autonomy, see Helen Nader, *Liberty in Absolutist Spain: The Habsburg Sale of Towns, 1516–1700* (Baltimore: Johns Hopkins University Press, 1990). Also see Francisco José Aranda Pérez, who notes the tension in the binary of 'monarchy' and 'municipal republic' in "Repúblicas ciudadanas": un entramado político oligárquico para las ciudades castellanas en los siglos XVI y XVII, *Estudis* 32 (2006): 7–48. As we shall see, for Bravo de Lagunas, that tension would be resolved in 1758 in favour of the king.
- [66] Barrientos Grandón, *La cultura jurídica*, 73.
- [67] Paola Volpini, "Por la autoridad de los ministros": observaciones sobre los letrados en una alegación de Juan Bautista Larrea, *Cuadernos de Historia Moderna* 30 (2005): 63–84.
- [68] Bravo de Lagunas, 'Carta . . . si por el favor de la libertad', 234.
- [69] *Ibid.*, 236.
- [70] See the arguments of a slave who claims his first owner's will and testament, which left him free, had been destroyed in the earthquake, in 'Autos seguidos por Lorenzo de Aguilar contra D. Manuel de Orejuela, sobre su libertad', 22 f. Archivo de la Nación del Perú, Cabildo, Causas Civiles, Legajo 17, Cuaderno 80, 1755.
- [71] Domingo José de Orrantía in Bravo de Lagunas, *Colección legal*, 2.
- [72] In 1769, Peru's enlightened viceroy banned mention of probabilism in courses on theology at the University of San Marcos and closed the Jesuit colleges, replacing them with an institution

named for the Bourbon king. Felipe Barreda y Laos, 'La universidad en el siglo XVII', in *La universidad en el Perú: historia, presente y futuro*, vol. 2, *La época colonial*, ed. Jaime Ríos Burga (Surco: Asamblea Nacional de Rectores), 718–719.

- [73] See Elisa Luque Alcaide, 'Reformist Currents in the Spanish-American Councils of the Eighteenth Century', *Catholic Historical Review* 91, no. 4 (2005): 743–760; Victor Ruíz de Peralta, 'Las razones de la fe: iglesia y la ilustración en el Perú, 1750–1800', in *El Perú en el siglo XVIII: la era Borbónica*, ed. Scarlett O'Phelan Godoy (Lima: Instituto Riva Agüero, 1999), 177–204; Pablo Macera D'Orso, 'El probablismo en el Perú durante el siglo XVIII', in Ríos, *La universidad*, 805–842.
- [74] The case does not appear to have survived to be housed today in the Archivo de la Nación del Perú, but Bravo de Lagunas quotes verbatim from the lawyer's closing argument (*auto de vista*). José Pedro Bravo de Lagunas y Castilla, 'Carta en que se trata: si lo que nace de la *statulibera*, sea libre, o esclavo; y si pueda ser *statulibera* la manumitada desde cierto tiempo', in *Colección legal*, 107–112.
- [75] *Ibid.*, 115.
- [76] Domingo José de Orrantía, in Bravo de Lagunas, *Colección legal*, 2.
- [77] Bravo de Lagunas, 'Carta . . . si por el favor de la libertad', 202.
- [78] Bravo de Lagunas, 'Carta en que se trata . . . *statulibera*', 143.