

Between Slavery and Freedom: Disputes over Status and the Codex Justinianus

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Abstract — The third-century rescripts found in the Code of Justinian provide numerous examples of disputes over status which had come to the emperor’s attention. This article explores the situation of those in the liminal status between slavery and freedom as seen in the rescripts. At the same time, however, it seeks to locate the rescripts in their sixth-century context, as Justinian’s guide to the law of his own day.

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“We frequently buy free men in ignorance,” remarked the Roman jurist Papinian in the early third century — a statement borne out by the Roman legal sources, which devote considerable space to disputes over status and the nebulous but all-important line between slave and free.¹ The third-century imperial rescripts

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Abbreviations and frequently cited sources: C. [Codex] = *Codex Justinianus*, ed. P. Krueger (*editio minor*); C.Th. [Codex Theodosianus] = *Theodosiani Libri XVI cum Constitutionibus Sirmondianis*, ed. T. Mommsen and P. M. Meyer; D. [Digesta] = *Justiniani Digesta*, ed. T. Mommsen and P. Krueger; *FIRA* = *Fontes Iuris Romani Anteiustiniani*, 1 [*Leges*, ed. S. Riccobono (Florence 1941; repr. 1968)], 2 [*Auctores*, ed. J. Baviera (Flor-

(responses) to petitioners found in the Code of Justinian provide numerous examples of disputes over status which had come to the emperor's attention. Again and again questions of freedom and slavery come up: petitioners claim to have been enslaved illegally, or to be harassed by enemies intent on claiming them as slaves, or they write on behalf of an unjustly enslaved relative. Or, conversely, they claim that someone who has been living as free is actually a runaway slave or the child of a runaway and is illegally holding the position and privileges of a freeborn person. This article explores the situation of those in this liminal and ambiguous state, between slavery and freedom, whose stories emerge from the rescripts of the Code of Justinian. It also, however, seeks to locate the rescripts in their sixth-century context, as Justinian's guide to the law of his own day.

I. The evidence

The Codex Justinianus, part of Justinian's monumental Corpus Iuris Civilis, contains legislation of Roman emperors from Hadrian up to the Code's publication in 529.² For second and third century emperors, the great majority of laws preserved in the Code is in the form of private rescripts (*subscriptiones*), responses given by the emperor to petitions from individuals who had written to the emperor for help or clarification of the law.³ Although some are responses to imperial officials who had consulted the emperor, most rescripts for this period are replies to private

ence 1940; repr. 1968)], 3 [*Negotia*, 2nd ed. V. Arangio-Ruiz (Florence 1969)]; Frag. Vat. = Fragmenta Vaticana (text in *FIRA*, 2, 463–540); Sent. Pauli = Sententiae Pauli (text in *FIRA*, 2, 319–417). Abbreviations and full references for papyri can be found at J. D. Sosin, et al., eds., “Checklist of Editions of Greek, Latin, Demotic, and Coptic Papyri, Ostraca and Tablets,” *Duke Papyrus Archive*, at the website of Duke University. All translations are my own unless otherwise noted.

¹ D.41.3.44 pr. (23 *quaest.*): . . . *nam frequenter ignorantia liberos emimus*. Papinian is contrasting the frequency with which free men are mistakenly bought and sold with the infrequency of adoption.

² This is the date of the second, revised edition of the Code; an earlier version, no longer extant, was published in 529. See the Conclusion below on the compilation of the Code.

³ In contrast to the imperial legislation found in the Code from the fourth and fifth centuries, which consists of *leges generales*, either *epistulae* (letters) to officials or edicts. For emperors from Constantine to Theodosius II, Justinian's Code drew on the Codex Theodosianus, which contained only such general laws. See J. Harries, *Law and Empire in Late Antiquity* (Cambridge 1999), 19–31; J. Matthews, *Laying Down the Law* (New Haven 2000); A. J. B. Sirks, *The Theodosian Code: A Study* (Friedrichsdorf 2007), 20–35.

subjects, whether Roman citizens or not, who had petitioned the emperor about their own situation. There are about 2,500 rescripts in the Code dating to the period before Constantine, almost all of which are from the “long third century” from the reign of Septimius Severus through that of Diocletian (193-306 CE).⁴ The bulk of this material is from Diocletian’s reign at the end of the third century, when two (no longer extant) collections of imperial rescripts were compiled, from which Justinian’s team drew for his Code more than two centuries later. One, the *Codex Gregorianus*, contained rescripts from Hadrian to Diocletian, although of these Justinian’s compilers retained fewer than two dozen pre-dating the Severan period. The *Codex Hermogenianus*, on the other hand, contained only Diocletianic rescripts, almost all from the years 293-294.⁵ The extant rescripts from the *Codex Hermogenianus* have been the subject of recent valuable studies by Serena Connolly, who explores the social and legal world of the petitioners to whom the rescripts responded, and Kyle Harper, whose book on slavery in the period 275-425 CE draws on the dozens of Hermogenianic rescripts that involve slavery and slave/free relations.⁶ Here I focus solely on rescripts and other texts that concern claims of wrongful enslavement or the illegal assumption of free status. I also include the rescripts of earlier third-century emperors, which, while not as numerous as those from Diocletian’s reign, evince the same concerns with status and freedom.

The recipients of imperial rescripts represent a much broader spectrum of the population of the Roman Empire than that seen in most imperial literature.⁷ Many of the petitioners were provin-

⁴ Cf. K. Harper, *Slavery in the Late Roman World AD 275 – 425* (Cambridge 2011), who takes as his subject slavery in the “long fourth century” from 275–425.

⁵ The bibliography on imperial rescripts is vast. See especially S. Corcoran, *The Empire of the Tetrarchs: Imperial Pronouncements and Government A.D. 284 – 324* (Oxford 1996; rev. 2000); S. Connolly, *Lives Behind the Laws: The World of the Codex Hermogenianus* (Bloomington, IN 2010); J.-P. Coriat, “La technique du rescrit à la fin du principat,” *SDHI*, 51 (1985), 319–48; T. Honoré, *Emperors and Lawyers*, 2nd ed. (Oxford 1994); F. Millar, *The Emperor in the Roman World* (Ithaca 1977), 240–52 and 537–49; W. Turpin, “Imperial Subscriptions and the Administration of Justice,” *JRS*, 81 (1991), 101–18.

⁶ Connolly (note 5), esp. 98–136, and Harper (note 4), esp. 378–90, both of which appeared as this article was in progress. Both have useful appendices listing the Hermogenianic rescripts as known from the Code of Justinian. See also the analysis of the social make-up of Diocletian’s petitioners in Corcoran (note 5), 25–42.

⁷ The closest literary analogue would be Apuleius’ *Golden Ass*

cials, and in fact almost all the rescripts in the Code attributed to the first Tetrarchy (293–305) originated from the chancellery of Diocletian, and so are responses to petitioners in the eastern half of the Empire.⁸ Since most rescripts post-date 212, when the emperor Caracalla (Antoninus) granted Roman citizenship to all free inhabitants of the Empire, these provincials, if they were legally free, were Roman citizens. About twenty percent of the extant rescripts are addressed to women; the percentage rises to almost thirty percent for the reign of Diocletian.⁹ Men in the military also received a number of rescripts.¹⁰ Freed people and, as we will see, even those held in bondage, are represented.¹¹

Unfortunately, the Code's compilers did not retain the original petitions to which the rescripts responded. Indeed, often the rescripts themselves were abbreviated and edited so as to include only the legal ruling, and the details of the petitioner's particular situation were usually omitted. Moreover, not only does the Code not preserve all the rescripts promulgated in the third century, but those that have been preserved are not a representative sample.¹² The rescripts in Justinian's Code have undergone (at least) a double winnowing process, first in the late third century, when the *Codex Gregorianus* and *Hermogenianus* were compiled,

(*Metamorphoses*), on which see F. Millar, "The World of the Golden Ass," *JRS*, 71 (1981), 63–75. Connolly (note 5) describes most petitioners represented in the *Codex Hermogenianus* rescripts as "the middling sort."

⁸ Corcoran (note 5); Connolly (note 5) thinks most rescripts from the *Codex Hermogenianus* were to petitioners in the lower Danube provinces. Although virtually all rescripts from this period are Diocletianic, in the *Codex Justinianus* they appear in the names of all current rulers, and that is how I cite them in the notes.

⁹ L. Huchthausen, "Zu kaiserlichen Reskripten an weibliche Adressaten aus der Zeit Diocletians (284–305 u.Z.)," *Klio*, 58 (1976), 55–85; Corcoran (note 5), 105–107.

¹⁰ J. B. Campbell, *The Emperor and the Roman Army, 31 B.C. – A.D. 235* (Oxford 1984), 264–99.

¹¹ Corcoran (note 5), 107–14; A. Piganiol, "Les empereurs parlent aux esclaves," *Latomus*, 133 (1973), 202–11; L. Huchthausen, "Kaiserliche Rechtsauskünfte an Sklaven und in ihrer Freiheit angefochtene Personen aus dem *Codex Justinianus*," *Wissenschaftliche Zeitschrift der Universität Rostock*, 23 (1974), 251–57; J. Evans Grubbs, "The Slave who avenged her Master's Death," *Ancient Hist. Bull.*, 14 (2000), 81–88; S. Connolly, "Quasi libera, quasi ancilla: Diogenia and the Everyday Experience of Slaves," *Am. J. Ancient Hist.* (n.s.), 3–4 (2004–2005) (published 2007), 171–88.

¹² See Turpin (note 5), who points out that many *subscriptiones*, such as those confirming immunities from public duties, were of purely personal interest to their recipients and did not express any principle of law; these certainly would not have been included in the *Codex Justinianus* and presumably were not in the two Diocletianic collections either.

and again under Justinian himself. Justinian's Code retained only the rescripts that were still valid and relevant in Justinian's empire, and therefore omitted many rescripts whose legal rulings had been overturned or made obsolete by subsequent legislation.¹³ The evidence of the rescripts we have is incomplete and, in a sense, anecdotal; it cannot tell us about the total number of slaves in the third century or the relative importance of different means of enslavement.¹⁴ Nevertheless, the rescripts offer invaluable evidence for an otherwise poorly documented era.

The frequent appearance of those below the elite in the rescripts is all the more remarkable in view of the difficulties of presenting a petition to the emperor and receiving a response. It was up to the petitioner to deliver his or her petition to the emperor, wherever the imperial court happened to be. This was not an easy undertaking for ordinary subjects, especially in areas not regularly visited by the emperor. The imperial replies, incorporating the emperor's own decision, would be composed by the imperial secretary for petitions (*a libellis*) and then endorsed by the emperor.¹⁵ The petition, with the emperor's reply written underneath (hence the name, *subscriptio*, for petitions so subscribed) was posted in a public place, such as the forum, in the city where the emperor was residing at the time he answered the petition. Thus the petitioner not only had to get the petition to the emperor but also wait for the reply to be posted and then copy down its contents; the original petitions with subscriptions remained in the imperial archives.¹⁶ Third century emperors did travel a great deal throughout their Empire, but given ancient

¹³ See the Conclusion below. Indeed, Gregorius and Hermogenianus may have used earlier collections, which may have introduced changes or variations: see D. Johnston, "Epiclassical Law," in A. K. Bowman, P. Garnsey, and A. Cameron, eds., *The Crisis of Empire, A.D. 193 - 337* [*The Cambridge Ancient History*, 12, 2nd ed.] (Cambridge 2005), 204.

¹⁴ On which see W. Scheidel, "The Roman Slave Supply," in K. Bradley and P. Cartledge, eds., *The Cambridge World History of Slavery*, 1 (Cambridge 2010), 287-310, and for the later period, Harper (note 4), 67-99.

¹⁵ How much input the emperor had into the wording, and even the decisions, of the rescripts subscribed by him is a matter of some debate. Honoré (note 5) believes that the secretary for petitions (*a libellis*), who was a legal expert (unlike the emperor), was responsible for the wording and decision; Connolly (note 5) goes even further and attributes the composition of rescripts to subordinates of the secretary. Certainly in the third century much imperial administrative work was delegated to others; see M. Peachin, *Iudex vice Caesaris: Deputy Emperors and the Administration of Justice during the Principate* (Stuttgart 1996).

¹⁶ On imperial archives, see Corcoran (note 5), 29-31; Millar (note 5), 259-65.

communication and transportation conditions, the difficulties in delivering a petition to the emperor and receiving a reply were formidable, even in peacetime — and the third century was a far from peaceful time. When the petitioner was held in slavery, or under threat of enslavement, the obstacles must have been almost insurmountable. Yet those in slavery were sometimes able to get a petition through to the highest authority in the Empire, revealing how even the humblest inhabitants could “use the system” and exercise agency.¹⁷

II. Proving status

Under Roman law, illegal enslavement did not affect free birth (*ingenuitas*) and if enslaved persons were proved to be freeborn and illegally deprived of freedom, they could recover their liberty and their status was unaffected. The claim of free birth was to be brought in a *causa liberalis*, a “case regarding freedom,” as were claims that a person living as free was actually a slave. In both cases the burden of proof was on the claimant,¹⁸ though of course the procedure was much more difficult and risky for the enslaved person than for the alleged owner. By the end of the third century, only the provincial governor had the power to decide cases *de ingenuitate* (“concerning free birth status”) and *de libertinitate* (“concerning freed status”); presumably *causae liberales* would likewise not be able to be delegated to lower judges.¹⁹ Investigation of status would involve torture of slaves who were thought to have information, since torture was standard operating procedure

¹⁷ On “using the system” see Connolly (note 5), 98–136.

¹⁸ As Alexander Severus tells Sabinus, whose slave claims she is free (C.7.16.5, undated, between 222–235); cf. D.22.3.8 (Paul 8 *Plaut.*); D.22.3.14 (Ulpian 2 *off. cons.*). On the *causa liberalis*, see W. W. Buckland, *The Roman Law of Slavery* (Cambridge 1908), 652–75; E. Hermann-Otto, “*Causae Liberales*,” *Index*, 27 (1999), 141–59. I was unable to consult M. Indra, *Status Quaestio. Studien zum Freiheitsprozess im klassischen römischen Recht* (Berlin 2011).

¹⁹ C.3.3.2, from a Tetrarchic edict (not a *subscriptio*) dated 294; see Corcoran (note 5), 171–72 and especially M. Talamanca, “*Le sacrae litterae* di CI 7.16.40 e l’ordinanza processuale di Diocleziano del 294 d.c.,” in A. Palma, ed., *Scritti in onore di Generoso Melillo*, 3 (Naples 2009), 1303–84. In cases where the imperial fiscus was claiming someone as a slave or freedman, however, the case would be tried by the *rationalis* or *magister rei privatae*: C.3.22.5 (an *epistula* to a provincial governor, 294): see Talamanca (this note), 1358–65 and note 145 below. In the Republic and early Empire, the praetor at Rome had jurisdiction over *causae liberales*; by the early fifth century, Christian bishops enjoyed that right along with governors: G. Vismara, “*Le Causae Liberales* nel tribunale di Agostino vescovo di Ippona,” *SDHI*, 61 (1995), 365–72.

when questioning slaves.²⁰ According to a letter of Diocletian to the governor of Syria, such interrogative techniques were necessary when determining free birth (*ingenuitas*), “lest by chance outsiders of sordid descent dare to be put in the place of [those of] splendid and freeborn origins.”²¹ Those whose status was actually in question were not to be tortured, and a rescript of Hadrian said that if someone claimed to be free in order not to be subjected to judicial torture, the claim had to be investigated (sc. by other means) before he was tortured.²² Antoninus Pius added that if a slave had been granted freedom in a will under a *fideicommissum* (trust), he was not supposed to be tortured “as a slave” unless he had been implicated in a crime by the evidence of someone else.²³ An exception would be made when it was suspected that a master’s will was forged, however: in that case, even if the person named as heir in the will had freed some of the slaves he had

²⁰ See Sent. Pauli 5.16; Buckland (note 18), 87–97; A. Watson, *Roman Slave Law* (Baltimore 1987), 84–89; P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford 1970), 213–16. Digest 48.18.1 (Ulpius 8 *off. procons.*) preserves many rescripts of second-century emperors regarding when torture of slaves should be used in investigations; see also D.48.18.8 (Paul 2 *adult.*), citing an edict of Augustus, and D.48.18.9 (Marcian 2 *iud. publ.*) and 10 (Arcadius Charisius l.s. *test.*) for rescripts of Antoninus Pius. These are addressed to officials tasked with judging cases rather than private petitioners.

²¹ C.9.41.9 (Emesa, 290), an *epistula* (not a rescript) to Charisius, governor of Syria, “ne alieni forte sordidae stirpis splendidis et ingenuis natalibus audeant subrogari.” N. Lenski, “Captivity and Slavery among the Saracens in Late Antiquity (ca. 250–630 CE),” *L’antiquité tardive*, 19 (2011), 237–66, connects this rescript to status investigations in the wake of a Saracen “uprising” in the region in 290. Those to be tortured were not, apparently, the ones claiming to be free, since (*pace* Harper (note 4), 383) the policy that the claimant for freedom should not be tortured was still in force under Diocletian: see note 22.

²² D.48.18.10.6 (Arcadius Charisius l.s. *test.*). Arcadius Charisius was secretary for petitions under Diocletian in the east (and prior to that, probably also under Maximian in the west). See Honoré (note 5), 156–62; Corcoran (note 5), 90–91; D. Liebs, *Hofjuristen der römischen Kaiser bis Justinian* (Munich 2010), 83–84; and now D. V. Piacente, *Aurelio Arcadio Carisio: un giurista tardoantico* (Bari 2012), esp. 15–56 on his rescripts and 105–36 on his book *de Testibus*. Rescript of Hadrian: cited in D.48.18.12 (Ulpius 54 *ed.*). In a dispute over ownership of a slave (as opposed to a claim for freedom), the slave in question could be tortured if there was no other means of determining the truth: C.9.41.12 (Tetrarchy to Asper, 294).

²³ D.29.5.1.5 (Ulpius 50 *ed.*, citing a rescript of Pius); cf. D.48.18.19 (Tryphoninus 4 *disp.*). See Garnsey (note 20), 213–15; and J. Pölonen, “Plebeians and Repression of Crime in the Roman Empire: From Torture of Convicts to Torture of Suspects,” *RIDA* (3rd), 51 (2004), 252.

allegedly inherited, imperial laws allowed the former slaves to be interrogated, even by torture.²⁴

Those in slavery could not bring legal claims themselves; they had to get a free person, called an *adsertor*, to advocate for them. Relatives who were free themselves would have the most motivation to bring a claim for freedom, and might have special knowledge not available to others, for instance that the enslaved person was actually freeborn and had been exposed (abandoned) at birth or sold into slavery as a child.²⁵ Even if the enslaved person did not want a *causa liberalis* brought on his (or her) behalf, parents or other relatives could still do so, as the existence of a kinsman in slavery was thought to bring grief and insult (*iniuria*) to the family.²⁶ Female relations as well as male could bring a claim, whereas the usual rule was that women could only bring legal actions on their own behalf.²⁷ Patrons (former masters) might also champion the freedom of their freedmen if they were in danger of being reenslaved by others, particularly since this would mean that the patron would lose the services that freed people owed to their former owners.²⁸

Sometimes, however, masters refused to free slaves whose manumission had already been agreed upon.²⁹ The heir of a

²⁴ C.9.41.10 (Diocletian and Maximian to Ptolemaeus, 290), referring to earlier “constitutions of emperors.” See P. A. Brunt, “Evidence given under Torture in the Principate,” *ZSS (RA)*, 97 (1980), 260–61. Presumably this was because it was suspected the alleged heir had freed the slaves in order to prevent their testifying against him (freedmen could not testify in court against their former master).

²⁵ On reclaimed *expositi*, see J. Evans Grubbs, “Hidden in Plain Sight: *Expositi* in the Community,” in V. Dasen and T. Späth, eds., *Children, Memory, and Family Identity in Roman Culture* (Oxford 2010), 293–310; on sale of children see V. Vuolanto, “Selling a Freeborn Child: Rhetoric and Social Realities in the Late Roman World,” *Ancient Society*, 33 (2003), 169–207; Harper (note 4), 390–423.

²⁶ D.40.12.1 (Ulpian 54 ed.); D.40.12.2 (Gaius ed. *praet. urb. tit. lib. causa*). An example is the famous *grammaticus* Melissus, enslaved after being exposed as an infant, who became Maecenas’ freedman. When his mother tried to reclaim him, he refused, preferring to remain with his illustrious patron: Suet. *Gram. et Rhet.* 21; Hermann-Otto (note 18), 150–51; Evans Grubbs (note 25), 298.

²⁷ D.40.12.3.2 (Ulpian 54 ed.); see J. Evans Grubbs, *Women and the Law in the Roman Empire: A Sourcebook on Marriage, Divorce, and Widowhood* (London/New York 2002), 68–69.

²⁸ Note C.7.16.19 (Tetrarchy, 293), where Paulus is told he can defend the freedom of his freedman, who is now being claimed by someone else as a slave, even if the freedman has consented to the new enslavement. Paulus has a right to protect his *ius patronatus*. See Connolly (note 5), 110–11.

²⁹ C.7.16.8 (Diocletian and Maximian to Veneria, 286) and C.4.6.9

master who freed his slaves in his will or by *fideicommissum* might be unwilling to carry out his wishes; by a decision of Marcus Aurelius and Commodus, slaves who found themselves in that position could bring charges of suppressed will against the heir — an exception to the usual rule that slaves could not sue their master.³⁰ Another much-cited ruling of the same emperors said that a slave sold on the condition that he or she be free at a certain time became legally free even if the buyer had not fulfilled his obligation to manumit the slave; evidently this was not an uncommon situation.³¹ Complications could arise if the slave whose manumission had been delayed was a woman who had had children in the meantime, as their mother's former owner might be reluctant to part with them. Several imperial decisions of the second and third centuries stated that in these cases the children were to be considered freeborn (*ingenui*), just as they would have been if their mother's manumission had not been delayed. Two rescripts respond to parents concerned about the status of their children born in such a situation.³²

(Tetrarchy to Bibulus, 294); both petitioners were themselves former slaves who had given money to buy their children out of slavery as well, but their former master had refused to part with the children. They are told (in identical language) to approach the governor, who will enforce the agreement, assuming that the *reverentia* due to masters is preserved. See also C.7.16.33 to Melitiana (Tetrarchy, 294).

³⁰ C.7.4.13 (Tetrarchy to Pythagoridas, 294); C.7.2.12 (idem to Rhizus, 293); C.7.4.11 (idem to Flavianus, 293–304). Decision of Marcus Aurelius and Commodus: D.48.10.7 (Marcian 2 *inst.*); see also D.36.1.23.1 (Ulpian 5 *disp.*); D.40.5.44 (Pomponius 7 *Sab.*). See T. Finkenauer, *Die Rechtsetzung Mark Aurels zur Sklaverei* (Mainz/Stuttgart 2010), 13–15; O. E. Tellegen-Couperus, *Testamentary Succession in the Constitutions of Diocletian* (Zutphen 1982), 135–44. The heir might also refuse the inheritance (because of debts on the estate). Therefore, Marcus Aurelius had allowed the slaves to have the estate adjudged to themselves and then carry out the testator's wishes: J.3.11.1–3; see C.7.2.6 (Gordian III to Pisistratus, 238–244) for such a case.

³¹ D.40.1.20 pr. (Papinian 10 *resp.*); D.40.8.1 (Paul 5 *Plaut.*); D.40.8.3 (Callistratus 3 *cognit.*); D.40.8.6 (Marcian l.s. *form. hypothec.*); D.40.8.8 (Papinian 9 *resp.*); cf. D.40.12.38 pr. (Paul 15 *resp.*). Rescripts: C.4.57.2 (Alexander Severus to Eutygianus, 222); C.4.57.3 (Alexander Severus to Fulcinius Maximus, 224; see note 32). See Buckland (note 18), 628–36; and Finkenauer (note 30), 36–44 (who downplays the innovativeness of the ruling). Marcus' ruling was apparently a rescript sent to Aufidius Victorinus, perhaps when the latter was urban prefect of Rome. By the early third century it was being applied to slaves who were given to a third party on condition of eventual manumission as well as those who were sold: C.4.57.1 (222, Alexander Severus to Patricensis, the slave in question).

³² See D.38.16.1.1 (Ulpian 12 *Sab.*), citing rescripts of Marcus Aure-

Even with an *adsertor*, those who claimed to be held in slavery illegally would need to be able to furnish proof of their free status. This might be a copy of the official declaration (*professio*) that parents were supposed to make at the child's birth: legislation under Augustus had called for the registration of all legitimate Roman citizens within thirty days of their birth.³³ The *Historia Augusta's* Life of Marcus Aurelius erroneously attributes this measure to Marcus himself, and says that that emperor wanted to make it easier for enslaved *ingenui* who were bringing a claim for freedom to prove their free birth. The discrepancy is usually explained by supposing that Marcus allowed illegitimate children (*spurii*) to be registered also, unlike Augustus, who had called for the registration of legitimate children only.³⁴ However, registration does not appear to have been compulsory, and even those who were registered would not possess proof of their birth, or of their exact age, unless they had made a copy of their birth certificate.³⁵ Examples of such certificates that have survived on wax tablets and papyri apparently are copies made for individuals to keep themselves. But many Romans, especially outside the upper classes, did not bother to register their children's births officially, much less have a copy made for their private records.³⁶ Failure to make a *professio* did not compromise a child's legiti-

lius and Lucius Verus and of Caracalla; D.40.5.26.2 (Ulpian 5 *fideicomm.*), citing a rescript of Septimius Severus and Caracalla that followed earlier decisions of Antoninus Pius; cf. also D.22.1.14 (Paul 14 *resp.*); D.40.5.41.5 (Scaevola 54 *resp.*); and D.40.5.53 (Marcian 4 *reg.*). Rescripts: C.4.57.3 (224, Alexander Severus to Fulcinius Maximus, the father of a child whose mother was supposed to have been freed at age 25); and C.4.57.4 (240, Gordian III to Cornelia Jucunda, a woman who did not receive freedom at the agreed-upon time).

³³ Discussion and examples known from tablets and papyri in C. Sánchez-Moreno Ellart, *Professio Liberorum. Las declaraciones y los registros de nacimientos en derecho romano, con especial atención a las fuentes papirológicas* (Madrid 2002); also G. Geraci, "Le dichiarazioni di nascita e di morte a Roma e nelle provincie," *MEFRA*, 113 (2001), 675–711.

³⁴ SHA *Marc.* 9.7, which does not explicitly mention the registration of *spurii*. *Professiones* of illegitimate children do appear in the documentary evidence from Egypt from the reign of Marcus on, however. Finkenauer (note 30) does not mention this passage.

³⁵ J. F. Gardner, "Proofs of Status in the Roman World," *Bull. Inst. Classical Stud.*, 32 (1986), 1–14; T. Parkin, *Old Age in the Roman World* (Baltimore/London 2003), 179–81.

³⁶ Moreover, *professiones* might be forged, and so were not a guarantee of legitimacy: C.4.19.14 (Tetrarchy to Mucianus, 293); C.6.23.5 (Valerian and Gallienus to Lucillus, 254 or 255); also a rescript of Gordian III to Nero Pudens known only from a papyrus: P.Tebt. II.285 (= *FIRA*, 1, no. 90, dated 239); see below at note 226.

macy, as long as the existence of the parents' marriage could be vouched for by "the knowledge of neighbors or others," according to a rescript of the emperor Probus to a petitioner named Fortunatus, who was worried because he had no written documentation.³⁷ Diocletian reassured another petitioner, Luscidis: "It is a matter of certain law that your status has not been damaged by loss of your birth declaration (*professio*)."³⁸ But was that really true? Someone may have been challenging Luscidis' freeborn status, perhaps even claiming him as a slave. Another reply by the same emperor to a certain Palladius suggests that lack of a *professio* could have serious consequences:

Omission of a birth declaration does not rule out proof of birth, nor does a fabricated forgery diminish the truth. Therefore since every kind of proof that is produced according to law ought to be admitted to an investigation of the truth, the governor of the province, approached by you and carrying out due legal procedures, to the extent that the reasoning of law allows, will see that the case for freedom is decided between you.³⁹

Here freedom itself is at risk, for the emperors call this a *causa liberalis*, a "case for freedom." One of the parties, either Palladius or his opponent, was suspected to be of slave status although living as free, or conversely, was being held in slavery but claiming to be free. The stakes were high, and written evidence was important, even essential. As Alexander Severus urged another petitioner, Carpus: "If a controversy over your free birth arises, defend your case with documents and whatever evidence you can think of, for witnesses alone are not enough for proof of free birth."⁴⁰ Threatening to destroy someone's *instrumenta status*

³⁷ C.5.4.9 (276–282); Gardner (note 35), 7–8; A. Watson, "The Rescripts of the Emperor Probus (276 — 282 A.D.)," *Tulane L. Rev.*, 48 (1974), 1123–24.

³⁸ C.4.21.6 (Diocletian and Maximian, Nicomedia, 286): *Statum tuum natali professione perdita mutilatum non esse certi iuris est.*

³⁹ C.7.16.15 (293): *Nec omissa professio probationem generis excludit nec falsa simulata veritatem minuit. Cum itaque ad examinationem veri omnis iure prodita debeat admitti probatio, aditus praeses provinciae sollemnibus ordinatis, prout iuris ratio patitur, causam liberalem inter vos decidi providebit.*

⁴⁰ C.4.20.2 (223): *Si tibi controversia ingenuitatis fiet, defende causam instrumentis et argumentis, quibus putas: soli etenim testes ad ingenuitatis probationem non sufficiunt.* Cf. J. Gardner, *Being a Roman Citizen* (London/New York 1993), 182–86, on priority placed upon reputable (sc. upper class) witnesses over documents in most cases; proof of free

(documents of status) if he did not pay money constituted extortion by violence, especially if the victim was being claimed as a slave.⁴¹ This is why Marcus Aurelius may have thought that allowing the births of illegitimate children to be officially registered would help those illegally enslaved to prove their free birth; those without a legal *paterfamilias* would be particularly vulnerable to exploitation and enslavement.⁴²

Freed men and women whose freedom was later challenged might produce a certificate attesting manumission, a document masters were supposed to provide: “Just as a patron is not able to take away from those manumitted the freedom he has given, so he is compelled to offer a document of manumission,” a petitioner named Molentus is informed.⁴³ This could be a tablet certifying receipt of the 5% tax (*vicesima*) on manumission (paid either by the master or the freed slave himself)⁴⁴ or perhaps a document attesting payment to the owner by a third party acting on the slave’s behalf,⁴⁵ or even an extract from a will in which a slave

birth, however, was different as it “was obviously a matter in which the state took an interest.” *Id.*, 184.

⁴¹ D.4.2.8.1 (Paul 11 *ed.*).

⁴² See above at note 34. Illegitimate children *ipso facto* had no *paterfamilias*.

⁴³ C.7.16.26 (Tetrarchy, 294): *Sicut datam libertatem manumissis adimere patronus non potest, ita manumissionis instrumentum praestare cogitur*. Another petitioner, Athenais, was assured that the master’s son didn’t need to sign the document in order for it to be valid: C.7.16.32 (Tetrarchy, 294). On manumission, see K. Bradley, *Slaves and Masters in the Roman Empire* (Oxford/New York 1987) (reprint of *Collection Latomus*, 1984), 81–112 (who says, *id.*, 83, that “in spite of Rome’s liberal practices most of the servile population probably never achieved freedom at all.”); T. Wiedemann, “The Regularity of Manumission at Rome,” *Classical Q.*, 35 (1985), 162–75; and most recently and thoroughly, H. Mouritsen, *The Freedman in the Roman World* (Cambridge 2011), esp. 120–205.

⁴⁴ *Vicesima* (5% tax): Bradley (note 43), 104–106 and 149–50. See the wood and ink tablet in Latin attesting payment of the *vicesima* at *FIRA*, 3 (Appendix), no. 10 bis (= P.Mich. VII.462), mid-second century; and P. van Minnen and K. A. Worp, “A Latin Manumission Tax Tablet in Los Angeles,” *Bull. Am. Soc. Papyrologists*, 46 (2009), 15–22 for another example and discussion.

⁴⁵ CPJ III.473 (dated 291) attests the manumission of a 40-year-old woman and her children, paid for by the Jewish community of Oxyrhynchus; *FIRA*, 3, no. 11 (= CPL 172), dated 221, is a Latin diptych attesting the manumission of a woman named Helena “inter amicos” after receipt of payment from a third party. In these cases, the freed person became a Junian Latin, if the requirements of manumission under the *lex Aelia Sentia* had not been met: see A. J. B. Sirks, “Informal Manumission and the *lex Junia*,” *RIDA* (3rd), 28 (1981), 249 n.6; S. Corcoran, “Softly

had been formally manumitted.⁴⁶ A freedwoman Roman citizen who wanted to prove that she had borne her illegitimate child after she was freed (and that therefore the child was freeborn and a Roman citizen) could produce the tablet attesting her manumission, as Julia Primilla did in Theadelphia, Egypt in the mid-second century.⁴⁷ But, as the response to Molentus implies, not all masters did provide a certificate, and even if they had, it might have been lost. That was not supposed to harm the manumitted person's free status, but lack of evidence to the contrary might result in illegal reenslavement.⁴⁸ Or there might be suspicion of forgery, or failure to pay the manumission tax or otherwise follow legal procedure might jeopardize the freedman's status.⁴⁹ On the other hand, those in slavery could not point to the lack of written documentation of their purchase as evidence that their enslavement was illegal. They might be "home-born" slaves, *vernae*, in which case their masters could use other evidence, including that obtained by torture of the slaves themselves, to provide proof of ownership.⁵⁰ And, as Diocletian reassured a woman named Phronima, if the documents of purchase for her slave Eutychia had been taken, the lack of such documents would not help

and suddenly vanished away': The Junian Latins from Caracalla to the Carolingians," in K. Muscheler, ed., *Römische Jurisprudenz — Dogmatik, Überlieferung, Rezeption. Festschrift für Detlef Liebs zum 75. Geburtstag* (Berlin 2011), 134; also notes 63 and 208 below.

⁴⁶ PSI IX.1040 (= *FIRA*, 3, no. 10) (post-212), a Greek papyrus from Egypt, appears to be an extract from a will, put into the third person, attesting the manumission of the slavewoman Dameis.

⁴⁷ SB I.5217 (= *FIRA*, 3, no. 6) (148), extract from an *epikrisis* (status examination) in which Primilla's *tabella eleutheroseos*, from the twelfth year of Hadrian's reign (i.e. 127/128, twenty years earlier) was among evidence adduced to attest to the free birth of Primilla's illegitimate twins. See C. A. Nelson, *Status Declarations in Roman Egypt* (Amsterdam 1979), 43–46; S. E. Phang, *The Marriage of Roman Soldiers 13 BC – AD 235* (Leiden, 2001), 43–44; and Geraci (note 33), 694–95. The twins' father was probably Primilla's patron C. Julius Diogenes, who had been a soldier and therefore unable to marry her at the time of the twins' birth.

⁴⁸ See C.7.16.25 to Licentianus (Tetrarchy, 294), whose freedman apparently had lost his *instrumenta* attesting manumission.

⁴⁹ See M.Chr. 91, an account of proceedings before the Idiologos in Egypt (second half of second century), where doubts are raised about the validity of manumission tablets with differing dates; discussed by E. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge 2004), 234–36.

⁵⁰ C.3.32.10 (Diocletian and Maximinus to Januarius, 290). On torture, see at notes 20 to 24.

Eutychia's claim for freedom; evidence that the *instrumenta* had been stolen would be enough to prove Eutychia's slave status.⁵¹

In Greek sanctuaries, manumission agreements in the form of sale and consecration to a god were engraved on the sanctuary walls or on stelai within the sanctuary, while the original was deposited in the temple archive and a copy made for the manumitter. The most famous manumission inscriptions are from the sanctuary of Apollo at Delphi and date from the second century BCE to the first century CE, but there are others from elsewhere in Greece, including examples from Roman Macedonia in the second and third centuries CE.⁵² The existence of a written record of their manumission set up in a public place, as well as the archived document, would provide protection for freed people, at least within the community or region. However, it might also record conditions that limited the amount of freedom a manumitted slave actually had, in particular, the *paramone* clause that required the freed person (or perhaps her child) to remain with the manumitter for the rest of the manumitter's lifetime or pay a certain amount to the manumitter, or (in the case of freed women) to leave a child with the manumitter in her stead.⁵³ Roman law did not recognize *paramone* as a legal contract, but such arrangements had long been customary in the eastern Mediterranean.⁵⁴ Such "manumission inscriptions," and the archived

⁵¹ C.4.19.20 (Tetrarchy to Phronima, 294).

⁵² R. Zelnick-Abramovitz, *Not Wholly Free: The Concept of Manumission and the Status of Manumitted Slaves in the Ancient Greek World* (Leiden 2005), discusses manumission inscriptions (including manumission by consecration) in the Greek world, mostly in classical and hellenistic Greece, but also including those from the Roman period: see esp. id., 61–99 and 184–207. For the Delphi inscriptions, see also K. Hopkins, *Conquerors and Slaves* (Cambridge 1978), 133–71. For the consecration inscriptions from the temple of the Autochthonous Mother of the Gods in Leukopetra, Macedonia, most of which are from the third century CE and which are often interpreted as recording manumissions in the form of consecration to the goddess, see below at notes 191 to 207. Manumission / consecration inscriptions are known from elsewhere in Roman Macedonia, such as Beroea.

⁵³ See Zelnick-Abramowitz (note 52), 222–48; also on *paramone* see A. E. Samuel, "The Role of *Paramone* Clauses in Ancient Documents," *J. Juristic Papyrology*, 15 (1965), 221–311; Hopkins (note 52); C. W. Tucker, "Women in the Manumission Inscriptions at Delphi," *TAPA*, 112 (1982), 225–36; and Harper (note 4), 373–78.

⁵⁴ See C.7.16.36 (Tetrarchy, 294), which tells Theodora that a *domina* does not have to adhere to an agreement she made with her slavewoman that the slave would be free after a certain amount of time, and that conversely, if the slavewoman promised to hand over her children to her former owner after being freed, she cannot be compelled to

documents from which they were abstracted, would serve to define the rights and the obligations of both owner and slave within the community.

But without documentation and in the absence of relatives or friends who knew the truth of their birth and were willing to come forward before the governor, unjustly enslaved people were trapped. Late Roman emperors were aware of the difficulties involved in bringing a claim of freedom. An imperial edict, evidently of Diocletian, said that when there was a dispute over *libertinitas* or *ingenuitas*, the case could be tried even in the absence of one party.⁵⁵ In the early fourth century, Constantine tried to make it easier for freeborn persons threatened with enslavement to find an *adsertor*. The person whose freedom was at risk was to wear a placard (*titulus*) stating that he or she was looking for an *adsertor*; ironically, this mimics the procedure used when a slave was put up for sale.⁵⁶ If necessary, alleged slaves could even be taken around the province in the hope that someone would recognize them. If no *adsertor* could be found at that time but later one turned up, the *causa liberalis* could be reactivated and the enslaved person's freedom could still be defended. If the suit was successful, the party who had enslaved the claimant was to pay as a penalty the same number of slaves as he had illegally possessed.⁵⁷ This is one of several laws of Constantine that champion the right to freedom of unjustly enslaved *ingenui* (freeborn people) while at the same time upholding traditional boundaries between slave and free.⁵⁸ In 393 Theodosius I decreed

do so. This appears to refer to a *paramone* agreement; Theodora is presumably either the owner or the slave. See L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig 1891; repr. Hildesheim 1963), 394–95. In Roman law, contracts between a free person and a slave were invalid: cf. C.3.1.7 (Tetrarchy to Irena, 294).

⁵⁵ The edict is cited in C.7.16.40 (undated, but evidently from the end of 294), an *epistula (exemplum sacrarum litterarum)* to Verinus, presumably a governor trying status cases. Talamanca (note 19), 1329–52, identifies this edict as the one partly preserved at C.3.3.2, C.3.11.1, and C.7.62.6, which he dates to 18 March 294.

⁵⁶ For the sale of slaves, see K. Bradley, *Slavery and Society at Rome* (Cambridge 1994), 52–54.

⁵⁷ C.Th. 4.8.5, addressed to Maximus, urban prefect of Rome, 20 July, 322. The law does not specify to whom the losing party was to give the slaves; it was probably the imperial fiscus rather than those who had been unjustly enslaved.

⁵⁸ See N. Lenski, “Constantine and Slavery: *Libertas* and the Fusion of Roman and Christian Values,” in G. Crifò, ed., *Atti dell'Accademia Romanistica Costantiniana XVIII* (Perugia 2012), 235–60. For Constantine's concern to maintain traditional social boundaries and uphold the

that those who had lived in freedom for twenty years or had performed civic duties (*munera*) or military service did not need to have an *adsertor* if a status claim was brought against them.⁵⁹ This indicates that normally an *adsertor* was needed even by someone living as free if another party claimed that he or she was a slave. Finally, in 528 Justinian did away with the need for an *adsertor* and said that those in slavery who claimed to be free could serve as their own advocate if no one else could be found.⁶⁰

Often, however, the suit for freedom would not be successful, and the possibility of failure would have deterred those in slavery from bringing a claim for freedom. Those who lost a *causa liberalis* against their master not only had to remain in slavery, but probably would have gained (or increased) the enmity of their *dominus*, leaving them in a very unpleasant and potentially dangerous position. Even if they were then bought and freed by a third party (perhaps the person who had acted as *adsertor* for them), they would not obtain their full freedom but instead were consigned to the status of Junian Latin.⁶¹ Junian Latins, as defined by the *lex Junia* of (most likely) the reign of Augustus, were freedmen and freedwomen whose manumission did not meet the specifications of Augustus' *lex Aelia Sentia*, which required that fully manumitted slaves be at least thirty years old and manumitters at least twenty, or of the *lex Fufia Caninia*, which had limited the number of slaves testators could manumit by will.⁶² This meant that although Junian Latins lived in freedom, they did not become Roman citizens (as slaves formally freed by

importance of *ingenuitas*, see J. Evans Grubbs, *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (Oxford 1995), 261–309.

⁵⁹ C.Th. 4.8.9 (Valentinian II, Theodosius and Arcadius, from Constantinople), addressed to the praetorian prefect Rufinus Sept. 25, 393.

⁶⁰ C.7.17.1 (to the praetorian prefect Menas). Thus all references to an *adsertor* have been deleted from the Code and the Digest (see Conclusion below), but pre-Justinianic sources make it clear that one was required and many rescripts assume the existence of one.

⁶¹ As known from C.7.6.1.8, Justinian's repeal of the *lex Junia* in 531 (see Conclusion below). The date of this provision is unknown, but was evidently quite ancient by Justinian's time (*quod putabat antiquitas*) so likely to have been in existence by the third century: Buckland (note 18), 549.

⁶² See G.1.18–47 and Buckland (note 18), 533–35; and J. F. Gardner, "The Purpose of the Lex Fufia Caninia," *Echos du Monde Classique/Classical Views*, 35 (n.s. 10) (1991), 21–39, on the *lex Aelia Sentia* (4 CE), *lex Fufia Caninia* (2 BCE), and Junian Latins. There were ways for a Junian Latin to achieve complete manumission and become a Roman citizen: G.1.28–34.

Roman citizens did), their children were illegitimate non-citizens, they could not make a will, and at their death any property they had amassed reverted to their former owner.⁶³

Slaves in the Roman Empire could not be distinguished by ethnic origins or physical appearance.⁶⁴ Although revolts and external wars (particularly along the Danube frontier) continued to contribute to the slave supply, most of the enslaved population at this time was drawn from domestic self-reproduction or other internal sources such as abandoned infants brought up as slaves.⁶⁵ Recovered runaways and other particularly troublesome slaves might be tattooed on the face or (after Constantine's banning of the practice) wear slave collars identifying their owner.⁶⁶

⁶³ G.1.22–24 and 3.55–76. The literature on the *lex Junia* is vast: see especially Sirks (note 45); idem, "The *lex Junia* and the Effects of Informal Manumission and Iteration," *RIDA* (3rd), 30 (1983), 211–92; P. R. C. Weaver, "Where have all the Junian Latins gone? Nomenclature and Status in the Early Empire," *Chiron*, 20 (1990), 275–305; idem, "Children of Junian Latins," in B. Rawson and P. Weaver, eds., *The Roman Family in Italy. Status, Sentiment, Space* (Oxford 1997), 55–72; P. López Barja de Quiroga, "Junian Latins: Status and Number," *Athenaeum*, 86 (1998), 133–63; U. Roth, "Peculium, Freedom, Citizenship: Golden Triangle or Vicious Circle? An Act in Two Parts," in U. Roth, ed., *By the Sweat of your Brow: Roman Slavery in its Socio-Economic Setting* (London 2010), 107–20; and most recently Corcoran (note 45). The date is disputed, as is whether it was enacted before or after the *lex Aelia Sentia*; it dates to either the reign of Augustus or his successor Tiberius, and was certainly in effect in the third century.

⁶⁴ This is not to deny that certain characteristics were ascribed to different ethnic groups of slaves, at least in the Republic and early Empire; see J. Webster, "Routes to Slavery in the Roman World: A Comparative Perspective on the Archaeology of Forced Migration," in H. Eckardt, ed., *Roman Diasporas: Archaeological Approaches to Mobility and Diversity in the Roman Empire* (Portsmouth, RI 2010), 45–65. The idea that *ingenuitas* manifests itself in the physical features even of those wrongly thought to be slaves is found in Latin literature (see Mouritsen (note 43), 20), but in real life this was not the case: see note 69.

⁶⁵ See Scheidel (note 14); Bradley (note 56), 31–56. War captives: K. Bradley, "On Captives under the Principate," *Phoenix*, 58 (2004), 298–318. Abandoned infants: W. Harris, "Child Exposure in the Roman Empire," *JRS*, 84 (1994), 1–22; and Evans Grubbs (note 25).

⁶⁶ Tattooing was used not only on repeat runaways but also as a criminal penalty: C. P. Jones, "Tattooing and Branding in Greco-Roman Antiquity," *JRS*, 77 (1987), 139–55 and M. Gustafson, "Inscripta in fronte: Penal Tattooing in Late Antiquity," *Classical Antiquity*, 16 (1997), 79–105. Tattooing on the face was banned by Constantine in 315 (C.Th. 9.40.2 = C.9.47.17 to Eumelius). Slave collars: F. H. Thompson, *The Archaeology of Greek and Roman Slavery* (London 2003), 238–40; C. J. Fuhrmann, *Policing the Roman Empire. Soldiers, Administration, and Public Order* (Oxford/New York 2012), 29–30.

Alexander Severus was said to have wanted to make everyone wear clothing appropriate to their rank, including slaves, “so that they could be recognized in public [and] no one would be rebellious and at the same time slaves not mix with *ingenui*.” But his legal advisors, Ulpian and Paul, supposedly discouraged the proposed law, because it would increase conflicts (*rixae*).⁶⁷ The story is no doubt apocryphal, similar to Seneca’s story of an aborted *senatus-consultum* requiring that slaves be identified by their clothing.⁶⁸ But most slaves would not differ in appearance from lower-class free citizens, and manumission (though not as frequent as sometimes supposed) regularly transformed slaves into freedmen. Thus, as the jurist Paul observed, a free person could be distinguished from a slave only with difficulty.⁶⁹

Assumptions about a person’s status would therefore be made on bases other than appearance. Several petitioners, although free, had occupations commonly thought to be “slave jobs,” or had hired themselves out and were later claimed as slaves by the heirs of those who hired them.⁷⁰ A free concubine might be assumed to be a slave; this was probably a case of a freedwoman in concubinage with her former master (a common and accepted relationship), who after his death had been assumed to be still a slave and part of the estate.⁷¹ A free man who cohabited with another

⁶⁷ SHA *Alex. Sev.* 27.1–2; cf. 23.3.

⁶⁸ Seneca says that the Senate had at one time debated making slaves identifiable by particular clothing, but desisted when senators realized that slaves would then see how numerous they were compared with free people (*Clem.* 1.24.1). On the lack of specific “slave clothing” see M. George, “Slave Disguise in Ancient Rome,” *Slavery and Abolition*, 23 (2002), 42–54, who notes (49) that there must have been “some contemporary understanding of what was meant by . . . ‘slave clothes’ . . . which the modern reader unfortunately does not share.”

⁶⁹ D.18.1.5 (Paul 5 *Sab.*): *quia difficile dinosci potest liber homo a servo*.

⁷⁰ Slave jobs: C.7.14.6 to Dionysius (Tetrarchy, 293) and C.7.16.16 to Diogenia (Tetrarchy, 293; see Connolly (note 11) are to petitioners who were household servants; cf. C.7.9.3 (290 or 293; see note 157 below) to Philadelphus, a freedman who had continued in his old job as keeper of the town-records (*tabularius*; see N. Lenski, “*Servi Publici* in Late Antiquity,” in J.-U. Krause and C. Witschel, eds., *Die Stadt in der Spätantike — Niedergang oder Wandel?* (Stuttgart 2006), 340–41). Hiring-out (*locatio*): C.7.14.11 to Maxima (Tetrarchy, 294); C.7.16.18 to Zoticus (Tetrarchy, 293). See J. Ramin and P. Veyne, “Droit romain et société: les hommes libres qui passent pour esclaves et l’esclavage volontaire,” *Historia*, 30 (1981), 472–97.

⁷¹ C.7.16.34 (Tetrarchy to Hermione, 294): *Libera concubinatus ratione non constituitur ancilla*. Note that the term used is *libera*, not *ingenua*; *pace* Harper (note 4), 385, this was not a freeborn concubine and freedwoman concubinage did not incur “sexual dishonor.” On *patromus* /

person's slave might be claimed as a slave also by his partner's master, on the analogy of the *senatusconsultum Claudianum*, which said that a free woman who lived with someone else's slave might be claimed as a slave or a freedwoman of the slave's owner.⁷² A free man might even be tortured on the assumption that he was a slave "because he also was ignorant of his own status."⁷³ Free people sometimes said they were slaves, either under duress or because they did not know their true status; this was not supposed to prejudice their freedom, but if they had signed documents asserting their servile condition, it would be difficult to disprove.⁷⁴ Those who did not reveal their free status and allowed themselves to be sold, presumably out of poverty, could later avail themselves of a *causa liberalis* (if they had an *adsertor*); however, if they had connived with a middleman in order to share in the price, they were forced to remain what they had pretended to be.⁷⁵ Even possession of what was considered "servile" nomenclature (evidently a single name) could foster disputes over free status.⁷⁶

Despite difficulties, cases for freedom were brought on behalf of enslaved persons, and some were successful. Several rescripts

liberta concubinage, see D.25.7.1 pr. (Ulpian 2 *leg. Iul. Pap.*); D.23.2.41.1 (Marcellus 26 *dig.*); D.48.5.14 pr. (Ulpian 2 *adult.*); S. Treggiari, "Concubinae," *PBSR*, 49 (1981), 59–81, esp. 72; T. A. J. McGinn, "Concubinage and the *lex Julia* on Adultery," *TAPA*, 121 (1991), 335–75. In such a case concubinage, from an elite male perspective, might actually be more respectable than marriage, due to the disparity in status, but it might also make proving manumission more difficult after the patron's death.

⁷² C.6.59.9 (Tetrarchy to Sopater, 294; part of the same rescript originally as C.3.32.28); C.7.16.3 (Alexander Severus to Quirinus, 225), which refers to the *denuntiationes* required under the *sc. Claudianum* before a free woman could be enslaved by her partner's master. On the *sc. Claudianum* (repealed by Justinian), see notes 138 and 221.

⁷³ D.48.5.28.5 (Ulpian 3 *adult.*). He could have legal redress against the person who sought him for questioning under torture.

⁷⁴ C.7.16.6 (Valerian and Gallienus to Vasumetius, undated; see Huchthausen (note 11), 253); C.7.16.24 (Tetrarchy to Sebastianus, 293); C.7.16.10 (Tetrarchy to Stratius, 293); C.7.16.22 (Tetrarchy to Pardalea, 293); C.7.16.39 (Tetrarchy to Eutyichius, 294).

⁷⁵ C.7.18.1 (Gordian III to Proculus, 239); Ramin and Veyne (note 70), 488–92; Watson (note 20), 8–9.

⁷⁶ C.7.16.9 (Tetrarchy to Proculus, 293); C.7.14.10 (Tetrarchy to Athenadora, undated). Disappearance of the traditional citizen nomenclature system (*praenomen*, *nomen*, *cognomen*), which was happening already by the early second century, would have further complicated things. In Rome, the use of Greek names could be taken as an indicator of servile origins (see Mouritsen (note 43), 124–27, drawing on studies by H. Solin), but since most of the rescripts discussed here were to petitioners in the Greek east, that is probably not relevant.

respond to annoyed petitioners who had bought a slave in good faith, only to have their purchase declared free in a *causa liber- alis*. They are all told they can recover the price they paid from the seller.⁷⁷ Sellers themselves might not have been aware of the true origin of their human merchandise: in one case Saturninus sold to Saturnina (a relative?) a woman he later realized was free, so he brought a case for freedom on her behalf. Not surprisingly, Saturnina wanted her money back.⁷⁸

III. Kidnapping and illegal enslavement

The seizure and sale into slavery of free citizens by individual enemies or by criminal bands was penalized under the Fabian law on kidnappers (*lex Fabia de plagiariis*).⁷⁹ Originally the law, which goes back to the mid-Republic, called for a monetary penalty, but by the early fourth century CE the penalty for *honestiores* (those of curial rank or above) was relegation and confiscation of half of one's property, and for *humiliores* (those below curial rank) crucifixion or the mines. In Diocletian's reign, according to the contemporary jurist Hermogenianus, offenders were usually sentenced to the mines.⁸⁰ Knowingly buying a free person or persuading someone else's slave to flee also fell under the penalty of the law.⁸¹

Many of the rescripts on the *lex Fabia* concern the kidnapping and concealment of someone else's slaves, but others make it clear that freeborn people were also victims. Illegal capture could occur even deep within imperial borders: in 287 Diocletian's western co-emperor, Maximian, received a report from the urban prefect of Rome that kidnappers were abducting not only other people's slaves, but even the freeborn. The emperor ordered the capital penalty as a deterrent to anyone who had the audacity to kidnap

⁷⁷ C.8.44.12 (Gordian III to Philippus, 239); C.8.44.18 (Tetrarchy to Eutychius, no date); C.8.44.21 (Tetrarchy to Heliodorus, 293); C.7.45.8 (Tetrarchy to Licinius, no date).

⁷⁸ C.8.44.25 (Tetrarchy to Saturnina, 294). A judge might construe this as a case of collusion between Saturninus and the "slave"; see at note 75 above.

⁷⁹ On the *lex Fabia*, see H. Bellen, *Studien zur Sklavenflucht in römischen Kaiserreich* (Wiesbaden 1971), 44–57; O. F. Robinson, *The Criminal Law of Ancient Rome* (Baltimore 1995), 32–35.

⁸⁰ *Sent. Pauli* 5.30B (in *FIRA*, 2, 414); D.48.15.7 (Hermogen. 5 *epit. iur.*). On penalties and the *honestiores* / *humiliores* distinction see Garnsey (note 20), esp. 103–52.

⁸¹ Buying a free person: D.48.15.1 (Ulpian 1 *reg.*); D.48.15.4 (Gaius 2 *ed. prov.*). Persuading a slave to flee: D.48.15.6 (Callistr. 6 *cognit.*).

slaves or free people within the imperial city itself.⁸² Two rescripts from the same period assure women that abduction and sale into slavery does not change the legal status of free people. Behind these answers we can sense the women's fear that they or members of their families have been deprived permanently of freeborn status.⁸³

Juliana claimed that an enemy was holding her brother illegally. Valerian and Gallienus told her that she ought to bring charges under the Fabian law on kidnapping, after first approaching the governor of her province.⁸⁴ The rescript describes the captor as an *adversarius*, a personal enemy, so this seems to have been a case of a private feud, not capture by an external foe. That sort of kidnapping may not have been unusual, particularly if the victim owed money to the kidnapper.⁸⁵

Another woman, Nica, petitioned Diocletian, claiming that a freeborn boy had been sold illegally. She was told that the appropriate judge would examine the case after being approached by someone capable of bringing charges.⁸⁶ Women could only bring a criminal prosecution in matters involving themselves or members of their immediate family, as Juliana could do in the case of her brother's kidnapping.⁸⁷ Nica, then, was not a close relative, and it is not clear why she was interested in the boy's fate. Possibly she was the unwitting purchaser.

Kidnapping victims were often destined for the slave trade. Ulpian speaks of a free *infans* who was seized and used as a slave, and did not even know his true status.⁸⁸ Kidnappers operated in coastal areas around the Mediterranean where they could make a fast getaway and sell their victims in a different province, as on the North African coast in the early fifth century, where slave-trading kidnappers, dressed as barbarians or Roman soldiers in

⁸² C.9.20.7 (287). This is a formal letter (*epistula*) to an official rather than a private rescript (*scriptio*), and is one of the few western texts from this period in the Code. See Corcoran (note 5), 126 and 340.

⁸³ C.9.20.11 (Tetrarchy to Ampliata, 293 at Lucio in modern Hungary); C.7.14.12 (Tetrarchy to Quieta, 294).

⁸⁴ C.9.20.5 (259).

⁸⁵ Cf. P.Grenf. II.78 (= M.Chr. 63, dated 307), a petition to the governor of the Thebaid; the petitioner claims that his wife and children had been kidnapped and were being held at the home of another couple.

⁸⁶ C.3.15.2, subscribed (by the emperor) 4 February, 294, at Sirmium in Serbia; Huchthausen (note 9), 71. Harper (note 4), 396 n.35, assumes this is a case of a father selling his child, but there is no indication of this in the rescript.

⁸⁷ On the rules for women's right to bring charges, see Evans Grubbs (note 27), 60–71.

⁸⁸ D.40.12.12.1 (Ulpian 55 *ed.*).

order to terrorize their victims into submission, preyed upon residents of remote areas.⁸⁹ Children were particularly vulnerable to seizure; in a law of 315 sent to the vicar of the province of Africa, Constantine legislated explicitly against the kidnappers (*plagiarii*) of freeborn children who, he said, “inflict pitiable bereavement on the parents of living children.” Slave or freedmen kidnappers were sentenced to be thrown to the wild beasts in the arena, while free men were to serve as gladiators.⁹⁰

But how could a judge tell if a claimant was really a free person held in slavery illegally, and not a runaway slave? A rescript of Diocletian responds to a man named Antonius, who claimed he had escaped from a house where he had been forced into slavery:

The violence of the man who claims he is a master is of no benefit whatever to the slave in placing the burden of proof.⁹¹ You declare that you fled from the house of Severus, but assert that you were not detained by him legally in the first place, but through violence. After it has first been investigated whether you came into possession of freedom without trickery, then through the outcome of this sort it will be shown who ought to undergo the burden of proof. Given 27 December, 293.⁹²

Antonius’ case raises a particularly difficult problem: he had escaped from slavery, which made him an illegal fugitive. But he claimed the enslavement itself was illegal and came about through violence. On whom did the burden of proof lie? More than a century and a half earlier, the Roman jurist Julian had anticipated such a scenario, and declared that it was “most un-

⁸⁹ August. *Ep.* 10*, in J. Divjak, ed., *Oeuvres de Saint Augustin*, 46B [*Lettres 1*-29**], 2nd ed. (Paris 1987). Around the same time, the teenage St. Patrick was captured by Irish pirates from his home in Britain and sold in Ireland as a slave (Patrick *Conf.* 1).

⁹⁰ C.Th. 9.18.1 (315). In the Codex Justinianus version of this law (C.9.20.16) execution by the sword has replaced gladiatorial combat for freeborn men. On children as victims of kidnappers, see Harper (note 4), 80–81.

⁹¹ Or, “is of no benefit in placing the burden of proof on the slave,” which would mean something quite different.

⁹² C.4.19.15:

Vis eius, qui se dominum contendit, ad imponendum onus probationis servo minime prodest. Cum igitur aufugisse te de domo Severi profiteris, verum nec ab illo iusto initio sed per violentiam adseveres esse detentum, inquisito prius, an in possessionem libertatis sine dolo malo constitutus sis, tunc etiam, onus probationis qui debeat subire, per huiusmodi eventum declarabitur.

worthy” for someone who had seized a free person and put him in chains to be at an advantage legally because the burden of proof now lay on the enslaved person.⁹³ In Antonius’ case, the emperors decide that there has to be a prior inquiry into whether his assumption of free status is fraudulent or not. If he is living as free in good faith, then the burden of proof for showing he is a slave rests on Severus. But if Antonius came by his freedom through trickery, then he has to prove that he is truly free, and in that case he would have a hard time finding an *adsertor* to advocate for him.⁹⁴

Another petitioner, addressed by the free citizen name of Aurelius Papias,⁹⁵ alleged that he had been the victim of a particularly outrageous case of illegal enslavement. Alexander Severus replied:

I am moved because you declare that you, their master, were sold by your own slaves, under the condition that you not remain in your native land, and that you were manumitted by the man to whom your first buyer had sold you. (1) Therefore the appropriate judge will grant a hearing against the man, who you say is present, and if the truth sustains your accusation, he will avenge this execrable crime with the capital penalty as an example. (2) But until you have proven what you maintain, your status appears to be what is observed in regard to you after your manumission. Posted 20 June, 224.⁹⁶

⁹³ D.22.3.20 (Julian 43 *dig.*). See Buckland (note 18), 660, on D.22.3.20 and C 4.19.15, both of which he says “leave something to be desired on the point of clearness.” (So did the situation they describe, of course.) Cf. D.40.12.10 and 12 (Ulpian 55 *ed.*): the fugitive who believes himself free is nevertheless in freedom fraudulently (*dolo malo*); see Harper (note 4), 383.

⁹⁴ See Huchthausen (note 11), 255.

⁹⁵ This is a rare case in the Code where the recipient’s *nomen* as well as *cognomen* has been preserved. Third-century rescripts preserved outside of the Code do record two (or sometimes more) names for recipients, but in the compilation process most *nomina* were dropped. See Corcoran (note 5), 95–96; Connolly (note 5), 80–81 (who notes that almost all of the Codex Justinianus rescripts that do have more than one name are from Book 4, as in this case). On the *nomen* Aurelius, see below at note 99.

⁹⁶ C.4.55.4:

Moveor, quod te a servis tuis dominum eorum venisse adfirmas sub ea lege, ne in patria moreris, et ab eo, cui te prior emptor vendiderat, manumissum esse dicis. 1. Quare competens iudex adversus eum, quem praesentem esse dicis, cognitionem suam praebebit, et, si

Aurelius Papias claimed that he had been sold into slavery by his own slaves, every slaveholder's worst nightmare. Perhaps he lived on a remote estate where free people were far outnumbered by the slaves they had working for them, and had been ambushed by his workers. Or, more likely, he had been traveling outside the region where he was known, accompanied by a servile entourage who had taken advantage of the opportunity to improve their own status. Mysterious disappearances of masters travelling in company with their slaves had been known to happen even in the more secure conditions of early second-century Italy.⁹⁷ Papias had been sold subject to the condition that he be taken out of his native land and not be allowed to return.⁹⁸ Had he returned to his home while still a slave, his first owner could have claimed possession. If he returned after manumission, he would be subject to seizure and enslavement by the imperial treasury. Evidently Papias' slaves were familiar with the law and wanted to eliminate the possibility that their former master would one day reappear at home. Papias had been resold to another master who had freed him, and Papias had then, he claimed, discovered the whereabouts of one of the perpetrators of his original sale. The emperor's reply is sympathetic but cautious, and reminds Papias that he must prove his claim. Until then, he is just a freedman.

Aurelius Papias had at least been given his freedom and therefore could use the citizen name, Aurelius, though whether that was his original name or that of the person who later freed him is unclear.⁹⁹ He was an *ingenuus manumissus*, a freeborn person who had been formally freed. Nor was he the only one; the

veritas accusationi aderit, execrabile delictum in exemplum capitali poena vindicabit. 2. Sed quoad usque probaveris quae intendis, status tuus esse videtur, qui in te post manumissionem deprenditur.

⁹⁷ Cf. Pliny *Ep.* 6.25, where a centurion had been travelling in Italy, carrying 40,000 sesterces as a gift from Pliny, and had completely disappeared along with his slaves. Had they killed their master, Pliny wondered, or been killed together with him? The occasion for the letter is the disappearance of an equestrian under similar circumstances.

⁹⁸ This condition (called a *lex* in the rescript) is discussed by the jurists at D.18.7; also mentioned at *Frag. Vat.* 6 (from Papinian). C.4.55.1–5 all concern this provision. See Buckland (note 18), 69 and 419–20.

⁹⁹ Aurelius is a *nomen*, which would indicate free citizen status. Freedmen and women would take the *nomen* of their manumittor/patron. In the third century there were many Aurelii, since all non-citizen provincials who became citizens in 212 by the decree of the emperor Aurelius Antoninus (also known as Caracalla) took his *nomen*. Aurelius Papias (or the person who manumitted him) may have been one of these new citizens.

title of Justinian's Code "on manumitted freeborn people" (C.7.14, *de ingenuis manumissis*) preserves fourteen replies to petitioners who claim to have been freeborn, or whose mother had been freeborn, but who had been enslaved and then freed.

IV. Capture and enslavement by external enemies

One of the most common ways for freeborn Romans to become enslaved was through capture by barbarians or other external enemies. This had been a possibility throughout Rome's history, and Roman law had developed elaborate rules governing the status of the captured person. Those captured by brigands did not legally lose their free status, although they might be illegally sold into slavery. Someone captured by Rome's enemies, however, such as the Germanic "barbarians" to the north or the Parthians to the east, was legally considered a slave of his captors.¹⁰⁰ A captive taken beyond the borders of the Empire became a legal non-person and had none of the rights of free citizens: his marriage ceased to exist, and he did not have paternal power over his children. As long as he lived in captivity beyond the borders of the Empire, his status in Roman law was "in suspense."¹⁰¹ But, under the principle of *postliminium* ("return within the borders of the Empire"), if he returned to Roman soil, he could regain both the status and the possessions he had had before capture, including paternal power over children who had been legally independent while their father was a captive.¹⁰² (His marriage, however, would only be renewed if his wife were still willing.¹⁰³)

¹⁰⁰ Ulpian defines "enemies" (*hostes*) as those with whom Rome is "publicly" at war, "as, for instance, Germans or Parthians" (D.49.15.24, Ulpian 1 *inst.*). On Roman captives among barbarians, see N. Lenski, "Captivity, Slavery, and Cultural Exchange between Rome and the Germans from the First to the Seventh Century CE," in C. M. Cameron, ed., *Invisible Citizens: Captives and Their Consequences* (Salt Lake City 2008), 80–109; idem, "Captivity and Romano-Barbarian Interchange," in R. W. Mathisen and D. Shanzer, eds., *Romans, Barbarians, and the Transformation of the Roman World* (Farnham/ Burlington, VT 2011), 185–98; and Lenski (note 21) for the eastern frontier with Persia.

¹⁰¹ Buckland (note 18), 292. Marriage: D.49.15.12.4 (Tryphon. 4 *disp.*).

¹⁰² On *postliminium*, see Buckland (note 18), 304–11. To regain his possessions (or anything he had inherited while in captivity), he had to bring an action for *restitutio in integrum* (restoration to original state) within a year (D.4.6.1.1, Ulpian 12 *ed.*). The same policy held for those held in illegal bondage within the Empire (D.4.6.9, Callistr. 2 *ed. monit.*). Resumption of *patria potestas* after return of father from captivity: D.26.1.6.4 (Ulpian 38 *Sab.*).

¹⁰³ D.49.15.12.4 (Tryphon. 4 *disp.*); D.49.15.8 (Paul 3 *leg. Iul. Pap.*, a commentary on the Augustan marriage law); D.49.15.14.1 (Pomponius 3

The Code of Justinian contains eighteen third-century rescripts under the title “on redemption from enslavement among the enemy and the right of return” (C.8.50, *de postliminio et de redemptis ab hostibus*), and other rescripts on the same subject appear elsewhere in the Code. In all cases those captured were Roman citizens, probably from border provinces. Most of these rescripts date to the reign of Diocletian at the end of the third century and refer to those captured “by the enemy” without specifying how or where they were captured. Probably most reflect barbarian raids across the Danube or the Black Sea into eastern Europe and Asia Minor.¹⁰⁴ One rescript from early 292, however, concerns a man who had been taken captive many years earlier. Diocletian told Agrippa that the provincial governor would see that freeborn status was restored to Agrippa’s relative, who had been sold into slavery after becoming “like a captive under the domination of the Palmyrene faction.”¹⁰⁵ This refers to events in the 260s and early 270s, when several eastern provinces, including Egypt, had been under the control of Zenobia, queen of Palmyra. The rescript dates a full twenty years after the emperor Aurelian had defeated Zenobia and restored Roman rule to the area. Even then, however, Agrippa’s relative had not regained his freedom, because he had been sold (perhaps beyond the borders of the Empire, although this is not stated). Eventually he was manumitted, and so became another *ingenuus manumissus*, like Aurelius Papias. He could finally reclaim his free birth status, two decades after his original capture, when his case had been heard by the provincial governor.

Sab.); Buckland (note 18), 291–98, 307–10. Two Digest texts (D.24.2.6, Julian 62 *dig.*; D.49.15.8, Paul, just cited) mention a time period during which, if the captive is not known to have died, his wife may not remarry. These are generally regarded as Justinianic interpolations: Buckland (note 18), 296–97; A. Watson, “*Captivitas and Matrimonium*,” *TRG*, 29 (1961), 254–56 (reprinted in A. Watson, *Studies in Roman Private Law* (London/Rio Grande, OH 1991), 48–50); S. Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford 1991), 453; M. Melluso, *La schiavitù nell’età Giustiniana: disciplina giuridica e rilevanza sociale* (Paris 2000), 20–23. Cf. C.5.18.5 (Valerian and Gallienus to Taurus, 259): if Taurus’ wife is still alive *apud hostes*, her brother may not bring an action to reclaim her dowry.

¹⁰⁴ See S. Connolly, “Roman Ransomers,” *Ancient Hist. Bull.*, 20 (2006), 125.

¹⁰⁵ C.7.14.4 (292). *Pace* Connolly (note 5), 129, the rescript does not refer to *postliminium*, and the claims of Agrippa’s relative to free status are based on his being an *ingenuus* who has been sold. On the Palmyrene revolt, see F. Millar, *The Roman Near East 31 BC – AD 337* (Cambridge, MA 1993), 159–73.

Sometimes captives in enemy hands were redeemed by payment of a ransom price to the captors. If the person paying the ransom was a relative, then the former prisoner would return to both family and social position. Even so, some relatives believed themselves entitled to repayment: Diogenia was reproved because she wanted to be reimbursed for ransoming her son, which she should have done gratis out of a sense of family duty (*pietas*).¹⁰⁶ But if a captive was ransomed by a Roman citizen who was not motivated by family feeling, he could not reclaim his former place in society until he had paid back the price of redemption.¹⁰⁷ He was, as several rescripts point out, under a “bond of pledge” (*vinculum pignoris*) to the person who had paid for his release.¹⁰⁸ In effect, he was in bondage to his redeemer, although strictly speaking he was not a slave. Roman law distinguished this condition from true slavery, since it affected freeborn people who — if they were fortunate — would one day regain their citizenship and *ingenuitas*. As Diocletian tells one redeemed captive, Euty chius, once he has paid off his redemption price he will not be the freedman of his redeemer, but will be “restored to the free birth which you had lost.”¹⁰⁹ And whereas the owner of a slave also owned all the slave’s possessions and earnings, the property

¹⁰⁶ C.8.50.17 (294). On rescripts enjoining *pietas* toward family members, see J. Evans Grubbs, “Promoting *pietas* through Roman Law,” in B. Rawson, ed., *A Companion to Families in the Greek and Roman Worlds* (Malden, MA/Oxford 2011), 377–92.

¹⁰⁷ E. Levy, “Captivus Redemptus,” *Classical Philology*, 38 (1943), 159–76, believes that Marcus Aurelius introduced the policy that a redeemed captive was in bondage to his/her redeemer until the redemption price was paid off at a time when the wars along the Danube had led to a large number of such captives, in order to encourage redemption by individuals (since the government could not afford to redeem them). M. Amelotti, *Per l’interpretazione della legislazione privatistica di Diocleziano* (Milan 1960), 139–45, following Amirante, attributes this change of policy to a law of (probably) Septimius Severus and Caracalla, due to the growing commercialism of redemption by those other than family members. Levy notes that passages in the Digest referring to the policy are unclear, presumably because Justinian changed it so that the redeemed did not lose their free birth. The policy was certainly in effect in the third century.

¹⁰⁸ Buckland (note 18), 311–17. The phrase *vinculum pignoris* is used repeatedly in the rescripts: e.g. C.8.50.2 (Gordian to Publicianus, 241); C.8.50.8 (Diocletian and Maximian to Matrona, 291); C.8.50.11 (Tetrarchy to Euty chius, 293); and C.8.50.13 (Tetrarchy to a female petitioner whose name has been garbled, 294). It should be noted that Romanist commentators in the past have seen this phrase as a Justinianic interpolation, e.g. Amelotti (note 107), 140.

¹⁰⁹ Cf. C.8.50.11 (Tetrarchy, 293): *non libertus effectus, sed ingenuitati quam amiseras restitutus*.

of redeemed captives was held in suspension until they had repaid the redemption price; at that point, *postliminium* went into effect and they regained the rights they had had as Roman citizens. This even extended to property which the former captive had inherited while still bound to his redeemer. In that case, in fact, the inheritance or legacy could be used to pay off the redemption price, as two different former captives, Severa and Mucatraulus, were told.¹¹⁰ Moreover, a child taken captive along with his parents who returned to the Empire alone after they had died in captivity could claim his inheritance from them.¹¹¹

The rescripts in the Code all address cases where the redemption price was ultimately repaid or did not need to be repaid, but there must have been many cases where it was never repaid, and the redeemed person remained in quasi-slavery for years. Many Romans ransomed captives not as a civic service, but in order to make use of those they redeemed, until someone repaid the price.¹¹² In 291, Diocletian told Justus that if his redeemer refused to accept the price of redemption even after it had been offered by both Justus and a third party, the governor would, with “urgent efficiency,” force the man to take the payment and allow Justus to regain his right of free birth (*ingenuitas*).¹¹³ It must have been difficult enough for Justus, held in bondage to his redeemer, to get a petition to the emperor; he then had to get his provincial governor to carry out the imperial decision.

Women were at least as vulnerable to capture and enslavement by barbarians or other foes as men, and would often be subjected to rape. But even after being ransomed, a woman might find herself in situations just as unfortunate, if her redeemer was bent on exploitation. Quintiana was assured that captives liberated by the Roman army did not belong to the soldier who rescued them, but regained their original status immediately without the need for repayment, for “our soldier should be their defender, not their master.”¹¹⁴ Evidently Quintiana, or someone she knew, had been rescued from enemy captivity by imperial soldiers, perhaps

¹¹⁰ C.8.50.14 (Tetrarchy, 294) to Severa; C.8.50.15 (294) to Mucatraulus; see Buckland (note 18), 312.

¹¹¹ C.2.53.5 (Tetrarchy to Licinianus, 294); cf. D.1.5.26 (Julian 69 *dig.*). Note that this is different from a case where a child is born to parents while they are in captivity, on which see below.

¹¹² Huchthausen (note 11), 253–54; Levy (note 107). See esp. Conolly (note 104) on the motives and *modus operandi* of these ransomers.

¹¹³ C.8.50.6 (Diocletian and Maximian, 291).

¹¹⁴ C.8.50.12 (Tetrarchy, 293): . . . *et militem nostrum defensorem eorum decet esse, non dominum.*

in the course of a raid across the frontier or in an exchange of prisoners.¹¹⁵ Perhaps the soldier had paid to redeem her, and saw no reason why he should not be repaid for his trouble just as private citizens were.

Particularly revealing is a response sent by Diocletian to a man named Claudius, who had petitioned regarding the plight of his daughter:

We are deeply moved by the wickedness of that most abominable woman. You declare that your daughter, who was captured and then prostituted by the woman who had redeemed her, fled to you in order to maintain her chastity and preserve her honorable birth. Therefore, if the governor of the province learns that the above-mentioned injury was inflicted on your daughter by a woman who knew she was freeborn, he will keep your daughter safe and protected, with her free birth safely guarded against the shameful of that criminal woman. For a person of this sort would be unworthy to receive a price on account of the offensiveness of her detestable occupation, even if the price was not repaid due to your wretched need. Posted 3 February, 291.¹¹⁶

¹¹⁵ Cf. C.8.50.5 (Diocletian and Maximian, 290) to Ursa, whose son was handed over by barbarians (apparently Saracens, see Lenski (note 21)) to the prefect of a Roman legion “without any contract” (*sine ullo contractu*). She is told that *postliminium* immediately takes effect and her son will get back his *ingenuitas*. See Connolly (note 104), 120. In a case known from the Digest (D.49.15.6, Pomponius 1 *var. lect.*), a woman convict in the imperial salt mines was captured by “brigands of a foreign people” (*latrunculi exteræ gentis*), sold, and redeemed by a centurion named Cocceius Firmus, who did receive the price back from the imperial *fiscus* (presumably because she was a slave owned by the state).

¹¹⁶ C.8.50.7:

Foedissimæ mulieris nequitia permovemur. Cum igitur filiam tuam captam ac prostitutam ab ea quæ eam redemerat ob retinendæ pudicitiaæ cultum ac servandum natalium honestatem ad te confugisse proponas, præses provinciae, si filiaæ tuæ supra dictam iniuriam ab ea, quæ sciebat ingenuam esse, inflictam cognoverit, cum huiusmodi persona indigna sit pretium recipere propter odium detestabilis quæstus, etiamsi pretium compensatum non est ex necessitate miserabili, custodita ingenuitate natae tuæ adversus flagitiosæ mulieris turpitudinem tutam eam defensamque præstabit.

Tony Honoré attributed composition of this rescript to the jurist Arcadius Charisius, head of the bureau on petitions under Diocletian, whose strong moral sense comes through in other rescripts of the period: see Honoré (note 5), 156–62; Corcoran (note 5), 56; on Charisius, see note 22 above and note 153 below. Amelotti (note 107), 143–44, sees Diocletian’s ruling

The woman who had redeemed Claudius' daughter from captivity had then prostituted her. Claudius' daughter had been able to flee to her father, who was, however, too poor to repay her redemption price. The emperor, declaring his revulsion at the redeemer's conduct, ruled that there was no need for Claudius to reimburse the woman and that the governor of the province would see that his daughter was protected from "the shamelessness of that criminal woman."¹¹⁷

The sexual potential of captive women seems often to have been taken into account by those who redeemed them. An early fourth-century work wrongly attributed to the third-century jurist Ulpian discussed the case of a man who redeemed a freeborn woman, assuming her to be a slave, "in order to beget children from her." When she bore a son, he freed them both and called the child his "natural [i.e. illegitimate] son," and apparently afterwards considered her his wife. The jurist noted that the man's error in believing the woman was a slave did not actually change her freeborn status, and her son was also freeborn, since his mother was legally a free woman. Moreover, the woman should be considered to have repaid the price of her redemption from the time when her redeemer first intended to have children by her.¹¹⁸ A rescript of 294 informs a woman that if she married the man who ransomed her, because of the "honor of marriage and the hope of future offspring" the price of redemption was considered paid and she returned to her original freeborn status.¹¹⁹ Although the fate of these women after redemption was not as unpleasant as that faced by Claudius' daughter, they probably had no choice in the matter.

as an innovation, due to that emperor's humane and moral bent: by allowing Claudius' daughter to regain her freedom without repayment of the redemption price, Diocletian was going against the legal policy established in the second century (if by Marcus Aurelius) or early third century (if by Septimius Severus and Caracalla).

¹¹⁷ As a procuress, the redeemer was a *persona indigna*. See T. A. J. McGinn, *Prostitution, Sexuality, and the Law in Ancient Rome* (New York/Oxford 1998), 21–69 (on the legal disabilities imposed on pimps and prostitutes as *infames*), 194 (on this rescript).

¹¹⁸ D.49.15.21 pr. (Ulpian 5 *opin.*). On the date and provenance of the Opinions, see T. Honoré, *Ulpian: Pioneer of Human Rights [Ulpian, 2nd ed.]* (Oxford 2002), 217–22.

¹¹⁹ C.8.50.13 (Tetrarchy, 294; the addressee's name is garbled). Such assurance in writing might come in use later if her husband predeceased her and questions arose about the status of his wife and children (Huchthausen (note 11), 254). Amelotti (note 107), 144–55, thinks this is another case (as in C.8.50.7, note 116) where Diocletian innovated and ignored earlier law out of considerations of "umanità."

Questions still arose about the status of children born to women who had been redeemed from captivity and whose own status was in limbo at the time of their children's birth. In all these cases the imperial responses make it clear that the former captives were not legally slaves (and therefore their children were freeborn), but it is significant that the petitioners felt that their, or their children's, status was in jeopardy and that they needed the emperor's word to confirm it. Gordian III reassured a man named Publicianus that if he had married his wife after her ransom price had been repaid, he had nothing to fear about their children's status.¹²⁰ A woman named Matrona was told that the governor of her province would see that she was not further "detained under the yoke of slavery," and the free status of her children, born after she was redeemed but while she was still under the "bond of pledge," would also be protected, since her redeemer had not paid ransom for them.¹²¹ It is easy to see how the person who had paid to redeem Matrona might assume he had a claim on offspring born while she was in a state of quasi-bondage to him; after all, that was the usual rule with "real" slaves. Another petitioner, Basilina, had borne children to a slave, after being ransomed but while she was in service to the man who ransomed her. What was their status? She is assured that they, like their mother, are freeborn.¹²² Sarmatia was born to a husband and wife while they were both in captivity, presumably among the barbarian Sarmatians along the Danube. If she had returned with both her parents to Roman soil, she would have come under her father's paternal power, and been considered his legitimate child even though her parents, as enslaved captives, had not been legally married at the time of her birth. However, since her father had died in captivity and only her mother returned with her, she would of necessity follow her mother's status, and therefore be illegitimate.¹²³ Potamon was the daughter of a

¹²⁰ C.8.50.2 (241).

¹²¹ C.8.50.8 (Diocletian and Maximian, 291). Since she was legally free after being ransomed, even though she was still in service to her ransomer, her children were freeborn.

¹²² C.8.50.16 (Tetrarchy, 293, subscribed at Viminacium on the Danube, now in Serbia). Illegitimate children took their mother's status, so the child of a free woman and a slave would be freeborn. See M. V. Sanna, *Nuove ricerche in temi di postliminium e redemptio ab hostibus* (Cagliari 2001), 150–52.

¹²³ C.8.50.1 (Septimius Severus and Caracalla, between 198 and 211), to Ovinus, cited several times in the Digest, from which we learn that the recipient was Ovinus Tertullus, governor of "Lower Mysia" (Moesia). See D.38.17.1.3 (Ulpian 12 *Sab.*); D.49.15.9 (Ulpian 4 *leg. Iul. Pap.*); D.49.15.25

former slave, but was born after her mother had been freed. Potamon was later taken prisoner by the enemy, and when she returned to Roman soil she was herself claimed as a slave, perhaps by her mother's former owners. She is told that neither her mother's original status nor her own captivity has detracted from her freeborn status, and that she should go to the governor of her province.¹²⁴

A Christian source of the mid-third century, the so-called "Canonical Epistle" of Gregory bishop of Neocaesarea in Pontus on the Black Sea, confirms that the fellow-citizens of those taken captive by foreign invaders would sometimes take advantage of their neighbors' misfortunes.¹²⁵ Gregory, known to later ages as "the Wonderworker" (*Thaumaturgos*) and credited with the conversion to Christianity of much of that remote area, wrote to a fellow bishop about Christians who had engaged in most un-Christian behavior during an attack on the province by Goths in the 250s. People in Pontus had seized the property of those still held captive, or even taken for themselves captives who had managed to escape. Gregory also addressed the question of the treatment of women who had been raped by the barbarians while in captivity, a particularly sensitive issue given the great importance placed on women's sexual chastity in antiquity by Christians and non-Christians alike.¹²⁶ He responded that women who had always before lived a blameless and completely chaste life should not be blamed for what happened to them under duress. But

(Marcian 4 *inst.*). See Watson, *Studies* (note 103), 38–44 on the problems raised by this rescript. The rescript does not explicitly say Sarmatia is illegitimate, but Marcian (D.49.15.25), evidently referring to this rescript, says the child would be *spurius*, and Ulpian (D.38.17.1.3) further says that the child, "quasi vulgo quaesitus," can be admitted to the inheritance from her mother (not her father) like an illegitimate child. See Sanna (note 122), 129–43 on this ruling and on its application to analogous cases in the Digest.

¹²⁴ C.7.14.9 (Tetrarchy, undated but between 293 and 305).

¹²⁵ See P. Heather and J. Matthews, *The Goths in the Fourth Century* (Liverpool 1991), 1–11, for context and translation of the Epistle, and D. Sloop, "Bishops and their Position of Power in the Late Third Century C.E.: The Cases of Gregory Thaumaturgos and Paul of Samosata," *J. Late Antiquity*, 4 (2011), 100–15, on Gregory's involvement in court cases, prefiguring the *audientia episcopalis* of the fourth century and later.

¹²⁶ According to Ulpian (D.48.5.14.7, 2 *adult.*), on the Augustan adultery law, a woman who had suffered violence at the hands of the enemy should not be prosecuted by her husband for adultery. On the other hand, if she had willingly committed adultery during captivity, her husband did have the right to bring charges upon her return, even though she was not, strictly speaking, his wife while she was a captive. (This may be a Justinianic interpolation; see Watson, *Studies* (note 103), 50–51.)

those who had even before capture displayed wanton behavior could be assumed to have led their captors on, and ought not to be admitted to communion.¹²⁷ With the prospect of such shame before them, prospective rape victims might opt for death. A grave inscription from Paphlagonia commemorates in verse a victim of the same Gothic invasion, the fourteen-year-old recently married Domitilla, who preferred to die in defense of her chastity rather than suffer outrage at the hands of marauding barbarians.¹²⁸

Elsewhere in the Empire, another bishop, Cyprian of Carthage, undertook to ransom from captivity Christian men and women who had been captured by marauders from further west. He collected 100,000 sesterces from his congregation for this purpose, one of the first such collective ransoms of captives by Christian communities known in the late Roman world.¹²⁹ Capture of Roman citizens by barbarians only increased in late antiquity, however.¹³⁰ Imperial law adjusted accordingly. In December 408, in the wake of Alaric's invasion of Illyricum, the emperor Honorius decreed that former captives who had returned to the Empire could go back to their homes immediately, and those who had simply supplied food and clothing to them should not expect reimbursement. Only a redeemer who had paid a ransom price to the barbarians should be reimbursed by the redeemed captive, and those who could not pay back the price were to work no more than five years for their ransomers, after which time they were

¹²⁷ Gregory, *Canonical Epistle* canon 1. Cf. Ulpian's position, discussed in note 126.

¹²⁸ See W. D. Lebek, "Das Grabepigramm auf Domitilla," *ZPE*, 59 (1985), 7–8, who revises the original reading of I. Kaygusuz, "Funerary Epigram of Karzene (Paphlagonia): A Girl Raped by the Goths?," *Epigraphica Anatolica*, 4 (1984), 61–62, and provides literary analogues to Domitilla's fate. W. Peek, "Zu neugefundenen Epigrammen aus Kleinasien," *Epigraphica Anatolica*, 5 (1985), 156–58, likewise amends Kaygusuz' original reading, but thinks that the attack that precipitated Domitilla's death was by pirates, not Goths.

¹²⁹ Cyprian *Epist.* 62, dated between 249 and 257. Cyprian was particularly concerned about the fate of dedicated Christian virgins while in captivity. On the circumstances, see G. W. Clarke, "Barbarian Disturbances in North Africa in the Mid-Third Century," *Antichthon*, 4 (1970), 78–85. On the Christian duty to redeem captives, cf. Lactant. *Div. Inst.* 6.12.15; C. Osiek, "The Ransom of Captives; Evolution of a Tradition," *Harvard Theological Rev.*, 74 (1981), 365–86; and W. Klingshirm, "Charity and Power: Caesarius of Arles and the Ransoming of Captives in Sub-Roman Gaul," *JRS*, 75 (1985), 183–203.

¹³⁰ See Lenski, "Captivity and Romano-Barbarian Interchange" (note 100) and Lenski (note 21).

automatically free to return home. The emperor clearly expected some opposition to this law on the part of landowners who had been exploiting the labor of captives they had redeemed in order to work their estates.¹³¹

V. Flight and passing as free

Some petitioners claimed not that they or a loved one was unjustly held in bondage, but that a person living in freedom was actually a slave. These alleged slaves might have run away (usually from the petitioner) or might even be children of someone who had evaded servitude years before. Owners of runaway slaves posted notices for their return, as in antebellum America, and there were also professional slavecatchers who could be hired by masters of fugitives.¹³² By the time of Marcus Aurelius, the Roman government was taking an active role in the search for and recovery of fugitive slaves, and magistrates who did not follow up requests from slaveholders to look for their runaways were subject to fines.¹³³ Someone who knowingly received a fugitive slave could be prosecuted for theft (*furtum*) or even for kidnapping under the *lex Fabia*, and landowners who refused to allow their estates to be searched would be fined.¹³⁴ In 317,

¹³¹ Sirmondian Constitution 16 (to the praetorian prefect Theodorus, 408), found also in large part at C.Th. 5.7.2. See also C.Th. 10.10.25 (also to Theodorus, 10 December, 408), referring to Alaric's invasion of Illyricum. An earlier law, C.Th. 5.7.1 (Valentinian I, Valens, and Gratian to Duke Severianus, 366) had ordered those captured by the enemy who had not deserted of their own accord to return to their homes by *postliminium*, apparently without repayment of ransom. C.Th. 5.6.2 (23 March, 409), says that if booty taken by imperial soldiers includes free people or slaves captured by barbarians, they must be returned to their native towns or (in the case of slaves) their original owners.

¹³² Notices: P.Oxy. LL.3616; cf. 3617 (both third century); P.Oxy. XIV.1643 (298) and XII.1423 (fourth century) are authorizations to slavecatchers to pursue fugitives. D. Daube, "Slave-catching," *Juridical Rev.*, 64 (1952), 12–28, discusses a "racket" between slavecatchers and escaped slaves, designed to cheat the slaveowner. A rescript to a woman named Marciana (C.9.20.6, Diocletian and Maximian, 287) relates to this scam.

¹³³ See D.11.4, esp. D.11.4.1 (Ulpian 1 *ed.*); Bellen (note 79), 10–15; Fuhrmann (note 66), 30–43; S. R. Llewellyn, *New Documents Illustrating Early Christianity*, 8 (North Ryde, NSW 1998), 26–40. Cf. P. Turner 41 (third century), a petition from a woman to the strategos of the Oxyrhynchite nome complaining that her trusted slave absconded with some clothing and provisions and is (she has heard) living in another nome with a certain Chairemon. Discussed in S. R. Llewellyn, *New Documents Illustrating Early Christianity*, 6 (North Ryde, NSW 1992), 55–58.

¹³⁴ Prosecution for theft (with civil penalties) or kidnapping (with

Constantine decreed that anyone found harboring a runaway had to return the slave along with another one of equal worth or pay a fine of twenty solidi; repeat offenders had to hand over more slaves. He also foresaw the possibility that a slave might have claimed to be freeborn in order to get hired work, or even have been secretly sent by his master to another's property in order to steal. In such cases the owner of the property where the fugitive was found was blameless. In order to know for sure, the alleged runaway was to be tortured. Similarly, a law of Constantine of 332 says that in cases where a man seeking his fugitive slave is opposed by someone else who claims ownership or even brings a claim for freedom on the slave's behalf, the "most wicked whipping-boy" (*nequissimus verbero*) whose status is in question is to be subjected to torture, "which will not only be useful to the two quarreling parties, but also can deter the minds of (other) slaves from flight."¹³⁵

The action *de liberali causa*, which enabled free people held in slavery to assert their freedom, could also be used against a person living as free who was accused of being a slave. In that case also, the burden of proof fell on the claimant, so the accuser would have to provide some sort of evidence.¹³⁶ If the claim was successful, however, the consequences would be disastrous for both the alleged slave and the family he or she had formed while living as free.

criminal penalties; see notes 79–81). C.9.20.1 (Caracalla to Placidus, 213) and C.9.20.12 (Tetrarchy to Mucianus, 294) give slaveowners these alternatives, but see D.48.15.6 (Callistr. 6 *cognit.*) for rescripts of Hadrian to the contrary. It would be more to the slaveowner's advantage to prosecute for theft since he, rather than the state, would get the compensation; see B. Kraemer, "P.Strasb.Inv.1265 + P.Strasb.296 recto: Eingabe wegen *Andrapodismos* (= *Plagium*) und *Sylesis* (= *Furtum*)," *ZPE*, 69 (1987), 145–46.

¹³⁵ Rescript of 317: C.6.1.4 (to Valerianus). See Kraemer (note 134) on a papyrus petition dated 326 which claims that the slave of the petitioner (a *bouletes*, i.e. decurion) was enticed to steal from him repeatedly by another *bouletes*; Kraemer suggests this refers to Constantine's law. Law of 332: C.6.1.6 (to Tiberianus, *comes Hispaniarum*, not a private rescript). For the unusual word *verbero*, see Evans Grubbs (note 58), 273–74. Another rescript attributed in the Code to Constantine and Licinius (C.6.1.3, to Probus, also evidently an official, undated but between 314 and 324) orders that fugitive slaves caught crossing over into barbarian territory are either to have a foot cut off or be sent to the mines or suffer some similar penalty. This may be a law of Licinius: see Corcoran (note 5), 280 and 341, but cf. 287–88.

¹³⁶ D.22.3.14 (Ulpian 2 *off. cons.*); see at note 18 on *causa liberalis*.

Caracalla's reply to a woman named Hostilia gives a glimpse of the havoc such a case could cause:

If, in ignorance of Eros' status, you married him as a free man and gave him a dowry, and he afterwards was judged a slave, you will get your dowry back out of his *peculium*, along with anything else that it appears he owed you. Moreover, your children are understood to be freeborn illegitimates (*spurii ingenui*), as they were born from a free woman but "uncertain" father. Posted 26 August 215.¹³⁷

Hostilia had learned that her husband, Eros (a name often given to male slaves and ironically appropriate in the case of the unfortunate Hostilia), was not the free man she thought she had married, but someone else's slave. She had given him a dowry and had children by him, so clearly Eros had been able to pass as free for some years. Then he was judged to be a slave; his owner may have discovered his whereabouts and brought a suit for freedom (*liberalis causa*) against him, or Hostilia may only have learned his true status after his death, when questions of inheritance arose. Hostilia wrote to the emperor asking what this meant for the status of her children and her dowry. Caracalla's reply, that her children were freeborn and illegitimate, applies the usual rule that the status of a child in an illegal union follows that of the mother.

Although she had lost her husband and her children were now considered illegitimate, Hostilia could consider herself lucky. She could have been charged with harboring a runaway. Or she might have become a slave herself: under the *senatusconsultum Claudianum* of 52 CE, a free woman who cohabited with someone else's slave became the slave of her partner's master if the master had not consented to the union, or his freedwoman if he had consented.¹³⁸ Evidently Hostilia had broken off the union when

¹³⁷ C.5.18.3: *Si ignorans statum Erotis ut liberum duxisti et dotem dedisti isque postea servus est iudicatus, dotem ex peculio recipies et si quid praeterea tibi debuisse eum apparuerit. Filii autem tui, ut ex libera nati incerto tamen patre, spurii ingenui intelleguntur.* See Gardner (note 35), 10–11; J. Evans Grubbs, "Marriage more shameful than adultery: Slave-Mistress Relationships, 'Mixed Marriages,' and late Roman law," *Phoenix*, 47 (1993), 135–36.

¹³⁸ On the *sc. Claudianum*, see Tac. *Ann.* 12.53; G.1.84; Sent. Pauli 2.21A; and C.Th. 4.12. The bibliography is vast; see P. Weaver, *Familia Caesaris: A Social Study of the Emperor's Freedmen and Slaves* (Cambridge 1972), 162–69; B. Sirks, "Der Zweck des *Senatus Consultum Claudianum* von 52 n. Chr.," *ZSS (RA)*, 122 (2005), 138–49; and at note 221 below for the *sc. Claudianum* in late Roman law.

she discovered her husband's status, and so had avoided that possibility. It was also generous of Caracalla to grant her the right to reclaim her dowry from Eros' *peculium*.¹³⁹ A slave's *peculium*, the allowance sometimes given to slaves by their owners, legally belonged to his master, and in a non-marital union (as slave/free marriages always were), there could legally be no dowry. Thus by rights Eros' master could have taken anything Hostilia had given Eros.¹⁴⁰

Eros had been able to pass himself off as free not only to Hostilia but to the community as a whole. Often in the rescripts the factor enabling someone alleged to be a slave to pass as free is described as "public opinion": people lived as if they were free, and were accepted as such by the community. Sometimes the allegation that a person was a slave did not surface until after his or her death, perhaps when survivors tried to claim their property. At this point the true status of the deceased might have been forgotten, and suspicions would cast a cloud over any children they had. Therefore, Roman emperors ever since the first century had limited investigations of slave status to within five years of the death of the person whose status was being questioned.¹⁴¹ On the other hand, freedpeople who later found evidence that they were originally freeborn had only five years after their manumission to make a claim of *ingenuitas*.¹⁴²

There are eleven rescripts under the title "That no inquiry be brought regarding the status of the dead after five years" (C.7.21: *ne de statu defunctorum post quinquennium quaeretur*), and elsewhere in the Code more cases emerge. For instance, Polla's mother had lived "as if freeborn in common opinion" and had died more than five years earlier. The mother's status was now being challenged by opponents called *pupilli* (indicating they were fatherless children under age fourteen who were under guardianship), who probably were claiming that she had belonged to their

¹³⁹ On Caracalla's concession, see D.24.3.22.13 (Ulpian 33 *ed.*). Eros may have absconded with his *peculium*, or left it with his owner.

¹⁴⁰ See D.16.3.27 (Paul 7 *resp.*) for the same situation.

¹⁴¹ D.40.15.4 (Callistr. 1 *iure fisci*), an edict of Nerva. Claudius had earlier given a rescript that if an investigation over money appeared prejudicial to status, it should be dropped. Hadrian confirmed this, and Marcus Aurelius decided that if someone had been pronounced freeborn while alive (sc. in a *causa liberalis* or an inquiry *de ingenuitate*; see note 19), this could not be questioned after his death at all (D.40.15.1 pr.–3, Marcian l.s. *delat.*). See J. F. Gardner, "Hadrian and the Social Legacy of Augustus," *Labeo*, 42 (1996), 83–86.

¹⁴² D.40.14.2.1 (Saturn. 1 *off. procons.*); D.40.14.4 (Papinian 22 *quaest.*).

father.¹⁴³ It may be that Polla's mother had actually been a freedwoman, not freeborn, and her former master's children were claiming a share of her property, as they were entitled to do under Roman law.¹⁴⁴ Or, worse for Polla, the claimants may have said that her mother was a fugitive slave who had never been freed. In that case, Polla, as the child of a slave mother, would herself be a slave. Since Polla's mother had died more than five years earlier, it was thus crucial for Polla to demonstrate that her mother had lived "as if freeborn" according to popular opinion up until her death. If that were the case, the statute of limitations on inquiries into her status would have expired, and she could repel her opponents' move to question her mother's status.

Heliodorus was told that he did not need to worry if his father, accused of being a slave of the imperial fiscus, had been investigated by the *curator rei publicae* (a city official), who did not have jurisdiction over the matter; in any case Heliodorus' father had been dead five years before his status was questioned.¹⁴⁵ However, even a formal judgment by the governor might be questioned. Crescens, having already appealed to more than one governor, continued to have his status challenged even after there had been a ruling in his favor. When he then petitioned the emperor, he was instructed to approach the governor once again! Matrona was more fortunate: she was assured that if someone had brought a claim that she and her children were slaves but had later dropped it, their freeborn status was not affected.¹⁴⁶

¹⁴³ C.7.21.6 (Valerian and Gallienus, 260).

¹⁴⁴ As suggested by Gardner (note 141), 84–85. Under the *lex Aelia Sentia*, patrons (and their children) had a claim to part of the property of freedpeople who had fewer than three children. Perhaps Polla's mother was a Junian Latin, who had been freed only informally; if so, that information would have been omitted from the rescript when it was included in the Code; see at notes 61–63 and Conclusion below.

¹⁴⁵ C.7.21.7 (Diocletian and Maximian, between 284 and 292). On cases involving the freedom of those claimed by the fiscus as slaves, see D.49.14.3.9 (Callistr. 3 *iure fisci*), a rescript of Hadrian; and D.49.14.7 (Ulpian 54 *ed.*), citing a rescript of Marcus Aurelius, saying that the *advocatus fisci* must be present; note also C.3.22.5 (*an epistula* to Diogenes, *praeses insularum* [in the Aegean], 294): *causae libertinitatis et servitutis* (that is, when the dispute is over the freed or slave status of a person) that involve the fiscus go to the *rationalis* or the *magister privatae rei* (i.e. officials concerned with imperial finances) whereas those involving *ingenuitas* must be heard by the governor. On this see above at note 19 and Talamanca (note 19), 1358–63.

¹⁴⁶ Crescens: C.7.14.5 (Tetrarchy, 293). Matrona: C.7.14.7 (Tetrarchy, 293).

Challenges to the status of freedpeople could arise from disputes over the status of those who had manumitted them. Nico petitioned Septimius Severus and Caracalla regarding the case of a freedwoman named Domitia, whose former master had lived as a Roman citizen until the day of his death. There was now a dispute over the property of Domitia (who may have been dead by that time also) and the status of her patron had been questioned. If he had not been a free citizen, then Domitia's own status was in jeopardy, since her manumission would be invalid. The emperors responded that "the appropriate judge" (that is, the governor) would investigate whether Domitia's patron had died more than five years earlier.¹⁴⁷

Children whose mother was posthumously discovered to have been a slave might not even be aware of their own legal status, and would assume that they were freeborn when they were actually the slaves of their mother's owner.¹⁴⁸ This may have been the case with the son of the woman that Orcina (perhaps herself a former slave¹⁴⁹) claimed had belonged to her. Diocletian told her:

If the provincial governor decides that the man who is fulfilling the office of aedile is your slave and determines that he was not unaware of his status when he aspired to the aedileship, he will inflict an appropriate penalty because the honor of the town council was violated by a servile stain (*servili macula*). But if, born from a decurion (town councillor), he proceeded to receive this office out of error, since his mother was taken for a free person in public opinion, the governor will submit him to your ownership.¹⁵⁰

¹⁴⁷ C.7.21.1 (undated, but between 193 and 211) to Nico. See Gardner (note 141), 83–84.

¹⁴⁸ In addition to Polla and Heliodorus (above) and the son of the woman Orcina claims as a slave (below), see C.7.21.2 (Septimius Severus and Caracalla to Maximus, 205); Gardner (note 141) on these and others.

¹⁴⁹ Slaves freed in their master's will were known as *liberti orcini*: Mouritsen (note 43), 51–52. Orcina may have taken her name from that circumstance.

¹⁵⁰ C.10.33.2 (undated, but between 286 and 292):

Praeses provinciae, si eum qui aeditate fungitur servum tuum esse cognoverit, si quidem non ignarum condicionis suae ad aeditatem adspirasse perspexerit, ob violatam servili macula curiae dignitatem congruenti poena adficiet: si vero, cum opinione publica mater eius pro libera haberetur, ex decurione procreatus ad capessendum honorem errore lapsus processit, dominio tuo eum subiugabit.

The man's father had been a decurion and the son, currently serving as aedile, would (assuming he was freeborn) have been expected to hold the same position.¹⁵¹ Yet if his mother had been Orcina's slave, the fact that his father was a freeborn man of local dignity was irrelevant, since "it is a matter of established law that the offspring of a slavewoman follows her condition, nor is the father's status considered in this case."¹⁵² In this case, the governor has to decide two things: (1) was the man's mother really Orcina's slave? and (2) if so, did the son know this and so fraudulently aspire to a position only open to freeborn men, or did he make an honest mistake, assuming that his mother was free because that was how public opinion regarded her? If he fraudulently assumed freeborn status, then he was to suffer a severe punishment for having "violated" the dignity of the *curia* with a "servile stain."¹⁵³ But even if he was honestly mistaken, he would still become Orcina's slave, if his mother had died less than five years previously.

This is not the only instance where alleged slaves aspired to civic offices, or freedmen pretended to be freeborn and held offices forbidden to those of slave birth; quite a few rescripts of the tetrarchic period address this issue. Philosarapis learned that the fact that he had held the office of limenarch did not mean there could not be an investigation into his status. Similarly, Faustinus and his siblings were informed that their father's holding of civic office did not prevent a status inquiry against them: "Slaves do not change their status if they illegally or wickedly aspire to civic office."¹⁵⁴ A rescript in the name of Constantine and Licinius to

¹⁵¹ He was not the only one to assume that a father's holding of public office guaranteed the *ingenuitas* of his children: cf. Isidorus in C.4.19.10, 293 (see below) and C.7.16.28 (294) to Eurymedon, who is told that the magistracy of a paternal grandfather does not prove the grandson's free status.

¹⁵² C.3.32.7 (Philip and the Caesar Philip to Aurelius Antoninus, 245). On the other hand, the child of a free woman and a slave was freeborn, but illegitimate (*spurius*, as in the case of Hostilia's children; see note 137). For a case of the son of a free woman and a slave becoming a decurion, see D.50.2.9 pr. (Paul 1 *decr.*, quoting a *decretum* of Septimius Severus); cf. C.7.55.6 (Tetrarchy to Posidonius, 294).

¹⁵³ For the loaded language, compare C.7.20.1 (290) at note 173 below, which uses some of the same vocabulary. Honoré (note 5) attributes C.10.33.2, 7.20.1 and 8.50.7 to the same secretary for petitions, the jurist Arcadius Charisius (see above, notes 22 and 116). On the "servile stain," see Mouritsen (note 43), 12–29.

¹⁵⁴ Philosarapis: C.7.16.38 (Tetrarchy, 294); see Gardner (note 35) on this and other examples of slaves claiming civic or military office illegally. Faustinus: C.7.16.11 (Tetrarchy, 293).

the governor of Cappadocia refers to the case of one Aelius, who despite his slave status had misrepresented himself as a decurion (and a *principalis* at that) to a woman plaintiff.¹⁵⁵ According to another rescript of tetrarchic date, a freedman who fraudulently claimed free birth and held official positions that were reserved for freeborn men would be punished with legal infamy under the *lex Visellia* and forced to perform the duties suitable to his status — unless the emperor had granted him the “right of gold rings” (*ius aureorum anulorum*), which bestowed a fictitious, but not inheritable, *ingenuitas*. Those with the right of gold rings “obtain the likeness (*imago*), but not the status of free birth for as long as they live and undertake public duties without risk to freeborn men (*sine periculo ingenuorum*),” presumably because their descendants would not be able to infiltrate the curial order.¹⁵⁶ Only the emperor himself could bestow this privilege, not the local decurions themselves.¹⁵⁷

Accusations that someone living as free was really a slave (or conversely, claims for freedom by an enslaved person) were all the more common because so often people related by blood, who thought of themselves as members of the same family, were on different sides of the slave/free divide. Diocletian told a woman named Agathoclea that the fact that Glycon’s mother and brother had served as slaves did not mean Glycon himself was a slave; probably Glycon had been born after his mother was freed. And Paulina was curtly instructed to prove that she had been born after her mother was freed because the fact that no one had brought an inquiry into the status of her brothers did not help her at all.¹⁵⁸ Similarly, Reginus was told that there were “many

¹⁵⁵ C.7.16.41, to Titianus. This was a rescript of Licinius, apparently from 316; see Corcoran (note 5), 36, 109 and 280.

¹⁵⁶ C.9.21.1 (Tetrarchy, to Bacchus, posted at Antioch, probably 300). Cf. C.6.8.2 (Tetrarchy, to Eumenes, from Sirmium, 294) for very similar wording. On the *ius anulorum*, see Millar (note 5), 489; Mouritsen (note 43), 107–108. On the *lex Visellia* (24 CE) see below, note 179. See also C.10.33.1 (Diocletian and Maximian to Saturninus, undated): the provincial governor will not allow a freedman who has not received the *ius anulorum* or been restored to free birth status to participate in the local *curia*. Freedmen were banned from holding all positions of public authority: see Mouritsen (note 43), 248.

¹⁵⁷ C.6.8.1 (Philadelphus, from Ravenna, 290 or 293). This was originally part of the same rescript as C.7.9.3 (same recipient, same date and place of issue), from which it appears that Philadelphus was a freedman who administered the town archives and was at risk of losing his freedom; see note 70 above. This is a rescript of the western emperor Maximian.

¹⁵⁸ Glycon: C.4.19.22 (Tetrarchy, 294). Paulina: C.4.19.17 (Tetrarchy, 294).

ways” his freeborn brothers could have become slaves, and the fact that Reginus’ own freedom had not been questioned did not prove their free status; other proofs (*probationes*) were necessary. Isidorus learned that neither the fact that he could prove his own free birth, nor his holding of public office, was proof of his daughter’s status, “since nothing prevents (the possibility) that you are an *ingenuus* and she a slave.”¹⁵⁹ Isidorus may have had a long-standing relationship with his own slavewoman, and brought up children by her, never realizing that unless he manumitted her, their children would also be slaves. Indeed, a general law of Constantine in 331 had to reiterate the ancient legal principle: “For it is necessary by *ius commune* that a child follow its mother’s status, so that, even if a slavegirl has climbed into her master’s bed, she brings forth for her master not the offspring of free people, but of slaves.”¹⁶⁰

No amount of time in slavery, not even sixty years, could cause a legally free person to lose the right to freedom, according to a rescript attributed to Constantine and Licinius.¹⁶¹ On the other hand, no amount of time in *de facto* freedom would enable a runaway slave to claim free status. Diocletian assured Aemilia, probably the owner of a fugitive slave, that because a slave had “stolen himself” he could not claim the “exception of lapsed time” (*longi temporis praescriptio*), which enabled those who had been in possession of something for an extended period of time to be the owners.¹⁶² Apparently by the time of Diocletian the *praescriptio* could apply to slaves who mistakenly thought they were free and lived as free in good faith for twenty years.¹⁶³ Another petitioner,

¹⁵⁹ Reginus: C.7.16.17 (Tetrarchy, 293). Isidorus: C.4.19.10 (Tetrarchy, 293).

¹⁶⁰ C.Th. 4.8.7 (to Junius Bassus, praetorian prefect): . . . *Iure enim communi maternam condicionem natum sequi necesse est, ita ut, etsi herilem lectulum ancilla ascenderit, non liberorum domino, sed servorum partum*. See Evans Grubbs (note 58), 280–83.

¹⁶¹ C.7.22.3 to Dionysius, acting vice prefect, given in the name of Constantine and Licinius (314), but apparently from a law of Licinius. See Corcoran (note 5), 304, 341. Probably to be joined with C.3.1.8.

¹⁶² C.6.1.1 (Diocletian and Maximian, 286).

¹⁶³ According to a rescript to Carterius (C.7.22.2, from Antioch, 300). Buckland (note 18), 649, notes that this rescript is probably “not in its original state,” and that the concept of freedom by *praescriptio temporis* was probably not found in earlier classical law. Amelotti (note 107), 120–24, believes almost all of C.7.22.2 is a post-Diocletianic addition resulting from legal changes under Constantine and later emperors (on which see below). He does, however, think that Diocletian made real changes to Roman law by recognizing that having lived in freedom *sine dolo malo* for an extended (but not specified) length of time could protect one from

Mucianus, actually admitted to having escaped from his owner, hoping that he could benefit from the *praescriptio temporis*. But, he learned, this did not apply to those who had achieved their liberty by fraud.¹⁶⁴ Likewise, Constantine's law of 331 (above) was responding to cases where the children of slave mothers and freeborn fathers had asserted their freedom by claiming the *praescriptio temporis* because they had remained free for sixteen years. The emperor had to stress that this only applied to those living as free in good faith, not to slavewomen's children whom their master/father had raised as free.¹⁶⁵ There is a point worth noting here. The unclassical idea of *praescriptio temporis* (whether of twenty or sixteen years) as applied to freedom had led, in Constantine's eyes, to abuses; after all, these masters could have freed their enslaved children under the *lex Aelia Sentia*, but had not done so.¹⁶⁶ They may in fact have died without manumitting their children, who hoped to claim not only freedom but perhaps also their father's property – a prospect abhorrent to the traditionalist Constantine.¹⁶⁷

The rescript to Mucianus is a good illustration of the purpose and limitations of the rescript system. By his own admission, Mucianus was a fugitive slave, who at the very least would face reenslavement if caught. But the emperors were not going to send out slavecatchers to hunt him down. Only if a runaway slave's master complained to the authorities would slave-catching personnel be employed; even then, they may not have been very effective, since other landowners were often reluctant to allow their property to be searched for fugitives.¹⁶⁸ Imperial rescripts elucidate the law, they do not enforce it. Receiving a rescript

reenslavement.

¹⁶⁴ C.7.22.1 (Tetrarchy, 293).

¹⁶⁵ Evidently by 331 the *praescriptio temporis* for claims of freedom by slaves who had lived as free in good faith had been reduced from 20 to 16 years, probably by Constantine himself; Lenski (note 58), 252–53, attributes this to an earlier law of Constantine, predating C.Th. 4.9.1 of 319.

¹⁶⁶ On the *lex Aelia Sentia*, see above at note 62. An exception to the usual requirement that manumitted slaves be at least thirty years old was made if the manumittor was freeing his/her own flesh and blood.

¹⁶⁷ As is clear from other legislation of Constantine, forbidding men to leave anything to their children from lowborn women whom they were not (under Constantine's expansion of earlier marriage restrictions) allowed to marry legally: C.Th. 4.6.3 (336), on which see Evans Grubbs (note 58), 283–94; T. A. J. McGinn, "The Social Policy of Emperor Constantine in Codex Theodosianus 4.6.3," *TRG*, 67 (1999), 57–63; and Harper (note 4), 442–55, who sees this as part of a larger reform of the Augustan marriage and adultery laws dating to 326.

¹⁶⁸ Bellen (note 79), 11.

about his or her own situation enabled the petitioner to approach the appropriate authority, usually the provincial governor, who would pronounce judgment on the case. Mucianus had hoped to get a response that confirmed him in possession of his liberty, which he could then use in court in a case concerning freedom (*causa liberalis*). No doubt he was disappointed, but the unfavorable rescript in itself would not lead to automatic loss of liberty. However, rescripts were publicly posted and could be read by others besides the recipient. The emperor's reply would reveal Mucianus' status, and this would not only be embarrassing but could lead to his reclamation if it came to his master's attention.¹⁶⁹

Fugitive slaves who settled far from their master's home were less likely to be recognized and reclaimed, although that did sometimes happen. One petitioner, Aurelius Aristocrates, said his slave had fled to another province, and was claiming that she was free. Perhaps Aristocrates had hired a professional slave-catcher to find her, or he may have heard about her whereabouts in some other way. He was told that the governor of the province would have her sent back to the place where she had been a slave, where her claim would be heard.¹⁷⁰

Occasionally the owner or former owner of a slave or freedman would collude with the slave in the pretense that the slave was freeborn. This had been forbidden by a senatorial decree of the late first century, passed "in order that excessive indulgence of certain masters towards slaves not pollute the most splendid order" of the Senate by enabling slaves and ex-slaves to become senators. According to the second-century jurist Gaius, the measure was necessary because owners were allowing their slaves to claim freeborn status and be judged free. The penalty was that the false *ingenuus* became the freedman of the person who uncovered the collusion.¹⁷¹ Two petitioners are told that freedmen cannot simply claim free birth without proof, nor does an agree-

¹⁶⁹ See Connolly (note 5), 117–18 and 120–21 on the public nature of posted rescripts; id., 130, on C.1.18.9 (Tetrarchy, 294), to Gaius and Anthemius, who had also apparently admitted to slave status.

¹⁷⁰ C.3.22.1 (Alexander Severus, 231).

¹⁷¹ D.40.16.1 (Gaius 2 *ed. praet. urb. tit. lib. causa*): *ne quorundam dominorum erga servos nimia indulgentia inquinaret amplissimum ordinem*. This was apparently the *sc. Ninnianum* (referred to in C.7.20.2, Tetrarchy to Milesius, 294). Marcus Aurelius set a period of five years after the judgment of *ingenuitas* during which others could uncover the collusion. See Buckland (note 18), 674–75. Hermann-Otto (note 18), 143–46 suggests these masters were actually senators who wished their illegitimate children (by their slavewomen) to succeed them.

ment (with a free person) to do so carry any weight.¹⁷² A rescript of Diocletian to a woman named Theodora addresses an interesting case of collusion between master and slave. Theodora claimed that her mother, now deceased, had been living in a sexual relationship with her own slave. The couple had attempted to cover this up by pretending that the man was originally freeborn, had been captured by barbarians and was subsequently redeemed from captivity by Theodora's mother. He had then officially undergone the process for reclaiming his free birth status. But according to Theodora, her mother had never even manumitted the man and he was still a slave. She is told that she may certainly bring charges against the fraudulent slave-husband.¹⁷³ Although nothing is said of this in the rescript, there were probably financial interests at stake here. Perhaps Theodora's mother had left property to her lover which Theodora thought should have gone to her. If the man was judged to be a slave, he too would belong to Theodora, since she was her mother's heir.

VI. The importance of 212

Cases of disputed status appear to be disproportionately represented among the third-century rescripts; of those rescripts deriving from the Codex Hermogenianus, almost a quarter respond to issues involving enslavement and freedom.¹⁷⁴ How do we explain this preponderance of responses to petitions regarding personal status?

Recently, Kyle Harper, in an outstanding study of slavery in the period between ca. 275–425 CE, has offered a wide-ranging

¹⁷² C.7.14.8 (Tetrarchy to Callimorphus, 293); C.7.14.13 (Tetrarchy to Menander, 294).

¹⁷³ C.7.20.1 (Diocletian and Maximian to Theodora, 290; see note 153). See Huchthausen (note 9), 71; Evans Grubbs (note 137), 138–40. Constantine later enacted an edict “to the People” on free women who married their own slaves, punishing all parties concerned (including the couple's children, if the parents did not desist): C.Th. 9.9.1 (326 or 329); Evans Grubbs (note 137), 142–47. K. Harper, “The *SC Claudianum* in the *Codex Theodosianus*: Social History and Legal Texts,” *Classical Q.*, 60 (2010), 610–38, points out that the text of C.Th. 9.9.1 does not explicitly describe the slave as belonging to the woman (this appears only in the heading to C.Th. 9.9, added by the compilers); he believes C.Th. 9.9.1 may have applied to all unions between free women and slave men, not just those between a woman and her own slave. But C.Th. 9.9.1 makes no mention of the slave's master, whose rights would have been affected, and the slave is harshly punished, whereas legislation on the *sc. Claudianum* penalizes only the free woman (with deminution of status), not the slave.

¹⁷⁴ Harper (note 4), 369; see his Appendix 2 for a list.

and plausible explanation: the enactment of the *Constitutio Antoniniana*, Caracalla's grant of Roman citizenship to virtually all free inhabitants of the Empire in 212, would have brought millions of people under the aegis of Roman law and generated both questions about legal status among new citizens and access to Roman courts to resolve them.¹⁷⁵ Indeed, the *constitutio Antoniniana* had a huge impact on law and status throughout the Empire over the course of the third century, especially in eastern provinces where only a small proportion of the inhabitants had held Roman citizenship before 212. By the time of Diocletian, we can see the use of Roman concepts like *patria potestas*, and the decline of local practices like close-kin marriage, even in a province as previously "un-romanized" as Egypt.¹⁷⁶ And it appears that the Roman government used the rescript system itself as a tool for "judicial Romanization" by informing petitioners of the expectations of Roman law and of intrinsic Roman ideals like *pietas*.¹⁷⁷ The third-century rescripts preserved in the Code of Justinian testify to both the need for clarification on the part of new citizens and the promulgation of Roman norms throughout the Empire by emperors and jurists.

However, uncertainty over status was certainly not unknown in the earlier Empire. In the reign of Augustus after the long period of civil war, some Italian landowners were known to kidnap and enslave free people, keeping them in private workhouses (*ergastula*) on their estates, and the problem continued under his successor Tiberius.¹⁷⁸ Also under Tiberius, the *lex Visellia* was

¹⁷⁵ Harper (note 4), 363–90; on the impact of the *constitutio Antoniniana* see also P. Garnsey, "Roman Citizenship and Roman Law in the Late Empire," in S. Swain and M. Edwards, eds., *Approaching Late Antiquity* (Oxford 2004), 133–55; and R. W. Mathisen, "*Peregrini, Barbari* and *Cives Romani*: Concepts of Citizenship and the Legal Identity of Barbarians in the Later Roman Empire," *American Historical Rev.*, 111 (2006), 1011–40.

¹⁷⁶ On the impact of Roman law and citizenship on Roman Egypt, see J. Modrzejewski, "La règle de droit dans l'Égypte romaine," in D. H. Samuel, ed., *Proceedings of the Twelfth International Congress of Papyrology* (Toronto 1970), 317–77; O. Montevecchi, "Endogamia e cittadinanza romana in Egitto," *Aegyptus*, 59 (1979), 137–44; and A. Arjava, "The Romanization of Family Law," in J. Keenan, J. Manning, and U. Firanko, eds., *Law and Legal Practice in Egypt from Alexander to the Arab Conquest: A Selection of Papyrological Sources in Translation, with Introductions and Commentary* (Cambridge) (forthcoming).

¹⁷⁷ Coriat (note 5); see also Evans Grubbs (note 106).

¹⁷⁸ Suet. *Aug.* 32; *Tib.* 9. Cf. the mysterious disappearance of a centurion and an equestrian (on two separate occasions) while travelling in Italy in the time of Pliny: see note 97.

passed to punish the usurpation by freedman and slaves of offices reserved for *ingenui*; this law is referred to in a Tetrarchic rescript, and was still in operation in the later fourth century.¹⁷⁹ As noted earlier, Marcus Aurelius was credited with requiring registration of all citizen births in order to make claims of freeborn status in a *causa liberalis* easier.¹⁸⁰ A rescript from Hadrian to Catonius Verus, the earliest found in the Code of Justinian (and the only Hadrianic text preserved in the Code) was written in response to doubts over the status of witnesses to a will: "It is not necessary to investigate whether the witnesses were slave or free, since at the time when the will was signed, by the agreement of all they were considered to be in the position of free men, nor has anyone raised a dispute over status against them up to now."¹⁸¹ The story behind this is unknown, but it is probable that questions over the witnesses' status were raised by someone who had not received what he or she had expected in the will and who was hoping to invalidate the will by disqualifying the witnesses.

The case of Petronia Justa, known from the dossier of wax tablets relating to her case found at Herculaneum, illustrates how disputes over status could occur even in the early Empire.¹⁸² Justa's nomenclature, including the pseudo-patronymic "daughter of Spurius" indicates that she was freeborn and illegitimate.¹⁸³ The daughter of the freedwoman Vitalis, Justa was claiming freeborn status on the grounds that she had been born after her mother had been freed. Vitalis' former owner, Calatoria Themis (perhaps a former slave herself) who had shared joint ownership of Vitalis along with Calatoria's husband Petronius Stephanus, claimed that Justa had been born while Vitalis was still a slave, and had been freed by Calatoria herself.¹⁸⁴ Several tablets record

¹⁷⁹ *Lex Visellia*: C.9.21.1 (300?) at note 156, above; C.Th. 9.20.1 = C.9.31.1 (Valens, Gratian, and Valentinian I, Trier, 378). See M. Reinhold, "Usurpation of Status and Status Symbols in the Roman Empire," *Historia*, 20 (1971), 286; Mouritsen (note 43), 73–75, 107–108.

¹⁸⁰ See above at notes 34 and 42.

¹⁸¹ C.6.23.1 (undated): *Testes servi an liberi fuerunt, non oportet in hac causa tractari, cum eo tempore, quo testamentum signabatur, omnium consensu liberorum loco habiti sunt nec quisquam eis usque adhuc status controversiam moverit*. Witnesses to a Roman will had to be free male citizens. This rescript is also referred to in Justinian's *Institutes* (J.2.10).

¹⁸² TH (= Tabula Herculaneensis) XIV, in V. Arangio-Ruiz, "Testi e documenti. IV. Tavolette ercolanensi (il processo di Giusta)," *BIDR* (3rd), 1 (1959), 223–45.

¹⁸³ "Sp. f." (= *Spurii filius/a*) is the standard way of denoting illegitimate status. See B. Rawson, "*Spurii* and the Roman View of Illegitimacy," *Antichthon*, 23 (1989), 10–41.

¹⁸⁴ Justa's *nomen*, Petronia (rather than Calatoria) suggests that if

testimonies both for and against Justa's freeborn status, given by former slaves of the household and others familiar with the family.¹⁸⁵ It is likely, though not certain, that Justa herself was the plaintiff.¹⁸⁶

Evidently no written documentation, either of Justa's manumission (if she was a freedwoman) or of her birth (if she was freeborn), existed. One fragmentary tablet may record her mother Vitalis' manumission which, if it were dated before Justa's birth, would be evidence for Justa's *ingenuitas*.¹⁸⁷ But even if she had been born after her mother's manumission, as she claimed, Justa was illegitimate and so would not have had an official birth *professio*, since until the time of Marcus Aurelius only the births of legitimate Roman children were officially registered (this would not have prevented her mother from making some sort of declaration, but it would not have carried the same weight), and she probably had no documentation of her exact age.¹⁸⁸ With no written proof on either side, determination of Justa's status depended on the conflicting memories of different parties, including that of her mother's patron — who was also her legal opponent. The outcome of the case which, if it had reached the trial stage, would have been heard in Rome before the urban praetor, is unknown.¹⁸⁹

she were a freedwoman, she had been manumitted by Petronius Stephanus rather than Calatoria; see A. Lintott, "Freedman and Slaves in the Light of Legal Documents from First-Century AD Campania," *Classical Q.*, 52 (2002), 562. On the possibility that Calatoria Themis was herself a former slave, see P. R. C. Weaver, "Children of Freedmen (and Freedwomen)," in B. Rawson, ed., *Marriage, Divorce and Children in Ancient Rome* (Oxford 1991), 171–72.

¹⁸⁵ The case of Petronia Justa has engendered a huge amount of scholarship. See Arangio-Ruiz (note 182); A.-J. Boyé, "Pro Petronia Iusta," in *Droits de l'antiquité et sociologie juridique: Mélanges Henri Lévy-Bruhl* (Paris 1959), 29–48; J. A. Crook, *Law and Life of Rome* (Ithaca, NY 1967), 48–50; Lintott (note 184), 555–65; E. Metzger, "The Case of Petronia Iusta," *RIDA* (3rd), 47 (2000), 151–65; idem, *Litigation in Roman Law* (Oxford 2005), 155–63; Weaver (note 184), 166–90; and idem, "Children of Junian Latins" (note 63), 69–71.

¹⁸⁶ Metzger, "The Case of Petronia Iusta" (note 185), 153–54; idem, *Litigation* (note 185), 158–59.

¹⁸⁷ TH XXIX, at Arangio-Ruiz (note 182), 242–45. There is no indication of date. Weaver, "Children of Junian Latins" (note 63), 70, suggests Vitalis may have been a Junian Latin, freed informally under age 30 (see at notes 62 to 63 above).

¹⁸⁸ See at notes 33 to 36 on birth *professiones*. On ignorance of exact age among ancients, see Parkin (note 35), 173–89.

¹⁸⁹ Metzger, *Litigation* (note 185), 159–63. Dated documents in the dossier are from 74–75 CE.

Justa's case arose in the heartland of the Empire and was subject to Roman legal process. We must assume that there were many more such cases centered on the disputed status of former slaves that arose in Rome and Italy, particularly in areas where freedmen were numerous. Disputes over status and freedom arose frequently in the provinces too, as evidenced in the correspondence between Trajan and Pliny the Younger, when Pliny was governing Bithynia-Pontus. In one letter, Pliny recounted that he had been approached by petitioners seeking rulings on *threptoi* ("fosterlings"), defined by Trajan in his response as "those who were born free, exposed, then taken up by certain people and reared in slavery" (*liberi nati expositi, deinde sublati a quibusdam et in servitute educati*). Pliny was asked to decide not only on the status of *threptoi* who were asserting their freedom or being reclaimed as free by the parents who had earlier abandoned them, but also on whether those who had raised them as slaves should be reimbursed for rearing costs. It is clear from the exchange between governor and emperor that this issue had been the subject of several earlier legal decisions elsewhere in the East, especially Achaia, and there was no set policy, particularly regarding repayment of rearing costs.¹⁹⁰ Caracalla's edict would have brought such issues to the fore for many new citizens, and for those governing them.

The publication of the dedicatory inscriptions from the Sanctuary of the Autochthonous Mother of the Gods at Leukopetra in Roman Macedonia has allowed scholars a glimpse of the consequences of the Edict of Caracalla in small rural communities of the eastern Empire.¹⁹¹ At this sanctuary, located in the territory

¹⁹⁰ Pliny *Ep.* 10.65; 10.66 is Trajan's response. For Pliny as governor in Bithynia-Pontus, see Pliny *Ep.* book 10; A. S. Sherwin-White, *The Letters of Pliny: A Historical and Social Commentary* (Oxford 1966, 1998); W. Williams, *Pliny the Younger: Correspondence with Trajan from Bithynia* (Warminster 1990); and recently, J. Madsen, *Eager to be Roman: Greek Response to Roman Rule in Pontus and Bithynia* (London 2009), 11–26. On the (still debated) question of whether Trajan's decision regarding Bithynia-Pontus reflected Roman law or local law, see E. Volterra, "L'efficacia delle costituzioni imperiali emanate per le provincie e l'istituto dell'*expositio*," in *Studi di storia e diritto in onore di Enrico Besta* (Milan 1939), 449–77; T. G. Nani, "Threptoi," *Epigraphica* 5/6 (1943/44), 67–71; Amelotti (note 107), 132–37; M. B. Fossati Vanzetti, "Vendita ed esposizione degli infanti da Costantino a Giustiniano," *SDHI*, 49 (1983), 182–87; A. Lintott, *Imperium Romanum: Politics and Administration* (London and New York 1993), 151. On the ambiguous status of *threptoi* in the Greek East, see below at note 193.

¹⁹¹ See Ph. M. Petsas, M. B. Hatzopoulos, L. Gounaropoulou, and P. Paschidis, *Inscriptions du sanctuaire de la Mère des Dieux Autochtone de*

of Beroea, almost two hundred inscriptions were found, dating from the second half of the second century to the early fourth century. At least 116 of these inscriptions concern the donation of human beings to the goddess, for a total of 178 such donations by 175 donors. All but one of those donated were slaves; more females were dedicated than male, and half of those whose age is known were younger than twelve.¹⁹² Eight of the dedicated persons are identified as *threptoi*, a term which, as the editors point out, “underlines the ambiguity of their status.”¹⁹³ They were probably foundlings, perhaps freeborn, who had been picked up by the dedicators, perhaps specifically to serve as dedications.

The dedications were intended as consecrations to the goddess, often for the fulfillment of a vow or the repayment of a debt; the inscriptions recording these dedications are abbreviated versions of written documents attesting the transaction that were deposited by the consecrators in the sanctuary archives.¹⁹⁴ The

Leukopetra (Macédoine) [Μελετήματα, 28] (Athens 2000) for publication of the inscriptions and discussion. Important discussions of the significance of the Leukopetra inscriptions in M. Riel, “Donations of Slaves and Freeborn Children to Deities in Roman Macedonia and Phrygia: A Reconsideration,” *Tyche*, 16 (2001), 127–60; E. A. Meyer, *American J. Philology*, 123 (2002), 136–40 (a review of Petsas, et al., *Inscriptions du sanctuaire*); and Harper (note 4), 369–78.

¹⁹² The editors relate the large number of dedicated children and of females to the goddess’ own sex and her character as *kourotrophos* (raiser of children). The one free person who was dedicated was also a child named Paramonos [*sic*] whose mother dedicated him to the goddess after promising to do so if he recovered from an illness (Petsas, et al. (note 191), 115–116, inscription no. 47). Slaves were not the only dedications: about 10% were inanimate objects such as statues, altars, and plaques: Petsas, et al. (note 191), 38; Riel (note 191), 127–28.

¹⁹³ Petsas, et al. (note 191), 37. The correspondence of Pliny the Younger and Trajan (Pliny *Ep.* 10.65–66; see above note 190) indicates that Roman governors in the eastern provinces had to contend with the ambiguous status of *threptoi*, a term used in the inscriptions of Asia Minor to denote several different statuses, including often (though not always) slave children who held a more favored position in the household than other slaves, or foundlings who had been adopted. See A. Cameron, “*Threptos* and Related Terms in the Inscriptions of Asia Minor,” in W. M. Calder and J. Keil, eds., *Anatolian Studies Presented to William Hepburn Butler* (Manchester 1939), 27–62; Nani (note 190); P. Guinea, “La peculiaridad de los *threptoi* en el Asia Menor,” *Dialogues d’histoire ancienne*, 24 (1998), 41–51; and M. Riel, “Legal and Social Status of *threptoi* and Related Categories in Narrative and Documentary Sources,” in H. M. Cotton, et al., eds., *From Hellenism to Islam: Cultural and Linguistic Change in the Roman Near East* (Cambridge 2009), 93–114.

¹⁹⁴ Petsas, et al. (note 191), 38; Riel (note 191), 128–29. It was not obligatory to set up an inscription recording the consecration, which means that the inscriptions presumably represent only a fraction of the

dedicators seem to be of the “middle levels” of the population with fairly moderate means — probably of the same social standing as most of the petitioners to whom the third-century rescripts preserved in the Codex Justinianus are addressed. Many of them dedicated more than one slave; in one case three generations of a slave family were dedicated at the same time.¹⁹⁵ A little over half of the dedicators were women. Almost half of those dedicating slaves before Caracalla’s Edict of 212 already had Roman citizenship.¹⁹⁶ The Edict of Caracalla had “an immediate and general effect” on the dedicators at the Sanctuary of the Autochthonous Mother of the Gods. After 212, all the free people mentioned in the inscriptions have Roman names, usually “Aurelius/a” (signifying that they received citizenship from the emperor Caracalla, whose *nomen* was Aurelius), with their Greek name becoming a *cognomen*.¹⁹⁷ Moreover, 212 brought with it the involvement of the imperial government, through the medium of the provincial governor, in the dedications to the sanctuary (see below).

In some cases the consecrated slave is subject to a *paramone* arrangement, whereby he or she is to spend the rest of the consecrator’s lifetime still serving the consecrator (and presumably living with him or her rather than at the sanctuary), but will spend “customary” or “festival” days with the goddess. Other dedicatory inscriptions explicitly state that the goddess is to have power (*exousia*) over the consecrated person and that no one else has a right to deny that; anyone who tries to reenslave the consecrated person is subject to a fine far exceeding the usual price for a slave. There it seems that the consecrated slave’s obligation is solely to the sanctuary which, as the editors point out, would not have been very onerous given its remote location.¹⁹⁸ The presence

total number of such consecrations.

¹⁹⁵ Petsas, et al. (note 191), 133–34, inscription no. 69. Those dedicated included a grandmother (aged 60), her daughter (aged 40), and her daughter’s three children (a male aged 20, a female aged 18, and a son aged 12).

¹⁹⁶ See Petsas, et al. (note 191), 25–28, on the social level of the dedicators; some were obviously better-off than others. But cf. Riel (note 191), 129: “. . . the language of these inscriptions is that of very poorly educated individuals” suggesting “texts composed by persons of lower social standing.” Fifty-two dedicators definitely made their donation before 212; of these, twenty-three had Roman citizenship. For the social level of recipients of Diocletian’s rescripts, see note 7 above.

¹⁹⁷ Petsas, et al. (note 191), 26: “un effet immédiat et général.” On the name “Aurelius” see note 99.

¹⁹⁸ See Petsas, et al. (note 191), 49–55, for the stipulations for service and the “protection clause” prohibiting enslavement of the consecrated person by anyone else. Such protection clauses are found at other

and size of such a fine suggests that consecrated persons were in fact at risk of reenslavement, perhaps by the heirs of the consecrator who felt they had been cheated of part of their inheritance.

What was the legal status of the slaves after they had been consecrated to the goddess? The act of consecration, and the obligations that it entailed (at the least service to the goddess on particular days, but in some cases continued service to the former owner) leaves this unclear. Consecration was a common means of manumission in the eastern provinces and the Leukopetra consecrations have been understood as manumissions, albeit with strings attached.¹⁹⁹ However, as Marijana Rici has pointed out, “the freedom of the donated slave is nowhere mentioned” in the Leukopetra dedications, unlike in some other consecrations found elsewhere in Macedonia. She believes that “[t]he purpose of the consecration was not to emancipate the slave but to subject him to the authority of the Goddess, his new mistress.”²⁰⁰

The consecrated slaves at Leukopetra occupied a place on the “spectrum of statuses” that did not correspond to any recognized in Roman law.²⁰¹ They were no longer enslaved to their dedicator, although some were still required to serve their former owner under a *paramone* agreement (also not recognized by Roman law). In most cases it appears that the future children of those consecrated did not automatically become the goddess’ slaves also, as they would have if their mothers were still enslaved.²⁰² But neither had they undergone manumission in any legal sense;

sanctuaries too. The Leukopetra fines increased during the third century, apparently in line with inflation. On *paramone*, see notes 53 to 54.

¹⁹⁹ Petsas, et al. (note 191), 33–38, summarize the debate over the status of “sacral manumissions” in the past century. Zelnick-Abramovitz (note 52), 233, and Harper (note 4), 369 n.11, accept the consecrations as manumissions, though Zelnick-Abramovitz (at 246) concludes that “manumission [sc. not only ‘sacral manumissions’] was always conditional.”

²⁰⁰ Rici (note 191), at 128 and 139 respectively. Cf. id., 129: “[W]e are dealing with regular conveyances of slaves to the Goddess performed with a view to supplementing the regular temple personnel.” In this 2001 article she is somewhat modifying the conclusions she reached in an earlier article, which were based on other Macedonian inscriptions.

²⁰¹ For the concept of a spectrum of statuses, see M. I. Finley, “The Servile Statuses of Ancient Greece,” in B. D. Shaw and R. P. Saller, eds., *Economy and Society in Ancient Greece* (New York 1983) (orig. pub. 1960), 143, 147; note also, in the same work, M. I. Finley, “Between Slavery and Freedom” (orig. pub. 1964), 132, on “a continuum of statuses” in late antiquity.

²⁰² Rici (note 191), 134, infers this from the fact that in a small number of inscriptions the consecrated slave’s descendants are specifically given to the goddess also.

rather, their “ownership” had been transferred to the goddess. In fact, many inscriptions refer to the handing-over of a purchase document (*oné*) to the goddess, which is then placed in her sanctuary. This indicates that a purchase had taken place (the goddess having acquired the slave as return for answering a prayer or extending a loan to the dedicator) and the sanctuary’s possession of the documents was evidently intended to provide surety against anyone (including the former owner or their family members) later claiming the consecrated person as a slave.²⁰³ Again we see the importance of written documents in determining status in the third century, although unlike manumission papers, the purchase documents did not provide proof of free identity.

Dedications made after 212 routinely refer to a decision (*apophasis*) made by the Roman governor of Macedonia, M. Ulpius Tertullianus Aquila, whose term in office coincided with Caracalla’s citizenship grant. Unfortunately, the contents of this gubernatorial decision is not clear from surviving mentions of it in the inscriptions, but it regulated in some way the status of the consecrated people and protected their particular (and non-Roman) position in local society. Several dedications that mention the fine for reenslavement of the dedicated person state that the amount of the fine was set in accordance with the *apophasis* of Tertullianus Aquila, so presumably part of his decision at least was directed to the possibility of reenslavement.²⁰⁴ More generally, it appears that the *apophasis* had to do with the status of the dedicated persons, and was prompted by Caracalla’s decree of universal citizenship in 212, which would have raised the question of whether such “sacrally manumitted” persons (if we consider them to have been freed) would also become Roman citizens, as those freed under the Roman law of manumission would. Indeed, as Elizabeth Meyer has suggested, it may have been the former slaves themselves, now in service to the goddess, who approached Tertullianus Aquila for an official determination of their status and possible civic rights.²⁰⁵ In this they were like so

²⁰³ Petsas, et al. (note 191), 56–57. The editors note that the term *oné* is not used in cases where a homeborn (*oikogenes*) slave is consecrated; by providing the document the consecrators are showing that they had originally acquired the slave legally from someone else. Cf. Harper (note 4), 376–77, on the importance of mentioning homeborn status.

²⁰⁴ Petsas, et al. (note 191), 59–60. Harper (note 4), 371–72, stresses that an *apophasis* was a *sententia* (a ruling given in court) rather than an edict. However, although this may have originally been a decision for one particular case, it continued to be cited as a standing rule for decades after Tertullianus’ term as governor.

²⁰⁵ See Meyer (note 191), 139–40, for this explanation. She points out

many of the recipients of rescripts who petitioned the emperor for a ruling on their or another's status. The universal grant of Roman citizenship in 212 would have overlaid a new legal status over ancient local identities, bringing new obligations (to observe Roman law in respect to marriage and inheritance practice, for instance²⁰⁶), but also offering the possibility of negotiating traditional social boundaries — though such negotiations were not always successful.²⁰⁷

Emperors and governors were eager to define legal identities and decide questions over status, particularly questions of ownership and freedom. But the Roman legal categories “slave” and “free” were not as important to their provincial petitioners as were questions of reimbursement for rearing, or inheritance rights, or social relationships whose parameters were more flexible in the lives of provincial petitioners than they were in Roman law. These social relationships, and the provincial matrices in which they occurred, did not end with the extension of Roman citizenship after 212. But the imposition of the Roman categories of legal status, particularly the free/slave dichotomy (never perfectly delineated even before 212, as we have seen) would have meant that vague, liminal identities like *threptos* needed to be clarified, at least when Roman authorities were concerned.

The Leukopetra inscriptions are evidence for the existence of those still outside the system even after 212, who were dependent on local mores and recognition for their peculiar status, and for the attempt of one Roman governor to respond to their situation.

that the fact that after 212 the consecrated persons did not use Roman nomenclature (unlike their former owners and consecrators, who immediately adopted Roman names) indicates that they lost their case for citizenship. Harper (note 4), 375–76, suggests that the *apophysis* may have been prompted by a dispute over *paramone* obligations.

²⁰⁶ On the conflict between Roman marriage law and local practice in Egypt, see Montevecchi (note 176).

²⁰⁷ C. Humfress, “Law and Custom under Rome,” in A. Rio, ed., *Law, Custom, and Justice in Late Antiquity and the Early Middle Ages* (London 2011), 23–47, has recently advised looking at the interplay of Roman law and local practices “from the ground-level up” — that is, at how provincials utilized the opportunities Roman law offered and “effectively introduced the question of . . . various indigenous laws and customs into the Roman courts.” *Id.*, 41. The repeated reference to Tertullianus’ *apophysis* on consecration inscriptions could be seen as an example of attempts to integrate a Roman legal ruling into pre-Roman custom — a ruling that was apparently prompted by questions (challenges?) on the local level, either by the sanctuary, the dedicators, or those who were consecrated.

Nor were they the only inhabitants of the Empire in the third century and beyond who were neither citizens nor slaves. Although not identical, the status of the Leukopetra slaves after consecration resembled that of Junian Latins, freedmen who had not been manumitted formally under Roman law but who lived in freedom and bore freeborn (though non-citizen) children. Slaves who were informally freed after 212 did not receive citizenship.²⁰⁸

It is quite likely that the expanded citizen body, and consequent need for explication of Roman legal norms, engendered an increase in petitions regarding status to the emperor, and also to the emperor's stand-in, the provincial governor. Of course, non-citizens had always been able to approach Roman officials for legal redress. In the early second century, Pliny the Younger, as governor of Bithynia-Pontus, was dealing with issues brought to him by provincials, and in the only recently formed province of Arabia, the Jewish woman Babatha had enough knowledge of and confidence in the workings of Roman administration to bring her dispute with her son's guardians to the governor's court in Petra.²⁰⁹ But Caracalla's Edict would have encouraged, perhaps even forced, many new citizens to engage with Roman law and legal process. Ultimately, by the end of the third century, Diocletian's reforms dividing the Empire (including Italy) into many new, smaller provinces, each under a governor (*praeses*), would have increased government efficiency in meeting this increased demand, as would the publication of two collections of imperial rescripts under his reign, the Codex Gregorianus and Codex Hermogenianus.²¹⁰ Many — though by no means all — of these

²⁰⁸ On Junian Latins, see at notes 45 and 63 above and Conclusion below. Even if Corcoran is right that all existing Latins (including Junians) became citizens in 212, that would not be the case for those informally freed after 212 (see Corcoran (note 45), 132–33). As both Weaver, “Where have all the Junian Latins gone?” (note 63) and López de Barja Quiroga (note 63) point out, there must have been many Junian Latins, but they have escaped the notice of historians since they do not appear in the Digest. Another group excluded from the 212 grant of citizenship was the *dediciti*, on whom see note 215 below.

²⁰⁹ The documents relating to Babatha are published in N. Lewis, *The Documents from the Bar Kokhba Period in the Cave of Letters. Greek Papyri* (Jerusalem 1989); for her encounters with Roman law, see H. Cotton, “The Guardianship of Jesus Son of Babatha: Roman and Local Law in the Province of Arabia,” *JRS*, 83 (1993), 94–108; and J. G. Oudshoorn, *The Relationship between Roman and Local Law in the Babatha and Salome Komaise Archives* (Leiden and Boston 2007). The documents relevant to the dispute before the governor are P.Yadin 13-15, dating to 124–125 CE. On Pliny, see above at note 190.

²¹⁰ On the Codices Gregorianus and Hermogenianus, see above at

rescripts were adapted by the compilers of the Codex Justinianus, and the preponderance of rescripts addressing status issues found in the latter Code reinforces the impression that uncertainty and conflict over status increased in the third century, as new Roman citizens (and those who were still excluded from the citizen body) tried to come to terms with the new order. But, as noted above, the rescripts preserved in the Diocletianic Codes may have been quite unrepresentative of all imperial responses enacted in the third century. And they were included in Justinian's Code for a different reason.

VII. Conclusion: Justinian and legal *spolia*

In 529 the emperor Justinian issued what is now known as the "first edition" of his Code. The Code's compilers (led by John the Cappadocian) had swiftly and efficiently gone through the three previously published Codes of imperial laws (the Codex Gregorianus, the Codex Hermogenianus, and the Codex Theodosianus), as well as "new laws" (*novellae*) promulgated by emperors after the publication of the Theodosian Code in 438, and had winnowed out obsolete, redundant, and contradictory rulings, as well as removing the prefaces to the laws that explained the background and reasoning behind the enactment. Much of this winnowing had already been done when the Theodosian Code, and perhaps also the Codex Hermogenianus and the Codex Gregorianus, were compiled, but Justinian's team went further, retaining only what was still usable in Justinian's day. This slimmed-down body of imperial law had been created "so that all litigants as well as learned lawyers may know that for the future they may by no means cite in legal contests the constitutions from the three old codes . . . or from those laws which were up to the present time called new (*novellae*), but they must use only the constitutions inserted in this Code of ours."²¹¹ Only laws contained in the new Codex Justinianus could be used in court, and any attempt to rely on laws outside of the new collection — for instance, by citing a

notes 5 to 6.

²¹¹ C. *Summa* (per Krueger): . . . *ut sciant omnes tam litigatores quam disertissimi advocati nullatenus eis licere de cetero constitutiones ex veteribus tribus codicibus . . . vel ex iis, quae novellae constitutiones ad praesens tempus vocabantur, in cognitionibus recitare certaminibus, sed solis eidem nostro codici insertis constitutionibus necesse esse uti . . .* This law was addressed to the praetorian prefect Menas April 7, 529; the original plan for the Code (*c. Haec*) was announced to the Senate in Constantinople in February 528.

third-century rescript that Justinian's compilers had not included — would be subject to a charge of forgery (*falsum*).

Five years later, however, Justinian issued a second edition of his Code, revised under the direction of his legal expert Tribonian (who had also been a member of the first commission). This is the one that has come down to us.²¹² The intervening years had been busy ones for the emperor, in the legal as well as the military realm: not only had 533 seen the publication of the Digest, but Justinian and Tribonian had undertaken to revisit and resolve numerous points of legal controversy and to enact new laws repealing or modifying older statutes, including some that went back to the first emperor Augustus. The main product of these labors was the “Fifty Decisions” enacted between August 530 and April 531 in preparation for the Digest, but there had been other new legislation as well, also included in the Code's second edition when it was issued in 534.²¹³

Issues of personal status figure prominently among the legal problems or controversies Justinian resolved. Already in 528 the emperor had repealed the *lex Fufia Caninia*, an Augustan law that had limited the number of slaves a slaveholder could manumit by will. It seemed almost *inhumanum*, the emperor said, that masters could free “their entire household” of slaves while living, but had not been allowed to do this when they died.²¹⁴ The status of *dedicitius peregrinus*, (“capitulated alien”), created under the *lex Aelia Sentia*, was formally abolished in 530 at Tribonian's

²¹² The first edition does not survive, but P.Oxy. XV.1814 preserves part of an index from the first edition, which lists titles and headings for a number of laws in Book 1: see S. Corcoran, “Justinian and his Two Codes: Revisiting P.Oxy. 1814,” *J. Juristic Papyrology*, 38 (2008), 73–111.

²¹³ Corcoran (note 212); T. Honoré, *Tribonian* (London 1978); C. Humfress, “Law and Legal Practice in the Age of Justinian,” in M. Maas, ed., *The Cambridge Companion to the Age of Justinian* (Cambridge and New York 2005), 161–84; H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge 1972), 478–98. Justinian's introduction to the second edition of the Code is *c. Cordi*, published with the Code in Krueger's edition. On the compilation of the Digest, see now T. Honoré, *Justinian's Digest: Character and Compilation* (Oxford 2010).

²¹⁴ The repeal is C.7.3.1 (to Menas, praetorian prefect, 528); “inhumanum” at J.1.7. Justinian also lowered the minimum age at which a slaveowner could manumit from 20 to 17 (J.1.6.7) and abolished the requirement that slaves be at least thirty to be manumitted fully (C.7.15.2, to Julianus, praetorian prefect, 530). Both had been requirements under the *lex Aelia Sentia*. See Melluso (note 103), 78–85. On the *lex Fufia Caninia* and the *lex Aelia Sentia*, see above at note 62.

suggestion — although, Justinian says, it had long ago fallen into desuetude.²¹⁵

In the following year, again at the instigation of his quaestor Tribonian, Justinian did away with the status of Junian Latin, which by the reign of Constantine had become a sort of half-way status between slave and freed, being used as either a reward (for slaves) or a penalty (for free people), as well as continuing to be the status assigned to freed slaves who had not been manumitted in accordance with the *lex Aelia Sentia*.²¹⁶ Originally, Justinian (or Tribonian²¹⁷) says, this status was modelled on that of residents of Latin colonies in the Republic, bringing nothing but civil wars to the state. After that, new laws introduced various ways in which people might be assigned Latin status, including by means of the *lex Junia*. Justinian now proposed that most circumstances that previously would have resulted in Latin status would henceforth lead to full manumission. In the future, freed

²¹⁵ C.7.5.1 (to Julianus, praetorian prefect, 530); cf. J.1.5.3. See G.1.13–15 and 1.25–27. These *dedicitii* were former slaves who had been punished for wicked acts by their owners by being put in chains, or branded, or tortured (while being investigated for their act), or sent to the arena, but had later been freed. They could never become Roman citizens or even Latins. See Melluso (note 103), 25–27.

²¹⁶ On Junian Latins, see notes 45, 63, and 208 above. For Latin status in the Theodosian Code, see C.Th. 9.24.1 (Constantine *ad populum*, 326), reward for slaves who report an abduction; C.Th. 2.22.1 (Constantine to Maximus, urban prefect of Rome, 320), penalty for those (evidently freedmen) who had Roman citizenship; cf. C.Th. 4.12.3 (Constantine *ad populum*, 320), where children of freeborn women who cohabit with fiscal slaves are to have Latin status (a modification of the *sc. Claudianum*, on which see note 138 above and notes 221 to 222 below). C.Th. 4.6.3 (Constantine to Gregorius, 336) mentions freedwomen who hold Latin status as well as those who are Roman citizens; these are probably Junian Latins. The Christian writer Salvian (in fifth-century Gaul) also knows of Latins: see Corcoran (note 45), 139. Corcoran suggests (137–41) that the overall numbers of Latin freedmen (as opposed to those with Roman citizenship) would have been much reduced by Justinian's time due to the possibility of manumission through the Christian church legalized by Constantine.

²¹⁷ According to Honoré, *Tribonian* (note 213), Tribonian, who served twice as quaestor, was actually the author of many laws of Justinian's reign. I accept his arguments while agreeing with Michael Maas that these laws would not have been enacted had they not had Justinian's approval and had the emperor not promulgated them as part of his program: see M. Maas, "Roman History and Christian Ideology in Justinianic Reform Legislation," *Dumbarton Oaks Papers*, 40 (1986), 27–28.

slaves would automatically receive Roman citizenship along with manumission.²¹⁸

In the passage of his *Institutes* that recalled his abolition of the statuses of Latins and *dediciti*, Justinian again looked to the ancient past, this time providing a history of the origin of slavery:

. . . [manumission] took its origin from the law of nations (*ius gentium*), since in natural law (*ius naturale*) all were born free and manumission was unknown, because slavery was unknown. But after slavery rushed onto the scene (*invasit*) by the law of nations, the benefit of manumission followed . . .

[Justinian recounts the different gradations of freed status: those *liberti* who also became Roman citizens, Latin freedmen created by the *lex Junia et Norbana*, and the lowest class, *dediciti*, created by the *lex Aelia Sentia*.]

. . . and so our *pietas*, desiring to increase all things and improve status, emended it in two laws and restored it to its original state, since from the earliest childhood of the city of Rome one single [form of] liberty was fitting . . . and many means have been added by which liberty with Roman citizenship — which is the only [form of] liberty in the present time — can be granted to slaves.²¹⁹

Another of Justinian's decisions dealt with complicated cases of freedom by *fideicommissum*, in which the testator would entrust manumission of a slave or slaves to a third party; as we have seen, the person given the *fideicommissum* might delay following through on the obligation, and disputes could arise over the status of children born to women whose freedom had thus been delayed.²²⁰ Justinian also repealed the almost 400-year-old *senatusconsultum Claudianum*, which had decreed demotion in status for free women who “married” someone else's slave. We

²¹⁸ C.7.6.1 (to Johannes, praetorian prefect, 531). This did not apply to those who currently held Latin status. In circumstances not enumerated by the law, slaves were to remain slaves — in the future no more Latins were to be created. See Corcoran (note 212), 78–79; Corcoran (note 45), esp. 139–43; Watson (note 20), 32–34, on Justinian's repeal of this and other laws on status.

²¹⁹ J.1.5 *passim*; see Melluso (note 103), 124–27.

²²⁰ See C.6.57.6, 7.4.14, and 7.4.15 (to Julian, praetorian prefect, 530), all part of the same decision (one of the Fifty Decisions). C.7.4.14 says that if fideicommissary freedom was left to the yet-unborn offspring of a slavewoman, children born even while the mother was still a slave immediately became free. On evidence for such disputes in the third-century rescripts, see above at notes 30 to 32.

know from Gaius' *Institutes* and from a spate of fourth-century laws preserved in the Theodosian Code that this law had undergone several iterations and modifications since its original enactment under the emperor Claudius in 52 CE. Now Justinian swept it away, declaring that as a ruler who had always "undergone many labors on behalf of his subjects' liberty," he could not allow freeborn women to fall into slavery (and mortify their illustrious kin) because they were "once deceived or captivated by unhappy desire."²²¹ (Masters were, however, enjoined to punish any of their slaves who had cohabited with free women; they had only themselves to blame if they allowed such unions, since from now on their offspring would be freeborn.²²²) In other legislation, Justinian decreed that all children who were exposed by parents or masters were automatically considered freeborn, thus definitively reversing a provision of Constantine's law two centuries earlier, which had given someone who picked up an *expositus* the right to rear it as a slave.²²³

Moreover, Justinian said that in disputes over freedom, both those held in slavery who were claiming to be free and those who, living in freedom, had been claimed as someone's slave, did not need an *adsertor* to press their case; they could represent them-

²²¹ C.7.24.1 (to Hermogenes, praetorian prefect, 531–534); cf. J.3.12.1; Melluso (note 103), 47–51. On the *sc. Claudianum*, see note 138 above, and for the laws in the Theodosian Code, see A. Arjava, *Women and Law in Late Antiquity* (Oxford 1996), 220–24; Evans Grubbs (note 58), 263–73; Harper (note 173); and B. Sirks, "The *Senatus Consultum Claudianum* in 438 and After in the West," in K. Muscheler, ed., *Römische Jurisprudenz — Dogmatik, Überlieferung, Rezeption* (Berlin 2011), 623–35. Note, however, that post-Roman "barbarian" law in the West evidently maintained provisions of the *sc. Claudianum*: see Sirks, "The *Senatus Consultum Claudianum*," 625–29, citing D. Liebs, *Römische Jurisprudenz in Gallien (2. bis 8. Jahrhundert)* (Berlin 2002).

²²² C.7.24.1.1, whose wording is almost identical to C.11.48.24.1, on unions between free people and *adscripticii*. C.7.24.1 mentions unions between free women and *adscripticii* also, but its focus is unions between free women and slaves, the object of the original *sc. Claudianum*, whereas C.11.48.24 is all about *adscripticii*, on whom see at note 229 below.

²²³ C.Th. 5.9.1 (to Ablabius, praetorian prefect, 331); later laws at C.8.51.2 (Valentinian I to Petronius Probus, praetorian prefect, 374); C.Th. 5.9.2 (Honorius to Melitius, praetorian prefect, 412). On these laws see Volterra (note 190); Fossati Vanzetti (note 190); J. Tate, "Christianity and the Legal Status of Abandoned Children in the Later Roman Empire," *J. Law and Religion*, 24 (2008), 123–41; and J. Evans Grubbs, "Church, State, and Children: Christian and Imperial Attitudes Toward Infant Exposure in Late Antiquity," in A. Cain and N. Lenski, eds., *The Power of Religion in Late Antiquity* (Farnham, UK / Burlington, VT 2009), 119–31.

selves.²²⁴ This is why there is no explicit mention of an *adsertor* in any of the third-century rescripts preserved in Justinian's Code on the *causa liberalis*. This omission of reference to an *adsertor* has distorted our understanding of the *causa liberalis*, making the bringing of a claim for freedom by an enslaved person appear less difficult and more possible than it actually was in the third century.

Justinian's laws on manumission and status employ a rhetoric of freedom: Justinian the lawgiver works tirelessly to cut back obsolete and obstructive policies and to restore his subjects, as much as possible, to their pristine state of freedom, before slavery invaded this legal Eden. The theme of restoration, rather than innovation, continues to appear in the emperor's post-Codex *novellae*, prefaced, as in the *Institutes* passage cited above, by (not always accurate) "mini-histories."²²⁵ The abolition of the status of Junian, like the repeal of the *senatusconsultum Claudianum* and other Justinianic laws favoring full freedom, could be cast as restoring a state prior to the enactment of Roman legislation (mostly of the imperial period). But they also introduced significant changes to the existing laws of slavery and freedom, and obviated the rulings of, and the need for, many imperial rescripts of earlier times. These rescripts therefore do not appear in the Code of 529.

We know from several pre-Justinianic legal collections that preserve *subscriptions* from the Codex Gregorianus and the Codex Hermogenianus that many rescripts from the two codes were not retained in the Codex Justinianus.²²⁶ Some that did

²²⁴ C.7.17.1 (to Menas, praetorian prefect, 528); cf. C.7.17.2 (to Johannes, praetorian prefect, 531) for a follow-up decision for cases in which the individual bringing a *causa liberalis* without an *adsertor* died before the case was decided. This second decision was necessary because of questions that had arisen after the passage of C.7.17.1. See Melluso (note 103), 111–22, on the impact of Justinian's law on the (re)wording of the Digest and Codex Justinianus texts on the *causa liberalis*.

²²⁵ See the excellent treatment by Maas (note 217); cf. also C. F. Pazdernik, "Justinian's *Novels* and the Law of Succession: A Chapter in the Transformation of Law and Society, with Special Reference to *Ius Naturale*," in L. J. Hall, ed., *Confrontation in Late Antiquity: Imperial Presentation and Regional Adaptation* (Cambridge 2003), 47–59.

²²⁶ E.g., the *Fragmenta Vaticana* (FIRA, 2, 463–540); the *Mosaicarum et Romanarum Legum Collatio* (id., 543–89); the *Veteris Cuiusdam Iurisconsulti Consultatio* (id., 593–613); *Epitome Codicum Gregoriani et Hermogeniani Wisigothica* (id., 656–65), the *Appendices Legis Romanae Wisigothorum Duae* (id., 670–79). A fragment attributed to the Codex Gregorianus has recently been published: see S. Corcoran and B. Salway, "Fragmenta Londiniensia Antejustiniana: Preliminary Observations,"

appear in the first edition of the Code would have been omitted in the second, after the reforms of the intervening years. Among these would have been rescripts responding to confusion or dispute over a person's status. Surely the awkward and peculiar situation of Junian Latins, or the anomalous legal status of children born to free women under the *senatusconsultum Claudianum*, would have generated much uncertainty over the freedom and inheritance rights of those affected.²²⁷ Because Justinian abolished the status of Junian Latin and the *senatusconsultum Claudianum* (in both cases ostensibly in the interests of *libertas*), rescripts responding to those issues were omitted from the Code. In other cases, such as the status of *expositi*, the law had changed significantly since the third century, and most third-century responses on the subject would have conflicted with the law of Justinian's day.²²⁸ On the other hand, new statuses and consequent legal issues had arisen in late antiquity, for instance that of *adscripticii (coloni)*, agricultural workers bound to the land they worked and answerable to *domini*, but yet not slaves themselves.²²⁹

In other words, the Code of Justinian (and the Digest) present a smoothed-out, consistent presentation of legal rules regarding

RLT, 8 (2012), 63–83. In addition to preserving third-century rescripts which the Justinianic compilers chose to omit, these other collections also sometimes offer somewhat different renderings of the same rescript, suggesting editing done by Justinian's team. Note also P.Tebt. II.285 (= *FIRA*, 1, no. 90), a private rescript of Gordian III to Nero Pudens, preserved only in Greek and known because it was found in a bundle of family documents from third-century Egypt: see A. M. F. W. Verhoogt, "Family Papers from Tebtunis: Unfolding a Bundle of Papyri," in A. M. F. W. Verhoogt and S. P. Vleeming, eds., *The Two Faces of Graeco-Roman Egypt (P.L. Bat. 30)* (Leiden 1998), 141–54. The rescript responded to a question about legitimacy and identity in cases where a child's birth had not been registered (see note 36 above).

²²⁷ López Barja de Quiroga (note 63), 149–50 and 161–63, comes up with at least thirty-two known laws (*leges, senatusconsulta*, and imperial constitutions) relevant to the *lex Junia*.

²²⁸ *Sc. Claudianum*: see note 221 above. There are a few references to infant exposure and the status of *expositi* extant in the Justinianic corpus (on which see Evans Grubbs (note 25)), but there must have been many more rescripts that conflicted with Justinian's policy. For Trajan's policy on enslaved *threptoi*, see at note 190 above.

²²⁹ On *adscripticii*, see A. J. B. Sirks, "The Colonate in Justinian's Reign," *JRS*, 98 (2008), 120–43; and P. Sarris, *Economy and Society in the Age of Justinian* (Cambridge 2006). The word *adscripticius/a* has sometimes been interpolated into third-century Code rescripts dealing with slaves, e.g. C.8.51.1 (Alexander Severus to Claudius, 224). Another status arising in the later Empire after the third century is that of *laeti* (barbarians settled on land within the Empire), on whom see Mathisen (note 175), 1025–28.

status, one geared to the social conditions of the early sixth century, not those of the third century when statutes later overturned by Justinian still existed and governors like M. Ulpius Tertullianus Aquila were faced with the ambiguities of provincial social mores that did not have a clear analogue in Roman law. The situation was much messier, and there was much *more* uncertainty and conflict over status in the third century, than the Code reveals.²³⁰

The Codex Justinianus was intended, first and foremost, as a guide to legal issues of the sixth century, although the presentation of current law by means of third-century rescripts provides precious evidence for the existence of these issues in the earlier Empire also. The third-century rescripts in the Code are legal *spolia*, analogous to the remnants of earlier imperial buildings and monuments that were reused and reintegrated into late antique architecture.²³¹ They provide evidence, albeit fragmentary, for status issues in two different time periods: the third century Empire, when the petitions to which they responded were written, and the sixth-century world of Justinian when, despite the reforms of Justinian himself, conflict over status still existed. This, ultimately, accounts for the survival of so many rescripts responding to confusion or disputes over status, as well as for the loss of other rescripts. When using the Code of Justinian as evidence for social and legal status in the third century, we must always keep in mind what does not survive as well as what does.

²³⁰ Our view of the status landscape in late antiquity would be even “smoother” and less accurate were it not for the Codex Theodosianus, whose compilers (to the eternal gratitude of historians) not only included obsolete laws but also arranged laws chronologically in titles so that we can trace the evolution of a legal policy over 125 years. Had we only the Codex Justinianus, our knowledge of much of Constantine’s legislation, for instance, would have been lost. Of course, given the haste with which the Digest and the Codex Justinianus (especially the second edition) were compiled, it is to be expected that some ambiguities survive: see Melluso (note 103).

²³¹ I owe this insight to my colleague Eric Varner.