

**The *Edictum Theoderici*: A Study of a Roman
Legal Document from Ostrogothic Italy**

By

Sean D.W. Lafferty

A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy

Department of History
University of Toronto

The *Edictum Theoderici*: A Study of a Roman Legal Document from Ostrogothic Italy

Sean D.W. Lafferty

Doctor of Philosophy

Department of History
University of Toronto

2010

Abstract

This is a study of a Roman legal document of unknown date and debated origin conventionally known as the *Edictum Theoderici* (*ET*). Comprised of 154 *edicta*, or provisions, in addition to a prologue and epilogue, the *ET* is a significant but largely overlooked document for understanding the institutions of Roman law, legal administration and society in the West from the fourth to early sixth century. The purpose is to situate the text within its proper historical and legal context, to understand better the processes involved in the creation of new law in the post-Roman world, as well as to appreciate how the various social, political and cultural changes associated with the end of the classical world and the beginning of the Middle Ages manifested themselves in the domain of Roman law. It is argued here that the *ET* was produced by a group of unknown Roman jurists working under the instructions of the Ostrogothic king Theoderic the Great (493-526), and was intended as a guide for settling disputes between the Roman and Ostrogothic inhabitants of Italy. A study of its contents in relation to earlier Roman law and legal custom preserved in imperial decrees and juristic commentaries offers a revealing glimpse into how, and to what extent, Roman law survived and evolved in Italy following the decline and eventual collapse of imperial authority in the region. Such an examination also challenges long-held assumptions as to just how peaceful, prosperous and Roman-like Theoderic's Italy really was.

Acknowledgements

There are many people I would like to thank for making this dissertation possible. The first thanks go to my supervisor and committee members: Nick Everett, Isabelle Cochelin, Giulio Silano, Andy Orchard, and Ralph Mathisen. Their encouragement, insight, curiosity, and thoughtful and challenging questions have helped me to sharpen my arguments and push me to exceed my own expectations.

I am indebted above all to Nick, graduate supervisor *par excellence*. He gave me the confidence to engage in the most interesting and difficult problems he or I could think of. He set high standards for scholarship, saved me from a great number of foolish mistakes, and constantly inspired me with his enthusiasm for the study and teaching of the past. He has suffered through the worst parts of this thesis, often more than once, and is responsible for all that is good and interesting in these pages and none of what is erroneous, boring or illiterate. My debt to his instruction, kindness, and goodwill cannot be adequately summed up in these acknowledgements.

I also extend thanks to my friends, classmates, and colleagues, for time spent in conversation, commiseration, and frivolity, especially to Josh Moukperian, Emre Gönlügür, Özgür Gürel, Jonathan (Scott) Perry, Ann Park Lanpher, Patricia Greve, Vanessa Peters, John Duncan, Serdar Tekin, Kathryn Edwards, Katelyn Batrie, and Amanda Lepp. Whether at the pub, on the soccer pitch, in the gym, or at the dons' table, I enjoyed every moment I spent with these exceptional individuals. I am truly fortunate to have had their friendship through the ups and downs of graduate school.

To my brothers, sisters, and nephews, whose own accomplishments inspire me to pursue my goals with determination, confidence, and humility, I am sincerely grateful.

My final and most significant thanks go to my mom and dad. Their unsurpassed capacity for affection, encouragement, patience, and humour has provided me with a wealth of opportunities that cannot be fully acknowledged with these few words of gratitude. It is to them that I dedicate this work.

Table of Contents

Abstract	ii
Acknowledgements	iii
Abbreviations	vii
Introduction	1
Chapter One: <i>The Historical Context of the</i>	
Edictum Theoderici	17
Introduction	17
The Authorship of the <i>ET</i>	18
The Purpose of the <i>ET</i>	45
The Provisions of the <i>ET</i>	52
Vulgarisation and Roman Vulgar Law	58
Conclusions	65
Chapter Two: <i>The Legal Context of the</i>	
Edictum Theoderici	67
Introduction	67
The Sources of the <i>ET</i>	68
The Works of Paul	71
The Works of Ulpian and Papinian	87
<i>Gregorian and Hermogenian Codes</i>	90
<i>Theodosian Code</i>	97
Post-Theodosian <i>Novels</i>	106
Conclusions	113
Chapter Three: <i>Public Law and Order: Judges, Courts</i>	
<i>and the Administration of Justice</i>	121
Introduction	121
Judges and Courts	127
In the Courtroom	144
Appeal	156
Crime and Punishment	159
Judicial Enforcement and Accountability	169
Conclusions	180
Chapter Four: <i>Of Persons, Property and Family: Aspects</i>	
<i>of Roman Private Law in the Edictum Theoderici</i>	182
Introduction	182
The Law of Persons and Legal Personality	184
Freedom and Slavery	185
The Legal Position of Slaves	196
Freedom and Property	205
Title and Tax	212

Family Law.....	218
Marriage	219
Adultery and Divorce.....	229
Family Property	236
Conclusions	243
Chapter Five: <i>Conclusions</i>	246
Appendix: <i>Edict of King Theoderic</i>	257
Bibliography.....	300

Abbreviations

Anon. Val.	<i>Anonymi Valesiani pars posterior</i>
Cass., Var.	Cassiodorus, <i>Variae</i>
CG	<i>Codex Gregorianus</i>
CH	<i>Codex Hermogenianus</i>
CJ	<i>Corpus Iuris Civilis</i> , ii. <i>Codex Iustinianus</i> , ed. Paul Krueger (Zurich, 15 th edn., 1970).
CLA	<i>Codices Latinae Antiquiores</i>
Collatio	<i>Mosaicarum et Romanarum Legum Collatio</i> in <i>FIRA</i> ii. pp. 543-89.
Cons. Phil.	Boethius, <i>Consolation of Philosophy</i>
CSEL	<i>Corpus Scriptorum Ecclesiasticorum Latinorum</i> (Vienna).
CTh	<i>Theodosiani Libri XVI cum Constitutionibus Sirmondianis et Leges Novellae ad Theodosianum Pertinentes</i> , vols. i. 1, i. 2, and ii, ed. Theodor Mommsen and Paul M. Meyer (Berlin, 1905).
Dig.	<i>Corpus Iuris Civilis</i> , i. <i>Institutiones et Digesta</i> , ed. Paul Krueger and Theodore Mommsen (Zurich, 21 st edn., 1970).
EMC/CV NS	<i>Echos du Monde Classique/Classical Views New Series</i>
ÉFR	<i>École française de Rome</i>
EHR	<i>English Historical Review</i>
Ep.	<i>Epistulae</i>
ET	<i>Edictum Theoderici</i>
FIRA	<i>Fontes Iuris Romani Anteiustiniani</i> , vol. I, ed. S. Riccobono; vol. II, ed. J. Baviera; vol. III, ed. V. Arangio-Ruiz (Florence, 2 nd edn., 1968-9).
Fr.	<i>Fragmenta</i>
FV	<i>Fragmenta Vaticana</i> in <i>FIRA</i> II, pp. 463-540
Get.	Jordanes, <i>Romana et Getica</i>
Inst.	<i>Institutiones of Gaius</i>
Itpr.	<i>Interpretationes</i>
JECS	<i>Journal of Early Christian Studies</i>
JRA	<i>Journal of Roman Archaeology</i>
JRS	<i>Journal of Roman Studies</i>
LRE	<i>The Later Roman Empire 284-602: A Social, Economic and Administrative Survey</i> , A.H.M. Jones (orig. pub. Oxford, 1964; repr. Baltimore, 1986. Orig. edn. had 3 vols., 1986 edn. has 2).
MEFRA	<i>Mélanges de l'École française de Rome: Antiquité</i>
MGH	<i>Monumenta Germaniae Historica</i>

MGH AA
MGH SRM
MGH SS
Nov. Maj.
Nov. Val.
Pan. Th.

PBSR
PLRE

PS
RE

RHDFE

RHS
RIDA
SDHI
TAPA

V. Epiph.
ZSS (RA)

MGH Auctores Antiquissimi
MGH Scriptores rerum merovingicarum
MGH Scriptores
Novellae Majoriani
Novellae Valentiniani
Ennodius, *Panegyricus dictus clementissimo regi Theoderico*
Papers of the British School at Rome
The Prosopography of the Later Roman Empire, vol. 2: A.D. 395-527, ed. J.R. Martindale *et al.*
Pauli Sententiae in FIRA ii. pp. 319-417.
Real-Encyclopädie der classischen Altertumswissenschaft, ed. A. Pauly *et al.*
Revue historique de droit français et étranger
Royal Historical Society
Revue internationale des Droits de l'Antiquité
Studia et Documenta Historiae et Iuris
Transactions of the American Philological Association
Ennodius, *Vita Euphrasii*
Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)

Introduction

This study explores how and to what extent Roman law continued to survive and evolve in Italy following the collapse of imperial authority in the peninsula. Evidence for this is drawn from a variety of materials, including historical, literary, legal, papyrological and archaeological sources. But the primary focus is on the *Edictum Theoderici* (*ET*), a collection and emendation of Roman law comprising 154 provisions as well as a prologue and epilogue. This is a significant but largely ignored document that offers valuable historical insights into the formative social, political and cultural developments taking place on Italian soil during Late Antiquity, as the beliefs, institutions and customs of the ancient world were slowly transformed or replaced altogether. The principal reason for its exclusion as a useful historical source in most modern studies of the period is the fact that historians have been unable to agree on two important issues surrounding the text: that is, the identity of the individual(s) responsible for its creation, and when this was carried out. It is argued in the pages that follow that the *ET* was the work of a group of unidentified Roman jurists commissioned for the task by the Ostrogothic king Theoderic the Great, who ruled Italy from 493 until his death in 526. It is hoped that with issues of paternity and dating settled, we can turn to the *ET* for better understanding the history of Italy during a period of significant social, cultural, and political transition.

Scholars of late antique Italy generally view Theoderic's reign as a golden age, treating it as a short interlude of Roman renewal, evoking both nostalgia for a peaceful and prosperous time, and regret for the unavoidable truth that it was as fleeting and illusory as an Indian summer.¹ Such sentiment echoes the conclusions of many contemporary sources. For instance,

¹ See e.g. T.S. Brown, *Gentlemen and Officers: imperial administration and aristocratic power in Byzantine Italy, A.D. 554-800*, British School at Rome (Rome, 1984), p. 4; John Moorhead, *Theoderic in Italy* (Oxford, 1992), ch. 1; Chris Wickham, *Early Medieval Italy: Central Power and Local Authority, 400-1000* (Michigan, 1989), pp. 21-7.

while Belisarius was attacking the Gothic kingdom, his secretary Procopius remarked about the dead Theoderic:

After gaining the adherence of such of the hostile barbarians as chanced to survive, he [Theoderic] secured the supremacy over both Goths and Italians. And though he did not claim the right to assume either the garb or the name of emperor of the Romans, but was called 'rex' to the end of his life, for thus the barbarians are accustomed to call their leaders, still, in governing his own subjects, he invested himself with all the qualities that appropriately belong to one who is by birth an emperor. For he was exceedingly careful to observe justice, he preserved the laws on a sure basis, he protected the land and kept it safe from the barbarians dwelling round about, and he attained the highest possible degree of wisdom and manliness ... Although in name Theoderic was a usurper, yet in fact he was truly an emperor as any who have distinguished themselves in this office from the beginning; and love for him among both Goths and Italians grew to be great, and that, too, contrary to the ordinary habits of men.²

Not surprisingly, the impression given by Cassiodorus, Theoderic's minister of propaganda and chief collaborator among the Romans, is a highly laudatory one.³ But a generally favourable view was also taken by another contemporary chronicler, the Anonymous Valesianus:

For whatever Theoderic did was good. He so governed two races at the same time, Romans and Goths, that although he himself was of the Arian sect, he nevertheless made no assault on the Catholic religion; he gave games in the circus and amphitheatre, so that even by the Romans he was called a Trajan or a Valentinian,⁴ whose times he took as a model; and by the Goths, because of his edict, in which he established justice, he was judged to be in all respects their best king.⁵

² Procopius, *BG* 1.1.25-39 (trans. Dewing).

³ Cassiodorus, *Variae*, ed. T. Mommsen, *MGH AA* 12 (Berlin, 1894), pp. 1-385; ed. and trans. in part by S.J.B. Barnish, *Cassiodorus: Variae*. Translated Texts for Historians, Vol. 12 (Liverpool, 1992). Flavius Magnus Aurelius Cassiodorus Senator, born c. 490, d. c. 585, was both statesman and monk. His public life is well-known to us from his *opus vitae*, the *Variae*: including a consulship in 514, he held the offices of quaestor under Theoderic (507-11), *magister officiorum* under Theoderic and his son Athalaric (523-7), and praetorian prefect of Italy under Theodahad and Witigis (533-7). The standard treatment of his life and work is that of James J. O'Donnell, *Cassiodorus* (Berkeley, 1979).

⁴ Theoderic was not the only Amal ruler to be compared to Trajan. For instance, Cassiodorus referred to Athalaric as "Trajan" in a letter (*Var.* 8.13.5) where the newly-appointed quaestor, a certain Ambrosius, was instructed "redde nunc Plinium et sume Traianum."

⁵ Anon. Val. 12.60, ed. and trans. J. C. Rolfe, *Ammianus Marcellinus*. This document, which is found in the second part of a larger work called the *Excerpta Valesiana* (named after Henri de Valois, the first editor of the text who published his edition in Paris in 1636), is an important source for social and political history of Ostrogothic Italy, particularly during the reign of Theoderic. The first part of the *Excerpta* covers the reign of Constantine; a different author, the so-called 'Anonymous Valesianus', deals with Theoderic and his antecedents in the second part (*pars posterior*). Written sometime after the death of Theoderic, the text begins with the arrival of Julius Nepos in Italy in

The scale of Theoderic's accomplishments should not be underestimated. According to Cassiodorus, he successfully maintained peaceful relations with Constantinople, and achieved harmony between his barbarian followers and the native population by cooperating with Rome's senatorial class and fulfilling Roman expectations of continuity. He revived various ancient and politically significant aspects of the imperial administration, including the free distribution of corn and other foodstuffs to the poor in the city of Rome, and the holding of costly but popular circus games.⁶ Perhaps the most extravagant of these were the games held in Rome in 500 to celebrate Theoderic's *decennalia*.⁷

In addition to maintaining Roman civic offices and institutions, Theoderic is said to have observed the rule of Roman law. This is a persistent theme one encounters in the *Variae* – Cassiodorus' collection of official letters, proclamations and formularies related to the

474 and continues as far as Theoderic's death, dealing in general terms with the various good works associated with his reign. In sections 82-84 of the work, the author mentions several bizarre events, such as the appearance of devils, a comet, and a woman giving birth to four snakes, which together signaled the beginning of a disastrous end to Theoderic's reign. Similar to the *Getica* of Procopius, there was a religious purpose to this work: namely, to show how Theoderic, in spite of the fact that he was a great ruler, was an enemy of God due to his Arian beliefs. According to the author, his death from dysentery, a fate that befell Arius himself, proved his unsuitability in God's eyes. Additional problems detract from the overall historical value of the work: it contains numerous chronological errors, and a large portion of Theoderic's reign (roughly between 510 and 520) is ignored altogether. See further Sam J.B. Barnish, "The Anonymous Valesianus II as a source for the last years of Theoderic," *Latomus* 42 (1983), pp. 572-96; John Moorhead, "The Last Years of Theoderic," *Historia* 32 (1983), pp. 106-20; Henry Chadwick, *Boethius: The Consolations of Music, Logic, Theory, Philosophy* (Oxford, 1981), p. 291 n. 67.

⁶ Cass., *Var.* 6.18 (concerning Theoderic's arrangement of 12,000 *modii* of grain to be supplied to the people of Rome on an annual basis). On the history of this long-established Roman right, which seems to have gone into abeyance in the fifth century, see Federico Marazzi, "The Last Rome: From the End of the Fifth to the End of the Sixth Century," in S.J. Barnish and F. Marazzi (eds.), *The Ostrogoths from the Migration Period to the Sixth Century: An Ethnographic Perspective* (Woodbridge, 2007), pp. 279-302, esp. pp. 295-6. Theoderic also had maintained other free provisions including pork. On this, see Cass., *Var.* 6.18.4; and S.J.B. Barnish, "Pigs, Plebeians and *Potentes*: Rome's Economic Hinterland, c. 350-600 A.D.," *Papers of the British School at Rome* 55 (1987), pp. 157-85. *Var.* 11.34 implies that the supply of pork was provided by Lucania and Bruttium – a situation that seems to have continued from the later empire: in legislation from the emperor Valentinian III (*Nov.* 36.1, 4) we learn that the province of Samnium, as well as Lucania and Bruttium, were involved in the meat supply of Rome.

⁷ *Decennalia* celebrations: Ferrandus, *Vita s. Fulgentii*. Edited and translated by Gabriel –G. Lapeyre (Paris, 1929), ch. 9, pp. 55-6. See also Moorhead, *Theoderic in Italy*, pp. 60-63. The event is discussed in relation to the promulgation of the *ET* in the following chapter (pp. 38-39). On Rome in Late Antiquity, see Bertrand Lançon, *Rome in Late Antiquity, A.D. 313-604* (Edinburgh, 2000).

Ostrogothic administration.⁸ According to Cassiodorus, Roman law was the great symbol of a society functioning on a civilized, rational basis. Of the 468 assorted documents which comprise the *Variae*, 235 were written on behalf of Theoderic during the years Cassiodorus served as quaestor and *magister officiorum*. Whether addressed to individuals such as emperors, kings, members of the Amal royal house, or civic and ecclesiastical personnel associated with the Ostrogothic regime; or issued to general assemblies, legislative bodies or entire communities within the Ostrogothic kingdom, these letters, *formulae* for appointment and proclamations frequently stress the need to preserve the rule of Roman law, demand respect for it, reflect upon its fundamental correctness, or even cite it.⁹

A product of and testament to the primacy of Roman law in Theoderic's Italy is the *ET*. It was compiled sometime during Theoderic's reign by Roman jurists working under the imperial office of the *quaestor*, and intended primarily for the Roman and Gothic populations residing in the provinces.¹⁰ It was a work of inherently Roman jurisprudence; but it was also a work of critical selection, the purpose of which – as stated in the prologue – was to put an end to those sorts of disputes that most commonly reached the ears of the king. For this, it had to be possible, it had to be suited to the time and place of its creation; it had to be clearly expressed, so that there was no danger of ambiguity – especially so, since one of its prime roles was the removal of doubt and uncertainty as to the meaning and application of the law. These were

⁸ The *Variae* are cited from the edition of Theodore Mommsen, ed., *MGH AA* 12 (Berlin, 1894), pp. 1-385.

⁹ E.g., *Var.* 1.1 (a letter in Theoderic's name to the emperor Anastasius, remarking that the king's rule was in direct imitation of the emperor's, and noting how his Gothic followers obeyed Roman law); 1.27 (here, the Roman Senate is instructed by Theoderic to uphold the rule of Roman law); 1.44 (a letter to the people of Rome instructing them to obey the authority of the newly-appointed urban prefect); 3.17 (a letter in Theoderic's name to the Gothic inhabitants of Gaul, instructing them to obey Roman law); 3.43 (a letter to the same provinces of Gaul, in which Theoderic reiterates the point that Roman law was to be followed by all provincials). In the preface to the *Variae*, Cassiodorus exclaims how he was frequently encouraged by Theoderic to embrace the laws of the ancient Romans: "hortamini [Theoderic] me [Cassiodorus] frequenter, ut diligam senatum, leges principum gratanter amplectar..."

¹⁰ The most accessible editions are those of Friedrich Bluhme (*Edictum Theoderici regis* in *MGH Leges* 5 [Hannover, 1875-1889], pp. 145-179) and Johannes Baviere (*Fontes Iuris Romani Anteiustiniani* 2, ed. S. Riccobono et al. [2nd edn., Florence, 1968-69], pp. 683-710).

particular attributes of practical and necessary importance, and dictated by the facts of the realities in which it was to function.

It goes without saying that those who compiled the *ET* selected for inclusion those laws that seemed most relevant to them for maintaining the peace between native Romans and barbarian settlers. But they were no mindless copyists: they elaborated upon what they considered important and rejected what they found impractical or unnecessary. The significance of this merits careful and comprehensive study. For if the compilers demonstrate that Roman law continued to be relevant in the early sixth century (and this they certainly do), then they also might reveal an awareness of what made their own time unique. Through a consideration of the selection of topics made by the compilers of the *ET*, and the ways in which they updated earlier Roman law and custom, it is possible to gain valuable historical insights into the nature and extent of the transmission and evolution of classical Roman law, legal administration, and society in Italy between the fourth and sixth century. Such an investigation also challenges customary assumptions – based primarily on a selective reading of Cassiodorus' *Variae* – that Ostrogothic Italy, and in particular the reign of Theoderic, was indeed a peaceable kingdom; and instead posits a picture of a society experiencing considerable dislocation and crisis.

The problems in using legal materials as a historical source are well known, yet no less easy to avoid. It is easy to interpret legal precept as evidence of social practice; to assume that a measure, by merit of its existence alone, was necessarily enforced; to attribute relevance to provisions that had little, if any, bearing on reality. Moreover, it must be appreciated that it is often the unusual that is provided for, especially in those laws that deal with criminal matters. Therefore, our picture may be an exaggerated one or one that might never have existed except as an ideal. But the rewards in such an approach are particularly valuable. In light of the relative

dearth of sources for this period, law serves as a valuable source for understanding the objectives and ideals of the society which produced it – or, at least, of the governing elite of that society.¹¹

With this in mind we begin in Chapter One by addressing several important questions surrounding the *ET*, including: debates about its authorship and manuscript tradition, the date of its production, the identity of those who compiled it, the purposes for which it was created, and the subject matter with which it deals. To put things into perspective, we conclude with a discussion of ‘vulgarisation’ – a significant but somewhat misleading concept that has profoundly influenced current scholarship on the subject of Roman law in Late Antiquity. Vulgarisation has become a catch-all phrase for the developments we see taking place in Roman law in the post-classical era – developments that were associated with the influence of Christianity, Eastern custom and the barbarian codes on Roman law. It is an especially troublesome term since it is capable of different meanings. In its most derogatory sense, vulgarisation refers to the simplification or, depending upon one’s perspective, debasement of Roman law that the barbarian codes like the *ET* can be said to represent. In a more technical sense, vulgarisation can be taken to refer to the departure of post-classical law from the classical norms of legal development. The term can also encompass the inevitable divergence between the law practiced in outlying districts of the Empire and that applied in the major civic centres like Rome and Constantinople. And lastly, vulgarisation can be understood as the way in which Roman law was allegedly practiced over the course of the fourth and fifth centuries in a more crude and unscientific manner than it had been in previous generations. It shall be argued that

¹¹ For this view of the significance of law as a window into the social, political and economic changes taking place in Late Antiquity, see Ralph W. Mathisen, *Law, Society, and Authority in Late Antiquity* (Oxford, 2001), *Introduction*, p. 1.

while this concept is useful for identifying some of the ways in which Roman law evolved in Late Antiquity, it should not be applied prematurely or indiscriminately.

The goal of Chapter Two is to contextualize the *ET* in terms of the developments taking place in Roman law in the West from the fourth to early sixth century. To that end, we shall examine the relationship between the *ET* and its possible sources to better understand how the text fits within the evolving framework of Roman law in Late Antiquity. While legal historians have identified the sources that have had an influence, whether considerable or not, direct or indirect, on the content, language and style of the *ET*, there is nothing in the way of an explanation as to how and why the *ET* departs from such sources.¹² For many of the 154 provisions of the *ET* contain words, phrases and concepts that differ significantly from the original texts in question. Many of these variances reflect the sorts of changes – social, political, economic and cultural – taking place in Italy as a result of the decline and eventual collapse of imperial authority in that region. Some express the compilers' interests with ancient or outmoded customs and practices; and others, their concern for present day circumstances. Still others are merely haphazard and of little importance. By way of example we shall explore some of these variations and points of difference in greater depth. The investigation offers a revealing glimpse into the character of Roman law, and to some extent society, in early sixth-century Italy.

The ways in which long-held principles of Roman public law and legal administration functioned in Ostrogothic Italy is the topic of Chapter Three. Drawing on evidence from a variety of sources, in particular late imperial decrees, the *ET* and *Variae*, this chapter sets forth to construct a reasonably detailed account of how a case was initiated, brought to court and heard, and of how judgement was made and executed. We shall explore how the court system in sixth-

¹² An edition such as that of Bluhme or Baviera lists for the provisions the corresponding Roman law texts.

century Italy was organized, the role of the judge and litigant in the settlement of disputes, and how threats to the public order were dealt with through circumscribed penalties. By using late imperial decrees as a model, the chapter will demonstrate that while many aspects of the late Roman justice system were selectively appropriated by Theoderic and his successors, many others were re-worked or ignored altogether, thus challenging Cassiodorus' highly Romanized and well-ordered version of events.

Chapter Four addresses topics of Roman private law that comprise the *ET*, particularly those concerning persons, contract, property and family, with an end to understanding how the compilers interpreted, and in some cases modified, earlier Roman law on the subject. It is here, in the realm of private law, where the compilers demonstrated a far greater willingness to stray from earlier Roman law and legal trends in general. The principal reason for this, it is argued, was that local custom played a greater role than Roman law did in regulating everyday life in the communities of the Italian countryside. Despite the fact that its principles were universal and thus could be applied everywhere, the law of Rome, the Civil Law, was designed by the elite, largely for the elite of a large urban setting, and thus it was in many respects ill-equipped to deal with the sorts of problems associated with life in the country. Emperors, prefects and jurists had long acknowledged the limitations of the Civil Law in the rural communities and outlying districts of the Empire, and allowed local customs and traditions in those places to remain in force – provided they were not at odds with imperial will. The *ET* attests to the continued supremacy of local custom in the Italian countryside of the early sixth century.

A study of this scope cannot treat in detail all 154 provisions of the *ET*. To serve as a reference point and foster further study of the text, a translation is provided in the Appendix. Accompanying many of the provisions are notes that contain references to the Roman sources

and analogous texts (a differentiation to be discussed fully in Chapter Two), brief explanations of technical terms and legal concepts, a discussion of interesting points of the law or debates about its meaning, and specific instances in our sources that involve the operation of the law in question. A brief note concerning the translation: the language and style of the *ET* are essential for understanding its purpose and the audience for which it was aimed. The *ET* was intended to serve not only judges and legal experts in their efforts to settle disputes, but also the general public at large, for according to the prologue it was to be posted for all to see. To ensure clarity and precision it purposefully lacks the excessively verbose and intricate style of the imperial collections of Theodosius and Justinian, as well as the eloquence on display in the *Variae*. Unlike the *ET*, these texts were intended to impress a small, educated elite. To that end, artistic elaboration and grandiloquence was as, if not more, important than the need for the content to be comprehensible for the general public at large.¹³ The translation offered here limits the use of colloquialisms and idioms in an effort to retain, to a worthwhile degree, the original meaning and spirit of the compilers.

While this is first and foremost a study of a Roman legal text from early sixth-century Italy, the implications extend far beyond the bounds of legal history. For the survival of Roman law is intimately connected with the wider question of the way in which the world of antiquity came to an end – a much debated issue that dominates scholarship on Late Antiquity. Traditionally, the removal of Romulus Augustulus in 476 marked the end of Roman rule in the

¹³ For a useful study of the language and style of the *Theodosian Code* and *Variae*, see G. Viden, *The Roman Chancery Tradition: Studies in the Language of Codex Theodosianus and Cassiodorus' 'Variae'*, *Studia Graeca et Latina Gothoburgensia* 46 (Göteborg, 1984). See also the comments of Nick Everett in his *Literacy in Lombard Italy, c. 568-774* (Cambridge, 2003), pp. 22, 24; and Sam J.B. Barnish, "Sacred Texts of the Secular: Writing, Hearing, and Reading Cassiodorus' *Variae*," *Studia Patristica* 38 (2001), pp. 362-70, esp. pp. 367-68. For the artistic style of Tribonian, the jurist primarily responsible for putting together Justinian's legal corpus, see Tony Honoré, *Tribonian* (London, 1978), pp. 244-45.

West.¹⁴ But whether this date actually marked the end of the Roman world is a matter of perspective. Since Edward Gibbon more than 200 years ago wrote his monumental treatise, *Decline and Fall of the Roman Empire*, the degree of disruption or gradual change at the end of Antiquity has been debated. Did Rome fall, or was it only transformed? Was the Empire destroyed by barbarians, or was its decay inevitable for internal reasons? Influenced by the intensity of his admiration for the Roman Empire, Gibbon regarded the period during which Europe was given over to the rule of Goths, Burgundians, Franks and other barbarians as one of unprecedented destruction and devastation.¹⁵ For Gibbon, the disintegration of the Roman Empire in the West brought changes which, for the most part, fundamentally changed Europe for the worse.

Gibbon's model, which emphasizes the destructive nature of Rome's collapse, has endured for centuries. In the last three decades, however, a number of alternative models have been put forth by scholars attempting to revise the pessimistic view of Gibbon. These scholars prefer to see change and transformation where Gibbon and others only saw destruction. The trailblazer of this revisionist approach is the historian Peter Brown. Beginning with his brief but influential survey *The World of Late Antiquity*, followed soon after by his seminal article "The

¹⁴ Technically speaking, however, it was the murder of Julius Nepos in 480 that signaled the official end of the Roman Empire in the West. In the eyes of Constantinople, which had never revoked its recognition of Nepos, who had been removed from power by the generalissimo Orestes in 475, Romulus was in fact a usurper, which means that Odovacer, strictly speaking, had only driven out a usurper and had not deposed an emperor. This is why Odovacer's coinage was issued in the name of Nepos until 480. The end of imperial rule in the West was a long and complicated process that lasted the better part of a century, beginning with the battle of Adrianople in 378 and ending with the removal of Romulus Augustulus in 476. For discussion, with different emphases on the role played by the barbarian invaders, see E. A. Thompson, *Romans and Barbarians: The Decline of the Western Roman Empire* (Madison, 1982); Ian Wood, "The Fall of the Western Empire and the End of Roman Britain," *Britannia* 18 (1987), pp. 251-62; Averil Cameron, *The Later Roman Empire: A.D. 284-430* (Cambridge, MA, 1993); id., *The Mediterranean World in Late Antiquity, A.D. 395-600* (London, 1993); M. E. Jones, *The End of Roman Britain* (Ithaca, 1996); Walter Pohl, *Kingdoms of the Empire: the Integration of the Barbarians in Late Antiquity* (New York, 1997).

¹⁵ Gibbon was not alone in this pessimistic estimation. The French scholar André Piganiol, for example, declared (*L'Empire chrétien (325-395)*, *Histoire Romaine* 4 [Paris, 1947], p. 222) that the Roman Empire did not die a natural death but was assassinated by the Germans. In light of the fact that Piganiol was writing in France so soon after WWII, such sentiment is hardly surprising.

Rise and Function of the Holy Man in Late Antiquity,” Brown changed the way scholars have viewed the end of the Roman world.¹⁶ He articulated a new period, ‘Late Antiquity’, beginning with the accession of the Emperor Diocletian in AD 284 and lasting right up to the eighth century, which was characterized not by the decline and dissolution of the western Roman Empire but by vibrant intellectual, religious and cultural debate. For Brown, Late Antiquity was a period of transition and transformation in which the fundamental elements of the classical world survived and evolved in different, though no less inferior, forms. Of central importance for this transition were the holy men. Acting as intercessors not only between the increasingly disenfranchised common man and the ruthless, corrupt elite, but also between the earthly and heavenly realms, these ‘saintly’ leaders embraced the spiritual avant-garde of the age, and in so doing, provided a vital link between the classical and medieval worlds.

Along a parallel route, some historians have called into question the very notion that the Roman Empire in the West came to an end as a direct result of hostile and violent barbarian invasions. Just as words like ‘decline’ and ‘crisis’ were replaced with ‘transition’ and ‘transformation’ to account for the cultural change in this period, so ‘accommodation’ is now used to explain how barbarians came to live within the Empire and eventually rule it. For these historians, there was no brutal catastrophic onrush of barbarian invaders in the fourth century. Rather, there was a slow evolution during which time the Empire became progressively Germanized while, inversely, the Germans adapted to the mode of existence of the Roman

¹⁶ Peter Brown, *The World of Late Antiquity: From Marcus Aurelius to Muhammad* (London, 1971). This work, published in 1971, was followed soon after by his seminal article “The Rise and Function of the Holy Man in Late Antiquity,” *JRS* 61 (1971), pp. 80-101. Other notable works include *The Making of Late Antiquity* (Boston, 1978); *Society and the Holy in Late Antiquity* (Berkeley, 1982); *The World of Late Antiquity: AD 150-750*, rev. edn. (London, 1989); *Power and Persuasion in Late Antiquity: Towards a Christian Empire* (Wisconsin, 1992). On the significance of Peter Brown in the scholarship of Late Antiquity see James Howard-Johnson & Paul Antony Hayward (eds.), *The Cult of Saints in Late Antiquity and the Middle Ages: Essays on the Contribution of Peter Brown* (Oxford, 1999).

populations. And when, in 476, the western Roman Empire died of exhaustion and not because it was invaded, the new masters in fact understood, or ended by understanding, that they had everything to gain by maintaining rather than upsetting the existing order.¹⁷ As Alfons Dopsch put it, “The Germans did not behave as enemies of culture, destroying or abolishing it; on the contrary they preserved and developed it.”¹⁸ Some historians have gone even further than this, notably Walter Goffart, who challenged the very premise of fifth-century ‘invasions’. Rather than regard the relationship between the Romans and barbarians in terms of conquest and consolidation, Goffart proposed a new paradigm which lay emphasis on integration and cooperation. The barbarians were incorporated into the fold as protectors of the Roman way of life through an ingenious and effective tax arrangement.¹⁹ In other words, the Romans accommodated the barbarians on essentially Roman terms through existing institutional mechanisms.²⁰ While allowing for a degree of crisis and disruption, Goffart’s model envisions the transition of the Roman world as a relatively peaceful process. In his words, the fall of the Roman Empire “was an imaginative experiment that got a little out of hand.”²¹

In recent years, there has been a mini-revival in “disruption” models. The most notable of these is that of Brian Ward-Perkins.²² It was the unwelcomed arrival of barbarian invaders,

¹⁷ See e.g. Brian Croke, “A.D. 476: The Manufacture of a Turning Point,” *Chiron* 13 (1983), pp. 81-119.

¹⁸ Alfons Dopsch, *The Economic and Social Foundations of European Civilization*, trans. M. G. Beard and N. Marshall (London, 1937), p. 386.

¹⁹ Walter Goffart, *Barbarians and Romans: Techniques of Accommodation, AD 418-584* (Princeton, 1980), esp. ch. 3. Goffart’s major adherent is Jean Durliat: see e.g. Durliat, “Le salaire de la paix sociale dans les royaumes barbares,” in Herwig Wolfram and Andreas Schwarcz (eds.), *Anerkennung und Integration: zu den wirtschaftlichen Grundlagen der Völkerwanderungszeit 400-600* (Vienna, 1988), pp. 17-70; id., “Cité, impôt et intégration des barbares,” in W. Pohl and Reimitz (eds.), *Strategies of Distinction: the construction of ethnic communities, 300-800* (Leiden, 1988), pp. 153-79; *contra* Chris Wickham, “The Fall of Rome Will Not Take Place,” in Lester Little and Barbara Rosenwein (eds.), *Debating the Middle Ages: issues and readings* (Malden, Mass., 1988), pp. 45-57. See further Chapter Three, p. 132 n. 32.

²⁰ Goffart reiterates this point in his *Barbarian Tides: The Migration Age and the Later Roman Empire* (Philadelphia, 2006), the title of which reinforces the notion that there was no such thing as a barbarian invasion.

²¹ Goffart, *Barbarians and Romans*, p. 35.

²² Ward-Perkins, *The Fall of Rome and the End of Civilization* (Oxford, 2005), *passim*.

Ward-Perkins argues, that brought about a violent and decisive end to the Roman world. In the aftermath of this collapse civilization sank to a primitive level. For Ward-Perkins, the fall of Rome was a destructive event that marked a decisive break from the classical past and ushered in the Dark Ages.²³ If there was any continuity beyond the fifth century, it failed to live up to the greatness of the preceding era: by whatever standards one might wish to use, life in post-Roman Europe was culturally inferior to, economically retarded by comparison with, and politically backward when measured against the standards of the Graeco-Roman world. While Ward-Perkins' views might be extreme in their elaborations of the social, political and economic developments associated with Rome's administrative demise, they have reignited the debate among historians wishing to account for Rome's fall or measure its passing.

Scholarship on Ostrogothic Italy has been rooted in these interpretive paradigms. Those interested in the destructive forces of the barbarian invasions have tended to emphasize the otherness and "barbarian" qualities of Theoderic and his followers, or point towards "un-Roman" activities within the Ostrogothic regime.²⁴ Those who support the notion of accommodation have in turn explored a number of angles including the legal mechanisms of the Gothic settlement in Italy; the constitutional position of Theoderic *vis-à-vis* the Roman Empire in the East; and Roman collaborators among the ruling senatorial class who worked together with their barbarian overlords.²⁵ The following study seeks to bring greater clarity to these issues by exploring how Roman law, the institutions of legal administration, and even society continued to function in the

²³ For a similar view but with less emphasis on the negative impact of the barbarians, see Peter Heather, *The Fall of the Roman Empire: A New History of Rome and the Barbarians* (Oxford, 2006).

²⁴ E.g., Bryan Ward-Perkins, *The Fall of Rome and the End of Civilization*, pp. 72-3.

²⁵ For arguments that the Goths were given tax allotments rather than land, see Walter Goffart, *Barbarians and Romans*, ch. 3. For the constitutional position of Theoderic, A.H.M. Jones, "The Constitutional Position of Odovacer and Theoderic," *JRS* 52 (1962), pp. 126-30; P.S. Barnwell, *Emperors, Prefects and Kings: The Roman West, 395-565* (North Carolina, 1992), part 3. For collaboration, Moorhead, *Theoderic in Italy*; James O'Donnell, "Liberius the Patrician," *Traditio* 37 (1981), pp. 31-72; Barnish, "Taxation," pp. 120-55.

Italian peninsula long after the official collapse of the western imperial administration, when the maintenance of peace and order was the responsibility of Theoderic and his successors, whose Ostrogothic kingdom would survive for just over half a century: from 493, with the proclamation of Theoderic as king, until 553, when the eastern emperor Justinian was able to establish (albeit briefly) Roman authority in the region. While scholars have focused on the connection that exists in so many respects between the legal conditions prevailing in the successor kingdoms of the Franks, and to a lesser extent the Visigoths, and those of the later Roman Empire, there is as yet no modern legal or constitutional history of the Ostrogothic kingdom such as that offered here, which brings together administrative and judicial structures, law and judicial procedure, and attempts to put these in historical perspective.²⁶

²⁶ For the *leges barbarorum* in general, see H. Brunner, *Deutsche Rechtsgeschichte*, 2nd edn. (2 vols.; Leipzig, 1928); R. Buchner, *Die Rechtsquellen* (Weimer, 1953). More recently, P. Wormald, “*Lex Scripta* and *verbum Regis*: Legislation and Germanic Kingship from Euric to Cnut,” in P.H. Sawyer and I.N. Woods (eds.), *Early Medieval Kingship* (Leeds, 1977), pp. 105-38; Roger Collins, “Law and Ethnic Identity in the Western Kingdoms in the Fifth and Sixth Centuries,” in *Medieval Europeans: Studies in Ethnic Identity and National Perspectives in Medieval Europe* (New York, 1998), pp. 1-28. For the Merovingian and Frankish laws, see: Peter Classen, “Kaiserreskript und Königsurkunde: Diplomatische Studien zum römisch-germanischen Kontinuitätsproblem, 2 Teil,” *Archiv für Diplomatik* 2 (1956), pp. 1-115 id., “Spätromischen Grundlagen mittelalterlichen Kanzleien,” (1974), reprinted in *Ausgewählte Aufsätze von Peter Classen*, ed. J. Fleckenstein, *Vorträge und Forschungen* 28 (Sigmaringen, 1983), pp. 67-84; id., “Fortleben und Wandel spätromischen Urkundenwesens im frühen Mittelalter,” in Classen (ed.), *Recht und Schrift im Mittelalter*, *Vorträge und Forschungen* 23 (Sigmaringen, 1977), pp. 13-54 (it should be noted that these works go far beyond the boundaries of Merovingian institutional history); Walter Goffart, “Old and New in Merovingian Taxation,” *Past and Present* 96 (1982), pp. 3-21; A. C. Murray, “The Position of the ‘Grafio’ in the Constitutional History of Merovingian Gaul,” *Speculum* 64 (1986), pp. 787-805; id., “From Roman to Merovingian Gaul: ‘Centenarii’ and ‘Centenae’ in the Administration of the Merovingian Kingdom,” *Traditio* 44 (1988), pp. 59-100; id., “Immunity, Nobility, and the Edict of Paris,” *Speculum* 69 (1994), pp. 18-39; id., “‘Pax et disciplina’: Roman Public Law and the Merovingian State,” in Kenneth Pennington et al. (eds.), *Proceedings of the Tenth International Congress of Medieval Canon Law* (Vatican City, 2001), pp. 269-85; Ian Wood, “Disputes in Late Fifth- and Early Sixth-Century Gaul”; id., “Administration, Law and Culture in Merovingian Gaul,” in Rosamond McKitterick (ed.), *The Uses of Literacy in Early Medieval Europe* (Cambridge, 1990), pp. 63-81; Stefan Esders, *Römische Rechtstradition und merowingisches Königtum: Zum Rechtscharakter politischer Herrschaft in Burgund im 6. und 7. Jahrhundert* (Göttingen, 1997). On the Visigoths, see, e.g., F.S. Lear, “The Public Law of the Visigothic Code,” *Speculum* 26 (1951), pp. 1-24; P.D. King, *Law and Society in the Visigothic Kingdom* (Cambridge, 1972); P. Wormald, “*Lex Scripta*”; to a lesser extent, D. Claude, “Freedmen in the Visigothic Kingdom,” in E. James (ed.), *Visigothic Spain: New Approaches* (Oxford, 1980), pp. 159-188; F. Arvizu, “La Femme dans Le Code d’Euric,” *Revue historique de droit français et étranger* 62 (1984), pp. 391-405; Roger Collins, “Visigothic law and regional custom in disputes in early medieval Spain,” in W. Davies and P. Fouracre (eds.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986), pp. 85-104; revised in his *Law, Culture and Regionalism in Early Medieval Spain* (Aldershot, 1992); L.A. Garcia Moreno, “Legitimate and illegitimate violence in Visigothic Law,” in G. Halsall (ed.), *Violence and Society in the Early Medieval West*

In this regard, the *ET* is a significant body of source material that cannot be ignored. On the one hand it fully bears out the longevity of Rome's classical legal heritage. By the early sixth century, the imperial administration had largely disappeared, but, however selective and modified, the *ET* was a handbook of Roman law that presupposed a population still concerned with formalities that had their origins in an ancient institution. And with the exception of a few references to barbarians, nothing within the text would suggest that an army of Goths had taken up residence on the Italian peninsula. It is clear that for both the compilers and Theoderic, Roman law should define relations among the Romans and Goths. But to suggest from this sort of continuity alone that Theoderic's Italy constituted a renewed Empire is to overlook far more important questions that the *ET* raises.²⁷ For instance, how much of the population had access to

(Woodbridge, 1998), pp. 46-59. For limited treatment of the Ostrogoths see R.W. Mathisen, "The *Leges Barbarorum*: Law and Ethnicity in the Ostrogothic West," in Goetz et al. (eds.), *Regna and Gentes: the relationship between late antique and early medieval peoples and kingdoms in the transformation of the Roman world* (London, 2003), pp. 21-53. For Roman law in the late Empire in general see Jill Harries, *Law and Empire in Late Antiquity* (Cambridge, MA, 1999); id., "Legal culture and identity in the 5th-century West," in G. Greatrex and S. Mitchell (eds.), *Ethnicity and Culture in Late Antiquity* (Cardiff/London, 2000), pp. 45-57; J.F. Matthews, *Laying Down the Law* (New Haven, Conn., 2000); P.S. Barnwell, "Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West," *Past and Present* 168 (2000), pp. 6-29; and the works collected in R.W. Mathisen (ed.), *Law, Society and Authority in Late Antiquity*.

²⁷ For many scholars, this sort of continuity is sufficient grounds for concluding that the Roman Empire lived on, in both form and function, well after the date that marks its official demise. See, for example, J.M. Wallace-Hadrill, *Early Germanic Kingship in England and on the Continent* (Oxford, 1971); Jill Harries and Ian Wood (eds.), *The Theodosian Code. Studies in the Imperial Law of Late Antiquity* (London, 1993); J. Harries, *Law and Empire in Late Antiquity* (Cambridge, MA, 1999); John Matthews, *Laying Down the Law* (New Haven, 2000); M.E. Jones, "The Legacy of Roman Law in Post-Roman Britain," in R. W. Mathisen (ed.), *Law, Society and Authority in Late Antiquity*, pp. 45-57. Proponents for this school of thought have also drawn attention to patterns of land occupation and urban settlements, the social status of nobles and peasants, bonds of kinship, cult practices and religious life, and traditions in education, arguing that in these areas, too, continuity was the rule and not the exception. In so doing they have called into question the notion that the Empire had fallen. For discussions on the continuity of social order in early medieval Europe see Walter Ullman, *The Carolingian Renaissance and the Idea of Kingship* (London, 1969); F. L. Ganshof (ed.), *The Carolingians and the Frankish Monarchy*, trans. Janet Sondheimer (Ithaca, N.Y., 1971); J. Martindale, "The French Aristocracy in the Early Middle Ages: A Reappraisal," *Past and Present* 75 (1977), pp. 5-45; Edward James, *The Origins of France: From Clovis to the Capetians, 500-1000* (London, 1989), pp. 73-92; Wickham, *Early Medieval Italy*, pp. 80-145. On bonds of kinship: Alexander C. Murray, *Germanic Kingship Structure: Studies in Law and Society in Antiquity and the Early Middle Ages*, Pontifical Institute of Medieval Studies, Studies and Texts 65 (Toronto, 1983); Joseph H. Lynch, *Godparents and Kingship in Early Medieval Europe* (Princeton, N.J., 1986). For cult practices and religious life, see (in addition to the works of Peter Brown): Raymond Van Dam, *Saints and their Miracles in Late Antique Gaul* (New Jersey, 1993); Yitzhak Hen, *Culture and Religion in Merovingian Gaul, A.D. 481-751* (Leiden/New York, 1995); Daniel Caner, *Wandering, Begging Monks: Spiritual Authority and the Promotion of Monasticism in Late Antiquity* (Berkeley, 2002). And on

legal experts and the courts? Were the judges capable of dispensing justice swiftly and equitably? Were they honest and upright? Were the rights of citizens reasonably secure against greedy officials and powerful magnates?²⁸ To judge from the amount of attention devoted to such topics in the *ET*, it would seem that the availability of skilled and honest judges who could effectively settle cases at the local level was limited, and this posed a significant challenge for the central administration to maintain peace and order effectively throughout the provinces.

The text also casts doubt on the supposed prosperity of Ostrogothic Italy as suggested by some rather ambiguous references in the *Variae*. While the peaceful conditions Cassiodorus attributed to Theoderic's reign certainly allowed for a measure of recovery, such recovery was temporary; and it is questionable whether it extended to the entire population. As the *ET* bears witness, Theoderic was unable to remedy certain structural weaknesses that had afflicted the peninsula since the later empire: specifically, the problem of manpower shortage and the insecurity of property in the provinces. Such pressures could only have served to undermine a superficially stable social fabric that disintegrated completely with the crisis of war that enveloped Italy shortly after Theoderic's death. It is because the *ET* reflects the legal and cultural realities of the times as they were, and not as they were hoped for, that it is such an important historical source for understanding the social, political and economic conditions that shaped Ostrogothic Italy, and the world of Late Antiquity as a whole.

continuity in the area of education: M. L. W. Laistner, *Thought and Letters in Western Europe, A.D. 500 to 900* (Ithaca, 1966); R. McKitterick, *The Carolingians and the Written Word* (Cambridge, 1990); John Contreni, *Carolingian Learning, Masters and Manuscripts* (Aldershot, 1992); Erich Auerbach, *Literary Language & its Public in Late Antiquity and in the Middle Ages* (New Jersey, 1993); Richard E. Sullivan (ed.), *"The Gentle Voices of Teachers": Aspects of Learning in the Carolingian Age* (Columbus, 1995).

²⁸ Tony Honoré, "Roman Law AD 200-400: From Cosmopolis to Rechtstaat?" in Simon Swain and Mark Edwards (eds.), *Approaching Late Antiquity. The Transformation from Early to Late Empire* (Oxford, 2004), pp. 109-32, at p. 112.

Chapter One

The Historical Context of the Edictum Theoderici

Introduction

In the autumn and winter of 488/9, after concluding a formal treaty with the Emperor Zeno (474-491), Theoderic the Amal set out from Thrace with his followers to create a Gothic kingdom in the rich and famous lands of Italy. Standing in his way was Odovacer (476-493), a general of Germanic extraction who had usurped power in the peninsula following his removal of Romulus Augustulus in 476.¹ For some four years Theoderic proved himself Odovacer's better, having defeated him on three separate occasions and forcing him to retreat to the former imperial capital of Ravenna. Despite a heavy siege, the city's dense swamps and insurmountable walls proved too much, and the besieger was forced to come to terms. On 5 March 493, Theoderic entered Ravenna, having formalized an agreement with Odovacer by which the two would jointly rule over Italy. Ten days later during a banquet to celebrate the occasion, Theoderic murdered his coregent and ruled until his own death in 526.²

¹ Odovacer's position vis-à-vis Constantinople was ambiguous at best. Following the deposition of Romulus, Odovacer wrote to Emperor Zeno proclaiming that Italy no longer required its own emperor. Instead, he would rule as king and patrician, subordinate to the emperor's authority. But the official position of the eastern court was that Odovacer was a usurper who lacked any legitimate authority: in 475 the true emperor, Julius Nepos, had been deposed by Orestes who then named his own son, the "Little Augustus", as emperor in that same year. See further Penny MacGeorge, *Late Roman Warlords* (Oxford, 2002), pp. 281-93.

² On the treaty authorizing Theoderic's mission, see John of Antioch, fragment 238: ed. and trans. Sergei Mariev, *Ioannis Antiocheni Fragmenta Quae Supersunt Omnia* (Berlin, 2008), pp. 444-45. On Theoderic's victory over Odovacer, see Ennodius, *Panegyric to Theoderic* (*Pan. Th.*) 14, 25; id., *Life of Epiphanius* 109: trans. Brian Cook, *The Life of Saint Epiphanius by Ennodius: a translation with an introduction and commentary* (Washington D.C., 1942); Jordanes, *Getica*, 57.289-91: ed. Theodor Mommsen, in *MGH AA* 5.1 (Berlin, 1882), pp. 53-138; Procopius, *BG* 5.1.9-12: ed. and trans. H.B. Dewing, Loeb Classical Library (London, 1914-40). See further Herwig Wolfram, *History of the Goths*, trans. Thomas J. Dunlap, 2nd edn. (London, 1988), pp. 278-80; John Moorhead, *Theoderic in Italy* (London, 1992), ch. 1; Peter Heather, *The Goths* (Oxford, 1997), pp. 216-220. According to John of Antioch's account (fragment 238), as Theoderic killed Odovacer he exclaimed: "This scoundrel does not even have a bone in his body." (trans. Mariev, p. 445) One might interpret this treacherous act as a sign of primitive barbarism. In fact, Theoderic's actions could be seen as Roman. The fourth-century historian Ammianus Marcellinus, for example, describes no less than five occasions when Roman commanders made dinner invitations an opportunity for dispensing with opponents: *Res Gestae*, 31.5.5-8; 21.4.1-5; 27.10.3; 29.4.2-4; 29.6.5; 30.1.18-21: ed. and trans. John C. Rolfe, *Ammianus Marcellinus*, 3 vols., Loeb Classical Library (Cambridge, MA., 1935-40).

As an official representative of the eastern emperor in Italy, Theoderic had the right to issue edicts – legal pronouncements that addressed matters particular to the peninsula and surrounding environs that fell under Theoderic’s jurisdiction.³ Comprising 154 such edicts, the *ET* is a useful source for understanding what Theoderic regarded as important and thus requiring immediate attention. In this respect, the *ET* is perhaps the most authentic statement as to how Theoderic intended to maintain the rule of law and order in his Italian kingdom. But before we can appreciate the historical significance of this, it is first necessary to understand, as far as the evidence will permit, the circumstances surrounding the creation of the *ET*. Such an investigation is intertwined with the larger problem of authorship.

The Authorship of the ET

The issue of the *ET*’s authorship is a persistent one that stems from problems connected to the uncertainty of the manuscript tradition, the date of composition, and the identity of those who compiled it. In 1579, the French humanist Pierre Pithou published the first edition of the *ET*.⁴

³ Theoderic’s authority extended over the peninsula and the following dependent territories conquered through the course of Theoderic’s time in the West: Sicily (reconquered by Theoderic in the early 490s); the provinces of Dalmatia and Suavia (504); Provence, the Narbonnaise and most of Spain, where Theoderic allowed his young Visigothic grandson Amalaric to rule as nominal king, and installed a regent from Italy named Theudis (507). Ravenna, as it had for the Roman emperors since 401, served as the seat of Theoderic’s civil administration. We shall return to the subject of Theoderic’s constitutional position in greater detail below (pp.33-34).

⁴ Pithou’s edition was originally published by Sébastien Nivellius in Paris as part of a larger collection of works, principle among them being those of Cassiodorus: *M. Aurelii Cassiodori senatoris Variarum libri XII. De anima liber I. De institutione divinarum scripturarum libri II. De schematibus et tropis sacrae scripturae libri II. De orthographia lib. I. de septem disciplinis. Computus paschalis. Chronicon ad Theodericum regem. Iordanis episcopi ravenensis de origine actibusque getarum liber I. Edictum Theoderici regis Italiae. Enodii ticinensis episcopi de Theoderici rege epistola. Codicis legum visigothorum libri XII.* G. Fornerii antecessoris avel. *Notae in libros Variarum*, Parisiis, apud Sebastianum Nivellium sub ciconiis, via Jacobaea, 1579. Nivellius republished the collection in 1589. Five subsequent editions of the *ET* were similarly published as part of Cassiodorus’ general works: two in Paris in 1588 and 1600 by Marc L’Orry; and three in Geneva in 1609, 1650, and again in 1663. During the eighteenth century, the *ET* was republished several times, in each instance as part of a larger collection of various legal sources: M. Goldast included a copy in his *Collectio constitutionum imperialium*; Pietro Georgisch in his *Corpus iuris germanici antiqui*; and Paulo Canciani’s *Leges antiquae barbarorum* likewise contained the text. In 1816, G.F. Rhon published a new edition of the text complete with commentary. This was soon followed (1824) by a revised edition of F. Walter in his *Corpus iuris germanici antiqui*, and again by Felix Dahn in 1866, who provided for the first time references to the analogous Roman sources which presumably served as models for individual provisions of the *ET*. Subsequent editions have added to the list of possible analogues, the most comprehensive (and accurate) being that of Bluhme (see below). The *ET* was next published in the *MGH* by Friedrich Bluhme, who

The circumstances of that edition are well known through a letter dated 2 January 1579 and addressed to Eduard Molé, an acquaintance of Pithou.⁵ In it, Pithou refers to his recent publication of the *Variae*, and proposes to have published as an accompaniment to that work an edition of the *ET*. According to the letter, Pithou was in possession of a surviving manuscript, and obtained a second from Molé.⁶ Unfortunately, neither exemplar has survived, leaving Pithou's edition as our only witness to the original texts. The relationship between the two manuscripts, and how Pithou drew from them for his own edition, is not known.⁷

Pithou identified the *ET* as the work of the Ostrogoth Theoderic (493-526), referring to his 1579 edition as the *Edictum Theoderici regis Italiae*⁸ – a title he apparently derived from the formula which comes at the end of the text: *Explicit Edictum Theoderici Regis*.⁹ But the formula does not specify – as Pithou does – that the Theoderic to whom the *Edict* is attributed is king of

worked directly from Pithou's original edition. Bluhme's served as the basis for three subsequent editions: those of Padelletti, Baviera and Ponchielli respectively. The *ET* was last reprinted by Falaschi in 1966 (*Edictum Theoderici regis Italiae* [Milan: Giuffrè]), who also based his edition directly on that of Pithou. The most accessible editions are those of Bluhme (*Edictum Theoderici regis* in *MGH Leges* 5 [Hannover, 1889], pp. 145-179) and Baviera (*Fontes Iuris Romani Antejustiniani* 2, ed. S. Riccobono et al. [2nd edn., Florence, 1968-69], pp. 683-710). For a review of the various editions of the *ET*, see Giulio Vismara, "Edictum Theoderici," *Ius Romanum Medii Aevi*, part 1, 2 b aa a (Milan, 1967), pp. 9-11; Baviera, *FIRA*, p. 683.

⁵ The letter accompanied the 1579 edition (*editio princeps*) as well as subsequent editions of Nivellius (1589), l'Orry (1588, 1600) and Brosse (1600, 1609). On this letter, Vismara, "Edictum," pp. 6-7.

⁶ "I wanted the Edict of the wisest prince [Theoderic] to appear in your name ... by whose kindness I have obtained another copy." ("Edictum vero prudentissimi principis in tuo nomine apparere volui ... cuius beneficio alterum eius exemplar nactus sum.") See Vismara, "Edictum," p. 6, n. 4.

⁷ On Pithou and the MSS, see the comments in the editions of Bluhme, *MGH LL* 5 (Hannover, 1889), pp. 146-7; and Baviera, *FIRA*, p. 683; see also Vismara, "Edictum," pp. 6-8.

⁸ Pithou again makes this identification in the preface to a selection of his edited works which included the text of the *ET*, a letter of Sidonius Apollinaris, and a panegyric of Ennodius composed in honour of the Ostrogothic king: *Edictum Theoderici regis Italiae – C. Sollii Apollinaris Sidonii Arvenernorum episcopi de Theoderico rege epistola – Ennodii Ticinensis panegyricus Theoderico regi dictus* (c. 356 ed. Orry 1588). See Vismara, "Edictum," p. 7 n. 8.

⁹ In 1953, Piero Rasi (Sulla paternità del c.d. Edictum Theoderici Regis," *Archivio Giuridico* 145 (1953), pp. 105-62, esp. pp. 105-13) challenged the authenticity of the *explicit*, arguing that it was an addition of Pithou himself, and therefore should not be considered a genuine component of the original *Edict*. Though the *explicit* can hardly have been original to the *ET*, it is impossible to prove that it was Pithou's own creation. Likely, it was derived from an earlier redaction on which Pithou's manuscripts were based; for this was a common method for terminating MSS. For examples, see *Appendices Legis romanae visigothorum*, ed. Baviera in *FIRA*, vol. 2, Auctores (2nd edn., Florence, 1940), pp. 675, 679; *Lex Romana Burgundiorum*, ed. Bluhme in *MGH LL* 3 (Hannover, 1863), p. 630. In fact, Rasi goes so far as to argue that the *ET* is a forgery of Pithou, citing the lack of any reference to the *ET* in any source of any period or place. But the silence of our sources is indicative of their deficiencies more so than it is proof that the *ET* is a forgery. In the end, the burden of proof rests with Rasi.

Italy, only that he is king. In total, there are eight kings known to us from historical sources who ruled under this name. These include two Visigothic kings, Theoderic I (418-451) and Theoderic II (453-466), the Ostrogoths Theoderic Strabo (d. 481) and Theoderic the Great, king of Italy, as well as four Frankish kings – Theoderic I (511 to 534), Theoderic II (595-613), Theoderic III, who became king in 679, and Theoderic IV (721-737). Theoderic the Great has always been the main contender for the authorship of the *ET*.¹⁰ In the 1950s, however, Giulio Vismara made a strong case for Theoderic II of the Visigoths. His findings have received broad support from scholars ever since.¹¹

Vismara argues *ex silentio* that although detailed in other respects, sources such as Cassiodorus, Jordanes, Ennodius and Procopius make no mention of the *ET*, nor do they explicitly cite Theoderic as being responsible for issuing such a legal pronouncement.¹² Moreover, there are contradictions between the *Variae* and *ET* which Vismara has taken as proof that the *ET* is not of Ostrogothic extraction. For example, we hear from Cassiodorus that

¹⁰ Supporters of this attribution include most notably: A.H.M. Jones, *The Later Roman Empire, 284-602: A Social, Economic and Administrative Survey*, 3 vols. (Oxford, 1964), p. 477; Hermann Nehlsen, "Edictum Theoderici," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 86 (1969), pp. 246-60; id., *Sklavenrecht zwischen Antike und Mittelalter: germanisches und römisches Recht in den germanischen Rechtsaufzeichnungen I, Ostgoten, Westgoten, Franken, Langobarden*, Göttinger Studien zur Rechtsgeschichte 7 (Göttingen, 1972), pp. 120-3; Herwig Wolfram, *History of the Goths*, p. 289; Katherine Fischer Drew, *Law and Society in Early Medieval Europe. Studies in Legal History* (London, 1988), II, p. 21, though she contradicts herself at section VII, p. 2; J. Moorhead, *Theoderic in Italy*, pp. 75-6; R. Lambertini, *Introduzione allo studio esegetico del diritto romano* (Bologna, 1993), p. 92; Amory, *People and Identity*, pp. 78-82; P. Wormald, "The *Leges Barbarorum*: Law and Ethnicity in the Ostrogothic West," in Goetz et al. (eds.), *Regna and Gentes: the relationship between late antique and early medieval peoples and kingdoms in the transformation of the Roman world* (London, 2003), pp. 21-53.

¹¹ Giulio Vismara, "Romani e Goti di fronte al diritto nel regno ostrogoto," *Settimane di studio del Centro Italiano di studi sull'alto medioevo* 3 [= *I Goti in occidente: problemi*] (Spoleto, 1956), pp. 407-63; most notably his "Edictum Theoderici," *Ius Romanum Medii Aevi*, part 1, 2 b aa α (Milan, 1967). So convincing was Vismara's argument that standard works on early Germanic law have adopted his viewpoint wholesale. See, for example, Hans-Jürgen Becker, "Edictum Theoderici," in *Handwörterbuch zur Deutschen Rechtsgeschichte*, vol. 1 (Berlin, 1971), pp. 802-04; W. Kunkel, *An Introduction to Roman Legal and Constitutional History*. Trans. J.M. Kelly, 2nd edn., based on the sixth German edition of *Römische Rechtsgeschichte* (Oxford, 1973); H. Schlosser, *Grundzüge der neueren Privatrechtsgeschichte*, 4th edn. (Heidelberg, 1982), p. 6; A. Watson, *The Evolution of Western Private Law* (Baltimore, 1985), pp. 77-79.

¹² Vismara, "Edictum," pp. 246-8; Dahn also notes the silence of the sources (*Die Könige der Germanen* IV (Leipzig, 1879), p. 6 n. 1), but does not discount the *ET* as being the work of Theoderic the Great's government.

Theoderic's nephew Theodahad received a far more lenient punishment for *invasio*, the illegal usurpation of property, than that stipulated in *ET* 10.¹³ Such minor points of difference, however, should hardly come as a surprise. In the first place, many of the cases discussed by Cassiodorus represent special intervention on the part of the king, after the regular courts had seen things otherwise. It goes without saying that such cases were by their very nature exceptional, and were not necessarily reflective of the sorts of everyday cases for which the *ET* was intended to apply. Secondly, it is worthwhile to keep in mind that the *Codex Justinianus*, the single most comprehensive code of law at the time of its promulgation in 529/30, contains countless contradictions of the law, despite Justinian's own claims that his code would eliminate any and all such inconsistencies.¹⁴

Generally speaking, negative arguments like these are a weak form of proof for this period, especially for a document-type like the *ET* that was not out of the ordinary. But Vismara does not rest his case solely on the absence of evidence. Turning his attention north of the Alps, he argues that the *ET* was the work of the Visigothic king Theoderic II, who quite possibly entrusted the actual writing of the text to the praetorian prefect of Gaul, Magnus of Narbo.¹⁵ There are three reasons for this attribution. First, the latest law from which the *ET* borrows is a novel of the emperor Majorian of 458 (*Nov. Maj.* 7.1.1). Issued to the praetorian prefect Basilus,

¹³ Cass., *Var.* 4.39, 5.12.

¹⁴ Stein, *Roman Law in European History*, pp. 32-35.

¹⁵ Giulio Vismara, "Edictum," § 28. Kunkel sums up the views of Vismara succinctly (*An Introduction to Roman Legal and Constitutional History*, p. 160): "It was in the Visigothic kingdom and not, as was long believed, in the Italy of the eastern Goths that probably the oldest of these restatements of law, the so-called *Edictum Theoderici*, was drawn up. Its name probably refers not to the eastern Gothic king Theoderic the Great, but to the western Gothic ruler Theoderic II, during whose reign (453-66) the western Roman Empire still existed and the imperial power in Gaul was represented by the *praefectus praetorio Galliarum*. The *edictum Theoderici* seems in fact to have been issued not by the west Gothic king himself, but by a holder of this prefectship, Magnus of Narbo."

the novel reaffirms the *temporis praescriptio* for a decurion at thirty years.¹⁶ *ET* 69, based loosely on the novel, recognizes this same thirty-year period:

ET 69

We order that decurions, guild members or slaves that clearly have not contributed to their municipality [i.e. through the performance of compulsory public services] are to be retained by property owners who have been in possession of them for a period of thirty years; since We allow the beneficial decree of this thirty-year statute to be disturbed with respect to no one under any pretext, it is fitting that this law [of thirty years] maintain its legal force, in whatever way the laws prescribe, whether in matters involving a private citizen or the fisc. And since We know that such false accusations are frequently stirred up to the ruin of masters when rustics or decurions connive together to say that they have offered a contribution [to their municipality], We grant the following: if it is proven that a contribution was made with the knowledge of the property owner or his procurator or chief tenant if the owner was overseas, this law will remain in full force.¹⁷

Nov. Maj. 7.1.1

...We sanction that except for those decurions who have assisted their municipalities by some performance of compulsory public services and for that reason are not lost to the municipal senates by any prescription, wherever decurions may be found who have been absent less than thirty years previous to the present time, the procurators or lessees of the landed estates shall be constrained, the owners of the estates shall be notified, and such decurions together with their wives, shall be restored to the cities which they had deserted.¹⁸

¹⁶ According to the Roman legal principle of *favor libertatis*, under certain circumstances freedom could be attained through lapse of time by anyone who for a long period of time had continued in possession of his freedom. *CTh* 3.8.9 (393) fixed this period at twenty years. A law of Justinian upheld earlier legislation of the emperor Diocletian (*CJ* 7.22.2 [300]) which recognized this twenty year period: “those who have lived as bona fide free people for an uninterrupted period of twenty years ... shall become free and Roman citizens.” (“qui bona fide in possessione libertatis per viginti annorum spatium sine interpellatione morati essent ... ut et liberi et cives fiant romani.”) The basis for the thirty-year statute of limitations is Valentinian III’s voluminous statute (*de triginta annorum praescriptione omnibus causis opponenda*) of 449: *Nov. Val.* 27; esp. §§ 3 and 4.

¹⁷ *ET* 69: “Quisquis curialem, aut collegiatum, aut servum, per triginta annos possederit, qui nullam patriae suae collationem subisse monstratur, eos praediorum dominis iubemus adquiri: quia in nullo tricennalis legis saluberrimum constitutum sub qualibet patimur occasione turbari: quam sive adversus privatum, sive adversus fiscum, suam, quemadmodum leges praecipunt, obtinere convenit firmitatem. Et quia frequenter scimus tales calumnias in perniciem dominorum, conniventibus rusticis aut curialibus excitari, quo conlationem praestitisse dicantur: hoc eatenus valebit, si sciente possessionis domino, et non reluctante, aut certe procuratore, conductoreque eius, cum dominus in transmarinis fuerit regionibus constitutus, conlationem praestitam, fuerit adprobatum.” The *saluber lex* mentioned here seems to be a reference to *Nov. Maj.* 7.1.1; at the very least it suggests that the compilers had this in mind when they drafted *ET* 69.

¹⁸ *Nov. Maj.* 7.1.1 (trans. Pharr): “...sancimus praeteritae praesumptionis supplicium relaxantes, ut praeter illos, qui patrias suas aliqua munerum conlatione iuverunt ac propterea nulla ordinibus praescriptione depereunt, ubicumque intra triginta abhinc retro annos inventi fuerint curiales, constrictis procuratoribus vel conductoribus praediorum dominisque conventis ad urbes, quas deseraverant, cum uxoribus reducantur.”

That the *ET* does not borrow from any novel of the emperor Severus (461-65) provides sufficient justification for Vismara to fix the latest possible *terminus ante quem* for the production date of the *ET* at 461.¹⁹ But given that the perspective in *ET* 69 is quite distinct from *Nov. Maj.* 7.1.1, it is unlikely that it came soon after 458. *ET* 69 is focused on landlords. Its purpose was to preserve the thirty-year prescription in favour of those who had acquired decurions, guildsmen and *servi*. It permits claims only if it can be proven that landlords allowed contributions willingly, and not under compulsion, in the thirty year period; otherwise, the owner would lose possession of the decurion, guildsman or *servus*. In the novel, however, the emphasis is on the preservation of the rights of the state. Here, the law's purpose is the continued maintenance and protection of civic property and cities against the flight of those who by birth were responsible for their upkeep.²⁰ There is no consideration along the lines of *ET* 69 where the interests of the owner are safeguarded in the event that the decurion or slave should make a false claim (as to his service to the state) in an attempt to escape his servile condition. Given this shift of focus between them, it is probable that some decades had elapsed between the writing of the two texts.

Second, there is the testimony of Sidonius Apollinaris (born about 432), who claims that Seronatus – usually considered to be *vicarius* of Aquitanica Prima around 469 – tramples on the laws of Theodosius and issues the laws of Theoderic: “leges Theodosianas calcans,

¹⁹ Vismara (“Edictum,” p. 154): “La data dell’ET potrebbe quindi cadere tra il 459 e il 461.”

²⁰ The plight of decurions in Late Antiquity is well known, and legal references to attempts by curials to escape their obligations are found as early as the Antonine period. In the early third century, Ulpian mentions decurions who “have transferred themselves to the status of *coloni* of estates in order to escape greater burdens.” Ulpian: *Dig.* 50.5.1.2; similarly *Dig.* 50.2.1 and *CJ* 10.32.13 for other attempts to escape the decurionate. On the decline of the decurion in general, see: A.H.M. Jones, *LRE*, pp. 737-57 and id., “The Caste System in the Later Roman Empire,” in Peter Brunt (ed.), *The Roman Economy* (Oxford, 1974), pp. 396-418, esp. pp. 397-8 and 413-16; Meyer Reinhold, “Usurpation of Status and Status Symbols in the Roman Empire,” *Historia* 20 (1971), pp. 275-302, esp. pp. 299-301; Geza Alföldy, *The Social History of Rome*, trans. David Braund and Frank Pollock (Baltimore, 1988), pp. 201-2; Ramsey MacMullen, *Corruption and the Decline of Rome* (New Haven, Conn., 1988), pp. 46-9.

Theudericanasque proponens.”²¹ Vismara has taken this to be a reference to the *ET*.²² But the most that can be taken from this is that Theoderic the Visigoth issued some laws (*leges*), not that he promulgated something along similar lines as the *ET*.²³ Here, the reference to the *Theodosian Code* is clear, but the second part of the flourish demonstrates Sidonius’ penchant for assonance more so than it does the existence of a Visigothic ‘Code of Theoderic’.²⁴ The whole thing might simply just be an exercise in word play. Moreover, the *ET* is not a law code consisting of *leges*, but rather a collection of edicts (*edicta*). The issue is one of jurisdiction: Roman officials did not have the power to legislate, but they could declare by *edicta*, how they would carry out their duties. These were binding regulations that specified the principles which he would observe in enforcing the law and the conditions under which he would allow prosecutions and suits.²⁵ The term *Edictum* is appropriate for legal rules that were intended to apply to Romans and barbarians, set forth by someone other than the emperor. We do not know if Theoderic the Visigoth was in any *de iure* position to issue an edict in a strictly technical sense. For unlike Theoderic the Ostrogoth, he was a king without any legal or constitutional limitations imposed on him by the East.²⁶

²¹ *Ep.* II 1.3, ed. C. Lütjohanni in *MGH Auctor. VIII* (Berlin, 1887), pp. 21-22. On Seronatus: *PLRE* II, pp. 995-6. On the dating of the letter, see André Loyen, *Sidoine Apollinaire*, vol. 2 (Paris, 1970), p. 246 n. 1.

²² Vismara, “Edictum,” p. 180.

²³ That Theoderic the Visigoth issued at least individual edicts is attested to in the so-called *Codex Euricianus* – a collection of laws issued by Theoderic’s brother and successor Euric (466-84). Although Isidore tells us (*Hist. Goth.* 35) that the Goths (sc. Visigoths) had previously been ruled by customary law alone, this is certainly an exaggeration. An Eurician law expressly refers to a provision of Theoderic I (*CE* 277), and Sidonius’ reference to *leges Theodoricanæ* is not without justification. But this collection was probably small and composed in the main of measures concerning the division of lands and perhaps some aspects of the internal Gothic regime – nothing as comprehensive as the *ET*. On this point see P.D. King, *Law and Society in the Visigothic Kingdom* (Cambridge, 1972), pp. 65-70.

²⁴ This point is noted by Jill Harries, *Sidonius Apollinaris and the Fall of Rome, AD 407-485* (Oxford, 1994), p. 126.

²⁵ Watson, *The Evolution of Western Private Law*, p. 204; George Mousourakis, *The Historical and Institutional Context of Roman Law*, p. 88.

²⁶ Watson, *The Evolution of Western Private Law*, p. 204. We shall return to this point below, pp. 33-34.

Third, Vismara's hypothesis that Magnus was the jurist entrusted by Theoderic to draft the *ET* rests on a text of Sidonius (*Carmina* 5.561-2), the meaning of which is uncertain. Sidonius' poem is a panegyric on Majorian, and in stressing the good qualities of the emperor's assistants, he says, having just referred to the prefect Magnus:

The enemy dressed in skins, who now gives law to the Goths under your judge,
admires the hoarse auctioneer.

(qui dictat modo iura Getis, sub iudice vestro pellitus ravum praeconem suspicit
hostis.)

Vismara takes the first part (*qui dictat modo iura Getis*) to be a reference to Magnus.²⁷ But the person "who now gives laws to the Goths" must grammatically and logically be "the enemy dressed in skins" (*pellitus hostis*), a reference not to Magnus but to the Visigothic king himself. The point is a minor one, to be sure, but it casts further doubt on Vismara's version of events.

Vismara's claim that our sources for Theoderic are silent on the matter of the *ET* is not entirely accurate. For instance, we are told by the Anonymous Valesianus that Theoderic issued an *edictum* by which he established justice. For this reason, he was judged by the Goths to be their best king in all respects: "... because of his edict, in which he established justice, he [Theoderic] was judged by the Goths to be in all respects their best king."²⁸ Vismara has taken this to mean a code of Gothic law intended for use by Theoderic's Gothic followers only, derived from the so-called *belagines*.²⁹ Concerning this tradition, Jordanes says that Dicineus, the great and mythical civilizer of the savage Goths, gave them laws by which they learned to live, and

²⁷ Vismara, "Edictum," pp. 25-8.

²⁸ Anon. Val. 12.60: "et a Gothis secundum edictum suum, quo ius constituit, rex fortissimus in omnibus iudicaretur." It is perhaps worthwhile to note that both the Anonymous Valesianus and Pithou use the term *Edictum*. Pithou could not possibly have derived the title of his edition from this account, for it was first published in 1636, well after Pithou's 1579 edition.

²⁹ Vismara, "Edictum," pp. 33, 64-75.

which still existed in writing in his day and were referred to as *belagines*.³⁰ That the term only occurs here, in a quasi fictitious context, is hardly proof of a continuing Gothic legal tradition in Italy during Theoderic's time. What the Anonymous Valesianus refers to as an *edictum* which established justice and thus earned the praise of the Goths is less indicative of Theoderic issuing a code of Gothic law than it is a collection of legal pronouncements in keeping with his official position *vis-à-vis* Constantinople.

Theoderic invaded Italy as *patricius et magister militum praesentalis* of the Emperor Zeno. The expressed purpose of his mission was to remove the barbarian upstart Odovacer.³¹ The Anonymous Valesianus reports that pending a successful outcome of his campaign, Theoderic was to rule in Odovacer's place on a strictly interim basis – only until Zeno could return and re-establish full imperial authority in the West.³² That Zeno intended Theoderic to be a vassal king is clear. Officially, he was to have but limited rights over Roman bishops and senators, requiring the consent of the emperor in most regards. He was unable to appoint offices, and was not authorized to enact *leges*, but only, like a praetorian prefect, to issue *edicta*.³³ In the *Variae*, Cassiodorus describes Theoderic's enactments in words which, in imperial laws, apply to the activities of magistrates rather than emperors: he describes the legal enactments of Theoderic and his successors not as *leges* but as edicts or *iura*.³⁴ One such enactment selected for inclusion in

³⁰ Jordanes, 11.69: “[Dicineus] gave them laws by which to live naturally; to this day, [the Goths] call these written laws *belagines* ...” (“...naturaliter propriis legibus vivere fecit, quas usque nunc conscriptas *belagines* nuncupant ...”)

³¹ On the terms of his campaign, the most explicit is that of the Anonymous Valesianus (11.49): “cui Theodericus pactuatus est, et si victus fuisset Odovacer pro merito laborum suorum loco eius dum advenerit tantum praeregnaret.” See also, Jordanes, *Get.* 57.290-2; Procopius, *BG* 5.10-12.

³² Anon. Val. 11.49. On the official position of Theoderic in Italy, see: A.H.M. Jones, “The Constitutional Position of Odovacer and Theoderic,” *JRS* 52 (1962), pp. 126-30; John Moorhead, “Theoderic, Zeno and Odovacer,” *Byzantinische Zeitschrift* 77 (1984), pp. 261-6; id., *Theoderic in Italy*, pp. 39-51.

³³ On this point see A.H.M. Jones, “The Constitutional Position,” pp. 126-130.

³⁴ On the vocabulary of Cassiodorus, see Å. Fridh, *Terminologie et formules dans les Variae de Cassiodore* (Stockholm, 1956), pp. 109-10; G. Vidén, *The Roman Chancery Tradition*, pp. 84, 88, 142 with n. 193.

the *Variae* is the *Edict* of Athalaric (c. 533-534), which recognizes and upholds the edicts of Theoderic:

But lest, by touching on a few laws, I should be supposed not to desire the maintenance of the rest, I decree that all edicts, both my own, and ones of the lord my grandfather's [Theoderic], that were drafted with honored deliberation, as also the ordinary public laws, are to be kept with full force and rigor ... The ordinary rule of the laws and the integrity of my commands are everywhere to be upheld.³⁵

On the one hand, then, we have the Anonymous Valesianus expressly mentioning an *Edictum* of Theoderic, and on the other Cassiodorus, who cites several of the king's individual edicts. Many of these, in fact, correspond with, or seem to make reference to the *ET*. For instance, in a letter to the distinguished John, governor of Campania (507-12), Theoderic addresses the seemingly pervasive problem of *pignoratio* in that region – the practice of seizing someone's property in order to obtain payment of money owed. He instructs John that whereas the seizure of property by a creditor is penalized with forfeiture of his claim, the pledge-holding creditor is permitted to appropriate it:

Now I have discovered from a complaint of the provincials of Campania and Samnium that many, forgetting the good order of the times, have taken themselves to the practice of distraint. And, as though my edict were forgotten, the wrongful license has increased among the people... Therefore, in accordance with Our edict (*edictalis programmatis tenore*)³⁶, We direct the attention of all to the following provision: should anyone violently lay hold of any property to secure an alleged claim, by the authority of the law he shall at once forfeit that claim; nor is a person permitted to seize hold of any property [*pignus*] unless it is pledged to him.³⁷

The letter seems to be referring to *ET* 123 and 124, which are clearly to be taken together:

³⁵ *Var.* 9.18.12 (trans. Barnish, *Variae*, p. 120): "Sed ne pauca tangentes reliqua credamur noluisse servari, omnia edicta tam nostra quam domni avi nostri, quae sunt venerabili deliberatione formata, et usualia iura publica sub omni censemus distractionis robore custodiri ... legum usualis regula et praeceptorum nostrorum probitas ubique servetur."

³⁶ The term '*edictali programme*' is also found in *Var.* 1.31.2; 2.24.5; 2.35.1; 4.10.2; 4.27.5; 5.5.4.

³⁷ Cass., *Var.* 4.10.1, 3 (trans. Barnish, *Variae*, p. 77): "Provincialium igitur Campaniae atque Samnii suggestione comperimus nonnullos neglecta temporum disciplina ad pignorandi se studia transtulisse et quasi edicto misso per vulgus licentiam crevisse vitiorum ... Proinde edictalis programmatis tenore comperto spectabilitas vestra in cunctorum faciat notitiam pervenire, ut quisquis quod repetere debuisset pignorandi studio fortassis invaserit, voce iuris amittat nec liceat cuiquam sua sponte nisi obligatum forsitan pignus auferre."

ET 123 We deny an individual the permission to seize a pledge on his own unless in a credible case the presiding judge gives him the authority.³⁸

ET 124 If a creditor forcibly seizes from his debtor property that is not pledged to him, let him restore as penalty fourfold the amount previously taken if he is sued within a year of the offense being committed; but after a year, he will be obligated to pay back the simple sum. Even with respect to produce that has been forcibly removed the rule of law must also be observed.³⁹

Like *Var.* 4.10, both *ET* 123 and 124 permit the right to self-help of the *bona fide* creditor when the property concerned was pledged to him; *ET* 124 only prohibits the creditor from seizing property not pledged to him (*sibi non obligatas*). According to *ET* 123, this seizing of pledged goods could be done only with the permission of a judge.

Perhaps the most telling example of a correspondence between the *ET* and the legislative acts of Theoderic preserved in the *Variae* concerns the treatment of Jews. Cassiodorus documents several instances which together demonstrate that Theoderic's policy towards the Jews was generally positive. In a letter in Theoderic's name to the Jews of Genoa, for example, the king granted them permission to rebuild their synagogue, concluding that the provisions of the old laws concerning them were to continue to apply: "We freely grant your request, that the privileges of the laws which Antiquity has bestowed upon all Jews are to remain intact."⁴⁰ In another letter to the populace of Rome in the king's name, Cassiodorus reports that any Romans who took part in the burning of a synagogue at Rome were to be punished, although the cause of their anger towards the Jews was to be investigated; and the synagogue at Milan was to be

³⁸ *ET* 123: "Capiendorum pro suo arbitrio pignorum unicuique licentiam denegamus: ita ut, si probabile fuerit, hoc agendi iudicis praestet auctoritas."

³⁹ *ET* 124: "Creditor si debitori suo res sibi non obligatas violenter rapiat, intra annum criminis admissi conventus, sub poena quadrupli praesumpta restituat: post annum vero in simplum debet exsolvere. Quod etiam de fructibus violenter ablatis servari debere legum ratio persuadet." On the significance of the fourfold penalty, see below p. 177.

⁴⁰ Cass., *Var.* 4.33.2: "deposcitis privilegia vobis debere servari, quae Iudaicis institutis legum provida decrevit antiquitas: quod nos libenter annuimus." The 'ancient source' for these laws is most likely *CTh* 2.1.10 (398); and similarly 16.8.13 (397).

protected from the attacks of clerics.⁴¹ Around 519 or 520, the people of Ravenna burned down synagogues on two separate occasions. Our source for these events is the Anonymous Valesianus.⁴² According to his account, the Jews fled to Verona following the second burning, and made a charge against the Christians before the king. Theoderic conveyed an order by means of Bishop Peter and Eutharic that the entire Roman populace of Ravenna was to pay for the rebuilding of the synagogues; those who lacked the means to contribute were to be publicly flogged. Theoderic's goodwill towards the Jews no doubt goes a long way in explaining why the Jews of Naples were among the supporters of the Goths in the city when the forces of Belisarius came knocking in 536.⁴³ Likewise, the *ET* accords protection to the Jews by confirming their right – inherited from earlier Roman precedents and reaffirmed in the *Variae* – to live under their own laws:

The privileges conferred by the laws upon Jews shall be preserved: when disputes arise between those Jews who live in accordance with their own laws, they must have as judges those whom they consider to be teachers of their observance.⁴⁴

We find nothing of the sort in the legal sources pertaining to the Toulousan Visigoths. In fact, Visigothic law was decidedly anti-Semitic.⁴⁵

⁴¹ Rome: Cass., *Var.* 4.43; Milan: *Var.* 5.37. *Var.* 4.43 explains that the synagogue was burned down when the Romans learned of an incident of slaves being punished for the death of their masters. The reaction of the Roman populace to the death of some slaves can only be understood if we consider that the slaves were themselves Roman, that is, Christian. This would indeed be interesting, considering the position of late imperial legislation on the subject. See, for example, *CTh* 3.1.5 of the emperors Gratian, Valentinian and Theodosius of 384, which prohibited Jews from owning Christian slaves or otherwise 'contaminating' them with Jewish religious rites. On Theoderic's Jewish legislation, see Amnon Linder, *The Jews in the Legal Sources of the Early Middle Ages* (Detroit, 1997), pp. 200-06 (with translation and commentary of Cassiodorus' accounts).

⁴² Anon. Val. 14.80-82. On this account see Moorhead, *Theoderic in Italy*, pp. 98-99; C. Morton, "Marius of Avenches, the *Excerpta Valesiana* and the Death of Boethius," *Traditio* 38 (1982), pp. 107-36, esp. p. 119; Stein, *Histoire du Bas-Empire*, p. 249; Ensslin, *Theoderick*, p. 302; Chadwick, *Boethius*, p. 58. On the Jewish community at Ravenna see L. Ruggini, "Ebrei e Orientali nell'Italia settentrionale fra il IV e il VI secolo d. Cr.," *Studia et documenta historiae et iuris* 25 (1959), pp. 186-308, esp. p. 228 n. 103.

⁴³ Proc., *BG I* (V) 8.41 and 10.24-6.

⁴⁴ *ET* 143: "Circa Iudaeos privilegia legibus delata servantur: quos inter se iurgantes, et suis viventes legibus, eos iudices habere necesse est, quos habent observantiae praeceptores." Note the parallel between this and *Var.* 4.33.2: *privilegia legibus delata servantur = privilegia ... debere servari, quae ... provida decrevit antiquitas*.

Our sources, then, are hardly silent on the matter of Theoderic issuing a document like the *ET*. There is further evidence from the *ET* itself: three provisions, *ET* 10, 111, and 145, point inescapably to it being a product of Ostrogothic Italy. The first deals with the problem of *invasio*. It requires that judges and their staff, appointed in the provinces or the ‘Venerable City’, who believe themselves incapable of bringing offenders to book, were to notify the *scrinia* so that their decisions could be enforced:

We command all those judges, appointed in the provinces, or in the Venerable City, and their staffs, to be guardians of this just and lawful decree, in such a manner that if there is any reason they should think themselves incapable of exacting the penalty referred to above, they shall send their report to Our bureaus [*nostra scrinia*] so that, if reason demands it, the penalty may be exacted more strictly by Us.⁴⁶

The basis for this is a rescript of the emperor Theodosius of 389⁴⁷ which contains no reference to Rome. This was clearly an addition on the part of the compilers of the *ET*. A second reference to Rome appears in *ET* 111, which upholds the ancient proscription against the practice of burying corpses within the city’s limits:

Anyone who buries corpses within the city of Rome shall be compelled to allocate a fourth of his patrimony to the fisc; if he is destitute he shall be publicly flogged.⁴⁸

The model for this is *CTh* 9.17.6 (381) of the emperor Theodosius, significant points of which are either ignored or altered by the compilers. For instance, the reference to the existing burial sites of apostles and martyrs is overlooked; and the penalty is decreased from the confiscation of a third of the property to a fourth. Moreover, the compilers make the additional requirement that

⁴⁵ P.D. King, *Law and Society in the Visigothic kingdom*, pp. 130-144 (although most of this discussion pertains to Visigothic Spain).

⁴⁶ *ET* 10: “Cuius decreti iusti atque legitimi omnes per provincias iudices et urbe venerabili constitutos vel eorum officia iubemus esse custodes: ita ut si aliquid extiterit, quo se putent exigendae mulctae superius comprehensae pares esse non posse, relationem ad scrinia nostra transmittant, ut a nobis, si ratio poposcerit, districtius vindicetur.”

⁴⁷ *CTh* 4.22.3 (addressed to the Count of the Privy Purse Messianus).

⁴⁸ *ET* 111: “Qui intra urbem Romam cadavera sepelierit, quartam partem patrimonii sui fisco sociare cogatur: si nihil habuerit, caesibus fustibus civitate pellatur.”

those unable to pay were to be publicly flogged. Such a measure as this makes sense only if there was at this time a problem connected with the unlawful burial of corpses within Rome's sacred limits. Since the early fifth century the area around the Colosseum was used as a burial site in the early fifth century (an activity no doubt connected with the traumas associated with the Visigothic sack in 410); and, in fact, there is extensive evidence for a renewal of burial activity in that same region in the first half of the sixth century (some tombs feature tiles with stamps bearing the image of Theoderic).⁴⁹ In any event, the reference to Rome both here and in *ET* 10 makes it clear that the *ET* was intended to apply to the ancient capital. While Theoderic the Great had authority over matters pertaining to Rome, Theoderic II of the Visigoths did not. That he would issue a code with two provisions dealing specifically with the city is unlikely.

A third indicator of the *ET*'s Italian provenance is *ET* 145, a provision dealing with recalcitrant barbarians. In referring to them it uses the term *capillati*:

If any barbarian, upon being summoned for a third time by the authority of a judge exercising the appropriate jurisdiction, and duly called upon by judicial directives refuses to come to the judge by whose command he has been summoned, he shall deservedly receive a sentence of contempt after examination of the case; and moreover he shall be judged to have lost the case concerning which he was summoned. There must be these conditions: that either the reliability of the guarantee issued by the defendant shows, or the testimony of freeborn and honorable men confirms, that he who was summoned for the third time was one of the *capillati*; and that it is clearly obvious to those giving testimony that he who lost by judicial decree disdained to give a response and had no wish to come before the court.⁵⁰

⁴⁹ See further Neil Christie, *From Constantine to Charlemagne. An Archaeology of Italy AD 300-800* (Burlington, Vermont, 2006), p. 253; R. Rea (ed.), *Rota Colisei: La valle del Colosseo attraverso i secoli*, Electa (Milan, 2002), pp. 85-125.

⁵⁰ *ET* 145: "Si quis barbarorum tertio competentis iudicis auctoritate conventus, et edictis solemniter inclamatus, ad iudicem, cuius praeceptione conventus est, venire neglexerit, merito sub discussione causae sententiam excipiet contumaciae, adeo ut iudicetur de quo conventus est, perdidisse negotium: dummodo tertio quemlibet *capillatorum* fuisse conventum, aut cautionis ab eodem emissae fides ostendat, aut ingenuorum vel honestorum testium dicta confirmet, quibus manifeste clareat, auctoritate pulsatum, contempsisse dare responsum nec voluisse ad iudicium convenire."

The term *capillati*, meaning ‘long-haired ones’, figures prominently in Jordanes’ Gothic history.⁵¹ Quoting Dio Chrysostom, Jordanes tells how Dicineus instructed the noblest and wisest among the Goths in theology, appointed them priests and called them *Pilleati*. Jordanes believes this name is derived from the manner in which they performed their sacrifices, namely with their heads covered by a headdress called a *pilleus*.⁵² Dicineus referred to the remainder of the Goths as *Capillati*, a name, Jordanes says, they still revere and remember in song in the author’s day (of

⁵¹ On the significance of the term: Amory, *People and Identity*, pp. 94, 319, 345-6; Arne Søbyst Christensen, *Cassiodorus, Jordanes and the History of the Goths* (Copenhagen, 2002), pp. 245-6. As Christensen notes, long hair has been traditionally viewed as a custom of barbarian kings, who used it as a sign of their sacral right to rule. But it must be noted that long hair was in fact used by emperors as early as the mid-fifth century, despite classicizing depictions to the contrary. Evidence would seem to suggest that Theoderic himself put little stock in long hair. In the famous Senigallia Medallion, Theoderic only seems to be portrayed with long hair. In fact, he has his hair cropped short in the front, with long hair to the back in a style evocative of the modern-day mullet. He is likewise portrayed with short hair in the mosaic in Sant’Apollinare Nuovo – his Arian palace church in Ravenna. While the church itself no longer survives, the mosaic does: it contains the portrait of an elderly figure adorned in traditional clothing of imperial rule. Despite the fact that a nineteenth-century inscription at the top identifies the figure as Justinian, scholars have concluded that other portions of the scene are contemporary with Theoderic’s reign, leading to the assumption that the figure is either Theoderic, or perhaps Justin or Anastasius. But it is unlikely that an eastern emperor would associate himself with an Arian basilica of Theoderic, not just because of differences in dogma, or the sometimes cool relations between Ravenna and Constantinople during Theoderic’s reign, but because the entire basilica complex was intended to demonstrate Theoderic’s authority in the West. As for facial hair, however, long a mark of cultural distinction associated with barbarians, and Goths in particular, Theoderic sported the so-called clipped moustache, the *barba Gothica*, as seen in official portraits of the king. For discussion of the mosaic of Sant’Apollinare Nuovo, see Friedrich von Lorentz, “Theoderich -nicht Iustinian,” *Mitteilungen des Deutschen Archäologischen Instituts, Römische Abteilung* 50 (1935), pp. 339-47; S. Fuchs, *Kunst der Ostgotenzeit* (Berlin, 1944), pp. 125-6; Giuseppe Bovini, “Note sul presunto ritratto musivo di Giusttiniano in S. Apollinare Nuovo di Ravenna,” *Annales Universitatis Saraviensis. Philosophie, Lettres* 5 (1956), pp. 50-3; B. Ward-Perkins, *From Classical Antiquity to the Middle Ages: urban public buildings in northern and central Italy AD 300-850* (Oxford, 1984), pp. 162, 164-5; Mark J. Johnson, “Toward a History of Theoderic’s Building Program,” *Dumbarton Oaks Papers* 42 (1988), pp. 73-96, esp. pp. 86-7; Maria Andaloro, “Tendenze figurative a Ravenna nell’età di Teodorico,” in *Teoderico il Grande e i Goti d’Italia: atti del XIII Congresso internazionale di studi sull’Alto Medioevo, Milano 2-6 novembre 1992* (Spoleto, 1993), pp. 561-2. For parallels of long-haired Roman heads of state in fifth- and early sixth-century statuary, mosaics and diptychs, see Richard Delbrueck, *Die Consulardiptychen und verwandte Denkmäler*, 2 vols. (Berlin, 1929), vol. 2, p. 42; Amory, *People and Identity*, pp. 344-6. For Theoderic and his moustache, see Ward-Perkins, *The Fall of Rome and the End of Civilization*, pp. 72-9, who cites coins and the description offered by Ennodius. Noting the fact that there was no Latin word for moustache (though Greek had two, *mústax* and also *hupénē*), Ward-Perkins (rightly) concludes (at p. 73): “Contemporaries ... will have interpreted Theoderic’s moustache as a sign of his un-Romanness, indeed of his Gothiness; and, in so doing, they will have surely been right.” For others who share this opinion, see F.F. Kraus, *Die Münzen Odovacars und des Ostgotenreichs in Italien* (Halle, 1928), p. 79; Delbrueck, *Die Consulardiptychen und verwandte Denkmäler*, vol. 2, pp. 42-3; Percy E. Schramm, *Herrschaftszeichen und Staatssymbolik: Beiträge zu ihrer Geschichte vom dritten bis zum sechzehnten Jahrhundert* (Stuttgart, 1954), p. 221; James Breckenridge, “Three Portrait Gems,” *Gesta* 18.1 (1979), pp. 7-18, esp. p. 12; and Michael McCormick, *Eternal Victory: Triumphal Rulership in Late Antiquity, Byzantium, and the early medieval west* (Cambridge, 1986), p. 269.

⁵² Reports about the Getic-Thracian nobility and their ‘short hair’ date back to the fourth century. For discussion, see Arne Søbyst Christensen, *Cassiodorus, Jordanes and the History of the Goths*, p. 245.

course, the Goths of Jordanes' time were those living in Italy).⁵³ But Jordanes' account was simply an attempt to demonstrate that his Goths possessed a genuine Roman or Italian tradition, since there existed actual living, breathing *Capillati* in Italy as early as the first century. Pliny, for example, used the term to designate a group of people living in the north around the Cottian Alps.⁵⁴ These long-haired people are known in Theoderic's Italy where they are mentioned by Cassiodorus. In a proclamation written in the king's name and addressed to the residents of Siscia and Suavia in the north eastern corner of the peninsula, Cassiodorus includes 'long-haired' people among the recipients:

The king Theoderic sends greetings to all provincials, the *capillati*, the *defensores* and *curials* who reside in the regions of Siscia and Suavia.⁵⁵

In *ET* 145, the term is used to identify those barbarians whose status allowed them to refuse a judicial summons that was otherwise compulsory for all others.⁵⁶ According to the provision, the penalties for non-attendance in court would remain in force provided that the reliability of the guarantee issued by the defendant, or the testimony of freeborn and honorable men confirms that the defendant was among those ranks of barbarians designated as *capillati*; and that the defendant's non-attendance was owing to his refusal to appear. The provision leaves room for the interpretation that a long-haired barbarian could avoid the stipulated penalty for contumacy if his absence was not a willful act of contempt towards the court, but was rather a consequence owing to his status. Presumably, such long-haired Goths were soldiers actively serving in Theoderic's army: long hair, while traditionally viewed as a Germanic custom, had its roots in

⁵³ Jordanes, *Get.* 40, 71-2.

⁵⁴ Pliny, *Nat. Hist.* 3.5.47. See further Amory, *People and Identity*, pp. 94, 319.

⁵⁵ Cass., *Var.* 4.49: "universis provincialibus et capillatis, defensoribus et curialibus siscia vel savia consistentibus Theodericus rex."

⁵⁶ *ET* 5.

Roman military custom.⁵⁷ That Theoderic's soldiers continued the habit is possible. What is clear is that the term *capillatus* was used exclusively in connection with certain Goths who were living in Theoderic's Italy. There is no evidence for it being used among the Visigoths.

The two references to Rome and this last one to *capillati* at least confirm the Italian provenance of the *ET*.⁵⁸ And judging from the disparity between *ET* 69 and *Nov. Maj.* 7.1.1, it can be reasonably concluded that the *ET* was produced well after 458 (the date of Majorian's novel). This narrows things considerably. When we take into consideration the parallels between it and the *Variae*, and the fact that Cassiodorus confirms that Theoderic issued edicts, a strong argument can be made in favour of the *ET* being produced in Italy sometime during Theoderic's reign. But there is nothing to rule out the possibility that the *ET* was in fact produced earlier during Odovacer's tenureship of the peninsula (476-93).⁵⁹ The reason for this is the lack of any evidence, either within the text itself or elsewhere, to furnish a reliable *terminus ante quem* by which to secure a more precise publication date other than sometime after 458. Despite this, there have been interesting attempts to do so. For example, the Italian historian Augusto Gaudenzi argued that the silence of Cassiodorus in regards to the *ET* is proof that it was drafted after 511, for it was in that year that Cassiodorus stepped down from his position as *quaestor sacri palatii* – the imperial office which under Theoderic was responsible for dealing with various legal matters of the *comitatus*.⁶⁰ Scholarship on the *Variae* has revealed that this

⁵⁷ Wolfram connects the use of the word *capillati* to denote soldiers or Goths in Italy with the barbarian royal custom of long hair, but also with the customs of the Roman army. He points out that the Gothic Bible borrows the Latin word to form *kapillon*, and hypothesizes that it means "getting a Roman type military haircut." See his *History of the Goths*, pp. 102-3, 301-2; "Gotische Studien I," p. 14; "Gotische Studien II," pp. 304, 307-8; and also Amory, *People and Identity*, pp. 345-46, who likewise attributes the term to soldiers in Ostrogothic Italy.

⁵⁸ Patrick Wormald, "The *Leges Barbarorum*: law and ethnicity in the Ostrogothic West," in Goetz et al. *Regna and Gentes*, pp. 21-53, esp. p. 25 n. 10.

⁵⁹ See e.g. Piero Rasi, "Sulla paternità del c.d. Edictum Theodorici Regis," *Archivio Giuridico* 145 (1953), pp. 105-62.

⁶⁰ A. Gaudenzi, *Gli editti di Teodorico e di Atalarico nel Diritto Romano nel Regno degli Ostrogoti* (Bologna, 1884), p. 29.

collection of imperial documents was written in three separate phases: 507-511, 523-527 and 535-537. These, we deduce, were the periods during which Cassiodorus himself was at Ravenna holding office, in the first instance as quaestor, in the second as *magister officiorum*, and in the third as praetorian prefect.⁶¹ The assumption here is that Cassiodorus' activity drafting letters for the king would in each case roughly begin and end with his terms in office, and that he was only involved in the literary activity preserved in the *Variae* during those years when he was appointed to office. Thus, as Gaudenzi argues, it was during Cassiodorus' first such leave of absence, namely between 511 and 523, that the composition of the *ET* took place. Not surprisingly, Gaudenzi's hypothesis has won only few adherents: for arguments *ex silentio* are never particularly persuasive.⁶² And as has already been pointed out, Cassiodorus is not altogether silent on the matter of the *ET*.

Perhaps the least untenable of approaches to dating concerns *ET* 70. But here, too, we run into difficulty. Derived principally from *CTh* 9.45.5 of the emperor Theodosius of 432, the provision concerns the matter of asylum-seeking slaves on the lam:

If a slave of any nation should take refuge in a church, let him be returned immediately upon his owner promising pardon, for We forbid him from staying in that place for more than a single day. If he is unwilling to depart, the archdeacon of that church, or a priest and clerics shall compel him to return to his owner, and deliver him up without delay on the owner pardoning him. But if it happens that the abovementioned religious persons are unwilling to do this, they shall be compelled to give to the owner another slave of equal value; even the slave that remains within the retreats of the church may be claimed by his owner forthwith if he can be captured beyond church limits.⁶³

⁶¹ Cassiodorus himself mentions in his preface to the *Variae* that he included for publication only that which he wrote while holding the office as quaestor, *magister*, or prefect (trans. Barnish, *Variae*, p. 3): "And therefore, I have put together all that I could find of my compositions made on various public affairs while I held the posts of Quaestor, Master, and Prefect." ("Et ideo quod in quaesturae, magisterii ac praefecturae dignitatibus a me dictatum in diversis publicis actibus potui reperire, his sena librorum ordinatione composui.")

⁶² It was attacked vigorously by Heinrich Brunner, *Deutsche Rechtsgeschichte* (Leipzig, 1906), 1, p. 365; and R. Schröder, *Lehrbuch der deutschen Rechtsgeschichte* (Leipzig, 1907), p. 247.

⁶³ *ET* 70: "Si servus cuiuslibet nationis ad quamlibet ecclesiam confugerit, statim domino veniam promittente reddatur: nec enim ultra unum diem ibidem residere praecipimus. Qui si exire noluerit, vir religiosus archidiaconus eiusdem ecclesiae, vel presbyter atque clerici, eundem ad dominum suum exire compellant, et domino indulgentiam

According to a widespread view,⁶⁴ the impetus for the inclusion of this provision within the *ET* was the social and political upheaval wrought by the collapse of the Visigothic kingdom of Toulouse in 507.⁶⁵ For the problem of runaway slaves seems to have been a particularly pernicious one in the years immediately following Vouillé. The evidence for this is the occurrence of three successive church councils in Gaul in the first half of the sixth century which convened to address several pertinent topics, including the problem of runaway slaves and in particular those which sought sanctuary. The first of these was the Council of Orléans of 511 which established the following (Canon 3):

A slave who has fled to a church for any fault whatsoever shall be compelled to return immediately to the servitude of his master if he has received pardon from his lord for the admitted fault; however, if after it is documented that the master granted pardon it is proven that he [the slave] has endured any penalty for those same faults for which he was pardoned, he [the master] shall be considered a stranger from the communion and community of Catholics on account of his contempt of the church or collusion of the faith, as it has been previously established. If, however, the slave, upon being defended by the church for his own fault, has received pardon from his master for the impunity sought after by the priests, the master shall be permitted to seize that slave who is unwilling to leave.⁶⁶

praestanti sine dilatione contradant. Quod si hoc suprascriptae religiosae personae facere forte noluerint, aliud mancipium eiusdem meriti domino dari cogantur: ita ut etiam illud mancipium quod in ecclesiae latebris commoratur, si extra ecclesiam potuerit comprehendi, a domino protinus vindicetur.”

⁶⁴ E.g., A. Gaudenzi, *Gli editti di Teodorico e di Atalarico nel Diritto Romano nel Regno degli Ostrogoti* (Bologna, 1884), p. 29; H. Brunner, *Deutsche Rechtsgeschichte* (Leipzig, 1887), 1, p. 365; Leipzig, 1906, 1², p. 527; Schröder, *Lehrbuch der deutschen Rechtsgeschichte* (Leipzig, 1907), p. 247; Dahn, *Die Könige der Germanen*. IV. Abth., pp. 11-12; B. Kübler, *Geschichte des römischen Rechts* (Leipzig, 1925), p. 397; S. Mazzarino, “Si può parlare di rivoluzione sociale alla fine del mondo antico” in *Il passaggio dall'antichità al medioevo in Occidente*, Settimane di Studi del Centro Italiano di Studi sull'Alto Medioevo 9, (Spoleto, 1961), pp. 410-425, esp. pp. 421-23.; For a summary of the scholarship, see Vismara, “Edictum,” pp. 17-18, 100-109.

⁶⁵ In the aftermath of Vouillé, in which the Visigothic king Alaric was killed and most of his army defeated, the Franks and Burgundians overran most of the Gothic kingdom in Gaul, including the capital of Toulouse. Thereafter, the Visigothic kingdom was mostly restricted to the Iberian peninsula, with the exception of the region between the lower Rhone and the Pyrenees. For a review of these events, see Roger Collins, *Visigothic Spain, 409-711* (London, 2004), *Introduction*.

⁶⁶ *Concilia Galliae a. 511-a. 695*, ed. C. DeClercq, Typographi Brepols Editores Pontificii (Turnholt, 1963), pp. 5-6: “Servus qui ad ecclesia pro qualibet culpa confugerit, si a domino pro admissa culpa sacramenta susceperit, statim ad servitium domini redire cogatur; sed posteaquam datis a domino sacramentis fuerit consignatus, si aliquid poenae pro eadem culpa, qua excusatur, probatus fuerit pertulisse, pro contemptu ecclesiae vel praevaricatione fidei a communione et convivio catholicorum sicut superius conpraehensum est, habeatur extraneus. Sin vero servus pro culpa sua ab ecclesia defensatus sacramenta domini clericis exigentibus de inpuniate perciperit, exire nolentem a

The conditions outlined here were reiterated by the Council of Epaune (Burgundia) on 15 September 517,⁶⁷ and by a second council held in Orléans on 28 October 549.⁶⁸ That the issue of asylum-seeking slaves was addressed by three different ecumenical councils within a forty year period is indeed an indication that it was regarded as a serious problem in Gaul at this time. And we hear from Cassiodorus that Theoderic, too, took steps to respond to it. In a letter addressed in the king's name to the sword-bearer (*spatharius*) Unigis, the addressee is charged with a special commission to restore to their owners those slaves who had fled during the Gallic war.⁶⁹ That *ET* 70 was drafted in response to these specific circumstances cannot be ruled out. But neither can it be proved definitively. For the problem of runaway slaves was a persistent one throughout antiquity. As such, *ET* 70 bears witness to a general phenomenon and not necessarily a specific event.

Despite the lack of any direct evidence for this, it would be tempting to place the publication date of the *ET* in the early years of Theoderic's reign, that is, before 512. For if we are to take Cassiodorus' mention of "Our edict" (*edictalis programmatis tenore*) in his letter (*Var.* 4.10) to the governor John as a reference to the *ET*, a fact presupposed by the similarities between the letter and *ET* 123-124 concerning *pignoratio*, then it can be reasonably assumed that the promulgation of the *ET* took place sometime before John left office in 512.⁷⁰ Taking this one step further, a case could be made for the *ET* being produced as early as 500, for it was in that

domino liceat occupari." Generally speaking, the provisions of Canon 3 of the First Council of Orléans demonstrate a greater consideration for the welfare of the slave and the rights of the church than do those of *ET* 70.

⁶⁷ *Concilia Galliae a. 511-a. 695*, 34: *Concilium Epaonense* c. 39.

⁶⁸ *Concilia Galliae a. 511-a. 695*, 156 c. 22.

⁶⁹ Cass., *Var.* 3.49: "Wherefore, if upon Our army's propitious entry into Gaul, some slaves have abandoned their servitude and taken themselves to new masters, We order that they must assuredly be returned to their former masters..." ("Quapropter cum deo propitio Gallias exercitus noster intravit, si qua mancipia servitium declinantia ad alios se, quam quibus videbantur competere, contulerunt, prioribus dominis iubemus sine aliqua dubietate restitui...")

⁷⁰ Barnish, *Variae*, p. 76.

year when Theoderic celebrated his *decennalia* in Rome.⁷¹ The event was marked by the holding of popular games and festivities. It was also during this visit that Theoderic enjoyed the last western *adventus*, the formal and elaborate imperial ceremony used to signal an emperor's entrance into a city. A special medallion was also issued to commemorate the event.⁷² Such an occasion as this would have served as an ideal backdrop for Theoderic to issue his *Edict*. Throughout the Empire the promulgation of law by state officials was a very public affair, often celebrated with a great deal of splendor and solemnity. The issuance of the *Theodosian Code* in the West, for instance, took place in the stately home of the Praetorian Prefect of Italy, Glabrio Faustus, on Christmas Day 438. According to the record of proceedings, the senators in attendance received the *Code* with no less than forty-three acclamations, each one of which was repeated eight to twenty-seven times.⁷³ Given his strong desire to preserve ancient Roman traditions, Theoderic likely arranged for the promulgation of his *Edict* to be a public spectacle. His visit to Rome would have functioned as the ideal setting for this.

Moreover, it is worth pointing out the fact that the reference of the Anonymous Valesianus to Theoderic issuing an *Edict* appears in the same section (12.60) and immediately after a passage describing how the barbarian king gave games in the circus and amphitheatre. This brief note is obviously referring to events taking place in Rome, and could in fact be a specific reference to the *decennalia* celebrations of 500. That the Anonymous would mention Theoderic issuing his *Edict* in the same context as this could be taken as proof that the two

⁷¹ Ferrandus, *Vita s. Fulgentii*, ch. 9, pp. 55-6; Moorhead, *Theoderic in Italy*, pp. 60-63.

⁷² This is the so-called Senigallia Medallion, now in the National Museum at Rome. The obverse bears a portrait of the king making a stylized gesture with his right hand as the pacifier of the world, and carrying in his left a statue of Victory. Inscribed is the legend REX THEODERICUS PIUS PRINC(EPS) I(NVICTUS) S(EMPER), "king Theoderic, the pious and always most invincible prince"; and on the reverse REX THEODERICUS VICTOR GENTIUM, "king Theoderic, conqueror of the peoples." The medallion is discussed by M.R. Alföldi, "Il medaglione d'oro di Teodorico," *Rivista italiana di Numismatica e scienze affini* 80 (1978), pp. 133-41.

⁷³ On these events, see further Matthews, *Laying Down the Law*, ch. 3.

events were contemporaneous. But again, all of this is simply guesswork. As noted already, there is nothing in our sources to allow for the secure pinpointing of a precise publication date for the *ET*. Nevertheless, it is a far more likely scenario that this took place sooner rather than later, if for no other reason than the fact that Theoderic would have attempted to consolidate his rule and make a definitive statement as to his authority in the region in the early years of his reign. The issuance of a legal document like the *ET* would have gone far in achieving these ends.

Although the question as to precisely when the *ET* was produced cannot be resolved definitively, it is possible to identify to a certain extent the identity of the individuals to whom this task fell. Judging from their intimate knowledge of Roman legal and juristic conventions and concepts, those who compiled the *ET* were clearly Roman jurists. A further indication of this is their use of the term *barbarus* to mean Goth, a term which appears both in the prologue and epilogue, in addition to the following provisions: *ET* 32, 34, 43, 44, 145.⁷⁴ In each instance the phrase is a deliberate addition on the part of the compilers, for it appears in none of the Roman texts which seem to have served as models.⁷⁵ Generally speaking, this was a term used by Romans to describe the Goths, and not by the Goths themselves.⁷⁶ Roman sympathizers, too, avoided the term in their description of the Goths. Only on two occasions does Cassiodorus refer to the Goths as barbarians;⁷⁷ elsewhere he makes it clear that they were not.⁷⁸ Jordanes, too,

⁷⁴ In both the prologue and epilogue, *barbarus* is juxtaposed with *Romanus* to underscore the fact that both groups were equally required to fulfill the legal obligations imposed upon them by the *ET*: prol. (“barbari romanique”); epil. (“tam barbaris quam romanis ... barbarorum sive romanorum ... seu barbari seu romani”). The same juxtaposition is made in the following provisions: *ET* 34 (“nemo aut romanus aut barbarus”); 43 (“nullus ad potentem romanum aut barbarum”); 44 (“nullus se potens romanus aut barbarus”).

⁷⁵ Vismara, “Edictum,” p. 92 n. 312.

⁷⁶ For the discussion that follows, see Guy Halsall, *Barbarian Migrations and the Roman West, 376-568* (Cambridge, 2007), p. 332; Amory, *People and Identity*, pp. 59-71; Peter Heather, *Goths and Romans, 332-489* (Oxford, 1991), pp. 52-7.

⁷⁷ Cass., *Var.* 3.24 (a letter addressed in Theoderic’s name to the Romans and barbarians residing in Pannonia); 1.18.2 (a letter of general instruction to the Roman Domitianus and the Gothic Wilia, both recently dispatched to administer justice in their respective jurisdictions, which addresses the problem of *invasio* and refers to any Goth who has committed this crime as a barbarian usurper).

implicitly denies that the Goths were barbarians. Yet, for most other Romans of the time, the Goths were barbarians. Pope Gelasius, for instance, viewed the Goths as barbarous; Boethius complains often in his *Consolation* about the avarice of the barbarians; and Procopius certainly regarded them as barbarians.⁷⁹

In the *ET*, *barbarus* is used both in a generic sense as a synonym for Goths, much in the same way the compilers of the Burgundian *Liber Constitutionum* (517) used the term to designate Burgundians;⁸⁰ and in a technical sense to refer specifically to a soldier in Theoderic's army.⁸¹ For example, both *ET* 43 and 44, which clearly are to be taken together, use *barbarus* to refer to a powerful Gothic magnate (*potens barbarus*) who was not necessarily a soldier:

ET 43 No one shall transfer their legal suits under any title to a powerful Roman or barbarian. But if he should do this, let the litigant lose the suit, and he who receives the suit shall be compelled to bear half the value of the matter under dispute as evaluated by the fisc. We stipulate that even those who try to transfer the property in dispute to a person of this sort are to be held by this penalty, since We desire that the litigants contend with the same opportunity when the more powerful person has been removed. But after the conclusion of the case, We grant to the litigants the power of giving what they won to any person they wish.⁸²

⁷⁸ Cass., *Var.* 2.5.2 (in this letter concerning soldiers' arrears, Cassiodorus has Theoderic describe other Germanic groups as barbarians); 9.21.4 (in this proclamation of Athalaric which calls for an increase in the wages of grammarians, Cassiodorus has the king extol the skills of these individuals, and note that while the grammatical art may be lost on other barbarian kings, it is cherished by legitimate sovereigns [i.e. members of the Amal royal household]).

⁷⁹ Gelasius: *ep.* 6.1 (ed. Theil; *barbarici incursi*); *frag.* 9.35. See too *MGH AA* 12.391 *ep.* 8. Boethius: *Phil. Cons.* 1.4.10. Procopius: *BG* 1.1.26, 1.2.8, 17, 18.

⁸⁰ *ET* prol., 34, 43, 44, epil. In the *Liber Constitutionum*, *barbarus* is frequently used as a synonym for Burgundian: e.g., *Liber Constitutionum* 8.1. Edited L. R. von Salis, *MGH LL nationum Germanicarum I* (Hannover, 1902), pp. 1-122. For discussion, see Ian Wood, "*Gentes*, kings and kingdoms – the emergence of states. The kingdom of the Gibichungs," in Hans-Warner Goetz et al. (eds.), *Regna and Gentes. The Relationship between Late Antique and Early Medieval Peoples and Kingdoms in the Transformation of the Roman World* (Leiden, 2003), pp. 243-269, esp. pp. 260-61; Patrick Amory, "The meaning and purpose of ethnic terminology in the Burgundian laws," *Early Medieval Europe* 2 (1993), pp. 1-28.

⁸¹ *ET* 32, and possibly 145.

⁸² *ET* 43: "Nullus ad potentem Romanum aut Barbarum proprias quolibet titulo transferat actiones. Quod si fecerit, iacturam litis iurgator incurrat, et is qui suscepit, medietatem pretii rei aestimatae fisco cogatur inferre. Qua poena teneri praecipimus etiam eos, qui rem in lite positam in huiusmodi crediderint transferendam esse personam; quoniam volumus, ut remota persona potentioris, aequa iurgantes sorte confligant. Litigantibus vero post caussae terminum, largiendi quod vicerint, cui voluerint personae, concedimus potestatem."

ET 44 No powerful Roman or barbarian shall involve himself as a representative (*defensor*) or supporter (*suffragator*) in [another's] trial.⁸³

The purpose behind both was to prevent the sorts of abuses that had plagued the provincial courts of the later Empire – namely the exercise of undue influence by magnate patrons.⁸⁴ Thus, the *ET* extended the prohibition to include all magnates, whether Gothic or Roman. In *ET* 32, however, *barbarus* is clearly referring to a soldier:

We grant the freedom of making wills to barbarians who are known to have performed military service for the state, in any way they wish and are able, whether they are settled at home or at a military camp.⁸⁵

Here, a barbarian is identified as a soldier in active service of the state; and he is granted the right to draft a will (that is, the soldier's will) wherever he happened to be stationed, just as Roman soldiers were so permitted. The separate soldier's will apparently lived on in Byzantium until the time of Justinian.⁸⁶ Like other Romans of their time, the compilers used *barbarus* to refer to Goths. While they were perhaps unaware of some of the ancient negative connotations associated with the word, they clearly did not use it in a pejorative way.⁸⁷

As to the official capacity of these compilers, there is a clue in *ET* 10. According to the provision, judges that were unable to enforce their own judgment were to bring the matter to the attention of *nostra scrinia*, that is, we may presume, the offices of the palace secretariat, the *magister officiorum*.⁸⁸ In theory, the Master of the Offices had the widest range of administrative

⁸³ *ET* 44: "Nullus se potens Romanus aut Barbarus tanquam defensor aut suffragator negotio misceat."

⁸⁴ E.g., *CTh* 2.14.1 (400). On limiting the power of magnates in court, see below p. 132.

⁸⁵ *ET* 32: "Barbaris, quos certum est reipublicae militare, quomodo voluerint et potuerint, faciendi damus licentiam testamenti, sive domi sive in castris fuerint constituti."

⁸⁶ *CTh* 4.4.1, 3 (Constantine ?336). On the soldier's will, see W.W. Buckland, *A Manual of Roman Private Law* (Cambridge, 1925), p. 224; Burns, *History of the Ostrogoths*, p. 127. On wills in general, see Ulrich Nonn, "Merowingische Testamente: Studien zum Fortleben einer römischen Urkundenform in Frankreich," *Archiv für Diplomatik* 18 (1972), pp. 14-15.

⁸⁷ As Amory demonstrates (*People and Identity*, p. 79 with examples), the word was not necessarily a pejorative one in sixth-century Italy.

⁸⁸ Cassiodorus uses the term *scrinia* in a more generic sense to refer to officers of the imperial administration in general. The following examples are illustrative. In the first three instances, the reference is to members of the office

duties. According to Cassiodorus, who was himself a holder of the position (523-527), the officer controlled access to the court, was in charge of the imperial attendants, had authority over provincial governors and performed a variety of undisclosed legal functions.⁸⁹ But the responsibility for the actual compilation of the *ET* most likely fell to the office of the imperial *quaestor sacri palatii*. Derived from the distant senatorial *quaestor candidatus*, who acted as the emperor's spokesman in the Senate, the imperial quaestor had become, by the reign of Constantius II (337-361) and Valentinian I (364-375), the emperor's legal adviser.⁹⁰ According to the late imperial *Notitia Dignitatum* (*register of State Dignities*),⁹¹ the quaestor was responsible for dictating the emperor's laws (*leges dictandae*), and receiving petitions (*preces*). He had no *officium* of his own:⁹² rather, he was expected to rely on the services of the *scrinia*, that is, the clerks and advisers from the three principle secretariats of the *memoria*, *epistulae*, and *libelli*, whose *magistri* were subject not to him but to the *magister officiorum*.⁹³

of the praetorian prefect: *Var.* 11.7 ("universis iudicibus provinciarum Senator ppo, 533 ante Sept. I: ad scrinia nostra transmittite"); 12.2 ("universis iudicibus provinciarum Senator ppo, 534 ante Sept. I: ad scrinia dirigere"); 12.16 ("canonicaria, 537 ante Sept. I: ad scrinia nostra destinabis"). In the following examples, the reference is to members of the count of the sacred largesse: *Var.* 7.22 ("formula commonitorii illi et illi scrinariis de binis et ternis"); 9.18 (Edict of Athalaric: "si quis autem de nostris scriniis aliquid crediderit promerendum").

⁸⁹ Cass., *Var.* 6.6 (*formula* for appointment). In his *Consolation of Philosophy* (III, prose iv), Boethius, who took up the post in 522, seems to confirm that the *magister officiorum* was essential for ridding Ravenna of the corruption that had plagued the court under Odovacer. For a good review of the office in Ostrogothic Italy, see H. Wolfram, *History of the Goths*, p. 293. W. Sinnigen, "Administrative Shifts of Competence under Theoderic," *Traditio* 21 (1965), pp. 456-67. Barnwell argues unconvincingly that Cassiodorus' appointment *formula* for the Master's post may exaggerate its power somewhat. According to Barnwell, the sheer lack of any specific reference in the *Variae* to any such officer in action suggests that this position was becoming increasingly obsolete. A reason for this is that Theoderic himself began to assume many of the responsibilities traditionally associated with the office. On this subject see Barnwell, *Emperors, Prefects and King*, pp. 143-5.

⁹⁰ Jill Harries and Ian Wood (eds.), *The Theodosian Code* (Ithaca, New York, 1993), p. 7.

⁹¹ *Not. Dig. Or.* 11.13-16, ed. O. Seeck (Berlin, 1876; reprinted Frankfurt, 1962). The *Notitia* is an official list of all ancient Roman civil and military posts drawn up under the auspices of the offices of the eastern and western *primicerius notariorum* respectively. Latest scholarly efforts to date both western and eastern versions of the list place it somewhere between 395 and 427. On the significance of this document and the problems surrounding it, see in general G. Clemente, *La Notitia Dignitatum*, *Saggi di storia e letteratura* 4 (Cagliari, 1968); Michael Kulikowski, "The 'Notitia Dignitatum' as a Historical Source," *Historia* 49.3 (2000), pp. 358-77.

⁹² *Not. Dig. Or.* 12.

⁹³ *Not. Dig. Occ.* 10. As witness to the importance of the quaestor in imperial lawmaking in Late Antiquity are the *Theodosian Code* (438) and Justinian's *Code*, *Digest* and *Institutes*, produced between 529 and 534 – each the product of imperial quaestors. On the production of the *Theodosian Code*, see John Matthews, "The Making of the

Under Theoderic, the position of the quaestor remained largely unchanged. In the official scheme of things, the officer was the third-highest-ranking official, immediately behind the Praetorian Prefect of the West and the Prefect of Rome.⁹⁴ According to Cassiodorus' *formula* for appointment, the main points of which are reiterated throughout the *Variae*,⁹⁵ the quaestor was responsible for dealing with appeals and petitions, and the restatement of existing laws in edictal form – which is precisely what the *ET* was:

Of necessity, this office [i.e. the quaestor's] is linked intimately to my [i.e. the king's] thoughts, that it may speak in its own words what it knows as my sentiments; it discards its own will and judgement, and so absorbs the purpose of my mind that you would think its discourse really came from me ... Think of the honour and responsibility you have in equal measure. If I am in any doubt, I ask the Quaestor, who is a treasury of public reputation, a store-room of the laws, ever ready for the unexpected ... Finally, the Quaestor must be such a man as it befits to bear the image of a prince. For if, as is often the case, I should chance to hear a case from documents, how great will be the authority of that tongue which can prime the royal wits under the public eye? Legal skill and cautious speech must accompany him, so that no one shall criticize what the prince may happen to decide ... For to you, the provinces transmit their petitions; from you, the Senate seeks the aid of the laws; from you experts request the justice they have learnt; and you must satisfy all those who may demand legal help from me.⁹⁶

Text," in Jill Harries and Ian Wood (eds.), *The Theodosian Code*, pp. 19-44; Tony Honoré, "Some Quaestors of the Reign of Theodosius II," in Harries and Ian Wood (eds.), *The Theodosian Code*, pp. 68-94. The standard work of Tribonian, the quaestor *par excellence* of the emperor Justinian, is that of Tony Honoré, *Tribonian* (London, 1978), esp. chs. 1, 2, 5-7. On the importance of the quaestor in imperial lawmaking in Late Antiquity, see Jill Harries, "The Roman Imperial Quaestor," pp. 148-721; Honoré, *Tribonian*, pp. 8-9

⁹⁴ Cass., *Var. 6 capitula*, arranged in order of rank. In the index of the *Not. Dig. Or.* the *magister officiorum* ranks above the quaestor in importance. In Ostrogothic Italy the evidence would seem to suggest that the order in which individuals could hold these two offices was interchangeable. Cassiodorus, for instance, held the quaestorship before he was appointed as *magister officiorum*. Eugenius (*PLRE 2*, pp. 414-16) followed a similar career path, but Faustus Niger (*PLRE 2*, 'Faustus 9,' pp. 454-6) was master of offices before he was quaestor. See further Andrew Gillett, "The Purposes of Cassiodorus' *Variae*," in A. C. Murray (ed.), *After Rome's Fall: Narrators and Sources of Early Medieval History. Essays Presented to Walter Goffart* (Toronto, 1998), pp. 37-50, esp. pp. 41-2.

⁹⁵ E.g., *Var. 5.4* (a letter notifying the Senate of the appointment of Honoratus as quaestor). See also *Var. 8.13* (a letter in Athalaric's name conferring the position of quaestor on a certain Ambrosius – presumably the same Ambrosius to whom Ennodius addressed his 'Paraenesis Didascalica,' containing some important notices of Festus, Symmachus, Boethius, Cethegus, and their contemporaries: see *PLRE*, p. 69); *8.18* (a letter in Athalaric's name appointing Felix to the position of quaestor); and *10.6* (an appointment letter in Theodahad's name conferring the position of quaestor on Patricius). Judging by these names, it would seem that the position of the quaestor was usually reserved for members of the Roman elite.

⁹⁶ Cass., *Var. 6.5* (trans. Barnish, *Variae*, pp. 96-7): "Haec nostris cogitationibus necessario familiariter applicatur, ut proprie dicere possit quod nos sentire cognoscit: arbitrium suae voluntatis deponit et ita mentis nostrae velle suscipit, ut a nobis magis putetur exisse quod loquitur ... Considerate quid ponderis habeatis pariter et decoris. si quid dubitamus, a quaestore requirimus, qui est thesaurus famae publicae, armarium legum, paratus semper ad

While many of Cassiodorus' own letters attest to the importance of eloquence in the quaestor's role as official spokesman for the king,⁹⁷ his appointment letters for the position make it clear that legal knowledge was essential. Despite the fact that the *ET* lacks the rhetorical flourish of Cassiodorus' *Variae*, it certainly attests to the legal erudition of the officer under whose supervision it was most likely produced.

In light of all this evidence, Pithou's original attribution of the *ET* to Theoderic the Great seems more than justified. First, the *ET* itself points to it being the product of Ostrogothic Italy. Second, we have two sources, the Anonymous Valesianus and Cassiodorus, who tell us that Theoderic issued both an *Edict* as well as several individual edicts, some of which not only parallel but also appear to refer specifically to ones found in the *ET*. Although we cannot establish an exact date of publication, it is clear that the *ET* was produced well after 458, most likely before 512 and possibly around 500. Moreover, there is good reason to conclude that it was the work of Roman jurists commissioned for the task by the *quaestor sacri palatii*. This office, Cassiodorus informs us, was an integral component of Theoderic's administration, which was responsible for many things including the issuance of edicts. These were binding rules that reinforced, added to, and in some cases clarified certain points of the law. For

subitum ... Talem denique oportet esse quaestorem, qualem portare principis decet imaginem. nam si nos, ut assolet, causam gestis audire contingat, quae auctoritas erit linguae, quae sub oculis regalem genium possit implere? adesse debet scientia iuris, cautela sermonis, ut nemo debeat reprehendere quod principem constiterit censuisse ... Ad te enim provinciae sua vota transmittunt: a te senatus iuris quaerit auxilium: a te docti probantur expetere quod noverunt, et necesse tibi est omnibus sufficere, quantos a nobis contigerit legum remedia postulare."

⁹⁷ E.g., Cass., *Var.* 8.14 (a letter of appointment for Ambrosius, a quaestor under Athalaric c. 526: trans. Gillett, "The Purposes of Cassiodorus' *Variae*," p. 42): "It is tactless to praise the talents of eloquence in a *quaestor*, since he is judged to have done well in his office specifically when he graces the reputation of our times with the quality of his speech. For to some magistrates in the provinces taxation is committed, to others is delegated the care of royal finances; here, however, are stored the outward signs of the fame of the palace, and from here the popular reputation of the court is extolled throughout the whole world." ("Eloquentiae vero bona ineptum est in quaestore praedicare, cum ad hoc specialiter probetur adscitus, ut opinionem temporum commendat qualitate dictorum. Aliis enim iudiciis provinciarum committatur exactio, aliis privati aerarii custodia delegeta: hic autem aulicae famae insignia reponuntur, unde per totum mundum opinio vulgata laudetur.")

Theoderic, who lacked the official capacity to issue laws in the same way an emperor did, edicts provided him the means by which to maintain peace and order through binding rules that explained how the law – that is Roman law – was to be properly observed. The *ET* was a collection of 154 such edicts.

The Purpose of the ET

As the prologue expressly states, the immediate purpose of the *ET* was to lay out the legal rules that were to apply both to Romans and barbarians:

Many complaints have come to Our attention that some people within the provinces are trampling upon the rules of law. Even though the authority of the laws can in no way be used to defend unjust actions, however, We, taking into consideration the [desired] peace of the population, and having before Our eyes the irregularities that can often occur, command that the present edicts be posted for ending matters of this sort, so that both barbarians and Romans, while maintaining the respect due to the public laws and dutifully preserving in their entirety the rights of everyone, may clearly know what they are obligated to follow concerning the items specified in the present edicts.⁹⁸

The prologue announces that the king has received many complaints that laws are not being observed in the provinces. To preserve the desired peace and order, the *ET* was to be posted so that Romans and barbarians would know what was expected of them. The epilogue concludes by saying:

We have brought together these [edicts], advantageous to all barbarians as well as Romans, as much as Our labours could permit or We could address at this time; all loyal barbarians and Romans must abide by them. Those matters which either the brief scope of the *Edict*, or [Our] attention to [other] public business have prevented Us from including are to be settled as they arise by the usual path of the laws. Let no one with any rank, wealth, power, office or honour presume in any way to oppose these beneficial precepts. We have gathered these laws to some extent from recent law (*lex*) and the sanctity of ancient Roman custom (*ius*). And all judges and those who pronounce the law shall know that if they allow these

⁹⁸ *ET* prol.: “Querelae ad nos plurimae pervenerunt, intra provincias nonnullos legum praecepta calcare. Et quamvis nullum iniuste factum possit sub legum auctoritate defendere: nos tamen cogitantes generalitatis quietem et ante oculos habentes illa, quae possunt saepe contingere, pro huiusmodi casibus terminandis praesentia iussimus edicta pendere: ut salva iuris publici reverentia et legibus omnibus cunctorum devotione servandis, quae barbari Romanique sequi debeant super expressis articulis, edictis praesentibus evidentem cognoscant.”

edicts to be violated in any way, they shall be deservedly struck by the punishment of proscription and exile. But if it happens that a person of considerable influence or his procurator, deputy or even chief tenant, whether barbarian or Roman, does not allow the present edicts (which have been decreed for the good of all) to be heeded in a case of some kind, and the judge involved is unable to withstand or prevent this, let that judge, if he has his own interests at heart, draw up an account of everything, lay aside any appearance of fear, and without delay send a report to Us. Only in this way can he be absolved of blame. For it is the duty of the whole to uphold that which has been provided for the security of all provincials.⁹⁹

Neither ignorance of the law nor the claim that an alleged crime did not figure as the object of a particular ruling constituted a defence, but matters outside the scope of the *Edict* were to be settled as the law required.

Both the prologue and epilogue establish that the context for the *ET*'s enforcement was provincial in outlook. The realm envisaged is not a *regnum*, kingdom, but a *respublica*¹⁰⁰ consisting of *provinciae*, Roman provinces administered by the central authority through the provincial governors – variously identified throughout the text as *iudices provinciae*, *iudices per provinciam constituti*, or *cognitores*.¹⁰¹ The authority of the *ET* as a valid source for settling disputes lay in the fact that it was derived from *novellae leges* and *vetus ius*, that is to say,

⁹⁹ *ET* epil.: “Haec quantum occupationes nostrae admittere, vel quae nobis ad praesens occurrere potuerunt, cunctis tam barbaris, quam Romanis, sumus profutura complexi: quae omnium barbarorum, sive Romanorum debet servare devotio. Quae comprehendere nos vel edicti brevitatis, vel curae publicae non siverunt, quoties oborta fuerint, custodito legum tramite terminentur. Nec cuiuslibet dignitatis, aut substantiae, aut potentiae, aut cinguli vel honoris persona, contra haec, quae salubriter statuta sunt, quolibet modo credat esse veniendum; quae ex novellis legibus ac veteris iuris sanctimonia pro aliqua parte collegimus: scituris cognitoribus universis ac iura dictantibus, quod si in aliquo haec edicta fuerint violata, se proscriptionis deportationisque poena merito esse feriendos. Quod si forsitan persona potentior, aut eius procurator, vel vice dominus ipsius, aut certe conductor, seu barbari, seu Romani, in aliquo genere causae praesentia non permiserint edicta servari, et iudex, cuius intererit obsistere aut vindicare aut obviare non potuerit, in nostram illico, si sibi consulit, instructa ex omnibus relatione dirigat, deposita totius formidinis suspicione, notitiam. Haec enim sola ratione a culpa esse poterit absolutus. Quia quod pro omnium provincialium securitate provisum est, universitatis debet servare devotio.”

¹⁰⁰ *ET* 32 (concerning military testaments) actually uses the term *respublica*. Similarly, Cass., *Var.* 5.41.5: “in penuria rei publicae.”

¹⁰¹ A total of twenty-nine provisions deal directly with, or contain a reference to, the *iudex*: *ET* 1-7, 8, 10, 25, 46, 52, 53, 55, 56, 58, 64, 71, 73, 91, 99, 106, 109, 114, 123, 128, 131, 139, 145. On the subject of judges, see below, pp. 127-44.

written enactments or statutes, and ancient custom.¹⁰² This was a distinction between complementary sources of law that had been well understood in Roman jurisprudence. At times, the terms seem to refer with clarity and precision to particular rules drawn from specific imperial decrees, subscriptions and rescripts: *ET* 1, 12, 17, 24, 28, 29, 35, 36, 37, 53, 54, 68, 69, 71, 72, 113, 124, 143, 153. At others, *lex* or *ius* assumes a broader significance that does not correspond to any particular text but asserts that a particular transaction or agreement accorded with all that was just and authoritative: *ET* prol., 4, 7, 11, 13, 20, 26, 27, 31, 34, 55, 56, 104, 142, epil. In some instances the compilers were working directly from a specific text: the evidence for this lies in similarities between language, syntax and content. Elsewhere, they simply put into their own words a commonly-held legal principle or concept for which no particular source would have been necessary.

Without exception all provisions were either derived directly from a Roman source or based on a Roman legal principle or concept. In other words, the *ET* bears witness to the fact that Roman law continued to have full force in the provinces of Theoderic's Italy: it was the *ius commune* – the law common to Goths and Romans residing in those parts. And as the prologue and epilogue make clear, it was the responsibility of all, whether learned or ignorant, city-dweller or countryman, officer or citizen, barbarian or Roman, to uphold the rule of the law in equal measure. This is wholly in keeping with Roman tradition and the ideology of Theoderic's regime, the consistent message of which as presented by Cassiodorus makes the point that the Goths were required to adopt the superior juridical notions of the Roman legal system.

¹⁰² On this distinction between *ius* and *lex*, see Mousourakis, *The Historical and Institutional Context of Roman Law*, pp. 17-18; John Matthews, "Interpreting the *interpretationes* of the *Breviarium*," in R. W. Mathisen (ed.), *Law, Society and Authority*, pp. 11-32 at p. 16; Peter Stein, *Roman Law in European History* (Cambridge, 1999), pp. 4, 28; George Mousourakis, *The Historical and Institutional Context of Roman Law* (Aldershot, 2003), p. 357. For similar usages of the terms in later periods, see Rosamond McKitterick, *The Carolingians and the Written Word* (Cambridge, 1989), p. 38.

While Goths and Romans were expected to obey the solemnity of Roman law, each group fell under different jurisdictions which, according to Cassiodorus, corresponded to their respective functions: that of the former was military while the latter's was civilian. In theory, separation of function provided a simple means by which the incoming Goths could take up positions within the existing state structure, and thereby minimize the potentially disruptive consequences of their settlement. Cassiodorus' *formula* for the Gothic count (*comes Gothorum*) provides a rough sketch of this arrangement:

As we know that, by God's help, Goths are dwelling intermingled among you: in order to prevent the trouble which is accustomed to arise among partners We have deemed it necessary to send you as Count a sublime man, whose outstanding character has already been proven to Us, in order that he may terminate any contests arising between two Goths according to our edicts; but that, if any matter should arise between a Goth and a born Roman, he may, after consulting with a Roman jurisconsult, decide the strife by fair reason. As between two Romans let the Roman examiners whom we appoint in the various provinces decide the matter; so that each may keep his own laws, and with various judges one justice may embrace the whole realm.¹⁰³

The officer is instructed here to resolve cases involving Goths according to Theoderic's edicts (*nostra edicta*); whereas those between Goth and Roman by fair reason (*aequabili ratione*) in consultation with a Roman legal expert (*prudens Romanus*); and authorized Roman examiners, that is judges dispatched from Ravenna into the provinces, were to resolve those disputes where the litigants were Roman.

¹⁰³ Cass., *Var.* 7.3: "Cum deo iuvante sciamus Gothos vobiscum habitare permixtos, ne qua inter consortes, ut assolet, indisciplina nasceretur, necessarium duximus illum sublimem virum, bonis nobis moribus hactenus comprobatum, ad vos comitem destinare, qui secundum edicta nostra inter duos Gothos litem debeat amputare, si quod etiam inter Gothum et Romanum natum fuerit fortasse negotium, adhibito sibi prudente Romano certamen possit aequabili ratione discingere. inter duos autem Romanos Romani audiant quos per provincias dirigimus cognitores, ut unicuique sua iura serventur et sub diversitate iudicum una iustitia complectatur universes." This idea of Goths and Romans living under separate jurisdictions appears at several points in the *Variae*, being by its very nature a continuance in not so subtle terms of traditional Roman propaganda which justified taxation with the need to pay for defence: e.g., Cass., *Var.* 6.1 (*formula* for the consulship); 7.3 (*formula* for the Gothic count); 7.4 (*formula* for the duke of Raetia); 9.14.8 (from a letter in Athalaric's name to the *vir spectabilis* Gildas, governor of Syracuse, concerning many of his alleged misdoings). On this functional division between barbarians and Romans, see below pp. 124-27.

Just as in the late Empire, soldiers and civilians were to be judged separately. The difficulty, however, was to ensure justice in disputes involving Roman and Goth, where the jurisdiction was not clear. What is meant here by ‘fair reason’ is uncertain. But elsewhere Cassiodorus is more explicit, and insistent, that such disputes were to be settled by a common, that is to say Roman, law. For instance, in a letter drafted in Theoderic’s name and addressed to Sunhiudas (a. 507-12), the newly-appointed governor of Samnium, Cassiodorus has the king proclaim:

Now use this opportunity: strive to respond to so favourable a judgement by honourable practices, and show yourself well fitted to my commands, since you formerly pleased me of your own accord. Therefore, within the province of Samnium, terminate according to the laws any case that may arise between a Roman and Goths, or a Goth and Romans. Those whom I singly-mindedly wish to defend, I do not permit to live by separate laws.¹⁰⁴

Cassiodorus reiterates this point several times in his letters: the superiority of the Goths can only be achieved through their obedience to Roman law;¹⁰⁵ the Senate, the symbolic head of the old Roman order and therefore an example to be followed by the Goths, are instructed to observe *ius Romanum*;¹⁰⁶ and the newly-reconquered provinces of Gaul are likewise encouraged to obey Roman law, which has now at last been restored to them.¹⁰⁷ In another letter regarding the return of runaway slaves in these provinces, Cassiodorus has Theoderic remark: “We are delighted that those whom We wish to defend with arms are living under Roman law ... For what profit results

¹⁰⁴ Var. 3.13.2 (trans. Barnish, *Variae*, p. 53): “Unde nunc enitere, ut tam bono iudicio laudabili respondeas instituto, aptumque te nostris praebe mandatis, qui hactenus propria sponte placuisti. intra provinciam itaque Samnii si quod negotium Romano cum Gothis est aut Gotho emersit aliquod cum Romanis, legum consideratione defines, nec permittimus discreto iure vivere quos uno voto volumus vindicare.”

¹⁰⁵ Cass., Var. 1.1.3.

¹⁰⁶ Cass., Var. 1.27. Similarly Var. 1.31, where Romans are reminded that “there is nothing that we [Theoderic] want you to preserve more keenly than the discipline of your ancestors, so that you might increase under our reign what you have always, since ancient times, held as praiseworthy.” (“nihil est enim, quod studiosius servare vos cupimus quam vestrorum veterum disciplinam, ut, quod ab antiquis laudabile semper habuistis.”)

¹⁰⁷ Cass., Var. 3.17.

from removing barbarian confusion if one does not live by the laws?”¹⁰⁸ Similarly, the Anonymous Valesianus reports that soon after his authority was recognized by the eastern emperor Anastasius, Theoderic made an announcement to the Senate and people of Rome, “promising that with God’s help he would preserve inviolate the legal order of the former emperors.”¹⁰⁹

The *ET* presupposes the existence of a population still concerned with the forms and procedures of Roman law, and still with access to institutional resources at the local level, such as municipal *curia* and *gesta*, by which they could be administered.¹¹⁰ Thus, despite their universal application, the provisions were entirely Roman in nature: they bear no discernable traces of a Gothic legal tradition along the lines of that of the so-called *belagines* – supposed Gothic written legal tradition predating the Goth’s arrival on the Italian peninsula. The *ET* was to supplement existing Roman law, which was at this time erratically preserved in sources that were not easily accessible for the general public at large. For instance, the *Theodosian Code*, arguably the most important source for Roman law in the West throughout the early Middle Ages, survives in only ten manuscripts from before the ninth century.¹¹¹ This is not a very significant number for such an important legal source, and is perhaps an indication that the preservation and transmission of Roman legal texts in general was at this time limited. Given its purpose, then, the *ET* did not have to be comprehensive, only relevant. For this, it had to be suited for the most pressing issues in Italy at the time of its production.

¹⁰⁸ Cass., *Var.* 3.43: “Delectamur iure Romano vivere quos armis cupimus vindicare ... quid enim proficit barbaros removisse confusos, nisi vivatur ex legibus?”

¹⁰⁹ Anon. Val. 12.66: “se omnia deo iuvante quod retro principes Romani ordinaverunt inviolabiliter servaturum promittit.” Likewise, Procopius describes (*BG* 1.1.25-39) how Theoderic “was exceedingly careful to observe justice, and preserved the laws.” (“δικαιοσύνης τε γὰρ ὑπερφῶς ἐπεμελήσατο καὶ τοὺς νόμους ἐν τῷ βεβαίῳ διεσώσατο.”)

¹¹⁰ Municipal *curia*: *ET* 27, 52, 53, 126; municipal *gesta*: *ET* 52, 64, 80.

¹¹¹ In *Codices Latinae Antiquiores* Lowe listed nine manuscripts of the *CTh*, or sections of it, one manuscript of a summary of the *CTh*, and one manuscript of the post-Theodosian Novels. Of these, he assigned only one manuscript of the *CTh* to Italy (*CLA* VIII 1212).

The *ET* could be consulted either by judges or litigants themselves in an effort to resolve the sorts of disputes that most often came to the attention of the king. These included disputes not just between Romans, but also between Romans and Goths. Thus, it had particular relevance in those places where the Goths actually resided. For the most part, Theoderic's soldiers and the families they brought with them, a group numbering around 100,000,¹¹² were settled in regional clusters outside urban centres.¹¹³ Procopius' war narrative suggests very strongly that in the 530s the Goths were concentrated in three specific areas: Samnium and Picenum on the Adriatic coast and between Ravenna and Rome, Liguria to the north west, and the Veneto to the north east.¹¹⁴ Such an arrangement makes perfect sense strategically: in occupying these regions Theoderic effectively controlled the major transalpine and internal east-west routes that intersected Italy, while at the same time ensuring a military presence along the east coast in the event of a possible Byzantine attack.¹¹⁵ Within these regions Goths could be settled permanently as urban garrisons;¹¹⁶ but elsewhere there is no evidence to suggest that such urban garrisons were anything but temporary, being mobilized against specific Byzantine threats.¹¹⁷ Of course, this is not to say that the *ET* did not – at least nominally – apply equally to all parts of Italy. For instance, as we shall see, its authors believed that it had full force within the walls of Rome

¹¹² The question of the number of Goths, including soldiers and civilians, who accompanied Theoderic to Italy is difficult to assess with any certainty. Conservative estimates place their number at 20,000 soldiers, that is to say, about one hundred thousand people altogether. For this see Patrick Amory, *People and Identity*, p. 41. Thomas S. Burns ("Calculating Ostrogothic Population," *Acta Antiqua Academiae Scientiarum Hungaricae* 26 [1978], pp. 457-64) estimates the total number of soldiers between 35,000 and 40,000; and Herwig Wolfram (*History of the Goths*, p. 279) estimates about 100,000. This figure is supported by Wilhelm Ensslin in his *Theoderic der Grosse*, 2nd edn. (Munich, 1959), pp. 62-4.

¹¹³ Peter Heather, "Merely an Ideology? – Gothic Identity in Ostrogothic Italy," in Sam Barnish and Federico Marazzi (eds.), *The Ostrogoths from the Migration Period to the Sixth Century*, pp. 31-60, esp. pp. 40-43; Moorhead, *Theoderic*, p. 69 n. 12; *contra* Amory, *People and Identity*, pp. 93-4, who argues that the Goths were interspersed throughout the entire peninsula.

¹¹⁴ Heather, "Merely an Ideology?" p. 40.

¹¹⁵ Heather, "Merely an Ideology?" p. 41.

¹¹⁶ Procopius, *Wars* 6.28.30-5 (concerning the Goths guarding the routes through the Cottian Alps, who were clearly settled in the fortresses of the region).

¹¹⁷ Moorhead, *Theoderic in Italy*, p. 69 n. 12; Heather, "Merely an Ideology?" p. 40.

itself, once the political and symbolic centre of the Roman Empire, and which was at this time the seat of power for the senatorial elite of Italy.¹¹⁸

The Provisions of the ET

The *ET* addresses a wide variety of subjects in a somewhat disjointed and *ad hoc* manner.¹¹⁹

Topics, which range from sundry breaches of the public and criminal law to aspects of the private law and civil misdemeanors, do not follow the Theodosian model which groups constitutions chronologically under subject headings. Instead, they are listed regardless of heading (*titulus*) and with little consideration of subject matter. Several provisions concern civic administration and judicial procedure, as well as wrongful acts whose punishment was pursued in the interest of the community in public courts (*crimina*). Examples include instances of judicial corruption and venality, sedition, murder, abduction (*raptus*) and kidnapping (*plagium*), adultery, robbery, forgery, peculation, arson, necromancy, sorcery, the violation of tombs, fiscal liability and caducous land. Topics of Roman private law, which incorporates the law of persons, things, obligations, succession, civil procedure and *delicta* (that is, civil wrongs where the state had no interest), include: ownership and possession, contract, sale and donation, betrothal, marriage, concubinage, *stuprum*, *raptus*, divorce, testacy and inheritance. The following chart provides a breakdown. Topics of Roman public and criminal law are listed on the left, and private law matters on the right; the corresponding provisions of the *ET* are noted in parentheses:

Public Law and <i>Crimina</i>	Private Law and <i>Delicta</i>
judicial corruption (1, 2)	unauthorized detention/punishment of a freeman (8, 9)
judicial misconduct (3, 4)	temporary seizure of another's property (10)
delivery of a judgement and the conclusion of a legal action (5-7)	right to self defence (15, 16)

¹¹⁸ Chris Wickham, *Early Medieval Italy*, p. 18.

¹¹⁹ On the provisions of the *ET*, see W. Ensslin, *Theoderich der Grosse*, pp. 220-36; Hans-Jürgen Becker, "Edictum Theoderici," in *Handwörterbuch zur deutschen Rechtsgeschichte* 1 (Berlin, 1971). For an index of the *ET*, see G. Melillo et al. (eds.), *Lessico dell' «Edictum Theoderici Regis»* Edizioni Scientifiche Italiane (Rome, 1990).

<p>rules for laying a criminal accusation (13, 14, 50)</p> <p>intestate claims involving the fisc (24, 25, 27)</p> <p>soldier's will (32)</p> <p>informers in court (<i>delatores</i>) (35)</p> <p>adultery (38, 39)</p> <p>perjury (40, 42, 91)</p> <p>forgery (30, 41, 90)</p> <p>prohibition against the seizure of crown property (47)</p> <p>testimony of freedmen, originarii and slaves against current and former masters (48, 49)</p> <p>fiscal liability (51-3, 144)</p> <p>rules of appeal (55)</p> <p>cattle rustling (56-8)</p> <p>removal of public debtors from churches and places of worship (71)</p> <p>public registration of wills (72)</p> <p>guidelines for the enforcement of judicial decrees (73)</p> <p>armed brigands (75)</p> <p>noxal liability in a criminal context (77, 117, 118, 120)</p> <p><i>plagium</i> (78, 81)</p> <p>inciting violence (89)</p> <p>arson (97)</p> <p>homicide (99)</p> <p>safeguards for a slave giving testimony in a criminal proceeding (100-102)</p> <p>jurisdiction for the prosecution of a crime (103)</p> <p>rules for the use of oaths in a legal proceeding (106)</p> <p>sedition (107)</p> <p>prohibition against the practice of pagan ceremonies, necromancy and sorcery (108)</p> <p>destruction of tombs (110)</p> <p>theft of public money (115)</p> <p>recognition of the privileges of Jews (143)</p> <p>recalcitrant barbarians (145)</p> <p>regulations on the proper use of measures and scales for transaction (149)</p> <p>on the proper observance of Sunday and the days of Easter (154)</p>	<p>abduction (<i>raptus</i>) (17-22)</p> <p>recovery of lost or stolen property (11, 119, 131, 146, 148)</p> <p>thirty-year limit by which <i>de iure</i> ownership is established (12)</p> <p>intestate claims involving private individuals (23, 26)</p> <p>robbery and theft (34, 116, 129, 130)</p> <p>wills and inheritance (28, 29, 31, 33)</p> <p>illicit marriage (36)</p> <p>remarriage of a woman (37)</p> <p>prohibition against transferring a legal action to a <i>potentior</i> (43)</p> <p>prohibition against the involvement of a <i>potentior</i> in another's suit (44)</p> <p>prohibition against the use of titles to indicate ownership (45, 46)</p> <p>rules for initiating unilateral divorce (54)</p> <p><i>stuprum</i> (59-63)</p> <p>mixed marriages and slave unions (64-67)</p> <p>rules of prescription (68, 69)</p> <p>removal of runaway slaves from churches and places of worship (70)</p> <p>liability for bringing forward a frivolous civil action (74)</p> <p>restoration of property and temporary possession (76)</p> <p>enslavement of freemen (79, 82, 83, 96)</p> <p>runaway slaves (80, 84, 85, 87)</p> <p>immunity from prosecution to the relatives of a rustler, seducer or thief (88)</p> <p>misuse/destruction of another's property (86, 150-52)</p> <p>betrothal (92, 93)</p> <p>selling/pledging children (94, 95)</p> <p>boundary markers (104, 105)</p> <p>improper disposing of a corpse within Rome (111)</p> <p>guidelines for making and recovering loans (121-27, 134, 135)</p> <p>noxal liability in a civil context (98, 109, 128)</p> <p>rights, property and children of individuals convicted of a criminal act (112-114)</p> <p>civil actions involving property holders (132)</p> <p>financial immunity for women (133, 153)</p> <p>ownership involving disputed property (136-</p>
---	---

	38) contracts and agreements of sale (139-41, 147) right of owners to transfer slaves, <i>originarii</i> , and <i>coloni</i> (142)
--	---

As we can see, the *ET* is primarily a handbook of Roman private law, with a total of 94 provisions dealing in whole or in part with issues pertaining to the law of persons, property, contract, sale, family, and *delicta* of one sort or another.

One reason for this disparity is the very narrow definition applied by Roman law to what constituted a crime. A crime was a wrongful act that generated a penalty, *poena*, which benefitted the community rather than the victim. The penalty itself could vary: it could be flogging, exile or death, which meant that it affected the status of the wrongdoer exclusively; or it might be sub-capital, which usually involved a fine (*multa*) that was paid not to the victim or his family but to the treasury. Acts which fell under this category included both crimes against the state (e.g., treason and sedition) and common law crimes that primarily affected only the injured party, such as murder, forgery, kidnapping and adultery. This category excludes a number of wrongful acts that we might classify as ‘criminal’, such as theft, fraud, injurious behaviour, robbery and some kinds of murder (e.g. of a slave), as well as actions that we might define as ‘white-collar crime’, such as embezzlement. In these instances, it was the victim alone who benefited from the stipulated remedy. While the state provided the judicial machinery for the settlement of these delicts, it had no vested interest in them.¹²⁰

With such a narrow definition of crime, we emerge with a somewhat restricted and arbitrary list of what constituted a public offence. While this accounts for some of the imbalance in the *ET* between public and private spheres, there is no disputing the obvious fact that the focus

¹²⁰ On this differentiation between crime and delict, see Richard Bauman, *Crime and Punishment in Ancient Rome* (London, 1996), p.2.

of the compilers was decidedly in favour of aspects pertaining to the private law. It should be noted that public/administrative law was itself not typical of the juristic writings of Paul, Ulpian or Marcian, or indeed of the *Gregorian* and *Hermogenian Codes* – important sources for the compilers of the *ET*. At the same time, the exclusion of topics associated with public law speaks to the purpose of the *ET* as a handbook of Roman private law. Thus, in making their selections the compilers ignored a great deal pertaining to Roman public law and civic administration. For instance, they make no reference to the Roman army, its enrollment, means of organization and provisioning. *ET* 32 only presupposes the fact that the Goths were soldiers, granting them the right to make wills in the same way Roman soldiers once did. The whole subject of Roman public works and entertainments is omitted. There is nothing in the *ET* on the repair of aqueducts or roads, public monuments and works of art, theatres, pimps and procurers, or wild beast shows (*venationes*) and gladiators – topics that are generally associated with life in the larger cities of the Empire, and which receive a good deal of attention from Cassiodorus.¹²¹ The vast and complex body of Roman tax law and its administration, including such topics as immunity for certain classes of persons, like doctors and teachers, the position of artists and manual labourers, and the properties and fiscal obligations (*munera*) of ship owners, is largely overlooked.

Such omissions as these are hardly surprising given that the *ET* was, for the most part, a collection of Roman private law made relevant for the contemporary period. The compilers do, however, make some interesting oversights. Concerning religion, for instance, they include three

¹²¹ Cass., *Var.* 4.47 (*cursus publicus*); 11.12 (Flaminian Way); 3.31 (statues); 5.38, 8.30 (aqueducts); 1.20, 1.27, 1.30, 3.51, 5.42, 6.4, Anon. Val. 12.60, 67 (games); *Var.* 7.10 (theatre); 1.31 and 32 (pantomimes); 7.10 and 9.21 (actors); 2.37, 5.38, 6.4, 7.6, 8.31, 9.6, 10.29 (baths). Of course, walls, roads and aqueducts continued to be maintained well into the early middle ages, at least in the former ancient capital. But this was becoming increasingly a matter of private initiative rather than public policy. In the city of Catana, for example, we are told by Cassiodorus that the walls and public works (theatre and amphitheatre) were in such a state of disrepair that the inhabitants petitioned the king, seeking permission to rebuild where possible (*Var.* 3.49). On the maintenance of walls and aqueducts in Rome, see Robert Coates-Stephens, “The Walls and Aqueducts of Rome in the Early Middle Ages, A.D. 500-1000,” *JRS* 88 (1998), pp. 167-78.

provisions that address the topic directly. *ET* 143, cited above, confirms the privileges of Jews. *ET* 154 recognizes Sundays and the days of Easter as legal holidays. Here, the compilers refer to Sunday in antiquarian terms as the day of the sun (*dies Solis*), and qualify this further to mean the day of the Lord (*qui dominicus nuncupatur*). This is a specific reference to Constantine's purposeful identification between the pagan day for the worship of the sun and the Lord's Day of the Christians.¹²² And *ET* 108 is a prohibition against the practice of pagan rites, which the compilers associate with the activities of diviners (*[h]arioli*), necromancers (*umbrarii*) and those knowledgeable of the wicked arts (*malarum artium conscii, id est malefici*). In light of these inclusions, it is noteworthy to find nothing in the *ET* on the Catholic faith (aside from the traditional respect afforded Sundays and Easter) or heresy and heretics; and nothing on monasticism, baptism or apostasy – subjects which received a great deal of attention by Christian emperors from Constantine onwards.

It is tempting to see in these omissions a sympathy of the compilers to the fact that Theoderic and the bulk of his followers were Arian – a fact that had the potential to drive a wedge between Goths and Romans.¹²³ Theoderic was acutely aware of this possibility, and in turn adopted a religious policy that was characterized by tolerance and a reluctance to intervene in the affairs of the Catholic Church (at least until the closing years of his reign when his relations with the Church suddenly turned sour).¹²⁴ The Anonymous Valesianus, for instance, observed that Theoderic, despite his being Arian, did nothing against the Catholic faith, and described him as the son of a Catholic mother, even going to St Peter's "most devoutly and like a

¹²² The model for this, a rescript of the emperor Valentinian of 386 (*CTh* 2.8.18), glosses the phrase '*solis die*' with the words '*quem dominicum rite dixere maiores*' as does *CTh* 8.8.3 (386), together with its *interpretatio* (*Brev.* 8.3.1).

¹²³ On this point, see Moorhead, *Theoderic in Italy*, pp. 89-91.

¹²⁴ *Ibid.*, pp. 91-3. See also Wolfram, *History of the Goths*, pp. 327-8; Moorhead, *Theoderic in Italy*, pp. 97-100 (concerning Jews); T.S. Brown, "Everyday life in Ravenna under Theoderic: an example of his 'tolerance' and 'prosperity'?", XIII Congresso, Milan, 3 November 1992.

Catholic” during his visit to Rome in 500.¹²⁵ To remain silent on issues that could potentially draw attention to the differences between Gothic Arians and Roman Catholics would certainly help the two groups coexist peacefully, as Theoderic had hoped.

The same sort of editorializing we see in the *ET* is on display in the *Lex Romana Visigothorum* of 506 – a digest of Roman law incorporating selections, relevant for the contemporary period, of the *Codex Theodosianus* and other legal texts which served as the main source of Roman law for the Visigothic kingdom of Gaul.¹²⁶ The emphasis of those who compiled this work was likewise on aspects of Roman private law, in particular the law of property, gift, and succession.¹²⁷ In drawing from the *Theodosian Code*, these compilers omitted almost all laws pertaining to Roman civic offices and institutions, the organization of the army, taxation, the maintenance of public works and services, civic life in general, and religion.¹²⁸ From this process of selection and omission, we gain a sense of what was important and what was not. For the compilers of the *ET*, the focus was on such issues as runaway slaves, labour shortages, the overworking of slaves or oxen of another, damaged crops, shifting boundary markers, cattle rustlers, the usurpation of land at the hands of powerful magnates, careless farmhands and so on – in short, the sorts of perennial problems that plague all agricultural

¹²⁵ Anon. Val., 12.58 (Catholic mother); 12.60 (Catholic religion); 12.65 (visit to St Peter’s): “...in urbe ecclesiae ambulavit rex Theodericus Romam, et occurrit Beato Petro devotissimus ac si catholicus.”

¹²⁶ The *Lex Romana*, or *Breviary of Alaric*, is a compilation of selections from various Roman sources, including: the *Theodosian Code*, the *Gregorian* and *Hermogenian Codes*, some *Novellae* of Theodosius II and Valentinian III, and some extracts from a *responsum* of Papinian, Paul’s *Sententiae* and the complete *Epitome Gai*, the Gallic version of Gaius’ *Institutes* (reduced to two books and departing from the original text in many places). For the edition of the *Breviarium: Lex Romana Visigothorum* (or *Breviarium Alarici*), ed. K. Zeumer, *MGH LL nationum germanicarum* 1 (Hannover, 1902), pp. 33-456. For the *Breviarium* in general, see Mommsen, *Theodosiani*, 1. xxxii-xxxvii; J. Gaudemet, *Le Bréviaire d’Alaric et les Epitome*, *Ius Romanum Medii Aevi* I.2b (Milan, 1965); C. de Wretschko, “De usu Breviarii Alariciani forensi et scholastico per Hispaniam, Galliam, Italiam regionesque vicinas,” in Mommsen, *Theodosiani*, I. cccvii-cccxv; and R. Lambertini, *La codificazione di Alarico II* (Turin, 1990); H. Wolfram, *History of the Goths*, pp. 194-7 and nn. Full details as to the transmission of the text can be found in Mommsen’s extensive *Prolegomena*.

¹²⁷ On the circumstances surrounding the creation of this text and the identity of those responsible for its compilation, see John Matthews, “Interpreting the *interpretationes* of the *Breviarium*,” pp. 16-7; id., “Roman law and barbarian identity in the late Roman west,” pp. 31-45, esp. pp. 35-6.

¹²⁸ Matthews, “Interpreting the *interpretationes* of the *Breviarium*,” pp. 18-23.

communities. Their silence regarding those aspects of Roman public and administrative law is perhaps a statement of the extent to which such institutions no longer had any practical applications in Theoderic's Italy.

Vulgarisation and Roman Vulgar Law

Just as the selection of topics was dictated by the realities in which the *ET* was intended to function, so too was the content. The 154 edicts that comprise the *ET* are largely extracts of earlier imperial laws and juristic commentaries that were adapted to better suit the conditions associated with life in the provinces of early-sixth century Italy. A parallel in the East is the so-called Farmer's Law, a legal document that was probably drawn up in the late seventh or early eighth century, which incorporated provisions of the early to mid-sixth century.¹²⁹ But, in fact, this process of adaptation had been going on since the reign of Constantine. According to Ammianus Marcellinus, Constantine was denounced by his nephew, the apostate Julian, as an "innovator and disturber of the ancient laws and of custom received long ago."¹³⁰ Many modern scholars have agreed with Julian's description, viewing Constantine as a radical innovator responsible for the introduction into the Roman legal system of fundamentally non-Roman concepts, derived from Christian and eastern (primarily Greek law) sources, and the

¹²⁹ For convenient discussions and further literature, see Walter Ashburner, "Farmer's Law. I," *JHS* 30 (1910), pp. 68-108; id., "Farmer's Law. II," *JHS* 32 (1912), pp. 68-95; George Ostrogorsky, "La commune rurale byzantine: Loi agraire – Traité fiscal – Cadastre de Thèbes," *Byzantion* 32 (1962), pp. 140-7; id., *History of the Byzantine State*, 2nd edn. (Oxford, 1968), pp. 90-1; Haldon, J. F., *Byzantium in the Seventh Century: The Transformation of a Culture* (Cambridge, 1990), pp. 132-5; Whittow, Mark, *The Making of Orthodox Byzantium, 600-1025* (Basingstoke, 1996), pp. 115-17.

¹³⁰ Amm. Marc., 21.10.8.

vulgarisation of classical law.¹³¹ This final point requires brief consideration, for the *ET* has been viewed by many as a work of ‘vulgar’ law.¹³²

The term vulgarisation has been key to understanding some of the developments taking place in Roman law from the third to sixth century. It is a particularly value-laden concept that has traditionally been used to draw an artificial dichotomy between the sophisticated classical law of the Roman forum and the primitive custom of the Germanic forests. But as shall be seen, things were not nearly so black and white. The expression was first coined by the legal historian Heinrich Brunner in 1880 to designate a body of relatively simple, perhaps customary, law which was not written down, and which governed every day legal business in the western Roman provinces from the fourth to sixth century.¹³³ It was an evolution, or, depending upon one’s perspective, a degeneration of purely ‘classical’ Roman Civil Law, that is, the law that originally applied to the city of Rome.¹³⁴ But as the application of this law was gradually extended to encompass all Roman citizens living in outlying provinces, it gradually came to take account of,

¹³¹ Eastern law: Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs: Mit Beiträge zur Kenntniss des griechischen Rechts und der spätrömischen Rechtsentwicklung* (Leipzig, 1891), pp. 548-52. Id., ‘Vulgar’ law: *West Roman Vulgar Law: The Law of Property* (Philadelphia, 1952), pp. 9-10, *passim*.

¹³² Most notably Levy, *West Roman Vulgar Law*, *passim*. See also Stein, *Roman Law in European History*, p. 38 (in referring to Roman law in western Europe from the sixth to eleventh centuries as vulgar law).

¹³³ H. Brunner, *Zur Rechtsgeschichte der römischen und germanischen Urkunde I, Das Privaturkund Italiens; das angelsächsischen Landbuch; die fränkische Privaturkunde* (Berlin, 1880), pp. 113, 119; id., *Forschungen zur Geschichte des deutschen und französischen Rechtes* (Stuttgart, 1894), p. 607, n. 1. This was largely followed by Ernst Levy: *Pauli sententiae: a palingenesis of the opening titles as a specimen of research in west Roman vulgar law* (Ithaca, NY, 1945); id., “Vulgarization of Roman Law in the Early Middle Ages,” *Mediaevalia et Humanistica* 1 (1963), pp. 14-40; id., *West Roman Vulgar Law*, esp. pp. 6, 15; cf. many of his papers, gathered together in his *Gesammelte Schriften*, 2 vols. (Cologne, 1963). In the 1970s Franz Wieacker made a modest concession. Classical law, he argued, lingered on in an attenuated form until the end of the third century. Values were diluted but not altogether destroyed. Jurists continued to write summaries and epitomes of the law, though on a reduced scale. For this: “Le droit romain de la mort d’Alexandre Sévère à l’avènement de Dioclétien,” *RHDFE* 49 (1971), pp. 201-23; Wieacker’s earlier works, however, reinforce the gloomy outlook of later Roman law developments. See e.g. “Nochmals über Vulgarismus: Ein Diskussionsbeitrag,” in *Studi in onore di Emelio Betti* (5 vols.; Milan, 1962), v. The fundamental study of the development of Roman law in the East remains Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*. Here, the focus is on the influence of peregrine law on classical notions and principles of Roman law.

¹³⁴ For this definition and a discussion of *ius civile*, see Mousourakis, *The Historical and Institutional Context of Roman Law*, pp. 22-24; A.A. Schiller, *Roman Law: Mechanisms of Development* (New York, 1978), pp. 366-68, 525-27; M. Kaser, *Römische Rechtsgeschichte* (Göttingen, 1976), pp. 130-33; A. Guarino, *Diritto privato romano* (Naples, 2001), pp. 128-30.

and to be influenced by, custom or provincial practice in a process commonly referred to as ‘vulgarisation’. Prior to the granting of citizenship to all the inhabitants of the Empire, provincial communities were permitted to continue on observing their own local systems of law and custom provided they were not incompatible with Roman rule. As citizenship was gradually extended to ever increasing numbers of provincials, culminating in 212 with Caracalla’s *constitutio Antoniniana* that granted Roman citizenship to all free inhabitants of the Empire, provincial communities were required to adopt and apply the Civil Law, the rules and procedures of which were largely unknown to them. Given that the inhabitants of these communities were often reluctant to abandon the norms by which they had been governed in the past, elements of these local systems gradually crept into the Civil Law. Over time, Rome’s law lost its classical ‘purity’ and became ‘vulgarized’.¹³⁵ At the same time, Civil Law influenced to a considerable degree local conceptions of justice and legal practices. As a result, the law which in fact applied in the provinces of the Empire was an admixture of simplified Civil Law and local custom, varying from area to area, which shared little of the sophistication and elegance of classical Roman law.

The most influential voice for defining vulgar law has belonged to Ernst Levy, who drew attention to the vulgarizing tendencies inherent in Roman laws of property that slowly emerged in the West over the course of the third and fourth centuries.¹³⁶ Vulgarizing tendencies, Levy exclaims, had existed at all times, but classical jurisprudence kept them in check. Although vulgar law penetrated even the legislation, and was taken over by the elementary books for practitioners and students (for instance the author of the so-called *Pauli Sententiae*), third-

¹³⁵ For this version of events, see Barnwell, “Emperors, Jurists and Kings,” p. 14.

¹³⁶ Levy’s theories have found many adherents including, e.g., K.F. Drew, “The Germanic Family of the Lex Burgundionum,” *Mediaevalia et Humanistica* 15 (1963), pp. 5-14; and her “The Barbarian Kings as Lawgivers and Judges,” in R.S. Hoyt (ed.), *Life and Thought in Early Middle Ages* (Minneapolis, 1967), pp. 7-29; T. Honoré, “Ausonius and Vulgar Law,” *Iura* 35 (1984), pp. 79-82; J.B. Sirks, “Shifting Frontiers in the Law: Romans, Provincials and Barbarians,” in Mathisen and Sivan (eds.), *Shifting Frontiers in Late Antiquity* (Aldershot, 1996), pp. 146-57.

century emperors generally strove against this dissolution of the pure (classical) Roman law. The chief protagonist of this fight was Diocletian (284-305), and with his abdication this imperial policy came to an abrupt end. Levy considers that the spread of vulgar law in the West over the course of the fourth and fifth centuries was due largely to its tendency towards popularization, away from the technicalities of the classical structure, and the desire for regulations adapted to the conditions of the time. Related to Caracalla's universal grant of citizenship was the spreading of a relaxation of legal discipline. A corollary to this was a decline in legal erudition associated with a drop in the number of skilled legal professionals. The result was the emergence of a new type of law. Adhering neither to traditional niceties nor strict concepts, this law was unable, or simply unwilling to match the standards of the artistic and comprehensive elaboration of logical construction which defined classical jurisprudence.¹³⁷ This was the vulgar law.

According to Levy and others, Roman law was in the later Empire not just misunderstood or misapplied in places where legal experts were lacking. The official law of the Roman State sank to an almost primitive and unscientific level. For Levy, the law of property in particular suffered a decline. Fourth- and fifth-century jurists and lawyers could not comprehend even the most basic principles: distinctions between contract and conveyance, ownership and possession, rights *in rem* and *in personam*, and so on. More recent work on late Roman law, however, suggests that it is time to reassess this concept of 'vulgarisation'.¹³⁸ In the first place, the number of trained lawyers and legal experts all over the later Empire did not decline.¹³⁹ Only after the Visigothic sack of Rome in 410 did the availability of lawyers, at least in remote areas,

¹³⁷ Levy, *West Roman Vulgar Law*, p. 7.

¹³⁸ Tony Honoré, for example, exclaims: "This Vulgar Law theory is a prize candidate for scholarship's Most Implausible Myth ..." See his "Conveyances of Land and Professional Standards in the Later Empire," in Peter Birks (ed.), *New Perspectives in the Roman Law of Property. Essays for Barry Nicholas* (Oxford, 1989), pp. 137-52, at p. 151. The discussion that follows draws on many ideas put forth by Honoré in this work.

¹³⁹ Detlef Liebs, *Die Jurisprudenz im spätantiken Italien 260-640 n. Chr.* (Berlin, 1987), p. 284.

become somewhat of a problem.¹⁴⁰ Lawyers and legal experts remained in high demand as assessors in the late imperial *scrinia*; and Cassiodorus, too, attests to the continued importance of skilled lawyers and jurists in the early sixth century.¹⁴¹ In such a society, bureaucratic and committed to the rule of law, it is hard to imagine that professional standards and legal erudition declined in the dramatic way supposed by Levy and others. Evidence from the *ET* argues against any such decline. To take as an example *ET* 147, concerning sale:

A sale agreed upon in good faith and concluded cannot be challenged by the vendor; but he may demand from the buyer any outstanding payment.¹⁴²

If a contract requiring good faith has been made, ownership of the thing has been transferred, and the price paid, the validity of the sale could not later be challenged, for example on the grounds that the price was too low.¹⁴³ Levy argues that the transfer of title was the instantaneous consequence of payment, and has taken this provision as proof that the tendency in post-classical times was to conflate two or all of the separate elements that defined sale in the classical period – that is, contract (usually the consensual *emptio-venditio* contract), transfer/conveyance of

¹⁴⁰ *Nov. Val.* 32.6 (31 Jan. 451) referring to the lack of lawyers and judges since the time of Alaric's invasion.

¹⁴¹ E.g., *Cass., Var.* 1.12 (a letter written in the name of Theoderic to the *vir illustris* Eugenius, extolling his skills as an advocate); 4.3 (a letter addressed in Theoderic's name to the *vir illustris* and *comes* Senarius, newly elected to the position of *comes patrimonii*, mentioning his skill as an advocate, and commends his track record as an honest officer to the crown); 5.4 (Honoratus, subject of this letter to the Roman senate concerning his appointment as quaestor, is extolled for his service as an advocate in Spoleto, where he had to contend against the corrupt practices of the provincial judges); 5.22 (another letter addressed in the name of Theoderic to the senate of Rome, concerning the appointment of a certain Capuanus as *rector decurionum*, noting his distinguished service as an advocate before the senate). Cassiodorus himself admits (*Var., praefatio chartarum praefecturae*, 4, 5) that during his tenure of the prefecture, much of the judicial burden of the office was shouldered by his legal expert (*consiliarius*) Felix, and he rarely dealt with legal matters directly.

¹⁴² *ET* 147: "Placita bona fide et definita venditio a venditore rescindi non potest: sed pretium, quod ab emptore debetur, repetendum est."

¹⁴³ Levy, *Weströmisches Vulgarrecht. Das Obligationenrecht*, Forschungen zum römischen Recht (Weimar, 1956), p. 211. There were other factors, however that might void a sale that was otherwise correctly performed in this aspect. On the one hand, the transaction had to be consensual. A sale performed under duress was *prima facie* void, just as any forced donation was void. To that end, it was illegal for any minor to enter into a contract (*Cass., Var.* 4.35). On the other, there had to be a specific and authentic title vested in the vendor (or donor). An individual was not permitted to alienate property that was the subject of legal proceedings, which belonged to someone else or which was physically possessed by another who claimed it as his own (*ET* 10).

ownership, and payment of the price.¹⁴⁴ But it is unclear how *ET* 147 runs these incidents of sale together. In the first place, there is the contract requiring good faith (*placita bona fide et definita venditio*). The compilers presuppose the requirement that transfer of the ownership to the buyer is made; but nowhere do they conflate the action with the payment of the price – which is clearly separate, and had no effect on the transfer of ownership (as Levy maintains).

In the same way, *ET* 141 presupposes all three aspects of the classical sale as being achieved:

Anyone who sells a slave with a history of escaping to another unaware of this, should the slave then flee the buyer the vendor shall both return the payment and compensate [the buyer] for any losses he may have suffered as a result of that [fugitive] slave.¹⁴⁵

Here, the buyer had the right to recover the price of a slave on the ground that he was a recurrent runaway, along with any expenses he incurred as a result. The crux of the ruling rests on the fact that the contract for the sale of such a runaway slave was *prima facie* void, since it was not made in good faith; and it assumes that the transfer of the ownership to the buyer was accomplished (presumably through delivery), and that the payment of the price was given. There is nothing to suggest here that any or all stages of a classical sale were run together. The same holds true for *ET* 78, 83 and 120, which Levy cites as evidence for this conflation: the first deals with transference (either by sale or gift) of a freeborn man at the hands of a *plagiator* (kidnapper); the second concerns the selling or purchasing of a freeborn by a *humilior*; and the third applies to slaves that have been manumitted, sold or given away after having committing a theft. In none of these examples are the separate aspects of classical sale conflated. Given the firm grasp of

¹⁴⁴ Levy, *Law of property*, pp. 156-61, and *Schriften*, pp. 205-6, 213-14.

¹⁴⁵ *ET* 141: “Quicumque fugere solitum vendiderit ignoranti, si emptorem quoque fugerit, et precium venditor reddat et damna sarciat, quae per eundem contigerint fugitivum.”

classical distinctions displayed in these provisions, it is difficult to agree with Levy's assumption that legal erudition in Italy had been in sharp decline since the fourth century.

The *ET* is not a work of vulgar law in the way Levy has defined the concept. Nor is it a work of classical law and jurisprudence characterized by the kind of imperial legislation that pre-dates Diocletian or the classicizing efforts on display in Justinian's corpus. While the compilers certainly possessed a rudimentary knowledge of some of the more complex and technical aspects of classical law and jurisprudence, it is clear from their selection of topics and the characterization of the provisions which they wrote that such knowledge was no longer necessary, or even practical. They freely adapted the law to fit better the circumstances of their own time. For this, they relied heavily on long-held provincial customs and traditions. The *ET* bears out the influence of local customs and provincial practices on late Roman law in its emphasis upon reason, flexibility, and judicial discretion and not the strict technicalities of the classical legal tradition; as well as in its desire for specific regulations adapted to the conditions of the time, as opposed to general principles.¹⁴⁶ The compilers, like the Roman jurists before them, understood that custom could be more binding than formal regulation, because it was founded on common consent. As Hermogenianus, codifier of imperial rescript-law under Diocletian, wrote, people understood customary law "as being a tacit agreement of the

¹⁴⁶ Generally speaking, the tendency of classical jurisprudence was to pursue each legal principle to its most remote and minute consequences. Moreover, whereas the jurisprudence of both the Republic and the Principate avoided and impeded the fixing of the law by official enactment, in an effort to prevent the law from being petrified and stabilized, the tendency after Diocletian was to stabilize law already existing as juristic doctrine through statute. For similar views: Levy, *West Roman Vulgar Law*, p. 7; Fritz Schulz, *History of Roman Legal Science* (Oxford, 1967), pp. 99-261; Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History* (Oxford, 1966), pp. 135-151; H. F. Jolowicz and Barry Nichols, *Historical Introduction to Roman Law*, 3rd edn. (Cambridge, 1972). For the development of Roman imperial law in general, see, e.g., A.H.M. Jones, *LRE*, pp. 470-71, 520-22; J. Harries, "The Roman Imperial Quaestor from Constantine to Theodosius II," *JRS* 78 (1988), pp. 148-72; T. Honoré, *Emperors and Lawyers* (London, 1981), *passim*; S.J. Corcoran, *The Empire of the Tetrarchs: Imperial Pronouncements and Government AD 284-324* (Oxford, 1996).

citizens,”¹⁴⁷ and Paul, writing sometime before 212, ascribed even greater importance to custom than to written law, because it was so universally approved that there was no need for it to be set down in writing.¹⁴⁸ Indeed, Roman law recognized the benefit of local customs and practices, provided they were compatible with the aims of Roman government. That people in Italy of the early sixth century continued to go about their business, and even settle their disputes under systems of rules not quite like those envisaged by the *Theodosian Code* should come as no surprise.

Conclusions

At some point during Theoderic’s reign, and perhaps as early as 500, the office of the imperial quaestor was instructed by the king to draw up a collection of edicts that spelled out in clear and unambiguous language the rules that were to apply to Goths and Romans residing in the provinces. This task ultimately fell to a group of unidentified Roman jurists working in one of the offices of the imperial *scrinia*. Drawing upon previous Roman *lex* and *ius*, in some instances working directly from a written text and in others relying on their knowledge of a commonly-held principle of Roman law or jurisprudence, they came up with 154 edicts that together comprised the *ET*. By way of introduction they appended a prologue that explained the purpose behind these legal pronouncements: namely, to put an end to the most common disputes that arose between the inhabitants of Theoderic’s kingdom. To reinforce the point, they included an epilogue with instructions that it was the responsibility of all to uphold the rule of law.

From their selections we get a sense of what they considered to be most serious and thus requiring immediate remedy. Not surprisingly, the majority of topics concern issues pertaining to life in the provinces. It was here in the rural communities of the countryside where local custom

¹⁴⁷ *Dig.* 1.3.35 (Hermogenian, *Epitome iuris*): “tacita civium conventio.”

¹⁴⁸ *Dig.* 1.3.36 (Paul, lib. 7 *Ad Sabinum*).

remained strong. The compilers recognized this fact and in many cases adapted earlier Roman law according to an evolving provincial setting. In this they were not breaking from imperial tradition. Emperors, prefects and jurists had long recognized the importance of local custom for making the ancient laws of Rome more accessible and thus more effective. The *ET* is both a product of and witness to this legacy. In the pages that follow we shall examine the significance of this for the study of Roman law and society in late antique Italy.

Chapter Two

The Legal Context of the Edictum Theoderici

Introduction

In early sixth-century Italy, when a Goth or Roman required clarification or remedy in such matters as the payment of loans, distributions of property, boundaries, the status of slaves, succession, sales, gifts, and so on, they could turn to the *ET*, a guidebook intended to supplement existing Roman law. With its stated purpose in mind, the *ET* did not need to be comprehensive, only relevant. Thus, the compilers approached the Roman sources, both legislative acts of emperors and juridical customs and concepts preserved in the opinions and commentaries of jurists, with a selective eye for the most useful and applicable. In the process they ignored a good deal. Their selections demonstrate a careful consideration for developments that had taken place in the law – developments which reflected changes in legal administration and even society in the West during the post-classical era. While they sometimes reproduced a Roman law more or less unchanged, they usually offered a paraphrase. In some places where they were working from a particular source, they omitted or added details for clarity and relevance to the conditions that were particular to their own day. Where they were acknowledging a long-held principle or concept and not necessarily working directly from a specific source, their perspectives were shaped by the circumstances in which the particular provision was intended to apply. By examining the relationship between the *ET* and its proposed sources, we get a sense as to how Roman law was evolving in Italy between the fourth and sixth century, as well as how the *ET* fit within this evolutionary framework. Such an investigation also sheds valuable light on the prevailing social conditions of Italy in the early sixth century.

The Sources of the ET

In the epilogue to the *ET* the compilers point out that they derived the 154 provisions primarily from *novella leges* and *vetus ius*. Though not explicitly stated, the sources for this *lex* and *ius* were extracts from the commentaries and legal opinions of the third-century jurists Paul, Ulpian and Papinian;¹ the late third-century *Gregorian* and *Hermogenian Codes*;² the fifth-century *Theodosian Code* and some post-Theodosian novels (*novellae constitutiones*) to the exclusion of those of Marcian (450-57), Severus (461-65) and Anthemius (467-72).³ In some instances the compilers were working directly from a specific text. The basis for identification rests on the technical subject matter or close verbal affinities that demonstrate the Roman derivation of individual provisions. Elsewhere, they were simply acknowledging a principle of Roman law or jurisprudence that would have been well understood in the sixth century, and for which no source would have been necessary. In these instances legal experts have called attention to so-called

¹ Little is known of Julius Paulus. It appears that early in his career he was a law teacher and lawyer. Afterwards, during the reigns of Septimius Severus and Caracalla he served as a member of the *consilium principis*, and held the office of praetorian prefect under Alexander Severus. He was a prolific author, producing introductory and elementary works for law students and practitioners, as well as extensive notes and commentaries on various features of the Civil Law and Praetorian Edict. Like Paul, Ulpian held several positions in the imperial administration, including a position in the *consilium principis* and the office of praetorian prefect in 203. In 212 he was executed by the emperor Caracalla for refusing to condone the emperor's murder of his brother to gain the throne. As for Papinian, little is known of his life, aside from the fact that he was born in Tyre and was writing between 213 and 217. The most important of his works, the *Ad edictum* and *ad Sabinum*, covered a great deal of ground, and are quoted extensively throughout the *Digest*. On the life and times of these jurists, see in general George Mousourakis, *The Historical and Institutional Context of Roman Law*, pp. 291-305; Stein, *Roman Law in European History*, pp. 20-21; Andrew Borkowski and Paul du Plessis, *Textbook on Roman Law*, 3rd edn. (Oxford, 2005), pp. 49-50.

² Under Diocletian, these two collections of imperial legislation, comprising mostly *subscriptiones*, were compiled. The *Codex Gregorianus* covers the period from Hadrian to Diocletian, and the *Codex Hermogenianus* contains legislation from the reign of Diocletian only. These collections provided the model for the *Theodosian Code* and were used by Justinian in his compilation of the *Codex Justinianus*. Although far from certain, it is likely that Diocletian had a hand in the publication of these two collections, which together provided a convenient and accessible reference for local judges and lawyers (as well as other interested parties) to consult as needed. See H.J. Wolff, *Roman Law: An Historical Introduction* (Norman, Oklahoma, 1951), pp. 84-176; Jean Gaudemet, *La formation du droit séculier et du droit de l'Église aux IV^e et V^e siècles*, 2nd edn. (Paris, 1979) pp. 44-8; Simon Corcoran, *The Empire of the Tetrarchs* (Oxford, 1996); Jill Harries, *Law and Empire in Late Antiquity*, p. 15.

³ For the edition of the *CTh* see *Theodosiani libri XVI cum constitutionibus Sirmondianis*, ed. T. Mommsen and P. Meyer, 3 vols. (Berlin, 1905; last reprint 1971). For a translation, see Clyde Pharr, *The Theodosian Code and Novels, and Sirmondian Constitutions* (Princeton, 1952). For the *Novellae*, see Mommsen's *Theodosianus*, vol. 2: *Leges Novellae ad Theodosianum pertinentes*, ed. P. Meyer.

‘analogous’ texts – sources of earlier Roman law which, although comparable in certain respects and performing the same basic function or legal principle as the provision, were not consulted directly by the compilers of the *ET*. Rather, there was a common source for both.

It must be noted that when it comes to the identification of a particular source, there is no consensus among scholars: where some differ, others will be reluctant to commit themselves. In his edition of the text, for example, Bluhme distinguishes between sources and analogues. Baviera makes no such distinction, treating all corresponding texts as analogues. Bluhme’s identifications, which he included in an appendix to his edition, have remained standard.⁴ This is not to say, however, that his is the last word. More recently, Giulio Vismara has taken issue with some of Bluhme’s identifications.⁵ For some sources he provides alternative texts than those listed by Bluhme, and elsewhere cites as sources some texts that Bluhme originally identified as analogues. A major reason for debate is the fact that the sources of the *ET* are never specified in detail. Thus, it is not always clear what the source for a particular provision was, or if the nearest surviving comparable passage is the correct one, especially where we only have texts in possibly altered forms.

For imperial decrees originally collected in the *Gregorian* and *Hermogenian Codes*, as well as the opinions of Papinian and Ulpian, we must rely primarily on later, oftentimes highly interpolated, versions collected in Justinian’s *Codex (CJ)* and *Digest (Dig.)*. The former was a collection in twelve books of imperial constitutions intended to update the *Theodosian Code*. The latter was an anthology of extracts from the writings of the great jurists dealing with all subjects of Roman law. It was a work of unprecedented scope, taking three years to complete. In

⁴ Bluhme, *Edictum Theoderici regis*, p. 176.

⁵ Vismara, “Edictum,” §§ 21-23.

their task the jurists were instructed by Justinian to attribute each fragment to its original source by an appropriate designation. Despite this, however, there is no way of knowing that what they attributed to a particular jurist is what he actually wrote. This is partly because the original discussion had been reduced (perhaps substantially), but also because the compilers were expressly instructed to do away with all contradictions and repetitions. Furthermore, the jurists were permitted to make whatever substantive changes as they saw fit to ensure that the final result expressed the law as Justinian desired it – which was a law that both sought to restore the sophistication, precision and artistry of the Roman law from three centuries before, but also one that could be applied in the Byzantine Empire of his own time. The same rules applied to earlier imperial constitutions collected in the *CJ*.⁶

Such interpolations, whether they take away from, add to, or just modify the original text, make the task of identifying the sources of the *ET* a difficult one. Where the compilers of Theoderic were working from a source for which we have only the interpolated version of Justinian's jurists, it is not possible to make a case for positive identification on linguistic or stylistic grounds. That both groups of jurists were working from a common source that no longer survives in its original form is entirely possible, but we cannot determine how closely, or if at all, either group was adhering to the original source in question. Nevertheless, we can see in their work how their perspectives differed (oftentimes quite substantially) from each other in terms of what aspects of the same rule of law or convention they chose to emphasize or ignore. Such discrepancies reflect some of the ways Roman law was evolving in Italy along a different path than it was in the East.

⁶ The instructions given to the sixteen jurists commissioned for the task can be found at *CJ* 1.17.1 (*De auctore*). See also Stein, *Roman Law in European History*, pp. 32-34.

In the following analysis of the relationship between the *ET* and its sources, we shall begin with the juristic works of Paul, Ulpian and Papinian; and then proceed to formal imperial collections, that is, the *CG*, *CH*, *CTh*, and post-Theodosian novels respectively. In each instance a chart is provided that lists the specific reference point of the source on the left and the corresponding provision in the *ET* on the right. By way of example we shall then examine how the compilers used the sources, paying particular attention to some of the ways in which they departed from them. In those instances where the original source survives only in a later, perhaps interpolated, version of the *Digest* or *CJ*, discussion shall focus on the different ways Theoderic's and Justinian's compilers approached the same basic legal principles – differences that reflected their opposing objectives and perspectives.

The Works of Paul

Texts from the <i>Sententiae</i> (<i>PS</i>)	Provisions of the <i>ET</i>
lib. 1 tit. 12 § 3	40
lib. 2 tit. 17 § 11	141
lib. 2 tit. 26 § 11	62
lib. 2 tit. 31 § 7, (8) 10	117, 120
lib. 2 tit. 31 § 16	119
lib. 2 tit. 31 § 24, 25	130, 151
lib. 2 tit. 31 § 30	146
lib. 4 tit. 7 § 2	41
lib. 5 tit. 1 § 1	94, 95
lib. 5 tit. 5a § 4	131
lib. 5 tit. 5a § 6	5
lib. 5 tit. 12 § 2	33
lib. 5. tit. 5 § 5	42
lib. 5 tit. 16 § 3, 7, 9	100-102
lib. 5 tit. 18 § 2, 1, 4	56-58
lib. 5 tit. 20 § 2-4	97, 98
lib. 5 tit. 22 § 1	107
lib. 5 tit. 22 § 2	104
lib. 5 tit. 23 § 11	99
lib. 5 tit. 25 § 12, 5, 2	89-91
lib. 5 tit. 26 § 1	99
lib. 5 tit. 26 § 3	75
lib. 5 tit. 26 § 4	123, 124

lib. 5 tit.27 § 1	115
lib. 5 tit.30b § 1	83
Texts from Book Three of the <i>Responsa</i>	
fr. 12 <i>Finium regundor.</i> (Dig. 10.1.12)	105
fr. 49pr. <i>de iudiciis</i> (Dig. 5.1.49)	139

Thirty-five provisions were derived directly from summaries of legal pronouncements and rules attributed to Paul, incorporated (although not by Paul) into a larger collection referred to as the *Pauli Sententiae* (PS).⁷ A further two provisions are analogous to (presumably) interpolated versions of Justinian's compilers on excerpts taken from Book Three of Paul's *Responsa*, an extensive commentary on the praetorian edict in eighty books which is preserved for us primarily in the *Digest*.⁸ The PS, a significant work dealing with a broad range of topics relating to both private and criminal law, appears not to have been a genuine work of Paul but rather a summary of his works composed sometime in the early decades of the fourth century.⁹ It became an

⁷ ET 5 (PS 5.5a.5-6), 33 (PS 5.12.2), 40 (PS 1.12.2 [3]), 41 (PS 4.7.2), 42 (PS 5.15.5; cf. Dig. 22.5.16 *Paulus libro 5 sententiarum*), 56 (PS 5.18.2; ex Coll. 11.2), 57 (PS 5.18.1), 58 (PS 5.18.4; ex Coll. 11.5; cf. Dig. 47.14.1, 1), 62 (PS 2.26.11), 75 (PS 5.26.3), 83 (PS 5.30b.1), 89 (PS 5.25.12), 90 (PS 5.25.12, 5, 2), 91 (PS 5.25.12), 94 (PS 5.1.1), 95 (PS 5.1.1), 97 (PS 5.20.2; ex Coll. 12.2.1), 98 (PS 5.20.3-4), 99 (PS 5.23.10 [11]; cf. PS 5.26.1), 100 (PS 5.16.3), 101 (PS 5.16.7), 102 (PS 5.16.9), 104 (PS 5.22.2), 107 (PS 5.22.1), 115 (PS 5.27; for this see Levy, *Gesammelte Schriften*, 1, p. 256), 117 (PS 2.31.7), 119 (PS 2.31.16); 120 (PS 2.31.8-10), 123 (PS 5.26.4), 124 (PS 5.26.4), 130 (PS 2.31.25 [24]), 131 (PS 5.5a.4), 141 (PS 2.17.11), 146 (PS 2.31.30; Dig. 47.2.83.1), 151 (PS 2.31.24 [25]). Bluhme cites PS 5.22.1 and ET 107 as being analogous, but based on the verbal similarities between the two, notably the reference in both to an *auctor seditionis*, it seems that PS 5.22.1 was consulted directly by the compilers. He also cites a fragment from Callistratus' second book on *Cognitiones* (preserved in Dig. 42.1) as an additional source for ET 131. But given the linguistic similarities between ET 131 and PS 5.5a.4 (i.e. PS 5.5a.4: *pignora capi et distrahi possunt* = ET 131: *capi eorum pignora debent et distrahi*), and the absence of any such similarities between ET 131 and Dig. 42.1 – a lack no doubt owing to the fact that Dig. 42.1 is a highly interpolated version of the original – it is difficult to argue that this was consulted directly by the compilers of the ET. Likewise, Bluhme cites Dig. 49.8.1, 3 (from Marcian's second book on *appellationes*) as an additional source for ET 5, but the evidence for this is lacking. Baviera in his edition of the text cites the following as analogous: ET 1 (PS 5.23.11 [10]), 2 (PS 5.23.11 [10]), 76 (PS 5.6.7), 107 (PS 5.22.1), 55 § 3 (PS 5.26.1), 78 (PS 5.30b.1); 83 (PS 5.6.14), 110 (PS 5.19a; similarly Dig. 47.12.11).

⁸ *Responsa*: ET 105 (Dig. 10.1.12), 139 (Dig. 5.1.49).

⁹ Detlef Liebs, "Römische Jurisprudenz in Afrika," ZSS (RA) 160 (1989), pp. 210-47, argues that the *Sententiae* originated in Africa sometime around 300; and that the compiler did not draw only on Paul's own works, but also on works by a number of classical jurists as well as the *Codex Gregorianus* and *Codex Hermogenianus*. T.D. Barnes, *Constantine and Eusebius* (Cambridge, 1981), p. 289 n. 73, notes that the fragment of the full text of the *Sententiae* dates, on paleographical grounds, to around 300, and was most likely written soon after the composition of the original text. The original text of the PS, which has not survived, has been reconstructed on the basis of extracts included in various post-classical compilations, such as Justinian's *Digest*, the *Lex Romana Visigothorum* and the *Collatio Legum Mosaicarum et Romanarum* (or *Collatio*), from the early fourth century. For the text see FIRA II, pp. 317-417, 419-432. For a useful discussion, see George Mousourakis, *The Historical and Institutional Context of*

extremely popular handbook for students and practitioners in the later Empire, and was cited extensively in the *Lex Romana Visigothorum* (506).¹⁰ Of all the juristic works available to them, it was the *PS* which the compilers turned to most often. In several instances they left the original extract unchanged, or nearly so.¹¹ The following examples are illustrative of this. To draw attention to the similarities between them, they are left untranslated.

ET 40, a brief provision concerning the matter of testimony, provided immunity to anyone who made a false claim in court without knowing. Its model is *PS* 1.12.2(3), which the compilers left essentially untouched:

<i>ET</i> 40	<i>PS</i> 1.12.2(3)
Qui falsum nesciens allegavit, ad falsi poenam minime teneatur.	Qui falsum nesciens allegavit, falsi poena non tenetur.

In the same way, the compilers found no reason to alter *PS* 5.16.9, the basis for *ET* 102:

<i>ET</i> 102	<i>PS</i> 5.16.9
Si servus ad hoc fuerit manumissus ne torqueatur, quaestio de eo nihilominus haberi potest.	Si servus ad hoc fuerit manumissus, ne torqueatur, questio de eo nihilo minus haberi potest.

In the event that a slave was manumitted to prevent him from being tortured under interrogation, the rule here allows for an interrogation concerning him to be held. The basis for this is a non-extant decree of the emperor Pius, a reference to which is made by the editors of Justinian's *Digest*:

Roman Law, p. 358 (who places it somewhere in the first two decades of the fourth century). For the *Sententiae* as a source of vulgar law in the West, see E. Levy, *Pauli sententiae: a palingenesia of the opening titles as a specimen of research in west Roman vulgar law* (Ithaca, NY, 1945); Fr. Wieacker, "Le Droit romain de la mort d'Alexandre Sévère à l'avènement de Dioclétien," *RHDFE* 49 (1971), pp. 201-23, esp. 218-20; W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, trans. J.M. Kelly from the 6th German edn. (Oxford, 1973), pp. 148-50.

¹⁰ Its popularity in the later Empire is attested to by the fact that it is cited repeatedly in the imperial legislation of the period (e.g., *CTh* 1.4.2 [Constantine]); 1.4.3 [Law of Citations]).

¹¹ *ET* 40, 62, 91, 94, 95, 98, 100, 102, 115, 117, 130, 141.

The deified Pius wrote in a rescript that if a slave is manumitted to avoid his being tortured, then, provided that he is not tortured in a capital case affecting his master, he can be tortured.¹²

Here, the freedman was prohibited from being tortured in a capital case involving his master.

Neither *ET* 102 nor *PS* 5.16.9 makes any such exception.

Varying only slightly from the original is *ET* 94. It concerns the matter of parents selling their children, and was derived directly from *PS* 5.1.1:

ET 94

Parentes qui cogente necessitate filios suos alimentorum gratia vendiderint, ingenuitati eorum non praeiudicant; homo enim liber pretio nullo aestimatur.

PS 5.1.1

Qui contemplatione extremae necessitatis aut alimentorum gratia filios suos vendiderint, statui ingenuitatis eorum non praeiudicant: homo enim liber nullo praetio aestimatur.

What is strange here, and inconsistent with the ancient notion of *patria potestas*, is the use of the term *parens* in *ET* 94, which seems to have been an addition of the compilers. The term could refer to either parent (or any close relation for that matter), and not necessarily *pater*.¹³ Nevertheless, the provision bears witness to the fact that the selling of children, a practice banned since the days of the Republic but revived in the later Empire in limited circumstances, continued into the early sixth century. Concerning the custom, Cassiodorus seems to suggest that it was relatively commonplace, at least in the countryside. In a letter (c. 527) addressed in Athalaric's name to the *vir spectabilis* Severus concerning the suppression of violent robberies at Leucothea, a great fair which took place on St Cyprian's day in the rural suburb of Consilinum, Cassiodorus describes the fair and how freeborn children, boys and girls, were there put up for sale by their parents:

¹² *Dig.* 48.18.1.13 (Ulpian 8 *de off. Procons.*) (trans. Watson): "Si servus ad hoc erit manumissus, ne torqueatur, dummodo in caput domini non torqueatur, posse eum torqueri divus pius rescripsit."

¹³ Jill Harries, "'Not the Theodosian Code': Euric's Law and Late Fifth-Century Gaul," in Harries and Wood (eds.), *The Theodosian Code*, pp. 39-51 at p. 44, notes the same confusion regarding the concept of *patria potestas* in the *Code of Euric* (at CE 320).

Though you will see no public buildings there, you may still behold the glory of a famous city. Boys and girls are on display, marked out by their differences in sex and age, brought on the market not as captives, but by freedom: their parents are right to sell them, since they benefit by slavery itself. Indeed, there is no doubt that slaves can be improved by transference from field work to service in the town.¹⁴

Despite Cassiodorus' otherwise rosy picture of southern Italy presented in the rest of the letter, it would seem that many were suffering from harsh economic conditions, and thus forced to sell their children – a far better scenario, according to Cassiodorus, than working in the fields as free peasants.

In these instances the compilers saw no reason to alter the contents of the *PS* in any dramatic way – presumably because they were already well-suited for the conditions in which the *ET* was intended to operate. In others, however, there are all sorts of variances and points of difference. Some of these, to be sure, are haphazard and of no major importance,¹⁵ but others represent both important developments taking place in the law, methods of legal administration, and the changing priorities of the time. The following examples are illustrative.

ET 41, concerning forgery (*falsum*), is modeled closely after *PS* 4.7.2 but departs from it in two important respects. First, unlike the original, which applied exclusively to written forms of testaments, *ET* 41 concerned all manners of forgery. Second, whereas *PS* 4.7.2 treats the offence as capital and punishes the guilty with deportation (presupposed by *PS* 4.7.1), *ET* 41 is purposefully imprecise in fixing a specific punishment, simply stating that the offender would be

¹⁴ Cass., *Var.* 8.33.4 (trans. Barnish, *Variae*, p. 110): “Ubi licet non conspicias operam moenium, videas tamen opinatissimae civitatis ornatum. praesto sunt pueri ac puellae diverso sexu atque aetate conspicui, quos non fecit captivitas esse sub pretio, sed libertas: hos merito parentes vendunt, quoniam de ipsa famulatione proficiunt. dubium quippe non est servos posse meliorari, qui de labore agrorum ad urbana servitia transferuntur.”

¹⁵ E.g., *PS* 5.12.2: aufertur = *ET* 33 auferatur; *PS* 1.12.2 (3): non tenetur = *ET* 40: minime teneatur; *PS* 5.18.4 (ex *Coll.* 11.5): furem magis eum quam abactorem constitui placuit = *ET* 58: furti magis reus tenendus est; *PS* 5.23.11 (11): ut homicidae puniuntur = *ET* 99: tamquam reus homicidii occidatur; *PS* 5.16.7: poterit interrogari = *ET* 101: debet subiici quaestioni; *PS* 5.5a.4: pignora capi et distrahi possunt = *ET* 131: capi eorum pignora debent et distrahi.

punished capitally. This could mean any number of things including exile, deportation and execution (by assorted manner):

ET 41

Anyone who produces or knowingly uses a forgery, or persuades or compels another to make one, shall suffer a capital penalty.¹⁶

PS 4.7.2

Not only shall he who tampers with, suppresses or destroys a testament, but also anyone else who knowingly with *dolus malus* instructs or undertakes this to be done, shall be held liable for the penalty of the Cornelian law [i.e. deportation].¹⁷

The basis for all of this is the Cornelian law on forgery (mentioned specifically in *PS 4.7.2*), which was overhauled substantially by Constantine in the fourth century. But Constantine's law applied the maximum penalty (i.e. death) only in the most serious of cases; in most instances it would seem that the usual punishment was deportation.¹⁸

As early as the Republic, documentary proofs had acquired administrative significance. In the later Empire, as the administration generally became more dependent on the use of the written word, even greater weight was accorded the significance of documents as a means of establishing proof. Thus forgery became a far more serious offence, and was more widely applied to include offences which under classical law constituted the less serious delictal act of fraud (*dolus*).¹⁹ At the same time, it is not out of the question to suggest that the corresponding punishment likewise increased in terms of its severity. The silence in *ET 41* concerning the penal

¹⁶ *ET 41*: "Qui falsum fecerit, vel sciens falso usus fuerit, aut alterum facere suaserit, aut coegerit, capitali poena feriatur."

¹⁷ *PS 4.7.2*: "Non tantum is, qui testamentum subiecit suppressit delevit, poena legis Corneliae coercetur, sed et is qui sciens dolo malo id fieri iussit faciendumve curavit."

¹⁸ *CTh 9.19.2* (trans. Pharr): "After proof of guilt, capital punishment, if the magnitude of the crime so demands, or deportation shall threaten the person who has committed forgery." ("capitali post probationem supplicio, si id exigat magnitudo commissi, vel deportatione ei qui falsum commiserit imminente.")

¹⁹ For this development concerning forgery, see Harries, *Law and Empire*, p. 108. Ulpian provides a useful, albeit vague, definition of the delictal act of *dolus* (*Dig. 4.3.1*): "By this edict the praetor affords relief against shifty and deceitful persons who by a certain cunning have harmed others, so as to prevent either their wickedness benefitting the former or their simplicity harming the latter." ("Hoc edicto praetor adversus varios et dolosos, qui aliis offuerunt calliditate quadam, subvenit, ne vel illis malitia sua sit lucrosa vel istis simplicitas damnosa.") This delict could be applied to any number of acts. It covered fraud perpetrated in the course of business transactions and commerce; falsely supporting a person's claim to freedom; destroying or altering a testament after the death of the testator; and so on. Those convicted of the fraudulent act were subject to *infamia*, or legal disgrace. See further Borkowski, *Textbook on Roman Law*, pp. 356-57.

component would seem to suggest that by the sixth century the matter had become one of judicial discretion. While the judge could impose a sentence of deportation in accordance with earlier imperial law, he could just as well apply the maximum penalty of death; he was not bound by the fixed limitations of the Cornelian law.

The compilers likewise did away with all outmoded forms of punishment. In *ET* 42, for instance, they omitted the reference in the original (*PS* 5.15.5) to the penal component requiring deportation to an island:

ET 42

Those who deliver varying or false testimony or offer such testimony to either party shall be exiled.²⁰

PS 5.15.5

Those who deliver testimony falsely or varyingly, or offer [such testimony] to either party shall either be exiled, relegated to an island or removed from the court (local council).²¹

In sixth-century Italy, the punishment of exile as a general rule did not necessarily entail banishment to an island: although, we hear from Cassiodorus that the curial Jovinus was exiled to the Lipari Islands off the coast of Sicily for killing a fellow curial during a heated exchange.²² Usually, those sentenced to exile were simply banished to another region of the kingdom, and sometimes subjected to a form of imprisonment in a bid to restrict mobility. The case of Boethius is illustrative of this: the hapless philosopher and former palatine official was banished to Calventia (modern Calvenzeno) following his conviction on treason charges, and there remained

²⁰ *ET* 42: “Qui varium aut falsum testimonium dixerint, aut utrique parti prodiderint, in exilium dirigantur.”

²¹ *PS* 5.15.5: “Qui falso vel varie testimonia dixerunt vel utrique parti prodiderunt, aut in exilium aguntur aut in insulam relegantur aut curia submoventur.” The editors of the *Digest* reduce this to the following (*Dig.* 22.5.16): false, inconsistent or double-faced witnesses are appropriately punished by the judge. (“Qui falso vel varie testimonia dixerunt vel utrique parti prodiderunt, a iudicibus competenter puniuntur.”)

²² Cass., *Var.* 3.47. The following provisions include penalties of exile: *ET* 18 (on parents who through complicity neglect to take legal action against the *raptor* of their daughter); 42 (on witnesses who provide varying or contradictory testimony); 75 (a *humilior* who prohibits a corpse from being buried, intending to claim the deceased as his debtor); 83 (on knowingly concealing, selling or purchasing a freeborn man); 89 (on assembling an armed body to incite terror); 95 (concerning a creditor who knowingly receives a freeborn child as surety on behalf of the parents); 97 (on any freeborn man convicted of arson, in lieu of the financial penalties prescribed); 108 (on *honestiores* convicted of making a sacrifice according to the pagan rite).

under house arrest from 523 until his death in late 525 or early 526.²³ To bring the law up to date, then, the compilers modified each instance where the original source included a penalty that stipulated relegation to an island.²⁴

Other outdated punishments included crucifixion, condemnation to the public mines and exposure to beasts in the arena. By the early sixth century, crucifixion had long since been abolished,²⁵ and there no longer were gladiatorial shows or ‘venationes’ involving victims. The compilers made adjustments to reflect these developments. For example, *ET* 104 applied a capital penalty (presumably death) to any slave or *coloni* who overturned boundary markers, whether on their own volition or at the request of the master. The compilers glossed over the detail in the original, *PS* 5.22.2, which specified punishment in these instances to be condemnation to the mines (which was, of course, a death sentence).²⁶ The texts read as follows:

ET 104

Those who dig up boundaries or plow up property lines, specifically those which designate a perimeter, or destroy trees marking boundaries, if they are slaves or *coloni* and have acted without the consent or authority of their master, they shall be punished capitally. If it is proven that this act was done at the owner’s behest, that same owner is to be

PS 5.22.2

Those who dig or plough up boundaries, or turn over boundary trees, if they are slaves and did so on their own, let them be condemned to the mines; *humiliores* shall be condemned to the public works, and *honestiores*, upon being deprived of a third of their goods, shall be relegated or forced into exile.²⁸

²³ Anon. Val. 14.87.

²⁴ E.g., *PS* 5.23.11 (10): “in insulam bonis ademptis deportatur” = *ET* 1: “capite puniatur”; *PS* 4.7.2: “in insulam deportatur” = *ET* 41: “capitali poena feriat”; *PS* 5.15.5: “aut in exilium aguntur aut in insulam relegantur aut curia submoventur” = *ET* 42: “in exilium dirigantur”; *PS* 5.26.3: “si honestiores sunt, tertia pars bonorum eripitur et in insulam relegantur: humiliores in metallum damnantur” = *ET* 75: “ad violentiae poenam ... teneatur; honestiores bonorum suorum partem tertiam perdant et in quinquennale exilium dirigantur: humiliores caesi fustibus perpetui exilii damna sustineant”; *PS* 5.20.2 (ex *Coll.* 12.2.1): “humiliores in metallum aut in opus publicum damnantur, honestiores in insulam relegantur” = *ET* 97: ... “si servus, colonus, ancilla, originarius fuerit, incendio concremetur: si ingenuus hoc fecerit, restituat quidquid dispendii acciderit per illud, quod commovit, incendium, aedificiumque renovet, et aestimationem insuper consumptarum rerum pro poena talis facti cogatur exsolvere; aut si hoc sustinere pro tenuitate nequiverit, fustibus caesus perpetui exilii relegatione plectatur”; *PS* 5.22.1: “auctores seditionis et tumultus vel concitatores populi pro qualitate dignitatis aut in crucem tolluntur aut bestiis obiciuntur aut in insulam deportantur” = *ET* 107: “qui auctor seditionis vel in populo vel in exercitu fuerit, incendio concremetur.”

²⁵ Constantine is credited with formally abolishing crucifixion. This is attested by Aurelius Victor, *Caes.* 41.4; Ambrosiaster, *Quaest. Vet. Test.* 115. See Harries, *Law and Empire in Late Antiquity*, p. 139 n. 28.

²⁶ On condemnation to the mines as a capital offence in the empire, see F. Millar, “Condemnation to Hard Labour in the Roman Empire, from the Julio-Claudians to Constantine,” *PBSR* 52 (1984), pp. 124-47.

deprived of a third of his possessions to the benefit of the rights of the fisc; nevertheless, the slave or *colonus* must be punished capitally.²⁷

Likewise, in *ET* 107 we read that those guilty of sedition (a treasonable offence) were to be burned alive, whereas the original, *PS* 5.22.1, provided varying penalties according to the status of the accused, including crucifixion, exposure to wild beasts, or deportation to an island:

ET 107

Anyone who instigates sedition either among the people or in the army is to be burned alive.²⁹

PS 5.22.1

Authors of sedition or tumults or disturbers of the populous shall, depending on their status, either be crucified, thrown to wild beasts or be deported to an island.³⁰

ET 107 is interesting for another reason. Unlike the original it makes a specific reference to mutineers within the army. And whereas *PS* 5.22.1 required that the guilty be punished according to considerations of status (which could entail deportation), *ET* 107 prescribed death in all such instances. Only in six other places do the compilers specify the manner of execution: of these, death by fire was the most flagrant.³¹ The attention to detail on display here, particularly

²⁷ *ET* 104: “Qui effodiunt terminos, vel exarant limites, finem scilicet designantes, aut arbores terminales evertunt, si servi sunt aut coloni, et sine conscientia vel iussu domini fecerint, [capite] puniantur. Si vero hoc imperante domino factum esse constiterit, idem dominus tertiam partem bonorum suorum perdat, fisci iuribus profuturam: servo ipso aut colono nihilominus capite puniendo.”

²⁸ *PS* 5.22.2: “Qui terminos effodiunt vel exarant arboresve terminales evertunt, si quidem id servi sua sponte fecerint, in metallum damnantur: humiliores in opus publicum, honestiores in insulam amissa tertia parte bonorum relegantur aut exulare coguntur.”

²⁹ *ET* 107: “Qui auctor seditionis vel in populo vel in exercitu fuerit, incendio concremetur.”

³⁰ *PS* 5.22.1: “auctores seditionis et tumultus vel concitatores populi pro qualitate dignitatis aut in crucem tolluntur aut bestiis obiciuntur aut in insulam deportantur.” Elsewhere (*PS* 5.29) we are informed that whereas the punishment for treason was formerly interdiction from fire and water, ‘nowadays’ (that is, sometime around 400) *humiliores* were condemned to the arena to be devoured by hungry beasts, or burned alive; and *honestiores* were punished capitally. Since acts of treason went against the ancient Roman value of *pietas*, and constituted a direct threat to the authority of the emperor, they were regarded as particularly heinous. The crimes which could constitute a treasonable offence or were regarded as equivalent to treason (listed in the *Lex Iulia*) could vary depending on the discretion of imperial legislators. For instance, hurling insults at an emperor might not always be considered treasonable if the abuser was drunk, confused or simply mad (*CTh* 9.4). While the definition of treason remained (purposefully) ambiguous, and the list of treasonable offences varied over time, the penalties for the crime were particularly harsh throughout the Empire. This clearly continued to be the case in Italy in the sixth century. On treason in Roman law, see Harries, *Law and Crime in the Roman World* (Cambridge, 2007), pp. 72-85.

³¹ There are three instances of punishment by the sword (*ET* 48, 49, 56) and a further three where the offender was to be burned alive (*ET* 35, 61 and 97). Throughout Late Antiquity, death by fire was a punishment reserved for the

the specific reference to the army, is perhaps indicative of the concern of the compilers towards such treasonable acts associated with the military. In fact, this fear is echoed by Cassiodorus, who notes several instances where soldiers, improperly or insufficiently supplied, resorted to brigandage in direct defiance of the central authority.³² Procopius, too, alludes to the challenges Theoderic (and subsequent rulers) faced in securing the loyalty of the army. To ensure allegiance and cohesion among the rank and file of the regular infantry, Theoderic appointed his most trusted followers, an inner élite of several thousand – variously identified by Procopius as ‘the best’ (*aristoi*), ‘the notable’ (*dokimoi*), and ‘the worthy’ (*logimoi*) – to positions of leadership.³³

ET 56 concerns cattle rustling – a recurring problem throughout the Empire whose pervasiveness rose and fell in response to the prevailing economic conditions of the time. Unlike ordinary theft (*furtum*), it was prosecuted as a public crime whose punishment was generally more severe. The legal force behind this was a decree of the emperor Hadrian (117-138), the main points of which were reiterated in *PS* 5.18.2. This served loosely as the model for *ET* 56:

ET 56

The rustler of another's animals, flocks and herds, whether he drives them off from stables or pastures, shall be punished by the sword; and the remuneration for the victim's loss, which is to be garnered from the property of the rustler, shall be fourfold. But if the rustler is a slave or *originarius*, his owner, upon being

PS 5.18.2

Heinous cattle thieves are generally consigned to the sword or the mines, but sometimes to public labour. Heinous [cattle thieves] are those who steal horses and flocks of sheep from a stable or pastures, or if they commit this deed often or with a weapon.³⁶

most heinous of crimes. For instance, in legislation of the emperor Constantine of 323 (*CTh* 7.1.1), it was stipulated that any soldiers who colluded with enemy forces (identified as “barbarians”) and caused loss or ruin to another Roman, or otherwise profited from such dealings, was to be burned alive. Elsewhere in legislation of the emperor Constantius (373), any person found to have mutilated his person in a bid to avoid military service was similarly condemned to the “avenging flames.” Jews and members of other non-Christian sects who punished Christian converts were also punished by the flame (*CTh* 16.8.1 [339]).

³² E.g., Cass., *Var.* 3.38, 4.13, 5.13, 12.5.

³³ For specific references to individual *logimoi*, *dokimoi*, and *aristoi*, see respectively: Procopius, *BG* 5.4.13 (*logimos*); 6.1.36, 6.20.14, 7.18.26, 8.26.4 (*dokimos*); 7.1.46 (*aristos*). On this policy and some of the challenges encountered by Theoderic in this regard, see the comments of Peter Heather in his “Merely an Ideology? – Gothic Identity in Ostrogothic Italy,” pp. 42, 44, 45, 50.

³⁴ Presumably, the participation of the master involved his testifying to the fact that he had no involvement in, or prior knowledge of the crime of his slave or *colonus*.

summoned before a judge for these crimes,³⁴ shall, if he prefer, either compensate [the victim] in accordance with what We have decreed above, or not delay to surrender those accused to a public judge to be punished by death.³⁵

Whereas the punishment in *PS* 5.18.2 varied from the most extreme (i.e. death by the sword or consignment to the mines) to an unspecified form of public labour depending upon the seriousness of the problem in general or the offender specifically, *ET* 56 punished all such thieves with the extreme penalty. Moreover, it went further than the original to require that the victim be compensated in the form of fourfold remuneration; and in accordance with the ancient principle of noxal liability, that slaves or *originarii* who were condemned for the act be surrendered by their owners to be punished capitally. Conversely, the largest fine imposed upon a cattle rustler in the *PS* was threefold the original amount.³⁷

Given its severity and attention to detail, *ET* 56 is perhaps indicative of the pervasiveness of cattle rustling in sixth-century Italy. As Ulpian noted in his commentary on Hadrian's rescript, the penalty of death applied only in those areas where the crime was most prolific (*puniuntur autem durissime non ubique, sed ubi frequentius est id genus maleficii*).³⁸ *ET* 56 made no such restriction and provided specific remedy for the victims.³⁹ Cassiodorus, too, seems to confirm that cattle rustling posed a significant problem for Theoderic. In a letter written in the king's

³⁵ *ET* 56: "Abactor animalium vel gregum atque pecorum alienorum, sive ea de stabulis, sive de pascuis abegerit, gladio puniatur, et in quadruplum amittentis damno de eius substantia consulatur. Quod si servus aut originarius fuerit, dominus pro his conventus legibus, si maluerit, aut, ut supra diximus, satisfaciat, aut impetitos ad poenam mortis iudici publico tradere non moretur."

³⁶ *PS* 5.18.2: "Atroces pecorum abactores plerumque ad gladium vel in metallum, nonnumquam autem in opus publicum dantur. Atroces autem sunt, qui equos et greges ovium de stabulo vel de pascuis abigunt, vel si id saepius aut ferro conducta mano faciunt."

³⁷ *PS* 5.18.3.

³⁸ *Dig.* 47.14.1pr.

³⁹ Compensation for cattle-rustling is also mentioned at *PS* 5.18.1: whereas *ET* 56 prescribed fourfold remuneration, *PS* 5.18.1 provided twofold or threefold compensation depending on the severity of the crime or the propensity of the offender.

name to the provincials, *capillati*, *defensores* and *curiales* of Suavia concerning the appointment of the governor Fridibad and the seemingly on-going violence that had been plaguing the land, Cassiodorus has Theoderic proclaim, in rather bold fashion, that the newly-appointed governor “will punish cattle rustlers with due severity.”⁴⁰ Here, cattle rustlers were purposefully signaled out and threatened with severe sanctions (presumably this meant capitally).

In *ET* 58 the compilers went beyond their source to make explicit the application of the rule of law that was most obviously relevant to conditions in Italy at this time. Based on *PS* 5.18.4, the provision outlines in detail the obligations of an individual who should happen upon another’s escaped animal(s):

ET 58

Anyone who leads away a cow, horse or other livestock wandering about must also be held guilty of the crime of theft, and he shall restore fourfold the number of animals or livestock stolen; unless he advertises this fact in public or in well-known places or before the official residence of a judge for seven continuous days since that day he found them; upon completion of this, let him not endure the detriment of any penalty.⁴¹

PS 5.18.4

Anyone who leads away a wandering cow, horse or any other kind of livestock, it is pleasing that he be held liable for the actions of a thief rather than those of a rustler.⁴²

The provision obliges anyone who finds strays to make this fact public for a period of seven days, by announcement to the local judge or notification in recognized public places; presumably he was then required to carefully look after them as his own and compensated for this – but there is no direct evidence for this. Failure to publicize his find rendered him liable to pay the compensation for theft. The basis for this punishment no doubt rested on the grounds that the

⁴⁰ Cass., *Var.* 4.49: “qui [sc. Fridibad] abactores animalium legitima severitate coerceat...”

⁴¹ *ET* 58: “Qui bovem, vel equum errantem, vel aliud pecus abduxerit, furti magis reus tenendus est, et in quadruplum animalia vel pecora sublata restituat: nisi ea ab eo die quo invenerit, septem diebus continuis in publicis celeberrimisque locis, aut ante praetorium iudicis, proposuerit : hoc enim facto nullius poenae damna sustineat.”

⁴² *PS* 5.18.4: “Qui bovem vel equum errantem quodve aliud pecus abduxerit, furem magis eius quam abactorem constitui placuit.”

culpability of the offender yielding to the temptation of a situation which he had not himself brought about should be rated less than that of the man who deliberately chose to assume the charge of strays, but concealed the fact. Presumably after the seven days were up the animals became the property of the individual who happened upon them, provided he took all necessary precautions. None of this information is found in the original, which simply required that the individual who assumed ownership of another's strays be held liable as a thief rather than a cattle rustler.

Just as the compilers made important additions, they made equally important omissions. In this, we may perhaps see an attempt on their behalf to render the law more accessible, and therefore more applicable. In most cases the sorts of details that they overlooked were simply extraneous, and made no difference to the effect of the law. For instance, *ET* 83 follows closely *PS* 5.6.14 concerning the unlawful confinement, selling and purchasing of a freeman, but ignores the reference in the original to the source for this – the *Lex Fabia*, a statute of unknown date (presumably the second or first century BC). Similarly in *ET* 123, a brief provision that prohibited creditors from seizing a pledge without the proper authorization of a judge, they ignored the specific reference in the original, *PS* 5.26.4, to the *Lex Iulia de vi privata*. When jurists or legislators mentioned sources like the *Lex Fabia* or *Lex Iulia*, the purpose was to show an accumulation of juristic interpretation of how the principles and expectations of the particular law or statute were intended to apply. This was not simply a matter of mere convention; rather, it was an affirmation of an ancient legal tradition. If the compilers of the *ET* had wished to continue this tradition, they could have done so by making specific reference to the original sources. But since the compilers were concerned with the application of the law in specific

circumstances, they did not need to trifle with details as to ancient precedents, even if these precedents continued to underpin the basic function of the law in the early sixth century.⁴³

In *ET* 146 there is a more meaningful omission that reflects a significant development that had taken place in the legal procedure after the original source was produced. According to the provision, both the *colonus* and owner – since it was a concern for each – were permitted to bring an action against a person suspected of stealing from the owner’s estate. In this, it follows *PS* 2.31.30 (*Dig.* 47.2.83.1) closely:

ET 146

De frugibus ab aliquo ex fundo cuiuslibet sublatis, tam colonus, quam dominus, quia utriusque interest, agere potest.

PS 2.31.30 (*Dig.* 47.2.83.1)

Frugibus ex fundo subreptis tam colonus quam dominus furti agere possunt, quia utriusque interest rem persequi.

The basis for this remedy is the classical *actio furti*, concerning which the *PS* makes explicit reference (*furti agere*). In classical terminology *actio* referred to the first stage of a traditional two-stage legal process (the second being *iudicium*), the formulary procedure. Under this system, a plaintiff would bring his complaint to the authorized magistrate who would lay down the rules governing how the case would proceed. The actual judgement was then rendered by a layman, who was guided in all of this by the instructions of the magistrate.⁴⁴ During the principate, and perhaps even earlier, this system was abandoned and replaced by the *cognitio extra ordinem* procedure, in which the judge was a state-appointed professional who heard the whole case. Under the rules of the *cognitio* system, the plaintiff presented his claim to the court in writing. It

⁴³ A similar air-brushing out of this Roman legal tradition is found in the *Code of Euric*, and noted by Jill Harries in her “‘Not the Theodosian Code’,” p. 47.

⁴⁴ On the formulary system in general, see A.A. Schiller, *Roman Law: Mechanisms of Development* (New York, 1978), pp. 435-37; H.F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn. (Cambridge, 1972), pp. 199-201; O.F. Robinson, *The Sources of Roman Law* (London, 1997), pp. 84-6; G. Mousourakis, *The Historical and Institutional Context of Roman Law*, pp. 206-18; W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, 2nd edn. (Oxford, 1973), ch. 6; B. Nicholas, *An Introduction to Roman Law* (Oxford, 1991), pp. 19-21; D. Johnston, *Roman Law in Context* (Cambridge, 1999), pp. 112-14; M. Kaser, *Römische Rechtsgeschichte* (Göttingen, 1976), pp. 140-42; M. Kaser, *Das römische Zivilprozessrecht* (Munich, 1996), pp. 151-53; W. Kunkel, M. Schermaier, *Römische Rechtsgeschichte* (Cologne, 2001), pp. 110-12; F. Wieacker, *Römische Rechtsgeschichte* (Munich, 1988), pp. 447-49.

was then served by a court officer on the defendant, who filed his defence with the court. The parties appeared before the judge, who heard argument on the legal issues, took evidence from witnesses and then rendered his decision.

The abandonment of the formulary procedure had certain effects on the law – traces of which can be found in *ET* 146 and elsewhere.⁴⁵ First, *actio* ceased to be conceived in classical terms as a basis of remedy with its own specific set of procedures: no longer did it determine or delimit the demands of the plaintiff or the pleas of the defendant. Second, since it was no longer necessary for a plaintiff to choose a particular formula, it was possible to bring forward an action without identifying precisely what the legal basis of the claim was. Third, now that one judge heard the entire case, the former distinction between the role of the praetor and *iudex* – a division which was reflected in a division of the law from the facts – became blurred. The legal issues could be brought up gradually as the case proceeded. In the *ET*, the term serves only as a symbol for a substantive legal concept. *Actio* and *agere* are employed chiefly to express the right to sue or as collective expressions for judicially enforceable claims (e.g. *ET* 12, 24, 31, 43, 46, 146, 152). Where the compilers name a specific *actio*, for example *actio furti* in *ET* 85, 86 and 120, it is not for the purpose of identifying a particular claim, but rather in a less technical sense to express the object of the action. Whereas in classical law, *actio furti* denoted a penal action through which the plaintiff could claim double or fourfold damages from the defendant, depending on the type of theft that had been committed (i.e., whether it was manifest or not), in the *ET* it refers to the very offence itself.⁴⁶ In all instances the compilers either did not specify the nature of the *actio*, as in *ET* 146, or the specific rules associated with a particular claim.

⁴⁵ On the demise of the *actio* in late Roman law, see Levy, *West Roman Vulgar Law*, p. 202. For the discussion that follows see Stein, *Roman Law in European History*, p. 25.

⁴⁶ Levy, *West Roman Vulgar Law*, p. 202; Reinhard Zimmermann, *The Law of Obligations* (Oxford, 1996), p. 200.

Thus, while the language of actions did not die out with the demise of the formulary system, by the early sixth century *actio* had lost its technical meaning, which in turn led to a loss of precision in the law itself.⁴⁷

These examples illustrate nicely some of the ways in which the compilers approached the legal works of Paul and sometimes adapted them to better suit contemporary needs. Many of these changes, as noted already, reflect some of the developments in the law that had taken place long before Theoderic's arrival in Italy. In these instances the compilers were simply updating the original sources to take these changes into account. But elsewhere they added specific details that seem to reflect conditions particular to their own time. In comparing the provisions to the sources drawn from the *PS*, there is a great deal of symmetry in terms of content and style. In their selections from this work, the compilers upheld all the same legal principles and even versed them in a similar, and in many places identical, language and syntax. As the *ET* illustrates, the opinions of Paul remained a popular source of Roman *ius* in Theoderic's Italy just as it had been in the later Roman Empire and other contemporary successor kingdoms. And it is surely significant that given what was available to them, the compilers so heavily drew upon the *PS*, a post-classical summary of Paul's opinions, rather than earlier more "classical" juristic works such as the *Institutes* of Gaius, which was by the middle of the fifth century too complex for lawyers and practitioners and was replaced by an *Epitome Gai* – an abridged version of the *Institutes* that did away with all of Gaius' complex explanations for the reasons behind a given rule.⁴⁸

While the *PS* clearly remained a relevant document in Italy well into the sixth century, in those instances where it required updating the compilers made the necessary changes. In most

⁴⁷ Stein, *Roman Law in European History*, p. 25.

⁴⁸ Ibid., pp. 27-8.

cases this involved an adjustment of the original penal component, which did not generally entail an increase in the scope and severity of the penalty, but rather a change in the methods and a greater emphasis placed on the discretionary authority of the judge in matters of punishment. This latter development was associated with the abandonment in the fourth century of the formulary procedure and its replacement with the *cognitio* procedure wherein the state-sanctioned judge played a much larger role in all aspects of a case than he did before. A related development was a loosening of technical language and legal precision. The *ET* documents many of these changes, and bears witness to the fact that Roman law was continuing to evolve in Italy to reflect and account for some of the profound developments taking place in the domain of legal administration and society over the course of the fourth, fifth and early sixth centuries.

The Works of Ulpian and Papinian

Sources from Ulpian (<i>de officio proconsulis</i>)	Provisions of the <i>ET</i>
lib. 2 fr. 1 <i>Quib. ad lib.</i> (Dig. 40.13)	82
lib. 5 fr. 79pr. <i>de iudiciis</i> (Dig. 5.1.79pr.)	74
lib. 7 fr. 7, 4 <i>de accus.</i> (Dig. 48.2.7.4)	103
lib. 8 fr. 1, 1 <i>de abigeis</i> (Dig. 47.14.1)	57-58
Sources from Papinian (lib. 2 <i>de adulteriis</i>)	
fr. 8 <i>ad legem Iuliam de adulter.</i> (Dig. 48.5.9)	39

A total of six provisions are analogous to versions in the *Digest* of extracts taken from works of Ulpian and Papinian respectively: five from Ulpian's *de officio proconsulis* (*On the Duties of a Provincial Governor*), and one from a commentary found in Book Two of Papinian's *de adulteriis* (*On Adultery*).⁴⁹ Presumably, in each instance the compilers were working directly from the sources themselves: there is sufficient correspondence in terms of technical subject matter between their versions and those preserved in the *Digest* to suggest a common source for both. But since these sources no longer survive in their original form, we cannot determine just how

⁴⁹ *De officio proconsulis*: 57 (Dig. 47.14.1 pr.), 58 (Dig. 47.14.1.1), 74 (Dig. 5.1.79 pr.), 82 (Dig. 40.13), 103 (Dig. 48.2.7.4); *de adulteriis*: 39 (Dig. 48.5.9).

closely this was done. Not surprisingly, the provisions bear little resemblance to what we find in the *Digest*: the differences between them reflecting the different tasks required of the respective groups of compilers. In consulting the sources, the compilers of the *ET* were guided by considerations for the changed priorities of the time and attempted to render the law in a form that was suitable for conditions particular to sixth-century Italy; whereas Justinian's compilers, guided by the will of the emperor, consciously looked back to the golden age of Roman law and aimed to restore it to the peak it had reached some three centuries earlier. The following examples illustrate some of the profoundly different ways each group approached the same sources of Roman law in an attempt to meet their individual objectives.

ET 39 addresses the topic of adultery, specifically targeting individuals who facilitated the crime. For this, the compilers borrowed from Papinian's commentary on Augustus' *Lex Iulia de adulteriis* of 18 BC, an extensive statute which among other things defined cases of adultery as public crimes punishable before a criminal court, the penalties, the forms and terms of accusation. The text is quite distinct from the version included in the *Digest*:

ET 39

Anyone who offers a house or dwelling so that adultery may be committed, or anyone who persuades a wife to consent to adultery, shall be punished capitally.⁵⁰

Dig. 48.5.9pr.

He who knowingly makes available his house for the commission of *stuprum* or adultery with the *mater familias* of another or for homosexual relations with a male, or who makes a profit from the adultery of his own wife, is punished as an adulterer, no matter what his status.⁵¹

Whereas *ET* 39 focuses exclusively on adultery, the version in the *Digest* includes acts of *stuprum* (illicit sexual behaviour) and homosexuality. In the *ET* version, the penal component is

⁵⁰ *ET* 39: "Qui ut adulterium fieret, domum vel casam praebuit; quive mulieri, ut adulterio consentiret, suasit, capite puniatur."

⁵¹ *Dig.* 48.5.9pr. (trans. Watson): "Qui domum suam, ut stuprum adulteriumve cum aliena matre familias vel cum masculino fieret, sciens praebuerit vel quaestum ex adulterio uxoris suae fecerit: cuiuscumque sit condicionis, quasi adulter punitur."

extended to include individuals who induced a married woman to commit adultery. Justinian's compilers, on the other hand, address specific instances where the husband pimped his own wife out for profit (*lenocinium*). And while the *ET* specifically notes that this was a capital offence, this fact is only presupposed in the *Digest*.

ET 74 concerns the matter of frivolous lawsuits, and was derived, we presume, from a fragment of Ulpian's commentary on judges. The provision includes a good deal of information not found in the version of Justinian's compilers (*Dig.* 5.1.79pr.):

ET 74

If a plaintiff launches a wrongful lawsuit over some matter, and is refuted after a just examination, from the day the suit was formally set out the falsely accused shall receive from the plaintiff the costs and expenses of the litigation which he demonstrates he sustained when he was undeservedly sued; this shall be determined by the assessment of a judge or of knowledgeable good men appointed for that purpose. It is right that their sense of justice and deliberations determine what costs and expenses of the suit he who heedlessly led another into a public trial should pay.⁵²

Dig. 5.1.79 pr.

He who, it is agreed, has without cause summoned the other party to court will be obliged to pay the other party's travelling and legal expenses.⁵³

ET 74 spells out in detail how the victim of a frivolous lawsuit was to recoup his losses. For this, a judge or group of *boni homines* (who were presumably aware of the facts of the case) were to determine what was owed by the plaintiff.⁵⁴ Here again, we see the compilers going far beyond Justinian's compilers, including details that presumably applied to the situation in Italy.

⁵² *ET* 74: "Si petitor improbe litem cuiuscunque rei alteri forte commoverit, et fuerit sub iusta examinatione convictus, ex die plantati solemniter iurgii, sumptus et litis expensas, quas se pulsatus immerito sustinuisse docuerit, a petitore recipiat, sub aestimatione scilicet iudicis, aut bonorum virorum ex delegatione noscentium: quorum iustitiae et deliberationis erit, quales sumptus litis et expensas eum, qui importune alterum ad publicum deduxerit examen, redhibere conveniat."

⁵³ *Dig.* 5.1.79pr. (trans. Watson): "eum, quem temere adversarium suum in iudicium vocasse constitit, viatica litisque sumptus adversario suo reddere oportebit."

⁵⁴ The role of these *boni homini* in court proceedings is discussed in further detail below (pp. 173-4).

As these examples illustrate, both groups of compilers adhered to the same basic rule of the law, but in so doing emphasized different aspects of it. In these instances the concern for the compilers of the *ET* seems to have been with ensuring clarity and relevance by including specific details not found in the versions of the *Digest*. Thus, whereas Justinian's compilers might leave the manner of punishment unspecified, or gloss over the details of how a particular rule was to be enforced, Theoderic's took particular notice of these aspects. What they wanted were rules that they could apply without necessarily bothering about their rationale or explaining how they had come to have the form that they did – considerations that loom large in the *Digest*.

Gregorian and Hermogenian Codes

From the <i>Gregorian Code</i>	Provisions of the <i>ET</i>
const. Alexandri Severi a. 224 (c. 6 <i>de furtis</i>) (CJ 6.2.6)	86
const. Gordiani a. 243 (c. 3 <i>ad legem Cornel. De sicariis</i>) (CJ 9.16.2)	15
const. Diocletiani et Max. a. 287 (<i>ad legem Fabiam</i>) (CJ 9.20.6)	87
const. Diocletiani et Max. a. 290 (c. 9 <i>de testamentis</i>) (CJ 6.23.9)	28
From the <i>Codex Hermogenianus</i>	
const. Diocletiani et Max. a. 286 (<i>in fragmentis codicis Greg. Lib. III tit. 2 c. 4</i>)	138
const. Diocletiani et Max. a. 293 (c. 9 <i>de noxalib.</i>) (CJ 3.41.4)	109
const. Diocletiani et Max. a. 304 (c. 10 <i>ad leg. Fabiam</i>) (CJ 9.20.10)	81
const. Diocletiani et Max. a incerti (c. 20 <i>de locato et conducto</i>) (CJ 4.65.20)	136

There are eight provisions that are analogous to (potentially fragmentary and interpolated) versions in the *CJ* of imperial decrees originally collected in the late third-century *Gregorian* and *Hermogenian Codes* (*CG* and *CH* respectively).⁵⁵ In these instances we presume that the

⁵⁵ *ET* 86 (CJ 6.2.6 [224]), 15 (CJ 9.16.2 [243]), 138 (*Epitome CG Wisigotica* 3.6(2).4), 87 (CJ 9.20.6 [287]), 28 (CJ 6.23.9 [290]), 109 (CJ 3.41.4 [293]), 81 (CJ 9.20.10 [293]), 136 (CJ 4.65.20 [?293]). One exception where the

compilers of the *ET* had access to the original sources, just as Justinian's did: while in each case the text of the *ET* is quite distinct from that of the *CJ*, there is enough overlap between them in terms of content to suggest that both groups of compilers were working directly from a common source. The considerations that are behind the sorts of variances we see between the *ET* and *Digest* likewise explain the (sometimes profound) differences between the *ET* and *CJ*. Some variances were associated with developments taking place in Roman law in the West from the fourth to sixth centuries. Others were the result of societal changes. Whereas the compilers in Ravenna took account of some of these developments, those in Byzantium did not: they were working under the classicizing spell of Justinian whose primary goal, as mentioned, was to restore the Roman law to its classical form. Such contrasting objectives resulted in very different versions of the same laws. For instance, *ET* 15, a brief provision which recognized the long-held Roman principle of killing in self-defence, bears little resemblance to *CJ* 9.16.2. Both are presumably versions of the same law – an imperial decree of the emperor Gordian of 243:

ET 15

Let the action of one who with a weapon repels an assailant advancing against him not be considered homicide, since someone defending

CJ 9.16.2

He who, when in danger of his life, kills his aggressor or anyone else, should have no fear of prosecution on this account.⁵⁷

original survived in a later version other than the *CJ* is a decree of Diocletian and Maximian from 286 (*in fragmentis codicis Greg.* Lib. III tit. 2 c. 4), which is found in the Visigothic *epitome* of the *CG* (3.6[2].4). The linguistic parallels are noted in italics: "When a sale is made to different people at different times, the one to whom possession was first conveyed is considered the stronger [claimant]." (*"Diversis temporibus pluribus venum datur, eum potioorem esse, cui possessio primum tradita est."*) In *ET* 138 we read: "If the same property is purchased by different people at different times, the one who received it shall have a stronger case and shall more readily acquire ownership." (*"Quotiens eadem res a domino diversis comparetur, ille potior erit et dominium eius magis acquirat, cui traditam fuisse claruerit."*) In both texts the *dominium* over property claimed by different people was granted to the individual who first acquired possession. Aside from a common adherence to the law, there is insufficient proof in terms of content matter and close verbal affinities (indicated here in Italics) to suggest a common source. Both Bluhme and Baviera cite the following as being analogous, but neither suggests that the *CG* or *CH* is the common source. From the *CG*: *ET* 85 (*CJ* 6.2.6 [223]), 96 (*CJ* 7.16.5), 127 (*CJ* 8.41 (42).1 [223]), 82 (*CJ* 7.18.1 [239]), 33 (*CJ* 6.34.2 [285]), 153 (*CJ* 4.12.2 [287]), 5 (*CJ* 7.43.9 [290]), 62 (*CJ* 9.9.22 [290]). From the *CH*: 116 (*CJ* 6.2.14 [293]), 147 (*CJ* 4.44.3 [293]), 148 (*CJ* 8.50 (51).10 [293]), 40 (*CJ* 9.22.20 [294]), 79 (*CJ* 6.16.31 [294]), 127 (*CJ* 8.41 (42).6 [294]), 129 (*CJ* 1.22.2 [294]), 135 (*CJ* 8.13 (14).21 [294]). Vismara, too, is reluctant to identify the *CG* or *CH* as the common source in these instances: "Edictum Theoderici," p. 135 n. 457.

himself is considered in no way to have committed an offence.⁵⁶

Aside from adhering to the same ancient principle of self defence, the written precedence for which was a Sullan enactment on murderers and poisoners from 81 BC (*lex Cornelia de sicariis et veneficis*), the two texts share little else. In the first place, the language of the *ET* is far less clear: that the person in question actually killed in self-defence is only presupposed by the fact that he is not to be held liable for homicide. Second, the *ET* limits his actions exclusively to the source of the threat, whereas the *CJ* leaves room for the interpretation that a person who was acting in self-defense was not liable for the (presumably unintentional) death of an individual other than the aggressor himself.

Elsewhere, the differences are more substantial. *ET* 87, a brief provision concerning the return of runaway slaves, shares little in common with *CJ* 9.20.6:

ET 87

A slave in flight can neither be sold nor given away.⁵⁸

CJ 9.20.6

It is not permitted to sell or give away a slave in flight. Understand that you have contravened the law which stipulates that a fixed sum for this sort of delict is to be paid to the fisc; exempt from this are co-heirs and partners to whom it has been permitted to make a bid concerning the fugitive slave in the dividing up of common goods. Thus it is permitted to sell a fugitive slave under this condition: the sale shall be valid whenever the slave, upon his capture, has been demanded by the buyer.⁵⁹

⁵⁶ *ET* 15: “Qui percussorem ad se venientem ferro repulerit, non habetur homicida: quia defensor propriae salutis videtur in nullo peccasse.”

⁵⁷ *CJ* 9.16.2 (trans. S.P. Scott): “Is, qui adgressorem vel quemcunque alium in dubio vitae discrimine constitutus occiderit, nullam ob id factum calumniam metuere debet.”

⁵⁸ *ET* 87: “In fuga positus servus nec vendi donari potest.”

⁵⁹ *CJ* 9.20.6: “In fuga servum constitutum neque vendere neque donare licet. unde intellegis te in legem incidisse, quae super huiusmodi delictis certam poenam fisco inferendam statuit, exceptis coheredibus et sociis, quibus in divisione communium rerum licitationem de fugitivo servo invicem facere permissum est. ita vero liceat fugitivum vendere, ut tunc venditio valeat, quando ab emptore requisitus fuerit deprehensus.”

The basis for this legal remedy is the *Lex Fabia* (the chief provisions of which are collected in *Dig.* 48.15.6), which deals with the crime of kidnapping (*plagium*), treating a freeman as a slave, or persuading another's slave to flee. In 287 Diocletian introduced legislation that prescribed the death penalty for *plagium*. It was this decree that served as the model for both *ET* 87 and *CJ* 9.20.6 – a fact supported by the linguistic echoes between the two texts (marked out here in *Italics*): *ET* 87: *In fuga positus servus nec vendi donari potest* = *CJ* 9.20.6: *In fuga servum constitutum neque vendere neque donare licet*. For the compilers of the *ET*, this was sufficient. Justinian's compilers, however, went much further to require that the (unspecified) fine for contravening this law was to go to the fisc, and that the sale of a fugitive slave could take place under the following conditions: when a co-heir or partner of the owner had a legal claim of ownership to the escaped slave, he could sell him (upon his return) to a willing third party.

To take as another example, *ET* 109 addresses the subject of an owner's liability of a slave for offences committed by the slave. For this, the compilers presumably drew upon a decree of the emperor Diocletian of 293, which survives in *CJ* 3.41.4:

ET 109

If a slave or *colonus* should seize anything violently without the knowledge of his owner, the owner shall be sued fourfold the original amount within a year of the offence, and for the simple sum after a year; or in place of this, should the owner choose the following alternative, let him know that the offending slave or *colonus* is to be delivered up to a judge to be punished: provided that the owner return that which he came into possession of as a result of the violence of the slave. But if the one sued claims that his slave has fled, let it suffice for the claimant to seek legal satisfaction [in accordance with this

CJ 3.41.4

If a slave, without the knowledge of his master, or even if he is aware of it but is unable to prevent it, takes away your property with violence, you can bring a suit for quadruple damages against his master before the Governor, if the available year has not yet elapsed; and if it has elapsed, you can bring the simple noxal action against him. When he prefers to surrender the slave by way of reparation, you will still not be prevented from suing him for the amount which came into his hands from the robbery; for if the act was committed with his knowledge and he could have prevented it, he should, by all means, be

provision].⁶⁰

compelled to pay the amount of the judgment, without taking into consideration the surrender of the slave. Where, however, you intend to bring an accusation for public crime, on account of your wife having been carried away by a slave, you should bring it not against the master, but against the slave who you allege perpetrated the offence.⁶¹

In both, the owner was liable for the theft committed by his slave as well as any damages that may have resulted. Within one year he was required to pay fourfold the value of the damaged property. Afterwards his liability was alternative: either to pay the damages or to surrender the offender to the person injured. Choice here no doubt depended on the value of the slave and the amount of the fine for which the owner was liable to pay. But the owner was still on the hook for the stolen goods. In terms of language and syntax the two texts are nothing alike. There are also significant differences between them in terms of technical precision. Whereas *CJ* 3.41.4 identifies the specific legal action (*noxali iudicio*) for the remedy, *ET* 109 passes over this detail – a further indication of a loosening of legal precision associated with the demise of the formulary procedure. Justinian’s compilers also envisage a situation not covered in the *ET* where the slave has made off with another’s wife and the victim is intending to bring forward a criminal action.

One last important difference is the extension of the law in *ET* 109 to include *coloni* – an indication perhaps of the decline in the status of the former free tenant from the fourth to sixth

⁶⁰ *ET* 109: “Si servus aut colonus domino nesciente violenter aliqua rapiat, dominus eius intra annum in quadruplum, post annum in simplum convenietur: aut pro noxia certe, si hoc magis elegerit, ipsum servum vel colonum noverit ad poenam iudici contradendum: ita ut, quod ad eum ex ipsa servi violentia pervenisse constiterit, reddat. At si conventus eum fugisse dixerit, executionem eius conquerenti dedisse sufficiat.”

⁶¹ *CJ* 3.41.4 (trans. S.P. Scott): “Si servus ignorante domino vel sciente et prohibere nequeunte res tuas vi rapuit, dominum eius apud praesidem provinciae, si necdum utilis annus excessit, quadrupli, quod si hoc effluxit tempus, simpli noxali iudicio convenire potes: qui si noxae maluerit servum dedere, nihilo minus cum ipso quantum ad eum pervenit experiri non prohiberis: nam si eo conscio et prohibere valente, detracta noxae deditione conventus ad summam condemnationis solvendam omnimodo compellendus est.”

centuries.⁶² *Coloni* – in technical terms, the *adscripticii* – were tied to a particular location (*origo*) and remained free but were liable, should they flee, to be reclaimed by the landowner to provide labour services.⁶³ The laws do not inform us how *coloni* came to be in the first place, and are ambiguous about their legal status: Theodosius’ law, ordering the return of *coloni* found on another’s land, concludes by saying: “*Coloni* also who meditate flight must be bound with chains and reduced to a servile condition, so that by virtue of their condemnation to slavery, they shall be compelled to fulfill the duties that befit freemen.”⁶⁴ That such incoherent language is indicative of the confusion of a society in which social and legal boundaries were becoming increasingly blurred is possible.

In Italy, this blurring of distinction between lower-class free and slaves had been going on since the third century.⁶⁵ By the sixth century, the evidence would seem to suggest that the peninsula had become a region in which rural dependants were mostly unfree; or at the very least this distinction was not expressed in legal terms.⁶⁶ An isolated piece of evidence for Padua in north-eastern Italy, presumably for the church of Ravenna and dating around 560, demonstrates that rent-paying peasants, or tenants (*coloni*), were obligated to perform heavy labour services

⁶² The late Roman term *colonus* could mean either free tenant or owner-cultivator. Since the state taxed them both, and required even independent owners to remain on the land, the law did not always make a distinction between them, and thus it is difficult in many instances to determine whether *colonus* is referring to a free tenant or owner-cultivator. Despite the fact that they were required to stay on the land, it is clear that *coloni* did not always do so. There are several instances documented by late Roman legislation of complaints about the flight of *coloni* and the resultant *agri deserti*, ownerless land, which formed a large percentage of the land lost to agriculture at the end of the Empire. On this development, see P.J. Jones, “L’Italia agraria nell’ alto medioevo: problemi di cronologia e di continuità,” *Settimane* xiii (1969), pp. 57-92, esp. p. 67; C.A. Grey, “Revisiting the ‘problem’ of *agri deserti* in the late Roman Empire,” *JRA* 20 (2007), pp. 362-76.

⁶³ *CTh* 5.17.1 (332).

⁶⁴ *CTh* 5.17.1 (trans. Pharr). On the subject of the colonate, see below, p. 111 n. 111; p. 210 n. 92.

⁶⁵ See Moses I. Finley, *Ancient Slavery and Modern Ideology* (Harmondsworth, 1980); Natalie Kampen, *Image and Status: Roman Working Women in Ostia* (Berlin, 1981), pp. 27-32; Beryl Rawson, “*Spurii* and the Roman View of Illegitimacy,” *Antichthon* 23 (1989), pp. 10-41. Using Egypt as a case study, Roger Bagnall argues for a similar development in the East. See his *Egypt in Late Antiquity* (Princeton, NJ, 1993), pp. 121-7.

⁶⁶ The situation in the East at this time seems to have differed little: in a piece of legislation from 530, Justinian remarked that he could see no difference between *adscripticii* and slaves (*CJ* 11.48.21): “What difference can be distinguished between slaves and *adscriptii*?” (“quae etenim differentia inter servos et adscripticios intellegitur...?”) Concerning the status of *adscripticii* in the sixth century, see Wickham, *Framing the Early Middle Ages*, p. 521.

for their lord one to three days per week (in addition to paying various dues in the form of rent and gifts of lard, honey, eggs and chickens).⁶⁷ There is little distinction made here between the position of the *colonus* and that of the slave both in terms of their *de facto* economic autonomy and *de iure* status. Likewise, the *ET* treats rural dependants as essentially unfree, applying a common penal regime to slaves and *coloni* alike.⁶⁸ What remains entirely unclear is whether the tendency of dependent peasants to be unfree was a long-standing feature of late Roman Italy or whether the effects of war, barbarian invasions, or general economic hardship had reduced formerly free *coloni* to serfs.⁶⁹

As the examples above illustrate the point, the Roman law of Theoderic's Italy was not the Roman law of Justinian's Byzantium. Although Italy in the sixth century never ceased legally to belong to the Roman Empire,⁷⁰ nevertheless the king of the Ostrogoths in fact exercised the

⁶⁷ Tjäder, *Die nichtlit. Papyri Italiens*: n. 3. The document survives in two columns, the left of which records the dues owed by a set of unidentified tenants; on the right, in a second set, which relates to the territory of Padua, there is listed both the names and dues. The dues are in money, *xenia* (the standard medieval Italian term for symbolic gifts like chickens and eggs, ducks, lard, honey and milk which are mentioned specifically in the document), and *operae*, that is labour, measured *per ebdomada*, and varying between 0 and 3 days/week. For dating, see the comments of Tjäder, pp. 185-6. For commentary on the text, see J. Percival, "P.Ital. 3 and Roman estate management," *Latomus* 102 (1969), pp. 607-15; Vera, "Forme e funzioni," pp. 425-30; the former stresses its importance, the latter minimizes it. Other analyses: Jones, "L'Italia agraria," pp. 83-4; Percival, "Seigneurial aspects of late Roman estate management," *EHR* 84 (1969), pp. 449-73, esp. 454-5, 460; P. Toubert, *Les structures du Latium médiéval* (Rome, 1973), pp. 466-7; A. Verhulst, "Quelques remarques à propos des corvées de colons à l'époque du Bas-Empire et du Haut Moyen Age," in *Revue de l'Université de Bruxelles* (1977), I, pp. 89-95, esp. pp. 92-3 (now in *id.*, *Rural and urban aspects*, study II); B. Andreolli, "La corvée precarolinga," in *Le prestazioni d'opera nelle campagne italiane del Medioevo* (Bologna, 1987), pp. 29-52, esp. p. 29. See also Jones, *LRE*, pp. 805-6; Wickham, *Early Medieval Italy: Central Power and Local Society 400-1000* (London, 1981), pp. 99-100; *Framing the Middle Ages*, pp. 278-79.

⁶⁸ E.g., *ET* 21 (*CJ* 9.13.1), 97 (*PS* 5.20.2), 104 (*PS* 5.22.2), 109 (*CJ* 3.41.4), 148 (*CJ* 8.51 (50).10). In each instance, the compilers included *coloni* where the original source or analogue did not. Similarly, in *ET* 48, a provision banning slaves and freedmen from testifying against their current or former masters, they applied the prohibition to *originarii*, where the original (*CTh* 9.6.3) did not.

⁶⁹ See A.H.M. Jones, "Slavery in the ancient world," in Moses I. Finley (ed.), *Slavery in classical antiquity* (Cambridge, 1960), pp. 1-15, who writes (p. 15) of the later Empire in the West: "Where agricultural slavery survived it was a heritage of the past, and the social and economic position of slaves on the land had become indistinguishable from that of free persons. Of course, it mattered enormously to individual tenants whether they were free or not; their capacity to negotiate their rents and to live and work within a wider social context was entirely dependent upon their legal status."

⁷⁰ Mommsen, *Gesammelte Schriften*, vol. VI, pp. 362-4; Jones, "The Constitutional Position of Odovacer and Theoderic," *JRS* 52 (1962), pp. 126-30.

legislative power independently of the Byzantine emperor, down to 535 when his rule collapsed under the onslaught of Belisarius' troops. As the *ET* bears witness, the Roman law of Theoderic's Italy was unconcerned with the traditional niceties of strict classical Roman law, was governed by social and economic rather than legal considerations: it was a law averse to the standards of classical jurisprudence with respect to artistic elaboration, rhetorical flourish and technical precision. In contrast to this were the classicizing efforts of Justinian's jurists. These conservative theorists continued to interpret the works of the great classical jurists and the imperial predecessors of Constantine by adhering to outmoded classical standards of precision and artistry in an attempt to resurrect the Roman law from three full centuries earlier. That these jurists may not have known how Roman law was changing in Italy is possible. If they did, they clearly saw no reason why such changes were worthy of their attention. In any event, what the law actually was in Italy during its Ostrogothic tenureship can only be understood from sources like the *ET*, in so far as they speak to us.

Theodosian Code

From the <i>Theodosian Code</i>	Provisions of the <i>ET</i>
lib. 2 tit. 8 c. 18	154
lib. 2 tit. 13 c. 1	43, 44, 122
lib. 2 tit. 14 c. 1	46
lib. 2 tit. 30 c. 2	121
lib. 2 tit. 33 c. 2	134
lib. 3 tit. 8 c. incerta a. 380, nunc c. 1 <i>CJ de secundis nuptiis</i> (5, 9) et c. 4 ad SC Tertullian (6, 56)	37
lib. 3 tit. 16 c. 1, 2	54
lib. 4 tit. 4 c. 1, 3	28
lib. 4 tit. 14 c. 1	12
lib. 4 tit. 22 c. 3	10, 11
lib. 5 tit. 2 c. 1	27
lib. 5 tit. 3 c. 1	26
lib. 5 tit. 9 c. incerta, nunc c. 4 Iust. <i>De servis fugitivis</i> (6, 1)	84
lib. 5 tit. 10 c. 1	65-68

lib. 7 tit. 42 c. 2. 24	112, 113
lib. 8 tit. 8 c. 3 (sive lib. 2 tit. 8 c. 21)	154
lib. 8 tit. 12 c. 1. 8	51-53
lib. 9 tit. 1 c. 10	103
lib. 9 tit. 1 c. 11. 19	13
lib. 9 tit. 1 c. 15	14
lib. 9 tit. 6 c. 3	48, 49
lib. 9 tit. 10 c. 4	77
lib. 9 tit. 17 c. 6	111
lib. 9 tit. 24 c. 1	17-19
lib. 9 tit. 24 c. 2	61
lib. 9 tit. 24 c. 3	20
lib. 9 tit. 25 c. 1	61
lib. 9 tit. 27 c. 3	3
lib. 9 tit. 45 c. 3. 5	70, 71
lib. 10 tit. 10 c. 2	35
lib. 10 tit. 10 c. 4	50
lib. 11 tit. 8 c. 1. 3	149
lib. 11 tit. 30 c. 42. 22	55
lib. 11 tit. 39 c. 12	132
lib. 12 tit. 6 c. 18	144
lib. 16 tit. 10 c. 6. 23	108

A total of 49 provisions, roughly a third of the *ET*, were derived in whole or in part from imperial decrees, postscripts, and rescripts originally collected in the *Theodosian Code* (*CTh*).⁷¹ Nowhere did the compilers leave the original source untouched. In all instances, there are superficial differences which reflected the compilers' aim to simplify the law and therefore render it in a more comprehensible and accessible form by doing away with the complex,

⁷¹ Baviera notes similarities between the following: *ET* 3 (*CTh* 9.27.3,4 [382]; not *CTh* 9.27.2 [380] as indicated by Mommsen in his edition of the *CTh*), 10 and 11 (*CTh* 4.22.3 [389]), 12 (*CTh* 4.14.1 [424]), 13 (*CTh* 9.1.11 [368]; 9.1.19 [423]), 14 (*CTh* 9.1.15 [385]), 17-19 (*CTh* 9.24.1 pr., 2 and 4 [326]), 20 (*CTh* 9.24.3 [374]), 26 (*CTh* 5.3.1 [434]), 27 (*CTh* 5.2.1 [352]), 28 (*CTh* 4.4.1 [326?]), 35 (*CTh* 10.10.1-3), 37 (*CTh* 3.8.1), 43 (*CTh* 2.13.1 [422]; A. D'Ors, *El Código de Eurico*, p. 246 n. 838, cites *CTh* 2.14.1 as a possible source for *ET* 43: the former deals with the transfer of titles and the latter with the transfer of cases), 44 (*CTh* 2.12.6 [395]), 46 (*CTh* 2.14.1 [400]), 48 and 49 (*CTh* 9.6.3 [397]), 50 (*CTh* 10.10.4 [338]), 51 (*CTh* 8.12.1 [323]), 52 and 53 (*CTh* 8.12.8 [415]), 54 (*CTh* 3.16.1 [331]), 55 (*CTh* 11.30.22 [343]; 11.30.42 [384]), 61 (*CTh* 9.25.1 [349]), 65-68 (*CTh* 5.10.1 [419]), 70 (*CTh* 9.45.3 [398]; 9.45.5 [432]), 71 (*CTh* 9.45.1 [392]; 9.45.3 [398]), 77 (*CTh* 9.10.4 [390]), 84 (*CTh* 5.9.?), 103 (*CTh* 9.1.10 [368]), 108 (*CTh* 16.10.6 [356]; 16.10.23 [423]), 111 (*CTh* 9.17.6), 112, (*CTh* 9.42.2 [356]), 113 (*CTh* 9.42.2 [356]; simil. 9.42.24 [426]), 121 (*CTh* 2.30.2 [422]; simil. 2.32.1 [422]), 122 (*CTh* 2.13.1 [422]), 132 (*CTh* 11.39.12 [396]), 134 (*CTh* 2.33.2 [386]), 144 (*CTh* 12.6.18 [396]), 149 (*CTh* 11.8.1 [397]; 11.8.3 [409]), 154 (*CTh* 2.8.18; 8.8.3; 11.7.13 [386]; 2.8.21 [*CJ* 3.12.7]). The following are cited by both Bluhme and Baviera as possibly sharing a common source: *ET* 4 (*CTh* 9.27.3,4), 6 (*CTh* 4.17.1 [374]), 16 (*CTh* 9.14.2 [391]), 24 (*CTh* 5.1.9), 25 (*CTh* 10.10.27, 30-31), 38 (*CTh* 9.40.1), 45 (*CTh* 2.14.1 [400]), 92 (*CTh* 9.24.1), 94 (*CTh* 5.8.1 [314]), 114 (*CTh* 9.3.5), 143 (*CTh* 16.8.3).

technical and rhetorical language of the original texts. In many cases, however, there are substantial differences between the provision and original text in terms of what the compilers omitted, added or altered.⁷² The following examples are illustrative of this.

ET 10 adopts and amplifies the measures of *invasio* – the deliberate and unauthorized occupation of immovables in the possession of another – prescribed in *CTh* 4.22.3 of the emperors Valentinian II, Theodosius I and Arcadius (which applied specifically to public property):

ET 10

We decree that any property holder whatsoever is to be sued by use of a judicial summons, and the outcome of a proper trial is always to be awaited. And if anyone evicts any holder whatsoever from his property, let him also be deprived of the impartial right to sue for such presumption; let him of course restore the property which he seized and also pay twice the property's income for his insolence. And if he has taken possession of property to which he had no legal right at all, let him suffer this penalty: that he both return to its owner the property, along with its income, in the same condition as it was when it was seized; and let him be compelled to pay the value of the property he seized to the fisc.⁷³

CTh 4.22.3

We have learned that very many persons have forcibly seized property which belongs to Our privy purse and which had been acquired by due formality of confiscation. We order such property to be forcibly taken from such illegal holders and to be added to Our treasury. We punish those persons who assume, beyond the measure permitted by public decency, such contumacious haughtiness that when they were able to bring suit, they were unwilling to await a judgment, spurned the victory which the outcome of legal proceedings would have prescribed, and appropriated that which their audacity had given them.⁷⁴

⁷² E.g., *ET* 10, 12, 14, 17-19, 28, 35, 43, 44, 46, 48, 50, 51, 52, 54, 61, 68, 70, 71, 103, 108, 111, 134, 144, 149. The variances between these texts and the original sources are discussed at greater length either in the course of this and subsequent chapters, or in the notes which accompany the provision in the Appendix.

⁷³ *ET* 10: "Qualemcumque cuiuslibet rei possessorem conveniri iudiciaria auctoritate decernimus et expectari semper iustae cognitionis eventus. Quod si quis qualemcumque possessorem possessione deiecerit, amissionem pro tanta praesumptione vel bonae litis incurrat; reformata scilicet possessione, quam occupaverit, fructus quoque duplos pro tanta temeritate persolvat. Quod si illam possessionem occupaverit, quae eidem minime debebatur, hanc poenam habeat, ut et rem cum fructibus in eo statu domino reddat invasam et aestimationem rei pervasae subire cogatur fisci viribus profuturam."

⁷⁴ *CTh* 4.22.3 (trans. Pharr): "plerosque detectum est rem privatam nostram, quam publicatio celebrata quaesiverat, invasisse: quam nos a retentatoribus ereptam sociari iubemus aerario, punientes contumacius, quam decus publicum sinebat, erectos, ut, qui litem inferre potuissent, nollent exspectare iudicium ac spernerent victoriam, quam iustitiae praescripsisset eventus, et amplecterentur, quod dedisset audacia."

While both prohibited *invasio* and required the unlawfully seized property to be returned to the dispossessed, the *ET* went much further than the *CTh*: where the offender had a legal claim to the property and was acting in anticipation of a court order, he forfeited his claim and was required to pay the dispossessed twofold the value of the income. Where he was acting without any legal claim, he was to return to the property and was fined the value of the property (to be paid to the fisc).

Concerning informers (*delatores*), *ET* 35 was derived from a rescript (*CTh* 10.10.2) of the emperor Constantine of 312, but differs from it significantly:

ET 35

Anyone who comes forth as an informer to do [what he thinks] necessary as though under the pretext of the public interest, whom nevertheless We affirm We utterly curse, shall be prohibited in accordance with the laws from being heard during a suit, although he may even be reporting factual events; nevertheless, if upon being interrogated during the proceedings he is unable to prove those things which he conveyed to public ears, let him be consumed by flames.⁷⁵

CTh 10.10.2

The accursed ruin caused by informers, the one greatest evil to human life, shall be suppressed; at the beginning of an attempt it shall be strangled in the very throat, and the tongue of envy shall be cut off from its roots and plucked out, so that judges shall not grant a hearing at all either to such calumny or to the voice of an informer, but if any informer should arise, he shall be subjected to the capital penalty.⁷⁶

While both texts treat the informer with the utmost contempt (*CTh* 10.10.2 does not even recognize the *delator* as a person, referring to it in neutral terms), the *ET* does recognize some potential benefit from their services whereas Constantine's legislation did not. To deter them from acting altogether, *CTh* 10.10.2 punished any *delator* who attempted to bring forth an accusation with strangulation and the plucking out of the tongue – particularly grisly and

⁷⁵ *ET* 35: "Is qui quasi sub specie utilitatis publicae, ut sic necessarie faciat, delator existit, quem tamen nos execrari omnino profiteamur, quamvis vel vera dicens, legibus prohibeatur audiri: tamen si ea, quae ad aures publicas detulerit, inter acta constitutus non potuerit adprobare, flammis debet absumi."

⁷⁶ *CTh* 10.10.2 (trans. Pharr): "comprimatur unum maximum humanae vitae malum, delatorum execranda perniciēs, et inter primos conatus in ipsis faucibus stranguletur, et amputata radicitus invidiae lingua vellatur, ita ut iudices nec calumniam nec vocem prorsus deferentis admittant; sed si qui delator exstiterit, capitali sententiae subiugetur."

symbolic acts that reflected the disdain which the emperor had towards this class of people; but *ET* 35 simply barred them from acting in accordance with the laws. The *ET* went much further than Constantine's to allow the informer, presumably in serious cases, to give evidence under interrogation, but always at their extreme peril: an informer who failed to prove his claims was to be burned alive. This is more in keeping with post-Constantinian legislation like that of the emperors Gratian, Valentinian and Theodosius (*CTh* 10.10.12.2 [380]; 28 [418 west]), which limited the number of times an informer could act to a maximum of two; the third time constituted a capital offence.

The compilers also had an eye to matters of credit and debt. Generally speaking, they tended to favour the interests of the creditor over the debtor,⁷⁷ a position which was in sharp contrast to earlier imperial legislation that sought to protect debtors from overzealous creditors.⁷⁸

ET 134 is indicative of this. Derived in part from a rescript of the emperor Valentinian I of 386 (*CTh* 2.33.2), it fixed the maximum rate of interest on money at one percent:

ET 134

A creditor who presumes to demand from his debtor anything more than the one percent

CTh 2.33.2

If any person, taking advantage of the necessity of a debtor, should extort anything beyond the

⁷⁷ E.g., *ET* 127 and 124. The first of these attempts to protect the interests of the debtor by preventing the creditor from making him responsible to pay to a third person, and the second granted *bona fide* creditors the right to self-help of pledged properties. The sorts of protective rules have a long history, appearing in the West in the early third century when creditors began to assert maximum discretion to deal with securing pledges – discretionary practices that were abusive compared to the experience of the previous century. On this history, see Donald E. Phillipson, "Development of the Roman Law of Debt Security," *Stanford Law Review* 20 (1968), pp. 1230-48. *ET* 124.

⁷⁸ For example, in the early fourth century (315), peasants received extra protection from a rule exempting implements of cultivation from any purported pledge (*CJ* 8.16 (17).7 of the emperor Constantine). At approximately the same time Constantine expressly provided a preference for a ward's claim against his guardian (*Dig.* 20.4.21 pr. [Scaevola]). As an attempt to solve the problem of unknown pledges, in 472 the emperor Leo provided a priority for security transactions executed before a public authority (*CJ* 8.17 (18).11). An extremely important priority was established in 530 when Justinian recognized a privileged claim for a wife's dowry (*CJ* 8.17 (18).12). Justinian also protected the husband by creating a general legal pledge of the property of a person who promised to pay dowry, and he protected legatees by creating a pledge for the claims of the legatee over anything acquired from the inheritance by the person charged with the legacy. On the negative effects that these sorts of measures had on the economic growth of the late Empire, see Phillipson, "Development of the Roman Law of Debt Security," pp. 1230-48; M. Kaser, *Das römische Privatrecht, I: Das altrömische, das vorklassische und klassische Recht*, trans. Rolf Dannenbring, *Roman Private Law*, 6th edn. (London, 1968), p. 130; F. Schulz, *Classical Roman Law* (Oxford, 1954), pp. 403-5.

allowed by law shall lose his share of the one percent allowed by law, he shall debt.⁷⁹ immediately, without delay, restore what was rapaciously taken, and he shall be obligated to pay fourfold the amount as a penalty.⁸⁰

Whereas *CTh* 2.33.2 fined creditors fourfold the original sum for extorting *cautiones* at a rate higher than the one percent, *ET* 134 punished them with forfeiture of the original debt. Obviously this was a far less punitive measure than *CTh* 2.33.2. While direct evidence for this is lacking, we may perhaps see in this an attempt on behalf of Theoderic to free up credit and thus encourage commercial activity by making the prospect of lending money more appealing to creditors. This would be in keeping with what we know of the king's efforts to revive the Italian economy through various initiatives designed to encourage private enterprise. Thus, for instance, to foster internal trade he instructed the praetorian prefect Abundantius to ensure that the rivers Mincius, Ollius (Oglio), Anser (Serchio), Arno and Tiber were unobstructed so that "ships can travel through unimpeded."⁸¹ Similar in purpose was the granting of land to private individuals who undertook to invest in income-producing activities such as the draining of the Pontine Marshes and the swamps around Ravenna.⁸²

ET 71 departs from the original source in ways that reflect developments in areas involving the Church. Concerning public debtors who sought refuge in a church, the provision requires the relevant church authority to surrender the debtor immediately; should the debtor refuse and the church be unable to comply, the archdeacon is here instructed to pay the original

⁷⁹ *ET* 134: "Amittat sortem debiti creditor, qui ultra legitimam centesimam crediderit a debitore poscendum."

⁸⁰ *CTh* 2.33.2 (trans. Pharr): "quicumque ultra centesimam iure permissam quicquid sub occasione necessitatis eruerit, quadrupli poenae obligatione constrictus, sine cessatione, sine requie protinus ablata redhibebit." *ET* 134 ignores as superfluous the final part of *CTh* 2.33.2, which states (trans. Pharr): "But those persons who are detected as guilty of having acted with equal madness by making excessive demands in any transaction before the issuance of this law shall restore twofold the extorted sum." ("hi vero, qui antea pari furore grassati uspiam deteguntur, in duplum extorta restituant.")

⁸¹ Cass., *Var.* 5.17 (reiterated again in 5.20): "inviolati alvei tractus navium relinquantur excursibus."

⁸² Cass., *Var.* 2.32, 33.

debt. The corresponding legislation of Theodosius (*CTh* 9.45.1 [392]) is much harsher, stipulating that the public debtor is to be forcibly removed from the church whereupon, it is assumed, he was to pay the outstanding debt:

ET 71

If anyone flees to any church whatsoever on account of a public debt, the archdeacon shall compel him to leave in order to render account according to law; but if he is unwilling to do this, he shall deliver forthwith his property which he transferred to the church. Unless he does this, the archdeacon shall be compelled to pay as much of the debt as involves the public interest.⁸³

CTh 9.45.1

If public debtors should suppose that they may take refuge in the churches, they shall either be dragged out of their hiding places at once, or payment of their debts shall be exacted of the bishops who are proved to have harbored them.⁸⁴

That the provision does not go so far as calling for the forcible removal of the debtor from a place of worship reinforces the claims of the Anonymous Valesianus (12.60) that Theoderic was especially respectful of ecclesiastical authority. But such respect was conditional. Criminals, for instance, could not escape the censure of the laws by hiding behind the protection of the Church. The case of Opilio and Gaudentius is illustrative. Both had been arrested for fraud and sentenced to exile by Theoderic, but fled for asylum to a church in Ravenna. Thereupon Theoderic directed that, unless they left by a prescribed date, they should be branded on the forehead and forcibly expelled. It was at this moment that they signed a bill of accusation against Boethius confirming his alleged involvement in the treasonous actions of the senator Albinus. In return they were granted a reprieve.⁸⁵

⁸³ *ET* 71: “Si quis in causa publici debiti ad ecclesiam quamlibet convolaverit, archidiaconus eum compellat egredi, ad edenda legibus ratiocinia sua: aut si hoc facere noluerit, eius substantiam, quam ad ecclesiam detulit, sine mora contradat. Quod nisi fecerit, quanti interest utilitatis publicae, archidiaconus cogatur exsolvere.”

⁸⁴ *CTh* 9.45.1 (trans Pharr): “publicos debitores, si confugiendum ad ecclesias crediderint, aut ilico extrahi de latebris oportebit aut pro his ipsos, qui eos occultare probantur, episcopos exigi.”

⁸⁵ On these events, see Anon. Val. 14.85; Boethius, *Cons. Phil.* 1.4.14-18. We shall return to the subject of asylum in Chapter Three.

One last example is *ET* 108. Concerning the practice of pagan sacrifices, it borrows elements from two imperial rescripts – *CTh* 16.10.6 (356) of the emperor Constantius and 16.10.23 (423) of the emperors Honorius and Theodosius:

ET 108

If anyone is apprehended while sacrificing according to the pagan rite, as well as diviners [*harioli*] and necromancers [*umbrarii*] should they be discovered, upon conviction in a lawful trial they shall be punished capitally; of those individuals who are knowledgeable of the wicked arts, that is magicians [*malefici*], *honestiores*, upon being stripped of all their possessions that they might possess, shall be condemned to perpetual exile; and *humiliores* shall be punished capitally.⁸⁶

CTh 16.10.6

If any persons should be proved to devote their attention to sacrifices or to worship images, We command that they shall be subjected to capital punishment.⁸⁷

CTh 16.10.23

(After other matters.) Proscription of their goods and exile shall restrain the pagans who survive, if ever they should be apprehended in the performance of accursed sacrifices to demons, although they ought to be subjected to capital punishment.⁸⁸

While Theodosius I's famous *cunctos populos* edict of 380⁸⁹ officially outlawed the ancient religion of Rome, paganism continued to thrive in more rural districts of the Empire – a fact owing in part to the conservative attachment of the peasantry for the ancient rites: emperors continued to legislate against paganism well into the fifth century.⁹⁰ Following the demise of the imperial administration this task fell to barbarian kings, who maintained and reissued anti-pagan

⁸⁶ *ET* 108: “Si quis pagano ritu sacrificare fuerit deprehensus, arioli etiam atque umbrarii, si reperti fuerint, sub iusta aestimatione convicti, capite puniantur; malarum artium conscii, id est malefici, nudati rebus omnibus, quas habere possunt, honesti perpetuo damnantur exilio, humiliores capite puniendi sunt.”

⁸⁷ *CTh* 16.10.6 (trans. Pharr): “poena capitis subiugari praecipimus eos, quos operam sacrificiis dare vel colere simulacra constiterit.”

⁸⁸ *CTh* 16.10.23 (trans. Pharr): “paganos qui supersunt, si aliquando in execrandis daemonum sacrificiis fuerint comprehensi, quamvis capitali poena subdi debuerint, bonorum proscriptio ac exilium coercebit.”

⁸⁹ *CTh* 16.1.2.

⁹⁰ Peter Brown, *The Rise of Western Christendom. Triumph and Diversity, A.D. 200-1000*, 2nd edn. (Maldon, MA., 2003), pp. 145-54.

legislation of the Christian emperors.⁹¹ Of the two original texts, *ET* 108 follows the language of *CTh* 16.10.23 more closely; but like *CTh* 16.10.6 it applied the maximum penalty to those caught making pagan sacrifices.⁹²

In connection with this the compilers made explicit reference to diviners (*[h]arioli*), necromancers (*umbrarii*); and extended the rule to include magicians (*malefici*), which they defined as ‘those knowledgeable of the wicked arts’. The punishment for these varied according to status: *honestiores* were deprived of their possessions and exiled; *humiliores* were punished capitally.⁹³ None of these categories are mentioned in the original texts. Significantly, the term *umbrarii* appears nowhere in the *CTh*. An *umbrarius* was a soothsayer, more specifically, one who sought answers from spirits.⁹⁴ That the compilers use the term and presuppose the fact that

⁹¹ J.N. Hillgarth, *Christianity and Paganism. The Conversion of Western Europe, 350-750* (Philadelphia, 1986), pp. 105-10; Brown, *The Rise of Western Christendom*, p. 149.

⁹² The death penalty for pagan sacrifices was reintroduced by the emperors Theodosius and Valentinian in 435 (*CTh* 16.10.25).

⁹³ In the *CTh*, the various terms indicating sorcerers/magicians are used almost synonymously, with little distinction except of degree and intention. The practice of magic was especially opposed by Theoderic and his successors who feared its effect would detract from their own authority. Thus, Athalaric’s *Edict* (Cass., *Var.* 9.18.9) condemned magicians, requiring that they be punished as the law demanded (trans. Barnish, *Variae*, p. 119): “Magicians, moreover, and those who have thought to gain anything by their nefarious arts, are to be pursued with the rigor of the law, since it is impious for us to be negligent towards those whom the pity of heaven does not allow to go unpunished. For what stupidity it is to desert the creator of life, and follow instead the originator of death! Disgraceful actions should be wholly shunned by the magistrates. No one should do what the laws condemn, since those who have shared in forbidden transgressions must be punished by the decreed penalty. For what can they condemn in other men, if they themselves are stained by shameful pollution?” (“Maleficos quoque vel eos, qui ab eorum nefariis artibus aliquid crediderint expetendum, legum severitas insequatur, quia impium est nos illis esse remissos, quos caelestis pietas non patitur impunitos. qualis enim fatuitas est creatorem vitae relinquere et sequi potius mortis auctorem? turpis actus ex toto sit a iudicibus alienus. nemo faciat quod iura condemnant, quia decretali poena plectendi sunt, qui se prohibitis excessibus miscuerunt. quid enim in aliis damnent, si ipsi se inhonesta contagione commaculent? sit etiam sub divitibus tuta mediocritas.”) In a letter (Cass., *Var.* 4.22) written in the name of Theoderic and addressed to the illustrious Argolicus, urban prefect, Cassiodorus has Theoderic instruct the addressee to oversee the trial of the two senators, Basilius (former consul in 463) and Praetextatus, accused in 510 of practicing the magical arts. But before any trial could take place, Cassiodorus tells us that they escaped custody, taking advantage of the guards’ custodial shortcomings (*Var.* 4.23): “The urban prefect informs Us that Basilius and Praetextatus were alleged by many to be involved in the magical arts; he further reports that they escaped through the stupor (*alienatio*) of the guards.” (“Praefectus igitur urbis sua nobis relatione declaravit Basilium atque Praetextatum magicis artibus involutos impeti accusatione multorum: quos elapsos intimat mentis alienatione custodum...”)

⁹⁴ Augustine seems to refer to it as a sacrilegious mystery – one in which he never took part (*Confess.* 10.35.56, ed. James J. O’Donnell, 3 vols. (Oxford, 1992)): “True, the theatres do not now carry me away, nor care I to know the courses of the stars, nor did my soul ever consult ghosts departed; all sacrilegious mysteries I detest.” (“sane me iam

it required no explanation or definition is perhaps indicative of a distinctly more doctrinaire understanding of the black arts among rural populations in the West at this time.⁹⁵

As with the other sources of law they consulted, the compilers had no problem modifying the contents of the *CTh* as they saw fit. In all instances where it appears that they were working directly from a specific text, they offered a paraphrase that retained the basic meaning of the law but did away with any unnecessary artistic or rhetorical flourish. In many places, however, they did more than just paraphrase. They made additions and omissions to bring greater clarity and relevance to the law. The *CTh*, while still an authoritative source of law for Italy in the sixth century, required updating, at least in those areas where the compilers felt that Gothic and Roman provincials required immediate guidance and clarification. Their selections and modifications attempted to accomplish this. In some cases this meant changing a law to account for developments that took place long before the *ET* was produced. In others, the changes reflect more recent events. When we take into consideration the fact that at the time of its production in 437 (less than a century before the *ET*) the *CTh* represented the most up-to-date body of imperial legislation available at the time, we get a sense as to just how quickly the law was adapting in Italy to keep pace with developments taking place on the ground.

Post-Theodosian Novels

From the Post-Theodosian Novels	Provisions of the <i>ET</i>
novella Theodosii II a. 439 <i>de paternis bonis</i> , tit. 14 § 1. 2. 4	54
novella Theodosii II a. 439 <i>de testamentis</i> , tit. 16	28, 29
novella Valentiniani III a. 451 <i>de colonis vagis</i> ,	64, 68

theatra non rapiunt, nec curo nosse transitus siderum, nec anima mea umquam responsa quaesivit umbrarum; omnia sacrilega sacramenta detestor.”) For a definition: W.H. Maigne d’Arnis, Jacques-Paul Migne, *Lexicon manuale ad scriptores mediae et infimae latinitas* (Paris, 1977), p. 2240.

⁹⁵ In noting the variances between *CTh* 9.16.3 and the accompanying *interpretatio*, which includes the specific reference to ‘invokers of demons’, Matthews arrives at the same conclusion for early sixth-century Gaul. See his “Interpreting the *Interpretationes* of the *Breviarium*,” p. 29.

tit. 31 § 1. 2. 5	
novella Valentiniani III a. 452 <i>de episcopali iudicio</i> , tit. 35 § 13	12
novella Maioriani a. 458 <i>de curialibus</i> , tit. 7 § 1. 1	69

A total of seven provisions were derived in whole or in part from imperial constitutions drafted after the publication of the *CTh* in 438 – the so-called post-Theodosian *novellae*.⁹⁶ The novels themselves never existed in a single standard collection: it would seem that the compilers only had access to texts ranging in date from 439 to 458. Two provisions, *ET* 12 and 68, refer specifically to the novel from which they borrow. The first of these is a prohibition against challenges to ownership in the event that the current possessor could demonstrate long and uninterrupted enjoyment of the property for a period of thirty years or more; and grants a five year extension to minors established by ‘recent law’ – a reference to a novel of the emperor Valentinian III of 452, which upholds an existing law of Theodosius (*CTh* 4.14.1 [424]) in regards to the thirty-year rule. In terms of subject matter *ET* 12 and *Nov. Val.* 35.13 are essentially the same:

ET 12

Anyone who is proven to be in possession of any property without interruption for thirty years shall be subject to no judicial challenge at all, whether on the part of a private party or the state. Moreover, We decree that the periods [of possession] of a previous holder, or the holder before that, must by law be [calculated] in favour of such a possessor. We add that if a

Nov. Val. 35.13

Of course, just as We have forbidden that any case whatever should be commenced which had not been begun within thirty years, so a case which has assumed the beginning of a formal attestation of suit shall be terminated within the aforesaid time, with the exception of the privilege of papillary age, which was granted by a law of Our father, Theodosius, of

⁹⁶ *ET* 12 (*Nov. Val.* 35.13 [452]), *ET* 28 (*Nov. Th.* 16.2; *simil. Nov. Val.* 21.1.3-4), 29 (*Nov. Th.* 16.3), 54 (*Nov. Th.* 14.1, 2 [439]), 64 (*Nov. Val.* 31.5 [451]), 68 (*Nov. Val.* 31.2), 69 (*Nov. Maj.* 7.1 [458]; *simil. Nov. Val.* 27.1). A possible derivation is the epilogue, which stipulates: “We have drawn upon these edicts, advantageous both to barbarians and Romans, as much as Our labours could permit or We could address at this time; all loyal barbarians and Romans must preserve them.” “cunctis ... sumus profutura complexi: quae omnium barbarorum, sive Romanorum debet servare devotio.” Similarly, *Nov. Val.* 6.2 (443) begins with the following invocation (trans. Pharr): “The devotion of all men ought eagerly to surpass a regulation which will salutarly profit all.” Both Bluhme and Baviera note the similarity between the following texts (perhaps suggestive of a common source): *ET* 110 (*Nov. Val.* 23.2.3-4 [447]), 142 (*Nov. Val.* 35.18).

suit has been brought within thirty years, and the end of the thirty years comes about before the suit is concluded, let that end the suit without any further ado; for We believe it is more than sufficient for anyone at all both to institute proceedings properly and bring them to completion within thirty years either through the judgment of a public court or the decision of private arbitration. There is this restriction: the exemptions granted by ancient and recent laws with regard to wards under puberty are to be preserved, and with regard to those persons who begin their cases according to law twenty-five and thirty years after legal action could be taken. In this instance we approve the privilege of a five year extension as added in a recent law.⁹⁷

sainted memory, unless perchance the litigation had been formally attested after the twenty-fifth year from the time when the action began to be available.⁹⁸

According to Theodosius' law on prescription of actions, whoever had possession for a long time without being in some way still subject to legal attack, was regarded as the owner. This was upheld by Valentinian's novel, which provided the basis for extending the period another five years in cases involving minors. New in the *ET* is the provision that the time of possession could include that of predecessors.⁹⁹

Under certain circumstances freedom could be attained by anyone who "for a long period of time, that is, a space of twenty years, had continued in possession of his freedom[.]"¹⁰⁰ By the

⁹⁷ *ET* 12: "Qui per triginta annos quamlibet rem iugiter possidere fuerit adprobatus, neque publico neque privato nomine patiatur aliquam penitus quaestionem. Tali autem possessori etiam auctorum proauctorumque suorum tempora secundum legem proficere debere censemus : illud adiicientes ut si intra triginta annos mota lis fuerit, nec finita, superveniens conclusio XXX annorum eandem sine aliqua dubitatione consumat : quia cuiusvis satis credimus abundeque sufficere, intra XXX annos et actiones suas rite componere et eas publico iudicio vel privata definitione peragere; ita ut circa pupillarem aetatem privilegia antiquis vel novellis legibus concessa servantur, vel circa eos, qui ex quo competere poterant, post vicesimum et quintum annum intra tricesimum suas legibus proposuerint actiones. Cui casui quinquennii beneficium novella lege probamus adiectum."

⁹⁸ *Nov. Val.* 35.13 (trans. Pharr): "Sane sicut non coeptam intra tricennium quamlibet causam vetuimus incohari, ita quae contestate litis sumpsit exordium, excepto privilegio pupularis aetatis, quod divinae memoriae patris nostri Theodosii lege concessum est, intra eadem coeperat, contestata lis fuerit. Cui si is causus eveniat, emenso hoc tricennio, quod statutum est, aliud quinquennium prorogamus, intra quod debent negotia universa consumi[.]"

⁹⁹ The significance of this provision is discussed fully in Chapter Four.

¹⁰⁰ *CTh* 3.8.9 (trans. Pharr): "qui diuturno tempore, hoc est per viginti annorum spatia in libertatis possessione duravit[.]" Justinian upholds earlier legislation of the emperor Diocletian (*CJ* 7.22.2 [300]) which recognizes this twenty year period: "those who have lived as bona fide free people for an uninterrupted period of twenty years ...

‘*tenore novellae legis*’, *ET* 68 upholds the original twenty-year statute of limitations for reclaiming an *originaria*; and requires that any children born within that period are to remain the property of the former owner. The *novella lex* to which this refers seems to be a novel of the emperor Valentinian III (*Nov. Val.* 31.1.2), issued in Rome on 31 January 451 and addressed to the praetorian prefect Firminus. The basis for identification rests on similarities between the two texts in terms of technical subject matter and organization of contents:

ET 68

An *originaria* can be reclaimed by her former owner (ingenuous) only within a period of twenty years from the day she departed. But if after a period of twenty years has elapsed, and the *originaria* should be lost to her former owner as a result of this prescription, in keeping with the tenor of the new law any offspring which she gave birth to within this twenty year period must not be lost to her [former] owner.¹⁰¹

Nov. Val. 31.1.2

If a *colona*, who is refused to a petitioner after a period of twenty years, has given birth to any offspring before the aforesaid time limit, such offspring must not be lost to her former master. For it is equitable that the progeny begotten at that time when the woman still belonged to him should return to him, in order that the damage sustained by loss of the mother, which happened because of the passing of years, may be consoled at least by the vindication of her progeny.¹⁰²

By the middle of the fourth century, forty years seems to have been the normal period for initiating an action of prescription. According to *CTh* 4.11.2 of the emperors Constantius and Constans, “The prescriptive period of forty years, which the statutes and law choose to call ‘long time’, must not be admitted when a personal action is instituted.”¹⁰³ Over time this was reduced to thirty years – a period which was granted wider acceptance in the West as the general time

shall become free and Roman citizens.” (“qui bona fide in possessione libertatis per viginti annorum spatium sine interpellatione morati essent ... ut et liberi et cives fiant romani.”)

¹⁰¹ *ET* 68: “Originaria ex quo de ingenuo solo discesserit, intra vicennii spatia repetatur. Quod si originaria, expletis viginti annis, domino sub hac praescriptione perierit, simul eius agnatio, intra viginti annos suscepta a domino mulieris servato novellae legis tenore non pereat.”

¹⁰² *Nov. Val.* 31.1.2 (trans. Pharr): “colona vero, quae petitori post XX annorum curricula denegatur, si quem partum ante designatum tempus edidit, priori domino eum convenit non perire: aequum est ad eum subdolos redeat suscepta tunc temporis, cum adhuc mulier competebat, ut damnum amissae matris, quod processu contigit annorum, prolis saltem vindicatione consoletur.”

¹⁰³ *CTh* 4.11.2 (trans. Pharr): “annorum quadraginta praescriptio, quam vetustatem leges ac iura nuncupare voluerunt, admittenda non est, cum actio personalis intenditur.”

requirement for prescription.¹⁰⁴ For instance, Valentinian III issued a voluminous statute that fixed the period at thirty years,¹⁰⁵ thereafter supplementing it with additional provisions which reinforced the thirty-year limit.¹⁰⁶ In a rescript to the praetorian prefect Basilius of 458 (*Nov. Maj.* 7.1.1), the emperor Majorian likewise used thirty years as the proscribed measure of time.¹⁰⁷

Lastly, there is *ET* 64 which concerns the issue of freemen who at one time transferred themselves to the status of *coloni* of estates in order to gain some sort of financial security; and in the process defiled the owner's *originaria* or *colona*. For this, it borrows extensively from section five of Valentinian's novel of 451:

ET 64

Any freeborn man (who is obligated to no municipality in any manner), who defiles another's virgin slave woman or *originaria* of any age, and wishes to be united with her (provided the owner is also willing), he shall acknowledge this in the municipal records and remain under the authority of the woman's owner; [having done this] he shall not abandon the union with the woman he despoiled, nor be able to leave upon her death. If the owner of the slave woman does not consent, or the corruptor is unwilling to acknowledge this [in the municipal records], then he shall either give the owner two slaves of equal value should he suffer any financial loss as a result of this; or, if he is unable to fulfill this, upon being flogged most severely with military rods, he shall be judged by a board of magistrates of the nearest city; the judge of that place, mindful of his written statement, will be obligated to

Nov. Val. 31.1.5

Many times immigrants who are poor and of lost fortune join themselves to the services of certain persons in order that, by pretending endurance of labor and services, they may receive food and clothing and thus escape the filth and squalor of want. When they have been freed from the straits of their disaster by the humanity and compassion of the person who receives them, then replete, then thinking of nothing of misfortune, they choose women who belong to a paterfamilias and who are superior in cleverness, beauty, and usefulness. When satiety overtakes them, they leave; they depart without considering their former status, the association of marriage, the affection of children, since no law prohibits them. Therefore, if a person who is obligated to no municipality in any manner should join himself to the rustic or urban landed estate of any person and should wish to be united with a

¹⁰⁴ Levy, *West Roman Vulgar Law*, p. 187.

¹⁰⁵ *Nov. Val.* 27 (449); esp. §§ 3 and 4. The title of the Novel reads: *de triginta annorum praescriptione omnibus causis opponenda*.

¹⁰⁶ *Nov. Val.* 35 (452); esp. §§ 12 and 13, and also § 6.

¹⁰⁷ *Nov. Maj.* 7.1.1 (458).

ensure that this is carried out.¹⁰⁸

woman who is obligated [as a *colona*], he shall state in the municipal records his intention to reside where he has chosen, in order that, since this bond precedes, he may not desert the habitation which he chose and he may not break off the union with the woman. When this declaration has been thus published, his freeborn status shall be unimpaired, but he shall not have the right to depart.¹⁰⁹

The compilers followed closely the structure of the novel while at the same time using much of the original language, suggesting that they were working directly from the text.¹¹⁰ But there are noticeable differences. For instance, the compilers ignore the preamble in Valentinian's novel concerning the reasons why a freeman would choose to so obligate himself to another in the first place, and focus exclusively on what steps should be taken to safeguard the interests of owners in such instances. And in this regard they go beyond the original source. According to the provision, the owner was permitted the choice of receiving the freeman under terms, or two slaves of equal value (to the one despoiled). Should the freeman be unable to pay the stipulated fine, he was to be flogged. Another difference here is one of terminology: whereas the original uses the term '*colona*', *ET* 64 uses '*originaria*'.

The same variation appears in *ET* 68. The first reference to *coloni* in extant Roman legal sources is legislation of the emperor Constantine. Although the beginnings of the colonate

¹⁰⁸ *ET* 64: "Ancillam alienam virginem vel originariam cuiuslibet aetatis, quisquis ingenuus, nulli tamen quolibet modo obnoxius civitati, corruperit, si dominus voluerit, aut corruptor ipse rogaverit, et apud gesta professus fuerit, mansurus in domini mulieris potestate, eius quam vitiavit contubernium non relinquat, nec, eadem mortua, discedendi habeat facultatem. Quod si dominus ancillae non consenserit, aut ille profiteri noluerit, tunc aut huius meriti duo mancipia domino tradat, eius iuri profutura, si eius substantia patiat: aut si hoc implere non potuerit, caesus districtissime fustibus vicinae civitatis collegio deputetur: quod iudex eiusdem loci, periculi sui memor, implere et custodire debet."

¹⁰⁹ *Nov. Val.* 31.1.5 (trans. Pharr): "...itaque si nulli quolibet modo obnoxius civitati ad praedium se cuiuscumque rusticum urbanumque collegerit et mulieri obnoxiae sociari voluerit, gestis municipalibus profiteatur habitandi ubi elegerit voluntatem, ... qua professione deprompta salva ingenuitate licentiam non habeat discendi."

¹¹⁰ Note the following linguistic echoes (marked out in *Italics*): *ET* 64: *nulli tamen quolibet modo obnoxius civitati ... et apud gesta professus fuerit ... non ... discedendi habeat facultatem* = *Nov.* 31.1.5: *itaque si nulli quolibet modo obnoxius civitati ... gestis municipalibus profiteatur ... licentiam non habeat discendi*.

predate Constantine it was not subject to imperial regulation until his reign. *Coloni* are not to leave their place of birth or to cultivate another's land, nor are those who belong to imperial estates to be asked to perform civic *munera*. However, *coloni* whose masters (*domini*) demand more of them than had previously been required may approach a *iudex* (the provincial governor or his subordinate) for help, and if their complaints are proven valid, they are to receive back the excess that was taken from them.¹¹¹ For whatever reason, the compilers chose to replace it with *originaria*. Used in a generic sense, the term denotes an *origo*, or place of origin; thus a *decurion* can be *originalis* (*CTh* 12.1.96). In the technical sense, as in the *ET*, it indicates an attachment to a particular piece of land in much the same way as a *colonus*; and designates that status of ignoble birth.¹¹²

That copies of post-Theodosian novels were available and being consulted in Italy at this time is confirmed by Cassiodorus. In an edict of Athalaric prohibiting the unlawful seizure of property (referred to here as *pervasio*), Cassiodorus has the king uphold an earlier novel of Valentinian III of 440 (*Nov.* 8) which fined *pervasores* by the value of the estate seized, and in case of default, *deportationis ultio*: “By the severity of the laws and my own anger, I condemn that chief poison of the human race, the seizure of property [*pervasio*], under which civil order [*civilitas*] can be neither claimed nor maintained. I decree that the rule of the divine Valentinian,

¹¹¹ *CTh* 5.17.1 (332); *CJ* 11.68.2 (no date): *coloni* are not to leave their *origo*; *CJ* 11.68.1 (no date): not to hold *munera*; *CJ* 11.50.1 (no date): *coloni* may seek help for increased demands by *domini*. The laws do not tell us how individuals became *coloni* in the first place, however, and the legal texts are unclear about the status of a *colonus*; the law (*CTh* 5.17.1) ordering *coloni* found on another's land to be returned concludes by stating (trans. Pharr): “*Coloni* also who mediate flight must be bound with chains and reduced to a servile condition, so that by virtue of their condemnation to slavery, they shall be compelled to fulfill the duties that befit freemen.” (“*colonus iuris alieni fuerit inventus, is non solum eundem origini suae restituat, verum super eodem capitationem temporis agnoscat.*”) On the origins of the colonate: A.H.M. Jones, *LRE*, pp. 796-803; Ramsey MacMullen, *Roman Government's Response to Crisis A.D. 235-337* (New Haven, Conn., 1976), pp. 175-81.

¹¹² In a later law of 452 (*Nov. Val.* 35.1.19) in which Valentinian reaffirms this right of the owner, the term *originaria* is used (trans. Pharr): “Moreover, We decreed by a law previously promulgated that if a woman of ignoble birth status (*originaria*) had been lost by a lapse of time, her offspring should not be lost to her former master, and by a clear regulation We forbid that decree to be brought into dispute.”

long seriously neglected, shall rouse itself against those who despise legal process, and, in person or by their servants, dare to expel the owner and violently occupy estates in town or country.”¹¹³

At some point in the nearly one hundred years between the time of its issuance in 440 and the promulgation of Athalaric’s edict in 533/4, Valentinian’s novel had gone into abeyance. But the Ostrogothic king clearly was aware of it and cited it as a relevant source of legal authority, much in the same way the compilers of the *ET* acknowledged the relevance of the post-Theodosian novels, in two instances going so far as to cite the specific text. But again, just as they had with other sources of earlier Roman law, the compilers adapted these novels to better suit conditions particular to their own day.

Conclusions

As noted at the outset of this chapter, the identification of a particular source or sources for any given provision is not a straightforward process. In many cases, the compilers were simply adhering to a universally-held legal principle or juristic concept that might be upheld in multiple decrees and juristic commentaries and was already well-established in Italy by the early sixth century. In these instances the compilers may have consulted a specific source for guidance in especially complex legal matters; but there is simply no way of telling if this was the case. A further complication is the fact that many of the sources from which the compilers were working do not survive in their original form, but rather in possibly later interpolated versions which share little or no verbal affinities with the corresponding provisions of the *ET*. It is hardly surprising, then, that when it comes to the matter of identifying sources for the *ET* there is no scholarly consensus. But this lack of agreement does not preclude the fact that the compilers

¹¹³ Cass., *Var.* 9.18.1 (trans. Barnish, *Variae*, p. 117): “Primam humano generi noxiam pervasionem, sub qua nec dici potest civitas nec haberi, severitate legum et nostra indignatione damnamus statuentes, ut sanctio divi Valentiniani adversum eos diu pessime neglexta consurgat, qui praedia urbana vel rustica despecto iuris ordine per se suosque praesumpserint expulso possessore violenter intrare.” On the variations between this and *ET* 10 and 76, see Chapter Four, p. 208.

were freely adapting and updating sources of earlier *lex* and *ius*. They, like their counterparts in Byzantium, were given the task of collecting and in some cases abbreviating the material at their disposal and making the resulting extracts as coherent as possible. But whereas Justinian's jurists were working primarily to restore Roman law to its classical form, Theoderic's jurists were attempting to provide a law that was suitable for sixth-century Italy. Their alterations of the original sources, whether in the form of additions, omissions or substitutions, demonstrate a careful consideration for the realities in which the *ET* was intended to operate.

In adapting the sources of Roman law available to them, the compilers were not alone. North of the Alps in the contemporary Gallic kingdom of the Visigoths we find a group of Roman jurists working under the direction of a barbarian king, Alaric II, whose task was to produce a law for the Roman population that was relevant for conditions in sixth-century Gaul. Their efforts culminated in the *Lex Romana Visigothorum*. Accompanying each part of the collection (with the exception of the *Epitome Gai*) are *interpretationes* – explanatory commentaries that sometimes clarify, abridge, paraphrase or expand the original text.¹¹⁴ Whether they were actually written by the same individuals who compiled the *Lex Romana* or

¹¹⁴ For many scholars, these *interpretationes* represent different traditions of juristic commentary dating back to the fourth century. Evidence for this is the absence of uniformity in the manner in which the *interpretationes* are expressed. Whereas some *interpretationes* are nothing more than a short expression, such as “this law does not require an interpretation” (“haec lex interpretatione non eget”), others are small essays which are sometimes longer than the original text in question. Still others make reference to other *interpretationes* or sources for further elaboration. At times the *interpretatio* employs a neutral third person singular voice, and elsewhere it uses the imperial first person plural. Among those who view the *interpretationes* as the product of varying juristic tradition, see: F. Wieacker, “Lateinische Kommentare im Codex Theodosianus,” *Symbolae Freiburgenses* (Leipzig, 1933), pp. 259-61; following Wieacker's original position: W.E. Voss, *Recht und Rhetoric in den Kaiser Gesetzen der Spätantike: Eine Untersuchung zum nachklassischen Kauf- und Übereignungsrecht* (Frankfurt-am-Main, 1982), pp. 43-50; Kunkel, *An Introduction to Roman Legal and Constitutional History*, p. 162; Levy, *West Roman Vulgar Law*, pp. 9, 11; similarly, King, *Law and Society*, p. 10; Antti Arjava, “The Survival of Roman Family Law After the Barbarian Settlements,” in R.W. Mathisen (ed.), *Law, Society and Authority in Late Antiquity*, pp. 33-51, esp. p. 34, n. 4. More recently, John Matthews has argued that the *interpretationes* were specifically prepared for the *Breviarium*, though he does point out that this does not necessarily rule out the possibility that they were a part of an earlier tradition of juristic commentary. See his “Interpreting the *interpretationes* of the *Breviarium*,” pp. 11-32, esp. p. 14; see also his *Laying Down the Law*, ch. 5. Similarly: Jill Harries, “‘Not the Theodosian Code’,” p. 41.

incorporated by them into their work as part of a much older tradition of juristic commentary, the purpose of the *interpretationes* was to give greater meaning and clarity to certain points of the law. Oftentimes they differ quite substantially from the texts they comment upon: many employ different terms or phrases; others are versed in a language and style more succinct and pithy; still others are more elaborate than the text in question. In these *interpretationes* we see some of the ways in which Roman law and society had evolved in Gaul over the course of the fourth and fifth centuries, and how the authors of the *interpretationes* (whether they were Alaric's compilers or not) attempted to account for these changes by making adjustments and alterations in their commentary to the original sources. Many of these revisions, in fact, parallel ones found in the *ET*. We shall conclude this chapter by looking at a few examples.

ET 27, on intestate decurions, ignores much of the original, *CTh* 5.2.1 of the emperor Constantine of 318, just as the *interpretatio* does:

ET 27

If a curial dies intestate without a legally recognized successor, let his municipal council (*curia*) succeed; the fisc is excluded from making a claim.¹¹⁵

CTh 5.2.1

If a decurion should fulfill the last day of his life intestate and without children, leaving neither a last will supported by law nor an heir of nearest degree by any other right, his estate shall accrue to the resources of his municipal council; that is, it shall contribute to the advantage of the order from whose body he was removed by the necessity of fate.¹¹⁶

CTh 5.2.1 *itpr.*

If a curial should die intestate, leaving neither children nor near kinsmen, the municipal council from whose order he has been removed by death shall vindicate whatever he has left, so that no person shall dare to petition the Emperors for this estate as being caducous.¹¹⁷

¹¹⁵ *ET* 27: "Curialis si sine successore, quem leges vocant, intestatus defecerit, excluso fisco curiae suae locum faciat."

¹¹⁶ *CTh* 5.2.1 (trans. Pharr): "si decurio sine liberis intestatus diem vitae solverit, cui neque voluntas postrema legibus fulta, neque alio iure gradu proximo heres exstiterit, bona eius curiae suae commodis cedant, id est ordinis utilitati proficiant, cuius corpori fatali necessitate exemptus est[.]"

¹¹⁷ *CTh* 5.2.1 *itpr.* (trans. Pharr): "si curialis intestates moriens neque proximos derelinquat, curia, cuius ordini subducitur, quicquid reliquerit, vindicabit, ita ut nullus audeat ea quasi bona caduca a principibus postulare."

In terms of style, the *interpretatio* and *ET 27* are far more succinct than the original. Both gloss over the detailed attention devoted in the original to the matter of the will. Moreover, in referring to the decurion, both use the term *curialis* rather than the original *decurio*. By the fourth century, the terms were essentially synonymous.¹¹⁸ In the later Empire, as the duties of the decurionate became more burdensome, each curial was compelled at some time to discharge the duties of a decurion, and the term curial and decurion were used interchangeably.

Concerning the woman's right to remarry, *ET 37* upholds the fixed time of mourning, the so-called *tempus luendi*, in which a widow could lawfully remarry, as outlined by the emperor Theodosius (*CTh* 3.8.1 [381]). Both it and the accompanying *interpretatio* make the same important omissions:

ET 37

No woman shall marry for a second time within a year of her husband's death; and she shall not associate herself secretly with that one of whom she will be a wife after a year, since in this way she seems to have been willing to circumvent the laws. For this reason, We stipulate that each one of them is guilty of immorality. We grant this grievance to children and relatives alone so that they may carry out what is

CTh 3.8.1

If any woman who has lost her husband should hasten to marry another man with the period of a year (for We add a small amount of time to be observed after the ten months period, although We consider even that to be very little) she shall be branded with the marks of disgrace and deprived of both the dignity and rights of a person of honorable and noble status. She shall also forfeit all the property which she obtained

CTh 3.8.1 *itpr.*

If within a year after the death of her husband a woman should marry another man, she shall know that she will subject herself to infamy and be rendered infamous to such a degree that she shall forfeit any betrothal gifts that she has received by the bounty of her former husband or anything that he has given to her by his testament, and all this property shall go to his children.¹²¹

¹¹⁸ Originally, a curial was a member of a municipality whose property and wealth made him eligible to serve as a decurion and as a municipal magistrate. During the empire, as curials and decurions became indispensable for the maintenance of the state, their duties became compulsory and increasingly burdensome. Such duties included among other things the collection of outstanding taxes and the maintenance of the public post by supplying animals and provisions. They were compelled to serve without remuneration, at great personal inconvenience, and at such great personal expense that as a class they were finally destroyed by their crushing burdens. As late Roman legislation makes clear, such officers sought in every possible way to escape but were hunted down, arrested, brought back and compelled to serve. They were even forbidden to travel lest they might escape. On laws forbidding the flight of curials, and the extreme steps taken by the state to ensure their continued service, see e.g. *CTh* 12.18.1 (367), 12.1.71 (370), 12.1.76 (=CJ 10.32.31 (371)). For discussion, see Noel E. Lenski, *Failure of empire: Valens and the Roman state in the fourth century A.D.* (Berkeley and Los Angeles, 2002), p. 275.

admissible in such legal cases.¹¹⁹ from the estate of her former husband, either by the right of betrothal gifts or by the will of her deceased husband.¹²⁰

The purpose of the *tempus luendi* was to avoid confusion over the paternity of any child the woman might have afterwards.¹²² But unlike Theodosius' rescript, *ET* 37 and the *interpretatio* ignore the reference in the original to previous custom that fixed the period at ten months; and both incorporate elements of a later law of Theodosius (*CTh* 3.8.2 [382]) in their reference to the children of the marriage, which presupposes their rights to property of the marriage should the mother disregard the one year period.

ET 77 upholds the basic principle outlined in *CTh* 9.10.4 (390) of the emperor Valentinian that an owner was liable should it be discovered that his slave committed violence (*vis*) on his instructions. Both it and the *interpretatio* to the original ignore many of the same elements, such as the reference in the beginning to the testimony of witnesses, the explicit requirement that the offending slave was to be surrendered up, and mention of the *lex Iulia de vi* as the source for the owner's liability for a criminal slave:

<i>ET</i> 77	<i>CTh</i> 9.10.4	<i>CTh</i> 9.10.4 <i>itpr.</i>
If slaves are convicted of inflicting violence, or at the	When slaves are proved by the testimony of witnesses or by	If slaves should confess that they have committed violence

¹¹⁹ *ET* 37: "Intra annum mortis mariti nulla ad secundas nuptias migret: sed nec furtim se misceat illi, cuius post annum erit uxor futura, quia leges videtur circumscribere voluisse."

¹²⁰ *CTh* 3.8.1 (trans. Pharr): "si qua ex feminis perduto marito intra anni spatium alteri festinaverit iam nubere (parvum enim temporis post decem menses servandum adiicimus, tametsi id ipsum exiguum putemus), probrosis inusta notis, honestioris nobilisque personae et decore et iure privetur."

¹²¹ *CTh* 3.8.1 *itpr.* (trans. Pharr): "mulier, quae post mortem mariti intra annum alteri viro nupserit, sciat se infamiae subiacere et notabilem usque adeo reddi, ut quaecumque sponsalicia largitate percepit, vel si per testamentum ipsi aliquid prior maritus donavit, amittat, et totum illius filiis cedat: si filii non fuerint, illis profuturum personis, qui priori marito gradu proximiori iunguntur et hoc sibi per successionem poterunt vindicare."

¹²² While an ancient concept going back to early Roman mores and law, the requirement that a widow observe a proper mourning period went into abeyance by the late Republic, but reappears in several later laws of Theodosius: *CJ* 5.9.1, joined with *CJ* 6.56.1 (Theodosius, 380); and 3.81. On the subject of the mourning period, see Michel Humbert, *Le Remariage à Rome: Étude d'hisiore juridique et sociale* (Milan, 1970), pp. 113-31, 378-87; Susan Treggiari, *Roman Marriage: Iusti Coniuges from the time of Cicero to the Time of Ulpian* (Oxford, 1991a), pp. 493-5; J. Evans Grubbs, *Law and Family in Late Antiquity*, p. 94.

very least they confess to this, and it evident under a just and diligent inquiry that this was committed through the exhortation of the owner, when the owner has been held for the penalty of violence, those things which have been pervaded shall be returned; slaves, nevertheless, shall be punished by the extreme penalty if it is proven that they committed this act on their own volition.¹²³

their own confession to have committed violence, if they committed this crime without the knowledge of their masters, We decree that they shall be surrendered and shall atone for their deeds by the supreme penalty. But if they committed the violence because of fear or the exhortation of their masters, it is clear, according to the Julian Law, that the master shall be pronounced infamous and that he cannot use as defense the dignity of his station or of his birth; but slaves who are proved to have obeyed the madness of such masters shall be sentenced to the mines.¹²⁴

without the knowledge of their masters or should be convicted of doing so, they shall be sentenced to severe tortures and punished. But if it was at the command of their masters that they committed the crime of violence, the masters who commanded the illicit deeds shall be branded with infamy and cannot retain the dignity of their high rank or office. Slaves, moreover, who have obeyed such madness of their masters shall be cast into the mines.¹²⁵

Interestingly, the compilers do not specify the penalty for slaves that committed the act of *vis* with the knowledge or bidding of the owner. Furthermore, in regards to the complicit owner, they do away with the original penalty of *infamia*, or loss of status, and instead make him liable for criminal violence (*vis*) – a capital offence.¹²⁶ *Infamia* deprived the offender of the legal rights of Roman citizenship, which included bequeathing or receiving property in a will, or making a legally binding contract. In the late Empire, it still threatened those convicted of traditional

¹²³ *ET 77*: “Si servi de irrogata violentia convicti fuerint, aut certe confessi, et hoc domini praecepto factum sub iusta et diligenti cognitione constiterit, domino ad violentiae poenam retento, pervasa reddantur, servis nihilominus extremo supplicio puniendis, si violentiam eos sua temeritate commisisse claruerit.”

¹²⁴ *CTh 9.10.4* (trans. Pharr): “servos, qui fecisse violentiam confessionibus testium aut propriis docebuntur, si id inscio domino commiserint, postremo supplicio deditos luere perpetrata censemus. quod si illi metu atque exhortatione dominorum violentiam admiserint, palam est, secundum legem iuliam dominum infamem pronuntiandum loci aut originis propriae dignitate non uti, servos vero, quos furoribus talium paruisse constiterit, metallis per sententiam dedi.”

¹²⁵ *CTh 9.10.4 itpr.* (trans. Pharr): “servi inscio domino confessi vel convicti fuerint violentiam commisisse, addicti tormentis gravibus puniuntur. si vero iubentibus dominis violentiae crimen admiserint, domini, qui illicita praeceperunt, notantur infamia et nobilitatis vel honoris sui dignitatem tenere non possunt. servi autem, qui talibus dominorum furoribus paruerunt, in metallum detruduntur.”

¹²⁶ *CTh 9.10.1* (317) of the emperor Constantine.

offences, such as conniving at the insertion of the name of a powerful person into the titles of a contested property,¹²⁷ breaking the conditions of an arbitration agreement by seeking a referral to a judge,¹²⁸ or lodging petitions for estates owned by the emperor.¹²⁹ Judges, too, were threatened with *infamia*, and a fine of twenty pounds of gold, if they delayed execution of a sentence for a serious crime, or allowed the criminal to be spirited away by clerics.¹³⁰ And the religiously incorrect, the Manicheans, Donatists and apostates, were given notice that their testamentary rights were withdrawn.¹³¹ Nowhere in the *ET* is the punishment of *infamia* used, nor does it appear anywhere in the *Variae*: no doubt the compilers deemed it impractical or unsuitable as a sufficient deterrent for the average person residing in the countryside.

One final example is *ET* 29, which outlines what steps should be taken in the event that a testator is unable to provide a subscription. In this it shares many elements of the original source, a novel of the emperor Theodosius of 439, as well as the accompanying *interpretatio*:

ET 29

If a testator is unable to provide his subscription because he is either illiterate or gravely ill, then there shall be summoned on his behalf an eighth witness whose credibility cannot be challenged in any way. But let witnesses, and particularly the testator himself, know that if, under examination [of the document] anything should be proven false, they shall not be able to avoid the punishment which is stipulated by the

Nov. Th. 16.3

But if the testator should be ignorant of letters or should not be able to subscribe, We decree that the aforesaid regulations shall be observed and that an eighth subscriber shall be employed in his stead.¹³³

Nov. Th. 16.3 *itpr.*

[T]he author of the testament, if he knows letters, shall himself subscribe as the eighth person. If, however, he is not able to subscribe or does not know letters, then he shall employ an eighth subscriber in his stead.¹³⁴

¹²⁷ *CTh* 2.14.1 (400).

¹²⁸ *CTh* 2.9.3 (395).

¹²⁹ *CTh* 5.15.21 (367-70).

¹³⁰ *CTh* 9.40.15 (392).

¹³¹ *CTh* 16.5.3 (372) and 7 (381) on Manicheans; 16.5.54 (414) and 6.4.3 (405) on Donatists; 16.7.5 (391) on apostates.

authority of the laws
concerning forgers.¹³²

All three comment upon the literacy or illiteracy of the testator, and require that an eighth witness be summoned in his place should he prove unable to provide a subscription. But *ET* 29 expands upon both to mention a dying testator specifically, and requires that the status or credibility of the additional witness could not be impugned in any way. This may also have been the situation envisaged by the novel and corresponding *interpretatio*, but the compilers went beyond these to make explicit the application of the rule that was most obviously relevant in their day.

The *ET* was a restatement of previous Roman *ius* and *lex*, designed primarily to bring clarity and relevance to them so that Romans and barbarians “may clearly know what they are obligated to follow...”¹³⁵ For the *ET* to be effective, it had to be understandable and relevant. To that end, the compilers emendated and updated earlier Roman law. Sometimes this meant defining terms that were perhaps no longer familiar, or offering a paraphrase, and occasionally omitting or adding details for clarity and relevance. These variances were fundamentally related to developments taking place in the law and administration of justice via the courts from the fourth to sixth centuries. Others, too, reflected changes taking place in society. In the balance of this study we shall examine what aspects and concepts of Roman law the compilers regarded as relevant or necessary, and how they modified the law to make the *ET* both a functional and practical guidebook for life in the provinces of early sixth-century Italy.

¹³² *ET* 29: “Quod si testator aut literas ignorando aut per necessitatem vicinae mortis propriam subscriptionem non potuerit commodare, tunc octavus testis pro testatore adhibeatur huiusmodi, de cuius fide dubitari omnino non possit[.]”

¹³³ *Nov. Th.* 16.3 (trans. Pharr): “Quod si litteras testator ignoret vel subscribere nequeat, octavo subscriptore pro eo adhibito eadem servari decernimus.”

¹³⁴ *Nov. Th.* 16.3 *itpr.* (trans. Pharr): “Auctor testamenti, si litteras scit, octavus ipse subscribat, sin autem subscribere non potest aut litteras nescit, tunc octavum pro se adhibeat.”

¹³⁵ *ET* epil.

Chapter Three

Public Law and Order: Judges, Courts and the Administration of Justice

Introduction

In a highly rhetorical letter to the Roman senate that was intended to underscore the Solomonesque quality of Theoderic's justice, Cassiodorus has the king proclaim that he was so besieged with petitioners that he was forced to settle cases on horseback:

[Cyprian] often obtained during my [i.e. Theoderic's] horse rides what used to be transacted in the solemn councils [*consistoria*] of former days. For, when I wished to relieve a mind exhausted with cares of the state, I would turn to horse exercise, that the body's strength and energy might be refreshed by the very change of activity. Then, this agreeable reporter would present many cases to me, and his statement was welcome to the judge's wearied mind.¹

In practice, however, the king rarely tried cases in person, as the nature of his office, like that of the Roman emperor, did not permit close contact between him and his subjects. Rather, the bulk of cases were handled directly by specialist officials in the provinces, all of whom were ideally versed in the law in some capacity, and could thus effectively decide any matter which fell under their jurisdiction.² Consisting of members from both the Roman civil service and the Gothic army, this was the judicial bureaucracy that determined the extent to which law and order would be effectively maintained throughout the Ostrogothic kingdom.³ The questions as to who these

¹ Cass., *Var.* 5.41 (trans. Barnish, *Variae*, p. 89): "obtinuit ille saepius in vocationibus nostris, quod in consistoriis agi solebat antiquis. si quando enim relevare libuit animum rei publicae cura fatigatum, equina exercitia petebamus, ut ipsa varietate rerum soliditas se corporis vigore recrearet. tunc nobis causas multiplices relator delectabilis ingerebat eratque eius infastidita suggestio sub iudicis animo taedioso."

² As to their legal qualifications, Cassiodorus has Athalaric proclaim (*Var.* 8.18) to the quaestor Felix (c. 526): "It is agreeable that the matter of justice be administered by judges experienced in the law, since he who knows fairness nor can easily become soiled by the fault of error can scarcely be able to disregard one who is purged of learning ... It is not fitting that a judge be the subordinate of another's will, as he who is followed by so many civic officers should seem greater than another." ("Professionem constat esse iustitiae legum peritos iudices ordinare, quia vix potest neglegere qui novit aequitatem nec facile erroris vitio sordescit, quem doctrina purgaverit ... non enim decet iudicem ministrum esse voluntatis alterius, ut magis alteri appareat, cui tot milites obsecundant.")

³ As Patrick Wormald has convincingly shown, law in itself was of little consequence unless reduced to practice. Thus, judges and others charged with the administration of justice occupied a crucial position within the legal system because they put otherwise abstract rules into practice. See his "*Lex Scripta and Verbum Regis: Legislation and Germanic Kingship from Euric to Cnut*," in P.H. Sawyer and I.N. Wood (eds.), *Early Medieval Kingship*

officers were, the mechanisms involved in the administration of their duties, the rules of jurisdiction and procedure which guided them, and the external factors that hindered them, are the focus of attention here. Evidence for this is drawn primarily from the *ET*, Cassiodorus' *Variae* and late imperial decrees.

Traditionally, scholars have turned to Cassiodorus for the administrative details of Theoderic's government. His *Variae* suggest that the administrative bureaucracy of early sixth-century Italy was a highly differentiated and specialized one, and little removed from that which had existed under the fifth-century emperors: the range of appointment letters preserved in books six and seven of the *Variae* suggest that Theoderic's central bureaucracy consisted of a comparatively vast and specialized officer corps composed of civil and military officers with clearly defined and separate functions along similar lines as the late imperial administration.⁴ At the local level, the basic unit of government was the *civitas*, comprising both an urban core and a stretch of dependent rural territory administered by the *curia*, that is, the local town council made up of quasi-judicial officers who had the authority to deal with civil and minor criminal matters. The *civitates* were organized into provinces, each with their own governor. As in the later Empire, the governor or his deputy functioned as the judge of first instance in serious cases. His decision could be appealed against to the vicar and in some circumstances, for those with enough time and more importantly money, to the praetorian prefect or even the king himself. While the court to which all of these officials were ultimately responsible was that of a king rather than an

(Leeds, 1977), pp. 105-38. Similarly, H. Nehlsen, "Aktualität und Effektivität der ältesten germanischen Rechtsaufzeichnungen," in P. Classen (ed.), *Recht und Schrift im Mittelalter*, Vorträge und Forschungen Bd. Xxiii (Sigmaringen, 1977), pp. 449-502.

⁴ A good account of the governmental structure of the kingdom and its functioning can be found in A.H.M. Jones, *LRE*, pp. 253-7; Moorhead, *Theoderic in Italy*, cc. 2-3; id., "The Last Years of Theoderic," pp. 106-20; Wolfram, *History of the Goths*, pp. 288-295; Ensslin, *Theoderich*, pp. 152-54; id., "Beweise der Romverbundenheit in Theoderichs des Grossen Aussen – und Innenpolitik," in *Settimane di studio del Centro italiano di studi sull'alto medioevo* 3 (Spoleto, 1956), pp. 509-11; E. Stein, *Histoire du Bas-Empire*, II (Paris, 1949), pp. 119-21.

emperor, the administrative bureaucracy as outlined by Cassiodorus appears to have maintained the essential elements of the late imperial system to a remarkable degree.⁵

According to Cassiodorus, then, Theoderic sought and largely maintained the institutions and administrative procedures of the later western imperial administration as he found them. While not entirely misleading, this account does not tell the whole story. It must be borne in mind that the *Variae*, in as much as it was intended as a semi-official record of the barbarian regime, was a product of political expediency which sought to illustrate the legitimacy and suitability of the Italian bureaucracy for resuming palatine services following the conclusion of the Gothic war.⁶ It was compiled in 537/8, towards the end of Cassiodorus' troubled service as

⁵ On the court system during the later fourth and fifth centuries see in general H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, pp. 445-47; M. Kaser, *Das römische Zivilprozessrecht*, 2nd edn. (Munich, 1996), pp. 517-19; George Mousourakis, *The Historical and Institutional Context of Roman Law*, pp. 349-380. On the imperial civil service see W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, pp. 141-2; Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, pp. 423-25; Jones, *LRE*, chs. 11, 12 and 16; A. Cameron, *The Later Roman Empire* (London, 1993), pp. 39-41; M. Kaser, *Römische Rechtsgeschichte*, (Göttingen, 1976), pp. 208-10; E. Stein, *Untersuchungen über das Officium der Prätorianerpräfektur seit Diokletian* (Amsterdam, 1962); J. Harries, "The Roman imperial quaestor," pp. 148-72; A. Giardina, *Aspetti della burocrazia nel Basso Impero* (Rome, 1977); Harries, *Law and Empire in Late Antiquity*, pp. 38-40; R. Delmaire, *Les Institutions du Bas-Empire romain, de Constantin à Justinien, I, Les Institutions palatines* (Paris, 1995); F. De Martino, *Storia della costituzione romana V* (Naples, 1975), pp. 253-55, 373-75; A. Burdese, *Manuale di diritto pubblico romano* (Turin, 1987, repr. 1994), pp. 222-24; A. Guarino, *Storia del diritto romano* (Naples, 1996), pp. 527-29; M. Talamanca (ed.), *Lineamenti di storia del diritto romano* (Milan, 1989), pp. 564-66.

⁶ The extent to which the *Variae* remain a reliable source for Theoderic's administration has come into question in recent years. For some, the work is overtly propagandistic. See e.g. Shane Bjornlie, "What Have Elephants to Do with Sixth-Century Politics? A Reappraisal of the 'Official' Governmental Dossier of Cassiodorus," *Journal of Late Antiquity* 2.1 (2009), pp. 143-71; similarly Andrew Gillett, "The Purposes of Cassiodorus' *Variae*," in Alexander C. Murray, ed., *After Rome's Fall: Narrators and Sources of Early Medieval History. Essays Presented to Walter Goffart* (Toronto, 1998), 37-50, who points out that the element of governmental propaganda interspersed throughout Cassiodorus' letter collection is a result of it being the product of the office of the quaestor. The claims of Barnwell that Cassiodorus was a fraud and that the letters are entirely fictitious are of little merit and are in no way indicative of the prevailing scholarship on the text. For Barnwell, the anachronistic character of the *Variae* and the fact that Cassiodorus' career is known only from his own writings (he seems to have neglected the fact that Cassiodorus held the consulship in 514), is proof that Cassiodorus created his own career – with the corollary that "many, if not all, the documents found throughout the *Uariae* [sic] are not genuine" – "in order to provide a respectable set of Roman aristocratic credentials to use as a background against which to set his propaganda for the Ostrogoths" (*Emperors, Prefects and Kings*, pp. 167-9). While the *Variae* must be treated with a great deal of care, it appears to be a genuine product of the Ostrogothic regime, one which was written in the style of the late imperial chancery tradition. On the authenticity of the *Variae* as part of an actual chancery tradition, see Stefan Krautschick, *Cassiodor und die Politik seiner Zeit*. Habelts Dissertationsdrucke, Reihe Alte Geschichte 17 (Bonn, 1983), pp. 41-5, 118-22; Moorhead, *Theoderic in Italy*, pp. 2-3, 145 with n. 29; J.J. O'Donnell, *Cassiodorus*, p. 59; G. Vidén, *The Roman Chancery Tradition*.

Praetorian Prefect of Italy, while war was raging, and Witigis was besieging the Byzantine commander Belisarius in Rome. Throughout, Cassiodorus deliberately glossed over disturbances (such as Boethius' downfall and execution in 524) and highlighted in deliberate fashion the perception of the order and *civilitas* – that is, the civilized rule of law – associated with Ostrogothic rule.⁷ At the same time, he emphasized a connection between the barbarian regime and the late imperial administration both in terms of ideology and organization.

The picture that emerges is a highly civilized and Romanized one – one that does not necessarily reflect conditions as they actually were, in the aftermath of the collapse of the imperial administration through which the proper and efficient adjudication of disputes could be carried out. The problem for Ostrogothic Italy was that the appointment of provincial governors was extremely erratic. There are only twelve governors known for Italy between 476 and 553 – a significant drop from the thirty-three governors attested for the peninsula in the period 394-476.⁸ Even if this scarcity can be partly explained as a problem with the evidence, it is nonetheless clear that Theoderic progressively appropriated the functions of the Roman *iudices* through such officers as the Gothic *saio* and *comes*.

While the *ET* attests to the operation of a formal hierarchy of courts within the provinces, as well as the existence of institutional resources at the local level,⁹ this was hardly the well-ordered, fully-functioning or sophisticated version presented by Cassiodorus. In fact, the impression given by the compilers is of a system wherein the bulk of cases, whether civil or

⁷ Bjornlie, "What Have Elephants to Do with Sixth-Century Politics," p. 144. This definition of *civilitas* is essentially the same as that of Moorhead (*Theoderic in Italy*, p. 79), who concludes: "civilitas and its cognates ... indicate the quality of abiding by the laws." Amory's definition (*People and Identity*, p. 43), which characterizes *civilitas* as "two nations living together in peace but performing different functions," is not particularly accurate, since this ideology extended to all peoples, not just Romans and Goths. See *Var.* 1.27.1 where *civilitas* applies to the Jews of Gerona.

⁸ *PLRE* II, pp. 1278-79; P.S. Barnwell, *Emperors, Prefects and Kings*, p. 158.

⁹ Municipal *curia*: *ET* 27, 52, 53, 126; municipal *gesta*: *ET* 52, 64, 80.

criminal, minor or major, were dealt with almost exclusively by the provincial governor regardless of a person's status; and in practice, only those litigants with enough money and connections could appeal the decision of a governor. Moreover, the many specialty courts mentioned by Cassiodorus, like that of the *rationalis* or the episcopal courts (*episcopalis audientia*), appear nowhere in the *ET*.¹⁰ This was a much simplified and watered down rendering of the type of administration which had existed in the later Empire, or that supposed by Cassiodorus.

Cassiodorus himself confirms that the strict division between civilian and military sections of Roman government was already weakening under Theoderic, and officers from both spheres crossed from one branch to another, or operated in both at the same time.¹¹ For example,

¹⁰ For references to the court of the *rationalis* in the *Variae*, see *Var.* 6.7 (*formula* for the count of the sacred largesses). As noted already (Chapter One, pp. 56-57), the *ET* is decidedly silent on matters pertaining to the Church and its administration. This silence extends to the bishop's court, *episcopalis audientia*, which was since the later Empire an important source for providing justice at the local level. Evidence for the survival of the *episcopalis audientia* in early sixth century comes from *Var.* 3.37, wherein the bishop Peter is instructed by Theoderic to hear the case of Germanus, whose suit alleges that the aforesaid bishop wrongfully detained a portion of his paternal inheritance: "Therefore, We have come to learn the matter concerning you through the lamentable petition of Germanus, who alleges that you detain from him a part of the property of his father Thomas which legally belongs to him ... As it is proper that cases which concern you should first be remitted to you (so often employed as judges to settle the disputes of others), we call upon you to enquire into this claim swiftly, and if it be a just one to satisfy it. Know that if you fail to do justice yourself to the petitioner, his cause will be heard by Us." ("atque ideo sanctitas vestra a Germano nos aditos flebili allegatione cognoscat, qui se filium legitimum asserit quondam Thomatis, dicens partem facultatis patris sui a vobis detineri sibimet legibus competentem ... quam monetis, sine observationis longae dispendio debita tribuantur, quoniam causarum vestrarum qualitas vobis debet iudicibus terminari, a quo expectanda est magis quam vobis. imponenda iustitia. quod si hanc causam sub aequitate vestrum minime definit arbitrium, noveritis supplicis querelam ad nostram audientiam perducendam ... debita tribuantur, quoniam causarum vestrarum qualitas vobis debet iudicibus terminari.") Despite the relative dearth of sources on the functioning of the bishop's court in Late Antiquity, the subject has received extensive treatment in the secondary literature. See generally Rapp, *Holy Bishops*, pp. 242-52; J.C. Lamoreaux, "Episcopal Courts in Late Antiquity," *JECS* 3 (1995), pp. 143-67; Harries, *Law and Empire*, pp. 191-211; Noel Lenski, "Evidence for the *Audientia episcopalis* in the New Letters of Augustine," in R.W. Mathisen (ed.), *Law, Society, and Authority in Late Antiquity*, pp. 83-97; M. Kaser, *Das römische Zivilprozessrecht*, pp. 526-29. The most extensive work is that of M.R. Cimma, *L'episcopalis audientia nelle costituzioni imperiali da Costantino à Giustiniano* (Turin, 1989).

¹¹ Historians have long accepted this functional division as broadly true in descriptive terms. For a good modern account, see Moorhead, *Theoderic in Italy*, pp. 71-5, who presupposes that differences between Goths and Romans were inherently obvious, envisaging Theoderic's programme as "the imposition of race on a dichotomy which had already existed [viz. soldier-civilian]" (p. 72). See further Mommsen, *Gesammelte Schriften*, 8 vols. (Berlin, 1904), 6, p. 436; Stein, *Histoire du Bas-Empire*, p. 120; J.B. Bury, *History of the Later Roman Empire*, 2 vols. (New York, 1958), 1, pp. 455-6; Ludwig Schmidt, "Die comites Gothorum: ein Kapitel zur ostgotischen Verfassungsgeschichte," *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 40 (1925), pp. 129-33

to judge by his name the *comes* Colosseus, the governor of Pannonia Sirmiensis and who apparently had troops under his command, was a Roman whose commission encompassed both military and civilian spheres.¹² Similarly, Servatus, duke of Reate, exercised a jurisdiction that seems to have been both military and civilian in nature.¹³ Liberius, the praetorian prefect of Gaul, was described by Cassiodorus as a military hero whose imposing appearance was heightened by his visible battle scars;¹⁴ and another Roman, Cyprian, is unambiguously stated to have served Theoderic in both military and civilian capacities.¹⁵ On the other hand, towards the end of his reign Theoderic appointed the Goth Wilia as count of the Privy Purse (*comes patrimonii*) – a civilian post that was occupied by at least two Romans earlier during his rule.¹⁶

In the course of the sixth century, military officers like the *comes* and *saio* began to supersede the traditional civil service (*militia Romana*) in terms of importance in the overall administration.¹⁷ By the close of the century, this process was complete: Byzantine Italy was at

(an attempt to fit the complex administrative framework of Ostrogothic Italy into Theoderic's ethnic ideology). This scholarly consensus has been questioned by R. Soraci, *Ricerche sui conubia tra Romani e Germani nei secoli IV-VI* (Catania, 1974), pp. 85-9; and challenged altogether by Patrick Amory in his *People and Identity in Ostrogothic Italy* (Cambridge, 1997), ch. 2. Amory argues that this functional division was in fact an ethnic one: "barbarian ethnicity was an identity adopted within the context of the break-up of the Empire, one shaped by roles within society. In this framework, Goths played the role of the soldier, and Romans the role of administrators, churchmen and such."

¹² Cass., *Var.* 3.23.3 (a letter in Theoderic's name confirming Colosseus' appointment as governor of Pannonia Sirmiensis).

¹³ Cass., *Var.* 1.11 (a letter in Theoderic's name to Servatus, concerning on-going violence in the province).

¹⁴ Cass., *Var.* 11.1.16. See too *V. Caes. Arel.* 2.10-12, discussed by J. O'Donnell, "Liberius the Patrician," *Traditio* 37 (1981), at pp. 48-50; and, for his unusual military career under Justinian, see Martindale, *PLRE* 2.680.

¹⁵ Cass., *Var.* 8.21.3; concerning whose life, see Martindale, *PLRE* 2.332.

¹⁶ Cass., *Var.* 5.18-20.

¹⁷ On the office of the *comes*, see: Dieter Timpe, "Comes," *Reallexikon der germanischen Altertumskunde* 5 (2nd edn., New York/Berlin, 1982), pp. 63-5; Dietrich Claude, "Comes," *Reallexikon der germanischen Altertumskunde* 5: pp. 65-7; Ludwig Schmidt, "Die Comites Gothorum," *Mitteilungen des österreichischen Instituts für Geschichtsforschung* 40 (1925), pp. 127-34; Otto Seeck, "Dux," *RE* 10 (1905), pp. 869-7; id., "Comites," *RE* 17 (1900), pp. 622-24; Wolfram, *History of the Goths*, pp. 290-2. Similarly, Jones, *LRE*, pp. 366-68; Ennslin, *Theoderich*, pp. 168-9.; Schmidt, *Ostgermanen*, pp. 380-1.; O.J. Zimmermann, *The Late Latin Vocabulary of the 'Variae' of Cassiodorus* (Washington, DC, 1944), pp. 204-5; K. F. Drew, "Law, German: Early Germanic Codes," in J.R. Strayer (ed.), *Dictionary of the Middle Ages* 7 (1986), pp. 468-75. Similar to the *comites* but of lesser rank were the *saiones* – royal officers charged with exercising the king's authority in the provinces. Established perhaps as early as 508, when Theoderic instructed *saio* Nandus to prepare an invasion force for Gaul (Cass., *Var.* 1.24), the office seems to have emerged in response to the basic need of the king to maintain personal and trusted contacts

this time ruled by a military governor known to us as the *exarch*.¹⁸ This process of militarization had important implications for the nature of legal administration in Italy, particularly in the provinces, and calls into question the extent to which things were conducted in the highly bureaucratized and systematized manner suggested by Cassiodorus. With this in mind, we begin our study with the judges and courts before whom and in which provincials, Goth and Roman alike, attempted to seek justice.

Judges and Courts

The insistence of the *ET* on having cases brought before judges, *iudices*, who exercised appropriate jurisdiction presupposes that the illegal exercise of such authority, either by judges who overstepped the boundaries allotted to them or by individuals who had been conceded no right of jurisdiction, was a serious offence and speaks to the existence of a functioning formal judicial hierarchy in the provinces at this time.¹⁹ In Late Antiquity, all hearings, whether they were civil or criminal in nature, were conducted before a judge (*iudex*) authorized by the state.²⁰ It was in the nature of late imperial administration that nearly every officer who held a higher position was at the same time judge over those within his sphere of authority. Thus, the military officers (the *duces* and *magistri militum*) sat in judgement over their soldiers, and the heads of regional and local authorities (e.g., provincial governor, praetorian prefect) presided over the Roman provincials. The *Variae* maintain this administrative structure and the Roman *iudex* terminology that went along with it. Cassiodorus uses *iudex* to indicate any official who holds

throughout his kingdom. As a group *saiones* were remarkably versatile and could be called upon to fulfill any number of functions, including the offering of *tuitio*, royal protection (Cass., *Var.* 7.39), and the general administration of justice. Such officers operated within many barbarian kingdoms throughout the Middle Ages. On the office, see Stein, *Histoire du Bas-Empire*, pp. 122-3; Jones, *LRE*, p. 255.

¹⁸ On the militarization of the Roman bureaucracy, see Brown, *Gentlemen and Officers*, pp. 61-81, 93-101.

¹⁹ E.g., *ET* 8 (on holding a freeborn man without the authorization of a judge); 13 (on making an accusation); 25 (on suing a landholder); 73 (on the proper enforcement of judicial decrees); 99 (homicide); 128 (on the defence of sons *in potestate* and slaves); 145 (concerning recalcitrant barbarians).

²⁰ For a good overview see Jill Harries, *Law and Empire in Late Antiquity*, pp. 53-5.

judicial power, such as the *comes*, *dux*, or provincial governors; and not a particular office or rank. But in the context of the *ET*, *iudex* usually refers to the provincial governor, the *praeses* or *conductor*, whose main function, after Diocletian's reorganization of the provinces into smaller units, was to preside over the courts of first instance.²¹

Cassiodorus' *formula* for the position underscores the point that the primary function of the governor was to ensure the proper administration of his province. An essential aspect of this was the immediate and effective suppression of crime:

Antiquity has prudently decreed that judges be sent throughout the provinces, so that the small numbers that come to see us might not increase. For who can endure the audacity of thieves, if they know that the means of establishing order is far away. Violence will everywhere increase unabated, if it is supposed that a litigant's complaint will be dealt with slowly. To repress yet minor quarrels in those regions is far better than defending against hardened crimes [here].²²

In accordance with ancient tradition, judges are to be dispatched into the provinces to deal with all matters that would have otherwise found their way to the king's *comitatus*, thereby saving the litigants a long and expensive journey, and effectively extending the king's reach into those areas outside of his immediate control. In a letter to Severinus, governor of Suavia, Cassiodorus describes how judges travelled throughout the provinces on yearly circuits: "Judges are to visit each town once in the year, and are not entitled to claim from such towns more than three days' maintenance ... Our ancestors wished that the circuits of the judges should be a benefit, not a

²¹ A total of twenty-nine provisions of the *ET* deal directly with, or contain a reference to, the provincial governor, variously identified as a *iudex*, *iudex provinciae*, *iudex per provinciam constitutus* or *sacer cognitor*: *ET* 1-7, 8, 10, 25, 46, 52, 53, 55, 56, 58, 64, 71, 73, 91, 99, 106, 109, 114, 123, 128, 131, 139, 145. There appears to be a reference in *ET* 10 to the urban prefect (discussed below). On the function of the *iudex* in Late Antiquity, see Harries, *Law and Empire*, pp. 53-4.

²² Cass., *Var.* 6.21.1: "Omnino provide decrevit antiquitas iudices ad provinciam mitti, ne possit ad nos veniendo mediocritas ingravari. quis enim latronum ferret audaciam, si longe positam cognoscerent disciplinam? absolute poterat vis permissa grassari, si conquerens tardius crederetur audiri. sed quanto melius in ipsis cunabulis adhuc mollia reprimere quam indurata crimina vindicare."

burden, to the Provincials.”²³ But as Cassiodorus makes clear, the effectiveness of the system was limited by the inability of the central bureaucracy to interfere systematically in the day-to-day running of such provincial communities. In a letter written in Athalaric’s name to the provincial governors, Cassiodorus has the king exhort these officers to do the job appointed them:

Although we have, by God’s help, appointed you on a yearly basis throughout Our provinces, and throughout all the territories of Italy there is no lack of appointed judges, We learn that an abundance of cases have come [to Us] on account of a lack of justice. Moreover, the blame is clearly a result of your negligence, whenever men are compelled to seek the benefits of the laws from Us.²⁴

In two separate letters drafted during his tenureship of the praetorian prefecture, Cassiodorus makes similar entreaties.²⁵ Thus, while the provincial governor had a clearly defined and significant role within the judicial scheme of things, the impression given by Cassiodorus is that the officials appointed the role were not always up to the task.

As to the provincial governors themselves, these could be Roman or Goth depending on the province under their control. For instance, military districts which could comprise one or

²³ *Var.* 5.14.5: “Iudices ... tam de cursu quam de aliis rebus illicita dicuntur possessoribus irrogare dispendia....Iudex vero ... propter expensas provincialium, quae gravare pauperes suggeruntur, per annum in unumquodque municipium semel accedat: cui non amplius quam triduanæ praebeantur annonae, sicut legum cauta tribuerunt. maiores enim nostri discursus iudicum non oneri, sed compendio provincialibus esse voluerunt.” Towards the end of the letter (5.14.9) these circuit judges are chastened not to claim from the towns’ residents more than that which is lawfully entitled to them – namely, three days’ maintenance. To prevent similar such abuses in the future, as well as to protect a judge from possible fraud, all such officers were to enter their proceedings into official registers (*polyptycha*). In a letter (*Var.* 12.15) drafted in his own name as praetorian prefect to the right honourable Maximus, *cancellarius* in Lucania-and-Bruttium, Cassiodorus explains that he is abolishing the travel fees of judges (*pulveratica*) imposed upon the residents of Squillace, the chief city of the region: “Pulveratica quoque iudicis funditus amputantes trium tantum etiam dierum praesulibus annonas praeberi secundum vetera constituta decernimus, suis expensis facta tarditate vecturis.”

²⁴ *Cass.*, *Var.* 9.20: “Cum vos provinciis nostris iuvante deo annua reparatione praestemus nec desint iudicia per universos fines Italiae distributa, intellegimus de inopia iustitiae copiam venire causarum. culpa siquidem vestrae probatur esse neglegentiae, quotiens a nobis coguntur homines legum beneficia postulare.”

²⁵ *Cass.*, *Var.* 12.2, 6.

more border provinces were subject to the authority of a Gothic *comes*.²⁶ According to Cassiodorus, whether the judge was Goth or Roman had important implications for the practical settlement of disputes. The *formulae* for the office of the various *comes* preserved in the *Variae* consistently make the point that cases involving just Romans were to be handled by Roman officials, while the Gothic officers were to handle inter-Gothic disputes. Cases involving both Goths and Romans were to be handled by a pair of judges, the Gothic count and his Roman counterpart.²⁷ This jurisdictional division between Roman and Goth followed a functional one between the two groups. As illustrated in the *Variae*, the propaganda of Theoderic's regime consistently presented the incoming Goths as having taken the place of the old Roman army, which was itself becoming increasingly barbarized over the course of the fourth and fifth centuries. There was, in short, a separation of function between Goths and Romans. The Roman role within this system was primarily civilian: paying taxes to support the army. That of the Goths was military: ensuring peace by securing the *res publica Romana* against both external and internal threats; and in return they received tax and the benefits that Roman society had to offer. On one occasion Cassiodorus observed, "While the army of the Goths makes war, the Romans may live in peace,"²⁸ and the theme of the Goths fighting while the Romans enjoyed the benefits of peace is one frequently encountered in his *Variae*.²⁹ Just as in the later Empire, where the old Roman army was subject to the jurisdiction of its own courts and operated separately, in legal terms, from the surrounding civilian population, Gothic cases were to be judged separately by Gothic officials.

²⁶ On this point, see Ensslin, *Theoderich*, pp. 168-69; Schmidt, *Ostgermanen*, pp. 380-1; Wolfram, *History of the Goths*, p. 291.

²⁷ E.g., Cass., *Var.* 7.3 (*formula* for the Gothic count).

²⁸ Cass., *Var.* 12.5.4 (an edict of Cassiodorus, drafted during his tenureship of the praetorian prefecture, granting various forms of relief to the inhabitants of Lucania and Brutii).

²⁹ Chapter One, p. 22 n. 10.

That things were not so clearly defined as this is suggested both by *ET* and Cassiodorus himself. In the *ET*, there are a total of five provisions which deal specifically with Goths.³⁰ In two of these they are identified clearly as soldiers: *ET* 32, permitting barbarians the right to draft a will, wherever they happened to be stationed, just as Roman soldiers were so permitted; and *ET* 145, concerning recalcitrant barbarians. In both instances, *barbarus* has a technical sense to it meaning ‘soldier’. In all other instances, the term is used in a more generic way to refer to Goths as a whole. In *ET* 34, for example, the unlawful seizure of another’s property was expressly forbidden, whether the act was committed by a Roman or barbarian:

Let no one, whether Roman or barbarian, obtain another’s property which (if he acquires it through theft) he will be unable to return, and does not think he will return together with its income. Our previous edicts above ratify this with an end to preserving the law.³¹

Such seizures were endemic of late antique society in general. In the context of Ostrogothic Italy, Cassiodorus most often presents the problem as symptomatic of the relationship between Gothic soldiers and Roman landholders (*possessores*) – a situation encouraged by the terms through which the Gothic settlement was effected.³² And in two related provisions, *ET* 43 and 44, the

³⁰ *ET* 32, 34, 43, 44, 145.

³¹ *ET* 34: “Nemo, aut Romanus, aut Barbarus, rem petat alienam, quam si per subreptionem impetraverit, non valebit, et eam se non dubitet cum fructibus redditurum. Salvo eo quod super hac parte superiora nostra edicta ius sanciant.”

³² E.g., *Var.* 1.18.2 (a letter of general instruction to the Roman Domitianus and the Gothic Wilia, both recently dispatched to administer justice in their respective jurisdictions, which condemns acts of *invasio* committed by barbarians); 7.4.3 (*formula* for the duke of Raetia which warns the officer to keep vigilant against acts of *invasio*); 8.26.4 (a letter of exhortation in Athalaric’s name to the Goths of Reate and Nursia, seeking an end to acts of *invasio*); 8.28 (a letter in Athalaric’s name citing the specific case of *invasio* committed by the Goth Tanca). Walter Goffart has argued (*Barbarians and Romans*, pp. 89-100) that the barbarian armies that were settled in the different regions of the West were not given shares in land, the one-third or two-thirds of Roman estates that was the traditional picture of the *hospitalitas* settlements of the Germanic peoples; but rather what they received consisted of tax assessment and its proceeds. That is to say, the barbarian armies remained salaried, though with tax shares associated with specific areas of land, of which each soldier was a *hospes*, a guest, and from where he collected the tax directly. Through such a process of accommodation, the settlement of barbarians was carried out not on the backs of private Roman landholders, but through an allocation of taxes by the Roman government. It must be noted, however, that Goffart’s theory has little direct evidence in support of it. Central to his argument is the evidence for the *illatio tertiarum* (*Barbarians and Romans*, pp. 73-9): traditionally seen as an additional tax imposed on those landowners who did not have to divide up and assign portions of their property as allotments, Goffart argues that it

compilers sought to prevent magnate patrons, whether Roman or barbarian, from exercising undue influence in the provincial court – a common abuse in the later Empire – by preventing litigants from transferring their cases to them in the first place, and limiting their role within the proceedings as another’s *defensor* or *suffragator*, that is, supporter.³³

Aside from *ET* 32 and 145, which applied specifically to Goths actively serving in the rank and file of the Roman army, nowhere do the compilers give the impression that Goths could expect, and were expected, to be treated differently from their Roman, that is to say, civilian counterparts. The *ET* leaves no doubt that the rule of Roman law extended over all without distinction of ethnicity, condition, age or sex: the law ruled learned and ignorant, city-dweller and countryman, Goth and Roman in equal measure. And it was the responsibility of the judge to ensure that this was the case.

That these judges were limited in this regard by considerations of a person’s functional status or that of their own appears to have been the exception rather than the rule. In one instance we hear from Cassiodorus that Gildilas, a Gothic count, was reprimanded by Athalaric for summoning contending Romans before his court on what would seem multiple occasions.³⁴

is actually an allocation of a portion of existing tax revenues. For this, he cites Cass., *Var.* 1.14 (concerning the collection of *tertiae* in addition to the normal tax due). But this is hardly conclusive of a tax-based settlement. In direct opposition to Goffart’s work: Sam J. Barnish, “Taxation, Land and barbarian settlement in the Western Empire,” *PBSR* 65 (1988), pp. 120-55; and J.H.W.G. Liebeschuetz, “Cities, Taxes and the accommodation of the barbarians,” in Walter Pohl (ed.), *Kingdoms of the Empire* (Leiden, 1997), pp. 135-51; Peter Heather, “*Gens* and *Regnum* Among the Ostrogoths,” in Hans-Werner Goetz *et al.* (eds.), *Regna and Gentes: the Relationship Between Late Antique and Early Medieval Peoples and Kingdoms in the Transformation of the Roman World* (Leiden, 2002), pp. 88-133, esp. p. 113. In the end, whether one opines to the traditional theories that suggest the Goths were effectively settled according to the rules of the Roman system of *hospitalitas*, or those proposed by Walter Goffart, who suggests rather that the Goths received a third of the sum collected in taxes, it is obvious that the settlement of the Goths on Italian soil had important implications for tax liabilities. See further Matthew Innes, “Land, Freedom and the Making of the Medieval West,” *Transactions of the RHS* 16 (2006), pp. 39-74, esp. pp. 43-4; Chris Wickham, *Framing the Early Middle Ages: Europe and the Mediterranean, 400-800* (Oxford, 2005), pp. 84-86; and Thomas F.X. Noble (ed.), *From Roman Provinces to Medieval Kingdoms* (London/New York, 2006), pp. 1-27 (for a general review of the scholarship). See also Chapter Four, pp. 213-19.

³³ On these sorts of abuses in the later Empire, see e.g. *CTh* 2.14.1 (400); for discussion, Jones, *LRE*, pp. 502-4.

³⁴ Cass., *Var.* 9.14.7: “You are alleged to have rendered judgment in your own court on matters involving two Romans, even against their will. If you know that these things have been done, do not presume [to do so] anymore,

Elsewhere, however, judges were expected to carry out the rule of the law regardless of the participants' status. As noted in Chapter One, Theoderic instructed Sunhiudas to terminate according to the laws any case that may arise between Roman and Goths, or Goth and Romans, since "[t]hose whom I singly-mindedly wish to defend, I do not permit to live by separate laws."³⁵ Similarly, Cassiodorus has Theoderic command all the inhabitants of Marseilles to obey the jurisdiction of their new governor, the *comes* Marabad, who was, judging by his name, a Goth: "Wherefore, willfully obey that chosen man [Marabad], in those things which he commands to you for the public good, as befits your faith, which was proven on earlier occasions and made evident on subsequent ones; since that sort of loyalty which is preserved with perpetual devotion is pleasing."³⁶ Likewise, the *saio* Dumerit, evidently a Goth, was sent to Faventia to punish the plunderers of small farmers whether the culprits were Goth or Roman.³⁷

In theory, Romans and Goths who lived as *consortes* in post-Gothic settlement Italy were not to be judged by separate laws, but by Roman law alone. Cassiodorus makes this point explicit. For instance, Athalaric's *Edict* concludes with this final stipulation: "The ordinary rule of the laws and the integrity of my commands are everywhere to be upheld."³⁸ And in a letter in Athalaric's name to the Roman senate concerning his recent accession (c. 526), Cassiodorus has the king promise that the Goths and Romans would receive at his hands impartial treatment under the law:

lest while you wish to incompetently seek judgment, you instead seem to be guilty." ("Duorum negotia Romanorum etiam his invitis ad tuum diceris vocare iudicium: quae si cognoscis facta, ulterius non praesumas, ne dum vis iudicium incompetenter quaerere, reatum potius videaris invenire.")

³⁵ Cass., *Var.* 3.13.2: "intra provinciam itaque Samnii si quod negotium Romano cum Gothis est aut Gotho emersit aliquod cum Romanis, legum consideratione definies, nec permittimus discreto iure vivere quos uno voto volumus vindicare."

³⁶ Cass., *Var.* 3.34.2: "Quapropter designato viro in his, quae vobis pro publica utilitate praeceperit, libentibus animis oboedite, ut fides vestra, quae iam prioribus monstratur exemplis, subsequentibus quoque declaretur indiciis, quia gratius est obsequium quod devotione perpeti custoditur."

³⁷ Cass., *Var.* 9.10.

³⁸ Cass., *Var.* 9.18 (trans. Barnish, *Variae*, p. 120): "et usualia iura publica sub omni censemus distractionis robore custodiri, quae tanto munimine se tegunt, ut nostra quoque iurisiurandi interpositione cingantur."

We wish that before Us the Goths and Romans be judged by the same law; and there shall be no other difference between you, except that they undergo the trials of war for the common advantage, and you may increase in number through the quiet habitation of the city of Rome.³⁹

In practice, this policy led to a blurring of boundaries between the separate legal jurisdictions of Goth and Roman whereby Romans could be judged by Goths and vice versa. That Theoderic and his successors intended for this jurisdictional divide to be rigorously enforced is quite possible; but judging from the case of Gildilas mentioned above, the judges themselves were far less concerned with such details.⁴⁰

In all instances the governor possessed executive power throughout his respective province or provinces. While many cases involving small claims could conceivably have reached their courts, such judges were entitled to delegate hearings to deputies, or lesser judges.⁴¹ In the later Empire, one of the most important of these lesser judges was the *defensor civitatis*.⁴² In his

³⁹ Cass., *Var.* 8.3: “Gothis Romanisque apud nos ius esse commune nec aliud inter vos esse divisum, nisi quod illi labores bellicos pro communi utilitate subeunt, vos autem habitatio quieta civitatis Romanae multiplicat.”

⁴⁰ This blurring of boundaries transcended all aspects of life in Theoderic’s Italy. The king himself is said to have remarked (Anon. Val. 61) that “the poor Roman imitates the Goth, the Rich Goth the Roman.” (“Romanus miser imitatur Gothum et utilis Gothus imitatur Romanum.”) This need not have applied to the aristocracy giving up its military role, or the lower classes filling the ranks of the army, but an indication of the convergence of the two cultures, Roman and Gothic, that was occurring in Italy at this time. If the archaeological record is any indication, there is nothing to suggest a distinctly Gothic culture in Italy. On the archaeological invisibility of the Goths in Italy see V. Bierbrauer, *Die Ostgotischen Grab- und Schatzfunde in Italien* (Spoleto, 1975); and Gian Pietro Brogiolo, “Dwellings and Settlements in Gothic Italy,” in S. Barnish and Federico Marazzi (eds.), *The Ostrogoths from the Migration Period to the Sixth Century: An Ethnographic Perspective* (Woodbridge, 2007), pp. 116-7.

⁴¹ This was the practice throughout the late Empire. See Harries, *Law and Empire*, p. 54. According to Cassiodorus (*Var.* 7.26) *iudices* of local towns were designated as *comites secundi ordinis*, counts of the second order – a clear indication of their subordination to the counts of the first order, namely the *comites civitatis*. On this arrangement see Jones, *LRE*, 3, pp. 50-1.

⁴² Scholars have generally viewed the *defensor civitatis* as the brainchild of the emperors Valentinian I and Valens in 368. The law specified that *defensores* should be drawn from the ranks of former provincial governors or other officials from the civil service of sufficient rank. Regarding this point Valentinian was emphatic. To ensure the success of his law, Valentinian stipulated that the final appointment of a candidate for the office had to be approved by the emperor himself. For scholarship on the *defensor civitatis*, see Paul Vinogradoff, “Social and Economic Conditions of the Roman Empire in the Fourth Century,” *Cambridge Medieval History I* (New York, 1936), pp. 542-67, esp. 565; A.H.M. Jones, *The Greek City from Alexander to Justinian* (Oxford, 1940, repr. 1966), pp. 243-4, 358 n. 61; Jones, *LRE*, pp. 144-45, 279-80, 480, 726-27; Franz Wieacker, *Recht und Gesellschaft in der Spätantike* (Stuttgart, 1964), pp. 72-3; Francesco De Martino, *Storia della Costituzione Romana* 5 (Naples, 1975), pp. 501-509; G. E. M. de Ste. Croix, *The Class Struggle in the Ancient Greek World from the Archaic Age to the Arab Conquest* (Ithaca, 1981), pp. 317, 363, 629 n. 30; V. Mannino, *Ricerche sul “Defensor Civitatis”* (Milan, 1984);

legislation concerning the creation of the office of *defensor* in Illyricum, the emperor Valentinian entrusted this officer with the task of protecting the lower classes of the population against the sorts of abuses committed at the hands of great land-owners and state officials.⁴³ Towards the end of the fourth century, however, the *defensor civitatis* was proving itself to be an increasingly unsuccessful institution, as many of those who held the office often committed abuses themselves or were rendered incapable through bribery or intimidation.

By the early sixth century, the office had clearly lost its initial prestige and became an additional burden imposed upon members of the municipal council. Both the *ET* and *Variae* make this point clear. The *ET* refers to the institution of the *defensor civitatis* twice, and in both instances the officer appears as being largely responsible for enrolling records in the municipal registers. The two provisions, *ET* 52 and 53, address the matter of tax liability, and should be taken together as a general edict on the matter:

ET 52 But if anyone wishes to willingly make a gift of rural or urban estates, a record of the generosity, confirmed by the signatures of witnesses, shall be registered in the municipal records; provided that three curials or municipal magistrates, and a *defensor civitatis* on behalf of the municipal magistrate together with three decurions or *duumviri* or *quinquennales* are present as witnesses for the drawing up of the records [of the gift]; but if these are not available, the registering of the transaction shall be fulfilled in another municipality which has these officials; or let a report of what was given be forwarded to the governor of that province.⁴⁴

Jens-Uwe Krause, *Spatäntike Patronatsformen im Westen der römischen Reiches* (Munich, 1987), pp. 289-93; Ramsay MacMullen, *Corruption and the Decline of Rome* (New Haven, 1988), p. 49; Alexander Demandt, *Römischen Geschichte von Diocletian bis Justinian 284-565 n. Chr.* (Munich, 1989), pp. 335, 404; Bärbel Kramer, "Liste der Syndikoi, Ekdikoi und Defensores in den Papyri Ägyptens," *Miscellanea Papyrologica* 19 (Florence, 1990), pp. 305-29; R. M. Frakes, "Some Hidden *Defensores Civitatum* in the *Res Gestae* of Ammianus Marcellinus," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Rom. Abt.) 109 (1992), pp. 562-32; and most recently Frakes, who argues in "Late Roman Social Justice and the Origins of the *Defensor Civitatis*," *The Classical Journal* 89 (1994), pp. 337-48 that the office existed as early as 319; Albert Dietl, *Defensor civitatis: der Stadtpatron in romanischen Reliefzyklen Oberitaliens* (Munich, 1998).

⁴³ *CTh* 1.29.1. See also *CTh* 1.29.2, 5, 7, 8; 11.8.3 (409).

⁴⁴ *ET* 52: "Si vero praedium rusticum aut urbanum quisquam libero arbitrio conferre voluerit, scriptura munificentiae etiam testium subscriptionibus roborata gestis municipalibus allegetur; ita ut confectioni gestorum praesentes adhibeantur tres curiales, et magistratus, et pro magistratu defensor civitatis cum tribus curialibus aut

ET 53 Concerning *traditio*, it is necessary for it to be conducted according to the laws in the district: if a municipal magistrate, *defensor*, *duumviri* and *quinquennales* are not available, three decurions shall be sufficient for executing the records of transfers, provided that the performance of the material conveyance is carried out before knowledgeable men in the neighborhood.⁴⁵

For the purposes of tax assessment, it was a requirement that all transactions involving movables and immovables be recorded in the *gesta municipalia* before the presence of the *defensor* and other municipal officers. According to Cassiodorus' *formula* for the appointment of the position, the *defensor civitatis* was responsible for the equitable collection of all tax revenues.⁴⁶ In this capacity, a *defensor* could be expected to fulfill any number of functions. For example, in a letter written in the name of Theoderic to the *possessores*, *defensores* and curiales of Aestunae, Cassiodorus has the king instruct the addressees to collect and ship off to Ravenna all unused blocks of marble found within their municipality.⁴⁷ Elsewhere, Theoderic is made to instruct the *defensores* of Pavia to supply the neighbouring Heruli with ships for their voyage to the royal court.⁴⁸

Alongside the *defensor civitatis* there existed certain other municipal magistrates that exercised jurisdiction in minor civil matters within the *civitas*. Both *ET 52* and *53* mention two such officials: the *duumvir* and *quinquennalis* respectively. The *duumvir* was one of the two heads of the municipal government. In the later Empire, the *duumviri* presided together in the council, supervised the overall functioning of the municipal administration within individual cities, and provided the city with games and other forms of entertainment. The term

duumviri vel quinquennales: qui si defuerint, in alia civitate, quae haec habuerit, allegationis firmitas impleatur, aut apud iudicem eiusdem provinciae, quod donatum fuerit, allegetur."

⁴⁵ *ET 53*: "De traditione vero quam semper in locis secundum leges fieri necesse est, si magistratus, defensor, aut duumviri quinquennales forte defuerint, ad conficienda introductionem gesta tres sufficiant curiales: dummodo vicinis scientibus impleatur corporalis introductionis effectus."

⁴⁶ Cass., *Var.* 7.11.

⁴⁷ Cass., *Var.* 3.9.

⁴⁸ Cass., *Var.* 4.45.

quinquennalis seems to be a simple abbreviation for the *duumvir quinquennalis*, an official in the municipal administration who was elected every fifth year to perform the local census; it is not one of the titles used by the Roman professional *collegia* to denote their chief magistrates.⁴⁹ As for other members of the municipal government, the *ET* makes no specific distinction, referring to them simply as decurions and curials.⁵⁰ But the *ET* confirms what some of the Ravenna papyri tell us, namely that city councils continued to function well into the sixth century. In fact, the Ravenna papyri preserve a number of certified copies of proceedings before local *curiae*, including those of Ravenna, Reate and Syracuse, which range in date from 489 to 625. While documenting some of the minor functions of the *curia*, including the authentication of wills, the registration of conveyances involving real property, the approval of the appointment of guardians and the performance of similar quasi-judicial functions, these records serve as a striking testimony to the lasting legacy of this quintessentially Roman civic institution in the Italian peninsula.⁵¹

Ideally, the municipal *curia* were useful for dealing with petty cases, and provided members of the lower classes the means by which to obtain justice cheaply and promptly in their own cities. For major civil and criminal cases, however, the court of first instance was, as has been mentioned, that of the governor; and all appeals against lower municipal courts were forwarded to him. In the later Empire, the decisions of governors were subject to appeal to a higher ranking provincial officer, a feature of the late Roman legal system that was designed to

⁴⁹ On the office of the *quinquennalis*, see Halsey Royden, "The Tenure of Office of the Quinquennales in the Roman Professional Collegia," *American Journal of Philology* 110 (1989), pp. 303-15.

⁵⁰ E.g., *ET* 27 (the property of an intestate decurion or curial is to revert to the state); 69 (the authorized possession of a decurion); 113 (concerning the children of a decurion convicted of a crime); 126 (decurions and curials are prohibited from issuing notices of debt within a church).

⁵¹ Jan-Olof Tjäder, *Die nichtliterarischen Lateinischen Papyri Italiens aus der Zeit 445–700*, Acta Instituti Romani Regni Sueciae, series in 4° 19, (2 vols.; Uppsala 1955; reprinted Stockholm 1982). For records of private ownership (n. 2, pp. 178-83); wills (nn. 3, 4, pp. 198-217); gifts (nn. 10-12, pp. 279-99); bills of sale (nn. 29-34, pp. 48-104); manumission (n. 9, pp. 246-49); the appointment of guardians (n. 7, pp. 228-234).

keep these officers in check. Such appeals were directed to the office of the praetorian prefect, the highest-ranking civil servant of the Italian prefecture. In principle, this officer, together with the urban prefect, were the final courts of appeal, as they could hear cases in place of the emperor, *vice sacra*, and were in effect able to delegate powers of appellate jurisdiction as if they were emperors.⁵² In practice, however, some cases proved to be too challenging or sensitive (given the status of the participants involved) even for them; and by the middle of the fourth century, such cases were channeled directly to the emperor himself.⁵³

Cassiodorus' administrative breakdown of the Ostrogothic regime would seem to suggest that little had changed with respect to how the judiciary was organized. His *formula* for the office of praetorian prefect presents the officer as a supreme judge with quasi-regal status and unappellable jurisdiction:

For this dignity and my own [the monarch's] position have certain rights in common. For it summons men living at a distance to its court without legal limitation; it imposes large fines on wrong-doers; it distributes public moneys at will; it bestows travel warrants with like power; it confiscates unclaimed property; it punishes the misdeeds of provincial governors; it pronounces judgment by word of mouth [whereas all other Judges had to read their decisions from their written statement]. What is not entrusted to the Prefect, when his very speech is a verdict? He can almost establish laws, since the awe he inspires can settle cases without appeal.⁵⁴

But as Cassiodorus admits in the preface to the letters drafted during his tenure of the prefecture, much of the judicial burden of the office was shouldered by his legal expert (*consiliarius*) Felix, and he rarely dealt with legal matters directly.⁵⁵ It is clear from Cassiodorus that parties which

⁵² The basis for this is *CTh* 11.30.16 (331) of the emperor Constantine.

⁵³ Harries, *Law and Empire*, p. 55.

⁵⁴ Cass., *Var.* 6.3 (trans. Barnish, *Variae*, p. 94): "Quaedam enim huic dignitati et nobiscum iura communia sunt. exhibet enim sine praescriptione longinquos, magna quantitate multat errantes, fiscum pro sua deliberatione distribuit, evectiones simili potestate largitur, vacantia bona proscribit, delicta provinciarum iudicum punit, verbo sententiam dicit. quid est, quod non habeat commissum, cuius est vel ipse sermo iudicium? paene est, ut leges possit condere, quando eius reverentia sine appellatione potest negotia terminare."

⁵⁵ Cass., *Var.*, *praefatio chartarum praefecturae*, 4, 5.

considered that they had been wronged by the prefect's decision could, in fact, appeal. In most cases, this was done before the *saio*, an official who controlled and directed all other officers of the crown, including the praetorian prefect. In one instance we are told that the *saio* Triwila was entrusted with the task of bringing an unjust praetorian prefect to book.⁵⁶

As for the urban prefect, his jurisdiction seems to have declined considerably in this time. For reasons which lay in its past history, Rome was governed on quite different lines from other cities of the Italian peninsula. In supreme charge of the city was the *praefectus urbis*. Traditionally, the *praefectus urbi* was the judge of first instance within the city and for a radius of 100 miles around it; within his jurisdiction fell cases involving violations of public order in the city and breaches of building regulations. In this he was assisted by an *officium* consisting of a five-member senatorial subcommittee, the *iudicium quinquevirale*.⁵⁷ There is a possible reference to the urban prefect in *ET* 10, wherein judges were instructed to uphold the rule of the law whether they were dispatched into the provinces, or in Rome itself: "We command all those judges, appointed in the provinces, or in the Venerable City, and their staffs, to be guardians of this just and lawful decree ..."⁵⁸

According to Cassiodorus, the office was still esteemed highly honourable in the early sixth century, ranking officially below that of praetorian prefect, and was normally filled by members of the best families of the senatorial aristocracy.⁵⁹ And judging from a letter drafted in Theoderic's name to the urban prefect Argolicus, the officer continued to perform important

⁵⁶ Cass., *Var.* 3.20.

⁵⁷ The quinquerviral court was created through legislation (*CTh* 9.1.3) of the emperors Valens, Gratian and Valentinian of 376 – legislation which was drafted following a notorious hunt for senatorial sorcerers.

⁵⁸ *ET* 10: "... Cuius decreti iusti atque legitimi omnes per provincias iudices et urbe venerabili constitutos vel eorum officia iubemus esse custodes: ita ut si aliquid extiterit, quo se putent exigendae mulctae superius comprehensae pares esse non posse, relationem ad scrinia nostra transmittant, ut a nobis, si ratio poposcerit, districtius vindicetur."

⁵⁹ See e.g. Cass., *Var.* 1.42-3 (concerning the elevation of the *vir illustris* and patrician Artemidorus, relative of the emperor Zeno, to the position of urban prefect).

judicial functions. In the letter, Argolicus was instructed by the king to oversee the trial of the two senators, Basilius (former consul in 463) and Praetextatus, accused in 510 of practicing the magical arts.⁶⁰ But the impression given elsewhere by Cassiodorus is of an officer whose authority was largely ignored. In a letter concerning the ongoing violence that had embroiled Rome as a result of the Laurentian schism (roughly between 502 and 507), Cassiodorus describes how the members of the Senate dismissed the presiding prefect in the matter. He has the king remind the senators to forward their complaints to the urban prefect Agapitus so that the guilty could be punished in accordance with the laws: “If there is any insult which requires notice, bring it before the urban prefect so that any fault can be remedied in accordance with the laws and not through a presumed action that results in injury: for, how does he who strives to take the law into his own hands differ from the one at fault?”⁶¹

In addition to these regular courts Cassiodorus lists a large number of special courts which dealt with cases of a particular type or with matters concerning specific categories or ranks of persons. The vast majority of these courts operated under the old Roman principle

⁶⁰ Cass., *Var.* 4.22 (trans. Barnish, *Variae*, p. 78): “Now, by the official report of your mightiness, I have learnt that Basilius and Praetextatus, who have long been polluted by the infection of the sinister art, have been indicted for your examination by the charge of certain individuals. In this affair, you assert that you look to my verdict, so that what is commanded by my pious authority may be strengthened. But I, who am incapable of departing from the laws, to whom it is natural to maintain a regular justice in all things, decree by this authority that you shall try this case by legal examination, together with five senators: namely the magnificent Patricians Symmachus, Decius, Volusianus and Caelianus, and the illustrious Maximianus. And, keeping to every legal procedure, ensure that, if the accusation brought should be proved, it is also punished by the penalty of the laws themselves, so that hidden and secret culprits, whom our uncertain knowledge cannot bring before the laws, may be deterred by this kind of punishment from such sins.” (“Magnitudinis itaque tuae relatione comperimus Basilium atque Praetextatum, artis sinistrae iam diu contagione pollutos, in accusationem tui examinis personarum intentione deductos. super qua re nostram te asseris spectare sententiam, ut confidentius fiat quod pietatis nostrae mandat auctoritas. Sed nos, qui nescimus a legibus discrepare, quorum cordi est in omnibus moderatam tenere iustitiam, praesenti auctoritate decernimus, ut quinque senatoribus, id est magnificis et patriciis viris Symmacho Decio Volusiano atque Caeliano nec non illustri viro Maximiano, hanc causam legitima examinatione pensetis. et per omnia iuris ordine custodito, si crimen quod intenditur fuerit comprobatum, ipsarum quoque legum districtione plectatur, ut rei abditae atque secreti per hoc vindictae genus a culpis talibus arceantur, quos ad leges trahere non potest incerta notitia.”)

⁶¹ Cass., *Var.* 1.30.4: “si quod est forte, quod poenam mereatur, admissum, in praefecti urbis notitiam deferatur, ut culpa legibus, non per praesumptam coerceatur iniuriam. quid enim discrepat a peccante, qui se per excessum nititur vindicare?” On the circus factions: Cass., *Var.* 1.27; 1.31-33; 1.44; 3.51.5, 11. On these events in general see Moorhead, *Theoderic in Italy*, pp. 114-39, 239-40.

(*praescriptio fori*) according to which a magistrate had jurisdiction over matters arising out of his departmental duties as well as jurisdiction to deal with his subordinates in matters of discipline. The most important of these special administrative courts were those of the imperial treasury. A court of this type was, for example, the court of the *rationalis*, overseen by the magistrate who represented the public treasury in a particular region, which dealt with cases relating to taxation and other fiscal issues.⁶²

A decision of the court of the *rationalis* could be appealed against to the count of the sacred largesses (*comes sacrarum largitionum*), the officer in charge of state finances. Apart from the fiscal courts, the other administrative courts were of minor importance. At Rome, the *praefecti annonae*, for instance, had jurisdiction over matters involving trade and the supply and administration of foodstuffs.⁶³ The *comes formarum urbis*, count of the aqueducts, had judicial authority to settle disputes concerning water rights or the infraction of rules protecting the aqueducts.⁶⁴ In addition to these types of courts, Cassiodorus mentions several which oversaw cases involving individuals of a particular category or rank. In accordance with the rules of *praescriptio fori*, various categories of persons could claim, as defendants, if accused in civil or criminal cases, and sometimes also as plaintiffs in civil cases, the jurisdiction of a court other than that of the province of their residence or where the offence was alleged to have taken place. The justification for this was based on the argument that the state was so dependent upon the services of the classes concerned that it could ill afford to have them put aside their duties to attend courts other than those of their chief officer. One such class which enjoyed jurisdictional privileges was that of senators. As noted already, Cassiodorus' *formula* for the urban prefect

⁶² Cass., Var. 6.7 (*formula* for the count of the sacred largesses).

⁶³ Cass., Var. 6.18 (*formula* for the office).

⁶⁴ Cass., Var. 7.6 (*formula* for the office).

stipulates that those domiciled within a 100 mile radius of Rome were accordingly entitled to claim trial before the officer, whether accused of crimes or sued in civil actions.⁶⁵

The impression given by Cassiodorus is of a vast and complicated network of courts with equally complex rules of jurisdiction. But even if things were not so complicated or complex as this, the plaintiff's task of discovering in what court he should sue his adversary could be proven a difficult and daunting one, particularly if the latter belonged – or at least claimed to belong – to one of the privileged classes. In its insistence that cases were to be brought before the judge possessed of the appropriate jurisdiction, the *ET* at least confirms that there was a functioning judicial hierarchy in the provinces. But this appears to have been a somewhat simplified system in which the provincial governor was the judge of first instance in nearly all matters, whether civil or criminal, regardless of a person's rank. As Cassiodorus himself makes clear, although Goths and Romans officially fell under separate jurisdictions, and thus were entitled to have their cases heard by Gothic and Roman judges respectively, in practice this proved to be difficult to enforce; and judges themselves could be equally confused as to what types of cases they had jurisdiction over. Thus, Athalaric had to remind the *comes* Gildilas of his jurisdictional limitations.⁶⁶

The judicial system was bewildering enough if litigants and governmental officials had followed the already intricate rules of jurisdiction. But confusion no doubt was confounded by the general willingness of certain parties to circumvent the rules. Litigants who were wealthy or

⁶⁵ Cass., *Var.* 6.4 (*formula* for the urban prefect). Physicians, too, seem to have been granted special jurisdiction. As the *formula* for the count of the chief of physicians would have it (*Var.* 6.19), disputes involving those in the medical profession were to be settled by this officer: "Therefore, hence forth adorn [yourself] with the rank of count of the chief physicians, so that among doctors you alone shall be considered exceptional, and all who pain themselves with a desire of mutual contention shall submit to your judgment. Be the judge of this eminent profession, and end their quarrels, which result alone used to judge." ("Quapropter a praesenti tempore comitivae archiatrorum honore decorare, ut inter salutis magistros solus habeatis eximius et omnes iudicio tuo cedant, qui se ambitu mutuae contentionis excruciant. esto arbiter artis egregiae eorumque discinge conflictus, quos iudicare solus solebat effectus.")

⁶⁶ Cass., *Var.* 9.14.

influential enough to grease the necessary palms or pull the right strings could secure the right to summon their adversaries before some court other than the one designated. On several occasions Ennodius, whose intimacy with the court at Ravenna made him the perfect candidate, was petitioned by friends to secure the goodwill of the quaestor in presenting their petitions, or in rendering other forms of assistance in their legal dealings.⁶⁷ His letters are particularly revealing of the importance of patronage in legal affairs. One letter requested a quaestor by the name of Festus to take care of a certain Bassus and assist him to present his petitions to the court.⁶⁸ Another asked the same Festus to help Venantius gain justice.⁶⁹ This officer's intervention again was sought in a lengthy and intractable lawsuit between a relative of Ennodius by the name of Julian, and one Marcellinus of Milan.⁷⁰ Another letter petitioned Festus on behalf of a religious woman;⁷¹ and yet another requested his assistance for a certain Dalmatius who was attempting to establish his rights to a tract of territory in Sicily.⁷² And on one occasion, Ennodius recommended to his friend Stefanus, an abbot in southern Gaul, to send a representative, supplied with appropriate letters of recommendation, to Faustus at Ravenna in an attempt to forestall an unfavourable judgment, obtainable for a price, being rendered by the Milanese magistrates.⁷³ As these correspondences attest, friends at court, and more importantly the money

⁶⁷ The majority of these letters, composed in Milan, date between 501 and 513. On the career of Ennodius and the dating of this works, see S.A.H. Kennell, *Magnus Felix Ennodius* (Ann Arbor, 2000), pp. 6-18; Richard Bartlett, "The Dating of Ennodius' Writings," in Edoardo D'Angelo (ed.), *Atti della Seconda Giornata Ennodiana* (Naples, 2003); and the introduction in Vogel's *MGH* edition (AA 7). Vogel's numbering system is used, with that of Hartel's supplied in brackets (below).

⁶⁸ Enn., 25 [= *Ep* 1.20].

⁶⁹ Enn., 137 [= *Ep* 4.9].

⁷⁰ Enn., 90 [= *Ep* 3.20].

⁷¹ Enn., 115 [= *Ep* 3.33].

⁷² Enn., 121 [= *Ep* 4.5].

⁷³ Enn., 150 [= *Ep* 4.18].

to pay them, were crucial elements not only for obtaining a successful outcome but for having a case brought forward in the first place.⁷⁴

In the Courtroom

In Late Antiquity it was the practice that all hearings, whether civil or criminal, were brought before a judge authorized by the state. In the early Empire this was not normally the case, particularly for criminal hearings where verdicts were delivered by juries. Gradually, however, hearings before a single judge became the standard practice in the provinces for all types of cases.⁷⁵ The fact that the same judge was expected to deal with any matter brought before him, criminal or civil provided that it fell within their jurisdiction, led to a merging of the two procedures, although the initial stages of bringing forward the suit retained an important difference: the accuser in the criminal case had to bind himself by a written undertaking (*inscriptio*) to undergo the same penalty as that which faced the defendant, if proved innocent; whereas in civil cases the plaintiff simply had to bear the expenses of the trial if his accusations proved groundless.⁷⁶

The *ET* maintained this important difference. Under *ET* 13, the rules governing *inscriptio* compelled the accuser in a criminal case to bind himself, in writing, to undergo the penalty, including death, if the prosecution failed:

Anyone who considers accusing another with any crime, let him not be heard first, nor let anything concerning the case be judged, unless he undertakes the

⁷⁴ All of these letters demonstrate in varying degree the extent to which a patron was expected to act on behalf of his clients – an exercise that entailed writing letters to the quaestor, and no doubt bribery or other forms of corruption that could lead to the perversion of the course of justice. On the subject of patronage in Ennodius' letters, see Kennell, *Ennodius*, pp. 20, 28, 32, 34, 46-8. On the content of these letters: Moorhead, *Theoderic in Italy*, pp. 156-8; Heather, *The Goths*, p. 247. For a discussion of patronage and the importance of having court clout (*potentia*) and connections (*gratia*) in the later Empire, see Christopher Kelly, *Ruling the Later Roman Empire* (Cambridge, MA., 2004), pp. 129-37. See further below, pp. 174-75.

⁷⁵ For this development see Harries, *Law and Empire*, p. 101; id., "Violence, Victims, and the Legal Tradition in Late Antiquity," in H.A. Drake et al. (eds.), *Violence in Late Antiquity: Perceptions and Practices* (Burlington, VT: 2006), pp. 85-102 at p. 85; Mousourakis, *The Historical and Institutional Context of Roman Law*, pp. 365-78.

⁷⁶ The basis for this is *CTh* 9.10.3 (319).

bond of a preliminary inscription, and guarantees the following before a judge exercising the appropriate jurisdiction: that if he does not prove what he claims, he will suffer a similar penalty which the accused, when convicted according to law, can receive. And let both the accused and accuser be held in similar custody until the outcome of the trial has been reached; unless either the charges are minor, in which cases a guarantor must be produced, or the accused is sufficiently noble or of distinguished enough honour that he ought to be entrusted to his rank.⁷⁷

The requirement that both the accuser and accused had to submit themselves to a form of custody to await the outcome of the trial was the subject of a rescript (*CTh* 9.1.19) of the emperors Honorius and Theodosius of 423, which partly formed the basis for *ET* 13. While *CTh* 9.1.19 applied specifically to capital cases, the compilers did not make this point explicit. Rather, the matter was one of judicial discretion, with decision based upon such factors as the nature of the crime committed, the status of the accused (and accuser), his possessions, record and so on.

Unquestionably, not all alleged criminals or accusers were arrested, and certainly not many involved in civil suits. But in many instances, to be sure, the arrest of a defendant, and for that matter the accuser, both before and during a trial must have been necessary in order that the case be heard and judgment executed. It is difficult to believe that a person charged with a serious crime, or the accuser in such a case, was permitted his freedom until the hearings, and thus allowed the opportunity to make good his escape. Arrest might prove a problem, however, if the accused fled to sanctuary.⁷⁸ A further problem was that an innocent person could suffer a long term in custody while awaiting the judge's verdict;⁷⁹ and perhaps not survive at all, given

⁷⁷ *ET* 13: "Qui alterum quolibet crimine putaverit accusandum, non prius audiatur nec de exhibitione aliquid iubeatur, nisi se praemissae inscriptionis vinculis obligarit et istud caverit apud competentem iudicem, se eam poenam subiturum, si non probaverit quod intendit, quam possit reus convictus secundum leges excipere : et usque ad eventum iudicii, tam reus quam accusator aequali custodiae sorte teneantur. Nisi forte aut minora sint crimina, in quibus fideiussor praeberi debeat, aut reus adeo nobilis vel splendidi honoris sit, ut suae committi debeat dignitati."

⁷⁸ Perhaps the most infamous case concerning asylum-seekers was that of Opilio and Gaudentius (discussed above).

⁷⁹ Boethius, for example, suffered an exceptionally long internment (roughly between 523 and late 525 or early 526) before he was put to death for treason. Doubt concerning his guilt and the need to gain sufficient evidence before execution are possible reasons for such a duration, but it is just as likely that protracted, and for that matter public imprisonment served a deterrent purpose, particularly in capital cases. Given the severity of the crime with which he

what we know about the generally squalid state of prison conditions in the early sixth century.⁸⁰

For the civil suit, *ET* 74 (cited and discussed in the previous chapter) required that the plaintiff, should he fail to prove his case, had to pay the expenses of his opponent – obviously a far less severe penalty than what his counterpart could face in the criminal sphere. Despite such differences, however, the rules governing civil and criminal proceedings were essentially the same.

From the early fifth century onwards, the preliminary stage in civil proceedings was the summoning of the defendant. When an action was initiated through the making of a formal accusation⁸¹ before a competent judge, it was his duty to summon the defendant and ensure his appearance in court. But there were limitations imposed upon him. For instance, a defendant could not be forcibly dragged to court. *ET* 73 makes this point clear:

Let office staffs carry out the directives of any judges, as well as the commands of any office or jurisdiction, provided local custom of the *civitas* is observed; it is enough that the person sued promise to go before the court, and let the *apparitor* dare nothing beyond [extracting this promise – that is, he cannot compel attendance]. And let the *apparitor* of that jurisdiction from which the precepts are issued handle the judgments. But if a *miles* of another jurisdiction should attempt

was charged, it is unlikely that Boethius was permitted the luxury of house arrest, but it is clear he did not suffer unduly in a dungeon, at least until the very end: for it was during this time that he composed his masterpiece *Consolation of Philosophy*.

⁸⁰ In his *formula* of general amnesty for prisoners (to coincide with Easter), written in his own name as praetorian prefect on behalf of the state, Cassiodorus gives a rather stark impression of prison conditions (*Var.* 11.40): “... The prison – that house of Pluto, in which men suffer a living death, from its foul odours, from the sound of groaning which assails their ears, from starvation which destroy their taste, from the heavy weights which weary their hands, from the endless darkness which makes their eyes grow dim – let the prison now be filled with emptiness ... Never is it so popular as when it is seen to be deserted.” (“... cella gemituum, tristitiae domus, apud superos Plutonis hospitium, locus perpetua nocte caecatus, tandem infusione lucis albescat: in quo non unum tormentum sustinet reus, qui antequam incurrat necis exitus, a superis probatur abscisus. primum pector ille collega catenarum abominabili maerore discruciat: auditum alieni gemitus et lamenta conturbant: gustum ieiunia longa debilitant: tactum pondera prementia defetigant: lumina diutinis tenebris obtusa torpescunt. non est unum clausis exitium: multifaria morte perimitur, qui carceris squalore torquetur ... atria tua vacuitatibus impleantur. locus ille perennium lacrimarum quondam tristes incolas perdat. non sunt inde qui laeti sunt: qui tunc profecto habebit gratiam, si desertus appareat.”) This concern for prisoners’ rights is along the lines as that of Roman law (e.g., *CTh* 9.3.4 [365]; *CTh* 9.2.3 [380]; *CTh* 9.3.1 [320]; *CTh* 9.3.3 [340]; *CTh* 9.2.3 [380]; *CTh* 9.2.6 [409]; *CTh* 9.3.1 [320]; *CTh* 9.3.6 [380]; *CTh* 9.3.7 [409] = *CJ* 1.4.9).

⁸¹ *ET* 14 uses the phrase ‘*specie accusationis*’ to indicate a formal accusation.

to implement the directive of another, let him be flogged and incur the loss of his position. And the plaintiff shall forthwith lose his case.⁸²

Once initiated, cases were to be settled in a timely fashion. Although there is no specific mention in our sources as to a statutory time limit for concluding a case, Cassiodorus has Theoderic remind the *vir spectabilis* Florianus that justice was to be swift: “Lawsuits are not to drag on forever. For how will peace be granted to the litigants, if trials are not settled by lawful judgments?”⁸³

While the aim here was to keep the details of a case fresh in the minds of those involved and thereby ensure a fair conclusion, clearly this was not always realized in practice. That some delay was the inevitable result of the slowness and uncertainty of communications is clear.⁸⁴ But for some litigants, to be sure, it was advantageous to have the case drag on, and thus they devoted their efforts and money to ensuring this. This could be done in any number of ways, the easiest of which was simply not appearing to answer a charge in the first place. If the defendant was persistently absent, however, the hearing could take place without him:

A judgment delivered against parties not present shall be of no consequence, unless it is shown to have been rendered against an individual who, despite being

⁸² *ET* 73: “Auctoritates quorumlibet iudicium, vel praecepta cuiuslibet sedis ac potestatis, sola publica servata civitate exequantur officia: et conventum sufficiat promittere, se ad iudicium esse venturum, nihil ultra praesumat apparitor. Et illius sedis apparitor executiones suscipiat, unde praecepta manaverint. Quod si alterius miles, alterius iudicis auctoritatem exsequi forte temptaverit, amissionem cinguli, fustibus caesus, incurrat: litigator autem negotium incunctanter amittat.” The jurists list a number of restrictions for summoning defendants to court. These included magistrates, priests or other religious officials, judges presiding over a case, litigants involved in another case, lunatics, children, a bride or bridegroom, or the relatives and guests at a funeral (*Dig.* 2.4.2-4). Moreover, a summons could not be issued against the duty to the gods (*pietas*), close relations and patrons (*Dig.* 2.4.4-8). Defendants could not be forcibly removed from their homes, but could be summoned from the threshold of their houses, baths or theatres (*Dig.* 2.4.18).

⁸³ Cass., *Var.* 1.5: “In immensum trahi non decet finita litigia. quae enim dabitur discordantibus pax, si nec legitimis sententiis adquiescant?” Despite this general provision, it would seem that this problem remained a persistent one. See e.g. *Var.* 9.20 (cited above, p. 130 n. 24): written in the name of Athalaric to all judges dispatched into the provinces, Cassiodorus has the king admonish these officers for their slowness in administering justice in their respective jurisdictions.

⁸⁴ On the problem of communication in the late Empire, see Kelly, *Ruling the Later Roman Empire*, pp. 115-27.

summoned and formally called upon for the third time by judicial directives, has refused to appear [in court].⁸⁵

The failure of the defendant to answer a judicial summons after a third time resulted in his automatic loss of the suit. For Goths, however, there is good evidence that at the summons stage they were permitted to provide a written guarantee for appearance. Concerning contumacious barbarians, *ET* 145, cited in Chapter One, makes reference to the reliability of their (presumably written) guarantee – ‘*cautionis ab eodem emissae fides*’. Here, a barbarian could avoid the penalties for contumacy provided that the reliability of his guarantee, or the testimony of freeborn and honorable men confirms, that he was a *capillatus* and that his previous absences were the result of his role as a soldier, and not simply a willful act of contempt towards the court.⁸⁶

Before any hearing could begin, determination as to competence of the court and the legal qualifications of the litigants had to be made – in accordance with the rules of *praescriptio fori*. Otherwise, the general rule was that trials ‘follow the forum’ of the defendant.⁸⁷ When the status of the participants was established, the hearing began. As to how the formal arguing of the case proceeded, we are little informed.⁸⁸ But there is enough information from the *ET* and *Variae*, in the form of general summaries of cases, to provide a rough outline. While the burden

⁸⁵ *ET* 5: “Sententia non praesentibus partibus dicta nullius momenti sit, nisi adversus eum prolata doceatur, qui tertio conventus et edictis sollemniter inelamatus adesse contempserit.” Similarly, *ET* 145 (concerning recalcitrant barbarians).

⁸⁶ Wolfram, *History of the Goths*, pp. 102-3, 301-2; P. Amory, *People and Identity*, pp. 94, 319, 345-6; Christensen, *Cassiodorus, Jordanes and the History of the Goths*, pp. 245-6.

⁸⁷ E.g., *ET* 139: “The vendor, even if he should obtain the privilege of a judge, shall nevertheless observe the jurisdiction of the buyer when he is to defend his sale.” (“Auctor venditionis etiamsi privilegium habeat sui iudicis, tamen defensurus venditionem suam, forum sequatur emptoris.”)

⁸⁸ Unfortunately, records of specific cases in the form of charters or *placita* do not survive for early sixth-century Italy. As it pertains to *placita* in particular, Peter Classen has demonstrated convincingly that it may well be no accident that *placita* do not survive in any part from the period before the seventh century. *Placita* are the documents least like any known form of late Roman document. As Classen stresses, it is perhaps more sensible to view them as a document type that developed in the early part of the seventh century to meet the needs of the newly emerging centres of royal justice in northern Francia. As royal and ecclesiastical monopolies grew, traditional bureaucratic skills became increasingly rare, thus leading to the emergence of this particular type of document. See Classen, “Kaiserreskript und Königsurkunde,” pp. 69-70.

of proof rested upon the plaintiff,⁸⁹ evidence was heard from both sides.⁹⁰ It would seem that advocates, or the litigants themselves, put forward the cases, to be sure with the appropriate amount of rhetorical flourish, during which the basic points and arguments were established, followed then by the rebuttal.

That advocates played a pivotal role in court proceedings is clear from Cassiodorus. On several occasions he extols their eloquence as a powerful tool for directing the course of affairs;⁹¹ and in at least one case, the juristic and forensic skills of an ancient day Perry Mason played a determining role in the outcome of the trial. In a letter written in the name of the king to Adeodatus, wrongly convicted for the crime of rape, Cassiodorus attributes the current predicament of the addressee to his being deprived the services of an advocate, and thus rendered defenseless against the rhetorical skills and legal knowledge of his adversaries: “Moreover, [your suit] alleges that justice was unavailable [to you], adding that you were deprived the protection of legal representatives, while your adversaries, flourishing with [legal] skill, were able to entangle you with the laws, despite your innocence.”⁹² At the same time, the corrupt advocate

⁸⁹ Particularly clear from *ET* 13, 74, 96, 100 and 132.

⁹⁰ *ET* 7: “When the claims and proofs of each party have been examined, a judge must render a decision only on that that which he perceives to be in accordance with justice and law.” (“Iudex discussis utriusque partis suggestionibus atque documentis id solum iudicare debet, quod iuri et legibus viderit convenire.”)

⁹¹ E.g., Cass., *Var.* 1.12 (a letter written in the name of Theoderic to the *vir illustris* Eugenius, extolling his skills as an advocate; 4.3 (a letter addressed in Theoderic’s name to the *vir illustris* and *comes* Senarius, newly elected to the position of *comes patrimonii*, mentioning his skill as an advocate, and commends his track record as an honest officer to the crown); 5.4 (Honoratus, subject of this letter to the Roman senate concerning his appointment as quaestor, is extolled for his service as an advocate in Spoleto, where he had to contend against the corrupt practices of the provincial judges; 5.22 (another letter addressed in the name of Theoderic to the senate of Rome, concerning the appointment of a certain Capuanus as *rector decurianum*, noting his distinguished service as an advocate before the senate).

⁹² Cass., *Var.* 3.46: “illud etiam, quod minime iustitia pateretur, adiciens defensorum tibi patrocina saepius postulanti fuisse subtracta, cum adversarii florentes ingenio etiam innocentem te possent legum laqueis obligare.” Similarly, Cassiodorus relates (*Var.* 4.41) the story of the arch-physician Joannes who suffered the burdens of a wrongful conviction because of the skills of the prosecutor, the *spectabilis* Vivianus: “You [sc. Joannes] inform us that, by the devices of the Spectabilis Vivianus and his superior knowledge of the laws, an unjust judgment was obtained against you, in default, in the Court of the Vicar of the City of Rome: that Vivianus himself, having found God, has now renounced worldly pursuits, and now regrets the charge he brought against you. We therefore (if your statements shall prove to be correct) quash the sentence against you, restore you to your country and your

was a real and constant danger, and contemporary opinion commonly cited the ingenuity of advocates as the main source of judicial delay. Lawyers, it was believed, fully exploited the ambiguity and uncertainty of the law and the conflicting jurisdictions of the courts to prolong proceedings, whether to increase their own fees or in the interest of clients who had weak cases but deep pockets. An anecdote told of Theoderic, while certainly apocryphal, is revealing of this popular sentiment. A widow of senatorial rank, named Juvenalia, had grown old while awaiting the outcome of a lawsuit against a certain patrician named Firmus. Having waited thirty years, she appealed directly to the king to hasten the litigation. Theoderic then issued an ultimatum granting the lawyers only two more days to resolve the dispute. Having been so inspired, they settled the suit forthwith. When Juvenalia came to thank Theoderic shortly thereafter, he promptly summoned the litigators and asked how they could accomplish in two days what was impossible to do in thirty years. Unsatisfied with their response, he had them executed.⁹³

property...and that you may be preserved from future molestation, founded on the old sentence against you, we assign you to the guardianship (*tuitio*) of the Patrician Albinus, without prejudice to the laws.” (“data siquidem supplicatione conquereris virum spectabilem Vivianum legum artificio, quo callet, elatum, personam tuam obiectis criminationibus insecutum et eo usque perventum, ut indefensus contra iuris ordinem vicarii urbis Romae sententia damnareris: nunc autem religiosae mentis affectu odia mundana damnasae auctorique suo tuum displicuisse periculum. Et ideo, si nullis impugnationibus enervantur asserta, laesionem non patimur miseris inhaerere, quam suis constiterit machinatoribus displicere. quapropter in abolitum missa sentential ... patriae te rebusque omnibus nostra reddit auctoritas ... Sed ne cuiusquam forsitan plectenda temeritas in te impetus reparare possit audaciae, patricii Albinus salvis legibus tuitio te deputata communit ...”) In a rather surprising move, Theoderic here promises the doctor *restitutio in integrum*, and protection from any further molestation under the *tuitio* of the patrician Albinus, provided that the merits of the doctor’s claims are substantiated.

⁹³ On the details of this case, see Joannes Malalas *Chronographia* 384 (ed. C. de Boor, *CSHB*, vol. 28 [Berlin, 1905]); Jones, *LRE*, p. 494. For the sorts of time-consuming tactics practiced by members of the legal profession, Ammianus Marcellinus provides an insightful commentary (30.4.13, trans. John C. Rolfe, *Ammianus Marcellinus History*, Loeb Classical Library [Cambridge, 1911], p. 327): “A third group consists of those who, in order to gain glory by their vexatious profession, sharpen their venal tongues to attack the truth, and with shameless brow and base yelping often gain entrance wherever they wish. When the anxious judges are distracted by many cares, they tie up the business in an inexplicable tangle, and do their best to involve all peace and quiet in lawsuits and purposely by knotty inquiries they deceive the courts, which, when their procedure is right, are temples of justice, when corrupted, are deceptive and hidden pits: and if anyone is deluded and falls into those pits, he will not get out except after many a term of years, when he has been sucked dry to his very marrow.” (“Tertius eorum est ordo, qui ut in professione turbulent clarescant, ad expugnandam veritatem ora mercenaria procudentes, per pristinatas fronts vilesque latratus, quo veline aditus sibi patefaciunt crebros: qui inter sollicitudines iudicum per multa distentas, irresolubili nexu vincientes negotia, laborant, ut omnis quies litibus implicetur, et nodosis quaestionibus de industria

It was during this interchange that various kinds of evidence could be produced to support particular points, accompanied by extensive cross-examination by the *iudex*, who could be aided in this by a team of advisers, or assessors.⁹⁴ Witnesses and documents were the prime sources of this. As early as the Republic, documentary proofs had acquired administrative significance.⁹⁵ In the later Empire, as the administration generally became more dependent on the use of the written word, even greater weight was accorded the significance of documents as a means of establishing proof.⁹⁶ That this was the case in early sixth-century Italy seems likely. The references in the *ET* to municipal archives presuppose that written records could be used in court proceedings as a means of establishing proof of ownership or fulfill some other probative purpose.⁹⁷ In the later Empire handwriting experts could be used to determine the authenticity of a document;⁹⁸ and it is clear from Gregory of Tours that in the Frankish kingdom forged charters were still detected on paleographical grounds, as happened in the trial of Bishop Egidius of Rheims in 590.⁹⁹

Despite the importance of the written word, oral testimony was invaluable. In many instances, to be sure, it was witnesses who provided the bulk of evidence. There is little in the *ET*

iudicia circumscribunt, quae cum recte procedunt, delubra sunt aequitatis: cum depravantur, foveae fallaces et caecae: in quas si captus ceciderit quisquam, non nisi per multa exsiliet lustra, ad usque ipsas medullas exsuctus.”)

⁹⁴ In the case of Archotamia (discussed fully below), who made a complaint against her former daughter-in-law alleging that the latter had unlawfully squandered the assets of her children, Cassiodorus notes (*Var.* 4.12.3) that three assessors were to be chosen by consent of the litigants involved, to help settle the case: “cum tribus honoratis, quos partium consensus elegerit, qui legum possint habere notitiam... proferatis[.]”

⁹⁵ E.A. Meyer, *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice* (Cambridge, 2004), pp. 38-43, 209-10, 218-27.

⁹⁶ Meyer, *Legitimacy and Law*, pp. 79-86, 112-120, 227-49; Harries, *Law and Empire in Late Antiquity*, pp. 99-110.

⁹⁷ As some Ravenna papyri illustrate, copies of land records, wills, donations, bills of sale, and any legal decisions indicating rights were regularly filed in the *gesta* both for permanent safekeeping, and in keeping with the rules governing tax liability. These, we may presume, could be retrieved by an interested party and used in court as a means of verifying their claims of ownership or some other legal right/privilege. For examples of such records, see Tjäder, *Die nichtlit. Papyri Italiens*: private ownership (n. 2, pp. 178-83); wills (nn. 3, 4, pp. 198-217); gifts (nn. 10-12: 1, pp. 279-99); bills of sale (nn. 29-34, pp. 48-104).

⁹⁸ *CTh* 2.27.1; 9.19.2; *CJ* 4.21.20.3.

⁹⁹ Gregory of Tours, *Decem Libri Historiarum*, 10.19. B. Krusch and W. Levison eds., *MGH SRM*, 1.1 (Hanover, 1937-51). For accusations of tampering with wills, see 4.51; 6.46.

or *Variae* concerning witnesses. Obviously, they had to present themselves in person and were questioned by the judge, who then made the decision as to who were the more credible.¹⁰⁰ As to how many witnesses were required to determine a point of fact, there is no mention; but a general rule observed in the later Empire required that more than one witness was necessary for this.¹⁰¹ Evidently, as was the practice in the later Empire, witnesses in most cases provided sworn depositions of what they knew. In his description of the case of extravagant widow Aetheria, accused by her former mother-in-law Archotamia of squandering the property of her children, Cassiodorus notes that a copy of the Gospels was to be present in court before the proceedings began – presumably for the swearing in of witnesses:

Therefore, We, who have been accustomed to turn down the pleas of supplicants (although We neither reject the insinuation of supplicants nor arbitrarily condemn the case of an adversary) have entrusted this case to your judgment to be decided according to the laws; when you have removed all hostility and placed the holy Gospels in the open, with three honourable men knowledgeable in the law and elected by the consent of the parties, fulfill before them that which the precedent of ancient law calls for, while at the same time mindful of the law of Our time, since it does not befit those who deserve to come to Our stewardship to do anything by force.¹⁰²

¹⁰⁰ Incidentally, the *ET* does not provide any specific measures in the event that a witness was unable or unwilling to present himself in court. Although, it is not unreasonable to assume that the same rules governing recalcitrant defendants applied to these witnesses as well.

¹⁰¹ *Dig.* 22.5.12 (Ulpian), that when the number of witnesses required was not specified, two would suffice. See also *CJ* 4.20.4 (284); 4.20.9 (334), which also privileges the testimony of *honestiores* (see below).

¹⁰² Cass., *Var.* 4.12: “Ideoque nos, qui desideria supplicum consuevimus remittere ad statuta diuinalium sanctionum, ut nec insinuationem supplicum renuamus nec adversarii negotium credula facilitate damnemus, sublimitatis vestrae iudicio hanc causam legibus committimus audiendam, ut omni incivilitate summota mediis sacrosanctis evangeliis cum tribus honoratis, quos partium consensus elegerit, qui legum possint habere notitiam, quicquid prisca iuris forma constituit inter eos, considerata disciplina nostri temporis, proferatis, quia non decet per vim eos aliquid agere, qui ad nostra meruerunt regimina pervenire.” Similarly, Justinian issued a decree in 530 (*CJ* 3.1.13.4) that required a copy of the Holy Scriptures (*scripturae terribiles*) to be present during contumacious proceedings (that is, trials where one of the litigants was absent): the copy was to compensate for the absent litigant. In the same year, he issued a constitution (*CJ* 3.1.14) that required a copy of the *scripturae sacrosanctae* to be placed before the judge where the suit was to be settled according to Roman law; the copy was to remain for the duration of the trial. Caroline Humpress, “Judging by the Book: Christian Codices and Late Antique Legal Culture,” in William E. Klingshirn and Linda Safran (eds.), *The Early Christian Book* (Washington, DC, 2007), pp. 141-58, esp. pp. 148-50, argues that the *scripturae sacrosanctae* is a reference to the Gospels. And several Justinianic constitutions (e.g. *CJ* 3.1.14.4 [530], 2.58 [59].2pr [531], 2.58[59].1.1 [530], 4.1.12.5-6 [529], 5.70.75-6 [530]) required that witnesses swear using sacred scripture. Nick Everett, *Literacy in Lombard Italy*, notes (p. 171) that from 643 onward, Lombard law put greater emphasis on oaths sworn upon a copy of the Gospels, as opposed to the alternative of swearing oaths upon arms. That the Gospels became the standard text for procedural oath swearing in

The two presiding judges, the Goth Marabad, *vir illustris* and *comes*, and the Roman senator Gemellus, were instructed to restore order to the proceedings (*omni incivilitate summtota*) and bring in a copy of the Holy Gospels, in addition to three *assessors* (agreed upon by the litigants) to settle the dispute.¹⁰³ Perjury posed a major obstacle to the proper determination of a case. Thus, to help limit its occurrence, the compilers treated perjurers severely. According to *ET* 42, those who knowingly delivered false or varying testimony were to be exiled. As pointed out in Chapter Two, the basis for this provision was *PS* 5.15.5, which offered less severe penalties, including the simple removal of the offender from the proceedings. That the compilers applied only the maximum penalty in such instances is perhaps indicative of the increasing pervasiveness of the problem in the early sixth century.

Attempts were made to ensure fairness by excluding certain categories of witnesses. While the jurists provided an extensive list of excluded categories, including freedmen of the litigants, the under-age, beast-fighters, prostitutes and advocates involved in the case,¹⁰⁴ the compilers mentioned only slaves, *originarii* and freedmen. According to *ET* 48, these were prohibited from testifying against their current or former masters and their family:

We prohibit freedmen, *originarii* or slaves who inform against their patrons or the children of these patrons from being heard in any matter; for, persons of this sort are incapable of having a legitimate voice in civil or criminal cases involving their patrons, masters or their children, even if they speak in their defence; those caught in the act must be cut down with swords at the commencement of the suit.¹⁰⁵

the sixth century was perhaps due to the fact that they embodied the teachings of Jesus Christ more faithfully than any other text, and in essence became a sort of *lex Christiana* – a Christian law based on the New Testament – by which all faithful and observing Christians were required to obey, and through which eternal damnation could be secured in the event that they committed perjury.

¹⁰³ On the subject of sworn witnesses in Roman law, see Jolowicz, *Historical Introduction to Roman Law*, p. 462.

¹⁰⁴ E.g., *Dig.* 22.5.3.5; 5.9; 5.10; 5.19; 5.25.

¹⁰⁵ *ET* 48: “Libertos originarios, vel servos, dominos aut patronos suos eorumque liberos deferentes, in quolibet negotio prohibemus audiri: quia huiusmodi personae neque in civilibus neque in criminalibus causis contra patronos aut dominos eorumque liberos, etiamsi pro his dicant, vocem possunt habere legitimam; quos in huiusmodi facto deprehensos, in ipso actionis exordio gladiis oportet extingui.”

Evidence from slaves occasionally could be admitted in cases involving serious or capital crimes; but, as was the case with earlier imperial legislation on the subject, torture was necessary for his testimony to be considered valid.¹⁰⁶ It would seem that only under exceptional circumstances, when their information was regarded as essential to a case, were informers (*delatores*) permitted to testify, and always at their extreme peril: if an informer was unable to prove the information which he had laid under torture, he was to be burned alive.¹⁰⁷ While these sorts of restrictions were intended to ensure fairness, they are proof of the continuance of one of the long-held peculiarities of the Roman justice system, namely that the credibility of a witness' testimony was based in large part on his or her social status.¹⁰⁸ That this sort of practice could easily be abused to the detriment of the poorer and less well-connected litigant goes without saying.

Oaths, too, could be administered to the litigants. While the details of the process are obscured, *ET* 106 addresses the matter of oath-taking:

Whenever an oath is used to determine the outcome of some legal matter, whether in accordance with the consent of the litigants or the determination of the judge,

¹⁰⁶ E.g., *ET* 19 (concerning the crime of *raptus* that has been covered up by the victim's parents); *ET* 100 (requiring the plaintiff or accuser to compensate the owner should his slave be injured or killed as a result of the torture). The general prohibition against slaves or freedmen from testifying in matters involving current or former masters seems to have created an unintended consequence whereby individuals sought to achieve some form of immunity through the purchase or sale of a slave for the expressed purpose of preventing him from testifying. Thus, *ET* 101 voided any such sale, and required the slave to testify under torture against the fraudulent buyer. In the same way, *ET* 102 allowed for a freedman to testify under torture against his manumittor.

¹⁰⁷ *ET* 35. *Delatores* had long since been held in disrepute by the emperor and public alike. Concerning the reporting of *caduca* to the fisc, Paul comments (*PS* 5.13.1: trans. Evans Grubbs, *Law and Family*, p. 110): "Everyone is completely forbidden to denounce (*deferre*) another and to report a pecuniary matter to the fisc. It does not matter whether males or females, slaves or free-born or freed people do this, or whether they denounce their own relatives or outside parties; in every case they are punished." ("Omnes omnino deferre alterum et causam pecuniariam fisco nuntiare prohibentur: nec refert, mares istud an feminae faciant, servi an ingenui an libertini, an suos an extraneos deferant: omni enim modo puniuntur.") Likewise, imperial decrees concerning *delatores* often associate their actions with terms for 'calumny' and 'betrayal'. Only when the information they provided was used against heretics (particularly Manicheans) or other disreputable groups were *delatores* not described in such negative overtones (as in Theodosius I's investigation against the Manicheans launched in 382 [*CTh* 16.5.9]). As noted in Chapter Two (pp. 100-01), the very public and painful punishment prescribed in *ET* 35 is indicative of the repudiation which this class of people continued to face in the early sixth century.

¹⁰⁸ E.g., *CTh* 11.39.3.

the matter cannot be reconsidered; nor is it permitted for anyone to bring an action or start an inquiry concerning the possibility of perjury.¹⁰⁹

As Ulpian described the procedure, the defendant was asked by the judge to take the oath. In the event that he refused, he either had to make restitution or to have the judgment go against him. If he agreed, the oath was then offered to the plaintiff, who also had to swear; if he did he won the case, if not he lost.¹¹⁰ Here, the oath was employed as an evidentiary or probative purpose with its function the basic one of resolving the question of which party should emerge victorious. Nevertheless, the compilers recognized that the oath was no sure guarantee against perjury, and thus they made it the responsibility of the judge concerned to determine in which cases and by whom an oath should be taken. To maintain the integrity of the institution, a case determined by oath could not be reopened on the grounds that the declarant had committed perjury. There is nothing to suggest that oath-helpers – a necessary component of oath-taking as a legitimate method of proof in most other barbarian law codes – played a role.¹¹¹

On the basis of evidence, whether in the form of records, testimony of witnesses and exceptionally informers, or the oaths of the participants themselves, the judge then rendered his decision. *ET* 6 required that the verdict be written down, or else it was considered invalid.¹¹² Concerning this requirement, Cassiodorus remarks in a letter to the tax-collector Joannes: “Rightly did Antiquity ordain that a large store of paper should be laid in by Our bureau (*scrinia*), that litigants might receive the decision of the judge clearly written, without delay, and

¹⁰⁹ *ET* 106: “Quotiens aliquod negotium consensu litigantium aut sententia iudicis sacramentis fuerit diffinitum, retractari non poterit: nec de periurio agere cuiquam vel movere permittitur quaestionem.”

¹¹⁰ *Dig.* 12.2.34 (9).

¹¹¹ In Burgundian law, for instance, proof depended entirely on the accused being permitted, prepared and able to swear with at least twelve other oath-takers (*Liber Constitutionum*, viii.1). This pattern is similar to that in the *Pactus Legis Salicae*, although there are variations in the numbers of oath-takers (*iuratores*) required: xiv.2, 3; xlii.5; lxxix and cii (*Decretio Childeberti regis*); cxi (*Edictus Chilperici*); *Decretus Childeberti*, ii.5.

¹¹² *ET* 6: “It is the business of the judge’s staff and the judge’s own sense of responsibility to bring to a conclusion with a verdict issued in writing suits tried before them; and let them order the judgment to be executed.” (“Ad officium sollicitudinemque iudicis pertinet, ut ea scripto lata definiant, quae apud se aguntur, sententia: et in executionem mitti iubeant, quod fuerit iudicatum.”)

without avaricious and impudent charges for the paper which bore it.”¹¹³ And *ET* 64, based loosely on a *novel* of Valentinian of 451,¹¹⁴ instructed the *iudex* to be mindful of his written statement (*periculum*) when carrying out his judgment.¹¹⁵ An exception to this rule was permitted the praetorian prefect. As the *formula* for appointment makes clear,¹¹⁶ the officer could render his verdict orally (*verbo sententiam dicit*) without the requirement of a written record, since he was considered to be representing the king in person.

There were several reasons for the recording of the verdict. One was to determine that the judge had rendered his decision fairly: if he had failed to do so, he could be held accountable. Secondly, the transcript would document all the arguments and legal points of the case. Concerned parties undoubtedly kept a record of this in the local archives, to protect themselves in the event of future contestation. The third purpose was to provide a full record for a higher court in the event that the decision was appealed against. In theory, all decisions could be appealed before a higher court, but realistically only those with enough time and sufficiently deep pockets could afford the costs that such protracted litigation would entail.

Appeal

In the glory days of the early Empire, every Roman citizen had the right to appeal in all proceedings, whether civil or criminal in nature. To ensure that only those qualified to appeal did so, that procedures were correctly followed, and that delays were minimized, the emperors issued detailed and complex laws governing the rules of appeal which are preserved in a lengthy section

¹¹³ Cass., *Var.* 11.38: “Moderatrix rerum omnium diligenter consideravit antiquitas, ut, quoniam erat plurimis per nostra scrinia consulendum, copia non deesset procurata chartarum, quatinus, cum iudices multis profutura decernerent, odiosas moras dulcia beneficia non haberent.”

¹¹⁴ *Nov. Val.* 31.5.

¹¹⁵ The basis for the written judgment is *CTh* 4.17 (374) of the emperor Valentinian. On the use of the written decision in late imperial judicial proceedings, see André Piganiol, *L'Empire chrétien* (Paris, 1946), p. 378; Peter Classen, “Fortleben und Wandel,” pp. 14-15, 51-2; Harries, *Law and Empire*, p. 110.

¹¹⁶ As cited above, p. 139 n. 54.

of Book XI of the *Theodosian Code*.¹¹⁷ Together, they demonstrate that appeal was considered by the imperial legislators to be an essential tool for limiting perceived instances of judicial corruption or misconduct.¹¹⁸ These rules were largely overlooked by the compilers, whose only concern as set out in *ET* 55 was the corrupt procrastination or refusal of a judge, specifically the provincial governor, to accept appeals (even superfluous ones) in the first place:

Those provincial judges before whom pleas can be petitioned shall hear all appeals; since it befits their unsurpassed knowledge to hear even a superfluous appeal without hesitation, provided that an ordained *cognitor*, upon consideration of the laws, can render a judgment about the merit of an appeal. If a judge should secure his absence so as not to hear appellate petitions, We decree that he who intended to make an appeal must present his petition concerning the absence of the judge, and about his own appeal in well-known places. But let a judge who either refuses to hear an appeal, or at least takes the appellant into custody, or has him flogged or injured by some other grievance, be punished with the loss of ten pounds of gold; this sum We ordain to be amassed by the care of an ordained *cognitor* for the coffers of the fisc. Moreover, the office for which this is a concern will be subject to a lawful penalty.¹¹⁹

This is in keeping with the emergence in the later Empire of legislation designed to make officials and judges more accountable for their actions – or inactions – as the case may be.

By about the middle of the fourth century, judges and their staff could face fines for delays in forwarding appeals or refusing to hear them altogether. The latter was regarded as a particularly serious offence. In a rescript of 343, the emperor Constantius made the judge answerable to a fine of ten pounds of gold, his staff for fifteen.¹²⁰ In 385, the emperors Gratian, Valentinian and Theodosius decreed that if a litigant could prove that his case had been unjustly

¹¹⁷ For a discussion of these and the relevant texts, see Harries, *Law and Empire*, pp. 111-12.

¹¹⁸ Harries, *Law and Empire*, pp. 110-13.

¹¹⁹ *ET* 55: “Omnes appellationes suscipiant ii provinciarum iudices, a quibus provocari potest: quando optima conscientiae conveniat etiam superfluum appellationem sine dubitatione suscipere, dum de appellationis merito sacer possit perpensis legibus cognitor iudicare. Quod si iudex suam absentiam procuravit, ne appellatorios libellos accipiat: in locis celeberrimis, qui appellare voluerit, libellum de absentia iudicis et de sua appellatione exhibere debere censemus. Iudex autem, qui aut suscipere appellationem contempserit, aut certe in custodiam dederit, aut verberaverit, aut aliquo dispendio laeserit appellantem, decem librarum auri amissione feriatur, quas fisci compendiis cura sacri cognitoris praecipimus aggregari; officium quoque, cuius interest, mulctae legitimae subiacebit.”

¹²⁰ *CTh* 11.30.22.

denied or deferred through a judge's 'arrogance' or 'favouritism', the judge was fined the value of the sum in dispute (to be paid to the fisc), and the head of his office staff would be deported.¹²¹ In 393, Valentinian I imposed a fine of thirty pounds of gold on the judge, and fifty on his office staff for not properly advising the judge.¹²² *ET 55* follows Constantius' imperial rescript of 343 closely: it restricts the liability of the judge to ten pounds and his staff to an unspecified but lawful penalty (presumably the fifteen pounds stipulated in *CTh* 11.30.22). But there are important points of difference between the two. In the first place, the provision makes a differentiation between judges who simply fail to appear and those who corruptly refuse to hear an appellant. In the first instance, the appellant is instructed to take it upon himself to bring the matter of the no-show judge and the original appeal to the public's attention in well-known places (*in locis celeberrimis*). There is no parallel for this in any of the detailed rules of appeal preserved in the *Theodosian Code*.

Moreover, whereas the rescript admonishes judges who deter appellants "by infliction of outrages and deprive them of the aid of necessary defense," *ET 55* elaborates on this to specify judges who imprison, beat or otherwise injure the appellant in any way. The provision also goes beyond the imperial rescript by giving a general outline of how the fine was to be exacted: a provincial governor, *cognitor* (presumably appointed for the task by the office of the praetorian prefecture), was to ensure that the fine went to the fisc. The same officer is instructed in the first part of the provision to hold a cognizance trial to determine the merits of the appeal. But we are entitled to ask just how effective such a system was that relied on governors to watch over and enforce judgement on their own peers.

¹²¹ *CTh* 2.1.6.

¹²² *CTh* 11.30.51.

Crime and Punishment

When it came to *crimina*, that is, criminal offences such as murder, kidnapping, robbery, arson and so on, the stakes were much higher, both for the accused and accuser. Not only were the prescribed forms of punishment for *crimina* much harsher than those for *delicta*, that is misdemeanors, but judges themselves were permitted much more leeway in determining the facts of a case, including the interrogation of witnesses and suspects, usually under torture (*quaestio*). In the very making of a criminal accusation, an individual had to be very sure of his facts: as mentioned above, when a criminal accusation was lodged before the competent judge, the accuser was compelled to bind himself in writing to undergo the penalty threatening the accused if he failed to prove his case.¹²³

The seriousness of the criminal charges suspended privileges otherwise reserved for litigants in civil suits, in particular those concerning *praescriptio fori*, whereby certain classes of individuals were permitted to have the case tried in a court of their own choosing. Under criminal procedure, the accused, regardless of rank, was to stand trial in the province where the offence was alleged to have taken place:

The formal accusation and prosecution of a crime is to happen in the place where the crime is alleged to have been committed. For those who are accused should not be transferred from one province to another, lest during the course of travel they are rescued or escape; and it is not a matter of concern if those who are reported to have committed something criminal are freeborn, freedmen, or slaves.¹²⁴

There existed other safeguards. *ET* 14, for instance, required that accusations had to be made by the prosecutor in person, not through a representative:

¹²³ *ET* 13.

¹²⁴ *ET* 103: “Ubi quod facinus commissum dicitur, ibi deferendum et vindicandum est. Hi enim qui accusantur, de provincia ad aliam provinciam transferri non debent, ne per longum iter eripiantur, aut fugiant: nec interest si ingenui, vel liberti, vel servi sint, qui aliquid criminis commisisse dicuntur.”

Let no one make a criminal accusation on behalf of another, since We judge it improper that someone should prosecute in the interests or wishes of another under the pretext of a criminal accusation.¹²⁵

And as already pointed out, an accuser could find himself in custody depending on the seriousness of his allegations.¹²⁶ The intent of the law behind placing the onus on the accuser, requiring him to do all the work himself, and exposing him to a corresponding internment and penalty of the accused if he failed to prove his case, was to limit instances of malicious or false accusation and ensure justice. It goes without saying, of course, that the general requirements concerning the making of a criminal accusation must frequently have deterred private individuals from doing so in all but the most serious of crimes.

In some criminal trials, when the accuser or informer failed to prove his case by direct evidence, the judge had recourse to more coercive tactics to get at the facts: he was entitled to submit to the ‘the Question’, under torture, slaves, *originarii*, and in some instances even freemen. Trial by ordeal was not accorded any legitimacy in the *ET* as a recognized method of proof, and there is no evidence of it being employed in the Ostrogothic kingdom.¹²⁷ While torture could be used to exacerbate the death penalty in particularly heinous crimes, as was the case in the execution of Boethius,¹²⁸ its use in the course of the *quaestio* was not intended to be

¹²⁵ *ET* 14: “Sub alterius nomine nullus accuset: quia improbum iudicamus, ut quis alienae utilitatis vel voluntatis, quasi sub specie accusationis executor existat.” Similarly, *ET* 50: “No credence shall be given to hidden and secret accusations; but it is proper for the person who makes any [criminal] accusation to go before a judge so that if he is unable to prove that which he charges, he may be subjected to capital retribution.” (“Occultis secretisque delationibus nihil credi debet: sed eum qui aliquid defert, ad iudicium venire convenit; ut si quod detulit, non potuerit adprobare, capitali subiaceat ultioni.”)

¹²⁶ *ET* 13.

¹²⁷ Trial by ordeal was a common method of proof in some of the other *leges barbarorum*. In the *Pactus Legis Salicae*, for instance, two types of ordeal are apparent: ordeal by hot water (*inius*) and ordeal by lot (*sors*), which may have been thought particularly appropriate in the trial of men of low status. *Inius*: *Pactus Legis Salicae*, xiv.2, xvi.5, ;iii, lvi, lxxiii.5-6, lxxxi, cxii, cxxxii. *Sors*: *Pactus Legis Salicae*, lxxxii, lxxxiii.2, lxxxvii, cxiii (*Edictus Chilperici*). *Sors* is apparently associated with the servile classes in lxxxvi. See Brunner, *Deutsche Rechtsgeschichte*, 2, pp. 413-14.

¹²⁸ The Anonymous Valesianus records (14.87) that in prison, Boethius was subjected to ferocious tortures. A cord was twisted around his head so tightly that his eyes dislodged from their sockets. A guard then finished him off with a cudgel. Gruesomeness aside, the veracity of these claims seem to be confirmed by an equally terrible account in

gratuitous, but was designed to illicit the truth from those so engaged, in accordance with the long-standing position of Roman jurists that only torture guaranteed truth, even when the testimony was apparently offered voluntarily. But throughout the later Empire, the use of torture was strictly regulated because of its efficacy in extracting confessions of guilt. Its use was further limited, at least in provincial areas, by the lack of skilled operators necessary to both properly carry out the act of torture and then interpret the results.¹²⁹

The *ET* calls for the regular employment of the *quaestio* against slaves and *originarii*.¹³⁰ But it is clear from Cassiodorus that freemen, too, were not immune. In a letter written in Theoderic's name to the senator Tancila concerning the theft of a brazen statue from the city of Como, Cassiodorus mentions that aside from rewards to witnesses and inducements to accomplices, the king seems to have authorized the use of torture against the workmen of the city, whose experience in working with such things has made them prime suspects. He states: "Inquire from them, under terror, by whose service this [theft] was perpetrated."¹³¹ It is not entirely clear what is meant by the phrase '*sub terrore*'. That this could include the use – or at least the threat – of torture is possible, given Theoderic's strong wish, made clear in this and the following letter, to catch the culprits.

The case of Adeodatus is more explicit. Cassiodorus notes that Adeodatus was forced to confess himself guilty of *raptus* despite his being innocent:

You have alleged that while pressured by the stinging hatred of the *vir spectabilis* Venantius, governor of Lucania and Bruttii, you were compelled to confess to the

Procopius' *Secret History* (16.26), where the author says that on Theodora's orders a young man accused of being a homosexual was subjected to torture by leather being bound tightly around his head until he his eyeballs had been loosened. On the death of Boethius, see Chadwick, *Boethius*, p.55.

¹²⁹ For discussion on the use and abuse of torture in the Empire, see Edward Peters, *Torture* (Oxford, 1985), pp. 28-30, 33-6.

¹³⁰ *ET* 84, 100-102.

¹³¹ Cass., *Var.* 2.35: "a quibus sub terrore perquire quo ministro fuerit perpetratum."

abduction of the maiden Valeriana; moreover, that you had preferred rather to die a swift death than to anymore endure the savage tortures [inflicted upon you].¹³²

According to the petition, no doubt intended to underscore the sorrowful condition of the petitioner, Adeodatus suffered a rather lengthy internment during which he was compelled to wrongly incriminate himself. The method of coercion here was torture, of such an extreme that death was a welcome relief. As the rest of the letter reveals, in the interest of public morality Theoderic did not grant Adeodatus a full pardon but rather reduced his sentence to six months exile, after which he was not to suffer any further recrimination. The original decision of the presiding judge, Venantius, was neither upheld nor reversed.

While Adeodatus' fate demonstrates some of the drawbacks of torture as a method for determining the truth, the compilers saw no reason to do away with it, only to limit its potential misuse. The safeguards were such that any accuser in doubt about the outcome of the case would agree to the use of torture only at his extreme peril: in criminal cases, doubtless involving accusations of homicide and abduction, and certainly involving those of treason, he was bound by the rule of *inscriptio*, the implications of which have been discussed above.¹³³ Generally speaking, the use of torture was freely employed against slaves and the un-free, and quite often unregulated; its possible use against freemen was restricted to all but the most serious of cases.¹³⁴

As for punishment, the compilers were again profoundly influenced by earlier legislation on the matter. Just as in the early Empire, the prime motives for inflicting punishment were retribution and deterrence. Penalties ranged from the most extreme, that is death (in assorted

¹³² Cass., *Var.* 3.46: "allegasti viri spectabilis Venantii Lucaniae at Bruttiorum praesulis odiorum te acerbitate compressum, custodiae longo situ laborantem, in confessionem raptus adultae puellae Valerianae fuisse compulsus, ut gratius fuerit spem citae mortis expetere quam tormentorum crudelia sustinere."

¹³³ *ET* 13 and 50. Similarly, *CTh* 9.1.14 and 19.

¹³⁴ On the use of torture against lower classes of freemen and women in Late Antiquity, see O.F. Robinson, *Penal Practice and Penal Policy in Ancient Rome* (London, 2006), ch. 5.

manner),¹³⁵ to exile (which entailed banishment to another region of the kingdom),¹³⁶ and flogging, usually carried out in public, and sometimes in lieu of another penalty.¹³⁷ Financial penalties varied widely, from confiscations and fines to the benefit of the fisc,¹³⁸ to compensation, in money or kind, and established according to a fixed amount (usually fourfold the amount originally and demonstrably taken).¹³⁹ A particular death penalty was not always

¹³⁵ *ET* 1 (judicial corruption); *ET* 9 (referring to the previous chapter on the unauthorized custody of a freeman); 17 (abduction of a freeborn woman, which includes a complicit 'victim'; see Cass., *Var.* 3.46, where Adeodatus, wrongly convicted for the abduction of the maiden Valeriana, suffered such extreme torture that death was surely inevitable had Theoderic not intervened; cf. *ET* 21); 38 and 39 (adultery); 41 (on making and using a forgery); 47 (*pervasio*); 48 and 49 (on freed *originarii*, slaves and domestics informing against their current or former patrons, masters or their families); 50 (on the failure of the person making an ambiguous or secret accusation); 56 (an *originarius* or slave convicted of cattle rustling); 63 (concerning a slave or *originarius* who forcibly defiles a freeborn woman, or commits *stuprum* with a widow by force); 78 (on stealing a freeborn man); 91 (on a *humilior* convicted of bribing either a witness to commit perjury or a judge to improperly decide a case); 97 (concerning a slave, *colonus*, *ancilla* or *originarius* convicted of arson); 104 (on slaves or *colonii* convicted of digging or plowing up boundaries or property lines); 107 (on instigating sedition; cf. *ET* 75, concerning defence against an armed militia); 108 (*humiliores* convicted of sacrificing according to a pagan rite); 110 (destroying graves); 120 (a slave who has committed theft and henceforth been manumitted); 125 (on forcibly removing property or persons from a church).

¹³⁶ *ET* 18 (on parents who through complicity neglect to take legal action against the *raptor* of their daughter); 42 (on witnesses who provide varying or contradictory testimony); 75 (a *humilior* who prohibits a corpse from being buried, intending to claim the deceased as his debtor); 83 (on knowingly concealing, selling or purchasing a freeborn man); 89 (on assembling an armed body to incite terror); 95 (concerning a creditor who knowingly receives a freeborn child as surety on behalf of the parents); 97 (on any freeborn man convicted of arson, in lieu of the financial penalties prescribed); 108 (on *honestiores* convicted of sacrificing according to the pagan rite). As has been noted in Chapter Two, we hear from the Anonymous Valesianus (14.87) that Boethius was banished to Calventia (modern Calvenzeno); and Cassiodorus reports (*Var.* 3.47) that Jovinus was banished to the Lipari Islands off the coast of Sicily for killing a fellow curial.

¹³⁷ *ET* 55 (contains a reference to a judge who has an appellant wrongly flogged); 73 (on a *miles* who oversteps his jurisdiction); 83 (concerning *humiliores* who knowingly conceal, sell or purchase a freeborn man); 89 (*viliores* who assemble an armed body to incite terror); 111 (any person who is unable to pay the financial penalty imposed for burying a body within the city of Rome).

¹³⁸ *ET* 3 (removal of a corrupt judge from office); 10 (unlawful *invasio*, with the additional requirement that a fine be paid to the fisc); 22 (an owner who is knowledgeable of the commission of *raptus* is to pay a fine to the fisc); 24 (concerning caduceus property or matters of intestation); 55 (a judge who refuses to hear an appeal, or otherwise injures an appellant is to pay the fisc ten pounds of gold); 73 (on the removal of a *miles* for extrajudicial action); 83 (*honestiores* fined with a loss of a third of their goods for their knowing involvement in the concealment, sale or trade of a freedman); 84 (on knowingly receiving another's fugitive slave or *colonus*); 104 (an owner shall lose a third of his possessions to the fisc for commanding a slave or *colonus* to uproot boundaries or property lines); 111 (a fine to the fisc of a fourth of the property of an individual convicted of burying a body within Rome); 112 (property of a condemned criminal shall pass to the fisc in the absence of suitable heirs); 115 (on stealing public money).

¹³⁹ E.g., *ET* 2, 3 and 4 (on corrupt judges and their staff); 10 (*invasio*); 11 (refusal of a property holder to fulfill a judgment rendered against him); 64 (on defiling another's slave or *originaria*); 70 (on harbouring fugitive slaves in a place of worship); 71 (harbouring public debtors); 80 (on inducing another's slave to flee); 84 (on knowingly receiving another's fugitive slave or *colonus*); 97 (a freeborn convicted of arson); 109 and 117 (concerning owners of a slave or *colonus* convicted of robbery); 141 (on knowingly selling a slave with a history of fleeing to an unsuspecting party).

specified.¹⁴⁰ In some places, the compilers were more specific. A slave, domestic servant or freedman who attempted to denounce his master in court was to be ‘cut down with swords’.¹⁴¹ The instigator of sedition was to be burned alive.¹⁴² The deterrent effect could be further enhanced if the punishment fitted the crime: thus, an arsonist could be ‘consumed by fire’.¹⁴³ In the same way, Constantine’s decree of 320 against abduction stipulated that nurses who convinced those in their care to cooperate with their abductors were to be punished by having molten lead poured down their mouths and throats – which were responsible for the ‘wicked persuasion’.¹⁴⁴

Generally speaking, in Late Antiquity the death penalty applied to more crimes and extended to more categories of people. At the same time, however, the range of penalties to which criminals were subject had decreased.¹⁴⁵ Both execution *ad bestias* and crucifixion were abolished under Constantine; and as pointed out in Chapter Two, the compilers took steps to update the law to reflect these developments.¹⁴⁶ Although sentences of hard labour in the mines and *infamia* continued to be regarded by imperial legislators as useful deterrents well into the fifth century, they appear nowhere in the *ET* or *Variae*. This certainly had an effect on the operation of the ‘dual penalty’ system whereby *honestiores* could expect to be spared the more humiliating punishments accorded their social inferior counterparts: for certain crimes, a capital penalty was imposed regardless of the wrong-doer’s rank. For instance, a capital penalty was

¹⁴⁰ E.g., *ET* 1, 9, 17, 38, 39, 41, 47, 50, 56, 63, 78, 91, 104, 108, 110, 120, 125.

¹⁴¹ *ET* 48 and 49.

¹⁴² *ET* 107.

¹⁴³ *ET* 97.

¹⁴⁴ *CTh* 9.24.1 (trans. Pharr): “Since the watchfulness of parents is often frustrated by the stories and wicked persuasions of nurses, punishment shall threaten first such nurses whose care is proved to have been detestable and their discourses bribed, and the penalty shall be that the mouth and throat of those who offered incitement to evil shall be closed by pouring in molten lead.” (“Et quoniam parentum saepe custodiae nutricum fabulis et pravis suasionibus deluduntur, his primum, quarum detestabile ministerium fuisse arguitur redemptique discursus, poena immineat, ut eis meatus oris et faucium, qui nefaria hortamenta protulerit, liquentis plumbi ingestione claudatur.”)

¹⁴⁵ Harries, *Law and Empire*, pp. 138–9.

¹⁴⁶ *CTh* 9.18.1 (315).

imposed for crimes of violence (*vis*),¹⁴⁷ *raptus*,¹⁴⁸ forgery and counterfeiting money,¹⁴⁹ *pervasio*,¹⁵⁰ destroying graves,¹⁵¹ or assaults on widows.¹⁵² Adultery, too, was a capital offence, whereas in earlier centuries the matter was dealt with privately by the family involved.¹⁵³ For such serious crimes, members of the elite, if convicted, were liable to the same, or similar, penalties as those living life at the bottom.

This is not to say, however, that hierarchical distinctions were not reflected in the penal regime. For lesser offences, and in special circumstances some serious ones, a member of the upper class could rightly expect, and lawfully demand, preferential treatment in relation to their social inferiors.¹⁵⁴ Thus, *honestiores* were spared a public flogging where *humiliores* or *viliores* were not.¹⁵⁵ Throughout the Empire, flogging was considered a rather severe sanction, principally because all forms of corporal punishment were held to be degrading. And emperors regularly prescribed it upon members of the lower class as an additional penalty in an attempt to

¹⁴⁷ ET 9.

¹⁴⁸ ET 17.

¹⁴⁹ ET 41.

¹⁵⁰ ET 47.

¹⁵¹ ET 110.

¹⁵² ET 60.

¹⁵³ ET 38. Since the Principate, Roman husbands were prohibited from killing adulterous wives who were caught *in flagrante delicto* (although in exceptional circumstances they had the right to kill the man). By the early sixth century, however, the matter seems once again to have been one of private vengeance. The *Breviary* and the *Lex Romana Burgundionum* did not even include a statutory penalty for adulterers who were convicted in court. Rather, they permitted the wronged husband to murder an adulterous couple on the spot. According to Cassiodorus, a wronged husband could murder his wife's lover with impunity. In a letter addressed in the name of Theoderic to Crispianus, who was alleged to have killed the man he caught *in flagrante delicto* with his wife, Cassiodorus exclaims (*Var.* 1.37): "While the crime of murder is abominable ... it is necessary to consider the circumstances in which the act was perpetrated. For, what man would punish another according to the laws if he had attempted to violate the sanctity of his marriage?" ("Quamvis homicidii facinus primus detestetur auditus ... tamen iustitiae consideratione librandum est, qua cuique fiat iniuria necessarium scelus: qui nova infelicitate fortunae tunc erit detestatio cunctorum, si se servet innoxium. quis enim ferat hominem ad leges trahere, qui matrimonii nusus est iura violare?") That this apparent change in Roman law was due to an influence from Germanic custom or at least the result of the disappearance of imperial authority in those regions is unclear. For the development of adultery as a public crime, see J. Beaucamp, *Le statu de la femme à Byzance (4e-7e siècles)* vol. 1, *Le droit imperial* (Paris, 1990), pp. 139-70; G. Clark, *Women in Late Antiquity. Pagan and Christian Lifestyles* (Oxford, 1993), pp. 35-6.

¹⁵⁴ Members of the upper class are identified by the compilers as *potentes/potentiores* (ET 43, 122, epilogue), *honestiores* (ET 75, 83, 89, 91, 108, 122, 145), and *nobiles* (ET 13, 59). Conversely, their counterparts on the bottom of the social scale are identified at various points as *humiliores* (ET 75, 83, 91, 108) and *viliores* (ET 89).

¹⁵⁵ E.g., ET 64, 75, 83, 89, 97, 111.

further enhance the aspect of physical humiliation.¹⁵⁶ In instances where punishment involved exile, an *honestior* could expect to be banished for up to a period of five years, whereas the *humilior* was exiled for life.¹⁵⁷ But for some offences *honestiores* faced fines or banishment whereas their social inferiors could be punished capitally (which could include the death penalty). An assault on a freeborn virgin, for instance, was a capital offence unless the offender was sufficiently wealthy to properly compensate the girl.¹⁵⁸ An *honestior* could similarly avoid being punished capitally if convicted of bribing witnesses or judges, and instead was fined the total sum of his possessions.¹⁵⁹ And while all others who possessed knowledge of the black arts were to be executed, the *honestior* was instead deprived of his property and exiled.¹⁶⁰

Just as penalties could vary depending upon one's social status, they could be further complicated by considerations of legal responsibility, which were themselves tied closely to the status of the offender. Slaves, for instance, might act on their own volition or at the behest of their owner, and for some offences the penalty could vary accordingly. Thus, according to *ET* 77, cited in Chapter Two, a slave who committed *vis* on his own account was to be punished capitally; but if in doing so he was following the instruction of his owner, then the owner was held liable, and the implication is that the punishment for the slave, while not explicitly stated, was less severe. An exception to this was *ET* 104, which applied the same penalty (death) to a slave or *colonus* who had destroyed a property marker regardless of whether he acted on his own or at the instruction of his owner.¹⁶¹ But the likelihood of a slave successfully incriminating his

¹⁵⁶ Harries, *Law and Empire in Late Antiquity*, p. 141.

¹⁵⁷ E.g., *ET* 75, 83.

¹⁵⁸ *ET* 59.

¹⁵⁹ *ET* 91.

¹⁶⁰ *ET* 108.

¹⁶¹ *ET* 104.

owner if the latter chose to deny prior knowledge under oath would be slim given the prejudice of the law towards the testimony of slaves.

In some circumstances, the liability of women was limited,¹⁶² while there is good evidence in the *Variae* to suggest that wards and minors continued to be provided some measure of protection under the law. For instance, in a letter addressed in the name of Theoderic to the representatives (*actores*) of the minor Albinus, Cassiodorus explains how, according to these *actores*, Albinus had entered into a variety of fraudulent contracts as a consequence of his age. If, as Cassiodorus notes, these allegations prove correct, Albinus is entitled to a *restitutio in integrum*, that is, a suit commenced through these *actores* for the quashing of the contracts that were fraudulently made with the young Albinus.¹⁶³ The *formula aetatis veniae* in fact notes how wondrous a thing it is for a minor, whose age permits him a degree of protection from those wishing to take advantage of his inexperience, is here seeking to be recognized as an adult. For if successful, the applicant would forfeit his status and lose the protection it once afforded.¹⁶⁴

¹⁶² *ET* 133, 153.

¹⁶³ Cass., *Var.* 4.35: "As Antiquity has wisely decreed, young children are not to enter into contracts since they would be both deceived by the trickery of the treacherous and their tenuous age would bring them to ruin. And so, by promise of ancient custom you suggest that your patron, while still a minor, is incurring expenses rather than property, since on account of his youth he carries on not knowing what is good for him...For this reason, if your petition is accurate and brought [before Us] in a timely manner, as the most sacred laws have made this provision to such minors... Our authority permits that your patron, provided his case is fully and properly made known, is to be restored wholly. We make this stipulation: the entire proceeding is to be carried out according to justice and the laws, since We aim to protect supplicants in such a way that we do not injure their adversaries through the court." ("Consulto provida decrevit antiquitas minores contractus liberos non habere, ut et insidiantium laquei frustrarentur et lapsis aetas lubrica subveniret. Et ideo priscae consuetudinis supplicatione porrecta suggeritis patronum vestrum in annis minoribus constitutum facultatibus suis potius aggregasse dispendia, dum ignara pueritia contraria gerit...Atque ideo, si petitio vestra a veritate non deviat et intra annorum spatia deget, quibus hoc beneficium leges sacratissimae praestiterunt... patronum vestrum sollemniter causa cognita in integrum restitui nostra quoque permittit auctoritas, ita tamen, ut omnia secundum iustitiam legesque peragantur, quia sic supplicantibus consulere volumus, ut eorum adversarios per iniustitiam non gravemus.")

¹⁶⁴ Cass., *Var.* 7.40: "The petition for *venia aetatis* is a glorious one; for in it, [the applicant] declares that he accepts the full weight of the law, yet he has not yet reached adulthood ... this is a most daring thing, namely in secular affairs you disregard the assistance afforded one of your age." ("Gloriosa est supplicatio, quae veniam quaerit aetatis: quando se gravitatem de moribus profitetur accipere, quam maturitatem vitae adhuc non contingit intulisse ... ita quod in humanis rebus audacissimum est, ad erroris auxilium beneficium contemnis annorum.") Indicative of the law's concern for minors is the case of the widow Gundihild, the details of which are preserved for us on a Ravenna papyrus from the city of Reate. According to the record, her two sons, Lendarit and Landerit, claimed to

Both the *ET* and *Variae* enshrined many of the long-standing inequalities of Roman law, and amply demonstrate that just as in the Empire, inequality or discrimination was an acknowledged feature of the Roman legal system that operated in early sixth-century Italy. More than simply using his wealth to pay a fine and avoid the otherwise universally stipulated punishment for a given offence, an *honestior* could expect to be spared the more humiliating punishments dealt out to his socially inferiors. Generally speaking, his status involved additional legal privileges and responsibilities, and more widely entitled him to protection and favour from the law. A contributing factor was the fact that those at the bottom were substantially impeded by their insufficient knowledge of the legal system and lack of resources to initiate proceedings and properly navigate the complicated court system: the unequal distribution of wealth, influence, and legal knowledge prevented them from utilizing the legal system to the same degree as persons of power and rank. And in matters of appeal, such recourse was in practice available only to those litigants who could afford the expense and the inconvenience of a protracted legal process, to those with friends and connections which enabled them to secure an audience before the judge through their (improper) influence with court officials. In law, as in other aspects of life in Ostrogothic Italy, those most advantageously positioned by virtue of their greater property, power and status received the foremost privileges and rewards.

This deliberate policy of class inequality, in as much as it could anger those who lacked the means to benefit from it, made very good sense from an administrative standpoint. For the *honestior* was most amply possessed of the means to benefit the state both through his loyal service and as a consequence of his defiance of the law. If, on the one hand, an otherwise law-

have been deprived of their property at the hands of certain noblemen, Rosemund and Gunerit respectively. Since Lendarit and Landerit were minors, and as such unable to seek legal redress on their own, Gundihild brought the matter before the local *curia* which in turn appointed a legal guardian for the two by the name of Flavianus. For the case: Tjäder, *Die nichtlit. Papyri Italiens* (n. 7, pp. 228-234).

abiding *honestior* was convicted of an offence, it was in the state's own best interest to secure both short-term and long-term gains through the imposition of penalties that generally targeted the offender's material wealth but not his potential for benefiting the state in the future. On the other, such an individual could not be permitted to defy the law on a continual basis, and in turn undermine the authority of the state. Thus, by targeting possibly substantial portions of their material wealth, the very means of their defiance, the law removed, or at the very least minimized, them as a potential threat.

Judicial Enforcement and Accountability

As *ET* 73 makes clear, it was the responsibility of the judge to ensure the compulsory execution of his judgment through the agency of the *apparitor* or *miles* – a general term that Cassiodorus uses for an officer of the Roman civil service.¹⁶⁵ In his *formula* for the officer of the court of the provincial governor, we read:

Great toils and great perils are the portion of an officer of the courts in giving effect to their sentences. It is easy for the judge to say, "Let so and so be done;" but on the unhappy officer falls all the difficulty and all the odium of doing it. He has to track out offenders and hunt them to their very beds, to compel the contumacious to obey the law, to make the proud learn their equality before it. If he lingers over the business assigned to him, the plaintiff complains; if he is energetic, the defendant calls out. The very honesty with which he addresses himself to the work is sure to make him enemies, enemies perhaps among powerful persons, who next year may be his superiors in office, and thus subjects him to all sorts of accusations which he may find it very hard to disprove. In short, if we may say it without offence to the higher dignitaries, it is far easier to discharge without censure the functions of a judge than those of the humble officer (*miles*) who gives effect to his decrees.¹⁶⁶

¹⁶⁵ On the position of the *apparitor*, see A.H.M. Jones, "The Roman Civil Service (Clerical and Sub-Clerical Grades)," *JRS* 39 (1949), pp. 38-55, at p. 38.

¹⁶⁶ Cass., *Var.* 6.13: "Grandia sunt, quae sustinent excubantes: personas contumaces ad parendum cogunt, latentes in cubilibus suis prudenti sagacitate vestigant, superbis modestiam aequalitatis imponunt: ita quod a iudicibus breviter dicitur, ab ipsis efficacia famulante completur. notum est quae pericula sustineant, cum ad causas mittuntur alienas. si segnius agat, petitor queritur: si districte, pulsatus vociferatur. sic inter utrumque diversum rara laus est invenisse praeconium. Dignitatum pace dicamus, facilius est laudatum iudicem reperire quam militem iniuncta sine offensione complere. aliud est enim tantum dicere legitima, aliud ad terminum deduxisse iustitiam. laudabiliter quidem bonum dicitur, sed multo gloriosius statuta complentur. verba tantum diriguntur a praesulibus, a militibus autem postulator

Elsewhere, Cassiodorus tells us of an *apparitor* by the name of Ferrocinctus who was instructed by Theoderic to bring the disgraced praetorian prefect Faustus to book. He was aided in this task by the *saio* Grimoda.¹⁶⁷

Although prison sentences were not part of the late Roman penal regime, Cassiodorus demonstrates how they could be used in certain circumstances to help ensure that the requirements of a judgment could be met. In a letter addressed in Theoderic's name to the praetorian prefect Abundantius, he describes the case of a certain Frontosus, convicted of embezzling public money. According to the letter, Frontosus requested, and was granted what would seem multiple occasions to repay the money; but in each instance he failed to satisfy the requirements of the judgment. Such was his intransigence that Theoderic here instructs the prefect to ignore Frontosus' promises and remand him in custody to secure what money there is which can actually be repaid:

Frontosus ... confessed to having embezzled a large sum of public money, but promised that, if a sufficient interval were allowed him, he would repay it. Countless times has this interval expired and been renewed, and still he does not pay. When he is arrested he trembles with fear, and will promise anything; as soon as he is liberated he seems to forget every promise that he has made ... Since this is his character, when you arrest him, first stop him from making any promises, for his facile nature is ready with all sorts of promises which he has no ability to fulfill. Then, determine what he can actually repay at once, and remand him until he does this.¹⁶⁸

effectus." See also Cass., *Var.* 5.6 (a letter addressed in the name of Theoderic to the court officer Stabularius, instructing the addressee to carry out the decision of the *comitatus* concerning the case of the debtor Thomas, who has hitherto failed to pay back his guarantor, the *vir clarissimus* John).

¹⁶⁷ Cass., *Var.* 3.20. Faustus was accused of taking property from the petitioner Castorius. The officer is similarly enlisted in *Var.* 9.14 to assist Gildias, count of Syracuse, in enforcing the law: "Wherefore, We command that if Our decrees are being enforced against those defeated in a suit, the enforcer shall receive as much as a reward as Our glorious lord and grandfather established that *saiones* ought to accept, in due reference to the ranks of the litigants involved." ("unde censemus, ut, si nostra conveniunt decreta pulsatos, tantum commodi percipiat exsecutor, quantum gloriosus dominus avus noster pro honoribus personarum debere saiones accipere expressa quantitate constituit. commodum enim debet esse cum modo.")

¹⁶⁸ Cass., *Var.* 5.34: "Frontosum ... frequenti nobis insinuatione suggestum est pecuniae publicae decoxisse non minimam quantitatem. quem a diversis iudicibus fecimus iusta examinatione perquiri, ne forsitan, ut assolet, eum non veritas, sed infamaret invidia. ille omnia confessus reddere se posse constituit. si ei largae praeberentur indutiae:

Despite such measures and resources as these, however, it is clear from our sources that the judge was in a vulnerable position, and at times could be hard-pressed to enforce a decision. While the central administration accepted some, limited role in the workings of law enforcement, it lacked the ability to interfere systematically in the local communities of the provinces where these judges operated: in effect, they were left on their own to ensure that a criminal was pursued and punished accordingly. In this, their task could be made difficult, if not impossible, by the simple fact that there were those who were prepared to resist and had more effective force at their command than did the judge. Just as our sources abound with examples of *potentes* who could operate outside the authority of the state with virtual impunity, the compilers, too, recognized this unfortunate feature of life in early sixth-century Italy. Both *ET* 75 and 89 concern individuals who were capable of raising private armies to enforce their will on the weak and unsuspecting;¹⁶⁹ and the epilogue concludes by insisting that where a judge was unable to enforce a decision, he was enjoined to bring the matter to the attention of the *scrinia*.

In many instances, to be sure, the responsibility to ensure that the rule of law was upheld rested with the members of the community at large. To that end, public involvement in court proceedings was essential. Several references in the *ET* make the point that members of the public at large could play a role. Both *ET* 12 and 74 mention public trials specifically: the reference to a *publicum iudicium* in *ET* 12, and similarly to a *publicum examen* in *ET* 74 emphasizes the public aspect of the proceedings, rather than indicating simply the involvement

quibus frequenter emensis immemor promissionis suae ad constituta semper imparatus occurrit, fugere quidem nescius, sed suae sponsionis ignarus, obliviosus cum relinquitur, trepidus cum tenetur ... Et quia sic notus est, cum facies ad tuum venire iudicium, primum agito, ne promittat, caveto ne constituat, quia levissimi animi mos est polliceri facile quae non disponit implere. quicquid autem persolvere considerata aequitate potuerit, constrictus sine aliqua dilatione iam reddat, quia post tot falsitates argutiae suae reputare poterit, quod se frequenter illuisse cognoscit.”

¹⁶⁹ *ET* 75 (resistance against armed men); 89 (on assembling a militia).

of public authorities. And *ET* 74 makes a further reference to the so-called *boni viri*, who clearly played an important part in the suit. These *boni homines*, who were the large landholders and leaders of the local communities and were presumably knowledgeable in the law, could be assigned as *assessors* by the judge to determine how much was owed a defendant wrongfully brought to trial by a dishonest plaintiff.

Groups of *boni homines* no doubt appeared at nearly every hearing, but we have no records that document their precise activities. While some of the Ravenna papyri list the names of individuals (usually three to four) in attendance who served as witnesses for the signing of documents or transfer of property, such records applied exclusively to relatively minor legal matters that fell under the jurisdiction of the local *curia*.¹⁷⁰ As such, they are of little help for understanding the role played by *boni homines* in more serious civil proceedings, not to mention criminal cases. But the general silence of the sources about their activity should not be taken as a sign of their insignificance. Beyond the fact that they could play an active role, as presupposed here, the very presence of the *boni homines* is an important reflection of participation in the administration of justice by prominent members of communities. This participation offered a guarantee of sorts that court decisions would receive broad support, and the proofs that were presented, decisions issued, and oaths taken would be enforced through the collective efforts of the community.¹⁷¹

Despite the fact that the justice system was by its very nature an imperfect one, biased in favour of the wealthy, it was nevertheless a legitimate system. Where its integrity came under threat was in areas where the authority of the state was subverted by the exercise of patronage. As the letters of Ennodius make clear, powerful men, following centuries of honourable

¹⁷⁰ E.g., Tjäder, *Die nichtlit. Papyri Italiens* n. 7, pp. 228-234.

¹⁷¹ On *boni homini* in late antique Italy, see generally P.J. Jones, *The Italian City-State* (Oxford, 1997), pp. 120-51.

tradition, continued to use connections at the court, to influence, or expedite, the judicial process for the benefit of their clients.¹⁷² The compilers, too, recognized some of the dangers which patronage posed, and attempted to weaken this ancient institution through provisions designed to make it a less attractive venture for patron and client alike. For instance, *ET* 75 and 89 held the leader of an armed group, and here we may presume a patron, personally accountable for crimes committed in his name by members of his retinue. At the same time, the value of a patron to his dependant was diminished by the prohibition in *ET* 43 against a *potentior*, a designation which could certainly apply to patrons, serving as the legal representative of a lesser freeman: a defendant who enlisted the legal services of a patron in order to gain advantage in an impending suit in fact lost his case. Nor was it permitted for a *potentior* to influence the outcome of a trial by making his presence felt in court; or in cases involving land claims, have his name connected with the disputed land in question.¹⁷³ That these sorts of provisions had the desired effect, however, is unlikely. For the efficacy of the law lay in the willingness or ability of the judges to properly enforce it. And it was the wealthy and powerful patron who was most amply possessed of the means to diminish or otherwise impede the capacity of the judge to do his job.

Of all the factors that influenced how law was applied and justice administered, it was the judge who had the greatest bearing. While the lack of a professional judiciary no doubt played its part in permitting injustice to flourish and the laws to be flouted, a judge whose perceived

¹⁷² Those who commended themselves to a patron received from him land on which to live and the means with which to protect it. The patron's participation in this relationship afforded him a means to power, profit and prestige; that of the client to profit and protection. Ultimately, the relationship of patron and client presented a threat to law and order, for it led to the creation of semi-autonomous lords – not unlike later feudal vassals – who were capable of exercising sufficient *de facto* power to threaten the *de iure* authority of the state. As mentioned in the previous chapter, our sources abound with examples of patrons using their dependents in much the same way as a private army, which could as easily be deployed against another of the king's subjects or the king himself, as against a foreign enemy. For traditional patronage structures, see A. Wallace-Hadrill (ed.), *Patronage in Ancient Society* (London, 1989), *passim*.

¹⁷³ *ET* 44, 46.

impropriety was the result of bribery or favoritism was an altogether different matter.¹⁷⁴ The problem of judicial venality and abuse of power was nothing new: in fact, it seems to have been a particularly pervasive one throughout Late Antiquity. In 325, following his victory over Licinius at Chysopolis, Constantine issued a proclamation to the people of Nicomedia encouraging them to forward complaints against provincial governors or members of the palatine staff directly to him.¹⁷⁵ He followed this up in 331 with a wide-ranging edict that dealt specifically with corrupt judges:

The chamber curtain of the judge shall not be venal; entrance [to his hearings] shall not be gained by purchase, the private council chamber shall not be infamous on account of the bids. The appearance of the governor [*iudex*] shall not be at a price; the ears of the judge shall be open equally to the poorest as well as to the rich.¹⁷⁶

¹⁷⁴ There were three types of influence a judge could exercise on the proceedings that were considered improper, and could trigger judicial liability: these were *gratia*, *potentia* and *pecunia*. In the judicial context, *gratia* can perhaps be best understood as an improper relationship between the judge and litigant, or the litigant's patron, where the judge renders a verdict out of favour and against the internal content of the law in an attempt to maintain such an alliance. *Potentia* refers not just to power, but to coercion, or oppression. In the context of improper influences in litigation, *potentia* could be aimed at the judge, forcing him to render a judgment contrary to justice as a consequence of the fear for doing otherwise; or it may be targeted against a litigant to prevent him from prosecuting his rights to their fullest before a judge. Of all these concepts *pecunia* is the most simple. It refers to outright bribery, to the judge who accepts payment, in money or kind, from a litigant in exchange for rendering a particular judgment or for otherwise affecting the outcome of the trial. The concept of *gratia* in Roman political, social and legal thought has been the subject of substantial comment: see P. Garnsey, *Social Status and Legal Privilege in the Early Empire* (Oxford, 1970); R. Saller, *Personal Patronage Under the Early Empire* (Cambridge, 1982), esp. p. 23 and following, where Saller discusses the contractual and reciprocal nature of *gratia* in the Roman social context. It is also important to recognize that in the later Empire, *gratia* came to have significant negative connotations: see J.N.L. Myres, "Pelagius and the End of Roman Rule in Britain," *JRS* 50 (1960), pp. 21-36. For Late Antiquity, see J. Harries, *Law and Empire*, ch. 8. On the subject of judicial corruption in general, see J.M. Kelly, *Roman Litigation* (Oxford, 1966), pp. 33-4. Falling outside the scope of this triad was the problem of judicial *imprudencia* or *ignorantia*. The reasons for this are straightforward: legal knowledge at this time was a premium, and it is relatively clear from what we know of the Ostrogothic bureaucracy that many officials exercising judicial functions did so without benefit of significant legal training or expertise. The same holds true for the administrations of the Visigoths and Burgundians. On the problem of judicial incompetence in Late Antiquity, see in general P. Riché, *Education and Culture from the sixth through the eighth century*, translated from the 3rd French edn. by J. Contreni (Columbia, 1962), pp. 229-31, 316-18; R. MacMullen, "Roman Bureaucratism," *Traditio* 18 (1962), pp. 364-78; P. Wormald, "*Lex Scripta* and *Verbum Regis*," pp. 105-38.

¹⁷⁵ *CTh* 9.1.4 (325).

¹⁷⁶ *CTh* 1.16.7 (with 1.16.6; 2.26.3; 3.30.4; 4.5.1; 11.30.16-17; 11.34.1) (trans. Pharr): "non sit venale iudicis velum, non ingressus redempti, non infame licitationibus secretarium, non visio ipsa praesidis cum pretio: aequae aures iudicantis pauperibus ac divitibus reserentur."

In 386, three years after the western emperor Gratian threatened judges who sold verdicts with the penalty for embezzlement (*peculates*), Theodosius I in the East issued an open invitation to all citizens of the Empire to bring forward complaints against judges for extortion, venality and other acts of injustice.¹⁷⁷ In legislation of the emperors Arcadius and Honorius, judges who abused their powers were subject to stern moral condemnation as well as fine of thirty pounds of gold; and those who contrived ‘venally’ to delay the execution of a sentence or abuse the appeals procedure were threatened further.¹⁷⁸

To compensate for these untrustworthy *iudices*, the state relied more heavily on other organizations. The Church, for instance, became responsible for prison conditions and the return of people enslaved or imprisoned abroad; while Valentinian recruited decurions in an attempt to enforce the law on tomb violations – a law which was, for the most part, disregarded by the conniving and venal governors.¹⁷⁹ In addition to these forms of criminal conduct, legislation of the late fourth century was expanded to encompass punishments for judges whose inefficiency or negligence prevented justice from prevailing: those found to be lazy, negligent or idle were to be punished and replaced if necessary.¹⁸⁰

Jill Harries has argued that the concern of judicial venality and abuse of power in these laws was simply a rhetorical device intended to demonstrate that emperors were concerned about the state of justice, and were willing to do something about it; not that there was, necessarily, more corruption in the fourth and fifth centuries than there was in earlier times. In other words, it was not that judges were more corrupt in Late Antiquity, but rather emperors were more often

¹⁷⁷ *CTh* 9.27.5 (383).

¹⁷⁸ *CTh* 1.12.8 (400) imposing a fine of 30lb of gold for improper delegation; 9.40.15 connivance with criminals.

¹⁷⁹ *Nov. Val.* 23.6 (447). On the role of the bishop as a provider of political and spiritual leadership in Italy following the collapse of the imperial government, see Rita Lizzi, *Vescovi e strutture ecclesiastiche nella città tardoantica: L'Italia Annonaria nel IV-V secolo d.C.* (Como, 1989); and for the West in general, Claudia Rapp, *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition* (Berkeley, 2005), pp. 274-89.

¹⁸⁰ *CTh* 1.5.9 (389).

prepared to say so in a bid to appear as hardliners against such imperial corruption.¹⁸¹ While this might certainly have been the case for the later empire, it seems clear that for the compilers of the *ET* such concern was genuine. The untrustworthiness of judges is one of the persistent themes of the *ET*: a total of ten provisions deal with related matters of judicial corruption and misconduct. So important was the issue, in fact, that the first seven provisions of the *ET* were dedicated to it.¹⁸²

For the compilers, the prime and constant threat was bribery. The first two provisions of the *ET* dealt with judges on the take; and a third, *ET* 91,¹⁸³ concerned the bribers themselves:

ET 1 In the first place We have decreed that if a judge accepts money to pass judgment which imperils the life or civil status of an innocent person against the ordinances and provisions of the public law, let him be subjected to a capital penalty.¹⁸⁴

ET 2 If a judge accepts money in order to render a decision to the detriment of a person's status or property, and is convicted of this crime in a fair hearing, he shall pay fourfold the amount which he previously accepted in his eagerness for corrupt gain, and it will redound to the benefit of that person against whom he who was bribed is shown to have rendered judgment.¹⁸⁵

¹⁸¹ Harries, *Law and Empire in Late Antiquity*, ch. 8.

¹⁸² *ET* 1-7, 55, 91, 114.

¹⁸³ *ET* 91: "Anyone who bribes witnesses so that they commit perjury, or at least remain silent about what they know, or suppress the truth, or those who bribe a judge so that he renders a judgment contrary to justice, or not make a judgment at all, those who are *humiliores* shall be punished capitally; those who are *honestiores* shall suffer the deprivation of their possessions." ("Qui testibus pecuniam dedit, ut falsum testimonium dicant, vel certe quod sciunt taceant, aut non exprimant veritatem, vel iudici praemium dederint, ut sententiam contra iustitiam dicat, vel non iudicet, humiliores capite puniantur, honestiores bonorum suorum amissione multentur.") The provision follows *PS* 5.25.2 closely, with the exception that it punishes offending *honestiores* with confiscation of property and not deportation to an island: "Anyone who offers or accepts money so that false testimony may be delivered or true testimony may be suppressed, or corrupts or attempts to corrupt a judge so that he may give or not give a judgement, *humiliores* shall be punished capitally; and for the sake of the public good, *honestiores* together with the judge shall be exiled to an island." ("Qui ob falsum testimonium perhibendum vel verum non perhibendum pecuniam acceperit dedit iudicemve, ut sententiam ferat vel non ferat, corruperit corrumpendumve curaverit, humiliores capite puniuntur, honestiores publicatis bonis cum ipso iudice in insulam deportantur.")

¹⁸⁴ *ET* 1: "Priore itaque loco statuimus, ut si iudex acceperit pecuniam, quatenus adversum caput innocens contra leges et iuris publici cauta iudicaret, capite puniatur."

¹⁸⁵ *ET* 2: "Iudex si pecuniam contra statum aut fortunas cuiuslibet ut sententiam proferret, acceperit et ex hac re sub iusta fuerit examinatione convictus, in quadruplum quod venalitatis studio acceperit, exsolvat, illi profuturum contra quem redemptus docebitur tulisse sententiam."

The compilers made an important distinction between instances of judicial bribery which imperiled another's status (*caput*) and those which threatened his property: in the first case, the judge who took a bribe to secure a conviction, when a man's life was at stake, faced the death penalty; in the second, he was required to pay fourfold the amount of the bribe to the litigant he attempted to injure. It did not matter if a conviction was secured.¹⁸⁶

The imposition of the fourfold penalty in *ET 2* is interesting. In the late fourth century, the fourfold penalty had become standard for *furtum*, both *manifestum* and *nec manifestum*.¹⁸⁷ Thus, *ET 2* illustrates not only the persistence in the early sixth century of a notion of civil liability for improper judicial conduct, but it also suggests that conceptually, such misconduct was perceived as tantamount to theft. Therefore, the provision required fourfold restitution of the amount illegally taken. In light of this fourfold penalty, it would seem that the judicial liability rule was not primarily compensatory but was rather deterrent in nature. In a compensatory context, one would expect that the penalty paid to the injured party would approximate the amount of his loss. The quadruple penalty, however, would serve primarily to deter a judge from committing the illegal action in the first place.¹⁸⁸ This is precisely the purpose behind the quadruple penalty which *ET 3* and 4 imposed on corrupt judges and their staff. Together, they comprise a general edict on judicial corruption:

ET 3 A judge that unjustifiably takes anything from provincials shall lose the office which he abused, and shall return at least fourfold the amount to those from

¹⁸⁶ An analogous text, *PS 5.23.11* (10), made no such distinction. In all instances the guilty judge faced exile and confiscation of property (it is not stated whether this was to go to the victim or the fisc): "A judge who accepts a bribe to the detriment of the *caput* and property of an innocent man shall be deprived of his property and be deported to an island." ("Iudex, qui in caput fortunaeque hominis pecuniam accepit, in insulam bonis ademptis deportetur.") This underwent substantial interpolation by the compilers of Justinian's *Digest* (*Dig.* 48.8.1.1): "A trial magistrate or judge who accepts a bribe in a capital case will be guilty in accordance with the public custom." ("quive magistratus iudexve quaestionis ob capitale causam pecuniam acceperit ut publica lege reus fieret.")

¹⁸⁷ E. Levy, *Weströmisches Vulgarrecht. Das Obligationenrecht*, pp. 36 and following.

¹⁸⁸ Michael H. Hoeflich, "Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages," *Law and History Review* 2.1 (1984), pp. 79-104, esp. 97-8.

whom clearly something was unjustifiably taken; and if the judge has died, let this penalty be sought from his heirs.¹⁸⁹

ET 4 Let the staff of any judge whatsoever that has exacted anything beyond what it has been mandated be compelled, under the penalty of being beaten, to pay fourfold to those from whom property was shown clearly to have been taken.¹⁹⁰

The basis for this was an imperial rescript of the emperor Theodosius of 382. To keep the rest in line, the emperor made an example of a corrupt official: he informed the duke and governor of Sardinia that the former duke, Natalis, was to be escorted to the province by soldiers from the imperial bodyguard to restore fourfold what he and his staff had extorted, “in order that the punishment of one person may inspire fear in many.”¹⁹¹

That the judge’s property would serve as bond for his good behaviour seems clear; and this in itself implies that the *iudex* was a member of the local landowning class.¹⁹² This link between local appointment and property liability can be found in Justinian’s *Pragmatic Sanction* of 554, wherein the emperor provided for the nomination of provincial governors in Italy from the provinces in which they were to serve. The task of appointing these offices fell on the shoulders of local bishops and secular magnates, and their property was to guarantee their behaviour:

We order that provincial judges, solvent and wealth men who are to be chosen by the bishops and chief men of each of the regions, are to be appointed without venal suffrage from the same provinces they are to administer ... Thus if the judges are found to have inflicted some injury on taxpayers, they may make satisfaction from their own property.¹⁹³

¹⁸⁹ *ET 3*: “Iudex quod immerito provincialibus rapuerit, amissa dignitate qua male usus est, in quadruplum reddat his duntaxat, quibus immerito constat ablatum: et si defunctus fuerit, ab eius heredibus haec poena poscatur.”

¹⁹⁰ *ET 4*: “Officium cuiuslibet iudicii, quod quid ultra quam iussum est exegerit, in quadruplum sub fustuarie poena cogatur exsolvere iis, quibus inclite monstrabuntur ablata.”

¹⁹¹ *CTh* 9.27.3 (trans. Pharr): “ut unius poena metus possit esse multorum ...”

¹⁹² On this subject in general see A. C. Murray, “Immunity, Nobility and the Edict of Paris,” *Speculum* 69 (1994), pp. 18-39.

¹⁹³ *Novellae*, ed. Rudolf Schoell and Wilhelm Kroll, *Corpus iuris civilis*, 3 (Berlin, 1895 and later), appendix 7, pp. 800-801 (trans. Murray, “Immunity, Nobility and the Edict of Paris,” p. 28): “Provinciarum etiam iudices ab episcopis et primatibus uniuscuiusque regionis idoneos eligendos et sufficientes ad locorum administrationem ex ipsis videlicet iubemus fieri provinciis quas administraturi sunt sine suffragio, solitis etiam codicillis per competentem

ET 3 was undoubtedly in response to the sorts of regional interests reflected by the frequent complaints in the *Variae* to the general maladministration of judges.¹⁹⁴

In the fourth century, the minimum requirement of judges was to demonstrate a proper deference towards imperial constitutions which had been referred to them. Those who did not would be punished: “a judge who renders his decision against the sacred pronouncements of the emperors or public custom, which have been recited to him, shall be exiled to an island.”¹⁹⁵ In the *ET*, the minimum requirement of the judge was to properly weigh the evidence before him and render a judgement which he deemed to be in accordance with established *ius* and *lex*: “When the claims and proofs of each party have been examined, a judge must render a decision only on that which he perceives to be in accordance with justice and law.”¹⁹⁶ Thus, the lawless judge, the judge who adjudicated disputes not based upon his legal system’s internal content, but rather upon external and therefore unacceptable standards (such as which party provided the largest bribe) posed a major threat to the continued functioning of that system, and was dealt with harshly. That judges sometimes put their own interests before those of justice was an unavoidable consequence of the limitations imposed by the Ostrogothic bureaucracy: as Cassiodorus makes clear, it simply lacked the capacity to interfere systematically in the quotidian affairs of local communities on the periphery, and thus ensure the integrity of its agents in those places.

iudicem eis praestandis, ita videlicet ut si aliquam collatoribus laesionem intulisse inveniantur aut supra statuta tributa aliquid exigisse, vel in coemptionibus mensuris enormibus aliisque praeiudiciis vel gravaminibus aut iniquis solidorum ponderibus possessores damnificasse, ex suis satisfaciant facultatibus.”

¹⁹⁴ E.g., *Var.* 9.20 (cited and discussed above, p. 130 n. 24).

¹⁹⁵ *PS* 5.25.4: “Iudex, qui contra sacras principum constitutiones contrave ius publicum, quod apud se recitatum est, pronuntiat, in insulam deportatur.”

¹⁹⁶ *ET* 7: “Iudex discussis utriusque partis suggestionibus atque documentis id solum iudicare debet, quod iuri et legibus viderit convenire.”

Conclusions

The *ET* is a striking testimony to the lasting legacy of Roman policy and procedure in matters of public law and legal administration. Drafted upon the principles that the rule of law was territorial, that is, it applied in equal measure without consideration of one's nationality, and that justice be sought in the proper courts presided over by authorized judges, the *ET* readily attests to the fact that notions of law and justice, and the courts and officers responsible for maintaining the integrity of the system, were in the early sixth century essentially the same as those of the later Roman Empire. The provincial courts were administered by the central administration through Roman judges, that is, governors and their staff, as well as officers of the local municipalities, including the Roman *defensores*, *duumviri*, *quinquennales*, and the ubiquitous decurions. But it is clear both from the compilers and Cassiodorus, too, that this was a much simplified and watered down version wherein the bulk of cases were dealt with by the provincial governor irrespective of the type of case or considerations of a person's nationality; and the jurisdiction of lesser officials, in particular the *defensor*, was significantly curtailed as a result. In practice, at least, the strict jurisdictional division between Goths and Romans as envisioned by Cassiodorus seems to have been the exception more so than the rule. The *ET* also underscores just how fragile a system it was, and the dangers that threatened to take it down – dangers that had existed since the early days of the Empire: namely, the exercise of patronage, judicial venality and corruption, and the inability of the central administration to establish a strong presence in the local communities under its authority, thereby ensuring that justice was maintained equally and impartially throughout the peninsula.

As for the rules of procedure and evidence in the context of legal administration, the compilers displayed an interest in, an ability to understand, and a desire to preserve the

fundamentals of the late Roman justice system. Throughout, they exhibited few traces of conscious innovation, except in their tendency to increase the severity of penalties for certain prescribed offences (in particular those concerning judicial corruption). The dual penal system, such concepts as *inscriptio*, rules over making formal accusations, pre-trial custody, the use of oaths and many other aspects of Roman public law and legal administration, including long-held prejudices and assumptions based on status, remained unchanged. On the other hand, some technical concepts of imperial procedure, such as the classical *actio*, and the complex rules governing appeal, were evidently no longer so important in the early sixth century, at least in the provinces. But there is no denying the fact that when it came to matters of public law and legal procedure, the compilers turned to a range of Rome's legal traditions and customs for guidance and inspiration.

Chapter Four

Of Persons, Property and Family: Aspects of Roman Private Law in the Edictum Theoderici

Introduction

As mentioned in Chapter One, the *ET* is primarily a handbook of Roman private law. Provisions pertaining to such topics as status and legal personality, property (including slaves), ownership and possession, marriage and divorce, succession and inheritance, take up the bulk of the collection. This is not to say, however, that the compilers distinguished between these subjects in strict terminological or conceptual terms, but rather treated them in an *ad hoc* manner, just as the classical jurists and imperial legislators had done for centuries before them. For instance, the subject of inheritance was as much an issue of property law as it was family law. The conveyance of property through donation or inheritance involved aspects of both private and public law. And the giving away of a daughter in marriage was equally subject to considerations of the law of persons, property and family respectively. Given its vast subject matter, it should come as no surprise that the compilers devoted the majority of their attention to aspects of Roman private law. In this regard, they demonstrated a thorough grasp of the material, in part, perhaps, because most concepts of Roman private law were inherently easy to comprehend, and did not pose problems for anyone possessed of at least an elementary level of legal training. But they also exhibited a conscious willingness to innovate: important variations and points of difference from earlier laws and legal trends do occur. For instance, the prescribed penalties for the unauthorized seizure of another's property were increased dramatically. The complex and detailed rules governing donations that were overhauled substantially by Constantine were modified further by the compilers in an effort to make them more practical. Subjects like marriage, divorce, *raptus*, female chastity and adultery, which received a great deal of attention

on the part of Christian emperors from the fourth century onwards, were altered or passed over with little or no comment. At the same time, the compilers adhered to many concepts of the private law that were no longer relevant in early sixth-century Italy. For example, their preoccupation with the various categories and degrees of status in Roman law seems out of touch in light of the realities of life in Theoderic's Italy, where legal distinctions between free and unfree, lower and upper class, were not always enforced in quotidian affairs.

What follows is an examination of the provisions of Roman private law that comprise the greater part of the *ET*'s subject matter, with particular attention paid to their relationship with earlier Roman models and legal trends in general. The survey is useful for three principal reasons. First, the provisions document what aspects of Roman private law the compilers considered applicable for their own time, and in some cases how they needed to be updated. Secondly, the provisions detail extremely well some of the characteristic features of the *ET*: its range, its thoroughness, its reasonableness, its concern with the practical and tangible, its tendency for the particular provision, not the general principle. Lastly, they are of intrinsic importance for their relevance to the realities of Ostrogothic Italy. Behind the starkly informative rulings of the *ET* may be glimpsed, though obscurely, the day-to-day life experienced by the Roman and Gothic inhabitants of the countryside, preoccupied as they were with such issues as incidents of land tenureship and ownership, rights over, and obligations to, slaves and farmhands; and matters closer to home, like a wife's infidelity, the rights of a spouse in matters of marriage and divorce, some of the responsibilities and obligations of parents to their children, the conveyance of property through succession and inheritance, and so on. It was provisions such as these with which ordinary persons most often had to deal while going about their daily life,

even if at times they testify to the exception more so than they do the rule. To begin, some words concerning the law of persons are necessary.

The Law of Persons and Legal Personality

The law of persons refers to the various categories and degrees of status in Roman law, and the ways in which status could be gained or lost. In Roman law, status was determined by three constituent factors – *libertas*, *civitas* and *familia*, that is, freedom, citizenship and family.¹ Of these, the most important was freedom: for the loss of liberty entailed the loss of citizenship and family rights as well.² The loss of citizenship did not incur the loss of freedom, but usually carried with it the loss of family. In most instances it occurred as a result of deportation. It has already been noted that while the punishment of *infamia* for certain prescribed actions resulted in the loss of citizenship,³ and was deemed by emperors as an effective deterrent well into the fourth century in the West, it appears to have gone into abeyance in Italy by the early sixth.⁴ The loss of family liberties affected status the least. For instance, if a child was emancipated, that is, freed from the legal authority of the *paterfamilias*, the child's legal status transformed from one of dependence to one of independence.⁵ While the emancipation resulted in the child losing inheritance rights on intestacy, the child also gained legal independence, which could certainly be of an advantage in some instances. Together, these three elements of status constituted the law

¹ Borkowski, *Textbook on Roman Law*, p. 86.

² As Paul remarks (*Dig.* 4.5.11 [lib. 2 *Sab.*]): “There are three kinds of change of civil status: the greatest, the middle, and the least. For there are three things which we have: freedom, citizenship and family. Therefore, when we lose all three ... the change of civil status is the greatest. But when we lose citizenship and retain freedom, the change of status is the middle. When both freedom and citizenship are retained and only family is changed, it is plain that the change of civil status is the least.” (“Capitis deminutionis tria genera sunt, maxima media minima: tria enim sunt quae habemus, libertatem civitatem familiam. igitur cum omnia haec amittimus ... maximam esse capitis deminutionem: cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis deminutionem: cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat.”)

³ *Dig.* 3.2.1 (Jul., lib. 1 *Edict.*).

⁴ Chapter Three, p. 164.

⁵ Legal age for males in Roman law was twenty-five, although children could be released from *potestas*, through a procedure called *emancipatio*, which severed most legal ties with paternal relatives. For males, this could be granted at the age of twenty-one; for females at nineteen: *CTh* 2.17.1, 2 (321; 324); *CTh* 2.16.2 (319).

of persons, and underpinned all aspects of Roman private law which appear in the *ET*. We begin with the first.

Freedom and Slavery

The Roman law of persons recognized two types of people – free and unfree.⁶ Nowhere do the classical jurists provide a clear definition of freedom, although Florentius in his *Institutes* described it as a ‘natural condition’.⁷ In view of the great importance of slavery as a social and economic institution of the Roman world, Florentius’ sentiments hardly seem genuine. Of more practical importance was his definition of slavery as an institution of the *ius gentium*, that is, the law of nations, whereby someone is subjected to the ownership of another against the will of nature.⁸ In other words, slaves were the property of another. As such, they could be acquired, owned and disposed of, and had no rights of their own. They had limited privileges, usually in regards to their *peculium*, that is their *de facto* possession of goods, which they could in some instances use to purchase their freedom; sometimes their families were recognized; sometimes the punishment that their owners could administer them was restricted by law. But they were defined in law as un-free, in that they had no legal ability to bring forth a complaint to the attention of a judge (with the exception of making a claim that they were illegally enslaved), and had no political rights to speak of.⁹

These were essential features of the Roman law of slavery, a vast compendium of rescripts and juristic commentaries that sought to define and regulate the ancient institution.

⁶ E.g., *Dig.* 1.5.3 (Gaius, lib. 1 *Inst.*)

⁷ *Dig.* 1.5.4pr. (Florent. lib. 9 *Inst.*).

⁸ *Dig.* 1.5.4.1 (Florent. lib. 9 *Inst.*).

⁹ These characterizations are hardly controversial and there is no need here to add to the volumes of scholarship on the subject. For a review see Wickham, *Framing the Middle Ages*, pp. 261-65; id., *Land and Power*, pp. 84-9. For the later Empire see Jones, *LRE*, pp. 793-5; and more recently, D. Vera, “Forme e funzioni della rendita fondiaria nella tarda Antichità,” in A. Giardina (ed.), *Società romana e impero tardoantico*, vol. 3 (Bari, 1986), pp. 367-447; id., “Schiavitù rurale, colonate e trasformazioni agrarie nell’Italia imperial,” *Scienze dell’antichità*, VI-VII (1992-3), pp. 291-339; id., “Dalla ‘villa perfecta’ alla villa di Palladio,” *Athenaeum* 83 (1995), pp. 189-211, 331-56; A. Giardina, *L’Italia romana: Storie di un’identità incompiuta* (Rome and Bari, 1997), pp. 223-64.

While the compilers ignored a good deal of previous legislation, the *ET* stresses this legal and proprietary aspect of slavery, and underscores the fact that slavery remained an integral institution in early sixth-century Italian society.

Before turning to what the *ET* has to say about the legal status of slaves in particular, some words must be said of the slave class in general. While we are not informed of their exact numbers, the frequency of references in the *ET* and other sources to them – that is *servi*, *familiarii*, *ancillae*, and *mancipia* – would seem to confirm that their number was considerable.¹⁰ Enslavement could arise from several factors, mainly though the sale of children, through punishment, by capture or by birth. Banned since the days of the Republic, the selling of children was revived in the later Empire in limited circumstances, and continued into the early sixth century: according to *ET* 94, newly-born children could be sold into slavery by their parents on the grounds of poverty. But a right of redemption was reserved to the parents should their circumstances improve. When redeemed, the child regained its original status.¹¹

Enslavement could be imposed as a punishment for certain prescribed crimes. Roman law on the subject documents many such instances. In the early Empire, these included crimes where

¹⁰ In all, a total of 40 provisions deal with slaves either in whole or in part: *ET* 19, 21, 22, 48, 49, 51, 56, 61, 62, 63, 64, 65, 66, 69, 70, 77, 80, 81, 84, 85, 86, 87, 96, 97, 98, 100, 101, 102, 104, 109, 117, 118, 120, 121, 128, 141, 142, 148, 150, 152. For instances in the *Variae* involving slaves, see e.g.: 1.11 (a complaint concerning a certain Maniarius who alleges that his slaves [*mancipia*] were stolen); 1.30 (concerning slaves accused of murdering their masters); 3.14 (a complaint alleging that the slaves of the venerable bishop Aurigenes outraged the wife of a certain Julianus and squandered some of his property); 3.18 (a letter of instruction commanding Gemellus, governor in Gaul, that the property, goods and slaves are to be restored to a certain *vir spectabilis* Magnus); 3.43 (a letter in Theoderic's name instructing that fugitive slaves are to be restored to their previous owners); 5.1 (here, Cassiodorus has Theoderic extol the Vandal king [Thrasamund] for his gifts of musical instruments and slave boys); 5.15 (concerning the purchasing of slaves for the outfitting of a Gothic navy).

¹¹ One of the analogous texts (*CTh* 5.8.1), a rescript of the emperors Valentinian, Theodosius and Arcadius of 386, stipulates that a freeborn child so sold could reclaim his freedom at no cost (that is, he does not have to repay the purchase price). On the selling and pledging of children in Roman law, see: *CTh* 5.9.1 and 5.10.1 (Constantine); *Dig.* 20.3.5; 21.2.39.3; *PS* 5.1.1; *CJ* 8.16.1 (197); 7.16.1 (Caracalla); 8.16.6 (293); 2.4.26 (294); 7.16.37 (294). See also John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (New York, 1988), pp. 53-137; W.W. Buckland, *The Roman Law of Slavery* (Cambridge, 1908), pp. 420-2; Ludwig Mitteis, *Reichsrecht und Volksrecht in den östlichen Römischen Kaiserreichs* (Leipzig, repr. Hildesheim, 1963), pp. 358-64; Jaques Ramin and Paul Veyne, "Droit romain et société: Les hommes libres qui passent pour esclaves et l'esclavage volontaire," *Historia* 30 (1981), pp. 472-97.

the punishment involved working in the mines or fighting in the arena.¹² Those who evaded paying taxes or fulfilling obligatory military duties could also be enslaved: although evidence for this in the *ET* is lacking; and as has been pointed out already, the condemnation of criminals to the mines or arena was no longer practiced in the early sixth century. Debt-bondage was not uncommon in some regions of the Empire, particularly in the East.¹³ That this practice continued in Italy into the sixth century is unclear. While *ET* 79 gives the impression that a freeman could be held in servitude of another, it does not specify the grounds for this. And despite the fact that the position of the creditor was much improved from what it had been in the later Empire, as *ET* 127 and 135 suggest, there is no indication that he was permitted to resort to such extreme measures. In exceptional circumstances, a freedman, that is an ex-slave, could be re-enslaved for showing ingratitude to his patron (the former master), although the compilers did not comment on this specifically.¹⁴

Another action that resulted in enslavement was self-sale, which the compilers addressed in *ET* 82:

If a freeborn man is sold, he is not to incur the prejudice of his new status, unless perchance, being of the age of majority, he kept the buyer in the dark by remaining silent about his freeborn status. For he could have brought an action against the seller in defence of himself, or injustices concerning the crime of *plagium*, except that he wanted the money that was given for him to be split between himself and the seller. In that case, he shall incur the prejudice of the condition which he created for himself through deceit and connivance.¹⁵

¹² Such convicts were described as penal slaves (*servi poenae*) and were regarded as the lowest form of slaves. See J. Burdon, "Slavery as a punishment in Roman Criminal Law," in Léonie Archer (ed.), *Slavery and Other Forms of Unfree Labour* (London, 1988), pp. 68-83, where the author demonstrates in which cases and to which class of offenders this form of punishment applied; Borkowski, *Textbook on Roman Law*, p. 89.

¹³ E.g., at Dura Europos. See further C.B. Welles et al., *The Excavations at Dura-Europos, Final Report V. Part 1: The Parchments and Papyri* (New Haven, Conn., 1959), p. 12; and generally G.E.M. de Sainte Croix, *The Class Struggle in the Ancient Greek World* (London, 1981), pp. 162-9.

¹⁴ *Dig.* 25.3.6.1; Borkowski, *Textbook on Roman Law*, p. 89.

¹⁵ *ET* 82: "Si ingenuus distrahatur, nullum praeiudicium sui status incurrit, nisi forte tacendo de ingenuitate sua, emptoris ignorantiam maior aetate circumvenit. Nam de plagio adversus venditorem pro defensione vel iniuria agere potuit nisi pretium quod pro eo datum fuerit, cum suo voluerit venditore partiri. Tunc enim praeiudicium conditionis incurret, quod sibi ipse dissimulando et consentiendo peperit."

A freeman was prohibited from selling himself into slavery: such a sale was *prima facie* invalid since a free person could not in theory be the object of a contract of sale. Paradoxically, attempts to sell oneself in this way were punished with enslavement. The context envisaged in the provision here was one where the freeman, pretending to be a slave, would arrange for an accomplice to sell him to an unsuspecting customer. After the sale the freeman would establish his freedom (no doubt by means of providing proper documentation)¹⁶ and share the purchase price with the accomplice. To curb the practice, offenders were enslaved – a particularly fitting punishment for the crime.¹⁷

Lastly, we are informed by Cassiodorus that Athalaric punished any free woman who chose to be a concubine with enslavement. According to his *Edict*, the woman and her children (should she have any) became the property of the aggrieved wife:

But if anyone, in wanton and shameful desire, despises married decency, and prefers to go to the embraces of a concubine, if she is a free woman, she and her children will, in all cases, be made over to the wife, under the yoke of slavery. Thus, by a moral sentence, she will experience subjection to one above whom she expected to be placed in her illicit lust.¹⁸

There is no precedence for this in Roman law, nor is there anything close to it in the *ET*. It would seem that this was an innovation of Athalaric's, and it documents in the first place just how seriously the king took the matter of adultery, and secondly the extent to which classical standards of Roman law had evolved even further in the intervening years between Theoderic and his grandson Athalaric.

¹⁶ While the details for this are lacking, *ET* 96 makes it clear that the burden of proof in such circumstances rested with the claimant.

¹⁷ On this subject in earlier law, see Jaques Ramin and Paul Veyne, "Droit Romain et société," pp. 472-97.

¹⁸ Cass., *Var.* 9.18.7 (trans. Barnish, *Variae*, p. 119): "Si quis autem superflua turpique cupidine coniugali honestate despecta ad concubinae elegerit venire complexus: si ingenua fuerit, iugo servitutis cum filiis suis modis omnibus addicatur uxori, ut illi se per honesta iudicia sentiat subdi, cui per illicitam libidinem credidit posse praeponi."

Another source of slaves was provided through capture in war of foreign prisoners. Prisoners-of-war became slaves if they were not ransomed. While contemporary sources include specific examples,¹⁹ and earlier Roman law on the subject is particularly detailed,²⁰ the compilers focused their attention on the return of existing slaves and *coloni* that had been captured by enemy forces in the course of war.²¹ This was obviously a far greater concern for slave-owners than was the return of a captured soldier. Lastly, many slaves, and perhaps most, were such by virtue of their birth. Slavery through birth occurred if the child's mother was a slave when the child was born (the status of the father being irrelevant).²² This was a long-established principle of the Roman law of persons. Yet, the compilers elected to include a specific provision on it in the *ET*²³ – an indication, perhaps, that they felt people needed reminding.

Of course, the actions of powerful magnates also contributed to the number of slaves. The arrival of the Goths posed significant problems for the Italian population, the greatest of which was the unauthorized expropriation of properties and subsequent enslavement of the landholders at the hands of Gothic *potentes*. Both the *ET* and *Variae* addressed this problem directly. *ET* 78 and 83 attempted to curb the unlawful enslavement of freemen by targeting those who abducted, sold or purchased such individuals:

ET 78 Anyone who sells, gives away, or presumes to retain for his own service a freeborn man whom he has taken to another place by means of *plagium*, that is through solicitation, shall be put to death.

ET 83 Of those who conceal, sell, or knowingly purchase a freeborn man, *humiliores* shall be flogged and sentenced to perpetual exile; *honestiores* shall be

¹⁹ E.g., Ennodius, *V. Epiph.* 136-77 (on the capture and ransoming of 6,000 Ostrogothic hostages at the hands of the Burgundians).

²⁰ E.g., *Dig.* 28.1.12 (Julian, lib. 42 *Digest*); *Dig.* 49.15.5pr.-1 (Pomp., lib. 37 *Quintus Mucius*); concerning specific cases of Roman citizens being captured and enslaved by barbarians: *CJ* 8.50.1-18; *CJ* 7.14.9.

²¹ *ET* 148.

²² *Dig.* 1.5.5.1-2.

²³ *ET* 65: "Whenever a freeborn man, *originarius* or slave per chance joins himself to a slave woman, it is mandatory that complete agnation follows the mother; that is, all children shall belong to the owner of the slave woman." ("Quotiens se ancillae ingenuus, aut originarius, aut servus forte miscuerit, necesse est ut omnis matrem sequatur agnatio, id est, filii omnes ad dominum ancillae pertineant.")

deprived a third of their goods and shall also endure a penalty of exile for a period of five years.²⁴

Interestingly, in referring to the crime of *plagium* the compilers felt the need to provide a few words of definition for it (*id est sollicitando*) – again, a possible indication of a decline in the level of legal erudition in Italy during this time. *Plagium* seems to have been particularly ripe throughout the Empire, especially – and not surprisingly – in times of civil strife.²⁵ In several instances in the *Variae*, Cassiodorus has the king bemoan the illegal enslavement of freemen. The case of the blind Goth Anduit is illustrative. In a letter addressed in Theoderic's name to Neudes, *vir illustris*, which alleges that Anduit was dispossessed of his property and unlawfully enslaved by two other Goths, Gudila and Oppa, the king is made to say:

But I, whose special task it is to preserve an impartial justice between equals and unequals, decree by this command that, if he has proved himself free in the court of the aforementioned late Pitzias, you are immediately to make his slanderers withdraw. Nor may those who should have condemned their own intentions, when they were first defeated in law, dare to harass him any further with compulsions foreign to his [free] status.²⁶

Despite repeated calls of Theoderic and such provisions as *ET* 78 and 83, however, the various examples cited by Cassiodorus of Romans and Goths alike being forced into servitude by

²⁴ *ET* 78: "Qui ingenuum plagiando, id est sollicitando, in alia loca translatum aut vendiderit, aut donaverit, vel suo certe servitio vindicandum crediderit, occidatur."

ET 83: "Qui ingenuum celaverint, vendiderint, vel scientes comparaverint, humiliores fustibus caesi in perpetuum dirigantur exilium; honestiores confiscata tertia parte bonorum suorum, poenam patiantur nihilominus quinquennalis exilii."

²⁵ In an anecdote told of Augustus, for instance, Suetonius describes how the young emperor took drastic steps to put an end to what was becoming a commonplace problem as a result of the recent civil war: Suet., *Life of Augustus*, ch. 32, trans. with introduction and notes by Catherine Edwards (Oxford, 2000).

²⁶ Cass., *Var.* 5.29 (trans. Barnish, *Variae*, p. 86): "Sed nos, quorum est proprium inter pares se dispaes aequabilem iustitiam custodire, praesenti iussione decernimus, ut, si in iudicio supra memorati quondam Pitziae se probavit ingenuum, calumniantes protinus amovete: nec audeant ulterius necessitatibus alienis illudere, quos semel convictos decuerat sua vota damnare." Anduit's was not an isolated incident. See *Var.* 5.30 (addressed in Theoderic's name to the *dux* Guduin, this letter concerns the complaint of two Goths, Costula and Daila, alleging that the addressee has imposed servile tasks [*onera servilia*] on them); 8.28 (a letter in Athalaric's name to Cunigast, *vir illustris*, that concerns the petition of the Romans Constantius and Venerius, which alleges that the Goth Tanca had seized their farm and reduced them to slavery). On similar events in Gaul, see Salvian, *De Gubernatione Dei* 5. 8, 9, ed. F. Pauly, *CSEL* 8 (Vienna, 1883).

rapacious neighbors speaks to the inability of the central authority to deal effectively with the problem.

The slave class was by no means a homogenous one. From the standpoint of economic function, there were two main kinds of slaves: the first was comprised of skilled ones such as the household slave, *familiarius*; and the menial or field type, variously identified by the compilers as *rusticii*, *mancipii*, or the generic *servi* and *ancillae*, constituted the second. As a general rule, household slaves were considerably more valuable than their counterparts in the field, but it was these field slaves, working in some capacity or another, that constituted the bulk of the slave population.

It was certainly these whom the provisions in the *ET* dealing with the flight of slaves targeted.²⁷ In all, a total of six provisions deal with runaway slaves.²⁸ Together, they aimed to put an end to the problem in one of two ways. In the first, by preventing escape through provisions for the punishment of those who incited flight, or knowingly sold or gave away a fugitive slave.²⁹ *ET* 80, for which there appears to be no precedent in Roman sources, dealt harshly with a person who incited another's slave to flee: those found guilty were required to repay the owner three additional slaves including the absconder together with his *peculium*. In the second, the compilers sought to ensure that a fugitive, deprived of assistance, would be swiftly caught and returned. Here, efforts largely took the form of threats designed to deter anyone from harbouring a fugitive slave. *ET* 84 is illustrative of this:

Anyone who knowingly receives or conceals another's fugitive slave or *colonus* shall render to the owner that fugitive together with his (i.e. the slave's) income and *peculium*, as well as another slave of equal value. But if the one who first received the fugitive allowed him to be received for a second or third time, then

²⁷ *ET* 80, 84-7, for fleeing *servi* (and once, in 84, a *colonus*).

²⁸ *ET* 80, 84-7, 141.

²⁹ *ET* 80, 87, 141.

that one shall render to the slave's owner three additional slaves in addition to the fugitive along with his income. However, a slave must be tortured in examination lest perchance he has been sent by his owner to the home of the person who received him in order to cleverly and deceitfully profit; so that if through the interrogation of the one testifying it is established that he was fraudulently sent by his owner to another's home, the fisc may at once be compensated.³⁰

Anyone who knowingly received another's fugitive slave was to compensate the fugitive's master with another slave of equal value, in addition to the absconding slave where possible, and any property or income amassed by the slave following his escape. Furthermore, in the event that the absconding slave was received for a second or third time by the same individual who provided him employment in the first place, then that person was to pay the fugitive's master three slaves in addition to the absconder, and any income the slave may have accumulated during the intervening period: otherwise, he could be held criminally liable.³¹ To limit the possibility of fraud, the provision required that the slave be tortured as a means to rule out the possibility that his master had, in fact, contrived his original escape in order to profit. This was a slight variation from *CJ* 6.1.4, the basis for which is a now-lost decree of the emperor Constantine of 317, which gave the receiver the option of paying the master twenty *solidi* instead of returning the fugitive slave; and provided the receiver the option of compensating the owner two or three slaves in addition to the absconder.

The problem, of course, was how such fugitive slaves could be identified and distinguished from *originarii*, *coloni* or even humble freemen who were compelled to travel

³⁰ *ET* 84: "Quisquis servum sive colonum alienum sciens fugitivum susceperit aut occultaverit, ipsum domino cum mercedibus et peculio eius et eiusdem meriti alterum reddat. Quod si secundo aut tertio eundem fugitivum idem apud quem fuerat, suscipiendum esse crediderit, praeter ipsum, cum mercedibus, tres alios domino eius tradat. Mancipium tamen ipsum, ne forte propter capiendum lucrum callide et dolose a domino ad domum eius, qui susceperat, immissum fuerit, oportet in examinatione torqueri: ut si per interrogationem in quaestionem positi constiterit a domino suo ad domum alterius fraudulenter immissum, fisci protinus compendiis adplicetur."

³¹ Cf. *ET* 85: "If someone knowingly receives slaves that have been induced to flight or furtively taken by another, not only must they be prosecuted concerning those received and return them, but they also must be detained to answer for the offence of theft." ("Servos sollicitatos ab altero vel furto ablatos, si scientes alii susceperunt, non tantum de his susceptis conveniri et eos reddere debent, sed etiam ad poenalem actionem furti detinendi sunt.")

about in search of employment on the estates of wealthy landholders. Thus, *ET* 80 provided that anyone who took on the services of a stranger was required to direct him to the public records office (*gesta*) where declaration of his (free) status could be made:

Anyone who induces another's slave to flee shall render to the owner three others of equal value, and the original slave together with his *peculium*. But if anyone is received by another under good faith whereby he claims that he is freeborn, it is necessary for the receiver to take these precautions: namely, to direct the claimant to the records offices where he can declare his freeborn status; upon completion of this, if the claimant is demanded by the owner and proven to be his slave or *originarius*, he shall be returned without any inconvenience to the one who received him [in the first place].³²

Those who failed to do so, or deliberately concealed the fact that a stranger so received turned out to be an absconding slave, were criminally liable.

That the compilers devoted such attention to the subject of runaway slaves suggests that it was a serious problem, and forces one to consider why so many slaves fled. While the *ET* presupposes that they were going to other landlords, the prospects available to such runaways for a better life were few, if any. In economic terms, the most a fugitive could reasonably have expected was a smallholding as the tenant of some free landholder. For a slave, of course, the conditions of tenancy might well have been better than those he abandoned, and the stigma associated with servitude, concomitant with its legal disadvantages, would have been lost. But the *ET* makes the point that there was little, if any, difference, between tenancy and slavery: as a general rule the compilers did not differentiate between slaves and *originarii* – a sure indication that the frontier between slavery and tenancy was at this time blurred.³³ In fact, over the course of the fourth and fifth centuries, the social and economic position of the agricultural slave had

³² *ET* 80: "Qui mancipium alienum sollicitaverit, tres alios eiusdem meriti, et ipsum domino cum peculio suo reddat. Quod si quis a quolibet bona fide suscipitur quo se dicat ingenuum, susipientis haec debet esse cautela, ut eum ducat ad gesta, et se profiteatur ingenuum: quo facto dum a domino servus aut originarius postulatus fuerit et probatus, solus sine retinentis incommoditate reddatur."

³³ The *ET* frequently equates *originarii* with *servi*: 21, 56, 63, 64, 80, 84, 97, 98, 104, 109, 142 (where slaves are *originarii*).

tended to become in practice, at least, less and less distinguishable from that of the dependent tenant farmer, variously described in the *ET* as a *colonus*³⁴ or *originarius*.³⁵

Just as slaves risked a great deal in escaping, so, too, did the landholders who received them. Given the prevailing economic conditions of early sixth-century Italy, it is easy to see why. Beginning at the start of the fifth century, Italy was in decline with respect to both the role it played in long-distance trade and its internal situation, and this for reasons not directly connected with the political turmoil of the times.³⁶ Despite some of the documented efforts of Theoderic to stimulate the economy,³⁷ it is clear from the *ET* that no amount of government involvement

³⁴ *Coloni* (similarly, *originarii*) clearly survived in Italy in the first quarter of the sixth century, for they are mentioned throughout the *ET*: 21 (on abducting another's *ancilla*); 48 (on testimony from *originarii/liberti* or slaves); 56 (on cattle rustlers, this provision mentions *originarii* specifically); 63 (on the defilement of a freewoman); 64 (on defilement of another's *ancilla/originaria*); 65 (on unions involving freemen/*originarii/servi/coloni* with slave girls); 66 (on unions involving *originariae*); 67 (unions between *originarii* and *originariae*); 68 (on the flight of an *originaria*); 80 (on the inducement of another's slave or *originarius* to flight); 97 and 98 (on fire set by slaves/*coloni/originarii*); 104 (on boundary markers destroyed by *servi/coloni*); 109 (concerning theft committed by a slave or *colonus*); 121 (on making loans to another's *servus* or *colonus*); 128 (in the event that a master refuses to defend his *servus/colonus* against an accusation); 148 (on *servi/coloni* returned by the enemy).

³⁵ On this point see Chapter Two, pp. 94-96; A.H.M. Jones, "Slavery in the ancient world," pp. 1-15; M.I. Finley, *Ancient Slavery and Modern Ideology* (Harmondsworth, 1980); Natalie Kampen, *Image and Status: Roman Working Women in Ostia* (Berlin, 1981), pp. 27-32; Beryl Rawson, "Spurii and the Roman View of Illegitimacy," *Antichthon* 23 (1989), pp. 10-41.

³⁶ On the archaeological evidence for economic decline in Italy between the fifth and sixth century, see G.P. Brogiolo, "Dwellings and Settlements in Gothic Italy," in Barnish and Marazzi (eds.), *The Ostrogoths from the Migration Period to the Sixth Century*, pp. 128-30; A.M. Small and R.J. Buck, *The Excavations of S. Giovanni di Ruoti*, I (Toronto, 1994), p. 121; T.W. Potter and A.C. King, *Excavations at the Mola di Monte Gelato* (London, 1997), pp. 76-7, p. 121. For evidence of decline both in terms of the distribution and sophistication of fine pottery during this period, see P. Arthur and H. Patterson, "Local Pottery in southern Puglia in the sixth and seventh centuries," in L. Sagui (ed.), *Ceramica in Italia: VI-VII secolo. Atti del convegno in onore di J.W. Hayes*, May 11-13, 1995. Arch. Medievale 14 (Florence, 1998), pp. 511-30, esp. p. 507; H. Di Giuseppe, "La Fornace di Calle di Tricarico," in Sanguì, *Ceramica in Italia*, pp. 735-52. See also Chris Wickham, *Framing the Early Middle Ages*, pp. 34, 115, 203-10; Bryan Ward-Perkins, "Land, Labour and Settlement," in Cameron et al. (eds.), *The Cambridge Ancient History*, vol. 14: *Late Antiquity: Empire and Successors, A.D. 425-600* (Cambridge, 2000), pp. 315-46; id., "Specialized Production and Exchange," in Cameron et al. (eds.), *The Cambridge Ancient History*, pp. 346-91, esp. 354-5.

³⁷ E.g., Theoderic's reform of the coinage and fixing of corn prices: Cass., *Var.* 10.27; 2.26 and 12.27 (emergency measures to combat rising prices). See Ludo Maritz Hartmann, *Geschichte Italiens im Mittelalter*. Vol. 1. 2nd edn. (Gotha, 1923), 1: 128, n. 20. Coinage: Wolfgang Hahn, *Moneta Imperii Byzantii I: Von Anastasius I bis Iustinianus I*. Denkschriften der Österreichischen Akademie der Wissenschaften in Wien, Phil.-hist. Kl. 109 (1973), pp. 77-91; id., *Moneta Imperii Byzantii II*. Ibid. 119 (1975), pp. 25-32, which contains an excellent discussion of the Ostrogothic monetary system. Some account must also be taken of the many building programmes undertaken by Theoderic and his successors; as well as the government's encouragement for private individuals who engaged in income-producing activities (e.g. the draining of swamps and marshes). On the building programme: Cass., *Var.*

could completely rid the peninsula of one of the greatest problems which had plagued it for more than a century – namely, the manpower shortage on the land, a situation made worse in the early sixth century by the occurrence of devastating droughts, famines and wars.³⁸ The lack of available manpower led to a highly competitive labour market, forcing desperate landowners to take on fugitives as free workers or tenants, no questions asked, in an attempt to preserve their accustomed standard of living. *ET* 142 speaks to the sorts of problems facing the landowner as a result of the manpower shortage, and the steps some of them took to compensate for it:

An owner shall be permitted to transfer rustic slaves of each sex, even if they are *originarii*, which he possesses physically and lawfully, from his properties to locales which he owns, or to enjoin them to urbane services, provided that they are returned to those regions where they first departed in accordance with the will of the owner, and rightfully be considered to be members of his household staff in the city; and no judicial challenge on any grounds (for example under the opposition of origin) may arise concerning the actions and orderly arrangements of this measure. Moreover, it shall be permitted for owners of the aforementioned circumstance, under the attestation of their will, to transfer [slaves] from any portion of their land, or surrender, sell or grant them to anyone they wish.³⁹

Here, the owner was permitted to transfer his slaves to areas where they were most needed, whether to perform domestic duties in town or provide agricultural labour in the fields, as a means to maximize production; he could even lend them to other landholders at his discretion. In

11.39.2; Anon. Val. 12.71 (palace construction at Verona). On the reclamation of swamp land: Cass., *Var.* 2.32, 33 (above, p. 102).

³⁸ Cass., *Var.* 4.5 (a letter addressed in Theoderic's name to the *comes* Amabilis, concerning the supply of provisions to the famine-stricken province of Gaul); 4.7 (apparently, some of the supply ships sent to Gaul to relieve the famine sank. Here, Theoderic instructs the *comes privatarum* not to penalize any merchants whose loss was no fault of their own); 10.27 (written in Theodahad's name, this letter concerns the supply of corn to the depleted regions of Liguria and Venetia); 12.25 (a letter in Cassiodorus' own name concerning the famine which struck Italy in 538). The famine is mentioned again in 12.28.

³⁹ *ET* 142: "Liceat unicuique domino ex praediis, quae corporaliter et legitimo iure possidet, rustica utriusque sexus mancipia, etiamsi originaria sint, ad iuris sui loca transferre, vel urbanis ministeriis adplicare, ita ut et illis praediis adquirantur, ad quae voluntate domini migrata fuisse constiterit, et inter urbanos famulos merito censeantur: nec de eiusmodi factis atque ordinationibus, velut sub oppositione originis, quaestio ulla nascatur. Alienare etiam supradictae conditionis liceat dominis, absque terrae aliqua portione, sub scripturae adtestatione, vel cedere, vendere cui libuerit vel donare."

such instances, however, the slave remained the property of the original master: should he end up in the employ of another, he was to be returned to the original owner upon his request.

In the same way, *ET* 150 recognized the need for landholders to share oxen and slaves between them, but severe fines punished anyone who did so without expressed permission. Those found guilty were to pay (presumably the owner) a *solidus* for every day he so employed his slave or oxen:

Let no one demand work or service from another's farmhand without the consent of the owner, or to make use of his slave or cow unless that farmhand, or his chief tenant or owner willingly offers this. Anyone who contradicts this precept shall give [the owner] one gold *solidus* for every day he so imposed burdens on [his] farmhand or cow without permission.⁴⁰

The provision clearly speaks to the (possibly widespread) problem of landholders using other people's slaves without paying for the services. In light of the fact that in the sixth century an average person could survive on some three to four *solidi* a year,⁴¹ this was a particularly harsh penalty. There is no parallel for this in the Roman sources, and it appears to be an innovation on the part of the compilers. Both it and *ET* 142 attest to the fact that Italy at this time was plagued by acute labour shortages and a general lack of resources through which produce-bearing land could be effectively maintained.

The Legal Position of Slaves

Slaves lacked rights, but their legal position constituted a complex area of Roman law, as is clear from the considerable amount of space devoted in juristic literature to legal issues affecting slaves. According to the jurists, slaves were neither wholly thing nor wholly person: on the one hand, they lacked legal personality but were held accountable for their criminal actions. And

⁴⁰ *ET* 150: "Nulli liceat invito [domino] rustico alieno operas aut obsequium imperare, nec eius mancipio aut bove uti, nisi hoc forte idem rusticus aut conductor ipsius, vel dominus sua voluntate praestiterit. Qui contra fecerit det pro unius rustici, vel unius bovis diurna opera, quam praesumpsit, auri solidum unum."

⁴¹ See generally the statistics compiled in A.H.M. Jones, *LRE*, pp. 447-8.

because they were first and foremost the property of their masters they did not possess rights. Rather, they were objects of them. In drawing from previous legislation and juristic commentary on the subject, the compilers focused primarily on the rights and responsibilities of owners over slaves. In this regard, they were not concerned with modifying the laws or improving the legal position of slaves, but rather with clarifying certain points of the law.

According to the second-century jurist Gaius, in early law an owner had the authority to do what he wished with his slave, over whom he had the unrestricted power of life and death (*ius vitae ac necis*).⁴² But in time some protection was afforded slaves against maltreatment through the law, the most important of which prohibited masters from killing their slaves without consent or justification.⁴³ Under Constantine, it was made an offence to kill a slave, even with cause, if the method involved was considered excessively cruel or gratuitous.⁴⁴ Ignoring these developments, the compilers focused instead on detailing how an owner could gain back, or at the very least be compensated for, a slave that had taken flight and sought sanctuary as a means of ameliorating his position. Cited in Chapter One, *ET* 70 required that the relevant church authorities surrender up the slave in a day's time, with the master promising pardon, or else compensate the owner accordingly. That this acted as a sufficient deterrent against the master's future brutality is unlikely. In fact, the *ET* presented no real obstacles to a slave-owner from punishing his slaves as he saw fit. While killing or abusing another's slave was strictly prohibited,⁴⁵ there is nothing in the *ET* to suggest that an owner was legally liable for the death or permanent injury of his own slave as the result of his actions. It would seem, therefore, that it

⁴² Gaius, *Inst.* 1.52.

⁴³ *Dig.* 1.6.2 (Ulp., lib. 8 *de off. procons.*).

⁴⁴ *CTh* 9.12.2. On the development of 'slave-friendly' legislation, see Borkowski, *Textbook on Roman Law*, pp. 92-3.

⁴⁵ *ET* 150 (on abusing another's slave); 152 (on the unjustified killing of another's slave).

was not the law but rather his own economic worth that afforded a slave protection against his owner's will, which could no doubt be arbitrary and brutal at times.

As property of his master, a slave could not own property. Any acquisition gained lawfully by a slave, from whatever source – earnings, gifts, legacies, even children – was transferred to the ownership of his master.⁴⁶ However, masters could grant their slaves a *peculium* – property (whether in the form of moveables or immovables) that the slave could use and enjoy. The compilers pass over this subject with a few general remarks.⁴⁷ In theory, the owner had the right to take possession of the *peculium* at will. This is presupposed by *ET* 84, which instructs the receiver of a fugitive slave to return that slave, along with his *peculium*, to the rightful owner; and *ET* 121, where a creditor who makes a loan to another's slave is to reclaim what he is owed from the slave's *peculium*, and not the owner's property. Moreover, the absence of provisions dealing with offences committed against the property of slaves suggests that the *peculium* belonged to the slave's owner.⁴⁸

It followed as a consequence of his legal status as property of his owner that any offence committed against a slave was to be dealt with by the owner: since this was an injury to his property, it was his ultimate right and responsibility to seek redress. The compilers provided several scenarios. For instance, the owner of a murdered slave was given the choice of either prosecuting the offender criminally, or receiving from him two substitute slaves of equal value.⁴⁹ The unlawful use of another's slave was satisfied by the payment of one *solidus* for every day the slave was so employed.⁵⁰ The freeman who defiled another's virgin *ancilla* or *originaria* was

⁴⁶ *Dig.* 41.1.10.1 (Gaius, lib. 2 *Inst.*); Levy, *Obligationenrecht*, pp. 71-2; Borkowski, *Textbook on Roman Law*, p. 94.

⁴⁷ *ET* 80, 84, 121.

⁴⁸ On this point, see *Dig.* 4.4.3.4; 34.4.31.3; *CJ* 5.18.7 (294); Kaser, *Das römische Privatrecht*, p. 344.

⁴⁹ *ET* 152.

⁵⁰ *ET* 150.

required to place himself under the authority of the aggrieved master, should both parties be willing, or pay the master two slaves of equal value; failure to do so resulted in his being flogged.⁵¹ In all instances, it was the owner who initiated the action.⁵² Along the same lines, if a slave committed a delict, the master was liable – a slave could not be sued since he was property. Under the rules of noxal surrender, an ancient concept dating back to the Republic – and one which the compilers clearly had a good grasp of – the master had the choice whether to pay for the damage or to surrender the slave to be punished; this rule applied equally to *coloni* and *originarii*.⁵³ Naturally, the master's decision rested largely on the amount of the sum demanded and the value of the offending slave. We have no direct information on slave-prices in early sixth-century Italy, but an indication is to be found in *Var.* 5.16, where Cassiodorus has Theoderic fix a bounty of two or three *solidi* (depending on their condition) for slaves whose masters commit them to the service of the Ostrogothic navy. But this seems to be an especially low value given that a person who wrongfully employed another's slave was liable to pay one *solidus* for every day he so employed the slave (*ET* 150). In the event that the offending slave was sold or manumitted after the offence, the general rule was that liability followed the wrongdoer, thus making the new owner or the ex-slave liable.⁵⁴

Although slaves had no independent legal personality to speak of, it has already been pointed out that the law recognized the independent personality of the slave when he committed

⁵¹ *ET* 64.

⁵² There are references only to slave informers and witnesses, not plaintiffs: *ET* 48, 84, 100, 101, 102. A *colonus*, however, was permitted to bring an action against anyone suspected of stealing from his or his master's property (*ET* 146).

⁵³ *ET* 98 (an owner is given the choice of paying for the damages resulting from a fire set by his slave, or surrendering him); 109 (here, the provision concerns an owner who is unaware of a theft committed by a slave or *colonus*, and instructs him to either compensate the victim accordingly or deliver up the thief and return anything he may have received as a result of the theft); 117 (instructing an owner to compensate the victim(s) of his slave's theft, or deliver up the slave himself). In one instance, the compilers envisioned a scenario where noxal liability involved a criminal action: *ET* 56 (concerning cattle rustling, the owner has the option of recompensing the victim or delivering up the offending slave or *originarius* to be executed).

⁵⁴ *ET* 120.

a criminal act on his own; and there were occasions when the participation of slaves was required in legal proceedings. While prohibited from bringing forward a civil or criminal action on their own behalf or that of their owner, a slave could be compelled to act as a witness, under torture, in some civil and criminal proceedings, and in rare instances against their own masters.⁵⁵ Here again, the matter for the compilers was one of practical concern for an owner whose slave was injured or killed as a result of judicial torture. According to *ET* 100, in the event that a plaintiff was unable to prove his case through the torture of another's slave, he was obliged to compensate the owner accordingly:

Another's slave cannot be tortured [to testify] the detriment of another, unless the informer or accuser, whose concern it is to prove what he claims, is prepared to stake the amount of the slave's value as determined by his owner.⁵⁶

That a slave was conceived as a possession of his owner was an important consideration for his lowly legal status, but it was not the only one. A related factor was the long-standing prejudice of Roman law that the slave was by his very nature inherently depraved, whereas the freeman was morally superior.⁵⁷ This prejudice was enshrined in the *ET*'s restrictions on the admissibility of slave evidence – for the character, position, and economic condition of a witness were all factors that could determine the degree to which he could be trusted, and found palpable expression in the provisions governing sexual relations between free and unfree.⁵⁸ The idea of a freewoman willingly cavorting with a slave, whether it was her own or another's, was totally

⁵⁵ *ET* 19 permits a slave to testify against his owner where a complaint of *raptus* has been concealed. Likewise, a slave could testify to the fact that his owner had connived his escape in order to profit (*ET* 84). Otherwise slaves and freedmen were forbidden, under penalty of death, to give testimony either in defence of or against current and former owners (*ET* 48).

⁵⁶ *ET* 100: "Servus alienus in alterius caput torqueri non potest: nisi delator, aut accusator, cuius interest probare quod intendit, precium eius, quantum dominus taxaverit, inferre paratus sit."

⁵⁷ This distinction was a basis of classical law on the subject of slavery, and has been used by some scholars to underscore some of the essential continuities between the classical and medieval worlds. See generally, Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, MA., 1985); Pierre Bonnassié, *From Slavery to Feudalism in South-Western Europe* (Cambridge, MA., 2009), pp. 1-59.

⁵⁸ *ET* 61, 62.

abhorrent, and constituted an act of immorality (*stuprum*). Following *CTh* 9.24.1 of the emperor Constantius of 349, the compilers punished the offenders severely, in particular the slave:

But if any slave commits this crime [*stuprum*], even if he does so with a willing and complicit widow, he shall be burned up by avenging flames; she, too, who was not ashamed to find pleasure with a slave, shall pay the penalty of adultery.⁵⁹

The focus here was on sexual relationships between a free woman and slave, something Roman society had never favoured, partly because children of such unions would be free.⁶⁰ Under Roman law, sexual relationships between slaves, or those of free people with slaves, had never been recognized as legitimate marriages; and such unions, *contubernia*, lacked all of the legal consequences of marriage, *coniugium*.⁶¹ Unions involving freemen and slave women, though considered disgraceful to be sure, were not strictly prohibited, in part because children born of such unions would be slaves.⁶² For free women, however, the situation was quite the opposite. The general rule from Constantine onwards was that a free woman who cohabitated with another's slave against the will of the master forfeited her free status.⁶³ As for unions between a free woman and her own slave, the penalty was death for both.⁶⁴

⁵⁹ *ET* 61: "Si quis vero servus, etiamsi cum volente et adquiescente vidua hoc crimen admiserit, flammis ulticibus exuratur: illa quoque adulterii poena damnanda, quae non erubuit servili subiacere libidini."

⁶⁰ A preferred slur of Roman satirists against supposedly respectable women was that they consorted with slaves or low-born males. For a review of the literature, see A. Richlin, "Approaches to the Sources on Adultery at Rome," in H. Foley (ed.), *Reflections of Women in Antiquity* (New York, 1981), pp. 379-404, esp. pp. 385, 395; K.R. Bradley, *Slaves and Masters in the Roman Empire: A Study in Social Control* (Oxford, 1987).

⁶¹ *PS* 2.19.6; *Reg. Ulp.* 5.5. See also Judith Evans-Grubbs, "'Marriage More Shameful than Adultery': Slave-Mistress Relationships, 'Mixed Marriages', and Late Roman Law," *Phoenix* 47 (1993), pp. 125-54; Jane Gardner, *Women in Roman Law and Society* (Bloomington, 1986), pp. 213-18; B. Rawson, "Roman Concubinage and Other de facto Marriages," *TAPA* 104 (1974), pp. 279-305; Susan Treggiari, "*Contubernales* in *CIL* 6," *Phoenix* 35 (1981), pp. 42-69. For Roman traditions on marriages between persons of different social status, see generally Paul R.C. Weaver, "The Status of Children in Mixed Marriages," in B. Rawson (ed.), *The Family in Ancient Rome: New Perspectives* (Ithaca, 1986), pp. 145-69.

⁶² *CJ* 9.9.24 (291). For review and discussion see Susan Treggiari, "*Contubernales* in *CIL* 6," pp. 41-69 at p. 53; P.R.C. Weaver, "The Status of Children in Mixed Marriages," p. 149.

⁶³ *CTh* 4.12.4. Cf. 4.12.1-3 (concerning *contubernium* between free women and imperial slaves).

⁶⁴ *CTh* 9.9.1 (326). For discussion of this law see Evans Grubbs, "Marriage More Shameful than Adultery," pp. 142-7.

The subject of mixed unions received a good deal of attention by jurists and emperors alike. The compilers followed in step, applying equally severe measures on the guilty parties. But in light of the fact that such measures were repeated over and over from Constantine to Justinian, it would seem that they met with little success. One reason for the failure, no doubt, rested in the fact that in the provinces, at least, there was a great deal of uncertainty about the legitimacy of mixed unions. Roman law did not necessarily correspond with provincial practice in regards to marriages between free women and slaves, and there is evidence that these sorts of unions did occur in some outlying districts of the Empire well into the fifth century.⁶⁵ Further adding to the problem was the general blurring of social and legal boundaries between free and unfree at this time, and the confusion of status that resulted. For a variety of reasons – legal or otherwise – already pointed out, slaves could become free and free-born people in turn could be enslaved. This was a general feature of late antique society. That people as a result were unsure of their own legal status (or that of other members of their family) or of the validity of their own marriage is clear from the many rescripts and juristic commentaries devoted to questions of status.⁶⁶

That slaves constantly sought to improve their lot in life through the liberation of their bondage and elevation into the ranks of the freed, the *liberti*, goes without saying. Escape was of course a solution, but by no means was it the only one. For freedom could be granted to a slave as a direct consequence of the law in return for services he or she performed for the state, or through the will of the owner in a process of manumission. There were three ways manumission

⁶⁵ See Evans Grubbs, *Law and Family in Late Antiquity*, p. 269, who cites eastern examples. Wickham cites evidence for this practice continuing in the West well into the ninth century: *Framing the Early Middle Ages*, pp. 405, 560.

⁶⁶ E.g., *CJ* 5.18.3 (215); *Dig.* 24.3.22.13 (Ulpian); *PS* 2.21a14. For discussion, see Evans Grubbs, “Marriage more shameful than Adultery,” pp. 135-6; id., *Law and Family in Late Antiquity*, pp. 269-71; Watson, *Roman Slave Law*, p. 11.

could be validly effected: *vindicta*, *census* and *testamentum*, which are described at length both by Gaius and Ulpian.⁶⁷ The compilers passed over the subject of manumission without comment.

Instead, they addressed one instance where freedom was the reward for service:

If a slave learns that a complaint of abduction (*raptus*) has been concealed by his owners and the crime passed over by connivance, and reports this to the courts, he shall be freed.⁶⁸

We are entitled to ask, however, how such a slave could hope to achieve any success in this action given the position of the law towards informers and slave evidence in general, and the likelihood of the owner simply denying the accusation.

Of course, a *libertus* was not entirely free, but remained obligated to his manumittor in a number of ways for the balance of his life. His freedom was conditional and always subject to the discretion of his patron or that of the patron's heirs.⁶⁹ While Roman law clearly made a distinction between *liberti* and freemen (*ingenui*) in terms of legal status, this distinction found little expression in the *ET*, at least in terms of punishment: nowhere do the former receive differential treatment.⁷⁰ But the *libertus* clearly was not of the same ilk as the slave. Although a freedman did not necessarily lose his inherently depraved nature and gain the rectitude of the

⁶⁷ *Manumissio vindicta*, the oldest of these three methods, required the consent of a magistrate in a formal process involving a ceremonial rod (*Dig.* 40.2.8); in the case of manumission by census, the name of the slave was enrolled in the census with the approval of the master (Gai., *Inst.*, 1.140); and in the most straightforward process, freedom could be granted in the will of the deceased master (*Dig.* 40.4.24). While Justinian considerably simplified the law of manumission, he did not do away with any of these long-standing methods. That manumission was a matter of public record is clear: for it was in the freedman's best interest, and that of his heirs, to have his newly-found status formally recognized in some form or another. Among the Ravenna papyri is one such record of freedom: Tjäder, *Die nichtlit. Papyri Italiens*: n. 9, pp. 246-49. On the subject of manumission in Roman law and the requirement of documentation, see Gardner and Thomas Wiedemann, *The Roman Household. A Sourcebook* (London, 1991), pp. 145-50, 163-4; Borkowski, *Textbook on Roman Law*, pp. 97-100.

⁶⁸ *ET* 19: "Servus vero, si querelam de raptu dissimulari a dominis et pactione crimen senserit definiri atque iudicii prodiderit, libertate donetur."

⁶⁹ E.g., *CTh* 4.10.2 of the emperor Constantine, which prohibited a freedman from showing ingratitude to his former master. Those found guilty were re-enslaved.

⁷⁰ Only four provisions mention freedmen specifically: *ET* 19; 30 (freedmen are among those included in this provision on forgery); 48 (freedmen here are prohibited from informing against their patrons); 103 (anyone, including a freedman, accused of committing a criminal offence is to be prosecuted in the region where the crime is alleged to have taken place).

freeman immediately upon his liberation, he was not subject to the same impositions or restrictions as was a slave. For instance, there is nothing in the *ET* prohibiting unions between freed and free. Likewise, Constantine's extensive legislation on the subject of mixed unions involving freewomen and slaves did not include a provision on *liberti*. It was not until the emperor Anthemius 150 years later that such unions were declared illegal, subject to the same harsh penalties as unions between free women and slaves.⁷¹ That the compilers chose to ignore this later development is likely an indication that in Ostrogothic Italy a *libertus*, despite his not being born *ingenuus*, could enjoy many of the privileges that went along with being free. This was not the case for the lowly freeman who found himself working as a tenant farmer.

The number of provisions that involve social status implies that the preservation of status distinctions in all levels of society continued to be a matter of importance in the early sixth century. A distinct dichotomy between the freeborn, privileged classes and those of slave or 'base' birth appear in many of the provisions. Of course, the importance of status distinctions in Roman law was hardly a new thing. Considerations of status had always loomed large in Roman society, and legal distinctions between *honestiores* and *humiliores* had a long history behind them. But given the fluidity of late Roman society, wherein it was possible for slaves to become free and *vice versa*, and the fact that among the lower levels of society, and particularly in the provinces, the legal distinction between slave and free among the lower classes was not always acknowledged in everyday practice,⁷² one might reasonably expect that concerns of legal distinction would not figure so prominently in the *ET*. That they do speaks to the longevity of such Roman prejudices, which continued to be enshrined in the laws well after they ceased

⁷¹ *CTh* 4.12. *Nov. Anth.* 1 (468). As pointed out already in Chapter One, the compilers did not consult the novels of Anthemius.

⁷² See e.g. Chapter Two, pp. 94-96.

serving any useful purpose. In fact, such artificial legal distinctions between free and unfree remained one of the most conservative elements of early medieval culture, and only after the tenth century did they slowly begin to break down.⁷³

Freedom and Property

The subject of freedmen brings us to the matter of freedom in general, and specifically how the compilers defined a free person, and the rights and obligations that free status entailed. To begin, it is important to point out that Roman law made a distinction between two types of free people: those who were *sui iuris*, that is, individuals who were legally independent; and those who were *alieni iuris*, individuals subject to the authority of another. This was a fundamental aspect of both Roman property and family law. The first group included greater freemen, identified by the compilers with the various equivalent terms *potentes/potentiores*, *honestiores*, and *nobiles*;⁷⁴ and possibly lesser freemen, *humiliores*.⁷⁵ The second group included *coloni*, *originarii*, and those subject to the *potestas* of a *paterfamilias*, such as women and children. Of course, it was the first group which stood to benefit the most from the law as a direct consequence of their status.

The most important consideration of free status in early sixth-century Italy was the ability to lawfully *and* physically possess property. *ET* 142, cited above, makes the point that *de iure* ownership was established by long and uninterrupted physical occupation of the property. The same blurring of boundaries between lawful and physical ownership is found in *ET* 45:

⁷³ Paul Fouracre, "Space, Culture and Kingdoms in Early Medieval Europe," in Peter Linehan and Janet Nelson (eds.), *The Medieval World* (New York, 2003), pp. 366-80, esp. p. 370.

⁷⁴ *Potentes/potentiores*: *ET* 43, 122, epil.; *honestiores*: *ET* 75, 83, 89, 91, 108, 122, 145; *nobiles*: *ET* 13, 59. Significantly, the compilers ignore the sorts of classifications of free status attributed to the Goths by Procopius in his war narrative. His account consistently uses three terms to designate a small portion of the Gothic army that were responsible for making important policy decisions, and were presumably members of a broader Ostrogothic elite: *aristoi* ("the best"), *dokimoi* ("the notable"), and *logimoi* ("the worthy"): *BG* 5.4.13 (*logimoi*); 6.1.36, 6.20.14, 7.18.26, 8.26.4 (*dokimoi*); 6.8.9, 7.1.46 (*aristoi*). For these distinctions, see generally Peter Heather, "*Gens* and *Regnum* Among the Ostrogoths," pp. 96-8.

⁷⁵ *Humiliores*: *ET* 75, 83, 91, 108; *vilior* is used synonymously with *humilior* in *ET* 89. The model, *PS* 5.25.12, uses *humilior*.

Absolutely no one shall put titles [of ownership] onto another's property or his own; since it is clear that this privilege is granted to the fisc alone for properties which it holds by right or by fact.⁷⁶

In the Empire, when land had for any reason become property of the state, the emperor's officers customarily affixed *tituli* to it, to denote the fact and to warn off all other claimants. Powerful men who had dispossessed weaker claimants used to imitate this practice⁷⁷ – a tradition that clearly carried on into the sixth century. Here, they are strictly prohibited from doing so. Analogous to this provision is a rescript of the emperors Arcadius and Honorius of 400 (*CTh* 2.14.1), which imposes forfeiture of the legal *and* factual control over property upon anyone who, as a defendant in a lawsuit, alleges it to belong to a *potentior* (presumably in an effort to bolster his claim in court). The enactment phrases ownership and possession in three different ways: '*quum ipse et rei sit possessor et iuris*'; '*eius possessionis aut causae*'; '*neque proprietas, neque possessio*'. The second and third clauses more or less follow the classical terminology, and make a distinction between possession and ownership. But the first clause specifically equates factual holding as the visible expression of legal control – a sharp contrast from the classical distinction upheld in the other two clauses.

This same equation between physical occupation and legal ownership appears in *ET* 45 ('*possidet iure vel corpore*'). This was perhaps another consequence associated with the abandonment of the formulary procedure, as the strict hierarchies of rights envisaged by classical Roman property law – rooted as it was in the fundamental distinction between title (*dominium*)

⁷⁶ *ET* 45: "Nullus alienae rei vel suae titulos prorsus adfigat: cum soli fisco hoc privilegium, his quae possidet iure vel corpore, videatur esse concessum."

⁷⁷ *CTh* 2.14.1 (400).

and possession – became less clear.⁷⁸ Note, however, that the compilers quite clearly make a distinction between possession and ownership in *ET* 136:

If anyone should acquire his property without knowing that it already belongs to another landholder, he is to suffer no prejudice; but he shall be able to bring forward an action concerning the matter of ownership.⁷⁹

Thus, it was not so much a lack of legal erudition on their part as it was a lack of technical precision.

It was because property was so integral to the definition of one's free status that in *ET* 10 (cited and discussed in Chapter Two) the compilers adopted and amplified the measures of *invasio* prescribed in *CTh* 4.22.3 of the emperors Valentinian, Theodosius and Arcadius.⁸⁰ Whereas *CTh* 4.22.3 required the return of the stolen property, *ET* 10 stipulated that where the offender had no legal right, payment was to go to the fisc while the dispossessed party received the property. If, on the other hand, the *invasio* was of property to which the *pervasor* had a right, his extrajudicial action resulted in the loss of his claim and *fructus duplos* to the benefit of the man who had previously held possession, provided he was a *possessor non vitiosus* in accordance with *ET* 76:

The suit regarding ownership being preserved, in accordance with the law of temporary possession, property occupied through force shall be returned within one year to that one who will hold the same property (which he lost through the presumption of another) neither violently, nor clandestinely, nor with permission [by the one who ejected him in the first place].⁸¹

⁷⁸ Stein, *Roman Law in European History*, p. 25; Levy, *West Roman Vulgar Law*, pp. 28-9, 176-93, who notes that this blurring of boundaries became increasingly the case in the western provinces following Diocletian's reign (284-305).

⁷⁹ *ET* 136: "Si quisquam rem suam nesciens a possessore conduxerit, nihil sibi praeiudicat: sed de proprietate ipsius agere poterit."

⁸⁰ While *CTh* 4.22.3 applied to land belonging to the fisc, *ET* 10 was intended to apply to public and private land equally.

⁸¹ *ET* 76: "Illis res occupata per violentiam intra annum momenti iure, salva proprietatis causa reddetur, qui eandem rem, quam alterius praesumptione perdidit, nec violenter, nec abscondite, nec precario possidet."

Property occupied by force could not be retained. It was to be returned to the dispossessed, if he met the conditions stipulated in the provision, namely that he had not reacquired it through violence or theft, or by permission from the one who dispossessed him in the first place. Otherwise, neither could have it. The implication is that it would go to the fisc, which was supposed to take estimation of its value in accordance with *ET* 10.⁸² It was no excuse, in other words, to plead mere anticipation of a court order.

The legal consequences of *invasio* were severe, and demonstrate the determined concern of the compilers both to protect property-holders against the open greed of others and to prevent the anarchy that would have threatened if private individuals had been permitted to take the law into their own hands.⁸³ At the same time, however, they felt it prudent to observe the thirty year statute of limitations established by earlier Roman precedents, and repeatedly mentioned in special decrees of Theoderic between 507 and 526. For example, in a letter of general instruction to the Roman Domitianus and Gothic Wilia, Theoderic is made to proclaim:

If, after the date [489] when, by God's favor, I crossed the river Isonzo, and the realm of Italy first received me, a barbarian occupier has seized the estate of a

⁸² Deviating from this is *Var.* 3.20, which requires the offender to return the property under dispute along with another of equal value : guilty party to a letter written in Theoderic's name to the *saio* Triwila and the *apparitor* Ferrocinctus (trans. Barnish, *Variae*, p. 56): "Now I have been moved by the grievous disaster of Castorius, on whom, up to now, the deadly malice of various men has pressed. It has given an opportunity for a salutary decree, so that the help of my devotion may avail more than the evil cunning of the wicked. And therefore I decree that, if the magnificent Prefect Faustus has burdened the property of Castorius with his titles of ownership, or has seized it by an act of private usurpation, the occupier must quickly be forced by you [*saio* Triwila and the *apparitor* Ferrocinctus] to return him that estate, along with another of equal value." ("Castorii igitur flebili calamitate permoti, quem exitialis hactenus diversorum pressit invidia, occasionem praebuit salutaribus constitutis, ut plus valeret nostrae pietatis auxilium quam iniqua calliditas improborum. atque ideo praesenti vobis auctoritate decernimus, ut, si praefectus vir magnificus Faustus ea quae Castorius possidebat vel titulis ingravavit vel privata usurpatione detinuit, mox ei praedium cum alio eiusdem meriti vobis imminentibus a pervasore reddatur, ut crudelibus damnis afflicto pietatis nostrae remedio consulamus.") An edict of Athalaric (*Var.* 9.18.1) upheld an earlier novel of Valentinian III of 440, which fined *pervasores* by the value of the estate seized, and in case of default, sentenced them to deportation. Despite these variances, as Cassiodorus makes clear and the *ET* confirms, there was no place for a provisional procedure with the issue of ownership set aside; unless royal pardon released the invader from that penalty, as was the case with Tanca (Cass., *Var.* 8.28), accused of seizing the estates of Constantius and Venerius and enslaving the pair in the process.

⁸³ For specific instances, see *Variae* 5.29-30. On the subject in general: Matthew Innes, "Land, Freedom and the Making of the Medieval West," pp. 39-74.

Roman, without a warrant taken from any assigning officer, he is to restore it without delay to its former master. But, if he has evidently entered the property before that time, since the thirty year limitation is clearly an objection, I decree that the plaintiff's claim is to fall.⁸⁴

Based in part on a novel of Valentinian of 452 (*Nov.* 35), which reiterated an earlier law of Theodosius on prescription of actions,⁸⁵ *ET* 12 prohibited attempts to contest title from being made if the current possessor could demonstrate long and uninterrupted enjoyment of the property for a period of thirty years or more. New here was the provision that the time of possession could include that of predecessors. The purpose of this thirty year prescription was to protect all current landholders, whether Goth or Roman, who had established ownership over property through lawful *and* physical possession.

Not all freemen held their lands in full ownership. We hear from Cassiodorus, for example, that Theoderic made use of grants *in stipendio*.⁸⁶ These were remuneratory concessions of land, made also by patrons to their private soldiery⁸⁷ and by the Church to its servants,

⁸⁴ Cass., *Var.* 1.18.2 (trans. Barnish, *Variae*, p. 16): "Si Romani praedium, ex quo deo propitio Sonti fluenta transmisimus, ubi primum Italiae nos suscepit imperium, sine delegatoris cuiusquam pittacio praesumptor barbarus occupavit, eum priori domino summotam dilatione restituat. quod si ante designatum tempus rem videtur ingressus, quoniam praescriptio probatur obviare tricennii, petitionem iubemus quiescere pulsatoris." Elsewhere in *Var.* 2.27, a letter to the Jews of Genoa, Cassiodorus has the king command (trans. Barnish, *Variae*, p. 35): "It is unlawful for you to add any ornament [to your synagogue], or to stray into an enlargement of the building. And you must realize that you will in no way escape the penalty of the ancient ordinance if you do not refrain from illegalities. Indeed, I give you permission to roof or strengthen the walls themselves only if you are not affected by the thirty year limitation." ("Et noveritis vos severitatem minime defugere veteris sanctionis, si rebus non abstinence illicitis. in ipsis vero parietibus cooperiendis vel fulciendis tantum licentiam damus, si vobis tricennalis non potest obesse praescriptio.") For further examples citing the thirty-year rule: Cass., *Var.* 5.37.3; 3.31.3.

⁸⁵ *CTh* 4.14.1 (424).

⁸⁶ In one instance we are told by Cassiodorus (*Var.* 5.7) that a certain tenant, the *vir honestus* Thomas, had failed to make good on the rent he owed for properties leased out to him by Theoderic. And elsewhere, Theoderic is adamant that rent for crown land be properly assessed and paid. To the illustrious Ampelius and Liveria, commissioned to put a stop to various abuses committed at the hands of the king's tax-collectors in the Ostrogothic territories of Spain, he instructs (Cass., *Var.* 5.39): "We command that the farmers of the Lord's domain, whether they be Roman or barbarian, must pay the rent imposed upon them. And lest their labour may seem ungrateful to anyone, We wish their rents to be established by your fairness in accordance with the quality of the land." ("*conductores domus regiae, quacumque gente sint editi, ad liquidum veritate discussa tantum decernimus solvere, quantum nostra praedia constiterit pensitare. et ne cuiquam labor suus videatur ingratus, solaria eis pro qualitate locatae rei vestra volumus aequitate constitui.*")

⁸⁷ E.g., Procopius, *BG* 1.12.50-4 (concerning the nobleman Theudis who raised a private army on his own land).

whether clerical or lay,⁸⁸ and held conditionally upon the obedience and service of the grantee.⁸⁹

These types of concessions corresponded to those made *iure precario* in classical times, but differed from them in that they could be revoked only when the stipendiary was in breach of his obligations, such as rent, services or both.⁹⁰ But other agreements were certainly made in the direct economic interests of the landlord.⁹¹ Of these, the compilers only addressed certain conditions of those involving *coloni* and their landlords; and in so doing they shed some valuable light on one of the most obscure institutions of Late Antiquity – the colonate.⁹²

⁸⁸ Tjäder, *Papyri Italiens* n. 3: in this example, discussed at length in Chapter Two, from the region of Padua and dating to c. 550, tenants (*coloni*) of the church were obliged to undertake heavy labour services for the land they received.

⁸⁹ Wickham, *Framing the Early Middle Ages*, pp. 268-9, 271, 277-8, 293-4.

⁹⁰ It can be reasonably assumed that peasants paid rents in kind, just as they paid taxes in kind: most peasants did not have sufficiently easy access to long-distance markets that they could obtain the metal for money-rents on a regular basis. These rents might be assessed in monetary terms, and then converted to kind. In a letter concerning *inter alia* the administration of his Sicilian estates (ep. 1.42), Gregory the Great describes just such a process (*comparatio*). This custom, according to Wickham (*Framing the Early Middle Ages*, p. 271) was modeled on the imperial practice of *coemptio*, whereby the state purchased goods in accordance with state-determined prices. It was also a system that gave tax assessors just another opportunity to defraud peasants by unfair pricing and false weights. On the subject of rent paid in kind but assessed in money, see also Vera, “Forme e funzioni,” pp. 435-7; id., “Strutture agrarie e strutture patrimoniali nella tarda Antichità: l’aristocrazia romana fra agricoltura e commercio,” *Opus* 2 (1983), pp. 489-533, esp. pp. 516-21; and, classically, L. Ruggini, *Economia e società nell’ “Italia annonaria”* (Milan, 1961), p. 131, and *passim* for agricultural exchange.

⁹¹ Despite the lack of direct evidence, leases for a determined number of years were certainly made, leases for life or lives almost certainly and perpetual leases very probably. For discussion, see Levy, *West Roman Vulgar Law*, pp. 43-9.

⁹² The debate on the colonate goes back into the nineteenth century and earlier, but the formulations of A.H.M. Jones, who in 1958 and 1964 summed up the institution nicely, serve as a useful starting point. According to Jones, early imperial agricultural tenants were often hired by landholders on short-term leases and were free to travel about. With the introduction of Diocletian’s tax reforms, however, this came to an end. Diocletian’s legislation required peasants to be registered in their villages or estates, an innovation which led ultimately to the position of tenant farmer becoming a hereditary occupation. Around the middle of the fourth century we begin to have imperial laws that explicitly bind tenants, *coloni*, to their land. Despite the fact that tax laws changed, *coloni* continued to be tied to the land they worked, for, as a law of Theodosius I of 386 (*CJ* 11.51.1) declared, the tying of tenants was an advantage to landlords. In such a way, fiscal measures evolved into a tool of powerful landholders to increase their authority and dominance over an increasingly dependent rural population. These tied *coloni*, or *adscripticii*, slowly became subject to their owners/masters (*domini*), and even came to resemble slaves in terms of social status. Jones and others have viewed colonate as a new institution of the fourth century, whereas others have recently argued that the colonate of the fourth century laws was simply a systematization of long-standing relationships of rural subjection based on the power of landlords. For the former: Jones, *The Roman Economy*, pp. 293-307; id., *LRE*, pp. 795-803; F. De Martino, “Il colonato fra economia e diritto,” in *Storia di Roma*, III.1 (Turin, 1993), pp. 789-822, esp. pp. 791-803; A. Marcone, “Il lavoro nelle campagne,” in *Storia di Roma*, III.1 (Turin, 1993), pp. 823-43, esp. pp. 825-8. For the latter: M. Mirković, *The later Roman Colonate and Freedom* (Philadelphia, 1997); W. Scheidel, “Slaves of the Soil,” *JRA* 13 (2000), pp. 727-32. For a general history, see Chris Wickham, *Framing the Early Middle Ages*, pp. 520-27; W. Goffart, *Caput and Colonate. Towards a History of Late Roman Taxation* (Toronto,

As in the late Empire, the colonate of early sixth-century Italy was inextricably linked with the credit system of rural estates.⁹³ It was a solution for destitute farmers in need of credit: it would have embodied a permanent obligation that was even stronger than one established through a private law contract. For property owners, the colonate would have had the same advantage that debt-slavery had over a labour contract in which merely food and lodgings were supplied in return for services. A labour contract involved only the contracting parties, but in debt-slavery the debtor-slave could be transferred to another person at the discretion of the master. The colonate operated much in the same way. Registered farmers, that is *coloni*, were tied to the land and would be transferred with it if need be, thus allowing an owner to sell any property with the available manpower to work it.

This would be consistent with the idea of the colonate as a means of securing debts with the rendering of services. It would also explain *ET* 121:

If a creditor lends money to another's procurator, chief tenant, *colonus* or slave without the consent or knowledge of the owner, no prejudice of any kind shall be placed against the owner or his assets; the demands of the creditor shall be exacted from the *peculium* of the slave or *colonus* after deduction of what is owed to the master.⁹⁴

1974); F. De Martino, "Il colonato fra economia e diritto," in *Storia di Roma*, III.1 (Turin, 1993), pp. 789-822, esp. pp. 791-803; A. Marcone, "Il lavoro nelle campagne," in *Storia di Roma*, III.1 (Turin, 1993), pp. 823-43, esp. pp. 825-8; M. Mirković, *The later Roman Colonnate and Freedom* (Philadelphia, 1997); W. Scheidel, "Slaves of the Soil," *JRA* 13 (2000), pp. 727-32. For a review of the scholarship, see Wickham, *Framing the Early Middle Ages*, pp. 520-27.

⁹³ A reference to this credit system is found in a western law of 371 (*CJ* 11.48.8). The law deals with registered farmers (individuals *cum emolumentis tributariis*, that is, for whom taxes were owed) who had fled. It ends with this provision: "si qui vero inter agricolas, ut solet, ex quibuscumque commerciis huiusmodi hominibus inveniuntur esse debitores, coram partibus constitutis iudex ab obnoxiiis quod debetur exposcat." According to this, if a fugitive was a debtor "as is usually the case, as a result of any sort of dealings of this sort," the judge must insist that the fugitive repay the debt before he was returned to his original place of residence. For this and the discussion that follows, see Boudevijn Sirks, "The farmers, the landlord, and the law in the fifth century," in R.W. Mathisen (ed.), *Law, society and authority in Late Antiquity*, pp. 256-271.

⁹⁴ *ET* 121: "Si procuratori vel conductori, sive colono vel servo alicuius, invito vel nesciente domino, mutuum pecuniam quis dederit, nec ipsi domino, nec rei eius aliquod praeiudicium comparetur: sed ex peculio servi vel coloni, considerata vel servata prius indemnitate domini, consulatur petitionibus creditoris."

Analogous to *CTh* 2.31.1⁹⁵ and 2.32.1⁹⁶ of the emperors Honorius and Theodosius of 422, the provision stipulates that if someone gives a loan to a *colonus* without his master's knowing, the *colonus* was to repay out of his own *peculium*, adding the words, "after deduction of what is owed the master" (*considerata vel servata prius indemnitate domini*). Here, the emphasis is on the debts of the *colonus* to the landowner. Moreover, the reservation regarding the master's claims is not unconditional: it not only gives him a right of priority, but it also implies that the *colonus* owed him money. We may assume that the *peculium* served as security for the master. It created, so to speak, a floating charge to secure the repayment of the loan; in the event of non-fulfillment, the owner then became the priority creditor, provided, of course, he knew what the debts were. In this way, the colonate functioned as a form of continuing security for the payment and performance of all debts pertaining to the *coloni*.

Title and Tax

Early sixth-century Italy was a society where title to land was dependent on the ability to meet fiscal demands.⁹⁷ What little information the *ET* offers concerning the tax system is profoundly obscure. But it is at least apparent that the basic taxes fell on lands, houses and slaves, for it was

⁹⁵ *CTh* 2.31.1 (trans. Pharr): "Therefore We sanction in perpetuity by this edictal law that a person who lends money to a slave, *colonus*, chief tenant, procurator, or overseer of a landholding shall know that neither the owner of the landholding nor the cultivators of the land can be held liable." ("igitur in perpetuum edictali lege sancimus, ut, qui servo, colono, conductori, procuratori actorive possessionis pecuniam commodat, sciat, dominos possessionum cultoresve terrarum obligari non posse.")

⁹⁶ *CTh* 2.32.1 (trans. Pharr): "After other matters. This remedy also We do not deny to creditors, namely, that if an overseer, slave, or procurator of landed estates should be found to be un-obligated in the accounts which he manages, an adapted action (*utilis actio*) for payment from his *peculium* shall be available." ("post alia: hoc quoque creditoribus non negamus, ut, si liber a rationibus fuerit, quas regebat, inventus actor, servus procuratorve praediorum, utilis actio pateat de peculio etc.")

⁹⁷ See e.g. Cass., *Var.* 1.14 (on the collection of *tertiae*); 2.17 (on the granting of *sors*, or tax share, to the Gothic priest Butila in Italy in c. 510, which resulted directly in the lessening of the tax burden on the relevant city, Trento); 4.14 (discussed below); 8.26 (a letter of exhortation addressed in Athalaric's name to the Gothic settlers of Reate and Nursia, reminding them that "allotments of your own nourish you, and our gifts, God willing, will enrich you." ["cum vos et sortes alant propriae et munera nostra domino iuvante ditificent."]). See further Goffart, *Barbarians and Romans*, pp. 60-102; S. Barnish, "Taxation, land and barbarian settlement in the western Empire," pp. 120-55; F. Thibault, "L'impôt direct dans les royaumes des Ostrogoths, des Wisigoths et des Burgundes," *Novellae revue historique de droit français et étranger*, 25 (1901), pp. 699-728.

the reception of precisely these objects of property which obliged the new owner, by implication of *ET* 144, to assume the liabilities of the alienator:

Those who are receivers of tax receipts, when recording the sureties of landholders, shall specifically record the names of each of the holders and their tax declaration (*professio*); they shall also record the amount of money they receive. But if anyone should be unwilling to record the tax assessment of the property, the names of the owners, and sum of the money received in making these sureties, and is proven guilty of this offence in court, he shall be compelled to pay fourfold the amount of the money which the landholder proves he paid. It is equally appropriate that this precept be observed concerning *discussores* if, when publishing sureties concerning any titles, they are unwilling to record how much money they received from would-be possessors or those in arrears.⁹⁸

If property changed hands through inheritance, sale or gift, the new owner was held liable for the tax due the state, although the details for this remain unclear.⁹⁹ Thus, a proper record of the transfer had to be made.¹⁰⁰

Just as Roman soldiers enjoyed immunity from taxation, so, too, did Theoderic's Goths who, as it has already been pointed out, functioned as the military arm of the Roman state.¹⁰¹ Because of this, those properties which some Goths received as allotments (*sortes*) were not to be taxed.¹⁰² But Goths were free to use their personal resources to purchase additional property if they so desired. As Theoderic made clear in a letter addressed to the *saio* Gesila, concerning the Gothic settlers in Picenum and Tuscia, the king's periodic distribution of donatives in gold to his

⁹⁸ *ET* 144: "Quicumque susceptores fuerint fiscalium titulorum, in emittendis possessorum securitatibus nomina singularum possessionum, professionem earum evidenter designent: acceptam quoque pro earum functione exponant pecuniae quantitatem. Quod si aliquis professionem locorum, nomina summamque praeceptae pecuniae, in securitatibus a se factis comprehendere forte noluerit, et huius culpa reus in iudicio fuerit adprobatus, quadruplum eius pecuniae, quam possessor se dedisse probaverit, eidem cogatur exsolvere. Quod etiam circa discussores similiter convenit custodire, si de quibus titulis quas summas a praesumptoribus vel reliquatoribus exegerint, in securitatibus emittendis signare noluerint."

⁹⁹ The *CTh* contains various regulations on tax records, from how to preserve and record them, to the techniques involved in authenticating them: E.g., *CTh* 5.15.20.1; 8.1.9 (368); 8.2.2 (370); 11.1.3 (366); 11.28.13 (422); 12.1.173 (109); 12.6.20 (386); 13.10.8 (383).

¹⁰⁰ E.g., *ET* 51-3. On obligatory transfer of tax liability in the later Empire: *Fragmenta Vaticana* 35 (c. 330; *FIRA* 2, pp. 469-71); *CTh* 11.3.5 (391); *PItal* 10-11 (489). For Ostrogothic Italy, see W. Goffart, "From Roman Taxation to Mediaeval Seigneurie: Three Notes," *Speculum* 47 (1972), pp. 165-87, esp. pp. 92 n. 68, 170, 203 n. 59, 229 n. 43.

¹⁰¹ Roman soldiers: Yann Le Bohec, *The Imperial Roman Army* (London, 1994), p. 218. Goths: Goffart, *Barbarians and Romans*, pp. 91-3.

¹⁰² Goffart, *Barbarians and Romans*, p. 92.

Goths enabled them to invest in additional real estate.¹⁰³ When they did, their ownership undoubtedly became the subject of public record. While the details for this are lacking, mention in *Var.* 1.18 of official warrants (*pittacia delegationis*) effecting and limiting transfer is suggestive of a regular and public process along the lines as that described in a novel of Valentinian of 445.¹⁰⁴

Records of one sort or another were necessary for this to be achieved, and although no example of an official document type for Ostrogothic Italy has survived, it is not unreasonable to suggest that such documents were similar in form to the *polyptyca exactorum* mentioned in the *interpretatio* to *CTh* 11.26.2¹⁰⁵ or the catalogue document (*breve*) described by Gregory the Great.¹⁰⁶ In any event, Goths were obliged to assume the liabilities of the alienator when they

¹⁰³ *Var.* 4.14.

¹⁰⁴ *Nov. Val.* 15.1.3 (trans. Pharr): “Moreover, every contract shall lack validity if it should be entered into secretly by either a buyer or a seller, to the fraud of the law. In order that this may not be done, We provide in this manner that a contract that has been entered into with respect to immovable property shall be established in the municipal public records, but a contract for movable property shall be transacted by the issuance of written instruments (*pittacia*). The person who has been placed in charge of this compulsory public service shall declare that he has obtained that which has been decreed through this law for the public advantage, so that if the receipt should be lost after one year, no investigation shall be required.”

¹⁰⁵ *CTh* 11.26.2 *itpr.* (trans. Pharr): “This law charges that tax collectors obtain their greatest amount of booty from the provincials, in that after tax receipts are issued, they begin to demand again the account books (*polyptici*) and the receipts, and this is not done by them for the public interest, but in order that if the receipts cannot be found, they may obtain a greater amount of booty. Therefore the law decrees that if tax receipts are contained in the public account books or in the record books of the tax collectors, they may not again be demanded through the wickedness of cupidity.”

¹⁰⁶ E.g., *ep.* 9.113 (March 599), a letter concerning the matter of intestate succession and addressed to Sergius, defender of the patrimonies of Calabria and Apulia (trans. John R.C. Martyn, *The Letters of Gregory the Great* (Toronto, 2004), p. 610): “And since, if that is so, the law prevents that woman from being heir to her intestate uncle in the absence of his son-in-law, we therefore suggest to you with this order that you should bring in our most reverend brother and fellow-bishop, Vitalian and the notary Boniface, as your assistants, so that she might not suffer any loss through his absence. And you ought to keep a record (*breve*) of whatever property is agreed to have been left by the deceased, and keep it safe until the aforesaid Pantaleo may return. For a further reference to *breve* in Gregory’s *Registrum*: *ep.* 14.14. The subject receives detailed treatment by Goffart, “From Roman Taxation to Mediaeval Seigneurie: Three Notes,” *Speculum* 47 (1972), pp. 165-87, esp. pp. 381-2; Innes, “Land, Freedom and the Making of the Medieval West,” p. 56. It has been argued (e.g., Ernst Gaupp, *Die germanischen Ansiedlungen und Landtheilungen in den Provinzen des römischen Westreiches* (Breslau, 1844), p. 474; Hartmann, *Geschichte*, vol. 1, p. 94; Alfred von Halban, *Das römische Recht in den germanischen Volksstaaten*, vol. 1, Untersuchungen zur deutschen Saats- und Rechtsgeschichte, ed. O. Gierke 58 (Breslau, 1899), p. 112; Ensslin, *Theodorich*, p. 94; Jones, *LRE*, p. 250) that the Goths were given their *sortes* by *delegatores*, specific officers who were charged with the task of issuing ‘assignment warrants’ (*pittacia delegationis*). As Goffart shows, however, a *delegator* was not an official *per se* but anyone responsible for the task of assigning a debt (*delegatio*). For instance, during his prefecture

purchased property. And if they failed to do so, others would be unjustly burdened with paying their tax – a situation that would not be tolerated. To Gesila, Cassiodorus has Theoderic proclaim:

To burden others with debts that are not their own is the greatest kind of sin ... it is fitting that each person look after his own debts, and he who is known to have acquired property shall pay the tax. Therefore, through your present authority We command that the Goths residing in Picenum and the two regions of Tuscia shall be compelled by your threats to pay their due obligations (*debitae functiones*).¹⁰⁷

And just as Goths were not exempt from the operations of fiscal liability, so, too, were churches subject to taxation. In a letter in Theoderic's name to the praetorian prefect Faustus, Cassiodorus tells of an unnamed church that had for some time before been granted limited exemption from taxes due, although its lands had continued to be subject to occasional extraordinary levies (*superindicta*).¹⁰⁸ The petition now presented to Theoderic by this church sought for remission of all taxation, including both *superindicta* and regular taxes imposed on lands that the church had acquired since its previous award: "Since the time of Cassiodorus the

Cassiodorus functioned as a *delegator* when he compensated his staff with *delegatoria*, authorizing them to draw their salaries on the tax receipts of a given province (*Var.* 2.33, 35-8). And a curial, accountant, or a tax receiver might discharge a debt he was being hounded for by "delegating" a fiscal debtor from whom he had been unable to collect (*ET* 126).

¹⁰⁷ Cass., *Var.* 4.14: "Magni peccati genus est alienis debitis alterum praegravare ... sua quemque damna respiciant et is solvat tributum, qui possessionis noscitur habere compendium. atque ideo praesenti tibi auctoritate delegamus, ut Gothi per Picenum sive Tuscias utrasque residentes te imminente cogantur exsolvere debitas functiones.") In two other letters, Cassiodorus underscores the point that Goths who own property in addition to their original allotments (*sortes*) were required to assume normal tax liability in the same way Romans were. The first, addressed in Theoderic's name to the sublime Saturninus and Verbusius, has the king instruct the addressees to compel those who are able but otherwise unwilling to contribute to the *fiscus Gothorum* (Cass., *Var.* 1.19): "Therefore, We command by your present authority, upon receiving the petition of the *curiales* from the city of Adriana, that whosoever shirks from paying the *fiscus Gothorum* you are to compel to pay that which is equitable; but lest a poor person be compelled to pay from his own holdings, it is prudent for him to retain a suitable amount for himself." ("Et ideo praesenti vobis iussione praecipimus, ut Adrianae civitatis curialium insinuatione suscepta, quicumque Gothorum fiscum detrectat implere, eum ad aequitatem redhibitionis artetis, ne tenuis de proprio cogatur exsolvere, quod constat idoneos indebite detinere.") In the second letter (Cass., *Var.* 5.14), Cassiodorus has Theoderic instruct those Goths who had retired and settled on the Danube frontier, and who were now claiming tax exemption for property recently acquired through marriage with Roman women, that such exemptions were not permitted: "Old barbarians who have chosen to marry Roman women and obtained estates under any title whatsoever, shall be compelled to pay the fisc for the property held, in addition to any *superindicta* [extra levies] imposed." ("Antiqui barbari, qui Romanis mulieribus elegerunt nuptiali foedere sociari, quolibet titulo praedia quaesiverunt, fiscum possessi cespitis persolvere ac superindicticiis oneribus parere cogantur.")

¹⁰⁸ Cass., *Var.* 1.26.2-3.

Patrician, the aforementioned church has been free from the burden of *superindicta*.” But following this initial grant, “property has been conveyed to Our church by others.”¹⁰⁹ In response Theoderic liberated the church from *superindicta* with respect to the property that had formerly been exempted, but required that it was to pay regular and extraordinary taxes for all property that it had recently acquired:

We decree that this [property] is to be subject both to the same tax as that which burdens all landholders, and the same action that attends all recently obtained rights of ownership. The gains of the church cannot be pleasing to Us: for a person shall not disadvantage the fisc. Proceeds from the [original] compensation shall alone suffice the landholder: tributes belong to the purple, not the military cloak.¹¹⁰

In addition to the imposition of regular taxes, customs dues were no doubt still levied and *coemptiones* imposed. For instance, any possessor of grain could be required to sell at the purchase price all that he did not need for his family.¹¹¹ On other occasions, the government acquired marble, timber, slaves, military supplies, etc., against compensation.¹¹² The general gist of this policy of expropriation can fairly well be grasped from a letter in Theoderic’s name to the *saio* Avilf, instructing him to collect timber (for the navy) along the banks of the Po:

You are to proceed at once to the designated places with the proper men, and whether the wood is found in crown land or private property, you are to procure it

¹⁰⁹ Ibid. (trans. Goffart, *Barbarians and Romans*, pp. 92-3): “quatinus superindicticiorum onera titulorum praefata ecclesia in ea summa non sentiat, qua usque a magnifici viri patricii Cassiodori ... temporibus est soluta. Ea vero quae a tempore beneficii ad ecclesiam nostram ab aliquibus est translata professio.”

¹¹⁰ Ibid. (trans. Goffart, *Barbarians and Romans*, pp. 92-3): “commune cum universis possessoribus onus solutionis agnoscat et illius subiaceat functioni, cuius nacta est iura dominii. Alioquin grata nobis augmenta eius esse non possunt, qui fisci damno proficiat. Sufficiat possessori compendium pensionis: tributa sunt purpurae, non lacernae.”

¹¹¹ E.g., Cass., *Var.* 9.5 (a letter of Athalaric to the bishops and functionaries of an unidentified province, forcing this action in an attempt to lessen the effects of an ongoing famine); cf. 2.26 (an edict of Theoderic, addressed to the praetorian prefect Faustus, regulating the sale of grain in southern Italy, and requires that maximum prices set on food are to be observed); 4.19 (relief of tax on imports of grain, wine and oil); 12.14 (*coemptiones*); 2.38 (a letter in Theoderic’s name to the merchants of the city of Sipontum in Apulia calling for a two-year exemption on *coemptiones* in an effort to mitigate the losses associated with ‘hostile incursions’ – presumably a reference to the attack of a Byzantine fleet in 508). For secondary literature, see Dahn, *Könige* III, pp. 162-3, 279-80, also on maximum prices placed on food.

¹¹² Cass., *Var.* 1.28 (marble); 4.8; 5.16-20 (timber); 5.16.4 (slaves); 12.5 (an edict of Cassiodorus, as praetorian prefect, recognizing that supplies seized by the army in the regions of Lucania and Brutii would be valued in cash [above the market rate], and regarded as tax already paid).

with utmost speed, since that which by God's help will service the common good We do not believe to be an impediment to anyone. But We want you to carry out these commands in such a way that upon diligent inquiry nothing seems to have been sought after to the detriment of a landholder; but only those things which are necessary for our purpose shall be taken. Nothing which is not said to be reckoned for public use is to be demanded from a lord. We order only forests to be felled; nothing from others' property is to be violently destroyed.¹¹³

In the same way, the government requisitioned labour and services. *Munera* appeared in most various forms.¹¹⁴ Pits, for example, were to be dug for defense works,¹¹⁵ camps to be fortified and houses built for the shelter of the neighbouring population.¹¹⁶ According to the *formula* for appointment, the count of Ravenna had the authority to exact a certain amount of forced labour from the owners of merchant vessels.¹¹⁷ Horses had to be provided for the *cursus publicus*, granaries, bridges and aqueducts had to be constructed or repaired and kept in good shape, famine relief had to be provided for and so on.¹¹⁸

Over the course of the sixth century, however, the central administration became increasingly incapable of effectively managing the system, which strained to meet the demands for more revenue from less territory and increasingly devastated populations as war, famine, and pestilence ravaged the Italian economy. The situation was exasperated by the tendency of government officials to extort unlawful services, as well as to levy taxes, for their own ends. The

¹¹³ Cass., *Var.* 5.20: "ad loca designata cum artificibus incunctanter accedas et, sive in domo regia seu in privata reperta fuerint, sine aliqua facies tarditate procurari, quia nulli grave credimus praebere, quod deo auxiliante pro communi utilitate praeparatur. Verum ita volumus te iniuncta peragere, ut nihil ad laedendum possessorem studiose videatur inquiri, sed tantum quae sunt necessaria utilitatis nostrae causa praesumantur. Non exquiratur aliquid a domino, quod postea publico non dicatur acceptum. Ligna silvestria iubemus caedi, non aliquid de alienis facultatibus violenter abscidi."

¹¹⁴ Dahn, *Könige* III, pp. 147, 278-9; VI, p. 260.

¹¹⁵ Cass., *Var.* 12.17 (a letter in Cassiodorus' name to John, tax-collector at Ravenna, instructing him to have the residents dig a series of defensive ditches along the perimeter).

¹¹⁶ Cass., *Var.* 1.17 (addressed in Theoderic's name, Cassiodorus has the king instruct the Gothic and Roman inhabitants of Dertona [now Tortona] to fortify the existing castle with a series of battlements).

¹¹⁷ Cass., *Var.* 7.14.

¹¹⁸ Cass., *Var.* 4.47 (public horses); 3.29 (repair of granaries); 12.19 (a bridge of boats ordered to be constructed across the Tiber); 3.31, 5.38, 8.30 (aqueducts); 1.34, 2.26, 4.5, 7, 5.35 (famine relief); Anon. Val. 12.67 (*annonae*). On the subject of the *annonae* in general see J. Rougé, "Quelques aspects de la navigation en Méditerranée au V^e siècle et dans la première moitié du VI^e siècle," *Cahiers d'histoire* 6 (1961), pp. 129-54, at 143, with Jones, *LRE*, p. 1295 n. 56.

barbarian regime recognized and forbade the practice, but clearly was in no position to stop it. Cassiodorus, for example, tells of two tax collectors (*censitores*) in Sicily, Victor and Witigisdus, *viri spectabiles*, who refused a summons to the *comitatus* to face charges of extortion and oppression of the provincials.¹¹⁹ In another instance of bureaucratic corruption, Gildias, *comes* for Syracuse, used an alleged need for wall repairs to raise taxes and then did not rebuild the walls. He was chastened with a reminder that “the true praise of the Goths is respect of the civilized rule of law [*civilitas*].”¹²⁰ This was little more than a slap on the wrist. In the end, taxes, customs, levies and *munera* gave way to direct payments to, and outright confiscations by, corrupt officers.

Family Law

The ability to possess property and meet the fiscal obligations attendant upon it was the defining mark of free status in early sixth-century Italy. But it was not the only one. An important consideration was family, and it is this area of the law in which the compilers took a good deal of interest. In all, a total of twenty-five provisions address specific points of Roman family law.¹²¹ As previously mentioned, Roman family law had the capacity to touch upon virtually every aspect of private law, and in some instances public law, too. As such, these provisions addressed a variety of subjects including marriage and divorce, *raptus* and *stuprum*, succession and inheritance; and defined some of the rights and responsibilities of parents and guardians, blood relations and in-laws. They also speak to the importance of the family as a primary social institution of society; and at the same time underscore the depressed legal status of those individuals subject to the *potestas* of the *paterfamilias*, even if such authority of the head of

¹¹⁹ Cass., *Var.* 9.12.

¹²⁰ Cass., *Var.* 9.14.8: “Gothorum laus est civilitas custodita.”

¹²¹ *ET* 17-20, 23, 24, 36, 37, 38, 39, 54, 59, 60, 61, 62, 63, 64, 65, 66, 67, 92, 93, 94, 95, 153.

household was by the early sixth century much attenuated and had long since ceased being of the total and absolute kind. By the fifth century, in fact, the extreme form of the authority of the *paterfamilias* – namely the father’s right to kill his children (*ius vitae ac necis*), was considered obsolete.¹²² Despite this, it was the *paterfamilias* which the law took into greatest account in all aspects pertaining to the household. This was a fundamental concept of Roman family law, and one which had a long future ahead of it. With that in mind, we begin with the subject of marriage, and what the compilers had to say in regards to it.

Marriage

In attempting to legislate the marital practices and private behaviour of those individuals subject to the authority of the king, the compilers were simply following long-established imperial tradition. Emperors had attempted to regulate Roman marriage ever since Augustus, whose *lex Julia de maritandis ordinibus* and *lex Iulia de adulteriis* (18 BC) and *lex Papia-Poppaea* (AD 9) had become the basis for all subsequent marriage legislation over the next 500 years.¹²³ The Augustan legislation was originally intended to promote marriage and child-bearing (and to discourage extramarital affairs) among members of the senatorial aristocracy and the wealthier and more socially distinguished classes in general. The main points of the laws were: the treatment of adultery and *stuprum* as public offences;¹²⁴ the regulation of divorce proceedings;

¹²² On the decline of *patria potestas* as a viable legal concept in Late Antiquity, see A. Arjava, “Paternal Power in Late Antiquity,” *JRS* 88 (1998), pp. 147-65; Y. Thomas, “Vitae necisque potestas. Le père, la cité, la mort,” in *Du châtement dans la cité: Supplices corporels et peine de mort dans le monde antique* (Coll. ÉFR 79, 1984), pp. 499-548; W.V. Harris, “The Roman father’s power of life and death,” in R.S. Bagnall and W.V. Harris (eds.), *Studies in Roman Law in Memory of A.A. Schiller* (Leiden, 1986), pp. 81-95; Arjava, “Roman Family Law,” pp. 41-4; E. Meyer-Marthaler, *Römisches Recht in Rätien im frühen und hohen Mittelalter* (Zurich, 1968), pp. 131-8. On the subject of family law in the late Roman West in general, see Arjava, “Roman Family Law,” pp. 33-51.

¹²³ Evans Grubbs, *Law and Family in Late Antiquity*, p. 94.

¹²⁴ Adultery applied to extramarital sexual relations with or by a married woman; *stuprum* covered illicit sexual relations in general, including adultery and relations with a widow or an unmarried girl or boy of respectable status. For the development of adultery as a public crime, see J. Beaucamp, *Le statut de la femme à Byzance (4e-7e siècles)* vol. 1, *Le droit impérial* (Paris, 1990), pp. 139-70; G. Clark, *Women in Late Antiquity. Pagan and Christian*

the penalization of celibacy and promotion of child-bearing with the rewarding of certain privileges (e.g. *ius liberorum*); and the prohibition of certain unions.¹²⁵ Augustus' regulations remained more or less unchanged through the third century, with certain revisions and alterations made by various emperors.¹²⁶

In the fourth century, however, important developments took place. Adultery, for instance, originally entailed a fine and sentence of banishment to an island for those convicted.¹²⁷ By Constantine's time, it is generally assumed that convicted adulterers, both male and female, could be punished by death.¹²⁸ Over the course of the second and third centuries, restrictions on certain types of marriages were tightened, and the category of prohibited unions was extended.¹²⁹ Rules of inheritance were relaxed, and although unpopular, laws penalizing celibacy and promoting child-bearing continued to be enforced. Under Constantine, however, an attempt was

Lifestyles (Oxford, 1993), pp. 35-6. For adultery in the *ET*: *ET* 38 and 39. For *stuprum*: *ET* 60-3. The difference between *adulterium* and *stuprum* in Roman law is discussed in greater detail below.

¹²⁵ On the Augustan legislation, see: Riccardo Astolfi, *La Lex Iulia et Papia* (Padua, 2nd edn., 1986); P.A. Brunt, *Italian Manpower 225 BC-AD 14* (Oxford, 1971), pp. 588-66; P.E. Corbett, *The Roman Law of Marriage* (Oxford, 1930), pp. 31-9, 119-21, and 133-46; Pal Csillag, *The Augustan Laws of Family Relations* (Budapest, 1976); Richard I. Frank, "Augustus' Legislation on Marriage and Children," *California Studies in Classical Antiquity* 8 (1975), pp. 41-52; Jean Gaudemet, "Le mariage en droit romain: *iustum matrimonium*," in Gaudemet, *Sociétés et mariage* (Strasbourg, 1980), pp. 46-103; Dieter Nörr, "Planung in der Antike: Über die Ehegesetze des Augustus," in Horst Baier (ed.), *Freiheit und Sachzwang: Beiträge zu Ehren Helmut Schelskys* (Braunschweig, 1977), pp. 309-43; Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford, 1991), pp. 37-80; and Andrew Wallace-Hadrill, "Family and Inheritance in the Augustan Marriage Laws," *Proceedings of the Cambridge Philological Society* 207 (1981), pp. 58-80.

¹²⁶ Evans Grubbs, *Law and Family in Late Antiquity*, pp. 95-102.

¹²⁷ E.g., *PS* 2.26.14 (mentions only the classical penalties of relegation and partial confiscation of property).

¹²⁸ *CTh* 9.40.1 (314) includes adultery as among the crimes receiving "capitalem ... severamque sententiam." Presumably this meant the death penalty. On the meaning of *capitalis* in this law, see Clémence Dupont, *Le Droit criminel dans les constitutions de Constantin*, ii. *Les Peines* (Lille, 1955), pp. 22-8. On the subject of adultery as a capital offence in Constantine's reign, see generally Theodor Mommsen, *Le Droit pénal romain*, trans. J. Duquesne, 3 vols. (Paris, 1907), ii. p. 426; C. Dupont, *Le Droit criminel dans les constitutions de Constantin*, i. *Les Infractions* (Lille, 1953), pp. 51-2; Richard A. Bauman, "*Leges Iudiciorum Publicorum*," in H. Temporini (ed.), *Aufstieg und Niedergang der römischen Welt* ii., 13 (1980), pp. 103-233, esp. p. 191 n. 191; P.E. Corbett, *The Roman Law of Marriage* (Oxford, 1930), p. 146; Pal Csillag, *The Augustan Laws of Family Relations* (Budapest, 1976), p. 196; Susan Treggiari, *Roman Marriage: Iusti Coniuges*, p. 290; Evans Grubbs, *Law and Family in Late Antiquity*, pp. 95, 216-225.

¹²⁹ *Dig.* 47.11.4 (concerning quasi-marital relations between a free woman and another's slave); see Jane F. Gardner, *Women in Roman Law and Society* (London, 1986), p. 159. Relations between senators and members of the lower class were prohibited by legislation of the emperors Aurelius and Commodus: *Dig.* 23.2.16pr. Similarly *Dig.* 23.2.34.3; 23.2.42.1.

made to strengthen or at least better define rules of inheritance and transactions involving transfer of property within families; and penalties on celibacy as well as rewards for having children, in particular the *ius liberorum*, were abolished.¹³⁰

Indeed, Roman marriage legislation is a rich subject with a long history behind it. In drawing from it, the compilers ignored a good deal, and in some instances made important changes to earlier legislation. In this process of selection and modification they demonstrated what they considered to be most relevant for the conditions of their own day. To that end, *ET* 36, on prohibited marriages, stipulates:

If anyone plans to contract an illegitimate marriage, let him not escape the thorough censure of the laws; he shall know that he has neither a just marriage nor legitimate children.¹³¹

According to this, a prohibited marriage lacked legitimacy, and any children from it were themselves illegitimate, the main consequence of which was that they were barred from making a claim of ownership on their natural father's estate. This is a highly interpolated version of *CTh* 3.12.3, an imperial rescript of the emperors Arcadius and Honorius of 396. Issued in Constantinople and addressed to the praetorian prefect Eutychianus, the rescript concerned one specific type of prohibited marriage, namely ones which contravened rules of incest, and outlawed unions between first cousins.¹³²

¹³⁰ Evans Grubbs, *Law and Family in Late Antiquity*, pp. 103-123.

¹³¹ *ET* 36: "Si quis ad nuptias non legitimas aspiraverit, legum censuram penitus non evadat; qui nec iustum matrimonium nec filios sciat se habere legitimos."

¹³² *CTh* 3.12.3 (trans. Pharr): "The decrees shall remain undisturbed with regard to those persons who have been either absolved or punished in any manner under the law formerly issued. But hereafter, if any person should defile himself by an incestuous marriage with his own first cousin, the daughter of his sister or brother, or finally with any man's wife whose marriage to him has been forbidden and condemned, he shall indeed be exempt from the punishment designated by the law, that is, the punishment of fire and proscription, and he shall have the right to hold his own property as long as he lives. But he shall not be considered as having a wife, or as having children born from her." ("manente circa eos sententia, qui post latam dudum legem quoquomodo absoluti sunt aut puniti, si quis incestis posthac consobrinae suae vel sororis aut fratris filiae uxorisve vel eius postremo, cuius vetitum damnatumque coniugium est, sese nuptiis funestavit, designato quidem lege supplicio, hoc est ignium et proscriptionis, careat, proprias etiam, quamdiu vixerit, teneat facultates: sed neque uxorem neque filios ex ea editos habere credatur.") Justinian's compilers interpolated this law similarly to *ET* 36 (*CJ* 5.5.6pr): "If anyone defiles

Drawing from *CTh* 3.12.3, the compilers took out any reference to incest, a significant modification considering the amount of attention the subject received by jurists and imperial legislators. Under Diocletian, incest seems to have been a capital offence, and by the mid-fourth century, prohibition extended to relations between cousins of the third degree and those between an individual and a relative of his or her previous spouse.¹³³ That the compilers did not mention incest specifically in the provision can perhaps be explained by a more relaxed position towards the subject at this time – a position reinforced by Cassiodorus’ *formula* for granting legitimacy to unions between first cousins:

Moved by your request, if you prove that she is joined to you in proximity of blood relations to the extent of first cousin, and no more, We decree that you may be joined in marriage, and order that henceforth you shall not have to undergo any trial ... By God’s favour may you have legitimate heirs from this marriage, which, our consent having been obtained, is not culpable but praiseworthy.¹³⁴

himself through a marriage of an incestuous or forbidden nature, he shall retain his property for as long as he lives, but he shall know that the wife or any children from her are not his.” (“si quis incesti vetitique coniugii sese nuptiis funestavit, proprias quamdiu vixerit teneat facultates, sed neque uxorem neque filios ex ea editos habere credatur.”)

¹³³ On the subject of incest in general, Ulpian states (*Tit. Ulp.* 5.6-7): “There is no *conubium* between ascendants and descendants no matter how far removed. Between collateral relatives, at one time marriages could not be contracted up to the fourth degree. But now it is permitted to take a wife also from the third degree – but only a brother’s daughter, not a sister’s daughter or a paternal or maternal aunt, although they are of the same degree. We cannot take as wife a woman who was our stepmother or stepdaughter or daughter-in-law or mother-in-law. If someone takes a wife who is not permitted, he contracts an incestuous marriage; so the children (of this marriage) are not in his power but are bastards, as if promiscuously conceived.” (“Inter parentes et liberos infinite cuiuscumque gradus sint conubium non est. inter cognates autem ex transverse gradu olim quidem usque ad quartum gradum matrimonia contrahi non poterant: nunc autem etiam ex tertio gradu licet uxorem ducere, sed tantum fratris filiam, non etiam sororis filiam aut amitam vel materteram, quamvis eodem gradu sint. Eam, quae noverca vel privigna vel nurus vel socrus nostra fuit, uxorem ducere non possumus. Si quis eam quam non licite uxorem duxerit, incestum matrimonium conrahit: ideoque liberi in potestate eius non fiunt, sed quasi vulgo concepti spurii sunt.”) On legislation see e.g. *Collatio* 6.4 (*FIRA*² ii. 588-60 [1 May 295] of the emperor Diocletian to the provincials in Damascus), which likened incestuous unions to the mating of cattle or wild beasts (which lacked any respect for modesty), recognized children of such unions as illegitimate, and punished wrongdoers with a penalty of ‘worthy severity’ (presumably death). See also *CTh* 3.12.1-2 (344 and 355) of the emperor Constantius, issued to the provincials of Phoenicia, which prohibited unions between a man and the former wife of his brother or the sister of his former wife. On the subject in general, see Evans Grubbs, *Law and Family in Late Antiquity*, pp. 24, 55, 95, 96, 99-101.

¹³⁴ Cass., *Var.* 7.46.2 (formula qua consobrinae matrimonium legitimum fiat): “... supplicationum tuarum tenore permoti, si tibi tantum illa consobrini sanguinis vicinitate coniungitur nec alio gradu proximior approbaris, matrimonio tuo decernimus esse sociandam nullamque vobis exinde iubemus fieri quaestionem ... erunt vobis itaque deo favente posterius sollemniter heredes, castum matrimonium, gloriosa permixtio, quoniam quicquid a nobis fieri praecipitur, necesse est ut non culpis, sed laudibus applicetur.”

According to the *formula*, unions that contravened rules of incest continued to be penalized, but the scope of the censure was not nearly as comprehensive as that of earlier Roman legislation. A possible explanation for this more relaxed stance on incest lies in numbers. On the one hand, Italy in the early sixth century simply lacked the sufficient numbers to allow for comprehensive legislation on the subject of incest. That is, the number of eligible candidates for marriage precluded far-reaching legislation on incest of the kind issued in previous centuries. While direct evidence for population estimates is lacking, Cassiodorus' description of the amphitheatre and baths of Rome implies that they were far too large for contemporary needs:

It is evident how great was the population of the city of Rome...[f]or the vast extent of the walls bears witness to the throngs of citizens, as do the swollen capacity of the buildings of entertainment, the wonderful size of the baths, and that great number of water-mills which was clearly provided especially for the food supply.¹³⁵

On the other hand, the central administration lacked sufficient numbers of officers who could effectively regulate such provisions. As both *ET* 52 and 53 suggest, municipal magistrates were at this time in short supply.

In addition to the subject of prohibited marriages in general, the compilers addressed the particular custom of marriage by abduction. In accordance with established custom (*lex*), *ET* 17 stipulates that abductors of a freeborn woman or virgin were to be executed; and complicit virgins were to be similarly treated. *ET* 18 and 19, which should be taken together with *ET* 17 as a whole, concern the matter of complicit parents and slave informants. They are all derived from the same *lex* – an imperial decree of the emperor Constantine (*CTh* 9.24.1, 2 [326]):

¹³⁵ *Var.* 11.39.2 (trans. Barnish, *Variae*, p. 161): “Apparet, quantus in Romana civitate fuerit populous...Testantur enim turbas [Romanorum] civium amplissima spatia murorum, spectaculorum distensus amplexus, mirabilis magnitudo thermarum et illa numerositas molarum, quam specialiter contributam constat ad victum.” Rome’s population decreased as a result of the demographic crises of the fifth century and by the limitation of its role within the empire as a whole. Modern estimates place the population of Rome during Cassiodorus’ time at 500,000: e.g., Christie, *From Constantine to Charlemagne*, p. 251.

ET 17

We decree, in accordance with established custom, that an abductor of a freeborn woman or virgin, together with his accomplices or assistants, shall be executed once his crimes have been proven; if the abducted consents to her abductor, she, too, shall be killed¹³⁶

ET 18

If perhaps the parents or guardian of the abducted (*rapta*) girl neglect to prosecute and take legal measures against the guilty party of such a deed, by making an illicit pact concerning this crime, they shall suffer the penalty of exile.¹³⁷

ET 19

If a slave learns that a complaint of abduction (*raptus*) has been concealed by his owners and the crime passed over by connivance, and reports this to the courts, he shall be freed.¹³⁸

CTh 9.24.1, 2, 4, 5

If any man who had not previously made a pact with the parents of a girl should ravish this girl against her will, or if he should abduct a girl who was willing, hoping to obtain protection from the consent of the girl, although it was because of the fault of frivolity and the inconstancy of her sex and judgement that a girl was altogether excluded by the ancients from conducting suits in court and from giving testimony and from all matters pertaining to courts, the consent of the girl shall be of no advantage to him, as it would have been under the ancient law, but rather the girl herself shall be held liable as a participant in the crime. [2] If willing agreement is discovered in the girl, she shall be punished with the same severity as her ravisher... [4] If any slave should report to the public courts a crime of rape passed over by connivance or disregarded by a pact, he shall be granted Latinity, or if he is Latin, he shall be made a Roman citizen. If the parents, whom the punishment of the crime concerns especially, should show forbearance and suppress their grief, they shall be punished by deportation. [5] We order that partners and accomplices of the abductor also be subjected to the same punishment without regard to

¹³⁶ *ET 17*: “Raptorem ingenuae mulieris aut virginis, cum suis complicitibus vel ministris, rebus probatis iuxta legem iubemus extingui, et si consenserit rapta raptori, pariter occidatur.”

ET 18: “Si parentes raptae aut curator eius, quae minore aetate rapta est, exsequi et vindicare talis facti culpam forte neglexerit, pactum, quod non licet de hoc crimine faciendo, poenam patiantur exilii.”

ET 19: “Servus vero, si querelam de raptu dissimulari a dominis et pactione crimen senserit definiri atque iudiciis prodiderit, libertate donetur.”

¹³⁷ *ET 18*: “Si parentes raptae aut curator eius, quae minore aetate rapta est, exsequi et vindicare talis facti culpam forte neglexerit, pactum, quod non licet de hoc crimine faciendo, poenam patiantur exilii.”

¹³⁸ *ET 19*: “Servus vero, si querelam de raptu dissimulari a dominis et pactione crimen senserit definiri atque iudiciis prodiderit, libertate donetur.”

¹³⁹ *CTh 9.24.1, 2, 4, 5* (trans. Pharr): “si quis nihil cum parentibus puellae ante depectus invitam eam rapuerit vel volentem abduxerit, patrociniū ex eius responsione sperans quam propter vitium levitatis et sexus mobilitatem atque consilii a postulationibus et testimoniis omnibusque rebus iudiciariis antiqui penitus arcuerunt, nihil ei secundum ius vetus prosit puellae responsio, sed ipsa puella potius societate criminis obligetur. [2] Et si voluntatis assensio detegitur in virgine, eadem, qua raptor, severitate plectatur...[4] Si quis vero servus raptus facinus dissimulatione praeteritum aut pactione transmissum detulerit in publicum, latinitate donetur, aut, si latinus sit, civis fiat romanus: parentibus, quorum maxime vindicta intererat, si patientiam praebuerint ac dolorem compresserint, deportatione plectendis [5] Participes etiam et ministros raptoris citra discretionem sexus eadem poena praecipimus subiugari, et si quis inter haec ministeria servilis condicionis fuerit deprehensus, citra sexus discretionem eum concremari iubemus.” On this law, see Evans Grubbs, “Abduction Marriage in Antiquity: A Law of Constantine and

sex.¹³⁹

The subject of these provisions is the custom of marriage by abduction (*raptus*), and not rape: Roman law did not define rape *per se*, but sexual violence could be prosecuted as *stuprum per vim* (illegal sexual intercourse by force), which was categorized under the *vis publica*. Bride theft entails the capture of an unmarried young woman by a man who is not betrothed to her, with the aim of obtaining her parents' consent to what is essentially a *de facto* marriage. A girl who actively consented was to suffer the same penalty as her abductor. What that penalty actually was is omitted in the text of the *CTh*,¹⁴⁰ but not in the *ET*.

That *raptus* was considered an especially heinous act in both Constantine's time and the early sixth century is clear from the provision in both the *CTh* and *ET* that granted freedom to the slave who brings information to the authorities – a significant reward in light of the harsh conditions associated with slavery; and the allowance in both for the use of informers. Given the decidedly dim view Roman law took on the use of informers, and especially slave informers who acted against their masters, these were obviously extreme measures intended to combat a crime that was deemed particularly abhorrent.

A law of the emperors Valens, Gratian and Valentinian of 377 required that any marriage contracted through the crime of abduction was to be prosecuted immediately, either by a relative wishing to avenge the dishonor committed against his family or by a third party inspired by his contempt for the abominable act. However, it also established a five-year statute of limitations on

its Social Context," *JRS* 79 (1989), pp. 59-83; Denise Grodzynski, "Ravies et coupables: Un essai d'interprétation de la loi 9,24,1 du Code Théodosien," *MEFRA* 96 (1984), pp. 697-726; and Lucetta Desanti, "Costantino, il ratto e il matrimonio riparatore," *SDHI* 52 (1986), pp. 195-217.

¹⁴⁰ That the punishment was particularly harsh and degrading is evinced by a later law of Constantius (*CTh* 9.24.2 [349]), which reduced the Constantine's penalty for *raptores* to a capital penalty. J. Evans Grubbs speculates that it was *summum supplicium* ("the supreme penalty"), such as condemnation *ad bestias* or burning. See Evans Grubbs, "Abduction Marriage in Antiquity," p. 66; Joëlle Beaucamp, *Le Statut de la femme à Byzance (4e-7e siècle)*, i. *Le Droit impérial* (Paris, 1990), p. 113. Richard Bauman ("Leges Iudiciorum Publicorum," in H. Temporini (ed.), *Aufstieg und Niedergang der römischen Welt* ii., 13 [Berlin, 1980], pp. 103-233, at 223) suggests the penalty is not specified because it came under the *lex Julia de vi. Summum supplicium*.

such prosecution. After five years the marriage could not be contested on the grounds that it was illicit, nor could any children borne from it be considered illegitimate.¹⁴¹ *ET* 20 upholds this five-year statute of limitations, and similarly grants the right of accusation to all:

Let it be permitted for all to make an accusation of abduction (*raptus*) within a period of five years, but after this period let no-one initiate an investigation of this crime, even if it is shown that a legal action could have been brought forward within the period of time prescribed above: particularly since all the children from this marriage [which has been contracted by the crime of abduction] are protected both by the authority and privilege of legitimacy after a period of five years has passed.¹⁴²

The purpose behind the five year limitation was twofold: any marriage that had survived for a period of five years or longer, even one brought about illegally through abduction, essentially constituted a stable union; and should there be any children, their legal status and source of support would at once be put at risk if their parents suddenly faced legal sanction.

The compilers followed Constantine's legislation closely but omitted important sections of it. According to Constantine, because 'ancient law' declared that a girl's testimony was invalid in court (on account of the fickleness of her sex), in the same way her consent to a marriage with her abductor was of no legal consequence. The same contempt toward female discretion and disapproval of women's participation in legal affairs are found in several other Constantinian laws,¹⁴³ but the *ET* contains no traces of this. While the compilers did not grant

¹⁴¹ *CTh* 9.24.3, addressed to Maximinus, praetorian prefect of Gaul. Under classical law, *raptus* was dealt with by the *lex Julia de vi publica*, which did not impose a five-year limit: *Dig.* 48.5.30.9. See J. Evans Grubbs, *Law and Family in Late Antiquity*, p. 193.

¹⁴² *ET* 20: "Raptum intra quinquennium liceat omnibus accusare, post quinquennium vero nullus de hoc crimine faciat quaestionem, etiam si intra supra scriptum tempus egisse aliquid de legibus doceatur: maxime cum et filii de hoc matrimonio suscepti exacto quinquennio legitimorum et iure et privilegio muniantur."

¹⁴³ E.g., *CTh* 9.1.3 (322) (trans. Pharr): "Since it is clear and manifest law that women do not have the right to prosecute public criminal suits, except in certain cases, that is, when prosecuting a case of outrage [*iniuria*] to themselves or to members of their families, the ancient statutes must be observed. For it is not right that the power to make an accusation should be entrusted generally to women. On the other hand, in public criminal trials at times their testimony or their authority as accusers has been admitted. Advocates also must be warned that they must not, in the interest of gain, rashly accept women as clients who depend on the security of their sex and perhaps rush into unlawful action." ("quum ius evidens atque manifestum sit, ut intendendi criminis publici facultatem non nisi ex

more rights to women than did previous Roman legislators, they did so without employing the usual negative rhetoric. *ET* 17 also ignores the penalty (deprivation of the right to inherit from her parents) for girls who did not consent, but did not raise enough clamour to alert their neighbours.¹⁴⁴ Also absent is the provision regarding complicit nurses. In Constantine's legislation, those who convinced the girls under their care to cooperate with their abductors were to be punished by having their mouths and throats (responsible for the 'wicked persuasion') closed shut by the pouring in of molten lead.¹⁴⁵ Of course, such a provision as this would have been a concern only for a small percentage of families that had both the means and opportunity to acquire the services of a nurse. In other words, it was largely meaningless in the context of the *ET*, where the concern of the compilers was with parents who were compelled to sell their children in a bid to escape the crushing burden of poverty (*ET* 94).

Interestingly, in dealing with the subject of marriage by abduction the compilers ignored a major development in post-Constantinian law of legislation that dealt with the abduction of consecrated Christian virgins or widows, those who had vowed themselves to a marriage with Christ. In a constitution of 354, for instance, the emperor Constantius threatened offenders of

certis causis mulieres habeant, hoc est si suam suorumque iniuriam persequantur, observari antiquitus statuta oportet. neque enim fas est, ut passim mulieribus accusandi permissa facultas sit; alioquin in publicis olim quaestionibus interdum aut admissa probatio est aut accusantis auctoritas. patroni etiam causarum monendi sunt, ne respectu compendii feminas, securitate forsitan sexus in actionem illicitam proruentes, temere suscipiant.”)

¹⁴⁴ *CTh* 9.24.1.2 (trans. Pharr): “...since impunity must not be granted even to those girls who are ravished against their will, when they could have kept themselves chaste at home up to the time of marriage and when, if the doors were broken by the audacity of the ravisher, the girls could have obtained the aid of neighbors by their cries and could have defended themselves by all their efforts. But we impose a lighter penalty on these girls, and We command that only the right of succession to their parents shall be denied them.” On this penalty see Paulo Merêa, “Le mariage ‘*sine consensus parentum*’ dans le droit romain vulgaire occidental,” *RIDA* 5 (1950), pp. 203-17, esp. pp. 208-10.

¹⁴⁵ *CTh* 9.24.1.1 (trans. Pharr): “Since the watchfulness of parents is often frustrated by the stories and wicked persuasions of nurses, punishment shall threaten first such nurses whose care is proved to have been detestable and their discourses bribed, and the penalty shall be that the mouth and throat of those who offered incitement to evil shall be closed by pouring in molten lead.” (“Et quoniam parentum saepe custodiae nutricum fabulis et pravis suasionibus deluduntur, his primum, quarum detestabile ministerium fuisse arguitur redemptique discursus, poena immineat, ut eis meatus oris et faucium, qui nefaria hortamenta protulerit, liquentis plumbi ingestione claudatur.”)

such divine chastity with ‘due severity’ (presumably death).¹⁴⁶ The culmination of this sort of legislation was a comprehensive law of Justinian of 533, which covered the abduction of all categories of women and paid particular attention to dedicated celibates, virgin and widow alike:

We decree that the abductors of virgins of honest or ingenuous rank, whether they are married or not, or any widows, and even freedwomen or slaves, have committed the most vile of crimes and shall be punished by the capital penalty: in particular, if they are abductors of virgins or widows dedicated to God (an act which is not only an injury to humankind, but an affront to the omnipotent God, especially when virginity or chastity once corrupted cannot be restored), they shall be deservedly condemned to death, since abductors of this sort shall be held for the crime of homicide.¹⁴⁷

It goes without saying that Constantine’s legislation on the matter would have been sufficient for dealing with violators of divine chastity in the early sixth century. But the silence of the compilers concerning this specific type of *raptus* is perhaps indicative of the fact that sacrosanct virgins or widows were as yet an uncommon feature of rural life in the Italian countryside at this time. Presumably, the hazards of the countryside discouraged people from constructing female communities outside the large towns and cities, for all female monasteries were, by the end of the sixth century, located in urban centres of the peninsula. In addition to Rome, Gregory the Great, for example, wrote letters for female monasteries in Naples, Pisa, Lilybitano, Luna, Nola, and the towns of Sicily and Sardinia.¹⁴⁸ At any rate, judging from the number of provisions in the

¹⁴⁶ E.g., *CTh* 9.25.1 (354). In *ET* 17 there is no mention of the virgin *rapta* as being celibate. For widows, the compilers concerned themselves exclusively with acts of *stuprum*: *ET* 60-2. According to these, those who had sexual relations with a widow (provided she was of respectable status) could be accused of adultery; if the widow was a willing participant, she too was considered guilty. This was standard Roman law.

¹⁴⁷ *CJ* 9.13.1: “Raptores virginum honestarum vel ingenuarum, sive iam desponsatae fuerint sive non, vel quarumlibet viduarum feminarum, licet libertinae vel servae alienae sint, pessima criminum peccantes capitis supplicio plectendos decernimus, et maxime si deo fuerint virgines vel viduae dedicatae (quod non solum ad iniuriam hominum, sed ad ipsius omnipotentis dei inreverentiam committitur, maxime cum virginitas vel castitas corrupta restitui non potest): et merito mortis damnantur supplicio, cum nec ab homicidii crimine huiusmodi raptores sint vacui.” See further Evans Grubbs, “Abduction Marriage in Antiquity,” pp. 77-9; D. Grodzynski, “Ravies et coupables,” pp. 724-6; and Beaucamp, *Le Statut de la femme à Byzance (4e-7e siècle)*, pp. 114-18 for this and later legislation of Justinian.

¹⁴⁸ E.g., *ep.* 3.58 in *MGH Epistolae*, 1, pp. 217-18, and *epp.* 9.54, 11.207 in *MGH Epistolae*, 2, 79, pp. 195-6 (Naples); *Ibid.*, *ep.* 14.14, *MGH Epistolae*, 2, pp. 433-34 (Pisa); *Ibid.*, *ep.* 9.233, *MGH Epistolae*, 2, pp. 228-29

ET dedicated to *raptus*, it is clear that this remained a viable marriage strategy in the provinces at this time despite all attempts to put a stop to it.

Adultery and Divorce

Roman law defined adultery as extramarital sexual relations with or by a married woman.¹⁴⁹ The husband could be held liable only in the event that he had sexual relations with a married woman of respectable status; if his lover was an unmarried virgin or widow, and again of respectable status, the crime was classified as *stuprum*. While this was equally reprehensible, it was only because of his lover's status and not because he was married. A man, regardless if he was married, who had sexual relations with slaves (provided it was not done against the owner's will), prostitutes, or any other woman considered beneath the legal and social definitions of respectability, was acting within the limits of what was deemed acceptable behaviour, and was not committing adultery or *stuprum*.¹⁵⁰ For respectable women, on the other hand, these sorts of relations were strictly prohibited: those who were married were expected to observe strict marital

(Lilybitano); Ibid., *ep.* 9.114, *MGH Epistolae*, 2, pp. 119-20 (Luna); Ibid., *ep.* 1.23, *MGH Epistolae*, 1, p. 27 (Sicily); Ibid., *ep.* 4.101, *MGH Epistolae*, 1, p. 243 (Sardinia). The most comprehensive account of monasticism in Italy in this period is to be found in Georg Jenal, *Italia ascetica atque monastica. Das Asketen- und Mönchtum in Italien von den Anfängen bis zur Zeit der Langobarden (c.a. 150/250–604)*, 2 vols. (Stuttgart, 1995), vol. 1, pp. 145-311. See also Georges Duby et al., *A History of Women in the West*, vol. II: *Silences of the Middle Ages* (Cambridge, MA., 1992), p. 188.

¹⁴⁹ Evans Grubbs, *Law and Family in Late Antiquity*, p.203; on the law: *Dig.* 48.2.3, 48.5; *SP* 2.26; *CJ* 9.9. See also P.E. Corbett, *The Roman Law of Marriage* (Oxford, 1930), pp. 133-45; Pal Csillag, *The Augustan Laws of Family Relations* (Budapest, 1976), pp. 175-99; Jane F. Gardner, *Women in Roman Law and Society* (London, 1986), pp. 127-32; T.A.J. McGinn, "Concubinage and the *Lex Julia* on Adultery," *TAPA* 121 (1991), pp. 335-75, esp. pp. 340-3; T. Mommsen, *Le Droit pénal romain*, trans. J. Duquesne from German, 3 vols. (Paris, 1907), ii, pp. 414-28; Amy Richlin, "Approaches to the Sources on Adultery at Rome," in Helene P. Foley (ed.), *Reflections of Women in Antiquity* (New York, 1981), pp. 379-404; Susan Treggiari, *Roman Marriage: Iusti Coniuges*, pp. 277-90; Carlo Venturini, "'Accusatio Adulterii' e politica constantiniana (Per un riesame di CTH 9,7,2)," *SDHI* 54 (1988), pp. 66-109.

¹⁵⁰ For a definition of *adulterium*: *Dig.* 48.5.6.1; 48.5.35.1. Slaves: *Dig.* 48.5.6 pr.; *SP* 2.26.16 (a man who corrupted another's slave could be charged with *iniuria* under the *lex Aquilia*). Prostitutes: *CJ* 9.9.22 (290). On the difference between *adulterium* and *stuprum* in Roman law, see: Evans Grubbs, *Law and Family in Late Antiquity*, p. 203; Elaine Fantham, "*Stuprum*: Public Attitudes and Penalties for Sexual Offenses in Republican Rome," *EMC/CV NS* 10 (1991), pp. 267-91; David Cohen, "The Augustan Law on Adultery: The Social and Cultural Context," in David Kertzer and R.P. Saller (eds.), *The Family in Italy from Antiquity to the Present* (New Haven, Conn., 1991), pp. 109-26; McGinn, "Concubinage and the *Lex Iulia*," pp. 335-75.

fidelity, and those who were unmarried were to remain celibate.¹⁵¹ After Constantine, Christian emperors broadened the definition of adultery to include offenses other than infidelity on the part of the married woman. In 388, for instance, Valentinian II issued a decree that defined marriage between a Christian and a Jew as adultery, and granted the right of accusation to anyone, provided they do so before the appropriate judge.¹⁵² The compilers, however, ignored these sorts of developments, and instead continued treating adultery strictly as an act involving an unfaithful wife. As noted in Chapter One, this is not the only place in the *ET* where Christian influence seems to have been downplayed.

Under the Augustan law, an accusation of adultery could be brought forward by anyone, and the punishment for adulterers was harsh: a woman convicted of adultery was relegated to an island and lost a third of her property and half her dowry, and was prohibited from contracting a valid marriage again; a guilty man was similarly relegated and forfeited half of his property.¹⁵³ Constantine, however, restricted the right of accusation to the husband and male relatives exclusively, thus making the preservation of a woman's sexual chastity the responsibility of the male members of the family.¹⁵⁴ Moreover, he seems to have punished convicted adulterers, both male and female, with death. The compilers further limited the right of accusation to husbands

¹⁵¹ Despite the fact that this double standard was long criticized by more high-minded pagans and Christians alike, it clearly continued throughout Late Antiquity. See Peter Brown, *The Body and Society: Men, Women and Sexual Renunciation in Early Christianity* (New York, 1988), pp. 23-4. For the objections of pagan philosophers, see e.g., the first-century Italian *eques* and Stoic philosopher Musonius Rufus (in Cora Lutz, "Musonius Rufus: 'The Roman Socrates'," *Yale Classical Studies* 10 [1947], pp. 3-147, esp. pp. 38-49, 84-101); Evans Grubbs, *Law and Family*, p. 62.

¹⁵² *CJ* 1.9.6: "Let not a Jew accept a Christian as his wife, nor shall a Christian be married to a Jew. For, if anyone has committed an action of this sort, he will be held for the crime of adultery; and the freedom to bring forth an accusation shall be granted to all members of the public at large." ("Ne quis christianam mulierem in matrimonium iudaeus accipiat neque iudaeae christianus coniugium sortiat. nam si quis aliquid huiusmodi admiserit, adulterii vicem commissi huius crimen obtinebit, libertate in accusandum publicis quoque vocibus relaxata.") On the subject of Jewish-Christian marriages in Late Antiquity, see Hagith S. Sivan, "Why Not Marry a Jew? Jewish-Christian Marital Frontiers in Late Antiquity," in Mathisen (ed.), *Law, Society, and Authority in Late Antiquity*, pp. 208-219.

¹⁵³ *PS* 2.26.14.

¹⁵⁴ *CTh* 9.7.2.

alone (with no mention of male relatives), and treated adultery as a capital offence – a provision that extended to collaborators and anyone complicit in the crime:

Adulterers and adulteresses, upon being convicted during a trial, shall not escape a violent death; collaborators or those knowledgeable of that crime must be punished in the same way.¹⁵⁵

Under classical law, either spouse could initiate a unilateral divorce provided they notify their partner by means of a written repudiation (*repudium*). While such an action required no justification or formal legal undertaking, the declaration of divorce had to be made publicly in the presence of seven witnesses for it to be considered fully valid.¹⁵⁶ If the divorce was the fault of the wife (or that of her *paterfamilias*), the husband was entitled to retain the dowry. If, on the other hand, the divorce was due to the husband's actions, he was obligated to repay the dowry in full.¹⁵⁷ These rights, however, were subject to certain conditions: family property, that is property associated exclusively with the marriage, and conjugal gifts could not be disposed of freely by either man or woman if there existed children between them. For the law guaranteed children succession rights to parental property through inheritance or conjugal gift.¹⁵⁸

Apart from these requirements, and the punishments for which an adulterous wife was liable, divorce entailed no legal sanctions until Constantine, who in 331 issued a new divorce law that was to be universally upheld. Addressed to the praetorian prefect Ablabius, *CTh* 3.16.1 represents a complete overhaul of the procedures for unilateral divorce in effect since the time of Augustus. This formed the basis for *ET* 54:

ET 54

We do not permit marriages to be dissolved indiscriminately. Wherefore, upon the issuance

CTh 3.16.1

It is pleasing that a woman not be permitted to send a *repudium* to her husband because of her

¹⁵⁵ *ET* 38: "Adulteri et adulterae, intra iudicia convicti, interitum non evadant; ministris eiusdem criminis aut consciis pariter puniendis." See also *ET* 39 (on facilitating adultery).

¹⁵⁶ Evans Grubbs, *Law and Family*, pp. 226-7.

¹⁵⁷ *Ibid*; Treggiari, *Roman Marriage: Iusti Coniuges*, pp. 352, 463-4.

¹⁵⁸ On the obligations of parents to their children, see below, pp. 234-35.

of a divorce notice, neither a wife nor husband shall withdraw from the marriage bond except on proven grounds which the laws recognize. Divorce is permitted only on the following grounds: if a wife proves in trial that her husband is a murderer, sorcerer, or a destroyer of tombs. A husband, too, may rightfully divorce his wife who is convicted of these crimes: that is, if he is able to prove in a trial that she is an adulteress [*adultera*], or sorceress [*malefica*], or what is commonly referred to as a procuress [*aggagula*]. When these facts have been disclosed clearly, a husband shall both gain back the dowry and receive or retain the dowry; and in accordance with the laws, We order him to preserve intact property of both himself and his former wife for the children of that marriage. And in like manner, if a wife proves that her husband has been involved in the aforementioned crimes, she shall receive both the dowry and dower as profit. But she is required to retain only the dowry for the children of that marriage; and in accordance with ancient customs, she shall obtain the freedom to marry again or not.¹⁵⁹

own depraved desires for some carefully contrived cause, such as the fact that he is a drunkard or gambler or a womanizer, but neither should husbands be permitted to dismiss their own wives for just any reason whatever. But in the sending of a *repudium* by a woman [it is pleasing] that these crimes alone be looked into: if she has proved that her husband is a murderer or a preparer of poisons [*medicamentarius*] or a disturber of tombs, so that not until then shall she receive back her entire dowry having received praise. But if she has sent a *repudium* to her husband for any reason other than these three crimes, she should leave it [the dowry], down to a hairpin [*acucula capitis*] in her husband's home and be deported to an island in return for such great confidence in herself. Also in the case of men, if they send a *repudium*, it is fitting that these three crimes be inquired into: if they wanted to repudiate an adulteress [*moecha*] or a preparer of poisons or a go-between [*conciliatrix*]. For if he has ejected a woman free from these crimes, he should restore the entire dowry and not marry another woman. But if he does [marry another woman], the power shall be given to the first wife to invade his house and transfer the entire dowry of the second wife to her own possession in return for the injury she

¹⁵⁹ ET 54: "Passim matrimonia dissipari non patimur. Ideo uxor a marito, aut maritus ab uxore, nisi probatis causis, quas leges comprehendunt, omisso repudio, a iugali vinculo non recedant. Causae autem debent esse divortii: si maritus aut homicida, aut maleficus, aut sepulchrorum violator ab uxore in examine fuerit adprobatus. Maritus quoque his criminibus convictam merito dimittat uxorem, si adulteram, vel maleficam, vel etiam quam vulgus adpellat aggagulam, in iudicio potuerit adprobare. Quibus edoctis, maritus, et dotem lucretur, et sponsalitiā recipiat vel sibi habeat largitatem, et tituli utriusque proprietatem secundum leges filiis eum iubemus servare communibus. Pari etiam modo, si mulier maritum superioribus criminibus involutum a iudicatione convicerit, et dotem recipiat, et sponsalitiā lucro habeat largitatem. Cuius tamen sponsalitiā tantum donationis proprietatem liberis communibus etiam ipsa conservet: et nubendi vel non nubendi licentiam pro constitutis veteribus sortiatur."

¹⁶⁰ CTh 3.16.1, 2 (trans. Evans Grubbs, *Law and Family in Late Antiquity*, p. 229): "placet, mulieri non licere propter suas pravas cupiditates marito repudium mittere exquisita causa, velut ebrioso aut aleatori aut mulierculario, nec vero maritis per quascumque occasiones uxores suas dimittere, sed in repudio mittendo a femina haec sola crimina inquiri, si homicidam vel medicamentarium vel sepulchrorum dissolutorem maritum suum esse probaverit, ut ita demum laudata omnem suam dotem recipiat. nam si praeter haec tria crimina repudium marito miserit, oportet eam usque ad acuculam capitis in domo mariti deponere, et pro tam magna sui confidentia in insulam deportari. in masculis etiam, si repudium mittant, haec tria crimina inquiri conveniet, si moecham vel medicamentariam vel conciliatricem repudiare voluerit. nam si ab his criminibus liberam eiecerit, omnem dotem restituere debet et aliam non ducere. quod si fecerit, priori coniugi facultas dabitur, domum eius invadere et omnem dotem posterioris uxoris ad semet ipsam transferre pro iniuria sibi illata."

has received.¹⁶⁰

In terms of subject matter and organization of content, the two texts are similar, but there are important differences between them. According to both, a spouse could initiate a unilateral divorce with impunity only if the other partner was guilty of a particularly heinous crime.¹⁶¹ In the case of the wife, she had to prove that her husband was one of three things: a murderer, sorcerer, or disturber of tombs. For the husband, it was necessary to prove that his spouse was an adulteress, sorceress, or procuress. There are significant variations in terminology between the two texts. In Constantine's law, the word for an adulteress is *moecha*; a preparer of poisons/dealer in magic is a *medicamentaria/us*; and a procuress or go-between is a *conciliatrix*. In the *ET*, the corresponding terms are *adultera*, *malefica/us*, and *aggagula*, which for clarity the compilers note is a colloquial expression (*quam vulgus adpellat aggagulam*). Given the similarity between them, it would be tempting to see *aggagula* in *ET* 54 as a misreading of *acucula* in *CTh* 3.16.1, meaning 'hairpin'. In replacing these terms the compilers clearly regarded them as obscure. For the vocabulary of Constantine's law is very unusual and is unlike that found in other contemporary legal works as well as later imperial constitutions. In particular, eight words in Constantine's law appear nowhere else, including *medicamentarius/a*, *acucula*, and *moechus/a*.¹⁶² Thus, the compilers took it upon themselves to update the original language in an effort to make the law more understandable for a larger audience that was presumably not familiar with sort of terminology found in this particular law of Constantine.

There are other important differences between the two texts. Whereas *ET* 54 treats the husband and wife on more or less equal terms, Constantine's legislation is clearly much harder

¹⁶¹ Divorce by mutual consent was not subject to legislation until 542, when it was prohibited by a law of the emperor Justinian (*Novel* 117.10), and subsequently annulled by his successor Justin (*Novel* 140).

¹⁶² On the unique vocabulary of this law, see Evans Grubbs, *Law and Family*, p. 258; Edoardo Volterra, "Intorno ad alcune costituzioni di Costantino," *Rendiconti dell'Accademia Nazionale dei Lincei. Classe di Scienze morali, storiche e filologiche*, series 8, vol. 13(1958), pp. 61-89; id., "Quelques remarques sur le style des constitutions de Constantin," *Mélanges Levy-Bruhl* (Paris, 1959), pp. 325-34.

on the wife who attempted an illegal divorce than on the husband. A woman who repudiated her husband for any reason other than those explicitly permitted was to be deprived of her dowry (including her last hairpin!) and be banished to an island. The husband, however, was simply required to give back the dowry (just as he had been under classical law), if there were no children between them and he was unable to prove that his wife was guilty of being an adulteress, sorceress or procuress. The only new stipulation introduced by Constantine's legislation, which the compilers chose to ignore, was that the husband was not supposed to remarry. While, in fact, there was nothing expressly prohibiting him from doing so, if he did he risked having his former wife enter his new home and confiscate the dowry of his second wife. Exactly how this was to be done is unclear. That the compilers ignore this provision altogether is perhaps an indication that they regarded it as impractical.

ET 54 makes a further reference to the laws in its requirement that the husband who retained his wife's dowry after divorce was to pass it on to any children they had together; the wife was likewise obligated to retain the dower for any children.¹⁶³ Constantine's legislation, on the other hand, has nothing in it regarding children. Under Roman law, children of legitimate marriages belonged to their father's family and were his financial responsibility: in 315, Constantine ruled that the widowed father was forbidden from alienating anything from the *bona*

¹⁶³ On this matter, we are told by Cassiodorus (*Var.* 4.12) of the case of the extravagant widow Aetheria, accused of squandering the marriage property to which her children had claim: "The illustrious Lady Archotamia, saddened over the loss of her grandson, alleges that her (grand)daughter-in-law Aetheria, having put aside the love of her [former] husband and subsequently marrying a certain Liberius, and eager to appear more embellished in her new marriage, has enriched herself from the inheritance of her children, for whom this property was suitably intended." ("Arcotamia itaque illustris femina flebiliter ingemiscens nepotis sui calamitatem tali conquestione deploravit . . . asserens Aetheriam nurum suam, mariti postposita dilectione, cuidam se Liberio iugali foedere sociasse et cum ornatior cupit novis thalamis apparere, studuerit prioris viri facultates evertere, allegans ditatam filiorum spoliis, quibus magis decuit congregari.") The suggestion here is that the widow's actions became a problem only after her remarriage. In the event that a widow disregarded the rules of the *tempus luendi*, she forfeited all conjugal proceeds to her husband's relatives or heirs (*ET* 37).

materna, but had to preserve them for the children; although he retained both control, *dominium*, and what was called *potestas utendi fruendique*, (a lifelong usufruct of the estate).¹⁶⁴

Divorced mothers, too, were required by a law of Theodosius I (*CTh* 3.8.2 [382]) to make provisions for their children in their will. A law of Theodosius II of 439 reiterated this point, but also made the same requirement of husbands.¹⁶⁵ This latter condition appears to have served as the basis for the provision in *ET* 54 that placed equal responsibility on husbands for the financial welfare of their children. This is in contrast to earlier legislation, illustrated by a rescript of the emperor Theodosius of 382,¹⁶⁶ which legally bound wives to adhere to this requirement but simply admonished husbands to do the same by appealing to their sense of morality. That such moral appeals were eventually replaced with binding legal sanctions is perhaps proof that they largely fell on deaf ears. At any rate, the *ET* provides no details as to how property was to be transferred from parents to children or other direct descendants, or how it was to be divided between children. Presumably this was because the matter was one of common knowledge, and since the *ET* was not intended to be an exclusive source of law, but rather a supplement to other collections (such as the *Theodosian Code*), such details were not necessary.

Family Property

¹⁶⁴ *CTh* 8.18pr. See Arjava, *Women*, pp. 100-105. On the problems of the legal terminology (including the act of *cretio*, through which the child and the father together demanded the inheritance), see e.g. P. Voci, "Il diritto ereditario Romano nell'età di tardo impero: il IV secolo (prima parte)," *Iura* 29 (1978), pp. 17-113, esp. pp. 56-79; and P. Fuenteseca, "Maternum patrimonium (Revisión de *CTh*. 8,18,1 y 8,18,2)," *Atti dell'Accademia Romanistica Costantiniana: IX Convegno internazionale* (1993), pp. 331-47.

¹⁶⁵ *Nov. Th.* 14.1, 2 (trans. Pharr): "Previous constitutions commanded that a woman, if her marriage should be dissolved by the death of her husband and if common children should survive, should, under certain conditions, preserve for the aforesaid children the antenuptial gifts and other property which devolved upon her in certain fixed ways from the person of her husband. [2] The sainted grandfather of Our Clemency by his humane mind had recommended that husbands also under the aforesaid conditions, if their marriage should be dissolved by the death of the wife and there should be surviving children, should observe these regulations with regard to the dowry and other property which devolved from them in certain fixed ways from the person of the wife." ("praeteritae constitutiones mulierem, morte mariti matrimonio dissolute communibus liberis extantibus, donationem ante nuptias resque alias certis modis ad eam devolutas ex mariti persona isdem liberis quibusdam condicionibus servare... [2] Nos feliciter vinculo legis haec a viris observanda censemus.")

¹⁶⁶ *CTh* 3.8.2.3.

Roman law governing the transfer of property within families, particularly between parents and children, comprises a considerably complex and detailed set of rules and regulations, which for the most part are preserved in Book IV of the *Theodosian Code*.¹⁶⁷ These were passed over by the compilers except for a few very general clauses on inheritance and donation.¹⁶⁸ Property was normally inherited either under a will or as the result of an intestacy. The latter occurred when the deceased had died without making a will, or where he had made a will that was not operative. *ET* 28 and 29 address the subject of testaments, and were clearly intended to function together with *ET* 30 as a general edict on testacy. The first deals with the issue of legitimacy, and concedes testamentary rights to all those whom the *leges* recognize as being legitimate testators; the second outlines what steps are to be taken should the testator be illiterate or otherwise unable to subscribe the document, and warns against forgers; and the third qualifies the issue of forgery even further:

ET 28 We grant the universal right to make a will to all whom the laws permit to do so: provided that seven or five witnesses who are freeborn and of adult age shall at his request and at the same time subscribe the document in the presence of the testator.¹⁶⁹

ET 29 If a testator is unable to provide his subscription because he is either illiterate or gravely ill, then there shall be summoned on his behalf an eighth witness whose credibility cannot be challenged in any way. But let witnesses, and particularly the testator himself, know that if, under examination [of the document] anything should be proven false, they shall not be able to avoid the punishment which the authority of the laws concerning forgers stipulates.¹⁷⁰

ET 30 Moreover, let an appointed heir, legatee or freedman know that if anything of this sort is attempted through their complicity or knowledge, not only will they be deprived of the very profit and income of that testamentary provision, but also,

¹⁶⁷ For a useful review see Evans Grubbs, *Law and Family*, pp. 112-118. Joshua C. Tate, "Inheritance Rights of Nonmarital Children in Late Roman Law," *Roman Legal Tradition* 4 (2008), pp. 1-36.

¹⁶⁸ *ET* 23-4, 28-33, 51-52, 72. *ET* 26 and 27 deal with intestate clerics and decurions respectively.

¹⁶⁹ *ET* 28: "Faciendorum testamentorum omnibus quos testari leges permittunt, damus late licentiam: ita ut septem aut quinque testes ingenui ac puberes in conspectu testatoris, uno tempore, eodem rogante subscribant."

¹⁷⁰ *ET* 29: "Quod si testator aut literas ignorando aut per necessitatem vicinae mortis propriam subscriptionem non potuerit commodare, tunc octavus testis pro testatore adhibeatur huiusmodi, de cuius fide dubitari omnino non possit: scituris testibus et scriptore praecipue testamenti, quod si quis falsitatis extiterit, sub cognitione decursa se supplicium evadere non posse, quod circa falsarios legum dictat auctoritas."

they will not be able to avoid the penalty of forgery. Anyone who makes an effort or applies himself to drafting such testaments will be guilty of this offence, since We wish that the desire of the dead to remain unimpeded, and nothing should be appropriated for another's benefit because of a difference of opinion [concerning the validity of the document].¹⁷¹

Based on a nine-part novel of the emperor Theodosius of 439, *ET* 28 fails to specify the particular grounds for establishing the capacity of a testator, referring only to the *leges* that have already done so – a further indication that the *ET* was not to replace previous law, only supplement certain points of it that required additional clarification or emphasis.

For the most part, the detailed rules concerning capacity are laid out for us in the juristic works of Labeo, Gaius and Ulpian and cited in the legislative works of several emperors.¹⁷² In a law of Constantine, for instance, the legal requirements for making a will were set out as follows:

In the case of codicils not preceded by a testament, just as in the case of wills in testamentary form, the presence of seven or of five witnesses must not be lacking, for thus it will come about that the provisions of testators for succession will be preserved without any trickery.¹⁷³

ET 28 allowed for the document to be signed before seven or five witnesses in the same way Constantine's law had – five according to the older civil law, seven according to the

¹⁷¹ *ET* 30: “Sciat autem scriptus heres vel legatarius aut libertus, quod si eis conniventibus aut scientibus, tale aliquid temptatum fuerit, se non solum emolumento ipso vel fructu eius scripturae esse privandos, verum etiam falsi poenam declinare non posse. In hoc reatu erit quisquis operam aut studium faciendis adhibuerit talius testamentis: cum voluntates velimus esse liberas mortuorum et nihil ibi sibi aliena debeat persuasio vindicare.”

¹⁷² According to Labeo (*Dig.* 28.1.2): “in the case of someone who is making his will, at the time when he makes the will, soundness of mind is required, not health of body.” (“In eo qui testatur eius temporis, quo testamentum facit, integritas mentis, non corporis sanitas exigenda est.”) As Labeo makes clear, the testator was required to have mental capacity (but not physical) at the time he made the will. The basic requirements for capacity to make a will were that the testator should be a citizen of full age, i.e., the age of puberty, and *sui iuris*. Gaius adds (*Dig.* 28.1.6pr.): “a person in parental power has not the right to make a will, and this is so much the case that even if his father gives him permission, he still cannot thereby lawfully make the will.” (“Qui in potestate parentis est, testamenti faciendi ius non habet, adeo ut, quamvis pater ei permittat, nihilo magis tamen iure testari posit.”) Persons judged to be *intestabiles* (*Dig.* 28.1.26) lacked capacity to make a will, as did children *in potestate*. According to Ulpian, however, any will made before the interdict was valid (*Dig.* 28.1.18pr.).

¹⁷³ *CTh* 4.4.1 (?326) (trans. Pharr): “in codicillis, quos testamentum non praecedat, sicut in voluntatibus testamenti septem testium vel quinque interventum non deesse oportet: sic enim fiet, ut testantium successiones sine aliqua capione servantur.”

modifications introduced by the praetor and known as the praetorian law, or the honorary law.¹⁷⁴

ET 29 ignores this differentiation completely, requiring seven witnesses and an eighth in the event that the testator was not up to the task.¹⁷⁵ It also expands upon this to include the application of the penalty for forgery, which was most obviously a pressing issue for the compilers. Both this and the following provision warn the forger and the witnesses who knowingly signed a forged deed that they would not escape the thorough censure of the laws concerning forgery. According to *ET* 41, this was a capital offence.¹⁷⁶ To guard against these sorts of actions, and at the same time to establish tax liability, wills were to be registered in the public records as the laws required:

Testaments shall be registered as the laws prescribe; in this way, the fulfillment of another's will shall not be able to falter.¹⁷⁷

There is nothing in the *ET* as to the internal form which the will was to take – details that were of paramount importance for establishing the authenticity of the document as a genuine expression of the deceased's final wishes. This, combined with the interest of the compilers on

¹⁷⁴ Ian Wood ("Disputes in Late Fifth- and Sixth-Century Gaul" p. 19) has argued that this admixture of procedures reflected a general misunderstanding of earlier classical forms, and that such incoherency is the hallmark of vulgar law. But there is no reason to interpret this admixture of procedures as a decline in legal standards in Late Antiquity. In fact, it could be taken as an inventive solution to the fact that in many areas of the Empire the availability of suitable witnesses was limited.

¹⁷⁵ The model for this is *Nov.Th.* 16.1.3 (trans. Pharr): "But if the testator should be ignorant of letters or should not be able to subscribe, We decree that the aforesaid regulations shall be observed and that an eighth subscriber shall be employed in his stead."

¹⁷⁶ *ET* 90 classifies as *dolus* (fraud) the action of tampering with or destroying a genuine document, but treats the offence as *falsum* (forgery): "Those who erase, change, add to or take away, burn or expunge another's testament, codicil, records, accounts, transcripts of registered instruments, documents, bonds, or letters in any place for the purposes of fraud, or give, sell or substitute gilded bronze, silver or iron for gold, and those who substitute tin for silver, or cut around the outer circle of a *solidus*, or those who prescribe or take pains that this may be done, shall endure the stipulated penalty for the crime of forgery." (Qui testamentum, codicillum, tabulas, rationes, gesta, libellos, cautiones, epistolas in fraudem alterius, quocumque loco deleverint, mutaverint, subiecerint, subreperint, incenderint, raserint, aut aes, argentum, vel ferrum inauratum scientes pro auro dederint, vel vendiderint, vel subposuerint, quique pro argento stannum subiecerint, vel exteriorem circulum solidi praeciderint, quive, ut id fieret, iusserint operamve dederint, poenam sustineant falsi crimini constitutam.") An analogue to this is Constantine's law on forgery (*CTh* 9.22.1), which addresses the subject of decurions who tamper with a testament, codicil or any will of a dying person; but applies the death penalty only in the most serious of offences.

¹⁷⁷ *ET* 72: "testamenta, sicut leges praecipunt, allegentur: hoc modo fides voluntatis alienae titubare non poterit." The *leges* mentioned here is presumably a reference to *CTh* 4.4.1-4.

the subject of intestacy and intestate succession, is perhaps indicative that by the early sixth century the act of making a will was not a particularly common one in Italy.¹⁷⁸ Despite the variety of reasons for testation, it cannot be maintained that will-making was the norm in the late Roman world as well. It is true that juristic discussion in the *Digest* of problems arising from wills overwhelmingly exceeds that devoted to intestacy, but this is hardly conclusive: the law relating to wills was more extensive and complex than the laws of intestacy.¹⁷⁹

In classical law, the order of succession to the estates of an intestate person was children, heirs-at-law other than children (such as agnates), cognates, and if there were not claimants with the previous classes, the surviving spouse was entitled to *bonorum possessio* (possession of property) of the whole or part of the estate. Under *ET* 23, the order of succession was children (including grandchildren), then followed by agnates and cognates.¹⁸⁰ That surviving spouses could inherit if there was no successful claimant among these is presupposed by *ET* 24, a provision that concerns the rights of the fisc over caducous land. Citing the precepts of ancient laws and desiring this prerogative to be universal in accordance with the will of the emperors, the provision permitted the fisc to assume ownership of property in the absence of a suitable heir, such as a surviving spouse:

In accordance with the precepts of the ancient laws, the fisc shall act at that time when neither a parent, child, grandchild, relative, kin, wife or husband can be found to succeed: provided that whenever the fisc discovers an instance that it has a right to succession, or seeks something which it has a legal right of ownership

¹⁷⁸ In all, a total of five provisions deal with the topic of intestacy and intestate succession: *ET* 23 and 24, 26, 27, 33. Intestate succession refers to the passing of all property, debts as well as assets, to the *sui heredes* specified by law, at the death of an individual with a patrimony capable of passing in this way. The law of intestacy applied when there was no operative will, which occurred if a person failed to make a will or made one which lacked legal effect (e.g., for want of proper form or heirs).

¹⁷⁹ See D. Daube, "The Preponderance of Intestacy in Rome," *Tulane Law Review* 35 (1964-65), pp. 253-62; D. Cherry, "Intestacy and the Roman Poor," *Traditio* 64 (1996), pp. 155-72.

¹⁸⁰ *ET* 23: "If someone dies intestate, let the closest in degree and title amongst the agnates and cognates of the deceased succeed, excepting that the rights of children and grandchildren must be preserved." ("Si quis intestatus mortuus fuerit, is ad eius successionem veniat, qui inter agnatos atque cognatos gradu vel titulo proximus invenitur, salvo iure filiorum ac nepotum.")

to, it shall put forth an action [to claim it] without the formality of titles or benefice; for the fisc can deservedly, and without causing injury through the oppression of another, demand for itself any property whatsoever, provided that during a proper hearing a judgment was rendered in its favour. And We desire, just as the emperors willed also, that this [property] law be universal.¹⁸¹

In keeping with this, we are told by Cassiodorus that Theoderic instructed the senator Epiphanius to reclaim for the fisc property hitherto belonging to a certain Joanna who was intestate upon her death, “since the laws have established as a precaution that caducous property is to be claimed by Our fisc.”¹⁸² But the king insisted that Epiphanius hold an inquiry into the matter: if it was determined that those who had appropriated the land had a legal basis for doing so, then their claims would be upheld.¹⁸³

¹⁸¹ *ET* 24: “Fiscus tunc agat, quando nec parentum nec filiorum nec nepotum nec agnatorum nec cognatorum nec uxoris et mariti, quae succedat, extare comperitur persona, secundum legum veterum constituta: ita ut fiscus quotiens locum successionis invenerit vel aliqua sibi competentia repetit, actionem, remota titularum vel officii praesumptione proponat, quia tunc fiscus unamquamque rem merito potest et sine oppressionis alienae iniuria vindicare, dum intercedente sententia pro ipso fuerit iudicatum. Nobis enim, sicut et principes voluerunt, ius cum privatis volumus esse commune.” The final clause of this provision is similarly expressed in *CJ* 6.22.7 of the emperors Valentinian, Valens and Gratian (371): “cum heredes instiluuntur imperator seu Augusta, ius commune cum ceteris habeant: quod et in codicillis vel fideicommissariis epistulis iure scriptis observandum erit. Et sicuti prisci legibus cautum est, imperatori quoque vel Augustae testamentum facere liceat et mutare.” Likewise, *CTh* 11.30.68 of the emperors Theodosius and Valentinian (429): “ius nobis cum privatis non dedignamur esse commune.”

¹⁸² Cass., *Var.* 5.24: “quia caduca bona fisco nostro competere legum cauta decreverunt ... substantia a diversis nullo legitimo iure suffultis usurpatione voluntaria suggeritur possideri.”

¹⁸³ Cass., *Var.* 5.24.2: “Inquire into these allegations as it does not befit Our eminence to be defrauded, for it is a weakness borne out of negligence to forfeit that which the laws require [Us] to take away. But if you find the facts different to these, by all means leave the present owners in quiet possession, since Our patrimony consists of those lands which are lawfully reclaimed from Our subjects.” (“Rogari enim in talibus causis, non fraudari principem decet, quia negligentiae vitium est praesumptiones relinquere, quas iura praecipiant amputare. Si quid autem contra reppereris, quietos dominos habere patieris, quia magis illa nostra sunt patrimonia, quae a subiectis legitime possidentur.”) For the practice of the imperial fisc in regards to seizing caducous property, the relevant legislation is *CJ* 6.51, a constitution drafted by the quaestor Tribonian in 534, and entitled *de caducis tollendis* (‘Concerning the abolition of the forfeitures of successions to the State’), which summarizes all imperial legislation on the matter since the *lex Papia Poppaea* of Augustus. On this constitution see further M. Kaplan, *Les propriétés de la couronne et de l’église dans l’empire byzantin (Ve-Vie siècles)* (Paris, 1976), p. 76; Honoré, *Tribonian*, p. 110 (who notes 46 characteristic traits of Tribonian within this constitution). Beyond summarizing the details as to how the imperial fisc was to confiscate property where the deceased had no recognized legal heir, this constitution has received a good deal of scholarly attention because of its inscription, which suggests that it was issued to both the Senates of Constantinople and Rome: *Imp. Justinianus A(ugustus) senatui urbis Constantinopolitanae et urbis Romae*. That Justinian included the Senate of Rome as the recipient of this decree is a significant one, for at this time Rome was in the hands of the Ostrogothic king Athalaric, who was recognized by the eastern emperor as the legitimate ruler of Italy. Scholars have picked up on this and suggested that the inclusion of Rome here was an attempt by Justinian to assert his authority in Italy on the eve of his Gothic war. See e.g. Johannes Sundwall, *Abhandlungen zur Geschichte*

Family property could also be transferred between parents and children in the form of a gift. In the matter of gifts, late classical law had grown fairly complicated. To effectively perform a *donatio perfecta*, various and complex rules had to be followed. To simplify the process, Constantine introduced legislation in 323 which constituted a complete reworking of the ancient Roman law of donations.¹⁸⁴ According to Constantine's law, the emperor had learned that gifts were not being made according to the correct legal procedure, and as a result many lawsuits had arisen in part due to the inconsistency of previous imperial legislation on the matter. Henceforth, gifts had to be publicly recorded, with the name of the donor, the property being given and the donor's right to that property put down in writing.¹⁸⁵ Strictly speaking, the matter became one of public law. The physical transfer and acceptance of the object or property donated had to be carried out before neighbours and other witnesses; and to eliminate instances of fraud, a record of the transaction had to be registered in the public *acta* in the presence of the provincial governor or, in his absence, of local magistrates. Concerning the conveyance of land, *ET* 51 and 52 not only take over all these provisions, but also demand that the document be signed by the donor and witnesses:¹⁸⁶

des ausgehenden Römertums (Roman History Series) (Helsinki, 1919; repr. 1975), p. 278; Stein, *Histoire du Bas-Empire*, p. 341. More recently, Evangelos Chrysos ("Justinian and the Senate of Rome under Ostrogothic Rule," *Byzantina Symmeikta* 15 (2008), pp. 33-38), has argued that the reference to the Roman Senate in the inscription was not part of the original (it was added by Krüger in his edition of the text), and that the constitution applied exclusively to the eastern empire. He takes note that the *CJ* contains no post-476 legislation issued to the Senate of Rome, and not a single one addressed to both senates at the same time.

¹⁸⁴ This is preserved in part at *CTh* 8.12.1, where it is addressed to the urban prefect Valerius Maximus. Since he was *praefectus urbi* from 319 to 323, the law is dated to probably 323. See Otto Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.* (Stuttgart, 1919), p. 88; Evans Grubbs, *Law and Family*, p. 118 n. 64. On the content of the law, see C. Dupont, "Les Donations dans les constitutions de Constantin," *RIDA* 9 (1962), pp. 291-324, esp. 292-4, 298-304; Ernst Levy, *West Roman Vulgar Law*, pp. 137-46.

¹⁸⁵ In this regard, Constantine was simply adhering to long-held practice. Since the third century the imperial chancellery and the leading jurists recognized that the public registration of a donation, or simply the documentation of it, or the support of it through the delivery of documents had become a basic feature of the process of donation. See e.g. *Dig.* 41.2.48 (Papinian); *Dig.* 6.1.77 (Ulpian); *FV* 263, 265, 268, 281, 288, 297, 314; *CJ* 4.19.18; also *CJ* 4.21.12.

¹⁸⁶ See also the *Edict* of Athalaric (Cass., *Var.* 9.18.8).

ET 51 We command that donations are to be made public under this formality: if moveable property of any value, or a slave, happens to be donated, the transaction shall be completed only upon delivery by the grantor; moreover, a record of the donation, which includes the signatures of witnesses, must be made public.¹⁸⁷

ET 52 But if anyone wishes to willingly make a gift of rural or urban estates, a record of the generosity, confirmed by the signatures of witnesses, shall be registered in the public records of the city; provided that three curials or municipal magistrates, and a *defensor civitatis* on behalf of the municipal magistrate together with three decurions or *duumviri* or *quinquennales* are present as witnesses for the drawing up of the records [of the gift]; but if these are not available, the registering of the transaction shall be fulfilled in another municipality which has these officials; or let a report of what was given be forwarded to the governor of that province.¹⁸⁸

Also in accordance with Constantine's law, *ET 53* makes this requirement regarding moveables:

"provided that the performance of the material conveyance is carried out before knowledgeable men in the neighborhood."¹⁸⁹

A possibly unintentional but impractical consequence of Constantine's law was that every gift, including occasional and petty ones, was to be registered in the public archives. The compilers, however, saw nothing impractical about Constantine's law, but they did make certain allowances that differed slightly from both Constantine's and subsequent legislation. Both Constantine and later adaptations of the law required that the record of the transaction be registered before the provincial governor or, in his absence, local magistrates. A later law of the emperor Honorius allowed the registration to take place in the presence of the defender of the people from any municipality in the event that local magistrates could not be found.¹⁹⁰ The *ET*, on the other hand, required the registration to be performed before the municipal magistrates. In

¹⁸⁷ *ET 51*: "Donationes sub hac sollemnitate praecipimus celebrari. Quod si cuiuslibet pretii res mobiles fortasse donetur, vel certe mancipium, sola traditione largientis sit perfecta donatio; quae tamen scripturae fide possit ostendi, cui testium subscriptio adiecta monstretur."

¹⁸⁸ *ET 52*: "Si vero praedium rusticum aut urbanum quisquam libero arbitrio conferre voluerit, scriptura munificentiae etiam testium subscriptionibus roborata gestis municipalibus allegetur; ita ut confectioni gestorum praesentes adhibeantur tres curiales, et magistratus, et pro magistratu defensor civitatis cum tribus curialibus aut duumviri vel quinquennales: qui si defuerint, in alia civitate, quae haec habuerit, allegationis firmitas impleatur, aut apud iudicem eiusdem provinciae, quod donatum fuerit, allegetur."

¹⁸⁹ *ET 53*: "dummodo vicinis scientibus impleatur corporalis introductionis effectus."

¹⁹⁰ *CTh* 8.12.8 (415).

ET 52 the compilers made the point that three were necessary for this – a detail which is lacking in the earlier texts. In the absence of these, the record could be registered before a *defensor civitatis* together with three decurions, *duumviri* or *quinquennales*: none of these officers are specified by Constantine's or any other subsequent law. And should these officers be lacking, the compilers similarly allowed for the witnessing to take place in another municipality that had such officers, but added that a report of the events could also be forwarded to the governor of that province. This was a minor innovation to be sure, but an innovation nonetheless; and it perhaps speaks to the limited availability of civic magistrates in the rural towns and communities of early sixth-century Italy.

Conclusions

Aspects of Roman private law, a detailed and complex subject which addressed various points of legal status and personality, property and the family, comprise the bulk of the content of the *ET*. In drawing from it, the compilers displayed a keen interest in, an ability to understand, and a desire to preserve Roman traditions and customs. While they paraphrased a great deal, the compilers adhered to long-standing rules and conventions pertaining to the legal conditions and consequences of freedom and unfreedom, aspects of private land ownership, the general system of succession and inheritance, rules over marriage and divorce, and many other features of Roman private law. At the same time, the influence of local provincial custom on Roman law is also apparent. For instance, strict prohibitions against incest, which figured prominently in imperial legislation of the late fourth and fifth centuries, were purposely overlooked: and we are told by Cassiodorus that close-kin marriages of first cousins were permitted. This is hardly evidence of a breakdown in ancient social structures or the development of a new concept of the

family,¹⁹¹ but simply a testament to the persistence of certain provincial marriage practices that had long been considered abhorrent to Roman morals and legal standards. The compilers also ignored the derogatory tone against women that is such a defining feature of Roman family law.

They also emphasized the importance of a woman's chastity (provided she was above a certain legal and social standing),¹⁹² just as Roman law had, but ignored the significance placed on divine chastity by later imperial legislation. That these sorts of omissions are indicative of a general change in social attitudes and mores toward the position of women in public and private life is certainly possible. But more than likely they are simply reflective of the realities of rural life of the smaller towns and countryside for which the *ET* was drafted; just as earlier Roman laws on the subject reflected a more sophisticated urban culture of the large cities of the Empire.¹⁹³ This is reinforced by the amount of detail the compilers devoted to such issues as abduction marriage or the selling of children, issues that were more relevant to the rural lower classes than matters of testation and inheritance, subjects which were passed over with a few very general remarks since they concerned primarily the urban, wealthier, more sophisticated classes, that is, those who had enough wealth or property that the details of the law were important to know.

Just as with Roman public law, the compilers felt at ease with most concepts of private law. While they ignored a good deal, they clearly understood those aspects of the law which they considered relevant for their own times. But with private law, they demonstrated a far greater

¹⁹¹ An argument made by Evelyne Patlagean in regards to the eastern provinces of the late Empire. See her *Pauvreté économique et pauvreté sociale à Byzance* (Paris, 1977), pp. 113-28.

¹⁹² E.g., *ET* 62: "If a widowed matron is willingly defiled by another's libidinous [slave], she has committed *stuprum*, unless she is common and low-class. If anyone has intercourse with those consenting widows who are known to practice the work of a trade or service in public, neither he nor they shall be held accountable for this offence" ("Si matrona vidua alicuius libidine volens corrupta sit, stuprum admittitur; nisi forte vilis vulgarisque sit mulier. Cum his enim viduis adquiescentibus si quis concubuerit, quas artis operam, aut ministerii laborem publice exercere constiterit, hoc crimine nec ipse nec illae teneantur obnoxii.")

¹⁹³ On the sorts of differences reflected in Roman law between urban culture and country living regarding issues of women, see Evans Grubbs, *Law and Family*, pp. 333-36.

willingness to concede to local custom than they did with public law. In adapting the original sources, they did more than just simplify them, or broaden their scope and severity: significant innovations appear, particularly in regards to the family. These innovations reflect the continued supremacy of local custom over Roman law in regulating private life in the provinces: as earlier imperial legislation documents, provincials generally followed local customs rather than Roman law when it came to questions pertaining to everyday life, even when the two traditions were at odds with each other. For the laws of Rome, in their complex style and diverse subject matter, were better-suited for life in the big cities of the Empire rather than the local communities of the countryside. In its selection and modification of the laws, the *ET* bears witness to how this continued to be the case for Italy in the early sixth century.

Chapter Five

Conclusions

A case has been put forth here that *ET* was the work of Theoderic the Ostrogoth, drawn up in the tradition of the praetor's edict of old by Roman jurists working under the authority of the office of *quaestor*. Although the circumstances surrounding its composition and promulgation are unclear, we know that at the very least it was produced sometime after 458, that is, the date of the latest novel from which it borrows. As to precisely when this took place, we have no direct information. But what evidence we do have allows for a reasonable argument to be made that the *ET* was drafted early on in Theoderic's reign, and issued perhaps as early as 500 to coincide with the king's *decennalia* celebrations in Rome.¹ In the end, while issues of authorship and dating can never be fully resolved, the conclusions reached here place the burden of proof squarely on the shoulders of those wishing to discount the *ET* as a genuine product of Theoderic's Italian administration.

With questions answered – at least to the extent that the evidence permits – as to the date of composition and identity of those who compiled it, we can turn to the *ET* as a useful historical source for understanding the nature and extent of the evolution of Roman law, legal administration, and society in the Italian peninsula from the fourth to early sixth century. According to its prologue, the purpose of the *ET* was to put an end to the most common disputes that arose between barbarians and Romans. As such, it served as a supplement to existing Roman law and custom. To underscore the point, the epilogue concludes by stating that it was the responsibility of all to adhere to the rule of law with an end to restoring order and prosperity. Significantly, despite its universal application, the *ET* is quintessentially Roman in design and content, as was the administrative apparatus responsible for delivering it. Its authority was

¹ Chapter One, pp. 37-39.

derived from imperial *lex* and *ius*, that is, the laws and customs of Rome preserved in the legislative acts of the emperors and the legal opinions of the jurists; and aside from a few references in it to barbarians, it concedes nothing to Ostrogothic legal custom, that is, the *belagines*. While it lacks many of the strict niceties of purely classical Roman law, it is in every respect Roman law. Given its straightforward style and focus on everyday matters, it is not difficult to imagine that Romans and Goths alike took equal advantage of it.

In drawing up the *ET*, the compilers had an eye to those sorts of everyday personal and commercial transactions in which Ostrogoths and Romans were likely to have a common interest. To that end, when it came to deciding what to include, they selected those subjects and concepts of Roman law and jurisprudence that were most apt for meeting the needs and understanding of those who lived and worked in the countryside, whether Roman or Goth. Not surprisingly, the sorts of problems to which the compilers devoted the majority of their attention are indicative of this kind of rural existence: the usurpation of land at the hands of powerful magnates (*ET* 10-11); the destruction of crops or trees (*ET* 151); the shortage of available manpower (*ET* 142); cattle rustling and wandering livestock (*ET* 56-58, 88); the selling of children out of extreme poverty (*ET* 94); the overworking of slaves or oxen of another (*ET* 150); shifting boundary markers (*ET* 104); and so on. Omitted were almost all laws pertaining to public offices and institutions, civic works and services, the Roman army, religion, taxation, and aspects of civic life in general, such as the organization of entertainments and games.

The *ET* thus speaks directly to the kinds of issues that mattered in Ostrogothic Italy and how they were to be dealt with. The arrival of barbarians on Italian soil created a predictable legacy of boundary disputes that had to be settled within a limited time (*ET* 10).² In an effort to

² Chapter Two, pp. 99-100; Chapter Four, pp. 208-09.

control the violent retinues of powerful warlords (disingenuously described as patrons), the forceful and unlawful seizure of property, beating people with clubs or stoning them, and setting fires were henceforth considered seditious and subject to the harshest penalties (*ET* 47, 75). In addition, this was still a society where members of the upper class could rightly expect, and lawfully demand, preferential treatment in relation to their social inferiors (e.g., *ET* 64, 75, 83, 89, 97, 111). All of these provisions of course had a basis in Roman law. But this is not to say that the compilers necessarily understood the complexities of some of the ancient concepts that they covered. One example of the erosion of understanding of a central Roman institution is what the *ET* made of *patria potestas* (*ET* 94).

Even more significant for would-be litigants in Ostrogothic Italy was the absence of an effective system of administration through which the proper and efficient adjudication of disputes could be carried out. In as much as law is about rights, obligations and penalties, it is also about procedures and the existence of a functioning judicial hierarchy. The problem for Theoderic and his successors was that the supply of skilled judges and other magistrates who could effectively uphold the law at the local level was extremely scarce. The *ET* attests to the fact that government in the provinces was in the hands of a limited number of local magistrates who lacked any real authority to deal with the sorts of serious problems addressed by the compilers. The *defensor civitatis*, for instance, once an important feature of late Roman government, was reduced to little more than a record keeper: rather than serving as a local protector and representative of the central administration, the *defensor* mostly enrolled acts in the municipal registers with the aid of the local *curia*.³

³ Chapter Three, pp. 134-36.

As for the provincial governor, an officer ideally possessed with the authority to handle serious breaches of the law and ensure that justice at the local level was fair and accessible, both the *ET* and *Variae* underscore not only the importance of the position in these respects, but also the limitations: the frequency of provisions in the *ET* and some letters of Cassiodorus that deal with some or other form of corruption, negligence or disobedience by these officers, while demonstrating the earnestness with which the central administration addressed concerns of judicial corruption and misconduct, reveals the magnitude of the problem and the government's inability to do anything about it.⁴

Through their selection of topics, the compilers displayed an ability to understand and a desire to preserve the essence of classical Roman law to a remarkable degree, even if they usually paraphrased it rather freely. Procedural rules governing criminal and civil cases, evidentiary matters pertaining to the validity of witnesses and written documents, the delivery and enforcement of the verdict, the general system of succession, rules over marriage, remarriage and divorce, the conveyance of private property, and many other aspects of Roman public and private law were transmitted, perhaps somewhat simplified, but still in easily recognizably Roman form. That this sort of conservatism was due to a lack of understanding that precluded the compilers from altering the contents of the original texts is unlikely. For innovations do occur. While most are minor and of little import, reflecting the compilers' desire to render the somewhat complex and technical language of the original texts into a more comprehensible, and therefore accessible form, others represent significant points of difference that are indicative of some of the changes taking place both within Roman law itself, and Roman society in general. In some places the compilers added to or took away from the original text to emphasize and clarify

⁴ Chapter Three, pp. 128-29, 173-79.

those aspects that were most relevant to their own times. Elsewhere, they updated the original in a more comprehensive manner. Outmoded forms of punishment such as *infamia*, exile to an island, or condemnation to wild beasts were done away with. In some cases the original penalty was lessened, and in others it was increased both in terms of severity and application. Some technical concepts of classical jurisprudence were modified or ignored altogether to reflect the influence of local custom on Roman law. And in some cases, innovations without any parallel in the Roman sources appear.

In adapting previous laws and juristic concepts, the compilers were simply adhering to tradition. For centuries, emperors, prefects and jurists adapted Roman law according to the circumstances in which it was intended to function. Constantine has been credited with the introduction of ‘non-Roman’ elements into Roman law and the ‘vulgarisation’ of classical law. While Constantine was to some extent an ‘innovator’ as his nephew Julian described him, he was more or less acknowledging practices and customs that had been in place long before his arrival on the scene. With Caracalla’s issuance of the *constitutio Antoniniana* in 212, which granted Roman citizenship to all free inhabitants of the Empire, provincial communities throughout the Empire were required to adopt and apply the laws and customs of Rome, many of which were largely alien to them. In the course of time, this Civil Law was infiltrated by elements of local custom in a process some historians refer to as ‘vulgarisation’. In turn, local customs underwent considerable change as emperors attempted to reconcile provincial practices with classical norms and conventions. By Constantine’s time, the law which in fact applied in the provinces was an admixture of Civil Law and local custom, differing from region to region and sharing little of the sophistication, complexity and technical precision that characterized purely classical Roman law from earlier centuries.

It is from this perspective that we should view the *ET* as a point within the evolutionary lifespan of Roman law: it did not mark a break from Rome's classical legal heritage, nor, more importantly, did it signify a devolvement of the exacting standards of classical Roman law and legal jurisprudence. While the compilers certainly lacked the artistic and rhetorical skills of earlier jurists, there is nothing inherently alien or inferior about their work. They steered a subtle course between the strict formalities of the classical law that would be enshrined in the legal works of Justinian's compilers as well as the demands of local custom and practice; and in so doing, they maintained a firm grasp on the classical concepts of Roman law that continued to have relevance for their own day.

Indeed, the *ET* preserves the essence of classical law to a remarkable degree. But this was not the law of the third or fourth century. It was the law as it was intended to function in the towns and countryside of Theoderic's Italy. As such, the *ET* is of intrinsic historical importance for understanding and appreciating the realities experienced by the ordinary person, barbarian or Roman, as they went about their daily life during a period of significant political and cultural upheaval. Such realities, which were no doubt harsh and brutal at times, can only be glimpsed behind the smokescreen of Roman culture offered by Cassiodorus, whose picture of Ostrogothic Italy, and in particular the reign of Theoderic, has left us with an image of a peaceful and prosperous time – an Indian summer of Roman renewal that was contrasted sharply by the winter of discontent ushered in by Justinian's wars of reconquest.

For Cassiodorus, in contrast to the preceding century that witnessed decades of rivalry between ambitious generals, greedy aristocrats, and generally incompetent emperors that culminated in the deposition of Rome's last emperor and the seizure of power by the barbarian warlord Odovacer, Theoderic's reign was a veritable golden age of peace and posterity of a kind

not experienced since the glory days of the early empire. According to Cassiodorus' *Variae*, under this barbarian "Sun King" the entire administrative structure of the Roman state was maintained to a great degree, and the traditional civilian offices continued in aristocratic Roman hands.⁵ And there is evidence that there was at least some modest revival in production, trade, and civic life during this time.⁶ We are, in fact, told, though perhaps with some exaggeration, that on one occasion Theoderic ordered the construction of a thousand ships, and that he arranged for the exportation of grain (at great expense to the state) from the ports of Campania and the upper Adriatic to relieve a severe food shortage in Liguria and Provence.⁷ We also learn from the annals of the first Gothic War that Naples was an active centre of trade and the residence of many merchants from the east, especially Jews, who urged the population to resistance during the siege with assurances that they could keep the town supplied with provisions.⁸ Some account must also be taken of Theoderic's reform of the coinage and fixing of corn prices,⁹ or the many building programmes which he undertook.¹⁰

In addition to it being a relative period of social, political and economic recovery, Cassiodorus presents Theoderic's reign as a renaissance of Roman culture, and the king himself as the savior of Rome's classical heritage – a role in which he seems to have taken particular

⁵ Wickham, *Framing the Early Middle Ages*, pp. 203-05.

⁶ In general see Federico Marazzi, "The Destinies of the Late Antique Italies," in Richard Hodges and William Bowden (eds.), *The Sixth Century. Production, Distribution and Demand* (Boston, 1998), pp. 119-159, esp. pp. 132-34.

⁷ Cass., *Var.* 5.16, 17 (construction of fleet); *Var.* 1.34; 2.26; 4.5, 7; 5.35 (ended in failure); 9.3.4, 5; 10.27 (grain transportation and distribution). On the movement of grain, on trade in general, and on the type of ships used, see the excellent discussion of Dietrich Claude, *Der Handel im westlichen Mittelmeer während des Frühmittelalters*. Abhandlungen der Akademie der Wissenschaften in Göttingen, Phil.-hist. Kl. III 144 (1985), esp. pp. 71-3; see also Lellia Ruggini, *Economia e società nella Italia annonaria* (Milan, 1960), pp. 292-4.

⁸ Proc., BG I (V) 8.41 and 10.24-26.

⁹ Cass., *Var.* 10.27; 2.26 and 12.27 (emergency measures to combat rising prices). See Ludo Maritz Hartmann, *Geschichte Italiens im Mittelalter*. Vol. 1. 2nd edn. (Gotha, 1923), 1, p. 128, n. 20; Wolfgang Hahn, *Moneta Imperii Byzantii I: Von Anastasius I bis Iustinianus I*. Denkschriften der Österreichischen Akademie der Wissenschaften in Wien, Phil.-hist. Kl. 109 (1973), pp. 77-91; id., *Moneta Imperii Byzantii II*. Ibid. 119 (1975), pp. 25-32, which contains an excellent discussion of the Ostrogothic monetary system.

¹⁰ Anon. Val. 12.71. On Theoderic's building program in general, see M.J. Johnson, "Toward a History of Theoderic's Building Program," *Dumbarton Oaks Papers* 42 (1988), pp. 73-96.

pride. For instance, shortly after he had taken control of a large portion of southern Gaul in 510, Theoderic wrote to his new Gallic subjects, describing his rule as Roman and contrasting it explicitly with the ‘barbarous’ rule of the Visigoths:

You who have been restored to it after many years should gladly obey Roman custom, for it is gratifying to return to that state from which your ancestors assuredly took their rise. And therefore, as men by God’s favour recalled to ancient liberty, clothe yourselves in the morals of the toga, cast off barbarism, throw aside savagery of the mind, for it is wrong of you, in my just times, to live by alien ways.¹¹

It cannot be doubted that Theoderic was responsible for a measure of recovery in Italy. But his reign, and especially those of his successors, must be viewed in the context of a dying or defunct empire, and relative to the harsh economic conditions that characterized much of the Italian peninsula during the first half of the sixth century. The favourable impression created by Cassiodorus’ selected missives must be weighed against the evidence of the *ET*, which suggests that Theoderic and his administration was powerless to turn back the clock and completely rid Italy of the problems that had been plaguing it for more than a century: namely, the manpower shortage on the land, the insecurity of property, the violent overbearing of the small proprietors and labourers by the great magnates, and the corruption and venality of government officials. Cassiodorus, too, gives some indication of the extent of decline and ruin. In a letter penned by the minister of propaganda, Theoderic bemoaned the ruinous state of Rome and his inability to prevent further destruction to the ancient capital:

I strive to restore all things to their original condition, the improvement of the city of Rome still binds me to a special concern; there whatever is spent on adornment is furnished for the joy of all ... Bronze moreover – no small weight of it – and soft lead, which is very vulnerable to theft, are reported to have been removed from the adornments of the public buildings, although

¹¹ Cass., *Var.* 3.17 (trans. Barnish, *Variae*, p. 54): “Libenter parendum est Romanae consuetudini, cui estis post longa tempora restituti, quia ibi regressus est gratus, ubi provectum vestros constat habuisse maiores. atque ideo in antiquam libertatem deo praestante revocati vestimini moribus togatis, exuite barbariem, abicite mentium crudelitatem, quia sub aequitate nostri temporis non vos decet vivere moribus alienis.”

their inventors dedicated them to the service of the ages...Furthermore, temples and public places which, at the request of many, I assigned for repair, have instead been given over to demolition.¹²

Although long since becoming a political and economic backwater, Rome remained a potent symbol of the vitality of Empire. Its significance was clearly not lost on Theoderic, who in 500 celebrated his *decennalia* there.¹³ But despite such reverence as this, Theoderic clearly was unable to prevent its continued deterioration.

Indeed, Theoderic restored a degree of stability and allowed normal life to resume its course following nearly a century of political unrest, but his Italy continued to be beleaguered by an acute shortage of men, resources, and problems associated with the inability of the central administration to maintain an effective presence in towns and communities at the local level. To be sure, civic life continued, as did the administrative bureaucracy that regulated it, but on a much smaller scale. That there was an overall decline in civic life in post-Roman Italy can hardly be doubted. Many towns had been in a period of decline long before Odovacer removed the enfeebled Romulus Augustulus in 476, and although his tenureship was brief (476-489), it only

¹² Cass., *Var.* 3.31: "tamen Romanae civitatis sollicitiora nos augmenta constringunt, ubi quicquid decoris impenditur, generalibus gaudiis exhibetur ... aes praeterea, non minimum pondus, et quod est facillimum direptioni, mollissimum plumbum, de ornatu moenium referuntur esse sublata, quae auctores suos saeculis consecrarunt ... templa etiam et loca publica, quae petentibus multis ad reparationem contulimus, subversioni fuisse potius mancipata." See also Cass, *Var.*, 2.35 (a letter to the senator Tancila, concerning the theft of a brazen statue from the city of Como). The *formulae* for the prefect of the watch of Rome (7.7) and Ravenna (7.8), as well as that of the count of Rome (7.13) mention the problem specifically. Such abuses were nothing new. The emperor Majorian's fourth novel, an imperial ordinance on public buildings addressed in 458 to the city of Rome's government, responded at length to these sorts of problems, including the destruction of buildings to give materials for the repair of others. Majorian lamented (trans. Pharr): "While it is pretended that the stones are necessary for public works, the beautiful structures of the ancient buildings [in particular pagan temples and shrines] are being scattered, and in order that something small may be repaired, great things are being destroyed." ("Dum necessaria public opera saxa finguntur, antiquarum aedium dissipater speciosa constructio et ut parvum aliquid reparetur, magna diruuntur.") On the re-use of public materials, see in general Bryan Ward-Perkins, *From Classical Antiquity to the Middle Ages: Urban Public Buildings in Northern and Central Italy, A.D. 300-850* (Oxford, 1984), ch. 3; J. Alchermes, "Spolia in Roman Cities of the Late Empire: Legislative Rationales and Architectural Reuse," *Dumbarton Oaks Papers* 48 (1994), pp. 167-78. On the deterioration of the monumental centre of Rome, see Marazzi, "The Last Rome," pp. 279-301; Brogiolo, "Dwellings and Settlements in Gothic Italy," p. 127.

¹³ See above, pp. 3, 38-39 (*decennalia* celebrations).

added to the misery.¹⁴ The situation was made worse in 489 when Theoderic was dispatched by the eastern emperor Zeno to remove the barbarian upstart. Several towns throughout the peninsula were devastated as a result of the four-year-long contest for power between Theoderic and Odovacer, and others were despoiled or abandoned altogether during the sixth century.¹⁵ Even the many buildings Theoderic is alleged to have built have either not been found by archaeologists, or else turn out to be nothing more than restored ancient buildings. The palaces built in Ravenna, Verona and Pavia, for instance, appear to be nothing more than mere adaptations of existing Roman structures.¹⁶ Thus, rather than an active and attentive promoter of urban renewal as some contemporary accounts make him out to be, Theoderic was, as the archaeological evidence indicates, a far more modest figure in that regard.

At the same time, much of the Roman administrative machinery that Theoderic inherited was either not fully utilized or abandoned altogether. Cassiodorus' version of a highly-differentiated administration composed of civil and military officers with clearly defined and separate functions, gave way to one where authority was exercised by a smaller number of military officers such as the *comes Gothorum* and *saio*.¹⁷ In view of these developments the *ET*

¹⁴ Even if one were inclined to believe that Odovacer and his followers were not invaders who simply seized land but rather were accommodated as guests through an allocation of tax revenue, the results could hardly have been pleasant for the Roman inhabitants. On the negative impact of Odovacer's tenureship on Italy, see Ennodius' treatment in his *Vita Epiphani*, 107 (concerning the suffering of the landowners of Liguria at the hands of the corrupt praetorian prefect Pelagius); id., *Panegyric to Theoderic*, which at several points – not surprisingly – stresses the corruption and ineptitude of Odovacer's officials and soldiers (e.g. *Pan. Th.* 23-4, 25 and 37). For a more sympathetic treatment of Odovacer's reign, see Moorhead, *Theoderic in Italy*, pp. 8-9, 29-31; and Maria Cesa, "Odoacre nelle fonti letterarie dei secoli V e VI," in Paolo Delogu (ed.), *Le invasioni barbariche nel meridione dell'impero: Visigoti, Vandali, Ostrogoti: atti del convegno svoltosi alla Casa delle culture di Consenza dal 24 al 26 luglio 1998* (Soveria Mannelli, 2001). On the edition of the *Panegyric*, see *PanTh* = *Panegyricus dictus clementissimo regi Theoderico*, ed. and trans. Christian Rohr, *Der Theoderich-Panegyricus des Ennodius. MGH Studien und Texte 12* (Hannover, 1995).

¹⁵ E.g., Cass., *Var.* 3.49 (on the deteriorating state of the city of Catana).

¹⁶ Anon. *Val.* 12.71. For the archaeological evidence, see Brogiolo, "Dwellings and Settlements in Gothic Italy," pp. 113-42, esp. pp. 114-17, 127; Christina La Rocca, "Perceptions of an Early Medieval Urban Landscape," in Peter Linehan and Janet Nelson (eds.), *The Medieval World* (London, 2001), pp. 416-31, esp. pp. 417-25; Johnson, "Toward a history," pp. 73-96.

¹⁷ Chapter Three, pp. 123-27.

takes on greater significance as a testament to the extent to which Rome's laws had evolved to reflect the sorts of changes taking place in Italy between the fourth and sixth century; and the challenges that Theoderic and his successors faced in attempting to stave off economic decline and a weakening of civic and administrative institutions.

For Theoderic, governing over the famous lands of Italy whose cities, monuments and amenities he was scarcely able to maintain, Roman law was a source of prestige and authority through which he sought to define and justify his rule. It was an ancient institution that symbolized a connection between his reign and those of other glorious emperors of the past, thereby reinforcing an ideology that his rule truly witnessed a renewal of all the hallmarks that once defined classical culture, such as law, civility, art, and philosophy.¹⁸ But more than just a symbol of a distant past and bygone culture, Roman law served as an important medium for the legal, cultural and political integration of Romans and barbarians throughout Late Antiquity. As such, it is a significant source for understanding the nature of Italy's transition from Roman province to barbarian kingdom.

¹⁸ See e.g. *Var.* 4.26, 4.33 and 9.19 for references to Gothic kings as the successors of the Roman legal heritage.

Appendix

Edict of King Theoderic

Index of Titles

- 1.) If a judge accepts money to render a false judgment
- 2.) If a judge accepts money to render a decision to the detriment of a person's status or property
- 3.) If a judge receives anything unjustifiably from provincials
- 4.) If the staff of any judge whatsoever receives anything beyond its mandate
- 5.) If a judgment is delivered against those not present
- 6.) The manner in which judgments are executed shall be the business of the staff of the judge and the judge's own sense of responsibility
- 7.) A judge shall render a true decision after the charges and proofs of each party have been examined
- 8.) No freeborn man is to be held without the authorization of a judge
- 9.) Concerning those who presume to do anything contrary to this
- 10.) One must sue the holder of property of any kind with the authorization of a judge, and await the outcome of the trial
- 11.) If a landholder is defeated in a suit, and does not return the property that has been claimed
- 12.) Concerning those who have possessed any property without interruption for thirty years
- 13.) Concerning those who accuse another with any crime
- 14.) Let no one make a criminal accusation on behalf of another
- 15.) Concerning an assailant who advances against another
- 16.) Concerning those who advance violently against another's property (an approaching aggressor)
- 17.) Concerning the abductor of a freeborn woman or virgin
- 18.) Concerning the parent or guardian of an abducted girl
- 19.) Concerning a slave who discovers that the complaint of abduction has been concealed
- 20.) The crime of abduction shall be prosecuted within a set period of time
- 21.) If anyone abducts another's *ancilla* or *originaria* with a gang
- 22.) Concerning a chief tenant knowledgeable or complicit [of the crime of abduction]
- 23.) Concerning those who die intestate
- 24.) When the fisc is obligated to act
- 25.) Each landholder is to be brought before a judge with the authority of the fisc
- 26.) Concerning intestate clerics or religious persons
- 27.) If a decurion dies intestate without a successor
- 28.) Concerning the liberty of testamentary rights
- 29.) If a testator is either illiterate or otherwise unable to provide a subscription
- 30.) Concerning forgers
- 31.) Let no one hinder another who wishes to compose a final will and testament
- 32.) Concerning barbarians who wish to lawfully compose a final will and testament
- 33.) Concerning those who can inherit from another who has died intestate
- 34.) Concerning theft, whether committed by a Roman or barbarian
- 35.) Concerning informers
- 36.) If anyone plans to contract an illegitimate marriage

- 37.) If a woman marries within a year of her husband's death
- 38.) Concerning an adulterer and an adulteress
- 39.) Anyone who offers a house so that adultery might occur
- 40.) Anyone who unknowingly makes a false allegation
- 41.) Anyone who produces or uses a forgery
- 42.) Anyone who delivers conflicting or false testimony
- 43.) No one shall transfer their actions at law to a powerful Roman or barbarian
- 44.) No Roman or barbarian is to stand as a defense lawyer or supporter in another's trial
- 45.) No one shall put titles on another's property or his own
- 46.) If anyone, upon being summoned before a judge, places titles [of ownership] on the property which he possesses as a means of defence against his [legal] opponent
- 47.) If anyone seizes estates which are designated by titles as belonging to another
- 48.) Freedmen, *originarii* or slaves are not to be heard against their patrons or the children of such patrons.
- 49.) This must also be observed concerning domestics
- 50.) Concerning hidden and secret accusations
- 51.) Concerning the publication of the donations of properties
- 52.) If anyone bequeaths a rural or urban estate
- 53.) On making a conveyance
- 54.) Marriages are not to be dissolved indiscriminately; only when certain charges are proven may couples withdraw from marriage
- 55.) A judge is obligated to hear all appeals
- 56.) Concerning the rustler of assorted animals
- 57.) If a rustler is proven to have stolen anywhere from one steed, two mares and the same number of cows, ten she-goats and five pigs
- 58.) Anyone who finds a cow, horse, or other livestock wandering about
- 59.) Anyone who forcibly defiles a freeborn virgin
- 60.) If anyone should commit *stuprum* against an unwilling widow
- 61.) If a widowed matron is defiled by another's depravity
- 62.) If a widowed matron is willingly defiled by a slave
- 63.) If another's slave or *originarius* forcibly defiles a freeborn virgin
- 64.) If anyone defiles another's virgin slave woman or *originaria*
- 65.) Whenever a freeborn man, *originarius* or slave comeslingles with a slave woman
- 66.) Whenever another's slave or a freeborn comeslingles with an *originaria*
- 67.) If another's *originarius* comeslingles with an *originaria*
- 68.) If an *originaria* flees from a freeborn man
- 69.) If anyone takes possession of a decurion, guild member or servant of the state for a period of thirty years
- 70.) If a slave should take refuge in a church
- 71.) If anyone flees to a church on account of a public debt
- 72.) On the registration of wills
- 73.) Concerning the execution of judgments
- 74.) Concerning a dishonest plaintiff
- 75.) On fighting armed men if they come violently to a property
- 76.) Concerning the restoration of the temporary possession of seized properties
- 77.) If slaves are convicted of inflicting violence

- 78.) On stealing a freeborn man
- 79.) If anyone holds a freeborn man under terms
- 80.) If anyone incites another's slave to flee
- 81.) If anyone unknowingly purchases slaves from a plunderer
- 82.) If a freeborn man is sold
- 83.) Anyone who conceals, sells or knowingly purchases a freeborn man
- 84.) Anyone who knowingly receives another's fugitive slave or *colonus*
- 85.) If anyone receives slaves that have been solicited or furtively taken by another
- 86.) Anyone who detains another's slave at his residence against the wishes of the owner
- 87.) [Concerning] a slave in flight
- 88.) If a cattle rustler, seducer (of slaves) or thief dies before he can be prosecuted
- 89.) If anyone assembles an armed force on his own behalf to incite terror
- 90.) If anyone changes another's testament, codicil, records, accounts, transcripts of registered instruments, documents, bonds or letters for the purposes of fraud
- 91.) Anyone who bribes witnesses to commit perjury
- 92.) If a betrothed woman, upon being persuaded by the man with whom she is betrothed, should take up residence with him before she has formally been given away in marriage
- 93.) A father cannot be compelled to give away his child unwillingly to another in marriage
- 94.) Parents who are compelled by necessity to sell their children
- 95.) And it shall not be permitted for parents to give away their children as a pledge
- 96.) If those who live as free are claimed as slaves
- 97.) Anyone who sets fire to a house, villa or dwelling
- 98.) [Concerning] a fire that a slave or *colonus* heedlessly sets in his [owner's] field
- 99.) Anyone who kills a man or urges that he be killed without a hearing before a judge
- 100.) Another's slave cannot be tortured [to testify] to the detriment of another
- 101.) Anyone who purchases a slave in order to prevent him from giving evidence under torture against him
- 102.) If a slave is freed so that he is not tortured
- 103.) A crime must be prosecuted in the place where it is committed
- 104.) Concerning boundaries that have been dug up or trees marking boundaries
- 105.) Boundaries between two estates must be observed
- 106.) Concerning a suit that is completed with oaths
- 107.) Concerning the instigator of sedition
- 108.) Concerning those who make a sacrifice during a pagan ritual
- 109.) If a slave or *colonus* should seize anything violently without the knowledge of his owner
- 110.) Whoever destroys a grave
- 111.) If anyone buries corpses within the city of Rome
- 112.) Concerning the possessions of those condemned for any crime
- 113.) If a condemned curial should leave behind children
- 114.) If clerics or any others should release someone condemned for a crime
- 115.) Anyone who steals public or fiscal money
- 116.) If anyone should receive and keep plunder from a thief
- 117.) If a slave steals from [another] or should otherwise cause another to suffer a loss
- 118.) If an owner is sued for the theft committed by his slave
- 119.) If anything is lost from a tavern, ship or inn
- 120.) If a slave commits theft and is manumitted

- 121.) If a creditor lends money to another's procurator, overseer, *colonus*, chief tenant or slave without the consent or knowledge of the owner
- 122.) If anyone transfers *cautiones* of their debtors to a powerful person for the purposes of collection
- 123.) Concerning the acquisition of pledges
- 124.) If a creditor should forcibly seize property from his debtor that is not pledged to him
- 125.) If anyone should remove other individuals from churches, that is religious places
- 126.) No decurion, public registrar or tax receiver shall issue notices of assignment within a church
- 127.) No one may be unwillingly assigned to a third party [with respect to a debt]
- 128.) If a son *in potestate*, or a slave or *colonus* are not defended by the father or owner against any accusation
- 129.) Anyone who obtains something through deceit or theft
- 130.) If anything is promised so that a thief may be apprehended
- 131.) Concerning those who have been convicted or condemned in court on a charge of debt
- 132.) [Concerning] a landholder who is summoned to appear in court
- 133.) In the event that a woman promises by way of a guarantee that she will return another's debt
- 134.) Anyone who extorts from his debtor anything more than the one percent allowed by law
- 135.) If a guarantor should acquire possession of the pledged property of a debtor on whose behalf he has assumed the debt
- 136.) If anyone should acquire a portion of his property without knowing that it already belongs to another landholder
- 137.) If anyone should erect an edifice on another's land
- 138.) If the same property is purchased by different people
- 139.) The vendor shall observe the jurisdiction [of his buyer]
- 140.) [A vendor] who undergoes a judicial challenge concerning the purchase of property
- 141.) Anyone who sells a runaway slave to an unknowing party
- 142.) An owner shall be permitted to transfer his slaves, even *originarii*, to other regions, or do whatever he wants [in regards to them]
- 143.) Concerning the preservation of the privileges of Jews
- 144.) On recording the sureties of tax receipts
- 145.) If a barbarian should refuse to appear in court after being summoned for a third time
- 146.) Concerning stolen produce
- 147.) Concerning sales exercised in good faith
- 148.) Concerning slaves or *coloni* returned from the enemy
- 149.) Concerning public measure and weight
- 150.) No one may exercise control over another's *rustic* or cow
- 151.) Concerning a damaged crop or felled tree
- 152.) If a person's slave is killed by someone else
- 153.) A wife must not be prosecuted in the place of her husband
- 154.) Concerning the Lord's Day and the days of Easter

Prologue¹

Many complaints have come to Our attention that some people within the provinces are trampling upon the rules of law. Even though the authority of the laws can in no way be used to defend unjust actions, however, We, taking into consideration the [desired] peace of the state, and having before Our eyes the irregularities that can often occur, command that the present edicts be posted for ending matters of this sort,² so that both barbarians and Romans, while maintaining the respect due to the public laws and dutifully preserving in their entirety the rights of everyone, may clearly know what they are obligated to follow concerning the items specified in the present edicts.

1.) If a judge accepts money to render a false judgment³

In the first place We have decreed that if a judge accepts money to pass judgment which imperils the life or civil status of an innocent person against the ordinances and provisions of the public law, let him be subjected to a capital penalty.

2.) If a judge accepts money to render a decision to the detriment of a person's status or property⁴

If a judge accepts money in order to render a decision to the detriment of a person's status or property, and is convicted of this crime in a fair hearing, he shall pay fourfold⁵ the amount which he previously accepted in his eagerness for corrupt gain, and it will redound to the benefit of that person against whom he who was bribed is shown to have rendered judgment.

¹ The *Edict* of Athalaric (*Var.* 9.18) begins in much the same way, noting in typical legal rhetoric that the *comitatus* has long been inundated with reports of the laws being flouted (trans. Barnish, *Variae*, p. 116): "For a long while, now, We have received reports from all parts that certain people, having spurned the laws [*civilitate despecta*], are living in bestial savagery." ("diu est, quod diversorum querellae nostris auribus crebris susurrantibus insonarunt quosdam civilitate despecta affectare vivere beluina saevitia...") In the following letter (*Var.* 9.19), Cassiodorus has Athalaric confirm that the existing law (*residuum ius*), perhaps a reference to Theoderic's edict (described in similar fashion by the Anonymous Valesianus as '*ius*'), is to be confirmed rather than abrogated by his edict: "Let this revered edict seem not to diminish from the existing law, but rather strengthen it." ("...quae [referring to his edict] custodita residuum ius non debilitare, sed potius corroborare videantur.")

² Similarly, in a letter (*Var.* 9.19) addressed to the Senate of Rome announcing the promulgation of his edict, Athalaric instructs the praetorian prefect to have the prefect of the city post the edict in the most conspicuous places for a period of thirty days (trans. Barnish, *Variae*, p. 121): "They are to be read out in the splendor of your assembly, and the Urban Prefect shall have them solemnly published for thirty days in the most frequented places, so that my good order [*civilitas*] may be recognized, and men of aggressive character deprived of hope." ("Haec in coetus vestri splendore recitentur et per triginta dies praefectus urbis locis celeberrimis faciat sollemni more proponi, ut nostra civilitate recognita spes truculentis moribus auferatur.")

³ Similarly *PS* 5.23.10; *Dig.* 48.8.1.1 in fin (Marcian. lib. 14 *Inst.*).

⁴ Similarly *PS* 5.23.11 [10]. On the subject of judicial corruption in Late Antiquity see Jill Harries, *Law and Empire in Late Antiquity*, ch. 8; Michael H. Hoeflich, "Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages," pp. 79-104.

⁵ By the late fourth century the fourfold penalty had become standard for the crime of theft (*furtum*), whether manifest or not. See Ernst Levy, *Weströmisches Vulgarrecht*, pp. 36 and following.

3.) If a judge receives anything unjustifiably from provincials⁶

A judge that unjustifiably takes anything from provincials shall lose the office which he abused, and shall return at least fourfold the amount to those from whom clearly something was unjustifiably taken; and if the judge has died, let this penalty be sought from his heirs.

4.) If the staff of any judge whatsoever receives anything beyond its mandate⁷

Let the staff of any judge whatsoever that has exacted anything beyond what it has been mandated be compelled, under the penalty of being beaten, to pay fourfold to those from whom property was shown clearly to have been taken.

5.) If a judgment is delivered against those not present⁸

A judgment delivered against parties not present shall be of no consequence, unless it is shown to have been rendered against an individual who, despite being summoned and formally called upon for the third time by judicial directives,⁹ has refused to appear [in court].

6.) The manner in which judgments are executed shall be the business of the staff of the judge and the judge's own sense of responsibility¹⁰

It is the business of the judge's staff and the judge's own sense of responsibility to bring to a conclusion with a verdict issued in writing suits tried before them; and let them order the judgment to be executed.

7.) A judge shall render a true decision after the charges and proofs of each party have been examined

When the claims and proofs of each party have been examined, a judge must render a decision only on that which he perceives to be in accordance with justice and law.

⁶ *CTh* 9.27.3.

⁷ Similarly *CTh* 9.27.3.

⁸ *PS* 5. 5a.6; similarly *CJ* 7.43.9; *Dig.* 49.8.1, 3 (Macer. lib. 2 *de appellat.*). See also *Dig.* 48.19.5 pr. (Ulp. lib. 10 *de off. procons.*), the key Roman text on contumacy that is based on a rescript of Trajan. According to the law, the accused, *reus*, must not be condemned in his absence (but it does not preclude any process from taking place). Second, no one is to be condemned merely on suspicion. Third, where the guilty is deliberately absent, judgment is to be rendered against him as it would in a civil case. Penalties that could be imposed on the contumacious absentee could include a fine, loss of status/reputation, and in some cases exile (*relegatio*); and for crimes where the punishment was severe, such as condemnation to the mines or death, no reprieve would be given. There is simply no way of telling how prevalent the issue of contumacy was in Late Antiquity. That courts would prefer to levy fines, which could be collected relatively easily from the auctioning off of household goods left behind by the contumacious individual, rather than spend the time and effort in tracking down such individuals is likely. On the criminal and civil context of the Roman law of contumacy see Lucia Fanizza, *L'Assenza dell'Accusato nei Processi di Età Imperiale*, *Studi Juridica* 85 (Rome, 1992).

⁹ These are *edicta peremptoria* issued by judges.

¹⁰ Similarly *CTh* 4.17.1; *CJ* 7.44.

8.) No freeborn man is to be held without the authorization of a judge

Without the authorization¹¹ of a judge exercising the appropriate jurisdiction, no freeborn man shall endure the injustice of detention, or be delivered for judgment or be held in confinement in a private place on account of the presumption of anyone at all.

9.) Concerning those who presume to do anything contrary to this

But if anyone has committed any of those offences, let him have no doubt that he shall be arrested and charged with inflicting violence – a capital offence.

10.) One must sue the landholder of any type with the authorization of a judge, and await the outcome of the trial¹²

We decree that any landholder¹³ whatsoever is to be sued by use of a judicial summons, and the outcome of a proper trial is always to be awaited. And if anyone evicts any holder whatsoever from his property, let him also be deprived of the impartial right to sue for such presumption; let him of course restore the property which he seized and also pay twice the property's income¹⁴ for his insolence. And if he has taken possession of property to which he had no legal right at all, let him suffer this penalty: that he both return to its owner the property, along with its income, in the same condition as it was when it was seized; and let him be compelled to pay the value of the property he seized to the fisc. We command all those judges, appointed in the provinces¹⁵ or in

¹¹ Since the fourth century the use of written documents was a widespread (and increasing) phenomenon. *Praeceptum* here could be referring to an oral command, or as is more likely a document. On this subject see Jill Harries, *Law and Empire in Late Antiquity*, p. 108.

¹² *CTh* 4.22.3; similarly *CJ* 8.4.7; *Nov. Val.* 8. In similar vein is Cass, *Var.* 9.18.1 of the *Edict* of Athalaric (trans. Barnish, *Variae*, p. 117): “By the severity of the laws and my own anger, I condemn that chief poison of the human race, the seizure of property [*pervasio*], under which civil order [*civilitas*] can be neither claimed nor maintained. I decree that the law of the divine Valentinian (*Nov. Val.* 8 [440]; not, as Mommsen suggested, *CTh* 4.22.3 [389]), long seriously neglected shall rouse itself against those who despise legal process, and, in person or by their servants, dare to expel the owner and violently occupy estates in town or country. Nor do I intend any of its severity to be abated by abhorrent relaxation. In addition, if any free man is too poor to satisfy the law confirmed above, he is immediately to submit to the punishment of exile, since he who knows himself unable to undergo the penalty in another manner should pay the more heed to the public laws.” (“*Primam humano generi noxiam pervasionem, sub qua nec dici potest civilitas nec haberi, severitate legum et nostra indignatione damnatus statuentes, ut sanctio divi Valentiniani adversum eos diu pessime neglecta consurgat, qui praedia urbana vel rustica despecto iuris ordine per se suosque praesumpserint expulso possessore violenter intrare. nec aliquid de eius districtione detestabili volumus temperatione mitigari, insuper addentes ut, si quis ingenuorum ad satisfaciendum legi superius definitae idoneus non habetur, deportationis protinus subiaceat ultioni, quia plus debuit cogitare iura publica, qui se noverat alibi non posse sustinere vindictam.*”) For examples of specific cases in the *Variae*: 3.20; 4.10; 8.18. The far more lenient punishment proscribed in *Var.* 3.20 is perhaps indicative of the status of the accused in the case, the praetorian prefect Faustus. Similarly, *Var.* 4.39 and 5.12, where the accused is none other than Theoderic's own nephew.

¹³ Landholder (*possessor*): the owner or possessor of a landholding. During the Empire great landholders were capable of exercising a tremendous amount of authority in direct defiance of the central authority, either by defying the laws or evading them through connivance or collusion of the corrupt bureaucracy. On this subject see Chapter 3. Further references in the *ET* to *possessors*: cc. 11, 25, 132, 136, 144.

¹⁴ *Fructus*: in Roman law the term comprises primarily the natural produce of fields and gardens, animals and any other proceeds obtained from the property.

¹⁵ Province (*provincia*): an administrative and judicial district that was under the control of a governor. At the basis of the administrative organization of the Empire lay the division into prefectures, dioceses, provinces and

the Venerable City, and their staffs, to be guardians of this just and lawful decree,¹⁶ in such a manner that if there is any reason they should think themselves incapable of exacting the penalty referred to above, they shall send their report to Our bureaux [*nostra scrinia*]¹⁷ so that, if reason demands it, the penalty may be exacted (*vindicetur*)¹⁸ more strictly by Us.

11.) If a landholder is defeated in a suit, and does not return the property that has been claimed¹⁹

But if a landholder is defeated in a suit and does not return the property that was claimed, and as an outcome of the trial a judgment has been delivered against him in accordance with the laws, he shall pay the costs of the litigation and living expenses incurred from the time he was summoned by judicial authority and gave his reply [to the claim]. Let this remedy prevent anyone from being tempted to go to court with a frivolous case.²⁰

12.) Concerning those who have possessed any property without interruption for thirty years²¹

Anyone who is proven to be in possession of any property without interruption for thirty years shall be subject to no judicial challenge at all, whether on the part of a private party or the state. Moreover, We decree that the periods [of possession] of a previous holder, or the holder before that, must by law be [calculated] in favour of such a possessor. We add that if a suit has been brought within thirty years, and the end of the thirty years comes about before the suit is concluded, let that end the suit without any further ado; for We believe it is more than sufficient for anyone at all both to institute proceedings properly and bring them to completion within thirty years either through the judgment of a public court or the decision of private arbitration. There is this restriction: the exemptions granted by ancient and recent laws with regard to wards under puberty are to be preserved, and with regard to those persons who lawfully initiate their cases twenty-five and thirty years after a legal action could be taken. In this instance We approve the privilege of a five year extension as added in a recent law.²²

municipalities. At the end of the fourth century there were thousands of municipalities scattered throughout 120 provinces. These were divided into fourteen dioceses that formed the four prefectures of Gaul, Italy, Illyricum and the Orient. For the composition of Theoderic's Italy see Chapter One, p. 18 n. 3.

¹⁶ Decree (*decretum*): a judicial decision rendered by any judge, including the emperor.

¹⁷ That is, the offices of the palace secretariat, the *magister officiorum*. See further Chapter One, pp. 41-43; Jill Harries, "The Roman Imperial Quaestor from Constantine to Theodosius II," pp. 148-72, esp. 159.

¹⁸ Interesting here is the occurrence of the term *vindicetur*. In classical law *vindicatio* denoted a lawsuit to recover something which one already owned but did not possess at that particular time. Generally speaking, in post-classical law the term was used much more freely in the sense to 'acquire' or 'assert ownership rights', irrespective of whether one had already owned the property and whether one now actually possessed it or not. In *ET* 70, *vindicare* is even qualified to mean to retain as owner. The model *CTh* 9.45.3 has *revocentur*.

¹⁹ *CTh* 4.22.3.

²⁰ See below c. 74.

²¹ *CTh* 4.14.1; *Nov. Val.* 35.13. For a specific case involving the thirty year rule: Cass., *Var.* 1.18 (cited and discussed in Chapter Four). On another occasion Theoderic deals with a case in which the church possessed a house in Rome (Cass., *Var.* 3.45.1): "per annorum longa curricula ... quieto iure ... possedissee et in usus alios transtulisse securitate domini."

²² The recent law referred to here is a *novel* of the emperor Valentinian of 452 (*Nov. Val.* 35).

13.) Concerning those who accuse another with any crime²³

Anyone who considers accusing another with any crime, let him not be heard first, nor let anything concerning the case be judged, unless he undertakes the bond of a preliminary inscription, and guarantees the following before a judge exercising the appropriate jurisdiction: that if he does not prove what he claims, he will suffer a similar penalty which the accused, when convicted according to law, can receive. And let both the accused and accuser be held in similar custody until the outcome of the trial has been reached; unless either the charges are minor, in which cases a guarantor must be produced, or the accused is sufficiently noble²⁴ or of distinguished enough honour that he ought to be entrusted to his rank.

14.) Let no one make a criminal accusation on behalf of another²⁵

Let no one make a criminal accusation on behalf of another, since We judge it improper that someone should prosecute in the interests or wishes of another under the pretext of a criminal accusation.²⁶

15.) Concerning an assailant who advances against another²⁷

Let the action of one who with a weapon repels an assailant advancing against him not be considered homicide, since someone defending himself is considered in no way to have committed an offence.

²³ *CTh* 9.1.11; 9.1.19.

²⁴ *Nobilis*: it occurs in one other instance – c. 59 (on the forcible defilement of a freeborn virgin). It is impossible to define the nobles in precise terms. There are, of course, certain general features of the nobility, and certain defined groups who belonged to it, but no concise, formal statement of what identified the *nobilior* can be achieved. That some combination of social, political and economic factors, which can be distinguished only in the broadest terms, served as the basis of decision is evident. To Cassiodorus, *nobilitas* was a very vague concept, based on wealth, power and general eminence rather than ancestry. But more than anything else, membership of the aristocracy was defined by the holding of imperial offices and dignities, and aristocrats were in general synonymous with the governing elite, the *optimates*, rather than a cohesive nobility based on its high birth. Procopius' war narrative consistently uses three terms to designate an inner elite of the Gothic army that were responsible for making important policy decisions: *aristoi* ("the best"), *dokimoi* ("the notable"), and *logimoi* ("the worthy"). These three terms at least confirm the existence of a broader elite, what we may identify as nobility, among the Ostrogothic army. For specific references: Procopius, *Wars*, 5.4.13 (*logimoi*); 6.1.36; 6.20.14; 7.18.26; 8.26.4 (*dokimoi*); 6.8.9; 7.1.46 (*aristoi*). See further Peter Heather, "*Gens and Regnum Among the Ostrogoths*," pp. 96-8; id., "Merely an Ideology? – Gothic Identity in Ostrogothic Italy," pp. 42, 44, 45, 50.

²⁵ *CTh* 9.1.15.

²⁶ The compilers ignored as unnecessary the requirement in the original (*CTh* 9.1.15) that this did not apply to instances where an individual witnessed the unlawful flogging of an innocent man at the hands of a judge (and the subsequent covering up by his office staff). In all such instances, an action could be brought forward by a third party.

²⁷ *CJ* 9.16.2; similarly 9.16.3(4).

16.) Concerning those who advance violently against another's property (an approaching aggressor)²⁸

If anyone gathers a large band and attacks another's property, and he or someone from that band should happen to be killed as the attack is being repulsed, let the person who through necessity committed this act be considered free from the fear of punishment.

17.) Concerning the abductor (*raptor*) of a freeborn woman or virgin²⁹

We decree, in accordance with established custom, that an abductor of a freeborn woman or virgin, together with his accomplices or assistants, shall be executed once his crimes have been proven; if the abducted consents to her abductor, she, too, shall be killed.

18.) Concerning the parent or guardian of an abducted girl³⁰

If perhaps the parents or guardian³¹ of the abducted (*raptā*) girl neglect to prosecute and take legal measures against the guilty party of such a deed, by making an illicit pact concerning this crime, they shall suffer the penalty of exile.

19.) Concerning a slave who discovers that the complaint of abduction (*raptus*) has been concealed³²

If a slave learns that a complaint of abduction (*raptus*) has been concealed by his owners and the crime passed over by connivance, and reports this to the courts, he shall be freed.

20.) Within what period of time the crime of abduction is to be prosecuted³³

Let it be permitted for all to make an accusation of abduction (*raptus*) within a period of five years, but after this period let no-one initiate an investigation of this crime, even if it is shown that a legal action could have been brought forward within the period of time prescribed above: particularly since all the children from this marriage [which has been contracted by the crime of abduction] are protected both by the authority and privilege of legitimacy after a period of five years has passed.

²⁸ Similarly *CTh* 9.14.2. In the analogous text there are two specific references made to armed soldiers. That the compilers ignore this point could perhaps be taken as an indication of their reluctance to make such an explicit association, as soldiering at this time was an occupation exclusively reserved for the Goths.

²⁹ *CTh* 9.24.1.

³⁰ *CTh* 9.24.1.

³¹ Curator (*curator*): in Roman law the legal guardian of a person between the ages of puberty and twenty-five years old; also of other persons who were deemed mentally or physically incompetent to manage their own affairs.

³² *CTh* 9.24.1.

³³ *CTh* 9.24.3.

21.) If anyone abducts another's *ancilla* or *originaria* with a gang³⁴

If anyone violently abducts another's *ancilla* or *originaria*³⁵ with a gang, should he be of freeborn status let him be punished with that penalty reserved for an abductor,³⁶ since he has committed the crime of violence; should he be a slave or *colonus*, and has committed such an act willingly, let him be punished in the same manner.³⁷

22.) Concerning a knowledgeable or complicit chief tenant³⁸

If anyone commits this deed [abduction] with the knowledge, instruction, complicity or permission of a chief tenant,³⁹ the chief tenant himself shall be punished just as if he was guilty of the crime. And if someone perpetrates this crime with the knowledge or bidding of an owner, the owner shall forfeit forthwith, to the benefit of the fisc, that property from where the abductor has fled.

23.) Concerning those who die intestate

If someone dies intestate, let the closest in degree and title amongst the agnates⁴⁰ and cognates⁴¹ of the deceased succeed, excepting that the rights of children and grandchildren must be preserved.

24.) When the fisc is obligated to act⁴²

In accordance with the precepts of the ancient laws, the fisc shall act at that time when neither a parent, child, grandchild, relative, kin, wife or husband can be found to succeed: provided that

³⁴ Similarly *CJ* 9.13.1.

³⁵ *Originaria/originarius*: designates the status of ignoble birth and can be used interchangeably with *colonus* to denote a person of low (free) status. For further references in the *ET*: cc. 48, 56, 63, 64, 65, 66, 67, 68 80, 97, 142. For further discussion see Chapter Two, pp. 108-112.

³⁶ *ET* 17 (a capital offence).

³⁷ For a discussion of this law and its history, see Adolf Berger, *Encyclopedic Dictionary of Roman Law*, vol. 43, part 2 (Philadelphia, 1953), p. 376.

³⁸ Similarly *CJ* 9.13.1.

³⁹ Chief tenant (*conductor*): was a leaseholder or a lessee of a large landholding, who divided it into smaller landholdings which he sublet to small farmers, chiefly *coloni*.

⁴⁰ Everyone who was subject to the authority of *paterfamilias* was related to him and to one another through a relationship known as *agnatio*. Even after the death of the *paterfamilias* agnates remained in this relationship. The agnatic system had ancient origins, and remained the basis of family legal relationships for most of Rome's history. Being an agnate had important implications in the law, especially in regards to rights and obligations concerning inheritance and guardianship. Hence, it was of vital importance to know how the agnatic relationship broke down. In the later empire greater emphasis was accorded cognatic relationships (i.e., those based on blood) in part no doubt because of the artificiality of the agnatic relationship. On the agnatic system in Roman law see Borkowski, *Textbook on Roman Law*, p. 112.

⁴¹ Cognate (*cognatus*): a relative related by blood kinship, either through males or females; sometimes related through females only, as contrasted with agnates who were related exclusively through males.

⁴² Similarly *CTh* 5.1.9. By Caracalla's time, *caduca* were going into the imperial fisc rather than the *aerarium*, and Caracalla also apparently abolished the right of all but the closest relatives (within three degrees of kinship) to claim *caduca*. With the transfer of *caduca* from the *aerarium* to the *fiscus*, an *advocatus fisci* was created who could look out for losses to the imperial treasury. For the history: see Riccardo Astolfi, *La Lex Iulia et Papia*, 2nd edn. (Padua, 1986), pp. 250-4; W.W. Buckland, *A Textbook of Roman Law*, pp. 319-20; Evans Grubbs, *Law and Family*, pp. 109-10. For a specific reference in our sources involving caducous property, see Cass., *Var.* 5.24.

whenever the fisc discovers an instance that it has a right to succession, or seeks something which it has a legal right of ownership to, it shall put forth an action [to claim it] without the formality of titles or benefice; for the fisc can deservedly, and without causing injury through the oppression of another, demand for itself any property whatsoever, provided that during a proper hearing a judgment was rendered in its favour. And We desire, just as the emperors willed also, that this [property] law be universal.

25.) Disputes involving a landholder and the fisc must be settled before a judge⁴³

We decree that when the possession of a landholder is subject to petition by the fisc, the case must be settled before a judge exercising appropriate jurisdiction.

26.) Concerning intestate clerics or religious persons⁴⁴

We prescribe that clerics or religious persons who become intestate whenever a lawful successor has died are to bequeath their belongings to their church in accordance with the laws.

27.) If a curial dies intestate without a successor⁴⁵

If a curial⁴⁶ dies intestate without a legally recognized successor, let his municipal council (*curia*) succeed; the fisc is excluded from making a claim.

28.) Concerning the liberty of testamentary rights⁴⁷

We grant the universal right to make a will to all whom the laws permit to do so:⁴⁸ provided that seven or five witnesses who are freeborn and of adult age shall at his request and at the same time subscribe the document in the presence of the testator.

⁴³ *ET* 25 upholds the right of private individuals in regards to claims of the fisc over caducous land, to receive a hearing before a judge exercising appropriate authority. However, it presupposes the entire issue of caducous land, which is the basis of the analogous texts – two rescripts of the emperor Constantius (*CTh* 10.10.27, 30-31[421, 422]) that outline in detail how the matter is to be carried out.

⁴⁴ *CTh* 5.3.1.

⁴⁵ *CTh* 5.2.1.

⁴⁶ Curial (*curialis*): originally a member of a municipality whose property and wealth made him eligible to serve as a decurion and as a municipal magistrate. During the Republic and early Empire, municipalities enjoyed a large measure of freedom, as autonomous, self-governing units. But in the later Empire, with the decline of municipalities and their loss of independence, the curial office became primarily a tool of the central government for its administration of the municipalities, for the collection of taxes and the enforcement of various compulsory public services such as the maintenance of the public post by supplying animals and provisions, and other onerous and often ruinous duties. They were compelled to serve without remuneration, at great personal inconvenience, and at such great personal expense that as a class they were finally wiped out by these crushing burdens. On the decline of the decurion in general, see: A.H.M. Jones, *LRE*, pp. 737-57 and id., “The Caste System in the Later Roman Empire,” in Peter Brunt (ed.), *The Roman Economy* (Oxford, 1974), pp. 396-418, esp. pp. 397-8 and 413-16; Meyer Reinhold, “Usurpation of Status and Status Symbols in the Roman Empire,” *Historia* 20 (1971), pp. 275-302, esp. pp. 299-301; Geza Alföldy, *The Social History of Rome*, trans. David Braund and Frank Pollock (Baltimore, 1988), pp. 201-2; Ramsey MacMullen, *Corruption and the Decline of Rome* (New Haven, Conn., 1988), pp. 46-9; J.H.W.G. Liebeschuetz, *The Decline and Fall of the Roman City* (Oxford, 2003), p. 104. For further references in the *ET*: cc. 69, 113, 126. See also below n. 89.

⁴⁷ *CTh* 4.4.1, 3; *CJ* 6.23.9; *Nov. Th.* 16.2; similarly *Nov. Val.* 21.1.3-4.

29.) If a testator is either illiterate or otherwise unable to provide a subscription⁴⁹

If a testator is unable to provide his subscription because he is either illiterate or gravely ill, then there shall be summoned on his behalf an eighth witness whose credibility cannot be challenged in any way. But let witnesses, and particularly the testator himself, know that if, under examination [of the document] anything should be proven false, they shall not be able to avoid the punishment which is stipulated by the authority of the laws concerning forgers.

30.) Concerning forgers⁵⁰

Moreover, let an appointed heir, legatee or freedman⁵¹ know that if anything of this sort is attempted through their complicity or knowledge, not only shall they be deprived of the very profit and income of that testamentary provision, but they shall not be able to avoid the penalty of forgery.⁵² Anyone who makes an effort or applies himself to drafting such testaments will be guilty of this offence, since We wish that the desire of the dead to remain unimpeded, and nothing should be appropriated for another's benefit because of a difference of opinion [concerning the validity of the document].

31.) Let no one contradict another who wants to make a will

Let no one deter or contradict another who wants to make a will, or witnesses [to such a document], under any pretense: this We uphold by denying [the ability to initiate] a legal action to a contradictor even if he is the heir.

32.) Concerning barbarians who wish to make a lawful will⁵³

We grant the freedom of making wills to barbarians who are known to have performed military service for the state, in any way they wish and are able, whether they are at home or at a military camp.⁵⁴

⁴⁸ This provision fails to specify the particular grounds for establishing the capacity of a testator, referring only to the *leges* which have already done so. For discussion on these *leges*, see above, p. 237 n. 172.

⁴⁹ *Nov. Th.* 16.3.

⁵⁰ Similarly *Dig.* 48.10.6 pr. (African. lib. 3 quaest.).

⁵¹ Freedman (*libertus*): a person who has been legally manumitted from slavery. Their manumitters became their patrons, to whom the freedmen and freedwomen owed many obligations, such as services and reverential obedience. The relationship between patron (or patroness) and freedman was one of the most interesting and arcane areas of Roman civil law. For a discussion see J.A. Crook in *Law and Life of Rome* (Ithaca, N.Y., 1967), who describes (p. 50) freedmen as “the nearest thing Rome ever had to a middle class.” Freedom could be granted in a will, either as a direct legacy to the slave, or by way of a trust imposed on the heir or a legatee to manumit him. The most common form of manumission was by will (hence the specific reference to freedmen in the provision here). See Borkowski, *Textbook on Roman Law*, pp. 96-100.

⁵² *ET* 41.

⁵³ Similarly *Dig.* 29.1.1 pr. (Ulp. lib. 45 *ad Edict.*).

⁵⁴ The reference to barbarians at home or stationed in military camps is a differentiation between retired and active soldiers. In one of his letters (*Var.* 5.29), Cassiodorus refers specifically to a case involving a retired Gothic soldier, Anduit, who complains that his status entitled him to certain rights. In other words, Goths retained their *de iure* status throughout their lives, and not just when they were part of the army. But as in the late empire, function was an attribute of heredity and caste; functional groups were defined more broadly than just their serving members. Descendants of the clergy, for instance, whether practicing clerics or not, could claim ecclesiastical jurisdiction. The Goths as a whole were supposed to constitute a military caste. And just as the *Variae* regards a *Gothus* as a tax-

33.) Concerning those who can inherit from another who has died intestate⁵⁵

Anyone who expects an inheritance from another who has died intestate, should he have prevented the testator from making a will as he wished, let his inheritance be confiscated just as if he was unworthy (*indignus*).

34.) Concerning theft, whether committed by a Roman or Barbarian

Let no one, whether Roman or barbarian, obtain another's property which (if he acquires it through theft) he will be unable to return, and does not think he will return together with its income. Our previous edicts above ratify this with an end to preserving the law.

35.) Concerning informers⁵⁶

Anyone who comes forth as an informer⁵⁷ to do [what he thinks] necessary as though under the pretext of the public interest, whom nevertheless We affirm We utterly curse, shall be prohibited in accordance with the laws from being heard during a suit, although he may even be reporting factual events; nevertheless, if upon being interrogated during the proceedings he is unable to prove those things which he conveyed to public ears, let him be consumed by flames.

36.) If anyone plans to contract an illegitimate marriage⁵⁸

If anyone plans to contract an illegitimate marriage, let him not escape the thorough censure of the laws; he shall know that he has neither a just marriage nor legitimate children.

37.) If a woman marries within a year of her husband's death⁵⁹

No woman shall marry for a second time within a year of her husband's death; and she shall not associate herself secretly with the man to whom she shall be married after a year's time; for, in

collecting soldier whose role it was to serve the state, so, too, does the provision here follow this functional division. On the soldier's will, see W.W. Buckland, *A Manual of Roman Private Law* (Cambridge, 1925), p. 224; Burns, *History of the Ostrogoths*, p. 127. On wills and will-making in Roman law in general, see Ulrich Nonn, "Merowingische Testamente: Studien zum Fortleben einer römischen Urkundenform in Frankreich," *Archiv für Diplomatik* 18 (1972), pp. 14-15.

⁵⁵ *PS* 5.12.2; similarly *Dig.* 29.6.1 pr. (Ulp. lib. 48 *ad Edict.*).

⁵⁶ *CTh* 10.10.2.

⁵⁷ Informer (*delator*): an individual who provided information to the imperial fisc concerning property or money that the state had a claim to (e.g., caducous property, attempted tax evasion); or a person who informed the authorities of the commission of a crime or of a plot to commit some crime, particularly the crime of high treason (*maiestas*). Such informers were held in great disrepute throughout the Empire, and subject to severe penalties if their testimony failed to convict the accused person, or if they abandoned an action before the case was ended. For legislation outlawing informers: *CTh* 10.10.12.2 [380]; 28 [418 west]]. See also Chapter Three, p. 154 n. 107.

⁵⁸ Similarly *CJ* 5.5.6: the analogue refers to incestuous and prohibited unions. On legitimizing illegitimate children, see Cass. Var. 7.40 (*formula de matrimonio confirmando et liberis legitimis faciendis*).

⁵⁹ *CTh* 3.8.1. The purpose of the *tempus luendi* was to avoid confusion over the paternity of any child the woman might have afterwards. While an ancient concept going back to early Roman mores and law, the requirement that a widow observe a proper mourning period went into abeyance by the late Republic, but reappears in several later laws of Theodosius: *CJ* 5.9.1, joined with *CJ* 6.56.1 (Theodosius, 380); and 3.81. On the subject of the mourning period see Michel Humbert, *Le Remariage à Rome: Étude d'histoire juridique et sociale* (Milan, 1970), pp. 113-31, 378-87; Susan Treggiari, *Roman Marriage: Iusti Coniuges from the time of Cicero to the Time of Ulpian* (Oxford, 1991), pp. 493-5; J. Evans Grubbs, *Law and Family in Late Antiquity*, p. 94.

so doing she seems to have been willing to circumvent the laws. For this reason, We stipulate that each one of them is guilty of *stuprum*.⁶⁰ We grant this complaint to children and near relatives alone so that they may carry out what is lawfully admissible in such matters.

38.) Concerning an adulterer and an adulteress⁶¹

Adulterers and adulteresses, upon being convicted during a trial, shall not escape a violent death; collaborators or those knowledgeable of that crime must be punished in the same way.

39.) Anyone who offers a house so that adultery might occur⁶²

Anyone who offers a house or dwelling so that adultery may be committed, or anyone who persuades a wife to consent to adultery, shall be punished capitally.

40.) Anyone who unknowingly makes a false allegation⁶³

Anyone who unknowingly makes a false allegation shall not be held for the punishment of *falsum*.⁶⁴

41.) Anyone who produces or uses a forgery⁶⁵

Anyone who produces or knowingly uses a forgery, or persuades or compels another to make one, shall suffer a capital penalty [i.e. exile].

42.) Anyone who delivers conflicting or false testimony⁶⁶

Those who deliver conflicting or false testimony, or provide such testimony to either party [in a suit], shall be sent into exile.

⁶⁰ *Stuprum*: the general term for illicit sexual relations. For discussion: Judith Evans Grubbs, *Law and Family in Late Antiquity*, p. 203. On the difference between *adulterium* and *stuprum* in Roman law, see Elaine Fantham, “*Stuprum*: Public Attitudes and Penalties for Sexual Offenses in Republican Rome,” *EMC/CV NS* 10 (1991), pp. 267-91; David Cohen, “The Augustan Law on Adultery: The Social and Cultural Context,” in David Kertzer and R.P. Saller (eds.), *The Family in Italy from Antiquity to the Present* (New Haven, Conn., 1991), pp. 109-26; McGinn, “Concubinage and the *Lex Iulia*,” pp. 335-75.

⁶¹ Similarly *CTh* 9.40.1. In a case of adultery concerning the wife of a soldier, Cassiodorus has Theoderic instruct the *dux* Wilitanch (whose position granted him authority over cases involving Goths), to deal with the adulterers, if proven guilty, as the laws prescribe (“*sicut iura nostra praecipunt*.”) Presumably, the reference here is to *ET* 38, just as the *Edict* of Athalaric (9.18.5) requires that all the statutes of the late king (Theoderic) concerning the crime of adultery be observed: “*ceterum in adulteris totum districtissime volumus custodiri, quicquid divali potuit commotione decerni*.” For the details of the case, see *Var.* 5.33. According to *Var.* 1.37, a husband who caught his wife *in flagrante delicto* could kill the lover with impunity.

⁶² *Dig.* 48.5.9 pr. (Papinian).

⁶³ *PS* 1.12.2 [3].

⁶⁴ *Falsum* was a criminal act that covered any kind of forgery, falsification or counterfeiting. The fundamental statute on *falsum* was the *Lex Cornelia de falsis* by Sulla (81 BC). The statute was gradually extended to include crimes that were not originally mentioned in it. The statute was still in force by the time Justinian’s *Digest* was compiled. See further Berger, *Encyclopedic Dictionary of Roman Law*, p. 467.

⁶⁵ *PS* 4.7.2: the penalty here was deportation (presupposed by *PS* 4.7.1).

⁶⁶ *PS* 5.5.5; similarly *Dig.* 22.5.16 (Paul lib. 5 *sententiarum*).

43.) No one shall transfer their actions at law to a powerful Roman or barbarian⁶⁷

No one shall transfer their legal suit under any title to a powerful Roman or barbarian.⁶⁸ But if he should do this, let the litigant lose the suit, and he who receives the suit shall be compelled to bear half the value of the matter under dispute as evaluated by the fisc. We stipulate that even those who try to transfer the property in dispute to a person of this sort are to be held by this penalty, since We desire that the litigants contend with the same opportunity when the more powerful person has been removed. But after the conclusion of the case, We grant to the litigants the power of giving what they won to any person they wish.

44.) No Roman or barbarian is to stand as a defense lawyer or supporter in another's trial⁶⁹

No powerful Roman or barbarian shall involve himself as a representative (*defensor*) or supporter (*suffragator*) in [another's] trial.

45.) No one shall put titles on another's property or his own⁷⁰

Absolutely no one shall put titles [of ownership] onto another's property or his own; since it is clear that this privilege is granted to the fisc alone for properties which it holds by right or by fact.⁷¹

46.) If anyone, upon being summoned before a judge, places titles [of ownership] on the property which he possesses as a means of defence against his [legal] opponent⁷²

Anyone who, upon being summoned before a judge, presumes that a title in the name of a powerful person affixed to the property which he owns will serve as a deterrent to his opponent, let him be punished with the loss of his holding or house which he has attempted to retain as owner⁷³ under this fraud; and he shall not have the ability to initiate a civil action even if he is otherwise eligible to do so.

⁶⁷ *CTh* 2.13.1. Here, the compilers make the point explicit that this was prohibited whether the *potens* was Roman or barbarian: the original makes no such differentiation. For a specific case: Cass., *Var.* 4.20 (*pignorat*).

⁶⁸ Powerful person (*potens*): a person of the higher classes, either because of his wealth or official position or both. In the later Empire such persons were renowned for plundering and oppressing the lower classes at will, and were usually able to evade punishment. For discussion, see above pp. 173-74.

⁶⁹ *CTh* 2.13.1; similarly 2.12.6. The original applied to members of the imperial civil service, whereas here, the compilers extended the prohibition to include Roman and barbarian *potentes*.

⁷⁰ Similarly *CTh* 2.14.1.

⁷¹ See further Chapter Four, p. 206.

⁷² *CTh* 2.14.1; *Var.* 9.18.2 (Edict of Athalaric). The punishment enumerated in *CTh* 2.14.1 was *infamia* for the complicit *potens*, and flogging and perpetual punishment of labour in the mines for the litigant who attempted this fraud.

⁷³ *Vindicare*: the model *CTh* 2.14.1 has *retinere*. On the significance of the term *vindicare* in post-classical law, see above n. 18; Stein, *Roman Law in European History*, p. 25; Levy, *West Roman Vulgar Law*, p. 215, n. 71.

47.) If anyone seizes estates which are designated by titles as belonging to another⁷⁴

But let anyone who seizes estates which are designated by titles as belonging to another be punished capitally.

48.) Freedmen, *originarii* or slaves are not to be heard against their patrons or children of such patrons⁷⁵

We prohibit freedmen, *originarii*⁷⁶ or slaves who inform against their patrons or the children of these patrons from being heard in any matter; for, persons of this sort are incapable of having a legitimate voice in civil or criminal cases involving their patrons, masters or their children, even if they speak in their defence; those caught in the act must be cut down with swords at the commencement of the suit.

49.) This must also be observed concerning domestic servants (*familiarii*)⁷⁷

Moreover, We propose that this prohibition is to be observed in regards to domestic servants who, being intimately connected to another's household or home, come forth as informers or accusers; however, We except the crime of treason.

50.) Concerning hidden and secret accusations⁷⁸

No credence shall be given to hidden and secret accusations; but it is proper for the person who makes any [criminal] accusation to go before a judge so that if he is unable to prove that which he charges, he may be subjected to capital retribution.

51.) Concerning the publication of the donations of properties⁷⁹

We command that donations are to be made public under this formality: if moveable property of any value, or a slave, happens to be donated, the transaction shall be completed only upon delivery by the grantor; moreover, a record of the donation, which includes the signatures of witnesses, must be made public.

52.) If anyone bequeaths a rural or urban estate⁸⁰

But if anyone wishes to willingly make a gift of rural or urban estates, a record of the generosity, confirmed by the signatures of witnesses, shall be registered in the municipal records;⁸¹ provided

⁷⁴ In a letter written in Theoderic's name to the *saio* Triwila and the *apparitor* Ferrocinctus, Cassiodorus relates a case concerning allegations that the praetorian prefect Faustus had burdened the property of his neighbor, Castorius, with titles and henceforth seized it. The decision of the king was for the estate, along with another of equal value, to be returned. For details: Cass., *Var.* 3.20.

⁷⁵ *CTh* 9.6.3. Here, the compilers made the point that the punishment for contravening the ban on hidden or secret accusations was capital, whereas the original did not.

⁷⁶ On the significance of this term, see above n. 35.

⁷⁷ *CTh* 9.6.3.

⁷⁸ *CTh* 10.10.4.

⁷⁹ *CTh* 8.12.1.

⁸⁰ *CTh* 8.12.8.

⁸¹ The original specifies the office of the tax assessor. Both *ET* 126 and 144 mention this officer in particular. The use of municipal records was an extremely formal, albeit elaborate, process which was wholly in keeping with late

that three curials⁸² or municipal magistrates,⁸³ and a *defensor civitatis*⁸⁴ on behalf of the municipal magistrate together with three decurions or *duumviri*⁸⁵ or *quinquennales*⁸⁶ are present as witnesses for the drawing up of the records [of the gift]; but if these are not available, the registering of the transaction shall be fulfilled in another municipality which has these officials; or let a report of what was given be forwarded to the governor of that province.

53.) On transferring ownership (*traditio*)⁸⁷

Concerning *traditio*, it is necessary for it to be conducted according to the laws in the district: if a municipal magistrate, *defensor*, *duumviri* and *quinquennales* are not available, three decurions shall be sufficient for executing the records of transfers, provided that the performance of the material conveyance is carried out before knowledgeable men in the neighborhood.⁸⁸

54.) Marriages are not to be dissolved indiscriminately; only when certain charges are proven may couples withdraw from the marriage⁸⁹

We do not permit marriages to be dissolved indiscriminately. Wherefore, upon the issuance of a divorce notice, neither a wife nor husband shall withdraw from the marriage bond except on proven grounds which the laws recognize. Divorce is permitted only on the following grounds: if

imperial tradition: e.g., *CTh* 14.15.2; *Nov. Val.* 15.1. and 3. A common function of the municipal *gesta* was to establish tax liability. If property was exchanged through inheritance, sale or gift, the new owner was held liable for the tax attendant upon the property. Thus, a proper record of the transfer had to be made. But the public records also functioned as archives of legal transactions/agreements of every kind, and could be consulted by any interested party. Peter Classen has defined this as “record processing” (*Aktenwesen*) by a state machine. The medieval practice, however, was “charter issuance” (*Urkundenwesen*) by monarchs or other officials of exalted status, such as bishops. Under these circumstances, archives were largely individualized, if not necessarily private. On obligatory transfer of tax liability in the later empire: *FV* 35 (c. 330; *FIRA* 2, pp. 469-71); *CTh* 11.3.5 (391). In Ostrogothic Italy: *ET* 144; Levy, *West Roman Vulgar Law*, p. 130; see also W. Goffart, “From Roman Taxation to Mediaeval Seigneurie: Three Notes,” *Speculum* 47 (1972), pp. 165-87, esp. pp. 92 n. 68, 170, 203 n. 59, 229 n. 43. The invaluable guide for all this is Peter Classen, “Kaiserreskript und Königsurkunde,” pp. 1-115; “Spätromischen Grundlagen mittelalterlichen Kanzleien,” pp. 67-84; “Fortleben und Wandel spätromischen Urkundenwesens im frühen Mittelalter,” in Classen (ed.), *Recht und Schrift im Mittelalter*, Vorträge und Forschungen 23 (Sigmaringen, 1977), pp. 13-54. See also J. Harries, *Law and Empire in Late Antiquity*, pp. 70-1; E. Posner, *Archives in the Ancient World* (Cambridge, 1972).

⁸² See above n. 46.

⁸³ Municipal magistrate (*magistratus*): the head of municipalities, usually two in number, called *duumviri*.

⁸⁴ Defender of a municipality (*defensor civitatis*): originally a municipal official whose function was to protect the lower classes against the more powerful, in particular local magnates and governmental officers. He had police, financial, and judicial powers and was an important official of the municipality in the early empire. During the later empire the office deteriorated and became weak and corrupt, so that it finally became an additional burden to be imposed upon members of the curial order. For discussion of this office, see above, pp. 134-35 n. 42.

⁸⁵ *Duumvir*: one of the two highest of the municipal magistrates. Their office was similar to the Roman consulship, and was held for one year. In earlier times it was much sought after, as an honor, but in the later Empire it became burdensome and expensive and was evaded whenever possible; see below, c. 53.

⁸⁶ On these officers, see Halsey Royden, “The Tenure of Office of the Quinquennales in the Roman Professional Collegia,” *American Journal of Philology* 110 (1989), pp. 303-15.

⁸⁷ *CTh* 8.12.8.

⁸⁸ This final provision was an addition of the compilers. This, like the final provision in *ET* 52, is perhaps indicative of the declining number of civic magistrates in the rural towns and communities of early sixth-century Italy. For further discussion, see above, p. 223.

⁸⁹ *CTh* 3.16.1, 2; *Nov. Th.* 14.1. 2.

a wife proves in trial that her husband is a murderer, sorcerer,⁹⁰ or a violator of tombs. A husband, too, rightfully may divorce his wife who is convicted of these crimes, that is, if he is able to prove in a trial that she is an adulteress [*adultera*], or sorceress [*malefica*], or what is commonly referred to as a procuress [*aggagula*].⁹¹ When these facts have been disclosed clearly, a husband shall both gain back the dower and receive or retain the dowry;⁹² and in accordance with the laws, We order him to preserve intact property of both himself and his former wife for the children of that marriage. And in like manner, if a wife proves that her husband has been involved in the aforementioned crimes, she shall receive both the dowry and dower as profit. Moreover, she shall take back that which her husband bestowed upon her as a betrothal bounty for the benefit of the children; and in accordance with ancient customs, she shall obtain the freedom to marry again or not.

55.) A judge is obligated to hear all appeals⁹³

Those provincial judges before whom pleas can be petitioned shall hear all appeals; since it befits their unsurpassed knowledge to hear even a superfluous appeal without hesitation,⁹⁴

⁹⁰ Sorcerer (*maleficus*): a person who practiced the arts of the supernatural by invoking evil spells. In the *CTh*, the various terms indicating sorcerers/magicians are used almost synonymously, with little distinction except of degree and intention. The practice of magic was especially opposed by the emperors who feared its effect would detract from their own authority. On the prohibition of magic in the Theodosian Code, the relevant provisions are found in 9.16 under the title *De maleficis et mathematicis et ceteris similibus* ("concerning magicians, astrologers, and all such like"). See further James B. Rives, "Magic in Roman Law: The Reconstruction of a Crime," *Classical Antiquity* 22.2 (2003), pp. 313-39; Clyde Pharr, "The Interdiction of Magic in Roman Law," *Transactions and Proceedings of the American Philological Association* 63 (1932), pp. 269-96, esp. pp. 277-96. *ET* 108 prohibits the use of magic and the practice of soothsaying, and threatens anyone found guilty with the punishment of death.

⁹¹ *Aggagula*: this term, which the compilers identify as a colloquial expression, is used nowhere in the *CTh*. It seems to be a misreading of *acucula*, the word for 'hairpin', which appears in the corresponding rescript of the emperor Constantine (*CTh* 3.16.1 [331]).

⁹² *Dos*: in imperial Roman law this term always denoted the assets that the bride brought with herself into the marriage. In the fourth century it received a counterpart, *donatio nuptialis* (bride-gift), which was the groom's contribution. Eventually, through a development that is unclear, the bride-gift replaced the dowry in the western parts of the empire. By the sixth century, the term was most commonly used to designate the bride-gift. In this provision, the term is used twice, and each time with different meanings: the first refers to the bride-gift, and the second to the traditional dowry. On the subject of the *dos* in general, see Antti Arjava, *Women and Law in Late Antiquity* (Oxford, 1996), pp. 52-62; Evans Grubbs, "Marrying and Its Documentation in Later Roman Law," in P.L. Reynolds and J. Witte, Jr. (eds.), *To Have and To Hold: Marrying and Its Documentation in Western Christendom, 400-1600* (Cambridge, 2007), pp. 64-70.

⁹³ *CTh* 11.30.42; 11.30.22. A related matter was that of corrupt judicial procrastination. In a letter addressed in Athalaric's name to the entire retinue of provincial judges, Cassiodorus expresses the king's displeasure at the collective failure of these officers to settle in a timely fashion the disputes brought before them (Cass., *Var.* 9.20, trans. Barnish, *Variae*, p. 121): "Although, by God's help, I provide for my provinces by the annual renewal [of governors], and courts are distributed through every corner of Italy, I have learnt that a wealth of cases are arising from the shortage of justice. It is clearly the fault of your negligence, when men are forced to request from me the help of the laws. For who would choose to seek so far afield what he sees arriving in his own territory?" ("Cum vos provinciis nostris iuvante deo annua reparatione praestemus nec desint iudicia per universos fines Italiae distributa, intellegimus de inopia iustitiae copiam venire causarum. culpa siquidem vestrae probatur esse neglegentiae, quotiens a nobis coguntur homines legum beneficia postulare. nam quis eligeret tam longe petere, quod in suis videret sedibus advenisse?")

⁹⁴ *CTh* 11.30.42 made the same requirement that a judge was to hear even superfluous appeals – a flat contradiction of earlier prohibitions against such appeals.

provided that an ordained *cognitor*,⁹⁵ upon consideration of the laws, can render a judgment about the merit of an appeal. If a judge should secure his absence so as not to hear appellate petitions, We decree that he who intended to make an appeal must present his petition concerning the absence of the judge, and about his own appeal in well-known places. But let a judge who either refuses to hear an appeal, or at least takes the appellant into custody, or has him flogged or injured by some other grievance, be punished with the loss of ten pounds of gold; this sum We ordain to be amassed by the care of an ordained *cognitor* for the coffers of the fisc. Moreover, the office for which this is a concern will be subject to a lawful penalty.

56.) Concerning the rustler of assorted animals⁹⁶

The rustler of another's animals, flocks and herds, whether he drives them off from stables or pastures, shall be punished by the sword; and the remuneration for the victim's loss, which is to be garnered from the property of the rustler, shall be fourfold. But if the rustler is a slave or *originarius*, his owner, upon being summoned before a judge for these crimes,⁹⁷ shall, if he prefer, either compensate [the victim] in accordance with what We have decreed above, or not delay to surrender those accused to a public judge to be punished by death.

57.) If a rustler is proven to have stolen anywhere from one steed, two mares and the same number of cows, ten she-goats and five pigs⁹⁸

If a rustler is proven to have stolen anywhere from one steed, two mares and the same number of cows, and as many as ten she-goats and five pigs, whether he led them away through deception or by force from a pasture or stable, he shall be punished most severely: he shall be punished for the crime of theft and pay back fourfold the number of animals or pigs mentioned above which he stole from another.

⁹⁵ *Cognitor* (*cognitor*): in this instance, a judge who held an investigating trial or cognizance. The term could also be used to refer to the governor of a province who functioned as the judge of first instance.

⁹⁶ *PS* 5.18.2; similarly *Dig.* 47.14.1 pr. (Ulp. lib. 8 *de off. procons.*).

⁹⁷ Presumably, the participation of the master involved his testifying to the fact that he had no involvement in, or prior knowledge of the crime of his slave or *colonus*.

⁹⁸ *PS* 5.18.1; *Dig.* 47.14.1 pr. (Ulp. lib. 8 *de off. procons.*). This is clearly intended to serve as a supplement to the previous edict, specifying precisely the value of different animals. According to the provision, an adult steed was deemed equal in value to two mature mares or two cows, five pigs or ten she-goats. According to this formula, then, the value of an adult mare was on par with that of a mature cow, and both animals approximated the value accorded to two adult pigs and one suckling, or five she-goats; and lastly, one mature pig equaled the price of two adult she-goats. Beyond attesting to the diversification practiced by stock-raisers in early sixth-century Italy, the provision makes it clear that the horse was the most highly prized of all animals. It is likely that their importance stemmed primarily from their military role, but they were certainly used for the post and for personal travel, for threshing and carrying, and in the case of mares, for the breeding of mules. Horseracing, too, continued to thrive, undoubtedly placing an even higher premium on horses. On the survival of the games in Italy in the early sixth century: Cass., *Var.* 1.20, 27, 30; 3.51; 5.42; 6.4; Anon. Val. 12.60, 67.

58.) Anyone who finds a cow, horse, or other livestock wandering about⁹⁹

Anyone who leads away a cow, horse or other livestock wandering about must also be held guilty of the crime of theft, and he shall restore fourfold the number of animals or livestock stolen; unless he advertises this fact in public or in well-known places, or before the official residence of a judge for seven continuous days since that day he found them; upon completion of this, let him not endure the detriment of any penalty.

59.) Anyone who forcibly defiles a freeborn virgin

Anyone who forcibly defiles a freeborn virgin, should he be supported by a suitable patrimony¹⁰⁰ and is of noble rank, shall be compelled to accept her as his wife; provided that he is of the understanding that a fifth of his patrimony is to be conferred to her under the title of a dower. But if he commits such acts while already having a wife, he shall be compelled under worthy and solemn (written) guarantee to give a third of his patrimony to that one whom he forcibly corrupted; so that she, who lost her modesty on account of him, may find a respectable husband. But the oppressor and violator of freeborn modesty shall be afflicted with the most extreme punishment if he is not supported either by a suitable patrimony or nobility.¹⁰¹

60.) If anyone should commit *stuprum* against an unwilling widow

If anyone should commit *stuprum* against an unwilling widow, the corrupter, be him of whatever rank, shall perish under the penalty of adultery.

⁹⁹ PS 5.18.4; Dig. 47.14.1 pr. (Ulp. lib. 8 *de off. procons.*). While provisions like ET 56, 57 and 58 underscore the predominantly rural character of early sixth-century Italy, and the primary importance of livestock to this rural economy, remarkably, there is no specific mention in the ET to the killing of animals. The silence of the compilers might be seen as perplexing, especially considering the depth of detail which the more or less contemporary Visigothic laws devoted to the matter. In the Visigothic kingdom, the killing of animals involved nine fold restitution (LV 7.2.23), while that of strays whose owner was unknown, a necessary repayment *in duplo* (LV 8.5.7). The law went so far as to provide remedy for the killing of unborn animals: when a mare was caused to miscarry, the offender had to deliver a yearling foal, but when some other animal was involved the rule was different. A cow, for example, passed to the offender, who was required to hand over in its place a sound beast together with its calf (LV 8.4.5, 6). A possible explanation for the ET's silence in this matter is the position of the law towards the crime of cattle rustling. As a general rule, the loss of an animal to the actions of a rustler was considered permanent. Thus, it made no difference to an owner whether or not his animals were killed or absconded. That the compilers recognized this and accordingly treated the killing of animals in the same way as their theft seems entirely likely. The fact that the penalties reserved for cattle rustlers are on par with those faced by an individual convicted of killing another's *servus* or *rusticus* speaks to such a connection.

¹⁰⁰ Patrimony (*patrimonium*): a paternal inheritance.

¹⁰¹ According to this, an offender could pay for his crime provided he was of sufficient means both in terms of material wealth and status to do so. Otherwise he was to be punished most severely (presumably this meant death). While this last provision finds many parallels in the Roman sources, the idea that a corrupter of freeborn chastity could escape capital punishment through the payment of a fine was in profound opposition to earlier Roman law on the subject, which generally applied the maximum penalty in all instances, regardless of the rank or wealth of the accused.

61.) If a widowed matron is defiled by another's depravity¹⁰²

But if any slave commits this crime [*stuprum*], even if he does so with a willing and complicit widow, he shall be burned up by avenging flames; she, too, who was not ashamed to find pleasure with a slave, shall pay the penalty of adultery.

62.) If a widowed matron is willingly defiled by a slave¹⁰³

If a widowed matron is willingly defiled by another's libidinous [slave], she has committed *stuprum*, unless she is common and low-class.¹⁰⁴ If anyone has intercourse with those consenting widows who are known to practice the work of a trade or service in public, neither he nor they shall be held accountable for this offence.

63.) If another's slave or *originarius* forcibly defiles a freeborn virgin

If another's slave or *originarius* should forcibly defile a freeborn virgin, or commit *stuprum* against a widow by force, upon the summoning of his master and when the facts of the case have been investigated and disclosed, let him be executed.

64.) If anyone defiles another's virgin slave woman or *originaria*¹⁰⁵

Any freeborn man (who is obligated to no municipality in any manner¹⁰⁶), who defiles another's virgin slave woman or *originaria* of any age, and wishes to be united with her (provided the owner is also willing), he shall acknowledge this in the municipal records and remain under the authority of the woman's owner; [having done this] he shall not abandon the union with the woman he despoiled, nor be able to leave upon her death. If the owner of the slave woman does not consent, or the corruptor is unwilling to acknowledge this [in the municipal records], then he shall either give the owner two slaves of equal value should he suffer any financial loss as result of this; or, if he is unable to fulfill this, upon being flogged most severely with military rods,¹⁰⁷ he shall be judged by a board of magistrates of the nearest city; the judge of that place, mindful of his written statement,¹⁰⁸ will be obligated to ensure that this is carried out.

65.) Whenever a freeborn man, *originarius* or slave comingles with a slave woman¹⁰⁹

Whenever a freeborn man, *originarius* or slave should comingle with a slave woman, it is mandatory that complete agnation follows the mother; that is, all children shall belong to the owner of the slave woman.

¹⁰² *CTh* 9.24.2; 9.25.2. *CTh* 9.24.2 concerned acts of *raptus* involving a complicit virgin girl.

¹⁰³ *PS* 2.26.11; similarly *CJ* 9.9.22.

¹⁰⁴ The original, *PS* 2.26.11, qualifies this further to mean women who are known to work in taverns or inns.

¹⁰⁵ *Nov. Val.* 31.1.5.

¹⁰⁶ That is, either as a decurion or guildsman.

¹⁰⁷ By the early empire, the military staff, *fustis*, replaced the rods, *virgae* (traditionally borne by lictors), as the instrument of civilian beating. Beating was regarded as a rather severe sanction, principally because all forms of corporal punishment were held to be degrading. Yet, the man of small means might well find beating preferable.

¹⁰⁸ Written statement (*periculum*): a term denoting the written memorandum of a judicial statement. This was to be prepared and read by judge as the valid pronouncement of his sentence. As was the case in Roman law (*CTh* 4.17), an oral pronouncement not read from a written document was deemed invalid. Praetorian prefects were exempt from this requirement: *Cass., Var.* 6.3.3 (*formula* for the position).

¹⁰⁹ *CTh* 5.10.1.

66.) Whenever another's slave or a freeborn man comingles with an *originaria*¹¹⁰

Moreover, whenever another's slave or a freeborn man comingles with an *originaria*, the children shall in the same way establish their descent from the mother.

67.) If another's *originarius* comingles with an *originaria*¹¹¹

If another's *originarius* should comeingle with an *originaria*, the owner of the *originarius* shall acquire ownership over two thirds of the children, and the owner of the *originaria* a third.

68.) If an *originaria* flees from a freeborn man¹¹²

An *originaria* can be reclaimed by her former owner (ingenuous) only within a period of twenty years from the day she departed. But if after a period of twenty years has elapsed, and the *originaria* should be lost to her former owner as a result of this prescription, in keeping with the tenor of the new law any offspring which she gave birth to within this twenty year period must not be lost to her [former] owner.

69.) If anyone takes possession of a decurion, guild member or servant of the state for a period of thirty (30) years¹¹³

We order that decurions, guild members or slaves that clearly have not contributed to their municipality [i.e. through the performance of compulsory public services] are to be retained by property owners who have been in possession of them for a period of thirty years; since We allow the beneficial decree of this thirty-year statute to be disturbed with respect to no one under any pretext, it is fitting that this law [of thirty years] maintain its legal force, in whatever way the laws prescribe, whether in matters involving a private citizen or the fisc. And since We know that such false accusations are frequently stirred up to the ruin of masters when rustics or decurions connive together to say that they have offered a contribution [to their municipality], We grant the following: if it is proven that a contribution was made with the knowledge of the property owner or his procurator¹¹⁴ or chief tenant if the owner was overseas, this law will remain in full force.

¹¹⁰ *CTh* 6.10.1; similarly *CJ* 11.48 [47]. 16; *Dig.* 1.5.19 (Cels. lib. 29 *digest.*).

¹¹¹ *CTh* 5.10.1.

¹¹² *CTh* 5.10.1; *Nov. Val.* 31.1.2 [452] (referred to here as the *novella lex*).

¹¹³ *Nov. Maj.* 7.1.1; similarly *Nov. Val.* 27.1. The provision is far more lenient towards landholders than the novel of Majorian, which regards them in an almost disdainful manner (trans. Pharr): "... We sanction that except for those decurions who have assisted their municipalities by some performance of compulsory public services and for that reason are not lost to the municipal senates by any prescription, wherever decurions may be found who have been absent less than thirty years previous to the present time, the procurators or lessees of the landed estates shall be constrained, the owners of the estates shall be notified, and such decurions, together with their wives, shall be restored to the cities which they deserted. This regulation should not be displeasing to the owners of the fields, since they ought to be smitten by a more severe penalty, and they shall lose those women whom they permitted to be joined in illicit unions." The reference in the provision here to guildsmen seems to be based on *Nov. Maj.* 7.1.3.

¹¹⁴ Procurator (*procurator*): a manager or overseer in charge of the property of another. He was usually a slave or freedman and often managed the property in the absence of his master.

70.) If a slave should take refuge in a church¹¹⁵

If a slave of any nation should take refuge in a church, let him be returned immediately upon his owner promising pardon, for We forbid him from staying in that place for more than a single day. If he is unwilling to depart, the archdeacon of that church, or a priest and clerics shall compel him to return to his owner, and deliver him up without delay on the owner pardoning him. But if it happens that the abovementioned religious persons are unwilling to do this, they shall be compelled to give to the owner another slave of equal value; even the slave that remains within the retreats of the church may be claimed by his owner forthwith if he can be captured beyond church limits.

71.) If anyone flees to a church on account of a public debt¹¹⁶

If anyone flees to a church on account of a public debt, the archdeacon shall compel him to leave in order to render account according to the law; but if the debtor is unwilling to do this, let him deliver forthwith his property which he transferred to the church. Unless he does this, let the archdeacon be compelled to pay the debt: this is of great interest to the public good.

72.) On the registration of wills

Testaments shall be registered as the laws¹¹⁷ prescribe; in this way, the fulfillment of another's will shall not be able to falter.

73.) Concerning the execution of judicial directives

Let office staffs carry out the directives of any judges, as well as the commands of any office or jurisdiction, provided local custom [jurisdiction] of the *civitas* is observed;¹¹⁸ it is enough that the person sued promise to go before the court, and let the *apparitor* dare nothing beyond [extracting this promise].¹¹⁹ And let the *apparitor* of that jurisdiction from which the precepts are issued handle the judgments. But if a *miles*¹²⁰ of another jurisdiction should attempt to implement the directive of another, let him be flogged and incur the loss of his position. And the plaintiff shall forthwith lose his case.

¹¹⁵ *CTh* 9.45.3.

¹¹⁶ *CTh* 9.45.3, 5. Throughout the Empire most of the public debtors were delinquent taxpayers.

¹¹⁷ *CTh* 4.4.1-3.

¹¹⁸ The phrase here, *sola publica servata civitate*, is difficult to interpret with any certainty. The fact that the *MGH* edition suggests *civilitate* as an alternative to *civitate* is indicative of the problem. *CTh* 11.7.6 (and there are other instances) uses the phrase *consuetudine servata regionum*, which seems to fit best here. An alternative reading of this phrase is: "provided the local customs of the *civitas* are observed."

¹¹⁹ That is, the judge cannot compel attendance.

¹²⁰ *Miles*: a member of an imperial service whether it be civil or military in nature. See e.g. *CTh* 2.12.6, where the term *militans* is used to designate a member of the imperial service, either a civilian *apparitor* or a soldier. However, the Anonymous Valesianus (2.60) uses the term *militia* to describe the civil service of the Romans. As Moorhead notes (*Theoderic in Italy*, p. 71, n. 23), the term cannot possibly mean 'military service'.

74.) Concerning a dishonest plaintiff¹²¹

If a plaintiff launches a wrongful lawsuit over some matter, and is refuted after a just examination, from the day the suit was formally set out the falsely accused shall receive from the plaintiff the costs and expenses of the litigation which he demonstrates he sustained when he was undeservedly sued; this shall be determined by the assessment of a judge or of knowledgeable good men appointed for that purpose. It is right that their sense of justice and deliberations determine what costs and expenses of the suit he who heedlessly led another into a public trial should pay.

75.) On fighting armed men if they come violently to a property¹²²

Moreover, anyone who with men, armed with swords, clubs or stones, expels someone from his property, home or villa¹²³ or attacks, blockades and besieges him, and if on account of this matter he happens to furnish men of his own, or hires or assembles them and causes turmoil and insurrections and sets fire; or if through his property supplies, stations and leads his men, and incites turmoil and insurrections and sets fire, he shall be held for the penalty of violence (which has been prescribed above).¹²⁴ If anyone prohibits a corpse from being buried, intending to claim the deceased as his debtor,¹²⁵ those who are *honestiores*¹²⁶ shall lose a third of their goods and be sent into exile for a period of five years; those who are *humiliores*¹²⁷ shall be flogged and endure the penalty of perpetual exile.

76.) Concerning the restoration of the temporary possession of seized properties¹²⁸

The suit regarding ownership being preserved, in accordance with the law of temporary possession,¹²⁹ property occupied through force shall be returned within one year to that one who will hold the same property (which he lost through the presumption of another) neither violently, nor clandestinely, nor with permission [by the one who ejected him in the first place].

¹²¹ *Dig.* 5.1.79 pr. (Ulp. lib. 5 *de off. procons.*). The context here suggests a civil action. For in criminal trials, under the rule of *inscriptio* (*CTh* 9.10.3) the accuser had to bind himself by a written undertaking (*inscriptionis vinculum*) to undergo the same penalty as that which faced the defendant, if proved innocent: *ET* 13.

¹²² *PS* 5.26.3; similarly *Dig.* 48, 6, 3 pr. (Marcian. lib. 14 *Inst.*). 4 (Ulp. lib. 59 *ad Edict.*). The context of this seems to be illegal distraint of property because of debt. It follows *PS* quite closely, and seems to merge elements of *publica iudicia* of *vis publica* and *vis private* (see *Dig.* 48.6, 7). The confiscation of one-third seems to belong to the latter. The *Breviary of Alaric* combines the two under the same title but distinguishes them in chapters.

¹²³ Villa (*villa*): 1, a farmhouse; 2, a landed estate, often containing one or more villages, under the control of a great landholder.

¹²⁴ *ET* 9 (a capital offence).

¹²⁵ The *MGH* edition cites a passage from Ambrose of Milan's *De Tobia* c. 10 (*PL* 14.759-794) saying that the dead were sometimes denied burial until interest on any outstanding debt was paid.

¹²⁶ *Honestiores*: a term referring to members from the higher ranks of society, to be contrasted with their socially inferior counterparts, the *humiliores*. While this distinction was at first a social one, it came to take into account an increasing number of legal consequences, whereby *honestiores* could lawfully expect and demand preferential treatment in comparison with *humiliores*. These divisions appear in *ET* 83, 89, 91, 108, 145.

¹²⁷ These appear in *ET* 83, 91, 108.

¹²⁸ Similarly *PS* 5.6.7; Cass., *Var.* 9.18.1 (*Edict of Athalaric*).

¹²⁹ Temporary or interim possession (*momentum*): this referred to the possession of property in dispute that is granted to one of the litigants until the case can be adjudicated; another interpretation is that this refers to property which is to be possessed immediately.

77.) If slaves are convicted of inflicting violence¹³⁰

If slaves are convicted of inflicting violence, or at the very least they confess to this, and it is proven under a just and diligent inquiry that this was committed through the instruction of the owner, when the owner has been held for the penalty of violence, any stolen incomes shall be returned; slaves, nevertheless, shall be punished by the extreme penalty if it is evident that they committed violence through their own audacity.

78.) On stealing a freeborn man¹³¹

Anyone who sells, gives away, or presumes to retain for his own service a freeborn man whom he has taken to another place by means of *plagium*, that is through solicitation, shall be put to death.

79.) If anyone holds a freeborn man under terms¹³²

Anyone who holds a freeborn man in servitude and is unable to prove that he is [legally] bound to such a condition shall be held liable for trickery (*calumnia*) and the injuries incurred [by the victim].

80.) If anyone induces another's slave to flee

Anyone who induces another's slave to flee shall render to the owner three others of equal value, and the original slave together with his *peculium*.¹³³ But if anyone is received by another under good faith whereby he claims that he is freeborn, it is necessary for the receiver to take these precautions: namely, to direct the claimant to the records offices where he can declare his freeborn status; upon completion of this, if the claimant is demanded by the owner and proven to be his slave or *originarius*, he shall be returned without any inconvenience to the one who received him [in the first place].

81.) If anyone unknowingly purchases slaves from a *plagiator* [slave trader]¹³⁴

If anyone unknowingly purchases slaves from a *plagiator*, he cannot be held liable for the offence of *plagium*.

¹³⁰ *CTh* 9.10.4; similarly *ET* 118.

¹³¹ The basis for the legal remedy stipulated here and in the following nine provisions is the *Lex Fabia*, a statute of unknown date (presumably the second or first century BC) that prohibited kidnapping (*plagium*), treating a freeman as a slave, or persuading another's slave to flee. Interestingly, the compilers here added a few words of clarification for *plagium* ('*id est sollicitandum*') – an indication, perhaps, that they felt the meaning of the term was becoming, or had become, unclear at the time of their writing.

¹³² Similarly *CJ* 6.16.31. In a letter written in Theoderic's name to the *vir illustris* Neudes, Cassiodorus recounts the case of Anduit, a blind veteran of the Gothic army who charged two other Goths, Gudila and Oppas, with attempted enslavement. As Anduit maintains, despite having a judgment rendered in his favour by the judge of first instance, he continued to remain so enslaved. Neudes is here instructed by the king to determine for himself the merits of Anduit's claims and act accordingly (*Var.* 5.29).

¹³³ *Peculium*: technically, the property acquired by any legally dependent person, such as a slave during his servitude or a son under the control of his father. Cassiodorus uses the term twice to refer to the property (cattle) of free persons: *Var.* 8.28, 33.

¹³⁴ *CJ* 9.20.10.

82.) If a freeborn man is sold¹³⁵

If a freeborn man is sold he is not to incur the prejudice of his new status, unless perchance, being of the age of majority,¹³⁶ he kept the buyer in the dark by remaining silent about his freeborn status. For he could have brought an action against the seller in defence of himself, or injustices concerning the crime of *plagium*, except that he wanted the money that was given for him to be split between himself and the seller. In that case, he shall incur the prejudice of the condition which he created for himself through deceit and connivance.

83.) Anyone who conceals, sells or knowingly purchases a freeborn man¹³⁷

Of those who conceal, sell, or knowingly purchase a freeborn man, *humiliores* shall be flogged and sentenced to perpetual exile; *honestiores* shall be deprived a third of their goods and shall also endure a penalty of exile for a period of five years.

84.) Anyone who knowingly receives another's fugitive slave or *colonus*¹³⁸

Anyone who knowingly receives or conceals another's fugitive slave or *colonus*¹³⁹ shall render to the owner that fugitive together with his (i.e. the slave's) income and *peculium*, as well as another slave of equal value. But if the one who first received the fugitive allowed him to be received for a second or third time, then that one shall render to the slave's owner three additional slaves, in addition to the fugitive along with his income. However, a slave must be tortured in examination lest perchance he has been sent by his owner to the home of the person who received him in order to cleverly and deceitfully profit; so that if through the interrogation of the one testifying it is established that he was fraudulently sent by his owner to another's home, the fisc may at once be compensated.

85.) If anyone receives slaves that have been induced to flight or furtively taken by another¹⁴⁰

If someone knowingly receives slaves that have been induced to flight or furtively taken by another, not only must they be prosecuted concerning those received and return them, but they must also be detained to answer for the offence of theft (*actio furti*).¹⁴¹

¹³⁵ *Dig.* 40.13.

¹³⁶ Legal age for males in Roman law was twenty-five, although children could be released from *potestas*, through a procedure called *emancipatio*, which severed most legal ties with paternal relatives. For males, this could be granted at the age of twenty-one; for females at nineteen. See *CTh* 2.17.1, 2 (321; 324); *CTh* 2.16.2 (319). Cf. Cass., *Var.* 4.35, where minors are prohibited from entering into legal contracts of any sort – the implication being that once of age, a person was in a *de iure* position to decide any matter as they saw fit and as the law permitted.

¹³⁷ *PS* 5.30b.1; similarly *PS* 5.6.14.

¹³⁸ *CTh* 5.9.4; similarly *CJ* 6.1.4.

¹³⁹ *Colonus*: a tenant farmer, a sharecropper, of ignoble status. Originally he was of freeborn condition, but over the course of the empire his position gradually deteriorated until it was little better than that of a slave (*servus*). In the *ET* the two are often equated. Further references: cc. 97, 98, 99, 109, 121, 128, 146.

¹⁴⁰ Similarly *CJ* 6.2.6; *Dig.* 11.3.11.2 (Ulp. lib. 23 *ad Edict.*).

¹⁴¹ In classical law, it was a penal action in that the plaintiff could recover double or fourfold damages from the defendant, depending on the type of theft that had been committed, i.e., whether it was manifest or not. The specification is not made here.

86.) Anyone who detains another's slave at his residence against the wishes of the owner¹⁴²

Anyone who holds another's slave at his residence against the wishes of the owner must be persecuted through an action of theft.

87.) [Concerning] a slave in flight¹⁴³

A slave in flight can neither be sold nor given away.

88.) If a cattle rustler, seducer (of slaves) or thief dies before he can be prosecuted

If a cattle rustler, seducer (of slaves) or thief should die before he is convicted by the authority of a judge, his heirs shall in no way be held accountable for his offence, unless it is evident that by claiming these [stolen] things they came into possession of them.

89.) If anyone assembles an armed force on his own behalf to incite terror¹⁴⁴

If anyone assembles an armed force on his behalf to terrify someone else, or assumes authority which he does not have, let those who are from the lower classes (*viliores*)¹⁴⁵ be flogged and endure the punishment of perpetual banishment; those who are *honestiores* shall suffer the inconveniences of exile.

90.) If anyone changes another's testament, codicil, records, accounts, transcripts of registered instruments, documents, bonds or letters for the purposes of fraud¹⁴⁶

Those who erase, change, add to or take away, burn or expunge another's testament, codicil, records, accounts, transcripts of registered instruments, documents, bonds, or letters in any place for the purposes of fraud, or give, sell or substitute gilded bronze, silver or iron for gold, and those who substitute tin for silver, or cut around the outer circle of a *solidus*, or those who prescribe or take pains that this may be done, shall endure the stipulated penalty for the crime of forgery.¹⁴⁷

91.) Anyone who bribes witnesses to commit perjury¹⁴⁸

Anyone who bribes witnesses so that they commit perjury, or at least remain silent about what they know, or suppress the truth, or those who bribe a judge so that he renders a judgment

¹⁴² *CJ* 6.2.6.

¹⁴³ *CJ* 9.20.6.

¹⁴⁴ *PS* 5.25.12. The provision targeted individuals who assembled armed men or illegally assumed authority with the purpose of inciting terror: *humiliores* were to be flogged and exiled, and *honestiores* exiled. Whereas the compilers note the specific penalties for those *viliores* found guilty, the original simply states that they were to be punished capitally (presumably this meant exile).

¹⁴⁵ Synonymous with *humiliores*.

¹⁴⁶ *PS* 5.25.1, 5; similarly *CTh* 9.22.1.

¹⁴⁷ *ET* 41 (a capital offence).

¹⁴⁸ *PS* 5.25.2.

contrary to justice or not make a judgment at all, those who are *humiliores* shall be punished capitally; those who are *honestiores* shall suffer the deprivation of their possessions.¹⁴⁹

92.) If a betrothed woman, upon being persuaded by the one with whom she is betrothed, should take up residence with him before she has been formally given away in marriage¹⁵⁰

In the event that a betrothed woman, upon being persuaded by the man with whom she is betrothed, should take up residence with him before she has been formally given away in marriage, the bridegroom shall not be held criminally liable as an abductor.

93.) A father cannot be compelled to give away his child unwillingly to another in marriage

A father shall not be compelled to give away his child unwillingly to another in marriage.

94.) Parents who are compelled by necessity to sell their children¹⁵¹

Parents who are compelled by necessity to sell their children for the sake of vital necessities shall not prejudice their *ingenuus* status; for the value of a free person is considered inestimable.

95.) And it shall not be permitted for parents to give away their children as a pledge¹⁵²

Moreover, parents cannot give away their children as a pledge to another; and if a creditor knowingly receives freeborn children from their parents as a pledge, he shall be sent into exile. Parents can only transfer the services of those children that are under their legal authority [*in potestate*].

96.) If those who live as free are claimed as slaves¹⁵³

Anyone who while living as free is claimed as a slave shall take the part of the defendant: the burden of proof rests with the plaintiff or the one who says he is the owner, to demonstrate that this individual is his slave. But if [an enslaved] individual should claim that he is free, it is necessary for his *defensor* to prove his free status.

¹⁴⁹ According to *ET* 1 and 2, the punishment for the corrupt judge in this instance could vary, depending on whether the case was capital or not. *PS* 5.25.2 stipulates that he was to be deported along with the offending *honestior*.

¹⁵⁰ Similarly *CTh* 9.24.1. The context envisaged here is a *de iure* betrothal which has become a *de facto* marriage through the over-zealousness of the bridegroom, not to be confused with marriage by abduction (*raptus*) – a point which the compilers make clear.

¹⁵¹ *PS* 5.1.1; similarly *CTh* 5.8.1. According to Roman law, parents might sell their children for a limited period (perhaps 25 years) without ultimate prejudice to their freedom: *CTh* 3.3 (391); *Nov. Val.* 33 (451). Cassiodorus notes a specific incident of parents selling their children (*Var.* 8.33, cited and discussed above, p. 75 n. 14).

¹⁵² *PS* 5.1.1.

¹⁵³ Similarly *Dig.* 40.12.7, 5 (Ulp. lib. 54 *ad Edict.*). *Dig.* 40.12 required that anyone who could show that a person was being held in slavery unjustly could bring a ‘suit for freedom’ (*causa liberalis*). Enslaved persons could not bring the suit themselves; they needed to have an advocate who would bring the case for them. In Rome, the praetor heard claims for freedom; in the provinces, only the governor could judge them.

97.) Anyone who sets fire to a house, villa or dwelling¹⁵⁴

Anyone who sets fire to another's dwelling, house or villa out of enmity, if they are a slave, *colonus*, slave woman or *originarius*, they shall be consumed by fire. If a freeborn should do this, he shall repay any of the costs associated with the fire that he set, and he shall restore the building, and in addition, as a penalty for committing such an act, he shall be compelled to pay the value of the possessions destroyed; but if he is unable to raise this amount on account of his penury, let him be flogged and punished with the banishment of perpetual exile.

98.) [Concerning] a fire that a slave or *colonus* heedlessly sets in his [owner's] field¹⁵⁵

If, as a result of the fire heedlessly set by a slave or *colonus* in his owner's field, there is damage done to a neighbor's fruit-bearing trees, or woods, vineyards or grainfield, or there results any loss, upon an assessment of the damage done the owner (of the one through whom a loss to the neighbor occurred) shall either repair the damages and pay compensation; or, if he chooses this alternative instead, shall deliver up to a judge the one who set the fire so that he may be punished for the faults of his deed.

99.) Anyone who kills a man or urges that he be killed without a hearing before a judge¹⁵⁶

Anyone who unjustly orders a man to be killed or urges that he be killed without a hearing before a judge, and lacking the permission or legal authority of a judge exercising the appropriate jurisdiction, shall himself be killed as one guilty of homicide.

100.) Another's slave cannot be tortured [to testify] to the detriment of another¹⁵⁷

Another's slave cannot be tortured [to testify] to the detriment of another, unless the informer or accuser, whose concern it is to prove what he claims, is prepared to stake the amount of the slave's value as determined by his owner.

101.) Anyone who purchases a slave in order to prevent him from giving evidence under torture against him¹⁵⁸

If anyone purchases a slave in order to prevent him from giving evidence under torture against him, when the payment has been returned and the sale cancelled, let the slave be forced to testify under torture against the one who fraudulently purchased him.

102.) If a slave is freed so that he is not tortured¹⁵⁹

If a slave is freed so that he is not tortured, an interrogation under torture can in any event be held in respect to him.

¹⁵⁴ PS 5.20.2. The harshness of the penalty here, in comparison to that of the following provision, reflects the context for which the provision was drafted – namely an attack as opposed to an accident.

¹⁵⁵ PS 5.20.3-4.

¹⁵⁶ PS 5.23.10 [11]; PS 5.26.1.

¹⁵⁷ PS 5.16.3 [*De servorum quaestionibus*].

¹⁵⁸ PS 5.16.7.

¹⁵⁹ PS 5.16.9; similarly *Dig.* 48.18.1.13.

103.) A crime must be prosecuted in the place where it is committed¹⁶⁰

The formal accusation and prosecution of a crime is to happen in the place where the crime is alleged to have been committed. For those who are accused should not be transferred from one province to another, lest during the course of travel they are rescued or escape; and it is not a matter of concern if those who are reported to have committed something criminal are freeborn, freedmen, or slaves.¹⁶¹

104.) Concerning boundaries that have been dug up or trees marking boundaries¹⁶²

Those who dig up boundaries or plow up property lines,¹⁶³ specifically those which designate a perimeter, or destroy trees marking boundaries, if they are slaves or *coloni* and have acted without the consent or authority of their master, they shall be executed. If it is proven that this act was done at the owner's behest, that same owner is to be deprived of a third of his possessions to the benefit of the fisc as a requirement of the law; nevertheless, the slave or *colonus* must be punished capitally.

105.) Boundaries between two estates must be observed¹⁶⁴

The boundaries which the owner of different farms used to separate one property from another when he sold one of them must be observed; those which had at one time been used to separate the different farms are not to be observed.

106.) Concerning a suit that is completed with oaths¹⁶⁵

Whenever an oath is used to determine the outcome of some legal matter, whether in accordance with the consent of the litigants or the determination of the judge, the matter cannot be reconsidered; nor is it permitted for anyone to bring an action or start an inquiry concerning the possibility of perjury.¹⁶⁶

¹⁶⁰ *Dig.* 48.2.7.4; *CTh* 9.1.10 (368).

¹⁶¹ The explanation offered here as to why a trial must take place where the alleged crime took place appears nowhere in either of the original sources. It appears to have been an addition of the compilers, as was the stipulation that it made no difference as to the status of the accused.

¹⁶² *PS* 5.22.2. In a letter written in the name of Theoderic to an unidentified illustrious *consularis*, Cassiodorus refers to such property markers and the examination thereof by a land surveyor (*agrimensor*) to settle a dispute between the neighbouring *spectabiles* Leontius and Paschasius (*Var.* 3.52).

¹⁶³ Under Roman law, a *finis* was not a simple line but a strip of land, five feet in width, between two landholdings.

¹⁶⁴ *Dig.* 10.1.12 (Paul lib. 3 *respons.*).

¹⁶⁵ Similarly *Dig.* 12.2.7 in fine (Ulpian lib. 22 *ad Edict.*); *Dig.* 42.1.56 (Ulpian lib. 27 *ad Edict.*).

¹⁶⁶ The use of oaths to resolve disputes seems quintessentially barbarian, but it was, in fact, a common procedure in Roman law as well. Gaius wrote in his *On the Provincial Edict* (*Dig.* 12.2.1): "Conscientious oath-taking is relied upon as an important means of shortening litigation. Disputes are settled in this way by virtue of agreement between litigants or on the authority of a judge." ("Maximum remedium expediendarum litium in usum venit iurisiurandi religio, qua vel ex pactioe ipsorum litigatorum vel ex auctoritate iudicis deciduntur controversiae.") He continues (*Dig.* 12.2.31): "It is a frequent practice of judges in doubtful cases to pronounce, after an oath has been exacted, in favour of the party swearing." ("solent enim saepe iudices in dubiis causis exacto iureiurando secundum eum iudicare qui iuraverit.") The jurist Paul stated that (lib. 18 *Ad Edict.* [*Dig.* 12.2.2]): "The taking of an oath is a species of settlement and has greater authority than a judgment." ("Iusiurandum speciem transactionis continet maioremque habet auctoritatem quam res iudicata."); and that (lib. 37 *Ad Edict.* [*Dig.* 12.2.38]): "It is an indication of manifest wickedness and an admission to refuse to swear or to counter claim." ("Manifestae turpitudinis et

107.) Concerning the instigator of sedition¹⁶⁷

Anyone who instigates sedition either among the people or in the army is to be burned alive.

108.) Concerning those who make a sacrifice according to the pagan rite¹⁶⁸

If anyone is apprehended while sacrificing according to the pagan rite, as well as diviners and necromancers should they be discovered, upon conviction in a lawful trial they shall be punished capitally; of those individuals who are knowledgeable of the wicked arts, that is magicians, *honestiores*, upon being stripped of all their possessions that they might possess, shall be condemned to perpetual exile; and *humiliores* shall be punished capitally.

109.) If a slave or *colonus* should seize anything violently without the knowledge of his owner¹⁶⁹

If a slave or *colonus* should seize anything violently without the knowledge of his owner, the owner shall be sued fourfold the original amount within a year of the offence, and for the simple sum after a year; or in place of this, should the owner choose the following alternative, let him know that the offending slave or *colonus* is to be delivered up to a judge to be punished: provided that the owner return that which he came into possession of as a result of the violence of the slave. But if the one sued claims that his slave has fled, let it suffice for the claimant to seek legal satisfaction [in accordance with this provision].

110.) Whoever destroys a grave¹⁷⁰

Anyone who destroys a grave shall be killed.

confessionis est nolle nec iurare nec iusiurandum referre.”) On the subject of oath-taking in late Roman law, see Ian Wood, “Disputes in late fifth- and early sixth-century Gaul: Some Problems,” in W. Davies and P. Fouracre (eds.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986), pp. 7-22, at pp. 15-18. For a further reference to oath-taking, see *ET* 119.

¹⁶⁷ *PS* 5.22.1.

¹⁶⁸ *CTh* 16.10.6; 16.10.23. In a letter written in the name of Theoderic and addressed to the *vir illustris* and *comes* Arigern, Cassiodorus recounts the case of two senators, Basilius (former consul in 463) and Praetextatus, who in 510 were accused of practicing the magical arts. The two subsequently escaped from custody (*Var.* 4.22; see also 4.23). According to the *Edict* of Athalaric, magicians and others practicing the magical arts are to be punished by the severity of the laws (presumably a reference to *ET* 108): “Maleficos quoque vel eos, qui ab eorum nefariis artibus aliquid crediderint expetendum, legum severitas insequatur[.]” (*Var.* 9.18.9)

¹⁶⁹ *CJ* 3.41.4.

¹⁷⁰ Similarly *Dig.* 47.12.11; *CTh* 9.17; *Nov. Val.* 23.3-4. For specific cases: *Var.* 4.34, where Theoderic appoints the *saio* Duda the task of supervising grave robbing to ensure that the treasure went to the crown. See also the case of the grave-robbing priest: Cass., *Var.* 4.18. This problem seems to have been a pernicious one throughout Late Antiquity. In a letter to his nephew Secundus, Sidonius tells how the grave of his grandfather, obscured from sight – a result of weather and general lack of upkeep – was in the process of being dug up by some undertakers, unaware that there was even a grave there. At that moment, Sidonius came upon them and, in his own words, on the very spot of his grandfather’s final resting place, “gave them such a trouncing as should in future secure the dead from molestation and safeguard the pious care of the survivors.” (II.xii, c. 476, trans. O.M. Dalton, *The Letters of Sidonius* [Oxford, 1915])

111.) If anyone buries corpses within the city of Rome¹⁷¹

Anyone who buries corpses within the city of Rome shall be compelled to allocate a fourth of his patrimony to the fisc; if he is destitute he shall be publicly flogged.

112.) Concerning the property of those condemned for any crime¹⁷²

The property of those who have been condemned for any crime¹⁷³ shall first be conferred on their children and parents, or relatives up to the third degree; but if the condemned should have no such relation as these, the fisc shall lay claim to their property.

113.) If a condemned curial should leave behind children¹⁷⁴

If a condemned curial should leave behind children, they shall take possession of everything which he forfeits; if he has no children, his assets shall be conferred on the municipal council; an exception to this is the case of high treason when the precepts of the laws require that the property of all those condemned [for this crime] is to be conferred on the fisc alone and not their children (should they have any).

114.) If clerics or any others should release a condemned person¹⁷⁵

If clerics or any others should forcibly release those who have been adjudged [guilty] and condemned in a criminal proceeding, they themselves shall be penalized or held liable for the fines which the judgment rendered against those convicted had stipulated; and if it is proven that this was perpetrated through the complicity or collusion of the judge, that same judge shall be compelled to pay five pounds of gold.¹⁷⁶

115.) Anyone who steals public or fiscal money¹⁷⁷

Anyone who in their pursuit of plunder steals money belonging to the fisc or public accounts shall repay fourfold the original amount.¹⁷⁸

¹⁷¹ *CTh* 9.17.6.

¹⁷² *CTh* 7.42.2.

¹⁷³ The implication here is a capital offence. The original source excludes the crimes of treason and magic.

¹⁷⁴ *CTh* 7.42.24.

¹⁷⁵ Similarly *CTh* 9.3.5.

¹⁷⁶ It is unclear if the reference in this provision to *clerici* is to priests acting as jailors or to priests breaking people out of prison (*violenter eruerunt*). By the early fifth century, the church became formally involved in the supervision of prison conditions (e.g., *CTh* 9.3.7 [409]). In Italy by the sixth century, this could include guard duty. For we hear from the Anonymous Valesianus (14.85) that before their trial, Albinus and Boethius were imprisoned in a baptistery at Verona for an undetermined amount of time: from there, Boethius was taken to Ticinum (Pavia), south of Milan, but of Albinus' fate we hear no more. On the other hand, the violence engendered by the Laurentian schism would seem a reasonable context for legislation like this which targeted jail-breaking priests. But there is no specific mention in our sources of jail-breaks during this affair.

¹⁷⁷ *PS* 5.27.1.

¹⁷⁸ Presumably the offender was subject to capital retribution in addition to the stipulated fine.

116.) If anyone should receive and keep plunder from a thief¹⁷⁹

Should anyone knowingly receive plunder from a robber [*raptor*] (that is a thief [*fur*]) for safekeeping, he shall be held to the same penalty accorded the robber.

117.) If a slave should steal from [another] or otherwise cause another to suffer a loss¹⁸⁰

If a slave should steal from [another] or otherwise cause another to suffer a loss, his owner, if he is not prepared to return or restore the equivalent of that person's property, must surrender his slave to be punished; he shall also observe this rule concerning his animals should they cause another to suffer losses.

118.) If an owner is sued for the theft committed by his slave¹⁸¹

If an owner, upon being sued for the theft committed by his slave, should elect to surrender his slave rather than defend him in a trial, he is equally enjoined to repay those things which he is proven to have acquired as a result of the theft.

¹⁷⁹ Similarly *CJ* 6.2.14. In classical tradition (e.g., *Dig.* 47.8.2.23[Ulpian]), *rapina* had been nothing but *furtum* aggravated by the use or threat of violence, but the tendency in post-classical times had in fact been towards a blurring of the line which marked it off from simple theft, such as in *ET* 116. Elsewhere, however, the *ET* makes a distinction between acts of *rapina* and *furtum*, treating the thief, whose actions are defined by stealth, with far greater severity than the robber, whose actions are usually accompanied by force or menace. Generally speaking, thieves like tomb-raiders and cattle rustlers who would, we may assume, ply their trade at night or otherwise covertly were punished far more severely than the brazen robber who committed his acts openly. Compare, for example, the capital punishment enumerated in *ET* 110 for destroying a tomb (presumably done with an end to stealing any contents), and the simple restitution stipulated in *ET* 124 for creditors who violently seize property of a defaulting debtor. Other barbarian peoples similarly treated robbery less severely than theft (see Brunner, *Rechtsgesch.*, II, pp. 838-9). But it should be borne in mind that particular cases of theft or robbery were treated on their merits and punished in distinct fashion. The man who formed and led a band of robbers, for example, was punished capitally: *ET* 75. On the evolution of the concept of theft in Roman law, see A. Watson, "The Definition of *Furtum* and the Trichotomy," *Tijdschrift voor Rechtsgeschiedenis = Revue d'histoire du droit* 28 (1960), pp. 197-210; D. Ibbetson, "The Danger of Definition: Contrectatio and Appropriation," in A.D.E. Lewis and D. Ibbetson (eds.), *The Roman Law Tradition* (Cambridge, 1994), pp. 54-72.

¹⁸⁰ *PS* 2.31.7. In a letter written in the name of Theoderic to the senators of Rome recently caught up in the violence associated with rival circus factions (in connection with the Laurentian Schism), Cassiodorus has the king command that any slave accused of the murder of a free-born citizen is to be delivered up to the court by his master, under penalty of 10 pounds of gold (*Var.* 1.30).

¹⁸¹ Similarly *Dig.* 9.4.33 (*Pomp. lib. ad Sabin.*).

119.) If anything is lost from an inn, ship or stable¹⁸²

If anything is lost from an inn, [ship]¹⁸³ or stable, it must be reclaimed from those who operate such places or do business in them. There is this provision: that if they take an oath concerning their good faith and that of their associates [regarding the matter], they shall not be compelled to pay anything; or at least, restore however much the claimant swears he lost in that place.

120.) If a slave commits theft and is manumitted¹⁸⁴

If a slave commits theft and is manumitted by his owner, or sold or given to another, the one manumitted, or the one who purchases him, or the one to whom he was given shall then plead a case of theft; for the punishment that follows is always capital. Moreover, not only will the one who commits the theft be held liable for the act, but that one, too, through whose efforts and counsel the theft is committed, will also be held liable.

121.) If a creditor lends money to another's procurator, overseer, *colonus*, chief tenant or slave without the consent or knowledge of the owner¹⁸⁵

If a creditor lends money to another's procurator, chief tenant, *colonus* or slave without the consent or knowledge of the owner, no prejudice of any kind shall be placed against the owner or his assets; the demands of the creditor shall be exacted from the *peculium* of the slave or *colonus* after deduction of what is owed to the master.

122.) If anyone transfers *cautiones* of their debtors to a powerful person for the purposes of collection¹⁸⁶

Creditors who transfer *cautiones*¹⁸⁷ of their debtors to powerful persons and are more willing to secure the loan through them shall lose their claim of the debt.

123.) Concerning the acquisition of pledges¹⁸⁸

We deny an individual the permission to seize a pledge on his own unless in a credible case the presiding judge gives him the authority.

¹⁸² PS 2.31.16. Ulpian discusses this subject at length (lib. 14 *Ad edict.* [Dig. 4.9.1 pr.-1]): "The praetor says: 'I will give an action against seamen, innkeepers and stablekeepers in respect of what they have received and undertaken to keep safe, unless they restore it'. [1] this edict is of the greatest benefit, because it is necessary generally to trust these persons and deliver property into their custody." ("Ait praetor: 'nautae caupones stabularii quod cuiusque saluum fore receperint nisi restituent, in eos iudicium dabo'. [1] Maxima utilitas est huius edicti, quia necesse est plerumque eorum fidem sequi et res custodiae eorum committere.") As Ulpian notes, liability under this provision lay in respect of theft or damage committed by the employees of shippers, innkeepers and stable keepers. In addition, innkeepers were liable for the acts of permanent residents but not casual guests or travelers. The distinction was justified, according to Ulpian, since the innkeeper chose his permanent residents but not passing travelers (Dig. 47.5.1.6).

¹⁸³ Despite including this category in the title, the compilers omitted it in the provision.

¹⁸⁴ PS 2.31.8-10.

¹⁸⁵ CTh 2.30.2; similarly 2.32.1.

¹⁸⁶ CTh 2.13.1. The compilers ignored the moralizing reasoning for the basis of the law found in CTh 2.13.1 – namely the greed of the creditor.

¹⁸⁷ *Cautio*: a written acknowledgement of debt which guarantees that the debt will be paid back.

¹⁸⁸ PS 5.26.4.

124.) If a creditor should forcibly seize property from his debtor that is not pledged to him¹⁸⁹

If a creditor forcibly seizes from his debtor property that is not pledged to him, let him restore as penalty fourfold the amount previously taken if he is sued within a year of the offense being committed; but after a year, he will be obligated to pay back the simple sum. Even with respect to produce that has been forcibly removed the rule of law must also be observed.

125.) If anyone should remove other individuals from churches, that is religious places¹⁹⁰

If anyone should remove other individuals from churches, that is religious places, or presumes to remove anything therein by force, let him be punished capitally.

126.) No curial, tax collector, or registrar shall issue assignment warrants (*pittacia* [*delegationis*]) within a church

Hereafter no curial, registrar¹⁹¹ or tax collector shall issue assignment warrants¹⁹² within a church; but if he recognizes someone as being a debtor to the fisc, from outside the church let him expose him [as a public debtor], or at least ‘delegate’ [the fiscal debtor] so as to make the matter public in regards to the one who denies he is a debtor. But if anyone presumes to violently expel someone [from the church] against his will since he is a debtor and makes claims to the contrary, let him restore fourfold the amount that he has demanded.

127.) No one may be unwillingly assigned to a third party [with respect to a debt]¹⁹³

No one may be assigned unwillingly to another [with respect to a debt]; but if the person who is transferred by his creditor consents to the transfer, professes that he is in debt, and promises to repay, let him be compelled to pay what he promised.

128.) If a son *in potestate*, or a slave or *colonus* are not defended by the father or owner against an accusation¹⁹⁴

If a son *in potestate*, or a slave or *colonus* are not defended by the father or owner against an accusation of an offence or crime, they must be given over to a judge exercising the appropriate authority; but a son may choose to defend himself in court against an offence for which he has been sued.

¹⁸⁹ PS 5.26.4; similarly *Dig.* 4.2.14, 17 (Ulpian *lib. ad Edict.*). For further discussion, see above, pp. 27-28.

¹⁹⁰ Similarly *CJ* 1.12.2.

¹⁹¹ Public registrar (*tabularius*): an official in charge of public records and archives, especially the records of tax accounts.

¹⁹² *Pittacia delegationis*: in *CTh* 7.4 *pittacium* denotes the warrant or chit delivered by military *actuarii* to keepers of tax stores in return for ration supplies; that is to say, the *pittacium* documented the moment at which the tax *annona* turned into the ration *annona*. But it is not clear if *pittacium* retained this narrow definition in the sixth century. In *Var.* 12.20 it has the general sense of an acknowledgement of debt (*obligatio chirographi*) by the pope; the same in *PDipl* 138 (503), where it appears to be a synonym for *cautio*; Ennodius (*Vita Euphrophanii*, ed. Hartel, p. 375) mentions *pictacia ad clusuras*, meaning ‘passports’ or ‘exit permits’.

¹⁹³ Similarly *CJ* 8.41 (42) .1.

¹⁹⁴ Similarly *Dig.* 9.4.33 (Pomp. *lib. 14 ad Sab.*).

129.) Anyone who obtains something through deceit or theft¹⁹⁵

Anyone who obtains something through deceit or theft, let him neither profit nor cause harm to another as a result.

130.) If something is promised in order to catch a thief¹⁹⁶

That which has clearly been promised in order to catch a thief must deservedly and fittingly be paid.

131.) Concerning those who have been convicted or condemned in court on a charge of debt¹⁹⁷

Those who have been convicted or condemned in court on a charge of debt must procure the payment within two months of the day when the judgment was rendered. If they do not do this, by the authority of a judge the property which they have pledged must be seized and sold off in accordance with the legal claim of the victor: so that what has been lawfully decided may be carried out.

132.) [Concerning] a landholder who is summoned to appear in court¹⁹⁸

A landholder who is summoned to appear in court shall not be compelled to set forth the legal basis for his title of ownership, nor is the burden of proof to be imposed upon him: for, it is the duty of the claimant rather, to prove how the property which he lays claim to in fact belongs to him.

133.) In the event that a woman promises by way of a guarantee that she will repay another's debt

A woman is not to be held liable even if she promises by way of a guarantee that she will repay another's debt.¹⁹⁹

134.) Anyone who extorts from his debtor anything more than the one percent allowed by law²⁰⁰

A creditor who presumes to demand from his debtor anything more than the one percent²⁰¹ allowed by law shall lose his share of the debt.²⁰²

¹⁹⁵ Similarly *CJ* 1.22.2.

¹⁹⁶ *PS* 2.31.24, 25.

¹⁹⁷ *PS* 5.5a.4; similarly *Dig.* 42.1.31 (Callistr. Lib. 2 *cognit.*).

¹⁹⁸ *CTh* 11.39.12.

¹⁹⁹ Cf. *ET* 153.

²⁰⁰ *CTh* 2.33.2.

²⁰¹ This percent is calculated on a monthly basis; no more than 12 percent a year.

²⁰² The analogue imposed an additional fourfold fine on the rapacious creditor.

135.) If a guarantor should acquire possession of the pledged property of a debtor on whose behalf he has assumed the debt²⁰³

A guarantor who repays the creditor and acquires from him the pledged properties of the debtor on whose behalf he has made a pledge must return the pledged property to the debtor once the debt has been paid back.

136.) If anyone should acquire a portion of his property without knowing that it already belongs to another landholder²⁰⁴

If anyone should acquire his property without knowing that it already belongs to another landholder, he is to suffer no prejudice; but he shall be able to bring forward an action concerning the matter of ownership.

137.) If anyone should erect an edifice on another's land²⁰⁵

If anyone should unknowingly erect an edifice on another's land, he shall receive compensation for the costs which he incurred; but he shall forfeit ownership of that dwelling.

138.) If the same property is purchased by different people²⁰⁶

If the same property is purchased by different people at different times, the one who received it shall have a stronger case and shall more readily acquire ownership.

139.) The vendor shall observe the jurisdiction [of his buyer]²⁰⁷

The vendor, even if he has the privilege to claim the jurisdiction of his own court, shall nevertheless observe the jurisdiction of the buyer when he is to defend his sale.²⁰⁸

²⁰³ Similarly *CJ* 8.13 (14).21.

²⁰⁴ *CJ* 4.65.20.

²⁰⁵ Similarly *Dig.* 41.1.7.12 (Gaius lib. 2 *rer. Cott.*). In classical law, a person building on the private land of another, while retaining his rights in the materials, did not acquire ownership in the building made of them. The building accrued to the owner of the soil and to him alone. In this respect it made no difference whether or not the constructor built with the owner's consent, or if he did or did not believe himself to be the owner of the ground. However, a *bona fide* constructor might keep the building until his expenses were reimbursed. Elements of this classical arrangement can be found here. According to the provision, a person retained no legal claim of ownership to a building he unknowingly constructed on another's land: presumably, ownership accrued to the landholder. He was, however, to be reimbursed for the expenses, although the procedural details for this are not made clear. In the event that the proprietor had allowed another to build on his land, the provision provides no remedy. It is entirely likely, however, that it took for granted the development in later imperial law that recognized the builder in these circumstances as the *de iure* owner and not the landowner. On this, see *Gai Epitome* 2.1.4; Levy, *West Roman Vulgar Law*, pp. 53-4.

²⁰⁶ *Epitome CG Wisigotica* 3.6(2).4.

²⁰⁷ *Dig.* 5.1.49 (Paul lib. 3 *respons.*).

²⁰⁸ The general principle of venue in Roman law was *actor sequatur forum rei*, that is, that the prosecutor or plaintiff, in criminal and in civil actions, had to proceed in the court which had jurisdiction over the accused or defendant (*CJ* 3.13.2 [293]; *CTh* 2.1.4 [364]). In ordinary cases this meant the court within whose area the defendant was domiciled, that is, that of the governor of the province in which the defendant lived. There were some exceptions to this rule, the most important of which was that in a criminal case, prosecution had to take place in the court within whose jurisdiction the alleged crime was committed (*ET* 103). In derogation of these general principles were rules of *praescriptio fori* whereby certain categories of administrative cases were reserved for special courts

140.) [A vendor] who undergoes a judicial challenge concerning the purchase of property²⁰⁹

[A vendor] who undergoes a judicial challenge concerning the purchase of property must respond to the claimant, [the purpose of which is] not to reject [the validity of the sale] on the basis of what was offered to the vendor: let him [i.e. the vendor] be mindful that he is obligated to do only this – namely, to defend his action in the sale.

141.) Anyone who sells a runaway slave to an unknowing party²¹⁰

Anyone who sells a slave with a history of escaping to another unaware of this, should the slave then flee the buyer the vendor shall both return the payment and compensate [the buyer] for any losses he may have suffered as a result of that [fugitive] slave.

142.) An owner shall be permitted to transfer his slaves, even *originarii*, to other regions, or do whatever he wants [in regards to them]²¹¹

An owner shall be permitted to transfer rustic slaves of each sex, even if they are *originarii*, which he possesses physically and lawfully,²¹² from his properties to locales which he owns, or to enjoin them to urbane services, provided that they are returned to those regions where they first departed in accordance with the will of the owner, and rightfully be considered to be members of his household staff in the city; and no judicial challenge on any grounds (for example under the opposition of origin) may arise concerning the actions and orderly arrangements of this measure. Moreover, it shall be permitted for owners of the aforementioned circumstance, under the attestation of their will, to transfer [slaves] from any portion of their land, or surrender, sell or grant them to anyone they wish.

143.) Concerning the preservation of the privileges of Jews²¹³

The privileges conferred by the laws upon Jews shall be preserved: when disputes arise between those Jews who live in accordance with their own laws, they must have as judges those whom they consider to be teachers of their observance.

and various categories of persons could claim, as defendants, if accused in civil or criminal cases, and sometimes also as plaintiffs in civil cases, the jurisdiction of a court other than that of the province of their residence or where the crime or offence was alleged to have taken place. Soldiers, senators and others had privileges over where, and before whom, their cases should be conducted, which were set out in the various rules applying to *praescriptio fori*. Here, the vendor is explicitly prohibited from invoking any such privilege.

²⁰⁹ Similarly *Dig.* 21.2.74.2.

²¹⁰ *PS* 2.17.11.

²¹¹ Similarly *Nov. Val.* 35.18. The provision addresses a scenario in which great landowners, facing acute labour shortages, pooled workers from several areas and transferred others from domestic duties in town to agricultural labour.

²¹² The same distinction drawn between lawful and physical ownership is found in *ET* 45.

²¹³ Similarly *CTh* 16.8.13. We are told by Cassiodorus that on at least one other occasion Theoderic reaffirmed this privilege to the Jews of Milan (*Var.* 4.33).

144.) On recording the sureties of tax receipts²¹⁴

Those who are receivers of tax receipts, when recording the sureties of landholders, shall specifically record the names of each of the holders and their tax declaration (*professio*);²¹⁵ they shall also record the amount of money they receive. But if anyone should be unwilling to record the tax assessment of the property, the names of the owners, and sum of the money received in making these sureties, and is proven guilty of this offence in court, he shall be compelled to pay fourfold the amount of the money which the landholder proves he paid.²¹⁶ It is equally appropriate that this precept be observed concerning *discussores*²¹⁷ if, when publishing sureties concerning any titles, they are unwilling to record how much money they received from would-be possessors or those in arrears.

145.) If a barbarian should refuse to appear in court after being summoned for a third time

If any barbarian, upon being summoned for a third time by the authority of a judge exercising the appropriate jurisdiction, and duly called upon by judicial directives refuses to come to the judge by whose command he has been summoned, he shall deservedly receive a sentence of contempt after examination of the case; and moreover he shall be judged to have lost the case concerning which he was summoned. There must be these conditions: that either the reliability of the guarantee issued by the defendant shows, or the testimony of freeborn and honorable men confirms, that he who was summoned for the third time was one of the *capillati*;²¹⁸ and that it is clearly obvious to those giving testimony that he who lost by judicial decree disdained to give a response and had no wish to come before the court.

²¹⁴ *CTh* 12.6.18; similarly *Nov. Val.* 1.3. On the subject of tax liability: Cass., *Var.* 1.14; 2.17; 4.14; 5.26-7; 6.24; 7.45; 8.26; Goffart, *Barbarians and Romans*, pp. 60-102; S. Barnish, "Taxation, land and barbarian settlement in the western Empire," *PBSR* 65 (1988), pp. 120-55; F. Thibault, "L'impôt direct dans les royaumes des Ostrogoths, des Wisigoths et des Burgundes," *RHDFE* 25 (1901), pp. 699-728.

²¹⁵ *Professio*: see W. Goffart, "From Roman Taxation to Mediaeval Seigneurie," p. 170.

²¹⁶ The compilers made the point explicit that the taxpayer was to prove the amount which he claims he brought to the office of tax collector or receiver. This requirement does not appear in the original source (*CTh* 12.6.18).

²¹⁷ In the later empire, it was the task of the officers of the Privy Purse to employ more stringent means of coercing recalcitrant taxpayers and enforcing the collection of arrears. *Exactores*, *compulsores*, and *discussores* were sent out from the palace as representatives of the Count of the Privy Purse (*CTh* 8.8.7), armed with extraordinary powers that allowed them abundant opportunities for fraud and oppression. Of all these, those most open to corruption were the *discussores*, officers who were responsible for discovering and collecting arrears of taxation. By demanding old tax receipts which had been lost (*CTh* 11.26.2; Ammianus Marcellinus, 26.6.17), by over-exaction (*CTh* 11.8), by tampering with the census lists (*Nov. Just.* 30.3), the *discussor* was in a position to oppress the provincials for great personal profit. In the ordinary scheme of things these officers were appointed on a regular basis (*Nov. Val.* 1.3), and normally people would not be very willing to undertake so onerous a task, but in the later empire, as the administration became increasingly incapable of effectively managing its affairs, the position became highly sought after by individuals looking to profit at the expense of taxpayers (*Nov. Val.* 3.1; and *CTh* 8.8.9). In legislation of the emperor Valentinian of 369, *discussores* were compelled to refund whatever the amount they had illegally exacted on fictitious claims (*CTh* 11.26.1); this restitution was quadrupled by a law of Honorius (*CTh* 13.11.11), who also prohibited *discussores* from demanding old tax receipts that had been registered in the public records (*polypticha*) but were subsequently lost by the taxpayer (*CTh* 11.26.2). For discussion on the corruption of late imperial governments see George R. Monks, "The Administration of the Privy Purse," *Speculum* 32 (1957), pp. 748-79, esp. pp. 763-65; Peter Heather, *The Fall of the Roman Empire*, pp. 100-110.

²¹⁸ On the significance of this term, see above, pp. 31-34.

146.) Concerning stolen produce²¹⁹

Both a *colonus* and owner can bring forward an action concerning produce stolen from the property, since this matter is a concern for each.

147.) Concerning sales exercised in good faith²²⁰

A sale agreed upon in good faith and concluded cannot be challenged by the vendor; but he may demand from the buyer any outstanding payment.

148.) Concerning slaves or *coloni* returned from the enemy²²¹

Slaves or *coloni* that have been captured by enemies and returned shall be restored to their owner: provided that another did not already purchase them when they were sold by enemies in a valid transaction [*commercium*].²²²

149.) Concerning public measure and weight²²³

If, while matters of the fisc are being carried out, a [tax] collector or receiver should use a greater measure or heavier weight than what the long-standing regulation of public ordination has established, he shall at once be led to court²²⁴ along with his measures and weights; so that, if he is convicted in regards to their imbalance, he may thereupon suffer fourfold the value of the goods he fraudulently received in favour of the one he superexacted. Moreover, We decree that this must also be observed in regards to private businessmen should it be proven that they used improper weights or measures in the course of their transactions.²²⁵

150.) No one may exercise control over another's farmhand or cow

Let no one demand work or service from another's farmhand (*rusticus*) without the consent of the owner, or to make use of his slave or cow unless that farmhand, or his chief tenant or owner willingly offers this. Anyone who contradicts this precept shall give [the owner] one gold *solidus*²²⁶ for every day he so imposed burdens on [his] farmhand or cow without permission.

151.) Concerning a damaged crop or felled tree²²⁷

If another's crop or tree is destroyed, or any loss results from someone's cunning, fourfold the amount of damages shall be awarded [the victim] in the name of the person who did this.

²¹⁹ *PS* 2.31.30.

²²⁰ Similarly *CJ* 4.44.3; *CTh* 3.1.7.

²²¹ Similarly *CJ* 8.50 (51).10.

²²² The reference to sale here would seem to reflect the caveat in the second half of *CJ* 8.50 (51).10 in the clause "si ... ancilla nec commercio redempta est."

²²³ *CTh* 11.8.1. 3; similarly *Nov. Maj.* 7.1.15 (458), which punishes guilty tax collectors capitally. In a letter (*Var.* 5.39) written in the name of Theoderic concerning various misdeeds of revenue officers in Spain, Cassiodorus states that the land-tax collectors (*assis publicus*) are accused of using false weights in collecting the quotas of produce from provincials.

²²⁴ Presumably by the *defensor civitatis*, as stipulated in the corresponding imperial decree (*CTh* 11.8.3).

²²⁵ The application of this provision to private businessmen was an addition made by the compilers.

²²⁶ *Solidus*: the standard gold coin, 1/72 of a Roman pound.

²²⁷ *PS* 2.31.24.

152.) If a person's slave is killed by someone else

If a person's slave or farmhand is killed by someone else, his owner shall have the power either to act according to criminal procedure concerning the death of his slave and accuse²²⁸ the murderer of a criminal offence; or, in accordance with civil procedure, propose an action concerning the loss of his dead slave, in such a way that he shall receive two slaves of the same value as that of the murdered slave.

153.) A wife cannot be sued in the place of her husband²²⁹

A wife must not be sued in place of her husband; in accordance with the prudence and moderation of the laws, only his property or espousal largesse shall be demanded for his financial liability [*obnoxietate*].

154.) Concerning the Lord's Day and the days of Easter²³⁰

We order that no one is to be sued on the day of the sun, which is called the Lord's Day,²³¹ as well as the days of Easter; anyone who contradicts this precept shall be considered guilty of sacrilege.

Epilogue

We have brought together these [edicts], advantageous to all barbarians as well as Romans, as much as Our labours could permit or We could address at this time; all loyal barbarians and Romans must abide by them. Those matters which either the brief scope of the *Edict*, or [Our] attention to [other] public business have prevented Us from including are to be settled as they arise by the usual path of the laws. Let no one with any rank, wealth, power, office or honour presume in any way to oppose these beneficial precepts. We have gathered these laws to some extent from recent law (*lex*) and the sanctity of ancient Roman custom (*ius*). And all judges and those who pronounce the law shall know that if they allow these edicts to be violated in any way, they shall be deservedly struck by the punishment of proscription and exile. But if it happens that a person of considerable influence or his procurator, deputy or even chief tenant, whether barbarian or Roman, does not allow the present edicts (which have been decreed for the good of all) to be heeded in a case of some kind, and the judge involved is unable to withstand or prevent this, let that judge, if he has his own interests at heart, draw up an account of everything, lay aside any appearance of fear, and without delay send a report to Us. Only in this way can he be

²²⁸ The term *accusare* is used here in connection with laying a criminal charge. Elsewhere, the compilers are not so technical.

²²⁹ Similarly *CJ* 4.12.2.

²³⁰ *CTh* 2.8.18; 8.8.4.

²³¹ This is a specific reference to Constantine's purposeful identification in *CTh* 2.8.18 between the pagan day for the worship of the sun and the Lord's Day of the Christians (trans. Pharr): "On the day of the Sun, which Our ancestors rightly called the Lord's Day, the prosecution of all litigation, court business, and suits, shall be entirely suspended. No person shall demand the payment of a public or private debt, nor shall there by any cognizance of controversies before arbitrators, whether they have been requested in court or chosen voluntarily." ("sicut indignissimum videbatur, diem solis, veneratione sui celebrem, altercantibus iurgiis et noxiis partium contentione occupari, ita gratum ac iucundum est, eo die, quae sunt maxime votiva, compleri. atque ideo emancipandi et manumittendi die festo cuncti licentiam habeant, et super his rebus acta non prohibeantur.")

absolved of blame. For it is the duty of the whole to uphold that which has been provided for the security of all provincials.

Here Ends the Edict of King Theoderic

Bibliography

Primary Sources

- Ammianus Marcellinus, *Res Gestae*, ed. and trans. John C. Rolfe. 3 vols. Loeb Classical Library (Cambridge, MA.: Harvard University Press, 1935-40).
- Anonymi Valesiani pars posterior*, ed. Theodor Mommsen, *MGH AA* 9 (Berlin, 1892; reprint Munich, 1981); trans. John C. Rolfe, *Ammianus Marcellinus: Res Gestae*, vol. 3. Loeb Classical Library (Cambridge, MA.: Harvard University Press, 1940).
- Augustine of Hippo, *Confessions*, ed. James J. O'Donnell, 3 vols. (Oxford: Oxford University Press, 1992).
- Aurelius Victor, *Liber de Caesaribus* = *Sexti Aurelii Victoris Liber de Caesaribus*, ed. Franciscus Pichlmayr (Leipzig: Teubner, 1911); trans. H.W. Bird, *Sextus Aurelius Victor: Liber de Caesaribus*, Translated Texts for Historians 17 (Liverpool: Liverpool University Press, 1994).
- Avitus of Vienne, *Epp.* = *Alcimi Ecdicii Aviti Viennensis episcopi Opera quae supersunt*. ed. R. Peiper, *MGH AA* 6 vol. 2 (Berlin: Weidmann, 1883); trans. Danuta Shanzer and Ian Wood, *Avitus of Vienne: Selected Letters and Prose*, Translated Texts for Historians 38 (Liverpool: Liverpool University Press, 2002).
- Caesarius of Arles = *Caesari Arelatensis Opera omnia*, ed. G. Morin, *CSEL* 103-4 (Turnholt: Brepols, 1953); trans. Mueller, *Saint Caesarius of Arles: Sermons*. 3 vols. (New York, 1956; repr. Washington, D.C.: The Catholic University of America Press, 1964-73).
- Cassiodorus, *Chronica*, ed. Theodor Mommsen, *MGH AA* 11 vol. 2 (Berlin: Weidmann, 1894).
- _____, *Orationes*, ed. Ludwig Traube, *MGH AA* 12 (Berlin: Weidmann, 1894).
- _____, *Variae*, ed. Theodor Mommsen, *MGH AA* 12 (Berlin: Weidmann, 1894); trans. (partial) Thomas Hodgkin, *The Letters of Cassiodorus being a condensed translation of the Variae Epistolae of Magnus Aurelius Cassiodorus Senator* (London: Henry Frowde, 1886); trans. (select) S.J.B. Barnish, *The Variae of Cassiodorus Senator*, Translated Texts for Historians (Liverpool: Liverpool University Press, 1992).
- Chronica Gallica a. CCCCLII et DXI*. ed. Theodor Mommsen, *MGH AA* 9 (Berlin: Weidmann, 1892).
- Codex Theodosianus*, ed. Theodor Mommsen and Paul Krueger, 2 vols. (Berlin: Weidmann, 1905); trans. Clyde Pharr, *The Theodosian Code and Novels and Sirmondian Constitutions* (New York: Greenwood Press, 1952).

- Codices Latinae Antiquiores. A Palaeographical Guide to Latin Manuscripts Prior to the Ninth Century I-XI plus supplement*, ed. E.A. Lowe (Oxford: Oxford University Press, 1934-71).
- Concilia Galliae a. 511-a. 695*, ed. C. DeClercq, *Typographi Brepols Editores Pontificii* (Turnholt: Brepols, 1963).
- Corpus Inscriptionum Latinarum*. ed. Theodor Mommsen et al. 16 vols. and supplements (Berlin: G. Reimerum, 1862-).
- Corpus iuris civilis*, ed. Paul Krueger and R. Schoell, 3 vols. (Berlin: Weidmann, 1912-22).
- Edictum Theoderici regis*, ed. Friedrich Bluhme, *MGH Leges nationum Germanicarum* 5 (Hannover: Hahn, 1889), pp. 149-70; repr. by J. Baviera, *Fontes iuris anteiustiniani* 2 (Florence: S.A.G. Barbèra, 1940), pp. 683-710; repr. Pier Luigi Falaschi, *Edictum Theoderici regis Italiae* (Milan: Giuffrè, 1966).
- Ennodius, *Epistulae*. ed. and trans. Stéphane Gioanni, *Ennode de Pavie: Lettres*. Vol. 1: Livres I et II (Paris: Les Belles Lettres, 2006).
- _____, *Magni Felicis Ennodii Opera*, ed. Friedrich Vogel, *MGH AA* 7 (Berlin: Weidmann, 1885).
- _____, *PanTh = Panegyricus dictus clementissimo regi Theoderico*, ed. and trans. Christian Rohr, *Der Theoderich-Panegyricus des Ennodius. MGH Studien und Texte* 12 (Hannover: Hahnische Buchhandlung, 1995).
- Epistolae Theodericianae Variae*, ed. Theodor Mommsen, *MGH AA* 12 (Berlin: Weidmann, 1894), pp. 387-92.
- Evagrius, *Historia ecclesiastica*, ed. J. Bidez and L. Parmentier (London: Methuen, 1898); trans. Michael Whitby, *The Ecclesiastical History of Evagrius Scholasticus*, *Translated Texts for Historians* 33 (Liverpool: Liverpool University Press, 2000).
- Ferrandus Diaconus, *Vita s. Fulgentii*, ed. and trans. G. G. Lapeyre (Paris, Belles Lettres: 1929).
- Gregory of Tours, *Historiae = Gregorii episcopi Turonensis libri historiarum* X. ed. Bruno Krusch and Wilhelm Levison, *MGH SRM* 1.1, 2nd edn. (Hanover: Hahn, 1951); trans. Lewis Thorpe, *Gregory of Tours: The History of the Franks* (London: Penguin Books, 1974).
- Gregory the Great, *Registrum epistolarum*, ed. Paul Ewald and Ludo Moritz Hartmann, *MGH Epistolae* 1-2, 2 vols. (Berlin: Weidmann, 1887-1899); trans. John R.C. Martyn, *The Letters of Gregory the Great*, 3 vols. (Toronto, Pontifical Institute of Mediaeval Studies, 2004).

Hydatius, *Continuatio Chronicorum Hieronymianorum*, ed. Theodor Mommsen, *MGH AA* 11 (Berlin: Weidmann, 1894).

Inscriptiones Latinae Selectae, ed. Hermann Dessau, 3 vols. (Dublin: Weidmann, 1974).

Isidore of Seville, *Historia Gothorum Wandalorum Sueborum*, ed. Theodor Mommsen, *MGH AA* 11 (Berlin: Weidmann, 1894).

John Malalas, *Chronographia*, ed. Ludwig Dindorf (Bonn, Habelt: 1831); trans. (with new material and improved apparatus) Elizabeth Jeffreys *et al.* *The chronicle of John Malalas* (Melbourne: Australian Association for Byzantine Studies, 1986).

John of Antioch = *Ioannis Antiocheni Fragmenta ex Historia chronica*. ed. and trans. Umberto Roberto (Berlin: Walter de Gruyter & Co., 2005).

Jordanes, *Romana et Getica*, ed. Theodor Mommsen, *MGH AA* 5.1 (Berlin: Weidmann, 1882).

_____, *De origine actibusque Getarum*, ed. F. Giunta and A. Grillone, *Fonti per la storia d'Italia* 117 (Rome: L'Istituto, 1991).

Lex Romana Burgundiorum, ed. F. Bluhme in *MGH Leges nationum Germanicarum* 3 (Hannover: Hahn, 1863), pp. 675-9.

Liber Constitutionum, ed. L. R. von Salis, *MGH Leges nationum Germanicarum* 1 (Hannover: Hahn, 1902), pp. 1-122.

Liber historiae Francorum, ed. B. Krusch, *MGH SRM* vol. 2 (Hannover: Hahn, 1888), pp. 215-328.

Marcellinus comes = *Marcellini v.c. comitis Chronicon ad a. DXVIII*. ed. Theodor Mommsen, *MGH AA* 11.2 (Berlin: Weidmann, 1894).

Notitia Dignitatum omnium tam civilium quam militarium, ed. Otto Seeck (Berlin: Weidmann, 1876).

Novellae ad Theodosianum pertinentes, ed. Paul M. Meyer and Theodor Mommsen (Berlin: Weidmann, 1905).

Orosius, *Historiarum adversum paganos libri VII*, ed. K. Zangemeister, *CSEL* 5 (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1882); ed. and trans. Marie-Pierre Arnaud-Lindet, 3 vols. (Paris: Belles Lettres, 1990-1); trans. Roy J. Deferrari, *Paulus Orosius: The Seven Books of History Against the Pagans*. The Fathers of the Church 50 (Washington, D.C.: The Catholic University of America Press, 1964).

Pactus Legis Salicae, ed. K.A. Eckhardt, *MGH Leges nationum Germanicarum* 4.1 (Hannover: Hahn, 1962).

Pauli Sententiae, ed. J. Baviera, *Fontes Iuris Romani Anteiusiniani*, vol. II (Florence: S.A.G. Barbèra, 1940; repr. 1964) pp. 319-417.

Procopius, *Wars*, ed. J. Haury and trans. H.B. Dewing, 5 vols. (Cambridge, MA.: Harvard University Press, 1914-28).

_____, *The Anecdota or Secret History*, ed. J. Haury and trans. H.B. Dewing (Cambridge, MA.: Harvard University Press, 1935).

Prosper of Aquitaine, *Epitoma Chronicon*, ed. T. Mommsen, *MGH AA* 9 (Berlin: Weidmann, 1892; repr. Munich, 1981), pp. 341-499.

Salvian, *De Gubernatione Dei Libri VIII*, ed. F. Pauly, *CSEL* 8 (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1883).

Sidonius Apollinaris, *Carmina et Epistulae*, ed. and trans. W.B. Anderson and E.H. Warmington, 2 vols. Loeb Classical Library (Cambridge, MA.: Harvard University Press, 1936-65).

Suetonius, *De vita Caesarum*, trans. with introduction and notes Catherine Edwards (Oxford: Oxford University Press, 2000).

Tacitus, *De origine et situ Germanorum*, ed. J.G.C. Anderson (Oxford: Oxford University Press, 1938).

Tjäder, Olof, *Die nichtliterarischen Lateinischen Papyri Italiens aus der Zeit 445–700*, Acta Instituti Romani Regni Sueciae, series in 4° 19, 2 vols. (Uppsala: C.W.K. Gleerup, 1955; repr. Stockholm, 1982).

Venantius Fortunatus, *Opera*, ed. Friedrich Leo, *MGH AA* 4 (Berlin, Weidmann, 1881-5).

Secondary Sources

Alföldi, Maria R., “Il medaglione d’oro di Teodorico,” *Rivista italiana di Numismatica e scienze affini* 80 (1978), pp. 133-41.

Alföldy, Geza, *The Social History of Rome*, trans. David Braund and Frank Pollock (Baltimore: Johns Hopkins University Press, 1988).

Amory, Patrick, “The Meaning and Purpose of Ethnic Terminology in the Burgundian Laws,” *Early Medieval Europe* 2 (1993), pp. 1-28.

_____, *People and Identity in Ostrogothic Italy, 489-554*, Cambridge Studies in Medieval Life and Thought: Fourth Series (Cambridge: Cambridge University Press, 1997).

Andaloro, Maria, “Tendenze figurative a Ravenna nell’età di Teodorico,” in *Teoderico il Grande*

- e i Goti d'Italia: atti del XIII Congresso internazionale di studi sull'Alto Medioevo, Milano 2-6 novembre 1992* (Spoleto: Centro italiano di studi sull'alto Medioevo, 1993), pp. 555-83.
- Andreolli, Bruno, "La corvée precarolinga," in *Le prestazioni d'opera nelle campagne italiane del Medioevo* (Bologna: Loescher, 1987), pp. 15-33.
- Arvizu, Fernando, "La femme dans le Code d'Euric," *RHDFE* 62 (1984), pp. 391-405.
- Arjava, Antti, "Divorce in Later Roman Law," *Arctos* 22 (1988), pp. 5-21.
- _____, "Paternal Power in Late Antiquity," *JRS* 88 (1998), pp. 147-65.
- _____, "The Survival of Roman Family Law After the Barbarian Settlements," in R.W. Mathisen (ed.), *Law, Society and Authority in Late Antiquity* (Oxford: Oxford University Press, 2001), pp. 33-51.
- Arthur, P. and H. Patterson, "Local Pottery in southern Puglia in the sixth and seventh centuries," in L. Saguì (ed.), *Ceramica in Italia: VI-VII secolo. Atti del convegno in onore di J.W. Hayes*, May 11-13, 1995. *Arch. Medievale* 14 (Florence: All'insegna del giglio, 1998), pp. 511-30.
- Ashburner, Walter, "Farmer's Law. I," *JHS* 30 (1910), pp. 68-108.
- _____, "Farmer's Law. II," *JHS* 32 (1912), pp. 68-95.
- Astolfi, Riccardo, *La Lex Iulia et Papia*, 2nd edn. (Padua: Antonio Milani, 1986).
- Auerbach, Erich, *Literary Language & its Public in Late Antiquity and in the Middle Ages* (Princeton: Princeton University Press, 1993).
- Bagnall, Roger S., *Egypt in Late Antiquity* (Princeton: Princeton University Press, 1993).
- Barnes, Timothy, *Constantine and Eusebius* (Cambridge, MA.: Harvard University Press, 1981).
- Barnish, Sam J., "The *Anonymous Valesianus* II as a source for the last years of Theoderic," *Latomus* 42 (1983), pp. 572-96.
- _____, "Pigs, Plebeians and *Potentes*: Rome's Economic Hinterland, c. 350-600 A.D.," *PBSR* 55 (1987), pp. 157-85.
- _____, "Taxation, land and barbarian settlement in the western Empire," *PBSR* 65 (1988), pp. 120-55.
- _____, "Sacred Texts of the Secular: Writing, Hearing, and Reading Cassiodorus' *Variae*," *Studia Patristica* 38 (2001), pp. 362-70.

Barnwell, Paul S., *Emperors, Prefects and Kings: The Roman West, 395-565* (London: Duckworth, 1992).

_____, "Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West," *Past and Present* 168 (2000), pp. 6-29.

Bartlett, Richard, "The Dating of Ennodius' Writings," in Edoardo D'Angelo (ed.), *Atti della Seconda Giornata Ennodiana* (Naples: Pubblicazioni del Dipartimento di Filologia Classica dell'Università degli Studi di Napoli Federico II, 2003).

Basanoff, Vsevolod, "Les sources chrétiennes de la loi de Constantine sur le repudium et le champ d'application de cette loi," in *Studi in onore di S. Riccobono* 3 (Palermo: Artigrafiche G. Castiglia, 1936), pp. 177-99.

Bauman, Richard A., "*Leges Iudiciorum Publicorum*," in H. Temporini (ed.), *Aufstieg und Niedergang der römischen Welt* ii., 13 (Berlin: Walter de Gruyter & Co., 1980; repr. 1994), pp. 103-233.

_____, *Crime and Punishment in Ancient Rome* (London: Routledge, 1996).

Beaucamp, Joëlle, *Le statut de la femme à Byzance (4e-7e siècles)* vol. 1, *Le droit impérial* (Paris: De Boccard, 1990).

Becker, Hans-Jürgen, "Edictum Theoderici," in *Handwörterbuch zur deutschen Rechtsgeschichte* 1 (Berlin: E. Schmidt, 1971), pp. 801-3.

Berger, Adolf, *Encyclopedic Dictionary of Roman Law*, vol. 43, part 2 (Philadelphia: The American Philosophical Society).

Bierbrauer, Volker, *Die Ostgotischen Grab- und Schatzfunde in Italien* (Spoleto: Centro italiano di Studi sull'Alto Medioevo, 1975).

Bjornlie, Shane, "What Have Elephants to Do with Sixth-Century Politics? A Reappraisal of the 'Official' Governmental Dossier of Cassiodorus," *Journal of Late Antiquity* 2.1 (2009), pp. 143-71.

Bonnassié, Pierre, *From Slavery to Feudalism in South-Western Europe* (Cambridge, MA.: Cambridge University Press, 2009).

Borkowski, Andrew and Paul du Plessis, *Textbook on Roman law*, 3rd edn. (Oxford: Oxford University Press, 2005).

Boswell, John, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (New York: Pantheon Books, 1988).

Bovini, Giuseppe, "Note sul presunto ritratto musivo di Giustiniano in S. Apollinare Nuovo di

- Ravenna,” *Annales Universitatis Saraviensis. Philosophie, Lettres* 5 (1956), pp. 50-3.
- Bradley, Keith R., *Slaves and Masters in the Roman Empire: A Study in Social Control* (Oxford: Oxford University Press, 1987).
- Breckenridge, James, “Three Portrait Gems,” *Gesta* 18.1 (1979), pp. 7-18.
- Brogiolo, Gian Pietro, “Dwellings and Settlements in Gothic Italy,” in Sam Barnish and Federico Marazzi (eds.), *The Ostrogoths from the Migration Period to the Sixth Century: An Ethnographic Perspective* (Woodbridge: Boydell Press, 2007), pp. 113-33.
- Brown, Peter, *The World of Late Antiquity: From Marcus Aurelius to Muhammad* (London: Thames and Hudson, 1971).
- _____, “The Rise and Function of the Holy Man in Late Antiquity,” *JRS* 61 (1971), pp. 80-101.
- _____, *The Making of Late Antiquity* (Cambridge, MA.: Cambridge University Press, 1978).
- _____, *Society and the Holy in Late Antiquity* (Berkeley: University of California Press, 1982).
- _____, *The Body and Society: Men, Women and Sexual Renunciation in Early Christianity* (New York: Columbia University Press, 1988).
- _____, *The World of Late Antiquity: AD 150-750*, rev. edn. (London: Thames and Hudson, 1989).
- _____, *Power and Persuasion in Late Antiquity: Towards a Christian Empire* (Wisconsin: University of Wisconsin Press, 1992).
- _____, *The Rise of Western Christendom. Triumph and Diversity, A.D. 200-1000*, 2nd edn. (Maldon, MA.: Blackwell, 2003).
- Brown, Thomas S., *Gentlemen and Officers: imperial administration and aristocratic power in Byzantine Italy, A.D. 554-800*, British School at Rome (Rome, 1984).
- _____, “Everyday life in Ravenna under Theoderic: an example of his ‘tolerance’ and ‘prosperity’?,” in *Teoderico il Grande e i Goti d’Italia: atti del XIII Congresso internazionale di studi sull’Alto Medioevo, Milano 2-6 novembre 1992* (Spoleto: Centro italiano di studi sull’alto Medioevo, 1993).
- Brunner, Heinrich, *Zur Rechtsgeschichte der römischen und germanischen Urkunde, I, Das Privaturkund Italiens; das angelsächsischen Landbuch; die fränkische Privaturkunde* (Berlin: Weidmann, 1880).

_____, *Forschungen zur Geschichte des deutschen und französischen Rechtes* (Stuttgart: Scientia-Verl., 1894).

_____, *Deutsche Rechtsgeschichte*, 2nd edn., I, 1906; II completed by Claudius Frh. von Schwerin (Leipzig: Systematisches Handbuch der deutschen Rechtswissenschaft, 1906-28).

Brunt, Peter A., *Italian Manpower 225 BC-AD 14* (Oxford: Oxford University Press, 1971).

Buchner, Rudolf, *Die Rechtsquellen*, supplement to Wilhem Wattenbach and Wilhelm Levison (eds.), *Deutschlands Geschichtsquellen im Mittelalter: Vorzeit und Karolinger* (Weimar: H. Böhlau Nachfolger, 1952-).

Buckland, William W., *The Roman Law of Slavery* (Cambridge: Cambridge University Press, 1908).

_____, *A Manual of Roman Private Law* (Cambridge: Cambridge University Press, 1925).

Burdese, Alberto, *Manuale di diritto pubblico romano* (Turin: UTET, 1987; repr. 1994).

Burdon, Joan, "Slavery as a punishment in Roman Criminal Law," in Léonie Archer (ed.), *Slavery and Other Forms of Unfree Labour* (London: Routledge, 1988), pp. 68-85.

Burns, Thomas S., "Calculating Ostrogothic Population," *Acta Antiqua Academiae Scientiarum Hungaricae* 26 (1978), pp. 457-64.

_____, *A History of the Ostrogoths* (Bloomington: Indiana University Press, 1984).

Bury, James B., *History of the Later Roman Empire*, 2 vols. (New York: Dover Publications, Inc., 1958).

Cameron, Averil, *Procopius and the Sixth Century* (London: Duckworth, 1985).

_____, *The Mediterranean World in Late Antiquity, A.D. 395-600* (London: Routledge, 1993).

_____, *The Later Roman Empire* (London and New York: Routledge, 1993).

Caner, Daniel, *Wandering, Begging Monks: Spiritual Authority and the Promotion of Monasticism in Late Antiquity* (Berkeley: University of California Press, 2002).

Cenderelli, Aldo, *Ricerche sul Codex Hermogenianus* (Milan: Giuffrè, 1965).

Cesa, Maria, "Odoacre nelle fonti letterarie dei secoli V e VI," in Paolo Delogu (ed.), *Le*

- invasioni barbariche nel meridione dell'impero: Visigoti, Vandali, Ostrogoti: atti del convegno svoltosi alla Casa delle culture di Consenza dal 24 al 26 luglio 1998* (Soveria Mannelli: Rubbettino, 2001).
- Chadwick, Henry, *Boethius: The Consolations of Music, Logic, Theory, Philosophy* (Oxford: Clarendon Press, 1981).
- Cherry, David, "Intestacy and the Roman Poor," *Traditio* 64 (1996), pp. 155-72.
- Christensen, Arne Soby, *Cassiodorus, Jordanes and the History of the Goths: Studies in a Migration Myth* (Copenhagen: Museum Tusculanum Press, University of Copenhagen, 2002).
- Christie, Neil, *From Constantine to Charlemagne. An Archaeology of Italy AD 300-800* (Aldershot: Ashgate, 2006).
- Chrysos, Evangelos, "Justinian and the Senate of Rome under Ostrogothic Rule," *Byzantina Symmeikta* 15 (2008), pp. 33-38.
- Cimma, Maria R., *L'episcopalis audientia nelle costituzioni imperiali da Costantino à Giustiniano* (Turin: Giappichelli, 1989).
- Clark, Gillian, *Women in Late Antiquity. Pagan and Christian Lifestyles* (Oxford: Oxford University Press, 1993).
- Classen, Peter, "Kaiserrescript und Königsurkunde: Diplomatische Studien zum römisch-germanischen Kontinuitätsproblem," *Archiv für Diplomatik* 1 (1955), pp. 1-87; 2 (1956), pp. 1-115.
- _____, "Fortleben und Wandel spätrömischen Urkundenwesens im frühen Mittelalter," in id., *Recht und Schrift im Mittelalter, Vorträge und Forschungen* 23 (Sigmaringen: Thorbecke, 1977), pp. 13-54.
- _____, "Spätrömischen Grundlagen mittelalterlichen Kanzlein," (1974), reprinted in J. Fleckenstein (ed.), *Ausgewählte Aufsätze von Peter Classen, Vorträge und Forschungen* 28 (Sigmaringen: Thorbecke, 1983), pp. 67-84.
- Claude, Dietrich, "Comes," *Reallexikon der germanischen Altertumskunde* 5 (New York/Berlin: Walter de Gruyter & Co., 1982), pp. 65-7.
- _____, "Freedmen in the Visigothic Kingdom," in E. James (ed.), *Visigothic Spain: New Approaches* (Oxford: Oxford University Press, 1980), pp. 159-188.
- Clemente, Guido, *La Notitia Dignitatum, Saggi di storia e letterature* 4 (Cagliari: Editrice Sarda Fossataro, 1968).

- Coates-Stephens, Robert, "The Walls and Aqueducts of Rome in the Early Middle Ages, A.D. 500-1000," *JRS* 88 (1998), pp. 167-78
- Cohen, David, "The Augustan Law on Adultery: The Social and Cultural Context," in David Kertzer and R.P. Saller (eds.), *The Family in Italy from Antiquity to the Present* (New Haven, Conn.: Yale University Press, 1991), pp. 109-26.
- Collins, Roger, "Visigothic law and regional custom in disputes in early medieval Spain," in W. Davies and P. Fouracre (eds.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge: Cambridge University Press, 1986), pp. 85-104.
- _____, "Law and Ethnic Identity in the Western Kingdoms in the Fifth and Sixth Centuries," in Alfred P. Smyth (ed.), *Medieval Europeans: Studies in Ethnic Identity and National Perspectives in Medieval Europe* (New York: Palgrave MacMillan, 1998), pp. 1-28.
- _____, *Visigothic Spain* (London: Routledge, 2004).
- Contreni, John, *Carolingian Learning, Masters and Manuscripts* (Aldershot: Ashgate, 1992).
- Corbett, Percy E., *The Roman Law of Marriage* (Oxford: Clarendon Press, 1930).
- Corcoran, Simon J., *The Empire of the Tetrarchs: Imperial Pronouncements and Government AD 284-324* (Oxford: Clarendon Press, 1996).
- Croke, Brian, "A.D. 476: The Manufacture of a Turning Point," *Chiron* 13 (1983), pp. 81-119.
- _____, *Count Marcellinus and his Chronicle* (Oxford: Oxford University Press, 2001).
- Csillag, Pal, *The Augustan Laws of Family Relations* (Budapest: Akademiai Kiado, 1976).
- Dahn, Felix, *Die Könige der Germanen: Das Wesen des ältesten Königthums der germanischen Stämme und seine Geschichte bis auf die Feudalzeit*, 4 vols. (Leipzig: Teubner, 1879).
- Dalton, Ormonde M., *The Letters of Sidonius* (Oxford: Clarendon Press, 1915).
- Daube, David, "The Preponderance of Intestacy in Rome," *Tulane Law Review* 35 (1964-65), pp. 253-62.
- de Ste. Croix, George E.M., *The Class Struggle in the Ancient Greek World from the Archaic Age to the Arab Conquest* (Ithaca, N.Y.: Cornell University Press, 1981).
- Delbrueck, Richard, *Die Consulardiptychen und verwandte Denkmäler*, 2 vols. (Berlin: Walter de Gruyter & Co., 1929).
- Delmaire, Roland, *Les Institutions du Bas-Empire romain, de Constantin à Justinien, I, Les Institutions palatines* (Paris: Cerf, 1995).

- Demandt, Alexander, *Die Spätantike: Römischen Geschichte von Diocletian bis Justinian 284-565 n. Chr.*, Müller's Handbuch, 3te Abt., 6ter Teil (Munich: C.H. Beck, 1989; repr. 2007).
- De Martino, Francesco, *Storia della costituzione romana*, 6 vols. (Naples: E. Jovene, 1951-90).
- _____, "Il colonato fra economia e diritto," in *Storia di Roma*, III: *L'età tardoantica. I. Crisi e trasformazioni* (Turin: Einaudi, 1993), pp. 789-822.
- Desanti, Lucetta, "Costantino, il ratto e il matrimonio riparatore," *SDHI* 52 (1986), pp. 195-217.
- Dietl, Albert, *Defensor civitatis: der Stadtpatron in romanischen Reliefzyklen Oberitaliens* (Munich: Fink, 1998).
- Di Giuseppe, Helga, "La Fornace di Calle di Tricarico," in L. Sagui (ed.), *Ceramica in Italia: VI-VII secolo. Atti del convegno in onore di J.W. Hayes* (Rome, 11-13 May, 1995) *Arch. Medievale* 14 (Florence: All'insegna del giglio, 1998), pp. 735-52.
- Dopsch, Alfons, *The Economic and Social Foundations of European Civilization*, trans. M.G. Beard and N. Marshall (London: K. Paul, Trench, Trubner, & Co., 1937; repr. Berlin, 1969).
- Drew, Katherine Fischer, "The Germanic Family of the Lex Burgundionum," *Mediaevalia et Humanistica* 15 (1963), pp. 5-14.
- _____, "The Barbarian Kings as Lawgivers and Judges," in R.S. Hoyt (ed.), *Life and Thought in Early Middle Ages* (Minneapolis: University of Minnesota Press, 1967), pp. 7-29.
- _____, "Law, German: Early Germanic Codes," in J.R. Strayer (ed.), *Dictionary of the Middle Ages*, vol. 7 (New York: Charles Scribner's Sons, 1986), pp. 468-75.
- _____, *Law and Society in Early Medieval Europe. Studies in Legal History* (London: Variorum, 1988).
- Duby, Georges et al., *A History of Women in the West*, vol. II: *Silences of the Middle Ages* (Cambridge, MA.: Harvard University Press, 1992).
- Dupont, Clémence, *Le Droit criminel dans les constitutions de Constantin*, i. *Les Infractions* (Lille: Imprimerie Morel et Corduant, 1953).
- _____, *Le Droit criminel dans les constitutions de Constantin*, ii. *Les Peines* (Lille: Imprimerie Morel et Corduant, 1955).
- _____, "Les Donations dans les constitutions de Constantin," *RIDA* 9 (1962), pp. 291-324.
- Durliat, Jean, "Le salaire de la paix sociale dans les royaumes barbares," in Herwig Wolfram and

- Andreas Schwarcz (eds.), *Anerkennung und Integration: zu den wirtschaftlichen Grundlagen der Völkerwanderungszeit 400-600* (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1988), pp. 17-70.
- _____, "Cité, impôt et intégration des barbares," in Pohl and Reimitz (eds.), *Strategies of Distinction: the construction of ethnic communities, 300-800* (Leiden: Brill, pp. 153-79.
- Ensslin, Wilhelm, "Beweise der Romverbundenheit in Theoderichs des Grossen Aussen – und Innenpolitik," in *Settimane di studio del Centro italiano di studi sull'alto medioevo*, 3 (Spoleto: Presso la sede del Centro, 1956), pp. 509-11.
- _____, *Theoderich der Grosse*, 2nd edn. (Munich: F. Bruckmann, 1959).
- Esders, Stefan, *Römische Rechtstradition und merowingisches Königtum: Zum Rechtscharakter politischer Herrschaft in Burgund im 6. und 7. Jahrhundert* (Göttingen: Vandenhoeck & Ruprecht, 1997).
- Evans Grubbs, Judith, "Abduction Marriage in Antiquity: A Law of Constantine and its Social Context," *JRS* 79 (1989), pp. 59-83.
- _____, "'Marriage More Shameful than Adultery': Slave-Mistress Relationships, 'Mixed Marriages', and Late Roman Law," *Phoenix* 47 (1993), pp. 125-54.
- _____, *Law and Family in Late Antiquity* (Oxford: Clarendon Press, 1995).
- _____, "Marrying and Its Documentation in Later Roman Law," in P.L. Reynolds and J. Witte, Jr. (eds.), *To Have and To Hold: Marrying and Its Documentation in Western Christendom, 400-1600* (Cambridge: Cambridge University Press, 2007), pp. 64-70.
- Everett, Nicholas, *Literacy in Lombard Italy c. 568-774* (Cambridge: Cambridge University Press, 2003).
- Fantham, Elaine, "Stuprum: Public Attitudes and Penalties for Sexual Offenses in Republican Rome," *EMC/CV NS* 10 (1991), pp. 267-91.
- Finley, Moses I., *Ancient Slavery and Modern Ideology* (Harmondsworth: Penguin, 1980).
- Fouracre, Paul, "'Placita' and Disputes in Later Merovingian Francia," in Wendy Davies and Paul Fouracre (eds.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge: Cambridge University Press, 1986).
- _____, "Space, Culture and Kingdoms in Early Medieval Europe," in Peter Linehan and Janet Nelson (eds.), *The Medieval World* (New York: Routledge, 2003), pp. 366-80.
- Frakes, Robert M., "Some Hidden *Defensores Civitatum* in the *Res Gestae* of Ammianus Marcellinus," *ZSS (RA)* 109 (1992), pp. 562-32.

- _____, "Late Roman Social Justice and the Origins of the *Defensor Civitatis*," *The Classical Journal* 89 (1994), pp. 337-48.
- Frank, Richard I., "Augustus' Legislation on Marriage and Children," *California Studies in Classical Antiquity* 8 (1975), pp. 41-52.
- Fremantle, W. H., *Library of Nicene and Post-Nicene Fathers*, VI (New York: Christian Literature Co., 1893).
- Fridh, Åke, *Terminologie et formules dans les Variae de Cassiodore: étude sur le développement du style administratif aux derniers siècles de l'antiquité* (Stockholm: Almqvist & Wiksell, 1956).
- Frye, David, "Gundobad, the *Leges Burgundionum* and the Struggle for Sovereignty in Burgundy," *Classica et Mediaevalia* 41 (1990), pp. 199-212.
- Fuchs, Siegfried, *Kunst der Ostgotenzeit* (Berlin: Walter de Gruyter & Co., 1944).
- Fuenteseca, Pablo, "Maternum patrimonium (Revisión de CTh. 8,18,1 y 8,18,2)," *Atti dell'Accademia Romanistica Costantiniana: IX Convegno internazionale* (Naples: Edizioni scientifiche italiane, 1993), pp. 331-47.
- Gagos, Traianos and Peter van Minnen, *Settling a Dispute: Toward a Legal Anthropology of Late Antique Egypt*, New Texts from Ancient Cultures (Ann Arbor: University of Michigan Press, 1994).
- Ganshof, François L. (ed.), *The Carolingians and the Frankish Monarchy*, trans. Janet Sondheimer (Ithaca, N.Y.: Cornell University Press, 1971).
- Garcia Moreno, Luis A., "Legitimate and Illegitimate Violence in Visigothic Law," in Guy Halsall (ed.), *Violence and Society in the Early Medieval West* (Woodbridge: Boydell Press, 1998), pp. 46-59.
- Gardner, Jane, *Women in Roman Law and Society* (Bloomington: Indiana University Press, 1986).
- _____, and Thomas Wiedemann, *The Roman Household. A Sourcebook* (London: Routledge, 1991).
- Garnsey, Peter, *Social Status and Legal Privilege in the Early Empire* (Oxford: Clarendon Press, 1970).
- Gaudemet, Jean, *Le Bréviaire d'Alaric et les Epitome*, Ius Romanum Medii Aevi I.2b (Milan: Typis Giuffrè, 1965).
- _____, *La formation du droit séculier et du droit de l'Église aux IV^e et V^e siècles*, 2nd edn.

- (Paris: Sirey, 1979).
- _____, "Le mariage en droit romain: *iustum matrimonium*," in Gaudemet (ed.), *Sociétés et mariage* (Strasbourg: Cerdic, 1980), pp. 46-103.
- Gaudenzi, Augusto, *Gli editti di Teodorico e di Atalarico nel Diritto Romano nel Regno degli Ostrogoti* (Bologna: Loescher, 1884).
- Gaupp, Ernst Theodor, *Die germanischen Ansiedlungen und Landtheilungen in den Provinzen des römischen Westreiches* (Breslau: Josef Max, & Co., 1844).
- Giardina, Andrea, *Aspetti della burocrazia nel Basso Impero* (Rome: dell'Ateneo & Bizzari, 1977).
- _____, *L'Italia romana: Storie di un'identità incompiuta* (Rome and Bari: Laterza, 1997).
- Gillett, Andrew, "The Purposes of Cassiodorus' *Variae*," in A. C. Murray (ed.), *After Rome's Fall: Narrators and Sources of Early Medieval History. Essays Presented to Walter Goffart* (Toronto: University of Toronto Press, 1998), pp. 37-50.
- Goffart, Walter, "From Roman Taxation to Mediaeval Seigneurie: Three Notes," *Speculum* 47 (1972), pp. 165-87.
- _____, *Caput and Colonate. Towards a History of Late Roman Taxation* (Toronto: University of Toronto Press, 1974).
- _____, *Barbarians and Romans: Techniques of Accommodation, AD 418-584* (Princeton: Princeton University Press, 1980).
- _____, "Old and New in Merovingian Taxation," *Past and Present* 96 (1982), pp. 3-21.
- _____, "From *Historiae* to *Historia Francorum* and Back Again: Aspects of the Textual History of Gregory of Tours," in T.F.X. Noble and J. Contreni (eds.), *Religion, Culture and Society in the Early Middle Ages: Studies in Honour of Richard E. Sullivan*, *Studies in Medieval Culture* 23 (Kalamazoo: Medieval Institute Publications, 1987), pp. 55-76.
- _____, *The Narrators of Barbarian History (AD 550-800): Jordanes, Gregory of Tours, Bede, and Paul the Deacon* (Princeton: Princeton University Press, 1988).
- _____, (ed.), *Rome's Fall and After* (London: Hambledon Press, 1989).
- _____, *Barbarian Tides: The Migration Age and the Later Roman Empire* (Philadelphia: University of Pennsylvania Press, 2006).
- Greatrex, Geoffrey, "Lawyers and Historians in Late Antiquity," in R.W. Mathisen (ed.), *Law,*

- Society and Authority in Late Antiquity* (Oxford: Oxford University Press, 2001), pp. 148-161.
- Grey, Campbell Ainsworth, "Revisiting the 'problem' of *agri deserti* in the late Roman empire," *JRA* 20 (2007), pp. 362-76.
- Grodzynski, Denise, "Ravies et coupables: Un essai d'interprétation de la loi 9,24,1 du Code Théodosien," *MEFRA* 96 (1984), pp. 697-726.
- Guarino, Antonio, *Storia del diritto romano* (Naples: E. Jovene, 1996).
- Guterman, Simeon L., *The Principal of the Personality of Law in the Germanic Kingdoms of western Europe from the Fifth to the Eleventh Century* (New York: P. Lang, 1990).
- Hahn, Wolfgang, *Moneta Imperii Byzantii*, 3 vols. (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1973).
- Haldon, John F., *Byzantium in the Seventh Century: The Transformation of a Culture* (Cambridge: Cambridge University Press, 1990).
- Halsall, Guy, *Barbarian Migrations and the Roman West, 376-568*, Cambridge Medieval Textbooks (Cambridge: Cambridge University Press, 2007).
- Harries, Jill, "The Roman Imperial Quaestor from Constantine to Theodosius II," *JRS* 78 (1988), pp. 148-72.
- _____, and Ian Wood (eds.), *The Theodosian Code. Studies in the Imperial Law of Late Antiquity* (Ithaca, N.Y.: Cornell University Press, 1993).
- _____, "'Not the Theodosian Code': Euric's Law and Late Fifth-Century Gaul," in Jill Harries and Ian Wood (eds.), *The Theodosian Code. Studies in the Imperial Law of Late Antiquity* (Ithaca, N.Y.: Cornell University Press, 1993), pp. 39-51.
- _____, *Sidonius Apollinaris and the Fall of Rome A.D. 407-485* (Oxford: Clarendon Press, 1994).
- _____, *Law and Empire in Late Antiquity* (Cambridge, MA.: Cambridge University Press, 1999).
- _____, "Legal culture and identity in the 5th-century West," in G. Greatrex and S. Mitchell (eds.), *Ethnicity and Culture in Late Antiquity* (Cardiff/London: Duckworth, 2000), pp. 45-57.
- _____, "Resolving Disputes: The Frontiers of Law in Late Antiquity," in R.W. Mathisen (ed.), *Law, Society and Authority in Late Antiquity*, pp. 68-82.

- _____, "Violence, Victims, and the Legal Tradition in Late Antiquity," in H.A. Drake *et al.* (eds.), *Violence in Late Antiquity: Perceptions and Practices* (Burlington, VT: Ashgate, 2006), pp. 85-102.
- Harris, William V., "The Roman Father's Power of Life and Death," in R.S. Bagnall and Harris (eds.), *Studies in Roman Law in Memory of A.A. Schiller* (Leiden: Brill, 1986), pp. 81-95.
- Heather, Peter, *Goths and Romans, 332-489* (Oxford: Clarendon Press, 1991).
- _____, *The Goths* (Oxford: Blackwell, 1996).
- _____, "Gens and Regnum among the Ostrogoths," in Hans-Werner Goetz *et al.* (eds.), *Regna and Gentes: the Relationship Between Late Antique and Early Medieval Peoples and Kingdoms in the Transformation of the Roman World* (Leiden: Brill, 2002), pp. 88-133.
- _____, *The Fall of the Roman Empire: A New History of Rome and the Barbarians* (Oxford: Oxford University Press, 2006).
- _____, "Merely an Ideology? – Gothic Identity in Ostrogothic Italy," in Barnish and Marazzi (eds.), *The Ostrogoths from the Migration Period to the Sixth Century*, pp. 31-60.
- Heinzelmann, Martin, "Heresy in Books I and II of Gregory of Tours' *Historiae*," in A.C. Murray (ed.), *After Rome's Fall: Narrators and Sources of Early Medieval History. Essays Presented to Walter Goffart* (Toronto: University of Toronto Press, 1998), pp. 67-82.
- _____, *Gregory of Tours: History and Society in the Sixth Century* (Cambridge: Cambridge University Press, 2001).
- Hen, Yitzhak, *Culture and Religion in Merovingian Gaul, A.D. 481-751* (Leiden/New York: Brill, 1995).
- Herzog, Reinhart, and Peter L. Schmidt (eds.), *Handbuch der lateinischen Literatur der Antike. Vierter Band. Die Literatur des Umbruchs. Von der römischen zur christlichen Literatur (117-284 n. Chr.)* (Munich: Weidmann, 1997).
- Hillgarth, J.N. (ed.), *Christianity and Paganism. The Conversion of Western Europe, 350-750* (Philadelphia: University of Pennsylvania Press, 1986).
- Hoeflich, Michael H., "Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages," *Law and History Review* 2 (1984), pp.79-104.
- Honoré, Tony, *Tribonian* (London: Duckworth, 1978).
- _____, *Emperors and Lawyers* (London: Duckworth 1981).

- _____, *Ulpian: Pioneer of Human Rights* (Oxford: Oxford University Press, 1982; repr. 2002).
- _____, "Ausonius and Vulgar Law," *Iura* 35 (1984), pp. 79-82.
- _____, "Conveyances of Land and Professional Standards in the Later Empire," in Peter Birks (ed.), *New Perspectives in the Roman Law of Property. Essays for Barry Nicholas* (Oxford: Oxford University Press, 1989), pp. 137-52.
- _____, "Some Quaestors of the Reign of Theodosius II," in Jill Harries and Ian Wood (eds.), *The Theodosian Code*, pp. 68-94.
- _____, "Roman Law AD 200-400: From Cosmopolis to Rechtstaat?" in Simon Swain and Mark Edwards (eds.), *Approaching Late Antiquity. The Transformation from Early to Late Empire* (Oxford: Oxford University Press, 2004), pp. 109-32.
- Howard-Johnson, James and Paul Antony Hayward (eds.), *The Cult of Saints in Late Antiquity and the Middle Ages: Essays on the Contribution of Peter Brown* (Oxford: Oxford University Press, 1999).
- Humbert, Michel, *Le Remariage à Rome: Étude d'histoire juridique et sociale* (Milan: Giuffrè, 1970).
- Humphress, Caroline, "Judging by the Book: Christian Codices and Late Antique Legal Culture," in William E. Klingshirn and Linda Safran (eds.), *The Early Christian Book* (Washington, DC: The Catholic University of America Press, 2007), pp. 141-58.
- Ibbetson, David, "The Danger of Definition: Contrectatio and Appropriation," in A.D.E. Lewis and Ibbetson (eds.), *The Roman Law Tradition* (Cambridge: Cambridge University Press, 1994), pp. 54-72.
- Innes, Matthew, "Land, Freedom and the Making of the Medieval West," *Transactions of the RHS* 16 (2008), pp. 39-74.
- James, Edward, *The Origins of France: From Clovis to the Capetians, 500-1000* (London: MacMillan, 1989).
- Jenal, Georg, *Italia ascetica atque monastica. Das Asketen- und Mönchtum in Italien von den Anfängen bis zur Zeit der Langobarden (c.a. 150/250–604)*, 2 vols. (Stuttgart: Hiersemann, 1995).
- Johnson, Mark J., "Toward a History of Theoderic's Building Program," *Dumbarton Oaks Papers* 42 (1988), pp. 73-96.
- Johnston, David, *Roman Law in Context* (Cambridge: Cambridge University Press, 1999).

- Jolowicz, Herbert F. and Barry Nicholas, *A Historical Introduction to the Study of Roman Law*, 3rd edn. (Cambridge: Cambridge University Press, 1972; repr. 2008).
- Jones, Arnold H.M., "The Roman Civil Service (Clerical and Sub-Clerical Grades)," *JRS* 39 (1949), pp. 38-55.
- _____, "Slavery in the ancient world," in Moses I. Finley (ed.), *Slavery in classical antiquity* (Cambridge: Cambridge University Press, 1960), pp. 1-15.
- _____, "The Constitutional Position of Odoacer and Theoderic," *JRS* 52 (1962), pp. 126-30.
- _____, *The Later Roman Empire, 284-602: A Social, Economic and Administrative Survey*, 3 vols. (Oxford: Blackwell, 1964).
- _____, "The Caste System in the Later Roman Empire," in Peter Brunt (ed.), *The Roman Economy* (Oxford: Oxford University Press, 1974), pp. 396-418.
- Jones, Michael E., *The End of Roman Britain* (Ithaca, N.Y.: Cornell University Press, 1996).
- _____, "The Legacy of Roman Law in Post-Roman Britain," in R.W. Mathisen (ed.), *Law, Society and Authority*, pp. 45-57.
- Jones, Philip J., "L'Italia agraria nell' alto medioevo: problemi di cronologia e di continuità," in *Settimane di studio del Centro italiano di studi sull'alto medioevo*, 13 (Spoleto: Presso la sede del Centro 1969), pp. 57-92.
- _____, *The Italian City-State: From Commune to Signoria* (Oxford: Oxford University Press, 1997).
- Kaplan, Michel, *Les propriétés de la couronne et de l'église dans l'empire byzantin (Ve-VIe siècles)* (Paris: Sorbonne, 1976).
- Kampen, Natalie, *Image and Status: Roman Working Women in Ostia* (Berlin: Mann, 1981).
- Kaser, Michael, *Das römische Privatrecht, I: Das altrömische, das vorklassische und klassische Recht*, trans. Rolf Dannenbring, *Roman Private Law*, 6th edn. (London: Butterworths, 1968).
- _____, *Römische Rechtsgeschichte* (Göttingen: Vandenhoeck & Ruprecht, 1976; repr. 1993).
- _____, *Das römische Zivilprozessrecht*, 2nd edn. (Munich: Beck, 1996).
- Kelly, Christopher, *Ruling the Later Roman Empire* (Cambridge, MA.: Harvard University Press, 2004).
- Kelly, John M., *Roman Litigation* (Oxford: Oxford University Press, 1966).

- Kennell, Stefanie A.H., *Magnus Felix Ennodius* (Ann Arbor: University of Michigan Press, 2000).
- King, Paul D., *Law and Society in the Visigothic Kingdom* (Cambridge: Cambridge University Press, 1972).
- Kramer, Bärbel, "Liste der Syndikoi, Ekdikoi und Defensores in den Papyri Ägyptens," *Miscellanea Papyrologica* 19 (Florence, 1990), pp. 305-29.
- Kraus, Franz F., *Die Münzen Odovacars und des Ostgotenreichs in Italien* (Halle: A. Reichmann & Co., 1928).
- Krause, Jens-Uwe, *Spatäntike Patronatsformen im Westen der römischen Reiches* (Munich: Beck, 1987).
- Krautschick, Stefan, *Cassiodor und die Politik seiner Zeit*. Habelts Dissertationsdrucke, Reihe Alte Geschichte 17 (Bonn: Habelt, 1983).
- Kübler, Bernhard, *Geschichte des römischen Rechts* (Leipzig: Scientia, 1925).
- Kulikowski, Michael, "The 'Notitia Dignitatum' as a Historical Source," *Historia* 49.3 (2000), pp. 358-77.
- Kunkel, Wolfgang, *An Introduction to Roman Legal and Constitutional History*, trans. J.M. Kelly, 2nd edn., based on the sixth German edition of *Römische Rechtsgeschichte* (Oxford: Oxford University Press, 1973).
- _____, and M. Schermaier, *Römische Rechtsgeschichte* (Cologne: Böhlau, 2001).
- Laistner, Max L.W., *Thought and Letters in Western Europe, A.D. 500 to 900* (Ithaca, N.Y.: Cornell University Press, 1966).
- Lambertini, Renzo, *La codificazione di Alarico II* (Turin: Giapichelli, 1990).
- _____, *Introduzione allo studio esegetico del diritto romano* (Bologna: Loescher, 1993).
- Lamoreaux, John C., "Episcopal Courts in Late Antiquity," *J ECS* 3 (1995), pp. 143-67.
- Lançon, Bertrand, *Rome in Late Antiquity, A.D. 313-604* (Edinburgh: Edinburgh University Press, 2000).
- La Rocca, Christina, "Perceptions of an Early Medieval Urban Landscape," in Peter Linehan and Janet Nelson (eds.), *The Medieval World* (London: Routledge, 2001), pp. 416-31.
- Lear, Floyd S., "The Public Law of the Visigothic Code," *Speculum* 26 (1951), pp. 1-24.

Le Bohec, Yann, *The Imperial Roman Army* (London: B.T. Batsford, 1994).

Lenel, Otto, *Palingenesia iuris civilis* I-II (Leipzig: Tauchnitz, 1889; repr. Rome, 2000 with additions by L. E. Sierl).

_____, *Das Edictum perpetuum. Ein Versuch seiner Wiederherstellung*, 3rd edn. (Leipzig: Tauchnitz, 1927; repr. Aalen, 1956, 1974).

Lenski, Noel, "Evidence for the *Audientia episcopalis* in the New Letters of Augustine," in R.W. Mathisen (ed.), *Law, Society and Authority in Late Antiquity*, pp. 83-97.

_____, *Failure of empire: Valens and the Roman state in the fourth century A.D.* (Berkeley and Los Angeles: University of California Press, 2002).

Levy, Ernst, *West Roman Vulgar Law: The Law of Property* (Philadelphia: American Philosophical Society, 1952).

_____, *Weströmisches Vulgarrecht. Das Obligationenrecht*, Forschungen zum römischen Recht (Weimar: H. Böhlau Nachfolger, 1956).

_____, "Vulgarization of Roman Law in the Early Middle Ages," *Mediaevalia et Humanistica* 1 (1963), pp. 14-40.

_____, *Pauli sententiae: a palingenesia of the opening titles as a specimen of research in west Roman vulgar law* (Ithaca, N.Y.: Rothman Reprints, 1945, 1969).

Liebeschuetz, John H.W.G., "Cities, Taxes and the accommodation of the barbarians," in Walter Pohl (ed.), *Kingdoms of the Empire: The Integration of the Barbarians in Late Antiquity* (Leiden/New York: Brill, 1997), pp. 135-51.

_____, *The Decline and Fall of the Roman City* (Oxford: Oxford University Press, 2003).

Liebs, Detlef, *Die Jurisprudenz im spätantiken Italien 260-640 n. Chr.* (Berlin: Duncker & Humblot, 1987).

_____, "Römische Jurisprudenz in Afrika," *ZSS (RA)* 160 (1989), pp. 210-47.

Linder, Amnon, *The Jews in the Legal Sources of the Early Middle Ages* (Detroit: Wayne State University Press, 1997).

Lizzi, Rita, *Vescovi e strutture ecclesiastiche nella città tardoantica: L'Italia Annonaria nel IV-V secolo d.C.* (Como: Edizioni New Press, 1989).

Loyen, André, *Sidoine Apollinaire*, 2 vols. (Paris: Les Belles Lettres, 1970).

Lutz, Cora, "Musonius Rufus: 'The Roman Socrates'," *Yale Classical Studies* 10 (1947), pp. 3-

147.

Lynch, Joseph H., *Godparents and Kingship in Early Medieval Europe* (Princeton: Princeton University Press, 1986).

MacGeorge, Penny, *Late Roman Warlords* (Oxford: Oxford University Press, 2002).

MacMullen, Ramsey, "Roman Bureaucracy," *Traditio* 18 (1962), pp. 364-78.

_____, *Roman Government's Response to Crisis A.D. 235-337* (New Haven, Conn.: Yale University Press, 1976).

_____, *Corruption and the Decline of Rome* (New Haven, Conn.: Yale University Press, 1988).

Maigne d'Arnis, W.H. and Jacques-Paul Migne, *Lexicon manuale ad scriptores mediae et infimae latinitas* (Paris: J.P. Migne; 1977 repr.).

Mannino, Vincenzo, *Ricerche sul "Defensor Civitatis"* (Milan: Giuffrè, 1984).

Marazzi, Federico, "The Last Rome: From the End of the Fifth to the End of the Sixth Century," in S. Barnish and F. Marazzi (eds.), *The Ostrogoths from the Migration Period to the Sixth Century*, pp. 279-301.

Marcone, Arnaldo, "Il lavoro nelle campagne," in *Storia di Roma*, III: *L'età tardoantica. I. Crisi e trasformazioni* (Turin: Einaudi, 1993), pp. 823-43.

Martindale, Janet R., "The French Aristocracy in the Early Middle Ages: A Reappraisal," *Past and Present* 75 (1977), pp. 5-45.

_____, *The Prosopography of the Later Roman Empire*, vol. 2: A.D. 395-527 (Cambridge, Cambridge University Press, 1980).

Matthews, John F., *Western Aristocracies and Imperial Court, AD 364-425* (Oxford: Clarendon Press, 1992).

_____, "The Making of the Text," in Jill Harries and Ian Wood (eds.), *The Theodosian Code*, pp. 19-44.

_____, *Laying Down the Law: A Study of the Theodosian Code* (New Haven, Conn.: Yale University Press, 2000).

_____, "Roman law and barbarian identity in the late Roman west," in S. Mitchell and G. Greatrex (eds.), *Ethnicity and Culture in Late Antiquity* (London: Duckworth), pp. 31-45.

_____, "Interpreting the *Interpretationes* of the *Breviarium*," in R.W. Mathisen (ed.), *Law*,

- Society and Authority*, pp. 11-32.
- Mathisen, Ralph W., (ed.), *Law, Society and Authority in Late Antiquity* (Oxford: Oxford University Press, 2001).
- Mazzarino, Santo, "Si può parlare di rivoluzione sociale alla fine del mondo antico" in *Il passaggio dall'antichità al medioevo in Occidente*, Settimane di Studi del Centro Italiano di Studi sull'Alto Medioevo 9 (Spoleto: Presso la sede del Centro, 1961), pp. 410-425.
- McCormick, Michael, *Eternal Victory: Triumphal Rulership in Late Antiquity, Byzantium, and the early medieval west* (Cambridge: Cambridge University Press, 1986).
- McGinn, Thomas A.J., "Concubinage and the *Lex Julia* on Adultery," *TAPA* 121 (1991), pp. 335-75.
- McKitterick, Rosamond, *The Carolingians and the Written Word* (Cambridge: Cambridge University Press, 1989).
- Melillo, Generoso, et al. (ed.), *Lessico dell' «Edictum Theoderici Regis»* Edizioni Scientifiche Italiane (Rome and Naples: Edizioni scientifiche italiane, 1990).
- Mercogliano, Felice, *Tituli ex corpore Ulpiani: Storia di un testo* (Naples: Jovene, 1997).
- Merêa, Paulo, "Le mariage '*sine consensus parentum*' dans le droit romain vulgaire occidental," *RIDA* 5 (1950), pp. 203-17.
- Metzger, Ernest (ed.), *A Companion to Justinian's Institutes* (Ithaca, N.Y.: Cornell University Press, 1998).
- Meyer, Elizabeth A., *Legitimacy and Law in the Roman World. Tabulae in Roman Belief and Practice* (Cambridge: Cambridge University Press, 2004).
- Meyer-Marthaler, Elisabeth, *Römisches Recht in Rätien im frühen und hohen Mittelalter* (Zurich: Leemann, 1968).
- Millar, Fergus, "Condemnation to Hard Labour in the Roman Empire, from the Julio-Claudians to Constantine," *PBSR* 52 (1984), pp. 124-47.
- Mirković, Miroslava, *The later Roman Colonate and Freedom* (Philadelphia: American Philosophical Association, 1997).
- Mitteis, Ludwig, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs: Mit Beiträge zur Kenntniss des griechischen Rechts und der spätrömischen Rechtsentwicklung* (Leipzig: Teubner, 1891; repr. Hildesheim, 1963).
- Mommsen, Theodore, *Gesammelte Schriften*, 8 vols. (Berlin: Weidmann, 1904).

- Monks, George R., "The Administration of the Privy Purse," *Speculum* 32 (1957), pp. 748-79.
- Moorhead, John, "The Last Years of Theoderic," *Historia* 32 (1983), pp. 106-20.
- _____, "Theoderic, Zeno and Odovacer," *Byzantinische Zeitschrift* 77 (1984), pp. 261-6.
- _____, *Theoderic in Italy* (Oxford: Oxford University Press, 1992).
- Morton, Catherine, "Marius of Avenches, the *Excerpta Valesiana* and the Death of Boethius," *Traditio* 38 (1982), pp. 107-36.
- Mousourakis, George, *The Historical and Institutional Context of Roman Law* (Aldershot: Ashgate, 2003).
- Murray, Alexander C., *Germanic Kingship Structure: Studies in Law and Society in Antiquity and the Early Middle Ages* (Toronto: Pontifical Institute of Medieval Studies, 1983).
- _____, "The Position of the 'Grafio' in the Constitutional History of Merovingian Gaul," *Speculum* 64 (1986), pp. 787-805.
- _____, "From Roman to Merovingian Gaul: 'Centenarii' and 'Centenae' in the Administration of the Merovingian Kingdom," *Traditio* 44 (1988), pp. 59-100.
- _____, "Immunity, Nobility, and the *Edict of Paris*," *Speculum* 69 (1994), pp. 18-39.
- _____, "'Pax et disciplina': Roman Public Law and the Merovingian State," in Kenneth Pennington, et al. (eds.), *Proceedings of the Tenth International Congress of Medieval Canon Law, Syracuse, New York, 13-18 August 1996* (Vatican City: Bibliotheca apostolica Vaticana, 2001), pp. 269-85.
- Myres, John N.L., "Pelagius and the End of Roman Rule in Britain," *JRS* 50 (1960), pp. 21-36.
- Nehlsen, Hermann, "*Edictum Theoderici*," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 86 (1969), pp. 246-60.
- _____, *Sklavenrecht zwischen Antike und Mittelalter: germanisches und römisches Recht in den germanischen Rechtsaufzeichnungen I, Ostgoten, Westgoten, Franken, Langobarden*, Göttinger Studien zur Rechtsgeschichte 7 (Göttingen: Musterschmidt, 1972).
- _____, "Aktualität und Effektivität der ältesten germanischen Rechtsaufzeichnungen," in P. Classen (ed.), *Recht und Schrift im Mittelalter*, Vorträge und Forschungen, xxiii (Sigmaringen: Thorbecke, 1977), pp. 449-502.
- _____, *Überlieferung, Aufbau und Stil von Gai Institutiones* (Leiden: Brill, 1981).

- Nicholas, Barry, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1991).
- Nixon, Charles E.V., "Relations between Visigoths and Romans in Fifth-Century Gaul," in J. Drinkwater & H. Elton (eds.), *Fifth-Century Gaul: A Crisis of Identity?* (Cambridge: Cambridge University Press, 1992), pp. 64-74.
- Noble, Thomas F.X., "Theoderic and the papacy," in *Teoderico il Grande e i Goti d'Italia: atti del XIII Congresso internazionale di studi sull'Alto Medioevo, Milano 2-6 novembre 1992* (Spoleto: Centro italiano di studi sull'alto Medioevo, 1993), pp. 395-423.
- _____, (ed.), *From Roman Provinces to Medieval Kingdoms* (London/New York: Routledge, 2003).
- Nonn, Ulrich, "Merowingische Testamente: Studien zum Fortleben einer römischen Urkundenform in Frankreich," *Archiv für Diplomatik* 18 (1972), pp. 14-15.
- Nörr, Dieter, "Planung in der Antike: Über die Ehegesetze des Augustus," in Horst Baier (ed.), *Freiheit und Sachzwang: Beiträge zu Ehren Helmut Schelskys* (Braunschweig and Opladen: Westdeutscher Verlag, 1977), pp. 309-43.
- O'Donnell, James, *Cassiodorus* (Berkeley: University of California Press, 1979).
- _____, "Liberius the Patrician," *Traditio* 37 (1981), pp. 31-72.
- Ostrogorsky, George, "La commune rurale byzantine: Loi agraire – Traité fiscal – Cadastre de Thèbes," *Byzantion* 32 (1962), pp. 140-7.
- _____, *History of the Byzantine State*, 2nd edn. (Oxford: Blackwell, 1968).
- Paradisi, Bruno, "Critica e mito dell'editto teodericano," *Bollettino dell'Istituto di diritto romano* 68 (1965), pp. 1-47.
- Patlagean, Evelyne, *Pauvreté économique et pauvreté sociale à Byzance, 4e-7e siècles* (Paris: Mouton, 1977).
- Patterson, Orlando, *Slavery and Social Death: A Comparative Study* (Cambridge, MA.: Harvard University Press, 1985).
- Percival, J., "P.Ital. 3 and Roman estate management," *Latomus* 102 (1969), pp. 607-15.
- _____, "Seigneurial aspects of late Roman estate management," *EHR* 84 (1969), pp. 449-73.
- Peters, Edward, *Torture* (Oxford: Blackwell, 1985).
- Phillipson, Donald, "Development of the Roman Law of Debt Security," *Stanford Law Review* 6 (1968), pp. 1230-1248.

- Piganiol, André, *L'empire chrétien (325-395)*, Histoire Romaine 4 (Paris: Presses universitaires de France, 1947).
- Pohl, Walter, *Kingdoms of the Empire: The Integration of the Barbarians in Late Antiquity* (Leiden/New York: Brill, 1997).
- Posner, Ernst, *Archives in the Ancient World* (Cambridge: Cambridge University Press, 1972).
- Potter, Timothy W. and Anthony C. King, *Excavations at the Mola di Monte Gelato* (London: British School at Rome, 1997).
- Ramin, Jaques and Paul Veyne, "Droit romain et société: Les hommes libres qui passent pour esclaves et l'esclavage volontaire," *Historia* 30 (1981), pp. 472-97.
- Rapp, Claudia, *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition* (Berkeley: University of California Press, 2005).
- Rasi, Piero, "Sulla paternità del c.d. Edictum Theodorici Regis," *Archivio giuridico* 145 (1953), pp. 105-62.
- Rawson, Beryl, "Roman Concubinage and Other de facto Marriages," *TAPA* 104 (1974), pp. 279-305.
- _____, "Spurii and the Roman View of Illegitimacy," *Antichthon* 23 (1989), pp. 10-41.
- Rea, Rossella (ed.), *Rota Colisei: La valle del Colosseo attraverso i secoli* (Milan: Electa, 2002).
- Reinhold, Meyer, "Usurpation of Status and Status Symbols in the Roman Empire," *Historia* 20 (1971), pp. 275-302.
- Reiss, Edmund, "The Fall of Boethius and the Fiction of the *Consolatio Philosophiae*," *The Classical Journal* 77 (1981), pp. 37-47.
- Riché, Pierre, *Education and Culture in the Barbarian West: from the sixth through the eighth century*, translated from the 3rd French edn. by John Contreni (Columbia: University of South Carolina Press, 1962).
- Richlin, Amy, "Approaches to the Sources on Adultery at Rome," in H. Foley (ed.), *Reflections of Women in Antiquity* (New York: Gordon and Breach Science Publishers, 1981), pp. 379-404.
- Robinson, Olivia F., *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London: Routledge, 1997).
- _____, *Penal Practice and Penal Policy in Ancient Rome* (London: Routledge, 2006).

- Rougé, Jean, "Quelques aspects de la navigation en Méditerranée au V^e siècle et dans la première moitié du VI^e siècle," *Cahiers d'histoire* 6 (1961), pp. 129-54.
- Royden, Halsey L., "The Tenure of Office of the Quinquennales in the Roman Professional Collegia," *American Journal of Philology* 110 (1989), pp. 303-15.
- Ruggini, Lellia, "Ebrei e Orientali nell'Italia settentrionale fra il IV e il VI secolo d. Cr.," *Studia et documenta historiae et iuris* 25 (1959), pp. 186-308.
- _____, *Economia e società nell'Italia annonaria* (Milan: Giuffrè, 1961).
- Saller, Richard, *Personal Patronage Under the Early Empire* (Cambridge: Cambridge University Press, 1982).
- Scheidel, Walter, "Slaves of the Soil," *JRA* 13 (2000), pp. 727-32.
- Schiller, Arthur A., *Roman Law: Mechanisms of Development* (New York: Mouton, 1978).
- Schlosser, Hans, *Grundzüge der neueren Privatrechtsgeschichte*, 4th edn. (Heidelberg: Uni-Taschenbücher, 1982).
- Schmidt, Ludwig, "Die comites Gothorum: ein Kapitel zur ostgotischen Verfassungsgeschichte," *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 40 (1925), pp. 127-34.
- _____, *Die Ostgermanen*, Geschichte der deutschen Stämme bis zum Ausgang der Völkerwanderung (Munich: Beck, 1969).
- Schönbauer, E., "Tituli ex corpore Ulpiani in neuer Analyse," in *Studi in onore di P. de Francisci* (Milan: Giuffrè, 1956), pp. 303-334.
- _____, "Die Ergebnisse der Textstufenforschung und ihre Methode," *Iura* 12 (1961), pp. 145-158.
- Schott, Clausidieter, "Der Stand der Leges-Forschung," *Frühmittelalterliche Studien* 13 (1979), pp. 29-55.
- Schramm, Percy E., *Herrschaftszeichen und Staatssymbolik: Beiträge zu ihrer Geschichte vom dritten bis zum sechzehnten Jahrhundert* (Stuttgart: Hiersemann, 1954).
- Schröder, Richard., *Lehrbuch der deutschen Rechtsgeschichte* (Leipzig: Veit, 1907).
- Schulz, Fritz, *Classical Roman Law* (Oxford: Clarendon Press, 1954).
- _____, *History of Roman Legal Science* (Oxford: Clarendon Press, 1967).

Seeck, Otto, "Comites," *RE* 17 (1900), pp. 622-24.

_____, "Dux," *RE* 10 (1905), pp. 869-71.

_____, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.: Vorarbeit zu einer Prosopographie der christlichen Kaiserzeit* (Frankfurt: Minerva, 1964 repr.).

Sinnigen, William, "Administrative Shifts of Competence under Theoderic," *Traditio* 21 (1965), pp. 456-67.

Sirks, Adriaan J.B., "Shifting Frontiers in the Law: Romans, Provincials and Barbarians," in R. Mathisen and H. Sivan (eds.), *Shifting Frontiers in Late Antiquity* (Brookfield Vt.: Variorum, 1996), pp. 146-57.

_____, "The farmers, the landlord, and the law in the fifth century," in R.W. Mathisen (ed.), *Law, Society and Authority in Late Antiquity* (Oxford: Oxford University Press, 2001), pp. 256-271.

Sivan, Hagith S., "Why Not Marry a Jew? Jewish-Christian Marital Frontiers in Late Antiquity," in R.W. Mathisen (ed.), *Law, Society and Authority*, pp. 208-219.

Small, Alastair M. and R.J. Buck, *The Excavations of S. Giovanni di Ruoti, I* (Toronto: University of Toronto Press, 1994).

Soraci, Rosario, *Ricerche sui conubia tra Romani e Germani nei secoli IV-VI* (Catania: N. Giannotta, 1968; repr. 1974).

Spruit, J.E. and K.E.M. Bongenaar (eds.), *Het erfdeel van de klassieke Romeinse Juristen*, 4 vols. (Zutphen: Walburg, 1982-1987).

Stein, Ernest, *Histoire du Bas-Empire, II: De la disparition de l'Empire d'Occident à la mort Justinien (476-565)* (Paris: Desclée, 1949).

_____, *Untersuchungen über das Officium der Prätorianerpräfektur seit Diokletian* (Amsterdam: A.M. Hakkert, 1962).

Stein, Peter, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999).

Stühff, Gudrun, *Vulgarismus in Kaiserrecht unter besonder Berücksichtigung der Gesetzgebung Konstantins des Großen* (Weimar: Böhlau, 1966).

Sullivan, Richard E. (ed.), *"The Gentle Voices of Teachers": Aspects of Learning in the Carolingian Age* (Columbus, 1995).

Sundwall, Johannes, *Abhandlungen zur Geschichte des ausgehenden Römertums*, Roman History Series, (Helsinki: Arno, 1919; repr. 1975).

- Talamanca, Mario (ed.), *Lineamenti di storia del diritto romano* (Milan: Giuffrè, 1989).
- Tate, Joshua C., "Inheritance Rights of Nonmarital Children in Late Roman Law," *Roman Legal Tradition* 4 (2008), pp. 1-36.
- Thibault, Fabien, "L'impôt direct dans les royaumes des Ostrogoths, des Wisigoths et des Burgundes," *RHDFE* 25 (1901), pp. 699-728.
- Thomas, Yan, "Vitae necisque potestas. Le père, la cité, la mort," in *Du châtement dans la cité: Supplices corporels et peine de mort dans le monde antique*, organisée par l'École française de Rome avec le concours du Centre national de la recherche scientifique (Rome, 9-11 novembre) (Rome: École française de Rome, 1984), pp. 499-548.
- Thompson, Edward Arthur, *Romans and Barbarians: The Decline of the Western Roman Empire* (Madison: University of Wisconsin Press, 1982).
- Timpe, Dieter, "Comes," *Reallexikon der germanischen Altertumskunde*, vol. 5 (Berlin/New York: Walter de Gruyter & Co., 1982), pp. 63-5.
- Toubert, Pierre, *Les structures du Latium médiéval* (Rome: École française de Rome, 1973).
- Treggiari, Susan, "Contubernales in CIL 6," *Phoenix* 35 (1981), pp. 42-69.
- _____, *Roman Marriage: Iusti Coniuges from the time of Cicero to the Time of Ulpian* (Oxford: Clarendon Press, 1991).
- Ullman, Walter, *The Carolingian Renaissance and the Idea of Kingship* (London: Methuen, 1969).
- Van Dam, Raymond, *Saints and their Miracles in Late Antique Gaul* (Princeton: Princeton University Press, 1993).
- Venturini, Carlo, "'Accusatio Adulterii' e politica constantiniana (Per un riesame di CTH 9,7,2)," *SDHI* 54 (1988), pp. 66-109.
- Vera, Domenico, "Strutture agrarie e strutture patrimoniali nella tarda Antichità: l'aristocrazia romana fra agricoltura e commercio," *Opus* 2 (1983), pp. 489-533.
- _____, "Forme e funzioni della rendita fondiaria nella tarda antichità," in A. Giardina (ed.), *Società romana e impero tardoantico* (Rome: Laterza, 1986), pp. 367-447.
- _____, "Schiavitù rurale, colonate e trasformazioni agrarie nell'Italia imperial," *Scienze dell'antichità*, VI-VII (Rome: Università degli studi di Roma, 1992-3), pp. 291-339.
- _____, "Dalla 'villa perfecta' alla villa di Palladio," *Athenaeum* 83 (1995), part 1: pp. 189-211; part 2: pp. 331-56.

- Verhulst, Adriaan, "Quelques remarques à propos des corvées de colons à l'époque du Bas-Empire et du Haut Moyen Age," in *Revue de l'Université de Bruxelles* (Brussels: Bruylant-Christophe, 1977), I, pp. 89-95.
- Vidén, Gunhild, *The Roman Chancery Tradition: Studies in the Language of Codex Theodosianus and Cassiodorus' 'Variae'* (Göteborg: Acta Universitatis Gothoburgensis, 1984).
- Vinogradoff, Paul, "Social and Economic Conditions of the Roman Empire in the Fourth Century," *Cambridge Medieval History*, vol. 1 (New York: Cambridge University Press, 1936), pp. 542-67.
- Vismara, Giulio, "Romani e Goti di fronte al diritto nel regno ostrogoto," *Settimane di studio del Centro Italiano di studi sull'alto medioevo* 3 [= *I Goti in occidente: problemi*] (Spoleto: Presso la sede del Centro, 1956), pp. 407-63.
- _____, "Edictum Theoderici," *Ius Romanum Medii Aevi*, part I, 2 b aa α (Milan: Giuffrè, 1967).
- Voci, Pasquale, "Il diritto ereditario Romano nell'età di tardo impero: il IV secolo (prima parte)," *Iura* 29 (1978), pp. 17-113.
- Volterra, Edoardo, "Intorno ad alcune costituzioni di Costantino," *Rendiconti dell'Accademia Nazionale dei Lincei. Classe di Scienze morali, storiche e filologiche*, series 8, vol. 13 (1958), pp. 61-89.
- _____, "Quelques remarques sur le style des constitutions de Constantin," *Mélanges Levy-Bruhl* (Paris: Sirey, 1959), pp. 325-34.
- von Lorentz, Friedrich, "Theoderich -nicht Iustinian," *Mitteilungen des Deutschen Archäologischen Instituts, Römische Abteilung* 50 (1935), pp. 339-47.
- Voss, Wulf Eckart, *Recht und Rhetoric in den Kaisergesetzen der Spätantike: Eine Untersuchung zum nachklassischen Kauf- und Übereignungsrecht* (Frankfurt-am-Main: Löwenklau, 1982).
- Wallace-Hadrill, Andrew, "Family and Inheritance in the Augustan Marriage Laws," *Proceedings of the Cambridge Philological Society* 207 (1981), pp. 58-80.
- _____, (ed.), *Patronage in Ancient Society* (London: Routledge, 1989).
- Wallace-Hadrill, John Michael, *The Barbarian West, 400-1000*, 3rd edn. (London: Hutchison, 1967).
- _____, *Early Germanic Kingship in England and on the Continent* (Oxford: Oxford University Press, 1971).

Ward-Perkins, Brian, *From Classical Antiquity to the Middle Ages: urban public buildings in northern and central Italy AD 300-850* (Oxford: Oxford University Press, 1984).

_____, "Land, Labour and Settlement," in Averil Cameron et al. (eds.), *The Cambridge Ancient History*, vol. 14: *Late Antiquity: Empire and Successors, A.D. 425-600* (Cambridge: Cambridge University Press, 2000), pp. 315-46.

_____, *The Fall of Rome and the End of Civilization* (Oxford: Oxford University Press, 2005).

Watson, Allan, "The Definition of *Furtum* and the Trichotomy," *Tijdschrift voor Rechtsgeschiedenis = Revue d'histoire du droit* 28 (1960), pp. 197-210.

_____, *The Evolution of Western Private Law* (Baltimore: Johns Hopkins Press, 1985).

Weaver, Paul R.C., "The Status of Children in Mixed Marriages," in B. Rawson (ed.), *The Family in Ancient Rome: New Perspectives* (Ithaca, N.Y.: Cornell University Press, 1986), pp. 145-69.

Welles, C. Bradford et al., *The Excavations at Dura-Europos, Final Report V. Part 1: The Parchments and Papyri* (New Haven, Conn.: Yale University Press, 1959).

Whittow, Mark, *The Making of Orthodox Byzantium, 600-1025* (Basingstoke: Macmillan, 1996).

Wickham, Chris, *Early Medieval Italy: Central Power and Local Society 400-1000* (London: Macmillan, 1981).

_____, *Land and Power: Studies in Italian and European Social History, 400-1200* (London: British School at Rome, 1994).

_____, "The Fall of Rome Will Not Take Place," in Lester Little and Barbara Rosenwein (eds.), *Debating the Middle Ages: issues and readings* (Malden, Mass.: Blackwell, 1998), pp. 45-57.

_____, "Specialized Production and Exchange," in Averil Cameron et al. (eds.), *The Cambridge Ancient History*, vol. 14 (Cambridge, 2000), pp. 346-91.

_____, *Framing the Early Middle Ages: Europe and the Mediterranean, 400-800* (Oxford: Oxford University Press, 2005).

Wieacker, Franz, "Lateinische Kommentare im Codex Theodosianus," *Symbolae Friburgenses in honorem Ottonis Lenel* (Leipzig: Teubner, 1931).

_____, "Nochmals über Vulgarismus: Ein Diskussionsbeitrag," in *Studi in onore di Emelio Betti*, 5 vols. (Milan: Giuffr , 1962).

- _____, "Le droit romain de la mort d'Alexandre Sévère à l'avènement de Dioclétien," *RHDFE* 49 (1971), pp. 201-23.
- _____, *Römische Rechtsgeschichte* (Munich: Beck, 1988).
- Wolff, Hans J., *Roman Law: An Historical Introduction* (Norman: University of Oklahoma Press, 1951).
- Wolfram, Herwig, *History of the Goths*, trans. Thomas J. Dunlap, 2nd edn. (Berkeley: University of California Press, 1988).
- _____, *The Roman Empire and Its Germanic Peoples*, trans. Thomas Dunlap (Berkeley: University of California Press, 1997).
- Wood, Ian, "Gregory of Tours and Clovis," *Revue belge de Philologie et d'Histoire* 63 (1985), pp. 249-72.
- _____, "Disputes in Late Fifth- and Early Sixth-Century Gaul: Some Problems," in Wendy Davies and Paul Fouracre (eds.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge: Cambridge University Press, 1986), pp. 7-22.
- _____, "Clermont and Burgundy, 511-534," *Nottingham Medieval Studies* 32 (1988), pp. 119-25.
- _____, "Administration, Law and Culture in Merovingian Gaul," in Rosamond McKitterick (ed.), *The Uses of Literacy in Early Medieval Europe* (Cambridge: Cambridge University Press, 1990), pp. 63-81.
- _____, "The Code in Merovingian Gaul," in Jill Harries and Ian Wood (eds.), *The Theodosian Code*, pp. 161-77.
- _____, *The Merovingian Kingdoms, 450-751* (London/New York: Longman, 1994).
- _____, "Gentes, Kings and Kingdoms - The Emergence of States: The Kingdom of the Gibichungs," in Goetz *et al.* (eds.), *Regna and Gentes*, pp. 243-269.
- Wormald, Patrick, "*Lex Scripta and verbum Regis*: Legislation and Germanic Kingship, from Euric to Cnut," in P.H. Sawyer and I.N. Woods (eds.), *Early Medieval Kingship* (Leeds: The editors, 1977), pp. 105-38.
- _____, "The *Leges Barbarorum*: Law and Ethnicity in the Post-Roman West," in Goetz *et al.* (eds.), *Regna and Gentes*, pp. 21-53.
- Zimmermann, Odo J., *The Late Latin Vocabulary of the 'Variae' of Cassiodorus* (Washington, D.C.: The Catholic University of America Press, 1944).

Zimmerman, Reinhard, *The Law of Obligations: Roman foundations of the civilian tradition* (Capetown: Juta, 1992; repr. Oxford, 1996).