THE MINICIAN LAW: MARRIAGE AND THE ROMAN CITIZENSHIP

DAVID CHERRY

THE HISTORY OF THE LAW governing the marriage of Roman citizens and non-Romans is readily reconstructed, not much affected by the Justinianic reworking and redaction of many legal texts and the loss of much juristic writing. It betrays the complexity of the Roman law of marriage. At its heart was the Minician law, the terms of which are explicitly attested, though not much canvassed.[1] Enacted probably sometime before the Social War, the law seems never to have been abrogated. And changes in it can be dated. It is a record mainly of exclusionism, and one of consequence to the larger history of the Roman family, to patterns of inheritance, for example, perhaps to choice of marriage partner.

I MARRIAGE, *CONUBIUM*, AND THE CITIZENSHIP

A lawful Roman marriage could be contracted only by two Roman citizens or by a citizen and a Latin or foreigner (peregrine) who possessed *conubium*, which the jurists defined as the right of contracting a marriage valid in Roman law (*iure civili*).[2] Though identified as a distinct right, *ius*

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[1] For the Minician law: G. Luraschi, "Sulla data e sui destinatari della lex Minicia de liberis," *Studia et documenta historiae et iuris* 42 (1976) 431–443; R. Böhm, "Zur *lex Minicia*," *ZSav* 84 (1967) 363–371; C. Castello, "La data della legge Minicia," *Studi in onore di V. Arangio-Ruiz* (Naples 1953) 3.301–317. Brief notice in some of the many recent studies of the Roman family and Roman law: J. F. Gardner, *Women in Roman Law and Society* (London 1986) 138, 143, and 223; B. Rawson, "The Roman Family," in B. Rawson (ed.), *The Family in Ancient Rome: New Perspectives* (Ithaca, New York 1986) 23; P. R. C. Weaver, "The Status of Children in Mixed Marriages," *ibid.* 145 and 167. The rules are briskly summarized in W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*[3] (Cambridge 1966) 99–100.

[2] *Tituli Ulpiani* 5.3: *conubium est uxoris iure ducendae facultas* ("*conubium* is the capacity to contract a valid marriage"). The *Tituli Ulpiani* is probably an early fourth-century epitome of a *Regularum liber singularis* of Ulpian. Cf. Gaius *Inst.* 1.56. In non-juristic texts, *conubium* sometimes denotes "intermarriage" (Curt. 8.4.25, Cic. *Rep.* 2.63), sometimes simply "marriage" (Catullus 62.57, Verg. *Aen.* 3.319 and 4.126, Stat. *Theb.* 7.300 and 9.615, Apul. *Met.* 5.6, Ovid *Met.* 1.490). It is used for the ceremony of marriage (Verg. *Aen.* 4.168, Sen. *Tro.* 901), and even to mean "husband" or "wife" (Pliny *HN* 6.19, Stat. *Theb.* 10.768).

conubii, in the Latin settlement of 338 B.C.,[3] *conubium* was rarely awarded to non-Romans without simultaneous enfranchisement. The documented cases date to the period before the Social War.[4] In the course of a speech advocating abrogation of the ban on marriage between patricians and plebeians, which Livy (4.3.4) puts in the mouth of C. Canuleius, tribune of 445 B.C., Canuleius is made to say: *conubium petimus, quod finitimis externisque dari solet* ("we seek the right of intermarriage, which is customarily given to neighbors and foreigners"). Livy must have in mind the granting of *conubium* without citizenship,[5] since he has Canuleius go on to say: *nos quidem civitatem, quae plus quam conubium est, hostibus etiam victis dedimus* ("indeed we have given the citizenship, which is more than the right of intermarriage, even to conquered enemies").[6] Less instructive is Ovid *Fasti* 3.195–196, where Mars talks of the difficulty of finding wives at Rome in the time of Romulus: *extremis dantur connubia gentibus: at quae / Romano vellet nubere nulla fuit* ("the right of intermarriage is granted to the most distant peoples; yet there was no woman willing to marry a Roman").[7]

Conubium was awarded to some of the Latins resident in Italy before the Social War, and perhaps to some of the Italian allies.[8] From the clause beginning *qui legitimis nuptis* in Chapter 21 of the Flavian municipal law,[9] A. N. Sherwin-White has inferred "the existence of *ius conubii* between at least the local Latins and Romans" (above, n. 3, 337, n. 1):

[qui ex senatoribus decurion[ib]us conscriptisve municipii Flavi Irnitani magistratus uti h(a)c l(ege) [co]mprehensum est creati sunt erunt, ii, cum eo honore

[3]So too *commercium*. See A. N. Sherwin-White, *The Roman Citizenship*[2] (Oxford 1973) 32.

[4]Hadrian granted *conubium* (ἐπιγαμία) with Egyptian women to the inhabitants of Antinoopolis, which he founded in A.D. 130: L. Mitteis and U. Wilcken, *Grundzüge und Chrestomathie der Papyruskunde* (Leipzig 1912) 1.27. But these were Greeks, not Romans. See H. I. Bell, "Antinoopolis: A Hadrianic Foundation in Egypt," *JRS* 30 (1940) 136–139.

[5]R. M. Ogilvie, *A Commentary on Livy Books 1–5* (Oxford 1965) 534, labelled the passage anachronistic, since Livy records no earlier instance of intermarriage than that of the Romans and Campanians mentioned at 23.4.7: *conubium vetustum multas familias claras ac potentes Romanis miscuerat* ("the long-standing right of intermarriage had united many illustrious and powerful families with the Romans").

[6]Claudius took this to be a reference to the enfranchisement of the Sabines: Tac. *Ann.* 11.24.6. It could also apply to the enfranchisement of the Albans (Livy 1.30.1) and of the Latins (Livy 1.33.5).

[7]Cf. Cic. *Rep.* 2.63: *quae diiunctis populis tribui solent conubia* ("this right of intermarriage is customarily awarded to other states").

[8]Latins in Italy: Livy 8.14.10; allies: Diod. Sic. 37.15.2: a vague reference to ὁ τῆς ἐπιγαμίας νόμος (the time of the Social War); cf. Sherwin-White (above, n. 3) 125.

[9]J. González, "The *Lex Irnitana*: A New Copy of the Flavian Municipal Law," *JRS* 76 (1986) 147–243, at 154.

abierint, cum parentibus coniugibusque ac liberis qui legitimis nuptis quaesiti in potestate parentium fuerunt, item nepotibus ac neptibus filio [n]*atis, qui quaeque in potestate parentium fuerunt* ....

Those among the senators, decurions, or *conscripti* of the town Flavium Irnitanum who have been or will be made magistrates in accordance with this law are to be Roman citizens when they have left that office, together with their parents, their wives, and their children born in lawful marriage and subject to their fathers' power (*patria potestas*), similarly their sons' sons and daughters subject to their fathers' power ....

But the author of the law may have been thinking of the lawful union of two Latins. Chapters 22 and 86 of the law attest a form of *patria potestas* exercised by Latins. The purpose of the restrictive clause was probably to exclude illegitimate children from the grant of the citizenship.

The second century A.D. jurist Gaius reports (*Inst.* 1.56) that children born to a Roman citizen were in his power only if his wife was a Roman citizen or a Latin or foreigner with whom he enjoyed *conubium*: *Latinas peregrinasve cum quibus conubium habeant* ("Latin or foreign women with whom they have the right of intermarriage"). P. E. Corbett concluded that *conubium* with Roman citizens was granted to some, but not all, Latin and foreign women.[10] It is much more likely that *conubium* with Latin and foreign women was awarded to some Roman citizens. Gaius almost certainly had in mind veterans of the auxiliaries, who, he goes on to say (*Inst.* 1.57), were customarily given *conubium cum his Latinis peregrinisve, quas primas post missionem uxores duxerint* ("the right of intermarriage with the first Latin or foreign women whom they marry after discharge"). The grant of *conubium* was required to regularize unions of mixed citizenship formed during service or after discharge. *Tituli Ulpiani* 5.3 is ambiguous: *conubium habent cives Romani cum civibus Romanis: cum Latinis autem et peregrinis ita, si concessum sit* ("Roman citizens have the right of intermarriage with Roman citizens, with Latins and foreigners only if it has been granted"). It is not clear whether the *conubium* was granted to the Roman citizens or to the Latins and foreigners.

Children born of a marriage for which the partners possessed *conubium* took their father's status: *conubio interveniente liberi semper patrem sequuntur* ("where the right of intermarriage exists, children always follow their father").[11] So the child of a Roman man and a Latin or foreigner who

[10] P. E. Corbett, *The Roman Law of Marriage* (Oxford 1930) 24–25 and 28. Cf. Th. Mommsen, *Römisches Staatsrecht*[3] (Leipzig 1887/88) 3.715.

[11] *Tit. Ulp.* 5.8. So too *Dig.* 1.5.19 (Celsus): *cum legitimae nuptiae factae sint, patrem liberi sequuntur* ("where a lawful marriage has been contracted, the children follow their father").

possessed *conubium* by special grant was born a Roman citizen.[12] Conversely, the child of a Roman woman and a non-Roman (Latin or foreigner) who enjoyed *conubium* was born non-Roman (Gaius *Inst.* 1.77).

A marriage for which the partners lacked *conubium*, such as the union of a senator and a freedwoman after passage of the *lex Iulia de maritandis ordinibus* in 18 B.C. (*Dig.* 23.2.44, Paul), was deemed unlawful (*iniustum*), but appears not to have been legally void.[13] The law treated the couple as husband and wife, and afforded them at least some of the legal rights (and disabilities) of lawful Roman marriage.[14] Under the rule of the law of nations (*ius gentium*), which comprised those legal principles that the Roman jurists considered to be common to all peoples, including Roman citizens,[15] children born of a marriage for which the partners did not possess *conubium* were illegitimate and took their mother's, not their father's, status: *non interveniente conubio matris condicioni accedunt* ("where the right of intermarriage does not exist, they take their mother's status").[16] Their condition was analogous to that of children conceived in extra-marital intercourse (*Dig.* 1.5.19, Celsus).

Under the law of nations then children born to a Roman man and a non-Roman woman (Latin or foreigner) with whom he did not have *conubium* were illegitimate non-Romans. Conversely, children born to a Roman woman and a Latin or foreign man who did not have *conubium* were illegitimate Roman citizens (Gaius *Inst.* 1.78). Livy furnishes two examples. After Capua had been recaptured by the Romans in 211 B.C., a number of Campanians were stripped of the Roman citizenship and exiled (26.34.6–9). In 188 B.C., they petitioned the Roman Senate for permission to marry Roman women and asked, *si qui prius duxissent, ut habere eas* (sc. *liceret*) *et nati ante eam diem uti iusti sibi liberi heredesque essent* ("that any who had already married Roman women be permitted to keep them, and that

[12]Rules summarized in Gaius *Inst.* 1.56.

[13]Inferred from *Dig.* 38.11.1.pr. and 48.5.14.1 (cf. n. 14), both Ulpian. Cf. *Coll.* 4.5.1. See also J. Gaudemet, "*Iustum matrimonium*," *RIDA* 2 (1949) 309–366, and E. Volterra, "*Iniustum matrimonium*," *Studi in onore di G. Scherillo* (Milan 1972) 2.441–470. Incestuous marriages were void: Gaius *Inst.* 1.58–64.

[14]So Ulpian, *Dig.* 48.5.14.1: a man could charge his wife with adultery even if they were not lawfully married (*iniusta uxor*), since the *lex Iulia de adulteriis* of 18 B.C. encompassed all marriages (*omnia matrimonia*).

[15]So slavery was governed by *ius gentium*, since all *gentes* (peoples) had slaves. See P. Frezza, "*Ius gentium*," *RIDA* 2 (1949) 259–308.

[16]*Tit. Ulp.* 5.8–9; cf. Cic. *Top.* 20: in the absence of *conubium*, *qui nati sunt patrem non sequuntur* ("children do not follow their father"); Isid. *Orig.* 9.7.21: *quotiens autem conubium non est, filii patrem non sequuntur* ("whenever there is no right of intermarriage, children do not follow their father"). Children conceived in the absence of *conubium* but not yet born at the time of their father's death were also considered to be illegitimate and so took their mother's status (Gaius *Inst.* 2.241).

children born before this day should be legitimate and allowed to be their heirs," 38.36.5–6). The children were illegitimate Roman citizens because their fathers did not have *conubium* with their Roman wives. What the men wanted, and obtained, was a retroactive grant of *conubium*, by which their children were stripped of the Roman citizenship. It can be inferred that they considered legitimization to be more valuable than the citizenship's political and other benefits. In 171 B.C. the Senate settled at Carteia (Algeciras) more than 4,000 Spaniards born to Roman soldiers and Spanish women, and conferred upon Carteia the status of a Latin colony. The settlers had taken their mothers' status because their parents did not enjoy *conubium*: *ex militibus Romanis et ex Hispanis mulieribus, cum quibus conubium non esset* ("born of Roman soldiers and Spanish women, with whom there was no right of intermarriage").[17]

II THE MINICIAN LAW

The rules governing the status of children born to marriages for which the partners lacked *conubium* were altered by the Minician law. It is not easily dated. Only Gaius (*Inst.* 1.78) and the *Tituli Ulpiani* (5.8) mention it and neither assigns it a date. It may be conjectured that the law dates to the period after the Latin settlement of 338 B.C. in which *ius conubii* was first identified as a distinct right. And it can be inferred from Gaius *Inst.* 1.79 that it was passed sometime before the Social War.[18] Having first described its effects on the marriage of a Roman and a foreigner for which the partners lacked *conubium*, Gaius goes on to apply it to Roman-Latin marriages:

adeo autem hoc ita est, ut [ex cive Romano et Latina qui nascitur Latinus nascatur, quamquam ad eos qui hodie Latini appellantur lex Minicia non pertinet; nam comprehenduntur quidem peregrinorum appellatione in ea lege non] solum exterae nationes et gentes, sed etiam qui Latini nominantur; sed ad alios Latinos pertinet, qui proprios populos propriasque civitates habebant et erant peregrinorum numero.

This rule obtains so far that the child of a Roman man and a Latin woman will be born a Latin, although the Minician law does not apply to those who today are called Latins; for in that law the term foreigner encompasses not only foreign nations and peoples, but also those who are called Latins; but it applies to other Latins, who had their own communities and states, and were classified with foreigners.

[17]Livy 43.3.1–4. See also R. Syme, *Colonial Elites: Rome, Spain and the Americas* (Oxford 1958) 11.

[18]So Castello (above, n. 1). Cf. Luraschi (above, n. 1): 62 B.C.; E. Volterra, "Matrimonio. Diritto romano," *Enciclopedia del diritto* (Milan 1975) 778: "posteriore alla guerra sociale o, secondo alcuni, dell'epoca di Augusto."

Even without Mommsen's conjecture for two and one-quarter illegible lines in the (sole) manuscript of Gaius' *Institutes*, Veronese Codex 13,[19] it is clear that the law applied both to foreigners, *exterae nationes et gentes*, and to Latins, but only to those Latins who possessed their own communities and states and who were classified with foreigners. The past tense (*habebant* and *erant*) suggests that Gaius was not thinking of a type of Latin status which existed in his own day. It is unlikely then that he had in mind either Junian Latins (informally or improperly manumitted slaves) or Latin colonists.[20] Nor did Junian Latins have their own communities and states. The Latins of *Inst.* 1.79 are probably those Latins resident in Italy in their own communities and allied to Rome by treaties, who were given the Roman citizenship in the course of the Social War.

It was normal practice for Republican laws to be named after the magistrates who had introduced them. The *lex Gellia Cornelia* of 72 B.C., which validated Pompey's grants of the citizenship in Spain, was proposed by the consuls L. Gellius Publicola and Cn. Cornelius Lentulus Clodianus (Cic. *Balb.* 19). It follows that the Minician law was proposed by a magistrate named Minicius. However no Minicii are attested as magistrates at Rome before Cn. Minicius, *consul suffectus* probably early in the first century A.D. (*PIR*^{2} 5.2 603). C. Castello has suggested, not implausibly, that the sponsor of the law may have been named Minucius, not Minicius (above, n. 1, 313–314). The law is given the name *Mensia* in the manuscript of the *Tituli Ulpiani* (Vat. Reg. 1128). Editors of the *Tituli Ulpiani*[21] have taken the name *Minicia* from Gaius *Inst.* 1.78, where the law is mentioned twice: in the first instance, the reading *lege Minicia* is entirely conjectural, since the manuscript is badly damaged; in the second instance, *lex Minicia* is not a great deal more certain.[22] And it is to be remarked that the Minicius Acilianus of Brixia mentioned in Pliny *Ep.* 1.14.3 is otherwise styled in the manuscript traditions Municius, Milicius, and Minutius.

Eleven Minucii are firmly attested as magistrates in the period between 338 and 90 B.C.[23] None can be conclusively identified with the Minician (or Minucian) law. Perhaps most likely to be its sponsor is M. Minucius

[19] Adopted in F. de Zulueta, *The Institutes of Gaius* (Oxford 1946) 1.26.

[20] Junian Latin status was introduced by the *lex Iunia* (*Norbana*), perhaps simply *lex Iunia*, passed probably before the promulgation of the *lex Aelia Sentia* in A.D. 4. Terms in Gaius *Inst.* 1.16, 1.22–23, 3.56, *Tit. Ulp.* 1.10 and 1.16. For Latin colonists in the time of Gaius, see *Inst.* 1.22, 1.29, and 3.56. Cf. A. Watson, *The Roman Law of Persons* (Oxford 1967) 27–28, n. 4.

[21] See especially P. E. Huschke, *Iurisprudentiae antejustinianae reliquiae*^{6}, edited by E. Seckel and B. Kuebler (Leipzig 1908).

[22] Photograph and discussion in R. Böhm, *Gaiusstudien* (Freiburg im Breisgau 1968) 1.48–61.

[23] T. R. S. Broughton, *The Magistrates of the Roman Republic* (New York 1951–1952) 2.591–592.

Rufus, tribune in 121 B.C., a year after Gaius Gracchus had proposed that the Roman citizenship be granted to Latins and Latin rights to the Italian allies.[24] He proposed various bills to annul Gracchus' legislation.[25] The Minician law fits well the reactionary aftermath of Gracchus' second tribunate.

The terms of the Minician law are described only in Gaius *Inst.* 1.78 and *Tit. Ulp.* 5.8.[26] Veronese Codex 13, the only surviving manuscript of Gaius' *Institutes*, is badly damaged at 1.78, mostly illegible, and perhaps corrupt.[27] The restorations suggested by Mommsen and P. Krueger have been adopted by most recent editors and form the basis of the Teubner text of E. Seckel and B. Kuebler (1969):

[24]Of the other Minucii, Ti. Minucius Augurinus, consul in 305 B.C., fought the Samnites near Bovianum and then either celebrated a triumph or died of his wounds (Livy 9.44.5–15). M. Minucius Rufus, consul in 221 B.C., fought against the Istri; elected co-dictator with Fabius Maximus in 217, he made a dedication to Hercules and opposed Fabius and his strategy of delay (consulship: Eutrop. 3.7, Oros. 4.13.16; dictatorship: *ILS* 11, Polyb. 3.103–105, Livy 22.27–30). A tribune of 216 B.C. named M. Minucius proposed a law to appoint *triumviri mensarii* because of a shortage of money (Livy 23.21.6). Q. Minucius Thermus was tribune in 201 B.C., praetor in Spain in 196 and consul in 193: as tribune, he tried to prevent the consul Cn. Lentulus from taking command in Africa, and co-sponsored a bill empowering Scipio to make peace with Carthage; as consul, he campaigned against the Ligurians, with little success (tribunate: Livy 30.40.9–16, 30.43.2–3; praetorship: Livy 33.26.1–2; consulship: Livy 34.55.6, 56.3–7; 35.3.1–6, 6.1–4, 11.1–13). Q. Minucius Rufus, praetor in 200 B.C., is reported to have investigated thefts from the temple of Proserpina at Locri; as consul in 197, he fought the Gauls and the Ligurians, and celebrated an ovation over the Boii and the Ligurians (praetorship: Livy 31.12–13; consulship: Livy 32.22–23). Another M. Minucius Rufus was *praetor peregrinus* in 197 B.C. (Livy 32.28.2). Nothing is known of his conduct of the office. Aulus Gellius says (*NA* 6.19.2) that C. Minucius Augurinus, tribune in 184 B.C., fined L. Scipio for peculation and ordered his arrest. But Minucius Augurinus is not otherwise attested, and the incident is elsewhere assigned to 187 B.C. and the tribunes Q. Petillius and Q. Petillius Spurinus (Livy 38.50–56, Val. Max. 3.7.1, Plut. *Cato Maior* 15.1–2; cf. Polyb. 23.14). Of Ti. Minucius Molliculus, *praetor peregrinus* in 180 B.C., it is said only that he died in office (Livy 40.37.1). Not much more is known of the Q. Minucius attested as praetor, probably in 164 B.C. (*SIG* 2.664). The tribune of 133 B.C. who replaced the deposed M. Octavius is called Mucius by Plutarch (*Ti. Gracch.* 13.2 and 18.1), Q. Mummius by Appian (*BCiv.* 1.12 and 1.14), and Minucius only by Orosius (5.8.3).

[25]Aur. Vict. *De vir. ill.* 65.5, Florus 2.3.4, Oros. 5.12.5; cf. Plut. *C. Gracch.* 13.1.

[26]Ulpian elsewhere (*Dig.* 1.5.24) reports: *lex naturae haec est, ut qui nascitur sine legitimo matrimonio matrem sequatur, nisi lex specialis aliud inducit* ("it is a law of nature that a child born outside of lawful marriage follows its mother, unless a special law provides otherwise"). He may have been thinking of the Minician law, a *lex specialis* which altered *ius gentium*, here represented by *lex naturae*. The final clause may be interpolated. E. Volterra, "Sulla D. 1.5.24," *Eos* 48 (1956) 541–552, defends it.

[27]See Böhm (above, n. 1) and de Zulueta (above, n. 19) 1.24–26. The Oxyrhynchus fragments published by A. S. Hunt in 1927 (*POxy.* 2103) and the Antinoite fragments published by V. Arangio-Ruiz in 1933 (*PSI* 11.1182) are of no help.

quod autem diximus inter civem Romanum peregrinamque[28] *nisi conubium sit,*[29] *qui nascitur, peregrinum esse, lege Minicia cavetur, ut is quidem deterioris parentis condicionem sequatur. eadem lege autem ex diverso cavetur, ut si peregrinus, cum qua ei conubium non sit, uxorem duxerit civem Romanam, peregrinus ex eo coitu nascatur. sed hoc maxime casu necessaria lex Minicia fuit;*[30] *nam remota ea lege diversam condicionem sequi debebat, quia ex eis, inter quos non est conubium, qui nascitur, iure gentium matris condicioni accedit. qua parte autem iubet lex ex cive Romano et peregrina peregrinum nasci, supervacua videtur; nam et remota ea lege hoc utique iure gentium futurum erat.*

What I have said, that, in the absence of the right of intermarriage, the child of a Roman man and a foreigner is a foreigner, is prescribed by the Minician law, which provides that the child take the status of the inferior parent. In the opposite case, where a foreigner marries a Roman woman with whom he does not have the right of intermarriage, the same law provides that the child of this union is a foreigner. But the Minician law was most necessary in this case; for without it, the child ought to have taken the opposite status, since a child born to those who do not have the right of intermarriage takes its mother's status under the law of nations. That part of the law in which the child of a Roman man and a foreigner is declared to be a foreigner appears to be superfluous, for even without the law, this would be the case under the law of nations.

Most of the gaps in the manuscript can be filled by reference to *Tit. Ulp.* 5.8:

conubio interveniente liberi semper patrem sequuntur: non interveniente conubio matris condicioni accedunt, excepto eo qui ex peregrino et cive Romana peregrinus nascitur, quoniam lex Minicia ex alterutro peregrino natum deterioris parentis condicionem sequi iubet.

Where the right of intermarriage exists, children always follow their father; where it does not exist, they take their mother's status, except that the child of a foreigner and a Roman woman is born a foreigner, since the Minician law prescribes that a child born to a foreigner follow the status of its inferior parent.

Taken together, the two texts provide a clear picture of the provisions of the law. Children born to a marriage for which the partners did not enjoy *conubium* took the status of the non-Roman (*deterior*) parent. The

[28]The manuscript gives *cr peregrinuque* or *peregrinoque*. Seckel and Kuebler understood *civem Romanum peregrinamque* and, in the next sentence, *peregrin[us] ... civem Romanam* (again *cr* in the manuscript); de Zulueta (above, n. 19), and M. David and H. L. W. Nelson, *Gai Institutionum Commentarii IV* (Leiden 1954) understood *civem Romanam peregrinumque* and *peregrin[am] ... civis Romanus*. The text of Seckel and Kuebler makes better sense because of *hoc maxime casu*: under the law of nations, the children of a non-Roman man and a Roman woman were Roman citizens.

[29]Krueger here restored *contracto matrimonio eum*.

[30]*fuit* is omitted by de Zulueta (above, n. 19), and by David and Nelson (above, n. 28).

law affected then only one of the four types of marriage of mixed citizenship, that of a foreign man and a Roman woman for which there was not *conubium*, which prior to the passage of the law yielded Roman children under the law of nations. Both before the law and after it, the children of a marriage for which the partners possessed *conubium* took their father's status, and the children of a Roman man and a foreign woman who did not possess *conubium* were born foreigners (hence Gaius calls this part of the law superfluous). Gaius also applies the law (*Inst.* 1.79) to Latins who at one time had their own communities and states and were classified with foreigners. I have argued above that these are probably the Latins resident in Italy before the Social War.

In treating of the law, Gaius speaks only of marriage (*uxorem duxerit*), and it seems likely that the law applied only to marriages, not also to less formal unions such as concubinage. *Tit. Ulp.* 5.8 speaks only of birth: *nascitur, natum*. If the law affected only marriage, a Roman woman and a foreign man could have ensured that their children would be Roman citizens by not marrying, since children conceived outside of lawful marriage took their mother's status under the law of nations. But few Roman women, and especially upper-class women, will have chosen to forgo marriage and the status it conferred so that their children would have the Roman citizenship.

The Minician law probably applied to all Roman citizens, both those living in Italy and those resident in the provinces. Some laws which dealt largely with matters of contract or property affected only Roman citizens in Italy: so the Furian law, passed perhaps in the first century B.C., which regulated the release of sureties and guarantors.[31] But this is unlikely to have been the case with the Minician law. Neither Gaius nor the *Tituli Ulpiani* distinguishes between Roman citizens in Italy and Roman citizens in the provinces. There is at least one recorded case of provincial Roman citizens being governed by local law (Chios).[32] But real estate was involved, not the law of personal status.

A marriage of mixed citizenship was transformed into a lawful Roman marriage if the non-Roman partner acquired the Roman citizenship.[33] Children born to the marriage after the non-Roman partner had been enfranchised were Roman citizens.[34] It can be inferred from two passages in

[31] Gaius *Inst.* 3.122; cf. 3.121a.

[32] *CIG* II 2222, treated exhaustively in A. J. Marshall, "Romans under Chian Law," *GRBS* 10 (1969) 255–271.

[33] Inferred from Gaius *Inst.* 1.67–71 and 1.87.

[34] A somewhat more complicated rule governed the status of children conceived but not yet born when the non-Roman partner acquired the citizenship. Since children conceived outside of lawful marriage took their status from the time of birth (whereas those conceived in a lawful Roman or foreign marriage took their status from the time of conception), they were born Roman citizens. See Gaius *Inst.* 1.90; cf. 1.94.

Gaius' *Institutes* (1.92 and 1.94) that the Minician law did not apply to children conceived by two foreigners.[35] He reports that a foreign woman who conceived outside of lawful foreign marriage, and acquired the Roman citizenship while pregnant, gave birth to a Roman citizen. It appears then that the child took its mother's status under the law of nations. And it was not until sometime during the principate of Hadrian that a decree of the Senate declared that where a child was conceived in accordance with foreign laws and customs, and its mother acquired the Roman citizenship before its birth, it was born a Roman citizen only if the citizenship was also awarded to its father. The rule was derived from the principle that the child of a lawful marriage, Roman or otherwise, took its status from the time of conception. It is one of the very few instances in which Roman law took into account the laws and customs of foreigners. The rule also seems to have been unnecessary, for there is no recorded case of the granting of the citizenship to a foreigner without a corresponding grant of the citizenship to his or her partner or a simultaneous grant of *conubium*.

A Roman citizen could lose his status in several ways. Capture in war resulted in loss of citizenship and freedom[36] and dissolution of marriage, since there could be no marriage with a slave.[37] Children born to a captive took their mother's status under the law of nations, because the Minician law did not apply to children born of a slave parent.[38] A senatorial decree of A.D. 52 provided that a free-born woman who cohabited with a slave without his owner's consent could be stripped of the citizenship and freedom.[39] A Roman citizen convicted of a capital offence and banished to a remote place

[35]See also E. Volterra, "L'acquisto della cittadinanza romana e il matrimonio del peregrino," *Studi in onore di E. Redenti* (Milan 1951) 2.403–422, and "Sulla condizione dei figli dei peregrini cui veniva concessa la cittadinanza romana," *Studi in onore di A. Cicù* (Milan 1951) 2.645–672.

[36]See Hor. *Carm.* 3.5.41–42, the legend of Regulus. So too evasion of registration in the census: Gaius *Inst.* 1.160.

[37]*Dig.* 24.2.1 (Paul), 49.15.8 (Paul, where *post constitutum tempus* is probably an interpolation), 49.15.12.4 (Tryphoninus), 49.15.14.1 (Pomponius), 49.15.25 (Marcian); cf. A. Watson, "*Captivitas* and *Matrimonium*," *Revue historique de droit français et étranger* 29 (1961) 243–259, and J. Crook, *Law and Life of Rome* (Ithaca, New York 1967) 62. Only Julian says (*Dig.* 24.2.6) that marriage was not dissolved by capture, and the passage is almost certainly interpolated: see Corbett (above, n. 10) 212. The jurists were prepared to make exceptions. It was decided, for example, that a man could accuse his captive "wife" of adultery, but only if she had not been raped (*Dig.* 48.5.14.7, Ulpian). If a wife died after she had been captured, the jurists pretended that she had died a married woman in order that her father could recover her dowry (*Dig.* 24.3.10.pr., Pomponius). Ulpian and Julian believed that the marriage of a patron and his freedwoman ought not to be dissolved by his capture, because of the reverence which she owed to him (*Dig.* 23.2.45.6).

[38]Inferred from Gaius *Inst.* 1.82.

[39]Gaius *Inst.* 1.160. Where the owner had given his consent, she could be reduced to the status of a freedwoman. Discussion in Weaver (above, n. 1) 150–154.

(*deportatio*) underwent loss of citizenship without loss of liberty.[40] But deportation appears to have dissolved marriage.[41] Interdiction from fire and water, which was replaced by *deportatio* in the Empire, and which also entailed loss of citizenship,[42] seems not to have dissolved marriage: there is no reason to believe that Cicero's marriage was dissolved when he was interdicted from fire and water in 58 B.C. (Cic. *Dom.* 47). Relegation, such as that of Ovid to Tomis in A.D. 8, brought about neither loss of citizenship nor loss of freedom.[43]

The status of marriages contracted by Roman citizens and foreigners in foreign or local law is not attested.[44] Of the Roman jurists, only Gaius shows any interest in non-Roman law, and then only when it was likely to become an issue in Roman law, for example, when the Roman citizenship was granted to one partner of a foreign marriage. Cicero claimed (*Balb.* 20) that states had the right to adopt or reject Roman legislation, and he was almost certainly correct.[45] And it is hard to imagine that any state will have chosen to adopt the Minician law. The marriage of a Roman citizen and a foreigner was probably valid, or at least not penalized, in the laws of non-Roman communities.

III ROMANS AND JUNIAN LATINS

The union of a Roman citizen and a Junian Latin (an informally or improperly manumitted slave) was governed by the *lex Aelia Sentia* of A.D. 4 and the law of nations, not by the Minician law. The *lex Aelia Sentia* declared that if an improperly manumitted slave (for example, a slave freed when below the age of thirty) married a Roman citizen, a Latin colonist, or a Junian Latin, testified to this in the presence of no less than seven adult Roman citizens, and then fathered a child by her, he could, when his son or daughter (Gaius *Inst.* 1.32a) was one year old, appear before a praetor at Rome or a provincial governor and attempt to prove that he

[40] *Dig.* 48.19.2.1 (Ulpian). On judicial penalties, see P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford 1970) 111–122.

[41] *Dig.* 24.3.56 (Paul). Two texts, *Dig.* 24.1.13.1 and 48.5.20.1 (both Ulpian), suggest that marriage was not dissolved by deportation. But they may be interpolated; cf. Corbett (above, n. 10) 104.

[42] Gaius *Inst.* 1.161; cf. *Tit. Ulp.* 10.3, and *Fragmenta Interpretationis Gai Institutionum Augustodunensia* 19. See also Crook (above, n. 37) 272.

[43] *Dig.* 48.22.7.3 (Ulpian). For Ovid: *Tr.* 2.137, 5.11.21; cf. 4.9.11.

[44] Ulpian does reveal (*Dig.* 50.1.1.2) that children born to the marriage of persons from different non-Roman communities took their father's status. So the child of a Campanian father and a Puteolan mother was born a Campanian. He goes on to say that sometimes the children were allowed to take their mother's status. This privilege was granted to the Ilienses, to Delphi, and, by Pompey, to the Pontici. Some jurists thought that only bastards in Pontus were eligible; Ulpian and Celsus disagreed.

[45] See P. A. Brunt, "The Legal Issue in Cicero, *Pro Balbo*," *CQ* 32 (1982) 136–147.

had married in accordance with the *lex Aelia Sentia* and that he had a year-old child. If the praetor or governor announced that the case was as stated, the man acquired the Roman citizenship for himself, his child, and his wife (if she was not already a Roman citizen).[46] A decree of the Senate of circa A.D. 75 extended these privileges to informally manumitted slaves (Gaius *Inst.* 1.31). Gaius does not say that the same rights were enjoyed by Junian Latin women who married Roman citizens or Latin colonists.[47] The Roman jurists, Gaius included, regularly subsume women in the masculine gender. But that may not be the case here, since Gaius elsewhere indicates that Junian Latin men enjoyed other privileges which were denied to Junian Latin women (*Inst.* 1.67–75).

The *lex Aelia Sentia* created some confusion in juristic circles. Some jurists believed that the children of a Junian Latin who married a Roman woman in the manner prescribed by the *lex Aelia Sentia* were born Latins, on the grounds that the *lex Aelia Sentia* and the *lex Iunia* (*Norbana*) appeared to confer *conubium* upon their parents, and because children born to a marriage for which the partners enjoyed *conubium* took their father's status. And they argued that the children of a Junian Latin who married a Roman woman other than in the manner prescribed by the *lex Aelia Sentia* were born Roman citizens, since the couple did not possess *conubium* and because the children therefore took their mother's status under the law of nations. Other jurists believed that children born to the marriage of a Junian Latin and a Roman woman took their mother's status whether or not their parents had married in the manner prescribed by the *lex Aelia Sentia*. This was the opinion which eventually prevailed. A senatorial decree of the time of Hadrian declared: *quoquo modo ex Latino et cive Romana natus civis Romanus nascatur* ("in every case the child of a Latin and a Roman woman is born a Roman citizen").[48] Children born to a Roman man and a Junian Latin woman probably also took their mother's status. That part of Gaius *Inst.* 1.79 where he is likely to have described the rule is illegible. But *Inst.* 1.80, which begins with *eadem ratione ex contrario ex Latino et cive Romana, sive ex lege Aelia Sentia sive aliter contractum fuerit matrimonium, civis Romanus nascitur* ("on the same principle, in the opposite case, the child of a Latin man and a Roman woman is born a Roman citizen, whether the marriage has been contracted in accordance with the *lex Aelia Sentia* or otherwise"), implies that the converse of this rule was expressed in the preceding sentence, that is, in *Inst.* 1.79, and so

[46]Gaius *Inst.* 1.29. If the man died before proving his case, his wife could act in his place (Gaius *Inst.* 1.32). For the other ways in which Junian Latins could earn the citizenship, most for service on behalf of the state, see Gaius *Inst.* 1.32b–35.

[47]If a Junian Latin woman married a Junian Latin, he could obtain the citizenship for both of them.

[48]Gaius *Inst.* 1.80; cf. 1.30.

makes plausible Mommsen's restoration of *ex cive Romano et Latina qui nascitur Latinus nascatur* ("the child of a Roman man and a Latin woman is born a Latin").

The Latins in Gaius are almost all Junian Latins. He mentions (*Inst.* 1.29) Latin colonists in connection with the granting of the citizenship to Junian Latins who married in the manner prescribed by the *lex Aelia Sentia*, and subjects to the terms of the Minician law (*Inst.* 1.79) those Latins who had their own communities and states and were classified with foreigners, probably those Latins resident in Italy before the Social War. It is arguable whether Latin colonists were lumped together with foreigners and so governed by the Minician law, or classified with Junian Latins and therefore governed by the *lex Aelia Sentia* and by the law of nations.

IV THE LAW AMELIORATED

An unnamed decree of the Senate[49] legitimized certain types of marriage contracted by mistake, for example, where a Roman man married a foreign woman in the belief that she was a Roman citizen. It dates to the period after the passage of the *lex Iunia* (*Norbana*), since it treats of Junian Latins, and to the period before a senatorial decree of the time of Hadrian which altered some of its provisions. Error in determining status may not have been uncommon. There were few proofs of possession of the Roman citizenship: in the Republic, registration on the census-list; from the passage of the *lex Aelia Sentia*, registration of children born to the marriage of two Roman citizens; certificates issued to veterans and to those enfranchised by special grant.[50] Roman names could be, and were, usurped.[51] Lawfully manumitted slaves, perhaps especially those freed in their owner's will (Gaius

[49]Gaius otherwise dates decrees of the Senate by naming the consuls who were in office when they were passed (e.g., *Inst.* 1.31) or the emperor in whose principate they were enacted, e.g., *Inst.* 1.30: *ex novo senatus consulto, quod auctore divo Hadriano factum est* ("by a recent decree of the Senate enacted on the authority of the divine Hadrian"). That he consistently fails to date this decree, which is mentioned six times in *Inst.* 1.67–75, may indicate that he did not know when it had been promulgated.

[50]Census: for example, Livy 42.10.1–3; birth registration: for examples, see *FIRA*^{2} 3.1–3; certificates: *CIL* XVI (*diplomata*); A. N. Sherwin-White, "The Tabula of Banasa and the *Constitutio Antoniniana*," *JRS* 63 (1973) 86–98. See, in general, J. F. Gardner, "Proofs of Status in the Roman World," *BICS* 33 (1986) 1–14.

[51]Suet. *Claud.* 25.3; cf. App. *Hisp.* 68. See A. Mócsy, "Das Namensverbot des Kaisers Claudius (Suet. *Claud.* 25,3)," *Klio* 52 (1970) 287–294, and G. Alföldy, "Notes sur la relation entre le droit de cité et la nomenclature dans l'empire romain," *Latomus* 25 (1966) 37–57. The *lex Licinia Mucia* of 95 B.C. created a standing court to try cases of usurpation of the citizenship: Asc. pp. 67–68 C, Cic. *Balb.* 48 and *Off.* 3.47; cf. E. Badian, "*Quaestiones variae*," *Historia* 18 (1969) 489–490. Harsh penalties were established by the *lex Papia de peregrinis* of 65 B.C.: Cic. *Arch.* 10 and *Balb.* 52.

Inst. 1.17) may often have been unable to furnish proof of citizenship, such as a *tabella manumissionis* (*FIRA*^{2} 2.6).

The decree provided that where a Roman woman married a foreigner, and could prove that she had believed him to be a Roman citizen, the Roman citizenship was awarded to her husband and children, sons or daughters (Gaius *Inst.* 1.72). There was the same result if she married a foreigner in the belief that she was marrying a Junian Latin in accordance with the *lex Aelia Sentia.* But the citizenship was awarded only to her children if, in the belief that she was marrying a Roman citizen or a Junian Latin, she married a man ranked among the *dediticii*, a special category of slaves created by the *lex Aelia Sentia*, forbidden ever to acquire the citizenship, and including runaways and those consigned to combat in the arena.[52]

If a Roman man married a foreigner or Junian Latin and could prove that he had believed her to be a Roman citizen, his wife and children were enfranchised. If he married a foreigner or Junian Latin in the belief that he himself was a foreigner or Latin, the citizenship was awarded to his wife and children.[53] But if he married a woman ranked among the *dediticii* in the belief that she was a Roman citizen, only his children were granted the citizenship (Gaius *Inst.* 1.67). Gaius does not say that the decree provided for the case of a Roman man who married a foreigner in the belief that he was marrying a Junian Latin in accordance with the *lex Aelia Sentia.* This, together with the passage (*Inst.* 1.29) in which he assigns the benefits of the *lex Aelia Sentia* only to Junian Latin men who married Roman citizens or Latin colonists or Junian Latins, suggests that Junian Latin women were not entitled to marry Roman citizens under the *lex Aelia Sentia.*[54]

Junian Latins were also entitled to sue for the favor of the decree. A Junian Latin woman who married a foreigner in the belief that he was a Junian Latin and who was able to prove that she had married in error acquired the Roman citizenship for herself, her husband, and her children (Gaius *Inst.* 1.69). The same right was extended to Junian Latin men who married foreign women believing them to be Junian Latins or Roman citizens (Gaius *Inst.* 1.70). There was for a time some doubt about whether a foreigner could apply for the benefits of the decree. The issue was settled, at least to Gaius' satisfaction, by a rescript of Antoninus Pius, from which it could be inferred that foreigners were eligible: the emperor declared that a foreigner who married a Roman woman, fathered a child by her, and then in some way acquired the Roman citizenship, could try to prove that he

[52]Others listed in Gaius *Inst.* 1.13.

[53]Gaius *Inst.* 1.71. He mentions only Roman men who married Latin or foreign women. But it is probably to be understood that Roman women had the same privilege. There is no reason why they should not have had it.

[54]See also Gaius *Inst.* 1.87, where he says that the decree operated only in certain cases.

had married in error, presumably in order that his son be enfranchised, just as if he had remained a foreigner (Gaius *Inst.* 1.74).

Gaius nowhere describes the procedure to be followed in applying for the benefits of the decree. However it can be inferred that it was similar to that followed by Junian Latins who married in the manner prescribed by the *lex Aelia Sentia* and then applied for the citizenship. He several times refers to the birth of a son (*filio nato*) and in *Inst.* 1.73 reveals that a man could try to prove that he had been mistaken about his wife's or his own status regardless of the age of his son or daughter. It seems likely then that someone who wanted to obtain the benefits of the decree was required to attest his marriage in the presence of at least seven adult Roman citizens and then, upon the birth of a son or daughter, plead his case before one of the praetors or before a provincial governor.[55]

In the upshot, the senatorial decree intervened to improve the condition of the partners and children of certain types of marriage contracted because one partner had been mistaken about the other's or his own status.[56] It did so by granting the citizenship and, concomitantly, *patria potestas*, which is what Gaius had uppermost in mind in abstracting its provisions:

et ideo superius rettulimus [1.67–75] *quibusdam casibus, per errorem non iusto contracto matrimonio, senatum intervenire et emendare vitium matrimonii, eoque modo plerumque efficere ut in potestatem patris filius redigatur.*[57]

And so, as I reported above, in certain cases, when a marriage that is not valid has been contracted on account of error, the Senate intervenes and remedies the defect of the marriage, and in this way causes the son to be brought under his father's power.

[55]It was probably necessary that the child be at least one year old if the proof was furnished by someone who had believed that he was marrying in accordance with the *lex Aelia Sentia*. Almost two illegible lines in Veronese Codex 13 follow *nihil interest cuius aetatis filius sit filiave* ("the age of the son or daughter makes no difference"), before the sentence concludes with *si minor anniculo sit filius filiave, causa probari non potest* ("if his son or daughter is less than one year old, he cannot prove a case"). J. F. L. Goeschen, *Gai Institutionum Commentarii Quattuor* (Berlin 1820), plausibly conjectured: *nisi forte eorum aliquis, qui e lege Aelia Sentia matrimonium se contrahere putarint, erroris causam probare velit; ab hoc enim,* ("unless one of those who thought that they were contracting a marriage in accordance with the *lex Aelia Sentia* should want to prove a case of error; for such a person .... "). Cf. de Zulueta (above, n. 19) 1.22.

[56]Expressly provided for in the decree are the following cases: a Roman man marries a foreign or Latin woman in the belief that he is marrying a Roman woman; a Roman man marries a *dediticia* in the belief that she is a Roman citizen or a Latin; a Roman woman marries a foreigner or a *dediticius* in the belief that she is marrying a Roman citizen or a Latin; a Latin man marries a foreigner in the belief that he is marrying a Roman or a Latin; a Roman, man or woman, marries a Latin or a foreigner because he is mistaken about his own status.

[57]*Inst.* 1.87; cf. *Tit. Ulp.* 7.4.

But those who knowingly married foreigners were not to be helped (Gaius *Inst.* 1.75):

si vero nullus error intervenerit, sed scientes suam condicionem ita coierint, nullo casu emendatur vitium eius matrimonii.

But if there was no error, and they married with knowledge of their status, in no case is the defect of such a marriage remedied.

It was not until the time of Hadrian that the rules were relaxed, and even then not much.

A decree of the Senate promulgated under Hadrian, probably to be identified with the one which Gaius says applied the law of nations to Roman-Latin marriages,[58] stated: *etiamsi non fuerit conubium inter civem Romanam et peregrinum, qui nascitur iustus patris filius est* ("even if a Roman woman and a foreigner do not have the right of intermarriage, their child is the lawful son of his father") (Gaius *Inst.* 1.77). Children born to the marriage of a Roman woman and a foreigner were henceforth to be treated in Roman law as legitimate, *iusti filii*.[59] The point of the ruling is not obvious. There is no evidence that the children's illegitimate status in Roman law had disadvantaged them in non-Roman law (for example, in intestate succession). Perhaps the decree's authors were thinking of foreigners and their children who might subsequently be awarded the Roman citizenship and brought under the jurisdiction of the Roman civil law. The decree did not legitimize the children born of a Roman man and a foreign woman who did not enjoy *conubium*, for that would have given the Roman citizenship to the children of at least some marriages of mixed citizenship. The same decree provided that the child of a Junian Latin and a foreign woman or of a foreigner and a Junian Latin woman should take its mother's status. Gaius does not say whether the decree introduced or reiterated the rule (*Inst.* 1.81).

The decree does not seem to have affected the operation of the Minician law, which can perhaps be seen at work in Pausanias' travelogue (8.43.5, Arcadia):

[58]Gaius *Inst.* 1.30 and 1.80; cf. Corbett (above, n. 10) 98.

[59]This is the principal meaning of *iustus*. Cf. Gaius *Inst.* 3.72; Varro *Ling.* 5.86; Cic. *Caecin.* 99 and *Leg.* 2.30; Livy 9.10.7, 22.1.5, and 38.36.5–6; Sen. *Med.* 109; Lucan 2.379; Quint. *Inst.* 5.14.16; Tac. *Ann.* 12.7; Gell. *NA* 14.7.7, and 20.1.43; Ovid *Ars Am.* 2.598; Curt. 5.9.8; Mart. 1.103.2; *Dig.* 5.3.31.2 (Ulpian); and, especially, Livy 39.53.3: *hunc iusta matre familiae, illum paelice ortum esse* ("the one was born of a lawful wife, the other of a concubine"), and *Frag. Vat.* 194, which treats of exemption from service as a guardian: *iusti autem an iniusti sint filii, non requiritur; multo minus in potestate necne sint, cum etiam iudicandi onere iniustos filios relevare Papinianus libro V quaestionum scribat* ("no inquiry is made into whether the children are legitimate or illegitimate, much less whether or not they are in their father's power, since, as Papinian writes in Book V of his *Questions*, even illegitimate children afford exemption from the burden of serving as a judge").

ὅσοις τῶν ὑπηκόων πολίταις ὑπῆρχεν εἶναι Ῥωμαίων,[60] οἱ δὲ παῖδες ἐτέλουν σφίσιν ἐς τὸ Ἑλληνικόν, τούτοις ἐλείπετο ἢ κατανεῖμαι τὰ χρήματα ἐς οὐ προσήκοντας ἢ ἐπαυξῆσαι τὸν βασιλέως πλοῦτον κατὰ νόμον δή τινα.

A certain law required Roman citizens in the provinces whose children were considered to be Greek either to leave their property to strangers or to increase the emperor's wealth.

The children were Greek probably because one of their parents was Greek and because the Minician law ordered the children of a marriage of mixed citizenship to take the status of their "inferior" (*deterior*) parent. The νόμος is either the Minician law or, more likely in view of its place in the sentence, the rule that foreigners could not inherit from Roman citizens (hence property left to them was confiscated by the fisc, i.e., increased the emperor's wealth) (Gaius *Inst.* 2.110). Pausanias reports that Antoninus Pius ἐφῆκε καὶ τούτοις διδόναι σφᾶς παισὶ τὸν κλῆρον, προτιμήσας φανῆναι φιλάνθρωπος ἢ ὠφέλιμον ἐς χρήματα φυλάξαι νόμον ("allowed all these to give their property to their children, preferring rather to appear benevolent than to uphold a law that increased his riches"). It is arguable whether he abolished the rule[61] or set it aside only for the non-Roman children of a Roman parent (Corbett [above, n. 10] 101, n. 4) or granted a special exemption to the children of unions of mixed citizenship in Arcadia. This last view finds some support in τούτοις, which recalls ὅσοις ... ἐς τὸ Ἑλληνικόν and seems to narrow the scope of προτιμήσας ... νόμον.[62]

V THE LAW IN EGYPT

Roughly contemporaneous with Pausanias is the papyrus generally known as the Gnomon of the Idios Logos (*BGU* V [= no. 1210]),[63] which provides in summary form a collection of regulations, mostly of a financial nature, originally drawn up under Augustus, amended and augmented by later emperors, Egyptian prefects, financial officials, and the Roman Senate, and designed to be used in the administration of the ἴδιος λόγος, the emperor's "private account." The list of rules preserved in *BGU* V was probably compiled in the mid second century A.D. on the orders of the *idiologus*, who, apart from the prefect, was

[60]I take this to mean "Roman citizens living in the provinces," not "provincials recently enfranchised." See Dem. 18.295; cf. LSJ under ὑπάρχω B.2.

[61]This seems to be the view of D. Johnston, *The Roman Law of Trusts* (Oxford 1988) 39.

[62]Gaius cites (*Inst.* 2.110) only one exception to the rule: Roman soldiers entitled to make a military will could appoint foreigners their heirs. But the *Institutes* were completed circa A.D. 160, and therefore may date to the period before Antoninus Pius' reform.

[63]Text with commentary by E. Seckel and W. Schubart (1919). In general, S. Riccobono, *Das römische Reichsrecht und der Gnomon des Idios Logos* (Erlangen 1957).

the chief financial official in Egypt.[64] Several clauses in the document regulate the intermarriage of Macedonian women, aliens, ἀστοί (probably Alexandrian citizens), Egyptians, women of the Islands, the freedmen of Alexandrian citizens, Syrians, and Paraetonians (12, 13, 38, 48, 49, 51, 57). Three treat of marriage between Roman citizens and foreigners. Clause 52 permits the intermarriage of Romans and Egyptians: Ῥωμαίοις ἐξὸν Αἰγυπτίαν γ[ῆμαι] ("Romans are allowed to marry Egyptian women"). But Clause 39 prescribes the rule laid down by the Minician law:

Ῥωμαίου ἢ Ῥωμαίας κατ' ἄγνοιαν συνελθόντων ἢ ἀστοῖς ἢ Αἰγυπτίοις τὰ τέκνα ἥττονι γένει ἀκολουθεῖ.

Where a Roman man or woman marries an Alexandrian citizen or Egyptian on account of ignorance, their children take the status of the inferior parent.

The phrase ἥττονι γένει could be a translation of the jurists' *deterior parens*. ἄγνοιαν is obscure: it may be ignorance of the difference in status or it may be ignorance of the law. It is even more puzzling in light of Clause 46:

Ῥωμαίοις καὶ ἀστοῖς κατ' ἄ[γνοι]αν Αἰγυπ[τί]αις συνελθοῦσι συνεχωρήθη μετὰ τοῦ ἀνευθύν[ους] εἶναι καὶ τ[ὰ] τέκνα τῷ πατρικῷ γένει ἀκολουθεῖ.

It has been decided that Romans and Alexandrian citizens who marry Egyptian women on account of ignorance, are, in accordance with this [?], not accountable, and their children take their father's status.

The status of these children is governed neither by the Minician law nor by the law of nations, both of which required that they take their mother's status. Much may hinge on the mysterious phrase μετὰ τοῦ, which could mean almost anything. Perhaps a noun in the genitive case has dropped out of the text. On the basis of what is known of the Roman law of this period, it is tempting to try to reconcile Clauses 39 and 46 by identifying the ἄγνοιαν of Clause 39 as ignorance of the law, the ἄγνοιαν of Clause 46 as ignorance of the difference in status, and μετὰ τοῦ as a veiled or much compressed reference to the terms of the senatorial decree which legitimized certain types of marriage contracted by mistake. But this is probably wishful thinking, and perhaps unnecessary. There is no reason why the rules governing marriages of mixed citizenship in Egypt should have been identical to those described in Gaius' *Institutes* and the *Tituli Ulpiani*. There are likely to have been many local variations in the application of the Minician law. It may even be conjectured that at least some Roman officials were relieved when the law was made obsolete by the edict of Caracalla, often called the *Constitutio*

[64] Fragments of an earlier version (*POxy.* 3014), which seems to vary only slightly from *BGU* V, date perhaps to the middle of the first century A.D.

Antoniniana,[65] which awarded the Roman citizenship to all free inhabitants of the Empire, except *dediticii*.[66]

VI RULES AND PRACTICE

The Minician law was in effect then at least from the Social War to the time of Caracalla. Its longevity is to be explained by its purpose, not by the proverbially sluggish pace of legal reform, for it is clear from several senatorial decrees and imperial rulings that the Roman authorities were determined to uphold its basic provisions. Not much can confidently be said about its purpose, since its author and the exact date of its introduction are unknown. What can safely be maintained is that the law was passed at a time when the Roman citizenship had become more valuable than that of other states, and that it was designed to exclude the child of a non-Roman parent from the political and other rights and benefits of the citizenship. Policy is implied, its continuing approbation inferred. And it was customary for states to restrict their citizenship to the children of two citizens.[67]

[65] *PGissensis* 40.1, which is generally regarded to be a copy of Caracalla's edict. F. Millar has doubts: "The Date of the *Constitutio Antoniniana*," *JEA* 48 (1962) 127. Text in A. Wilhelm, "Die *Constitutio Antoniniana*," *AJA* 38 (1934) 180. Another widely used text with fewer restorations is that of P. M. Meyer, which is reproduced in *FIRA*^{2} 1.88, and in Mitteis and Wilcken 2.377 (above, n. 4). The bibliography is vast. See especially C. Sasse, *Die Constitutio Antoniniana* (Wiesbaden 1958), Sherwin-White (above, n. 50), and H. Wolff, *Die Constitutio Antoniniana und Papyrus Gissensis 40 I* (Köln 1976), with the review of F. Millar, *JRS* 69 (1979) 235.

[66] The *dediticii* have been variously identified with the barbarians settled in the Empire in the second century A.D., with Egyptians, who were barred from direct access to the Roman citizenship, and with the freedmen described in juristic texts as *in numero dediticiorum*. Barbarians: E. Bickermann, *Das Edikt des Kaisers Caracalla in P. Giss. 40* (Berlin 1926); Egyptians: A. H. M. Jones, "Another Interpretation of the *Constitutio Antoniniana*," *JRS* 26 (1936) 223–235, and *Studies in Roman Government and Law* (Oxford 1960) 130 and 134; freedmen: H. W. Benario, "The *Dediticii* of the *Constitutio Antoniniana*," *TAPA* 85 (1954) 188–196. Whatever their identity, they were few in number. Neither Cassius Dio (78.9.5) nor Ulpian (*Dig.* 1.5.17) mentions any exception to the grant of the citizenship, and Ulpian belonged to Caracalla's *consilium*: *in orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt* ("everyone in the Roman world has been made a Roman citizen as a result of the decree of the Emperor Antoninus"). Cf. Aur. Vict. *Caes.* 16.12, August. *De civ. D.* 5.17, Sid. Apoll. *Epist.* 1.6.2, Just. *Nov.* 78c.5.

[67] So Aristotle (*Pol.* 3.1.9). Periclean Athens affords example. A law attributed to Pericles, and passed probably in 451 B.C., decreed that only children born to two Athenians were entitled to the Athenian citizenship (Plut. *Per.* 37.2–5). Aristotle (*Ath. Pol.* 26.4) laconically ascribes its passage to the large number of existing citizens. A similar rule was in force at Oreos, Byzantium, and Rhodes (Dem. 23.213; ps.-Arist. *Oec.* 2.2.3; *IG* XII.1 766). The Athenian law also declared illegitimate children born to the marriage of an Athenian citizen and a foreigner (Ar. *Aves* 1649–1652). It was

The law's practical effects are not easily gauged.[68] It prescribed various penalties for the partners and children of marriages of mixed citizenship. But how many Romans ignored the law? How many even knew what the law was? And how much of it was enforceable?

That the law will have deterred Romans from marrying foreigners may be conjectured, but cannot be demonstrated.[69] I know of only one text that can be adduced, Seneca *De beneficiis* 4.35.1, where he provides an example of a good reason to break a promise:

promisi tibi in matrimonium filiam; postea peregrinus apparuisti; non est mihi cum externo conubium;[70] *eadem res me defendit, quae vetat.*

I promised you my daughter in marriage; afterwards, you were revealed to be a foreigner; I have no right of intermarriage with a foreigner; the same thing which forbids the marriage affords my defense.

The problem eludes quantification. Few examples of intermarriage can be discovered in the literature and epigraphy of the late Republic or early Empire. Ancient authors were not in the habit of distinguishing between Roman citizens and non-Romans or of reporting the status of the partners of the marriages (and less formal unions) which they record.[71] The many tombstones which attest marriages rarely afford evidence of the citizenship even of one partner (for example, notice of the husband's membership in a Roman tribe). At least some of the ex-slaves attested will have been Junian Latins.[72] And a Latin name is not proof of possession of the Roman citizenship.[73]

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suspended so that Pericles himself could enrol his illegitimate son on the phratry-lists. And it can be inferred from its apparent reiteration in 403/2 B.C. that it was not enforced during much of the Peloponnesian War (Isaeus 8.43). The right of intermarriage was granted to the Euboeans before 405 B.C. (Lys. 34.3). But harsh penalties were added sometime in the early fourth century, and appear to have remained in effect at least until after the battle of Chaeroneia (Dem. 59.16).

[68]For law as a (mostly unreliable) guide to social behavior, see G. Sawer, *Law in Society* (Oxford 1964), and D. Schiff, "Law as a Social Phenomenon," in A. Podgorecki and C. J. Whelan (eds.), *Sociological Approaches to Law* (New York 1981) 155–166.

[69]Corbett concluded that the intermarriage of Romans and foreigners was not uncommon (above, n. 10, 99–102).

[70]Of course it was Seneca's daughter, not Seneca, who required *conubium* with the foreigner.

[71]This is true often even of their own marriages. Josephus reveals (*Vita* 423 and 425) that he wed a Jewish woman of Crete shortly after he had been granted the Roman citizenship by Vespasian. He says (*Vita* 427) that her parents were very distinguished, but nothing about her citizenship.

[72]For Junian Latins with Roman names, Pliny *Ep.* 10.104. See also P. A. Brunt, *Italian Manpower 225 B.C.–A.D. 14* (Oxford 1971) 207.

[73]The usurpation of Latin names, like usurpation of the Roman citizenship, has a long history. Claudius forbade foreigners to adopt Roman names (see n. 51 with the

More can be said of the law's effect on the condition of the offspring of marriages of mixed citizenship. Consonantly with the temper of much of the Roman law of status, the Minician law reserved its harshest penalties for the children of the disobedient. Denied the privileges of the Roman citizenship and access to the institutions of the Roman civil law, they were probably most acutely disadvantaged in the Roman law of succession.[74] They could accept nothing bequeathed to them by their Roman parent, because foreigners (and Junian Latins) could not receive inheritances or legacies from Roman citizens.[75] Anything left to them by their Roman parent could be confiscated by the state.[76] The rule extended so far that a Roman could not bequeath even a usufruct to a foreigner (*Frag. Vat.* 47a).

If a Roman died without a will (and most Romans probably died intestate),[77] the Praetor's Edict awarded possession of the estate (*bonorum possessio*) in a fixed order of succession: first to *liberi*, including children who were in their father's power at the time of his death (*sui heredes*, proper heirs) and those who had been released from it, then, if there were no *liberi* or if they were ineligible, to *legitimi*, normally the nearest agnate relatives, thirdly, if no one was yet eligible, to *cognati*, other blood relatives, and lastly, to his wife.[78] There is no evidence for the position of the non-Roman children of a Roman parent. They are likely to have had a very low claim, if any, on the estate.

The upshot of the Minician law then was to deny the children of mixed marriages a share in their Roman parent's estate. And later changes in the

works cited there). Brunt (above, n. 72) has observed that the ban is "better evidence of the practice than of its cessation" (208).

[74]I know of no evidence for the rules governing succession to the estate of the non-Roman partner of a mixed marriage. I conjecture that the laws of foreign states and communities will not have barred the non-Roman partner from bequeathing his (or her) estate to his non-Roman child or the child from claiming the estate if his parent were to die intestate.

[75]Gaius *Inst.* 2.110; cf. Cic. *Arch.* 11. *Dediticii* were also ineligible: Gaius *Inst.* 1.25 and *Tit. Ulp.* 22.2. It can be inferred from Gaius *Inst.* 1.22–23 that Latin colonists could accept inheritances and legacies from Roman citizens.

[76]Details in Johnston (above, n. 61) 35–39.

[77]The opposite view is eloquently argued by J. A. Crook, "Intestacy in Roman Society," *PCPS* NS 19 (1973) 38–44. But D. Daube is surely right in thinking that most people in the Roman world were poor, and that the poor usually do not make wills: *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh 1969) 72 and 75. The point is not impaired by the survival of some wills written by those Crook calls "the little people."

[78]This was the law during the period when the Minician law was in effect. Details in Buckland (above, n. 1) 370–373. The earlier system of the Twelve Tables is described in Buckland 367–370.

law are unlikely to have afforded much relief.[79] The reform attributed to Antoninus Pius by Pausanias (8.43.5) was probably narrow in scope. And the undated decree of the Senate which provided for the enfranchisement of the partners and children of mixed marriages contracted by mistake cannot have benefited many. I think it reasonable to suppose that only the well-connected will normally have had the necessary access to a praetor or provincial governor. And it must often have been difficult for the petitioner to prove (*probare*) that he had been mistaken about his own or his partner's status.

It may be doubted, however, that the Minician law was always rigorously and evenly enforced. Though punitive, it appears to have established no method of exacting what it prescribed. The status of children born of marriages of mixed citizenship will probably not have become an issue unless they were betrayed to the authorities or laid claim to Roman status in a Roman court of law or before a Roman official. There were probably local differences in the degree to which the law was enforced, varying according to the extent to which Roman law was known and applied. And the children's disabilities in the Roman law of succession could be dodged.

A Roman could leave property to his non-Roman child in a trust (*fideicommissum*), i.e., by appointing someone his heir with the request that

[79]More was done for soldiers' children. At least from the time of Claudius to that of Septimius Severus, the children of serving soldiers took their mother's status, because soldiers were forbidden to marry (for the ban, B. Campbell, "The Marriage of Soldiers under the Empire," *JRS* 68 (1978) 153–166). So the children of soldiers and Roman women were illegitimate Roman citizens; the children of soldiers and foreign women were foreigners and, at least in Roman law, illegitimate. The illegitimate child of a Roman soldier and a Roman woman could be appointed heir or legatee (the inheritance rights of illegitimate children are expounded at great length in the Code of Justinian 5.27; summary in Crook [above, n. 37] 107). I know of no evidence for the rules governing the succession of Roman children to the estate of a non-Roman soldier. They are unlikely to have been disqualified. The same can be said of the non-Roman children of a non-Roman soldier. And Roman soldiers who made a military will were expressly allowed to appoint foreigners and Latins their heirs or legatees (Gaius *Inst.* 2.110). The introduction of the privilege cannot be dated. It may be coeval with the introduction of the military will. Ulpian says (*Dig.* 29.1.1.pr.) that it was Julius Caesar who first relaxed the rules governing soldiers' wills, but adds that the concession was short-lived (*concessio temporalis erat*). The privileges of the military will appear to have been reintroduced by Titus, reaffirmed by Domitian, perhaps expanded by Nerva, and entrenched in law by Hadrian: see A. Guarino, "Sull'origine del testamento dei militari nel diritto romano," *RendIst-Lomb* 72 (1939) 355–367, and V. Arangio-Ruiz, "L'origine del *testamentum militis* e la sua posizione nel diritto romano classico," *Bullettino dell'Istituto di diritto romano* 18 (1906) 157–196. In general, H. J. Wolff, "Zu den Bürgerrechtsverleihungen an Kinder von Auxiliaren und Legionaren," *Chiron* 4 (1974) 479–510, K. Kraft, "Zum Bürgerrecht der Soldatenkinder," *Historia* 10 (1961) 120–126, H. Nesselhauf, "Das Bürgerrecht der Soldatenkinder," *Historia* 8 (1959) 434–442.

the heir pass on all or part of the estate to the child.[80] Trusts were made actionable by Augustus. It was later decided, probably by Vespasian, that foreigners could not receive trusts from Roman citizens. But other dodges were at hand, including the secret or tacit trust.[81]

Per fideicommissum legibus inludimus ("we cheat the law by trusts"), so Jerome (*Ep.* 52.6). It is to be remarked, however, that legal dodges like trusts were of benefit mainly to those who stood to lose the most by the rigid application of the laws—the wealthy, their children and friends. The poor lived mostly outside the law.[82]

Department of Classics
Stanford University
Stanford, California 94305

[80]Johnston (above, n. 61) is comprehensive. See also Daube (above, n. 77) 96–102. For the right of foreigners and Latins to take trusts, see Gaius *Inst.* 2.285 and 2.275.

[81]For Augustus and Vespasian, see Johnston (above, n. 61) 21–31 and 36–39. The secret trust is described by Gaius, *Dig.* 34.9.10.pr. Details in Johnston 42–68.

[82]Cf. Daube (above, n. 77) 72, 81, and 82: "in the slums, there was no distinction between a citizen and a Greek or Jew."