

"MARRIAGE MORE SHAMEFUL THAN ADULTERY":  
SLAVE-MISTRESS RELATIONSHIPS, "MIXED MARRIAGES,"  
AND LATE ROMAN LAW

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A *CONTROVERSIA* of the elder Seneca posits the following rhetorical situation: a tyrant encouraged slaves to rape their mistresses and cohabit with them in marriage. One slave refused to violate his master's daughter. After the tyrant was overthrown her father, as a reward to the respectful slave, freed him and married him to the daughter whose honor he had saved. The girl's brothers then accuse their father of insanity for having made such a disgraceful marriage for their sister.

The *controversia*'s rhetoricians vie with each other in hurling abuse at the freedman for marrying his former mistress and invent fanciful description of the sordid nature of the union: "Marriage more shameful than any adultery (*matrimonium omni adulterio turpius*)!" exclaims one. Even those taking the father's side against his sons can only offer feeble justifications of a father's right to choose his daughter's husband; both sides agree that the slave's motives in saving his mistress were purely self-serving and in no way deserving of marriage with the child of a man who was not merely freeborn (*ingenuus*), but "born to respectable parents" (*honestis parentibus natus*).<sup>1</sup>

Roman society had never favored the idea of a free woman having a sexual relationship with a slave, and the insinuation that they consort with slaves or low-born males is a favorite slur of Roman satirists against supposedly

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The following abbreviations are used: *Cod. Iust.* = *Codex Iustinianus*. Edition used is that of P. Kruger, *Corpus Iuris Civilis*, vol. 2: *Codex Iustinianus* (Berlin 1877, repr. 1967). *Cod. Theod.* = *Codex Theodosianus*. Edition is that of Th. Mommsen and P. Meyer, *Theodosiani Libri XVI cum Constitutionibus Sirmondianis et Leges novellae ad Theodosianum pertinentes*, vol. 1-2 (1903, repr. Berlin 1962). *Dig.* = *Digest*. Edition is that of Th. Mommsen and P. Krueger, with translation edited by Alan Watson, *The Digest of Justinian* 1-4 (Philadelphia 1985). Gardner = J. Gardner, *Women in Roman Law and Society* (Bloomington 1986). Weaver = P. R. C. Weaver, *Familia Caesaris: A Social Study of the Emperor's Freedmen and Slaves* (Cambridge 1972). All translations are my own unless otherwise noted.

<sup>1</sup>Seneca *Controversiae* 7.6: *demens qui servo filiam iunxit*, in vol. 2 of M. Winterbottom's Loeb edition (Cambridge, Mass. 1974) 118-144; citations from 7.6.3 and 7.6.1 respectively.

respectable women.<sup>2</sup> To the elder Seneca and his upper-class audience, even legitimate marriage between a freedman and his former master's daughter was abhorrent, for it threatened the proper hierarchy of male over female and brought disgrace upon the woman and her family.

In the eyes of the educated male élite who made and interpreted the law, legitimate Roman marriage was a union between social equals, an alliance not only of two people but of their families, intended to produce children whose legitimacy and status were not in question and who could fittingly succeed to their parents' property and role in the social order.<sup>3</sup> And although classical Roman marriage ideology tended not to stress the ideal of wifely submissiveness found elsewhere in the Mediterranean, it did disapprove of unions in which the wife had significantly more wealth or higher rank than her husband, since the male was the acknowledged head of the household (*paterfamilias*) and his superior authority had to be unquestioned.<sup>4</sup>

This article will examine the evidence for monogamous unions between free women and slave men in imperial Roman society, with particular attention to the relationship of a woman with her own slave or former slave. This evidence is found mainly in the Roman legal sources, especially later imperial legislation in the Codes of Justinian and Theodosius. The Roman legal attitude toward unions between free women and slave men was always unfavorable, and in the late Empire imperial attempts to regulate or repress such relationships increase. In the fourth century Constantine enacted a number of laws against marriages between partners of different social status (including unions between men of high social standing and lowborn women as well as between free women and slaves), and his legislation remained largely in force until Justinian's overhaul of Roman law in the sixth century. In discussing this legislation and its social context, I hope to contribute to our understanding of the marital practices and *mores* of the imperial period and to the use of Roman legal sources for the social history of antiquity.

## I FREE-SLAVE UNIONS IN CLASSICAL ROMAN LAW

Roman law had never recognized monogamous sexual relationships between slaves, or between free people and slaves. Rather, such unions were

<sup>2</sup>E.g., Cicero *Pro Caelio* 23(57); Petronius *Satyricon* 75.11; Martial 6.39, 12.58; Juvenal 6.279, 331–332; cf. 63–135. See A. Richlin, "Approaches to the Sources on Adultery at Rome," in *Reflections of Women in Antiquity*, ed. H. Foley (New York 1981) 379–404, at 385, 395. Cf. Livy 1.58.4: the virtuous Lucretia submitted to rape rather than be thought to have been caught in adultery with a slave, and Tacitus *Annales* 14.60: Poppaea got one of Octavia's servants to accuse Octavia of adultery with a slave.

<sup>3</sup>Purposes of Roman marriage: S. Treggiari, *Roman Marriage: Iusti coniuges from the Time of Cicero to the Time of Ulpian* (Oxford 1991) 5–9.

<sup>4</sup>Cf. Treggiari (above, n. 3) 89; 238–241.

termed *contubernia* and had none of the legal consequences of *iustum matrimonium* (legitimate marriage).<sup>5</sup> Unions between free men and slave women, though without legal validity, were not penalized. A man who wanted to marry his slavewoman could free her and become both her husband and her patron, and Latin funerary inscriptions provide many examples of such patron-*liberta* marriages.<sup>6</sup> Indeed, although the *lex Aelia Sentia* of Augustus normally denied full legal validity to manumissions in which the slave was less than thirty years old or the owner younger than twenty, an exception was made in the case of a man who wished to free his slavewoman for the sake of marriage (*matrimonii causa*).<sup>7</sup>

The legal encouragement of marriage between free men and former slaves was not, however, extended to the highest ranks of Roman society: under the Augustan *lex Julia de maritandis ordinibus*, senators and their descendants to the third generation could not contract *iustum matrimonium* with freedpeople.<sup>8</sup> But although a man of senatorial status could not legally marry a freedwoman, he could live with her as his concubine; this sort of *concubinatus* was a perfectly respectable (though extra-legal) relationship.<sup>9</sup>

The Augustan rule against marriage between senatorial men and former slaves applied also to the female children and grandchildren of senators; and in the mid-second century Marcus Aurelius decreed that such unions were not only not *iusta matrimonia*, but had no legal validity whatsoever.<sup>10</sup> And Roman society did not condone *concubinatus* between a woman of senatorial rank and her former slave as it did between a senatorial man and his *liberta*,

<sup>5</sup>Gardner 213–218; B. Rawson, "Roman Concubinage and Other de facto Marriages," *TAPA* 104 (1974) 279–305; S. Treggiari, "Contubernales in *CIL* 6," *Phoenix* 35 (1981) 42–69; P. R. C. Weaver, "The Status of Children in Mixed Marriages," in B. Rawson (ed.), *The Family in Ancient Rome: New Perspectives* (Ithaca, N. Y. 1986) 145–169.

<sup>6</sup>*Dig.* 40.2.13, 40.2.20.2; cf. 23.2.28; 23.2.45 pr.; 40.2.19; *Cod. Iust.* 6.6.2(223); 5.5.1 (Alexander Severus); 5.4.15 (Tetrarchic). Inscriptions: e.g., *CIL* VI.1833A, 7368, 7515, 7673, 11440, 11770, 13596, 13670, 16413, 18208, 20222, 23223, 23897, 24049, 24177, 28670, 28964, 34853, 37373, 37893(= 28432); cf. Treggiari (above, n. 5) 48–49.

<sup>7</sup>Gaius *Institutes* 1.18–19; *Dig.* 40.2.13.

<sup>8</sup>*Dig.* 2.3.22.44; cf. also *Dig.* 23.2.32; 23.2.34.3; 23.2.42.1; 23.2.47; *Regulae Ulpiani* 13.

<sup>9</sup>Rawson (above, n. 5), esp. 288 ff.; S. Treggiari, "Concubinae," *PBSR* 49 (1981) 59–81; T. A. J. McGinn, "Concubinage and the *lex Iulia* on Adultery," *TAPA* 121 (1991) 335–375. However, it would have been considered unseemly for a man to live with his unfreed slave as concubine, nor should he have a wife and a concubine simultaneously.

<sup>10</sup>*Dig.* 23.2.16 pr; cf. 24.1.3.1; M.-T. Raepsaet-Charlier, "Clarissima femina," *RIDA* series 3, 28 (1981) 189–212, at 192–194; J. Gaudemet, "Le Mariage en droit romain: *justum matrimonium*," orig. publ. 1949, reprinted in *Sociétés et mariage* (Strasbourg 1980) 46–103, at 67–73. There is some dispute as to whether the Augustan ban on marriages between those of senatorial rank and former slaves (above, n. 8) originally also included senatorial women: A. Chastagnol ("Les Femmes dans l'ordre sénatorial: Titulature et rang social à Rome," *Revue Historique* 262 [1979] 3–28, at 10–12) thought that senatorial women were not included until Marcus Aurelius' law, but Raepsaet-Charlier believes the ban on *clarissimae*-freedmen unions goes back to Augustus.

not only because of the traditional double standard which allowed men greater sexual freedom than women, but also because of Roman disapproval of unions in which the wife had a higher social status than her husband.<sup>11</sup>

Roman legal and social attitudes were also stricter in regard to monogamous relationships between a free woman outside the senatorial order and a man of servile birth. A free woman who lived in *contubernium* with someone else's slave fell under the provisions of the *senatusconsultum Claudianum* of 52 A.D., and became the slave of her partner's owner if the owner had not agreed to the union, or his freedwoman if he had agreed. Children of the union might also be slaves even when the mother remained free, although normally children of unions not recognized by Roman law took their mother's status.<sup>12</sup>

The *s.c. Claudianum*, which had been framed by Claudius' freedman Pallas, originally appears to have been directed primarily toward the marital arrangements of the imperial household. Because of the high prestige and unusual opportunities for advancement available to members of the emperor's slave *familia*, *contubernium* with an imperial slave was an attractive option for some freeborn women (who might themselves be the daughters of imperial freedmen), despite the fact that this could not become a legitimate marriage until the slave was freed. The *s.c. Claudianum* thus ensured that imperial slaves would have children also of servile status who would remain in the imperial household.<sup>13</sup> Hadrian modified the law somewhat, so that if the mother remained free, she had free children, but it appears that such unions generally resulted in slave children, at least where slaves of the imperial household were concerned.

The *s.c. Claudianum* remained in force throughout antiquity until its final repeal by Justinian and was the subject of detailed discussion in the post-classical handbook known as the *Sententiae Pauli* and in a number of fourth- and fifth-century laws preserved in the Theodosian Code. But it was directed against women who cohabited with someone else's slave. There seems to have been no general law against the *contubernium* of a free woman with her own slave until the fourth century, although, given the very incomplete state of preservation of ancient legal sources, such a law may once have existed.

However, disapproval of unions between freeborn women and men who had formerly been their slaves can certainly be found in earlier imperial legislation. Manumission of a *male* slave by his mistress *matrimonii causa*

<sup>11</sup>Cf. Alan Watson, *Roman Slave Law* (Baltimore 1987) 14–15. Another reason is suggested by Gardner (33).

<sup>12</sup>Gaius *Institutes* i.84; *Sententiae Pauli* 2.21<sup>a</sup>; cf. Tacitus *Annales* 12.53; W. W. Buckland, *The Roman Law of Slavery* (Cambridge 1908) 412–418; Weaver 162–169.

<sup>13</sup>This is Weaver's hypothesis (162–166); cf. also J. Crook, "Gaius, *Institutes* 1.84–86," *Classical Review* 17 (1967) 7–8.

had never been considered seemly, and freeborn women did not enjoy the dispensation from the age requirements of the *lex Aelia Sentia* that had been allowed to men who wished to marry their freedwomen.<sup>14</sup> Indeed, legal experts of the early third century debated whether a woman should actually be *prohibited* from marrying her own freedman. According to the third-century jurist Marcian, "There are those who think that even women can manumit for the sake of marriage, but only if, by chance, her own fellow slave (*conservus*) had been left to her as a legacy for this purpose"—that is, if the woman had herself been a slave and her patron had bequeathed to her the man who had been her *contubernalis* in slavery. But if a woman had been her patron's wife, she should not later marry one of her fellow freedmen, according to Papinian, secretary a *libellis* under Septimius Severus.<sup>15</sup>

On the other hand, Ulpian, Papinian's immediate successor as secretary a *libellis*, wrote: "If a *patrona* is so lowborn (*ignobilis*) that even marriage with her own freedman is respectable for her, it ought not to be prohibited by the office of the judge investigating this."<sup>16</sup> Ulpian's tolerant attitude does not seem to have been shared by all of his contemporaries. The mention of a judicial investigation implies that the existence of such a marriage might be brought to the attention of the authorities, on the assumption that it was illegal and that the participants should be punished. Ulpian may have been thinking of this rescript sent by Septimius Severus in reply to the petition of a certain Valeria:

*libertum, qui patronam seu patroni filiam vel coniugem vel neptem vel proneptem uxorem ducere ausus est, apud competentem iudicem accusare poteris moribus temporum meorum congruentem sententiam daturum, quae huiusmodi coniunctiones odiosas esse merito duxerunt.*

You will be able to lay charges against a freedman who dared to marry his patroness, or the daughter, wife, granddaughter, or great-granddaughter of his patron, with the appropriate judge, who will give a sentence in accordance with the *mores* of my reign, which have rightly considered unions of this sort odious.<sup>17</sup>

It is not clear what Valeria's interest in the situation was, but as a woman she could only have initiated legal action in cases which directly concerned her or her immediate family.<sup>18</sup> Perhaps some female relative, oblivious to

<sup>14</sup>See Weaver 185.

<sup>15</sup>*Dig.* 40.2.14.1 (Marcian); 23.2.62.1 (Papinian). On the office a *libellis*, see T. Honoré, *Emperors and Lawyers* (London 1981) 56–59, who puts Papinian's tenure from 194 to early 202. On the rescript system, see F. Millar, *The Emperor in the Roman World: 31 B.C.–A.D. 337* (London 1977), esp. 94–97; 240–252 and 537–549.

<sup>16</sup>*Dig.* 23.2.13. Honoré (above, n. 15) 59–64, dates Ulpian's tenure to 202–209.

<sup>17</sup>*Cod. Iust.* 5.4.3, dated 196 and therefore written by Papinian while secretary a *libellis* (cf. above, n. 15). For another case under Septimius Severus of a woman charged with adultery with her slave, see *Dig.* 28.5.49.2 and Justinian's *Institutes* 2.14pr.

<sup>18</sup>For this rule, see *Dig.* 47.23.6; 48.2.1; 48.2.2; *Cod. Iust.* 9.1.5(222); 9.1.12 (293).

the social stigma attached to marriage with a legal inferior, had married her freedman or that of her father or deceased husband. Valeria had then written to the Emperor to learn whether such a union was really legal and, if not, whether the former slave could be punished for his audacity. Similarly, a woman called Hygia consulted the emperor Philip about a freedman who had arranged the marriage of his patron's daughter to his own illegitimate son, also of slave birth. The presumptuous freedman was the legal guardian of his deceased patron's child, and marriage of a *pupilla* to her *tutor* or his son was in any case illegal under Roman law. Philip assured Hygia that such a union was forbidden.<sup>19</sup> The girl in question must have been a relative of Hygia, perhaps her daughter. The *Sententiae Pauli*, dating from the late third or early fourth century, report that the penalty for marriage between a freedman and his patroness (or the wife or daughter of his patron) was condemnation to the mines or to *opus publicum*, state-imposed hard labor.<sup>20</sup>

## II UNIONS BETWEEN FREEBORN WOMEN AND FREEDMEN: EPIGRAPHICAL AND LITERARY EVIDENCE

The legal texts cited above imply that marriage between a woman and her freedman or the freedman of her husband or father did sometimes occur, and that some people found it objectionable. Valeria and Hygia were writing to the emperor about specific cases in which they were in some way involved. There is in fact inscriptional evidence for marriage between *patrona* and *libertus* in imperial Rome, though it is much less abundant than the evidence for unions between patron and freedwoman.<sup>21</sup> The commemoration of his patroness wife by the grateful freedman Tiberius Claudius Hermes provides an example:

Tiberius Claudius Hermes. I placed in the burial place of her relatives Claudia Ilias, the daughter of Tiberius, the best patroness [who was] at the same time my most faithful wife, with whom I lived for twenty-two years, one month [and] two days, without any envy (*aemulatio*) by the indulgence of her whose kindness,

<sup>19</sup> *Cod. Iust.* 5.6.4 (244–249). Marriage of *pupilla* and *tutor*: *Dig.* 23.1.15; 23.2.64; 23.2.66; 23.2.67; the penalty for the freedman *tutor* was relegation.

<sup>20</sup> *Sent. Pauli* 2.19.9; the penalty depended on the *dignitas personae*, but it is unclear whether this refers to the rank of the *patrona* or that of the freedman. For these penalties, see P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford 1970) 131–136.

<sup>21</sup> E.g., *CIL* VI.14014; 14462; 15106; 23915; 25214; 28815, and see below, n. 25. Weaver (185) finds only 15 cases of *patrona-libertus* marriage versus 143 cases of *patronus-liberta*. In 6.12129, the husband was probably the freedman of his wife's first husband. All of these inscriptions could pre-date Septimius Severus' rescript of 196 against the practice (above, n. 17), but that is not certain. I am grateful to Antti Arjava for his suggestions here.

faith, and opinion I obtained for myself for as long as I shall live. You, best [and] most holy mistress (*domina*), I would ask the gods that some one of my people make my departure such [as I made yours]. She lived forty-seven years, one month and two days.<sup>22</sup>

The identification of Claudia Ilias by her father's *nomen* indicates that she was freeborn, but her father was probably a freedman of one of the Julio-Claudian emperors. She was already twenty-five years old when she married Hermes; since that would be a rather late age for first marriage for a Roman woman, she may have been a widow or divorcée who had more freedom to choose her second mate than a teenage girl would have had.<sup>23</sup> Hermes was probably at least thirty years old when she freed him, since although a freedwoman could legally free her former *conservus* for marriage before he turned thirty, an *ingenua* could not.<sup>24</sup>

However, most *patrona-libertus* unions were cases where the woman, freed first, had been able to buy her *contubernalis* out of slavery or had been left him as a legacy by her former master.<sup>25</sup> Epigraphical evidence indicates that free women who married someone else's slave, and therefore were subject to the provisions of the *s.c. Claudianum*, were generally of slave birth themselves or were the children of former slaves.<sup>26</sup> The exception is women who married imperial slaves or freedmen, the majority of whom appear to have been *ingenuae* (although they would have undergone a diminution of status to *libertae* or *servae Caesaris* if their husbands were still slaves).<sup>27</sup> But in this case, the prestige and power that members of the *familia Caesaris* often possessed would have compensated for the husbands' servile status, and the women, though freeborn, are not likely to have been of equestrian or senatorial status.

<sup>22</sup> CIL VI.15106: Ti. Claudius Hermes Claudiam Ti. f. Iliadem posui in locum parentum suorum patronam optimam. Item coniugem fidelissimam cum qua vixi annis XXII. m.I.d.II. ulla aemulatione indulgentia eius cuius beneficio fide et opinione mihi adquisivi quam diu vixero. tu autem optima domina sanctissima, optarem deos ut tale exsitum meum aliqui meorum faciat. vixit annis XXXXVII m. I dieb. II.

<sup>23</sup>Cf. Treggiari (above, n. 3) 135–138.

<sup>24</sup>See above, n. 14. Of course, he could have been informally manumitted and therefore be a Junian Latin, on which see P. R. C. Weaver, "Children of Freedmen (and Freedwomen)" in B. Rawson (ed.), *Marriage, Divorce, and Children in Ancient Rome* (Oxford 1991) 166–190, esp. 181–185.

<sup>25</sup>So I would interpret CIL VI.15548; 16445; 21657; and 14355.

<sup>26</sup>Treggiari (above, n. 5), esp. 50–53; Weaver 186–193; cf. also B. Rawson, "Family Life among the Lower Classes at Rome in the First Two Centuries of the Empire," *CP* 61 (1966) 71–83, at 74–78; and M. B. Flory, "Where Women Precede Men: Factors Influencing the Order of Names in Roman Epitaphs," *CJ* 79 (1984) 216–224.

<sup>27</sup>Status of wives of imperial slaves and freedman: Weaver (112–136) concludes that about two-thirds were freeborn.

However, two Christian works of the early third century may refer to the possibility of relationships between slaves and women of higher rank. The *Refutation of all Heresies* (also known as the *Philosophumena*), now generally attributed to the Christian writer Hippolytus, describes an ecclesiastical decision made by Callistus, bishop of Rome from 217 to 222. Callistus, who was himself of servile birth, had declared that Christian women of high social status who did not wish to lose their rank but could not find suitable Christian husbands among men of their own class could "marry" those beneath them, either slaves or free men, provided that these unions were life-long and monogamous.<sup>28</sup>

Callistus' sanction of such unions had no effect on the Roman legal attitude toward slave-free relationships, nor indeed can it be considered "canon law" of the type later promulgated by church authorities.<sup>29</sup> It merely gave a Christian woman who wished to live with a low-born man the comfort of knowing that their relationship was considered a marriage in the eyes of the bishop of Rome. Callistus' decision was, however, strongly condemned by Hippolytus, who claimed that it had resulted in an increase in abortions by high-ranking women who did not wish to bear offspring to their low-born partners.

Since Hippolytus (our only source for this so-called "decree of Callistus") had himself been an unsuccessful candidate for bishop of Rome and hated Callistus, his testimony is open to suspicion. But Hippolytus' contemporary, the African Christian writer Tertullian (who considered Callistus overly lenient on other moral issues), also recommended that Christian women marry beneath themselves if they could not find partners of their own rank within the church. Tertullian's second treatise *Ad uxorem* was inspired by the occurrence of "mixed marriages" between socially conscious Christian women and non-Christian men, marriages allegedly caused by a scarcity of Christian men of wealth and high status. To discourage Christian women from what he considered dangerous and unholy unions, Tertullian pointed to the example of aristocratic and wealthy pagan women:

Many women, noble in birth and fortunate in wealth, join themselves indiscriminately to ignoble and humble men, who have been chosen for pleasure or castrated for lust. Some women bring themselves freely even to their own slaves, in contempt of everyone's opinion, as long as they have men from whom they fear no impediment to their freedom.

<sup>28</sup>Hippolytus *Philosophumena* 9.12.24–25. See J. Gaudemet, "La Décision de Callixte en matière de mariage," *Studi in onore di Ugo E. Paoli* (Florence 1956) 333–344, and J. Köhne, "Über die Mischehen in den ersten christlichen Zeiten," *Theologie und Glaube* 23 (1931) 333–350, at 339 ff.

<sup>29</sup>Gaudemet (above, n. 28) 338–339.



He concluded that Christian women should therefore certainly not be ashamed to marry poor men, especially since "to the poor belongs the kingdom of heaven."<sup>30</sup>

Tertullian's description of unions between upper-class pagan women and low-born men would seem to refer to promiscuous relationships of the sort attacked by Roman satirical writers. But the reference to the avoidance of any "impediment to their freedom" by women who cohabit with their own slaves or freedmen may refer to the *senatusconsultum Claudianum* (cited by Tertullian earlier in the same passage),<sup>31</sup> under which free women who lived with someone else's slave became the slave or freedwoman of their partner's owner. Such relationships were generally quasi-marital rather than simply cases of sexual exploitation of slaves by upper-class owners. The tendentious and often enigmatic character of Tertullian's writing makes interpretation of this passage difficult.

Hippolytus and Tertullian both seem to be talking primarily about women of senatorial status who would lose their rank if they married anyone outside the senatorial class, according to a rule by which married women took the status of their husband rather than of their father.<sup>32</sup> Marie-Thérèse Raepsaet-Charlier attributes this rule to Marcus Aurelius, and suggests that the appearance in the second century of new titles for the senatorial order (such as the term *clarissima femina* for a senatorial woman) was prompted by an increasing social mobility and a rise in the number of marriages between those of different social status in the second century, including unions between members of the senatorial aristocracy and freedpeople.<sup>33</sup> Inscriptions of the late second and third centuries do indicate that some women of senatorial status (including several Christian women) were marrying men of lower rank, that is, equestrians.<sup>34</sup> However, the only clearly

<sup>30</sup>Tertullian *Ad uxorem* 2.8.4 (in *Corpus Christianorum, Series Latina: Tertulliani opera* 1 [Turnhout 1954]): *Nonnullae se libere et servis suis conferunt, omnium hominum existimatione despecta, dummodo habeant a quibus nullum impedimentum libertatis suae timeant*. For *libere* (the reading of the oldest MS; the more recent MSS read *libertis*), see note in C. Munier's edition, Tertullian *À son épouse* (Paris 1980, Sources chrétiennes 273), 191. W. P. Le Saint (Tertullian, *Treatises on marriage and remarriage* [Westminster, Md. 1951, Ancient Christian Writers 13] 34) reads "freedmen."

<sup>31</sup>Tertullian *Ad uxorem* 2.8.1. See M.-T. Raepsaet-Charlier, "Tertullien et la législation des mariages inégaux," *RIDA* series 3, 29 (1982) 253–263.

<sup>32</sup>The rule is at *Dig.* 1.9.8 (Ulpian); cf. *Cod. Iust.* 12.1.1 (Alexander Severus). See Gaudemet (above, n. 28) 335–337; Köhne (above, n. 28) 337–339. But Raepsaet-Charlier ([above, n. 31] 258–260) does not think Tertullian refers specifically to *clarissimae*.

<sup>33</sup>Raepsaet-Charlier (above, n. 10) 210–211 and 198–199.

<sup>34</sup>See Chastagnol (above, n. 10) 13 and esp. 22–23; Raepsaet-Charlier (above, n. 10) 206–207; and W. Eck, "Das Eindringen des Christentums in den Senatorenstand bis zu Konstantin d. Gr.," *Chiron* 1 (1971) 381–406, at 389–391. Evidently the rule at *Dig.* 1.9.8 (see above, n. 32) had fallen into desuetude in the second half of the third century; even under Caracalla exceptions were made, especially for women of the imperial family.

attested example of a marriage between a woman of senatorial status and a freedman is found in the *Historia Augusta*, where Lucius Verus is said to have given the widow of a senator in marriage to one of his (Verus') freedmen. His colleague, Marcus Aurelius, objected to the union and refused to come to the wedding. Perhaps this incident (if true) prompted Marcus Aurelius' *oratio* denying all legal validity to such unions.<sup>35</sup>

A third-century Christian dedication to a certain Flavia Speranda, identified as "c.f." (the standard abbreviation for "*clarissima femina*"), has been thought to refer to a marriage between a woman of senatorial rank and a slave.<sup>36</sup> Flavia Speranda's husband Onesiforus apparently was not of senatorial rank, and does not identify himself by a *nomen* (the traditional indicator of free status) but only by a *cognomen*. However, this need not mean that he was a slave: the use of only one name on inscriptions becomes increasingly common in the later Empire, as does the omission of any mention of freed status by dedicants who were in fact former slaves.<sup>37</sup> The disappearance of traditional Roman indicators of status on late imperial inscriptions reflects a society in which free birth and possession of the Roman citizenship had less significance than in an earlier era, and suggests increasing confusion over legal status and its implications.

### III "MIXED MARRIAGES" AND STATUS CONFUSION IN THE THIRD CENTURY

In 212, the Edict of Caracalla extended the Roman citizenship to virtually all free inhabitants of the Empire. Before that time, imperial subjects who were not Roman citizens would have had no reason to know about or observe the Roman legal rule that marriage between a free person and a slave was a legal impossibility, and so many provincials may have been content to live in such a relationship without bothering to manumit their partner. Egyptian papyri provide several cases of unions between free women and slave men, although the status of such relationships under native Egyptian

<sup>35</sup> SHA, *Verus* 9.3; Chastagnol (above, n. 10) 11–12. M.-T. Raepsaet-Charlier, *Prosopographie des femmes de l'ordre sénatorial (I<sup>er</sup>–II<sup>e</sup> siècles)* (Louvain 1987) 6–7, says this is the only known example of such a marriage in the period she covers.

<sup>36</sup> ILCV 161: *d.m. Flaviae Sperandae coiugi sanctissime incomparabili matri omnium, quae bixit mecu annis n. XXVIII, m. VIII sene ulla bilae. Onesiforus c.f. coiux benemerenti fecit*. That Onesiforus was of servile status was suggested by Henri Leclercq in F. Cabrol et al. (eds.), *Dictionnaire d'archéologie chrétienne et de liturgie* (Paris 1907–53) 1.2, col. 2879 and 10.2, col. 1977.

<sup>37</sup> Brent Shaw, "Latin Funerary Epigraphy and Family Relations in the Later Empire," *Historia* 33 (1984) 457–497, at 470. Omission of indication of freed status is seen as early as Trajan's reign: cf. L. Ross Taylor, "Freedmen and Freeborn in the Epitaphs of Imperial Rome," *AJP* 82 (1961) 113–132, at 118 ff.; Weaver 83 ff.

law is unclear.<sup>38</sup> After 212, all these new citizens were subject to Roman laws, including the law of marriage, but they would not all know what the law was or how it differed from their native law and custom.<sup>39</sup>

Roman law tended to see status in terms of fixed either/or distinctions (slave or free, *humilior* or *honestior*), but in reality the lines were not so clearly drawn, and within the bounds of the Roman Empire there could be found a wide range of statuses often based in very ancient local custom. Even in Rome, imperial laws on slave-free unions (such as the *s.c. Claudianum*) "... reveal that the social gulf between slave and free citizen is not necessarily wide."<sup>40</sup> By the beginning of the fourth century, social and legal distinctions between free and non-free had become increasingly blurred, as some *humiliores* became subject to much the same treatment and living conditions as slaves. It was not possible to draw neat distinctions and assign a simple status designation to all inhabitants of the Empire, to sum up their rights and duties in a single word whose implications would be clear to all.<sup>41</sup> Many third-century imperial rescripts are responses to inquiries about status and legal rights, and suggest that confusion over status was a not uncommon problem.<sup>42</sup> These questions often concerned the validity of unions between partners of different status and the legitimacy of children born from them.

One often-cited example is the rescript sent in 215 by Caracalla to a certain Hostilia:<sup>43</sup>

*si ignorans statum Erotis ut liberum duxisti et dotem dedisti isque postea servus est iudicatus, dotem ex peculio recipies et si quid praeterea tibi debuisse eum apparuerit. filii autem tui, ut ex libera nati incerto tamen patre, spurii ingenui intelleguntur.*

<sup>38</sup>E.g., *PRyl* 103 (134 A.D.), and *PBrux* 19. See R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri, 332 B.C.-640 A.D.*<sup>2</sup> (Warsaw 1955) 72-73 and 91-92; and I. Biezunska-Malowist, *L'Esclavage dans l'Égypte gréco-romaine. 2<sup>e</sup> partie: Période romaine* (Warsaw 1977) 132-133. For the pre-Roman period, cf. the Gortyn law code (R. F. Willetts [ed.], *The Law Code of Gortyn* [Berlin 1967, *Kadmos* Supp. 1] Column VI, line 56 to Column VII, line 10 [Willetts 44-45]; and Herodotus 1.173.5 on the Lycians.

<sup>39</sup>This might particularly be the case with women. Cf. Millar (above, n. 15), 547-548; L. Huchthausen, "Zu kaiserlichen Reskripten an weibliche Adressaten aus der Zeit Diokletians," *Klio* 58 (1976) 55-85, at 59-60 and 74.

<sup>40</sup>Watson (above, n. 11) 11.

<sup>41</sup>Witness the problem of how to treat *coloni* who left their lands, as seen in *Cod. Theod.* 5.17.1 (332); cf. *Cod. Iust.* 11.52.1 (Theodosius I).

<sup>42</sup>Examples discussed in Huchthausen (above, n. 39) 60-62; Jane Gardner, "Proofs of Status in the Roman World," in *BICS* 33 (1986) 1-14; A. Watson, "The Rescripts of the Emperor Probus," *Tulane Law Review* 48 (1974) 1122-28.

<sup>43</sup>*Cod. Iust.* 5.18.3 (215). See Gardner (above, n. 42) 10-11.

If, in ignorance of Eros' status, you married him as a free man and gave him a dowry, and he afterwards was judged a slave, you will get your dowry back out of his *peculium* along with anything else it will appear that he owed you. Moreover, your children are understood to be illegitimate [but] freeborn, as they were born from a free woman but uncertain father.

Apparently Hostilia had married a runaway slave, who had later been reclaimed by his owner and judged a slave in a suit *de liberali causa*. Hostilia had given Eros a dowry and they had had children together, so this must have been a union of some duration. Presumably it had ended as soon as Eros' true status became known, since otherwise Hostilia could have become the slave or freedwoman of her husband's master under the *s.c. Claudianum*.

Caracalla found Hostilia's claim that she was unaware of her husband's status perfectly plausible, and third-century jurists also discussed the possibility of free people marrying slaves in ignorance as though this were a not infrequent occurrence.<sup>44</sup> It was even considered possible that the slave himself would be unaware of his true status.<sup>45</sup>

Septimius Severus decreed that the son of a free woman and a slave man could serve as a decurion, and a century later Diocletian and Maximian refer to the possibility of the slave father himself becoming a decurion, after having undergone a *restitutio natalibus suis*, although they state that the illegitimate son of a free woman by the ex-slave decurion could not consider himself a *decurionis filius*.<sup>46</sup> A rescript of Alexander Severus informs a certain Quirinus that if a free man cohabited with someone else's slavewoman against the wishes of the woman's *dominus*, he did *not* thereby become her master's slave; apparently Quirinus had thought the *s.c. Claudianum* could be applied to free men too. Seventy years later, the Tetrarchs had to inform another petitioner that the master of a slavewoman living in *contubernium* with a free man did not have the right of succession to the free partner's property.<sup>47</sup>

The *Sententiae Pauli* (from the late third or early fourth century) devote a long chapter to the *s.c. Claudianum*, detailing all the various ramifications of the law and possible situations where a free woman might marry a slave.<sup>48</sup> Some of the more interesting possibilities are:

- (2) If a freeborn (*ingenua*) woman joins herself to the slave of a ward, she becomes a slave by the warning of his guardian.

<sup>44</sup> *Dig.* 24.3.22.13 (Ulpian); *Sent. Pauli* 2.21<sup>a</sup>.14; cf. Gaius *Institutes* 1.85.

<sup>45</sup> Cf. *Cod. Iust.* 10.33.2 (Diocletian and Maximian).

<sup>46</sup> *Dig.* 50.2.9 (Septimius Severus); *Cod. Iust.* 6.55.6 (294): case of child of ex-slave decurion; because he was illegitimate, he could not legally be the son of his natural father.

<sup>47</sup> *Cod. Iust.* 7.16.3(225); 6.59.9(294); Buckland (above, n. 12) 414.

<sup>48</sup> *Sent. Pauli* 2.21<sup>a</sup>. Text in S. Riccobono *et al.* (eds.), *Fontes iuris romani antejustiniani*<sup>2</sup> (Florence 1940) 2.346–348.

- (9) A daughter in the power of her father (*filiafamilias*), if she should join herself to someone else's slave without her father's knowledge or against his wishes, retains her own status even after warning, since the rank of parents cannot become lower by their children's act. [If she persists in the unions after her father's death, then she becomes a slave: *ibid.* (18).]
- (10) If a *filiafamilias* should, at her father's command, enter into a *contubernium* with someone else's slave against his master's will, she does become a slave, since parents are able to make their children's rank worse.
- (12) A woman who mistakenly thought she was a slave and therefore entered into a *contubernium* with someone else's slave, if she should continue in the same relationship after learning that she is free, does become a slave.
- (13) If a patroness should join herself to her freedman's slave, it is not fitting that she become a slave even after the usual warning.
- (14) A freeborn woman, who knowingly has joined herself to a municipal slave, becomes a slave even without a warning, but not if she doesn't know [that he is a slave]. She appears not to have known, who, when she learned his status, withdrew from the relationship, or [who] thought that he was a freedman.
- (16) If a mother should join herself to her son's slave, the *s.c. Claudianum* does not remove the respectful reverence due a mother, even in a shameful situation, by the example of the woman, who has joined herself to her freedman's slave (as mentioned in 13 above).

A perhaps hypothetical case founded on the same premise as one of the situations in the *Sententiae Pauli* appears in the *Digest*: a father gave his daughter *in potestate* in marriage to someone else's slave, along with a "dowry." Presumably because this arrangement had the approval of the slave's master, no warning was given under the *s.c. Claudianum*, and when both the father and the slave-husband died, the woman, who was her father's heir, wished to recover her dowry. As this was not a real marriage, no dowry as such existed, but she was able to recover what her father had given to the slave by an action on his *peculium*.<sup>49</sup>

These third-century legal texts suggest that *contubernia* between a free partner (male or female) and a slave (often a slave belonging to someone else) were far from uncommon. Recent studies have challenged the traditional assumption that the end of Roman conquests abroad in the later Principate caused a drop in the number of slaves, and a subsequent "decline" in the institution of slavery.<sup>50</sup> Indeed, the legal sources of this period imply not a decline in slavery as such, but growing confusion about where

<sup>49</sup>*Dig.* 16.3.27. The names used, "Lucius Titius," his daughter "Seia," and the slave "Pamphilus," are clearly fictional, although the decision could have had its basis in an actual case. Cf. *Sent. Pauli* 2.21<sup>a</sup>.10; *Cod. Iust.* 5.18.3; Gardner 218.

<sup>50</sup>R. MacMullen, "Late Roman Slavery," *Historia* 36 (1987) 359–382, at 376–382; M. I. Finley, *Ancient Slavery and Modern Ideology* (New York 1980) 23–49; C. R. Whittaker, "Circe's Pigs: From Slavery to Serfdom in the Later Roman World," in M. I. Finley (ed.), *Classical Slavery* (London 1987) 88–122.

the boundaries between free and unfree lay and consequent failure to observe status boundaries. This noncompliance with the legal and social rules on mixed-status unions could be unwitting (as in the case of Hostilia) or deliberate, as in the following case described in a rescript of Diocletian and Maximian to a woman named Theodora.<sup>51</sup>

*cum servum matris tuae et stupro violasse dominam suam et turpis coniunctionis maculam excogitandae ingenuitatis collusione ac falsae captivitatis velamento apud competentem iudicem obtegere voluisse proponas nec libertatem ei matrem tuam dedisse, sed in solam ingenuitatem eum nudae voluntatis mendacio producere enisam adseveres, servum esse palam est, quando etiam divi Pii rescriptum super captivitate emissum, quam non intercessisse significas, ingenuum fecisse non videatur, nec adseveratio consensus tui ingenuitatis ius tribuere potuit.*

You declare that your mother's slave both defiled his own mistress by illicit sexual relations and wished to cover up the stain of this shameful union by colluding, before the appropriate judicial authority, in a claim of pretended free birth and the cover of a [claim of] false captivity, nor, you claim, did your mother actually free him, but she attempted to bring him into the condition of a freeborn person by a lie based purely on her own wish. It is thus clear that he is a slave, since he does not appear to have been made freeborn even under the terms of the rescript of the deified Antoninus Pius concerning a captivity, which you claim did not occur, nor did his claim of your consent have the power to confer the right of free birth.

Theodora claims that her mother, now deceased, had been living in a sexual relationship with her slave. According to Theodora, the couple had attempted to cover this up by pretending that he was originally freeborn, had been captured by barbarians and subsequently redeemed from captivity by Theodora's mother, and had then undergone the procedure for reclaiming his free birth. The slave had thus officially "regained" something he had never had in the first place. Indeed, Theodora alleges, he had never even been manumitted.<sup>52</sup> After her mother's death, Theodora wrote to the emperor, asking if the slave could be prosecuted. A *senatusconsultum* passed under Domitian had been directed against just this practice of owner and slave colluding in a false claim of *ingenuitas* for the slave; if such a case were proved, the slave then became the property of the person who had detected the collusion.<sup>53</sup>

<sup>51</sup> *Cod. Iust.* 7.20.1 (June 18, 290). I am grateful to Susan Treggiari for her help in translating this rather obscurely worded rescript. On the moralistic fervor of the secretary a *libellis* who composed this rescript, see Honoré (above, n. 15) 115–119.

<sup>52</sup> I follow the interpretation of Huchthausen (above, n. 39) 71; cf. also Buckland (above, n. 12) 674.

<sup>53</sup> *Dig.* 40.16.1; cf. *Cod. Iust.* 7.20.2 (294). Marcus Aurelius had put a *praescriptio* on claims of collusion of five years after pronouncement of *ingenuitas*. As a woman,

If Theodora's claim is true, her mother's slave had not only been cohabiting with his mistress, but was also committing a serious offense under Roman law by attempting to pass himself off as an *ingenuus*, a freeborn citizen. He may even have aspired to dignities prohibited to those of servile birth, such as the office of decurion.<sup>54</sup> Theodora's mother had never manumitted him because to have done so would have been to admit that he was not in fact freeborn. The couple had been able to continue in this fraudulent marriage until the woman's death; so apparently either no one in the household or the community had known the slave's real status, or had been willing to do anything about it.<sup>55</sup>

Not all slaveholders in antiquity were wealthy or of high social status. The large households of the Roman aristocracy that boasted hundreds of slaves were quite exceptional. Most slaveowners would have had only a few slaves, perhaps only a maid and a handyman, and had relatively humble households.<sup>56</sup> This may well have been the case with Theodora's mother.

It is not difficult to imagine a widow of limited means, perhaps herself a former slave or the child of ex-slaves, who would come to rely on her only male slave to the point where they essentially set up house together. She might not even see any reason to free him legally, especially since formal manumission had to be done in the presence of a Roman magistrate, which could be difficult to arrange, particularly for provincials who were not members of the local élite.<sup>57</sup> Children of unions not considered legal marriages took their status from their mother and therefore a free woman's children by her slave would be freeborn, though illegitimate. And after

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Theodora could not bring charges of collusion herself, but a third party could do so on her behalf (*Dig.* 40.16.2).

<sup>54</sup>Slave attempting to pass himself off as free: *Pliny Ep.* 10.29-30; cf. *Dig.* 49.16.11 (slaves enlisting in military). Slave or freedman illegally holding *honores*: *Cod. Iust.* 7.16.11 (293); 9.21.1 (300?); 7.16.41 (Constantine or Licinius); 9.41.9 (290); 7.16.38 (294); 10.33.1 and 2 (Diocletian and Maximian). The *Lex Visellia* prohibited a *libertinus* from holding positions reserved for *ingenui* (*Cod. Iust.* 9.21.1 [300?]). Cf. *Dig.* 23.2.58: *libertina* poses as *ingenua*, marries senator. See Gardner (above, n. 42) 11-12; M. Reinhold, "Usurpation of Status and Status Symbols in the Roman Empire," *Historia* 20 (1971) 275-302.

<sup>55</sup>The lover's fellow slaves would not have been able to bring charges against their own mistress: *Dig.* 48.4.10.7; some exceptions made, esp. in treason cases: *Dig.* 48.4.7.2; cf. 5.1.53. See Buckland (above, n. 12) 86 ff.; O. Robinson, "Slaves and the Criminal Law," *ZSav* 98 (1981) at 235-243.

<sup>56</sup>W. L. Westermann, *The Slave Systems of Greek and Roman Antiquity* (Philadelphia 1955) 87-89 and 134-136; MacMullen (above, n. 50) 359-382.

<sup>57</sup>See K. Bradley, *Slaves and Masters in the Roman Empire* (Brussels 1984, Collection Latomus 185, repr. New York 1987) 100-103, on opportunities for manumission. There were other legal restrictions on manumission: under the *Lex Junia* of the early Principate, a slave freed before age thirty or by an owner under twenty would become a Latin, not a Roman citizen: Bradley 93-95, Weaver (above, n. 24), esp. 180-187.

A.D. 178, even illegitimate children could inherit from their mother under intestate succession.<sup>58</sup> Thus free women who did not especially care about social distinctions but only about legal issues like inheritance rights might not consider "marriage" with their slave particularly degrading or even improper. Of course, if the couple could get away with it, they might (like Theodora's mother and her partner) pretend that he had never been a slave in the first place.

#### IV CONSTANTINE'S LEGISLATION ON "MIXED MARRIAGES"

Confusion over legal status and the blurring of boundaries between slave and free are not phenomena unique to the third-century Empire; examples can be found from the troubled period of the late Republic and even from the relative stability of the early Principate.<sup>59</sup> Most extant pre-Constantinian Roman legal sources date to the third century, and this may explain why status problems, a perennial source of concern to the Romans, seem to be particularly frequent at this time. But the potential for status confusion would certainly have increased in the political and social upheavals of the century preceding Constantine's reign, and help to explain the preoccupation with status questions, especially mixed-status unions, that we find in Constantine's legislation.

Most of this legislation is found in the *Codex Theodosianus*, a fifth-century compilation of excerpts from imperial edicts enacted between 311 and 437.<sup>60</sup> At least four measures on the *s.c. Claudianum* date from Constantine's reign. The first (*Cod. Theod.* 4.12.1) was dated 314 and addressed to a certain Probus.<sup>61</sup>

*Si quae mulieres liberae vel a servis vel a quolibet alio vim perpressae contra voluntatem suam servilis condicionis hominibus iunctae sint, competenti legum severitate vindictam consequantur. Si qua autem mulier suae sit immemor honestatis, libertatem amittat atque eius filii servi sint domini, cuius se contubernio coniunxit. Quae legem et de praeterito custodiri oportet. P(RO)P(OSITA) KAL. APRIL. VOLUSIANO ET ANNIANO CONSS.*

<sup>58</sup>Under the *s.c. Orphitianum*: *Dig.* 38.17.1.2, 38.17.2.1, 38.8.2; *Sent. Pauli* 4.10.1. See Gardner 198–200.

<sup>59</sup>Cf. the case of Petronia Iusta, on which see Gardner (above, n. 42) 1 and 12–13; Weaver (above, n. 24) 166–172. Cf. *Dig.* 22.3.29 (Antonine); Gaius *Institutes* 1.67–75; 85.

<sup>60</sup>On the compilation of the Theodosian Code, see T. Honoré, "The Making of the Theodosian Code," *ZSav* 103 (1986) 133–222.

<sup>61</sup>This has been attributed by some scholars to Licinius: see O. Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.* (Stuttgart 1919) 53; and R. Andreotti, "L'applicazione del 'Senatus Consultum Claudianum' nel basso impero," in E. C. Welskopf (ed.), *Neue Beiträge zur Geschichte der alten Welt* (Berlin 1965) 2.3–12.



If any free women, having suffered violence either at the hands of slaves or anyone else, have been joined against their will to men of servile status, they should obtain vengeance by the corresponding severity of the laws. (1) However, if any woman should be forgetful of her own reputation, she shall lose her liberty and her children shall be slaves of the master of the man to whom she has joined herself in *contubernium*. This law must also be observed for the past.

A second law was issued in 317 and required that women cohabiting with someone else's slave be warned of the legal consequences of their behavior three times in the presence of seven witnesses before they could be punished under the *s.c. Claudianum*. This apparently re-established the rule found in Gaius and in the *Sententiae Pauli* that a woman could only be enslaved under the *s.c. Claudianum* if she had been warned beforehand.<sup>62</sup>

Then in 320 a constitution addressed "to the people" mitigated considerably the effects of the *s.c. Claudianum* on *ingenuae* who cohabited with fiscal (i.e., imperial) slaves.<sup>63</sup> Such women would no longer become slaves, or even freedwomen, of the emperor, but could retain their freeborn status. However, the children that they had by their slave husbands were "to hold the middle lot as the children of slave men and the illegitimate offspring of free women"—that is, they were to have Latin status and their father's master was to have patronal rights over them. Cities, on the other hand, were to retain the same rights over the consorts and children of their slaves as before. According to the *Sententiae Pauli*, this meant that women cohabiting with municipal slaves could be enslaved without having to be warned beforehand.<sup>64</sup> However, the law added: *si vel error improvidus vel simplex ignorantia vel aetatis infirmiae lapsus in has contubernii plagas depulerit, haec nostris sanctionibus sit excepta* ("If improvident error or simple ignorance or mistake because of feeble age has thrown [a woman] into these snares of *contubernium*, she shall be exempted from these sanctions"). Like third-century jurists and emperors, Constantine envisaged the possibility that a free woman might be unaware of her partner's slave status. That young women were thought to be prone to this error implies that they were entering quasi-marital relationships without parental supervision; these would not have been girls of the upper-class élite, whose mar-

<sup>62</sup> *Cod. Theod.* 4.12.2, dated Jan. 28, 317 (text is missing; content known from fifth-century Visigothic interpretation). Gaius (*Institutes* 1.91; cf. 1.160) does not specify a triple warning, but *Sent. Pauli* 2.21<sup>a</sup>.17 does. It is not clear when the requirement for the triple warning first came into use.

<sup>63</sup> *Cod. Theod.* 4.12.3; cf. Weaver 165–166. Although the MSS date is 326, many scholars redate it to 320 and join it to the same edict as *Cod. Iust.* 6.37.21; 6.23.15; and 6.9.9; and *Cod. Theod.* 3.2.1; 11.7.3; and 8.16.1.

<sup>64</sup> *Sent. Pauli* 2.21<sup>a</sup>.14; see above, n. 48.

riage arrangements would have been subject to much scrutiny and parental negotiation.<sup>65</sup>

The law of 320 said nothing about free women who cohabited with the slaves of private owners, who would have continued to be subject to loss of status under the *s.c. Claudianum*, though they would have had the benefit of the three warnings mandated by *Cod. Theod.* 4.12.2. But in 331 Constantine rescinded the requirement that a triple warning be issued before a woman could be enslaved. This law was in turn repealed thirty-one years later by Constantine's nephew Julian, who re-established the need for three warnings.<sup>66</sup> These vacillations in the *s.c. Claudianum* can only have added to the confusion over legal status already apparent in the century before Constantine.

By the reign of Valentinian and Valens, the *s.c. Claudianum* was being applied to women married to men who were employed in industries considered vitally important to the Empire, in order to ensure that all the offspring of such men would also be liable for imperial service.<sup>67</sup> But despite the clearly utilitarian purpose of the *s.c. Claudianum*, late imperial legislation refers to it as a measure against female promiscuity and social degradation. The condemnation in Constantine's first law (*Cod. Theod.* 4.12.1) of a woman so "forgetful of her reputation" as to take a slave for a mate is echoed in a law of 365, which states that freeborn women who persist in unions with imperial weavers after being warned are to take on their husbands' status, since "they were unwilling to put the splendor of their birth before the vileness of *contubernia*." Another law of the same period refers to a woman who would live with a slave as *libidinosa*, one to whom lust meant more than liberty.<sup>68</sup>

Imperial repugnance toward marriage between free women and slaves emerges even more strongly in another edict of Constantine (*Cod. Theod.* 9.9.1), directed against unions between women and *their own* slaves.<sup>69</sup> Here Constantine's attitude was considerably harsher than in his legislation on the *s.c. Claudianum*. Issued on May 29, 326, and addressed (like *Cod. Theod.* 4.12.3) "to the people," this law is found in the ninth book of the

<sup>65</sup>Cf. Treggiari (above, n. 3) 125–127.

<sup>66</sup>*Cod. Theod.* 4.12.4 (331). Andreotti (above, n. 61) thought that 4.12.4 rescinded 4.12.3, but it is more likely that it only repealed 4.12.2 regarding slaves of private owners. Julian's law: *Cod. Theod.* 4.12.5 (362).

<sup>67</sup>E.g., *Cod. Theod.* 10.20.3 (365); *Consultatio Vet. Cuiusdam Iurisc.* 9.7 (365); *Cod. Theod.* 4.12.6 (366?); 10.20.10 (379); 4.12.7 (398); 12.1.179 (415; see below, n. 104). Justinian's repeal: see below, n. 112.

<sup>68</sup>*Cod. Theod.* 10.20.3 (365); 4.12.6 (366?); cf. *Cons. Vet. Cuiusdam Iurisc.* 9.7 (365).

<sup>69</sup>326 is the MSS date, followed by Mommsen. Seeck ([above, n. 61] 64) redated it to 329. The dating of Constantinian laws is very problematic, especially for years (like 320, 326, 329) when Constantine and one of his sons shared the consulship.

Theodosian Code, which was devoted primarily to criminal offenses and the procedures for dealing with criminal defendants:

*IMP. CONSTANTINUS A. AD POPULUM. Si qua cum servo occulte rem habere detegitur, capitali sententia subiugetur tradendo ignibus verberone, sitque omnibus facultas crimen publicum arguendi, sit officio copia nuntiandi, sit etiam servo licentia deferendi, cui probato crimine libertas dabitur, cum falsae accusationi poena immineat. (1) Ante legem nupta tali consortio segregatur, non solum domo, verum etiam provinciae communione privata, amati abscessum debeat relegati. (2) Filii etiam, quos ex hac coniunctione habuerit, exuti omnibus dignitatis insignibus in nuda maneant libertate, neque per se neque per interpositam personam quolibet titulo voluntatis accepturi aliquid ex facultatibus mulieris. (3) Successio autem mulieris ab intestato vel filiis, si erunt legitimi, vel proximis cognatisque deferatur vel ei, quem ratio iuris admittit, ita ut et quod ille, qui quondam amatus est, et quod ex eo suscepti filii quolibet casu in sua videntur habuisse substantia, dominio mulieris sociatum a memoratis successoribus vindicetur. (4) His ita omnibus observandis et si ante legem decessit mulier vel amatus, quoniam vel unus auctor vitii censurae occurrit. (5) Sin vero iam uterque decessit, suboli parcimus, ne defunctorum parentum vitiis praegravetur; sint filii, sint potiores fratribus, proximis atque cognatis, sint relictæ successionis heredes. (6) Post legem enim hoc committentis morte punimus. Qui vero ex lege disiuncti clam denuo convenerint congressus vetitos renovantes, hi servorum indicio vel speculanti officii vel etiam proximorum delatione convicto poenam similem sustinebunt. DAT. IIII KAL. IUN. SERDICAЕ CONSTANTINO A. VII ET CONSTANTIO CAES. CONSS.*

EMPEROR CONSTANTINE AUGUSTUS TO THE PEOPLE. If any woman is revealed to have dealings with [her] slave in secret, she shall undergo a capital penalty, and the worthless scoundrel shall be handed over to the flames. Let all have the opportunity to denounce the public crime, let all have the power to announce it to the authorities; let even a slave have the licence to bring information, to whom freedom will be given once the crime has been proven, although for a false accusation a penalty threatens. (1) A woman married before this law shall be separated from this union and deprived not only of her home, but even of the community of her province, she shall lament the absence of her exiled lover (or beloved). (2) The children also, whom she had from this union, stripped of all marks of rank, shall remain in bare freedom, nor will they receive anything from the woman's property, either through themselves or through an intermediary under any title of will. (3) But intestate succession to the woman's property shall be granted to her children, if they are legitimate, or to her next of kin and cognates or to that person whom the judgment of the law admits, in such a way that in addition anything which that man who was once her lover (beloved), and which the children conceived from him, appear by some chance to have held in their own possession, shall be claimed by the aforementioned successors, having been joined with the woman's property. (4) All these things should be observed in this way even if the woman or her lover (beloved) died before the law, since even one author

of this offense incurs judgment. (5) But if both parties have already died, we spare the offspring, so that they not be weighted down by the crimes of their deceased parents. They shall be [acknowledged as] children; they shall be preferred to [their mother's] brothers and sisters,<sup>70</sup> and to the next of kin and cognates; they shall be heirs to the remaining inheritance. (6) Those committing this crime after this law we punish with death. Moreover, those who, having been separated according to the law, have secretly come together again, renewing the forbidden union, will undergo a similar penalty [i.e., death], convicted on the evidence of slaves or of the office of the *speculator* or even the information of their next of kin. GIVEN ON THE FOURTH DAY BEFORE THE KALENDS OF JUNE AT SOFIA (SERDICA) IN THE YEAR OF THE SEVENTH CONSULSHIP OF CONSTANTINE AUGUSTUS AND THE CONSULSHIP OF CONSTANTIUS CAESAR.

It appears that both partners in relationships begun before the law's promulgation are to be separated and exiled. If such unions are discovered in the future, the offenders are to be executed—the slave by burning, the woman presumably by means of a less savage death, depending upon her rank.<sup>71</sup> Informers are encouraged (contrary to Constantine's usual attitude toward *delatores*), including the woman's relatives, who would of course benefit from her condemnation by succeeding to her estate. Constantine was so eager to bring to light these illegal unions that he even suspended the rule against a slave giving information against his owner (as he had done also in a law enacted against abduction earlier in the same year).<sup>72</sup>

The use of vocabulary not normally found in Roman legal texts (such as *occulte rem habere*, *verbero*, and *amatus*) and the severe penalties decreed for offenders have led many scholars to assume that *Cod. Theod.* 9.9.1 concerns respectably married women who have secret affairs with slaves, perhaps even having purchased the slaves for sexual purposes.<sup>73</sup> But it is more

<sup>70</sup>The text says simply *fratribus*, but it would be odd for illegitimate children to be preferred to their own, legitimate half-brothers born from a legal marriage. Here *fratres* must be the mother's siblings, who would be next in line to inherit after her children.

<sup>71</sup>I follow the interpretation of C. Dupont, *Le Droit criminel dans les constitutions de Constantin: Les Infractions* (Lille 1953) 14; others have thought the death penalty applied in all cases. Both Andreotti (above, n. 61) and Biondo Biondi, "Vicende post-classiche del SC. Claudiano," *Iura* 3 (1952) 142–154, thought that the woman was also to be burned. For the application of criminal penalties according to rank, see Garnsey (above, n. 20), esp. 103–152. Relegation for a slave is surprising (*ibid.* 119); condemnation to the mines or the arena would be more usual.

<sup>72</sup>*Cod. Theod.* 9.24.1, on which see J. Evans-Grubbs, "Abduction Marriage in Antiquity: A Law of Constantine (CTh IX.24.1) and Its Social Context," *JRS* 69 (1989) 59–83. For the usual rule on slaves informing against masters, see above, n. 55.

<sup>73</sup>This interpretation goes back to Jacob Godefroy's edition of 1665. Cf. Andreotti (above, n. 61); Biondi (above, n. 71) 144; Dupont (above, n. 71) 40–43; also M. Morabito, "Droit romain et réalités sociales de la sexualité servile," in J. Pounarede and J.-P.

likely that this law refers to a quasi-marital union like those between free women and slaves belonging to someone else (addressed by Constantine and earlier emperors in the s.c. *Claudianum*) or the less frequent but more shocking relationship between a woman and her own slave or former slave condemned by Diocletian and Septimius Severus.<sup>74</sup> Rather than put Constantine's law under the Theodosian Code's title on adultery (*Cod. Theod.* 9.7: *ad legem Iuliam de adulteriis*),<sup>75</sup> the fifth-century compilers of the Code placed it under its own, individualized heading (*Cod. Theod.* 9.9: *de mulieribus, quae se servis propriis iunxerunt*). Constantine's law is the only entry under this title, and there seems to have been no other legislation on this subject until 468, when the Western emperor Anthemius renewed and revised Constantine's law.<sup>76</sup>

The difficulties in interpreting *Cod. Theod.* 9.9.1 can be attributed to its unusual vocabulary and to the fact that what we have in the Theodosian Code is an abridged version. The word used to describe the slave partner, *verbero*, is familiar to readers of Roman comedy, but is not usually employed in legal writings. It is *hapax legomenon* in the Theodosian Code, though it does appear in another law of Constantine on fugitive slaves found only in the Code of Justinian.<sup>77</sup> *Rem habere cum* ("have dealings with") is also found in comedy, to describe the relationship between a man and a courtesan.<sup>78</sup> *Amatus* ("lover" or "beloved"), used three times in *Cod. Theod.* 9.9.1 and nowhere else in the Code, recalls Augustan love elegy, where the relationship of male poet and demanding *domina* is often depicted as *servitium*, and *servitium amoris* stresses the depth of the male lover's passion. For a free man to be reduced to a state of emotional servility by a woman (of any class) was considered degrading; thus the trope

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Royer (eds.), *Droit, histoire et sexualité* (Lille 1987) 3–20, at 7–8; W. Seyfarth, "Ehen zwischen freien Frauen und Sklaven," in J. Irmscher (ed.), *Byzantinische Beiträge* (Berlin 1964) 1.41–54, at 43–45; and Toru Yoge, "Die Gesetze im Codex Theodosianus über die eheliche Bindung von freien Frauen mit Sklaven," *Klio* 64 (1982) 145–150, at 148–149). Seyfarth and Yoge suggest that the woman bought her slave especially for sexual purposes.

<sup>74</sup>See above, nn. 17 and 51. It is possible that the original text of Constantine's law also mentioned marriage between *patrona* and freedman, as in Septimius Severus' rescript, but that this was deleted in the *Cod. Theod.* version.

<sup>75</sup>Which contained legislation not only on adultery, but also on such diverse matters as male homosexual prostitution (*Cod. Theod.* 9.7.3 [342] and 9.7.6 [390]) and marriage between Christians and Jews (9.7.5 [388]).

<sup>76</sup>For the law of 468 and other legislation on unions between free women and slaves, see Section v below.

<sup>77</sup>*Cod. Iust.* 6.1.6 (332): when there is a dispute as to whether a man is a fugitive slave, *ilico nequissimus verbero super quo ambigitur tormentis subiciatur*.

<sup>78</sup>Plautus *Bacch.* 564, *Merc.* 535; Terence *Eun.* 119, 137–138. See J. N. Adams, *The Latin Sexual Vocabulary* (Baltimore 1982) 203.

had considerable shock value.<sup>79</sup> The relationship portrayed in *Cod. Theod.* 9.9.1 is even more shocking: the lover really is a slave, and therefore the woman is also degraded.

Late Roman legislation often reveals a tension between the desire to display rhetorical grandiloquence and the necessity of communicating the Emperor's decision. Responsibility for the composition and distribution of imperial edicts in the late Empire belonged to the quaestor, a post created by Constantine himself.<sup>80</sup> Until the late fourth century, the quaestor and the bureaucrats who supplied him with background information were likely to be much more at home with classical literature and rhetoric than with classical Roman law.<sup>81</sup> A case in point is the Gallo-Roman rhetor and poet Ausonius, known to have been quaestor under Valentinian I and Gratian. Tony Honoré's comparison of the style of Western imperial constitutions in the 370s with Ausonius' literary work demonstrates clearly how the poet's striving after rhetorical effect completely obscured the sense of at least one of the laws he drafted, and resulted in the imposition of a disproportionately harsh penalty for a minor offense in another law.<sup>82</sup>

Constantine's law on the unions of women with their own slaves certainly reveals its composer's familiarity with earlier Latin literature, and the non-legal vocabulary suggests that it was drafted by someone who, like Ausonius, was unaccustomed to classical legal terminology.<sup>83</sup> Unfortunately, we cannot determine the identity of any Constantinian quaestors, and *Cod. Theod.* 9.9.1 cannot be associated with any known official or adviser.

Thus the true subject and intent of *Cod. Theod.* 9.9.1 has been obscured by its rhetorical flourish and the images it evokes of the licentious matrons so familiar to readers of Latin satire.<sup>84</sup> While *occulte rem habere* certainly implies that there is something clandestine about the relationship and *amatus* suggests a love affair rather than a marriage, this language is at odds with the use of the word *nupta* to describe the woman's relationship to the

<sup>79</sup>R. O. A. M. Lyne, "Servitium Amoris," *CQ* NS 29 (1979) 119–130; J. Hallett, "The Role of Women in Roman Elegy," *Arethusa* 6 (1973) 103–124, at 112–113.

<sup>80</sup>On the quaestor and the making of late Roman laws, see Honoré (above, n. 60), esp. 136–144; and J. Harries, "The Roman Imperial Quaestor from Constantine to Theodosius II," *JRS* 78 (1988) 148–172.

<sup>81</sup>See Honoré (above, n. 60) 171–176.

<sup>82</sup>See Honoré (above, n. 60) 147–150 and 203–210; *id.*, "Ausonius and Vulgar Law," *Iura* 35 (1984) 75–85. Another law composed by Ausonius (*Cod. Theod.* 9.6.2) calls for the burning of a slave, as in Constantine's law.

<sup>83</sup>Steven Oberhelman has remarked to me that the rhythms of the *clausulae* in *Cod. Theod.* 9.9.1 suggest that the law's composer may have been a native Greek speaker. This is certainly possible, though clearly he was familiar with Latin literature (cf. Ammianus Marcellinus and Claudian, other fourth century writers of Latin whose native language was Greek).

<sup>84</sup>For which see n. 2. For another example of rhetorical language obscuring the meaning of Constantine's legislation, cf. Evans-Grubbs (above, n. 72) 68–70 and 82–83.

slave. *Nupta* means "married woman" and is frequently used in Roman legal texts to denote a legitimately married woman. The situation in fact seems to be that described in the rescript sent to Theodora by Diocletian and Maximian thirty-six years earlier: a woman lives with her own unfreed slave as though they are free husband and wife.

Theodora's mother and her slave had attempted to conceal not their relationship, but the fact that he was a slave. If Constantine's law refers to the same sort of situation, then *occulte* would refer not to the fact that the relationship itself was being carried on in secret, but to an attempt to cover up the true legal status of the partner. In that case, the description of the woman as *nupta* and the reference to possible children of the illegal couple would make more sense. But the wording of *Cod. Theod.* 9.9.1 as we have it does not make this clear. The original edict of 326 would have included a prologue setting forth the emperor's reasons for enacting the law, but regrettably the fifth-century compilers of the Theodosian Code generally deleted the prologues of the laws they collected in order to conserve space. Therefore it is not now possible to ascertain the motives behind Constantine's promulgation of this edict.<sup>85</sup>

Like Diocletian, Constantine may have been acting on the report of an individual case of *domina*-slave marriage. This report could have reached him through a provincial governor or an imperial official like the praetorian prefect, or perhaps, like Septimius Severus, Philip and Diocletian, he received a petition from a private citizen who was in some way involved.<sup>86</sup> But although it may well have been inspired by a particular case, *Cod. Theod.* 9.9.1 is not a private rescript sent to an individual petitioner like Valeria or Theodora, but an edict addressed "to the people," applicable in all cases where a woman was cohabiting with her own slave, whatever the circumstances.

In its desire to discourage and penalize unions between men and women of widely disparate social status, Constantine's law against *domina*-slave marriage is very much in line with his policy elsewhere.<sup>87</sup> He also enacted legislation aimed at unions between free men and women of slave birth. A constitution of 318 was directed against decurions who, forsaking their legal and financial responsibilities, took refuge on the estate of a powerful landholder (to whom they would hand over their property) and lived in *contubernium* with one of the landholder's slaves. The decurion was to be

<sup>85</sup>Honoré (above, n. 60) 159–160.

<sup>86</sup>For emperors receiving private petitions, see nn. 17, 19, 43, 45, 47, and 51 above, and cf. the petition of Julia, n. 105 below. For the report (*suggestio*) of an imperial official instigating passage of legislation, see Honoré (above, n. 60) 136–138.

<sup>87</sup>I discuss Constantine's legislation on mixed-status unions at greater length in chapter six of my book, *Law and Family in Late Antiquity: The Emperor Constantine's Legislation on Marriage* (forthcoming).

deported, his property handed over to his town council, and the slave woman sent to the mines. This law does not ban sexual liaisons between decurions and slaves *per se*; it is the decurion's abnegation of his duties and the illegal transfer of curial property to the rural landowner that are at issue.<sup>88</sup>

A law of 331 was directed toward what was probably a not uncommon situation: a freeborn man who was living in *contubernium* with his own *ancilla* and attempting to pass off as free his children by her (who would by law be his slaves unless he had manumitted them). Such children were not to have the benefit of *favor libertatis* even if they had lived as if free for the prescribed period of time (sixteen years).<sup>89</sup> That freeborn men would bring up their children by slaves as if they were free, without even bothering to manumit them, is yet another indication that the legal line between free and slave status, so important to classical law (and to Constantine), mattered little to many ordinary subjects of the Empire.

The concern to preserve traditional social barriers is even clearer in legislation from late in Constantine's reign. Aimed at members of provincial and municipal aristocracies, this legislation extended the Augustan prohibition on marriage between senators and freedwomen to apply also to men of lesser *dignitas*.<sup>90</sup> Under this legislation, *clarissimi*, *perfectissimi*,<sup>91</sup> municipal *duoviri* and *quinquennales*, and holders of provincial priesthoods could not marry or consider as legitimate their children by slavewomen or their daughters, freedwomen or their daughters, actresses or their daughters, inn-keepers or their daughters, or "humble or low-born" (*vel humili vel abiecta*) women, or the daughters of pimps or gladiators, or women who "presided over [the selling] of common wares" (*quae mercimoniis publicis praefuit*).

Slavewomen would have been unable to make a legal marriage with anyone under classical Roman law, and actresses and the daughters of actors, gladiators, or pimps were already ineligible for *iustum matrimonium* with all freeborn men according to the Augustan legislation.<sup>92</sup> Thus it is only freedwomen and their daughters, as well as inn-keepers and sellers of "common

<sup>88</sup> *Cod. Theod.* 12.1.6 (Seeck's dating, MS 319), cf. Morabito (above, n. 73) 10. See below, n. 104, for the same situation 140 years later.

<sup>89</sup> *Cod. Theod.* 4.8.7 (331); cf. Buckland (above, n. 12) 649.

<sup>90</sup> *Cod. Theod.* 4.6.3 (336); also probably the mostly missing 4.6.2 (336); and the completely lost 4.6.1 (all under the title "concerning natural children and their mothers"). *Cod. Theod.* 4.6.3 concerns only attempts by fathers to benefit children by these women; that they may not marry the women is understood, and so must have been already stated in *Cod. Theod.* 4.6.1 and/or 2.

<sup>91</sup> *Perfectissimi* at this time included not only men of equestrian rank, but also the highest level of *curiales*. On the officials affected by this law, see A. H. M. Jones, *The Later Roman Empire, 284-602* (Oxford 1964, repr. 1986) 525-530, 725, 763-765.

<sup>92</sup> *Reg. Ulpiani* 13.1-2. For Augustan legislation on marriages of senators, see above, n. 8.



wares" (who were likely to be freedwomen or the children of freedpeople)<sup>93</sup> who were for the first time under Constantine's law unable to marry local and provincial officials, all of whom would have been freeborn.

But in addition to the prohibition on legal marriage between these women and men of rank, severe sanctions were threatened against those men who still attempted to benefit financially such women or their children, either during their lifetime or in a will. This strongly discouraged what would have been the suitable alternative to marriage for such couples, *concubinatus*.<sup>94</sup> On the other hand, another law of Constantine encouraged men to marry their *freeborn* concubines by retroactively granting legitimate status to any children they had previously had by such concubines, as long as the relationship was monogamous and there were no legitimate children from a previous marriage.<sup>95</sup>

Constantine's legislation has been hailed as an attempt to eradicate concubinage and to uphold a noble, "Christian" ideal of marriage.<sup>96</sup> This is manifestly not the case. Rather, he wished to eradicate mixed-status unions and to uphold the privileged position of *ingenuitas*, the right of free birth. Indeed, a distinct dichotomy between the freeborn, privileged classes and those of slave or low birth is found in many of his laws, not just those on "mixed marriages."<sup>97</sup> When it was a matter of unions between two slaves, rather than slave and free, Constantine's attitude was quite different, as can be seen from his law which forbade the separation of slave families on emphyteutic properties being leased to new proprietors.<sup>98</sup>

Ironically, Constantine himself had to a certain extent encouraged mobility earlier in his reign, when he had expanded the number of government positions open to both *clarissimi* and *perfectissimi*, and had also made lavish grants of these ranks to those who had not previously been endowed with *dignitas*. Some of the men who held quite important offices in Constantine's

<sup>93</sup>On the probable status of inn-keepers and saleswomen, see S. Treggiari, "Urban Labour in Rome: *mercenarii* and *tabernarii*," in P. D. Garnsey (ed.), *Non-Slave Labour in the Greco-Roman World* (Cambridge 1980, PCPS Supp. 6) 48–64.

<sup>94</sup>In 320 Constantine had repealed the inheritance penalties levied on those who did not marry in accordance with the Augustan laws (*Cod. Theod.* 8.16.1, 320), thus removing one of the main incentives for marriage rather than *concubinatus* (with a person one could not legally marry). *Cod. Theod.* 4.6.3 thus replaced the defunct Augustan penalties with new, harsher penalties. On Roman *concubinatus*, see above, n. 9.

<sup>95</sup>This law is no longer extant, but was revived by the Eastern emperor Zeno in 477 (*Cod. Iust.* 5.27.5) and also mentioned in Novel 4 of the Emperor Marcian (454); it may be identified with *Cod. Theod.* 4.6.1 or 2.

<sup>96</sup>E.g., by C. Dupont, *Les Constitutions de Constantin et le droit privé au début du IV<sup>e</sup> siècle: Les Personnes* (Lille 1937) 122–126.

<sup>97</sup>E.g., *Cod. Theod.* 9.21.1 (319); 11.39.3 (334); 4.38.1 (date missing); *Cod. Iust.* 12.1.2 (date missing). For precedents, see Garnsey (above, n. 20).

<sup>98</sup>*Cod. Theod.* 2.25.1, addressed to the *rationalis* of the three provinces (Sicily, Sardinia, and Corsica). The date is uncertain.

government, particularly in the East, were from very humble homes and at least one was married to a woman who would have been ineligible under the new legislation.<sup>99</sup> Evidently Constantine had not foreseen the results of his promotional policies, and the legislation of 336 was an attempt to reassert the honor and prestige of rank.

## V LEGISLATION AFTER CONSTANTINE

Subsequent legislation on "mixed marriages" by Constantine's successors indicates that quasi-marital unions between partners of different legal status continued to occur and that imperial lawmakers continued to try to regulate them. Several dozen fourth- and fifth-century constitutions deal with such mixed-status unions. Those on the *s.c. Claudianum* have already been mentioned. Valentinian and Valens softened Constantine's restrictions on the inheritance rights of children whose mothers were of humble origin or degraded profession, by allowing such children to inherit up to one-twelfth or their father's estate if he also had legitimate children or grandchildren, and up to one-fourth if there were no legitimate heirs.<sup>100</sup> Over the next century, the imperial attitude toward the illegitimate children of quasi-marital unions continued to fluctuate, and somewhat different policies evolved in the two halves of the Empire, with the East displaying a generally more lenient attitude toward such unions and their offspring.<sup>101</sup> In 442, in response to the needs of the ever-dwindling town councils, the Eastern emperor Theodosius II decreed that if a man had no legitimate children, he could in fact make an illegitimate son his heir—if he enrolled the child in his local *curia*. Soon afterwards, this was extended to apply also to illegitimate daughters—if they married decurions.<sup>102</sup> This Eastern law had a precedent in a Western law of 415 that children of women of decurion stock and slave men were not to become slaves of their father's owner, but to serve in their mother's *curia*.<sup>103</sup>

As we have it, the Western law of 415 does not mention the fate of the slave fathers. But in 458 the Western emperor Majorian decreed that a decurion's daughter who had been united with someone else's slave or *colonus* was to be returned to her *curia* and to succeed to her parents,

<sup>99</sup>Optatus, consul 334, who (according to Libanius *Or.* 42.26) married a tavern-keeper's daughter. See T. D. Barnes, *The New Empire of Diocletian and Constantine* (Cambridge, Mass. 1982) 107.

<sup>100</sup>*Cod. Theod.* 4.6.4 (371).

<sup>101</sup>*Cod. Theod.* 4.6.5 (397, West); 4.6.6 (405, East); 4.6.7 (426/7, West); 4.6.8 (428, East). Cf. also Novel 4 of Marcian (454, East).

<sup>102</sup>Novel 22 of Theodosius II (442).

<sup>103</sup>*Cod. Theod.* 12.1.178–179 (415, West), which invokes the *s.c. Claudianum*. Cf. Novel 31.6 of Valentinian III (451, West) on *ingenuae* who mate with others' slaves or *coloni*.

"since the *ordo* must be repaired through her offspring also." Her low-born mate, if a *colonus*, was to be bound to one of the town's *collegia*; if a slave, "he will perish by means of servile penalties."<sup>104</sup>

The penalty decreed for the slave reveals that the ancient Roman prejudice against marriages between freeborn women and slaves or former slaves still survived in late Roman imperial law. And in 468 the Western emperor Anthemius received a petition from an otherwise unknown woman named Julia. Unlike the laws of the Theodosian Code, which were abridged by the Code's compilers, the law of Anthemius enacted in response to Julia's case is preserved in full among the post-Theodosian *novellae*:<sup>105</sup>

*Julia quaedam preces nostris fundit altaribus adstruens cum eo sibi matrimonium contigisse, qui familiae quidem suae servus extiterit, sed libertatem morum claritate meruerit, exoratque nostri numinis maiestatem, ne sibi noceat, quod venerabilis sanctio Constantini dominam servorum suorum complexibus inflammari districtissimo rigore non patitur . . .*

A certain Julia pours out her prayers at our altars, adding that marriage has befallen her with one who was indeed a slave of her own household but who had deserved freedom by the splendor of his character, and she implores the majesty of our divinity that she may not be harmed by the fact that the sanction of the venerable Constantine with the strictest rigor does not allow a mistress to be inflamed by the embraces of her own slaves. . . .

Julia added that she thought Constantine's law should not apply to her, since it forbade unions between women and their own slaves but said nothing about women marrying their former slaves whom they had freed.<sup>106</sup> But she was clearly worried that her marriage might still be considered in violation of the law. We are not told what prompted her to seek the emperor's clemency; perhaps a malicious informer, with designs on her property, was threatening to inform the authorities—or had already done so.

In response to Julia's plea, Anthemius graciously allowed her marriage to stand, along with all other freedman-*patrona* unions contracted before the date of his law, and he granted legitimate status to any children already born from these marriages. But he went on to declare that henceforth all unions between women and their former slaves were illegal, and "shall not obtain even the name of marriage" (*ne nomen quidem matrimonii sortiat*). Those who entered such unions faced confiscation of all their property and perpetual deportation. Furthermore, children born from such illicit

<sup>104</sup>Novel 7.5 of Majorian (458). The same law also made provisions for the children of decurions who had fled to the country and mated with the slaves or *colonae* of rural landowners (cf. *Cod. Theod.* 12.1.6 of Constantine [above, n. 88]).

<sup>105</sup>Novel 1 of Anthemius (Feb. 21, 468), opening paragraph. Text in *Cod. Theod.* 2.203–205.

<sup>106</sup>Evidently the rescript of Septimius Severus (above, n. 17) had long been forgotten.

couplings in the future became slaves of the imperial *fiscus*. This is certainly harsher than the treatment of the children of mistress-slave couples mandated by Constantine a hundred and fifty years earlier. And whereas under Constantine's law the condemned woman's property fell to her heirs upon intestacy, Anthemius appropriated it to the imperial treasury, along with the couple's children.

Anthemius intended his law to apply both to women of high rank and to those who were merely freeborn. It has been inferred that Julia herself was of senatorial birth, but this is nowhere stated in the law. She was presumably at least an *ingenua*.<sup>107</sup> And although he does not say so explicitly, Anthemius also implies that freedwomen would still be permitted to marry the men who had once been their partners in slavery.<sup>108</sup>

One wonders how many other women in the late Empire had married their own freedmen, or even their unfreed slaves, in ignorance of Constantine's law. Unfortunately, we have very little information about how often or how thoroughly late Roman laws were applied, and there is no other reference to *Cod. Theod.* 9.9.1 in extant fourth- or fifth-century sources. It may well have been forgotten in the century after Constantine's death, until the publication of the Theodosian Code in 438 brought it to light.

#### CONCLUSION

The imperial response to quasi-marital unions between free women and their own slaves or former slaves illustrates clearly the emperors' desire to maintain "the proper articulation of a social hierarchy based on rank and gender."<sup>109</sup> Thus Roman society and classical Roman law acknowledged and essentially condoned unions of men with women of lower status (by permitting, except in the case of those of senatorial status, marriage between freeborn men and freedwomen, and by recognizing *concubinatus* between high-ranking men and their legal inferiors as an accepted alternative to marriage), but disapproved of and sometimes penalized the union of a woman with her legal inferior. This was the case not only when free women wished to cohabit with someone else's slave (which had been subject to legal sanctions since the reign of Claudius) but, from at least the late second century, when a freeborn woman desired marriage with her own freedman.

There may have been an increase (or perceived increase) in such unequal unions in the second century, to which the emperors were responding. The legal texts attest that in the third century some freeborn women were entering monogamous unions with slaves or former slaves, and this

<sup>107</sup> *PLRE* 2.635 infers that Julia was "of noble birth and probably of senatorial family."

<sup>108</sup> As had been allowed by classical jurists also; see above, n. 15.

<sup>109</sup> Quote is from McGinn (above, n. 9) 338.

is implied also by the (admittedly sparse) literary and inscriptional evidence. Imperial rescripts to or about such women do not tell us in what part of the Empire these women lived or what their social class was (apart from the fact that they were free). It is unlikely that they were of senatorial status, but also unlikely that they were from the very humblest stratum of society. Some women involved in unions with slaves or ex-slaves had relatives who were concerned about the social and economic implications of these unequal unions, even if the women themselves were not.<sup>110</sup>

The expansion of the Roman citizenship after 212 and the breakdown of imperial authority in the mid-third century would have intensified the tension (always present) between the hierarchical ideology espoused by the emperors and the behavior of many of their subjects, especially those outside of the élite, who were either unaware of or indifferent to traditional status boundaries. Certainly third-century imperial rescripts evince much confusion about legal status and imply that many Roman subjects did not know (or care?) where the lines were drawn.

In the fourth century, Constantine reacted against this blurring of social boundaries, and tried to re-establish traditional status distinctions and the social roles which belonged to each status. But later laws on unions between men of rank and lowborn women tended to mitigate Constantine's sanctions, at least in part because they had been ineffective. By the fifth century, barriers between slave and free and slaveborn and *ingenuus* had broken down to the point where emperors like Theodosius II were willing to recognize the offspring of slave-free unions (at least when the interests of the *curiae* were at stake).

But the mid-fifth century law of Anthemius, which not only revived but even intensified Constantine's penalties against mistress-slave unions, reveals that late imperial law still could not accept the marriage of a woman and the man who had once been her slave. And even in the sixth century, Justinian, who abolished virtually all earlier legislation penalizing unions of free men with their own slaves or freedwomen or with other women of low birth or occupation, included an abbreviated version of Constantine's law against the union of a woman and her own slave (*Cod. Theod.* 9.9.1) in his *Codex Justinianus*.<sup>111</sup> And although Justinian did repeal the *s.c. Claudianum* (by now almost 500 years old), he by no means condoned unions between free women and slaves belonging to someone else. On the contrary, he encouraged slaveowners to break up the "marriages" and punish their

<sup>110</sup>E.g., Valeria (above, n. 17), Hygia (above, n. 19), Theodora (above, n. 51).

<sup>111</sup>*Cod. Iust.* 9.11.1. Paragraphs 1, 5, and 6 of *Cod. Theod.* 9.9.1 are omitted in Justinian's version. And cf. also *Cod. Iust.* 6.57.5 (529): the illegitimate children of *illustres* women who also have legitimate children may not inherit at all, since *castitatis observatio* is especially incumbent on *ingenuae* and *illustres*. (On the other hand, the illegitimate children of free [*liberae*, presumably not freeborn] concubines may inherit.)

slaves, reasoning that permitting such unions to exist would bring about a gradual decline in the number of slaves (since children born of these unions would be *ingenui*). But the women themselves Justinian exempted from any penalties, out of concern for their free birth and, not incidentally, for their families.<sup>112</sup>

*ne . . . sit pessimum dedecus cognationis suae fulgori, ut, quae forsitan decoratos dignitatibus habeat cognatos, haec in alienum cadat dominium et dominum peritescat forsitan cognatis suis inferiorem.*

lest . . . there be the worst disgrace to the splendor of her kindred, so that she who might perhaps have relatives decorated with honors falls into slavery to someone else and perhaps fears a master inferior to her own relations.

Like Anthemius, Justinian implies that even high-born women were entering upon socially and legally inappropriate unions with men of servile status. (Elsewhere, he refers to a woman who fell under the *s.c. Claudianum* as "*servili amore bacchata*," evoking images of lovelorn females recklessly pursuing slaves.)<sup>113</sup> Again, we cannot tell whether this includes women of senatorial status, or how many such women were thought to be involved. But it does suggest that traditional élite prejudices against women and their inferiors, though still strongly felt in the imperial consistory, had little meaning to the women themselves. Julia's husband may not have been the only slave whose "splendidness of character" meant more to his wife than his servile origins.

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<sup>112</sup> *Cod. Iust.* 7.24.1 (531–534), for the Eastern Empire only. See Westermann (above, n. 56) 148.

<sup>113</sup> Justinian *Institutes* 3.12.