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Germanic Law and the Practice of Slaveholding in the Post-Roman West

1 Introduction: A Germanic Law of Slavery?

The rate of publication on late antique and early medieval slavery in western Europe has grown exponentially in recent decades. Major contributors have included Pierre Bonnassie, who argues that a system close to Classical chattel slavery survived in the west down to the year 1000;¹ Michael McCormick, who posits a decline in the economic importance of slavery in late antiquity followed by a rebirth in the ninth and tenth centuries driven by the export of enslaved humans from the west to the eastern Mediterranean;² Chris Wickham, who conceives of a trend toward the dissolution of large-scale agricultural enterprises of the sort characteristic of Classical Rome in favour of more pixelated productive units populated not by enslaved but by peasant labourers;³ Kyle Harper, who holds that a characteristically Roman ‘slave society’ prevailed through the long fourth century but collapsed with the decline of the western empire in the fifth;⁴ Didier Bondue, who holds that a gradual transformation took place under the influence of Christianity by which the chattel ‘servi’ of Roman times came instead to operate as dependent labourers by the ninth century;⁵ and Alice Rio, who contends that conceptions of legal personhood gradually shifted from Roman models that emphasized a stark free / slave divide to more flexible schemes that allowed people to think of their own free status as a divisible and negotiable commod-

1 Pierre Bonnassie, *From Slavery to Feudalism in South-Western Europe, Past and Present Publications* (Cambridge: Cambridge University Press; Editions de la Maison des sciences de l’homme, 1991); Wendy Davies, “On Servile Status in the Early Middle Ages,” in *Serfdom and Slavery: Studies in Legal Bondage*, ed. Michael L Bush (London: Longman, 1996): 225–46, offers a useful summary of the arguments up to the 1990s. Heike Grieser, *Sklaverei im spätantiken und frühmittelalterlichen Gallien (5.–7. Jh.): Das Zeugnis der christlichen Quellen*, Forschungen zur antiken Sklaverei 28 (Stuttgart: Franz Steiner, 1997), remains useful, although it does not enter into larger interpretive debates.

2 Michael McCormick, *Origins of the European Economy: Communications and Commerce A.D. 300–900* (Cambridge: Cambridge University Press, 2001).

3 Chris Wickham, *Framing the Early Middle Ages: Europe and the Mediterranean 400–800* (Oxford: Oxford University Press, 2005).

4 Kyle Harper, *Slavery in the Late Roman World, AD 275–425: An Economic, Social, and Institutional Study* (Cambridge: Cambridge University Press, 2011).

5 Didier Bondue, *De servus à esclavus: la fin de l’esclavage antique (371–918)* (Paris: Presses de l’université Paris-Sorbonne, 2011), building on the work of Duby.

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ity, leading to a softer kind of servitude than had prevailed in the high Roman period.⁶ Each of these approaches has value in helping us understand this complex and multi-faceted question. All are nonetheless united in their common assumption that Rome and its slaveholding practices should be taken as the normative reference point not just by which to judge the history that follows, but also from which all subsequent developments derived.

This study will challenge this preconception by arguing that at least some of the major trends in the evolution of slaveholding in the late antique and early medieval west were not simply continuations or transformations of Roman norms and practices but that they represent instead new social and legal forms introduced to the region by the Germanic peoples who gained hegemony over Rome's former western territories from the early fifth century onward.⁷

The concept 'Germanic' requires some explanation. As recently as forty years ago, it might not have occasioned discomfort, but beginning in the 1980s a wave of scholars has drawn into question the validity of the terms 'German' and 'Germanic' as ethnic categories in late antiquity and the early Middle Ages. A growing number of academics in Great Britain and North America, and increasingly in Germany and France as well, now hold that the ethnonym '*germanus*' was rarely used as an overarching qualifier in antiquity, and always only by Roman authors; therefore that it has been wrongly misappropriated by modern historians (already beginning in the sixteenth century, and culminating in the twentieth) in order to promote ethno-nationalist

6 Alice Rio, *Slavery after Rome, 500–1100*, Oxford Studies in Medieval European History (Oxford: Oxford University Press, 2017). See also Alice Rio, "Freedom and Unfreedom in Early Medieval Francia: The Evidence of the Legal Formulae," *Past & Present* 193 (2006): 7–40; Alice Rio, "High and Low: Ties of Dependence in the Frankish Kingdoms," *Transactions of the Royal Historical Society* 18 (2008): 43–68; Alice Rio, "Self-Sale and Voluntary Entry into Unfreedom, 300–1100," *Journal of Social History* 45 (2012): 661–85; Alice Rio, "'Half-Free' Categories in the Early Middle Ages: Fine Status Distinctions Before Professional Lawyers," in *Legalism: Rules and Categories*, ed. Paul Dresch and Judith Scheele (Oxford: Oxford University Press, 2015): 129–52; Alice Rio, "Penal Enslavement in the Early Middle Ages," in *Global Convict Labour*, ed. Christian G. De Vito and Alexander C. Lichtenstein, *Studies in Global Social History* 19 (Leiden: Brill, 2015): 79–107.

7 Further work on non-Roman ways of slaveholding in late antiquity at Noel Lenski, "Captivity, Slavery, and Cultural Exchange between Rome and the Germans from the First to the Seventh Century CE," in *Invisible Citizens: Captives and Their Consequences* (Salt Lake City: University of Utah Press, 2008): 80–109; Noel Lenski, "Schiavi Armati e Formazione Di Eserciti Privati Nel Mondo Tardoantico," in *Ordine e Sovversione Nel Mondo Greco e Romano: Atti Del Convegno Internazionale, Cividale Del Friuli, 25–27 Settembre 2008*, ed. G. Urso (Pisa: ETS, 2009): 145–75; Noel Lenski, "Captivity and Slavery among the Saracens in Late Antiquity (ca. 250–630 CE)," *AnTard* 19 (2011): 237–66; Noel Lenski, "Captivity among the Barbarians and Its Impact on the Fate of the Roman Empire," in *The Cambridge Companion to the Age of Attila*, ed. Michael Maas (New York: Cambridge University Press, 2014): 230–46; Noel Lenski, "The Late Roman Colonate: A New Status between Slave and Free," in *The Oxford Handbook of Greek and Roman Slavery*, ed. Stephen Hodkinson and Kostas Vlassopoulos (Oxford: Oxford University Press, 2022).

agendas of the sort that eventuated in the horrors of National Socialism.⁸ Although scholars continued to use the designation ‘Germanic’ without much controversy in the generation following World War II, the past thirty years have witnessed a full scale retreat from ‘Germanic’ as a category of analysis for any period before early modernity.

I believe this new orthodoxy is misguided. This is not because I refuse to accept the important objections raised against the excesses of Germanism / *Germanische Altertumskunde* in past scholarship, let alone because I sympathize in any way with the agenda of National Socialism. I am simply not convinced that we must or should jettison the idea that the cultures arising from the territories roughly collocated east of the Rhine and north of the Danube in the Roman and post-Roman period shared a cultural koine that might allow us to speak of them as a cohesive whole. While these peoples divided themselves into diverse political units that only began to emerge as distinct nations beginning in the third century, there is sufficient evidence to argue that they shared common elements of language, religion, family organization, social structure, and civic and legal principles that might trace back even further, and that they therefore merit classification as a broader cultural group that might justifiably be termed an *ethnos*.

The primary set of sources upon which this study is built are the post-Roman law codes – formerly widely designated ‘Germanic’ but in most recent scholarship generally referred to by the contentless designation *Leges*. These include the early sixth-century Frankish *Pactus Legis Salicae* (507 CE) and the Burgundian *Liber Constitucionum* (517), as well as the seventh-century *Lex Ribuaria* (also Frankish, 633/634), the Lombardic *Edictum Rothari* (643), the *Leges Visigothorum* (654, also called *Liber Iudiciorum*), the *Lex Baiuvariorum* (c. 630, reissued 745), and some of the early Anglo-Saxon codes (beginning with the *Ines cyninges asetnysse*, c. 690). Despite the fact that all of these except the Anglo-Saxon codes were written in Latin, they reflect collectively a legal anthropology that is largely foreign to that of the Roman – with the ex-

⁸ See, for example, Patrick Amory, *People and Identity in Ostrogothic Italy, 489–554*, Cambridge Studies in Medieval Life and Thought: Fourth Series 33 (Cambridge, U.K. – New York: Cambridge University Press, 1997); Walter A. Goffart, *Barbarian Tides: The Migration Age and the Later Roman Empire*, The Middle Ages Series (Philadelphia: University of Pennsylvania Press, 2006); Guy Halsall, *Barbarian Migrations and the Roman West, 376–568*, Cambridge Medieval Textbooks (Cambridge: Cambridge University Press, 2007); Ian N. Wood, *The Modern Origins of the Early Middle Ages* (Oxford: Oxford University Press, 2014); Sebastian Brather et al., eds., *Germanische Altertumskunde im Wandel: Archäologische, philologische und geschichtswissenschaftliche Beiträge aus 150 Jahren*, Ergänzungsbände zum Reallexikon der germanischen Altertumskunde 100,1 (Berlin: De Gruyter, 2021); Matthias Friedrich and James M. Harland, eds., *Interrogating the “Germanic”: A Category and Its Use in Late Antiquity and the Early Middle Ages*, Ergänzungsbände zum Reallexikon der germanischen Altertumskunde 123 (Berlin: De Gruyter, 2021). See further references at Noel Lenski, “Law and Language in the Roman and Germanic Traditions – A Study of Liber Iudiciorum 6.4.3 and the Idea of Iniuria in Visigothic Law,” *Atti Dell’Accademia Romanistica Costantiniana* 25 (2023): 357 n. 2.

ception of the Visigothic *Liber Iudiciorum*, which, as we shall see, intermingles Roman and Germanic principles. Thus, where Roman law is built of three primary parts – persons, things and actions, with the law of things being far and away the most important – Germanic laws have only stunted positive law concerning actions and things, but a highly developed law of persons. Status was thus much more important in Germanic than in Roman law and was broken into more highly differentiated gradations, membership in which dictated an individual's value at law – his or her *Wergeld*. Crucially, *Wergeld* is a notion entirely foreign to Roman law, yet it lies at the root of the entire law of persons in the Germanic codes, and this also has implications for the Germanic law of things. This is because, to a degree unheard of in Roman law, the Germanic codes are obsessed with the problem of 'delict' (tortious personal offenses), which it divides into minutely detailed categories and which much of its content governs. This stands in marked contrast with classical Roman law, which explicitly enumerated only four forms of delict (Gaius, inst. 3.182–225; Inst. Iust. 4.1–4) and which laid a heavier emphasis on regulating personal disputes through the notion of 'crime' (personal offenses against state order). As we shall see, these differences between Germanic and Roman law had implications that impacted directly on the law of slavery.

The study is divided into three parts: the first focuses on the enslavement of free males for engaging in sexual relations with enslaved females, a practice that is never attested in Classical or late Roman law but appears to have been common in the Germanic codes; the second will treat the question of murdering one's slaves, which came to be sanctioned in the Roman legal tradition but went largely unchecked in the Germanic codes; third, the enslavement of individuals as a judicial tool for the settlement of civil torts, for while Roman law never allowed a civil plaintiff to enslave a defendant for personal wrongs, Germanic law had regular recourse to personal enslavement for the settlement of debts rooted both in credit and in delict. These distinctive practices are shared across the Germanic codes and should, I will argue, be taken as indicators of a shared legal anthropology. They did not, in other words, develop from Roman norms and precedents but expressly in divergence from them.

2 Enslavement of Free Males for Sexual Relations with Enslaved Females

Roman law had long granted masters the right to enslave females who cohabited with their male slaves. This option was created in 52 CE with the passage of the *Senatus Consultum Claudianum*, which allowed the owner of any male slave who had become aware of a sexual relationship between that slave and a free female to warn the

woman to desist and, if she refused after three warnings, to enslave her.⁹ The precise impetus for the passage of this senatorial decree is a matter of dispute, but its logic was grounded in the principle upheld by the Roman slave system that the status of a child was dictated by the status of its birth mother: enslaved mothers bore slave children, free mothers free.¹⁰ Because Roman enslavers sought to control the reproductive output of those enslaved to them so as to maximize profit, this law closed a loophole that would have permitted children born of the sexual unions of their male slaves with free women by forcing those women into slavery (and thus also their children) if they did not end the relationship. There was no need, however, for a reciprocal law to enslave free males, for any relationship these had with an enslaved female would result in enslaved children who would accrue to the assets of the mother's slaveowner regardless.

Thus, Roman law assumed that a free male's choice to cohabit with another's female slave had no consequence for that male's free status. Indeed, a law of Constantine from 318 states this explicitly:

Even if it seems undignified for those who are not endowed with any rank to descend to the level of debased marriages with enslaved women, it is nonetheless in no way prohibited at law; but a marriage (*conubium*) is unable to be formed with servile persons, so from a union (*contubernium*) of this sort, the children are born enslaved.¹¹

The law's primary concern was not, however, so much the – unproblematic – question of sexual unions between free men and enslaved females but rather the problems that would ensue if a higher status male, a person with enough property to be obliged to perform curial service in his home town, formed such a union as a way to obtain patronage from a wealthier property holder and thus to avoid his curial duties. In this instance, Constantine ruled, the female slave was to be condemned to the mines and the male decurion to be deported to an island after confiscation of his property. Constantine was thus expressly unconcerned with free male / enslaved female unions, except when they entailed extreme status mixing of a sort that compromised the resources of civic *curiae* – in which case he still protected the freeborn status of the

⁹ Tac. ann. 12.53; Gai. 1.84, 91, 160; Inst. Iust. 3.12.1; Paul. sent. 2.21^A.1; Cod. Theod. 4.12.1–7 (Lex Romana Visigothorum Cod. Theod. 4.11.1–6). W.W. Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge: The University press, 1908): 412–14; Elisabeth Herrmann-Otto, *Ex Ancilla Natus: Untersuchungen zu den "hausgeborenen" Sklaven und Sklavinnen im Westen des Römischen Kaiserreiches*, Forschungen zur antiken Sklaverei 24 (Stuttgart: Franz Steiner, 1994): 115–21, 169–230; Harper, *Slavery in the Late Roman World* (n. 4).

¹⁰ Buckland, *The Roman Law of Slavery* (n. 9): 21–24.

¹¹ Cod. Theod. 12.1.6 (dated to July 1, 318 by O. Seeck): *Nulla praeditos dignitate ad sordida descendere conubia servularum etsi videtur indignum, minime tamen legibus prohibetur; sed neque conubium cum personis potest esse servilibus et ex huiusmodi contubernio servi nascuntur*. The same principle had already been affirmed at Cod. Iust. 7.16.3 (a. 335, a rescript of Alexander Severus) and is implied at Cod. Iust. 7.16.29 (a. 294, a rescript of Diocletian).

male even while punishing him severely using a state managed sanctioning mechanism, relegation. Constantine's law had a long shelf-life, for it was subsumed into the *Codex Justinianus* and thus republished in 534,¹² making late Roman law on the matter clear and consistent. Because the sexual unions of free males and enslaved females could not be legally recognized as marriage, they were not a concern to the law, except when such unions might serve to undermine the maintenance of curial property, in which case they were sanctioned criminally.

Under Germanic law, the children of female slaves were also automatically born into slavery – a principle that is upheld in our sources even if direct affirmations are scanty.¹³ And masters may even have been 'double covered' insofar as the Germanic codes seem fairly early to have upheld the standard that the children of mixed unions would follow the status of the lower-status parent.¹⁴ This makes it especially surpris-

¹² Cod. Iust. 5.5.3; cf. Novell. Iust. 12.1 (535). And see the related Novell. Major. 7.1–3.

¹³ See, e.g. Edict. Roth. 156; Formulae Senonicae 42; Greg. Tur. Franc. 4.3. Note that Lombardic law, which showed heavy Christian influence concerning matters of marriage and sexuality, punished slaveowners who attempted to usurp the wives of their own slaves by automatically freeing the slaves (Leg. Lang. Liutpr. 140.II), and it required slaveowners who wished to marry their female slaves to free them first (Edict. Roth. 222; Leg. Lang. Liutpr. 106).

¹⁴ The principle is first securely attested at Burg. Rom. 37.5 (a. 517): *qui ex his nati fuerint, deteriorem lineam secuti dominis adquiruntur*. It may already be present in the Visigothic *interpretatio* at Lex Romana Visigothorum Cod. Theod. 4.8.3 (a. 506): *Si quis in libertate positus ancillam sibi copulaverit in coniugium, si filii ex ipsis nati fuerint, origo matrem sequatur; simili modo, si liberta servum duxerit maritum, agnatio servum sequatur, quia ad inferiorem personam vadit origo*. However, Theodor Mommsen et al., eds., *Theodosiani libri XVI cum Constitutionibus Sirmondianis*, vol. 3 (Berlin: Weidmann, 1904): 185, believed the clauses here cited from the Lex Romana Visigothorum *intrepretatio* represented a later gloss and omitted them from his edition of the Codex Theodosianus. The principle is again attested in the seventh century, e.g. Lex Rib. 61.11: *generatio eorum semper ad inferiora declinentur*; Lex Visig. 4.5.7 [Wamba]: *dum his, qui de tam infami coniugio nascitur, inferioris parentis adsequens sexum una cum rebus suis omnibus ecclesiastice servituti addicitur*; cf. Lex Visig. 3.2.3; 9.1.16. Earlier, many scholars spoke of a principle of 'the worse hand' (*die ärgere Hand*), a term found in later medieval and early modern sources; these took the automatic assignment of the status of the lower parent to be distinctly a Germanic legal custom, Richard Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, vol. 3 (Leipzig: Veit & comp, 1898): 458. But because the principle closely resembles that applied to Roman *coloni* already in the fifth century (esp. Novell. Valent. 31.6 and *interp.*; cf. Novell. const. post Iust. Coll. 1 no. 13 at C.E. Zachariä von Lingenthal, *Ius Graecoromanum, pars III: Novellae constitutiones Imperatorum post Justinianum quae supersunt collatae et ordine chronologico digestae* [Leipzig: T.O. Weigel, 1857]: 24), it is difficult to determine the degree to which it grew out of Roman or Germanic traditions – or the fusion of the two. Based on an exhaustive reading of the sources but above all on analysis of Gaius Inst. 1.85–86 and Novell. Valent. 31.6, W.E. Voss, "Der Grundsatz der 'ärgeren Hand' bei Sklaven, Kolonen und Hörigen," in *Römisches Recht in der europäischen Tradition: Symposium aus Anlass des 75. Geburtstages von Franz Wieacker*, ed. O. Behrends, M. Diesselhorst and W.E. Voss (Ebelsbach: Verlag Rolf Gremer, 1985): 117–84, argues that the principle of 'die ärgere Hand' developed entirely out of Roman law, but the argument builds on *a priori* assumptions (that slaves and *coloni* are to be equated, that barbarian law lacked its own solutions to 'Mischehen') which vitiate the argument and thus leave the question open.

ing that Germanic legal culture refused to abide Roman law's tolerance for a free male's sexual unions with someone else's female slave. In laws on the matter, which generally base their motivation for enslavement on the need to punish sexual misbehaviour, both free females and free males were to be enslaved for sexual relations with an enslaved person of the opposite sex:

- Sal. Merov. 13.8–9: Concerning the abduction of free men or women. 8. But if a free girl follows anyone from these (royal slaves) willingly, she shall lose her liberty. 9. If a free male takes on another person's slave woman (*ancilla aliena*), he should suffer the same.¹⁵ (Or, in some manuscripts: If a free male takes in marriage another person's slave woman (called *honema* in the Malberg gloss), he should remain with her in slavery (*in servitio*).¹⁶
- Sal. Merov. 25.3–4: Concerning the adulterous relationships (*adulteria*) of slave girls and slaves. 3. The freeman who openly joins himself with another man's slave girl shall remain with her in servitude. 4. And likewise the free woman who takes someone else's slave in marriage shall remain in servitude.¹⁷
- Lex Ribuar. 61.9: But if an ecclesiastical freedman marries a royal or ecclesiastical enslaved woman or the enslaved woman of an ecclesiastical freedman, he must remain a slave (*servus*) with her. But if he only fornicated with her (*moechatus fuerit*), he shall be judged liable for eight and a half solidi or should swear with six (oath helpers). But if an ecclesiastical freedwoman (*tabularia*) does this, she and her offspring shall fall into slavery (*in servitio inclinetur*).¹⁸
- Lex Visig. 3.2.3 [Recc.] (Antiqua): If a freeborn woman partners herself in matrimony with the slave of another person or of the king, or if she presumes to conjoin with him in adultery, the moment that a judge comes to know of this, he should not delay in hastening to separate them in order that they receive the penalty they merit, which is one hundred lashes of the whip for each of them. And if

15 MGH LL nat. Germ. 4.1.61–62: *De rapto ingenuorum uel mulierum*. 8. *Si uero ingenua puella [ali] quemcumque de illis sua uoluntate secuta fuerit, ingenuitatem suam perdat*. 9. *<Ingenuus si ancilla aliena prisserit, similiter paciatur>*. On these Frankish laws, see H. Nehlsen, *Sklavenrecht zwischen Antike und Mittelalter: Germanisches und römisches Recht in den germanischen Rechtsaufzeichnungen*, Göttinger Studien zur Rechtsgeschichte 7 (Göttingen: Musters Schmidt, 1972): 271–72.

16 MGH LL nat. Germ. 4.1.62: 9. *Si [quis] ingenuus ancillam alienam in coniugium praeserit, mallobergo honema, cum ea ipse in seruitio permaneat*. The same principle is confirmed at Sal. Merov. (VII Capitulare) 3.14, a ninth-century text, see K.A. Eckhardt, *Pactus Legis Salicae II.2 Kapitularien und 70 Titel-Text* (Göttingen: Musters Schmidt, 1956): 452.

17 MGH LL nat. Germ. 4.1.93–94: *De adulteriis ancillarum <uel seruorum>*. 3. *Si quis <uero> ingenuus cum ancilla aliena publice se iunxerit, ipse cum ea in seruitio permaneat*. < 4. *Similiter et ingenua, si seruo alieno in coniugio acceperit, in serui(tio) permaneat*. >

18 MGH LL nat. Germ. 3.2.111–12: *Si autem tabularius ancillam regiam aut ecclesiasticam seu ancillam tabularii in matrimonium sibi sociaverit, ipse cum ea servus permaneat. Si autem cum ea tantum moechatus fuerit, octavo dimidio solido culpabilis iudicetur, aut cum sex iuret. Quod si tabularia hoc fecerit, ipsa et generatio eius in servitio inclinetur*. Cf. Lex Rib. 61.14–16.

after this intervention they conjoin themselves again, the judge should order them to be apprehended and produced in his presence in order that he not refrain from imposing one hundred blows of the whip on each one of them again. But if they refuse to separate themselves a third time, we order them likewise to be afflicted with one hundred lashes of the whip and the woman to be given into the power of her own relatives. But if afterward the relatives release her again, she should become a slave woman to the lord of her slave man. Nevertheless, any children who happen to be born from this iniquity, whenever that may be and however many they may be, should follow the condition of their father so that they remain in servitude; and her relatives should acquire the fortune of the woman by legal succession. But we order this law to be observed also concerning freeborn men who have coupled with slave girls of the king or of anyone, so that the form of this principle is observed.¹⁹

Thus, the Salian and Ripuarian Franks as well as the Visigoths not only required the enslavement of free females for cohabiting with an enslaver's male slave (as did the Romans), but they also required the enslavement of free males for cohabiting with another person's female slave (which the Romans did not).

Even so, the last of these citations differs from the first four insofar as the Visigothic code clearly alludes to the principle of requiring three warnings for free females that was a hallmark of the Roman *Senatus Consultum Claudianum*. There can be no denying, then, that Roman law influenced Visigothic law on the question of mixed slave / free unions. Yet Lex Visig. 3.2.3 is clearly anything but a simple repetition of Roman law, for it has a number of features that align much more closely with Germanic principles: the (initial) consignment of the free female transgressor into the custody of her family rather than enslavement to her partner's master; the enslavement of her children even if they were born to her while she was free; and, of course, the application of the same principle not just to free females but also to free males. This hybridization of Roman and Germanic legal principles should come as no sur-

19 MGH LL nat. Germ. 1.134–35: *Si mulier ingenua servo alieno, sive regis, se matrimonio sociaverit sive etiam per adulterium iungere presumerit, statim, ubi primum hoc iudex agnoverit, eos ad separandum festinare non differat, ut penam, quam merentur, hoc est, singuli eorum centena flagella suscipiant. Et si post hanc contradictionem se iterum coniuncxerint, eos iudex comprehendere iubeat et in sua presentia exhiberi, ut unicuique eorum iteratim centena flagella inponere non desistat. Quod si tertia vice se separare noluerint, similiter centena flagella eis inponi iubemus, et ipsa mulier parentibus suis in potestate tradatur. Quod si postmodum eam parentes retrorsum dimiserint, sit ancilla domino eius servi. Filii tamen, et quandocumque et quanticumque, qui ex ea iniquitate fuerint procreati, conditione patris sequantur, ut in servitio permaneant; facultate vero mulieris propinqui sui legali successione conquirant. Ipsam autem legem precipimus custodire et de viris ingenuis, qui regias ancillas vel etiam cuiuscumque habuerint copulatas, ut condicionis hec forma servetur. Lex Visig. 3.2.4 applies the same principle to *libertae* and *liberti* – if either joins an enslaved person in a permanent union, they are to be enslaved.*

prise. Indeed, the Visigothic Code regularly integrates Roman and Germanic law for the reason that it represents a seventh-century 'territorial' amalgamation of two 'personal' codes that had formerly prevailed in the Visigothic kingdom – the *Lex Romana Visigothorum* (also known as the *Breviarium Alarici*), a compendium of Roman laws issued under Alaric II in 506, and the *Codex Revisus*, Leovigild's Gothic code issued in the 580s, which was based on the first known Germanic code, the *Codex Euricianus*, issued c. 476.²⁰ The designation 'Antiqua' at the head of *Lex Visig.* 3.2.3 indicates that this law derived from Leovigild's *Codex Revisus*, probably more or less in its current form. But we also know that the *Codex Revisus* itself regularly melded Roman with Gothic principles in the manner we find in this law, making the hybrid nature of this provision typical.²¹

The readiness of Germanic law to enslave freeborn males for their sexual unions with enslaved females would appear to arise less from an effort to maximize profit from slave reproductivity (the prime concern in Roman law) and more from an elevated concern with the regulation of sexuality between status groups and with the social necessity to punish wrongs done to the authority of the householder through the sexual defilement of those under his charge.²² This is apparent already in the laws quoted above, and it is also reflected in other Germanic codes, which levy harsh physical punishments and/or monetary fines against free or freed males for 'defiling' the members of one's household, enslaved or free.²³ Indeed this same punitive spirit is also applied to free females for forming mixed unions. Thus, the seventh-century Lombardic *Edictus Rothari* requires that, if an enslaved man and free woman have established a sexual union, the slave may be killed while the woman is to be handed over to her relatives to be dealt with by killing her or selling her as a slave outside the kingdom; if these failed to do so, she was to be made a slave to the king.²⁴ In the same

²⁰ More on this process at Lenski, "Law and Language" (n. 8): 358–64, with earlier bibliography, esp. Paul D. King, "The Alleged Territoriality of Visigothic Law," in *Authority and Power: Studies on Medieval Law and Government Presented to Walter Ullman on His Seventieth Birthday*, ed. Brian Tierney and Peter Lineham (Cambridge: Cambridge University Press, 1980): 1–11; Paul D. King, "King Chindasvind and the First Territorial Law-Code of the Visigothic Kingdom," in *Visigothic Spain: New Approaches*, ed. Edward James (Oxford: Clarendon Press, 1980): 131–57.

²¹ Both Karl Zeumer, "Geschichte der westgotischen Gesetzgebung III," *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde* 24 (1899): 592–94 and Álvaro D'Ors, *El Código de Eurico. Edición, Palingenesia, Índices* (Madrid: Consejo Superior de Investigaciones Científicas, 1960): 135–37, agree that this hybrid law was a product of Leovigild, cf. Nehlsen, *Sklavenrecht zwischen Antike und Mittelalter* (n. 15): 241–45.

²² As with the Roman system, there was no regulation of a male master's access to sexual relations with females enslaved to him, cf. Greg. Tur. Franc. 4.3; 4.25–27; 10.8; and see Grieser, *Sklaverei im spätantiken und frühmittelalterlichen Gallien* (n. 1): 101–6.

²³ Thus Edict. Roth. 194; 205–12; Pactus Legis Alamannorum 22.15 (MGH LL nat. Germ. 5.1.33). See more below.

²⁴ Edict. Roth. 221 (MGH LL 4.53): *Si servus liberam mulierem aut puellam ausus fuerit sibi in coniugium sociare, animae suae incurrat periculum, et illa qui servum fuerit consentiens, habeant parentes*

vein, the early sixth-century Burgundian code (*Liber Constitutionum*) orders that, if a freeborn girl (*puella*) establishes a union with a male slave, both are to be killed – apparently by her family – but if her relatives refuse to inflict this punishment on their daughter, the female is to be enslaved to the king.²⁵ Striking about these Lombardic and Burgundian laws is not just their punitive spirit, but also the fact that both align with the Visigothic law (*Lex Visig.* 3.2.3 [Recc.]) quoted above in leaving it up to the relatives of the free female to kill or enslave their own daughter for her sexual transgressions.²⁶

Of note in the case of the Burgundian law, it appears to be directly contradicted by another Burgundian law, not in the *Liber Constitutionum* but rather in the *Lex Romana Burgundionum* (37.3–6). This allows mixed couples of enslaved and free, be they male or female, to remain in unions (*contubernia*) and explicitly forbids the enslavement of the free party, although that same free individual was not permitted to depart from the estate of his partner's enslaver and their children were to be kept in slavery.²⁷ This contradiction needs to be understood in the context of a Burgundian legal system which, like the Visigothic system of the fifth and sixth centuries, was also 'personal': individuals claiming 'Burgundian' ethnicity were governed by the *Liber Constitutionum*, which punished with death any free females who formed unions with slaves, while those who identified as 'Roman' followed the *Lex Romana Burgundionum*, which offered a much milder solution – one entirely in keeping with Roman law traditions. Driving home the divergence, *Lex Romana Burgundionum* 37.3–6 states explicitly that it derives its principles from the 'Novella de advenis', by which it means *Novella Valentiniani* 31.5–6 – a Roman law, concerned not with punishing such unions

potestatem eam occidendi aut foris provincia transvindicendi, et de res ipsius mulieris faciendi quod voluerint. Et si parentes eius hoc facere distulerint, tunc liciat gastaldium regis aut sculdhai ipsam in curte regis ducere et in pisele inter ancillas statuere. Cf. Leg. Lang. Liutpr. 24.VI; 120; Leg. Lang. Ratch. 6.II (MGH LL 4.188). See also Edict. Roth. 217, which orders the enslavement of an *aldia* or freedwoman who marries a slave owned by another householder; and Edict. Roth. 193, on unions between free women and male slaves who flee the kingdom to continue their relationship. Curiously, Lombard law did not insist on the enslavement of a free male or *aldius* who married an enslaved woman, Edict. Roth. 219; Leg. Lang. Liutpr. 66.II.

25 Burg. lib. const. 35.2–3 (MGH LL nat. Germ. 2.1): 2. *Si vero ingenua puella voluntaria se servo coniuncxerit, utrumque iubemus occidi.* 3. *Quod si parentes puellae parentem suam punire fortasse noluerint, puella libertate careat et in servitutem regiam redigatur.* For similar principles, see Burg. lib. const. 101.1–2, punishing sexual unions across status classes – *optimas, mediocris, leudes*.

26 To be sure, Roman law had permitted a paterfamilias the right to execute his own adulterous daughter, but only if she was caught in the act, and only he was granted this license and not other relatives, and never was any family member allowed to enslave their own daughter, cf. Thomas A. McGinn, *Prostitution, Sexuality, and the Law in Ancient Rome* (New York: Oxford University Press, 1998): 140–215.

27 Burg. Rom. 37.3–6 (MGH LL nat. Germ. 2.1.156–7), esp. 37.5: *Inter ingenuum vero et ancillam, sive servum et ingenuam, sicut consensus contubernia facere possunt, ita nuptiae non vocantur, et qui ex his nati fuerint, deteriore lineam secuti dominis adquiruntur.*

but only with regulating control over the offspring.²⁸ Meanwhile *Liber Constitutionum* 35.2–3, its Burgundian counterpart, is clearly based on the Germanic tendency to punish persons who establish mixed unions with death or, in the instance of the free partner, enslavement.²⁹

Returning to the question of punishing free males for their unions with enslaved females by enslaving them, we arrive at the Ostrogothic *Edictum Theoderici*, issued c. 500, where we might expect to find provisions that differ from the Germanic codes, for the *Edictum Theoderici* reproduced almost entirely Roman legal principles.³⁰ Yet, as its preface and colophon confirm, this code was explicitly issued to regulate relations between ‘Barbarians and Romans’, with the result that it sometimes applies principles foreign to Roman law that are found instead in the Germanic tradition.³¹ This latter would seem to be the case with Edict. Theodor. 64, ‘If someone defiles another person’s virgin female slave or bound tenant’:

If any free male defiles someone else’s enslaved virgin female, be she of whatever age, provided he is not in any way obligated to a city, if the owner wishes or the defiler himself asks for it and he makes a statement to this effect in the public record, he should remain in the power of the owner of the woman (*in domini mulieris potestate*), and he should not abandon this cohabitation with the female he diminished, nor even when she dies should he have the ability to depart. But

28 Novell. Valent. 31 concerned only *coloni* and not slaves, but its principles were modified at Burg. Rom. 37.3–6 to govern both. Burg. Rom. 6.3 also applies the principles at Novell. Valent. 31 to both slaves and *coloni*. On the assimilation of *colonus* status to that of slaves, see Lenski, “The Late Roman Colonnate” (n. 7): C.24 p.1–C.24 p.58.

29 Rio, “Freedom and Unfreedom” (n. 6): 16–23, argues that the abundance of Frankish formulae which guarantee freedom to women who have entered into sexual relations with a landowner’s slaves provide evidence of a new and more flexible legal system than what prevailed in Roman law (see *Formulae Andecavenses* 59; *Formulae Marculfi* 2.29; *Cartae Senonicae* 6; *Formulae Salicae Bignonianae* 11; *Formulae Salicae Merkelianae* 31; *Formulae Salicae Lindenbrogianae* 20; *Formulae Morbacenses* 18–19; *Formulae Augienses Coll. B* 41 [MGH *Form.* 1.25, 93–94, 187–88, 232, 253, 281, 334, 363]). This is hardly true. First, Roman law had already permitted such agreements, see Gai. 1.84; cf. Paul. Sent. 2.19.6. But second, the formulae in question make it abundantly clear that they are intended to grant a *personal exception* for women whom a master would otherwise have had every right to enslave on the basis of existing statute. They represent, in other words, a sort of ‘quit claim’ agreement through which masters could surrender a ‘right to enslave’ to which they were entitled at law – a workaround to the ‘normal’ process.

30 See Sean D.W. Lafferty, *Law and Society in the Age of Theoderic the Great: A Study of the Edictum Theoderici* (Cambridge: Cambridge University Press, 2013): 54–100; Ingemar König, ed., *Edictum Theoderici regis. Das “Gesetzbuch” des Ostgotenkönigs Theoderich des Großen. Zweisprachige Gesamtausgabe. Lateinisch und deutsch, Texte zur Forschung* 112 (Darmstadt: WBG Academic, 2018): 28–33; Sebastian Schmidt-Hofner and Hans Ulrich Wiemer, “Die Politik der Form: Das Edictum Theoderici, das Prätorische Edikt und die Semantik königlicher Rechtsetzung im postimperialen Westen,” *Chiron* 52 (2022): 335–412.

31 On ‘*barbari romanique*’, see Edict. Theodor. Praef., 155, cf. 34, 43–44. And see Hans Ulrich Wiemer, *Theoderic the Great: King of Goths, Ruler of Romans*, trans. John Noël Dillon (New Haven: Yale University Press, 2023): 131–33.

if the owner of the enslaved female does not consent or the perpetrator does not wish to make a statement, then he should hand over two slaves of the same value to the owner which will remain in his authority, provided he has the means; or if he is unable to fulfill this, he should be beaten quite harshly with clubs and enrolled in the guild (*collegium*) of the neighbouring city; and the judge of that region should fulfil and safeguard this, mindful of his written order.³²

Previous literature on this law has associated it with *Novella* 31 of Valentinian III, discussed in the preceding paragraph.³³ But Edict. Theodor. 64 differs from the Valentinianic Novel on four counts: first, where Novell. Valent. 31 applies only to relationships between a freeborn male (*ingenuus*) and female *colona* (whom it terms ‘*originaria*’), Edict. Theodor. 64 (like Burg. Rom. 37.3–6) extends its principles to relationships with a female slave (*ancilla*); second, while Valentinian’s law restricts itself to enduring unions, Edict. Theodor. 64 takes as determinative any sexual relationship – operating very much in the punitive spirit we have seen in the Germanic codes; third, while the Valentinianic law explicitly affirms that the free status of the male partner should endure (*salva ingenuitate*) despite its restrictions on his freedom of movement (as with Burg. Rom. 37.3–6), Edict. Theodor. 64 affirms the *enslavement* of the free male (*in domini mulieris potestate*) and thus his ongoing ties to the enslaved woman’s master after her death (*nec, eadem mortua, discedendi habeat facultatem*); and fourth, while Novell. Valent. 31.5 lays out a process whereby free males could voluntarily opt into a permanent union with an *originaria* on the condition they enroll themselves as permanent residents of her owner’s estate, Edict. Theodor. 64 treats any sexual encounter between a free male and an estate owner’s enslaved or dependent female as an offense which must be punished, whether by permanent enrolment as a slave or *originarius*, or by the surrender of two slaves of equal value, or by corporal punishment and enrolment in a municipal *collegium*. Theoderic and his legislators have thus not adopted the Roman law wholesale. Rather, they have adapted it using Germanic principles favouring the enslavement of any free person who dared to have sex with a householder’s slaves, punishing even free male offenders with beatings, fines, and potential enslavement.³⁴

³² Edict. Theodor. 64 (König ed., *Edictum Theodorici regis* (n. 30): 116): *Ancillam alienam virginem vel originariam cuiuslibet aetatis, quisquis ingenuus, nulli tamen quolibet modo obnoxius civitati, corrumpit, si dominus voluerit, aut corruptor ipse rogaverit, et apud gesta professus fuerit, mansurus in domini mulieris potestate, eius quam vitiavit contubernium non relinquit, nec, eadem mortua, discedendi habeat facultatem. Quod si dominus ancillae non consenserit, aut ille profiteri noluerit, tunc aut huius meriti duo mancipia domino tradat, eius iuri profutura, si eius substantia patiatur: aut si hoc implere non potuerit, caesus districtissime fustibus vicinae civitatis collegio deputetur: quod iudex eiusdem loci, periculi sui memor, implere et custodire debet.*

³³ Novell. Valent. 31.5 (31 Jan. 451); cf. Lafferty, *Law and Society* (n. 30): 268; König ed., *Edictum Theodorici regis* (n. 30): 116–17.

³⁴ See also Edict. Theodor. 142, a law with no parallel in the Roman codes (pace König ed., *Edictum Theodorici regis* [n. 30]: 187–88), which erases the distinction between *originarii* and *servi* by allowing the former to be moved off their birth-estate and treated as *servi urbani* or even sold as chattels.

The application of this law for the purpose of enslaving free males in the Ostrogothic kingdom is confirmed by a passage from the anonymous letter *Ad Gregoriam*, a text which likely derives from early sixth century Italy – and is thus precisely contemporary with the *Edictum Theoderici*. Here the author states matter-of-factly:

Your handmaid certainly takes on a husband on this condition, that both of them should be subject to you in their servitude, and if the man she takes on as husband happens to be sprung from a freeborn line, his union nevertheless brings him under your rule. Yet is it not impious that, through your handmaid, you yourself should obtain as a slave a man who owes you nothing, and that through yourself as His handmaid God should lose His servant, a man he bought with his own precious blood?³⁵

The author is not simply reporting this new reality, he clearly found it jarring and discordant with his sense of justice.

The Roman emperor Justinian did as well. Shortly after finishing his reconquest of Italy in 554, Justinian issued a lengthy *Pragmatic Sanction* attempting to bring Italian law into line with the laws of the Roman east. These included the longstanding provision – dating from early in the Classical period, well before the issuance of the *Corpus Iuris Civilis* – that freeborn males could not be enslaved for their sexual relations with another person's slaves, even if they could be charged with the tort actions of *iniuria* or *damnum iniuria datum* for harm done to the enslaver's 'property' through their sexual unions.³⁶ The fifteenth section of Justinian's *Pragmatic Sanction* shows not just that Justinian hoped to abide by this traditional norm but also how displeased he was that the Germanic custom of enslaving freeborn males (and females) for their sexual unions with enslaved partners had taken root in Italian society:

If any male living in slavery is found to have married a free woman in the most heinous times of Gothic ferocity (*per Gothicae ferocitatis nefandissima tempora*), or also if female slaves have been conjoined to free men, these should earn the right to depart (from this situation) as free persons in keeping with the present pronouncements, in such a way that slave women or slave men should return into the jurisdiction of their masters, with no prejudice to the masters of the male or female slaves being generated through the passing of time. But if they think these marriages should be upheld into the future, they should suffer no prejudice in regard to their personal lib-

35 Lib. ad Greg. 8 (CCSL 25A.204): *Certe hac condicione tua maritum accipit ancilla, ut utrique suo tibi seruiant famulatu, et si forte is, quem maritum accipit, ingenua sit sorte progenitus, sui copula tuo illum inclinat imperio. Et nefas non est ut tu per ancillam tuam illum qui nihil tibi debebat seruum obtineas, et per te ancillam suam suum deus famulum perdat, quem pretioso suo sanguine conparauit?* See Mark Humphries, "From Emperor to Pope? Ceremonial, Space, and Authority at Rome from Constantine to Gregory the Great," in *Religion, Dynasty, and Patronage in Early Christian Rome, 300–900*, ed. Kate Cooper and Julia Hillner (Cambridge: Cambridge University Press, 2007): 44–53 on dating and context.

36 Paul. Sent. 1.13A.6; D. 47.10.25 (Ulp. 18 ad ed.). But see the special case of D. 1.18.21 (Paul. l. s. de off. adsess.).

erty, but the children should follow the maternal condition; which we order also to apply in the case of those who were born from such a union.³⁷

Justinian's language indicates that he felt he was uprooting an explicitly Gothic practice when he granted freedom to all freeborn males who had been subjected to slavery for their sexual unions with enslaved females. Thus, to make sure the new (or rather the old) Roman norm would stick, he forbade these males to be enslaved even if they chose to continue their marital unions with another person's slavewoman in the years to come.

Curiously, Justinian applies the same principles to freeborn females who had been enslaved because of unions with another's male slave. This ruling would appear to contradict longstanding Roman practice under the *SC Claudianum*, but this egalitarian application of freedom to freeborn members of both sexes involved in unions with enslaved persons can be better understood when we take account of the fact that Justinian had also abolished the *Senatus Consultum Claudianum* in the eastern Roman empire already in 530/1 with the issuance of Cod. Iust. 7.24.1. In that law he states his grounds for doing so explicitly: "we thought it quite impious that some women should be deprived of their liberty and that a practice introduced by the ferocity of enemies (*ab hostium ferocitate*) contrary to natural liberty should also be the result of the caprice of worthless men."³⁸ The verbal echoes between Cod. Iust. 7.24.1 and *Pragmatic sanction* § 15 appear to indicate that Justinian associated the enslavement of freepersons for their sexual unions with slaves with barbarian 'ferocity' and more specifically with the Goths. The east Roman emperor, along with the compilers of the *Lex Romana Burgundionum* and the author of the *Ad Gregoriam*, thus perceived a salient difference between the legal customs of the Romans and Germanic barbarian peoples with regard to the enslavement of freepersons, especially freeborn males, for their unions with enslaved partners. Moreover, in another law of 531, Justinian even ordered that any master who permitted a marital union between his enslaved female and a free male had, by this very act, granted the slave woman full freedom. The eighth-century *Ecloga* expanded this measure further by taking any master-sanctioned marital union between a male or female slave and a freeperson as a trig-

37 Novell. Iust. App. 7.15: *Si qui per Gothicae ferocitatis nefandissima tempora servi constituti liberas uxores inveniantur duxisse, vel etiam liberis hominibus ancillae coniunctae, licentiam quidem liberae personae discedendi per praesentes nostros mereantur affatus, ancilla videlicet vel servo in dominorum suorum iura remeantibus, nullo praeiudicio dominis servorum vel ancillarum ex praeterito tempore generando. Si vero in posterum etiam coniugia tenenda esse putaverint, nullum praeiudicium circa libertatem propriam patiantur, filii vero maternam condicionem sequantur; quod etiam in illis, qui ex tali coniugio nati sunt, obtinere iubemus.* On the Pragmatic Sanction, see David Miller and Peter Sarris, *The Novels of Justinian. A Complete Annotated English Translation* (Cambridge: Cambridge University Press, 2018): 1116–30.

38 Cf. Inst. Iust. 3.12.1.

ger for automatic manumission.³⁹ This is precisely the opposite of what was happening in the contemporary west, for the Germanic codes punish any union between free and enslaved partners with the enslavement of the free party. Far from developing out of Roman traditions, then, the barbarian codes of the west differed from them *ab initio*, and the gap between the two traditions only widened over the course of late antiquity as the east Roman empire reacted against developments in the west by doubling down on Roman law's more robust defense of personal liberty.

3 Killing One's Own Slave

In a general way, slaves lack legal standing as persons, being classed instead as property. Under early Roman law, this meant that masters were permitted to murder their slaves with impunity. Beginning in the first century CE, emperors became increasingly concerned with the wanton mistreatment of slaves and began to place some restrictions on slave killing. Claudius ordered that all slaves whose owners had abandoned them to die because of illness should go free if they survived, and that those who chose to kill a sick slave to avoid paying for healthcare could be charged with murder; Hadrian is reported to have forbidden the killing of slaves by their masters, although details are scarce; and in a rescript mentioned in Gaius' Institutes and the Digest, Antoninus Pius is said to have ordered masters who killed their own slaves without just cause to be punished in the same manner as those who killed the slaves of a third-party.⁴⁰ Elsewhere, Gaius reports that the owner of a slave that had been killed by a third party had the choice of either suing the killer for damages or prosecuting the perpetrator on a capital charge (*capitali crimine reum facere eum*), which indicates that a master's murder of their own slave could also have resulted in a capital prose-

39 Cod. Iust. 7.6.1.9: *Sed et si quis homini libero suam ancillam in matrimonio collocaverit et dotem pro ea conscripserit, quod solum est in liberis personis solis procedere, ancilla non latina, sed civis efficiatur romana. si enim hoc, quod frequentissime in cives romanas et maxime in nobiles personas fieri solet, id est dotalis instrumenti conscriptio, et in hac persona adhibita est, necessarium est consentaneum effectum huiusmodi scripturae observari*; Ecloga 8.1.1, 3: Ἐπιτίθεται οἰκέτῃ ἐλευθερία [. . .] ἐὰν ὁ κύριος τὸν ὑποκειμένον αὐτῷ δοῦλον ἐλευθέρῳ ζεύξῃ προσώπῳ. See M. Melluso, *La schiavitù nell'età giustiniana: Disciplina giuridica e rilevanza sociale* (Besançon: Presses Universitaires Franc-Comtoises, 2000): 89.

40 Claudius: Suet. Claud. 25.2; Dio Cass. 60.29.7; D. 40.8.2 (Mod. 6 reg.). Hadrian: Hist. Aug. 18.7; cf. Coll. Mos. 3.3.4. Antoninus Pius: Gai. 1.53 = D. 1.6.1.2 (Gai. 1 inst.); Coll. Mos. 3.3.1–3; Inst. Iust. 1.8.2; cf. Hist. Aug. 18.7–11. See also D. 48.8.11.1–2 (Mod. 6 reg.), cf. D. 18.1.42 (Marcian. 1 inst.), for a prohibition on condemning one's slaves to the games without a trial before a magistrate. See more at Francesco Lucrezi, *L'uccisione Dello Schiavo in Diritto Ebraico e Romano*, Studi Sulla "Collatio" 1 (Turin: G. Giappichelli 2001): 62–73; Alexander Nogrady, *Römisches Strafrecht nach Ulpian: Buch 7 bis 9 De Officio Proconsulis*, Freiburger rechtsgeschichtliche Abhandlungen, neue Folge 52 (Berlin: Duncker & Humblot, 2006): 163–65, 256–60.

cution.⁴¹ And Pius also forbade the turning over of one's slave to be killed by beasts in the arena without a prior judicial hearing.⁴² Over time, the Romans thus became uncomfortable with the arbitrary killing of slaves – even by the enslaver – and, by the mid-second century, began to punish it as a civil and at times criminal offense.

For their part, Jews had long been uncomfortable with the deliberate killing of slaves which, they felt, violated the sixth commandment against murder. Exodus holds a master guilty of killing if he strikes his enslaved male or female so severely that the slave 'dies under his hand' (וַיָּמָת תַּחַת יָדוֹ) and thus punishes the master (בְּקָלָם יִקָּלָם), although not if the slave dies one or two days later 'for it is his money' (כִּי כֶסֶפוֹ הוּא), i.e. his property.⁴³ This same scriptural prohibition found its way into Christian canon law already in 306 at the Council of Elvira, which preserved the three-day prescriptive limit on responsibility for slave killing but added the additional element of intent: if a female master (*domina*) had killed her enslaved woman (*ancilla*) intentionally (*voluntate*), she was to be excommunicated for seven years, but if by bad luck (*casu*), for just five.⁴⁴ Not long thereafter, Constantine adopted the same principles into Roman law, with clear reference to the notions expressed at Elvira. Preserved as Cod. Theod. 9.12.1, this law states that if slaves died in the course of corrective punishment, regardless of the number of days, masters were not criminally responsible; but if masters did violence to their slaves in a manner clearly designed to kill, this constituted evidence of intent (*voluntate*) and could be punished as homicide.⁴⁵ Intent is, of course, difficult to prove, but Constantine clarified the matter by enumerating an extensive list of violent actions that were *ipso facto* to be taken as evidence of intention. This was a significant elaboration on the second-century principles noted above and shows how Christian values had begun to intermingle with classical legal regulations on slaveholding in ways that tightened enforcement against the killing of one's own slave.⁴⁶

⁴¹ Gai. 3.213; cf. D. 48.8.2 (Ulp. 1 de adult.); Coll. Mos. 1.3.2; Edict. Theodor. 152. A rescript of Diocletian preserved at Coll. Mos. 3.4.1 = Cod. Greg. 14.1 indicates that charges were at times pursued. More at Olivia F. Robinson, *The Criminal Law of Ancient Rome* (London: Duckworth, 1995): 43.

⁴² D. 48.8.11.1–2 (Mod. 6 reg.).

⁴³ Exod. 21.20–21, cited in Latin translation at Coll. Mos. 3.1.1. See also Catherine Hezser, *Jewish Slavery in Antiquity* (Oxford: Oxford University Press, 2005): 207–8; Lucrezi, *L'uccisione Dello Schiavo in Diritto Ebraico e Romano* (n. 40): 101–33.

⁴⁴ Conc. Eliberitanum a. 306 can. 5 (Johannes Mansi, *Sacrorum conciliorum nova et amplissima collectio*, vol. 2 [Florentiae, 1795]: 2.6 = Karl Joseph Hefele, *Conciliengeschichte* [Freiburg im Breisgau: Herder, 1873]: 1.138 = Engbert Jonkers, ed. *Acta et symbola conciliorum quae saeculo quarto habita sunt* [Leiden: Brill, 1975]: 6).

⁴⁵ Cod. Theod. 9.12.1 = Cod. Iust. 9.14.1 De emendatione servorum (May 11, 319), esp. *tunc reus homicidii sit, si voluntate eum vel ictu fustis aut lapidis occiderit* . . . See also Cod. Theod. 9.12.2 (Apr. 18, 329 Seeck), which indemnified masters whose slaves died during corrective punishment without, however, repealing the original law. For the same principle, see Paul. Sent. 5.23.6 and Basil. Epist. 188.8.

⁴⁶ More on this process at Noel Lenski, "Constantine and Slavery: Libertas and the Fusion of Roman and Christian Values," *Atti dell'Accademia romanistica costantiniana* 18 (2011): 235–60; Noel Lenski,

In light of our general awareness of the nearly unlimited de facto power of masters over those enslaved to them, most scholars have doubted that the Roman prohibition on slave killing had any significant effect on lived praxis. But a careful look at the sources shows that this assumption may not be correct. At the very least, the prohibition was upheld in legal pronouncements by subsequent rulers and jurists in the east Roman tradition.⁴⁷ And the same prohibition was also upheld in western canon law, with the obvious proviso that enforcement was limited to excommunication.⁴⁸ More importantly, some literary sources – though admittedly few in number – show an awareness in the broader society that slave killing was prohibited at law and that the prohibition could be enforced.⁴⁹ This is not to deny that masters continued to murder their slaves with impunity, for few accusers would have chosen to bring charges against a master for killing his own slave, and even if they had, it would have been difficult to convict the master by proving intent.

Even so, we do have one illustrative example of an imperial agent implementing the slave-murder prohibition which happens also to shine a light on differences between Roman and Germanic custom in this arena. Describing the Roman general Narses' preparations for his decisive battle over Alamannic and Frankish forces at the Battle of Casilinum in 554, Agathias reports that one of Narses' allied chieftains, a Herul, had murdered a slave he owned on a slight pretext. Narses was infuriated and brought the Herul before him to answer for his behaviour:

In answer to his enquiries the barbarian admitted full responsibility for what had been done and even went so far as to say that masters were at liberty to dispose of their own slaves as they wished and that, if the others did not behave themselves, they too would receive similar treatment.⁵⁰

“Monothéismes,” in *Les mondes de l'esclavage: une histoire comparée*, ed. Paulin Ismard (Paris: Seuil, 2021): 815–32.

47 Gai. epit. 1.3.1 (early fifth century); Inst. Iust. 1.8.1–2 (533 CE); SRRB (Walter Selb and Hubert Kaufhold, eds., *Kommentar*, vol. 3, *Das syrisch-römische Rechtsbuch* [Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2002]: 76, c. 500 CE); Ecloga 17.49 (741 CE, Ludwig Burgmann, ed., *Ecloga: Das Gesetzbuch Leons III. und Konstantinos' V*, *Forschungen zur byzantinischen Rechtsgeschichte* 10 [Frankfurt am Main: Löwenklau-Gesellschaft, 1983]).

48 Conc. Agathense (a. 506) can. 15(62) (CCSL 148.227); Conc. Epaonense (a. 517) can. 34 (CCSL 148A.33); Conc. Toletanum XI (a. 675) can. 6 (Vives 360), which also orders imprisonment against clerical violators; cf. Conc. Arelatense II (a. 442–506) can. 53 (CCSL 148.124).

49 Priscus, Frag. 8.111–13 Carolla (= Roger C. Blockley, ed., *The Fragmentary Classicising Historians of the Later Roman Empire: Eunapius, Olympiodorus, Priscus and Malchus*, ARCA [Liverpool: F. Cairns, 1983]: 11.2; = Karl Müller, ed., *Fragmenta Historicorum Graecorum*, vol. 5.1 [Paris: Firmin Didot, 1873]; Liban. Orat. 25.35.

50 Agath. 2.7.1–5, quotation at 3: ἐπεὶ δὲ αὐτῷ πυνθανομένῳ τὸ πραχθὲν ἀνωμολόγει ὁ βάρβαρος καὶ οὐκ ἀνῆνετο, τοῦναντίον μὲν οὖν καὶ ἐφικτὸν εἶναι ἔφασκε τοῖς κεκτημένοις τοὺς σφετέρους δούλους ἢ βούλονται μετιέναι, ὅτι τε καὶ οἱ ἕτεροι, εἰ μὴ σωφρονοῖεν, ἀλλὰ γὰρ καὶ οἶδε παραπλήσια πείσονται.

In the face of this defiance, Narses ordered the Herul chief to be executed by the sword, even despite the fact that this judgment would lead to serious protests among his Germanic allies before a major battle.⁵¹ The culture clash between these two approaches to slave killing thus points to differences in slaveholding practices that prevailed in an environment where Roman law was not the only nor even the predominant normative system.

Indeed, Germanic law seems not to have forbidden the killing of one's own slaves.⁵² Although it would be impossible to prove the absence of a rule, what we can say with certainty is that Germanic law was, in general, averse to criminalizing murder. It dealt with unlawful killing not through criminal prosecution in the name of state authority but rather through the tort system of compensatory personal damages described in the opening section of this paper – the system of *Wergeld*.⁵³ Thus, while Roman law from the first century BCE onward had treated murder as a crime of interest to the state and therefore subjected it to prosecution on behalf of the *res publica*, the barbarian codes of the sixth through eighth centuries treat it as a delictual matter to be recompensed with money compositions to be paid to the relatives of the victim.⁵⁴ These compositions were set according to the value assigned to a given individual on the basis of their sex, status, and social position, with fully free males netting the highest value and enslaved persons the lowest. All the early Germanic codes report fixed settlements to be paid in the instance of killing a slave by a third party, and correspondingly diminished sums for permanent injuries done to them.⁵⁵ Under these

51 On the Heruli as a Germanic people, see Jan Prostko-Prostynski, *A History of the Herules* (Poznań: Archeobooks, 2021).

52 Nehlsen, *Sklavenrecht zwischen Antike und Mittelalter* (n. 15): 272–73; cf. 175–77. Examples of masters killing slaves with impunity at Greg. Tur. Franc. 5.3; 7.46; cf. 3.15. Note that Tac. Germ. 25.1 states explicitly that slave killing occurred with impunity in Germanic society.

53 See R. Schmidt-Wiegand, “Wergeld,” in *Germanische Altertumskunde Online*, ed. Sebastian Brather, Wilhelm Heizmann and Steffen Patzold (Berlin: De Gruyter, 2010): https://www.degruyter.com/data-base/GAO/entry/RGA_6436/html [accessed 07.05.2024], and the studies at Lukas Bothe et al., eds., *Wergild, Compensation and Penance: The Monetary Logic of Early Medieval Conflict Resolution*, Medieval Law and Its Practice 31 (Leiden: Brill, 2021) with earlier bibliography. For the development of the death penalty in Germanic law, see H. Nehlsen, “Entstehung des öffentlichen Strafrechts bei den germanischen Stämmen,” in *Gerichtslauben-Vorträge. Freiburger Festkolloquium zum fünfundsiebzigsten Geburtstag von Hans Thieme*, ed. Karl Kroeschell (Sigmaringen: Thorbecke, 1983): 3–16.

54 On the Roman law of murder, see Olivia F. Robinson, *The Criminal Law of Ancient Rome* (n. 41): 41–46; Judy E. Gaughan, *Murder Was Not a Crime: Homicide and Power in the Roman Republic*, Ashley and Peter Larkin Series in Greek and Roman Culture (Austin: University of Texas Press, 2010): 134–40. On Germanic law and deadly violence, see William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago: University of Chicago Press, 1990).

55 Burgundian law: Burg. lib. const. 10.1–5, 46.3–4 (MGH LL nat. Germ. 4.1.50–51, 77); cf. Burg. Rom. 2.6 (MGH LL nat. Germ. 2.1.127). Frankish law: Lex Sal. Merov. 35.1, 104.10–11, 121 (MGH LL nat. Germ. 4.1.128, 261, 264); Lex Rib. 29(28) (MGH LL nat. Germ. 3.2.84); cf. Lex Rib. 65(62) (MGH LL nat. Germ. 3.2.117), and see Lex Sal. Merov. (VII Capitulare) 2 (Eckhardt, *Pactus Legis Salicae II.2* [n. 16]: 450). Lombardic law: Edict. Roth. 14, 129–36, 252, 334, 376 (MGH LL 4.15, 30–31, 61–62, 76, 87); Lex Lang. Liut. 124.

circumstances, because an enslaver was the only person who could claim compositions for damages done to their slaves, there could be no penalty assessed for the damage or destruction wrought on persons that the enslaver claimed as his property. Moreover, these same Germanic codes regularly prescribe death for enslaved persons when these committed even relatively minor delicts, particularly theft.⁵⁶ Slave killing was not, in other words, ever considered a criminal matter – and the killing of one's own slaves was not considered a legal matter whatsoever.

This unconcern with killing one's slaves is well illustrated in Gregory of Tours' account concerning the Frankish slaveholder Rauching, who became enraged over the conjugal affair of two of his slaves, to which he had not consented. Seeking protection, the slave couple fled to a church for asylum, a move which canon law attempted to protect by prescribing that church clerics should safeguard such couples by negotiating the return of the slaves to their master on the condition that no harm come to them without, however, consecrating the union. But after negotiating their return in keeping with the canon law, Rauching deliberately broke his oath by having a capsule specially crafted out of a hollow log inside of which he entombed the couple and suffocated them. This was precisely the sort of deliberate slave killing which Constantine had forbidden, but Rauching appears to have felt fully entitled to enact his wrath on these two humans with impunity – because they were his slaves.⁵⁷ Germanic law thus shows no moral compunction about slave killing, nor any concern that it might represent a threat to state order. Instead, as the Herul leader told Narses in Agathias' account, it granted to masters wanting to kill their slaves the power to do 'whatever they wished' with them (ἢ βούλονται).⁵⁸ This puts the Germanic tradition entirely at odds with contemporary Roman law, for Constantine's prohibition used state authority to punish the slave-killing master precisely for doing so 'willingly' (*voluntate*).

Moreover, what appears to be the lone exception to this principle turns out to be the case that proves the rule. The mid-seventh-century Visigothic King Chindaswinth (r. 642–53) issued a series of laws favourable to slaves among which was an order prohibiting private slave killing in the absence of a public judicial ruling – very much in

VIII (MGH LL 4.159–60); Lex Lang. Ratch. 7.III (MGH LL 4.188–89). Visigothic law: Lex Visig. 6.5.9 (MGH LL nat. Germ. 1.273).

⁵⁶ Burgundian law: Burg. lib. const. 4.2, 7.1, 35.1–3, 50.3–4, 77.1–2 (MGH LL nat. Germ. 2.1.44, 48, 68–69, 82, 101–2); cf. Burg. Rom. 4.4, 19.1–3 (MGH LL nat. Germ. 2.1.128, 143). Frankish law: Lex Sal. Merov. 40.5 (MGH LL nat. Germ. 4.1.148). Lombardic law: Edict. Roth. 33, 142–43, 237, 239, 370 (MGH LL 4.18, 32–33, 59, 86); Lex Lang. Grim. 3 (MGH LL 4.92–93); Lex Lang. Liut. 64.XI (MGH LL 4.133).

⁵⁷ Greg. Tur. Franc. 5.3; cf. Conc. Aurelianense IV (a. 541) can. 24 (CCSL 148A.138).

⁵⁸ It is impossible to know whether Agathias believed he was quoting the precise words of the Herul chief, but he does show remarkable linguistic fidelity to source material, Robert Rollinger and Josef Wieshöfer, "Even the Valleys and Hollows of the Mountain Thickets He Filled with Corpses . . .": Agathias, Shabbur and Ancient Near Eastern Topoi of Royal Heroism," in *From East to West in Late Antiquity. Studies in Honor of Jan Willem Drijvers*, ed. Noel Lenski et al., Munera 55 (Bari, forthcoming 2024).

keeping with the Roman rule first introduced by Antoninus Pius.⁵⁹ Masters who violated the rule were to be punished with perpetual exile and the loss of their fortunes.⁶⁰ To understand why Chindaswinth's law differs from other Germanic systems on the question of slave killing, we must return to the argument laid out above concerning the amalgamation of Germanic and Roman principles in the Visigothic system. Prior to the reign of Chindaswinth, the Gothic kings had operated with a 'personal' system under which 'Gothic' subjects followed the *Codex Euricianus* while 'Roman' subjects were governed by the *Lex Romana Visigothorum* (*Breviarium Alarici*).⁶¹ Unsurprisingly, the latter (issued in 507 and still valid down to the early seventh century) still retains Antoninus Pius' principle requiring a public trial of slaves whose crimes might merit execution by their masters before any slave killing could occur.⁶² Meanwhile, no extant portion of the *Codex Euricianus* says anything directly on the matter, although one extant 'Antiqua' (a law known to derive from the sixth-century *Codex Revisus* and, ultimately, probably from the *Codex Euricianus*) does report useful information:

If a slave steals something from his master or from a fellow slave, it rests in the power of the master to do whatever he wishes with him (*in domini potestate consistat, quid de eo facere velit*); nor should a judge intervene in this matter, unless the slave's lord happens to wish this.⁶³

This obviously grants the master broad latitude to punish his criminous slave without interference from state judicial oversight. It grants this 'power' with the distinctive general relative clause 'to do whatever he wishes with him,'⁶⁴ a phrase we saw already in Agathias' passage on the slave-murdering Herul chief. More importantly, Chindaswinth's law on slave killing – the primary subject of this discussion – also contains a very similar proviso: while it requires all masters to turn offending slaves over

⁵⁹ On Chindaswinth's mitigatory slave legislation, see Noel Lenski, "Slavery among the Visigoths," in *Slavery in the Late Antique World, 150 – 700 CE*, ed. Chris L. de Wet, Maijastina Kahlos and Ville Vuolanto (Cambridge: Cambridge University Press, 2022): 257–58, 271–72.

⁶⁰ Lex Visig. 6.5.12 [Recc.] (MGH LL nat. Germ. 1.274–78).

⁶¹ See above n. 20.

⁶² Lex Romana Visigothorum Epit. Gai 1.3.1: *occidendi tamen servos suos domini licentiam non habebunt (domini) [. . .] Nam si servus dignum morte crimen admiserit, iis iudicibus, quibus publici officii potestas commissa est, tradendus est, ut pro suo crimine puniatur*. Interestingly, Constantine's law forbidding slave killing was not transmitted into Visigothic law through the *Breviarium Alarici*, which preserves only Constantine's second Theodosian Code law exempting masters who killed their slaves in the course of corrective punishment from prosecution, Lex Romana Visigothorum Cod. Theod. 9.9.1.

⁶³ Lex Visig. 7.2.21 (MGH LL nat. Germ. 1.296): *Si servus domino suo vel conservo aliquid involaverit, in domini potestate consistat, quid de eo facere velit; nec iudex se in hac re admisceat, nisi dominus servi fortasse voluerit*.

⁶⁴ In post-classical Latin, indefinite and general relative pronouns are greatly simplified, such that what would have been *quicquid* reverts to *quid* here, see Veikko Väänänen, *Introduction au Latin vulgaire* (Paris: Klincksieck, 1963): 134, 174–75.

to a judge for adjudication of their misdeeds, it leaves open the possibility that the judge might still allow the master to execute his own slave:

But this should happen in such a way that, if the judge does not wish to kill the culprit, he should make a written decree concerning his death sentence, and it should remain in the power of his master to decide whether he wishes to kill him or to save his life (*et utrum interficere eum dominus eius an vite reservare voluerit, in eius potestate consistat*).⁶⁵

The verbal parallels between the two Visigothic passages are unmistakable and offer clear signs of a formulaic relationship – a relationship likely born from a common origin in what was the original Visigothic principle granting the master the ‘power to do whatever he wished’ (*voluerit*) with his slave. This was, once again, diametrically opposed to Constantine’s ruling strictly forbidding slave killing if it was deemed to be *willful* (*voluntate*).

In an earlier article, I have shown that Chindaswinth merged Gothic and Roman principles in a lengthy and important law (Lex Visig. 6.4.3) concerning personal assaults (*iniuriae*).⁶⁶ With this law on slave killing (Lex Visig. 6.5.12) we see the same sort of merger: a melding of the Roman law prohibiting slave killing without a prior trial, with the Germanic law granting masters wide latitude over the punishment and execution of their slaves as they wished. Moreover, we have direct testimony to the social discomfort occasioned by this merging of the two distinct legal traditions. Chindaswinth’s law is transmitted in the *Liber Iudiciorum*, which was first finalized and issued by his son Recceswinth in 654. Thirty years later, the staunchly traditionalist King Erwig (r. 680–687) issued a new recension of *Liber Iudiciorum* that significantly weakened Chindaswinth’s law against slave killing and entirely omitted another Chindaswinthian ruling forbidding a master’s punishment of his own slaves with bodily mutilation – a law directly connected with the abovementioned Lex Visig. 6.4.3 on *iniuriae*.⁶⁷ Erwig’s successor, Egica (r. 687–702), in his revisions to the *Liber Iudiciorum* in the 690s, chose to restore both of Chindaswinth’s original laws, which is why we have the two divergent copies.⁶⁸ But these vacillations, made apparent by the manuscript tradition, offer clear evidence of a controversy over the question of slave killing and mutilation and thereby leave us with a textual tradition that highlights the diver-

⁶⁵ Lex Visig. 6.5.12 (MGH LL nat. Germ. 1.275): *ita tamen, ut, si reum iudex occidere noluerit, mortis eius sententiam scriptis decernat, et utrum interficere eum dominus eius an vite reservare voluerit, in eius potestate consistat*.

⁶⁶ Lenski, “Law and Language” (n. 8).

⁶⁷ Lex Visig. 6.5.12 [Erv.] (MGH LL nat. Germ. 1.274–78). On mutilation, see Lex Visig. 6.5.13 (MGH LL nat. Germ. 1.278–79). See also Conc. Emeritanum (a. 666) can. 15 (Vives 335–36); Conc. Toletanum XI (a. 675) can. 6 (Vives 360) which show the church continuing to fight against the mutilation and killing of slaves by clergy.

⁶⁸ Lex Visig. 6.5.13* (MGH LL nat. Germ. 1.279–80).

gence between these two strains of Visigothic law and the social difficulties this occasioned.

The Germanic law tradition thus arrived at a legal prohibition on slave killing only very late and only in the Visigothic system, which finally melded its formerly personal codes of Germanic and Roman law into a single territorial system in the seventh century. Even here, however, the Visigoths implemented this new blanket prohibition against slave killing in the absence of a judicial hearing in desultory fashion, first introducing it, then weakening the prohibition, and finally – at the very end of the seventh century – embracing it. All the while, however, even Visigothic law preserved a space for the master to do ‘whatever he wished’ with slaves he regarded as worthy of execution, as with those he believed guilty of theft. As such, all the Germanic codes bear a marked difference with contemporary Roman law on the question of slave killing, for the Roman system had long since rejected the notion that the master’s will could be left unimpeded by state intervention.

4 Enslavement for Crimes and Delicts

Although the Romans of the Republican period put too high a premium on citizenship and freeborn status to permit individuals to be enslaved for crimes, the growing arena of ‘criminal’ law under the emperors burgeoned into a system of state behavioural control that came to include enslavement among its catalog of retributions for criminous behaviour. Termed *servitus poenae* (enslavement to one’s penalty), the practice became widespread by the first century as citizens convicted of a growing list of *crimina* were made liable to impressment into servile activities such as labouring in imperial mines, quarries, and factories, or fighting in the arena.⁶⁹ But even if *servi poenae* were considered a kind of ‘slave’, they were always distinguished from other Roman slaves in that they were not available for sale or conveyance on the open market. They were not, in other words, made into chattels but were enslaved to the state, more akin to convict labourers than privately held bondsmen.

Meanwhile the *ius civile* remained firm that *ingenuitas* was inalienable well into late antiquity. Apart from the *SC Claudianum*, discussed above, the only other excep-

69 Peter Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford: Clarendon, 1970): 131–36, 164–65; Fergus Millar, “Condemnation to Hard Labour in the Roman Empire, from the Julio-Claudians to Constantine,” *Papers of the British School at Rome* 52 (1984): 128–47; Julia Hillner, *Prison, Punishment and Penance in Late Antiquity* (Cambridge: Cambridge University Press, 2015): 199–211; Aglaia McClintock, *Servi Della Pena: Condannati a Morte Nella Roma Imperiale*, Pubblicazioni Della Facoltà Di Economia, Università Degli Studi Del Sannio, Benevento, Sezione Giuridico-Sociale 65 (Napoli: Edizioni scientifiche italiane, 2010) and Aglaia McClintock, “*Servi Poenae*: What Did It Mean to Be ‘Condemned to Slavery?’” in *The Position of Roman Slaves. Social Realities and Legal Differences*, ed. Martin Schermaier, *Dependency and Slavery Studies* 6 (Berlin: De Gruyter, 2023): 187–201.

tion was made for cases involving collusion between two co-conspirators who planned to profit by having one of the two sell the other to a third-party buyer, then seeking freedom for the purchased one once his *ingenuitas* was revealed, in theory allowing the two to pocket the money taken from the buyer in the fraudulent sale. The penalty for such chicanery was, ironically, enslavement – albeit pursuant to a fraud claim rather than as a result of the self-sale itself.⁷⁰ The generalized application of this rule surely explains why we have almost no evidence for self-sale in the period of the high empire; and even the attestations we do have tend to involve provincials who did not have Roman citizenship and whose *ingenuitas* was not, therefore, defended by Roman law.⁷¹

The Roman prohibition on the enslavement of freeborn individuals continued in force into the fifth century when, for example, Emperor Honorius allowed landowners who had ransomed freeborn Roman captives from the barbarians to retain these as dependent labourers for up to five years if they could not repay their ransom costs, but insisted that their freeborn status (*ingenuitas*) was never compromised and that they could walk free as *ingenui* (and not *liberti*) at the close of the five years.⁷² The statutory defence of freeborn status in Roman law continued throughout the fifth century and into the sixth when, for example, Justinian forbade creditors from using the children of their debtors as pledges against debts.⁷³ On similar principles, Justinian also abolished ‘enslavement’ for crimes: while still allowing condemnation to hard labour, he removed the status of ‘*servitus poenae*’ formerly attached to it so as not to compromise the marital status of the convict (since enslaved persons could not legally be married).⁷⁴

While the Roman state worked to defend freeborn persons against chattel enslavement and even did away with penal enslavement in late antiquity, the post-Roman Germanic successor states fully embraced enslavement as a solution to a series of legal problems, including debt and criminality.⁷⁵ This split occurred in no small part because the Germanic societies of late antiquity had a much less fully articulated sense of statehood than the Empire, but above all – once again – because Ger-

70 D. 1.5.5.1 (Marcian 1 inst.); D. 28.3.6.5 (Ulp. 10 ad Sab.); D. 40.12.7 (Ulp. 54 ad ed.); D. 40.13 (passim); D. 40.14.2 (Saturn. 1 de off. procons.); Cod. Iust. 7.16.5; 7.18.1; Cf. Edict. Theodor. 82.

71 Jacques Ramin and Paul Veyne, “Droit Romain et Société: Les Hommes Libres Qui Passent Pour Esclaves et l’esclavage Volontaire,” *Historia* 30 (1981): 472–97, assemble the evidence, most of which points to imperial interventions to overturn self-sales and uphold the inalienability of *ingenuitas*.

72 Const. Sirmond. 16 = Cod. Theod. 5.7.2 = Cod. Iust. 8.50.20 (a. 408), esp. *habituos incolumem, si in ea nati sunt, libertatem*. See also Cod. Theod. 10.10.25 (408); Cod. Theod. 11.11.1 = Cod. Iust. 11.55.2 (a. 368); Cod. Theod. 3.3.1 (391); Novell. Valent. 33 (451).

73 Novell. Iust. 134.7 (556); cf. Mellusso, *La schiavitù nell’età giustiniana* (n. 39): 223.

74 Novell. Iust. 22.8 (a. 535): οὐδένα τῶν ἐξ ἀρχῆς εὖ γεγονότων ἐκ τιμωρίας γίνεσθαι συγχωροῦμεν οἰκέτην; cf. Mellusso, *La schiavitù nell’età giustiniana* (n. 39): 56–59.

75 See especially Heinrich Brunner, “Abspaltungen der Friedlosigkeit,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 11 (1890): 62–100, esp. 88–98; Detlef Liebs, “Sklaverei aus Not im germanisch-römischen Recht,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Roma-*

manic legal anthropology displayed an entirely different conception of personhood. The question of ‘statehood’ remains subject to ongoing debate, but there can be no denying that these post-Roman kingdoms of the West had only a fraction of the institutional infrastructure witnessed in the high imperial Roman state.⁷⁶ This diminished political armature surely helps explain why post-Roman legal systems show only scanty concern with criminal law – if by ‘criminal law’ we mean state sanctioning of offenses deemed harmful to the public order. Instead, post-Roman law in western Europe provided a framework for the sanctioning of most offenses through its highly developed system of torts. There is thus no evidence for anything mirroring Rome’s state-managed penal servitude (*servitus poenae*). To be sure, individual kings sanctioned some acts as criminally unlawful, especially in the instance of the Visigothic state, which came the closest of any successor kingdom to reproducing Roman state structures and which punished some offenses – such as treason, counterfeiting, prostitution, and draft-dodging – with enslavement to the king.⁷⁷ Yet, in contrast with Roman *servitus poenae* which sequestered criminal convicts (*servi poenae*) from the emperor’s own slaves (*servi Caesaris*), the Visigothic king treated criminally enslaved persons as his own chattels, even to the extent that he could gift these to other private persons.⁷⁸

By the same token, the post-Roman Germanic states had a much more comprehensive concept of personal delict than one finds in Roman law. In Germanic law, delicts such as theft, assault, and even murder represented an offense not against the state order but against the person of the victim. As a consequence, such offenses were

nistische Abteilung 18 (2001): 286–311; cf. Nehlsen, *Sklavenrecht zwischen Antike und Mittelalter* (n. 15): 339.

⁷⁶ See, for example, Damián Fernández, “Taxation, Landownership, and the Infrastructural Power of the Visigothic State,” in *Ancient States and Infrastructural Power: Europe, Asia, and America. Empire and After*, ed. Clifford Ando and Seth Richardson (Philadelphia: University of Pennsylvania Press, 2017): 243–71. On Roman ‘statehood’, see Brent D. Shaw, “Was the Roman State a State?” *Medieval Worlds* 18 (2023): 3–71.

⁷⁷ Conc. Toletanum XIII (a. 683) can. 1; Lex Visig. 3.4.17; 7.6.2; 9.2.8–9 (MGH LL nat. Germ. 1.157, 310, 370–79). Other examples at Lenski, “The Late Roman Colonate: A New Status between Slave and Free” (n. 7): 263–64.

⁷⁸ In the Visigothic kingdom, apart from instances listed in n. 77, see Cod. Euric. Rest. 2 (MGH LL nat. Germ. 1.28, incestuous marriage); Lex Visig. 3.6.2 (MGH LL nat. Germ. 1.167–69, fraudulent divorce); Lex Visig. 4.5.7 (MGH LL nat. Germ. 1.205–7, violating marriage restrictions for ecclesiastical freedmen); Lex Visig. 12.2.11, 14, 17 (MGH LL nat. Germ. 1.417, 420–23, 425–26, Jews refusing conversion); Lex Visig. 12.2.12 (MGH LL nat. Germ. 1.417, Jews circumcising Christian slaves); Lex Visig. 12.2.18 (MGH LL nat. Germ. 1.426–27, unconverted Jews continuing to trade with Christians). At Fredegar, *Chronicon* 4.82 (MGH SS rer. Mer. 2.162–63) Chindaswinth is reported to have gifted the wives and daughters of those rivals whom he had executed to his supporters, along with their fortunes. Most disturbing of all, in 694, Egica decreed the enslavement of all Jews in the kingdom for redistribution as chattels to his subjects for the alleged crime of supporting the usurper Suniefred and for continuing to resist conversion (Conc. Toletanum XVII can. 8 [Vives 534–6]). In a Frankish context, *Vita Desiderii* 8 (CCSL 117.352). In the Bavarian tradition, enslavement to the fisc was prescribed for *minores personae* who established ‘incestuous’ marriages, Lex Bai. 7.3; cf. 16.11 (MGH LL nat. Germ. 5.2.348, 439–40).

redressed not through state sanctions on the perpetrator's freedom but through the payment of monetary compositions.⁷⁹ This was, as noted above, the Germanic system of *Wergeld*, a system for which there is no evidence in Roman legal practice of the Classical and post-Classical period.

In yet another marked contrast with Roman law, when offenders could not afford to meet the costs of compositions, which were often enormous, they were forced to enter into slavery to the plaintiff.⁸⁰ The classic description of the legal procedure subtending this process in Frankish society can be found in title 58 of the *Pactus Legis Salicae* (c. 507) '*De chrenecruda*' ('On mudslinging', a Frankish word – and concept):

If someone kills a man and, once his entire fortune has been given over, he does not have enough wealth to pay a composition so as to fulfill the law, he should offer twelve oathhelpers to the effect that neither above the earth nor beneath the earth does he have any more wealth except what he has given [. . .]

A ceremony is then described in which the bankrupt defendant collects dirt from the floor of the four corners of his house and slings it over his shoulders at various family members who can offer him no more money; he must then jump over the wall of his farmstead shirtless and barefooted and flee.

Then he who has the man who committed the homicide in his surety (*sub sua fide*) should present him in court, and after presenting him in four courts so they might remove his surety. And if no one grants him surety in paying the composition, that is so as to redeem him from the debt he has not paid, then he should make the composition with his life.⁸¹

The last phrase may have implied execution of the delictual debtor or it may instead have resulted in his enslavement to the party to whom the unpaid composition is owed.⁸² A somewhat different version of the process is reported in the considerably later *Lex Langobardorum Liutprandi* of the early eighth century:

⁷⁹ Though penalties were often supplemented with payments to the king for 'the peace' or for 'feuding' Lenski, "Law and Language" (n. 8): 378–79.

⁸⁰ If we are to believe Tacitus (Tac. Germ. 24.2), debt slavery went very far back among Germanic societies.

⁸¹ Lex Sal. Merov. 58.1, 6 (MGH LL nat. Germ. 4.1.218, 221): *Si quis hominem occiderit et, tota facultate data, non habuerit, unde componat, ut totam legem impleat, XII iuratores donet, quod nec super terram nec subter terram plus de facultate non habeat, quam iam donauit [. . .] Quod si uero nec ipse habuerit, unde totam legem <per>solvat, tunc illum qui homicidium fecit, <ille> qui eum sub <sua> fide habet, in mallo praesentare debet, et sic postea eum per quattuor mallos ad suam fidem tollant. Et si eum in compositionem nullus ad fidem tulerit, hoc est ut eum redemat de <hoc>, quod non persolsit, <tunc> de sua uita componat.*

⁸² Heinrich Geffcken, *Lex Salica zum akademischen Gebrauche* (Leipzig: Von Veit, 1898): 201 contends that '*de vita sua componat*' implies the death penalty, but because the formularies (e.g. *Formulae Andecavenses* 3 [MGH Form. 6]) make it clear that slavery could be substituted for execution, Lex Sal. Merov. 58.6 will often have resulted in enslavement. Brunner, "Abspaltungen der Friedlosigkeit" (n.

If a man who is prodigal or disastrous has sold or dissipated his fortune and does not have enough to pay a composition, and he commits theft, or adultery, or a breach of the peace and inflicts blows on another man, and the composition itself is worth twenty solidi or more, then a public representative should give him into the hand of the one to whom he did such illicit things, and that man may have him as his slave. But if the composition is worth less than twenty solidi, as can happen when it is up to six or twelve solidi, then a public representative should give him into the hand of the one to whom he committed this fault as a slave in order that he may serve him for as many years as it takes for the fault to be redeemed, and afterward he may be absolved and go wherever he wishes.⁸³

The legal procedures obviously differ between the two systems – with the earlier Frankish form having every appearance of tribal custom while the Lombardic law reflects less rustic ceremonial and a greater involvement of state representatives – but both clearly entail practices rooted in the distinctly Germanic system of *Wergeld*. The perpetrator of a delictual offense who is unable to afford the composition prescribed at law (and whose relatives cannot help) is to be enslaved to the plaintiff, usually the victim or a member of their family.

Similar principles allowing the private enslavement of a defendant who could not afford to pay an adjudicated *Wergeld* composition can be found across the Germanic codes, for this remedy is applied to a wide range of offenses:

- Burg. lib. const. 12.3 (MGH LL nat. Germ. 2.1.51): rape and bride theft
- Lex Sal. Merov. IV Cap. 113 (MGH LL nat. Germ. 4.1.262–63): general provision for all insolvent defendants⁸⁴
- Lex Visig. 2.1.21 (Antiqua, MGH LL nat. Germ. 1.68–69): giving fraudulent judgments
- Lex Visig. 2.4.6, 9 (Chindaswinth, MGH LL nat. Germ. 1.98–99, 102): bearing false witness
- Lex Visig. 3.3.5 (Antiqua, MGH LL nat. Germ. 1.142): kidnapping a freeborn female who is betrothed to a third party
- Lex Visig. 4.4.1, 3 (Antiqua, MGH LL nat. Germ. 1.193–94): exposing a child
- Lex Visig. 5.4.11 (Antiqua, MGH LL nat. Germ. 1.221): selling free men or women into slavery
- Lex Visig. 6.1.5 = Cod. Euric. Rest. 11 (Chindaswinth, MGH LL nat. Germ. 1.252–55): bringing a false accusation that results in the death of a slave tortured in court
- Lex Visig. 6.4.2 (Antiqua, MGH LL nat. Germ. 1.263): burglary

75): 96–98 is thus correct to argue that ‘*de vita sua componat*’ involved either execution or enslavement; cf. Richard Behrend, *Lex Salica*, 2nd ed. (Weimar: Böhlau, 1897): 24.

⁸³ Lex Lang. Liut. 152.X (MGH LL 4.175): *Si autem minus de viginti solidis fuerit ipsa conpositio, sicut solit fieri usque ad sex aut duodecim solidos, tunc debeat eum publicus dare in manum eius, cui tale culpa fecerit, pro servo in eo ordine, ut serviat ei tantos annos ut ipsa culpa redimere possit, et vadat postea ubi voluerit absolutus.*

⁸⁴ Cf. Chilperici Edictum 8 (MGH Capit. Reg. Franc. 1 Cap. 4.8 pp. 10–11), enslavement for debt incurred by failure to pay a composition for theft.

- Lex Visig. 7.1.1 (Antiqua, MGH LL nat. Germ. 1.286–87): bringing false accusations
- Lex Visig. 7.1.5 = Cod. Euric. Rest. 10 (Antiqua, MGH LL nat. Germ. 1.288): committing a capital offense (poisoning, magic, theft, or any other illegal acts)
- Lex Visig. 7.2.13–14 (Chindaswinth, MGH LL nat. Germ. 1.293): theft of chattels or slaves
- Lex Visig. 7.3.2 (Chindaswinth, MGH LL nat. Germ. 1.298): kidnapping of slaves
- Lex Visig. 7.5.2 (Chindaswinth, MGH LL nat. Germ. 1.304–5): forging signatures or documents
- Lex Visig. 8.2.1 (Antiqua, MGH LL nat. Germ. 1.318–20): arson
- Lex Visig. 9.1.2 (Antiqua, MGH LL nat. Germ. 1.352–53): releasing a fugitive slave
- Lex Lang. Liut. 20.II (MGH Leg. 4.117): homicide
- Lex Lang. Liut. 63.X (MGH Leg. 4.132–33): false testimony
- Lex Lang. Liut. 80.XI (MGH Leg. 4.139–40): theft
- Lex Lang. Aist. 22.XIII (MGH Leg. 4.204): theft
- Lex Bai. 1.10 (MGH LL nat. Germ. 5.2.281–82): killing a bishop
- Lex Bai. 2.1 (MGH LL nat. Germ. 5.2.291–93; cf. Lex Bai. 7.5 (MGH LL nat. Germ. 5.2.351–52): committing a capital offense (*mortale crimen*)
- Lex Bai. 7.4 (MGH LL nat. Germ. 5.2.349–51); cf. Lex Alamannorum 38 (MGH LL nat. Germ. 5.1.98): performing manual labour on Sunday
- Lex Bai. 9.4 (MGH LL nat. Germ. 5.2.370–71): kidnapping a free man and selling him into slavery
- Wihtrud 26 (Attenborough 1922, 28)⁸⁵: theft⁸⁶
- Ine 3.2 (Attenborough 1922, 36): performing manual labour on Sunday (cf. Edward and Guthram 7.1 [Attenborough 1922, 106])⁸⁷
- Ine 7.1 (Attenborough 1922, 38): theft (cf. II Edward 6 [Attenborough 1922, 120]; VI Æthelstan 12.2 [Attenborough 1922, 168])
- Ine 74.1 (Attenborough 1922, 60): homicide

It was also the case that some Germanic codes permitted the direct enslavement of a perpetrator without ever offering the chance for redemption through a composition. We find this direct path to enslavement to the plaintiff in the following instances:

⁸⁵ Frederick Levi Attenborough, *The Laws of the Earliest English Kings* (Clark: The Lawbook Exchange, 1922).

⁸⁶ This law offered three options – death, sale into slavery overseas, or ransom for the perpetrator's *Wergeld*. On the problem of enslavement for even petty theft in Anglo-Saxon England, see Wulfstan, Archbishop of York, *Sermo Lupi ad Anglos* at D. Whitelock, ed., *English Historical Documents, 500–1042*, vol. 1 (London: Eyre & Spottiswoode, 1955): 856.

⁸⁷ On the person enslaved for crimes and delicts (*witeþeow*) in Anglo-Saxon law, see D.A.E. Pelteret, *Slavery in Early Mediaeval England: From the Reign of Alfred until the Twelfth Century*, *Studies in Anglo-Saxon History* 7 (Woodbridge: Boydell Press, 1995): 42, 93, 120–23, 162–63, 247–48.

- Lex Sal. Merov. 13.7–9 (MGH LL nat. Germ. 4.1.61–62): enslavement of royal servants and freedmen (*leti*) who abduct a free girl, and of any free girl who consents⁸⁸
- Burg. lib. const. 40.1–2 (MGH LL nat. Germ. 2.1.72): generic offenses
- Burg. lib. const. 47.1–3 (MGH LL nat. Germ. 2.1.77–78): enslavement of wives and adult children who conceal the horse and cattle thefts of their husbands or fathers
- Lex Visig. 3.1.2 (Antiqua, MGH LL nat. Germ. 1.122–23): enslavement of a female and her lover if she breaks her betrothal to another man
- Lex Visig. 3.2.2 (Antiqua, MGH LL nat. Germ. 1.133–34): enslavement of a female slave owner who has sexual relations with her own slave but succeeds in gaining asylum in a church
- Lex Visig. 3.2.6 (Antiqua, MGH LL nat. Germ. 1.137): enslavement of both a woman whose husband had been missing and any man who was her lover if these married and later the missing husband returned
- Lex Visig. 3.3.1–2 (Antiqua, MGH LL nat. Germ. 1.139–41): enslavement of the kidnapper of a freeborn female who violates his victim
- Lex Visig. 3.3.11 (Chindaswinth, MGH LL nat. Germ. 1.144–45): enslavement of those who solicit adultery with another man's wife
- Lex Visig. 3.4.1 (Antiqua, MGH LL nat. Germ. 1.147): enslavement for raping another man's wife, and of an adulterous couple if the woman consents to the sex
- Lex Visig. 3.4.2 (Antiqua, MGH LL nat. Germ. 1.147–48): enslavement of a betrothed female who commits adultery
- Lex Visig. 3.4.3 (Antiqua, MGH LL nat. Germ. 1.148): enslavement of a couple convicted of adultery after the fact
- Lex Visig. 3.4.9 (Antiqua, MGH LL nat. Germ. 1.150–51): enslavement of a woman for marrying a man who is already married
- Lex Visig. 3.4.12 (Chindaswinth, MGH LL nat. Germ. 1.151–52): enslavement of an adulterous wife
- Lex Visig. 3.4.13 (Erwig, MGH LL nat. Germ. 1.152–55): enslavement of an adulterous couple when a third party brings the accusation
- Lex Visig. 3.4.14 (Antiqua, MGH LL nat. Germ. 1.155–56): enslavement for raping a widow
- Lex Visig. 3.6.1 (Antiqua, MGH LL nat. Germ. 1.166–67): enslavement of a couple for marrying while a divorce is pending
- Lex Visig. 3.6.2 (Chindaswinth, MGH LL nat. Germ. 1.167–68): enslavement of an adulterous wife

⁸⁸ Conc. Aurelianense I (a. 511) (CCSL 148A.5) can. 2 offers the related principle that abductors who had fled to the church were to be handed over to the father of the abductee for execution or enslavement if they had violated the girl, or for enslavement if the girl had consented.

- Lex Visig. 6.2.3 (Chindaswinth, MGH LL nat. Germ. 1.259): enslavement of a prisoner
- Lex Visig. 6.3.1 = Cod. Euric. Rest. 3 (Antiqua, MGH LL nat. Germ. 1.260): enslavement for administering abortifacients
- Lex Visig. 7.3.3 (Antiqua, MGH LL nat. Germ. 1.298–99): enslavement for kidnapping freeborn children
- Lex Visig. 11.1.6 [Erv.] (Antiqua, MGH LL nat. Germ. 1.402): enslavement of doctors for killing patients during a phlebotomy
- Lex Lang. Liut. 130 (MGH Leg. 4.163): enslavement of a male who fornicated with a married woman by her husband's consent to the relatives of that woman
- Edward & Guthrum 4 (Attenborough, 1922, 104): enslavement for incest (*syblegerum*), to the king for the male and to the bishop for the female.

The sheer number of offenses catalogued shows the way in which the *Wergeld* system of Germanic law became a powerful mechanism by which to effectuate enslavement following private legal disputes. Moreover, the concinnity of the evidence presented here is striking not just because the various Germanic codes are so many and varied – an indication that this method of punishment was a shared cultural practice – but also for two further important reasons.

First, classical Roman law would not have allowed a private plaintiff to settle a delictual suit through the enslavement of the defendant. Astonishingly, this fact has escaped mention by a number of contemporary scholars, who have argued for continuity with the Roman law tradition and have treated the private enslavement of plaintiffs for delictual offenses in post-Roman law as just another form of ‘penal enslavement’ akin to Roman *servitus poenae*.⁸⁹ It cannot be stressed enough that Roman penal slavery did not generate chattel slaves, while Germanic law operated on the default assumption that enslavement for delictual offenses *was* chattel slavery. Moreover, our late antique actors were aware that there was a difference across the two traditions. This is made particularly clear by comparing the provisions of the *Liber Constitutionum* and the *Lex Romana Burgundionum*, i.e. the two ‘personal’ codes issued respectively for ‘Barbarian’ and ‘Roman’ members of Burgundian society in 517. While both codes punish unmitigated homicides with death, the *Liber Constitutionum* says explicitly that it does so in lieu of a *Wergeld* composition and orders homicides perpetrated under mitigating circumstances (by accident or during a brawl) to be dealt with strictly through the *Wergeld* system.⁹⁰ The *Lex Romana Burgundionum*, by contrast, adopts elements of *Wergeld* only haltingly and with the explicit proviso that it does so because Roman law otherwise lacked any *Wergeld* system:

⁸⁹ Especially Rio, “Penal Enslavement” (n. 6); cf. Rio, *Slavery after Rome* (n. 6): 46–50.

⁹⁰ Burg. lib. const. 2.1–7 (MGH LL nat. Germ. 2.1.42–43).

But concerning the freeborn homicide who lodges within a church, a judgment must be awaited from the king concerning the monetary price for the murder victim; and because Roman law clearly makes no provision for monetary prices for those killed, Our Lord has established that the following must be observed: that if a freeborn person is killed by a freeborn person and the homicide takes asylum in a church, the one who committed the homicide should be handed over to the heirs of the dead man to serve as his slave, along with half of his property; the other half of his estate should be left to the heirs of the homicide.⁹¹

The mention of ‘Our Lord’ almost certainly references Gundobad, the father of king Sigismund under whom these two parallel codes were published. It thus highlights how the process of reconciling Burgundian and Roman law forced barbarian kings to grapple with the fact that the Roman law lacked any notion of *Wergeld*, the base structuring principle of Germanic law. This reality forced Gundobad (and in turn Sigismund) to apply valid Burgundian law in instances where a homicide was not simply to be executed, i.e. in cases involving asylum, for which the king imposed on the perpetrator the ‘price’ of enslavement to the family of the victim along with the loss of half his estate. Nothing could make it clearer that enslavement for delictual offenses, being as it was a sort of extension of *Wergeld* composition, was considered by contemporaries not to be ‘Roman law’.

Second, striking in the lists above is the degree to which Germanic law dealt with what it regarded as sexual offenses using personal enslavement. Of the 24 laws enslaving persons directly for their offense, 15 are offenses involving sexual transgressions. The situation is brought into clear focus with the single example of Lex Visig. 3.3.11, punishing those who attempted to force women into sexual relations by prescribing that they were to be:

arrested at the solicitation of a judge and handed over into the power of the man whose wife or daughter they are found to have been soliciting, so that the person whom either marital status or parental relationship holds up as the legal vindicator of this crime might have the freedom to make whatever judgment they wish concerning them.⁹²

This surrender of the body of the offender into the power of the male responsible for the female victim may seem to imply a whole range of options for the defendant’s fate, but as we have already indicated, the indefinite construction (‘whatever judg-

⁹¹ Burg. Rom. 2.5 (MGH LL nat. Germ. 2.1.126–27): *De ingenuo vero homicida intra ecclesiam posito de interempti precio principis est expectanda sententia; et quia de precii occisorum nihil evidenter Lex Romana constituit, dominus noster statuit observandum: ut si ingenuus ab ingenuo fuerit interemptus, et homicida ad ecclesiam confugerit, is ipse, qui homicidium admisit, cum medietate bonorum suorum occisi heredibus serviturus addicatur; reliqua medietas facultatis eius homicidae heredibus derelinquatur.* See also Burg. Rom. 2.1, in codex C5 (MGH LL nat. Germ. 2.1.125).

⁹² Lex Visig. 3.3.11 (MGH LL nat. Germ. 1.145): [. . .] *iudicis instantia comprehensi in eius potestate tradantur, cuius uxorem vel filiam sollicitasse repperiuntur; ut illi quoque de eis quod voluerint sit iudicandi libertas, quem vel coniugalis ordo vel parentalis propinquitas huius ultorem criminis legaliter esse demonstrat.*

ment he wishes') has a semantic range applying specifically to enslavement and more broadly to treating a person or thing as property. This fact sets the first part of our study in a new light, for in contrast with Roman norms (which were largely unconcerned with the sexuality of slaves provided their reproductive energy could be channelled toward the propagation of new enslaved children), the post-Roman western systems treated all manner of '*adulterium*' (an extremely broad category in Germanic law) as a personal affront which was to be punished severely by the offended party. This was especially true in cases involving the sexuality of one's free relatives, but it was even true when it involved one's slaves.

We can witness the effects of this draconian punishment of 'sex crimes' in Gregory of Tours' report that a certain cleric of the Urbs Cinomannica (Le Mans) initiated an adulterous relationship with another man's wife, inducing the couple to flee to another town; when the woman's family found out, they executed her by burning her alive; they then hoped to sell the offending cleric as a slave or, if a buyer could not be found, kill him; but instead he had the good fortune that his superior, Aetherius bishop of Lisieux, arranged to pay 20 gold pieces to redeem him – the normal price for adult slaves in this period.⁹³ The same principles also affected the decision at the Third Council of Toledo in 589 to deal with the problem of clerics who persisted in sexual relationships with the women who had been their wives before they converted from Arian to Nicene Christianity. Because Nicene clerics were forbidden to marry, their ongoing sexual relations with their wives represented a form of *adulterium*; to deal with this problem, the council chose a classic Germanic solution: enslave the women and sell them off, then piously donate the proceeds to the poor.⁹⁴ For all that Chindaswinth himself regularly activated this same tradition of enslaving persons for sexual offenses, in keeping with his broader concern for the fate of the oppressed, he also took pains to protect his subjects from the extortionate behaviour that the Germanic tradition of personal enslavement for 'sex crimes' could elicit from the property holding classes. Thus, he issued a law punishing any master who deliberately pretended his male slave was free so as to entice a free woman to marry him, then – after revealing the male's enslaved status – to impress the free woman into slavery. To counter this, Chindaswinth ordered that such deceptive masters should suffer *infamia*, be forced to regard the male slave they had pretended was free as in fact free, and even surrender any property they had promised the free woman for her bride price unto her.⁹⁵

When the documentary record for Iberia becomes more robust in the tenth century, we find regular attestations of just this sort of high-handed behaviour on the part of landowners with the regular enslavement of women and men for various

⁹³ Greg. Tur. Franc. 6.36; cf. 9.38.

⁹⁴ Conc. Toletanum III (a. 589) can. 5; Conc. Spalense I (a. 590) can. 3; cf. Conc. Toletanum VIII (a. 653) can. 5.

⁹⁵ Lex Visig. 3.2.7.

forms of sexual offense they are alleged to have committed with their slaves.⁹⁶ The same could be said of eleventh-century France, where the *Book of Serfs* of Marmoutier employs the same legal principles to ensure that mixed marriages between free and slave always resulted in the enserfment of the free spouse and of the resultant offspring.⁹⁷ Germanic law's strict norms of sexual regulation and its distinctive practice of subjecting violators to personal chattel enslavement – sometimes without even the option of reconciliation through a composition – could thus serve to entrap people into servitude in consequence of fulfilling their human urges.⁹⁸ It seems then that once this characteristically Germanic legal mechanism was locked in place, it displayed remarkable powers of endurance.

Further sealing the case for the distinctly Germanic character of this sort of enslavement for adultery is a law from Ostrogothic Italy issued as part of an edict of King Athalaric in 533/534 and preserved in Cassiodorus's *Variae*:

But if someone disdains the honourability of marriage and with excessive and foul desire chooses to enter the embraces of a concubine: if she (i.e. the concubine) happens to be freeborn, let her be fully subjected to the yoke of slavery (*iugo servitutis*) along with her children to his wife in order that she (the concubine) might know that by honest judgments she has been set beneath that person (the wife) over whom she thought she could be made superior through illicit love. But if an enslaved woman (*ancilla*) arrives at such disgraceful behaviour, she should be subjected to the wife's vengeful punishment (*matronali ultioni*), but without bloodshed, in order that she might endure having that person as her judge whom, when absent, she should have feared.⁹⁹

Despite the fact that Ostrogothic law, especially the law reflected in the *Edictum Theodorici*, generally follows Roman precedent, this ruling stands out for having nothing

⁹⁶ See Adam J. Kosto and Adam C. Matthews, "The Liber Iudiciorum and Iberian Legal History in the Medieval Documentary Record," in *Visigothic Law from Antiquity to Modernity: Essays on the Liber Iudiciorum*, ed. Damián Fernández and Noel Lenski (Cambridge: forthcoming); Graham Barrett, "The Transmission of the Liber Iudiciorum in the Early Middle Ages," in *Visigothic Law from Antiquity to Modernity: Essays on the Liber Iudiciorum*, ed. Damián Fernández and Noel Lenski (Cambridge: forthcoming); cf. Paul Freedman, *The Origins of Peasant Servitude in Medieval Catalonia*, Cambridge Iberian and Latin American Studies (Cambridge: Cambridge University Press, 1991): 79–83, 106–18.

⁹⁷ Paul Fouracre, "Marmoutier and Its Serfs in the Eleventh Century," *Transactions of the Royal Historical Society* 15 (2005): 29–49.

⁹⁸ The conceptual apparatus underpinning this legally constructed reality spawned the proverb, 'trittst Du mein Huhn, so wirst Du mein Hahn' ('If you mount my hen, then you'll be my rooster'), Wilhelm Körte, *Die Sprichwörter und sprichwörtlichen Redensarten der Deutschen* (Leipzig: Brockhaus Verlag, 1847): 217 no. 2973.

⁹⁹ Cassiod. Var. 9.18.8: *Si quis autem superflua turpique cupidine coniugali honestate despecta ad concubinae elegerit uenire complexus: si ingenua fuerit, iugo servitutis cum filiis suis modis omnibus addicatur uxori, ut illi se per honesta iudicia sentiat subdi, cui per illicitam libidinem credidit posse praeponi. Quod si ad tale flagitium ancilla peruenerit, excepta poena sanguinis matronali subiaceat ultioni, ut illam patiatur iudicem, quam formidare debuisse absentem.* On this edict, see Schmidt-Hofner and Wiemer, "Die Politik der Form" (n. 30): 384–87.

to do with Roman law. In a late antique context, the prohibition on married men keeping a concubine was settled law, but Roman law ordered only the separation of the pair, not the enslavement of the female.¹⁰⁰ Instead, this ruling coincides entirely with what we find in the Germanic codes – personal enslavement of the adulterer to the offended party for them to do with them as they wished. Indeed, the similarity between the language and sentiments of this law and that of the Visigothic law cited above (Lex Visig. 3.3.11) confirms that the two pronouncements are part of a shared tradition that appears to be distinctly Gothic. And this in turn sets in high relief Justinian's indignity expressed at both Cod. Iust. 7.24.1 and *Pragmatic sanction* § 15 with the '*ferocitas hostium*' and '*Gothica ferocitas*' he witnessed in the Gothic tendency to force persons into slavery for their sexual transgressions, as discussed in the first section of this study. The pointed dialogue between the two traditions becomes even clearer when we consider that the first of these Justinianic laws was issued in 530/531, immediately before Athalaric's pronouncement of 533/534, and the second in 554, immediately after Justinian gained full control of Italy from the Goths. The timing, the principles, and the wording of these various rulings make it clear that they arise from two distinct traditions whose operators were conscious of these divergences and persisted in pursuing distinctive solutions to the question of transgressive sexuality and human freedom in opposition to one another.

5 Post-Roman Self Sale and Enslavement for Debt and their Roots in the *Wergeld* Principle

Because Germanic legal systems revolved around settlements effectuated through *Wergeld* compositions, these could regularly lead to enslavement for debts amassed when a convicted defendant could not afford to pay the money composition prescribed for a given offense. Thus, in addition to the 24 separate laws listed above in which defendants found guilty of a specific offense were automatically condemned 'to act as a slave' (*servire*) to their plaintiff, we also have 29 which use enslavement to the plaintiff as an alternative punishment for perpetrators who lacked the financial means to pay a composition. In the same vein, the Visigothic Code explicitly equates debt amassed through credit with debt obligations arising from delictual settlements in a law granting collective ownership over any defendant who might have had unpaid credit and delictual obligations.¹⁰¹ Of course, such a system readily invited abuse on the part of the powerful, so much so that laws had to be issued to impede 'the awful greed of perverse per-

¹⁰⁰ Paul. Sent. 2.20.1; cf. Cod. Iust. 5.26.1, a. 326; cf. Antti Arjava, *Women and Law in Late Antiquity* (Oxford: Oxford University Press, 1996): 205–10.

¹⁰¹ Lex Visig. 5.6.5 (MGH LL nat. Germ. 1.233).

sons' that was inclined to ensnare innocent people into slavery through fraudulent claims.¹⁰²

It is in this context that we can better understand the abundance of 'self-sale' documents attested for the early medieval period. These are transmitted to us especially in the Merovingian formularies – handbooks of pre-written legal documents dating to the late sixth through early eighth centuries. A considerable number of these lay out provisions by which their signatories could commit themselves to enslavement to a plaintiff because of their inability to pay a composition for some offense:

- Formulae Andecavenses 2 (MGH Form. 5): enslavement for failure to pay a composition for theft
- Formulae Andecavenses 3 (MGH Form. 6): enslavement for failure to pay a composition for theft
- Formulae Marculfi 2.28 (MGH Form. 28): enslavement to a third party who had paid a compensation on behalf of the person being enslaved because of an unspecified offense
- Formulae Salicae Bignonianae 14 (MGH Form. 233): enslavement for failure to pay a composition for the negligent destruction of property on deposit
- Formulae Salicae Bignonianae 27 (MGH Form. 237): enslavement for failure to pay a composition for burglary of the victim's storehouse
- Formularum Pithoei Fragmenta 75 (MGH Form. 598): enslavement for the failure to pay a composition for theft.

The sixth-century poet Venantius Fortunatus offers us literary testimony to the same process in a poem lamenting the fate of a peasant girl who had been wrongly accused of theft. Lacking the means to pay the composition, she was taken into slavery by her plaintiff, leaving Venantius with little recourse but to seek support from his friend, Gregory of Tours. We have no idea how the case turned out, but given that the girl's family was poor and could not muster oathhelpers to defend her innocence, the law would not have been on her side.¹⁰³ We also have at least one document of practice that seems to point in the same direction. *Pizarra* 40, a Visigothic legal slate recovered from Diego Álvaro in northern Spain, records a *Professio de ser[vitute]* which, although fragmentary, seems to describe litigation (*lirigare*) between two parties, (H)un-

¹⁰² Lex Visig. 2.5.8 (MGH LL nat. Germ. 1.109): *dira perversorum cupiditas*; cf. Lex Visig. 5.7.5 (MGH LL nat. Germ. 1.236). And, in Ostrogothic Italy, see Edict. Theodor. 8; 9.9 and Cassiod. Var. 5.29; 5.30; 8.28; 9.5, which offer support to various individuals whose *ingenuitas* had been challenged over property claims.

¹⁰³ Venant. Fort. Carm. 5.14 (MGH AA 4.21).

igildus and Froilanus, over fraud (*fraude*) which results in Froilanus's enslavement to serve as a labourer in the strawberry fields at the 'House of Busanus'.¹⁰⁴

To be sure, many other self-sale formularies were written so as to enable their signatories to surrender themselves into servitude because of financial distress brought on by food scarcity, credit default, or other forms of financial ruin.¹⁰⁵ Even here, however, we cannot help but notice the influence of Germanic practice, especially because of our knowledge that Germanic law assigned a monetary value to every individual, whether freeborn, freed, or enslaved, while Roman law stubbornly refused to assign money values to free individuals on the grounds that their worth should never be quantified.¹⁰⁶ This Roman reticence by all means introduced problems of its own, for it made it all but impossible for individuals whose body had been harmed through some unjust action to obtain damages under the Roman statute for the recuperation of damages, the *lex Aquilia*; this fact forced plaintiffs to turn for redress instead to the delictual law of *iniuria*, a tricky avenue given the very personal nature of this offense.¹⁰⁷ In the Germanic legal environment, by contrast, all human bodies were treated as monetizable with their status being one important factor in the determination of their worth. In this environment, status itself could be treated as a commodity and could therefore be bargained with as a unit of exchange when debts arose – whether through credit or delict. This baseline reality must be reckoned with if we hope to understand the regular occurrence of enslavement for torts so common in the Germanic tradition.

It also goes most of the way toward explaining why the post-Roman formularies regarding self-sale sometimes divide personal status into parts – 'full freedom' or

104 Isabel Velázquez Soriano, *Las pizarras visigodas (Entre el latín y su disgregación: la lengua hablada en Hispania, siglos VI–VIII)*, Colección Beltenenebros 8 (Burgos: Fundación Instituto Castellano Leonés de la Lengua, 2004): 219–34.

105 *Formulae Andececavenses* 19; 25; 35; 38 (MGH Form. 10–12, 16, 17); *Formulae Marculfi* 2.27 (MGH Form. 93); *Formulae Turonenses* 10 (MGH Form. 140–41); *Cartae Senonicae* 4 (MGH Form. 10-1216-17, 93, 150, 187). Compare details on self-sale in Carolingian capitularia at *Decretum Vermeriense* cap. 6 (MGH Capit. I no. 16 p. 40, a. 758/768); *Capitula Legi Salicae Addita* cap. 6 (MGH Capit. I no. 142 p. 292, a. 819); *Memoria Olonnae Comibitus Data* cap. 1 (MGH Capit. I no. 158 p. 317, a. 822–823); *Canones Extravagantes Concilio Triburiensi Addicti* can. 2 (MGH Capit. II no. 252 p. 247, a. 895). Rio, "High and Low" (n. 6) describes the spectrum of dependency relationships possible in early medieval society.

106 On this point see Lenski, "Law and Language" (n. 8): 381–82, contra P.S. Barnwell, "Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West," *Past & Present* 168, no. 1 (2000): 6–29.

107 More on the *lex Aquilia* and *iniuria* at W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1921): 580–88; Jill Harries, *Law and Crime in the Roman World, Key Themes in Ancient History* (Cambridge: Cambridge University Press, 2007): 46–50; cf. Max Kaser, *Das Römische Privatrecht*, vol. 2, *Die nachklassischen Entwicklungen* (Munich: C.H. Beck, 1975): 437–40.

'half freedom'.¹⁰⁸ Alice Rio has posited that such differentiation results from the negotiation of terms between enslaver and dependent and that they therefore show the power of subaltern actors to cushion the impact of their descent into unfreedom by skillful bargaining.¹⁰⁹ This may be true of those documents reporting the creation of dependency relationships wherein the subaltern party seeks patronage or subsistence relief, especially through new forms of dependency in the early medieval west such as *precaria* or *censualitas*. But a careful reading of the sources for enslavement for delictual or credit debt shows that the options in these cases were really just two: loss of full status or half status. This *numerus clausus* was a corollary of Germanic law's widespread practice of breaking status into the three levels – full freedom, half freedom, and enslavement, each with its own monetary value fixed by grade.¹¹⁰ The middle status shows up repeatedly across the Germanic codes, which name half-free persons '*leti*' in the Frankish tradition, '*aldii*' in the Lombardic, '*fralets*' in the Bavarian, and '*liberti*' in the Visigothic. While Rio is surely right that those in more solid negotiating positions were able to secure half-free status in their self-sales, the formulae themselves make it clear that the options were not so much a matter of negotiation as they were of selecting between the bad and the less bad.

6 Conclusion

We have seen that Roman and Germanic legal norms related to slaveholding differed in three instances: first in the enslavement of free men who established marital relations with another person's female slaves; second, in granting masters unrestricted

108 Full status: Formulae Andecavenses 2 (MGH Form. 5, *integrum statum*); 3 (MGH Form. 6, *integrum statum*); 17 (MGH Form. 10, *integrum statum*); 19 (MGH Form. 10–11, *integrum statum meum*); Formulae Arvernenses 5 (MGH Form. 31, *statum meum*); Formulae Turonenses 10 (MGH Form. 140–41, *statum ingenuitatis meae*); Cartae Senonicae 4 (MGH Form. 187, *de capud ingenuitatis meae*); cf. Formulae Andecavenses 18 (MGH Form. 10, *pro statum suum*); 25 (MGH Form. 25, *estatus nostros*); Formulae Visigothicae 32 (Ioannes Gil, in *Miscellanea Visigothica*, 2nd ed. (Seville: Secretariado de Publicaciones de la Universidad de Sevilla, 1991): 101–2, *statum meum*). Half status: Formulae Andecavenses 38 (MGH Form. 17, *statum meum medietatem*); cf. Formulae Marculfinae 2.27 (MGH Form. 93).

109 Rio, "Self-Sale" (n. 6); cf. Rio, "Freedom and Unfreedom" (n. 6): 27–32; Rio, *Slavery after Rome* (n. 6): 48–57, which is surely correct that self-sale in periods of economic or subsistence crises offered a new survival strategy in post-Roman contexts. Nevertheless, the failure to distinguish these instances from the abundant records for self-sale and enslavement resulting from delictual liability vitiates the broader argument.

110 See Peter Heather, "Roman Law in the Post-Roman West. A Case Study in the Burgundian Kingdom," in *Das Vermächtnis der Römer: Römisches Recht und Europa: Referate einer Vorlesungsreihe des Collegium Generale der Universität Bern im Frühjahrssemester 2011*, ed. Iole Fargnoli and Stefan Rebenich, *Berner Universitätsschriften* 57 (Bern: Haupt Verlag, 2012): 20–22; Lenski, "Law and Language" (n. 8): 395–96.

rights to murder their own slaves; and third, in the personal chattel enslavement of persons found guilty of committing delicts against a third party. None of these things was possible by Roman law, and in several instances we have seen that even our ancient sources were aware of these important differences. These divergences seem adequate to prove that Germanic societies had their own shared practices of slaveholding that arose independently of those of their Roman neighbours. After all, the Germanic states which replaced Roman hegemony in the western empire grew out of societies which were themselves slaveholding even before they encountered Rome. As such they developed their own culturally specific slaveholding norms and practices. Many of these divergences between the Roman and Germanic law of slavery grew out of the distinctly Germanic legal concept of *Wergeld*, with its universal monetary valuation of bodies and its use of systems of fractional valuation to settle legal disputes. By deploying the value assigned to human bodies as a mechanism for the monetary resolution of torts, the *Wergeld* system made the enslavement of individuals for transgressions unproblematic and vested in the master expansive rights to abuse and even eliminate the bodies of humans under his ownership according to his will. Here again, this was not Roman law and thus continues to point to a distinctly Germanic strain in western practice that should no longer be denied.

