

Dominik Leyendecker

The Punishment of *servi* in Merovingian and Carolingian Legal Texts

1 Introduction

Early medieval legal systems in post-Roman Europe¹ were usually built on compensatory payments. These payments applied even to severe offenses such as homicide and rape.² The sum that an offender had to pay in order to compensate for killing or injuring another person – known as *wergild* – was determined by the legal status of the person harmed and the severity of the crime committed. For example, in the *Lex Salica*, which was codified around the year 500,³ the *wergild* of a free Frank is set at two hundred *solidi*⁴ and that of a Roman at one hundred *solidi*,⁵ while the killing of a *servus* or *ancilla* requires the payment of thirty *solidi* as compensation.⁶ The *wergild* sys-

1 On the kingdoms in the post-Roman world, see the various contributions in Hans-Werner Goetz et al., eds., *Regna and Gentes. The Relationship between Late Antique and Early Medieval Peoples and Kingdoms in the Transformation of the Roman World*, vol. 13, *Transformation of the Roman World* (Leiden: Brill, 2003). The question concerning those kingdoms being of “Germanic” origin is discussed in Guy Halsall, “Two Worlds Become One: A ‘Counter-Intuitive’ View of the Roman Empire and ‘Germanic’ Migration,” *German History* 4, no. 32 (2014): 515–32. See also Matthias Friedrich and James M. Harland, “Introduction: The ‘Germanic’ and its Discontents,” in *Interrogating the ‘Germanic’: A Category and its Use in Late Antiquity and the Early Middle Ages*, *Ergänzungsbände zum Reallexikon der Germanischen Altertumskunde* 123, ed. Matthias Friedrich and James M. Harland (Berlin: De Gruyter, 2021): 1–18.

2 An overview on *wergild* is provided in Stefan Esders, “*Wergild*, Compensation and Penance: *Wergild* and the Monetary Logic of Early Medieval Conflict Resolution,” in *Wergild, Compensation and Penance. The Monetary Logic of Early Medieval Conflict Resolution*, ed. Lukas Bothe et al., *Medieval Law and its Practice* 31 (Leiden: Brill, 2021): 1–37.

3 A detailed account of the dating of the *Lex Salica* is found in Karl Ubl, *Sinnstiftungen eines Rechtsbuchs – Die Lex Salica im Frankenreich*, *Quellen und Forschungen zum Recht im Mittelalter* 9 (Ostfildern: Jan Thorbecke, 2017): 54–66.

4 See Karl August Eckhardt, ed., *Pactus Legis Salicae* 41.1, *leges nationum Gemanicarum*, MGH LL nat. Germ. 4,1 (Hannover: Harassowitz Verlag, 1962): 154: *Si quis <uero> ingenuum Francum aut barbarum, qui lege Salica uiuit, occiderit, cui fuerit adprobatum, mallobergo leodi sunt, VIIIM denarios qui faciunt solidos CC culpabilis iudicetur*. The *wergild* could be increased under certain circumstances. For example, if the victim was *in truste dominica* or a free woman, the compensatory payment amounted to six hundred *solidi* (*Lex Sal.* 41.5, 156). On *wergild* tariffs and (legal) status in various legal systems, see Lisi Oliver, *The Body Legal in Barbarian Law* (Toronto: University of Toronto Press, 2011): 203–26.

5 See *Lex Sal.* 41.9, 157 (n. 4). For a *Romanus homo*, *conuiuia regis*, the *wergild* was tripled (*Lex Sal.* 41.8, 157). A *Romanus tributarius* required a *wergild* of 62 ½ *solidi* (*Lex Sal.* 41.10, 157).

6 *Lex Sal.* 35.9, 132 (n. 4): *Si quis uassum ad ministerium, quod est horogauo, puellam ad ministerium aut fabrum ferrarium uel aurificem aut porcarium <uel uinitorem aut stratorem> furauerit aut occiderit, cui fuerit adprobatum, mallobergo t(e)xaga aut amb(ah)t(o)nia sunt, MCC denarios qui faciunt sol-*

tems and tariffs of the Franks, Lombards and Saxons, among others, have been studied extensively by recent scholarship.⁷ Another aspect of this compensatory logic found in Frankish legal sources has, however, received far less scholarly attention: It is not only the legal status of the victim which has implications on how a given crime is compensated – the legal status of the perpetrator is relevant as well. According to Lex Salica, title 11.1, the theft of an object with a value of two *denarii* is compensated with a payment of six hundred *denarii* or fifteen *solidi*.⁸ By contrast, title 12.1 of the Lex Salica deals with the theft of an object of the same value (two *denarii*) by a *servus*. In this case, the crime is compensated with one hundred twenty lashes, the penalty therefore being corporal punishment rather than monetary compensation.⁹ The Lex Salica also provides an alternative to corporal punishment in cases involving unfree perpetrators: The aforementioned punishment of one hundred twenty lashes can be replaced by the payment of one hundred twenty *denarii* or three *solidi*. The fine charged for the same offense therefore is significantly lower in case of an unfree perpetrator.

In addition to the different nature of punishment depending on the convict's legal status, it has been frequently observed that Merovingian legal texts include an option for *servi* to avoid corporal punishment by paying one *denarius* per lash (one hundred twenty lashes commonly require the payment of one hundred twenty *denarii*).¹⁰ Beyond this, however, recent scholarship has largely ignored the provisions of Frankish Law for crimes committed by *servi*.¹¹ Paul Leseur's *Des conséquences du délit de l'e-*

idos XXX culpabilis iudicetur. Inter fre(d)o et faido sunt MDCCC denarii qui faciunt solidos XLV >excepto capitale et dilatura>. In summa sunt simul solidi LXXXV. The title requires the payment of forty-five *solidi* as a *fredus* in addition to the initial payment. Jan F. Niermeyer and Co van de Kieft, *Mediae Latinitatis Lexicon Minus* (Leiden: Brill, 2002): 593–94 define the *fredus* as a “fine to be paid to the public authority in addition to the payment of an indemnity to the injured party, at first as a reward for the action taken by public authority in behalf of restoration of the peace, later as a punishment for infringement of the law.” A *fredus* is not mentioned in Lex Sal. 41.

7 See, for example, the various articles in Bothe et al., eds., *Wergild, Compensation and Penance* (n. 2).

8 Lex Sal. 11.1, 55 (n. 4): *Si quis <uero> ingenuus deforis casa quod ualet duo denarii, furauerit <cui fuerit adprobatum>, mallobergo leodardi sunt, DC denarios qui faciunt solidos XV culpabilis iudicetur excepto capitale et dilatura.*

9 Lex Sal. 12.1, 58 (n. 4): *Si quis seruus <de>foris casa, quod ualet duo denarii, furauerit et ei fuerit adprobatum, mallobergo falcono sunt, except capitale et dilatura <aut> CXX flagellus <extentus> accipiat aut CXX denarios qui faciunt solidos III <pro dorsum suum> reddat.*

10 See, for example, Heinrich Brunner and Claudius von Schwerin, *Deutsche Rechtsgeschichte*, vol. 2 (Berlin: Duncker & Humblot, 1928): 787; Katherine Fischer-Drew, *The Laws of the Salian Franks* (Philadelphia: University of Pennsylvania Press, 1991): 77; Paul Friedland, *Seeing Justice Done: The Age of Spectacular Capital Punishment in France* (Oxford: Oxford University Press, 2012): 31–32; Maximilian McComb, *Strategies of Correction. Corporal punishment in the Carolingian Empire, 742–900* (New York: Cornell University, 2018): 166.

11 In addition to the studies cited in n. 10, some studies briefly mention the general differentiation between punishment for the free and the unfree. See, for example, Paul Fouracre, “‘Placita’ and the Settlement of Disputes in Later Merovingian Francia,” in *Settlement of Disputes in Early Medieval Eu-*

slave dans les Leges Barbarorum et dans les Capitulaires,¹² first published in 1888, still represents the fullest discussion of the topic. The most recent study to address the punishment of *servi*, at least in some detail, is Hermann Nehlsen's *Sklavenrecht zwischen Antike und Mittelalter* from 1972.¹³ Nehlsen, however, only covered Frankish Law from the Merovingian period, and his study did not account for potential changes in legal texts that might have emerged under the Carolingians. Concerning this, Maximilian McComb recently claimed that the Carolingian strategies of punishment had largely been based on the norms of the *Lex Salica*.¹⁴ However, a specific difference has already been identified between Merovingian and Carolingian legal texts: As briefly noted by Heinrich 10, capitularies from the reign of Louis the Pious require the payment of one *solidus* per lash, rather than one *denarius*, if a *servus* is found guilty of a crime and wants to avoid corporal punishment.¹⁵

rope, ed. Wendy Davies and Paul Fouracre (Cambridge: Cambridge University Press, 1986): 37–38; Paul Fouracre “Attitudes towards Violence in Seventh- and Eighth-Century Francia,” in *Violence and Society in the Early Medieval West*, ed. Guy Halsall (Rochester: Boydell Press, 1998): 72.

12 Paul Leseur, *Des conséquences du délit de l'esclave dans les Leges Barbarorum et dans les Capitulaires* (Paris: Hachette Livre, 1889).

13 Hermann Nehlsen, *Sklavenrecht zwischen Spätantike und Mittelalter. Germanisches und römisches Recht in den germanischen Rechtsaufzeichnungen*, Göttinger Studien zur Rechtsgeschichte 7 (Göttingen: Musterschmidt, 1972).

14 McComb, *Strategies of Correction* (n. 10): 163–65. This was already noted by Edwin Mayer-Homberg, *Die fränkischen Volksrechte im Mittelalter – Eine rechtsgeschichtliche Untersuchung in drei Bänden*, vol. 1, *Die fränkischen Volksrechte und das Reichsrecht* (Weimar: Böhlau, 1912): 72–99.

15 Brunner, *Deutsche Rechtsgeschichte 2* (n. 10): 787. See also McComb, *Strategies of Correction* (n. 10): 167. While Brunner failed to provide sources to support his claim, McComb referred to c. 5 of the so-called *Concilium Francofurtense*. The chapter that McComb quoted (id. 166) from the MGH Concilia edition (Albert Werminghoff, ed., *MGH Conc. 2,1* [Hannover: Hahnsche Buchhandlung, 1906]: 166) does not, however, include the said ratio. In Alfred Boretius' edition of the Capitulary (Alfred Boretius, ed., *MGH Capit. 1* [Hannover: Harassovitz Verlag, 1883]: 73–78, 74), which does not vary significantly from Werminghoff's later edition, the chapter reads: *De denariis autem certissime sciatis nostrum edictum, quod in omni loco, in omni civitate et in omni empturio similiter vadant isti novi denarii et accipiantur ab omnibus. Si autem nominis nostri nomisma habent et mero sunt argento, pleniter pensantes, si quis contradicit eos in ullo loco in aliquo negotio emptionis vel venditionis: si ingenuus est homo, quindecim solidos componat ad opus regis; si servilis conditionis, si suum est illud negotium proprium, perdat illud negotium aut flagelletur nudus ad palam coram populo; si autem ex iussione sui domini fecerit, tunc ille dominus solidos quindecim componat, si ei adprobatum fuerit.* On the capitulary issued by Charlemagne in 794, see Hubert Mordek, “Zur Bedeutung des Frankfurter Kapitulars Karls des Großen,” in *794 – Karl der Große in Frankfurt am Main. Ein König bei der Arbeit. Ausstellung zum 1200-Jahre-Jubiläum der Stadt Frankfurt am Main*, ed. Johannes Fried (Sigmaringen: Thorbecke, 1994): 46–50. It seems likely that McComb, *Strategies of Correction* (n. 10): 406 accidentally quoted the Capitulary of Frankfurt rather than c. 18 of the *Capitula legibus addenda* issued by Louis the Pious. The latter chapter also discusses the punishment of people who refuse to accept “good coins” and in fact mentions the ratio of sixty *solidi* or sixty lashes. See *Capitula legibus addenda* c. 18, *MGH Capit. 1*, 285: *De his, qui bonos denarius accipere nolunt. Quicumque liber homo denarium merum et bene pensantem recipere noluerit, bannum nostrum, id est sexaginta solidos, componat. Si vero servi ecclesiastici aut comitum*

The question of continuities and discontinuities between the Merovingian and Carolingian legislative approaches to the punishment of the unfree has so far not been discussed in detail.¹⁶ Therefore, it appears necessary to analyze the hypothesis of a Carolingian continuation of Merovingian strategies in regard to penal law and how far this extends to such cases in which *servi* are involved. In this paper, I will first attempt to illustrate how normative texts from Merovingian Francia discuss the punishment of *servi*. After that, I will present the situation as found in Carolingian material in order to identify potential changes between the materials from the sixth and the ninth centuries.

It needs to be emphasized that the provisions found in the Lex Salica do not provide us with information on the scope of the practical implementation of its titles. Hence, we do not know to what extent customary practices are reflected in the punishments defined in it. As recently noted by Alice Rio, neither the Lex Salica nor the Carolingian capitularies deal with crimes committed (and sanctioned) within a household.¹⁷ How a *servus* was punished for stealing from his own *dominus* is therefore not discussed in the source material analyzed in this paper.¹⁸

aut vassallorum nostrorum hoc facere praesumpserint, sexaginta ictibus vapulent aut, si magister eorum vel advocatus, qui liber est, eos vel comiti vel misso nostro iussus praesentare noluerit, praedictum bannum sexaginta solidorum componat. On the *Capitula legibus addenda*, see Britta Mischke, “Kapitularienrecht und Urkundenpraxis unter Ludwig dem Frommen am Beispiel von Restitutionen aus Fiskalgut,” in *Zwischen Tradition und Innovation. Die Urkunden Kaiser Ludwigs des Frommen (814–840) (Abhandlungen der Nordrhein-Westfälischen Akademie der Wissenschaften und der Künste 128)*, ed. Theo Kölzer (Paderborn: Brill Schöningh, 2014): 101–17; Ubl, *Sinnstiftungen* (n. 3): 195–200. The provision is indirectly preserved in c. 8 of the *Capitula missorum Wormatiense* (MGH Capit. 2, ed. Alfred Boretius and Victor Krause, Hannover 1897, 15–16 in 14–17) from 829, which mentions equal punishment. The transmission is “indirect” as the chapter from 829 directly refers to c. 4, 30 from the capitulary collection of Ansegis: *Die Kapitulariensammlung des Ansegis. Collectio capitularium Ansegisi* (MGH Capitularia regum Francorum NS 1), ed. Gerhard Schmitz (Hannover, 1996): 641, which represents c. 18 of the *Capitula legibus addenda*. On the capitulary collection of Ansegis, see, for example, Takuro Tsuda, “Was hat Ansegis gesammelt? Über die zeitgenössische Wahrnehmung der ‘Kapitularien’ in der Karolingerzeit,” *Concilium medii aevi* 16 (2013): 209–31; Stuart Airlie, “‘For it is Written in the Law’. Ansegis and the Writing of Carolingian Royal Authority,” in *Early Medieval Studies in Memory of Patrick Wormald*, ed. Stephen Baxter et al. (Farnham: Routledge, 2009): 219–36. On the *Capitula missorum Wormatiense*, see Veronika Lukas, “Die Wormser Kapitularien von 829,” *Studien und Texte zu Benedictus Levita*, 23.03.2005, <http://www.benedictus.mgh.de/studien/studien.htm> [accessed 03.11.2022].

¹⁶ The aforementioned study by McComb, *Strategies of Correction* (n. 10): 163–67 offers the most detailed account on the matter. Aside from the different rate of one lash per *solidus* rather than per *denarius*, as noted by Brunner, *Deutsche Rechtsgeschichte* 2 (n. 10), McComb does not address aspects of continuity/discontinuity in detail.

¹⁷ Alice Rio, “Corporal Punishment at Work in the Early Middle Ages: The Frankish Kingdoms (Sixth through Tenth Centuries),” *International Review of Social History* 68, no. 31 (2023): 87–90.

¹⁸ The synods held in Merovingian Francia frequently discussed *servi* fleeing and seeking asylum in the church in order to escape punishment by their owners. See, for example, *Concilium Aurelianense*

2 Merovingian Foundations: The Punishment of *servi* in the Lex Salica

As stated above, the tendency in recent scholarship has been to emphasize two aspects of penal law for the unfree, as found in Merovingian sources: The first is the fact that punishment depended on status, with the free paying a fine and the unfree being subjected to corporal punishment. The second concerns the option to redeem a *servus* from corporal punishment through the payment of a fine, at a rate of one *denarius* per lash.¹⁹

Concerning the first of those aspects, the Merovingian source material is consistent. Whenever the punishment of a *servus* is explicitly mentioned, it differs from that of a free perpetrator. Moreover, corporal punishment is always mentioned as an option, even though the character of the corporal punishment varies.

The second aspect – involving a possibility to avoid physical punishment through the payment of a fine calculated at a rate of one *denarius* per lash – is less straightforward than what the brief assessments in many recent studies would imply: In the earliest known version of the Lex Salica²⁰ – commonly referred to as version A – only titles 12.1,²¹ 25.6–7²² and 40.1–4 and 11²³ include provisions for the punishment of *servi* by means of lashes. In addition to these, titles 35.1 and 8 require the *dominus* of a *servus* who has killed someone to hand the perpetrator over to the damaged party;²⁴ titles 12.2,²⁵ 25.5²⁶ and 40.4²⁷ require an unfree perpetrator to be castrated²⁸ (or pay a fine); in title 40.5, a *servus* who has committed a crime that is compensated with two

541 can. 3, MGH Conc. 1, ed. Friedrich Maassen (Hannover 1893, 3–4); *Concilium Aurelianense* 549 can. 22, MGH Conc. 1, 107–8. On church asylum, see Brigitte Kasten, “Kirchliche Zufluchtsorte im Frühmittelalter,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 138 (2021): 29–100.

¹⁹ See n. 10 and 11.

²⁰ On the problem of dating of the Lex Salica, see again Ubl, *Sinnstiftungen* (n. 3): 54–66.

²¹ Lex Sal. 12.1, 58 (n. 4).

²² Lex Sal. 25.6–7, 95–96 (n. 4).

²³ Lex Sal. 40.1–4, 145–47; Lex Sal. 40.11, 153 (n. 4).

²⁴ When the victim is a free person, the *servus* is handed over, representing half of the wergild necessary, while the owner of the killer is liable for the payment of the other half (Lex Sal. 35.8, 131 [n. 4]). In the case of an unfree victim, the killer is divided between his owner and the owner of his victim (Lex Sal. 35.1, 128–29). Fischer-Drew, *The Laws* (n. 10): 97 interprets this as a division of the labor performed by the killer.

²⁵ Lex Sal. 12.2, 58 (n. 4).

²⁶ Lex Sal. 25.5, 94–95 (n. 4).

²⁷ Lex Sal. 40.4, 146–47 (n. 4).

²⁸ Nehlsen, *Sklavenrecht* (n. 13): 323–24, with n. 321 pointed out that castration as a punishment for non-sexual crimes is not found in any of the other Leges.

hundred *solidi* (when the victim is a free person) is sentenced to capital punishment.²⁹ Furthermore, in a chapter found in two manuscripts of version A, which is believed to be Merovingian,³⁰ a *servus* who either beats or unveils a free woman is to lose his hand or pay five *solidi* (a free perpetrator in this case would have to pay fifteen *solidi*).³¹ Now, how can the rather diverse situations found in the source material be condensed into a supposedly simple rate of one denarius per lash? It seems necessary to take a closer look at the mentioned provisions, beginning with those titles that contain one subtitle where the *servus* is sentenced to lashes, and another where he is sentenced to castration.³²

Lex Salica, title 12.1 discusses the punishment of a slave who is convicted of stealing an object worth two *denarii*. The title in Karl August Eckhardt's MGH edition reads: *Si quis servus <de>foris casa, quod ualet duo denarii, furauerit et ei fuerit adprobatum, mallobergo falcono sunt, excepto capitale et dilatura <aut> CXX flagellus <extentus> accipiat aut CXX denarios qui faciunt solidos III <pro dorsum suum> reddat.*³³ Title 12.2, however, presents a more severe case of theft, where an object with a value of forty *denarii* is stolen. It reads: *Si uero quod ualet XL denarii, furauerit, aut castretur aut CCXL denarios qui faciunt solidos VI reddat. Dominus uero serui <eius>, qui furtum fecit, capitale <et dilaturam> in locum restituat.*³⁴ The correspondence between lashes and compensatory payment is only mentioned in the first of the two prescriptions. A similar situation is found in titles 25.5–6: Title 25.5 presents the more severe crime – the rape of an *ancilla* by a *servus*, resulting in the death of the *ancilla* – which is punished with castration, as in 12.2, or with the payment of two hundred forty *denarii*.³⁵ Title 25.6 decrees that the rape of an *ancilla* by a *servus*, when it does not result in the death of the *ancilla*, is to be punished with either one hundred twenty or three hundred lashes (depending on the manuscript),³⁶ or with a compensatory payment of one

²⁹ Lex Sal. 40.5, 148–49 (n. 4). The option to avoid capital punishment by paying a fine of fifteen *solidi*, which is included in Eckhardt's edition, is only found in the Carolingian Lex Salica versions, while no manuscript from either version A or C includes that option.

³⁰ Karl A. Eckhardt, *Pactus Legis Salicae. 1.1 Einführung und 80 Titel-Text* (Göttingen: Musterschmidt, 1954): 160–61; Nehlsen, *Sklavenrecht* (n. 13): 325.

³¹ Lex Sal. 104.1 and 3, 260 (n. 4). The title is included in the manuscripts called A1 and A2 in Eckhardt's edition. Furthermore, it is found in the manuscript that Eckhardt called K17. On manuscripts A1 and A2, see n. 44 and 45. On Leiden, Bibliotheek der Rijksuniversiteit, Voss. Lat. Q. 119 (K17), see Hubert Mordek, *Bibliotheca capitularium regum Francorum manuscripta. Überlieferung und Traditionszusammenhang der fränkischen Herrschererlasse*, MGH Hilfsmittel 15 (Munich: MGH, 1995): 210–17. Mordek dated the manuscript to the late ninth (foll. 1–119) and early tenth centuries (foll. 120–41).

³² The titles in question are Lex Sal. 12.1–2; 25.5–6 and 40.1–4+11 (n. 4).

³³ Lex Sal. 12.1–2, 58 (n. 4).

³⁴ *Ibid.*

³⁵ Lex Sal. 25.5, 94–95 (n. 4).

³⁶ The matter is discussed in detail below.

hundred twenty *denarii*.³⁷ Titles 12.1–2 and 25.5–6 of the *Lex Salica* therefore apply the same rate, which makes it reasonable to assume that the offense covered in title 25.7 – the marriage between a *servus* and an *ancilla aliena* without the consent of the *dominus* of the latter – is also punished with either one hundred twenty lashes or one hundred twenty *denarii*. The fact that we have to make such an assumption can be ascribed to Eckhardt's edition of the title, which reads: *Si seruus ancillam alienam extra uoluntate domini sui <sibi> in coniugium sociaverit, mallobergo anthamo, <aut uapul(e)t(ur) aut> CXX denarios qui faciunt solidos III domino ancillae co(g)atur*.³⁸ A closer look at the individual manuscripts of version A, however, shows that only one of the four – Wolfenbüttel Herzog August Bibliothek, Cod. Guelf. 97 Weiss.³⁹ – vaguely includes the option of corporal punishment, while the remaining three only mention the compensatory payment of one hundred twenty *denarii*. It is thus rather plausible that the use of corporal punishment is implied, and that it is supposed to be equal to that prescribed in the preceding title, 25.6.⁴⁰

Disregarding the discrepancies in the manuscripts with respect to title 25.6, the ratio of one *denarius* per lash is used for the lesser crime (compensated with one hundred twenty *denarii*), and the more severe offenses (compensated with two hundred forty *denarii*) are punishable by castration rather than two hundred forty lashes. The fact that the ratio of one *denarius* per lash still somewhat applies in those cases is illustrated by title 40.11, which reads: *Si uero ancilla in tale crimine inuenitur, unde seruus castrare debuerat, aut CCXL denarios qui faciunt solidos VI <culpabilis iudicetur>, si conuenerit <ut> pro ipsa dominus <hoc> reddat, aut CCXL ictos accipiat flagellorum*.⁴¹ Therefore, castration is in fact considered to be equivalent to two hundred forty lashes.

In comparison with the analysis above, where titles 12 and 25 have been shown to include a distinction between lesser and more severe crimes that is reflected in their respective punishments, title 40 in Eckhardt's edition varies in its prescription: The lesser crime – one where a freeman has to pay six hundred *denarii* or fifteen *solidi* as compensation – corresponds to a punishment of one hundred twenty lashes or the payment of one hundred twenty *denarii* / three *solidi*. This title only differs from the others in its separation of the two alternatives – compensation or lashes – into two

³⁷ Lex Sal. 25.6, 95 (n. 4).

³⁸ Lex Sal. 25.7, 96 (n. 4).

³⁹ On the manuscript, see Mordek, *Bibliotheca* (n. 31): 958–60. Mordek dated the manuscript to the second half of the eighth century. The manuscript is labeled as A2 in Eckhardt's edition (XIII–XIV) (n. 30). A digital copy of the manuscript is available at: <http://diglib.hab.de/mss/97-weiss/start.htm> [accessed 03.11.2022].

⁴⁰ The possibility that physical punishment was only supposed to be enforced for certain types of violent crimes, namely the ones made explicit in the respective chapters, cannot be ruled out. This does, however, appear to be unlikely.

⁴¹ Lex Sal. 40.11, 153 (n. 4).

chapters. This, however, may be attributed to a (questionable) editorial decision⁴² made by Eckhardt. While the scribe of the Wolfenbüttel manuscript (A2) may have considered the two paragraphs to be separate subtitles,⁴³ there is no such indication in Paris, BNF Lat. 4404 (A1)⁴⁴ and 9653 (A4)⁴⁵ and München, BSB Lat. 4115 (A3).⁴⁶ Hence, I believe that Eckhardt's titles 40.1–2 should be considered as one coherent subtitle, which would make the structure of the provision resemble that of 12.1 and 25.5.⁴⁷

The more severe case (*maior culpa*) discussed in Lex Salica 40.3 – one where a freeman has to pay thirty-five *solidi* in compensation – initially only required a payment of one hundred twenty *denarii*.⁴⁸ Here, one would have expected a harsher penalty – castration or additional lashes (most likely two hundred forty). And while A2

⁴² Eckhardt's edition of the Lex Salica (n. 4) has received plenty of criticism since its publication. The points of criticism were summarized by Wilfried Hartmann, "Brauchen wir neue Editionen der Leges?" in *Mittelalterliche Texte. Überlieferung – Befunde – Deutungen*, Schriften der MGH 42, ed. Rudolf Schieffer (Hannover: Hahnsche Buchhandlung, 1996): 233–36. Hartmann (ibid.: 243) concluded that a new edition of the Lex Salica (among other Leges) was necessary. To date, Eckhardt's edition remains the most recent edition of the Lex Salica.

⁴³ In the Wolfenbüttel manuscript (fol. 18v), Eckhardt's title 40.2 begins with a rubricated letter, indicating a new subtitle. The scribe, however, did not systematically use rubricated letters to indicate new subtitles. The remaining subtitles of title 40 (foll. 19r–20r) are not separated by such visual markers.

⁴⁴ On the manuscript, see Mordek, *Bibliotheca* (n. 31): 456–63. According to Mordek, the manuscript was written at the beginning of the ninth century, probably in Tours. Eckhardt (*Pactus legis Salicae* 1,1, 134 [n. 30]), who labeled the manuscript as A1, assumed a common exemplar for A1 and A2 concerning the Lex Salica and the *Pactus pro tenore pacis*. A digital copy of the manuscript is available at: <https://gallica.bnf.fr/ark:/12148/btv1b8426042t> [accessed 03.11.2022].

⁴⁵ On the manuscript, see Mordek, *Bibliotheca* (n. 31): 560–62. Mordek dated the manuscript to the mid-ninth century. A digital copy of the manuscript is available at: <https://gallica.bnf.fr/ark:/12148/btv1b10545842k> [accessed 03.11.2022].

⁴⁶ On the manuscript, see Mordek, *Bibliotheca* (n. 31): 305–7. Mordek dated the manuscript to the eighth or ninth century. A digital copy of the manuscript is available at: <https://daten.digital-sammlungen.de/0006/bsb00060127/images/index.html?fp=193.174.98.30&id=00060127&seite=1> [accessed 03.11.2022]. In the Munich manuscript (A3) (fol. 53r), a semicolon was in fact used between what Eckhardt considered to be Lex Sal. 40.1 and 40.2 (n. 4). This, however, can also be found between sentences that Eckhardt did not consider to be individual subtitles – for example, in front of the last sentence that Eckhardt considered to be a part of title 40.3 (fol. 53v). The most convincing argument against Eckhardt's decision to consider 40.1 and 40.2 as separate subtitles can be found in MS Paris, BNF Lat. 4404 (A1): Most of the subtitles of title 40 (fol. 187v–188r) in this manuscript begin with a capital letter, but not 40.2: what is presumed to be a new subtitle that begins with a lowercase letter.

⁴⁷ This is relevant since the claim that title 40 could be a later addition to the Lex Salica, as made by Franz Beyerle ("Über Normtypen und Erweiterungen der Lex Salica," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 44 [1924]: 233–34) and later by Nehlsen, *Sklavenrecht* (n. 13): 328, was in part based on the differences between those titles. The debate was summarized by Nehlsen (ibid.: 324–41), although his conclusions are not always convincing.

⁴⁸ Lex Sal. 40.3, 146 (n. 4).

does not contain 40.3 altogether, there is mention of an initial punishment for the *maior culpa* in A1, which can be found in what Eckhardt considered to be the following subtitle (40.4).⁴⁹ In this regard, A3 reads: [. . .] *similiter servus CXXI colopos accipiat*,⁵⁰ whereas A4 states: [. . .] *similiter servus CCXX colobos CCCC*.⁵¹ It is therefore safe to state that neither A3 nor A4 contains a completely accurate text for title 40.3. We also have to assume that the one hundred twenty-one lashes mentioned in A3 are in fact a scribal error (from one hundred twenty in the exemplar?). The CCCC in A4, on the other hand, may in fact have read as *accipiat* originally. But why is the punishment for *servi* the same in 40.1–2 and 40.3, whereas a free person has to pay fifteen *solidi* in the first case and thirty-five *solidi* in the latter? The answer can be found in Eckhardt's 40.4: If the *servus* confesses to the crime he was accused of during the execution of the initial one hundred twenty lashes, he is to be castrated (or receive additional lashes totaling to two hundred forty).⁵² This can be avoided through a payment of two hundred forty *denarii* / six *solidi*.⁵³ Again, one has to wonder why Eckhardt decided to separate 40.3 and 4, which are clearly connected in their content. As with 40.1–2, the manuscripts give no indication of such a division of the subtitles.⁵⁴ While the description of the legal proceedings found in 40.4 is far more detailed than what is depicted in titles 12.1–2 and 25.5–6, their similarities in structure – a division between lesser and more severe crimes, compensated with physical punishment or a compensatory payment of three *solidi* in the former and six in the latter – are evident.

I will now turn to a peculiarity mentioned above concerning title 25.6 and the number of lashes mentioned under that title in the different manuscripts. Three of the four known manuscripts (A1–3) state that the rape of an *ancilla* by a *servus* corresponds to the payment of one hundred twenty *denarii* or three hundred lashes.⁵⁵ A4, on the other hand, applies the rate used in the other relevant titles: one hundred twenty lashes or one hundred twenty *denarii*.⁵⁶ Nehlsen believed that A1–3 correspond to an earlier version of the Lex Salica, while A4 and other manuscripts from more recent Lex Salica versions, including the still-Merovingian version C,⁵⁷ represent

49 Lex Sal. 40.4, 146 (n. 4).

50 See fol. 53v of A3.

51 See fol. 27v of A4.

52 See Lex Sal. 40.11, 153 (n. 4).

53 If the *servus* does not confess, he may only be lashed further, especially if the accuser hands over a pledge (*pignus*) to the owner of the accused *servus*. See Lex Sal. 40.4, 146–47 (n. 4).

54 For A1, see fol. 187vab; for A3, see fol. 53r–v; for A4, see fol. 27v. A2 varies significantly from the other manuscripts but also does not give any indication as to why 40.3–4 should be regarded as separate subtitles. For A2, see fol. 18v–19r.

55 See fol. 184v for A1, fol. 11v for A2, and fol. 49v for A3.

56 See fol. 25v for A4.

57 Out of the three manuscripts attributed to group C, only Paris, BNF Lat. 4403b (C5) mentions a physical punishment (of one hundred twenty lashes), while Paris, BNF Lat. 18237 (C6) and its six-

a later stage since they all prescribe one hundred twenty rather than three hundred lashes.⁵⁸ One has to question, however, if this assumption is warranted.

Nehlsen attempted to support his claim by providing two examples from texts considered to be Merovingian capitularies: the *Pactus pro tenore pacis* and the *Childeberti I. regis praeceptum*.⁵⁹ The former was most likely created between 511 and 558.⁶⁰ One of its chapters – c. 6 in Boretius' edition⁶¹ and title 82.2 in Eckhardt's Lex Salica edition⁶² – again deals with a *servus* convicted of theft. The chapter establishes the punishment for the theft of an object with a value less than a *tremissis*: *Si seruus minus tremisse inuolauerit et mala sorte priserit, dominus serui III solidos soluat et seruus ille CCC ictus accipiat flagellorum*.⁶³ The chapter therefore does provide us with an example where three hundred lashes are prescribed. The fact that the text orders this punishment to be carried out in addition to the payment of three *solidi* can be explained via an early corruption of the text, wherein *aut* was misread as *et*.⁶⁴ Assuming the occurrence of such a minor misreading despite the consistency in the manuscript tradition seems reasonable since the earliest known manuscripts of the *Pactus* – the Wolfenbüttel (A2) and Munich (A3) manuscripts – originate from the eighth century. One merely has to assume that the misreading of *aut* as *et* happened at a relatively early stage in the transmission of the *Pactus pro tenore pacis*. Otherwise, the title would provide a different example of a case where compensatory payment and corporal punishment were not alternatives but rather complementary aspects of the punishment. Nevertheless, the possibility of a misreading does not constitute proof – especially in the absence of comparable material. In contrast, the latter text, *Childeberti I. regis praeceptum*,⁶⁵ only partially survived in the manuscript Paris, BNF, Lat 12097,⁶⁶ and it states that a *servus* who dishonors church holidays is to

teenth-century copy (C6a) only mention the compensatory payment of three *solidi*. See Lex Sal. 40.3, 95 (n. 4).

58 Nehlsen, *Sklavenrecht* (n. 13): 302–3.

59 Ibid.: 327 and *passim*.

60 On the *Pactus pro tenore pacis*, see Anika Auer, “Pactus pro tenore pacis,” in *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 4, ed. Albrecht Cordes et al. (Berlin: Erich Schmidt Verlag, 2017): 305–7, https://www.hrgdigital.de/id/pactus_pro_tenore_pacis/stichwort.html [accessed 03.11.2022].

61 *Pactus Childeberti I. et Cholatarii II.* c. 6, MGH Capit. 1, 5.

62 Lex Sal. 82.2, 251 (n. 4).

63 This is a quote from Eckhardt's edition, which varies from Boretius' edition in such a way that Boretius did not use roman numerals, but rather spelled out those numbers (e.g., *tres solidos*; *trecentos ictos*). Furthermore, Boretius did not include *flagellorum* in his edition.

64 This has already been suggested by Franz Beyerle, “Normtypen und Erweiterungen der Lex Salica” (n. 47): 232 n. 1; Mayer-Homburg, *Die fränkischen Volksrechte* (n. 14): 84 n. 10. Nehlsen, *Sklavenrecht* (n. 13): 317 follows their line of thought.

65 *Childeberti I. regis praeceptum*, MGH Capit. 1, 3.

66 On the manuscript, see Mordek, *Bibliotheca* (n. 31): 607–9. The different layers have been dated very differently (from the first half of the sixth to the first half of the eighth century). The folia relevant here are found in a layer dated to the sixth or seventh century by Mordek.

be punished with one hundred lashes ([. . .] *si serviles persona est, centum ictus flagellorum ut suscipiat iubemus . . .*).⁶⁷ As the following folio of the manuscript is missing, we do not know how an *ingenuus* is supposed to be punished; the folio ends with [. . .] *si vero ingenuus aut honorator fortasse persona est*.⁶⁸ The provision does, however, vary from the *Pactus pro tenore pacis* and the Lex Salica titles in so far as it includes not only the free and the unfree, but also a group of more honorable *personae*. Furthermore, the character of the crime – misbehaving on church holidays – varies from those found in the Lex Salica and in the *Pactus pro tenore pacis*.

Nevertheless, Nehlsen concluded that before the seventh century, corporal punishment by lashes was prescribed in multiples of one hundred,⁶⁹ and that title 25.6 as found in manuscripts A1–A3 still reflects this situation. In light of the very limited evidence from the sixth and early seventh centuries, the assumption that corporal punishment for *servi* was universally given in multiples of one hundred is speculative – especially if one considers the (likely) corruption of the respective passages in the *Pactus pro tenore pacis* and the *Praeceptum Childeberti*. And to claim that this is reflected in manuscripts, which are notoriously unreliable concerning numbers,⁷⁰ is questionable at best. The skepticism about Nehlsen's assumption is heightened by the possibility that CCC, as presented in title 25.6 of A1–A3, could very well just be a misreading of CXX.⁷¹ Furthermore, while A3 only provides the sum that is needed to avoid corporal punishment in *solidi* (three), A1 and A2 additionally mention the equivalent of one hundred twenty *denarii*.⁷² If, as Nehlsen claimed, the three hundred lashes here are remnants of an older version, why is it that the payment in *denarii* was amended in the subtitle, while the number of lashes was not? Considering the inaccuracy of all Lex Salica version A manuscripts concerning numbers and values, the suggestion that CCC is a misreading of CXX seems to be more acceptable, whereas Nehlsen's theory of title 25.6 representing an earlier evolutionary stage lacks supporting evidence. We therefore have to assume another erroneous decision made by

67 *Childeberti I. regis praeceptum*, MGH Capit. 1, 3.

68 Fol. 62v of the manuscript.

69 Nehlsen, *Sklavenrecht* (n. 13): 327.

70 Despite the limited number of titles relevant to this paper, examples of obviously wrong values can be found in the aforementioned titles in all of the four manuscripts. Instead of the expected 240 lashes in Lex Sal. 40.11 (n. 4), A1 mentions 144 (CXLIIII), A2 mentions 300 (CCC), and A3 and A4 mention 242 (CCXLII). Additionally, A3 mentions 121 (CXXI) rather than 120 lashes in Lex Sal. 40.3. Upon consideration of all titles of the Lex Salica, all four manuscripts each contain more than twenty obvious mistakes.

71 This could of course also be assumed for the three hundred lashes stated in the *Pactus pro tenore pacis*. If we accept a misreading of *aut* as *et*, which happened at an early stage in the transmission of the text, why should the same not be assumed for a misreading of CCC as CXX? Yet again, this remains speculative due to the lack of evidence. It is definitely possible as well that the original text of the *Pactus* states 300 (CCC) lashes.

72 See n. 55 for the respective folia.

Eckhardt in regard to LS 25.6, for which A4 provides the better version of the text (with the intended number of one hundred twenty lashes) and not A1–3.

As implied earlier, there are more aspects to the punishment of crimes committed by *servi* in Merovingian law that need to be discussed, at least briefly. Given the two options for punishment – payment or lashes – that have already been mentioned, one has to wonder who had the power to determine which option was to be executed. The damaged party? The offender or his *dominus*? A representative of state authority? Furthermore, the modalities of the corporal punishment remain unclear. Who was supposed to carry out the beatings and with what? Why is the compensatory payment lower if the perpetrator is unfree? The Lex Salica rarely provides conclusive information, leaving most of those questions subject to speculation. According to title 40.6, beatings are to be carried out with rods (*virgas*) as thick as the little finger (*ad magnitudinem minores digiti*), with the convict stretched out on a rack (*scamnum*).⁷³ It seems reasonable to assume that the modalities set out in 40.6 also reflect how the punishment was supposed to be carried out in general. That same title also provides an indication as to who was in charge of carrying out the beatings: The *dominus* of the criminal *servus* can be ruled out as he is merely ordered to present the convict for punishment;⁷⁴ the accuser (or damaged party) is, however, responsible for providing the rods for the punishment,⁷⁵ making him a likely candidate for its infliction. Moreover, titles 40.1–2 mention that it is the perpetrator's *dominus* who may opt to pay a compensation in order to spare his *servus* from corporal punishment,⁷⁶ while others (12.1–2 and 25.5–6) seem to imply that it is the *servus* who may redeem himself from corporal punishment.⁷⁷ Although it is obvious why the *servus* would be interested in paying a fine rather than being beaten if given the opportunity,⁷⁸ there are at least

⁷³ Lex Sal. 40.6, 148–49 (n. 4).

⁷⁴ [. . .] *dominus uero serui ipsius, si praesens est, ab eo qui repetit admonere debet, ut seruum suum <iustus> debeat supplicii dare*, [. . .]

⁷⁵ [. . .] *ubi qui repetit et uirgas paratas habere debet* [. . .]

⁷⁶ Lex Sal. 40.1–2, 145–46 (n. 4).

⁷⁷ On the matter, see Nehlsen, *Sklavenrecht* (n. 13): 324 and *passim*, who believed that it is the *dominus* who gets to decide on whether or not he wants to prevent his *servus* from being beaten.

⁷⁸ Nehlsen, *Sklavenrecht* (n. 13): 270, assumed that the *servi* in Merovingian Francia did not have the legal capacity to own property (“Vermögensfähigkeit”) as there was no indication of that fact in the Lex Salica. The absence of evidence, however, does not necessarily constitute proof in this case. Canon 7 of the synod of Agde (506) (*Concilium Agathense* can. 7, in *Concilia Galliae* a. 314 – a. 506. CCSL 148, ed. Charles Munier, *Concilia Galliae, 314–506* [Turnhout: Brepols, 1963]: 195–96) mentions the capital given to *servi* upon manumission, however, and so it is possible that the manumission is what makes it possible for the former slave to own property. In the *Decretum Vermeriense* c. 7 (MGH Capit. 1, 40) from the time of Pippin the Short, a *servus* is mentioned as the owner of an *ancilla*. Hence, it was possible for *servi* to own property in the mid-eighth century at the very latest. We may assume that this was already possible at some point during the Merovingian era. On wealth and social mobility in Merovingian Gaul, see Allen Jones, *Social Mobility in Late Antique Gaul: Strategies and Opportunities for the Non-Elite* (Cambridge: Cambridge University Press, 2009): 157–78.

two potential motives for a *dominus* to opt for payment rather than having his *servus* beaten: Firstly, one could assume the existence of an emotional bond between the *dominus* and the guilty *servus*; secondly, one has to assume that one hundred twenty (or more) lashes with a rod would have resulted in lasting damage (or even death), leading to the temporary (or, indeed, permanent) loss of workforce on the part of the *dominus*. As for the calculation of the reduced tariffs, the Merovingian sources do not appear to follow a consistent logic. To provide an example: While in most cases a fine of fifteen *solidi* for the free corresponds with a fine of three *solidi* for the unfree, the aforementioned Merovingian capitulary, 104.1–3 in Eckhardt's version, prescribes fifteen *solidi* for the free and five for the unfree.⁷⁹

Concerning the punishment of crimes committed by *servi* as discussed in Merovingian legal texts, the following key elements have been noted: 1. The Lex Salica only covers crimes that affect parties outside of the household to which the unfree perpetrator belongs. 2. Different from the punishment of the free, the unfree are punished by being lashed, castrated or even executed, depending on the severity of the crime. 3. The alternative to avoid corporal punishment by ways of paying a (reduced) fine was calculated at a rate of 1 *denarius* per lash at some point.

3 Carolingian Adaptions: The Punishment of *servi* in the Capitularies of Charlemagne and Louis the Pious

The revisions made to the Lex Salica under Pippin the Short and Charlemagne include the same ratio of one *denarius* per lash at a conversion rate of forty *denarii* per *solidus*,⁸⁰ which can also be found in the Merovingian version A manuscript. At first glance, this may be surprising since the ratio of 1:40 applied to the gold and silver coins – the former being unminted⁸¹ – was no longer applicable by the mid-eighth or early ninth century, at which time one *solidus* was equal to twelve *denarii*.⁸² However, if one considers the findings of Karl Ubl, who argued that the revisors of the Carolingian versions of the Lex Salica had not been interested in making significant changes

⁷⁹ Lex Sal. 104.1+3, 260 (n. 4).

⁸⁰ See, for example, Lex Sal. 40.1–2, 145–47 (n. 4) in the K-version of the Lex Salica.

⁸¹ On the matter, see Patrick Breternitz, “Wann reformierte Pippin der Jüngere das fränkische Münzwesen?” *Francia* 43 (2016): 325 with n. 1.

⁸² Ibid. On the ratio, see also *Capitula legibus additum* c. 9, MGH Capit. 1, 114: *Omnia debita quae ad partem regis solver debent, solidis duodecim denariorum solvant, excepto freda quae in lege Salica scripta est; illa eodem solido quo caeterae compositiones solvi debent componatur.*

to its contents (while making attempts to improve the comprehensibility of the text),⁸³ then the adoption of this anachronistic conversion rate merely serves as another example of this effort to keep revisions to a minimum.⁸⁴ In contrast to the approach found in the Lex Salica with regard to the punishment of *servi*, the Lex Ribuarria holds liable the respective *dominus* of *servi* convicted of a crime.⁸⁵

Carolingian legal sources tend to be much more in line with the Lex Salica than the Lex Ribuarria.⁸⁶ Two capitularies from the time of Charlemagne – both issued in Aachen in 809 – correspond to the principles of the Lex Salica. One of the chapters in question reads: *De latrone forbannito: ut liber homo qui eum suscepit XV solidos componat, et servus CXX percussionebus vapuletur*;⁸⁷ the second relevant chapter decrees: *De meziban, ut unusquisque comis alio mandet ut nullus eum recipere audeat; si liber eum suscepit, solidos XV componat; si servus, CXX ictus accipiat et insuper dimidium caput tundatur*.⁸⁸ The fact that the capitularies mentioned here directly correspond to the ratio of the Lex Salica is by no means obvious, which is what led McComb to describe it as “unusual”⁸⁹ as the fifteen *solidi* for the free initially appear to be unrelated to the one hundred twenty lashes for the unfree. As discussed above, the provisions of the Lex Salica that prescribe the payment of fifteen *solidi* for the free require the payment of only three *solidi* (or one hundred twenty *denarii*) in the case of an unfree offender. Therefore, the one hundred twenty lashes mentioned in the chapters from 809 do in fact match the fine of fifteen *solidi*. The chapters from 809 only differ from the provisions found in the Lex Salica in so far as they do not mention the alternative (reduced) compensatory payment for the unfree.

⁸³ See Uhl, *Sinnstiftungen* (n. 3): for Pippin, see 155–60; for Charlemagne, see 171–80, especially 180. On additions to the Lex Salica under Charlemagne, see *ibid.*: 183–91.

⁸⁴ Yet again, I would like to emphasize that this differentiation based on legal status, as found in normative sources, does not necessarily mean that such a differentiation reflects the actual punishment practices in the eighth or ninth century. As Alice Rio pointed out, vulnerability to corporal punishment may have depended less on legal status rather than on bargaining position. On the matter, see Alice Rio, “Freedom and Unfreedom in Early Medieval Francia: The Evidence of the Legal Formulae,” *Past and Present* 193, no. 4 (2006): 33. See also McComb, *Strategies of Correction* (n. 10): 167, who followed Rio’s line of thought.

⁸⁵ An exception is found in *Lex Rib.* 61.17 (MGH LL nat. Germ. 3,2, Franz Beyerle and Rudolf Buchner, eds., *Lex Ribuarria* [Hannover 1954]: 113). Beyerle (*ibid.*: 163) assumed that this particular chapter was a later insertion to the Lex Salica.

⁸⁶ This was already noted by Mayer-Homberg, *Die fränkischen Volksrechte* (n. 14): 95–99. His subsequent conclusion, that the Carolingians must have been Salians, may be disregarded in light of more recent scholarship. See, for example, Matthias Springer, “Riparii – Ribuarier – Rheinfranken nebst einigen Bemerkungen zum Geographen von Ravenna,” in *Die Franken und die Alemannen bis zur “Schlacht bei Zülpich” (496/97)*, ed. Dieter Geuenich (Berlin: De Gruyter, 1998): 260.

⁸⁷ *Capitulare Aquisgranense* c. 3, MGH Capit. 1, 148.

⁸⁸ *Capitulare missorum Aquisgranense primum* c. 11, MGH Capit. 1, 151.

⁸⁹ McComb, *Strategies of Correction* (n. 10): 166.

The capitularies from 809 do, however, form an exception among the Carolingian capitularies. A chapter from the *Capitulare Mantuanum* (c. 4), issued by Charlemagne for Italy in 781, decrees that someone who attempts to reopen an already-settled lawsuit is to be punished with a fine of either fifteen *solidi* or fifteen lashes. In 803, the chapter was in essence extended to all of Francia as part of the *Capitulare legibus additum* (c. 10).⁹⁰ Neither of the two chapters specifies which punishment applies to whom and under what circumstances. While it is likely that the fine was intended for a free offender and the lashes were meant to be imposed on the unfree, this assumption remains uncertain and may be challenged by two arguments. Firstly, the provisions in all other comparable cases explicitly mention legal status.⁹¹ Secondly, the unfree were excluded from access to the legal system and hence could not have filed a lawsuit to begin with. This exclusion, however, was voided if an individual claimed that he (or she) was free and had been held in servitude unjustly.⁹² It is possible that the fifteen lashes stated in both of the aforementioned chapters were meant for individuals who had failed to prove their freedom before a court and had attempted to re-open their case. Another reading of the chapters could be that fifteen lashes are due in the case of insolvency on the part of the plaintiff. While insolvent culprits could be incarcerated under Pippin,⁹³ Charlemagne's capitularies usually demand that in such cases, the culprit is to pledge temporary servitude to his creditor – be that a private individual or a representative of the state.⁹⁴ However, under Lothar I, corporal punishment by means of beatings was introduced, at least in the parts of Italy under Frankish rule. It was intended for insolvent but free offenders and can be

⁹⁰ *Capitulare legibus additum* c. 10, MGH Capit. 1, 114: *Si quis causam iudicatam repetere in mallo praesumpserit ibique testibus convictus fuerit, aut quindecim solidos componat, aut quindecim ictus ab scabinis qui causam prius iudicaverunt accipiat*. Interestingly, the *Capitulare legibus additum* adds that the same *scabini*, who were responsible for the case in the first instance, are to be responsible for the rejection (and punishment) of the case upon its resumption. On the *scabini*, see Alice Hicklin, "The *scabini* in Historiographical Perspective," *History Compass* 18, no. 10 (2020): 1–11; Gianmarco De Angelis, "Scabini e altri ufficiali pubblici minori in Lombardia in età carolingia e postcarolingia. Profili, mobilità, culture grafiche, partecipazione ai processi documentari," *Scrineum Rivista* 16 (2019): 57–114.

⁹¹ See, for example, the *Capitulare Aquisgranense* c. 3, MGH Capit. 1, 148 or *Capitulare missorum Aquisgranense alterum* c. 7, MGH Capit. 1, 152.

⁹² An example of a law-suit regarding legal status is discussed in Karl Uhl, "Maurinus gegen die Agenten des Fiskus. Die Lex Salica in einem Prozess um Freiheit aus der Zeit Ludwigs des Frommen," in *Vom Reichsbewusstsein zum Verfassungspatriotismus. Zusammengehörigkeit durch Rechtsregeln*, ed. Dieter Gosewinkel et al., Der Staat, Beiheft 27 (Berlin: Duncker & Humblot, 2021): 105–24.

⁹³ See *Pippini regis Capitulare* c. 1, MGH Capit. 1, 31. On Pippin's royal capitulary, see Patrick Breternitz, *Königtum und Recht nach dem Dynastiewechsel. Das Königskapitular Pippins des Jüngeren* (Ostfildern: Jan Thorbecke, 2020). On c. 1, see especially 45–64.

⁹⁴ On self-sale, see Alice Rio, "Self-Sale and Voluntary Entry into Unfreedom, 300–1100," *Journal of Social History* 45 (2012): 661–85.

found in c. 11 of the so-called *Capitulare Olonnense Mundanum*.⁹⁵ The particularity of its content⁹⁶ makes it hard to imagine that Lothar (or his father Louis the Pious) had the intention of elevating that principle to universal validity. However, the same concept – beatings for the insolvent but free perpetrator – can be found in another chapter of an Italian capitulary issued by Lothar.⁹⁷ Assuming that the chapters in the *Capitulare Mantuanum* (c. 4) and the *Capitulare legibus additum* (c. 10), as in Lothar's provisions, were in fact concerned with the punishment of free but insolvent perpetrators, then this would constitute a significant turn in Frankish punishment practices: Under certain circumstances, free perpetrators could have been subjected to lashes that corresponded directly to the monetary fine.⁹⁸

95 *Capitulare Olonnense mundanum* c. 11, MGH Capit. 1, 331: *De his, qui proprietates suas habent et spontaneae alicui delegant et postea fraudulenter ab alio aliquo ignoranti praetium easdem res venundantes accipiunt et his, cui easdem res prius tradite fuerant, cognito negotio annum integrum silens non contradixerit, sed propter inlusionem tacens sinit emptorem inludere: Si infra patria anni spatium, ut dictum est, fuerit prior traditio, nihil ei valeat. Ille vero, qui post primam traditionem res vendiderit, si vivens conprobatus fuerit hanc inlusionem fecisse, bannum dominicum persolvat, id est LX solidos. Si vero bannum, unde componat, non habet, verberetur.* The capitulary in question was not issued by Louis the Pious himself, but rather by his son Lothar I, who was at this point (825) governing in Italy. On Lothar, see Maria Schäpers, *Lothar I. (795–855) und das Frankenreich*, Rheinisches Archiv 159 (Vienna: Böhlau, 2018). On the sons of Carolingian rulers as kings, see Brigitte Kasten, *Königssöhne und Königsherrschaft. Untersuchungen zur Teilhabe am Reich in der Merowinger- und Karolingerzeit*, Schriften der MGH 44 (Hannover: Hahnsche Buchhandlung, 1997). On the *Capitulare Olonnense mundanum*, see Schäpers, *Lothar I.* (n. 95): 138–44; Stefan Esders, “Die ‘Capitula de expeditione Corsicana’ Lothars I. vom Februar 825. Überlieferung, historischer Kontext, Textrekonstruktion und Rechtsinhalt,” *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 98 (2018): 91–144. Another example of physical punishment against the free can be found in the aforementioned *Capitulare de disciplina palatii Aquisgranensis* (c. 3, MGH Capit. 1, 298). The chapter is somewhat reminiscent of the spectacular punishment found in the capitularies of Herstal (c. 23, MGH Capit. 1, 51) and Thionville (c. 10, MGH Capit. 1, 124).

96 The chapter deals with very specific fraudulent land-sale practices. On the chapter, see Mathias Geiselhart, *Die Kapitulariengesetzgebung Lothars I. in Italien*, Freiburger Beiträge zur mittelalterlichen Geschichte 15 (Frankfurt am Main: Peter Lang, 2002): 170–71.

97 *Capitula Italica* c. 3, MGH Capit. 1, 335: *Volumus, ut, si quelibet persona in finibus regni nostri ignem per silvam convivare ausa fuerit, diligenter inquiratur. Et si servus comprobatus fuerit hoc fecisse, aut dominus eius eum ad flagellandum et capite tondendum tradat aut pro eo, quicquid damnis fecit, emendare cogatur. Si quoque libera persona hoc fecisse probata fuerit, penitus emendare cogatur et insuper bannum nostrum componat. Et si non habuerit, unde componat, flagelletur. Quod si factum fuerit, per meliores loci illius inquiratur. Si in qualibet persona suspectio fuerit, si servus est, aut ad iudicium dominus eius mittat aut ipse pro eo sacramentum faciat. Quod si libera persona fuerit, proprio sacramento se idoneum reddat.* The attribution of the chapter to Lothar is not certain. We are most likely presented with a chapter from a capitulary issued by Lothar I in Italy between 823 and 840. On this, see the introduction to the capitulary of Britta Mischke in the upcoming new edition of the capitularies of Louis the Pious.

98 Brunner, *Deutsche Rechtsgeschichte* 2 (n. 10) seemed to be unsure of how to interpret the situation described. First (ibid.: 787, n. 31), it was assumed that c. 10 of the *Capitulare legibus additum* (803) ex-

While we cannot determine with certainty as to who is being addressed in the two chapters, it is striking how a payment of fifteen *solidi* here equates to fifteen rather than one hundred twenty lashes: that is, one *solidus* is now equivalent to one lash. It seems as if the compilers of the two chapters were aware of an intended correspondence between fines and beatings. Compared to the aforementioned chapters from 809 (and their ratio of one hundred twenty lashes to fifteen *solidi*), the correspondence between the different punishment methods – albeit different from the Lex Salica – is much more obvious in the *Capitulare Mantuanum* and the *Capitulare legibus additum*. One could interpret this adjusted correspondence as an attempt to emphasize the continuity of Merovingian punishment ratio. But why did the compilers not use one hundred twenty lashes? The changed ratio could be explained by the absence of *denarii* in these texts: As was mentioned concerning the chapters from 809, the correspondence of fifteen *solidi* to one hundred twenty lashes is very difficult to identify as such. This is because none of the mentioned Carolingian capitularies include a reduced rate for the unfree, which was standard in the Merovingian sources.

The ratio of one lash per *solidus*, as found in the *Capitulare Mantuanum* and the *Capitulare legibus additum*, was later adopted in two chapters from a capitulary addition to the Lex Salica issued by Louis the Pious in 818/819. The chapters equated the prescribed payment of the *bannus* of sixty *solidi* for the free with sixty lashes for the unfree.⁹⁹ This observation led Heinrich Brunner to claim that under Louis the Pious, the ratio at which lashes could be replaced with a fine had been changed. This claim was, however, not elaborated on. Sources that could substantiate this claim are also not available. Even if the two chapters from the reign of Charlemagne (*Capitulare Mantuanum*, c. 4, and *Capitulare legibus additum*, c. 10), which employ the same ratio, drew a distinction between the fine as pertaining to the free and the beatings to the unfree, which as discussed is not necessarily true, Brunner's hypothesis would remain questionable. The majority of provisions from the reign of Louis the Pious (and the capitularies issued by his son Lothar I in Italy) that prescribe corporal punishment for the unfree made use of rather vague wording and did not specify the number of lashes that would have been required for the perpetrator.¹⁰⁰ Assuming the ubiquitous

clusively concerned the free. Later (*ibid.*: 809, n. 78), c. 11 of the *Capitulare Olonnense mundanum* was mentioned as the earliest example of corporal punishment against the (insolvent) unfree.

⁹⁹ *Capitula legibus addenda* cc. 18–19, MGH Capit. 1, 285.

¹⁰⁰ See *Capitula legibus addenda* cc. 16, MGH Capit. 1, 284; *Capitulare de disciplina palatii Aquisgranensis* c. 3, p. 298; *Capitula Italica* c. 3, MGH Capit. 1, 335 (on this chapter, see below, n. 97 and 105); *Capitulare pro lege habendum Wormatiense* c. 1, MGH Capit. 2, 18. This is also true for a number of Charlemagne's capitularies and c. 1 of Pippin's royal capitulary, which is the only relevant text from his reign. See *Pippini regis Capitulare* c. 1, MGH Capit. 1, 31. Another example can be found in a peculiar case in a chapter from a capitulary issued by Charlemagne in 802, where the *servus* has to pay a sum of ten *solidi* and is to be lashed, while a free person is to pay twenty *solidi* (*Capitulare missorum specialia* c. 13b, MGH Capit. 1, 100–101). On the chapter, see below, n. 114 and 117. Additional examples from the reign of Charlemagne are found in *Capitulare missorum in Theodonis villa datum secundum*,

and intentional introduction of an updated ratio of lashes to fines under Louis the Pious is therefore highly speculative. What can be stated with certainty, however, is the fact that whenever Louis the Pious (or his son Lothar I) imposed a specific number of lashes to be carried out as punishment, the ratio of one *solidus* per lash would have been applied and the Lex Salica ratio would not have been utilized. The ratio of fifteen to one hundred twenty, as known from the Lex Salica, was last used in the aforementioned capitulary from 809.¹⁰¹ It then seems reasonable to believe that Louis the Pious' use of this new ratio of one *solidus* per lash was inspired by the aforementioned provision issued by his father.¹⁰²

Another aspect that characterizes the provisions of the Lex Salica is the reduced fine for the unfree – for example, three rather than fifteen *solidi* – as seen in many of the titles discussed above. The absence of this reduced fine from the Aachen capitularies of 809 has already been noted. In fact, none of the capitularies specifying the number of lashes for an unfree perpetrator mention a reduced fine. Furthermore, while the Lex Salica frequently mentions the possibility for a *servus* or *ancilla* to avoid corporal punishment via their or their respective owner's payment of a reduced fine, in the Carolingian decrees, there is no allusion to an option given a dominus to prevent their *servi* from being beaten. The absence of any reference¹⁰³ to such an option, however, does not necessarily prove that it did not exist.¹⁰⁴ It is possible that the option of

generale c. 10, MGH Capit. 1, 124; *Capitulare missorum Aquisgranense alterum* c. 7, MGH Capit. 1, 152; *Capitula Karoli apud Ansegis servata*, cc. 1, 4 and 6, MGH Capit. 1, 160. This is also true for some Merovingian provisions. However, neither Lex Sal. 25.7 (96) nor the *Childeberti secundi Decretio* (c. 14, MGH Capit. 1, 17) specify the number of lashes.

¹⁰¹ See above, n. 87 and 88.

¹⁰² This assumption is supported by the fact that the earliest proof of this ratio under Louis the Pious can be found in the *Capitula legibus addenda* (c. 18–19, MGH Capit. 1, 285), which represents an intended addition to the Lex Salica, just as the *Capitulare legibus additum* (c. 10, MGH Capit. 1, 114) was added by his father and where the same ratio had already been applied.

¹⁰³ It is possible that the option of paying a fine to avoid corporal punishment was the intention of Pippin's royal capitulary (c. 1, MGH Capit. 1, 31). This interpretation stems from the imprecise wording of the chapter: [. . .] *Et si fecerit, LX solidos domno regi componat, usque dum se ipse homo correxerit. Et si pecuniam non habet, si liber est, mittatur in carcere usque ad satisfactionem, Si servus aut libertus est, vapuletur plagis multis* [. . .] The inserted *si liber est* makes it theoretically possible that both a free and an unfree person had the option to pay sixty *solidi*, and if they could not, then the corresponding punishment would have been applied. This option is what may have led Karl Ubl, *Inzestverbot und Gesetzgebung. Die Konstruktion eines Verbrechens [300–1100]*, Millennium-Studien 20 [Berlin: De Gruyter 2008]: 263) to his interpretation of the sentence. He seemed to imply that the *servus* in question could pay the required sixty *solidi* if he had the capacity to do so. Breternitz, *Königtum und Recht* (n. 93): 51 did not consider such an option for the *servus*.

¹⁰⁴ See Alice Rio, *Slavery after Rome. 500–1100* (Oxford: Oxford University Press, 2017): 9, who pointed out that early medieval norms usually presented elite perspectives rather than accurate reflections of universally followed legal practices. We can assume that in the context of private disputes, with the *servi* being the guilty party, compensatory payments were occasionally preferred to physical punishment by both parties.

avoiding corporal punishment by means of payment was considered to be common legal practice and therefore self-evident. Chapter 18 of the aforementioned *Capitula legibus addenda* from 818/819 appears relevant in this regard: The chapter deals with the refused acceptance of a “good coin” (*bonus denarius*). A free perpetrator is to pay sixty *solidi*, while *servi ecclesiastici aut comitum aut vassallorum nostrorum* are to receive sixty lashes.¹⁰⁵ This, however, does not mean that other *servi* are not to be lashed.¹⁰⁶ The chapter can be seen as an addition to or a clarification of c. 5 of the Capitulary of Frankfurt (794),¹⁰⁷ which deals with the same topic. The addition, however, is not concerned with the punishment of the unfree perpetrator,¹⁰⁸ but much rather with liability in cases where there has been a refusal to hand over the offender. Although the *dominus* would have been held liable if the case involved a privately owned *servus*, a case involving dependents of the church or representatives of the state would have required clarification. Consequently, Louis the Pious specified that the *magister* or *advocatus*, being responsible for the perpetrator, would have to be held accountable if the *servus* was not available for punishment. The case would therefore not explicitly warrant a *servus* or his owner the right to replace corporal punishment with payment. Instead, the reality of the perpetrator being unavailable would simply be accepted, and their owner (or whoever is responsible for the *servus*) would be threatened with liability. It seems possible that this approach was also applied to other cases of servant delinquencies. As has been noted, the Lex Ribuarum generally assumes liability on the part of the *dominus* for crimes committed by their *servi*.¹⁰⁹ However, the situation described in c. 18 of the *Capitula legibus addenda* is also in line with the provisions of the Lex Salica, according to which the owner of an accused *servus* who, after having been provided enough time, cannot present the *ser-*

¹⁰⁵ Cf. n. 15. In this context, Leseur, *Conséquences des délits* (n. 12): 112–13 mentioned the *Capitula Italica* c. 3 (MGH Capit. 1, 335), where the *dominus* of a *servus* who laid a fire in the forest would either have to hand over the culprit to be lashed and have his head shorn (*ad flagellandum et capite tondendum*), or be liable for the compensation of the damages caused by his dependent. “Le procédé est curieux,” as stated in Leseur’s comment (*ibid.*), since a free convict in this case would have to pay the *bannus* of sixty *solidi* in addition to the damages caused.

¹⁰⁶ Equal treatment of *servi* regardless of them being owned by the fisc, the church, or private individuals is implied in c. 8 of the so-called *Capitularia Italica* (MGH Capit. 1, 206), albeit in an entirely different context. The same chapter differentiates between *servi* owned by Franks and Allamans on the one hand, and those owned by Lombards or Romans on the other. Equal treatment of *servi* regardless of their owner is also decreed in c. 15 of the *Pactus pro tenore pacis*. While Boretius’ edition of the capitularies considers the last phrase (*De fiscalibus et omnium domibus [sic!] censuimus*) of the chapter as the initial sentence of c. 16, Eckhardt’s interpretation of the sentence as being a part of the previous chapter is more convincing. This is also reflected in his edition (Lex Sal. 90.2, MGH LL nat. Germ. 4,1, 252).

¹⁰⁷ Cf. n. 15.

¹⁰⁸ The chapter does, however, specify the number of lashes due (sixty), which the Capitulary of Frankfurt does not.

¹⁰⁹ See above, n. 85.

vus in question will be held liable *non qualem seruus sed qualem ingenuus, si hoc admisit, talem compositionem repetenti restituat*.¹¹⁰

By assuming liability, albeit indirectly, the *dominus* could prevent his *servi* from being corporally punished. This, of course, would have resulted in the *dominus* having to pay the fine of a freeman, not a reduced rate. Chapter 18 of the *Capitula legibus addenda* appears to follow the same approach. In the absence of contradictory evidence, one would be tempted to assume that a reduced fine for the unfree was no longer applicable in the Carolingian Empire. However, with regard to the so-called *Capitula Remedii*, at least one ninth century source does mention a differentiation of fines that is dependent on legal status.¹¹¹ Interestingly, while the *Capitula* require a *servus* to pay a reduced fine in some cases, in other cases within the same text, it is the status of the victim that defines the required payment.¹¹² The first paragraph of c. 8 even explicitly mentions that *servi* and *liberi* are to be punished equally for raping a nun.¹¹³ And while the local character of the *Capitula Remedii* needs to be emphasized, it seems as if a degree of uncertainty regarding how to financially punish the unfree existed in Carolingian Francia. In addition to the *Capitula Remedii*, a chapter of the *Capitularia missorum speciale* (802) decrees that *liberi* who live in coastal areas (*circa maritima loca habitant*) and fail to respond to a call for assistance are to pay twenty *solidi* as a fine – half *ad dominicum* and half *ad populum*.¹¹⁴ A *litus* is to pay fifteen *solidi ad populum*, while the *fredus* is to be paid with corporal punishment.¹¹⁵ *Servi* are required to pay ten *solidi* and are also beaten as payment for the *fredus*.¹¹⁶

110 Lex Sal. 40.9–10.

111 The most recent edition of the *Capitula Remedii* is Elisabeth Meyer-Marthaler, ed., “Die Gesetze des Bischofs Remedius von Chur,” *Zeitschrift für schweizerische Kirchengeschichte – Revue d’histoire ecclésiastique suisse* 44 (1950): 89–107 and 161–76. On the *Capitula Remedii*, see Reinhold Kaiser, “Die ‘Capitula Remedii’: Veranlassung, Autorschaft und Geltungsgrund, Verbreitung und Wirkung,” in *Schrift, Schriftgebrauch und Textsorten im frühmittelalterlichen Churrätien. Vorträge des internationalen Kolloquiums vom 18. bis 20. Mai 2006 im Rätischen Museum in Chur*, ed. Heidi Eisenhut et al. (Basel: Schwabe, 2008): 146–82; Harald Siems, “Recht in Rätien zur Zeit Karls des Großen. Ein Beitrag zu den Capitula Remedii,” in *Wandel und Konstanz zwischen Bodensee und Lombardei zur Zeit Karls des Grossen. Kloster St. Johann in Münstair und Churrätien (Acta Münstair. Kloster St. Johann 3)*, ed. Hans R. Sennhauser (Zürich: VdF Hochschulverlag, 2013): 199–238. I would like to express my gratitude to Luise Sigron for informing me about the relevance of the *Capitula Remedii*.

112 Cf. *Capitula Remedii* c. 6, ed. Meyer-Marthaler (n. 111): 161. The exceptional character of the *Capitula*, when compared with other Carolingian prescriptions, is also noted by McComb, *Strategies of Correction* (n. 10): 78–85.

113 *Capitula Remedii*. c. 8, ed. Meyer-Marthaler (n. 111): 166.

114 *Capitulare missorum specialia* c. 13b, MGH Capit. 1, 100–101: *De liberis hominibus qui circa maritima loca habitant: si nuntius venerit, ut ad succurrendum debeant venire, et hoc neglexerint, unusquisque solidos viginti conponat, mediaetatem in dominico, mediaetatem ad populum . . .*

115 [. . .] *Si litus fuerit, solidos quindecim conponat ad populum et fredo dominico in dorso accipiat* [. . .].

116 [. . .] *Si servus fuerit, solidos X ad populum et fredo dorsum*.

Although the differentiation of the punishment according to legal status is apparent in the chapter, the interpretation of the fines is puzzling. For instance, the total sum is the highest for *liberi*, but when only the part paid *ad populum* is compared, the fine is identical for *servi* and *liberi* (ten *solidi*) but higher for *liti* (fifteen *solidi*). It seems reasonable to assume that the compilers of the chapter had the intention of stating a reduced fine for lower legal statuses but ultimately failed in their attempt.¹¹⁷

Of course, neither the *Capitula Remedii* nor c. 13b of the *Capitularia missorum speciale* establishes the continuation of the principles found in the Lex Salica related to reduced fines for unfree perpetrators. The absence of such an option may be interpreted as the result of a decline in the importance of legal status, which may have led to a situation where reduced compensation tariffs for the unfree were no longer justifiable. Without such reduced tariffs, the number of *servi* (or their owners) willing and able to pay fines equivalent to those of the free would most likely have been very low. One could assume that the complete lack of such an option in the Carolingian capitularies is a result of this. Nevertheless, while the details of the punishment principles of the Lex Salica may not have been reflected in normative sources from the Carolingian era, the general concepts appear to have survived in the minds of Carolingian legislators.

This general survival of punitive principles may be interpreted as an attempt on the part of the Carolingians to bolster stately authority in the Frankish realm by aiming for legislative continuity. As McComb emphasized, the legal framework established by the Carolingians mostly built on that of their predecessors – something that is strikingly obvious when considering the Carolingian “revisions” of the Lex Salica. Nevertheless, certain nuanced changes could be identified in the provisions concerning the punishment of the unfree. This is also true concerning the punishment of the free: State-authorized sanctions feature prominently in Carolingian legislation, particularly in capitularies, which, especially under Charlemagne and Louis the Pious, experienced a heavy increase in usage compared to the Merovingians. The king and his agents¹¹⁸ (as representatives of the state) emerged as (more or less) active players that issued and enforced the law. In the aforementioned royal capitulary, most likely from

¹¹⁷ It seems as if we are yet again presented with a provision relevant only in certain regions. While the manuscript Leiden Voss. Lat. 4° presents the chapter as quoted, the provision is interrupted in Paris Lat. 4995. The manuscripts Vatican, Pal. Lat 582 and the related Paris Lat. 9654 do not have the chapter at all. This may well be attributed to the addressees of the manuscripts: While the Leiden manuscript was an exemplar for Aquitaine, the other versions of the Capitulary were addressed to non-coastal regions, hence rendering the chapter irrelevant for them. On the Capitulary, see Wilhelm A. Eckhardt, “Die Capitularia missorum specialia von 802,” *Deutsches Archiv für die Erforschung des Mittelalters* 12 (1956): 498–516. On the addressees, see 507.

¹¹⁸ On delegation and the royal *missi*, see Jennifer R. Davis, “Inventing the Missi. Delegating Power in the Late Eighth and Early Ninth Centuries,” in *The 'Abbasid and Carolingian Empires. Comparative Studies in Civilizational Formation*, ed. Deborah G. Tor, Islamic History and Civilization 150 (Leiden: Brill, 2018): 13–51; Shigeto Kikuchi, *Herrschaft, Delegation und Kommunikation in der Karolingerzeit*,

754/755,¹¹⁹ Pippin decreed that a free person who supports someone living in an incestuous relationship by hosting them is to pay the royal *bannus* of sixty *solidi*.¹²⁰ Should this person be insolvent, they are to be put *in carcere* until their debt is paid off.¹²¹ The chapter thus introduces incarceration to Frankish written law. It is, however, somewhat unlikely that this constituted the actual installation of a formerly unknown punitive measure for Francia.¹²²

Only under Charlemagne was non-lethal corporal punishment introduced as a method of punishment for the free.¹²³ This should, however, not be misinterpreted as a blurring of status boundaries concerning punitive matters. The vast majority of sanctions found in Charlemagne's capitularies are still divided into fines for the free and corporal punishment for the unfree. The rare examples where a free person is to be punished corporally can be described as exceptions. Furthermore, the form of corporal punishment in such cases is exceptional – one that is not equivalent to a certain number of lashes based on the crime. An example of such exceptional punishment can be found in c. 10 of the Capitulary of Thionville from 805. The chapter discusses

vol. 1, *Untersuchungen zu den Missi dominici (751–888)*, MGH Hilfsmittel 31 (Munich: Harrasowitz, 2021).

119 On the dating of the capitulary, see Breternitz, *Königtum und Recht* (n. 93): 45.

120 *Pippini regis Capitulare* c. 1, MGH Capit. 1, 31: *De incestis* [. . .] *et si emendare se noluerit, nullus eum recipiat nec cibum ei donet. Et si fecerit, LX solidos domno regi componat, usque dum se ipse homo correxerit* [. . .] The fact that supporters of incestuous individuals were the ones tasked to pay the *bannus* and not the incestuous individual him- or herself is illustrated in Ubl, *Inzestverbot und Gesetzgebung* (n. 103): 263 n. 222. Contra: Carlo de Clercq, *La législation religieuse franque. Etude sur les actes de conciles et les capitulaires, les statuts diocésains et les règles monastiques*, vol. 2, *De Louis le Pieux à la fin du IXe siècle (814–900)* (Antwerpen: Centre de recherches historiques, 1958): 132; Wilfried Hartmann, *Die Synoden der Karolingerzeit im Frankenreich und in Italien. Konziliengeschichte Reihe A: Darstellungen* (Paderborn: Ferdinand Schöningh, 1989): 68. The entire chapter is thoroughly analyzed in Breternitz, *Königtum und Recht* (n. 93): 45–64. Breternitz follows Ubl's interpretation of the payment of the *bannus*.

121 *Pippini regis Capitulare* c. 1, MGH Capit. 1, 31: [. . .] *Et si pecuniam non habet, si liber est, mittatur in carcere usque ad satisfactionem* . . .

122 The existence of prisons in the Lombard empire in the first half of the eighth century can be confirmed (see *Leges Liutprandi* c. 79, MGH LL 4, ed. Alfred Boretius [Hannover, 1868]: 442). It seems somewhat reasonable to assume at least the theoretical existence of prisons that were controlled by royalty and their agents – albeit far different from contemporary prisons of the twenty-first century – for Merovingian Francia. Imprisonment reappears in a capitulary issued by Charlemagne and in a capitulary issued by Louis the Pious in 814 dealing with public order at the royal palace of Aachen. For Charlemagne, see *Capitula per episcopos et comites nota facienda* c. 4, MGH Capit. 1, 141. The capitulary can only be found in MS Paris BNF Lat. 4995 and dated to 802–813 by Hubert Mordek, *Bibliotheca* (n. 31): 554. For Louis the Pious, see *Capitulare de disciplina palatii Aquisgranensis* c. 3, MGH Capit. 1, 298. On incarceration, see Julia Hillner, *Prison, Punishment and Penance in Late Antiquity* (Cambridge: Cambridge University Press, 2015).

123 Capital punishment for the free was already prescribed in Merovingian Francia. See, for example, *Pactus pro tenore pacis* c. 10 (MGH Capit. 1, 6) or Lex Sal. 50.4 (MGH LL nat. Germ. 4,1, 195).

punishments for different degrees of conspiracy sealed with an oath. First, it mentions the use of capital punishment for who have done “something evil” (*aliquid malus*). The helpers of those conspirators, however, are to flog each other and cut off each other’s noses. If the conspiracy is not acted on, helpers are to flog each other and cut off each other’s hair. If the conspiracy is sealed with a handshake and no evil intentions can be proven, they are to pay a fine if free or be flogged if unfree.¹²⁴ While the last of those three stages clearly corresponds to established practices, the first two do not. In addition, the conspirators have to punish each other – they are not punished by any form of authority. Therefore, the decree constitutes a case that is entirely different from the sanctioning of floggings against unfree culprits.¹²⁵ Furthermore, the

¹²⁴ *Capitulare missorum in Theodonis villa datum secundum, generale* c. 10, MGH Capit. 1, 124: *De conspiracyonibus vero, quicumque facere praesumpserit et sacramento quamcumque conspiracyonem firma-verint, ut triplici ratione iudicentur. Primo, ut ubicumque aliquod malum per hoc perpetratum fuerit, auctores facti interficiantur; adiutores vero eorum alter ab altero flagellentur et nares sibi invicem praecidant. Ubi vero nihil mali perpetratum est, similiter quidem inter se flagellentur et capillos sibi vicissim detundant. Si vero per dexteras aliqua conspiratio firmata fuerit, si liberi sunt, aut iurent cum idoneis iuratoribus hoc pro malo non fecisse, aut si facere non potuerint, suam legem componant; si vero servi fuerint, flagellentur.* On the chapter, see Otto Gerhard Oexle, “Gilden als soziale Gruppen in der Karolingerzeit,” in *Das Handwerk in vor- und frühgeschichtlicher Zeit. 1. Historische und rechtshistorische Beiträge und Untersuchungen zur Frühgeschichte der Gilde*, ed. Herbert Jankuhn et al., *Abhandlungen der Akademie der Wissenschaften in Göttingen. Philologisch-Historische Klasse* 3.122 (Göttingen: Vandenhoeck & Ruprecht, 1981): 303–4; McComb, *Strategies of Correction* (n. 10): 195–96 and passim. On the manuscript tradition, see Michael Glatthaar, “Die drei Fassungen des Doppelkapitulars von Diedenhofen/Thionville (805/806),” *Deutsches Archiv für Erforschung des Mittelalters* 69, no. 2 (2013): 443–77.

¹²⁵ This is also true for a comparable provision, issued by Louis the Pious, which includes the option of physical punishment for the free that is entirely different from the methods used for the punishment of the unfree. In the already-mentioned c. 3 of the *Capitulare de disciplina palatii Aquisgranensis*, a free person that hosts a thief, murderer, or adulterer first has to carry the criminal on his shoulders and take him around the palace, and then take him to prison. If a prostitute is found at someone’s home, that person has to carry her to the market square, where she will be lashed. If he refuses, he himself is to be lashed at that same place. See *Capitulare de disciplina palatii Aquisgranensis* c. 3, MGH Capit. 1, 298: *Volumus atque iubemus, ut nullus de his, qui nobis in nostro palatio deservunt, aliquem hominem propter furtum aut aliquem homicidium vel adulterium vel aliud aliquod crimen ab ipso perpetratum et propter hoc ad palatium nostrum venientem atque ibi latitare volentem recipere praesumat. Et si liber homo hanc constitutionem transgressus fuerit et talem hominem receperit, sciat se eundem hominem, qui apud eum inventus fuerit, in collo suo portare debere, primum circa palatium deinde ad cippum, in quem idem malefactor mittendus est. Si autem servus fuerit, qui hanc nostrum iussionem servare contempserit, similiter illum malumfactorem in collo suo usque ad cippum deportet, et ipse postea in marcatum adducatur et ibi secundum merita sua flagelletur. Similiter de gadalibus et meretricibus volumus, ut apud quemcumque inventae fuerint, ab eis portentur usque ad mercatum, ubi ipsae flagellandae sunt, vel, si noluerit, volumus, ut simul cum illa in eodem loco vapuletur.* The spectacular, personally humiliating element of the punishments mentioned above is obvious in the chapter.

mutilation of the nose and hair is highly reminiscent of spectacular¹²⁶ punishments known from Byzantium, which (temporarily) marked the culprit as such and functioned as public deterrents.¹²⁷ The cutting of hair as punishment and humiliation was of course not unprecedented among the “long-haired” Merovingians.¹²⁸ While the introduction of new forms of corporal (and spectacular) punishment for the free during the reign of Charlemagne is indisputable, the question of a potential end to the dichotomy of prescribing fines to the free and beatings to the unfree depends on the interpretation of the aforementioned chapters from the *Capitulare Mantuanum* (c. 4)¹²⁹ and the *Capitulare legibus additum* (c. 10).¹³⁰

4 Concluding Remarks

To conclude: McComb’s assessment, which claimed that the Carolingian approach to punishment and penal law was largely built on Merovingian principles,¹³¹ mostly holds true concerning the punishment of *servi*. The dichotomy of compensatory payments for the free and corporal punishment for the unfree appears to have, in principle, outlasted the Merovingian dynasty as it survives in various Carolingian sources.

126 McComb, *Strategies of Correction* (n. 10): 9 convincingly linked Frankish spectacular punitive practices to Foucault’s theory on “discipline and punishment.” On the subject, see Michel Foucault, *Surveiller et punir, naissance de la prison* (Paris: Gallimard, 1975). Furthermore, on Carolingian punishment strategies as an attempt to morally improve society, see Paul Fouracre, “Carolingian Justice. The Rhetoric of Improvement and Contexts of Abuse,” in *La giustizia nell’alto medioevo, secoli V–VIII*, Settimane di studio del Centro italiano di studi sull’alto medioevo 42 (Spoleto: Centro Italiano di Studi sull’Alto Medioevo, 1995): 771–803.

127 On mutilation as a penalty in Byzantium, see John Lascaratos and Panagiota Dalla-Vorgia, “The Penalty of Mutilation for Crimes in the Byzantine Era (324–1453 A.D.),” *International Journal of Risk and Safety in Medicine* 10, no. 1 (1997): 51–56. On the deterring effect of mutilation and mutilation as an act of communication, see McComb, *Strategies of Correction* (n. 10): 25–27, where McComb also provides more literature on the subject. The mutilation of the nose was already mentioned as punishment in the older Capitulary of Herstal from 779. See *Capitulare Haristallense* c. 23, MGH Capit. 1, 51.

128 See John M. Wallace-Hadrill, *The Long-Haired Kings. And Other Studies in Frankish History*, The Medieval World 16 (New York: Routledge, 2020 [1962]): 245–46.

129 *Capitulare Mantuanum* c. 4, MGH Capit. 1, 190–91: *Hoc omnibus notum sit, si quislibet post causam legibus finitam se proclamaverit, aut quindecim accipiat camactos aut solidos XV componere cogatur*. The *Capitulare Mantuanum* is briefly mentioned in Jennifer R. Davis, *Charlemagne’s Practice of Empire* (Cambridge: Cambridge University Press, 2015): 281–82 and 288; Francesco Manacorda, *Ricerche sugli inizi della dominazione dei Carolingi in Italia*, Studi storici 71–72 (Rome: Istituto Storico Italiano per il Medio Evo, 1968): 40 and 48; Hubert Mordek, “Die Anfänge der fränkischen Gesetzgebung für Italien,” *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 85 (2005): 31. The unusual term *camactos* (“beaten with a rod”) was used exclusively in the *Capitulare Mantuanum*, according to Niermeyer and van de Kieft, *Mediae Latinatis Lexicon Minus* (n. 6): 154–55.

130 See above, n. 90.

131 McComb, *Strategies of Correction* (n. 10): 163.

Furthermore, the correspondence between compensatory payment and the number of lashes, which is commonly found in the Merovingian Lex Salica, can also be found in two of Charlemagne's capitularies.¹³² However, most capitularies do not specify the number of lashes to be carried out but merely state that *servi* are to be beaten;¹³³ others employ a ratio of one *solidus* per lash rather than one *denarius*. Even the two capitularies that employ the ratio from the Merovingian Lex Salica do so covertly: They do not include a reduced rate for *servi* (three rather than fifteen *solidi*), therefore making the correspondence between lashes and payment very difficult to comprehend. A reduced rate for *servi*, which is commonly found in Merovingian sources, is in fact not found in any of the Carolingian provisions issued for the entire Frankish realm: Only the *Capitula Remedii* and a chapter of the so-called *Capitulare missorum speciale* (which is only contained in the version of the decree sent to Aquitaine) inconsistently prescribe a reduced payment that is dependent on legal status. Furthermore, not only do the capitularies disregard a reduced rate – the payment of which would have allowed *servi* (or their owners) to avoid corporal punishment – they do not include such an option at all. Indeed, it is reasonable to assume that if a *servus* was willing and able to financially compensate for a crime he committed, he would have been given the opportunity to do so, but it would not have been at a rate resembling the fine for the free. This, as has been mentioned, may be a result of the declining relevance of legal status. However, the general survival of the differentiation of punishment according to legal status does not represent the adoption of an anachronistic relic by the Carolingians to emphasize their legislative continuity. While the borders between legal statuses may have been blurred in Carolingian Francia, legal status was definitely not irrelevant.¹³⁴

¹³² Cf. *Capitulare Aquisgranense* c. 3, MGH Capit. 1, 148; *Capitulare missorum Aquisgranense primum* c. 11, MGH Capit. 1, 151.

¹³³ See, for example, *Pippini regis Capitulare* c. 1, MGH Capit. 1, 31; *Capitulare missorum in Theodonis villa datum secundum, generale* c. 10, MGH Capit. 1, 124; *Hlotarii capitulare papiense* c. 8, MGH Capit. 2, 61. Provisions that do not specify the number of lashes can also be found in Merovingian Francia; see *Childeberti secundi decretio* c. 14, MGH Capit. 1, 17.

¹³⁴ As proven, for example, by the aforementioned trial on the legal status of Maurinus. Cf. Uhl, *Maurinus* (n. 92): 105–24.

