Classical Quarterly **42** (ii) 448–458 (1992) *Printed in Great Britain*

CONSULTATION WITH A MAGISTRATE IN JUSTINIAN'S *CODE*

In his monograph on the praetorian prefect, L. L. Howe found it necessary to include an appendix concerning the *Codex Justinianus* as a source for this official.[1] The problem was that while manuscripts or early editors had labelled various recipients of third-century imperial constitutions as prefects, all save two of those appellations were expunged by Krueger in his edition of the *CJ*.[2] Howe considered it 'impossible to believe' that only two of the numerous pre-Diocletianic rescripts preserved by Justinian's compilers should have been directed to praetorian prefects; but he also realised that without further evidence or argumentation, Krueger's scepticism could not simply be ignored. The solution was to label some cases dubious; others, following Krueger, were rejected altogether.[3] But beyond this, Howe was able to discover several instances of entirely unlabelled addressees who could be identified with otherwise known praetorian prefects, and he supposed that many similar cases might be found.[4]

In what follows, I should like to propose such a find, suggesting that the Macrinus addressed by *CJ* 4.28.3 (15 March 198) arguably might have been the praetorian prefect D. Veturius Macrinus. Neither manuscript nor editor labels Macrinus *praefectus praetorio*; rather, the identification will depend upon interpretation of the rescript in its legal and historical context. But if the identification of this law's recipient as praetorian prefect is correct, there are interesting consequences for what is known of the office and its holders in the late second and early third centuries. And even though this law's Macrinus cannot indisputably be recognised as the otherwise known prefect of the guard, still more significant is the mere realisation that the addressee of *CJ* 4.28.3 was a magistrate judging a case, that Macrinus was not a private citizen. For while it is commonly supposed that the *CJ* offers a collection of imperial responses directed almost exclusively to private individuals, a good argument can be made for a higher proportion of government officials as addressees; and recognition of this will require modifying various notions of or approaches to the rescript system generally. But before proceeding to investigation of a specific text,

[1] L. L. Howe, *The Pretorian Prefect from Commodus to Diocletian* (Chicago, 1942), pp. 119–20.

[2] The two constitutions where Krueger unhesitatingly retained the reading *praefectus praetorio* are *CJ* 9.51.1 (Oclatinius Adventus and Opellius Macrinus) and *CJ* 1.50.1 (Domitius). A third (*CJ* 7.33.1) marks its recipient Julianus as praetorian prefect, and Krueger leaves the appellation in the inscription, though suggesting in a note that it is to be deleted. Howe, op. cit., p. 70 no. 20 would let it stand.

[3] For a chronological list of prefects that contains all those possibly labelled as such by the *CJ* manuscript tradition or early editors, see E. Cuq in *Oeuvres complètes de Bartolomeo Borghesi*, x (Paris, 1897), pp. 803–7. Howe, op. cit., pp. 87ff., provides thorough discussion of these. The following are classed as dubious: Decimus in 228 (*CJ* 1.54.2); Ammonius in 240 (*CJ* 6.45.2); Pompeianus in 293 (*CJ* 8.1.3); Tryphonius *c.* 293 (*CJ* 9.51.12). Those rejected are: Metrodorus in 207 (*CJ* 4.24.1); Severus in 223 (*CJ* 4.56.2); Herodotus in 238 (*CJ* 5.11.2); Fabianus under Gordian III (*CJ* 9.51.6); Celer in 239 (*CJ* 1.54.3); Claudius in 240 (*CJ* 5.11.3); Achillinus under Valerian and Gallienus (*CJ* 10.65.1).

[4] Howe, op. cit., p. 120 for the supposition of other cases. In six instances he identified unlabelled recipients of rescripts with otherwise known prefects: *CJ* 2.11.9, probably Q. Maecius Laetus (Howe, op. cit., p. 71 no. 21); *CJ* 8.30.2, probably Domitius (Howe, op. cit., p. 78 no. 44); *CJ* 5.30.2, 5.31.19, 5.70.4, 8.17.9, all probably Julius Asclepiodotus (Howe, op. cit., pp. 84–5 no. 60).

some general principles regarding identification of addressees in the *CJ* should be set out.

That Justinian's codification contains in the main private rescripts cannot be disclaimed; and these documents are often easily recognised. Where women or soldiers receive legal advice from the emperor there is no dilemma.[5] In other instances a man is addressed in the second person, and is also clearly involved as a litigant. Here too the document must be private. On the other hand, rescripts that indisputably can be called official are scarce. A very few pre-Diocletianic documents are readily identifiable as replies to *consultationes*, or as other types of communication with magistrates, because the recipients are marked by official titles.[6] Aside from these two groups of rescripts, the one plainly private and the other clearly official, there is a third group of documents that are not so simply classified. A significant body of imperial constitutions do not sport addressees labelled with titles, and thus are not immediately recognisable as official; but neither are they always indubitably private.[7]

[5] These have received attention: L. Huchthausen, 'Herkunft und ökonomische Stellung weiblicher Adressaten von Reskripten des *Codex Iustinianus* (2. und 3. Jhdt. u. Z.)', *Klio* 56 (1974), 199–228 and eadem, 'Soldaten des 3. Jahrhunderts u. Z. als Korrespondenten der kaiserlichen Kanzlei', in H. Scheel (ed.), *Altertumswissenschaft mit Zukunft. Dem Wirken Werner Hartkes gewidmet* (Berlin, 1973), pp. 19–51. For a general treatment of women at law, A. J. Marshall, 'Ladies at Law: the Role of Women in the Roman Civil Courts', in C. Deroux (ed.), *Studies in Latin Literature and Roman History*, v (Brussels, 1989), pp. 35–54. Paul, *Dig.* 5.1.12.2, in a discussion of those eligible to serve as judges, states the principle regarding women plainly – they were excluded, *non quia non habent iudicium, sed quia receptum est, ut civilibus officiis non fungantur*. See also Paul, *Dig.* 16.1.1.1 and Ulp. *Dig.* 50.17.2 on the inability of women to serve as judges. As for soldiers, while they might serve in certain instances as judges of civil matters, in all the instances where imperial constitutions are directed to men called soldiers, these men are clearly litigants in the case at hand. For a brief discussion of soldiers as judges, cf. R. MacMullen, *Soldier and Civilian in the Later Roman Empire* (Cambridge, Mass., 1967), pp. 54ff.

[6] It is worth noting that naming officials as such seems to begin in earnest with the tetrarchs. Aside from the praetorian prefects mentioned above (nn. 2 and 3), there are only the following before 284: *CJ* 3.31.1 (*Augurino proconsuli Africae*, 170); *CJ* 9.43.1 (*Rutiliano consulari Ciliciae*, 215); *CJ* 7.54.1 (*procuratoribus hereditatium*, Caracalla?); *CJ* 10.5.1 (*ad rationales*, 228); *CJ* 9.9.4 (*Iuliano proconsuli Narbonensis*, Severus Alexander); *CJ* 11.40.1 (*quattuorviris et decurionibus Fabraternorum*, Severus Alexander). It is hard to say with absolute certainty whether common practice before the time of Diocletian or the work of editors has resulted in this paucity of titles in the earlier constitutions. Unfortunately, inscriptions and papyri seem to be of rather little help in resolving the problem. The Greek rescripts on papyrus and stone are now conveniently collected by J. H. Oliver, *Greek Constitutions of Early Roman Emperors from Inscriptions and Papyri* (Philadelphia, 1989). Only one document recorded there goes to an official of the Roman state. Number 289 (*Stud. Pal.* 5.119) is a letter from Gallienus to the equestrian procurator Aurelius Plutio (*PIR*^{2} A 1576), who is addressed without a title. Latin documents, though I cannot claim to have seen them all, appear to give similar results. From Aezanis in Asia, for example, comes a dossier containing various official correspondence (*CIL* iii.355). Though the original address formula was not copied, a letter from Hadrian to the proconsul Avidius Quietus (*PIR*^{2} A 1409) is there described as an *Exempl(um) epistulae [Cae]saris scriptae ad Quietum*. Note also that in this letter the emperor refers to a previous governor of the province (Mettius Modestus, *PIR*^{2} M 568) simply by name. The documentary sources, though they certainly cannot have the last word here, at least do not show that titles are to be expected. On the other hand, it should be remarked that editorial deletion of recipients' titles, at least from fourth-century constitutions, is certainly known in the *CJ*. For example, *CJ* 4.61.4 is inscribed, *Imp. Constantinus A. ad Iunium Rufum*. At *CTh* 4.13.4, the same rescript goes to the same recipient, who is now called *consularis Aemiliae*. I should suspect, in fact, that the lack of titles for officials in the pre-Diocletianic constitutions of the *CJ* probably came about largely because of the editorial practices of the *Codex Gregorianus*.

[7] Borghesi long ago pointed out that lack of an official title in a constitution's inscription does not at all prove the recipient to be a private person rather than a magistrate. See the note by Cuq

Not a few imperial responses in the *CJ* go to men, and are phrased in such a way as to leave unclear the involvement of the addressee as litigant. That is, instead of speaking directly to a litigant and his situation in the case at hand, the emperor enunciates a more generalising legal principle, or provides what might appear to be a directive to the adjudicating magistrate. Such instances must be dealt with individually, and the texts themselves must be scrutinised with an eye to intent. Can the rescript plausibly be thought a response to a judge's consultation? Or does a *libellus* forwarded by a private individual lie behind the constitution? Extreme caution is here apposite, largely because we know the Justinianic editors, or possibly even their predecessors, upon occasion to have truncated the original texts.[8] This editorial habit is particularly significant for the present discussion because of what looks like a relatively common practice in the original composition of clearly private rescripts. Many seem to have been divided into two parts: (*a*) the description of a general legal principle; and (*b*) an application of that principle to the litigant and the case at hand.[9] It is then perfectly conceivable that there are instances where a rescript that originally was composed in this bipartite fashion has come down to us with only the statement of legal principle remaining, the rest having been excised by an editor. Moreover, there are any number of rescripts directed to women, hence surely private, which contain only an official-sounding utterance of standard legal practice.[10] Were men here addressed rather than women, the private nature of these texts would not be at all so evident. In short, a rescript that states general legal principle, and thus seems not to be directed specifically to the particulars of or participants in the case at hand, might tempt the identification of its recipient as a magistrate; however, the tone of a text is no absolute guarantee one way or another in this regard.

The possible pitfalls are daunting. On the one hand, a nearly universal absence of titled recipients in second- and third-century constitutions, combined with the fact that various of these documents nonetheless have been demonstrated to be addressed to magistrates, means that more unidentified officials must be lurking about. And yet, to rely on the texts of those rescripts that conceivably are official correspondence in order to identify their addressees as magistrates is a risky business. In the end, not to consider the cases where an emperor might be addressing an official can only doom us to misunderstand the overall nature of the documents in the *CJ*. We should proceed, but with caution. Duly warned, let us now turn to the text here in question, *CJ* 4.28.3.

Impp. Severus et Antoninus AA. Macrino. Si filius familias aliquid mercatus pretium stipulanti venditori cum usurarum accessione spondeat, non esse locum senatus consulto, quo fenerare filiis familias prohibitum est, nemini dubium est: origo enim potius obligationis quam titulus actionis considerandus est. *PP. id. Mart. Saturnino et Gallo conss.* [15 March 198]
If a son-in-power, having bought something, promises the (sale) price with the addition of interest to the seller who stipulates, no one doubts that there is no place for the *senatus*

in *Oeuvres complètes de Bartolomeo Borghesi*, pp. 117–18. There are also instances where unlabelled addressees were recognised as officials already by Krueger. For example: *CJ* 7.45.1, to a Quintilianus, whom Krueger suggests to have been the *praefectus vigilum* (cf. *PIR*^{2} I 511); *CJ* 8.50.1, to Ovinius, probably Ovinius Tertullus the governor of Moesia Inferior (cf. *PIR*^{2} O 191). See further below (n. 42) for more on this.

[8] For example, *CJ* 9.41.4 (*Pars ex rescripto imp. Antonini A.*) or *CJ* 10.5.1 (*Pars epistulae imp. Alexandri A.*). Note as well a document such as the rescript, now chopped into three pieces, from Severus Alexander to Syrus (*CJ* 3.42.2, 9.2.2, 9.35.1). The remaining fragments may or may not represent the complete original. A list of such constitutions is provided by T. Honoré, *Emperors and Lawyers* (London, 1981), p. 35 n. 78.

[9] I list just a few examples of such documents: *CJ* 4.5.1, 5.12.2, 5.71.1, 7.75.1.

[10] Again, a few examples as representative: *CJ* 2.12.5, 4.29.1, 8.15.3, 8.42.1.

consultum, where it is prohibited to make loans at interest to sons-in-power; indeed, the origin of the obligation rather than the name of the action must be considered.

Let us first set out the basic parameters of the case, an understanding of which is essential for deciding Macrinus' part in the matter. Originally, the *filius* and the *venditor* contracted for the sale of something. The son must have taken possession, but subsequently neglected to pay the sale price. At some point the seller tired of waiting for his money, and stipulated for the *pretium*, now with the addition of interest.[11] Apparently the son promised, in accord with the *stipulatio*, but still did not pay. At that point the seller sued, and this brings us to the problem addressed in the imperial reply.

The emperors' response indicates two sticking points in the case brought before them: (*a*) applicability or not of the *senatus consultum Macedonianum*; (*b*) some problem as regards the title of the action (*origo ... considerandus est*).[12] Moreover, it seems clear that these two elements of the case were somehow related to each other. In order to reconstruct the question originally asked of the emperors, and thus properly to understand who asked it and to whom Severus and Caracalla address their answer, several questions must be posed. Who most likely would have brought up the senatorial decree? What relationship might there have been between the *SC* and the title of the action brought by the plaintiff? Who would have written to Septimius Severus regarding all this?

Only one of the litigants might have benefited from the *SC Macedonianum* – the son. This law disallowed loans (*mutua pecunia*) to *filii familias*, not voiding the transaction itself, but granting the son an *exceptio* against the claim of the lender.[13] So if he could somehow show that the suit brought against him effectively concerned *mutuum*, rather than a sale price with accrued interest, our *filius* could claim an exception and avoid paying the debt owed the seller. This brings us back to the last clause of the emperors' response, stressing consideration of the original obligation rather than the action's title. Clearly the *actio* according to which the case was being tried became a point of dispute, and that probably because it gave the *filius* his opportunity to manoeuvre the *SC* into the contest. There is a likely scenario for this.

The agreement that led directly to litigation here was based on the seller's *stipulatio* and the resultant promise of the son to pay; hence the proper action for the seller ought to have been a *condictio certae pecuniae*.[14] However, this action was all but equivalent to the *actio certae creditae pecuniae*, the procedure employed chiefly to settle disputes over loans (*mutuum*).[15] Very likely then, the seller did not pay attention

[11] Regarding interest on sales, the seller's legal claim to such and the obligations of the purchaser, A. Bechmann, *Der Kauf nach gemeinem Recht*, iii.1,2 (Leipzig, 1905), pp. 138–9, and F. de Zulueta, *The Roman Law of Sale* (Oxford, 1945), p. 51. Note also M. Kaser, 'Zum heutigen Stand der Interpolationenforschung', *ZRG* 69 (1952), 75–6, where it is remarked that *pretium* in a sale is to be understood as *totum pretium*, i.e. including interest. The stipulation here may have involved *novatio*, in which case the *novum* could well have been the addition of interest. On novation generally, M. Kaser, *Das römische Privatrecht*[2] (Munich, 1971), p. 647. Cf. also Marcellus, *Dig.* 13.5.24.

[12] The rubric of *CJ* 4.28 is *Ad Senatus Consultum Macedonianum*; hence, there can be no doubt as to which *SC* is here intended. I should like to thank Dennis Kehoe for bringing my attention to the important role of the action's title.

[13] On this *SC* generally: A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia, 1953), p. 698; Kaser, op. cit., p. 532; R. J. A. Talbert, *The Senate of Imperial Rome* (Princeton, 1984), p. 443 no. 70.

[14] Ulp. *Dig.* 12.1.24, *Si quis certum stipulatus fuerit, ex stipulatu actionem non habet, sed illa condicticia actione id persequi debet, per quam certum petitur.* See also Kaser, op. cit., p. 542.

[15] On the near equivalence of the two actions, Kaser, op. cit., p. 531. Cf. also Berger, op. cit., p. 591 s.v. '*mutuum*'.

enough to absolute legal propriety, and brought an *actio certae creditae pecuniae*. The son thereupon claimed that technically, i.e. given the title of the action, he was being sued for non-payment of a loan.[16] An *exceptio* on the basis of the *SC Macedonianum* must next have been requested, in hope of slipping out of paying what was owed.[17]

Thus the *filius* must have caused the problem that led to this rescript by claiming an *exceptio* that ultimately was found at the imperial court to be improper. His argument was not allowed by the emperors, who imposed equity upon the letter of the law. But whom do they address in disallowing introduction of the *SC*? Who is Macrinus?[18]

It seems unlikely that the *filius* would have written to the emperors, particularly given the wording of the imperial response. The Macrinus of our constitution is informed that there is no doubt that the *SC* cannot be introduced. He apparently had been unsure as to whether the *SC* should or could apply, and we might reasonably suppose that his original communication with the emperors expressed hesitation in asking about its relevance to the case. Now, someone attempting the sort of legal sophistry that this young man apparently did – namely the metamorphosis, based on a perfectly legal though ethically questionable technicality, of a trial concerning a sale price into one concerning a loan – will hardly have written to the emperors thus. He would have hoped to finesse the ploy, and would not likely have risked bringing notice to his trick because of a half-hearted attempt to get the *SC* admitted. If the son had petitioned to obtain imperial support for introduction of the *SC Macedonianum*, he would have done so boldly, and in denying him this tactic the emperors surely would have addressed him directly and personally. They did not. We shall return in a moment to the generalising language of this rescript. For now, suffice it to say that Macrinus is not at all likely to have been the *filius*.

Nor can he be the seller, who had nothing to gain by mentioning the *SC*. To have written to the emperors with doubt as to whether it might apply would have been a poor tactic indeed. The seller can rather be expected to have pleaded forcefully against use of the law; and had he been the author of a petition to the emperors regarding the case, he would surely have asked them specifically to forbid the law's introduction altogether. In that case, the answer would likely have been directed to him in the second person, and ought to have said simply that he was right, and that the *SC* could not be adduced.

If both litigants are removed as likely recipients of this constitution, only one possible participant in the case remains. Macrinus must have been the judge. But

[16] On the importance of employing the right type of action under the formulary procedure and on the continued use of formulae with the *cognitio extra ordinem*, L. Wenger, *Institutes of the Roman Law of Civil Procedure* (New York, 1955), pp. 15–16 and 262ff. respectively. Note also Ulp. *Dig.* 2.13.1 pr., where it is said that the plaintiff must make known the action by means of which he brings suit so that the defendant might contest it.

[17] This interpretation is lent further weight by a passage from Ulpian's *ad edictum* (*Dig.* 14.6.3.3). We are there told that loans to sons-in-power are not allowed because they are detrimental to the parents, *et ideo etsi in creditum abii filio familias vel ex causa emptionis vel ex alio contractu, in quo pecuniam non numeravi, etsi stipulatus sim: licet coeperit esse mutua pecunia, tamen quia pecuniae numeratio non concurrit, cessat senatus consultum.* It is not clear from the context just why Ulpian thinks the initial contractual debt becomes a loan if the creditor attempts to collect on the basis of stipulation. Might it be that rather than stating a generally held rule, Ulpian is in fact thinking of the very case here under discussion?

[18] Most significant for what follows is W. Turpin, 'Imperial Subscriptions and the Administration of Justice', *JRS* 81 (1991), 101–18. He argues persuasively that private individuals usually petitioned the emperor in order to elicit favours or direct action regarding their litigation. They wanted 'practical assistance rather than intellectual guidance' (p. 119).

beside the argument that excludes the litigants, there are positive reasons for supposing the recipient of this constitution to have been the judge.

First of all, the language used to describe the parties to the suit and the other elements in this case is utterly generalising. There is talk of a *filius familias* and a *venditor*; names and the second person do not figure in. The thing purchased, and over which the dispute arose, is simply *aliquid*. Sale price and interest are also referred to in non-specific terms. This generalising tone can be taken to imply one of two things. Either the rescript is directed to an official, and states the approach that he is to adopt in his final decision, or we have here (originally) the sort of bipartite constitution mentioned above, and the more personalised part has been edited out. I should think that the former interpretation is more persuasive. The generalising here has not to do with broad legal principle; what the emperors say is absolutely case-specific. Generalised are names, things and amounts, not the legal problem itself. What we read, then, seems unlikely to have been followed by a personalised application of principle to the specific case, precisely because what we have is the solution of the specific problem at hand. Hence, I should think that we possess a complete text of the original imperial response. The fact that the emperors' reply talks broadly of a *filius*, a *venditor*, *aliquid*, probably indicates that they are writing to a judge who questioned them about a case, without bothering to include in his *consultatio* the names of those involved or the exact objects and amounts in dispute.

What is more significant, the emperors complete their response by saying to Macrinus that the *origo obligationis* ought to be considered. Surely consideration of the original obligation, as opposed to the title of the action, is the job of the judge. If Severus and Caracalla had been addressing Macrinus as litigant, would they not have told him that the judge would consider the one rather than the other?[19]

Let us assume that the Macrinus of *CJ* 4.28.3 is the judge. We may then ask whether any known person named Macrinus might have been trying such a case in March 198. It should be kept in mind that the search concerns a limited number of officials: in Rome the praetor, or possibly the prefect of the city or a curule aedile; the praetorian prefect or possibly a *iuridicus* in Italy; likewise a *iuridicus* or the governor in a province.[20] And given what generally can be determined regarding

[19] Note (e.g.) *CJ* 4.30.2, where Caracalla explicitly informs the petitioning litigant of the judge's eventual decision, given the parameters of the case. This type of response is rather common. It should here be mentioned that E. Levy, *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht*, ii (Berlin 1922), p. 19 n. 7 takes the last clause of *CJ* 4.28.3 to be a Justinianic interpolation, reflecting the later situation when the formulary procedure was inoperative. Levy supposes a similar interpolation regarding an action's title (though the legal question is different) in another place, Tryph. *Dig.* 46.1.69 – *et non titulus actionis, sed debiti causa respicienda est*. While both of these passages might be interpolations, I should think that they could just as likely reflect the attitude of Severan jurisprudence in this regard. Indeed in another area, i.e. where the *voluntas* of a testator was concerned, it seems that the Severans preferred to let their perception of equity supersede the strict letter of the law. Cf. D. Kehoe and M. Peachin, 'Testamentary Trouble and an Imperial Rescript from Bithynia', *ZPE* 86 (1991), 159–60.

[20] On the praetor, cf. O. Lenel, *Das Edictum perpetuum*[3] (Leipzig, 1927), p. 299 (§ 110). We know, at least, that the urban praetor might try an *actio venditi*. Ulpian, in his monograph *de officio praefecti urbi* (*Dig.* 1.12.1), reproduces a letter from Severus to Fabius Cilo, outlining the duties of the urban prefect. The law of sale does not figure in it. However, Paul, *Dig.* 4.4.38 pr. mentions a sale of a *fundus*, and the *praefectus urbi* handling litigation concerning the sale. Generally on the judicial duties of the urban prefect in civil matters, E. Sachers, *RE* xxii.2 (1954), 2522–3. On the curule aedile, A. M. Honoré, 'The History of the Aedilitian Actions from Roman to Roman-Dutch Law', in D. Daube (ed.), *Studies in the Roman Law of Sale Dedicated to the Memory of Francis de Zulueta* (Oxford, 1959), pp. 132–4. Also Ulp. *Dig.* 21.1.23.4 on

officials as recipients of imperial constitutions in the *CJ*, I should think that the most likely of those mentioned here would be one of the two prefects or a provincial governor, while a praetor at Rome is likewise possible. For the period here in question, the fasti of the urban prefecture are complete, and there is no Macrinus;[21] hence, our Macrinus should be suspected to have been a praetor, or better, either the governor of a province or a praetorian prefect.

The *HA* (*Sev.* 13.6) provides a long list of senators executed by Septimius Severus, and among those who met their maker is one Cerellius Macrinus. Were we truly in the presence of a senator named Macrinus, he might be a candidate as the recipient of this constitution. This man's proper *cognomen*, however, is not Macrinus; it is Marcianus.[22] The future emperor might also conceivably be considered. Yet it would appear that in 198 he was *procurator privatae* to another prefect, namely Plautianus.[23] It is impossible that in that capacity he should have been judge in a case like the present. So far as I can tell, only one presently known Macrinus should come in question – D. Veturius Macrinus, who was made *praefectus praetorio* in 193.[24] It is obviously possible that the Macrinus of our constitution is some otherwise unknown person, e.g. a provincial governor or praetor at Rome. Still, the known praetorian prefect is tempting. And if this identification is correct there are interesting consequences.

Precious little is known of Veturius Macrinus' career. From 181 to 183 he was *praefectus Aegypti*.[25] He then disappears for ten years, to resurface in 193 when he was appointed prefect of the guard by Didius Julianus, as a sort of peace gesture to Severus.[26] The new emperor apparently kept him on, though without the law

aedilician actions for sales by sons-in-power. As regards the praetorian prefect and his jurisdiction over Italy, see below n. 34. For *iuridici*, W. Eck, *Die staatliche Organisation Italiens in der hohen Kaiserzeit* (Munich, 1979), pp. 256ff., and W. Simshäuser, 'Untersuchungen zur Entstehung der Provinzialverfassung Italiens', *ANRW* ii.13 (Berlin and New York, 1980), pp. 429ff. On the provincial governor (e.g.), J. A. Crook, *Law and Life of Rome* (London, 1967), pp. 70–3. Also H. E. Mierow, *The Roman Provincial Governor as He Appears in the Digest and Code of Justinian* (Colorado Springs, 1926), pp. 30ff. Delegates of these officials (at least of the praetorian or urban prefect or provincial governor) are, of course, also possible.

[21] Paul M. M. Leunissen, *Konsuln und Konsulare in der Zeit von Commodus bis Severus Alexander* (Amsterdam, 1989), pp. 308–9. It may be that Manilius Cerealis should be added to the list during the years 200/201. See M. Peachin, 'Prosopographic Notes from the Law Codes', *ZPE* 84 (1990), 108–9.

[22] G. Alföldy, 'Septimius Severus und der Senat', *BJ* 168 (1968), 136–7 and 154. Also G. Alföldy, 'Eine Proskriptionsliste in der Historia Augusta', *BHAC* 1968/1969 (Bonn, 1970), 4 = *Die Krise des Römischen Reiches. Geschichte, Geschichtsschreibung und Geschichtsbetrachtung* (Stuttgart, 1989), p. 167. See also Leunissen, op. cit., pp. 400–2. As Alföldy points out, Marcianus ought to have been a *praetorius* or a young *consularis* in about 197. Otherwise, next to nothing can be said of his career.

[23] A. Stein, *Der römische Ritterstand* (Munich, 1927), p. 120; H. von Petrikovits, *RE* xviii. 1 (1942), 542; H.-G. Pflaum, *Les carrières procuratoriennes équestres sous le Haut-Empire romain* (Paris, 1960), p. 668; F. Millar, *The Emperor in the Roman World* (Ithaca, 1977), p. 126; *PIR*^{2} O 108. I have not been able to consult P. Cavuoto, *Macrino* (Naples, 1983).

[24] Another vague possibility might be the father-in-law of Severus Alexander, apparently named Sallustius Macrinus; however, there are numerous problems with this man, and he is, in the end, an unconvincing candidate. On him, A. Stein, *RE* i A 2 (1920), 1910–13 [Sallustius no. 4]. The *HA* (*Sev. Alex.* 58.1) also mentions a Varius Macrinus, active in Illyricum and a relative of Severus Alexander. This man is another invention of the *HA* author. See R. Syme, *Ammianus and the Historia Augusta* (Oxford, 1968), pp. 45–6. Also now, Maria Angustias Villacampa Rubio, *El valor histórico de la Vita Alexandri Severi en los Scriptores Historiae Augustae* (Zaragoza, 1988), pp. 345–6, and Leunissen, op. cit., pp. 209–10.

[25] G. Bastianini, 'Lista dei prefetti d'Egitto dal 30^a al 299^p', *ZPE* 17 (1975), 300.

[26] *HA Did. Jul.* 7.4.

presently under consideration Macrinus' career is subsequently obscure.[27] We otherwise know that the second prefect in 193 was Flavius Juvenalis.[28] Yet another given is that by 197, Severus had replaced one of these men with Plautianus.[29] The problem is that there has been no evidence as to which of the two prefects appointed in 193 four years later vacated the post in favour of Plautianus. If the interpretation of *CJ* 4.28.3 presented here is correct, Macrinus was in action as prefect during March 198. Juvenalis must have been the man replaced.

The identification of Macrinus is interesting also with regard to the movements of praetorian prefects. An opinion frequently repeated holds that at least by the Severan period, and thereafter, both praetorian prefects accompanied the emperor at all times.[30] Our constitution seems not to fit that supposition; since Severus and Caracalla write to him, Macrinus must not have been in the imperial presence during March 198.[31] Now, it was in midsummer 197 that Severus left Rome to begin his second Parthian expedition. The fighting took up, roughly, fall and winter of the year, and by spring 198 the imperial entourage appears to have returned to Syria, there to remain for nearly a year.[32] *CJ* 4.28.3, then, must have been composed in and sent from Syria.[33] Where was Macrinus? Since he is attested in his function as judge, it is tempting to suggest Rome. The *praefectus praetorio* was responsible for justice primarily in Italy beyond the hundredth milestone from the capital; hence, this is where we should expect to find him serving as judge.[34] I should also think that there will have been some pressure to have one of these officials, or occasionally a delegated

[27] On his career generally: Howe, op. cit., pp. 68–9; R. Stiglitz, *RE* viii A 2 (1958), 1901; Pflaum, op. cit., no. 179bis. Cf. also A. Birley, *Septimius Severus*[2] (Plymouth, 1988), p. 99.

[28] Howe, op. cit., p. 69 and *PIR*[2] F 300.

[29] Howe, op. cit., p. 69 and *PIR*[2] F 554, based on the evidence of *CIL* vi.224, where Plautianus is attested (his name is restored, but with some certainty) as praetorian prefect on 9 June 197.

[30] Howe, op. cit., p. 16; W. Ensslin, *RE* xxii.2 (1954), 2408; Millar, op. cit., pp. 127–8; H. Halfmann, *Itinera principum. Geschichte und Typologie der Kaiserreisen im Römischen Reich* (Stuttgart, 1986), pp. 103–4.

[31] We know, on the other hand, that the other prefect, Plautianus, was with Severus and Caracalla in the East. See Halfmann, op. cit., p. 104 with the relevant evidence. It could be, of course, that the emperors chose to communicate in written form with Macrinus even though he was near by. I am unable, however, to locate any direct evidence for such procedure.

[32] On the movements of Severus, Halfmann, op. cit., pp. 217 and 220.

[33] This interpretation might seem to cause trouble because of the subscription with *PP*. The usual assumption is that the remark *proposita* indicates a response to a *libellus* posted up at the emperor's residence, and which the petitioner was responsible to copy. See e.g. Honoré, op. cit., pp. 27–8. If my interpretation of the present constitution is correct, this can hardly have been the procedure followed; rather, the rescript must have been sent directly to Macrinus. The fact is, however, that *PP* is not an indication of much at all. On this, D. Nörr, 'Zur Reskriptenpraxis in der hohen Prinzipatszeit', *ZRG* 98 (1981), 9 n. 24 (citing Krueger's *Praefatio* to the editio maior of the *CJ*) and 14ff. on the problems generally of the 'Propositionsvermerk'.

[34] Ulp. *Coll.* 14.3.2. See also O. Karlowa, *Römische Rechtsgeschichte*, i (Leipzig, 1885), p. 548, and Howe, op. cit., p. 34 n. 7. Note further Ulp. *Dig.* 1.12.1.4 or Dio 52.21.2, remarking that cases within the hundredth milestone belong to the *praefectus urbi*. Wenger, op. cit., p. 46 n. 55 argues that the jurisdiction of the praetorian prefect was unrestricted territorially; however, I am aware of no evidence that indicates this for the period of the Principate. It is clear that the praetorian prefect could handle appeals from judgements of provincial governors, or cases sent him by such officials. See (e.g.), *CJ* 4.65.4 (222) or 9.2.6 (243). However, I do not think that we should expect to find prefects outside Italy and administering justice, unless in the company of the emperor, or unless specially delegated to do so. When travelling, of course, the emperor might well delegate a case to the prefect. See (e.g.), *P. Col.* vi, lines 45–9. Millar, op. cit., pp. 129–30 argues that the prefect was generally at the emperor's side when he gave justice. See also the discussion by Howe, op. cit., pp. 32–7, which gives no indication of a jurisdiction unlimited territorially for the prefect.

representative, present in Italy at all times.[35] Thus, the evidence that shows both prefects travelling with the emperor should possibly not be taken to represent a hard-and-fast rule of practice.[36]

A point of legal interest can also be gleaned from our constitution. There is little evidence regarding civil jurisdiction by the praetorian prefect. Clearly on record are a case involving a loan, and another concerning a trust.[37] In neither instance, unfortunately, is it absolutely certain whether the prefect heard the case in the first instance, or on appeal.[38] With *CJ* 4.28.3, given the present interpretation, we have a third instance of a civil matter being tried by the *praefectus praetorio*. Moreover, this is also a third type of legal problem. Although the attempt to introduce the *SC Macedonianum* means to turn the case into one involving a loan, in reality the dispute concerns contract for payment of a sale price; the *SC* is a red herring, and we are dealing here with the law of sale. So, while we still cannot be certain that the praetorian prefect handled civil cases in the first instance, nonetheless it begins to appear at least that he presided over a wide variety of civil litigation. And it may just be that this constitution presents us with an instance of the prefect handling a civil law trial in the first instance.

Let us now return to the implications of identifying the addressee as an officer of the state. Admittedly, we cannot be absolutely certain that D. Veturius Macrinus was the recipient of *CJ* 4.28.3; yet, that the man addressed by Severus was at least the judge in this case, hence an official, seems to rest on relatively firm ground. As a result, we should expect to be dealing here not with a subscription to a *libellus*, but instead with communication between the emperor and one of his bureaucrats. Given the traditional picture of the rescript system, such correspondence ought to have taken epistolary form, and the imperial secretary involved should have been the *ab epistulis*, not the *a libellis*.[39] Nonetheless, this very text has been employed by Professor Honoré

[35] Note Ulp. *Dig.* 32.1.4, *a praefectis vero praetorio vel eo, qui vice praefecti ex mandatis principis cognoscet*, etc. On vice-praetorian prefects generally, A. Stein, 'Stellvertreter der Praefecti praetorio', *Hermes* 60 (1925), 94–103. See also A. Chastagnol, 'Deux chevaliers de l'époque de la Tétrarchie', *AS* 3 (1972), 223–31. Interestingly, the *praefectus vigilum* and the *praefectus annonae* seem to have been the men generally chosen to represent the praetorian prefects. The mere fact of the existence of such substitutes indicates that there was a need always to have someone of this stature on hand in Rome.

[36] Note that Birley, op. cit., p. 175 assumes that of the two praetorian prefects, Papinian and Maecius Laetus, only the former accompanied Septimius Severus on the British campaign. That is supported by *CJ* 2.11.9 (18 February 208), directed to a Laetus who is almost certainly the prefect (cf. Howe, op. cit., p. 71). The emperor (N.B. oddly Caracalla alone) allows that anyone who has defended the public interest of his *patria* will not resultantly suffer *infamia*. We may assume that someone from an Italian town was here involved, and that the case had come before the prefect in his capacity as chief appellate judge for Italy. We may also presume that Laetus received written communication about the case because the imperial entourage had already headed north. For the departure date (late 207 or early 208), Halfmann, op. cit., p. 219.

[37] Paul, *Dig.* 12.1.40 (loan), Papin. *Dig.* 22.1.3.3 (*fideicommissum*). W. Ensslin, *RE* xxii.2 (1954), 2415 suggests that by the Severan period civil jurisdiction was regularly a part of the duties of the praetorian prefect. He also adds two possible instances of such: Paul, *Dig.* 29.2.97 (Papinian is thought here to be already *praefectus praetorio*); *CJ* 1.26.1. (A.D. 230), where it is said that a *libellus praefecto praetorio datus pro contestatione haberi non potest*. Note as well Paul, *Dig.* 3.2.21, where a theoretical suit for *iniuria* seems to take place in the first instance before the praetorian prefect.

[38] Howe, op. cit., p. 34.

[39] Still probably the best treatment of the rescript system as a whole is that of U. Wilcken, 'Zu den Kaiserreskripten', *Hermes* 55 (1920), 1–42. This may now be supplemented by: Honoré, op. cit., pp. 24–53; Nörr, *ZRG* 98 (1981), 1–46; W. Williams, 'The *Libellus* Procedure and the Severan Papyri', *JRS* 64 (1974), 86–103; idem, 'The Publication of Imperial Subscripts', *ZPE*

to document the activity (writing private rescripts) of Papinian as *a libellis*.[40] Honoré in fact recognises the presence of rescripts in the *CJ* which are not directed to private individuals; and these he would not admit for the purposes of his study, since they presumably were composed by the *ab epistulis*.[41] However, we have already observed that the number of such documents is probably somewhat greater than has generally been supposed, a fact essential to any proper understanding of either the *CJ* or the rescript system generally.[42] That is to say, if it should turn out that a significant proportion of the preserved imperial rescripts are directed not to private individuals but rather to government officials, then whatever one's attitude toward stylistic analysis of these texts, further thought must be given to the method of their original composition.[43]

Now, it seems to me that some of Honoré's arguments from style must convince. The words of Papinian, for example, can pretty certainly be recognised in a number of the preserved Severan constitutions from the period 194/202.[44] The question remains, though, as to how precisely those words came to be there. If a significant portion of the extant constitutions from the apparent period of Papinian's tenure as *a libellis* are addressed to magistrates, and thus should have been written by the *ab epistulis*, and if some of these seem to exhibit Papinian's style even though as *a libellis* he ought not to have been involved with their composition, the various appearances of his style cannot all simply be attributed to his having written every rescript preserved from that period. For the moment, I would suggest taking refuge in the

40 (1980), 283–94. Note as well the important articles of D. Liebs, 'Juristen als Sekretäre des römischen Kaisers', *ZRG* 100 (1983), 485–509 and idem, 'OM 13,1 und das Reskriptwesen in der Historia Augusta', *BHAC* 1982/1983 (Bonn, 1985), pp. 221–37.

[40] Honoré, op. cit., p. 57 n. 13.

[41] Honoré, op. cit., p. 34. See further on this Nörr, *ZRG* 98 (1981), esp. 9ff.

[42] Cf. above n. 7. Note also that Honoré's reviewers, for example, do not question the private nature of the constitutions examined by him. E.g. G. Burton, *CR* 34 (1984), 66 or F. Millar, *JRS* 36 (1986), 277. By way of illustration, I adduce another example of a constitution directed to a magistrate, but employed by Honoré (op. cit., p. 57 nn. 13 and 49) as a private rescript – *CJ* 2.50.1. The inscription reads, *Impp. Severus et Antoninus AA. Chiloni*, and the constitution is subscribed, *PP. k. Nov. Laterano et Rufino conss.* (1 November 197). Settlement of a soldier's will is in question, and the constitution clearly went to L. Fabius Cilo as *leg. Aug. pr. pr. Pannoniae superioris*. This was first recognised by E. Ritterling, 'Die Statthalter der pannonischen Provinzen', *AEM* 20 (1897), 34–5. See now, *PIR*^{2} F 27 (p. 99) and B. E. Thomasson, *Laterculi Praesidum* (Göteborg, 1984), p. 18 no. 45. Other examples of this phenomenon are noted by Peachin, *ZPE* 84 (1990), 105–12 and Turpin, *JRS* 81 (1991), 104 n. 20, although the latter generally regards the *CJ* rescripts as private.

[43] I have conducted an initial examination of the dated constitutions in the *CJ* from the reigns of Septimius Severus and Caracalla, using the method described at the beginning of this article. For the purposes of the present calculation, only officials actually labelled as such in Krueger's edition are listed as certainly official. The group called 'possibly official' includes various constitutions whose addressees are not labelled with official titles, but who have been identified as magistrates, e.g. *CJ* 2.50.1 (cf. above n. 42): total rescripts [*leges geminatae* are counted together as one], 355; certainly private, 268 = 75.1%; certainly official, 2 = 0.56%; possibly official, 85 = 23.9%. By way of comparison, in his study of *all* the rescripts (N.B. the numbers given above consider only dated documents in the *CJ*) from the period between A.D. 194 and 305, Honoré, op. cit., p. 34 finds that 54 of a total 2,639 rescripts (0.02%) are official.

[44] For example, *neque enim aequitas patitur* is a hapax in the *CJ* (21 April 200) and *non enim aequitas hoc probare patitur* appears only once in the *Dig.*, and comes from Papinian's pen. One is inclined, with Honoré, to see the same man at work in both places. See Honoré, op. cit., p. 58, with this and other such examples. It further seems to me that a reading of these rescripts in chronological order indeed gives at least a rough impression of periodic changes in style. However, fixing exact dates for the changes, as well as determining anything like real consistency of style within a given period of time, is not so neat as Honoré makes it out to be.

consilium principis. Papinian, as *a libellis*, did not write all of the rescripts between 26 September 194 and 12 February 202.[45] Rather, Papinian was a member of the *consilium*, where petitions were discussed and answers to them formulated. As a result of these discussions the opinion of Papinian, hence his words, frequently emerged as the most favoured response; and that response is now enshrined in the preserved constitution. There is clearly more to be done in this area, and I think that the more differentiated approach suggested here will bring us closest to the rescript system as it actually functioned under the Principate.[46]

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[45] For the dates, Honoré, op. cit., p. 144.

[46] The opinion expressed here as to how exactly private rescripts were composed is very close to that of Millar, *JRS* 36 (1986), 278, though he does not consider the distinction between rescripts to private individuals and communications to officials, which seems to me essential to the problem. I should like to remark that this paper grew from a graduate tutorial during the spring of 1991 at New York University with Sean Redmond, whom I thank for initial discussion of this law. Thanks go also to Géza Alföldy and this journal's referee for helpful comments on an initial draft. Bruce Frier and Dennis Kehoe have provided me with invaluable advice about things legal, and I am especially grateful to them.