

# ABDUCTION MARRIAGE IN ANTIQUITY: A LAW OF CONSTANTINE (*CTh* IX. 24. 1) AND ITS SOCIAL CONTEXT\*

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On 1 April A.D. 326 the Emperor Constantine issued a strongly worded edict (*CTh* IX. 24. 1) violently attacking the practice of abduction marriage or bride theft.<sup>1</sup> Addressed 'to the people' ('ad populum'), the law demands the punishment of all persons involved in such cases, including even the girl herself and her parents, if they had later agreed to the marriage of their daughter with her abductor. This edict marks the first explicit recognition in Roman law of marriage by abduction, although it is clear from other literary sources that the phenomenon was not new to the age of Constantine.

The real significance of the Constantinian law and the motivations behind it have never been properly examined, and more than one scholar has attributed its promulgation to Constantine's adoption of the Christian ideal of sexual purity. But such an explanation misunderstands both the nature of the practice attacked by the emperor, and the reasons for his opposition. The purpose of this study is to clarify the purpose and background of this late antique law, and to shed light on a hitherto ignored aspect of ancient society by comparing the description of *raptus* found in *CTh* IX. 24. 1 with modern ethnographical accounts of abduction marriage in areas of the Mediterranean today and with portrayals of the same practice in earlier Greek and Latin literature.

First, the law itself, as it has been preserved in the *Theodosian Code*, the compilation made under Theodosius II of extracts from the imperial constitutions of Constantine and his fourth- and early fifth-century successors:

Si quis nihil cum parentibus puellae ante depectus invitam eam rapuerit vel volentem abduxerit patrociniū ex eius responsione sperans, quam propter vitium levitatis et sexus mobilitatem atque consili a postulationibus et testimoniis omnibusque rebus iudiciariis antiqui penitus arcuerunt, nihil ei secundum ius vetus prosit puellae responsio, sed ipsa puella potius societate criminis obligetur. (1) Et quoniam parentum saepe custodiae nutricum fabulis et pravis suasionibus deluduntur, his primum, quarum detestabile ministerium fuisse arguitur redemptique discursus, poena immineat, ut eis meatus oris et faucium, qui nefaria hortamenta protulerit, liquentis plumbi ingestione claudatur. (2) Et si voluntatis adsensio detegitur in virgine, eadem qua raptor severitate plectatur, cum neque his impunitas praestanda sit, quae rapiuntur invitae, cum et domi se usque ad coniunctionis diem servare potuerint et, si fores raptoris frangerentur audacia, vicinorum opem clamoribus quaerere seque omnibus tueri conatibus. Sed his poenam leviolem inponimus, solamque eis parentum negari successionem praecipimus. (3) Raptor autem indubitate convictus si appellare voluerit, minime audiatur. (4) Si quis vero servus raptus facinus dissimulatione praeteritum aut pactione transmissum detulerit in publicum, Latinitate donetur aut, si Latinus sit, civis fiat Romanus: parentibus, quorum maxime vindicta inderat, si patientiam praebuerint ac dolorem compresserint, deportatione

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<sup>1</sup> The following abbreviations have been used:  
*CTh* = *Codex Theodosianus* ed. Th. Mommsen and P. Meyer (1903).  
Campbell = J. K. Campbell, *Honour, Family and Patronage* (1964).  
Desanti = L. Desanti, 'Costantino, il ratto e il matrimonio riparatore', *SDHI* 1986, 195-217.

Grodzynski = D. Grodzynski, 'Ravies et coupables: un essai d'interprétation de la loi IX. 24. 1 du Code Théodosien', *MEFRA* 96 (1984), 697-726.

Herzfeld = M. Herzfeld, 'Gender Pragmatics: Agency, Speech, and Bride-Theft in a Cretan Mountain Village', *Anthropology* 9 (1985), 25-44.

Magnarella = P. J. Magnarella, *Tradition and Change in a Turkish Town* (1964).

Bates = D. G. Bates, 'Normative and Alternative Systems of Marriage among the Yoruk of southeastern Turkey', *Anthropological Quarterly* 47 (1974), 270-87.

Kudat = A. Kudat, 'Institutional Rigidity and Individual Initiative in Marriages of Turkish Peasants', *ibid.*, 288-303.

Lockwood = W. G. Lockwood, 'Bride Theft and Social Maneuverability in Western Bosnia', *ibid.*, 253-69.

Stross = B. Stross, 'Tzeltal Marriage by Capture', *ibid.*, 328-45.

plectendis. (5) Participes etiam et ministros raptoris citra discretionem sexus eadem poena praecipimus subiugari, et si quis inter haec ministeria servilis condicionis fuerit deprehensus, citra sexus discretionem eum concremari iubemus.

If someone who has not previously made any agreement with a girl's parents should seize her although she is unwilling or if he should lead her away when she is willing, hoping for protection from the response of one whom, on account of the fault of frivolity and the fickleness of her sex and judgement, our ancestors completely excluded from making legal complaints and from giving testimony and from all judicial matters, (or: ... hoping for protection from her response which ... our ancestors completely excluded from legal complaints, etc.), the girl's response shall be of no use to him according to the ancient law, but rather the girl herself shall be made guilty by association in the crime. (1) And since often the watchfulness of parents is frustrated by the stories and wicked persuasions of nurses, these (the nurses) first of all, whose service is proved to have been hateful and whose talk is proved to have been bought, this punishment shall threaten: that the opening of their mouth and of their throat, which brought forth destructive encouragements, shall be closed by the swallowing of molten lead. (2) And if voluntary assent is revealed in the virgin, she shall be struck with the same severity as her abductor; impunity shall not be offered to those girls who are abducted against their will either, since they too could have kept themselves at home till their marriage day and, if the doors were broken down by the abductor's audacity, they could have sought help from the neighbours by their cries and could have defended themselves with all their efforts. But we impose a lighter penalty on these girls, and order that only legal succession to their parents is to be denied them. (3) Moreover, if the abductor who has been proved guilty without doubt should wish to appeal, he shall certainly not be heard. (4) But if any slave should bring forth into public the fact that the crime of abduction has been neglected by deception or disregarded by an agreement (between the abductor and the girl's parents), he shall be rewarded with Latin status, or if he already has Latin status, he shall become a Roman citizen: the parents, for whom revenge (for the abduction) was the major concern, if they displayed forbearance and repressed their sorrow, shall be punished with exile. (5) We order that partners and accomplices of the abductor also be subjected to the same punishment without regard to sex; and if among these attendants anyone of servile status should be caught, we order that person to be burned without regard to sex.<sup>2</sup>

Although the manuscripts of the *Theodosian Code* give a date of 1 April 320 for the publication of this edict, some scholars, following Otto Seeck, have redated it to 326 and have connected it with several other laws of 326, all of which are thought to involve sexual offences and to have formed a sort of 'legislative package' aimed at curbing sexual immorality.<sup>3</sup> The dates of Constantinian laws are particularly prone to confusion in the manuscripts, and it is probable that *CTh* IX. 24. 1 was in fact issued in 326 and not 320. But there is no reason to assume that this constitution on abduction was originally part of a longer law simply because, like many other Constantinian laws, it is concerned with sexual relationships. Indeed, its true intent and context are better understood if it is examined by itself.

The edict against abduction is clearly one of Constantine's crueller and more irrational laws. That he considers *raptus* a particularly heinous offence is indicated by the fact that this is one of the few cases where delation of a master by his own slave is not only encouraged, but actually rewarded.<sup>4</sup> Even the girl who was carried off against her will is penalized by being deprived of her right of succession to her parents. It should be noted, however, that although *CTh* IX. 24. 1 has often been described as a 'rape law', the crime of *raptus* against which this edict is directed is not rape. Rather,

<sup>2</sup> All translations are my own, unless otherwise noted. My translation of *CTh* IX. 24. 1 differs in some important respects from that given by Clyde Pharr, *The Theodosian Code and Novels and the Sirmondian Constitutions* (1952).

<sup>3</sup> O. Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.* (1919), 61, 63; followed by A. H. M. Jones, *Constantine and the Conversion of Europe* (1948), 199; T. D. Barnes, *Constantine and Eusebius* (1981), 220 and *The New Empire of Diocletian and*

*Constantine* (1982), 77; and Desanti. Other scholars, however, including Grodzynski and Mommsen, retain the 320 date.

<sup>4</sup> Another law of Constantine, *CTh* IX. 5. 1, declares that a slave or freedman who dares to inform on his master or patron is to be denied a hearing and crucified. But cf. *CTh* IX. 9. 1 (326 or 329), which also encourages delation by slaves. On use of a slave informant in *CTh* IX. 24. 1, see Grodzynski, 702.

Constantine's law attacks the abduction of an unmarried girl by a man who has not made a formal betrothal agreement with her but who hopes to force her parents' consent to what is essentially a *de facto* marriage.

The true nature of the situation described in this law becomes clear when it is set alongside accounts of abduction marriage in traditional rural societies today, particularly in the area of the eastern Mediterranean. The purpose of these analogies is not to suggest a direct continuity of the practice of bride theft from antiquity to the present, but to use the reports of anthropologists working in communities where bride theft is still known or where it has only recently disappeared to provide a gloss for the more enigmatic and scattered evidence from antiquity. In particular, the attitude shown by communities today toward the participants in a marriage by abduction can illuminate and explain the perspective of Constantine's law, whose harshness has often puzzled scholars.

#### I. THE DYNAMICS OF ABDUCTION

Marriage by abduction functions as an alternative to the arranged marriage preceded by betrothal. Betrothal, generally considered the 'correct' way of contracting a marriage, is an agreement entered into by the families of the bride and groom (more precisely, by their fathers). The betrothal is generally preceded by protracted negotiations between the two family heads, each of whom is anxious to determine the suitability of the prospective son or daughter-in-law, and to secure the best terms possible for his own family. The future groom may have some say in the negotiations, and perhaps even suggest possible brides for consideration by his parents; how much the male actually participates in choosing his wife depends on his family and the society. The future bride, on the other hand, is a passive participant and is expected to accept the partner chosen for her by her parents, who have spent considerable time and energy investigating the possible suitors and have the expertise necessary to make such a decision. In such societies it is unlikely that the girl, who may be considerably younger than her intended husband, has had much opportunity to get to know any members of the opposite sex outside her family, and she is usually willing to accept their recommendation.

Betrothal, then, is a social and indeed a political pact, formed on the basis of economic and social factors of concern to the family as a unit and to the community. The personal feelings of the prospective couple are not of great concern, though obviously a certain amount of mutual attraction is desirable, and if one party finds the other repugnant, the match is unlikely to be successful. It is generally agreed that it would be impractical to undertake such a serious endeavour as marriage on the basis of the personal whims of uninformed youth. 'Love' does not enter into the betrothal arrangements, even though the culture may have an ideology of romantic love.<sup>5</sup>

Disruption of an already settled marriage pact can have serious repercussions, since a unilaterally broken betrothal will cause great offence to the rejected party and his or her family. Thus a betrothal, once concluded, is rarely broken. If the male breaks off the engagement, the rejected girl's chances of making a good marriage are virtually ruined; the community will assume that she was rejected because of some serious fault, probably moral.<sup>6</sup> Rejection of a suitor by the girl's family, either after he has made an offer or, worse still, after a betrothal has already been concluded, is an attack on his male honour and must be avenged if he is to retain his standing in the community. Therefore the refusal of a suitor by a girl's parents, or the breaking off of a betrothal, can provide the motivation for an abduction.<sup>7</sup> Abduction may also occur if the male, forced to postpone his marriage plans for financial or family reasons, becomes impatient and decides to take matters into his own hands. Or the threat of another suitor may cause him to force the issue by stealing the girl outright.<sup>8</sup>

<sup>5</sup> cf. Bates, 276; Campbell, 124.

<sup>6</sup> Campbell, 127-8, cf. 201; J. du Boulay, *Portrait of a Greek Mountain Village* (1974), 98.

<sup>7</sup> Campbell, 124-32 indicates clearly the relationship between betrothal and abduction. Cf. Herzfeld, 28:

sometimes refusal by the girl's father may be an 'intentional challenge' to the suitor to abduct her.

<sup>8</sup> Bates, 276-7; Kudat, 291. Cf. Herzfeld, 30-8 (a first-person narrative by the abductor).

The would-be abductor gathers together male companions of his own age. The raiding party may waylay the intended bride outside her home while she is going about her daily chores, for instance at the well, or they may break into her house and seize her. Often violence ensues. The girl's father and brothers will attempt to defend her; the conflict may result in death, particularly for the abductor.<sup>9</sup>

If the abduction is successful, the girl is taken to a place outside the village, perhaps in the woods, where she cannot be found. She may then be raped by her prospective husband, but not necessarily; what is important is that her reputation will be irreversibly damaged, since it will be assumed by her family and by the community that she is no longer a virgin.<sup>10</sup> Soon her family will have called in the law, and the abductor will be arrested. The girl is then asked if she wants to marry her abductor or prefers to prosecute. Almost always she agrees to a marriage, even though she may have originally resisted abduction; she knows she will not be able to make a good marriage with anyone else after her reputation has been so compromised.<sup>11</sup>

The girl's family will be very angry for a while, perhaps for as long as several years. Eventually, however, there will be a reconciliation, particularly if the couple have a baby. Marriages formed by abduction can be as successful as arranged ones, though problems may arise later. The availability of divorce may therefore be relevant to the frequency and social acceptability of abduction marriage in a particular society.<sup>12</sup>

The arranged marriage preceded by betrothal joins two families and reinforces familial and community structures. Bride theft, on the other hand, can be a socially divisive marriage strategy. From the point of view of these traditional Mediterranean communities, marriage by abduction subverts the intentions and authority of the persons who, in a well-ordered society, should be responsible for the conclusion of the marriage—the fathers of the couple. In a marriage by abduction the initiative is taken by the individual participants themselves, not by their families. Paradoxically, however, in those societies in which the arranged marriage is (at least in theory) the norm, abduction can be a common and even, under certain circumstances, a socially acceptable marriage strategy, in spite of publicly expressed disapproval.<sup>13</sup>

From the description of abduction given above, it would appear that the initiative is entirely that of the abductor, and that the abducted girl has no more choice in the matter than if she had been formally betrothed by her parents. In reality, however, the *rapta* may be a more active participant in her own 'theft' than such a scenario suggests. There is a thin line between an abduction in which the girl, though she was not aware beforehand of plans for her kidnapping, anticipates some sort of action and is willing to be 'stolen', and an actual elopement planned by the two young people together. The disguising as an abduction of what is in fact a mutual agreement serves two useful purposes: it obscures any indication of sexual initiative on the girl's part, which would be regarded with horror by her parents and by the rest of the community, and it preserves the male's honour and demonstrates convincingly his courage and manliness.<sup>14</sup>

If the abductor was previously rejected by the girl's family, it is imperative that he recover his lost honour and abduction is the only effective way to do so. But even without such provocation, the successful completion of an abduction always increases the male's standing in the community, for it is a daring and dangerous undertaking which could have resulted in his death. A suitor may even be goaded into an

<sup>9</sup> Bates, 275; Campbell, 129; Herzfeld, 37–8; Lockwood, 253–4, cf. 259; Magnarella, 116.

<sup>10</sup> Raped: Bates, 275; Kudat, 291; Stross, 340; cf. du Boulay, 93 (op. cit., n. 6). But rape is not necessary to effect the purpose of abduction: cf. Campbell, 130; Herzfeld, 29.

<sup>11</sup> Bates, 275; Campbell, 130; Lockwood, 254; Stross, 340–1; Herzfeld, 39–41, another first-hand account: the girl refused to marry her abductor, only to be abducted by him again.

<sup>12</sup> cf. Lockwood, 266–7, on the frequency of bride theft in a Moslem area of Yugoslavia, where the

possibility of divorce for either party is an important factor in 'reducing the hazards of marriage by theft'. Divorce would be much less easy in Catholic or Greek Orthodox communities.

<sup>13</sup> Bates, 272, claims that among the Yoruk of Turkey twenty per cent of all marriages take place by means of bride theft (or elopement, which cannot always be distinguished from abduction). Cf. Magnarella, 113; Campbell, 130; Stross, 340; 342 (Mayan community in Mexico).

<sup>14</sup> Kudat, 292; cf. Lockwood, 254, 260; Campbell, 308; Stross, 339.

abduction by the girl's family as a test of his manliness and suitability as a son-in-law.<sup>15</sup> Sometimes, when a marriage has already been arranged (including provisions for dowry or bridal gifts), the groom and the girl's father may even collude in staging an 'abduction' to save the cost of an expensive wedding ceremony.<sup>16</sup>

In societies where the bride in a properly arranged marriage is expected to bring a substantial dowry to her husband, marriage by abduction even has certain advantages for the girl's family, since no dowry can be demanded by an abductor.<sup>17</sup> Conceivably a family that hoped to avoid giving a dowry could encourage their own daughter's abduction, but although complicity of the bride's parents with the abductor is known, it is prompted by other considerations, and few parents would be so little concerned with their daughter's welfare and their own reputation as to do such a thing (or at least to admit to it).<sup>18</sup> And abduction marriage occurs just as often in societies where brideprice is given by the groom rather than dowry by the bride's parents; indeed, a high brideprice is often the reason given for abductions, since a man can thereby get his bride 'free'. In such cases, the abductor's family may actually encourage him in his theft, but the abducted bride's family is much more angry and bitter than in societies where the bride brings a dowry.<sup>19</sup>

And although to us there is clearly a difference between elopement or a 'mock' bride theft, where the girl is a willing participant in an act which she may have had equal responsibility for planning, and 'genuine' bride theft, particularly in cases where the girl is raped or brutalized, we should not assume that the same distinction is made by societies where abduction marriage is a well-known phenomenon. On the contrary, there is always a presumption, on the part of the abductors and of the community as a whole, that the abducted girl was willing to be taken, and even if she puts up resistance and is subjected to violence during the abduction, she is still considered partly responsible.<sup>20</sup> The fact that the victim nearly always agrees in the end to marry her captor only reinforces this assumption.

Furthermore, elopement, 'mock' bride theft and 'genuine' bride theft all have the same end result: a marriage is made without proper preliminaries, through the action of the participant(s) rather than the decision of their parents. Hence all are equally 'anomic'. In the eyes of an authoritarian law, whether or not the bride was willing to be abducted may well be irrelevant. And whereas abduction and elopement are generally regarded with equanimity by the community as a whole (apart from the bride's family and perhaps also the groom's), the law takes a very different view of the matter, and abduction in particular is often subjected to strong legal sanctions. However, the threat of heavy penalties, even death, does not affect the popularity of abduction as a marriage strategy.<sup>21</sup> The only effective deterrent is the violent response of the girl's family, and for the abductor the gain in his prestige in the community as the result of a successful abduction, and the possession of the bride of his own choice more than compensate for the risk he must take.

Finally, it should be noted that there appear to be no geographical or religious boundaries within which the phenomenon of marriage by abduction occurs—it is

<sup>15</sup> cf. Herzfeld, 30–8, whose narrator was virtually railroaded into abducting his bride by his own relatives and her father.

<sup>16</sup> I have found two references to such staged abductions: S. Silverman, *Three Bells of Civilization* (1975), 201–2 (Umbrian hill-town); and L. Mair, *Marriage* (1971), 97 (African tribes). Unlike 'real' abduction marriages, the other financial components of a marriage agreement (dowry in Italy; bridewealth in Africa) have been arranged in advance and it is only the absence of a proper wedding ceremony that makes this 'irregular'.

<sup>17</sup> Campbell, 131. But cf. M.-E. Handman, *La violence et la ruse: Hommes et femmes dans un village grec* (1983), 85; three of the five cases of abduction/elopement in the Thessalian community she studies ended not only in reconciliation but with a full wedding ceremony and the handing over by the bride's parents of her dowry and trousseau.

<sup>18</sup> Handman (n. 17) claims that some families actu-

ally do this in Greece and south Italy, in contrast to the village she studied where this does *not* happen. She cites no evidence for this claim and I have come across no cases where a girl's parents are said to have contrived an abduction in order to avoid a dowry, nor any where the abductor and the girl's parents act in collusion for this purpose.

<sup>19</sup> Bates, 276–7 (among lower classes; abductors' families who are better off tend to pay bride price); cf. Kudat, 291–2 (bride price much less in cases of abduction); Stross, 343.

<sup>20</sup> Herzfeld, 29–30.

<sup>21</sup> Despite the imposition in Yugoslavia in the nineteenth century of the death penalty for the groom, corporal punishment for members of the wedding party, and defrocking of the priest who officiated at the wedding, abduction marriages continued to take place well into the twentieth century (Lockwood, 254).

found among Christians (Greece), Moslems (Turkey, Bosnia), and others (Tzeltal Indians in Mexico), in endogamous societies (Turkey) and those which place restrictions on the marriages of close kin (Greece, Tzeltal), and throughout the world, from Mexico to India. The only characteristic that these various cultures have in common is the fact that the arranged marriage, made by the fathers of the couple involved, is the socially approved norm.

## II. ABDUCTION MARRIAGE AND *CTH IX. 24. 1*

We can now examine *CTH IX. 24. 1* against this background. The first sentence of the law tells us that the situation is the same as that described in ethnographical accounts of bride theft: a man has not made an agreement (i.e. a betrothal) with the girl's parents but instead has abducted her, 'hoping for protection from her response'. Clearly, Constantine's *raptor* is operating on the same principle as modern-day abductors, that once the girl has been abducted and possibly (though not necessarily) raped, she will agree to marry him and will persuade her parents that that is the best solution. Constantine declares that because 'ancient law' declared that a girl's testimony was worth nothing in court (due to her 'sexus mobilitatem'), so also her agreement to a marriage with her abductor will be considered worthless. This is one of several laws of Constantine which express a low opinion of feminine self-control and behaviour, and its reference to female emotional instability is in line with third-century imperial rescripts which confirm traditional prohibitions on women's legal activities.<sup>22</sup> However, the assertion in *CTH IX. 24. 1* that 'the ancients' forbade women to give evidence in all court cases is untrue: under classical Roman law, women certainly could testify in cases in which they or their close relations were involved.<sup>23</sup>

Next the law decrees an exceptionally gruesome and sadistic punishment for the girl's nurse, who is here presumed to have acted as the instigator and abettor of her mistress's vicious inclinations. The venal nurse or maidservant who helps to conceal her mistress's sexual misconduct is familiar to us from classical literature, and indeed there appears to be some basis in fact for the assumption that the *nutrix* may be in part responsible for her charge's kidnapping.<sup>24</sup> A girl who actively consented is to suffer the same penalty as her abductor; oddly, this penalty is never actually defined in the law, but apparently it involved the death sentence. Even a girl who did not consent, but who did not raise enough clamour to alert the neighbours is still to be punished by being deprived of her rights to inherit from her parents.<sup>25</sup> Presumably she would still be able to contract a legal marriage with someone other than her abductor, though her marriageability would have been seriously damaged by the abduction and her loss of inheritance rights.

Scholars have always been appalled that the abducted girl is penalized even if she was unwilling. But the law is simply making the same assumption as modern-day abductors and their communities—that if the girl has allowed herself to be taken (forcibly or not), she has consented to the union. This may seem a strange notion of 'consent', but an analogy could be made with the Roman legal idea of 'consent' to marriage. The bride's consent to a marriage was required under Roman law, and a marriage was not considered valid unless both parties had actually agreed to be married. But a young girl who did not actively raise objections to her parents' choice

<sup>22</sup> cf. *CTH IX. 1. 3* (322); *CJ II. 12. 21* (315), for disapproval of women's involvement in legal affairs; and *CJ V. 37. 22. 5* (326) and *CTH III. 16. 1* (331) for a poor opinion of women's behaviour and motives. Cf. S. Dixon, 'Infirmis Sexus: Womanly Weakness in Roman Law', *Tijdschrift voor Rechtsgeschiedenis* 52 (1984), 343–71.

<sup>23</sup> In fact Constantine himself knew better: cf. *CTH IX. 1. 3* (322).

<sup>24</sup> e.g., the nurse in Euripides' *Hippolytus*, or the slave girl in Lysias' *On the Murder of Eratosthenes*; also Theocritus 6; Ovid, *Remedia Amoris* 638; also cf. Juvenal vi. 352. Cf. Bates, 275 on female accomplices

in the household.

<sup>25</sup> On deprivation of inheritance rights as the penalty for a girl marrying without her parents' permission, see P. Merèa, 'Le mariage *sine consensu parentum* dans le droit romain vulgaire occidental', *RIDA* 5 (1950), 203–17, esp. 208. Generally a girl's dowry was considered part, or even all, of her patrimony; it is not clear whether *CTH IX. 24. 1* intends to prevent parents from providing a previously abducted daughter with a dowry, which, although not actually a legal requirement for marriage under Roman law, was generally considered an essential part of a marriage settlement.

of husband was assumed to have consented.<sup>26</sup> The difference is, of course, that under Constantine's law only the girl's *successful* resistance to an abduction would be construed as an objection on her part, and a *fait accompli* would therefore imply her acquiescence.

In fact, the emperor's reasoning that the *rapta* could have summoned help if she had really wanted to is not as tendentious as it sounds. Houses in Mediterranean villages, then as now, were built quite close together, and there was very little 'private space' for the individual. It is unlikely that an adolescent girl would have had a room of her own, or even an opportunity to be alone inside the house where she could be snatched by an abductor without alerting the rest of the household—unless she had made arrangements ahead of time, perhaps with the aid of her trusty old nurse. It is, of course, possible that an abductor might force his way into a girl's home and seize her in the face of armed resistance from her family. The law foresees this possibility, and such resistance is mentioned in both modern and ancient accounts of abduction. But although Constantine's edict decrees a mitigation of the penalty for a girl really seized against her will, it is clear that such niceties as the victim's willingness mean little. In the eyes of the law, an abduction that has been allowed to succeed becomes *ipso facto* an elopement. As for the possibility of the girl being seized outside her house, where she would be more vulnerable (and where, as we know from both ancient and modern sources, abduction was just as likely to take place), the emperor's attitude is clear: she should have stayed safely indoors until she was properly married off by her parents.

Anthropologists have shown that, in those Mediterranean societies in which bride theft still occurs, anything from a violent kidnapping and rape to what is in effect a mutually agreed elopement is described by the same term.<sup>27</sup> Even when the society recognizes the difference in individual cases, the same assumptions about the girl's willingness and the stain on her reputation result whether she has been raped or has run away with her lover (although evidence of actual violence and resistance on the part of the girl will moderate her blameworthiness). This confusion of what to us would be quite different situations is found also in Constantine's law, which attempts to legislate for all cases of *raptus* simultaneously.

Thus we see that in *CTh* IX. 24. 1 all variations of the bride theft scenario are condemned equally. The young lover, who in order to protect the reputation of his beloved has staged an 'abduction' rather than eloping with her outright, is as guilty as the violent rapist who breaks in with an armed band of companions and seizes a completely helpless and unwilling victim. Parents who try to make the best of a bad situation by agreeing to a marriage between their daughter and the man who has destroyed her reputation (and her marriageability, since a previously abducted girl has very poor marriage prospects) are put in the same category as those who pretend not to notice an elopement or even push a young man into taking their daughter; they are, at best, accessories after the fact. Here the Emperor was attacking directly the fundamental reason for the success of abduction as a marriage strategy, for even if a girl's parents had known nothing of a *raptor's* plans to kidnap their daughter and were truly angry and upset by the abduction, they would have been far more likely to accept the union made without their consent than to repudiate the abductor and take back their daughter.

In order to prevent this concealment of a daughter's abduction, Constantine encourages even slaves who know of the crime to report it. And if a slave can turn informer, then so certainly can neighbours, rival suitors or personal enemies of the girl's family. *Raptus* is no longer a family affair, but has become a public offence, in much the same way that adultery had been made a public offence by Augustus more than three hundred years earlier. At that time the *Lex Julia de adulteriis* had thrown open prosecution of an adulterous wife to the general public if (after a period of sixty

<sup>26</sup> *D.* xxiii. 1. 12 (Ulpian); cf. S. Treggiari, 'Consent to Roman Marriage: Some Aspects of Law and Reality' in *EMC/CV* 26 (1982), 34–44.

<sup>27</sup> Lockwood, 260; du Boulay (op. cit., n. 6), 92–4;

Magnarella, 13; cf. Bates, 275. Elsewhere in Turkey, however, a verbal distinction is made between kidnapping and elopement: Kudat, 290–5.

days) neither the woman's husband nor her father had prosecuted.<sup>28</sup> Ironically, Constantine himself abrogated this provision of the Augustan adultery law in 326 (the same year that he promulgated *CTh* IX. 24. 1) by decreeing that a woman could be charged with adultery only by her husband or male members of her own family.<sup>29</sup>

Later imperial law realized that the penalties stipulated for abduction marriage by Constantine were unreasonably harsh. A law of 349 says simply: 'Although the authority of the former law, in which our glorious father had ordered that very fierce vengeance be taken against *raptores*, still stands, we, however, have established only a capital penalty, lest any delay in avenging the crime should arise under the pretext of too fierce a judgment'.<sup>30</sup> In other words, because of the severe punishments meted out to all concerned, officials had been reluctant to apply the penalty required by law, perhaps even to bring a conviction.

The 'capital penalty' (*capitalis poena*) here presumably means execution by the sword, and therefore Constantine's penalty, which is not stated in the text of *CTh* IX 24. 1 as we have it, may have been *summum supplicium*—that is, an especially atrocious and degrading form of the death penalty, such as crucifixion or condemnation *ad bestias* or, most likely, burning. Although *summa supplicia* in the fourth century were most often reserved for slaves or those of very low social status (as in the case of the *ministeria servilis condicionis* in *CTh* IX 24. 1), they could be applied to persons of any social class found guilty of particularly offensive crimes. Under Constantine, for instance, kidnappers of children (*plagiarii*) were sentenced *ad bestias*, if they were slaves or freedmen, or to fight in gladiatorial games if free-born; *haruspices* who practised their rites within the home of a private citizen were to be burned, regardless of social status; and parricides were to undergo the ancient penalty of the *culleus*.<sup>31</sup>

Constantine's harsh condemnation of *raptores* and all who help them suggests that, like kidnappers and parricides, abductors were originally subjected to the most degrading and painful punishment possible, and not simply death by the sword. On the other hand, another law of Constantine, issued only a few days after the edict against *raptus*, declares that a guardian (*tutor*) who has seduced his virgin ward is to be deported and his property confiscated but adds that 'he ought to receive the penalty which the law impose on a *raptor*'—which may mean simply the death penalty.<sup>32</sup> Perhaps the law had originally decreed crucifixion or condemnation to fight as a gladiator, both of which were abolished as criminal penalties during Constantine's reign. At any rate, it appears that the part of Constantine's law that specified the *raptor's* penalty was deleted sometime after its promulgation.<sup>33</sup>

How many cases of *raptus* had actually been brought to the attention of the legal authorities? We should ask who stood to gain from bringing charges. Disgruntled slaves, or hostile neighbours with a grudge against the family involved, or, most likely, another suitor, possibly one already betrothed to the girl, who had been upstaged by the abductor. Certainly the girl's family would prefer to hush the whole affair up and hope that it was not exposed, since otherwise their daughter would at the very least be deprived of her inheritance rights and their new son-in-law would be executed.

The next law under the same title in the *Theodosian Code*, dated 374, demonstrates even more clearly the problems which an imperial law against abduction

<sup>28</sup> On the *Lex Julia de adulteriis* see J. Gardner, *Women in Roman Law and Society* (1986), 127–32.

<sup>29</sup> *CTh* IX. 7. 2, dated 25 April 326.

<sup>30</sup> *CTh* IX. 24. 2. But slaves involved in cases of *raptus* are still to be burnt.

<sup>31</sup> *Plagiarii* (defined in law as those who kidnap others' children): *CTh* IX 18. 1 (315). *Haruspices*: *CTh* IX. 16. 1 (319). Parricides: *CTh* IX. 15. 1 (318).

<sup>32</sup> *CTh* IX. 8. 1, issued 4 April 326. It is difficult to know exactly what *capitalis poena* meant in the fourth century: *CTh* IX. 10. 1 (317?) explicitly contrasts *supplicium capitale* with *relegatio aut deportatio insulae*, implying that exile was no longer considered a capital penalty. But *capitalis poena* may still have meant exile with confiscation of property (*deportatio*), at least for

*honestiores*, in which case *CTh* IX. 24. 2 envisaged a substitute of exile for execution. Cf. P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (1970), 103–52; and D. Grodzynski, 'Tortures mortelles et catégories sociales' in *Du châtement dans la cité* (Collection de l'École Française de Rome 79, 1984), 361–403, who assumes that *capitalis poena* is beheading and thus distinguished from *summa supplicia* (cf. Garnsey, 104–5).

<sup>33</sup> C. Dupont, *Le droit criminel dans les constitutions de Constantin. 1 Les infractions* (1953), assumes (p. 48) that the penalty omitted in the *Theodosian Code* was burning, as do Barnes (op. cit., n. 3), 220; and Grodzynski, 712.

marriage could create. It calls for the immediate prosecution of 'marriage contracted by the crime of abduction', either by a relative wishing to expunge the blot on the family's honour or by a third party inspired by 'the common hatred of crimes'. But, the law continues, if for some reason the bringing of charges is delayed, there will henceforth be a five-year 'statute of limitations'. After five years, 'there will be no opportunity for accusation or for contesting the marriage or the offspring [of the union]'.<sup>34</sup> This is the first unambiguous reference to marriage and offspring (*coniugium* and *subolis*) in the series of fourth-century laws, and it indicates clearly that the legislation on *raptus* was attacking not the wanton and violent act of rape, but an apparently quite successful marriage strategy. A marriage by abduction which has lasted five years is clearly a stable union, and there could well be children involved whose legitimacy (and source of support) would be endangered if their parents were suddenly subjected to prosecution and conviction. The fact that the Emperor anticipates that no one would have prosecuted at the time the abduction occurred and that a marriage did indeed take place indicates that the harsh penalties prescribed for all participants and the illegality of such a marriage were not effective deterrents.

Although Constantine's edict is the first explicit reference to bride theft in extant Roman law, we should not assume that the practice of abduction marriage was a new phenomenon in the fourth century A.D., nor that there was necessarily an increase in the number of abductions in late antiquity. In fact, earlier references in Greek and Latin literature outside the legal sources suggest that Constantine's law was an imperial response to a widely known and not infrequently practised custom which, though of great antiquity, had not previously been recognized as a criminal offence by Roman jurists or their emperors.

### III. ABDUCTION MARRIAGE IN LITERATURE

Marriage by abduction is, of course, a popular theme in ancient myth and legend. The violent abduction by a god or hero of a young girl (or, as in the case of Ganymede, a boy) for sexual purposes is a well-known theme in early Greek epic poetry.<sup>35</sup> Plutarch remarks that among the many similarities between Theseus, the refounder of Athens and Romulus, the founder of Rome, is the fact that they both undertook *harpagē gunaikōn*—Theseus by the abduction of Helen and Romulus by the famous 'rape of the Sabine women'.<sup>36</sup>

Herodotus opens his *Histories* with the Persian version of the origins of the traditional enmity between Persia and the Greeks. According to the Persians, East-West hostility was the unfortunate result of a series of reciprocal abductions, culminating in the abduction of Helen by the Trojan prince Paris. For the Greeks to declare war on the Trojans in order to avenge one woman's abduction was, according to Herodotus' Persian informants, a foolish over-reaction: 'For it is clear that these women would not have been abducted if they had not wanted to be'.<sup>37</sup>

The attitude which Herodotus attributes to the Persians—that abducted women are more or less responsible for their own abduction—is essentially the same as the reaction of villagers in areas where bride theft occurs today, and explains the harsh declaration in Constantine's law which has so shocked scholars, that even the girls who were abducted against their will are to be penalized, '... since they too could have kept themselves at home till their marriage day and ... could have defended themselves with all their efforts'. The Persians' assumption gains some validity when we recall the circumstances of Helen's 'abduction' and indeed, anthropologists who have studied the dynamics of bride theft have concluded that 'women play an

<sup>34</sup> *CTh* ix. 24. 3, addressed to Maximinus, then praetorian prefect of Gaul.

<sup>35</sup> See C. A. Sowa, *Traditional Themes and the Homeric Hymns* (1984), 121-44. The words used to describe seizure for sexual purposes in the *Hymns* are *harpazo*, *haireō*, and *ago* (Sowa, 124).

<sup>36</sup> *Theseus* 2. 2; cf. 31-2; *Romulus* 9. For representa-

tions on Attic vases of Theseus in pursuit of a girl, see C. Sourvinou-Inwood, 'A Series of Erotic Pursuits: Images and Meanings', *JHS* 107 (1987), 131-53.

<sup>37</sup> Herod. i. 4. 2. Cf. also the Phoenicians' explanation of the *harpagē* of Io: she ran away with the Phoenician sailors willingly after discovering that she was pregnant by one of them (i. 5. 2).

important role in the arranging of their marriages through the use of such seemingly male-dominated options as bride theft'.<sup>38</sup>

The most famous abduction of Greek myth is of course that of Persephone by Hades, ruler of the underworld, an account of which is found already by the first half of the seventh century B.C. in the Homeric *Hymn to Demeter*.<sup>39</sup> The cult of Persephone and the story of her abduction were well-known throughout the Greek (and later the Roman) world, not only in mainland Greece but also in southern Italy and Sicily. The Eleusinian Mysteries, commemorating the return of Persephone to her mother, continued to be celebrated until the end of the fourth century A.D., and the sacred rites at Eleusis may have involved a re-enactment of Persephone's abduction.<sup>40</sup> At Locri in southern Italy, a number of votive plaques (*pinakes*) found in the sanctuary of Persephone illustrate scenes of abduction of a girl by a 'young abductor' (not Hades); interestingly, in some of these scenes the girl is portrayed as willing and co-operative. Iconographically, these *pinakes* share many characteristics with representations of wedding processions on Greek vases, which also contain elements of abduction.<sup>41</sup>

Both the vases and the plaques could be interpreted as portraying vestiges of a very ancient ritual of abduction as part of the wedding celebration or as symbolizing the traumatic taking of the young bride from the nurturing atmosphere of her family into the unknown and frightening world of married life.<sup>42</sup> Recently, it has been suggested that the iconographic similarities between scenes of abduction and wedding scenes in Greek art, and the intimations of complicity or willingness on the part of the abducted girl, reflect a perception deeply rooted in the Greek consciousness that sexual pursuit, followed by seizure, and marriage were essentially two sides of the same coin.<sup>43</sup>

But is the relationship between abduction and marriage as it is represented in art only metaphorical, an expression of a mental attitude without any basis in current reality? Perhaps the artists and their contemporaries were familiar with the practice of abduction marriage in their own time. Marriages in archaic Sparta were said to have been contracted by way of abduction. Plutarch (writing in the late first-early second century A.D.) describes this as a ritual, and his interpretation has been followed by modern scholars.<sup>44</sup> Herodotus, however, mentions a more spontaneous incident of bride theft among the Spartan nobility in the late sixth century B.C.<sup>45</sup> Similarly, the 'rape' (*raptus*) of the Sabine women, one of the founding legends of Rome, can be seen as a projection into the mythical past of early Latin rites of passage which depicted marriage as the forcible seizure of a girl from her parents, but could also preserve the memory of an actual practice of bride theft in the archaic period.<sup>46</sup>

By the Roman imperial period abduction marriage seems to have become something of a literary topos. *Raptus* appears as a popular topic for rhetorical declamation, along with other sensational subjects like kidnapping by pirates and the killing of adulterers taken *in flagranti delicto*. Six of the *Controversiae* of the elder Seneca and sixteen of the lesser *Declamations* attributed to Quintilian concern *raptus*.<sup>47</sup>

<sup>38</sup> Quotation from the introduction to *AQ* 47, 'Kidnapping and Elopement as Alternative Systems of Marriage', by D. G. Bates, F. Conant, and A. Kudat, 233-7, at 236; cf. Magnarella, 16.

<sup>39</sup> See N. J. Richardson, *The Homeric Hymn to Demeter* (1974), esp. 3-30 and 74 ff. On the motif of abduction while picking flowers: Sowa (op. cit., n. 35) 135 ff.

<sup>40</sup> Suggested by G. E. Mylonas, *Eleusis and the Eleusinian Mysteries* (1961), 261-4, but questioned by Richardson.

<sup>41</sup> C. Sourvinou-Inwood, 'The Young Abductor of the Locrian *Pinakes*', *BICS* 20 (1973), 12-21; and Ian Jenkins, 'Is there Life after Marriage? A Study of the Abduction Motif in Vase Paintings of the Athenian Wedding Ceremony', *BICS* 30 (1983), 137-45. I am grateful to J. J. Winkler for bringing these articles to my attention.

<sup>42</sup> Sourvinou-Inwood 1973, 17-19; and Jenkins.

<sup>43</sup> Sourvinou-Inwood 1987 (op. cit., n. 36), esp. 139-41.

<sup>44</sup> *Lycurgus* 15.3; the word used is again *harpagē*. On marriage by capture at Sparta, see W. K. Lacey, *The Family in Classical Greece* (1968), 197-8.

<sup>45</sup> Herodotus vi. 65. 2: Demaratus stole the bride intended for Leotychides by carrying her off (*harpazō* is the verb used).

<sup>46</sup> See M. Torelli, *Lavinio e Roma: Riti Iniziativi e Matrimonio tra Archeologia e Storia* (1984), 75-7; but cf. R. Kostler, 'Raub- und Kaufehe bei den Römern', *ZSS.RA* 65, (1947), 43-68, at 53-4.

<sup>47</sup> Citations are from M. Winterbottom's Loeb edition (1974) of the Elder Seneca and id., *The Minor Declamations Ascribed to Quintilian* (1984). The relevant texts are: *Contr.* I. 5; II. 3; III. 5; IV. 3; VII. 8; cf. VIII. 6; 'Quintilian', *Decl.* 247; 251; 252; 259; 262; 270; 276; 280; 286; 301; 309; 343; 349; 368; 370 and 383.

The premise in almost all of these is that the victim and/or her father have a choice between marriage (without dowry) to the *raptor* or his death. The declaimers then argue the case for and against the *raptor*. In his defence: he fell in love and asked for the girl in marriage, but the father delayed, so the suitor took matters into his own hands; or, he was drunk and egged on by his *sodales*. The case against the *raptor*: he attacked the girl's house with a gang of rowdy companions and broke down the doors ('effregit fores'; cf. *CTh* IX. 24. 1, 'si fores raptoris frangerentur audacia').<sup>48</sup>

The details of the descriptions of *raptus* in the *Controversiae* are remarkably similar to those in Constantine's law: the *raptor* is always aided by companions (as also is the case in modern abductions), who make an assault on the girl's home; he then seeks marriage from the girl and her father.<sup>49</sup> The abduction generally involves actual rape (*stuprum*) and is very violent, and it may have been this brutal kind of *raptus* which *CTh* IX. 24. 1 attacked. In one case, the rhetor speaking on behalf of the *raptor* pleads that he had in fact asked for the girl's hand in marriage, but had been thwarted in his honourable intention by her father's unwillingness to give a definite answer.<sup>50</sup>

The situations described in the Quintilianic declamations, which date from a somewhat later period, are more complicated and far-fetched, and generally involve outright rape without any other motive.<sup>51</sup> An interesting exception is *Decl.* 259, which features a *dives*, his daughter, and a *pauper*. Both the girl and the poor man claim that he violated her, and the father (who owes his life to the *pauper*) instructs his daughter to choose marriage rather than death. Later it is discovered that no rape ever took place. The father, understandably concluding that he has been tricked into agreeing to a marriage he would not otherwise have approved, disinherits his daughter. The declaimer, speaking in the daughter's behalf, goes to great lengths to show that she was *not* in collusion with her alleged *raptor*, but rather had over-reacted to an attempted rape.<sup>52</sup>

Interestingly, there are several cases where the speakers suggest that the *rapta* was not as unwilling a participant as she claimed to be, or that there was collusion between the *raptor* and the girl's father.<sup>53</sup> The same insinuations, which are not always without foundation, inform both Constantine's law and modern accounts of abduction marriage, and reflect the attitude of communities in which bride-theft is practised.

The relationship between the 'laws' cited by rhetorical writers and actual legal practice has been much debated by scholars.<sup>54</sup> The problem with any attempt to explain the rhetorical 'laws' is that the *raptus* described by the rhetors is always equated by scholars with rape, a crime for which we know both Greek and Roman law prescribed procedures quite unlike those proposed in the declamations. Roman law did not have a law against rape *per se*, but sexual violation could be prosecuted as *stuprum per vim* (illegal sexual intercourse by force), which fell under *vis publica*. A prosecution could also be brought for *iniuria*, which involved civil rather than criminal penalties. If the woman was thought to have been an unwilling participant who had yielded through force, she would not be punished for adultery or *stuprum*. The verb usually used to denote rape in classical Roman law is *violare*, not *rapere*. *Rapere*, the verb form of *raptus*, does not appear in the extant legal sources until the third century.<sup>55</sup>

<sup>48</sup> 'Effregit fores': *Contr.* II. 3. *Sodales*: *Contr.* II 3; cf. IV. 3: 'Collegit ingentem numerum perditorum, expugnavit domum, vexavit puellam'. Drunk: *Contr.* VII. 8; *Decl.* 309. See Winterbottom's (1984) note on such excuses, p. 453.

<sup>49</sup> An exception is *Contr.* I. 5, where the same man 'rapuit' two girls successively in one night; here the crime would appear to be simple rape without any intention of marriage on the *raptor's* part.

<sup>50</sup> *Contr.* III. 5. The girl's father, in whose hands lies the choice between marriage and death for the *raptor*, is still refusing to make up his mind.

<sup>51</sup> In three cases the *raptor* was put up to it by a third party: *Decl.* 252 and 270 (same situation); and, apparently, 343.

<sup>52</sup> *Decl.* 259.

<sup>53</sup> *Rapta* in collusion with *raptor*: *Contr.* I. 5; *Decl.* 259, 262. Her father in collusion with *raptor*: *Contr.* II.3; *Decl.* 349. On 'connivance and collusion' as rhetorical colours, see Winterbottom (op. cit., n. 47, 1984), 325.

<sup>54</sup> See S. F. Bonner, *Roman Declamation in the Late Republic and Early Empire* (1969), esp. 84-132; G. Kennedy, *The Art of Rhetoric in the Roman World* (1972), 312-37.

<sup>55</sup> *D.* XLVIII. 5. 30. 9 (Ulpian), 6. 3. 4 and 5. 2 (Marcian). See also *D.* XLVII. 10. 1 and 2, 10. 9. 4, 10. 10, and *Sententiae Pauli* v. 4. 4; Gardner (op. cit., n. 28), 118-21. Abduction or sexual abuse of unwilling freeborn boys was also a crime: *D.* XLVII. 11 pr. = *Sententiae Pauli* v. 4. 14; *Sent. Pauli* II 26. 12; cf. 13; see also *D.* XLVIII. 48. 6. 6. Cf. also Grodzynski, 119-21. *Rapere* in third-century legal text: n. 61 below.

The best explanation of this discrepancy in terminology is that the pre-Constantinian legal sources are not describing the same situation as either the *Controversiae* and *Declamations* or *CTh* IX 24. 1. Classical Roman law (and what we know of Greek law before the imperial period) was concerned with sexual violation, the victim of which might be a virgin, a married woman, or a widow, or even a male; Constantine's law is directed toward the abduction of an unmarried girl in order to force her into a marriage to which her parents had not consented. (It should be noted that *CTh* IX 24. 1 does not mention *stuprum per vim* or use the term *violare*.) The rhetors present a particularly sensational blend of both: the rape of an unmarried girl, sometimes as a wanton act of sexual violence, sometimes as a premeditated strategy of forcing a marriage.

Whereas the *raptus* of the rhetorical schools generally involves rape, followed by a belated appeal for marriage, elsewhere in the literature of the imperial period we find situations corresponding more closely to abduction marriage as it is described by modern ethnographers. One of the *Fabulae* of Phaedrus, the Greek-born freedman of Augustus, describes a spontaneous bride theft. Two suitors, one rich, the other poor but well-born and handsome, had courted the same girl; the wealthier one prevailed. While the wedding procession was already under way, a storm blew up and routed the wedding party. Amidst all the confusion, the rejected lover seized his opportunity and the girl. And although the bride's distraught parents sought their daughter, and the rich bridegroom grieved for his stolen bride, the populace approved the successful abduction as an indication of divine favour towards the abductor.<sup>56</sup>

In the novel *Clitophon and Leucippe* by Achilles Tatius, Callisthenes, a haughty and profligate young man whose proposal of marriage to Leucippe has been rejected, plots and carries out (with the usual gang of companions) a daring raid to obtain the object of his affections by force. His action is inspired by an alleged law of his native Byzantium, which decreed that the penalty for the abduction (*harpagē*) and deflowering of a virgin was marriage. But it turns out to be a case of mistaken identity: having never actually seen his would-be bride but only heard of her extraordinary beauty and desirability, the suitor and his companions had seized the wrong girl. Nevertheless, Callisthenes falls in love with the girl he did take, promises her great wealth if she will marry him, and respects her virginity until she and her father have agreed to a legal union.<sup>57</sup>

The Byzantine 'law' mandating an abductor's marriage with his victim may have been Achilles Tatius' own invention; it resembles the 'laws' of the rhetorical writers discussed above that allowed a *rapta* the choice between marriage with her *raptor* or his death. Possibly there were, in parts of the Empire, laws which forced the abductor of an unmarried woman to marry her, or perhaps Achilles Tatius is recalling a favourite rhetorical exercise of his schooldays, or it may be that the 'laws' cited in literature take their origin not from formal legislation but from the customary way of dealing with cases of abduction marriage in Mediterranean communities in antiquity and today.

Plutarch provides an amusing twist on the theme in his *Amatorius*; a mature widow wishes to marry a younger man, but the youth hesitates between her and his male lover.<sup>58</sup> Realizing that her beloved's reluctance is due to peer pressure and not to actual distaste for her, the woman engineers his abduction by means of male friends who have been trained by the would-be bride and her female companions. The 'raptus' is seized as he 'decorously' passes her house in a well-choreographed and orderly abduction, which contrasts sharply with the usual messy violence of abductions of females. The youth's male lover is at first extremely angry and ready to organize a rescue posse, but in the end he too joins in the wedding celebrations, and the story ends as happily as that of Callisthenes and his bride. Impartial observers

<sup>56</sup> Phaedrus, *Fabulae*, Perotti's Appendix 16. Text in B. E. Perry's Loeb edition (1965). I am grateful to J. J. Winkler for the references to abduction marriage in Phaedrus, Achilles Tatius, Plutarch and Polemo.

<sup>57</sup> Achilles Tatius, *Clitophon and Leucippe* II. 13-18

and VIII. 17-19 (Loeb edition). Most scholars now date Achilles Tatius to the second century A.D.

<sup>58</sup> Plutarch, *Amatorius* 11 (*Moralia*), 754 E-755 D (Loeb edition).

discuss the suitability of this solution to the triangle; one even suggests that the whole episode was a clever stratagem devised by the abducted youth—just as female victims of abduction marriage are generally suspected of complicity or at least willingness.

Polemo, the second-century rhetor and physiognomist, describes two incidents of abduction which he himself had first predicted and then actually witnessed.<sup>59</sup> In both cases the abducted girl was already betrothed to someone else, and the abduction took place while the wedding ceremony was in progress. At a wedding on Samos armed attackers swept down on the wedding procession as the bride approached the door of the groom's home. The wedding guests, among whom was Polemo himself, fled in all directions; some were even killed by the abductors who escaped with the girl. In the other incident, in Smyrna, the bride had actually entered her new husband's home but went outside again immediately afterwards on the pretext of a call of nature. She was quickly seized and spirited away under cover of night by the abductor's friends. An interesting parallel to this second episode is to be found in an account of an abduction in a modern town of northern Turkey.<sup>60</sup>

Polemo was able to predict these abductions because of his great skill in the art of physiognomy, the reading of others' character and emotions from their facial features. In both incidents he had spotted among the wedding party a young man unconsciously displaying signs of emotional disturbance which revealed his intentions. The brides' faces were equally revealing: the Samian had tears in her eyes and an expression of sadness as she walked in the procession; the Smyrnan girl 'smiled without smiling' and put on a show of false happiness. No doubt, like virtually all marriages in antiquity, the matches had been arranged by the parents of the bride and groom, with little thought for the wishes of the parties involved. By allowing themselves to be 'abducted', these brides had exercised their choice in the only way they could.

#### IV. ABDUCTION MARRIAGE IN THE LATE EMPIRE

These literary references span the first two centuries of the Empire, and, apart from the rhetorical sources, are by authors born in the Greek East. In the third century some obscure and enigmatic remarks in the legal sources provide the earliest extant references in Roman law to abduction marriage and its consequences. An extract from the third-century jurist Marcian preserved in the *Digest* says:

Whoever has seized ['rapuit', the word used in *CTh* ix. 24. 1] a single woman or a married woman, is punished by the capital penalty, and if her father, in response to pleading, should forgive his own injury [sc. and therefore not bring charges], nevertheless a third party will be able to bring charges against him [the *raptor*] without application of the five-year statute of limitations, since the crime of *raptus* goes beyond the power of the *Lex Julia de adulteriis*.<sup>61</sup>

In other words, the *raptor* may very well end up marrying his victim, if he can persuade her father to agree to the marriage; but according to imperial law a charge (under the *Lex Julia de vi publica*) can still be brought against him by someone else, and if convicted he would face the capital penalty. The situation is quite similar to one envisaged in several of the rhetorical exercises: a *raptor* who can within thirty days win the forgiveness of his victim's father, and of his own father, can escape the death

<sup>59</sup> Polemo, *de physiognomia liber* in *Scriptores Physiognomici Graeci et Latini*, ed. R. Foerster (1893), 286–90. The original Greek does not survive, but the text was preserved in an Arabic translation (I am relying on the Latin translation of the Arabic in Foerster's edition.) For my knowledge of Polemo and his work I am indebted to Maud Gleason.

<sup>60</sup> cf. Magnarella, 115.

<sup>61</sup> *D.* XLVIII. 6. 52. Marcian is referring to the possi-

bility of an *extraneus* bringing a charge of *stuprum per vim* according to the Augustan law on public violence. Note that whereas the third-century jurist denies the possibility of a five-year statute of limitations (on the analogy of adultery accusations) in cases of *raptus*, *CTh* ix. 24. 3 of 374 established just such a limit because of the possibility of long-lasting marriages being disrupted (see n. 34).

penalty.<sup>62</sup> Furthermore, the law of Justinian enacted in 533, which superseded all earlier legislation on *raptus*, explicitly forbade any abducted woman to marry her *raptor*. Therefore, however melodramatic and contrived we may find the situation in declamations where the *rapta* and her father are presented with the choice between marriage to the *raptor* or his death, there appears to have been some basis for it in real life, and this continued to be the case even after Constantine.

A rescript of Diocletian and Maximian, preserved in two separate fragments, seems to concern a case where a girl was betrothed to one man and broke it off to become engaged to someone else; her former fiancé abducted her and imprisoned her new *sponsus*. The emperors advise the father of the illegally imprisoned man that he may bring charges against the *raptor* before the governor of his province under the Lex Julia de vi.<sup>63</sup> An alternative interpretation would see the *rapta* as attempting to break off her engagement to the petitioner's son in order to marry her abductor; the emperors remind the father that betrothal is not a legally binding contract and therefore she may marry someone else, but he may still seek legal redress for the violent treatment of his son.<sup>64</sup>

The next extant legal reference to *raptus* is found in a constitution of Constantine sent to Octavianus, the *comes Hispaniarum*, about ten years before the promulgation of *CTh* IX. 24. 1. In this law the emperor declares that a man of senatorial rank who 'virginem rapuerit vel fines aliquos invaserit vel in aliqua culpa seu crimine fuerit deprehensus' could not avail himself of *praescriptio fori* and ask to be tried by the urban prefect of Rome, but had to face trial in the province in which he had committed the crime.<sup>65</sup> The purpose of this rule was to prevent senators or their children who had committed a criminal offence from taking advantage of the privileges traditionally awarded to those of rank. It is interesting that *raptus* and invasion of another's property boundaries are the only crimes mentioned by name, although clearly the same rule would apply to perpetrators of other serious crimes like murder. Octavianus may have had more problems with senatorial offenders in those two cases: abduction of local maidens and illegal seizure of the lands of less powerful citizens were perhaps traditional amusements of high-spirited noblemen in the provinces.

References to abduction marriage in non-legal sources continue into the fourth century, and we get a better glimpse of the reality behind the literary theme. A recently published papyrus records the complaint of a certain Aurelia Attiaena, who had tried in vain to secure a divorce from her reprobate husband and eventually wrote to an imperial official for help. She begins her tale of marital disharmony by declaring that she herself had been the victim of bride theft: 'A certain Paul, coming from the same city, recklessly carried me off by force and compulsion and cohabited with me in marriage'.<sup>66</sup> The word used to describe her abduction is ἀρπάζω, the Greek equivalent of *rapio*.

Gregory of Nyssa tells us that his mother had decided not to marry out of a Christian desire to preserve her virginity. 'However, since she was an orphan, and flowering in the springtime of her beauty, and the fame of her loveliness had attracted

<sup>62</sup> *Contr.* II. 3; *Decl.* 349; cf. Quintilian, *Inst.* IX. 2. 90. 1. Both Grodzynski, 703–4 and Desanti, 210–11 have suggested that the statement in *CTh* IX. 24. 1 denying that the *responsio* of the *rapta* will be of use to the *raptor* refers to her choosing the option of marriage. Desanti thinks that until *CTh* IX. 24. 1, Roman law had allowed, sometimes even encouraged, such a 'matrimonio riparatore'. Cf. Bonner (op. cit., n. 54), 90. See below for Justinian's law.

<sup>63</sup> This is how I interpreted *CJ* v. 1. 1 and IX. 12. 3, both addressed to Bianor (dated 293) and joined by Krueger.

<sup>64</sup> For this interpretation, see Desanti, 209, whose article I did not see until after I had written this.

<sup>65</sup> *CTh* IX. 1. 1, issued December 316 and received in Corduba March 317.

<sup>66</sup> *P. Oxy.* L. 3581 (fourth or fifth century); translation is that of the editor. On this papyrus, see Roger

Bagnall, 'Church, State and Divorce in Late Roman Egypt' in *Florilegium Columbianum: Essays in Honor of Paul Oskar Kristeller*, ed. R. E. Somerville and K.-L. Selig (1987), 41–61.

Other possible cases of *raptus* in the papyri: *PSI* 893 (dated 315) apparently concerns a case of 'reverse abduction' of a girl by her father, who took her away from her husband after two days of marriage (as interpreted by R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri* (2nd ed. 1955), 142 n. 41.). *P. Oxy.* 1837 (sixth century) concerns the apparently illegal detainment of a certain Macaria by a man, but it is unclear whether this is a case of abduction for the purpose of marriage: see B. Baldwin, 'Crime and Criminals in Greco-Roman Egypt', *Aegyptus* 43 (1963), 256–63. *BGU* 871 (second century) concerns a case of *hybris* and *bia* (= *vis*) and *harpagē*, but the victim appears to be a male *pais*.

many suitors, there was danger that, if she were not joined to someone by choice, she might suffer some unwished-for violence, because some of the suitors, maddened by her beauty, were preparing to carry her off.<sup>67</sup> This may or may not have been literally true in the case of Gregory's mother (perhaps it is only Gregory's attempt to explain why his mother decided to get married after all), but local Christian leaders considered it a real enough possibility, and we hear of a real incident of abduction marriage in a letter of Gregory's brother, Basil of Caesarea.

Canon eleven of the Council of Ancyra, held in A.D. 314, declares: 'Betrothed girls abducted by others should be returned even after this to their fiancés, even if they have suffered violence at their [sc. their abductors'] hands'.<sup>68</sup> Nothing is said concerning the fate of the abductor, and apparently no penalty was decreed by the church authorities who met at Ancyra. Although there is nothing in the text to indicate why the council would enact a canon to deal with such a situation, it may well have been prompted by a recent local case or cases of abduction marriage.<sup>69</sup>

Sixty-one years later Basil, bishop of Caesarea, repeated this decision and addressed the problem also of unmarried girls, not betrothed to anyone, who are abducted, and the validity of marriages contracted in this way. His answers are set out in one of several letters, commonly known as the 'canonical epistles', addressed to Amphilochius, the young bishop of Iconium, who had requested guidance on questions of church policy towards certain sins and the degree of penance required to expunge them. Although Basil's 'canons' did not have any secular legal force (nor, indeed, did the canons of the Council of Ancyra), they do indicate what a respected and influential authority of the church in Asia Minor considered the appropriate attitude to take in dealing with threats to the well-being of the family and community.<sup>70</sup>

Canon 22: Regarding men who hold women by abduction [*harpage*], if they have carried off women who had been betrothed to others, they must not be received before they have separated from them and have placed them in the power of those to whom they were originally betrothed, whether the latter wish to receive them or to give them up. But if anyone takes a girl who is not betrothed, it is necessary to take her away and restore her to her relatives, and commit her to their discretion, whether they are parents or brothers, or whoever have authority over the maiden: and if they choose to surrender her to him, the union shall be valid, but if they refuse, violence is not to be employed. However, he who holds a wife by secret or somewhat violent seduction [*diaphthora*] must acknowledge the punishment for fornication [*porneia*] ...

Canon 30: Regarding abductors [*harpazontes*], we have no ancient canon [referring to the fact that the Council of Ancyra only mentions the fate of the abducted girl], but we have formed our own judgement—that for three years both the abductors themselves and those who aid them in the abduction should remain outside the prayers. But whatever does not take place through violence is not liable to punishment, whenever neither seduction nor robbery precedes the deed. The widow, moreover, is free and it is in her power to follow. Accordingly we should pay no heed to pretences.

The penalties Basil proposed are strictly ecclesiastical and concern the amount of public penance each offence requires. Undergoing penance according to church rules would not, of course, excuse an offender from criminal penalties such as those instituted by Constantine. But it is remarkable here that Basil advocates a solution diametrically opposed to that proposed by Constantine for the same problem. *De facto* marriages brought about by rape or abduction are discouraged, and the abductor is penalized, as are young people who elope or engage in pre-marital sexual activity.

<sup>67</sup> Translated by V. W. Callahan in *Saint Gregory of Nyssa: Ascetical Works* (1967) 164. For the Greek text see P. Maraval's edition (Sources Chrétiennes, 1971), at 144–4, with his note.

<sup>68</sup> For the canons of Council of Ancyra, see *Histoire des Conciles d'après les documents originaux*, by C. J. Hefele, revised H. Leclercq (1909), I, 1, 313.

<sup>69</sup> Canon 25 of the same council was clearly

prompted by a specific incident, also involving pre-marital sex and betrothal.

<sup>70</sup> The translation given here is that of Roy J. Deferrari in his Loeb edition, III, 113–37 *passim*. An introduction to and explanation of the 'canonical epistles' is given by Deferrari, x–xvi. All canons mentioned here are from Ep. 199. On Basil's penitential system, Deferrari, xii–xv.

But if, after the fact, the parents and the girl agree to a marriage, these unions are to be considered perfectly valid in the eyes of the church. This surprisingly lenient attitude towards pre-marital sex among young people has parallels in other Christian sources.<sup>71</sup> On the other hand, adultery or sexual lapses by men and women consecrated to divine service are treated much more harshly.<sup>72</sup>

The case is somewhat different if the girl was previously betrothed to someone else; there both Basil and the Council of Ancyra believe that the properly affianced suitor has first claim on her, and so she must be returned to him. Basil, however, admits the possibility that the fiancé might not want his betrothed once her virginal purity has been called into question; this was undoubtedly quite often the case, as the abductors well knew. Basil also insists that the parents must agree to the *de facto* marriage before the church can sanction it; no doubt they usually did, and the finale to the abduction would perhaps be that described in an ethnographer's account of bride theft in a modern Greek community: '... they are taken immediately to the church and the service is celebrated'.<sup>73</sup>

It is interesting that Basil, here and in other canons, considers the abduction or seduction of a widow in a different light; unlike the young unmarried girl whose fate is to be decided by the wishes of her fiancé or her parents, the widow's sexuality is apparently in her own control. The 'pretences' to which Basil gives little heed are presumably those of widows who run away with their lovers and then claim to have been abducted—since a woman's reputation would be more damaged if she were willingly seduced rather than taken against her will.<sup>74</sup>

However, we do find a much sterner approach to abduction marriage in another letter of Basil, written at about the same time as the 'canons' to Amphilochius. The addressee of this letter is unknown, but he appears from the context to have been a local church leader in a community in which an actual incident of abduction had recently occurred. Basil is extremely angry about the abduction, as much by the complacency with which it has been received as by the act itself. He declares:

I am greatly grieved that I do not find you either indignant over deeds which are forbidden or able to understand that this abduction [*harpage*] which is going on is an unlawful outrage and a tyranny against life itself and the existence of man, and an insult to free men. For I know that if you all had such an opinion, nothing would have prevented this wicked custom from being driven long ago out of our country. Therefore assume in the present instance the zeal of a Christian, and be moved in a manner worthy of the injustice. And as for the child [*pais*], wherever you find her, take her by all force and restore her to her parents; and as for the man, debar him from the prayers, and declare him excommunicated; and as for those who accompanied the man, according to the canon already published by us [probably canon 30, cited above], debar them with their whole household from the prayers for a period of three years. And as for the village that received her who was abducted [*harpageisan*], and kept her, or even fought to keep her, put it also with all its people outside the prayers; that all may learn, considering the ravager as a common foe like a snake or any other wild beast, to pursue him accordingly and to champion those who are wronged.<sup>75</sup>

The letter is extremely revealing. A girl has been abducted and spirited away to a village that not only kept the abductor's secret, but actually seems to have fought to prevent her rescue. Basil's attitude here is closer to Constantine's than that shown in the canons, except that he does not demand any punishment for the girl or her parents, and that of course the penalties are ecclesiastical rather than civil. Excommunication is, however, as serious a penalty as a bishop can prescribe.

Perhaps the circumstances of this particular incident have caused Basil to take a

<sup>71</sup> E.g. canon 14 of Council of Elvira (Baetica, early fourth century); cf. also Basil's canons 25 and 26.

<sup>72</sup> Both the Council of Elvira (canon 13) and Basil (canon 18) have a quite different policy when the girl is a consecrated virgin; there adultery (to Christ) is at issue, and the penalty is much harsher. Imperial law also considers the case of consecrated virgins separ-

ately: see below.

<sup>73</sup> Campbell, 130.

<sup>74</sup> On the disguising of elopement as abduction, see n. 14. Sexual autonomy of widows: cf. Basil's canons 41 and 42.

<sup>75</sup> Epistle 270, trans. Deferrari, iv. 140–3 (with my correction of his mistranslation of *harpagē* as 'rape').

harder line than the policy set forth in the canons concerning hypothetical abductions. The 'bride' is here called a *pais*, a child, whereas in the canons the abducted girl is a *korē* or (when referred to as a wife) a *gunē*. Also, it seems clear that the girl's parents want her back and are not willing to agree to a marriage. In this case it may be that a very young girl, perhaps below the legal age for marriage (twelve), was kidnapped by a grown man, who was aided and abetted not only by the usual gang of friends but also by the complicity of an entire village (presumably his home village). Perhaps the abductor was a favourite among the villagers, or even a local notable taking advantage of his higher status and power; one recalls Constantine's directive to Count Octavianus which refused the right of *praescriptio fori* to *raptores* of senatorial rank. Also, it appears from the present tense of the participle, 'the abduction which is going on', that the abductor and his victim are still at large, and that the parents are still searching.

The 'fighting' Basil refers to may have been against the males of the girl's family and their slaves and freedmen who had come to rescue her. In modern Greece, bride theft is a dangerous undertaking and can result in the death of the abductor, which then leads to a vengeance killing by the abductor's brother, and so on into a long-term family feud.<sup>76</sup> It is at that point, and not with the abduction itself (which may be the most feasible resolution of tension when a suitor's honour has been insulted), that the affair becomes a threat to public order. The combination of the unusually shocking circumstances of this abduction (the girl's youth, the fact that her parents, who desperately want her back, have still not recovered her) and the violence which ensued, compounded by the village's complacency and active support of the abductor, has led Basil to abandon his usually more tolerant attitude toward abduction. However, despite his anger Basil makes no mention of the criminal penalties for abduction which imperial legislation prescribed, though it is quite probable that, as a highly educated bishop (he had studied rhetoric with Libanius at Athens) with a great deal of responsibility and authority, he was aware of the law.<sup>77</sup> Apparently he preferred to deal with the situation by means of ecclesiastical sanctions and not to expose all involved (including the victim and her parents) to the secular penalties.

The evidence from the Council of Ancyra and the canonical epistles of Basil does not support the view that Constantine's harsh law against abduction marriage, which punishes not only the *raptor* but the abducted girl and often her parents also, was enacted as a result of Constantine's conversion to Christianity and his adoption of Christian ideals of sexual purity.<sup>78</sup> On the contrary, the tolerance of marriages formed by abduction indicated by the canons of Ancyra and of Basil suggests strongly that Constantine's law on the abduction of virgins and the draconian penalties he set down for all involved are not consonant with contemporary Christian thinking. Even when Basil of Caesarea has been appalled and angered by a particularly shocking incident, he does not recommend handing the offenders over to the authority of the law (the whole village could have been punished for complicity), and he certainly does not suggest that the girl or her parents are in any way responsible for what happened.

For although Christians had always put a great deal of emphasis on sexual chastity and admired men and women who maintained their virginity throughout their life, they also freely recognized that not everyone could live up to these ideals; as we have seen, the practical response of local church authorities to a girl's loss of virginity before marriage was quite different from Constantine's. In fact, by allowing, and sometimes even insisting on, the marriage of the girl to the man who had violated

<sup>76</sup> Family feuds and vengeance killing: Herzfeld, 29; Campbell, 200–3. See Lockwood, 259–60 for a case with the same elements.

<sup>77</sup> According to a law of Theodosius I (*CTh* xi. 39. 8, 381), bishops could not be forced to testify in court, so (assuming that Epistle 270 post-dates 381, which is not certain) Basil would not have put himself in legal jeopardy by avoiding the imperial courts. For the same reluctance to bring before secular law Christians who have committed sex crimes, cf. canon 34 (adulteresses).

<sup>78</sup> This interpretation goes back to Godefroy (Gothofredus), and is adopted by Desanti (217); T. D. Barnes (op. cit., n. 3), 220; and B. Biondi, *Il diritto romano-cristiano* (1952–4), III, 484. Dupont (op. cit., n. 33) says it is possible that the Church's concern with *raptus* (as seen in canon 11 of Ancyra) drew Constantine's attention to the problem, but that the Emperor's treatment of *raptus* is totally different from that of the Church council. Grodzynski, 710–11, leaves the question of Christian influence open.

her, they were offering a solution directly opposed to Constantine's law. And although both Basil and those who met at the Council of Ancyra looked very unfavourably on the abductor, they apparently assumed that the girl herself was a passive victim, and did not really consider her wishes in the matter at all—only those of her parents, and if she was already betrothed, of her fiancé. These Christian leaders were less critical of the victim of an abduction than most ancient and modern observers, who generally impute some measure of responsibility to the abducted woman. Constantine, too, assumed more active participation on the part of the *rapta*—and punished her for it.

Probably Christians preferred to see a situation like abduction marriage handled by the Church rather than by the state. If they wanted any sort of official action taken, they would do better to go to their local bishop, who would of course impose penance on the abductor, but would probably also sanction the marriage—and would not, apparently, alert the authorities.

This survey has shown that the practice of marriage by abduction has a long history in antiquity—in myth, literature and clearly also in real life. Popular attitudes toward it were essentially the same as they are in Mediterranean societies today where bride theft still occurs: the community as a whole often supports the abductor, whose prestige and masculinity are enhanced by a successful abduction; as long as the couple finally marries and there have been no major acts of violence, the situation has probably turned out for the best. There is often a feeling that the abducted girl is to a certain extent responsible for her own abduction, and in some cases, when elopement is disguised as abduction, this is true. A girl who has been the victim of abduction will find that her reputation has suffered and she will have great difficulty in marrying anyone except her abductor, so the *raptus* usually ends in marriage—which indeed was the *raptor's* intention. But although the *rapta* is not considered blameless, she is much less culpable if she was taken by force than if she has been seduced or run away of her own accord. And so a staged abduction can serve as an alternative marriage strategy in which the bride and groom themselves take the initiative and marry the partner of their choice; otherwise they would have to accept the spouse selected for them by their parents. And even in cases where the *rapta* was unwilling or unaware of the abduction beforehand, the *raptor* is still taking the bride of his choice, probably in defiance of parental wishes.

The attitude of the authorities is less favourable than that of the general public, and of course the abducted girl's family is usually enraged at the theft of their daughter. However, the families of both the *rapta* and *raptor* generally come round and accept the union, and local church authorities, though displeased at this irregular and anomic way of making a marriage, feel that as long as all parties are satisfied with the union in the end, no great harm has been done. However, if the victim was already betrothed to someone else before her abduction, or if her family is not agreeable to a marriage, or if she had dedicated herself to holy virginity, the official Christian attitude is much more severe.

In the face of such a long-established custom, which was regarded with equanimity by most and tolerated even by those who did not approve, it would not be surprising if the harsh and sweeping legislation against *raptus* enacted by Constantine failed to eradicate abduction marriage. And from what little evidence we have, that appears to have been the case.

The two other fourth-century constitutions preserved under the title *de raptu virginum vel viduarum* in the Theodosian Code (*CTh* IX. 24. 2 of 349 and IX. 24. 3 of 374) have already been discussed.<sup>79</sup> Both of these later measures moderate the severity of Constantine's law by mitigating the fierceness of the penalties and refusing the right of prosecution if five years have elapsed since the abduction took place. From *CTh* IX. 24. 2 it appears that because of the atrocity of the punishments set forth in

<sup>79</sup> Part II above. The title is that of the fifth-century compilers of the *CTh*.

Constantine's law, citizens were reluctant to bring charges of *raptus* before the authorities, and imperial judges to convict those brought before them. Although we should not assume that harsh and inhumane penalties were never put into effect but were intended only as a deterrent,<sup>80</sup> in individual cases even the most hard-nosed advocate of law enforcement might hesitate to send two young lovers who had eloped to the stake or the arena or to pour molten lead down the throat of an aged nurse.

In fact, according to Eusebius, even Constantine himself had a weak spot when it came to employing the death penalty, and his provincial governors were so notoriously 'soft on crime' that he can claim that they provoked criticism from the emperor's detractors.<sup>81</sup> Eusebius is speaking in general and eulogistic terms of Constantine's 'mild' disposition and does not refer to any particular examples; but Ammianus Marcellinus reports that Constantine's nephew, the Emperor Julian, displayed similar clemency in a case of *raptus*, which the victim's parents had asked him to judge. Julian condemned the perpetrator to exile (*relegatio*), and when the girl's parents complained that his failure to apply the death penalty was an insult to their honour, he replied that it was fitting for imperial clemency to override the laws.<sup>82</sup>

Despite the more lenient attitude of individual emperors or other judges, by the reign of Constantius *raptus* had become, in the eyes of the imperial administration, one of the most serious criminal offences, of the same order of depravity as murder, adultery, treason, and sorcery—crimes so heinous that there could be no right of appeal or pardon for those convicted of them.<sup>83</sup> Also under Constantius there begins a series of laws directed against a kind of abduction particularly repugnant to Christian sensibilities: the *raptus* of women, either virgins or widows, who had dedicated themselves to God. Constantius' law, enacted in 354, expressly warned the *raptor* that his victim's consent after the fact would be of no use to him.<sup>84</sup>

Ten years later, the Emperor Jovian, Julian's short-lived successor, proclaimed that not only the *raptus* of a *sacrata* but even 'attemptare matrimonii iungendi causa' would be punished with a capital sentence. According to the fifth-century ecclesiastical historian Sozomen, Jovian's legislation was a reaction to official laxity during Julian's reign in the prosecution of such cases.<sup>85</sup> Prohibition of the abduction of consecrated virgins was repeated in 420 by Honorius and in 458 by Majorian.<sup>86</sup> Interestingly, in 451 the Council of Chalcedon condemned *clerics* who had abducted women, even if for the purpose of marriage.<sup>87</sup>

Finally, in 533 the Emperor Justinian abolished all earlier laws on *raptus* in order to replace them with a new, comprehensive law.<sup>88</sup> This was directed against all the possible types of *raptus*: the abduction of virgins and widows, secular and consecrated, of women of free birth, freedwomen, and slaves, of those who were already engaged and those who were not, and even of married women (although in this last case the *raptor* would be guilty of adultery also). Furthermore, Justinian's law explicitly included the man who 'had dared to seize his own fiancée [*sponsa*] by force'. This seems to refer to the possibility of a man whose marriage has been put off longer than he likes, perhaps by the decision of his parents or of his fiancée's parents, who anticipates the nuptials by taking matters into his own hands.

*Raptores* who were caught at the scene of their crimes by the male relatives or guardian of the woman (or, in the case of freedwomen or slaves, their patron or

<sup>80</sup> Grodzynski, 709–10; cf. R. MacMullen, 'Judicial Savagery in the Roman Empire', *Chiron* 16 (1986), 147–66.

<sup>81</sup> Eusebius, *VC* iv. 31.

<sup>82</sup> Amm. Marc. xvi. 5. 12. Grodzynski, 713 points out that here the *raptus*'s family clearly did press charges, and there is no mention of any penalty for the girl. Presumably Julian declined to punish her at all.

<sup>83</sup> *CTh* xi. 36. 7 (344): 'quorum appellationes non recipiantur', *CTh* ix. 38. 3 (369); ix. 38. 4 (368); ix. 38. 6 (381); ix. 38. 7 (384); ix. 38. 8 (385): 'de indulgentiis criminum'; cf. *CTh* ix. 2. 5 (409).

In Constantine's decree of amnesty (*CTh* ix. 38. 1, 322), there is no mention of *raptus*; likewise in xi. 36. 1 (314), nothing is said regarding *raptores*—but *CTh* ix.

24. 1 explicitly denies them the right of appeal.

<sup>84</sup> *CTh* ix. 25. 1 (354), addressed to the urban prefect Orfitus.

<sup>85</sup> *CTh* ix. 25. 2 (364); Sozomen, *HE* vi. 3.

<sup>86</sup> Sirmundian Constitution 10 (420), of which *CTh* ix. 25. 3 is an excerpt; Novels of Majorian 6. 4 (458)

<sup>87</sup> According to canon 27 of the Council of Chalcedon, laymen who abduct women are to be anathematized; clerics are to be deposed.

<sup>88</sup> Justinian's law is found at *Cy* i. 3. 53 (*raptus* of consecrated women) and *Cy* ix. 13. 1 (*raptus* of all other women). *Cy* v. 17. 11, and perhaps also *Cy* vii. 24. 1 and xi. 48. 24 are from the same law, though they do not directly concern *raptus*.

master) were to be killed, apparently immediately without trial,<sup>89</sup> but those who managed to escape were to be hunted ‘per diversas nostri orbis regiones’ by imperial officials at every level of government. When the fugitives were finally arrested, they were to have a proper trial (without the privilege of *praescriptio fori*) and then be executed. ‘And if they should wish to appeal, we give no licence for this, according to the prescription of the ancient Constantinian law’. The freeborn victim of a *raptor* also receives all his property, and she may use it to make up all or part of her dowry if she marries anyone except the *raptor*, or, if she prefers not to marry but ‘remanere in sua pudicitia’, she is to have full control over the confiscated goods. The *raptor* of a freedwoman or slave, on the other hand, may keep his property (or rather, his heirs may, since he will have been executed). In the cases of dedicated virgins or widows, the *raptor*’s property goes to the monastic institution at which they reside.

One paragraph of Justinian’s law is particularly interesting, for it recalls the situation posed in the rhetorical writers of the early Empire:

Nor shall the *rapta* ... have the opportunity to seek her *raptor* as a husband for herself, but her parents may join her in legitimate marriage with anyone they wish, with the exception of the *raptor*, since in no way at any time is licence given by our Serenity to consent to those in our republic who seek to contract a marriage for themselves by means of a hostile custom. For it is necessary that whoever would wish to marry a wife, whether freeborn or freed, ask her parents or others whom it is proper [sc. her guardian if she is an orphan, her patron if she is a *liberta*] according to our laws and the ancient custom and that there be legitimate marriage in accordance with their wish.<sup>90</sup>

Accomplices who went with the *raptor* ‘in the invasion itself’ are also to be executed and their property confiscated. And those who did not take part in the actual abduction but who aided and abetted the *raptor* in any way are to undergo the capital penalty, regardless of their sex or rank, and regardless of whether the abducted woman was willing or not:

For if the abductors restrain themselves from a deed of this kind from fear of the atrocity of the penalty, no opportunity for sinning will be left to any woman, whether willing or unwilling, because a woman is persuaded to want this very thing by the ambushes of a very wicked man who meditates plunder. For indeed unless he has solicited her, unless he has surrounded her with odious stratagems, he does not make her want to surrender herself to so great a disgrace.<sup>91</sup>

Here we come to the crux of the matter. In Justinian’s eyes, the most deplorable aspect of *raptus* is not the possibility of violence, even rape, but that the woman may be won over by the flattery and promises of her abductor and *willingly* ‘surrender herself to disgrace’. The idea that corruption of a woman’s thoughts and sense of shame is far worse than physical violation of her body is not due to new Christian ideals of the purity of the soul, but was an intrinsic part of the traditional Graeco-Roman mentality, and can be traced at least as far back as the fifth century B.C.<sup>92</sup> We recall the derogatory reference in *CTh* IX. 24. 1 to woman’s ‘fault of frivolity and the fickleness of her sex and judgement’, and indeed the next sentences in Justinian’s law, which state the penalties for parents who arranged their daughter’s abduction and for slaves who were involved, are taken directly from Constantine’s edict. But according to Justinian, the woman who allowed herself to be ‘solicited and surrounded with odious stratagems’ is not to be penalized, except in that she is not allowed to marry her seducer. Not only is this treatment of the *rapta* more humane; it may also have served as a greater deterrent to abduction marriage than Constantine’s harsh

<sup>89</sup> *CJ* IX. 13. 1. 1. The law’s wording suggests that lynching of the *raptor* by the woman’s family or protectors was allowed, if they caught him in the act. So Grodzynski, 725 also understands it.

<sup>90</sup> *CJ* IX. 13. 1. 2.

<sup>91</sup> *CJ* IX. 13. 1. 3b.

<sup>92</sup> The *locus classicus* is Lysias 1 (*On the Murder of Eratosthenes*).

penalties.<sup>93</sup> For parents would be more willing to denounce (and to kill) an abductor and, provided with a dowry greatly enlarged by the confiscated property of the *raptor*, the *rapta* might even be able to find another husband.

Justinian's law is thus more thorough and balanced than that of Constantine, and possibly also more effective. In any case, abduction continued to be the subject of legislation in the Middle Ages, both in the Byzantine Empire and in the western Germanic law codes which made use of the *Theodosian Code* and fifth-century imperial *Novellae*. And the Byzantine epic hero Digenes Akritas was said to be the product of an abduction marriage and carried on the family tradition when he stole his own bride.<sup>94</sup>

#### V. ABDUCTION AND BETROTHAL IN CONSTANTINE'S LEGISLATION

Marriage by abduction, as we have seen, functions as an alternative to, and a repudiation of, the arranged marriage preceded by a formal agreement. Betrothal is a social and sometimes also a political pact which creates and cements alliances between families. Abduction marriage is a socially disruptive force which ignores the interests of the family as a whole, and substitutes the selfish desires of reckless young men and women for the careful arrangements of their elders.

In antiquity, as in those Mediterranean societies where abduction marriage still occurs today, betrothal was traditionally an agreement between the parents (generally the fathers, though mothers were often consulted also) of the prospective bride and groom. Although the consent of the couple involved was, at least in theory, a legal requisite, and many parents did take their children's views into account when deciding upon their future marriage partners, the choice of spouse and the negotiations involved in making a betrothal pact were almost always in the parents' hands.<sup>95</sup> Thus by bypassing the betrothal stage and effecting a *de facto* marriage without any kind of preliminaries and without their parents' permission, the couple who married by abduction were flouting the authority of the Roman *paterfamilias* and overturning the traditional family hierarchy.<sup>96</sup>

In view of the relationship between betrothal and abduction as alternative marriage strategies, it is noteworthy that several other laws of Constantine deal with betrothal agreements and indicate that the emperor considered betrothal a social contract creating bonds that were not to be broken lightly. In a law of 319, he declared that 'the opinion of the ancient laws, which decreed that gifts made to a fiancée were valid even when marriage does not follow, is displeasing' and stated that henceforth the party responsible for breaking a betrothal was to forfeit all gifts, both those given by him (or her, though, according to the law, pre-nuptial gifts from *sponsa* to *sponsus* were rare) to the other, and those received from the other. No inquiries were to be made as to the reason for breaking the engagement, nor were any objections regarding the family background or moral behaviour of one party to be considered valid cause for reneging on a betrothal agreement, 'since all these things ought to be foreseen before the betrothal is contracted'.<sup>97</sup> This was revised in 336 by a constitution which

<sup>93</sup> Grodzynski, 724. It may be that *raptae* were rarely punished, even under Constantine's law. Merèa (art. cit., n. 25) thinks that judges always preferred the less severe penalty of disinheritance, even for willing *raptae*. The nurse's gruesome punishment is also absent from Justinian's law.

<sup>94</sup> Abduction marriage was also a Germanic custom in early medieval Europe: D. Herlihy, *Medieval Households* (1985), 29–55 *passim*; G. Duby, *The Knight, the Lady and the Priest* (1981, Eng. 1983), esp. 32–53. See also J. Brundage, 'Rape and Seduction in the Medieval Canon Law' in *Sexual Practices and the Medieval Church*, ed. V. L. Bullough and J. Brundage (1982), 141–8. For Byzantine law: J. Beaucamp, 'La situation juridique de la femme à Byzance' in *Cahiers de civilisation médiévale* 20 (1977), 145–76, at 168–9. For Digenes Akritas, see the text and trans. of J. Mavrogor-

dato (1956), esp. books 1 and 4.

<sup>95</sup> At least in the case of first marriage, when daughters and often sons would be under twenty-five and therefore, in the eyes of late Roman law, still minors.

<sup>96</sup> Merèa (op. cit., n. 25), 205, believes that the alleged weakening of *patria potestas* in late antiquity had led to children arranging their own marriages, thereby precipitating new legal restrictions. Cf. Dupont (op. cit., n. 33), 47. In fact, there are several later laws which do reassert the authority of the family elders over the marriages of women under twenty-five: *CTh* III. 7. 1 (371); *CJ* v. 4. 20 (409); *CTh* III. 5. 12 (422).

<sup>97</sup> *CTh* III. 5. 2 (319), addressed to the urban prefect of Rome. If one of the couples dies before the marriage, any gifts exchanged reverted to the giver or his/her immediate heirs (this was modified by *CTh* III. 5. 6).

laid down a detailed set of rules regarding the disposition of betrothal gifts when one partner died before the marriage took place.<sup>98</sup>

Another law of Constantine states bluntly that a girl who has been betrothed to a soldier is not to marry anyone else—if she does, her father or guardian or the relative responsible for her marriage is to be relegated to an island on a charge of *perfidia*. However, if the betrothal has lasted for more than two years and the soldier still has not married his fiancée, she is free to marry someone else.<sup>99</sup> It is worth noting that in this law the girl's father or guardian is sentenced to relegation (a somewhat less severe penalty than the *deportatio* imposed on parents who agree to the marriage of their daughter with her abductor), but the girl herself is not penalized for the broken betrothal. Clearly, in a proper betrothal pact, the responsibility lies with the person who has legal authority (though not necessarily *potestas*) over the *sponsa*, and who is assumed to have taken the initiative in both contracting and dissolving the betrothal. But a girl who has been abducted, even against her will, is considered responsible for having broken the rules, since she could have kept herself at home until she could be properly married through the arrangements of her parents or guardian.

Constantine's legislation on betrothal introduced a real innovation into Roman law, by making betrothal a binding contract subject to legal sanctions if broken. Not since the early Republic had *sponsalia* been legally actionable.<sup>100</sup> These laws are the first of a number of imperial constitutions on betrothal and pre-nuptial gifts spanning the next two centuries, which have been attributed to Christian influence. But although it is possible that Constantine's views on the importance of the betrothal bond reflect Christian ideology, evidence for specifically Christian attitudes toward betrothal in Constantine's time or earlier is very limited. Apart from a few remarks in Tertullian which indicate that Christians considered betrothal pacts serious contracts, the only ante-Nicene Christian sources which discuss betrothal are the canons of local church councils. The most informative is Canon 54 of the Council of Elvira, held in central Spain during the first decade of the fourth century:

Parents who break their children's betrothals must abstain from communion for three years; if however, the *sponsus* or the *sponsa* has been caught in a serious crime, the parents will be excused; if sin has been found in both [*sponsus* and *sponsa*] at the same time and they have polluted themselves [presumably by pre-marital sex], the first sentence stands.<sup>101</sup>

Clearly, the Spanish church authorities who met at Elvira strongly disapproved of broken betrothals, but whether this attitude was unique to Christians is less certain. What we know of betrothal agreements among Christians in the fourth and fifth centuries indicates that they followed closely, in form and content, the precedents of pre-Christian Roman society.<sup>102</sup> And that late antique Christians were not alone in considering the betrothal pact a solemn and binding agreement is shown by the surprisingly strong tone with which Symmachus, that staunch upholder of Roman pagan tradition, endeavoured to dissuade a senatorial acquaintance from breaking off a match.<sup>103</sup> There is little evidence for Roman attitudes toward betrothal outside the upper classes, but comparison with other traditional Mediterranean societies suggests that they also took betrothal agreements seriously.<sup>104</sup>

The law on *raptus* also demonstrates the importance placed by Constantine on

<sup>98</sup> *CTh* III. 5. 6 (336), addressed to the Vicar of Spain.

<sup>99</sup> *CTh* III. 5. 4 and III. 5. 5, addressed to Pacatianus, praetorian prefect, in 332.

<sup>100</sup> cf. P. E. C. Corbett, *The Roman Law of Marriage* (1930), 8–16; A. Watson, *The Law of Persons in the Later Roman Republic* (1967), 11–18.

<sup>101</sup> Text in Hefele-Leclercq (op. cit., n. 68), 251. Canons 11 and 25 of the Council of Ancyra also involve betrothal: see above, n. 68–9.

<sup>102</sup> For betrothal in late antique Christian society, see B. Shaw, 'The Family in Late Antiquity: the Experience of Augustine', *Past and Present* 115 (1987), 3–51, esp. 34–9; L. Anné, *Les rites des fiançailles et la donation*

*pour cause de mariage sous le Bas-Empire* (1941).

<sup>103</sup> Sym. Ep. 9. 43 (I am grateful to John Matthews for this reference). On betrothal among the Roman upper classes before Constantine: S. Treggiari, 'Digna Condicio', *Échos du Monde classique* 28 (1984), 419–51.

<sup>104</sup> See Part I. In classical Athens, betrothal (*engyē*) was a prerequisite for legitimate marriage (except in the case of *epiklēroi*), and was customary in other Greek states: Lacey (op. cit., n. 44), 105–6 and 225. It has often been suggested that late Roman betrothal laws were strongly influenced by Greek and Near Eastern customs, but this is disputed by Anné (n. 102).

the betrothal pact, for in its opening sentence it describes the *raptor* as 'nihil cum parentibus ante depectus'. And indeed it is not surprising that a legislator who wishes to regulate engagement pacts and to reinforce the bonds of betrothal by legal sanctions will also condemn marriage by abduction, the opposite of betrothal. Other legislation of Constantine indicates that he thought the preservation of a woman's *pudor* was very important and had little confidence in the ability of women to exercise self-control.<sup>105</sup> Several other laws, particularly from the early years of Constantine's reign, reflect attempts to crack down on incidents of local violence arising from private disputes, especially over property.<sup>106</sup> And in its concern for maintenance of the social order, even to the detriment of the individual families involved, *CTh* IX. 24. 1 can also be compared with a number of other Constantinian laws which ban and penalize harshly unions between those of disparate social status.<sup>107</sup>

## VI. CONCLUSION

It is rarely possible, in the absence of evidence outside the legal sources, to determine the circumstances or events which led to the promulgation of the constitutions preserved in the *Theodosian Code*. The *Code* is made up of excerpts from the original laws, and the fifth-century compilers generally omitted references to specific incidents and individuals and also deleted much of the rhetoric of the original legislation, which was felt to be superfluous. Because of this abridgement, clear statements of the lawmakers' intentions in promulgating their edicts have mostly been omitted.<sup>108</sup> However, fourth- and fifth-century laws preserved intact outside the *Code* often mention the people or events that prompted them.<sup>109</sup> The evidence of these laws suggests that Constantine's edict on *raptus* was precipitated by a specific incident or incidents, perhaps a particularly scandalous case of abduction, which had come to the attention of the imperial consistory.

Before Constantine's reign such a situation, if it had ever come to the emperor's attention, would have been handled via private rescript: an individual, perhaps the father of the abducted girl, would have written to the emperor for help in resolving the situation. The emperor's reply would have been made to that individual, based on the facts of the case presented to him. Imperial rescripts were publicly posted and could create precedents to be used in later legal cases, but they were not intended as general laws with immediate application to all inhabitants of the Empire, nor did they prescribe penalties, nor did the imperial administration take steps to see that a rescript's ruling was enforced or obeyed—though rescripts often advise the recipient to see his local governor for redress. A rescript of Diocletian and Maximian which appears to refer to a case of abduction and wrongful imprisonment follows exactly that format.<sup>110</sup>

Most of the legislation of emperors before Constantine that has been preserved in the *Codex Justinianus* is of this type. In the fourth century, however, *leges generales*, universally applicable and usually in the form of edicts, became the vehicle for almost all the emperor's official rulings. The promulgation of these laws was the responsibility of the *quaestor sacri palatii*, whose office was created by Constantine.<sup>111</sup> This change in the format and scope of imperial constitutions seems to have occurred during the reign of Diocletian, and has been linked with that

<sup>105</sup> See n. 22 above.

<sup>106</sup> cf. *CTh* IX. 1. 1 (n. 65 above); also *CTh* IX. 10. 1 (317?) and 2 (318). See J. Coroï, *La violence en droit criminel romain* (1915), 304–33, esp. 308–21. There is plenty of evidence in the papyri for such local violence: cf. Baldwin (art. cit. n. 66), 262.

<sup>107</sup> e.g., *CTh* IX. 9. 1 (326 or 329); *CTh* IV. 6. 2 and 3 (336); cf. *CTh* XII. 1. 6.

<sup>108</sup> On the compilation of the *CTh*, see, most recently, Tony Honoré. 'The Making of the Theodosian Code', *ZSS.RA* 103 (1986), 133–222.

<sup>109</sup> e.g., Sirmondian Const. 10 (420), prompted by a

priest's *suggestio*: 9 November of Majorian (459), prompted by a report of the governor of Suburbicarian Tuscany; 1 November of Anthemius (468), prompted by the petition of a private citizen named Julia; many other examples in the post-*CTh* imperial *novellae*.

<sup>110</sup> See nn. 63–4 above.

<sup>111</sup> Quaestor: see Honoré (op. cit. n. 108), 139–41; and J. Harries, 'The Roman Imperial Quaestor from Constantine to Theodosius II', *JRS* 78 (1988), 148–72. I am indebted to Dr Harries for allowing me to see her article before publication and for her advice concerning this section.

emperor's reorganization of the Empire and his attempts to streamline the imperial administration.<sup>112</sup>

Therefore, even though Constantine's ruling on *raptus* may have been inspired by a particular incident or incidents, it was given in the form of an edict, and addressed 'to the people'. Its provisions were applicable to all cases of abduction in the future, and it became the basis for a series of general laws on the same subject over the next two centuries. There is no need to assume that there was an increase in the frequency of abduction in the early fourth century to explain the enactment of a law against the practice just at this time.<sup>113</sup>

An important consequence of this increase in general legislation in the fourth century is that matters which in the earlier Empire would not have been considered worthy subjects for an imperial edict now were. This is surely the case with Constantine's edict against *raptus*. Judging from the evidence of ancient literature and from modern accounts of bride theft, marriage by abduction would have been much more likely to occur not among those in large urban areas such as Rome, or among the upper classes, but rather in more remote rural communities—towns and villages of the Mediterranean which were less accessible to, and less concerned about, upper-class Roman legal and social control. These are not the people for whom the classical law of the jurists or the imperial edicts of the Principate were written. Certainly, emperors from Augustus on concerned themselves with the marriages and sexual behaviour of the upper classes, particularly in Rome and Italy; thus there were laws encouraging marriage and child-bearing and punishing adultery. But clearly Augustus never saw the need for a *Lex Julia de raptu*—cases of abduction which involved rape or other violence would come under the *Lex Julia de vi*, and any other incidents of *raptus* would have been considered a private and probably a rather vulgar matter, with no relevance to the well-being of the Empire.

In late antiquity, on the other hand, such customs and the people who practised them *were* considered suitable material for imperial edicts, and this is of considerable interest for our understanding of late Roman law and what it can tell us. Since the Emperor Caracalla's universal grant of the Roman citizenship in 212, the tenets of Roman law had been applicable (though not necessarily applied) to all free inhabitants of the Empire. Constantine's law reflects this widening of the scope of imperial legislation.<sup>114</sup> Imperial interest in the *mores* and morals of those outside the urban upper classes of the Roman west is found already in one of the few pre-Constantinian edicts preserved in the legal sources: Diocletian's long and virulent edict against the practice of close-kin marriage.<sup>115</sup> This new imperial concern may owe something to the often rather humble provincial origins of late third- and fourth-century emperors, and to the increasing social mobility of the late Empire, when, for a variety of reasons, the traditional social boundaries of Graeco-Roman society were in flux and individuals of unexceptional or even ignoble origins were able to rise to prominence. Constantine himself seems to have encouraged this mobility by his policy of promoting his supporters to positions of high rank, even those of rather lowly background.<sup>116</sup> Such men would have brought the customs and attitudes of their region and social class with them, customs which might well not be those of the old aristocracy.<sup>117</sup>

Lastly, we should also consider the role of rhetoric in the framing of Constantine's laws. The similarity of parts of *CTh* ix. 24. 1 to passages in the *Controversiae* has already been noted, and in fact the edict on *raptus* is not the only late Roman law

<sup>112</sup> This is the thesis of T. Honoré, *Emperors and Lawyers* (1981).

<sup>113</sup> As do Dupont (op. cit., n. 33), 49; and Desanti, 204.

<sup>114</sup> Of course the rescripts of third-century emperors were also concerned with acquainting provincials and common people with Roman law, but they were issued as responses to private individuals, not as general edicts. See F. Millar, *The Emperor in the Roman World* (1977), 242–72 and 537–49.

<sup>115</sup> Preserved in full in the *Mosaicarum et Romanarum*

*Legum Collatio* iv. 1, *FIRA*<sup>2</sup> 11, pp. 558–60; given at Damascus in 295.

<sup>116</sup> Men like Ablabius, Constantine's praetorian prefect and right-hand man (cf. Eunapius, *Lives of the Philosophers* 463); and Optatus, *cos.* 334, who married a tavern-keeper's daughter (Libanius, *Or.* 42. 26).

<sup>117</sup> This would also help to explain laws like *CTh* iv. 6. 2 and 3 (336), which ban and penalize the marriages of senators and provincial and local officials with women of low social status.

to evoke the situations and the language of the rhetorical schools.<sup>118</sup> It is quite likely that the *quaestor* and other officials responsible for drafting imperial legislation in the late Empire were familiar with products of the rhetorical schools very similar to Seneca's work; such literature was part of the rhetorical training undergone by all well-educated men, and especially those who aspired to the law. Thus we have the intriguing possibility that life (or rather, law) has imitated art. In other words, it is possible that the imperial bureaucrats who actually determined the wording of the law were so steeped in the traditional rhetorical education that, perhaps unconsciously, they transferred the sensational and essentially artificial situations found in the rhetorical exercises into an imperial edict which was to be applied in real-life situations. Some of the inspiration behind Constantine's law may be found in the schoolroom, not the courts. This would help to explain the harsh and drastic measures prescribed in *CTh* IX. 24. 1 for what was essentially an ancient and often quite successful marriage strategy, which had long been practised and tolerated in the Graeco-Roman world. The lurid and violent *raptus* of rhetoric coloured the imperial perception of a custom for which classical law provided no precedent.

This is not to suggest that the *quaestor* and his office or the emperor would promulgate a law to cover a situation existing only in the minds of rhetors and their pupils. Late imperial law was usually prompted by some external stimulus, in order to rectify a contemporary problem which the Emperor felt needed to be addressed, or in response to a particular legal case which had been brought to his attention. Still, the similarities in wording and the appearance in general legislation, apparently for the first time, of one of the most popular subjects in the rhetorical repertoire are worth noting. Rather than looking for actual legal precedents, Greek or Roman, to explain the laws of the early imperial declamations, we should perhaps look to the declamations for help in understanding the highly rhetorical and often enigmatic enactments of late Roman law. Much could be learned from further examination of the relationship between law, rhetoric and reality in late antiquity.

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<sup>118</sup> e.g., two fourth-century laws concern ungrateful children, whose fathers may revoke their emancipation: Frag. Vat. 248 (A.D. 330); *CTh* VIII. 14. 1; cf. Bonner (op. cit., n. 54), 87–8 on the largely fictitious 'Ingrati sit actio'. A number of declamations involve exposed children and their natural parents: cf. *CTh* V. 10. 1 and

*Cy* IV. 43. 2 (329); *CTh* V. 9. 1 (331); *Cy* VIII. 51. 2 (374); Sirm. Const. 5 (412); see Bonner, 125–7. Note also Constantine's highly rhetorical law against the marriage of a woman to her own slave (*CTh* IX. 9. 1; cf. also *CTh* IV. 12. 1) and *Contr* VII. 6: 'Demens qui servo filiam iunxit'.