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A NEW CONSTITUTION OF GRATIAN*

1. INTRODUCTION

1.1. Arras, Médiathèque municipale, Ms. 572(644) and its final folios

Codex 644 (CGM 572) of the Médiathèque Municipale of Arras[1] is known among specialists as the oldest manuscript to transmit the *Collectio Quesnelliana*, a Roman collection of councils, papal decretals, and

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[1] See the catalogue of Caron 1860: 286–287. A digital reproduction of the manuscript is available at <http://medium-avance.irht.cnrs.fr/Manuscrits/Voir?idFicheManuscrit=770> (accessed 3 December 2024).

imperial constitutions composed *c.* 496–500.[2] While the 'neat, careful, small Caroline minuscule' displayed by most of the manuscript suggests a date between approximately 780 and 820,[3] the script of the two final folios (212v–213v) differs markedly from the rest. They are written by later hands with a brighter ink in a more irregular and pointed Caroline of smaller format. When not in a ligature, the letter *e* has an elongated central stroke, while the hook of the letter *g* is regularly open. The letters *nt* always form a ligature, whereby the final ascending stroke of capital *n* merges with the hasta of *t* (see Fig. 1). Finally, headings are no longer in uncial, but in rustic capital script. While Elias Avery Lowe and Bernhard Bischoff dated these additions to the ninth century, the palaeographers of the Institut de recherche et d'histoire des textes date them to sometime between the tenth and eleventh centuries.[4]

Above all, the final two folios are noteworthy because they feature rare texts not contained in other manuscripts of the *Collectio Quesnelliana*:

1. **Fol. 212v**. An apocryphal invective letter of Pope Silverius against his successor Vigilius, also known as *Damnatio Vigilii* (JK †899 = J^3 †1778, in the new numbering of the *Regesta pontificum Romanorum*), dating presumably to the mid-sixth century.[5]

[2] The most recent piece of legislation in the collection, Pope Gelasius' letter *Necessaria rerum* of 11 March 494 gives the *terminus post quem*, while the *terminus ante quem* is provided by the canonical collection of Dionysius Exiguus (*c.* 500), which utilises the *Quesnelliana*, as shown by van der Speeten 1985: 449–450. On the place of origin of the collection, see Silva-Tarouca 1931: 557–558. For an overview of the *Quesnelliana*, with further references, see Hoskin 2022: 111–113; Marconi & Margutti 2014: 177–186; and Kéry 2013: 27–29.

[3] Lowe 1952: 4, no. 713 (also available online in Galway's *Earlier Latin Manuscripts* database: <https://elmss.nuigalway.ie/catalogue/1112> [accessed 4 December 2024]) and Bischoff 1998: 26, no. 88.

[4] See the detailed description of the manuscript in d'Avray 2019: 42–43 (crediting Marie-Christine Duparc).

[5] According to Schieffer 1976: 182–183, the *Damnatio Vigilii* is an expression of the north Italian opposition to the condemnation of the Three Chapters at the council of Constantinople of 553. While a forthcoming article of mine will provide a study with critical edition of the *Damnatio Vigilii*, a non-critical text can be read in Hinschius 1863: 628–629. See also the online edition of K. G. Schon at <https://www.pseudoisidor.mgh.de/html/252.htm> (accessed 4 December 2024).

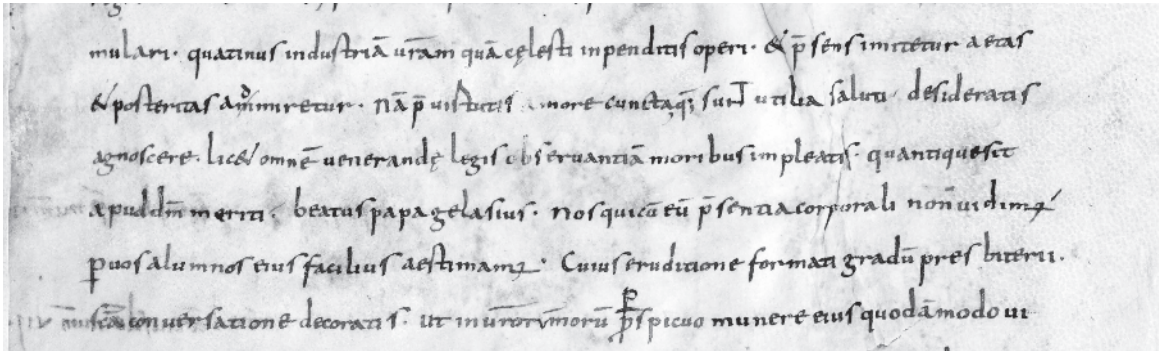

Fig. 1. Arras, Médiathèque municipale, Ms. 572(644), fol. 213r. Portion of Dionysius Exiguus' prefatory letter to the *Liber decretalium* (*Sanctitatis tuae sedulis excitatus officiis*) (CC-BY 3.0 Bibliothèque Virtuelle des Manuscrits Médiévaux (BVMM) – IRHT-CNRS)

2. **Fols. 212v–213v**. A letter dated to around 500, by the monk Dionysius Exiguus to the presbyter Julian (*Sanctitatis tuae sedulis excitatus officiis*),[6] which served as the preface to a collection of papal decretals known as the *Liber decretalium*.[7] An index of papal decrees containing chapters of papal decretals and/or Roman synods follows Dionysius' letter. This index largely matches those of the extant Dionysian collections, although it is not entirely identical.

1.2. An unpublished constitution

It is, however, the final text (fol. 213v), which is separated by previous two by a rather wide blank space and is written by a different hand, that is the

[6] Critical edition by Glorie 1972: 45–47. English translation in Somerville & Brasington 1998: 46–49.

[7] The *Liber decretalium* was paired with another work of Dionysius, a collection of ancient councils called *Liber canonum*: together, they formed the *Collectio Dionysiana*. While the original *Liber decretalium* of Dionysius is lost, it can be retrieved from revised and augmented versions of the *Dionysiana* of a later date. On the *Collectiones Dionysianae*, see Marconi & Margutti 2014: 139–145. On Dionysius, see Heith-Stade 2019: 315–333, with literature.

most surprising. It consists of eight lines preceded by the heading *Imperatores Gratianus Valentinianus et Teodosius* (in a later, somewhat sloppy script). Unfortunately, since fol. 213v effectively served as the manuscript's rear flyleaf for centuries, the text has become illegible in several places due to mechanical friction against the back cover. Even more concerning, the lines reveal an opaque halo under UV light, which may indicate traces of chemical agents commonly used in the past to make the text temporarily more legible, but which resulted in some of the damage seen today (Fig. 2). Fortunately, modern digital aids such as the Mirador viewer[8] and the image-processing tool Hoku,[9] as well as examination with a UV lamp, still allow for the recovery of some text that has become lost to the naked eye.

The legible text reveals a new, fascinating historical document. This is a general law (*generali lege*) of Emperor Gratian (also written in the name of his fellow emperors Valentinian II and Theodosius I, as customary) issued in the form of a letter to a praetorian prefect in response to the petition of a bishop: this means we are faced with a constitution. Constitutions were issued in multiple copies: in principle, all highest officeholders received a copy (*exemplar*/*ἰσότυπον*), with instructions to ensure the implementation of the law in their area of office.[10] Constitutions, particularly *leges generales*, typically end with a command to transmit the new law to the provinces, which sets them apart from *sanctiones pragmaticae* (Riedlberger 2020: 32). The praetorian prefects oversaw the dissemination of new laws together with accompanying edicts that ensured their publication.[11] In addition, constitutions feature a concluding note (called

[8] Online at <https://projectmirador.org/> (accessed 4 December 2024).

[9] I am deeply grateful to Ivan Shevchuk (Centre for the Study of Manuscript Cultures, University of Hamburg) for kindly processing the online reproductions of the manuscript into more legible images.

[10] The collections of imperial laws (*Theodosian Code*, *Post-Theodosian Novels*, *Justinian Code*, collections of *Justinianic Novels*) always contain only one copy. Occasionally, however, chancery notes about the recipients of further copies have survived; see only as examples: *C.Th.* 1.8.1 and *C.Th.* 6.28.8.2. See Dölger & Karayannopoulos 1968: 74–75 and Riedlberger 2020: 118–124.

[11] See, e.g., *Nov. Theod.* 1.8: *illustris et magnifica auctoritas tua* (…) *edictis propositis in omnium populorum, in omnium provinciarum notitiam scita maiestatis Augustae nostrae faciat pervenire*,

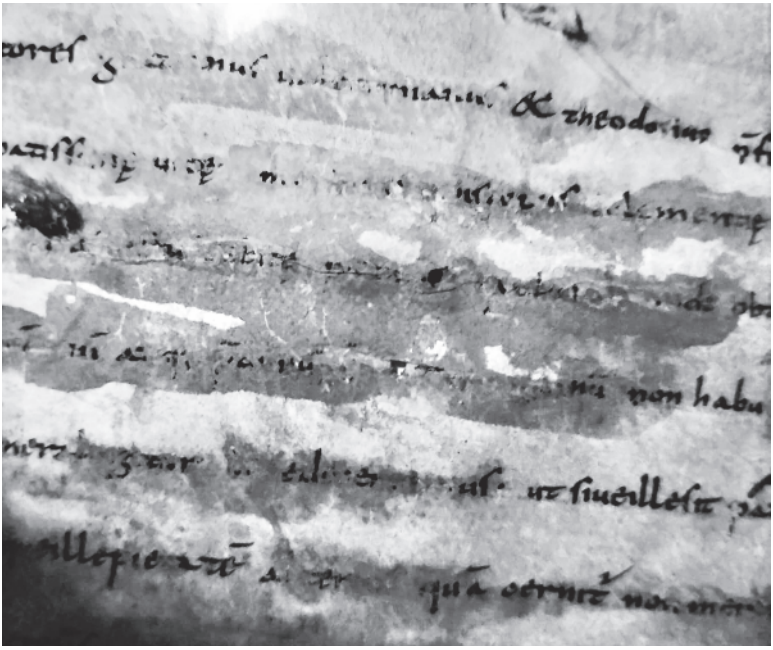

Fig. 2. Arras, Médiathèque municipale, Ms. 572(644), fol. 213v. Close-up under the UV lamp

subscriptio) indicating the date and place where the new law was issued (Dölger & Karayannopoulos 1968: 54–56). However, as it will appear from the edition below, both the reference to further dissemination of this law and the *subscriptio* are missing. On the other hand, this law ends with a complete sentence, which rules out accidental loss of text in the exemplar. In short, this document is defective at the end. Perhaps the exemplar from which it was copied was already lacking the *subscriptio* or was already intentionally abbreviated.

'Your Illustrious and Magnificent Authority (…) shall post edicts and shall cause to come to the knowledge of all peoples, of all provinces, the decrees of Our August Majesty' (transl. Pharr 1952: 488); *Nov. Val.* 34.6: *Itaque illustris et praecelsa magnificentia tua ad designatos provinciales* (…) *nostra edicta faciat pervenire*, 'Therefore, Your Illustrious and Excellent Magnificence shall cause Our edicts (…) to come to the designated provincials' (transl. Pharr 1952: 545). See Riedlberger 2020: 27–33 and 52–53.

1.3. Date and issuer

The absence of the *subscriptio* forces us to infer the document's date and issuer from internal factors. This constitution dates to a period between the imperial accession of Theodosius (19 January 379) and Gratian's brutal demise on 25 August 383 (Seeck 1919: 251 and 262).

Constitutions were invariably issued in the name of the whole imperial college, at least as far as accepted as legitimate by the actually issuing emperor. The document at hand was issued by Gratian, given Gratian's jurisdiction over Gaul, together with Spain and Britain (as opposed to Valentinian II's rule over Italy, Illyricum, and Africa).

1.4. The addressee and petitioner

Who is the prefect addressed by this constitution? Three attested candidates emerge from the Fasti in the *Prosopography of the Later Roman Empire*. One is Hesperius,[12] the son of Ausonius, Gratian's former teacher of rhetoric, celebrated poet, and consul of 379. Another possible addressee is Siburius (attested as prefect from December 379), who features in the letters of Quintus Aurelius Symmachus and is also known as a medical author.[13] The third possible recipient is Mallius Theodorus (382), a former *magister memoriae*, author of an extant treatise on metres, and the future consul of 399, on which occasion he was honoured with a panegyric by Claudian.[14] However, one cannot entirely rule out another (as yet) unattested prefect.

The identity of the petitioner rests on the reading of the faded letters at line 2 as *episcopus*, which is supported by parallels for the epithet *vir probatissimae vitae* (see commentary). Unfortunately, only the initial and two final letters of his name (*M....us*) are legible. In any case, he must have been a bishop located the part of the empire under Gratian's administration.

[12] *PLRE* I, *s.v.* 'Hesperius 2'.

[13] *PLRE* I, *s.v.* 'Siburius 1'.

[14] See Claud., *Mall. Theod.* 33–37 (ed. Hall 1985). *PLRE* I, *s.v.* 'Theodorus 27'. On the early offices of Mallius Theodorus, see also Harries 1988: 161–163.

2. EDITION

In the following, I provide the first edition of this find and formulate a few hypotheses, however tentative, on the content. Due to the highly fragmentary state of the manuscript text, I have made frequent use of the critical signs customarily employed for editing papyri. This will assist the reader in distinguishing what is safely legible in the manuscript from my conjectural supplements. In addition, round brackets encircle expanded abbreviations.

1 Imperatores Gratianus Valentinianus et Theodosius p(rae)fecto Galliaru(m). Iustissima supplicatione permoti qua(m)
2 vir probatissimae vitae M . . . . us ẹ[pisc]o̩pus clementiae nostrae sensibus intimavit, ut hi quos feralis
3 impietas a[b affect]u [d]ẹ̣bi̩tae p̣i̩ẹ̣tạ[tis e]xc̣[lu]d̩i̩t i̩nde obtineant libertate(m) unde promeruerint et salute(m).
4 Incongruu(m) ẹnim ạ̣tq̣uẹ p̣(rae)d̩u̩r̩u̩(m) [vide]t̩u̩r [ut] q̣u̩i̩ [alum]nu(m) non habuerint educand[um fac]u̩l̩[tatem d]ẹ̣b̩[ean]t habere repe-
5 tendi. Generali̩ i̩gi̩tu̩r l̩ẹ̣ge dẹc̣ẹ̣rn̩i̩mus ut sive ille sit pater sive s[it] `dom[inu]s´ l̩i̩c̣ẹ̣nt̩i̩ạ(m) n̩ẹq̣u̩eat habere repe-
6 tendi neque ille pietate(m) alteri̩u̩s quam cernitur non merẹ̣[ri] n[e]q[(ue)] ill[e] alteri̩u̩s fam̩[ul]ạ̣t̩u(m) que(m) no̩n m̩ẹ̣ri-
7 tus e(st) habere praesumat. Sit ecclesia sola mater et dominạ . ṭ . . . ibi̩ . . . . e(m) . . n . .trạ . et s̩ẹ̣n̩ẹ̣[ctut]ẹ̣(m) ubi infantiae
8 rudimenta creverunt.

The Emperors Gratian, Valentinian, and Theodosius to the Prefect of Gaul. Deeply moved [*as we are*] *by the most rightful supplication that Bishop M*[…]*, a man of most esteemed life, brought to the knowledge of Our clemency, namely that those whom a feral impiety excludes from the affection of rightly owed respect, may be granted freedom from the same source from which they also deserved safety. For it seems unsuitable and excessively harsh that those who did not have* [*a foster-child*] *to raise may have the possibility to reclaim it. Thus, we decree with a general law that whether he be*

> *the father or whether he be the master, he may not have the right of recovery, nor may he presume to enjoy the dutiful affection of another person which he evidently does not deserve or the service of another person which he did not deserve. Let the Church be the only mother and mistress* [. . .] *there* [. . .] *old age where the beginnings of childhood grew.*

1. *Imperatores Gratianus Valentinianus et Theodosius*. While not entirely identical, the *inscriptio* looks more similar to the ones found in the *Codes* than those in the unabridged constitutions, which are marked instead by lengthy series of epithets (*intitulatio*).[15] This is the first hint that the document at hand is an abridgement of a longer constitution.

p(rae)fecto Galliaru(m). The name of the praetorian prefect – the recipient of this constitution – is absent, perhaps because omitted by the scribe, or (more probably) because it was already not included in the exemplar. The customary intitulation *praetorio* after *praefecto* is likewise missing. Perhaps *praefecto* is the outcome of a misinterpreted abbreviation *PPO*.

Iustissima supplicatione permoti. The participle *permotus* is attested elsewhere in imperial responses to petitions.[16] Unsurprisingly, this same phrase, often in pair with *aditio* ('entreaty') *allegation* ('dispatch') and *supplicatio* ('supplication') also features in the legalistic diction of Cassiodorus' *Variae*. The compound *permovere*, while having a more intensive nuance than simple *movere* (*TLL*, *s.v. permoveo*), here also serves to make a rythmical clausula (see Appendix below).

2. *vir probatissimae vitae*. Imperial letters typically address the petitioner with honorifics: *vir clarissimus* and *vir spectabilis* are used for laymen, *vir sanctissimus* and *vir beatissimus* denote clerics. If the proposed reading *e[pisc]opus* is correct, this would be the first attestation of this honorific for a bishop in an imperial constitution. Besides, it is common knowledge that a bishop must lead an honourable life.[17]

[15] See Rösch 1978: 88–100 (98–99 on exceptional cases of abbreviated imperial titles).

[16] See fourth-century *FVat.* 35.2 (reporting a law of Constantine): *His sumus valde permoti*, 'We have been deeply moved by these'. See also C. 12.21.8.0 (Zeno): *Multis devotissimae scholae agentum in rebus aditionibus permoti*, 'deeply moved by the many requests of the most devoted corps of the couriers', and *Coll. Quesnelliana* 6 (Glycerius): *Qua rerum ratione permoti*, 'Deeply moved as we are by this state of things' (*PL* LVI: 896D: this constitution is now critically edited by Vanspauwen 2024).

[17] See, e.g., Leo's constitution against simony (C. 1.31.30.3): *Cesset altaribus imminere profanus ardor avaritiae et a sacris adytis repellatur piaculare flagitium. Ita castus et humilis nostris temporibus eligatur episcopus, ut, locorum quocumque pervenerit, omnia vitae propriae integritate purificet*, 'The profane ardor of greed shall cease to loom over the altars, and sinful wantonness shall be

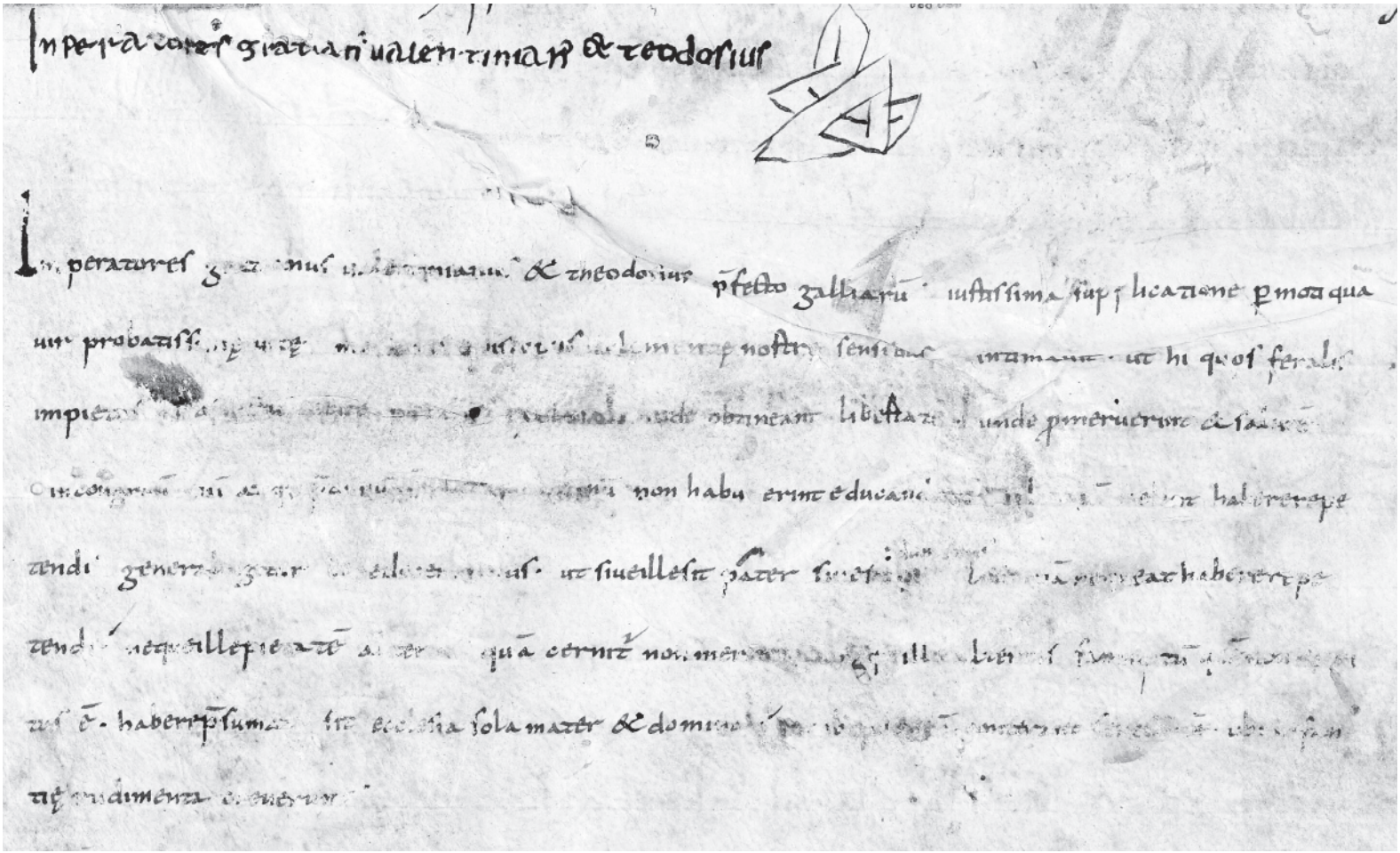

Fig. 3. Arras, Médiathèque municipale, Ms. 572(644), fol. 213v.
Imperatores Gratianus et Valentinianus et Theodosius praefecto Galliarum.
(CC-BY 3.0 Bibliothèque Virtuelle des Manuscrits Médiévaux (BVMM) – IRHT-CNRS)

Other administrative sources express the link between moral excellence and episcopal office, both secular[18] and ecclesiastic.[19]

M . . . . us e[*pisc*]*opus*. Petitioners are often identified not only by their personal names, but also by their offices.[20] See in particular *C.Th.* 9.40.24, issued in response to a petition by Bishop Asclepiades of Chersonesus.

clementiae nostrae. The emperor is very often referred to through abstract virtues such as *clementia*, *serenitas*, *mansuetudo*, and *moderatio*. Consequently, phrases such as *clementia/serenitas/mansuetudo/moderatio nostra* ('Our Clemency', 'Our Serene Highness', 'Our Grace', 'Our Moderation') become semantically equivalent to pronouns (Rösch 1978: 48).

sensibus intimavit. The verb *intimare*, 'to present, suggest', often features in petitions to the emperor.[21]

ut hi quos … et salutem. This sentence summarises the petitioner's *supplicatio*.

3. *feralis impietas*. *Impietas* may denote disloyalty or a neglect of one's filial or parental duty (*TLL*, *s.v. impietas* I.A.1, *in propinquos, maxime parentes*, but occasionally also inverted as in *Nov. Maior.* 6.1). Here, it is set in contrast to *debita pietas*.

driven from the inner sanctums. An unpolluted and humble man shall be elected bishop in Our age, so that, whatever station he attains, he shall purify everything by the blamelessness of his conduct' (transl. J. N. Dillon, in Frier 2016: vol. 1, 91).

[18] *Const. Sirm.* 1: *Illud est enim veritatis auctoritate firmatum, illud incorruptum, quod a sacrosancto homine conscientia mentis illibatae protulerit*, 'For what the conscience of a pure mind has brought forth from a sacrosanct person is upheld by the authority of truth and is incorrupt'.

[19] Greg. M. *epist.* 2.21 (ed. Norberg 1982): *Felix vir clarissimus praesentium lator edocuit nos esse quendam in illis partibus presbyterum, qui ad episcopatus ordinem provehi probatae vitae merito dignus appareat*, 'The *vir clarissimus* Felix, the bringer of this letter, informed Us that there is a presbyter who appears worthy of being elevated to the office of bishop due to his commendable life'.

[20] See, e.g. *Nov. Theod.* 4.0: (…) *Anatolii magistri per orientem utriusque militiae*, 'Anatolius, *magister utriusque militiae* in the East'; *Coll. Avell.* 143: *Iohannes vir beatissimus, huius regiae urbis antistes, et ceteri viri religiosi episcopi* (…) *nostram serenitatem docuerunt*, 'The most holy John, bishop of this royal city (viz. Constantinople), and other pious bishops (…) informed Us'.

[21] See, e.g., *C.Th.* 15.5.4: *relatio tui culminis intimavit*, 'A report of Your Sublimity has made known'; *Nov. Theod.* 4.0: *Haec adsertio viri sublimis Anatolii* (…) *nostris sensibus intimavit*, 'A report of the *vir sublimis* Anatolius (…) brought these events to Our knowledge' (transl. Pharr 1952: 432 and 490, lightly edited); C. 2.7.20: *Suggestionem viri illustris comitis privatarum et proconsulis Asiae duximus admittendam, per quam nostrae serenitatis auribus intimavit* (…), 'We believed that We should comply with the report of the *vir illustris* Count of the Privy Purse and the Proconsul of Asia, through which he has communicated to the ears of Our Serenity that (…)' (transl. B. Frier in Frier 2016: vol. 1, 467, lightly edited).

Pietas is a crucial concept in the Roman household, as it denotes the devotion, respect, and moral as well as material obligations between parents and children (*TLL*, *s.v. pietas* II.A.2). It also extends to relationships between master and their servants or freedmen (*TLL*, *s.v. pietas* II.B.2.b).[22] This terminology suggests that this constitution concerns the relationship between the holder of *patria potestas* (authority over children) or *mancipium* (ownership of slaves) and his dependents. Specifically, it addresses a situation in which an individual is prevented from fulfilling his or her *debita pietas* due to the *feralis impietas* of someone else. Furthermore, as I argue below (pp. 116–117) the verbs *educare* and *repetere* in lines 4–6 strongly suggests that the document pertains to abandoned children (*expositi*).

a[b affect]u [d]ẹḅịtae pịẹṭạ[tis e]xc̣[lu]ḍịt. The script is severely faded here, although an *x* and, perhaps, a *c* remain legible (see Fig. 2). I reconstruct the barely legible section as *pietā́tĭs ēxclū́dit*, which yields a good clausula (cretic-trochee / *tardus*: see Appendix). Regarding my supplied reading *affectu*, the noun *affectus* is often paired with *pietas* as a set phrase in Late Latin, typically referring to either filial piety or the respect owed to the master of a household. See, for instance, *FVat.* 248: *in affectu pietatis monitos*, 'admonished to be loyal to parental bond'.[23]

ịṇde obtineant libertate(m). The term *libertas* must be read in conjunction with the previous phrase *a[b affect]u [d]ẹḅịtae pịẹṭạ[tis e]xc̣[lu]ḍịt*, implying release from the obligations connected to *pietas*.

unde promeruerint et salute(m). *Salus*, 'safety', establishes a parallel with *libertas* and contrasts with the danger posed by the *feralis impietas* above.

4. *Incongruu(m) ẹnim ạṭqụẹ p(rae)ḍụrụm*. *Enim* makes clear that this is the beginning of a new sentence. The adjective *prāedū́rŭm* (matching *incongruum*) can be integrated with *ā́tquĕ* to restore a clausula cretic-trochee / *planus* (–⏑––⏑: see Appendix).

[vide]ṭụr. While only *-ṭụr* is clearly legible, *videtur* lends itself as a plausible integration, considering this sentence is still part of the bishop's petitition.

[ut] qụị [alum]nu(m). *-nu* with a nasal compendium is clearly legible. The space between *qụị* and *-nu(m)* cannot accommodate more than three or four letters. In the light of what follows – namely, the gerundive *educandum* and the gerunds *repetendi*, 'to reclaim', in the technical term of family law (see below) – a tentative integration might be *alumnum*, 'foster-child'.

non habuerint educand[um]. The ending of the *educand-* (gerund or gerundive) is currently illegible. However, since *habúerint educánd*… forms a clausula (*cursus*

[22] For an overview of the values and obligations connected with *pietas* in Roman family, see Saller 1994: 104–114 and Vuolanto 2016: 491–493, with further references. On *patria potestas* in late antiquity, see the overviews of Voci 1985 and Arjava 1998.

[23] In addition, there are numerous attestations in non-juridical literature: Ambrose – 12 times, Josephus – 2 times, Maximus of Turin – 4 times, Jerome – 3 times, Augustine – 15 times, according to the query *affect** + *pietat** carried out on the *Library of Latin Texts* database.

velox: see Appendix), it is likely to be a clause ending. Additionally, a noun-modifier pairing ([*alum*]*nu*(*m*) – *educand*[*um*]) would elegantly encircle the clause.

Because of *ut*, *habuerint* is a perfect subjunctive rather than a future perfect indicative, especially considering that the following verb, however difficult to discern, looks like present subjunctive (which I read as *debeant*). Accordingly, *habuerint* follows *consecutio temporum* and belongs in a dependent clause governed by *debeant*, possibly a relative clause, the beginning of which is, however, illegible at this time. Most importantly, the verb *educo* ('to rear' or ' to raise') points to household contexts, which notably include the fostering of children who had been exposed or sold.[24]

[*d*]*e̩b*[*ean*]*t habere repetendi*. The verb *repeto* ('to recover, reclaim, claim back') along with *educand*[*um*] above, is key for interpretating this text, as it is frequently attested in reference to to abandoned children (*expositi*). In rare instances, such children could be reclaimed by their natural father or, in the case of slaves, by their original master (*TLL*, *s.v. repeto* II.1.B). A notable early example of this usage of *repeto* appears in the elder Seneca's *controversia* 9.3 (ed. Håkanson 1982), which recounts the case of a man who took in and raised a pair of abandoned twins but later sought to keep one when compelled to return them to their natural father. It is striking that, according to Seneca, the rhetor Romanius Hispo characterised the act of exposure as savagery (*saevitiam*) when it suited his argument (*con.* 9.3.11; cf. *feralis impietas* at lines 2–3).

Above all, parallels in more recent legislation offers meaningful guidance: a law of Constantine, dating to 331, established that former *expositi*, whether free or slave, may not be reclaimed by their birth father or former owner.[25] A subse-

[24] *C.Th.* 5.9.1. interpr.: *Quicumque expositum recenti partu, sciente patre vel matre vel domino, collegerit ac suo labore educaverit, in illius, a quo collectus est, potestate consistat*, 'If any person should take up a newly born child that has been exposed with the knowledge of its father or mother or owner and should rear it by his own effort, the child shall remain firmly in the power of the person by whom it was taken up' (transl. Pharr 1952: 109); *C.Th.* 4.8.6.7 interpr.: *si quis minor ingenuus a quolibet fuerit educatus et, liberum se esse nesciens, fuerit a nutritore distractus* (…) *potestatem habeat reclamandi*, 'if any freeborn minor should be reared by any person whatsoever and the minor who is ignorant that he is free should be sold by the person who reared him (…) he shall have the right to make his claim for freedom' (transl. Pharr 1952: 90); C. 8.51.3: *hi, qui ab huiusmodi hominibus educati sunt, liberi et ingenui appareant*, 'children brought up by such people shall be considered free and freeborn' (transl. B. Frier in Frier 2016: vol. 1, 2219, slightly modified).

[25] *C.Th.* 5.9.1: *omni repetitionis inquietudine penitus summovenda eorum, qui servos aut liberos scientes propria voluntate domo recens natos abiecerint*, 'Every disturbance of suits for reclamation by those persons who knowingly and voluntarily cast out from home newly born children, whether slaves or free, shall be abolished' (transl. Pharr 1952: 109, slightly modified). See also the interpretation to *C.Th.* 5.9.1 quoted above n. 24.

quent law of Honorius from 412 provides a good parallel for *repeto* with reference to abandoned children of servile origin.[26]

Repeto is also attested in contexts other than child exposure, as seen in Paul's discussion in the *Digest*[27] regarding loaned or deposited servants. A law of Constantine of 329 permitting the sale of newborn infants (who could potentially be bought back years later) displays a similar phrasing.[28] Nonetheless, *educand*[*um*] above strongly suggests that this law deals with the rearing of *expositi*, as I will substantiate in more detail below.

5. *Generaḷị ịgịtụr ḷẹg̣e dẹcẹṛṇịṃus*. The sequence of letters following *generali igitur* is severely faded: only *e*, *d*, and the verbal ending *-mus* are clearly visible (Fig. 4). *Igitur* marks the beginning of a sentence. Furthermore, given that the previous sentences outline both the occasion for the new law (specifically, the petition of the *vir probatissimae vitae*) and the current state of affairs – described as 'unsuitable and excessively harsh' (*incongruum atque praedurum*) – that the new law aims to address, one may infer that this sentence introduces the new legal pronouncement. Accordingly, the phrase *l̄́ēgĕ dēc̄́ērnĭmus̽* (double cretic / *tardus*) lends itself to a plausible restoration, not only due to its metre, but also because of its frequent use in documents of this kind.[29]

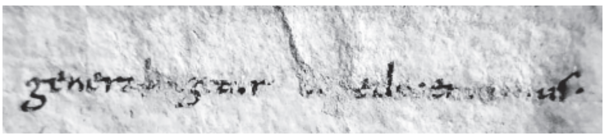

Fig. 4. Arras, Médiathèque municipale, Ms. 572(644), fol. 213v.
Close-up under the UV lamp

[26] *C.Th.* 5.9.2 ≅ C. 8.51.2.1: *Nullum dominis vel patronis repetendi aditum relinquimus, si expositos* (…) *voluntas misericordiae amica collegerit*, 'We leave to owners and patrons no avenue of recovery if good will, the friend of compassion, has taken up exposed children' (transl. Pharr 1952: 109).

[27] *Dig.* 9.4.22.1: *Sed hos quoque in potestate domini intellegi, si facultatem repetendi eos dominus habeat*, 'those slaves are understood to be in the power of their owner, should the said owner have the means of recovering them'.

[28] *C.Th.* 5.10.1: *si quis post seriem annorum ad libertatem eum repetat vel servum defendat*, 'and if after several years any person should restore the child to freedom or should defend his right to it as his slave' (transl. Pharr 1952: 110, slightly modified).

[29] Eight times in the *Justinian Code* (twice with *generali*), four times in the *Theodosian Code* (once with *generali*), once in *Nov. Theod.*, four times in *Nov. Val.* This and the following queries were carried out on the database *Amanuensis: Roman Law* at <http://www.riedlberger.de/amanuensis>.

ut sive ille sit pater sive s[*it*] `*dom*[*inu*]*s´*. A colon (:) following the second *sit* indicates that the scribe had forgotten to copy a word, which he subsequently supplied as a gloss in the interlinear space. I read *dominus*, which establishes a parallel with *pater*, thereby adding another member to the existing correlation *pietatem alterius* / *alterius famulatum* (l. 6) and *ecclesia mater* / *domina* (l. 7).

The parallel *pater* / *dominus* features notably in legislation regarding infant exposure, such as *C.Th.* 5.9.1: *Quicumque puerum vel puellam proiectam de domo, patris vel domini voluntate scientiaque, collegerit*, 'If any person should take up a boy or a girl child that has been cast out of its home with the knowledge and consent of its father or owner' (transl. Pharr 1952: 109). In addition, *sĭvĕ sīt dŏmĭnŭs* constitutes a clausula (cretic-tribrach / *tardus*: see Appendix), thus marking another syntactical unit.

licentia(*m*) … *habere repetendi*. An autoptic inspection reveals that the smudge before *licentia*(*m*) is the result of an erasure. As regards the content, see a similar formulation in the law of Honorius (*C.Th.* 5.9.2 ≅ CJ 8.51.2.1) concerning child exposure quoted above (see [*d*]*e*[*ean*]*t habere repetendi*, p. 116). In particular, the phrase *repetendi aditum* ('possibility of reclamation') closely resembles *licentiam repetendi* ('right of reclamation') in our text.

nequeat. Although the script is hardly legible, the verb *nequeo* ('to be unable, cannot') lends itself as a suitable reading, considering that is attested in late antique legislation to express prohibition. It is found four times in *C.Th.*

6. *alterius*. *Alter* ('another among many', not 'the other between two': *TLL*, *s.v. alter*, I B 2) refers to those who have been affected by the *feralis impietas* of lines 2–3. It denotes, as I argue below, the *expositi* in whose defence this law was issued.

quam cernitur non mere[*ri*]. Although the letters after *mere-* are almost illegible, the infinitive of *mereo* ('to deserve') presents itself as an easy restoration to complete an infinitive clause. It is more challenging, however, to determine whether the active voice (*merere*) or the deponent (*mereri*) should be supplied. Given that post-classical legal diction favours the deponent form (occurring 9 times in *C.Th.*, 13 times in C., and 3 times in the constitutions preserved outside the *Codes*), I choose the latter. In addition, the phrase *cĕrnĭtūr nōn mĕrĕrĭ* forms a good *clausula* (cretic-double trochee / *velox*). Finally, the deponent *mereri* might support the reading *meritus est* in lines 6–7 below.

n[*e*]*q*[(*ue*)] *ill*[*e*] *alterius fam*[*ul*]*atu*(*m*). Only the letters *lte . . . fam . . tu*(*m*) are clearly distinguishable. Considering the reference to the Church as *domina* in the following line (and my reading *dominus* in the interlinear gloss one line above), I read *alterius famulatum*, which also provides a parallel with *pietatem* in this same line and yields good rhythm (accentual *velox*).

7. *que*(*m*) *non meritus e*(*st*) *habere*. Although the final words of line 6 are quite faded, line 7 clearly starts with *ritus est habere*. The reading *meritus* is mutually supported by *non mereri* a few words prior.

praesumat. When paired with a form of negation, this verb is often used in late Roman law to express prohibition (21 times *praesumat*, 13 times *praesumant* in *C.Th.*).

Sit ecclesia sola mater et domina. The parallel *mater et domina* echoes and contasts with *sive pater sive sit dominus* at line 5, as well as with *pietatem alterius / alterius famulatum* at line 6. In other words, the Church *mater et domina* is set in opposition to the *feralis impietas* of those to whom the right of reclamation (*licentiam repetendi*) is denied. Finally, it is likely this ecclesiastical reference that prompted the scribe to insert this text at the end of this canonical manuscript.

.t. . . ibi. . . . e(m) . . n . . tra . et. This string of words is difficult to decipher. Only the letters *n . . tra . et* are somewhat legibile: it could be an imperfect subjunctive or a future indicative. Considering that the following noun *senectutem* is a foursylable paroxytone, a paroxytone verb may be apt here, as it would yield a *cursus velox*. In addition, the tense of this verb should determine whether the preposition with *t* after *domina* and the interpunct is *et* or *ut*. As for the word after *ibi*, which ends with *e(m)*, it may be *quidem*, although its meaning remains obscure for now. In doubt, I print only the letters that can be safely identified. Fortunately, the syntax is clear, as *ibi* corresponds to the following *ubi*.

sene[ctut]e(m). Only *s . . e* with nasal compendium are clearly legible. *Senectutem* looks like a plausible integration, given the following *infantiae rudimenta*. The meaning would be that those raised in an ecclesiastical environment may remain there without being subject to the right of reclamation (*facultas / licentia repetendi*) by their biological parents or original owners.

8. *ubi infantiae rudimenta creverunt*. The parallel *ibi / ubi* mirrors the parallel *inde / unde* at the beginning of the text: this quaestor is fond of parallelism. *Infantiae* may function as an abstract noun in place of a concrete term (= *infantes*), as seen in *C.Th.* 11.27.1: *educatio nascentis infantiae*, 'the rearing of newborn infants'.

3. INTERPRETATION

Let us sum up the key points. This text appears to be a law denying the right of reclamation (*licentia repetendi*) over children and/or slaves to people guilty of 'feral impiety' (*feralis impietas*). The crucial gerundive *educand[um]* and the final reference to the Church *mater et domina* suggest a context as follows: the father or owner who abandoned a child or slave child who was taken in and raised by members of the Church may not reclaim them. Accordingly, *feralis impietas* denotes the very act of exposure, which severs the relationship of *pietas* with one's offspring or household slaves. The following observations will further contextualise this

new constitution within the broader development of legislation concerning abandoned children (*expositi*).

3.1. *Expositi* in late antique legislation

Infant exposure was a relatively common practice in the Roman world. The discovery of formerly abandoned children who are then restored to their birth status is a standard trope for stories with a happy ending in New Comedy[30] and also features in the Greek novel.[31] However, fathers or other family members seeking to reclaim paternal rights over exposed children could raise thorny juridical questions surrounding the status of the *expositi*. The elder Seneca (see p. 116 above), Quintilian in the lesser declamations ascribed to him,[32] and Sulpicius Victor[33] attest that the question whether natural parents had the right to reclaim the children they once exposed was discussed in rhetorical education. At the same

[30] Among the many possible examples, the plot of Menander's *Epitrepontes* revolves around a foundling who is later discovered to be freeborn. Likewise, this theme recurs in *fabula palliata* plays, such as those of Plautus. In *Casina*, the servant Casina is eventually revealed to be the freeborn daughter of a neighbour (*Cas*. 79 and 1013–1014). In *Captivi*, the slave and war prisoner Tyndarus regains his status upon recognition of his true parentage (*Capt*. 1010–1014).

[31] Daphnis and Chloe are found out to be freeborn of wealthy origin (Longus, 4.24–25, 35–36 [ed. Viellefond 1987]), Chariclea is recognised as the daughter of the King of Ethiopia (Hld., 10.13–16 [ed. Rattenbury & Lumb 1960]).

[32] See Quint., *decl.* 278 (ed. Shackleton-Bailey 1989), involving the pecuniary implications of returning a former foundling – now a decorated war hero – to the natural father. On this declamation, see, most recently, the notes of A. Casamento in Pasetti *et alii* 2019: 405–412.

[33] Sulp. Vict., *rhet.* 48 (ed. Halm 1863): *Loci huius status: naturalis iusti, per quem utrimque in hac causa disputari potest; ex parte eorum qui retinent, an naturale sit iustum, ut qui semel filios exposuerunt, repetere non possint; ex parte patrum, an potius naturale sit iustum, ut patres quolibet tempore recipiant filios suos et naturale ius repetant*, 'Arguments pertaining to the dispute of "natural justice", by which one can argue for both sides on the following case: from the side of those who keep (the children), whether it is natural justice that those who once abandoned their sons, may not reclaim them; from the side of the fathers, whether it is rather natural justice, that the fathers regain their sons and reclaim natural justice'.

time, historical and legal sources prove that this was no fictional problem confined to rhetorical schools.[34]

Almost inevitably, foundlings who were lucky enough to survive were reared by their rescuers as slaves, not least because raising a foundling in servitude was cheaper than purchasing a new adult slave. Yet, however improbable as it may seem, former foundlings could sometimes be reclaimed by their biological families. In such cases, natural parents were often required to reimburse the costs of upbringing (*alimenta* / τροφεῖα) to the foster parents. The overarching principle determining the status of foundlings in the classical period was that the *patria potestas* of the biological father remained the decisive factor in determining the eventual status of the *expositus*: even after abandonment, the status derived from the biological family took precedence over the circumstances in which the foundling had been raised (Kaser 1971: 342).

Constantine introduced drastic changes to the policy surrounding the *expositi*. Although he influenced all subsequent legislation, it is important to keep in mind that both his laws and later ones survive only in the *Theodosian Code*. Accordingly, they may have been altered by textual interventions made by the second Theodosian commission. A law issued in 331 established that those who raised an *expositus* were entitled to keep him/her in the status they had established upon taking him/her up, whether free or slave, thereby nullifying future claims from the original family (*C.Th.* 5.9.1[35]): the principle of the pre-eminence of birth status was subverted. As several scholars have argued, Constantine probably intended

[34] Literature on this topic is considerable. For general orientation, I refer the reader to Boswell 1988: 53–266, Sarris 1994, Evans Grubbs 2010, Evans Grubbs 2011, and Kacprzak & Nowak 2018. Among the cases explored in the scholarship, one notable example is Trajan's rescript to Pliny (*ep.* 10.65–66 [ed. Mynors 1963]) concerning former foundlings in Bithynia, a situation without legal precedent. In his ruling, Trajan decreed that freeborn individuals exposed as infants could reclaim their freedom. Another important case involves a consultation of Cervidius Scaevola, which addressed the inheritance rights of a former *expositus* who had been recognised by their birth family (*Dig.* 40.4.29). Lastly, a rescript from Diocletian examined the issue of who held the right to give away a foundling girl in marriage, whether the foster father or the biological father (C. 5.4.16).

[35] See the discussion about *educand*[*um*] and *repetendi* in the commentary above (pp. 115–116).

to discourage families from abandoning their infants to a fate that too often led to death. This appears to be the motivation behind a decree from 329 that provided indigent families with food and clothing to prevent infanticide (*C.Th.* 11.27.1). In addition, another law of 329 permitted the sale of newborns, who could then be legally held in slavery: the natural father or the original owner could later ransom them by reimbursing the costs of upbringing or exchanging them with a slave of equal value (*C.Th.* 5.10.1).[36] Whereas the sale of infants still allowed parents to reclaim their children at a later stage, Constantine's law of 331 stated that abandoning a child resulted in the loss of *patria potestas*: fathers would think twice before relinquishing any future rights over their offspring.[37]

Later emperors confirmed and expanded Constantine's legislation. A law issued by Valentinian I in 374, included in the first compilation of the *Justinian Code*, established a legal obligation to raise one's offspring and referenced an earlier penalty for those who abandoned their children (C. 8.51.2: *Unusquisque subolem suam nutriat. Quod si exponendam putaverit, animadversioni quae constituta est subiacebit*, 'Everyone must support their offspring. But should he think about exposing them, he will be subjected to the established legal punishment' [transl. B. Frier in Frier 2016: vol. 3, 2217–2219]). However, the exact nature of this penalty remains unclear. While earlier scholars argued that it involved capital punishment, this was probably true only in the time of Justinian. More realistically, the full version of Valentinian's constitution prescribed the same penalty as *C.Th.* 5.10.1, namely the loss of paternal rights and the impossibility for natural parents to reclaim their children (Bianchi Fossati Vanzetti 1983: 212–216).

C. 8.51.2 is remarkable also for another reason, for it combines Valentinian's law with a constitution of Honorius, issued in 412 and excerpted in the *Theodosian Code*, which denied owners the right to reclaim children they had exposed (*C.Th.* 5.9.2: see above, p. 116). It is important to keep in mind that

[36] On *C.Th.* 5.10.1, see Lorenzi 2014, with discussion of earlier bibliography.

[37] See the detailed discussion of Bianchi Fossati Vanzetti 1983: 187–202 and Lorenzi 2010: 1163–1169. See also, more briefly, Kaser 1975: 204–205; Evans Grubbs 1993: 133–136; Miller 2003: 149–150; Evans Grubbs 2009: 123–124; Lovato 2015: 244–246; and Monnickendam 2019: 1–3, with further references.

Books 1–5 of the *Theodosian Code*, including the title *De expositis* in Book 5, are known only through their abridgement in the *Breviary of Alaric* (or *Lex Romana Visigothorum*; see below, pp. 127–128). Valentinian's law (C. 8.51.2) does not appear in the *Breviary*, but since the commission in charge of the *Justinian Code* used the complete *Theodosian Code* as a source, it must have been included there. In other words, the compilers of the first *Code* of Justinian merged two separate laws from the *Theodosian Code* to craft a unified text covering both freeborn individuals (in the first section excerpted from Valentinian) and slaves (in the second section excerpted from Honorius: see Bianchi Fossati Vanzetti 1983: 211–212 and Evans Grubbs 2009: 250–253).

But the Justinianic compilers did not include the full text of Honorius' law on *expositi* they found in the *C.Th.*, because the *Breviary of Alaric* transmits a longer extract, which states that the bishop should notify the rescue of a foundling with a written statement (*si modo testes episcopalis subscriptio fuerit subsecuta, de qua nulla penitus ad securitatem possit esse cunctatio*, 'provided only that the signature of a bishop as witness should immediately follow' [transl. Pharr 1952: 109]). This means that this part of the law was left out by the Justinianic commission. This provision of Honorius (*C.Th.* 5.9.2) is also noteworthy because it is the first piece of Roman legislation to attest to the involvement of ecclesiastical authorities in family law. Yet, if my interpretation of this text is correct – namely, that this new law concerns the status of the *expositi* and the impossibility for natural parents or slave masters to reclaim them – then it would predate *C.Th.* 5.9.2 as the earliest piece of legislation addressing any role of the Church in this matter.

Eventually, legislation concerning the *expositi* became part of canon law.[38] The council of Vaison of 442 expanded on the rule laid down by Honorius and prescribed the procedure to follow when picking up an abandoned infant, whether freeborn or slave. Canon 9 stated that the rescuer had to notify the local church. The discovery of the child would then be made publicly known on Sunday. From that moment, the one who had abandoned the child had ten days to come forward, in which case he or she would have to compensate the rescuer for ten days of alimony. After

[38] Scholz 2022 treats the reception and integration of the Roman laws concerning the *expositi* discussed so far in ecclesiastical legislation and in early medieval *formulae*.

that grace period, the biological father or the original owner would lose any authority over the child and any attempt to reclaim the child would be punishable as murder.[39] Ten years later, the second council of Arles envisaged a similar procedure.[40] The canons of these councils are comparable to this new constitution in that they deny any right of reclamation to the biological family or original slave owner.

In the above sources – from Constantine to the council of Vaison – the status of the *expositi* ultimately rested upon the will of the rescuer, who was entitled to raise them as he decided, whether free or slave. In 529, Justinian revolutionised this principle by issuing a new law (C. 8.51.3, also featuring as C. 1.4.24), which stated that, as in previous legislation, the exposers had no right to reclaim their children (C. 8.51.3.2). What was new is that any *expositus* was now granted free status, regardless of his or her status at birth: the *nutritor* could no longer decide over the status of the *expositus* (C. 8.51.3.2). While the legislation of Constantine and Valentinian I was mostly concerned with defending the life of the exposed infant, even at the cost of leaving the status of a freeborn child at the mercy of the *nutritor*, Justinian's new legislation emphasised the value of freedom against those rescuers who might have taken in *expositi* with the motive of personal gain rather than having been moved by genuine Christian piety (Bianchi Fossati Vanzetti 1983: 221–223; Evans Grubbs 2009: 129–130; Lorenzi 2010: 1178–1182).

This same spirit permeates a *sanctio pragmatica* Justinian issued in 541, in which the above measures were reiterated (*Nov.* 153). This law was prompted by the petition of the bishop of Thessalonica, Andreas (another *vir probatissimae vitae*?), who lamented that the owners of slave-born *expositi* attempted to reclaim them as adults after they had been raised 'by pious people' (εὐσεβούντων ἀνθρώπων, which might equally denote a lay or ecclesiastic context). Justinian's novel adamantly condemns such attempts, envisioning a fee of five pounds of gold.

Thus, the Justinianic legislation concerning the *expositi* stands at the culmination of a process in which the exposure of infants is increasingly

[39] *Concilium Vasense a. 442*, 9–10 (ed. Munier 1963). See Bianchi Fossati Vanzetti 1983: 217–218; Evans Grubbs 2009: 125–126; and Scholz 2022: 368–369.

[40] *Concilium Arelatense II*, 51 (ed. Munier 1963). See Scholz 2022: 369–370.

condemned as an act of inhuman cruelty. Conversely, the principle according to which the *patria potestas* of the natural family – and the status deriving from it – is pre-eminent over the status in which the foundling is raised is gradually subverted. First, Constantine denied biological families the right to reclaim their *expositi* and left the status of the *expositi* in the hands of their rescuers. Later, Justinian granted freedom to any *expositus*, including those of servile origin.

To sum up, the content of this law from Arras (at least what is currently legible) is best understood within the context of the legal developments between Constantine and Justinian, as it prevents birth fathers or slave owners from reclaiming the children they abandoned and aligns with Valentinian's general admonition for parents to raise their own offspring. Moreover, it grants the *expositi* freedom based upon the circumstances in which they were rescued and taken in (*unde promeruerint et salutem*), namely in the Church, as suggested by the reading *episcopus* at line 1 and by the final phrase (*sit ecclesia sola mater et domina*). Therefore, this law adds new evidence to the protection of *expositi* by the Church.

3.2. *Expositi* in a Christian society

Once the legal content of this new document is established, the next question to consider is: under which circumstances could this law be applied? In other words, what is the socio-historical context, or *Sitz im Leben*, in which this law would find application? Right from the start, Christianity was strongly averse to the practice of infant exposure for both doctrinal and moral reasons: exposed infants were likely to die unbaptised and thus face post-mortem damnation, while those who were rescued were at risk of being raised into servitude or unseemly services such as prostitution. John Boswell, in his still authoritative study of child abandonment in antiquity and the Middle Ages,[41] argued that Christian attitudes towards this practice changed over time. After an initial period of outright condemnation,

[41] Boswell 1988: 157–166 provides an overview of early Christian views on infant exposure. See also Miller 2003: 146–148 and Monnickendam 2019: 18–20.

exemplified, among others, by Justin Martyr (*1 apol.* 27, 29.1 [ed. Marcovich 2005, p. 73, with further parallels]) and Athenagoras (*leg.* 35.2 [ed. Marcovich 1990]), sources from the fourth century onwards have a more nuanced approach: authors such as Basil of Caesarea (*epist.* 217.52 [ed. Courtonne 1961]) or Lactantius (*inst.* 6.20.18–26 [ed. Heck & Wlosok 2009]) express concern for the difficult circumstances forcing poor families to give up their children, while nonetheless still condemning infant exposure. Additionally, considering that Lactantius was the tutor to Constantine's son, the fascinating question arises whether Lactantius' ideas might have influenced Constantine's legislation on the *expositi*. The answer, however, has been mostly negative thus far, because Constantine did not fully ban infant exposure but rather, as it seems, tried to curb it by not allowing birth parents to reclaim the children they exposed at a later time, while also defending the rights of the rescuers to raise foundlings according to the status they determined – even one that Christian moralists would not have approved of.[42]

Honorius' law of 412 (*C.Th.* 5.9.2) acknowledged the role of ecclesiastical institutions as clearing houses for unwanted babies. But the Church had been involved in the rearing of foundlings since long before then. The so-called *Apostolic Constitutions*, which date to between 375 and 380, prescribe that Christians should rear Christian orphans as their own children (4.1 [ed. Metzger 1986 = *PG* I: 808A]). But the kindness of Christians towards exposed infants was by no means limited to fellow Christians: Clement of Ancyra (*c.* 258–304) used to collect the children abandoned by pagans, sheltering them and raising them in the Christian faith, which eventually led to his election as bishop (*PG* CXIV: 824.10). Although Clement died during the Great Persecution, an orphanage such as the one described in his *vita* probably reflects the historical reality of the late fourth century (Miller 2003: 64–66). Gregory of Nyssa writes that his sister Macrina († 379) was mourned by the nuns whom she had rescued from exposure and raised.[43] In that same period, Basil of Caesarea (the eldest

[42] Tate 2008 presents a balanced view on the influence of Christianity on principles and language of many laws regarding child exposure discussed in the section above.

[43] *V. Macr.* 27 (ed. Maraval 1971 = *PG* XLVI: 983B): ἃ ν τ τ σιτοδε α καιρ κατ τ δο ρρμμ να ἀνε ομ νη τιθην σατό τε κα ἀνεθρ ψατο κα πρ τ ν καθαρόν τε κα φθο-

brother of Gregory and Macrina) set up a monastic school that welcomed orphans and abandoned children, among others, and was intended to educate future monks (Miller 2003: 114–116). Augustine tells of consecrated virgins nurturing foundlings and presenting them for baptism (*epist.* 98.6 [ed. Daur 2005]). In short, the Church could become a veritable *mater et domina* for abandoned infants.

Yet, what ought to be done if the natural parents (or, in the case of slaves, the owners) of children who had been taken up by the Church came back to reclaim them? Justinian's *Novel* 153 may provide a similar background story: even though it is not clear whether those who reared the foundlings were lay people or clerics, it is nonetheless certain that it happened with the mediation and assistance of the Church. If my overall interpretation is correct, this new law of Gratian constitutes a peculiar application of Constantine's legislation that decreed that *expositi* could no longer be reclaimed by their natural families, even when the role of *nutritor* was played by an ecclesiastical institution such as a monastery.

4. A LOST CONSTITUTION OF THE *THEODOSIAN CODE*?

The legislation of the *Theodosian Code* regarding the *expositi* is known solely through the *Breviary of Alaric* (5.7.1–2), which is the most important source for the first five books of the *Code*. Unfortunately, the constitutions preserved in the *Breviary* account for only ten percent of the *Theodosian Code*. On the bright side, the *Breviary*'s editors followed the original order of books and titles as they found it in the *Code* (meaning that they did not rearrange the material) and they rarely shortened or modified the Theodosian text. The drawback is that they did not reproduce the numbers of titles and laws as they found them in the *Theodosian Code* but used their own consecutive numbering. In other words, they did not state what they kept and what they left out. Based on the *Breviary* alone, it is impossible to detect which sections of the *Code* were omitted (Riedlberger 2020:

ρον β ον χειραγώγησεν, 'whom she picked up as they had been left on the streets at the time of the famine, and nursed and raised and guided towards the pure and immortal life'.

172–174; Riedlberger & Niemöller 2021: 4–5). This leaves open the possibility that the full version of the title *De Expositis* in Book 5 of the Theodosian Code might have contained more laws than are currently known. Was the Arras constitution among these?

To answer this tantalising question, one must consider how plausible it is that a law like the Arras constitution could have been included in the *Theodosian Code*. One of the criteria followed by the Theodosian compilers was the (vaguely defined) 'general validity' (*generalitas*) of earlier constitutions, even when some of these were valid for certain provinces only (*C.Th.* 1.1.6: *in certis provinciis seu locis*: see, among others, *C.Th.* 12.1.177, valid only for Illyricum, and *C.Th.* 11.28.9, only for the diocese of Oriens) or were bound to specific, one-off occasions (such as the Easter pardons of *C.Th.* 9.38.3–4). As this Arras constitution presents itself as a *lex generalis*, it is conceivable that the compilers of the *Theodosian Code* might have decided to include it. After almost a century, the law may have become obsolete in Visigothic Gaul, as other practices (such as oblation) were in place.

However, the hypothesis that this law from Arras, in its current form, originated from a more comprehensive version of the *Theodosian Code* encounters a few challenges that warrant discussion. The name of the prefect to whom the Arras law is addressed is missing. This goes against the custom of the *Theodosian Code*, where the recipients of all constitutions are addressed not just with their title, but also by name. Yet, it is also possible that the name of this prefect of Gaul was lost at an earlier stage of manuscript transmission. This possibility is especially likely for the *subscriptio* and date, which are customarily included in any law, but they were probably lost already in the exemplar from which this text was copied.

Another problem may lie in the fact that this new constitution features the event occasioning the creation of the law (the petition of the bishop, *vir probatissimae vitae*). This is unusual, as references to the individual petitions in response to which laws were issued were customarily left out by the Theodosian compilers. Yet, in some instances, they were kept, whether by accident or by conscious decision.[44]

[44] *C.Th.* 7.4.12 *In provinciis statione militum adfici possidentes Ursicini comitis suggestione cognovimus*, 'We have learned from the report of Count Ursicinus that the landholders are

All things considered, the hypothesis that this law from Arras ultimately derives from the full *Theodosian Code* is quite plausible. The document's brevity aligns with the abridged constitutions of the *Code*, and its structure – consisting of two parts, the first summarising the petition triggering the new law (a rare but not unparalleled feature), and the second containing the new legal provision – does not rule out a derivation from the *Theodosian Code*. While not identical, the *inscriptio* is comparable to those of the *Theodosian Code*. Thematically, it would fit well within the title *De expositis* (*C.Th.* 5.9), as it addresses a topic not covered by other laws of that section, namely the status of foundlings under ecclesiastical protection.

However, it is unlikely that this law featured in the *Theodosian Code* in the exact form in which it has come down to us, as it is missing the *subscriptio* and parts of the *inscriptio*, such as the customary title of the Augusti (*AAA*) and the name of the prefect of Gaul, its intended recipient. Nevertheless, the possibility that this document was included in the *Theodosian Code* does not necessarily imply that the scribe of the Arras manuscript copied it directly from a complete Theodosian manuscript. Instead, he may have found it in a canon law context and appended it to the end of the manuscript, thereby ensuring its survival.[45] During this

being oppressed by the encampments of soldiers in the provinces'; *C.Th.* 7.8.8 *Secuti suggestionem tuam*, 'Pursuant to your recommendation'; *C.Th.* 7.13.13: *Amplissimi ordinis petitionibus adnuit nostra clementia*, 'Our Clemency assents to the petitions of the Most August Order' (viz. the Senate; a petition of the Senate is also implied in *C.Th.* 7.13.14); *C.Th.* 8.4.4: *Iuxta suggestionem vicarii Mesopotamiae*, 'In accordance with the report of the Vicar of Mesopotamia'; *C.Th.* 8.4.29: *Ii, quorum nomina excellentiae tuae suggestio comprehendit*, 'The people whose names the report of Your Excellence includes'; *C.Th.* 9.40.24: *propter petitionem viri reverentissimi Asclepiadis Chersonesitanae civitatis episcopi*, 'because of the petition of the most Reverend Asclepiades, bishop of Chersonesus'; *C.Th.* 11.7.4: *Quoniam succlamatione vestra merito postulastis* …, 'Since by your modest entreaty you have deservedly requested …'; *C.Th.* 16.2.37: *ut tui culminis suggestio patefecit*, 'as the report of Your Excellency has revealed' (transl. Pharr 1952: 160, 172, 190, 194, 258, 299, and 446, occasionally modified).

[45] There are examples of orphaned *C.Th.* extracts in canon law contexts. For instances, two manuscripts – Berlin, Deutsche Staatsbibliothek lat. 83 (= Phillipps 1745), and its apograph Paris, BnF Lat. 1462 – transmit two abridged constitutions which are explicitly noted as being copied 'from the 27th title of the *Theodosian Code*, on the judicial decisions

process, the document may have been further abridged, with the *subscriptio* omitted and the *inscriptio* condensed.

5. CONCLUSION

The final page of MS Arras 644 (CGM 572) contains a hitherto unrecognised constitution of Gratian. Although some parts remain illegible (at least for now), it is an authentic piece of late antique legislation. Yet, this text is also defective at the end (and perhaps it was already when it was copied), as it lacks the *subscriptio*. Parallels with other late antique legislation demonstrate that this law denied to birth fathers and slave masters the right to reclaim children or slaves who had been raised by an ecclesiastical institution. If this interpretation is correct, this find would represent the first law acknowledging the role of the Church in the rearing of foundlings as it predates Honorius' pronouncement of 412 (*C.Th.* 5.9.2) by almost three decades. An examination of the Arras manuscript with advanced technology (such as multispectral imaging) will, it is hoped, confirm and further elucidate this exciting discovery.

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of bishops' (*lex de Theodosiano sub titulo XVII de episcopali definitione*). Accordingly, Mommsen reintegrated them as *C.Th.* 1.27.1 and 1.27.2 in his edition. A more complex example is provided by the *Collectio Pithouensis* (Paris, BnF Lat. 1564), a canonical collection compiled in Merovingian Gaul (late 6th or early 7th century: see Kéry 2013: 48–49 and Dunn 2015: 182–183). At fol. 21r, this collection contains an abridged constitution issued by Honorius regarding the status of freedmen. Unlike the Arras find, this extract contains the command to disseminate the law and is concluded by a *subscriptio*. On the other hand, it is notably shorter than any known constitution and is written in *cursus mixtus*. Both laws must have undergone drastic abridgment. Incidentally, these three texts (*C.Th.* 1.27.1, 1.27.2, and the abridged constitution from the *Pithouensis*) were first edited by Jacques Sirmond, who printed them alongside other unabridged constitutions in his *Appendix* to the Theodosian Code. For this reason, they are known today as *Sirmondian Constitutions* 17, 18, and 19 (Sirmond 1631: 54–57; *Sirm.* 19 = Haenel 1857: 238, no. 1170) despite being unrelated.

APPENDIX
LATE ANTIQUE PROSE RHYTHM AND THE *CONSTITUTIO TEXTUS*

Among the most salient features of this text's composition is its close adherence to what is known in modern terms as *cursus mixtus*, a type of prose rhythm characterised by the coexistence and overlap of metrical *clausulae* derived from classical rhetoric with rhythmical patterns of stressed syllables. In late antiquity, the school tradition kept promoting the use of classical *clausulae* based on metre. However, the phonetic distinction between long and short syllables became lost over time.[46] As a result, by the period encompassing the present text, metrical *ictus* and word accent tended to coincide, thus favouring the coalescence of some metrical *clausulae* with rhythmical cadences. Among the most frequent metrical *clausulae* are:

– cretic-trochee (–⏑– –⏑)
– cretic-spondee (–⏑– – –)
– double cretic (–⏑– –⏑×)
– cretic-tribrach (–⏑– ⏑⏑×)
– double trochee (–⏑–⏑)
– first paeon-trochee (–⏑⏑⏑ –⏑)
– first paeon-spondee (–⏑⏑⏑ – –)

The most frequent rhythmical patterns are:

– *cursus planus* ó ˘ ˘ ó ˘ (e.g. *órbis exúltat*)
– *cursus tardus* ó ˘ ˘ ó ˘ ˘ (e.g. *profitétur ecclésia*)
– *cursus velox* ó ˘ ˘ ˘ ˘ ó ˘ (e.g. *plácuit destinári*)
– *cursus trispondaicus* ó ˘ ˘ ˘ ó ˘ (e.g. *ágnos admittátis*), although featuring less frequently.[47]

[46] In the late fourth century, Augustine (*mus.* 3.3.5) famously stated that he could not tell long quantities apart from short naturally.

[47] For general overviews of *cursus mixtus*, see Di Capua 1937: 146–159; Oberhelman 1988; and Oberhelman 1991: 5–20. Nigel Holmes' website includes a bibliography of Late Latin Prose Rhythm up to the year 2013, available at <https://nigel-holmes.userweb.mwn.de/rhythm/welcome.html> (accessed 4 December 2024).

Legislative texts, such as imperial rescripts and constitutions, as well as papal decretals, conform closely to the *cursus mixtus* (Di Capua 1939: 67–85; Hall & Oberhelman 1985). In my edition, I identify the following *clausulae*:

– *supplicatiŏnĕ pērmŏtī*: cretic-spondee / *planus*
– *probatĭssĭmāe vĭtāe*: cretic-spondee / *planus*
– *clemĕntĭāe nŏstrāe*: cretic-spondee / *planus*
– *sĕnsĭbŭs ĭntĭmāvĭt*: dactyl + double trochee / *velox*
– *ferālĭs ĭmpĭĕtaš*: cretic-tribrach / *tardus*
– *obtĭnĕānt lībērtātĕm*: anapest + fourth epitrite / *velox*
– *promerŭĕrĭnt ēt-sălŭtĕm*: anapest + double trochee / *velox*
– *habĕrĕ rĕpĕtĕndī*: first paeon-spondee / *trispondaicus*
– *pietātĕm āltĕrĭŭs*: cretic-tribrach / *tardus*[48]
– *habĕrĕ prāesŭmăt*: cretic-trochee / *planus*
– *mātĕr ēt dŏmĭnă*: cretic-tribrach / *tardus*
– *infāntĭāe rŭdīmēntă*: cretic-antispastus[49] / *velox*
– *rudimēntă crēvĕrūnt*: cretic-spondee / *planus* (interlacing the previous *clausula*[50])

This document is written in a good *cursus mixtus* typical of the late antique style. Not only is this feature consistent with other fourth-century pieces of imperial legislation,[51] but it also has two important implications.

[48] Several parallels confirm that, like in poetry, the *i* of the pronominal genitive is short in late antique rhythmic prose. For *alterĭus*, see *Const. Sirm.* 15: *alterius dignitatis* (proparoxytone + double cretic / *velox*); *Coll. Avell.* 15 (ed. Günther 1895): *alterius festinarent* (accentual *velox*); Amm. Marc. 19.11.3 (ed. Seyfarth 1978): *alterius praefecturae* (accentual *velox*), 24.4.8: *alterius continetur* (proparoxytone + double cretic / *velox*); *Nov. Val.* 2.4.0: *observator alterius* (cretic-tribrach / *tardus*), 35.3: *urbis alterius* (cretic-tribrach / *tardus*); Pope Innocent's *epist.* 3.8 (JK 292 = J^3 674 [ed. Coustant 1721 = PL XX:491B]): *alterius vindicetur* (proparoxytone + double cretic / *velox*).

[49] The antispastus (⏑ – – ⏑) is endorsed by late antique handbooks of prose rhythm such as the *Fragmenta Bobiensia* (*De structuris*: Keil 627.2) as a suitable metre. See Di Capua 1937: 154, Morelli 2008: 343, and Winterbottom 2022: 51.

[50] On interlaced cursus, see Di Capua 1937: 80–84.

[51] In addition to having peculiar linguistic and stylistic features, spurious laws exhibit lack of consistent *cursus*. For instance, an apocryphal constitution of Valentinian III (discussed by Kaiser 2007: 296–312, critical edition at 288–289) displays only seven accentual

First, prose rhythm can help identify the ends of sentences and clauses, thereby aiding punctuation during transcription. Secondly, while restorations *ope ingenii* should be derived primarily from the meaning of the text, prose rhythm can narrow them down based on metre, assisting in formulating better conjectures.

Finally, it is remarkable how the manuscript's punctuation takes prose rhythm into account. Thus, we find interpuncts after *sĕnsĭbŭs ĭntĭmāvĭt*, after the first *habĕrĕ rĕpĕtēndī*, after *lĕgĕ dēcĕrnĭmuș*, and after *rudimēntă crēvērūnt*. There also two legible commas, one after the second *habĕrĕ rĕpĕtēndī* and one after *mătĕr ēt dŏmĭnă* (see Fig. 2). The punctuation of the text preceding this constitution in the Arras manuscript, Dionysius' letter *Sanctitatis tuae sedulis excitatus officiis*, also adheres to *cursus*: see for instance, in Fig. 1, the interpuncts or commas before *impĕndĭtĭs ŏpĕrĭ* (*tardus*), *postĕrĭtās ādmīrētŭr* (*velox*), *desiderātĭs āgnŏscĕrĕ* (*tardus*), *mŏrĭbŭs ĭmplēātĭs* (*velox*), *păpă Gēlāsĭŭs* (*tardus*), *corporālī nōn vĭdĭmŭs* (*tardus*), *facĭlĭŭs āestĭmāmŭs* (*velox*), *conversatiŏnĕ dĕcōrātĭs* (*trispondaicus*).[52] This punctuation, which coincides with the prose rhythm, may have already been present in the late antique exemplar from which this manuscript descends, potentially at the distance of one or two stages of copying.[53]

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clausulae out of *c.* 225 words, which accounts for only *c.* 25%, well below the 85% identified by Hall & Oberhelman 1985: 203 for legal writers.

[52] The passage corresponds to the edition of Glorie 1972: 45, ll. 16–23.

[53] See Di Capua 1937: 9–16 on punctuation in late antique manuscripts of Leo the Great.

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