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Aspects of Infamia

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***Submitted in Fulfilment of the Requirements for the Degree of Master
of Arts***

University of Tasmania

July, 2006

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Tristan Taylor

9 July 2006

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Tristan Taylor

9 July 2006

Abstract

This thesis examines the development of the legal concept of *infamia* in Roman law. The first chapter examines the legal sources for studying Roman law, in particular the *Corpus Iuris Ciuilis* in order to establish the degree to which they may be relied upon in establishing the law of earlier periods, in particular the period from the late Republic until the reign of Diocletian. A cautiously optimistic conclusion is drawn about the degree to which these sources may be used to establish classical law. A synchronic study is then undertaken of *infamia* as it appears in the *Corpus Iuris Ciuilis*, focusing on the terms used to describe persons who are *infames* and the consequences of *infamia*. The understanding of *infamia* gained from this examination is then compared with the concept of *infamia* that appears in the *Codex Theodosianus* and in the Roman law-based barbarian codes to provide some guide as to the degree to which Justinian's compilers may have altered the law. It is argued that, in fact, there is little evidence for doctrinal change under the law of Justinian. The final Chapter adopts a more diachronic approach and attempts to trace back the cases and consequences of *infamia* established through the synchronic examination of the Justinianic *Corpus*. It is argued that a 'core' of people can be identified for the classical period who were continuously subjected to the same legal disabilities that under Justinian were embraced by the term *infamia*. However, it is also argued that *infamia* as a positive legal concept was a later development. Instead of using an umbrella concept like *infamia*, late Republican and early Imperial legal documents tended to list exhaustively persons subject to legal disabilities and what those disabilities were. The earliest appearance of *infamia* or a cognate in the legal sources is as a descriptive term of art for people who undergo certain legal disabilities under the edict, though the term itself was not in the edict. It is tentatively suggested that the existence of a recurring 'core' of persons undergoing similar legal disabilities encouraged the expansion of the use of this term, which eventually enabled its use as a positive legal concept in later legal sources.

Acknowledgements

Thank you to my supervisors and mentors Associate Professor Peter Davis and Dr. Paul Gallivan for their continual support, encouragement and assistance throughout the long journey that this thesis has been. Thank you also to Dr. Paul Burton for reading the revised version of the thesis.

A huge debt of gratitude is also owed to my family, especially my parents, Greg and Janne, for their ongoing support, sacrifices and just for putting up with me.

A special thank you to my friends also, on both sides of the Pacific, Frankie, Jimena, Michael, Bek, Neil, Ian, Emma, John, Prमित, Ayelet, Damon, Richard, Ursula, Martin, Tansy, Sarah, Melanie, Phoebe, Jane H., Jane van Tienen, Amit, Adam, KW and KT and, of course, Aunty Sally. A special thanks also to Maggie (Mary) for putting me up so I could stay longer at the coal face.

Thank you also to the library staff for their continual help.

To the Team also, because they asked for it.

Thank you also to Associate Professor McGinn for corresponding with me on this topic.

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Introduction: *Infamia* the Legal Concept

John Crook wrote of *infamia* that ‘the subject is complicated’,¹ and indeed it is, and there are many aspects upon which one could focus. The aim of this thesis is to focus on only three of these aspects, but perhaps three of the most fundamental ones: who were the *infames*, what were the consequences of *infamia* and when is it proper to speak of a legal concept of *infamia*. The thesis receives its stimulus from the discussion of the ‘core’ of *infamia* argued for by Thomas McGinn,² with the hope of examining what made up this ‘core’, both in terms of persons and disabilities suffered pursuant to *infamia*.

As is well known, the main problem with attempting to reconstruct Roman law in the period of the Principate and late Republic is the fact that we are largely dependent upon the post-classical codification of Justinian, the *Corpus Iuris Ciuilis*, for much of our source material, and this source material was modified in the process of codification. In Chapter One of this thesis, the age-old ‘interpolation’ problem will again be examined, and a case will be made for a cautiously optimistic approach to establishing classical law from the *Corpus*.

Following the preliminary examination of the source material, a two stage methodology will be adopted, the first stage involving a synchronic understanding of *infamia* at the time of the two great post-classical attempts at legal codification, the aforementioned *Corpus* of Justinian, and the *Codex Theodosianus*. By examining first the *Corpus* to establish the ‘final’ conception of *infamia*, issues of interpolation can be ignored. The understanding of *infamia* gathered from this

¹ J. A. Crook, *Law and Life of Rome* (London, Thames and Hudson, 1967) 83.

² See T. A. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome* (Oxford, Oxford Uni. Press, 1998) 65-9.

examination will then be compared with the concept of *infamia* as contained in the *Codex Theodosianus* in order to establish to what extent the Justinianic concept differs, and therefore to what extent Justinian's compilers may have altered the law. As extra *comparanda*, the barbarian codes that draw on the Roman legal tradition, yet are external to the Justinianic tradition, will also be compared with the conception of *infamia* uncovered by the initial synchronic examination.

Part Two, has a more diachronic approach, and traces back through the Principate and late Republic both the fundamental categories of person who are *infames* in Justinian's law and the consequences said to flow from *infamia* in Justinian's law. In so doing, it is argued that there was indeed a core of persons who were *infames* in accordance with Justinian's law. However, the actual terms *infamis*, *infamia* and cognates were alien to classical law as a unitary positive legal concept. They perhaps have their initial genesis as a useful descriptive term for a recurring group of persons and consequences. The subtle stages of the evolution of the concept have been largely lost to us.

In carrying out this examination, there are several large questions that will not be examined for reasons of space and time. One is the issue of the actual motivation behind subjecting various persons to the multiple legal and civic disabilities that eventually became known as *infamia*.³ Another issue not addressed is the actual impact of legal *infamia* upon those who underwent it.⁴ These issues remain for

³ A recent interesting discussion in relation to actors, prostitutes and gladiators is found in C. Edwards, 'Unspeakable Professions: Public Performance and Prostitution in Ancient Rome' in J. Hallett and M. Skinner (eds.), *Roman Sexualities* (Princeton, Princeton Uni. Press, 1997) 66-95.

⁴ On this see, J. Gardner, *Being a Roman Citizen* (London, Routledge, 1993) Chapter 5.

consideration at a later date. These same constraints on space and time have also necessitated limiting consideration almost exclusively to legal sources.

Due to some difficulties in obtaining the document on inter-library loan, I have unfortunately been unable to consult Levy's work 'Zur Infamie in römischen Strafrecht' [1932] 2 *Studi Riccobono* 79-100 in preparation of this thesis.

Preliminary: The Sources

Chapter One: Sources and Methodology

An outline of the evidentiary problems pertaining to both diachronic and synchronic examinations of Roman law is a necessary precursor to a discussion of *infamia*. The central problems are essentially related to the fact that most of the main literary sources were written or compiled at a time far removed from the period of time for which they are our main source: the first three centuries of the Empire. The evidentiary sources for Roman law during the Empire can be conveniently divided into two groups: those in the 6th century *Corpus Iuris Ciuilis* compiled under the auspices of Justinian, and those sources outside this *Corpus*. Late Republican sources consist of essentially the forensic speeches of Cicero, inscriptions and scattered references in other literary sources. The central focus of this chapter is the imperial sources.

Pre-Justinianic Sources

There are numerous specialist legal sources from the pre-Justinianic era that have survived.¹ A characteristic feature of these sources is that, with one exception, they were compiled from the late third century CE onwards. A selection of the most important legal texts will be briefly mentioned here.

Legal Writings

- The *Institutiones* of Gaius: This is the sole surviving juristic work predating the third century CE. It is an elementary introduction to Roman private law written around 160 CE. It contains a clear account of classical procedure and

¹ Most of which are conveniently collected in S. Riccobono *et al.* (eds.), *Fontes Iuris Romani Anteiustiniani* (Florence, S. A. G. Barbèra, 1941) 3 Vols.

law and some material not preserved in Justinian's *Digesta*.² Two related works also survive, an epitome, which appears to date from the late fifth century CE, and fragments known as the *Autun Gaius*, which appear to be lectures on Gaius dating from the late third or early fourth century CE.³

- *Pauli Sententiae*: A short account of Roman private and criminal law attributed to the second century jurist Paul. However, the work appears to date from the late third century CE.⁴ The text does not survive as such, but a large selection is found in the *Lex Romana Visigothorum* and other fragments are contained in the *Fragmenta Vaticana*, *Collatio* and elsewhere. It is unclear whether Paul ever wrote a book of this title, but the fact that it was extracted by so many other works indicates its popularity.
- *Tituli ex Corpore Ulpiani*: Sometimes called the 'Rules of Ulpian' or the 'Epitome of Ulpian', this work is a short compendium of Roman law attributed to the late second/early third century jurist Ulpian, but actually dating from about 320 CE.⁵ It is generally regarded as being neither the work of Ulpian nor even derived from his work.⁶
- *Fragmenta Vaticana*: This document contains lengthy excerpts from the classical jurists Papinian, Paul and Ulpian and constitutions taken from the *Codices Gregorianus* and *Hermogenianus*, on a number of themes arranged in subject matter by titles. The compilation is only partially preserved and probably dates from around 320 CE.⁷
- *Collatio Legum Romanarum et Mosaicarum*: This is a collection of extracts from classical juristic authors, dealing mainly with criminal law. Again it is a late document and was probably compiled around the beginning of the fourth

² D. Johnston, *Roman Law in Context*, (Cambridge, Cambridge Uni. Press, 1999) 12-3; F. de Zulueta, *The Institutes of Gaius* (Oxford, Clarendon Press, 1969) 2 vols., vol. 2, 1-11.

³ Johnston, *Roman Law in Context*, above n. 2, 13.

⁴ Johnston, *Roman Law in Context*, above n. 2, 13.

⁵ Johnston, *Roman Law in Context*, above n. 2, 13; H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (3rd ed., Cambridge, Cambridge Uni. Press, 1972) 456. Three constitutions dating from after 320 CE, 35 (337 CE), 37 (369-72 CE) and 248 (330 CE) are thought to be later additions.

⁶ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 458; T. Honoré, *Ulpian*, (Oxford, Clarendon Press, 1982) 107-11.

⁷ Johnston, *Roman Law in Context*, above n. 2, 13.

century CE.⁸ The author evidently wished to show that Roman law coincided with the essentials of Mosaic law as each title begins with a few lines from the Pentateuch in Latin.⁹

- *Veteris Cuisusdam Iurisconsulti Consultatio*: Yet another late work, this text, which probably dates to the late fifth century CE, consists in the main part of answers given by a jurist to an advocate, incorporating a short central section of brief theoretical disquisitions. The writer gives authorities, although these are confined to the *Pauli Sententiae*, *Codex Gregorianus*, *Codex Hermogenianus* and *Codex Theodosianus*.¹⁰
- *Scholia Sinaitica*: This fragmentary work consists of *scholia* on Ulpian's *libri ad Sabinum*. It was probably written between 438 and 529 CE as it cites constitutions from the *Codex Gregorianus*, *Codex Hermogenianus* and *Codex Theodosianus*. It is probably the product of a law school and cites a broad range of jurists.¹¹
- *Leges Saeculares*: This work, commonly known as the *Syro-Roman Law Book*, deals mainly with the family, slaves and succession, though in no particular order. It cites constitutions, though without the name of the addressee or date, and the author also clearly used jurists, although they are never cited. The work is thought to have been written in the late fifth century CE, though it expounds the old civil law of Rome, which had ceased to apply by this time, and the law of imperial constitutions, though praetorian law, or the *ius honorarium*, is omitted. The work originally appeared in Greek, and was not translated into Latin until about the mid-eighth century by ecclesiastics who did not recognise the true character of the work.¹²

⁸ W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd ed., Cambridge, Cambridge Uni. Press, 1963) 35. The constitutions, with one exception (*Collatio* 5.3, 390 CE) come from the *Codices Gregorianus* and *Hermogenianus*. It is thought that the work was latter added to.

⁹ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 456-7.

¹⁰ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 458.

¹¹ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 459.

¹² Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 459-60.

Collections of Imperial Constitutions

From the late third to late fifth centuries CE, various collections of imperial rescripts and constitutions were made, some of which have survived in varying degrees of completeness:

- The *Codex Gregorianus*: A collection of rescripts issued in response to individual enquiries dating between the reign of Hadrian and 291 CE. This *Codex* has not survived, although the much later *Codex Iustinianus* is based in part on it.¹³
- The *Codex Hermogenianus*: this appears to have been a sort of supplement to the *Codex Gregorianus* covering the years after 291 CE, and appears to have been published around 295 CE.¹⁴ Like the *Codex Gregorianus*, this also does not survive, but does form a basis for the *Codex Iustinianus*.
- The *Codex Theodosianus*: as noted below, a collection of general laws compiled under the auspices of Theodosius II in 438 CE.¹⁵
- Imperial constitutions in other collections, namely, the *Constitutiones Sirmondianae*, pre-dating the *Codex Theodosianus* and containing constitutions from Constantine I to Honorius and Theodosius II, and the various *Novellae* of Augusti from Theodosius II to Anthemius.

Barbarian Codes

Although the codes promulgated by the Germanic kings in the wake of the collapse of the Western Empire do not form part of the sources of Roman law, they do contain fragments from Roman works not otherwise preserved and that are external to the Justinianic tradition.

- *Lex Romana Visigothorum*: This code was promulgated by the Visigothic king Alaric II in 506 CE for the use of his Roman subjects. It contains extracts

¹³ Johnston, *Roman Law in Context*, above n. 2, 23; Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 463-4.

¹⁴ Johnston, *Roman Law in Context*, above n. 2, 23; Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 463-4.

¹⁵ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 464-5.

from the *Codex Theodosianus*, the post Theodosian *Novellae*, an epitome of Gaius' *Institutiones*, the *Pauli Sententiae*, the *Codices Gregorianus* and *Hermogenianus*, and a *responsum* of Papinian.¹⁶

- *Lex Romana Burgundionum*: This code, from the late fifth/early sixth century CE consists of independent statements of legal rules arranged systematically in titles. The sources are only occasionally mentioned, but consist of the *Codices Gregorianus*, *Hermogenianus*, and *Theodosianus*, a work of Gaius and the *Pauli Sententiae*.¹⁷
- *Edictum Theoderici*: This was probably compiled under the auspices of the Visigothic king Theoderic II (453-67 CE). It contains independent statements of legal rules. The sources are not stated, but include the *Codices Gregorianus*, *Hermogenianus*, and *Theodosianus*, *Pauli Sententiae* and some other works. It was not intended to supersede other sources, but to make the enforcement of the existing law more certain.¹⁸

Textual Transmission

The late nature of many of the sources raises particular problems in relation to their analysis, namely, to what extent they may, or may not, have been updated to reflect changes in the law over time. For example, the texts in the *Fragmenta Vaticana* and the *Collatio* are extracted from works at times over a century old. However, there are indications that the extent to which such texts have been updated was not very great. In particular, the fourth century 'Law of Citations' implies that there were not, in general, large-scale changes to classical texts, and that the original wording of the text was desired for consultation. In accordance with this law, all the writings of the jurists Papinian, Paul, Gaius, Ulpian and Modestinus are confirmed. Works cited by these jurists are also decreed to be valid, providing that a collation of codices confirms their readings due to the

¹⁶ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 466-7.

¹⁷ Jolowicz and Nicholas, above n. 5, 467-8.

antiquity of the original work.¹⁹ This implies that it was thought that good manuscripts of the five named jurists existed, probably because they were either relatively recent or, in the case of Gaius, popular. However, as a collation of texts was required for other authors, their texts were considered more suspect, probably due to the vagaries of textual transmission, hence the reference to antiquity as a reason for the collation. The very fact that a collation was required indicates that it was the *original* text that was desired.²⁰ Further evidence that the classical texts were not heavily amended in the post-classical period can be found in the *Digesta*. As noted below, the *Digesta* is a collection of excerpts from classical jurists. Although the *Digesta* was intended to be consistent, in some instances the compilers have only carried out an imperfect job and contradictions between the excerpts of different jurists exist, which follow a chronological pattern illustrating how the law developed. For example, some texts give the *actio negotiorum gestorum* for or against a *procurator*,²¹ others the *actio mandati*.²² The existing contradictions follow a chronological pattern: Celsus (1st century CE) and Pomponius (sometime between 117 and 174 CE) allow the *actio negotiorum gestorum*;²³ Africanus (a contemporary of Clemens and Verus, consuls in 138 CE) allows a choice of either the *actio mandati* or *actio negotiorum gestorum*;²⁴ and Papinian (died 212 CE) and Ulpian (killed 224 or 228 CE) award the *actio*

¹⁸ Jolowicz and Nicholas, above n. 5, 468.

¹⁹ *Codex Theodosianus* 1.4.3 (426 CE).

²⁰ See further, A. Watson, 'The Law of Citations and Classical Texts in the Post-Classical Period' in A. Watson, *Legal Origins and Legal Change* (London, Hambledon Press, 1991) 225-9.

²¹ On this *actio*, see A. Berger, 'Encyclopedic Dictionary of Roman Law' (1953) 43 *Transactions of the American Philosophical Society*, 332-808, 593-4.

²² On this *actio*, see Berger, 'Encyclopedic Dictionary', above n. 21, 574.

²³ Celsus: *Digesta* 17.1.50pr; Pomponius: *Digesta* 27.3.3 and 34.3.8.6.

²⁴ *Digesta* 5.3.17pr (Gaius) and 21.1.51.1 (Ulpian).

mandati.²⁵ The fact that this pattern could be extracted from earlier authors at the time of Justinian indicates that the classical texts which the compilers of the *Digesta* had before them still contained material that had not been updated.

The *Codex Theodosianus*

The *Codex Theodosianus*, compiled under the auspices of Theodosius II and promulgated in 438 CE, was intended to be the first part of a codification of Roman law.²⁶ However, the plan remained unrealised until the reign of Justinian, with the *Codex* being the only part completed. It contains constitutions issued by emperors from the reign of Constantinus to that of Theodosius II. The *Codex* has only come down to us in incomplete form. A comparison between the constitutions preserved in the *Codex Theodosianus* and the same constitutions preserved in the *Codex Iustinianus* gives guidance as to the degree to which the Justinianic compilers altered the substantive law that they found in the earlier *Codex*. Two means are at hand to investigate the degree to which the constitutions in the *Codex Theodosianus* resemble those that were initially issued. Firstly, constitutions issued by Theodosius II, both ordering the compilation of the *Codex* and confirming its promulgation, provide guidance as to the intended and believed scope of the work, including the degree of substantive alteration that the compilers were authorised to undertake. Secondly, aside from texts contained in the *Corpus Iuris Ciuilis*, there are a few parallel texts surviving outside the *Codex*

²⁵ Papinian: *Digesta* 17.1.55, 17.1.56.4, 34.3.23, 41.2.49.2; Ulpian: *Digesta* 17.1.6pr; 6.2.14; 15.3.3.2. See Watson, 'Prolegomena for Establishing Pre-Justinianic Texts' (1994) 62 *Le Temps de la Réflexion* 113-25, 123 for the example, though used for a different purpose. For dating see Thomas, *Textbook*, xvii-xix.

²⁶ *Codex Theodosianus* 1.1.5 (429 CE)

Theodosianus of constitutions contained therein that provide an opportunity to observe the changes carried out by the Theodosian compilers.

Imperial Authorisation

Two constitutions are preserved containing the initial and subsequent instructions to the compilers of the *Codex*²⁷ and one constitution is preserved confirming its promulgation.²⁸ While there is some dispute as to the nature of the relationship between the two constitutions,²⁹ the instructions to the compilers with regard to the way in which they were to handle the texts are not inconsistent. The compilers were instructed to place the constitutions in chronological order under appropriate titles, dividing individual constitutions under different titles where the content of the constitution pertained to more than one title.³⁰ The only changes ordered to be made to wording were with regard to brevity and clarity, i.e., the removal of superfluous words and ambiguities,³¹ not substantive changes to the law itself.³² In fact, earlier laws are expressly commanded to be included, even though they may be invalid at the time of compilation, so that developments in the law may be observed, with later laws in the collection prevailing over inconsistent earlier

²⁷ *Codex Theodosianus* 1.1.5 (429 CE) and 1.1.6 (435 CE).

²⁸ *Novellae Theodosii* 1.1 (438 CE).

²⁹ See, e.g., J. Matthews, 'The Making of the Text' in J. Harries and I. Wood (eds.), *The Theodosian Code: Studies in the Imperial Law of Late Antiquity* (Ithaca, NY, Cornell Uni Press, 1993) 19-44 and A. J. B. Sirks, 'The Sources of the Code' in J. Harries and I. Wood (eds.), 45-67.

³⁰ *Codex Theodosianus* 1.1.5 (429 CE) and 1.1.6pr (435 CE).

³¹ *Codex Theodosianus* 1.1.5 (429 CE): ... *ipsa etiam uerba, quae ad rem pertinent, reseruentur, praetermissis illis, quae sancienda rei non ex ipsa necessitate adiuncta sunt. Codex Theodosianus* 1.1.6pr-1 (435 CE): ... *et circumcisis ex qua[ue] constitutione ad uim sanctionis non pertinentibus solum iu[s] relinquatur. Quod ut breuitate constrictum claritate luc[e]at, adgressuris hoc opus et demendi superuacanea uerba et a[di]ciendi necessaria et demutandi ambigua emendandi incongrua tribuimus potestatem, scilicet ut his modis unaquaeque inlustrata constitutio e[m]ineat[.]*.

³² J. Harries, *Law and Empire in Late Antiquity* (Cambridge, Cambridge Uni. Press, 2001), 23.

laws.³³ This is affirmed by the constitution confirming the *Codex*, where it is stated that the only changes to the laws were by way of clarification,³⁴ and that the light of brevity had been shone on the hitherto obscurity of the law by the compilation.³⁵ In fact, all that Theodosius II claims to have achieved is the shedding of the light of brevity.³⁶

Parallel Texts

Although few in number, the parallel texts that do exist provide evidence that the changes implemented by the Theodosianic compilers were limited to those contained in the constitutions authorising the compilation of the *Codex*.³⁷ Fourteen constitutions are preserved in the *Constitutiones Sirmondianae*,³⁸

³³ *Codex Theodosianus* 1.1.5 (429 CE) and 1.1.6pr (435 CE).

³⁴ *Novellae Theodosii* 1.1.3 (438 CE): ‘*immo lucis gratia mutati claritudine consultorum augusta nobiscum societate iunguntur*’.

³⁵ *Novellae Theodosii* 1.1.1 (438 CE): ‘*discussis tenebris compendio breuitatis lumen legibus dedimus*’.

³⁶ *Novellae Theodosii* 1.1.3 (438 CE): ‘*manet igitur manebitque perpetuo elimata gloria conditorum nec in nostrum titulum demigrauit nisi lux sola breuitas*’.

³⁷ A conclusion supported, though without argument, by Honoré ‘Wherever we can judge, they [changes] turn out to be no more than the substitution of an odd word here and there. No one lightly tampered with imperial constitutions’: T. Honoré, ‘Some Quaestors of the Reign of Theodosius II’ in Harries and Wood, *The Theodosian Code*, above n. 29, 68-94, 71.

³⁸ *Constitutiones Sirmondianae* 2 (405 CE) = *Codex Theodosianus* 16.2.35 (400/405 CE); *Constitutiones Sirmondianae* 4 (335 CE) = *Codex Theodosianus* 16.9.1 (335 CE) and 16.8.5 (335 CE); *Constitutiones Sirmondianae* 9 (408 CE) = *Codex Theodosianus* 16.2.39 (408 CE); *Constitutiones Sirmondianae* 10 (420 CE) = *Codex Theodosianus* = 16.2.44 (420 CE) and 9.25.3 (420 CE); *Constitutiones Sirmondianae* 12 (408 CE) = *Codex Theodosianus* 16.5.43 (408 CE) and 16.10.19 (408 CE); *Constitutiones Sirmondianae* 14 (409 CE) = *Codex Theodosianus* 16.2.31 (409 CE) and 16.5.46 (409 CE); *Constitutiones Sirmondianae* 15 (412/11 CE) = *Codex Theodosianus* 16.2.41 (412/11 CE); *Constitutiones Sirmondianae* 16 (408 CE) = *Codex Theodosianus* 5.7.2 (408 CE). Apparent parallel texts to the content of *Constitutiones Sirmondianae* 6 (425 CE) can be found in *Codex Theodosianus* 16.2.47 (425 CE); 16.5.62 (425 CE) and 16.5.64 (425 CE), however, the *Codex Theodosianus* texts are to different addressees to the texts in the *Constitutiones Sirmondianae* (the *Constitutiones Sirmondianae* text is addressed to the prefect of Gaul, *Codex Theodosianus* 16.2.47 and 16.5.64 are addressed to the Count of the Privy Purse, 16.5.62 is addressed to the prefect of the city).

*Fragmenta Vaticana*³⁹ and *Collatio*⁴⁰ that also appear in the *Codex Theodosianus*.

In each case, similar changes have been made to the constitutions as they appear in the *Codex Theodosianus*:

- contextual material, such as what prompted the law, has been removed;⁴¹
- single constitutions containing laws on different issues have been divided between different titles in the *Codex Theodosianus*;⁴²
- some sections of the original constitution have been excluded;⁴³
- wording changes have been made not affecting the substance of the law;⁴⁴ and
- instructions on the publication of the law have been omitted.⁴⁵

The specific inclusion of laws that had been superseded in the *Codex Theodosianus* makes it a useful, if incomplete,⁴⁶ record of legal development in the fourth and early fifth century CE.

³⁹ *Fragmenta Vaticana* 35 = *Codex Theodosianus* 3.1.2 (337 CE); *Fragmenta Vaticana* 37 = *Codex Theodosianus* 10.17.1 (fragmentary) (369 CE); *Fragmenta Vaticana* 249 = *Codex Theodosianus* 8.12.1 (341 CE).

⁴⁰ *Collatio* 5.3.2 = *Codex Theodosianus* 9.7.6 (390 CE).

⁴¹ The text omitted from the *Constitutiones Sirmondianae* by the *Codex Theodosianus* is noted in marginal notes in Mommsen's edition of the *Constitutiones Sirmondianae*. See also, *Fragmenta Vaticana* 35.1-2 and 249.1-2 and *Collatio* 5.3.2.1.

⁴² *Constitutiones Sirmondianae* 4 (335 CE) has been divided into *Codex Theodosianus* 16.9.1 (335 CE) (circumcision) and 16.8.5 (the outrage of converts) (335 CE); *Constitutiones Sirmondianae* 10 (420 CE) has been divided into *Codex Theodosianus* 16.2.44 (420 CE) (the female relatives permitted to reside with clergy) and 9.25.3 (420 CE) (ravishers of nuns); *Constitutiones Sirmondianae* 12 (408 CE) has been divided into *Codex Theodosianus* 16.5.43 (408 CE) (buildings of non-Catholic religious sects vindicated to the church) and 16.10.19 (408 CE) (destruction of pagan altars and prohibition of pagan banquets); *Constitutiones Sirmondianae* 14 (409 CE) has been divided into *Codex Theodosianus* 16.2.31 (409 CE) (punishment for the invasion of churches and outrage of priests) and 16.5.46 (409 CE) (penalties for not reporting invasion of churches). Three entries in the *Codex Theodosianus* parallel parts of *Constitutiones Sirmondianae* 6 (425 CE): 16.2.47 (425 CE) (clerics not subject to temporal authorities), 16.5.62 (425 CE) and 16.5.64 (425 CE) (penalties for heretics), although, as noted above, the *Codex Theodosianus* extracts are from constitutions addressed to different addressees to that of *Constitutiones Sirmondianae* 6.

⁴³ See the heavy abbreviation of *Fragmenta Vaticana* 249 in *Codex Theodosianus* 8.12.1 (316 CE?).

⁴⁴ For example, see the changes noted in the margin for *Constitutiones Sirmondianae* 2 in Mommsen's edition.

⁴⁵ For example, the end of *Constitutiones Sirmondianae* 2 (405 CE), 9 (408 CE) and 16 (408 CE).

Corpus Iuris Ciuilis⁴⁷

In 528 CE the Emperor Justinian set in motion the beginnings of a codification of Roman law that ultimately resulted in three works: the *Codex Iustinianus* (first edition 529, second 534 CE), the *Digesta* and the *Institutiones*, published in 533 CE, that were designed to represent the whole body of Roman law. These, together with a compilation of later constitutions called the *Novellae*, have been termed the *Corpus Iuris Ciuilis* since the 16th century.⁴⁸ The content of each of these works is as follows:

- *Codex Iustinianus*: This was published in two editions, the first in 529 and the second in 534 CE, only the second of which survives. The *Codex* contains imperial rescripts and constitutions from the reign of Hadrian to that of Justinian, arranged in titles according to their subject matter and chronologically within each title.⁴⁹ The second edition was published in order to incorporate the changes implemented by Justinian through his *Quinquaginta Decisiones*,⁵⁰ which aimed to settle legal disputes and abolish obsolete institutions, and other legislation.
- *Digesta*: A compilation of excerpts from juristic writings in 50 books divided into various titles published in 533 CE. Each excerpt bears an ‘inscription’ preserving the name of the author and the book number and the title of the work from which it was taken. The jurists excerpted range in date from the

⁴⁶ See Harries, *Law and Empire in Late Antiquity*, above n. 32, 22-3 on the question of the exclusion of constitutions from the *Codex Theodosianus*.

⁴⁷ For discussions of the *Corpus* see Buckland, *Textbook*, above n. 8, 39-47; Johnston, *Roman Law in Context*, above n. 2, 14-24; O. Robinson, *Sources of Roman Law: Problems and Methods for Ancient Historians* (London, Routledge, 1997), 56-60; Jolowicz and Nicholas, *Historical Introduction*, above n. 5, ch 29.

⁴⁸ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 479.

⁴⁹ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 479 and 493-6; Buckland, *Textbook*, above n. 8, 39 and 46-7.

⁵⁰ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 479-80; Buckland, *Textbook*, above n. 8, 46.

Republic to the fourth century CE, though the bulk come from imperial jurists prior to 250 CE.⁵¹

- *Institutiones*: An elementary introduction to Roman law drawn from institutional, or introductory, writings, primarily those of the second century jurist Gaius,⁵² promulgated in 533 CE.
- *Novellae*: A collection of imperial enactments from various times over the period following the promulgation of the three works above.⁵³ The tendency of the legislation contained in the *Novellae* is towards the recognition of Byzantine practice, unlike the rest of the compilation, which tends to look backwards towards Roman law of the preceding centuries.⁵⁴

The *Codex*, *Digesta* and *Institutiones* were intended to represent a codification of the law, with subsequent reference to imperial enactments or juristic writings pre-dating the codification and not contained in the works prohibited.⁵⁵ The *Novellae* contains the subsequent amendments to this codification. As the codification is, for the most part, constructed from works of an earlier period, the Roman Empire in the late second century, it represents our main source for the reconstruction of Roman law of that earlier period. The problem in its use is simply stated: the codification was compiled, for the most part, hundreds of years after the original texts were written and was promulgated as the law applicable at the time it was compiled. To what extent, therefore, can these texts be said to represent the law of the period in which they were written, and to what extent have they been modified to represent the law current at the time of compilation? A further related problem

⁵¹ See Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 480-92; Buckland, *Textbook*, above n. 8, 42-6 and Johnston, *Roman Law in Context*, above n. 2, 14-22.

⁵² *Cupidae Legum Iuventuti* 6: 'Quas ex omnibus antiquorum institutionibus et praecipue ex commentariis Gaii nostri tam institutionum quam rerum cottidianarum aliisque multis commentariis compositas'. Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 492-3; Buckland, *Textbook*, above n. 8, 46.

⁵³ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 496-8; Buckland, *Textbook*, above n. 8, 47.

⁵⁴ Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 496.

⁵⁵ *De Confirmatione* 19; *Code*² *Preface* 4.

is to what degree had the texts that the compilers used been modified and updated between the time they were written and the time they came into their hands? Further problems also arise from the method of composition of the *Digesta* and *Codex*, especially in relation to the loss of the original context of the extracts presented in the two compilations. Each text raises different issues in relation to addressing these problems and each will be dealt with separately.

Digesta

Most past scholarship on the issue of post-classical alterations, or ‘interpolations’, in the juristic texts contained in the Justinianic compilation have focused on the issue of interpolations in the *Digesta*. This question is essentially one of two parts: firstly, to what degree have the texts contained in the *Digesta* been modified by the compilers and secondly, to what extent had the texts that the compilers were using been modified prior to their use as a basis for the compilation of the *Digesta*. Several approaches have been suggested for the detection of interpolations:⁵⁶

- *Parallel texts*: Texts parallel to fragments contained in the *Digesta* in sources external to the *Digesta*.
- *Inconsistency*: Inconsistency within and between *Digesta* fragments.
- *Known innovation*: The existence of a constitution by Justinian can give an indication of a change in the law by him that has been incorporated by the amendment of the appropriate *Digesta* passages.
- *Linguistic criteria*: A highly subjective and difficult means of identifying interpolations, based on the idea that it is possible to identify a vocabulary and style of the various classical jurists and that passages straying from these are interpolated

⁵⁶ Johnston, *Roman Law in Context*, above n. 2, 19-20.

A logical place to begin in the search for Justinianic interpolations is to examine the instructions given to the compilers and the constitutions accompanying the promulgation of the laws to see what sort of changes Justinian authorised or requested them to make to the texts they were utilising and how he viewed the completed text.

Justinian on the *Digesta*⁵⁷

The *Digesta* was conceived as presenting the diverse books of Roman law in a single volume.⁵⁸ The compilers were instructed:⁵⁹

- to extract the whole substance of the law from the authors;⁶⁰
- to remove any repetition, including of principles found in imperial constitutions collected in the *Codex* unless for logical distinction, supplementation or for greater completeness;⁶¹
- discrepancies between texts were to be removed;⁶²
- what was not well expressed, superfluous, wanting in finish or prolix was to be removed;⁶³
- to make up what is deficient, in the context of expression;⁶⁴

⁵⁷ The following section owes a debt to the work of Watson, 'Prolegomena', above n. 24.

⁵⁸ *De Conceptione Digestorum* 2: '... tot auctorum dispersa uolumina uno codice indita ostendere ...'.

⁵⁹ The following analysis follows and is influenced by that of Watson, 'Prolegomena', above n. 24, 118-20.

⁶⁰ *De Conceptione Digestorum* 4: '... omnis materia colligatur ...'.

⁶¹ *De Conceptione Digestorum* 4: 'nulla (secundum quod possibile est) neque similitudine neque discordia derelicta'; 9: 'Sed et similitudinem (secundum quod dictum est) ab huiusmodi consummatione uolumus exulare: et ea, quae sacratissimis constitutionibus quas in codicem nostrum redeimus cauta sunt, iterum poni ex uetere iure non concedimus, cum diuisionem uel propter repletionem uel propter pleniorum indaginem hoc contigerit'.

⁶² *De Conceptione Digestorum* 4 and 8.

⁶³ *De Conceptione Digestorum* 7.

⁶⁴ *De Conceptione Digestorum* 7.

- to rectify quotations from old laws and constitutions where these were incorrectly expressed;⁶⁵ and
- to remove laws that have fallen into desuetude.⁶⁶

As can be seen from these instructions, consistency and clear expression were to be imposed on texts, inaccurate quotations were to be corrected, but aside from the removal of laws that have fallen into desuetude, there was no authorisation to change the actual substance of the laws. The directions with regard to expression, consistency and accuracy make it clear that the texts would have been amended so as not to contain the *ipsissima uerba* of the original authors. However, the changes authorised would only have affected the *substance* of the law so as to impose consistency, presumably with one school of thought already present in the ancient law. This is different from reform of the law. The very fact that the compilers were authorised to alter the manner of expression in the texts limits the utility of the linguistic criterion as a means of detecting interpolations. While it may enable the detection of where a text has been altered from the original wording, it does not automatically follow that the substance of the legal principle contained within the text has been altered.

The statements of Justinian made on completion of the *Digesta* also indicate that a great deal of reverence was paid to antiquity:⁶⁷

Tanta autem nobis antiquitati habita est reuerentia, ut nomina prudentium taciturnitati tradere nullo patiamur modo: sed unusquisque eorum, qui auctor legis fuit, nostris digestis inscriptus est: hoc tantummodo a nobis effecto, ut, si quid in legibus eorum uel superuacuum uel imperfectum uel minus idoneum uisum est, uel adiectionem uel deminutionem necessariam accipiat et rectissimis tradatur regulis. Et in multis similibus uel

⁶⁵ *De Conceptione Digestorum* 7.

⁶⁶ *De Conceptione Digestorum* 10.

⁶⁷ *De Confirmatione Digestorum* 10.

contrariis quod rectius habere apparebat, hoc pro aliis omnibus positum est unaque omnibus auctoritate indulta, ut quidquid ibi scriptum est, hoc nostrum appareat et ex nostra uoluntate compositum.

We have such reverence for antiquity that in no way did we suffer that the names of the jurists be consigned to silence; but each one of them, who was a writer of law, has been inscribed in our digest. This only has been done by us: that, if anything of theirs concerning the laws seemed superfluous, incomplete or not sufficient, it received either necessary addition or diminution and was related with the most correct rules. And what appeared more correct in many similar or contrary cases was put in place of all others, with one authority conferred on the whole, so that whatever is written there, this appears as ours and composed with our authority.

This passage appears at pains to minimise the degree of intervention by the compilers, that they ‘only’ (*tantummodo*) removed superfluous words, made up deficient wording or selected the more correct out of similar or contradictory passages. This echoes the instructions initially given to the compilers.⁶⁸ It is worth emphasising that the process described here for resolving repetitions or contradictions is the selection of what appeared more accurate (*rectius*) from among the ancients, rather than the imposition of a doctrine not found in classical law.

Johnston argues that there is an inherent incompatibility between reverence to the past and the promulgation of a new law code. He argues further that the conception underlying the process of excerption that, as stated in the passage quoted above, what is written appears as Justinian’s own work and as having been composed with his authority, lacks reverence to antiquity. Hence, ‘who might originally have written the words from which the *Digest* was composed becomes

⁶⁸ *De Conceptione Digestorum* 7.

a matter of insignificance'.⁶⁹ However, the degree to which reverence to the past is incompatible with the promulgation of a new law code depends on the degree to which the past legal writings were incompatible with the law at the time the new law code was to be promulgated. While there were undoubtedly major changes in society and law between the time of the classical jurists and Justinian, one of the most prominent being the change from a formulary procedure to one of *cognitio*,⁷⁰ there are strong indications that there was a high degree of compatibility between the writings of the classical jurists and the law of Justinian's time. The very fact of the composition of the *Digesta* is an indication that the writings of the jurists were still used and still considered of value and that an accurate view of the law could be extracted from them. Indeed, the *Quinquaginta Decisiones* of Justinian were aimed at settling disputes among ancient jurists, indicating further that their writings, as they were, were still of relevance to the empire of Justinian.⁷¹ The fifth century 'Law of Citations',⁷² also shows clearly that jurists were still both actively cited and authoritative in the fifth century. The presence of contradictions in the *Digesta* that follow chronological patterns, as discussed above, also indicates that the classical texts as they came down to the compilers had not been altered on a large scale and thus were likely to be largely compatible with the law of the sixth century. Furthermore, the outline of legal education at the time of Justinian indicates clearly that what was

⁶⁹ D. Johnston, 'Justinian's *Digest*: The Interpretation of Interpolation' (1989) 9 *Oxford Journal of Legal Studies*, 149-66, 151-2.

⁷⁰ Robinson, *Sources of Roman Law*, above n. 47, 95-6.

⁷¹ *Institutiones* 1.5.3: '*et dediticios quidem per constitutionem expulimus, quam promulgauimus inter nostras decisiones, per quas suggerente nobis Triboniano uiro excelso quaestore antiqui iuris altercationes placauimus*'.

⁷² As discussed above: *Codex Theodosianus* 1.4.3 (426 CE).

studied was the ancient jurists. Justinian even bewails that of the great multitude of writings that existed, so few were read.⁷³

While the conception underlying the *Digesta* may well have been that, following its promulgation, the writings contained therein would be treated as a law written under the auspices of Justinian, internal evidence suggests that this conception did not diminish the reverence paid to antiquity in the process of compilation. This is particularly evident in the scrupulousness with which excerpts are attributed to the appropriate classical jurist, especially in *catenae*, or ‘chains’, of texts, where a small fragment from one work is inserted into a larger whole from another, yet correct attribution of the fragment is maintained.⁷⁴ For example, in *Digesta* 9.2.5 – 9.2.7, a large fragment taken from book 18 of Ulpian *ad Edictum* (9.2.5 and 9.2.7) is broken by a fragment from Paul *ad Edictum* that does not even equate to a sentence:

Ulpian libro octauo decimo ad edictum. ... dicit igitur Iulianus iniuriarum quidem actionem non competere, quia non faciendae iniuriæ causa percusserit, sed monendi et docendi causa: an ex locato, dubitat, quia leuis dumtaxat castigatio concessa est docenti: sed lege Aquilia posse agi non dubito

Paul libro uicensimo secundo ad edictum. Praeceptoris enim nimia saeuitia culpae adsignatur.

Ulpian libro octauo decimo ad edictum: Qua actione patrem consecuturum ait, quod minus ex operis filii sui propter uitiatum oculum sit habiturus, et impendia quae pro eius curatione fecerit.

Ulpian, book 18 *On the Edict*: Julian says therefore that [these facts] are not capable of being *iniuria*, because he struck him not for the sake of causing *iniuria*, but for the sake of admonishment and teaching; he is uncertain whether an action on the contract would lie, because only

⁷³ *Constitutio Omnem* 1: ‘*quis ea quae recitabant enumerare malet, computatione habita inueniet ex tam immensa legum multitudine uix uersuum sexaginta milia eos suae notionis perlegere*’.

⁷⁴ Watson, ‘Prolegomena’, above n. 24, 122-3.

light castigation is permitted to the teacher; but I do not doubt it could be brought under the *lex Aquilia*

Paul, book 2 *On the Edict*: for excessive brutality of a teacher is reckoned as guilty.

Ulpian, book 18 *On the Edict*. By which action it is said the father would recover what he would not take from the services of his son on account of the injury to the eyes and expenses that he paid on account of his son's care.

Here a fragment from Paul's discussion of the same topic has been inserted, presumably because he made a point not found in Ulpian. The compiler's concern not to attribute something to a jurist that he did not write is clear in the preservation of an inscription for such a short intrusion.⁷⁵

Alterations

As can be seen from the above commands issued by Justinian to the compilers, changes to the *ipsissima uerba* of the ancient jurists were explicitly authorised. However, with the exception of correcting quotations from laws and omitting laws that have fallen into desuetude, most of the changes authorised relate to the form of the text rather than the legal substance. The fact that the *Digesta* represents only five per cent of the original texts also indicates that abbreviation of the original texts is likely to have occurred.⁷⁶ Further additions are also present in the form of cross-references.⁷⁷

With regard to changes of substance, as opposed to form, Watson has argued that there are only two types of substantive alteration to the texts in *Digesta*:

⁷⁵ Watson, 'Prolegomena', above n. 25, 122-3.

⁷⁶ From three million lines to 150 000: *De Confirmatione Digestorum* 1: Johnston, 'Justinian's Digest', above n. 69, 153.

⁷⁷ For example, *Digesta* 3.1.11.1 (Tryphonius): '*Qui autem inter infames sunt, sequenti titulo explanabitur*' referring to the following title of the *Digesta*, 3.2.

- Where a later constitution has altered the substantive law such that the best available juristic text required qualification. This change is of the type explicitly authorised and will always be evidenced in the *Codex*.⁷⁸
- Where, of two or more classical legal institutions related by function, one disappeared or was abolished in post-classical times, texts dealing with the abolished institution were used in connection with the related institution. For these classes of interpolation, there would always have been a classical forerunner.⁷⁹

An examination of texts in the *Digesta* with external parallels shows this analysis to be simplistic. Parallel texts to 118 *Digesta* excerpts can be found in *Fontes Iuris Romani Anteiustiniani* volume 2.⁸⁰ Twenty-one of these texts are not useful for the purposes of comparison, as the surviving parallel text is too fragmentary to allow an accurate assessment to be made of the extent to which the text in the *Digesta* mirrors that in the other source.⁸¹ Of those that provide useful examples,

⁷⁸ Watson, 'Prolegomena', above n. 25, 120-1: Watson gives the example of *Digesta* 18.1.2.1 (Ulpian) that includes a qualification about writing for a sale contract introduced by *Codex Iustinianus* 4.21.17 (528 CE).

⁷⁹ Watson, 'Prolegomena', above n. 25, 121-2: Watson gives the example of *Digesta* 17.1.22.9 (Paul) where references to *mancipatio* have been replaced by references to *traditio* after the 531 abolition by Justinian of the difference between *res Mancipi* and *res nec Mancipi* (*Codex Iustinianus* 7.31.1.5 (531 CE); J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam, Noth-Holland Publishing Co., 1976) 129).

⁸⁰ Buckland identifies 'about one hundred and sixty-five' texts, however, he frustratingly states '[i]t would be too tedious to set out all the references', which makes it unclear as to how he is using the fragmentary parallel texts: W. W. Buckland, 'Interpolations in the *Digest*', (1924) 33 *Yale Law Journal* 343-64, 349. The passages discussed here are entire *Digesta* extracts, which may be made up of multiple parallel texts. Buckland's number of 165, in contrast, refers to the number of external parallel texts.

⁸¹ *Digesta* 3.3.9 (Gaius) (*Digesta* 3.3.9.7 = *Fragmenta Vaticana* 340b); *Digesta* 7.1.9 (Ulpian) (*Digesta* 7.1.9.7 = *Fragmenta Vaticana* 70); *Digesta* 7.1.12 (Ulpian) (*Digesta* 7.1.12pr = *Fragmenta Vaticana* 71); *Digesta* 7.1.21 (Ulpian) (*Digesta* 7.1.21 = *Fragmenta Vaticana* 71b); *Digesta* 7.1.23 (Ulpian) (*Digesta* 7.1.23pr = *Fragmenta Vaticana* 72.1); *Digesta* 7.1.12 (Ulpian) (*Digesta* 7.1.12.1 = *Fragmenta Vaticana* 72.2); *Digesta* 7.2.1 (Ulpian) (*Digesta* 7.2.1pr = *Fragmenta Vaticana* 75.1); *Digesta* 7.2.1.1 = *Fragmenta Vaticana* 75.2; *Digesta* 7.2.1.2 = *Fragmenta Vaticana* 75.3); *Digesta* 7.3.1 (Ulpian) (*Digesta* 7.3.1pr = *Fragmenta Vaticana* 59; *Digesta* 7.3.1.2 = *Fragmenta Vaticana* 60); *Digesta* 7.4.1 (Ulpian) (*Digesta* 7.4.1pr = *Fragmenta Vaticana* 61; *Digesta* 7.4.1.1 = *Fragmenta Vaticana* 62; *Digesta* 7.4.1.3 = *Fragmenta Vaticana* 63) *Digesta* 7.4.3 (Ulpian) (*Digesta* 7.4.3pr = *Fragmenta Vaticana* 64); *Digesta* 22.1.8 (Papinian) = *Fragmenta Vaticana* 65; *Digesta* 28.3.13 (Gaius) = Gaius, *Institutiones* 1.133; *Digesta* 26.9.5 (Papinian) (*Digesta* 26.9.5pr = perhaps Papinian, *ex Libris Responsorum Fragmenta* 1.2); *Digesta* 26.7.39 (Papinian) (*Digesta* 26.7.39.3 = Papinian *ex Libris*

67 *Digesta* extracts paralleled in whole or part by one or more external texts contain either no changes or only alterations to wording that leave the legal doctrine contained in the *Digesta* unaltered compared to the parallel text.⁸²

Responsorum Fragmenta 2.6; *Digesta* 26.7.39.4 = Papinian, *ex Libris Responsorum Fragmenta* 2.7; *Digesta* 26.7.39.5 = Papinian, *ex Libris Responsorum Fragmenta* 2.8); *Digesta* 27.1.3 (Ulpian) = *Fragmenta Vaticana* 186; *Digesta* 35.2.1.9 (Paul) (*Digesta* 35.2.1.9 = *Fragmenta Vaticana* 68); *Digesta* 37.6.9 (Papinian) = Papinian, *ex Libris Responsorum Fragmenta* 4.13; *Digesta* 28.3.17 (Papinian) = Papinian, *ex Libris Responsorum Fragmenta* 4.14; *Digesta* 38.8.1 (Ulpian) (*Digesta* 38.8.1.8 = Ulpian, *ex Libris ad Edictum Fragmenta*) *Digesta* 39.5.31 (Papinian) (*Digesta* 39.5.31pr = *Fragmenta Vaticana* 252a and 254a); *Digesta* 39.5.31.1 = *Fragmenta Vaticana* 254; *Digesta* 39.5.31.2 = *Fragmenta Vaticana* 255); *Digesta* 40.7.35 (Papinian) = Papinian, *ex Libris Responsorum Fragmenta* 7.17.

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Digesta 1.1.9 (Gaius) = Gaius, *Institutiones* 1.1; *Digesta* 1.5.1 (Gaius) = Gaius, *Institutiones* 1.8; *Digesta* 1.5.3 (Gaius) = Gaius, *Institutiones* 1.9; *Digesta* 1.6.1 (Gaius) = Gaius, *Institutiones* 1.48, 1.50-3; *Digesta* 1.6.2 (Ulpian) = *Collatio* 3.3; *Digesta* 1.6.3 (Gaius) = Gaius, *Institutiones* 1.55; *Digesta* 1.7.2 (Gaius) (*Digesta* 1.7.2.1 = Gaius, *Institutiones* 4.105); *Digesta* 1.8.1 (*Digesta* 1.8.1pr = Gaius 2.2-3 and 2.8-14); *Digesta* 2.15.15 (Paul) = *Pauli Sententiae* 1.1.3; *Digesta* 3.3.67 (Papinian) = *Fragmenta Vaticana* 328 and 332; *Digesta* 4.2.1 (Paul) = *Pauli Sententiae* 1.7.2; *Digesta* 4.2.2 (Paul) = *Pauli Sententiae* 1.7.7; *Digesta* 4.2.22 (Paul) = *Pauli Sententiae* 1.7.10; *Digesta* 4.2.24 (Paul) = *Pauli Sententiae* 1.9.2; *Digesta* 7.2.1 (Ulpian) (7.2.1.2 = *Fragmenta Vaticana* 76; *Digesta* 7.2.1.4 = *Fragmenta Vaticana* 78); *Digesta* 7.2.3 (Ulpian) (*Digesta* 7.2.3pr = *Fragmenta Vaticana* 79); *Digesta* 7.2.8 (Ulpian) = *Fragmenta Vaticana* 87-8; *Digesta* 9.2.3 (Ulpian) = *Collatio* 7.3.1; *Digesta* 9.2.5 (Ulpian) (*Digesta* 9.2.5.1 = *Collatio* 7.3.4); *Digesta* 9.2.27 (Ulpian) (*Digesta* 9.2.27.7 = *Collatio* 12.7.1; *Digesta* 9.2.27.8 = *Collatio* 12.7.3; *Digesta* 9.2.27.9 = *Collatio* 12.7.7; *Digesta* 9.2.27.10 = *Collatio* 12.7.8; *Digesta* 9.2.27.11 = *Collatio* 12.7.9; *Digesta* 9.2.27.12 = *Collatio* 12.7.10); *Digesta* 10.2.35 (Papinian) = *Fragmenta Vaticana* 258; *Digesta* 14.2.1 (Paul) = *Pauli Sententiae* 2.7.1; *Digesta* 16.3.29 (Paul) (*Digesta* 16.3.29pr = *Pauli Sententiae* 2.12.5); *Digesta* 17.1.24 (Paul) = *Pauli Sententiae* 2.15.1; *Digesta* 18.1.73 (Papinian) (*Digesta* 18.1.73pr = *Fragmenta Vaticana* 5); *Digesta* 22.1.18 (Paul) (*Digesta* 22.1.18pr = *Fragmenta Vaticana* 17); *Digesta* 22.4.2 (Paul) = *Pauli Sententiae* 5.12.11; *Digesta* 22.5.24 (Paul) = *Pauli Sententiae* 5.15.1; *Digesta* 26.2.30 (Papinian) = *Fragmenta Vaticana* 227; *Digesta* 26.4.7 (Gaius) = Gaius, *Institutiones* 1.156; *Digesta* 26.5.14 (Papinian) = *Fragmenta Vaticana* 224; *Digesta* 27.1.5 (Ulpian) = *Fragmenta Vaticana* 190; *Digesta* 27.1.6 (Modestinus) (*Digesta* 27.1.6.19 = *Fragmenta Vaticana* 244); *Digesta* 27.1.7 (Ulpian) = *Fragmenta Vaticana* 240; *Digesta* 27.1.15 (Modestinus) (*Digesta* 27.1.15.16 = *Fragmenta Vaticana* 189); *Digesta* 27.1.24 (Papinian) = *Fragmenta Vaticana* 225; *Digesta* 27.1.46 (Paul) (*Digesta* 27.1.46pr = *Fragmenta Vaticana* 233; *Digesta* 27.1.46.1 = *Fragmenta Vaticana* 235); *Digesta* 27.10.15 (Paul) = *Pauli Sententiae* 3.4a.6; *Digesta* 28.1.4 (Gaius) = Gaius, *Institutiones* 2.114; *Digesta* 28.1.17 (Paul) = *Pauli Sententiae* 3.4a.11; *Digesta* 28.1.31 (Paul) = *Pauli Sententiae* 5.12.9; *Digesta* 28.5.92(91) (Paul) = *Pauli Sententiae* 5.12.8; *Digesta* 29.2.95 (Paul) = *Pauli Sententiae* 4.4.1; *Digesta* 30.1.120 (Ulpian) (*Digesta* 30.1.120.2 = *Fragmenta Vaticana* 44); *Digesta* 32.1.66 (Paul) = *Pauli Sententiae* 3.6.76; *Digesta* 33.7.22 (Paul) (*Digesta* 33.7.22pr = *Pauli Sententiae* 3.6.45; *Digesta* 33.7.22.1 = *Pauli Sententiae* 3.6.47); *Digesta* 34.5.8(9) = *Pauli Sententiae* 2.23.5; *Digesta* 37.5.22 (Papinian) = Papinian, *ex Libris Responsorum Fragmenta* 3.11; *Digesta* 37.7.5 (Papinian) = Papinian, *ex Libris Responsorum Fragmenta* 6.22 (this fragment is incomplete); *Digesta* 39.5.31 (Papinian) (*Digesta* 39.5.31.3 = *Fragmenta Vaticana* 257); *Digesta* 40.1.2 (Ulpian) = *Fragmenta Vaticana* 84; *Digesta* 41.1.10 (Gaius) (*Digesta* 41.1.10.2 = Gaius, *Institutiones* 2.89; *Digesta* 41.1.10.3 = Gaius, *Institutiones* 2.91; *Digesta* 41.1.10.4 = Gaius, *Institutiones* 2.92; *Digesta* 41.1.10.5 = Gaius, *Institutiones* 2.93); *Digesta* 41.3.37 (Gaius) (*Digesta* 41.3.37pr = Gaius, *Institutiones* 2.50; *Digesta* 41.3.37.1 =

Comparison with parallel texts reveals a further 12 texts in which the doctrine has been altered in accordance with Justinian's instructions to remove references to obsolete or abolished institutions or where the text is used to refer to a still existent institution.⁸³ There are also two texts that remove references to disputes that are contained in the parallel text, as ordered by Justinian.⁸⁴ In addition to

Gaius, *Institutiones* 2.51;); *Digesta* 43.11.3.1 (Paul) = *Pauli Sententiae* 1.14.1; *Digesta* 44.7.2 (Gaius) (*Digesta* 44.7.2pr = Gaius, *Institutiones* 3.135; *Digesta* 44.7.2.1-2 = Gaius, *Institutiones* 3.136; *Digesta* 44.7.2.3 = Gaius, *Institutiones* 3.137); *Digesta* 45.3.26 = *Fragmenta Vaticana* 55; *Digesta* 47.2.83(82) (Paul) (*Digesta* 47.2.83(82).3 = *Pauli Sententiae* 2.31.32); *Digesta* 47.10.42 (Paul) = *Pauli Sententiae* 5.4.18; *Digesta* 47.11.1 (Paul) (*Digesta* 47.11.1pr = *Pauli Sententiae* 5.4.5; *Digesta* 47.11.1.1 = *Pauli Sententiae* 5.4.13); *Digesta* 47.14.1 (Ulpian) (*Digesta* 47.14.1pr = *Collatio* 11.7.1; *Digesta* 47.14.1.1 = *Collatio* 11.8.1; *Digesta* 47.14.1.2 = *Collatio* 11.8.2; *Digesta* 47.14.1.3 = *Collatio* 11.8.3); *Digesta* 47.17.1 (Ulpian) (*Digesta* 47.17.1pr = *Collatio* 7.4.1-2); *Digesta* 48.6.11 (Paul) (*Digesta* 48.6.11pr-1 = *Pauli Sententiae* 5.3.3; *Digesta* 48.6.11.2 = *Collatio* 1.13.1); *Digesta* 48.8.4 (Ulpian) (*Digesta* 48.8.4.1 = *Collatio* 1.11.1); *Digesta* 48.10.9 (Ulpian) = *Collatio* 8.7.1; *Digesta* 48.10.18 (Paul) (*Digesta* 48.10.18.1 = *Pauli Sententiae* 3.6.15); *Digesta* 48.18.18 (Paul) (*Digesta* 48.18.18pr = *Pauli Sententiae* 5.14.2); *Digesta* 48.19.38 (Paul) (*Digesta* 48.19.38.5 = *Pauli Sententiae* 5.23.14; *Digesta* 48.19.38.7 = *Pauli Sententiae* 5.25.7; *Digesta* 48.19.38.10 = *Pauli Sententiae* 5.28.1).

⁸³ *Digesta* 1.7.2pr and 1.7.2.2 (Gaius), where adoption of persons *sui iuris* is at the authority of the *princeps*, rather than the *populi*, as in Gaius, *Institutiones* 1.107; *Digesta* 3.2.1 (Julian) = *Fragmenta Vaticana* 320: As Buckland notes, 'Interpolations in the *Digest*', above n. 80, 351, it is doubtful whether these two texts are the same, if they are, it is a case where a text on *cognitores* (abolished by Justinian) is used for postulation; *Digesta* 4.4.48pr (Paul) = *Pauli Sententiae* 1.9.5, *Digesta* text refers only to *fideiussio* and *mandatio* as the *fidepromissio* and *sponsio* mentioned in *Pauli Sententiae* had been fused together with *fideiussio* under Justinian: Berger, 'Encyclopedic Dictionary', above n. 21, 350-1; *Digesta* 7.1.12.3 (Ulpian) = *Fragmenta Vaticana* 89: reference to *mancipatio* removed, on the replacement of references to *mancipatio* with *traditio*, see Berger, 573; *Digesta* 7.2.3.1 (Ulpian) = *Fragmenta Vaticana* 80: *traditio* used in place of *mancipio*; *Digesta* 7.2.3.2 (Ulpian) = *Fragmenta Vaticana* 83: removal of reference to praetorian remedy; *Digesta* 18.1.27 (Paul) = *Fragmenta Vaticana* 1: text on tutelage of a woman used for that of a child and a reference to *mancipatio* removed. *Tutela mulierum* had probably already died out under Diocletian: M. Kaser, *Roman Private Law* (2nd ed., Trans. R. Dannenberg, London, Butterworths, 1968), 275; *Digesta* 22.5.17 (Ulpian) = *Tituli ex Corpore Ulpiani* 20.6: *Digesta* removes reference to *libripens*, used in *per aes et libram* acts: see Kaser, *Roman Private Law*, 38 on the removal of references to *per aes et libram*; *Digesta* 30.1.120 (Ulpian): reference to a legacy *per uindicationem* removed, Justinian had rendered the distinction between different types of legacy nugatory by making them all of one nature and enforceable by the same remedies: *Codex Iustinianus* 6.43.1.1 (529 CE), Kaser, *Roman Private Law*, 320; *Digesta* 40.4.50pr (Papinian) = *Papinian ex Libris Responsorum Fragmenta* 5.13: ownerless property is vindicated to the *fiscus* rather than to the *populus*; *Digesta* 41.1.10pr (Gaius) = Gaius, *Institutiones* 2.86 and *Digesta* 41.1.10.1 (Gaius) = Gaius, *Institutiones* 2.87: removal of references to *mancipatio* and *manus*: *manus* was obsolete in the classical period: see Buckland, *Textbook*, above n. 8, 118; *Digesta* 48.19.38.8 (Paul) = *Pauli Sententiae* 5.25.8: reference to a *cognitor* omitted. *Cognitores* were abolished by Justinian: Kaser, *Roman Private Law*, 346.

⁸⁴ *Digesta* 7.2.1.2 (Ulpian) = *Fragmenta Vaticana* 75.3; *Digesta* 7.2.1.2 (Ulpian) = *Fragmenta Vaticana* 77.

these relatively straightforward cases, there are 18 passages in the *Digesta* that appear worthy of further discussion.

Digesta 3.5.36(37).1 = *Pauli Sententiae* 1.4.3: The text of the *Pauli Sententiae* states that a person conducting business on behalf of another is liable for sums lent if the debtor is not solvent at the time of litigation.⁸⁵ In contrast, the *Digesta* text states that the lender is *not* liable if the debtor is insolvent at the time of litigation due to a *fortuitus casus*.⁸⁶ Unfortunately, there are no other surviving classical parallels on this point to enable us to determine whether the *Digesta* represents a post-classical rule or, as Buckland argues, is ‘nearer to the original than the abridgment of the *Sententiae* is’.⁸⁷ However, there are three third century constitutions in the *Codex Iustinianus* that contain the doctrine that a person conducting business on another’s behalf can be excused from liability through *fortuitus casus*.⁸⁸ As there is no Justinianic constitution on this point, indicating a change in the law by him, it could be argued that these constitutions contain their original substantive legal point, suggesting that Buckland is correct.⁸⁹

Digesta 7.2.8 = *Fragmenta Vaticana* 86: The *Fragmenta Vaticana* states that a wife, *uxor*, will enjoy usufruct left to her and her children by way of a legacy if the children die. The *Digesta*, in contrast, is broader, stating that a woman, *mulier*,

⁸⁵ *Pauli Sententiae* 1.4.3: ‘*Si pecuniae quis negotium gerat, usuras quoque totius temporis praestare cogitur et periculum eorum nominum quibus collocavit agnoscere, si litis tempore soluendo non sint: hoc enim in bonae fidei iudiciis seruari conuenit*’.

⁸⁶ *Digesta* 3.5.36(37).1 (Paul): ‘*Si pecuniae quis negotium gerat, usuras quoque praestare cogitur et periculum eorum nominum, quae ipse contraxit: nisi fortuitis casibus debitores ita suas fortunas amiserunt, ut tempore litis ex ea actione contestatae soluendo non essent*’.

⁸⁷ Buckland, ‘Interpolations in the *Digest*’, above n. 80, 350.

⁸⁸ *Codex Iustinianus* 2.18.22 (294 CE); 4.35.13 (294 CE); 5.38.4 (245 CE): Buckland, ‘Interpolations in the *Digest*’, above n. 80, 350.

⁸⁹ See further below on the *Codex Iustinianus* and the issue of alterations to the material contained therein.

will enjoy the usufruct. The close relationship between the terms *uxor* and *mulier* may mean that there is no great difference in doctrinal meaning between these two passages.⁹⁰

Digesta 9.2.5pr = *Collatio* 7.3.2-3: The *Collatio* text states that killing a thief at night does not involve liability under the *Lex Aquilia*;⁹¹ the *Digesta* text changes this to killing a thief from fear of death, without reference to time. It appears that the *Digesta* text represents pre-Justinianic law as the *Digesta* does contain the law as stated in the *Collatio* in an excerpt from another author,⁹² and the ability to kill a thief in self-defence is found in texts outside the *Digesta*.⁹³ However, the *Digesta* text does represent a change to the doctrine contained in the *Collatio* text itself.⁹⁴

Digesta 9.2.27.17 = *Collatio* 2.4.1: The *Collatio* text comes to the conclusion that expenses paid to heal a slave who has been injured by another cannot be recovered by an Aquilian action, as damages are only recoverable where there has

⁹⁰ Although *mulier* clearly had a wider meaning than *uxor*, see, e.g., *Digesta* 50.16.13pr (Ulpian), *mulier* also overlaps with *uxor*, see *Oxford Latin Dictionary*, ‘*mulier*’ entry 2, 1141. This passage is not one of those discussed by Buckland as containing a doctrinal change.

⁹¹ *Collatio* 7.3.2-3: ‘*sed et quemcumque alium ferro se petentem qui occiderit, non uidebitur iniuria occidisse. Proinde si furem nocturnum, quem lex duodecim tabularum omnimodo permittit occidere, aut diurnum, quem aequae lex permittit, sed ita demum, si se telo defendat, uideamus, an lege Aquilia teneatur. Et Pomponius dubitat, num haec lex non sit in usu. 3. Et si quis noctu furem occiderit, non dubitamus, quin lege Aquilia non teneatur: sin autem, cum posset adprehendere, maluit occidere, magis est, ut iniuria fecisse uideatur: ergo etiam lege Cornelia tenebitur*’.

⁹² *Digesta* 9.2.4 (Gaius).

⁹³ *Pauli Sententiae* 5.23.8: ‘*Qui latronem caedem sibi inferentem uel alias quemlibet stupro occiderit, puniri non placuit: alius enim uitam, alius pudorem publico facinore defenderunt*’.

⁹⁴ Buckland’s explanation, ‘Interpolations in the *Digest*’, above n. 80, 352-3, that the compilers are giving effect to the doubts of Pomponius referred to in the *Collatio* passage is incorrect. The doctrine about which Pomponius expresses doubt is clearly expressed in and given effect, with some further elaboration, in *Digesta* 9.2.4 (Gaius).

been a decrease in value or usefulness.⁹⁵ The *Digesta* comes to the contrary conclusion, based on the principle that it is loss that is claimable, even if neither value nor usefulness was affected.⁹⁶ It appears from Gaius that the *Digesta* text is the correct one as it was the loss to the owner caused by the injury that was important, and Gaius implies that a wide range of injuries was covered *scissa et collisa et effusa et quoquo uitiata aut perempta atque deteriora*,⁹⁷ which could encompass injuries that do not have a permanent effect. Buckland plausibly suggests that the *nec* in the *Collatio* text was inserted when the text became corrupted by the dropping of the clause *Aliqua enim eas ruptiones, quae damna dant persequitur*.⁹⁸

Digesta 12.6.26.3 = *Fragmenta Vaticana* 266: The *Fragmenta Vaticana* states that money paid could be recovered if paid where a *perpetua exceptio* existed preventing the money from being demanded.⁹⁹ The *Digesta* adds that this was

⁹⁵ *Collatio* 2.4.1: ‘*Rupisse eum utique accipiemus, qui uulnerauerit, uel uirgis uel loris uel pugnibus caedit, uel telo quoque alio uis sciderit hominis corpus uel tumorem fecerit: sed ita demum si damnum datum est. Ceterum si in nullo seruorum pretio uiliorem deterioremue fecerit, Aquilia cessat iniuriarumque erit agendum. Ergo et si pretio quidem non sit deterior factus seruus, uerum sumptus in salutem eius et sanitatem facti sunt, in haec nec mihi uideri damni Aquilia lege agi posse*’.

⁹⁶ *Digesta* 9.2.27.17 (Ulpian): ‘*Rupisse eum utique accipiemus, qui uulnerauerit, uel uirgis uel loris uel pugnibus cecidit, uel telo uel quo alio, ut scinderet alicui corpus, uel tumorem fecerit, sed ita demum, si damnum iniuria datum est: ceterum si nullo seruorum pretio uiliorem deterioremue fecerit, Aquilia cessat iniuriarumque erit agendum dumtaxat: Aquilia enim eas ruptiones, quae damna dant, persequitur. Ergo etsi pretio quidem non sit deterior factus seruus, uerum sumptus in salutem eius et sanitatem facti sunt, in haec mihi uideri damnum datum: atque ideoque lege Aquilia agi posse*’.

⁹⁷ Gaius, *Institutiones* 3.217 Buckland, ‘Interpolations in the *Digest*’, above n. 80, 353. Gaius, *Institutiones* 3.219, to which Buckland refers in support of this argument is discussing actions that fall outside the *Lex Aquilia*.

⁹⁸ Buckland, ‘Interpolations in the *Digest*’, above n. 80, 353.

⁹⁹ *Fragmenta Vaticana* 266: ‘*Indebitum solutum accipimus non solum si omnino non debebatur, sed et si per aliquam exceptionem peti non poterat, id est perpetuum exceptionem. Quare hoc quoque repeti poterit, si quis perpetua exceptione tutus soluerit*’.

only where payer did not know of the existence of the *exceptio*.¹⁰⁰ This addition is in accordance with classical law, the essence of which was that the payment be made in error.¹⁰¹ The change to the *Digesta* may therefore be explained as being a change made to clarify meaning, as authorised by Justinian.

Digesta 16.3.23 = *Collatio* 10.2.5: This text states that in a case of *depositum* an action is rightly brought on account of food supplied.¹⁰² The *Digesta* passage has the additional qualification, *seruo constituto* ‘when the slave has been returned’.¹⁰³ The additional words in the *Digesta* should be seen as explanatory, rather than doctrine-altering, indeed, the *Collatio* text as it stands leaves the reader asking ‘food supplied for what?’ The fact that the *Collatio* text may be regarded as problematic in the absence of the clause that is found in the *Digesta* suggests that the doctrine contained in the *Collatio* text represents a corruption either of the text on which the *Collatio* is based, or somewhere in the manuscript history of the *Collatio* itself.

Digesta 18.6.19(18).1 = *Fragmenta Vaticana* 12: According to the *Fragmenta Vaticana*, a purchaser did not have to pay the price for something the title to which was disputed, *even if* guarantors were provided by the vendor against eviction.¹⁰⁴ This is reversed in the *Digesta*, where a purchaser does not have to

¹⁰⁰ *Digesta* 12.6.26.3 (Ulpian): ‘*Indebitum autem solutum accipimus non solum si omnino non debeat, sed et si per aliquam exceptionem perpetuam peti non poterat: quare hoc quoque repeti poterit, nisi sciens se tutum exceptione soluit*’.

¹⁰¹ Gaius, *Institutiones*, 3.91: Buckland, ‘Interpolations in the *Digest*’, above n. 80, 351.

¹⁰² *Collatio* 10.2.5: ‘*Actione depositi conuentus cibariorum nomine apud eundem iudicem utiliter experitur: ...*’.

¹⁰³ *Digesta* 16.3.23 (Modestinus): ‘*Actione depositi conuentus seruo constituto cibariorum nomine apud eundem iudicem utiliter experitur*’.

¹⁰⁴ *Fragmenta Vaticana* 12: ‘*Ante pretium solutum domini quaestione mota pretium emptor restituere non cogetur, tametsi maxime fideiussores euictionis offerantur, cum ignorans possidere coeperit*’.

pay full price *unless* guarantors are provided.¹⁰⁵ The *Digesta* doctrine follows that contained in a rescript attributed to Diocletianus in the *Codex Iustinianus*.¹⁰⁶ As nothing in the relevant *Codex* title postdates Diocletianus, there is no sign of Justinianic intervention in this area and it may be that the change to the *Digesta* is in putting into effect Justinian's requirement for consistency between the *Codex* and *Digesta*.

Digesta 20.3.5 = *Pauli Sententiae* 5.1.1 and *Digesta* 48.19.38.9 = *Pauli Sententiae* 5.25.9: In the first *Digesta* text the lighter penalty of *relegatio* is substituted for that of *deportatio* in the *Pauli Sententiae* as the punishment for a creditor who knowingly took from a father a *filius familias* as *pignus*.¹⁰⁷ Buckland suggests that as punishments varied greatly according to the rank of the offender, that a varying selection had been made. However, if what Buckland means by this is that a punishment appropriate to a different rank has been selected by the compilers of the *Digesta* to that represented in the *Pauli Sententiae*, this misrepresents the way in which punishments varied according to rank. Both *relegatio* and *deportatio* were punishments appropriate to the same rank,¹⁰⁸ suggesting that this is not a simple case of selecting a punishment appropriate to a different rank. The only way that the texts can be reconciled, which does not require deliberate alteration by the *Digesta*'s compilers, is if either in the abridgement of the text for either the *Digesta* or the *Sententiae*, *deportatio* was used due to the interchangeability of the

¹⁰⁵ *Digesta* 18.6.19(18).1 (Papinian): 'Ante pretium solutum domini quaestione mota pretium emptor soluere non cogetur, nisi fideiussores idonei a uenditore eius euictionis offerantur'.

¹⁰⁶ *Codex Iustinianus* 8.44.24pr (294 CE): Buckland, 'Interpolations in the *Digest*', above n. 80, 351 n. 33.

¹⁰⁷ On the penalties *deportatio* and *relegatio* see P. Garnsey, *Social Status and Legal Privilege* (Oxford, Clarendon Press, 1970), 111-22.

¹⁰⁸ See Garnsey, *Social Status and Legal Privilege*, above n. 107, 104.

two terms *relegatio* and *deportatio*. The reverse change occurs in the second *Digesta* text, with *deportatio* being substituted for *relegatio*. It is further suggestive that both the texts in which this variation occurs come from *Pauli Sententiae*. This provides tentative support for an implication that the reason for the variation may lie in differences between the text of the *Pauli Sententiae* being used by the compilers and that used in the compilation of the text of the *Sententiae* that we possess.

Digesta 22.3.7 = *Pauli Sententiae* 2.17.12(13): Concerning when reliance may be placed on the evidence of a fugitive slave with regard to whether or not he had fled before, the *Pauli Sententiae* states that reliance may be placed on the *responsio* of the slave.¹⁰⁹ However, in the *Digesta* reliance is to be placed on the *quaestio* of the slave.¹¹⁰ As the *responsio* of slaves in legal proceedings was usually extracted by the *quaestio*,¹¹¹ this probably does not represent a change in doctrine.

Digesta 22.5.5 = *Collatio* 9.2.2: These two texts are by different writers who are discussing the same law. In listing the witnesses cognisable under the *Lex Iulia de vi*, the *Digesta* text omits the reference to a gladiator, *qui depugnandi causa auctoratus erit*, which is understandable considering the legal prohibition of gladiatorial games by the time of the reign of Justinian.¹¹² This is in keeping with Justinian's requirement for the removal of references to obsolete institutions. One further change is the omission of persons manumitted by freedpersons of either

¹⁰⁹ *Pauli Sententiae* 2.17.12(13): 'Cum probatio prioris fugae defecerit, serui responsioni credendum est: in se enim interrogari, non pro domino aut in dominum uidetur'.

¹¹⁰ *Digesta* 22.3.7 (Paul): 'Cum probatio prioris fugae deficit, serui quaestioni credendum est: in se enim interrogari, non pro domine aut in dominum uidetur'.

¹¹¹ Hence the practice of manumitting slaves so that they could not be tortured: for example, Cicero, *Pro Milone* 57: Garnsey, *Social Status and Legal Privilege*, above n. 107, 213.

the accused or the accused's parents. This category is accepted as classical in one of the most recent attempts to reconstruct the *ipsissima uerba* of the law itself.¹¹³ There are constitutions in the *Codex Theodosianus* dealing with the evidence of freedmen, that do not mention the patrons of the freedmen who freed them, indicating that perhaps this requirement had fallen into obsolescence prior to Justinian.¹¹⁴

Digesta 22.5.16 = *Pauli Sententiae* 5.15.5/*Collatio* 8.3.1:¹¹⁵ A catalogue of potential penalties for false, inconsistent or double-faced witnesses in the *Sententiae* is replaced by the statement that such persons *a iudicibus competenter puniuntur* in the *Digesta* extract.¹¹⁶ This does not represent a change in doctrine as *iudices* had had, throughout the classical period, discretion with regard to penalties not specified by statute, especially with the increasing use of the *cognitio* procedure.¹¹⁷ The specification of a range of three penalties in the *Pauli Sententiae* text, *in exilium aguntur aut in insulam relegantur aut curia submouentur*, shows that a *iudex* did indeed possess discretion in the infliction of punishment here.

¹¹² *Codex Iustinianus* 11.44.1 (325 CE).

¹¹³ M. Crawford (ed.), *Roman Statutes, Bulletin of the Institute of Classical Studies Supplement 64* (London, Institute of Classical Studies, 1996) 2 Vols., vol. 2, 789-91

¹¹⁴ *Codex Theodosianus* 4.10.2 (423 CE); 9.6.1 (376 CE); 9.6.4 (423 CE): Buckland, 'Interpolations in the *Digest*', above n. 80, 352.f

¹¹⁵ See Buckland, 'Interpolations in the *Digest*', above n. 80, 351.

¹¹⁶ *Pauli Sententiae* 5.15.5: '*Qui falso uel uarie testimonia dixerunt uel utrique parti prodiderunt, aut in exilium aguntur aut in insulam relegantur aut curia submouentur*'. *Digesta* 22.5.16 (Paul): '*Qui falso uel uarie testimonia dixerunt uel utrique parti prodiderunt, a iudicibus competenter puniuntur*'.

¹¹⁷ See Garnsey, *Social Status and Legal Privilege*, above n. 107, 171. On *cognitio* see Robinson, *Sources of Roman Law*, above n. 47, 91 *et seq*, Buckland, *Textbook*, above n. 8, 662 *et seq* and Thomas, *Textbook of Roman Law*, above n. 79, ch IX. On the development of the criminal law see Jolowicz and Nicholas, *Historical Introduction*, above n. 5, 401-4.

Digesta 39.5.34.1 = *Pauli Sententiae* 5.11.6: The text in the *Pauli Sententiae* states a rule that a gift of any amount can be made by a person who has been rescued from robbers or the enemy to his rescuer.¹¹⁸ The *Digesta* text, in contrast, states that if a person who has rescued another from robbers accepts anything from the person so rescued, this is an irrevocable gift.¹¹⁹ The text of the *Sententiae* makes sense in the context of the application of the *Lex Cincia*, which restricted the value that could be donated, i.e., in these circumstances, no limit on the value of the gift applied.¹²⁰ The *Digesta* text merely reiterates a general principle, as all gifts were in principle irrevocable, unless the gift was for a specific purpose that could not be accomplished or in limited cases of ingratitude.¹²¹ The *Digesta* text has probably been altered in light of the obsolescence of the *Lex Cincia* (replaced by a registration system),¹²² and inserted in the *Digesta* in order to illustrate the principle that is unaltered from what is contained in the *Sententiae* passage: that a gift in such circumstances should not be called a reward. This perhaps could be classed in Watson's second category of interpolation, where a text pertaining to an obsolete institution is used in relation to one that is not.

Digesta 47.9.12.1 = *Collatio* 12.5.1 and *Digesta* 47.14.1.4 = *Collatio* 11.8.4: The requirement for the imposition of certain penalties of the offender being at Rome,

¹¹⁸ *Pauli Sententiae* 5.11.6: 'Ei, qui aliquem a latrunculis uel hostibus eripuit, in infinitum donare non prohibetur (si tamen donatio et non merces eximii laboris appellanda est), quia contemplationem salutis certo modo aestimari non placuit'.

¹¹⁹ *Digesta* 39.5.34.1 (Paul): 'Si quis aliquem a latrunculis uel hostibus eripuit et aliquid pro eo ab ipso accipat, haec donatio irreuocabilis est: non merces eximii laboris appellanda est, quod contemplatione salutis certo modo aestimari non placuit'.

¹²⁰ See Kaser, *Roman Private Law*, above n. 83, 199; Thomas, *Textbook of Roman Law*, above n. 79, 191-2.

¹²¹ See Thomas, *Textbook of Roman Law*, above n. 79, 192-3.

¹²² Kaser, *Roman Private Law*, above n. 83, 199; Thomas, *Textbook of Roman Law*, above n. 79, 192.

contained in the *Collatio* texts,¹²³ is removed in the *Digesta* excerpts.¹²⁴ This makes sense in the context of an empire of which Rome had ceased to be the capital centuries prior to the reign of Constantinople-based Justinian.

Digesta 47.11.1.2 = *Pauli Sententiae* 5.4.14: Two changes of possible doctrinal significance occur in the *Digesta* passage. The first is the removal of the term *praetextatus* from the *Digesta* excerpt qualifying a *puer*, persuasion of whom to commit *stuprum* results in an offence. The second change is the limitation of the act to which the boy is persuaded to *stuprum* rather than also *aliud flagitium*.¹²⁵ It may well be that both these changes are due to abbreviation, the removal of superfluous words, with *aliud flagitium* being embraced by the offender *quid impudicitiae gratia fecerit* and *praetextatus* being regarded as unnecessary.

Digesta 48.8.17 = *Collatio* 1.7.2: Both passages state that, where a person dies in a brawl, regard must be had to the blows struck by each person. The primary difference lies in the fact that the *Collatio* text relates this to the type of punishment inflicted, which varies according to the rank of the offender.¹²⁶ The *Digesta* excerpt does not give any reason as to why regard should be paid to the

¹²³ *Collatio* 12.5.1: ‘*Nam qui data opera in ciuitate incendium fecerunt ... si in aliquo gradu et Romae id fecerunt, capite puniuntur*’. *Collatio* 11.8.4: ‘*Romae tamen etiam bestiis subici abigeos uidemus: et sane qui cum gladio abigunt, non inique hac poena adficiuntur*’.

¹²⁴ *Digesta* 47.9.12.1 (Ulpian): ‘*Qui data opera in ciuitate incendium fecerint ... si in aliquo gradu id fecerint, capite puniuntur ...*’. *Digesta* 47.14.1.3 (Ulpian): ‘*sane qui cum gladio abigunt, non inique bestiis obiciuntur*’.

¹²⁵ *Pauli Sententiae* 5.4.14: ‘*Qui puero praetextato stuprum aliudue flagitium abducto ab eo uel corrupto comite persuaserit, mulierem puellamue interpellauerit, quidue pudicitiae corrumpendae gratia fecerit, donum praebuerit pretiumue, quo id persuadeat, dederit, perfecto flagitio capite punitur, imperfecto in insulam deportatur: corrupti comites summo supplicio adficiuntur*’. *Digesta* 47.11.1.2 (Paul): ‘*Qui puero stuprum abducto ab eo uel corrupto comite persuaserit aut mulierem puellamue interpellauerit quidue impudicitiae gratia fecerit, donum praebuerit pretiumue, quo is persuadeat, dederit: perfecto flagitio punitur capite, imperfecto in insulam deportatur: corrupti comites summo supplicio adficiuntur*’.

blows struck.¹²⁷ The awkwardness in the *Digesta* passage is probably explicable on the basis that the compilers removed reference to punishment from this excerpt to avoid repetition with passages elsewhere in the title discussing the applicable punishment.¹²⁸ Although, here as well, the punishments listed in the *Digesta* title differ from those contained in the *Collatio* passage, for example, one passage gives the punishment for those of lower rank as crucifixion or being thrown to the beasts,¹²⁹ while the *Collatio* passage refers to the games or mines. This change may perhaps be attributed to Justinian's stated goal of removing differences between the ancient jurists.

Digesta 48.18.18.4 = *Pauli Sententiae* 5.16.2.¹³⁰ It is unlikely that any significance should be attached to the alteration in the *Digesta* text, whereby the terms 'iudex tutelaris' and 'centumviri' have been subsumed into the single term 'iudex'. In the first instance, the centumviral court had become obsolete at some time in the third century.¹³¹ Thus, the removal of a reference to the *centumviri* was in accordance with Justinian's instructions to remove references to obsolete institutions. Secondly, it had long been accepted that slaves could be the subjects of torture for the purpose of obtaining their evidence.¹³² The rule as expressed in the *Pauli Sententiae* is therefore not a restriction, but an extension, i.e., that the

¹²⁶ *Collatio* 1.7.2: 'Quod si in rixa percussus homo perierit, quoniam oportet, ideo humiliores in ludum aut in metallum damnantur, honestiores dimidia parte bonorum multati relegantur'.

¹²⁷ *Digesta* 48.8.17 (Paul): 'Si in rixa percussus homo perierit, ictus unius cuiusque in hoc collectorum contemplari oportet'.

¹²⁸ *Digesta* 48.8.3.5 (Marcian) and *Digesta* 48.8.16 (Modestinus).

¹²⁹ *Digesta* 48.8.3.5 (Marcian).

¹³⁰ See Buckland, 'Interpolations in the *Digest*', above n. 80, 351

¹³¹ Berger, above n. 21, 386.

¹³² As far back as the Republic, e.g. Cicero, *pro Milone*, 59-60.

rule against torturing slaves for or against their masters did not extend to the examination of slaves of an *hereditas* in disputes as to *tutela* under the will.¹³³

It appears from the foregoing examination that not all the changes found in the *Digesta* from the parallel texts found in other sources are easy to explain, especially slight changes in wording, such as from *uxor* to *mulier*;¹³⁴ from *deportatio* to *relegatio* and vice versa¹³⁵ and the dropping of *praetextatus* as qualifying *puer* and the term *aliud flagitium*.¹³⁶ In some cases alterations to texts seem to be more by way of explanations, clarifications or abbreviations, that are in accordance with classical principles.¹³⁷ In some cases it may be that the text in the *Digesta* is closer to the original than what has survived in the parallel text. However, this is difficult to establish, either because we are reliant on other texts in the Justinianic corpus,¹³⁸ or because textual corruption of the parallel source must be postulated.¹³⁹ In some cases, the law may have been altered to conform to pre-Justinianic changes to legal doctrine,¹⁴⁰ though in some cases we are reliant on evidence in the Justinianic corpus.¹⁴¹ In another case, the difference may be due to the compilers removing differences between classical jurists, but this is

¹³³ Buckland, 'Interpolations in the *Digest*', above n. 80, 351.

¹³⁴ *Digesta* 7.2.8 (Ulpian) = *Fragmenta Vaticana* 86.

¹³⁵ *Digesta* 20.3.5 (Paul) = *Pauli Sententiae* 5.1.1 and *Digesta* 48.19.38.9 (Paul) = *Pauli Sententiae* 5.16.2.

¹³⁶ *Digesta* 47.11.1.2 (Paul) = *Pauli Sententiae* 5.4.14.

¹³⁷ *Digesta* 12.6.26.3 (Paul) = *Fragmenta Vaticana* 266; 16.3.23 = *Collatio* 10.2.5; perhaps *Digesta* 22.3.7 (Paul) = *Pauli Sententiae* 2.17.12(13); *Digesta* 22.5.16 (Paul) = *Pauli Sententiae* 5.15.5/*Collatio* 8.3.1.

¹³⁸ For example *Digesta* 3.5.36(37).1 (Paul) = *Pauli Sententiae* 1.4.3: the only other surviving texts on point are in the Justinianic corpus: *Codex Iustinianus* 2.18.22 (294 CE); 4.35.13 (294 CE); 5.38.4 (245 CE); Buckland, 'Interpolations in the *Digest*', above n. 80, 350.

¹³⁹ *Digesta* 9.2.27.17 (Ulpian) = *Collatio* 2.4.1.

¹⁴⁰ Perhaps *Digesta* 22.5.5 (Gaius) = *Collatio* 9.2.2; perhaps *Digesta* 48.18.18.4 (Paul) = *Pauli Sententiae* 5.16.2.

¹⁴¹ *Digesta* 18.6.19(18).1 (Papinian) = *Fragmenta Vaticana* 12.

only speculation.¹⁴² There is also evidence of changes, without *Codex* evidence, made in light of changes in the empire, such as the removal of limitations of certain penalties to Rome.¹⁴³ The parallel texts also show that, while it may be possible to reconcile the text contained in the *Digesta* with legal principles found in pre-Justinianic texts, this does not mean that the text is being used to express the legal principle that it originally expressed.¹⁴⁴ This represents an important qualification to Watson's theory. For a *Digesta* excerpt to contain a doctrinal principle different from, but related to, that which it originally contained does not require that the original text be in relation to an abolished institution, though there is evidence of texts being used in accordance with Watson's theory.¹⁴⁵ Another related and important qualification to Watson's theory stems from the fact that the excerpts in the *Digesta* have been taken out of their original context and used to express principles that may well differ from those originally intended. A good example of this is *Digesta* 1.1.31 (Ulpian), which states that the *princeps legibus solutus est* ('the emperor is absolved from the laws'). The inscription in the *Digesta* makes it clear that this was taken from Ulpian's work on the Augustan marriage legislation, *ad Legem Iuliam et Papiam* and it is quite probable that it was intended to apply only to this legislation. The *Digesta* compilers have instead extracted it from this original specific context and made it into a general principle.¹⁴⁶ The starting point for dealing with this problem is Otto Lenel's

¹⁴² *Digesta* 48.8.17 (Paul) = *Collatio* 1.7.2.

¹⁴³ *Digesta* 47.9.12.1 (Ulpian) = *Collatio* 12.5.1 and *Digesta* 47.14.1.4 (Ulpian) = *Collatio* 11.8.4.

¹⁴⁴ See, *Digesta* 9.2.5pr (Ulpian) = *Collatio* 7.2-3 discussed above.

¹⁴⁵ *Digesta* 39.5.34.1 (Paul) = *Pauli Sententiae* 5.11.6.

¹⁴⁶ Johnston, 'Justinian's Digest', above n. 69, 152.

Palingenesia Iuris Ciuilis,¹⁴⁷ which attempts to reconstruct the order in which *Digesta* fragments appeared in the original juristic works from which they were extracted.¹⁴⁸

It appears from this examination that changes to doctrine do not appear to have been extensive.¹⁴⁹ However, wherever possible, the law as stated in the *Digesta* should be checked with what is known from sources external to it, and the *Codex Iustinianus* should be checked in the relevant area for evidence of Justinianic or post-classical reform to the law.

Codex Iustinianus

As with the *Digesta*, Justinian's instructions to the compilers of the *Codex Iustinianus* provide guidance as to what the *Codex* was envisaged to be and the degree to which the laws contained therein may have been substantively altered in the compilation process.¹⁵⁰ The *Codex* itself went through two editions, one predating the compilation of the *Digesta* and the promulgation of Justinian's *Quinquaginta Decisiones* and a second edition, incorporating changes introduced by the *Quinquaginta Decisiones* and other Justinianic constitutions.¹⁵¹ Of the first edition, we only possess a list of titles;¹⁵² whereas we possess the text of the second edition.

¹⁴⁷ O. Lenel, *Palingenesia Iuris Ciuilis* (Graz, Akademische Druck, 1960) 2 Vols.

¹⁴⁸ Johnston, *Roman Law in Context*, above n. 2, 16.

¹⁴⁹ Buckland, 'Interpolations in the *Digest*', above n. 80, 353-4.

¹⁵⁰ See Watson, 'Prolegomena', above n. 24, especially 113-7.

¹⁵¹ Johnston, *Roman Law in Context*, above n. 2, 22.

¹⁵² Contained in *The Oxyrhynchus Papyri* 1814: Harries, *Law & Empire in Late Antiquity*, above n. 32, 24 n. 80.

The *Codex Iustinianus* is sourced from the collections of imperial constitutions discussed above.¹⁵³

In relation to the first *Codex*, the compilers were instructed:¹⁵⁴

- to cut back on the multitude of *codices* and constitutions;
- to suppress superfluous preambles, and similar or contradictory laws;
- to divide laws;
- to remove those laws that had fallen into desuetude;
- to alter the expression of the laws for concision; and
- to place the laws in chronological order.

It is clear that these instructions do not contain a mandate to reform the law. Further, the fact that Justinian's *Quinquaginta Decisiones* post-dates the first edition of the *Codex* suggests that the *Codex* was not envisaged as a vehicle for law reform. The instructions for the second edition of the *Codex* contain similar injunctions to those for the first edition, with the addition of instructions to perform the changes necessary to accommodate the *Quinquaginta Decisiones* and other constitutions subsequent to the first edition of the *Codex*:

- the new constitutions were to be divided into separate chapters, placed under proper titles and added to the constitutions that preceded them;¹⁵⁵
- corrections were to be made and anything imperfect completed;¹⁵⁶
- superfluous or annulled decrees were to be removed;¹⁵⁷ and
- similar or conflicting constitutions were to be removed.¹⁵⁸

There are no instructions to re-examine pre-Justinianic constitutions or rescripts not contained in the first edition.¹⁵⁹ It could be postulated that, as the second

¹⁵³ *De Nouo Codice Componendo* pr.

¹⁵⁴ *De Nouo Codice Componendo* 2.

¹⁵⁵ *De Emmendatione Codicis Iustiniani et Secunda Eius Editione* 2.

¹⁵⁶ *De Emmendatione Codicis Iustiniani et Secunda Eius Editione* 3.

¹⁵⁷ *De Emmendatione Codicis Iustiniani et Secunda Eius Editione* 3.

edition of the *Codex* was designed to incorporate changes in the law introduced by Justinianic constitutions, the changes introduced by Justinian would be relatively easy to detect due to the presence in the *Codex* itself of the appropriate Justinianic constitution.

The fact that the texts contained in the *Codex Theodosianus* have undergone such relatively minor substantive alterations also makes it a very useful tool for assessing the degree to which the texts contained in the *Codex Iustinianus* have been substantively altered. A full discussion of the changes implemented to the *Codex Theodosianus* texts in the process of incorporating them into the *Codex Iustinianus* is beyond the scope of this thesis. There are, for example, 136 passages in book one alone of the *Codex Iustinianus* that have parallels in the *Codex Theodosianus*, *Novellae* and *Constitutiones Sirmondianae*.¹⁶⁰ An

¹⁵⁸ *De Emendatione Codicis Iustiniani et Secunda Eius Editione* 3.

¹⁵⁹ Watson, 'Prolegomena to Establishing Pre-Justinianic Texts', above n. 25, 124.

¹⁶⁰ *Codex Iustinianus* 1.1.1 (380 CE) = *Codex Theodosianus* 16.1.2 (380 CE); *Codex Iustinianus* 1.1.2 (381 CE) = *Codex Theodosianus* 16.5.6 (381 CE); *Codex Iustinianus* 1.2.1 (321 CE) = *Codex Theodosianus* 16.2.4 (321 CE); *Codex Iustinianus* 1.2.2 (381 CE) = *Codex Theodosianus* 9.17.6 (381 CE); *Codex Iustinianus* 1.2.3 (386 CE) = *Codex Theodosianus* 9.17.7 (386 CE); *Codex Iustinianus* 1.2.5 (412 CE) = *Codex Theodosianus* 16.2.40 (412 CE); *Codex Iustinianus* 1.2.6 (421 CE) = *Codex Theodosianus* 16.2.45 (421 CE); *Codex Iustinianus* 1.2.7 (423 CE) = *Codex Theodosianus* 15.3.6 (423 CE); *Codex Iustinianus* 1.2.8 (424 CE) = *Codex Theodosianus* 11.1.33 (424 CE); *Codex Iustinianus* 1.2.10 (439 CE) = *Novellae Theodosii* 8 (439 CE); *Codex Iustinianus* 1.3.1 (343 CE) = *Codex Theodosianus* 16.2.8 (343 CE); *Codex Iustinianus* 1.3.2 (357 CE) = *Codex Theodosianus* 16.2.14 (357 CE); *Codex Iustinianus* 1.3.3 (360 CE) = *Codex Theodosianus* 16.2.15 (360 CE); *Codex Iustinianus* 1.3.4 (361 CE) = *Codex Theodosianus* 8.4.7 (361 CE); *Codex Iustinianus* 1.3.5 (364 CE) = *Codex Theodosianus* 9.25.2 (364 CE); *Codex Iustinianus* 1.3.6 (377 CE) = *Codex Theodosianus* 16.2.24 (377 CE); *Codex Iustinianus* 1.3.7 (381 CE) = *Codex Theodosianus* 11.39.8 (381 CE); *Codex Iustinianus* 1.3.8 (385 CE) = *Codex Theodosianus* 11.39.10 (385 CE); *Codex Iustinianus* 1.3.10 (398 CE) = *Codex Theodosianus* 16.2.31 (398 CE); *Codex Iustinianus* 1.3.11 (398 CE) = *Codex Theodosianus* 16.2.33 (398 CE); *Codex Iustinianus* 1.3.12 (398 CE) = *Codex Theodosianus* 9.45.3 (398 CE); *Codex Iustinianus* 1.3.13 (399 CE) = *Codex Theodosianus* 16.2.34 (399 CE); *Codex Iustinianus* 1.3.14 (400 CE) = *Codex Theodosianus* 16.2.35 (400 CE); *Codex Iustinianus* 1.3.15 (404 CE) = *Codex Theodosianus* 16.2.37 (404 CE); *Codex Iustinianus* 1.3.17 (416 CE) = *Codex Theodosianus* 16.16.2 (416 CE); *Codex Iustinianus* 1.3.18 (418 CE) = *Codex Theodosianus* 16.2.43 (418 CE); *Codex Iustinianus* 1.3.19 (420 CE) = *Codex Theodosianus* 16.2.44 (420 CE); *Codex Iustinianus* 1.3.20 (434 CE) = *Codex Theodosianus* 5.3.1 (434 CE); *Codex Iustinianus* 1.4.1 (364 CE) = *Codex Theodosianus* 13.1.5 (364 CE); *Codex Iustinianus* 1.4.2 (369 CE) = *Codex Theodosianus* 11.36.20 (369

CE); *Codex Iustinianus* 1.4.3 (385 CE) = *Codex Theodosianus* 9.38.8 (385 CE) and 9.38.6 (385 CE); *Codex Iustinianus* 1.4.4 (394 CE) = *Codex Theodosianus* 15.7.12 (394 CE); *Codex Iustinianus* 1.4.5 (396 CE) = *Codex Theodosianus* 14.27.1 (396 CE); *Codex Iustinianus* 1.4.6 (398 CE) = *Codex Theodosianus* 9.40.16 (398 CE); *Codex Iustinianus* 1.4.8 (408 CE) = *Constitutiones Sirmondianae* 18 (408 CE); *Codex Iustinianus* 1.4.9 (409 CE) = *Codex Theodosianus* 9.3.7 (409 CE); *Codex Iustinianus* 1.4.10 (409 CE) = *Codex Theodosianus* 9.16.12 (409 CE); *Codex Iustinianus* 1.4.11 (409 CE) = *Codex Theodosianus* 5.7(5).2 (409 CE); *Codex Iustinianus* 1.4.12 (428 CE) = *Codex Theodosianus* 15.8.2 (428 CE); *Codex Iustinianus* 1.5.1 (326 CE) = *Codex Theodosianus* 16.5.1 (326 CE); *Codex Iustinianus* 1.5.2 (379 CE) = *Codex Theodosianus* 16.5.5 (379 CE), 16.5.24 (379 CE) and 16.5.28 (379 CE); *Codex Iustinianus* 1.5.4 (407 CE) = *Codex Theodosianus* 16.5.40 (407 CE); *Codex Iustinianus* 1.5.5 (428 CE) = *Codex Theodosianus* 16.5.65 (428 CE); *Codex Iustinianus* 1.5.6 (435 CE) = *Codex Theodosianus* 16.5.66 (435 CE); *Codex Iustinianus* 1.9.18 = *Novellae Theodosii* 3; *Codex Iustinianus* 1.6.1 (377 CE) = *Codex Theodosianus* 16.6.1 (377 CE) and 16.6.2 (377 CE); *Codex Iustinianus* 1.6.2 (413 CE) = *Codex Theodosianus* 16.6.6 (413 CE); *Codex Iustinianus* 1.6.3 (428 CE) = *Codex Theodosianus* 16.5.65 (428 CE); *Codex Iustinianus* 1.7.1 (357 CE) = *Codex Theodosianus* 16.8.7 (357 CE); *Codex Iustinianus* 1.7.2 (383 CE) = *Codex Theodosianus* 16.7.3 (383 CE); *Codex Theodosianus* 1.7.3 (391 CE) = *Codex Theodosianus* 16.7.4 (391 CE); *Codex Iustinianus* 1.7.4 (426 CE) = *Codex Theodosianus* 16.7.7 (426 CE); *Codex Iustinianus* 1.7.5 (438 CE) = *Novellae Theodosii* 4 (438 CE); *Codex Iustinianus* 1.9.3 (315 CE) = *Codex Theodosianus* 18.8.1 (315 CE); *Codex Iustinianus* 1.9.4 (368/370/373? CE) = *Codex Theodosianus* 7.8.2 (368/370/373? CE); *Codex Iustinianus* 1.9.5 (383 CE) = *Codex Theodosianus* 12.1.99 (383 CE); *Codex Iustinianus* 1.9.6 (393 CE) = *Codex Theodosianus* 3.7.2 and 9.7.5 (393 CE); *Codex Iustinianus* 1.9.8 (398 CE) = *Codex Theodosianus* 2.1.10 (398 CE); *Codex Iustinianus* 1.9.9 (396 CE) = *Codex Theodosianus* 16.8.10 (396 CE); *Codex Iustinianus* 1.9.10 (399 CE) = *Codex Theodosianus* 12.1.165 (399 CE); *Codex Iustinianus* 1.9.11 (408 CE) = *Codex Theodosianus* 16.8.18 (408 CE); *Codex Iustinianus* 1.9.12 (409 CE) = *Codex Theodosianus* 16.8.19 (409 CE) and 16.5.43 (409 CE); *Codex Iustinianus* 1.9.13 (412 CE) = *Codex Theodosianus* 2.8.26 = 8.8.8 (412 CE); *Codex Iustinianus* 1.9.14 (412 CE) = *Codex Theodosianus* 16.8.21 (412 CE); *Codex Iustinianus* 1.9.15 (415 CE) = *Codex Theodosianus* 16.8.22 (415 CE); *Codex Iustinianus* 1.9.16 (423 CE) = *Codex Theodosianus* 16.8.26 (423 CE); *Codex Iustinianus* 1.9.17 (429 CE) = *Codex Theodosianus* 16.8.29 (429 CE); *Codex Iustinianus* 1.9.18 (439 CE) = *Novellae Theodosii* 3 (439 CE); *Codex Iustinianus* 1.10.1 (339 CE) = *Codex Theodosianus* 16.9.2 (339 CE); *Codex Iustinianus* 1.11.1 (354 CE) = *Codex Theodosianus* 16.10.4 (354 CE); *Codex Iustinianus* 1.11.2 (385 CE) = *Codex Theodosianus* 16.10.9 (385 CE); *Codex Iustinianus* 1.11.3 (399 CE) = *Codex Theodosianus* 16.10.5 (399 CE); *Codex Iustinianus* 1.11.4 (399 CE) = *Codex Theodosianus* 16.10.17 (399 CE); *Codex Iustinianus* 1.11.5 (415 CE) = *Codex Theodosianus* 16.10.20 (415 CE); *Codex Iustinianus* 1.11.6 (423 CE) = *Codex Theodosianus* 16.10.24 (423 CE); *Codex Iustinianus* 1.12.1 (397 CE) = *Codex Theodosianus* 9.45.2 (397 CE); *Codex Iustinianus* 1.12.2 (409 CE) = *Codex Theodosianus* 16.8.19 (409 CE); *Codex Iustinianus* 1.12.4 (432 CE) = *Codex Theodosianus* 9.45.5 (432 CE); *Codex Iustinianus* 1.13.2 (321 CE) = *Codex Theodosianus* 4.7.1 (321 CE); *Codex Iustinianus* 1.14.1 (316 CE) = *Codex Theodosianus* 1.2.3 (316 CE); *Codex Iustinianus* 1.14.4 (429 CE) = *Novellae Theodosii* 9 (429 CE); *Codex Iustinianus* 1.14.9 (454 CE) = *Novellae Marciani* 4 (454 CE); *Codex Iustinianus* 1.15.1 (383 CE) = *Codex Theodosianus* 1.3.1 (383 CE); *Codex Iustinianus* 1.18.11 (330 CE) = *Codex Theodosianus* 3.5.3 (330 CE); *Codex Iustinianus* 1.18.12 (391 CE) = *Codex Theodosianus* 1.1.2 (391 CE); *Codex Iustinianus* 1.19.2 (325 CE) = *Codex Theodosianus* 1.2.5 (325 CE); *Codex Iustinianus* 1.19.4 (382 CE) = *Codex Theodosianus* 1.2.8 (382 CE); *Codex Iustinianus* 1.20.1 (396 CE) = *Codex Theodosianus* 1.2.10 (396 CE); *Codex Iustinianus* 1.21.2 (316 CE) = *Codex Theodosianus* 11.30.6 (316 CE); *Codex Iustinianus* 1.21.3 (331 CE) = *Codex Theodosianus* 11.30.17 (331 CE); *Codex Iustinianus* 1.22.4 (333 CE) = *Codex Theodosianus* 1.2.6 (333 CE); *Codex Iustinianus* 1.23.4 (322 CE) = *Codex Theodosianus* 1.1.1 (322 CE); *Codex Iustinianus* 1.24.2 (425 CE) = *Codex Theodosianus* 15.4.1 (425 CE); *Codex Iustinianus* 1.25.1 (386 CE) = *Codex Theodosianus* 9.44.1 (386 CE); *Codex Iustinianus* 1.26.3 (389 CE) = *Codex*

examination of book one of the *Codex Iustinianus* does nevertheless give an idea of the types of changes implemented by the Justinianic compilers. The compilers of the *Codex Iustinianus* were clearly not as concerned with reverence to antiquity as the compilers of the *Codex Theodosianus*. This is shown by their practice of combining together excerpts from two or more constitutions contained in the *Codex Theodosianus*, originally by different emperors, to make one entry in the

Theodosianus 1.5.9 (389 CE); *Codex Iustinianus* 1.26.4 (393 CE) = *Codex Theodosianus* 1.5.10 (393 CE); *Codex Iustinianus* 1.26.5 (405 CE) = *Codex Theodosianus* 1.5.14 (405 CE); *Codex Iustinianus* 1.28.1 (368 CE) = *Codex Theodosianus* 1.6.5 (368 CE); *Codex Iustinianus* 1.28.3 (376 CE) = *Codex Theodosianus* 1.6.7 (376 CE); *Codex Iustinianus* 1.28.4 (391 CE) = *Codex Theodosianus* 1.10.4 (391 CE); *Codex Iustinianus* 1.28.5 (424 CE) = *Codex Theodosianus* 1.6.12 (424 CE); *Codex Iustinianus* 1.29.2 (414 CE) = *Codex Theodosianus* 1.7.4 (414 CE); *Codex Iustinianus* 1.30.1 (424 CE) = *Codex Theodosianus* 1.8.2 (424 CE); *Codex Iustinianus* 1.30.2 (424 CE) = *Codex Theodosianus* 1.8.3 (424 CE); *Codex Iustinianus* 1.31.1 (359 CE) = *Codex Theodosianus* 1.9.1 (359 CE); *Codex Iustinianus* 1.31.2 (386 CE) = *Codex Theodosianus* 1.9.2 (386 CE); *Codex Iustinianus* 1.31.3 (441 CE) = *Novellae Theodosii* 21 (441 CE); *Codex Iustinianus* 1.31.4 (443 CE) = *Novellae Theodosii* 24 (443 CE); *Codex Iustinianus* 1.32.1 (401 CE) = *Codex Theodosianus* 1.10.7 (401 CE); *Codex Iustinianus* 1.33.2 (397 CE) = *Codex Theodosianus* 1.11.1 (397 CE); *Codex Iustinianus* 1.35.1 (320 CE) = *Codex Theodosianus* 1.12.3 (320 CE); *Codex Iustinianus* 1.35.2 (396 CE) = *Codex Theodosianus* 1.12.5 (396 CE); *Codex Iustinianus* 1.37.1 (386 CE) = *Codex Theodosianus* 1.14.1 (386 CE); *Codex Iustinianus* 1.37.2 (395 CE) = *Codex Theodosianus* 1.14.2 (395 CE); *Codex Iustinianus* 1.38.1 (377 CE) = *Codex Theodosianus* 1.15.7 (377 CE); *Codex Iustinianus* 1.38.2 (377 CE) = *Codex Theodosianus* 1.15.8 (377 CE) ; *Codex Iustinianus* 1.39.1 (359 CE) = *Codex Theodosianus* 6.4.16 (359 CE); *Codex Iustinianus* 1.40.2 (328 CE) = *Codex Theodosianus* 1.16.4 (328 CE); *Codex Iustinianus* 1.40.3 (331 CE) = *Codex Theodosianus* 1.16.6 (331 CE); *Codex Iustinianus* 1.45.1 (408 CE) = *Codex Theodosianus* 1.20.1 (408 CE); *Codex Iustinianus* 1.46.1 (393 CE) = *Codex Theodosianus* 1.21.1 (393 CE); *Codex Iustinianus* 1.47.1 (406 CE) = *Codex Theodosianus* 7.11.1 and 7.11.2 (406 CE); *Codex Iustinianus* 1.48.1 (316 CE) = *Codex Theodosianus* 1.22.1 (316 CE); *Codex Iustinianus* 1.48.3 (389 CE) = *Codex Theodosianus* 6.26.5 (389 CE); *Codex Iustinianus* 1.51.6 (417 CE) = *Codex Theodosianus* 8.1.16 (417 CE); *Codex Iustinianus* 1.51.7 (422 CE) = *Codex Theodosianus* 1.34.2 (422 CE); *Codex Iustinianus* 1.51.8 (423 CE) = *Codex Theodosianus* 1.34.3 (423 CE); *Codex Iustinianus* 1.55.1 (365 CE) = *Codex Theodosianus* 1.29.2 (365 CE); *Codex Iustinianus* 1.55.2 (368/370/373? CE) = *Codex Theodosianus* 1.29.3 (368/370/373 CE?); *Codex Iustinianus* 1.55.3 (373 CE) = *Codex Theodosianus* 1.29.5 (373 CE); *Codex Iustinianus* 1.55.5 (392 CE) = *Codex Theodosianus* 1.29.7 (392 CE); *Codex Iustinianus* 1.55.6 (392 CE) = *Codex Theodosianus* 1.29.8 (392 CE); *Codex Iustinianus* 1.55.7 (405 CE) = *Codex Theodosianus* 9.2.5 (405 CE); *Codex Iustinianus* 1.55.9 (409 CE) = *Codex Theodosianus* 11.8.3 (409 CE); *Codex Iustinianus* 1.56.1 (323 CE) = *Codex Theodosianus* 12.1.8 (323 CE).

Codex Iustinianus, with the date and promulgators recorded of only one of the original source constitutions.¹⁶¹

In the majority of cases, a comparison of the texts in book one of the *Codex Iustinianus* with their parallels in the *Codex Theodosianus* reveals few substantive changes, with changes largely confined to the exclusion of superfluous or repetitious material;¹⁶² the removal of material that has fallen into desuetude;¹⁶³ excerpting, without changing the substance of the part excerpted, only part of a larger law;¹⁶⁴ and minor wording changes that do not affect the substance of the law.¹⁶⁵ However, there are some clear instances where the passage as it appears in the *Codex Iustinianus* has been altered significantly from what appears in the *Codex Theodosianus*. A clear example of this is *Codex Iustinianus* 1.4.1, which appears under the title *De Episcopali Audientia et de Diuersis Capitulis, quae ad Ius Curamque et Reuerentiam pontificalem pertinent*:

¹⁶¹ *Codex Iustinianus* 1.4.3 (attributed to Gratian, Valentinian, Theodosius and Arcadius, dated to 385 CE) = *Codex Theodosianus* 9.38.8 (attributed to Gratian Valentinian II, Theodosius and Arcadius, dated to 385 CE) and 9.38.6 (attributed to the same Augusti, dated to 438 CE); *Codex Iustinianus* 1.5.2 (attributed to Gratian, Valentinian II and Theodosius, dated to 379 CE) = *Codex Theodosianus* 16.5.5 (attributed to Gratian, Valentinian II and Theodosius, dated to 379 CE), 16.5.24 (attributed to Theodosius, Arcadius and Honorius, dated to 394 CE) and 16.5.28 (attributed to Arcadius and Honorius, dated to 395 CE); *Codex Iustinianus* 1.6.1 (attributed to Valens, Gratian and Valentinian II, dated to 377 CE) = *Codex Theodosianus* 16.6.1 (Attributed to Valentinian II and Valens, dated to 373 CE) and 16.6.2 (attributed to Valens, Gratian and Valentinian II, dated to 377 CE); *Codex Iustinianus* 1.9.12 (attributed to Honorius and Theodosius II, dated to 409 CE) = *Codex Theodosianus* 16.8.19 (attributed to Honorius and Theodosius II, dated to 409 CE) and 16.5.43 (attributed to Honorius and Theodosius II, dated to 408[407] CE).

¹⁶² For example, *Codex Iustinianus* 1.3.1 (343 CE) omits a clause from its source constitution, *Codex Theodosianus* 16.2.8 (343 CE), on the tax-exempt status of the clergy, which is covered in *Codex Iustinianus* 1.3.2 (357 CE).

¹⁶³ For example, *Codex Iustinianus* 1.1.2 (381 CE) removes reference to the abolition of certain monasteries contained in *Codex Theodosius* 16.5.6, presumably accomplished within the 170 odd years between the promulgation of the law (381 CE) and the compilation of the *Codex Iustinianus* in 534 CE.

¹⁶⁴ For example, *Codex Iustinianus* 1.9.16 (423 CE) only reproduces the conclusion of *Codex Theodosianus* 16.8.26 (423 CE) on the prohibition of circumcision of Christians.

¹⁶⁵ For example, compare *Codex Iustinianus* 1.3.8 (385 CE) and *Codex Theodosianus* 11.39.10 (385 CE).

Negotiatores, si qui ad domum nostram pertinent, ne commodum mercandi uideantur excedere, Christianos, quibus uerus cultus est, adiuuare pauperes et positos in necessitate prouideant.

Merchants, if any of them belong to our household, so that they do not seem to violate the customs of business, ought to provide help to Christians, who are of the true faith, who are paupers or who have been placed in a position of necessity.

The original of this text, *Codex Theodosianus* 13.1.5, however, is very different and placed under a title headed *De Lustrali Conlatione*:

Neogotiatores si qui ad domum nostram pertinent, si modo mercandi uideantur exercere sollertiam et Christianos, quibus uerus est cultus, adiuuare pauperes et positos in necessitatibus uolunt, potiorum quoque homines uel potiores ipsos, si tamen his mercandi cura est, ad necessitatem pensationis adhibeas, praesertim cum potiorum quisque aut miscere se negotiationi non debeat aut pensationem debeat, quod honestas postulat, primus agnoscere.

You shall compel merchants to the necessity of payment, if any belong to our household, if they seem to be exercising the skill of trading, and Christians, who are adherents of the true faith, who wish to help the poor and those placed in necessity, also men under the more powerful men or the more powerful men themselves, if they see to business, especially anyone of the more powerful men, since they either ought not to involve themselves in trade or ought to be first to acknowledge the payment, as honour demands.

A law dealing with the obligations of merchants in the imperial household and Christians helping the poor to pay taxation has been transformed in the Justinianic text into an obligation for merchants in the imperial household to provide for poor Christians, which both reads somewhat awkwardly and sits somewhat uncomfortably under a title dealing with episcopal courts. There are no subsequent constitutions in the *Codex Iustinianus* title that contain an alteration of the law necessitating the insertion of this constitution in its revised form. The existence of changes such as this makes it difficult to generalise about the nature

of changes that Justinian's compilers made to the texts of the imperial constitutions as they found them.

Conclusion

There is evidence that the legal writings of the classical period were considered highly compatible with the legal system of the fourth and fifth century. This to a certain extent indicates that the texts contained in the sixth century *Corpus Iuris Ciuilis* in many areas do not differ significantly, in respect to substance, from the classical originals. However, it appears difficult to reduce the alterations made by the Justinianic compilers to a simple formula. Instead, a case-by-case approach must be adopted. Attention should always be paid to restoring the excerpts contained in the *Digesta*, as far as possible, to their original context. Also, close attention ought to be paid to the *Codex Iustinianus* in order to be aware of relevant changes introduced by Justinian or other later legislators. Indeed, the *Codex Theodosianus* and other late imperial collections of constitutions also provide a possible source for checking post-classical alterations to the law. Legal writings external to the Justinianic tradition should also be utilised wherever possible to check the extent to which the law as contained in the *Corpus Iuris Ciuilis* differs from what can be established by external sources.

Part One: *Infamia*: The Final Conception

Chapter Two: The *Digesta* and *Institutiones*

Before beginning to discuss the development of the legal concept of *infamia*, it is important to define exactly what we mean when we speak of an *infamis* or *infamia* – who were the *infames* in Roman law? What were the consequences of *infamia*?¹ The best place to begin the process of answering these two questions is not at the beginning of Roman legal history, but at the end, with the sixth-century CE *Corpus Iuris Ciuilis*. The *Corpus* is the only complete ‘snapshot’ we possess of Roman law at a particular time, which allows, in theory, the construction of a synchronic understanding of *infamia*. The synchronic understanding of *infamia* derived from this examination will form the basis of the diachronic examination undertaken in the final chapter, which will focus on tracing the history of the legal treatment of those classified as *infames*. It shall there be argued that a ‘core’ of *infamia* can be identified, whereby a consistent group of persons classified as *infames* in the *Corpus Iuris Ciuilis* remains subject to the consequences of Justinianic *infamia* at least as far back as the late Republic.

The obvious starting point in a discussion of *infamia* in the *Corpus Iuris Ciuilis* is the title of the *Digesta* and two titles of the *Codex Iustinianus* that explicitly claim in their headings to deal with *infamia*:

- *Digesta* 3.2: *De his qui notantur infamia*: ‘On those noted with *infamia*’;
- *Codex Iustinianus* 2.11(12): *De causis, ex quibus infamia alicui inrogatur*: ‘The causes, for which *infamia* is imposed on someone’; and
- *Codex Iustinianus* 10.59(57): *De infamibus* ‘On the *infames*’.

¹ Unless otherwise stated, the terms *infamia* and *infames* refer to legal *infamia* and *infames*.

An examination of these titles reveals that, as has been noted by others,² the vocabulary used to designate *infamia* and *infames* is much broader than simply the terms *infamia* or *infamis*. These titles will therefore be used as a basis for identifying the core vocabulary used in the *Corpus* in relation to *infamia*. This core vocabulary will form the foundation for an examination of the remainder of the *Digesta*, *Codex Iustinianus* and the *Institutiones* of Justinian to identify all the cases and consequences of *infamia* contained in the *Corpus*. However, the *Nouellae* of Justinian will not be examined, as the general tendency of this work is to look forward towards the recognition of Byzantine practice, rather than back to pure Roman law.³ As this examination is looking synchronically at the state of the law as promulgated in the *Corpus*, the complex issue of Justinianic interpolations need not be considered. Further, it shall be argued that the way in which *infamia* is referred to in the *Corpus*, especially the widely diverse vocabulary, provides evidence that the extent to which the concept has been ‘doctored’ by the Justinianic compilers is minimal.

This Chapter will examine the *Digesta* and the *Institutiones Iustiniani*; the following Chapter will examine the *Codex Iustinianus*. This division is based on the different authorship of the source material for the three texts. The former are essentially the work of jurists, designed for practitioners of law; whereas the *Codex Iustinianus* contains constitutions issued by Emperors in response to particular issues, which in some cases convey the impression of not being laws at

² See, e.g., M. Kaser, ‘Infamia und ignominia in den römischen Rechtsquellen’ (1956) 73 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 220-78, 246, although Kaser’s list is incomplete: see below.

³ H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (3rd ed., Cambridge, Cambridge Uni. Press, 1972) 496.

all. Rather, they illustrate a preference for rhetorical frameworks over legal precision.⁴

Infamia in the Digesta: Explicit Discussion

As stated above, one title in the *Digesta* refers to *infamia* in its heading: *Digesta* 3.2: *De his qui notantur infamia*: ‘On those noted with *infamia*’. This Chapter shall be examined to determine: (1) the cases of *infamia*, i.e., ‘who were the *infames*?’; (2) what were the consequences of being an *infamis*?; and (3) what vocabulary was used in referring to *infamia* and *infames*?

Digesta 3.2: *De his qui notantur infamia*: ‘On those noted with *infamia*’

Digesta 3.2 occurs within the context of the *Digesta*’s discussion of those who were restricted in their ability to postulate before the Praetor pursuant to the Praetor’s Edict, also known as the *edictum perpetuum*, the document that regulated civil procedure before the Urban Praetor in the city of Rome.⁵

Cases of Infamia in Digesta 3.2: Notantur infamia

Book 3.2 of the *Digesta* explicitly lists the following as *infames*:

- a person dismissed from the army with ignominy;⁶
- one who has appeared on stage for the reason of a stage play or recitation;⁷

⁴ See J. Harries, *Law & Empire in Late Antiquity* (Cambridge, Cambridge Uni. Press, 1999) 42-7 for a more detailed extrapolation of the formation of constitutions and their style. Although discussing the *Codex Theodosianus* for the most part, the same points apply to the *Codex Iustinianus*, which essentially utilises the same source material.

⁵ On the Praetor’s Edict see Jolowicz and Nicholas, *Historical Introduction*, above n. 3, 97-101 and O. Lenel, *Das Edictum Perpetuum* (3rd ed., Leipzig, B. Tauchnitz, 1927), which attempts to reconstruct the text of the Edict.

⁶ *Digesta* 3.2.1 (Julian): ‘*Qui ab exercitu ignominiae causa ab imperatore eoue, cui de ea re statuendi potestas fuerit, dimissus erit*’. The text of the *Digesta* used is that of T. Mommsen, P. Krueger as printed in the English translation edited by A. Watson, *The Digest of Justinian* (Philadelphia, Uni. of Pennsylvania Press, 1985) 4 Vols. All translations are my own unless otherwise indicated.

- one who has practiced the trade of a procurer;⁸
- one who has been judged guilty of *calumnia* ('malicious prosecution') or *praeuaricatio* ('collusion') in a *iudicium publicum* ('public court');⁹
- one who has been condemned in his own name or who has compromised in a case for *furtum* ('theft'), *ui bonorum raptorum* ('robbery with violence'), *iniuria* ('insult'), *de dolo malo et fraude* ('malice and fraud');¹⁰
- one who has been condemned in own name and not in a cross-action in an action for *pro socio* ('partnership'), *tutela* ('tutelage'), *mandatum* ('mandate') or *depositum* ('deposit');¹¹
- a *pater familias* who gives a widowed daughter *in potestate* to be married before the expiration of the customary period of mourning; a man who knowingly marries such a woman; and a *pater familias* who knowingly allows a son *in potestate* to marry such a woman.¹²
- one who enters into two agreements for betrothal or marriage at the same time either on his own or on behalf of one whom he has *in potestate*.¹³

Digesta 3.2 goes on to provide further elaboration on what constitutes these categories.¹⁴

⁷ *Digesta* 3.2.1 (Julian): '*qui artis ludicrae pronuntiandiue causa in scaenam prodierit*'.

⁸ *Digesta* 3.2.1 (Julian): '*qui lenocinium fecerit*'.

⁹ *Digesta* 3.2.1 (Julian): '*qui in iudicio publico calumniae praeuaricationisue causa quid fecisse iudicatus erit*'. On *calumnia* see A. Berger, 'Encyclopedic Dictionary of Roman Law' (1953) 43 *Transactions of the American Philosophical Society* 332-808, 378; on *praeuaricatio*, 648; and on *iudicia publica*, 521.

¹⁰ *Digesta* 3.2.1 (Julian): '*qui furti, ui bonorum raptorum, iniuriarum, de dolo malo et fraude suo nomine damnatus pactusue erit*'. On *furtum* see *Digesta* 47.2; on *ui bonorum raptorum* 47.8; on *iniuria* 47.10; and on *de dolo malo et fraude* see 4.3, for the expression '*de dolo malo et fraude* as a compound, see the *Lex Irnitana* ch 84, l 13 (discussed further in a later Chapter) in J. González, 'The Lex Irnitana: A New Copy of the Flavian Municipal Law' (1986) 76 *Journal of Roman Studies* 147-243, 175: '*... aut d(e) d(olo) m(alo) et [fraud]e, aut furto ...*'.

¹¹ *Digesta* 3.2.1 (Julian): '*qui pro socio, tutelae, mandati, depositi suo nomine non contrario iudicio damnatus erit*'. On *pro socio* see *Digesta* 17.2; on *tutela* 26.10; on *mandatum* 17.1; on *depositum* 16.3.

¹² *Digesta* 3.2.1 (Julian): '*qui eam, quae in potestate eius esset, genero mortuo, cum eum mortuum esse sciret, intra id tempus, quo elugere uirum moris est, antequam uirum elugeret, in matrimonium collocauerit: eamue sciens quis uxorem duxerit non iussu eius, in cuius potestate est: et qui eum, quem in potestate haberet, eam, de qua supra comprehensum est, uxorem ducere passus fuerit*'.

Other Cases by Implication

It is clear from *Digesta* 3.2 that the initial catalogue *de his qui notantur infamia* ('of those who are noted with *infamia*') in 3.2.1 is not exhaustive of the cases of *infamia*.¹⁵ This is clear where it is stated that: 'the crime of fraud (*stellionatus*) imposes *infamia* on the person condemned, even though it is not a public crime'.¹⁶ This both makes it clear that *stellionatus* involves *infamia* (though not listed in *Digesta* 3.2.1) and implies that conviction in a *iudicium publicum* also usually entails such a consequence.

One difficulty that arises in *Digesta* 3.2 is whether a failure to mourn entails *infamia*. Two seemingly contradictory passages on mourning are placed at the end of the Chapter, separated from the main discussion of the prohibition on marriages during the mourning period, although this is the only basis for *infamia* to which they could be pertinent. The first is a passage of Ulpian, stating that a person does not incur *infamia* for failing to mourn parents, children and other agnates or cognates, and that the degree of mourning for them is to be determined by individual *pietas*,¹⁷ reason and suffering of mind.¹⁸ This is followed, after one

¹³ *Digesta* 3.2.1 (Julian): '*quiue suo nomine non iussu eius in cuius potestate esset, eiusue nomine quem quamue in potestate haberet bina sponsalia binasue nuptias in eodem tempore constitutas habuerit*'.

¹⁴ On ignominious discharges: *Digesta* 3.2.2pr-4 (Ulpian); on actors: 3.2.2.5 (Ulpian), 3.2.3 (Gaius) and 3.2.4pr-1 (Ulpian); procurers 3.2.4.2-3 (Ulpian); calumniators 3.2.4.4 (Ulpian) 3.2.15 (Ulpian), 3.2.16 (Paul), 3.2.17 (Ulpian), 3.2.18 (Gaius) and 3.2.19 (Ulpian); those condemned in own name or compromised *furtum, ui bonorum raptorum, iniuria, de dolo malo*: 3.2.4.5 (Ulpian), 3.2.5 (Paul) and 3.2.6pr-4 (Ulpian); *mandatum* and *depositum* 3.2.6.5-7; marriage: 3.2.8 (Ulpian), 3.2.9-10 (Paul), 3.2.11 (Ulpian), 3.2.12 (Paul), 3.2.13pr-4 (Ulpian).

¹⁵ *Digesta* 3.2.1 (Julian).

¹⁶ *Digesta* 3.2.13.8 (Ulpian): '*Crimen stellionatus infamiam irrogat damnato, quamuis publicum non est iudicium*'.

¹⁷ On *pietas* see R. Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge Cambridge Uni. Press, 1994) 105-14.

¹⁸ *Digesta* 3.2.23 (Ulpian).

unrelated passage,¹⁹ by another passage that refers to a disinherited son mourning for his father and mother and to mourning a person who falls in war, even if he is not found.²⁰ The reference to those who have fallen in war could be construed as relevant to the restriction on marriages within the period of mourning. However, the reference to a legal requirement to mourn (*idemque et in matre iuris est*), implying that a failure to do so may have a legal consequence, seems out of place following a passage stating that a failure to mourn does not entail *infamia*.²¹

Consequences of *Infamia* in *Digesta* 3.2

The consequences of being included in the catalogue of *infames* in *Digesta* 3.2 are contained in the preceding title, title 3.1. This title deals with restrictions that were imposed by the Praetor, originally in three Edicts, on the ability of certain categories of persons to postulate (*postulare*) in his court. ‘To postulate is to set forth one’s own claim or the claim of one’s friend before him who presides over judicial authority, or to speak against the claim of another’.²² Each of these three

¹⁹ *Digesta* 3.2.24 (Ulpian): on the non-effect of a *serua*’s occupation on her *fama* following manumission (see further below).

²⁰ *Digesta* 3.2.25 (Papinian).

²¹ External evidence, discussed in a later Chapter, suggests that there was indeed a legal requirement to mourn in classical law: see Vatican Fragments [320]-[321] in S. Riccobono *et al* (eds.), *Fontes Iuris Romani Antejustiniani, pars altera, Auctores* (1940) 463, 535-6. In a section headed *de cognitoribus et procuratoribus* at [320] a passage is quoted that is virtually verbatim the passage in *Digesta* 3.2.1 (Julian), with the exception of an additional phrase ‘*quaeue uirum parentem liberosue suos uti moris est non eluxerit*’ (‘she who has not mourned her husband, parent, her children as is customary’). A passage of book II of Papinian’s *quaestiones* is then referred to (although Papinian is questioned by whoever is referring to him (Ulpian?)), the same book of the *quaestiones* from which *Digesta* 3.2.25 is taken, and placed by O. Lenel, *Palingenesia Iuris Civilis* (Graz, Akademische Druk, 1960) 2 Vols., vol. I, 815 before the *Digesta* passage.

²² *Digesta* 3.1.1.2 (Ulpian): ‘*Postulare autem est desiderium suum vel amici sui in iure apud eum, qui iurisdictioni praeest, exponere: vel alterius desiderio contradicere*’. See also, Berger, ‘Encyclopedic Dictionary’ above n. 9, 639.

Edicts contained different restrictions in relation to postulation that applied to a different specific class of persons:²³

- those who were unable to postulate;²⁴
- those who were able to postulate only for themselves;²⁵ and
- those who could postulate only for themselves and certain other persons.²⁶

In the text of the *Digesta*, the *infames* listed in Chapter 3.2 are explicitly included in the third Edict, i.e. those who can postulate only for themselves and certain other persons.²⁷ The others for whom *infames* are able to postulate are:²⁸

- parents;
- patrons;
- children or parents of a patron;
- children;
- siblings;
- wives;
- parents in law;
- children in law;
- step-parents;
- step-children;
- persons under the *infamis*' tutorship;²⁹ and
- the insane.

²³ *Digesta* 3.1.1.1 (Ulpian).

²⁴ See *Digesta* 3.1.1.3-4 (Ulpian).

²⁵ See *Digesta* 3.1.1.5-7 (Ulpian).

²⁶ See *Digesta* 3.1.1.8-11 (Ulpian).

²⁷ *Digesta* 3.1.1.8 (Ulpian): '*hoc edito continentur etiam alii omnes, qui edicto praetoris ut infames notantur, qui omnes nisi pro se et certis personis ne postulent*' ('This edict contains also all those, who are noted as *infames* by the edict of the Praetor, who may not postulate for anyone except themselves and certain persons').

²⁸ *Digesta* 3.1.1.11 (Ulpian, referring to Pomponius).

²⁹ I.e., a *pupillus* or *pupilla*, a minor under *tutela*.

Infamia and Existimatio

It also appears from *Digesta* 3.2 that *infamia* was conceptualised as affecting a person's *existimatio*. It is stated that the discharge from the army of a person who enlisted to evade public obligations (*munera*) *existimationem non laedit* ('does not harm his *existimatio*').³⁰ Similarly, a penalty imposed beyond that required by the laws *existimationem conseruat* ('conserves *existimatio*').³¹ Deciding when *existimatio* is related to *infamia* is potentially problematic due to the array of meanings it can have. There is an example in *Digesta* 3.2 where *existimatio* means 'an opinion, view, judgement',³² in the case of a woman who has been deceived through an incorrect judgement and who does not seem to have gained possession through *calumnia*.³³ However, the meaning of *existimatio* relevant to *infamia* would appear to be the definition contained in the *Digesta*:

Existimatio est dignitatis inlaesae status, legibus ac moribus comprobatus, qui ex delicto nostro auctoritate legum aut minuitur aut consumitur.

Existimatio is the status of unaffected *dignitas*, sanctioned by laws and morals, which is either diminished or destroyed through the authority of the laws on account of our delict.³⁴

³⁰ *Digesta* 3.2.2.2 (Ulpian): '... est et quartum genus missionis, si quis euitandorum munerum causa militiam subisset: haec autem missio existimationem non laedit ...'.

³¹ *Digesta* 3.2.13.7 (Ulpian): 'Poena grauior ultra legem imposita existimationem conseruat, ut et consitutum et responsum'. Examples are subsequently given of relegation instead of the required mulcting of property, where 'dicendum erit duriori sententia cum eo transactum de existimatione eius idcircoque non esse infamem' and the case of an excessive monetary penalty, where 'uerum hanc rem existimationem ei non conseruassem, quamuis si in poena non pecuniaria eum onerasset, transactum cum eo uidetur'.

³² See *Oxford Latin Dictionary* (Clarendon Press, Oxford, 1962), entry 2 under 'existimatio', 644.

³³ *Digesta* 3.2.18 (Gaius): 'Ea, quae falsa existimatione decepta est, non potest uideri per calumniam in possessione fuisse'.

³⁴ *Digesta* 50.13.5.1 (Callistratus); P. Garnsey, *Social Status and Legal Privilege* (Oxford, Clarendon Press, 1970) 228.

This passage then goes on to discuss the diminishment or destruction of *existimatio*. The former is said to result:³⁵

Quotiens manente libertate circa statum dignitatis poena plectimur: sicuti cum relegatur quis uel cum ordine mouetur uel cum prohibetur honoribus publicis fungi uel plebeius fustibus caeditur uel in opus publicum datur uel cum in eam causam quis incidit, quae edicto perpetuo infamiae causa enumeratur.

As often as, though liberty remains, we are punished with a penalty in respect to the status of our *dignitas*: such as when someone is relegated or removed from the *ordo* or when someone is prohibited from enjoying public *honores* or a plebeian is beaten with cudgels or sent into the public works or when someone falls in a category, which is enumerated in the perpetual Edict by reason of *infamia*.³⁶

Infamia therefore results in less than the complete destruction of *existimatio*, or loss of *libertas*, which occurs with a *magna capitis diminutio*, such as interdiction from fire and water, deportation, or the assignment of a plebeian to the mines or mine works.³⁷

Existimatio in this passage has been variously translated as ‘status’³⁸ and ‘good name’.³⁹ In this regard, it is interesting to note that, through its definition as *dignitas inlaesa*, this passage conceptualises *existimatio* as something very similar to *caput*,⁴⁰ although having a moral, as well as legal, aspect, hence the reference to both *leges* and *mores*. As such, it appears to refer to a person’s ‘status’ or ‘condition’ in terms of their basic human dignity, as Kaser says ‘der Zustand

³⁵ For a discussion of this passage, see Kaser, ‘Infamia und Ignominia’, above n. 2, 265-7.

³⁶ *Digesta* 50.13.5.2 (Callistratus).

³⁷ *Digesta* 50.13.5.3 (Callistratus): ‘Consumitur uero, quotiens magna capitis minutio interuenit, id est cum libertas adimitur: ueluti cum aqua et igni interdicitur, quae in persona deportatorum euenit, uel cum plebeius in opus metalli uel in metallum datur: nihil enim refert, nec diuersa poena est operis et metalli, nisi quod refugae operis non morte, sed poena metalli subiciuntur’.

³⁸ In Watson (ed.), *Digest*, above n. 6, 930.

³⁹ Garnsey, *Social Status and Legal Privilege*, above n. 34, 227-8.

unverletzter Menschenwürde'.⁴¹ Nevertheless, *existimatio* is also related to a person's reputation, as is clear from the parallel between the use of the terms *existimatio* and *fama*, which are used in a very similar way in *Digesta* 3.2.⁴² For example, it is stated that the *fama* of a *libertina* is not harmed by her occupation during slavery.⁴³ Equally, as will be seen below, the expression *integra fama* can be used for a person who has not been affected by *infamia*.

The Vocabulary of *Infamia* in *Digesta* 3.2⁴⁴

An examination of the terminology used in *Digesta* 3.2 shows that *infamia* was a polyonymous concept to the Roman jurist, with the following words/phrases being used to describe becoming an *infamis*:

- *infamia* with several verbs (*laborare*, *facere* and *importare*) mentioned only once;⁴⁵
- the phrase *infamia notari/notare*;⁴⁶
- the phrase *infamia irrogari/irrogare*;⁴⁷

⁴⁰ On *caput* as a legal *status*, common to all, see Berger, 'Encyclopedic Dictionary', above n. 9, 381.

⁴¹ 'The condition of undamaged human dignity': Kaser, 'Infamia und Ignominia', above n. 2, 266.

⁴² Contrast *Oxford Latin Dictionary*, above n. 32, entries 5 and 6 under '*fama*', 674, with entries 2 and 3 under '*existimatio*', 644.

⁴³ *Digesta* 3.2.23 (Ulpian).

⁴⁴ See, for a perspective coming from the opposite direction, Garnsey, *Social Status and Legal Privilege*, above n. 34, Ch 9 'The Vocabulary of Privilege', 221 *et seq.*

⁴⁵ *Digesta* 3.2.6.2 (Ulpian): If someone is condemned in another name, he does not '*laborat infamia*'; 3.2.13.6 (Ulpian): An arbiter appointed under a *compromissum* does '*infamiam non facit*'; 3.2.22pr (Ulpian) a beating with cudgels '*infamiam non importat*'.

⁴⁶ *Digesta* 3.2 – Title; 3.2.1pr (Julian): someone who falls within the categories listed is said '*infamia notatur*'; 3.2.2pr (Ulpian): even a general dismissed by the *princeps* ignominiously '*infami esse notatum*'; 3.2.6.2 (Ulpian): certain persons not condemned in their own name '*nec ... infamia notabuntur*'; 3.2.11.3 (Ulpian): a woman who marries after her husband has died '*infamia notabitur*'; 3.2.23pr (Ulpian): a person who has not mourned '*non notatur infamia*'.

⁴⁷ *Digesta* 3.2.13.7 (Ulpian): from a heavier penalty '*infamia non inrogatur*'; 3.2.13.8 (Ulpian): '*stellionatus infamiam irrogat*'.

- *notari* on its own;⁴⁸
- the phrase *ignominia notari*;⁴⁹
- the phrase *ignominia irrogari*;⁵⁰
- the phrase *existimationem laedere*;⁵¹ and
- a negative effect upon *fama*.⁵²

The following terms are used to describe an *infamis*:

- *infamis* with various verbs (*esse, fieri* and *habere*);⁵³
- *famosus* with various verbs (*esse, facere* and *habere*);⁵⁴ and

⁴⁸ *Digesta* 3.2.2pr (Ulpian): a general dismissed by the *princeps* ignominiously ‘*notatur*’; 3.2.3 (Gaius): a person who hires himself to appear on stage, but does not so appear ‘*non notatur*’; 3.2.4.3 (Ulpian): a *seruus* who kept prostitutes is said ‘*notari*’ after manumission; 3.2.4.4 (Ulpian): a calumnator ‘*notatur*’; 3.2.6.1 (Ulpian): a person is thought ‘*notari*’ from the time that an appeal lapses, ‘*non retro notatur*’; 3.2.6.3 (Ulpian): a person can beg off an action without money lest ‘*erit notatus*’; 3.2.6.4 (Ulpian): a person who makes a pact by the Praetor’s order ‘*non notatur*’; 3.2.6.4a (Ulpian): a person who swears that they have not committed an offence ‘*non erit notatus*’; 3.2.6.5 (Ulpian) persons condemned for *mandatum* ‘*notatur*’; 3.2.7pr (Paul): a person condemned in actions arising from contract ‘*notatur*’, but for pact ‘*non notatur*’; 3.2.11.4 (Ulpian): *notatur*; 3.2.12pr (Paul): a *filius familias* who marries at his *pater familias*’ orders ‘*non notatur*’; 3.2.13pr (Ulpian): *notabitur*; 3.2.13.1 (Ulpian): A man who marries a woman within the mourning period ‘*notatur*’; 3.2.13.4 (Ulpian): Since an act is ‘*notetur*’, a person who arranges a marriage or betrothal with a prohibited category of woman ‘*erit notatus*’; 3.2.15pr (Ulpian): A woman who claims possession for an unborn child through *calumnia* ‘*[n]otatur*’; 3.2.19pr (Ulpian): A woman who has been put in possession through *calumnia* ‘*notatur*’.

⁴⁹ *Digesta* 3.2.11.4 (Ulpian): a *pater familias* who allows a proscribed marriage is said ‘*notari ignominia*’.

⁵⁰ *Digesta* 3.2.20pr (Papinian): a statement ‘you have instigated a suit by a clever lie’ seems to increase *pudor* rather than ‘*ignominia ... irrogari*’.

⁵¹ *Digesta* 3.2.2.2 (Ulpian): ‘... *est et quartum genus missionis, si quis euitandorum munerum causa militiam subisset: haec autem missio existimationem non laedit ...*’.

⁵² *Digesta* 3.2.24 (Ulpian): *Imperator Seuerus rescipsit non offuisse mulieris fama quaestum eius in seruitute factum.*

⁵³ *Digesta* 3.2.2.2 (Ulpian): a soldier ignominiously discharged is ‘*inter infames efficit*’; 3.2.2.3 (Ulpian) a soldier condemned under the *Lex Iulia de adulteriis* ‘*infamis est*’; 3.2.2.5 (Ulpian): A person who appears on stage ‘*infamis est*’; 3.2.4.5 (Ulpian): persons condemned in their own name in *furtum, ui bonorum raptorum*, and *de dolo malo* ‘*infames sunt*’; 3.2.6.1 (Ulpian): someone ‘*non retro infamis est*’ after the period of appeal has lapsed; 3.2.6.6 (Ulpian): a heir condemned in his own name of *depositum* or *mandatum* ‘*infamis fit*’; 3.2.6.7 (Ulpian): persons condemned in a *iudicium contrarium* ‘*non erit infamis*’ (an *iudicium (actio) contrarium* is a counterclaim, see M. Kaser, *Roman Private Law* (2nd ed., Trans. R. Dannenberg, London, Butterworths, 1968), 166); 3.2.13.7 (Ulpian) a person inflicted with a greater penalty than that allowed by a statute is said ‘*non esse infamem*’; 3.2.21pr (Paul): on the issue of whether witnesses whose testimony had not been supported by the judgment were ‘*inter infames habentur*’, it was said that there was no reason why they ‘*infamium loco habentur*’.

⁵⁴ *Digesta* 3.2.2.5 (Ulpian): It is said that those who appear on stage for reward ‘*famosos esse*’; 3.2.6.1 (Ulpian) a person condemned of *furtum* or another *acito famosa* ‘*inter*

- *ignominiosus*.⁵⁵

The adjective *famosus* is also used to qualify *actio*⁵⁶ to indicate civil judicial procedures that entail *infamia* as a consequence. Only *furtum* and actions arising from contract are mentioned specifically, but from these it is possible to extend the term *actio famosa* to the other actions mentioned in *Digesta* 3.2.1.⁵⁷

It is important to note that, even in *Digesta* 3.2 itself, it becomes apparent that at least one of the terms, *ignominia*, used in that title to describe *infamia* carries more than one legal meaning. *Ignominia* is used to describe *infamia* in *Digesta* 3.2.11.4, where a *pater familias* who allows a marriage within the period of mourning is said *notari ignominia* ('to be marked with *ignominia*'), which is clearly describing the same action that in *Digesta* 3.2.1 results in a person *notatur infamia* ('being noted with *infamia*'). Similarly, in *Digesta* 3.2.20pr it is stated that a person who appears to have instituted a suit by a lie is not *ignominia ... irrogari* ('to be inflicted with *ignominia*'). In a discussion of *qui notantur infamia*, this must also refer to *infamia*. However, there are many references, also

famosos habetur'; 3.2.6.6 (Ulpian): If I condemn you of *mandatum* '*famosum facio*'; 3.2.14pr (Paul): an heir not condemned in own his own name '*non est famosus*'.

⁵⁵ *Digesta* 3.2.4pr (Ulpian): musicians, athletes, charioteers, those who sprinkle horses with water and those who participate in contests run by the state are not '*ignomiosi habentur*'.

⁵⁶ *Digesta* 3.2.6.1 (Ulpian): '*sed si furti uel aliis famosis actionibus quis condemnatus prouocauit, pendente iudicio nondum inter famosos habetur ...*'; 3.2.7 (Paul): '*In actionibus, quae ex contractu proficiscuntur, licet famosae sint ...*'.

⁵⁷ While, as Crawford notes in his commentary on the *Lex Irnitana*, contained in González, above n. 10, at 228, no text explicitly states that all the actions contained in *Digesta* 3.2.1 (Julian) are the *actiones famosae*, the statement in *Digesta* 3.2.6.1(Ulpian), referring to *furtum* and '*aliis actionibus famosis*' makes a very strong case for the inference. Especially in a context where the delicts listed in *Digesta* 3.2.1 had just been reiterated in 3.2.5, and the discussion in 3.2.6.1 clearly follows on from this. Similarly, the statement in *Digesta* 3.2.7 (Paul) that actions arising from contract are *famosae*, although those who make pacts are not '*notantur*' clearly would pick up *pro socio*, *mandatum* and *depositum* in 3.2.1 (Julian) (on these three acitons as arising from contract, see Berger, 'Encyclopedic Dictionary', above n. 9, 413), where it is also stated that a pact does not result in *infamia*. This only leaves *tutela* as an *actio* in 3.2.1 not specifically mentioned as an *actio famosa*. In light of the inclusion of this last *actio* amongst the other *actiones* for which there is strong evidence of the title *actio famosa*, it is very difficult to argue against its inclusion.

in *Digesta* 3.2, to a soldier who has been *missus ignominiae causa* ('dismissed with *ignominia*') or undergoes *ignominiosa missio* ('ignominious dismissal').⁵⁸

Ignominia is clearly not synonymous with *infamia* in this context as there is a discussion of what constitutes being dismissed with *ignominia*, so as to incur *infamia*.⁵⁹

Something that is immediately apparent is that all of the vocabulary used in relation to *infamia* can also convey the meaning of reputation. This is perhaps not surprising given that the various meanings carried by the word *infamia* all convey that sense.⁶⁰

Vocabulary of *Infamia*⁶¹

Word	Meanings
<i>Infamia</i>	'Bad reputation, ill-fame, notoriety'; 'defamation, reproach'; '(w. gen.) the reproach of or stigma of'; '[d]iscredit, disgrace'; 'official disgrace (involving loss of certain rights)'; '[a] scandalous action, quality or circumstance, disgrace, dishonour, etc.'; '(as a term of abuse)'.
<i>Notari/notare</i>	'To mark ... as a sign of disapproval'; 'to stigmatize ...

⁵⁸ See, *Digesta* 3.2.1 (Julian): '... qui ab exercitu *ignominiae causa* ab imperatore eoue ...'; *Digesta* 3.2.2pr (Ulpian): '... *ignominiae causa* ab imperatore missum hac nota laborare ... si princeps dimiserit et adiecerit *ignominiae causa* se mittere ...'; *Digesta* 3.2.2.2 (Ulpian): '*Ignominia causa missum ... est causaria ... est ignominiosa. Ignominiosa autem missio totiens est ... quotiens is qui mittit addidit nominatim ignominiae causa se mittere ... licet non addidisset ignominiae causa se eum exauctorasse*'. *Digesta* 3.2.2.3 (Ulpian) '... ut etiam ipsa sententia [Lex Iulia de adulteriis] eum sacramento *ignominiae causa* soluat'. *Digesta* 3.2.2.4 (Ulpian): '*Ignominia autem missis ...*'.

⁵⁹ *Digesta* 3.2.2pr-4 (Ulpian).

⁶⁰ See *Oxford Latin Dictionary*, above n. 32, entries under '*infamia*', 893: '[b]ad reputation, ill-fame, notoriety'; 'defamation, reproach'; '(w. gen.) the reproach of or stigma of'; '[d]iscredit, disgrace'; 'official disgrace (involving loss of certain rights)'; '[a] scandalous action, quality or circumstance, disgrace, dishonour, etc.'; '(as a term of abuse)'.

⁶¹ See *Oxford Latin Dictionary*, above n. 32, entries under '*infamia*', 893; entries 2-4 under '*noto*', 1193; entry 2 under '*ignominia*', 824; entry 3 under '*existimatio*'; entries 5-6 under '*fama*', 674; entries under '*infamis*', 893-4; entries 2-3 under '*famosus*'; entries under '*ignominiosus*', 824.

	to register formal disapproval ... to censure, stigmatize'; 'to diversify with marks, stain, scar'.
<i>Ignominia</i>	'Loss of good name, ignominy, disgrace'; 'a particular occasion of disgrace'.
<i>Existimatio</i>	'The opinion held about a person, his reputation, name (usu in favourable sense)'.
<i>Fama</i>	'The report which a person has, one's reputation'; '(w gen) a reputation for a specified quality'; 'One's good name, reputation ... ill repute, notoriety'.
<i>Infamis</i>	'(of persons, their actions, etc.) Having a bad name, of ill repute'; '[g]iven a bad name, defamed, disgraced ... officially disgraced (with loss of rights) ... smirched by suspicion, "under a cloud" ... suspected of misconduct (with)'; '[d]eserving of ill repute, of shameful badness, infamous, discreditable, etc.'
<i>Famosus</i>	'Ill spoken of, notorious, infamous ... (spec) notorious (for immorality), of ill fame'; 'Defamatory, libellous; (leg, of an action, involving infamy'.
<i>Ignominiosus</i>	'Suffering from <i>ignominia</i> ... involving <i>ignominia</i> '; '[c]overed with ignominy, disgraced'; '[i]nvolving shame, disgraceful, discreditable'.

The fact that this vocabulary can be used in this way presents the potential problem that it may be difficult to discern at times whether the particular legal cases and consequences of *infamia* are being discussed, or rather a broader, less specific, meaning of 'bad repute' etc. Similarly, some words, especially *notare*, can bear a variety of meanings that have no relation to *infamia* whatsoever.⁶²

Importantly, the very fact that such a wide variation in terminology can be found for what is essentially the same concept, especially as all the passages here are discussing *infamia* in the context of the Praetor's Edict, suggests that the compilers have not imposed a uniform concept of *infamia* upon the material before them. If the compilers had imposed a uniform concept, it can be supposed that they would have used a uniform vocabulary.

⁶² See entries under '*noto*' in *Oxford Latin Dictionary*, above n. 32, 1193.

It is clear that the jurists were aware of both a legal and extra-legal diminution of reputation in association with activities or actions that resulted in *infamia*.⁶³ This means that our reasoning below often becomes circular, i.e., often we only know that one of the terms or phrases above refers to *infamia* as a legal concept only because elsewhere, usually *Digesta* 3.2, we are explicitly told that the legal concept of *infamia* is involved.

Other Infames in the Digesta: Cases, Consequences and Vocabulary

Having deduced from *Digesta* 3.2 a base vocabulary for *infamia* and *infames*, the next step is to examine the usage of this vocabulary and the discussion of the cases of *infamia*, identified in this title of the *Digesta*, throughout the remainder of the text in order to determine what other cases of *infamia*, if any, it contains. The vocabulary used shall also be examined to determine how *infamia* is described. Such discussion is, unfortunately, lengthy; however, it serves two purposes: to group together different ways of referring to *infamia* to facilitate the discussion to be undertaken in later Chapters as to the evolution of the concept; and as an explicit discussion spelling out how we can say that *this* example before us is or is not an example of *infamia* in circumstances where, as will be seen, the vocabulary used in *Digesta* 3.2 to discuss *infamia* is also used in other places in the *Digesta* for different purposes.

The vocabulary in the *Digesta* can be divided into two groups: references to cases and consequences of *infamia* using the vocabulary identified in *Digesta* 3.2, and those cases and consequences referred to using vocabulary beyond that already identified. Each of these categories is susceptible to further subdivision in

⁶³ *Digesta* 37.15.2pr (Julian): *‘licet enim uerbis edicti non habeantur infames ita*

accordance with whether the cases and consequences of *infamia* being referred to are those adumbrated in *Digesta* 3.2, or new ones. Where the vocabulary of *infamia* outlined above is utilised in a context *not* referring to cases or consequences highlighted in *Digesta* 3.2, it can become an issue as to whether the meaning that is being conveyed refers to *infamia*, or whether instead another meaning should be attached to the words used.

The Vocabulary of *Digesta* 3.2

Infamia

Where the consequences of *infamia* are discussed in the *Digesta* title preceding 3.2, it can be inferred that what is being referred to is *infamia* as adumbrated in *Digesta* 3.2. In this context, it is stated that persons can be forbidden from making an application for a reason ‘not imposing *infamia*’ (*infamiam non irrogat*).⁶⁴

Where the term *infamia* is used in relation to actions for the removal of *curatores* and *tutores*, it is usually straightforward to infer that the meaning conveyed by *infamia* in this context is that of *Digesta* 3.2. In this regard, it is noted that the *praefectus urbi* has jurisdiction over *curatores* and *tutores* who deserve more severe punishment than would normally be provided by the *infamia* that follows *de suspecto* proceedings.⁶⁵

condemnati, re tamen ipsa et opinione hominum non effugiunt infamiae notam’.

⁶⁴ *Digesta* 3.1.9 (Papinian).

⁶⁵ *Digesta* 1.12.1.7 (Ulpian): ‘*Solent ad praefecturam urbis remitti etiam tutores siue curatores, qui male in tutela siue cura uersati grauiore animaduersione indigent, quam ut sufficiat eis suspectorum infamia*’. Examples given are people who obtain the tutorship by paying money or obtain it for another for a bribe; people who understand the amount of the ward’s estate through consultation over the amount or people who have manifestly alienated the ward’s property in a fraudulent way. *De suspecto* proceedings (more fully *de suspecto tutore cognoscere*) were special proceedings held to remove a *tutor* or *curator* from guardianship following an action rendering them *suspectus*, such as

Similarly, where the term *infamia* is used in relation to the consequences following condemnation in an *actio famosa*, it is straightforward to infer that this is *infamia* as in *Digesta* 3.2. Thus, it is stated that *infamia* follows a conviction for *furtum*, included among the *actiones famosae* in *Digesta* 3.2,⁶⁶ and is a consequence that cannot be avoided by a *praeses prouvinciae* ('a provincial judge').⁶⁷ *Actiones* involving *infamia* are also given priority over those involving a large sum of money.⁶⁸

Where the *Digesta* states that not all sentences, but only those in *iudicia publica* and *priuata* involving *infamia*, such as *furtum*, *ui bonorum raptorum* or *iniuriarum* (*actiones famosae* in *Digesta* 3.2),⁶⁹ result in *infamia*, there is a clear reference to legal *infamia*.⁷⁰ This statement confirms the supposition, made on the basis of the reference to *stellionatus* in *Digesta* 3.2.13.8, that conviction in a *iudicium publicum* involved *infamia*. *Infamia* is explicitly stated as the consequence of one of these *iudicia publica*, the crime of *ambitus* ('electoral bribery') in relation to municipal magistracies.⁷¹

Context also makes it clear that the reference to *infamia* in a passage dealing with *restitutio in integrum* is to the *infamia* in *Digesta* 3.2. It is stated that if a person

immoral conduct or enmity to the *pupillus*: see Berger, 'Encyclopedic Dictionary', above n. 9, 749.

⁶⁶ *Digesta* 3.2.1 (Julian).

⁶⁷ *Digesta* 47.2.64 (Macer): '*Non poterit praeses prouvinciae efficere, ut furti damnatum non sequatur infamia*'.

⁶⁸ *Digesta* 50.17.104 (Ulpian): '*Si in duabus actionibus alibi summa maior, alibi infamia est, praeponenda est causa existimationis. Ubi autem aequiperant famosa iudicia, etsi summam imparem habent, pro paribus accipienda sunt*'.

⁶⁹ *Digesta* 3.2.1 (Julian).

⁷⁰ *Digesta* 48.1.7pr (Macer): '*Infamem non ex omni crimine sententia facit, sed ex eo, quod iudicii publici causam habuit. Itaque ex eo crimine, quod iudicii publici non fuit, damnatum infamia non sequetur, nisi id crimen ex ea actione fuit, quae etiam in priuato iudicio infamiam condemnato inportat, ueluti furti, ui bonorum raptorum, iniuriarum*'.

famoso iudicio condemnatus ('having been condemned in a *famosum iudicium*') has undergone *in integrum restitutio*, this *infamia eximi* ('frees [him] from *infamia*').⁷² Preceding this statement, it is noted that *in integrum restitutio* was applicable to those listed in the third Edict pertaining to postulation, who include *infames*.⁷³

The term *infamia* is also on its own to refer to a legal penalty. Temporary relegation did not *ipso facto* involve *infamia*, but rather an inquiry should be made into the cause of the relegation to determine whether it involved perpetual *infamia*.⁷⁴ This can only mean *infamia* as a particular legal consequence, as a law could have no control over how long a person was subject to ill repute due to a conviction.

A more complicated usage of the term *infamia* occurs in a passage of the *Digesta* that provides a list of persons excluded from giving evidence against an accused:

- a person freed by the accused or his or her parent;⁷⁵
- *impuberes*;⁷⁶
- someone condemned in a public court and not having undergone *restitutio in integrum*;⁷⁷

⁷¹ *Digesta* 48.14.1.1 (Modestinus): 'Quod si in municipio contra hanc legem magistratum aut sacerdotium quis petierit, per senatus consultum centum aureis cum infamia punitur'.

⁷² *Digesta* 3.1.1.10 (Ulpian): '... si quis famoso iudicio condemnatus per in integrum restitutionem fuerit absolutus, Pomponius putat hunc infamia eximi'. On the terminology 'famosum iudicium' see further below.

⁷³ *Digesta* 3.1.1.9 (Ulpian).

⁷⁴ *Digesta* 49.16.4.4 (Arrius Menander) (discussing when someone is disqualified from military service): 'Ad tempus relegatus si expleto spatio fugae militem se dedit, causa damnationis quaerenda est, ut, si contineat infamiam perpetuam, idem obseruetur, si transactum de futuro sit et in ordinem futuro sit et in ordinem redire potest et honores petere, militiae non prohibetur'.

⁷⁵ *Digesta* 22.5.3.5 (Callistratus): '... qui se ab eo parente eius liberauerit ... '.

⁷⁶ *Digesta* 22.5.3.5 (Callistratus): '... quiue impuberes erunt ... '.

⁷⁷ *Digesta* 22.5.3.5 (Callistratus): '... quiue iudicio publico damnatus erit qui eorum in integrum restitutus non erit ... '.

- someone in public custody;⁷⁸
- someone who has hired out his services to fight beasts;⁷⁹
- someone who is or has been a female prostitute;⁸⁰ and
- someone judged or convicted of taking money for giving or not giving testimony.⁸¹

It is stated that people are included in this list *nam quidam propter reuerentiam personarum, quidam propter lubricum consilii sui, alii uero propter notam et infamiam uitae suae* ('some on account of reverence for persons, some on account of their insecure judgement, some on account of the *nota* and *infamia* of their lives'). The prohibition on giving evidence against a patron appears to fit the category of *reuerentia personarum*, and the prohibition on *impuberes* giving evidence appears to fit that of those prohibited on the basis of *lubricus consilii*. Similarly, beast fighters, those convicted either in public courts or of receiving bribes in relation to evidence appear to be those included on account of the *nota et infamia suae uitae*.⁸² However, do *nota* and *infamia* here mean the legal concept of *infamia*, such as that contained in *Digesta* 3.2 (which contains no reference to a restriction on giving evidence)? It seems unlikely as, although there does appear to be, with perhaps some exceptions, a prohibition on *infames* accusing (see below), to use both *nota*⁸³ and *infamia* to refer to legal *infamia* would be tautologous and the use of the qualifying genitive *uitae suae* ('of their lives')

⁷⁸ *Digesta* 22.5.3.5 (Callistratus): '... quiue in uinculis custodiae publica erit ...'.

⁷⁹ *Digesta* 22.5.3.5 (Callistratus): '... quiue ad bestias ut depugnaret se locauerit ...'.

⁸⁰ *Digesta* 22.5.3.5 (Callistratus): '... quaeue palam quaestum faciet feceritue ...'.

⁸¹ *Digesta* 22.5.3.5 (Callistratus): '... quiue ob testimonium dicendum uel non dicendum pecuniam accepisse iudicatus uel conuictus erit'.

⁸² See *Digesta* 3.1.1.5 (Ulpian) where beast fighters and calumniators are referred to as '*in turpitudine notabiles*'.

⁸³ On the use of '*nota*' in relation to *infamia*, see further below.

suggests that what is being referred to is the general notoriety of their way of life in Roman ways of thinking, rather than their legal status.

Another case where it is difficult to judge whether it is the legal concept of *infamia* that is being discussed is in the *Digesta*'s discussion of the Edict *quod metus causa gestum erit*,⁸⁴ pursuant to which the Praetor does not hold actions valid that have been done under duress.⁸⁵ In discussing what constitutes duress, or *metus*, it is stated that *[n]ec timorem infamiae hoc edicto contineri Pedius dicit* ('Pedius says that fear of *infamia* is not contained in this Edict').⁸⁶ There is nothing in the *Digesta* to indicate whether the use of *infamia* here equates to the legal concept, or merely a bad reputation.⁸⁷

Where the *Digesta* discusses a situation where a person, who promises a *dos* when it is most convenient to pay it, is required to pay it as soon as possible *sine turpitudine et infamia*,⁸⁸ it is likely that the term *infamia* means the legal concept. This is because the most inopportune time that can be envisaged for the payment of a sum of money would be when there is an inability to pay, which could lead to insolvency if the person were to be forced to pay. External evidence indicates that the procedure *bonorum uenditio*, utilised in cases of insolvency, resulted in the debtor becoming an *infamis*.⁸⁹ Hence, the most likely interpretation of this

⁸⁴ *Digesta* 4.2, see also Kaser, *Roman Private Law*, above n. 53, 49 and Berger, 'Encyclopedic Dictionary', above n. 9, 581-2.

⁸⁵ *Digesta* 4.2.1 (Ulpian).

⁸⁶ *Digesta* 4.2.7 (Ulpian).

⁸⁷ The Watson (ed.), *Digest*, above n. 6, translation leaves '*infamiae*' as '*infamia*', suggesting the legal concept, vol. 1, 113.

⁸⁸ *Digesta* 23.3.79.1 (Labeo): '*Pater filiae nomine centum doti ita promisit "cum commodissimum esset". Ateius scripsit Seruium respondisse, cum primum sine turpitudine et infamia dari possit, deberi*'.

⁸⁹ Gaius, *Institutiones* 2.154: a slave is often instituted as an heir where the testator suspects insolvency *id est ut ignominia, quae acciit ex uenditione bonorum*' attaches to the slave: on insolvency see D. Johnston, *Roman Law in Context* (Cambridge, Cambridge Uni.

passage is that the promisor had to pay as soon as it was possible to do so without becoming insolvent. The pairing of *turpitude* and *infamia* would thus refer to social stigma (*turpitude*)⁹⁰ and a legal consequence (*infamia*).

Another ambiguous usage of the term *infamia* occurs in a discussion of the grounds for manumission of a slave, where it is a just cause of manumission that a slave has saved their master ‘*periculo uitae infamiaee*’ (‘from danger to life or of *infamia*’).⁹¹ There seems no intrinsic reason, and no reasoning is provided in the *Digesta*, why this should be confined to the legal concept of *infamia*, rather than a wider concept of ill repute.

A particularly interesting passage states that actions for *iniuria* and *furtum*, both *actiones famosae* in *Digesta* 3.2,⁹² are not granted against patrons and parents as, although they are not rendered *infames* through such actions, they do not escape the *nota infamiae* in either the matter itself or the opinion of men.⁹³ This passage provides clear evidence, if any were needed, that the legal concept of *infamia* sat beside a wider, social, concept of *infamia* as ill repute.

Another interesting passage is in relation to a person who is to be dealt with severely by the Praetor *ob infamiam suam et egestatem* (‘on account of his

Press, 1999) 108-10 and J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam, North-Holland Publishing Co, 1976), 108-10, on *venditio bonorum* see also W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd ed., Cambridge, Cambridge Uni. Press, 1963) 402-4.

⁹⁰ See *Oxford Latin Dictionary*, above n. 32, entry 2 under ‘*turpitude*’, 1994.

⁹¹ *Digesta* 40.2.9pr (Marcian): ‘*Iusta causa manumissionis est, si periculo uitae infamiaee dominum seruus liberauerit*’. Translated as *infamia* in Watson (ed.), *Digest*, vol. 3, 426, suggesting the legal concept.

⁹² *Digesta* 3.2.1 (Julian).

⁹³ *Digesta* 37.15.2pr (Julian): ‘*licet enim uerbis edicti non habeantur infames ita condemnati, re tamen ipsa et opinione hominum non effugiunt infamiae notam*’.

infamia and poverty’) he has no fear of an action for *iniuria*.⁹⁴ It is probable that the term *infamia* could here refer to the legal concept, which was a penalty for *iniuria*,⁹⁵ and which, consequently, a person already an *infamis* would not fear.

As will be discussed below, it appears that *infames* were prohibited from holding offices, including a position in the decurionate. This prohibition provides a rationale for a passage stating that *infamia* does not exempt a person of the need to perform public *munera*, and suggests strongly that it is referring to the legal concept.⁹⁶

The term *infamia* is also used extensively in provisions dealing with *iniuria* and contumelies, not as a penalty, but rather as an equivalent to the modern ‘defamation’.⁹⁷ In this context, it clearly refers to a person’s reputation. In this context, all *iniuria* is said to pertain, *inter alia*, *ad infamiam* (‘to *infamia*’), such as *cum pudicitia adtemptatur* (‘when chastity is assailed’).⁹⁸ The term *infamia* is also used in relation to books pertaining to a person’s disgrace,⁹⁹ defining what loud shouting creates liability for *iniuria*, i.e. only that *ad infamiam uel inuidiam alicuius* (‘to the *infamia* and odium of another’);¹⁰⁰ a person following close

⁹⁴ *Digesta* 47.10.35 (Ulpian): ‘*Si quis iniuriam atrocem fecerit, qui contemnere iniuriarum iudicium possit ob infamiam suam et egestatem, praetor acriter exequi hanc rem debet et eos, qui iniuriam fecerunt, coercere*’

⁹⁵ *Digesta* 3.2.1 (Julian).

⁹⁶ *Digesta* 48.22.7.22 (Ulpian): ‘*ergo et si honoribus quis in poenam fuerit prohibitus, poterit dici, si honores isti habuerunt mixtam muneris grauem impensam, infamiam illi ad hoc non profuturam*’.

⁹⁷ On *iniuria* see: *Digesta* 47.10; Thomas, *Textbook*, above n. 89, 369-72; Kaser, *Roman Private Law*, above n. 53, 215 and Buckland, *Textbook*, above n. 89, 589-92.

⁹⁸ *Digesta* 47.10.1.2-3 (Ulpian): ‘*omnemque iniuriam aut in corpus inferri aut dignitatem aut ad infamiam pertinere ... ad infamiam, cum pudicitia adtemptatur*’.

⁹⁹ *Digesta* 47.10.5.9 (Ulpian): ‘*Si quis librum ad infamiam alicuius ...*’.

¹⁰⁰ *Digesta* 47.10.15.5 (Ulpian): ‘*Sed quod adicitur a praetore “aduersos bonos mores” ostendit non omnem in unum collatam uociferationem praetorem notare, sed eam, quae bonis moribus improbat, quaeque ad infamiam uel inuidiam alicuius spectaret*’.

behind reveals *infamia*;¹⁰¹ the Praetor acts *ne quid infamandi causa fiat* ('lest anything occur for the sake of defaming');¹⁰² the Praetor forbids anything *ad infamiam alicuius fieri* ('to the defamation of another to happen');¹⁰³ the actions *quae ad infamiam alicuius fiunt* ('that are to another's disrepute') giving rise to *iniuria*.¹⁰⁴ Where, however, the term *infamia* is used for the consequence for the perpetrator of *iniuria*, it is the legal concept that is being discussed. In this regard, shouting at a judge in a court is also stated to result in *infamia*.¹⁰⁵

Although not included in *Digesta* 3.2, it appears that the action for the violation of a sepulchre resulted in *infamia*,¹⁰⁶ as it is stated that the *actio infamiam irrogat* ('the action imposed *infamia*'), a terminology paralleled in *Digesta* 3.2.

Actiones Famosae

The terminology *actiones famosae* is also used in the *Digesta* outside title 3.2 for *actiones*, condemnation for which entailed *infamia*. It appears that there was a hesitancy to grant *actiones famosae*, not evident in *Digesta* 3.2. This was true both in general and in relation to granting *actiones* to particular persons against certain other persons.

The *Digesta* states that, in general, where a person has been deceived without fault, the Praetor should grant *restitutio in integrum, quam actionem famosam*

¹⁰¹ *Digesta* 47.10.15.22 (Ulpian): '... *adsiduo enim frequentia quasi praebet nonnullam infamiam*'.

¹⁰² *Digesta* 47.10.15.25 (Ulpian).

¹⁰³ *Digesta* 47.10.15.27 (Ulpian).

¹⁰⁴ *Digesta* 47.10.15.27 (Ulpian): '*haec autem fere sunt, quae ad infamiam alicuius fiunt*'.

¹⁰⁵ *Digesta* 47.10.42pr (Paul): '*Iudici ab appellatoribus conuicium fieri non oportet: alioquin infamia notantur*'.

¹⁰⁶ *Digesta* 47.12.1pr (Ulpian): '*Sepulchri uiolati actio infamiam irrogat*'.

constituere (‘rather than instituting an *actio famosa*’),¹⁰⁷ which in this particular case would have been an action for *dolus malus*.¹⁰⁸ A similar statement is also made in relation to *dolus malus*, where it is stated that *dolus malus* can only be brought when there is no other relevant action *quoniam famosa actio non temere debuit a praetore decerni, si sit ciuilis uel honoraria, qua possit experiri* (‘since an *actio famosa* ought not be rashly decreed by the Praetor, if there is a civil or praetorian one by which it could be litigated’).¹⁰⁹

In relation to particular persons, it is stated that persons are not allowed to summon a parent, patron or patroness or the children or parents of a patron or patroness without the Praetor’s permission. Permission is granted *si famosa actio non sit uel pudorem non suggilat* (‘if it is neither an *actio famosa* nor suggests shame’).¹¹⁰ In accordance with this, a preliminary inquiry into the status of a person must be made where his status as a *libertus* is at issue when it is proposed to bring a *famosa actio*.¹¹¹ The use of the phrase *actio famosa* here mirrors that in *Digesta* 3.2. However, there is also an additional type of action mentioned, *pudorem non suggilat*, an expression that is unique in the *Digesta*. This both

¹⁰⁷ *Digest* 4.1.7.1 (Marcellus): ‘... etenim deceptis sine culpa sua, maxime si fraus aduersario interuenerit, succurri oportebit, cum etiam de dolo malo actio competere soleat, et boni praetoris est potius restituere litem, ut et ratio et aequitas postulabit, quam actionem famosam constituere, ad quam tunc demum descendendum est, cum remedio locus esse non potest’.

¹⁰⁸ An *actio famosa*, see *Digesta* 3.2.1 (Julian).

¹⁰⁹ *Digesta* 4.3.1.4 (Ulpian): ‘Ait Praetor: “si de his rebus alia actio non erit”. Merito praetor ita demum hanc actionem pollicetur, si alia non sit, quoniam famosa actio non temere debuit a praetore decerni, si sit ciuilis uel honoraria, qua possit experiri ...’. The *ius ciuile* arose from statute, plebiscites, *senatus consulta*, imperial decrees and judicial interpretation, the *ius honorarium* was magisterial law, which aided, supplemented and corrected *ius ciuile*: *Digesta* 1.1.7pr-1 (Papinian); O. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London and New York, Routledge, 1997) 31 and 41; Jolowicz and Nicholas, *Historical Introduction*, above n. 3, 97-8.

¹¹⁰ *Digesta* 2.4.10.12 (Ulpian).

¹¹¹ *Digesta* 40.14.6 (Ulpian): ‘Quotiens de hoc contenditur, an quis libertus sit, siue operae petantur siue obsequium desideretur siue etiam famosa actio intendatur siue in ius uocetur qui se patronum dicit siue nulla causa interueniat, redditur praeiudicium’.

reiterates the close link between the term *infamia* and bad reputation, latent in the vocabulary utilised in relation to legal *infamia*, and suggests that the existence of a specific, identifiable, group of infaming actions (*actiones famosae*), did not exhaust the types of actions, condemnation for which the Romans considered to have a negative impact on reputation.

This apparent caution in allowing an *actio famosa* to be brought is further elaborated upon by the requirement, in relation to an *actio famosa* for *iniuria*,¹¹² that a person must specify exactly what injury was suffered *quia qui famosam actionem intendit, non debet uagari cum discrimine alienae existimationis ...* ('because he who intends an *actio famosa* ought not be vague in dealing with danger to the *existimatio* of another').¹¹³

The expression *actio famosa* is also utilised, using the example of *furtum*, in conjunction with the term *infamis* where it is stated that a person who is subjected to a more severe penalty than required by the law does not become an *infamis*.¹¹⁴ This reiterates a point made in *Digesta* 3.2, that the imposition of a more severe penalty than required *existimationem conseruat* ('preserves *existimatio*').¹¹⁵

¹¹² On *iniuria* as an *actio famosa* see *Digesta* 3.2.1 (Julian).

¹¹³ *Digesta* 47.10.7pr (Ulpian): 'Praetor edixit: "qui agit iniuriarum, certum dicat, quid iniuriae factum sit": quia qui famosam actionem intendit, non debet uagari cum discrimine alienae existimationis, sed designare et certum specialiter dicere, quam se iniuriam passum contendit'.

¹¹⁴ *Digesta* 48.19.10.2 (Macer): 'In personis tam plebeiorum quam decurionum illud constitutum est, ut qui maiori poena adficitur, quam legibus statuta est, infamis non fiat. Ergo et si opere temporario quis multatus sit uel tantum fustibus caesus, licet in actione famosa, ueluti furti, dicendum erit infamem non esse, quia et solus fustium ictus grauior est quam pecuniaris damnatio'.

¹¹⁵ *Digesta* 3.2.13.7 (Ulpian).

Further, the term *actio famosa* is used in discussing situations where the defendant is willing to make a payment of money before joinder where a *procurator* is bringing an action.¹¹⁶

Famosus

The adjective *famosus* is used in two ways in the *Digesta* in relation to legal *infamia*. The first is as a noun, equivalent to *infamis*. The second is as an adjective, qualifying legal measures, such as *actiones* (see above) or *interdicta*.

An example of the adjective *famosa* being used to qualify the name of an action, here *dolus malus*, without the use of the noun *actio*, occurs in extending the restriction on bringing *actiones famosae* against *patroni* in relation to *dolus malus* to embrace persons of low (plebian) rank against those of higher (consular) rank or persons of immoderate, prodigal or other vile natures.¹¹⁷

There are many cases where *famosus* is used as a noun to describe persons who undergo *infamia*. A person who hides a thief from the imperial mines is punished as if having been found guilty of manifest theft, an *actio famosa*,¹¹⁸ and made a *famosus*.¹¹⁹ Persons may denounce cases common to themselves and the imperial treasury and not become *famosi*, even if they fail to win the case.¹²⁰ This implies

¹¹⁶ *Digesta* 3.3.73 (Paul): ‘... *quid enim si et famosa sit actio?*’.

¹¹⁷ *Digesta* 4.3.11.1 (Ulpian): ‘*Et quibusdam personis non dabitur, ut puta liberis uel libertis aduersus parentes patronosue, cum sit famosa. Sed nec humili aduersus eum qui dignitate excellet debet dari: puta plebeio aduersus consularem receptae auctoritatis, uel luxurioso atque prodigo aut alias uili aduersus hominem uitae emendatoris*’. An *actio in factum* is granted instead: *Digesta* 4.3.11.1 (Ulpian). On *actiones in factum* see Berger, ‘Encyclopedic Dictionary’, above n. 9, 475 on ‘*Formula in ius concepta*’.

¹¹⁸ *Digesta* 3.2.1 (Julian) and 3.2.6pr (Ulpian).

¹¹⁹ *Digesta* 48.13.8.1 (Ulpian): ‘*is autem, qui furanti sinum praebuit, perinde habetur, atque si manifesti furti condemnatus est, et famosus efficitur*’.

¹²⁰ *Digesta* 49.14.18.7 (Marcian): ‘*sed communem causam sibi cum fisco quiuis deferre potest, hoc est uindicare, nec per hoc famosus est, licet in causa sua non optinuerit*’.

the legal concept of *infamia*, rather than a bad reputation, as it is difficult to see how a law could prevent a person acquiring a bad reputation for denouncing cases. Hence, *infamia* was a penalty either for laying a case (*deferre*), for failing to win a case, or for both, which is perhaps implied by *licet in causa sua non optinuerit*, all causes of *infamia* not mentioned in *Digesta* 3.2.

The *Digesta* also states that *famosi* were permitted to bring accusations in relation to the corn dole, as were women and soldiers, who were otherwise prohibited.¹²¹ That *famosi* here is synonymous with *infames* is suggested by the catalogue given in the *Digesta* of persons prohibited from bringing accusations, except where pursuing the death of parents, children, or patrons or matters concerning themselves,¹²² which matches, with one exception,¹²³ persons otherwise referred to explicitly as *infames*: those condemned in *iudicia publica*,¹²⁴ those condemned of *calumnia*,¹²⁵ those who hired their services to fight beasts, actors,¹²⁶ procurers,¹²⁷ those condemned of *calumnia* or *praeuaricatio*,¹²⁸ and those who

¹²¹ *Digesta* 48.2.13 (Marcian): ‘*Mulierem propter publicam utilitatem ad annonam pertinentem audiri a praefecto annonae deferentem diuus Seruerus et Antoninus rescripserunt. Famosi quoque accusantes sine ulla dubitatione admittuntur. Milites quoque, qui causas alienas deferre non possunt, qui pro pace excubant, uel magis ad hanc accusationem admittendi sunt. Serui quoque deferentes audiuntur*’.

¹²² *Digesta* 48.2.4 (Ulpian): ‘*Is, qui iudicio publico damnatus est, ius accusandi non habet, nisi liberorum uel patronorum suorum mortem eo iudicio uel rem suam exequatur. Sed et calumnia notatis ius accusandi ademptum est, item his, qui cum bestiis depugnandi causa in harenam intromissi sunt, quiue artem ludicram uel lenocinium fecerint, quiue praeuaricationis calumniae causa quid fecisse iudicio publico pronuntiatus erit, quiue ob accusandum negotiumue cui facessendum pecuniam accepisse iudicatus erit*’.

¹²³ Beast fighters, not elsewhere called *infames*, though they are listed among those not permitted to postulate at all: *Digesta* 3.1.1.6 (Ulpian) – see further below.

¹²⁴ *Digesta* 48.1.7 (Macer).

¹²⁵ *Digesta* 3.2.1 (Julian).

¹²⁶ *Digesta* 3.2.1 (Julian).

¹²⁷ *Digesta* 3.2.1 (Julian).

¹²⁸ *Digesta* 3.2.1 (Julian).

accepted money for the purpose of bringing an action or causing trouble.¹²⁹ If these persons were normally excluded from accusing, this would provide a rationale for the specific mention of their capacity to accuse in relation to the *corn dole*. An identical exception from the prohibition on accusing for *famosi* is expounded in relation to *maiestas*, where *famosi* are said not otherwise to have the *ius accusandi*.¹³⁰

The term *famosus* also at times bears a connotation other than a person labouring under *infamia*. In *Digesta* 1.15.3.1 (Paul), it is stated that the *praefectus uigilum* is responsible for trying certain cases, *nisi si qua tam atrox tamque famosa persona sit, ut praefecto urbi remittatur* ('unless the person is so terrible (*atrox*) and *famosus* that he is remitted to the urban prefect'). This passage, with the emphasis on a person being *atrox* as well as 'so' *famosus*, suggests that what is being discussed here is a person who is 'notorious',¹³¹ rather than an *infamis*.¹³² This also appears to be the meaning where it is stated that *famosos latrones in his locis, ubi grassati sunt, furca figendos compluribus placuit ...* ('it is pleasing to many that *famosi* robbers are fastened to the fork in the places where they used to rage ... ') as a spectacle.¹³³

Another passage containing *famosus* that appears unrelated to *infamia* is in the provision of the *Digesta* dealing with conditions in wills that require certain names to be borne by heirs:

¹²⁹ *Digesta* 3.6.1pr (Ulpian) classes such persons as having committed *calumnia*.

¹³⁰ *Digesta* 48.4.7pr (Modestinus): '*Famosi, qui ius accusandi non habent, sine ulla dubitatione admittuntur ad hanc accusationem*'.

¹³¹ See *Oxford Latin Dictionary*, above n. 32, entry 2 under '*famosus*', 675. This is the translation adopted in Watson (ed.), *Digest*, above n. 6, vol. 1, 31.

¹³² See *Oxford Latin Dictionary*, above n. 32, entry 2 under '*famosus*', 675.

¹³³ *Digesta* 48.19.28.15 (Callistratus).

Si uero nominis ferendi condicio est, quam praetor exigit, recte equidem facturus uidetur, si eam expleuerit: nihil enim male est honesti hominis nomen adsumere, nec enim in famosis et turpibus nominibus hanc condicionem exigit praetor.

If indeed it is a condition, which the Praetor demands, that a name be borne, he would seem to act well if he fulfilled it, for there is nothing bad to assume the name of an honest man, for the praetor does not demand this condition in the case of *famosi* and *turpis* names.¹³⁴

The most logical meaning to ascribe to *famosus* in this passage is again that of notorious, especially when conjoined with the term *turpis* ('disgraceful, dishonourable, degrading, or sim[ilar]'),¹³⁵ and qualifying *nomen* ('name'), potentially giving this provision a wide and vague application.

The adjective *famosus* is also used in relation to defamation, to qualify both *carmen*¹³⁶ and *libelli* that create liability for *iniuria*.¹³⁷ This shows again the close link between the term *infamia* and reputation.

Infames

The term *infamis* is frequently used in contexts indicating that what is being discussed is those persons who labour under the legal construct of *infamia*, although there are some contexts where it also bears a more general meaning of a disreputable person.

The phrase *haberi infames* is used to state that, although the wording of the Edict does not make parents and patrons *infames* if condemned for *iniuria* or *dolus*

¹³⁴ *Digesta* 36.1.65(63).10 (Gaius).

¹³⁵ *Oxford Latin Dictionary*, above n. 32, entry 3 under '*turpis*', 1994.

¹³⁶ *Digesta* 22.5.21pr (Arcadius Charisius): '*Ob carmen famosum damnatus intestabilis fit*'; 28.1.18.1 (Ulpian): '*Si quis ob carmen famosum damnetur, senatus consulto expressum est, ut intestabilis sit: ergo nec testamentum facere poterit nec ad testamentum adhiberi*'.

¹³⁷ *Digesta* 48.19.16pr (Claudius Saturninus): '*Aut facta puniuntur, ut furta caedesque, aut dicta, ut conuicia et infidae aduocationes, aut scripta, ut falsa et famosi libelli ...*'.

malus, both listed as *actiones famosae*,¹³⁸ nevertheless, such *actiones* are not granted against them.¹³⁹ As *iniuria* and *dolus malus* are both *actiones famosae* referred to in *Digesta* 3.2,¹⁴⁰ this passage is clearly dealing with legal *infamia*.

The term *infamis* is further used for those discharged from the army ignominiously, which clearly refers to the concept of *infamia*, as it is stated in *Digesta* 3.2 that ignominious dismissal from the army entails *infamia*.¹⁴¹ Soldiers discharged from the army because they enlisted in order to make it more difficult for others to bring suit against them do not become *infames* as a consequence of their discharge, i.e., it is not with *ignominia*.¹⁴²

The term *infames* is also used in relation to legal penalties. In this regard, men removed from the *ordo* for only a short time as a punishment are not to be regarded as *infames*.¹⁴³ It is further stated that an investigation into the cause of relegation must be made, as persons inflicted with a lesser penalty may still remain *inter infames*.¹⁴⁴ This must refer to a legal concept of *infamis*, rather than just to someone of bad reputation, as it is difficult to see how it could be a matter

¹³⁸ *Digesta* 3.2.1 (Julian).

¹³⁹ *Digesta* 37.15.2pr (Julian): ‘*nec actio de dolo aut iniuriarum in eos [parentes and patrones] detur: licet enim uerbis edicti non habeantur infames ita condemnati*’.

¹⁴⁰ E.g., *Digesta* 3.2.1 (Julian).

¹⁴¹ *Digesta* 3.2.1 (Julian).

¹⁴² *Digesta* 49.16.4.8 (Arrius Menander): ‘*exauctoratus eo nomine [being involved in a lawsuit] non utique infamis erit nec prohibendus lite finita militiae eiusdem ordinis se dare: alioquin et si relinquat litem uel transigat, retinendus est*’.

¹⁴³ 50.2.5pr (Papinian) (on removal of decurions from the *ordo*): ‘*Ad tempus ordine motos ex crimine, quod ignominiam importat, in perpetuum moueri placuit. Ad tempus exulare iussos ex crimine leuiore uelut transacto negotio non esse inter infames habendos*’.

¹⁴⁴ *Digesta* 50.1.15pr (Papinian): ‘*Ordine decurionum ad tempus motus et in ordinem regressus ad honorem, exemplo relegati, tanto tempore non admittitur, quanto dignitate caruit. Sed in utroque placuit examinari, quo crimine damnati sententiam eiusmodi meruerunt: durioribus etenim poenis affectos ignominia uelut transacto negotio postea liberari, minoribus uero, quam leges permittunt, subiectos nihilo minus inter infames haberi, cum facti quidem quaestio sit in potestate iudicantium, iuris autem auctoritas non sit*’.

of legal determination whether or not a temporary exile resulted in a bad reputation. Similarly, reiterating a point made in *Digesta* 3.2, a person is said not to be an *infamis* if a more severe penalty has been applied than was required,¹⁴⁵ in fact, it is stressed that, even where the case was an *actio famosa*, excessive punishment means a person is not *infamis*. The term *infamis* is also used in the passage, considered above, which discusses what sentences carry legal *infamia* as a consequence.¹⁴⁶

The use of *infamis* to describe a creditor who occupies a debtor's property without the authority of a judge also suggests *infamia*, especially as the phrase used, *infamis fit* ('becomes an *infamis*'), is coupled with another legal penalty, the confiscation of a third of the creditor's goods.¹⁴⁷

Infames are also said to be prohibited from accusing, confirming the deduction made above on the basis of the use of *famosi* in defining persons who were permitted to accuse in certain circumstances. It is stated that *itaque prohibentur accusare ... alii propter delictum proprium, ut infames* ('thus prohibited to accuse are ... others on account of a particular delict, such as *infames*').¹⁴⁸ The fact that they are said to be excluded *propter delictum* indicates that the term *infames* here embraces those who are suffering from *infamia* as *delicta* are elsewhere said to

¹⁴⁵ *Digesta* 48.19.10.2 (Macer): '*in personis tam plebeiorum quam decurionum illud constitutum est, ut qui maiori poena adficitur, quam legibus statuta est, infamis non fiat*'. The examples are given of forced labour and beating: '*ergo et si opere temporario quis multatus sit uel tantum fustibus caesus, licet in actione famosa, ueluti furti, dicendum erit infamem non esse, quia solus fustium ictus grauior est quam pecuniaris damnatio*'.

¹⁴⁶ *Digesta* 48.1.7pr (Macer): '*Infamem non ex omni crimine sententia facit, sed ex eo, quod iudicii publici causam habuit. Itaque ex eo crimine, quod iudicii publici non fuit, damnatum infamia non sequetur, nisi id crimen ex ea actione fuit, quae etiam in priuato iudicio infamiam condemnato importat, ueluti furti, ui bonorum raptorum, iniuriarum*'.

¹⁴⁷ *Digesta* 48.7.8pr (Modestinus) (this also results in a third of the offender's goods being seized): '*Si creditor sine auctoritate iudicis res debitoris occupet, hac lege tenetur et tertia parte bonorum multatur et infamis fit*'.

¹⁴⁸ *Digesta* 48.2.8 (Macer).

diminish a person's *existimatio*.¹⁴⁹ Similarly, a father is given priority in accusing a woman of adultery if the husband is an *infamis*.¹⁵⁰ An exception to this exclusion of *infames* from the right to accuse exists in the case of the *iudicium publicum* of *ambitus*, which entails *infamia* as a consequence of conviction.¹⁵¹ A person convicted of *ambitus* may restore their former status by successfully conducting a prosecution for the same crime.¹⁵²

Furthermore, if someone who is prohibited from bringing an accusation for *calumnia* is pronounced guilty of *praeuaricatio*, he is said to become an *infamis*.¹⁵³ This appears to refer to the legal concept of *infamia*, a consequence of being found guilty of *praeuaricatio*.¹⁵⁴ Although it is difficult to see why this provision is limited to those who are prohibited from bringing an accusation of *calumnia* since it is stated in *Digesta* 3.2 that all *praeuaricators* are *infames*.¹⁵⁵ Related to this, a father of a murdered daughter can accuse a person of the murder without risk of *calumnia*, and consequently becoming an *infamis*.¹⁵⁶

¹⁴⁹ *Digesta* 50.13.5.1 (Callistratus).

¹⁵⁰ *Digesta* 48.5.3 (Ulpian): '*Nisi igitur pater maritum infamem aut arguat aut doceat colludere magis cum uxore quam ex animo accusare, postponetur marito*'. Usually the husband had priority in accusation: *Digesta* 48.5.2.8 (Ulpian): '*Si simul ad accusationem ueniant maritus et pater mulieris, quem praeferri oporteat, quaeritur. Et magis est, ut maritus praeferatur ...*'.

¹⁵¹ On *ambitus* as a *iudicium publicum* see *Digesta* 48.1.1 (Macer); on *iudicia publica* as resulting in *infamia* see 48.1.7 (Macer).

¹⁵² *Digesta* 48.14.1.2 (Modestinus): '*Qua lege damnatus si alium conuicerit, in integrum restituitur, non tamen pecuniam recipit*'.

¹⁵³ *Digesta* 47.15.4 (Macer): '*Si is, de cuius calumnia agi prohibetur, praeuaricator in causa iudicii publici pronuntiatu sit, infamis erit*'.

¹⁵⁴ *Digesta* 3.2.1 (Julian).

¹⁵⁵ *Digesta* 3.2.1 (Julian).

¹⁵⁶ *Digesta* 48.1.14 (Papinian): '*Generi seruis a socero ueneficii accusatis praeses provinciae patrem calumniam intulisse pronuntiauerat. Inter infames patrem defunctae non habendum respondi, quoniam et si publicum iudicium inter liberos de morte filiae constitisset, citra periculum pater uindicaretur*'.

Perhaps the greatest restriction imposed upon *infames* is not directly stated in the *Digesta*, but is implied. In *Digesta* 48.7.1pr (Marcian) it is stated that a person found guilty under the *lex Iulia de ui priuata*

ne senator sit, ne decurio, aut ullum honorem capiat, neue in eum ordinem sedeat, neue iudex sit: et uidelicet omni honore quasi infamis ex senatus consulto carebit.

may not be a senator, nor decurion, nor hold any office, nor sit in that *ordo* nor be a judge: and evidently is deprived of every office by reason of a *senatus consultum* just as if an *infamis*.¹⁵⁷

The clear implication of *quasi infamis* is that *infames* are deprived of all the enumerated positions. This is also implied in a passage that states that those who sell objects of daily use are not *infames* and for this reason (*enim*), are not prohibited from being decurions or holding some other *honor* in their local community.¹⁵⁸ This prohibition may also explain why the jurists felt a need to discuss, and the compilers felt the need to include, a discussion of whether *infames* could be *adseorsores*, a question that was resolved in the negative.¹⁵⁹

Infamis clearly carries a meaning of ‘having a bad name, of ill repute’¹⁶⁰ when it is used to refer to a nation, the slaves from which are presumed to be bad.¹⁶¹

¹⁵⁷ *Digesta* 48.7.1pr (Marcian).

¹⁵⁸ *Digesta* 50.2.12pr (Callistratus): ‘*Eos qui utensilia negotiantur et uendunt, licet ab aedilibus caeduntur ... non sunt prohibiti huiusmodi homines decurionatum uel aliquem honorem in sua patria petere: nec enim infames sunt*’.

¹⁵⁹ Although this is vague: *Digesta* 1.22.2pr (Marcian): ‘*Infames autem licet non prohibeantur legibus adsidere, attamen arbitror, ut aliquo quoque decreto principali refertur constitutum, non posse officio adseorsoris fungi*’. *Adseorsores* were legal advisers to magistrates and judges in their judicial activity: Berger, ‘Encyclopedic Dictionary’, above n. 9, 351.

¹⁶⁰ *Oxford Latin Dictionary*, above n. 32, entry 1(b) under ‘*infamis*’, 893.

¹⁶¹ *Digesta* 21.1.31.21 (Ulpian): ‘... *praesumptum etenim est ... quosdam malos [seruos] uideri, quia ea natione sunt, quae magis infamis est*’.

Ignominia

As has been argued above, the term *ignominia*, even in *Digesta* 3.2, can convey more meanings than simply being a synonym for legal *infamia*. Nevertheless, the term clearly does refer to *infamia* in some circumstances. It is stated that a decurion who is removed from the *ordo* for a crime *quod ignominiam importat* is removed permanently. However, if exiled for a short time, he is not to be regarded as *inter infames*.¹⁶² The use in this passage of *ignominia*, as a consequence of a crime, in conjunction with the term *infames* indicates that *ignominia* is being used as an equivalent to *infamia*. A similar pairing of *ignominia* and *infamis* occurs in a *Digesta* extract on penalties, discussed above in relation to the term *infames*, where it is stated that a person may be relieved of *ignominia* where they have been subjected to a heavy penalty, following the expiration of the period of the penalty, although a person subject to a lighter penalty may still be numbered *inter infames*.¹⁶³

It is also stated that in *condictiones*,¹⁶⁴ *ignominia* ceases to be of application, although arising from *causae famosae*.¹⁶⁵ The coupling in this text of the term *ignominia* with the phrase *causa famosa*, which, though not used in *Digesta* 3.2,

¹⁶² *Digesta* 50.2.5pr (Papinian) (on removal of decurions from the *ordo*): ‘*Ad tempus ordine motos ex crimine, quod ignominiam importat, in perpetuum moueri placuit. Ad tempus exulare iussos ex crimine leuiore uelut transacto negotio non esse inter infames habendos*’.

¹⁶³ *Digesta* 50.1.15pr (Papinian): ‘*Ordine decurionum ad tempus motus et in ordinem regressus ad honorem, exemplo relegati, tanto tempore non admittitur, quanto dignitate caruit. Sed in utroque placuit examinari, quo crimine damnati sententiam eiusmodi meruerunt, durioribus etenim poenis affectos ignominia uelut transacto negotio postea liberari, minoribus uero, quam leges permittunt, subiectos nihilo minus inter infames haberi, cum facti quidem quaestio sit in potestate iudicantium, iuris autem auctoritas non sit*’.

¹⁶⁴ Personal actions that were available for a wide variety of causes: Berger, ‘Encyclopedic Dictionary’, above n. 9, 405.

¹⁶⁵ *Digesta* 44.7.36 (Ulpian): ‘*Cessat ignominia in condictionibus, quamuis ex famosis causis pendeant*’.

is apparently related to *actiones famosae* (see below), suggests that *ignominia* is here synonymous with *infamia*.

Ignominia also probably stands for legal *infamia* where it is stated that, in relation to appeals, *si pecuniaria causa est, ex qua ignominia sequitur, potest et per procuratorem hoc agi* ('if it is a financial case, from which *ignominia* follows, this can be conducted through a *procurator*').¹⁶⁶ Clearly, where the defining criterion for granting certain types of actions is whether or not they result in *ignominia*, a specific legal result, as opposed to merely a bad reputation, is being considered. It is interesting that this ability to conduct cases involving *infamia* through a *procurator* appears confined to civil cases, as all criminal cases involving penalties up to relegation cannot be conducted through a *procurator*.¹⁶⁷ Such cases would fall within those that merely reduce *existimatio*, as stated in *Digesta* 50.13.5 (Callistratus), which is the category that includes the cases of *infamia* enumerated in *Digesta* 3.2.¹⁶⁸

Ignominia is also used to refer to merely a bad reputation, rather than a specific legal consequence. This can be seen in the reference to the *fili ignominia* if the son's parents are slaves, justifying a suit for freedom, which implies social stigma rather than legal consequences.¹⁶⁹ Similarly, it is stated that the *facti ignominia* ('*ignominia* of the deed') of concealing a prostitute compensates for the fact that

¹⁶⁶ *Digesta* 49.9.1 (Ulpian).

¹⁶⁷ *Digesta* 49.9.1 (Ulpian): '*si ea causa sit, ex qua sequi solet poena usque ad relegationem, non oportet per alium causas agi, sed ipsum adesse auditorio debere sciendum est*'.

¹⁶⁸ *Digesta* 50.13.5.2 (Callistratus).

¹⁶⁹ *Digesta* 40.12.1.1 (Ulpian): '*Uersa etiam uice dicemus liberis parentum etiam inuitorum eandem facultatem dari [to bring a suit for freedom]: neque enim modica filii ignominia est, si parentem seruum habeat*'.

the person responsible for the concealment is not guilty of *furtum* ('theft').¹⁷⁰ As no legal sanction is said to be imposed, the *ignominia* referred to here can only be a bad reputation in the eyes of the general public.

As in *Digesta* 3.2, there are several references to ignominious dismissal from the army utilising the term *ignominia*.¹⁷¹

Notari Ignominia

The phrase *notari ignominia* is used in the same way as the phrase *notari infamia* to indicate the imposition of *infamia* upon persons for certain actions.

Judges who abandon prosecuting a charge are *notentur ignominia* under the *senatus consultum Turpillianum*.¹⁷² This clearly refers to *infamia*, as it is stated that this is done *ueluti calumniae causa iudicio publico damnati* ('just as if by reason having been damned for *calumnia* in a public trial').¹⁷³ Condemnation for

¹⁷⁰ *Digesta* 47.2.39 (Ulpian): '*an tamen uel Fabia teneatur, qui subpressit scortum libidinis causa? Et non puto teneri, et ita etiam ex facto, cum incidisset, dixi: hic enim turpius facit, quam qui subripit, se secum facti ignominiam compensat, certe fur non est*'.

¹⁷¹ *Digesta* 27.1.8 (Ulpian): men '*ignominia missi*' are excused from tutelage as they are not permitted to enter the city; 29.1.26 (Macer): military wills of those '*qui ignominiae causa missi sunt*' are invalid and *fili familias* '*qui ignominiae causa missi sunt*' cannot make a will regarding the *peculium castrense*; 29.1.38.1 (Paul): issue of the status of a will of a soldier '*non ignominiae causa missus*' who subsequently joins another branch of the service; 47.17.3 (Paul): a soldier who steals from baths '*ignominia mitti debet*'; 48.19.38.12 (Paul): A soldier who unsuccessfully attempts suicide for unbearable pain, sickness or grief '*cum ignominia mittendus est*', see also 49.16.6.7 (Arrius Menander): '*ignominia mittatur*'; 49.16.4.6 (Arrius Menander): a soldier who has a civil case opened against him or where he is *requirendus* (a fugitive against whom a criminal trial had been instituted: Berger, 'Encyclopedic Dictionary', above n. 9, 676) '*ignominia missus*'; 49.16.13.2 (Macer): soldiers who have bought land for farming in the province where they serve cannot claim the land after discharge where their purchase has not been questioned '*qui ignominiae causa missi sunt*'; 49.16.13.3 (Macer): a soldier '*qui ignominia missus est*' is not allowed to go to Rome or in the *sacrus comitatus* (escorts to the Emperor, F. Millar, *The Emperor in the Roman World* (London, Duckworth, 1977) 65, title also in *ILS* 2781). This rule applies even to soldiers '*sine ignominiae mentione missi sunt, nihilo minus ignominia missi intelleguntur*'.

¹⁷² *Digesta* 50.2.6.3 (Papinian): '*Qui iudicii publici quaestionem citra ueniam abolitionis deseruerunt, decurionum honore decorari non possunt, cum ex Turpilliano senatus consulto notentur ignominia ueluti calumniae causa iudicio publico damnati*'.

¹⁷³ *Digesta* 50.2.6.3 (Papinian).

calumnia is explicitly stated elsewhere to involve *infamia*.¹⁷⁴ This passage also states that those who are *infames* cannot hold the office of decurionate.

The phrase *notari ignominia* is also used in discussing the question of whether *infames* have the right to kill adulterers whom they have apprehended *in flagrante delicto*. It is asked whether a husband or father who is *leno uel aliqua ignominia notatus erit* can kill an apprehended adulterer.¹⁷⁵ To which it is answered that only those who can bring an accusation have the right to kill.¹⁷⁶ The expression *aliqua ignominia notatus* perhaps has a wider meaning than the legal concept of *infamia*. The expression may be referring rather to a more general ‘disgrace’ as,¹⁷⁷ although a *leno* is an *infamis*,¹⁷⁸ there are no other instances where different types of *infamia* are referred to, such that there would be *aliqua* (some other) *infamia* (as a legal construct). Nevertheless, the reference to a *leno* implies that those who were technically *infames* would be embraced by this provision. This is also implied by the fact that *infames* explicitly lack the right to accuse,¹⁷⁹ necessary for the exercise of the right to kill.¹⁸⁰

Ignominiosus

Like *famosus*, the term *ignominiosus* is used as an equivalent for *infamis*. It is stated that it does not matter whether a person is *integrae fama* ... an

¹⁷⁴ *Digesta* 3.2.1 (Julian).

¹⁷⁵ *Digesta* 48.5.25(24).3 (Macer).

¹⁷⁶ *Digesta* 48.5.25(24).3 (Macer): ‘*et rectius dicetur eos ius occidendi habere, qui iure patris maritiue accusare possunt*’.

¹⁷⁷ As translated in Watson (ed.), *Digest*, above n. 6, vol. 4, 811.

¹⁷⁸ For example, *Digesta* 3.2.1 (Julian).

¹⁷⁹ *Digesta* 48.2.8 (Macer): ‘*prohibentur accusare ... alii propter delictum proprium, ut infames*’.

¹⁸⁰ *Digesta* 48.25(24).3 (Macer): ‘*eos ius occidendi habere, qui iure patris maritiue accusare possunt*’.

ignominiosus, they can still be an arbiter.¹⁸¹ The fact that, as discussed above, *infames* were excluded from performing many official functions in the Roman world, including being a judge, provides a rationale for the need explicitly to include this rule. The phrase *integra fama* also recalls the way in which *fama* is utilised in *Digesta* 3.2, where it is stated that a *libertina*'s *fama* is unaffected by her occupation in slavery.¹⁸² This evidence suggests that *ignominiosus* is here being used as synonymous with *infamis*.

A problematic usage of *ignominiosus* is the statement that a patron cannot benefit from the *Lex Iulia et Papia* through marrying an *ignominiosa liberta* he has married *contra legem*.¹⁸³ External evidence suggests that *infamia* is what is being referred to, where there is reference to a marriage to a *famosa* against the statute.¹⁸⁴ However, the matter is not clear on the evidence of the *Digesta* itself, which nowhere refers to such a prohibition, although there are some definitions of women who are *notantur* (see below). Why some of these definitions of *notatae* women, such as of prostitutes or procurers,¹⁸⁵ are given is left unexplained. One

¹⁸¹ *Digesta* 4.8.7pr (Ulpian): ‘*Pedius libro non et Pomponius libro trigensimo tertio scribunt parui referre, ingenuus quis an libertinus sit, integrae fama quis sit arbiter an ignominiosus*’.

¹⁸² *Digesta* 3.2.24 (Ulpian).

¹⁸³ *Digesta* 23.2.48.1 (Terentius Clemens): ‘*si ignominiosam libertam suam patronus uxorem duxerit, placet, quia contra legem maritus sit, non habere eum hoc legis beneficium*’. Modern scholars disagree on what the benefit under the statute referred to is. Treggiari argues that it is the prohibition on a *libertina*, who marries her patron subsequent to manumission, from remarrying without her patron's consent following their divorce: *Digesta* 23.2.45pr (Ulpian): S. Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford, Clarendon Press, 1991) 63. McGinn argues that it is the ability of the patron to refuse permission for divorce: T. A. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome* (Oxford, Oxford Uni. Press, 1998) 94.

¹⁸⁴ *Tituli Ulpiani* 16.2: ‘*Aliquando nihil inter se capiunt, id est si contra legem Iuliam Papiamque Poppaeam contraxerint matrimonium, uerbi gratia si famosa<m> quis uxorem duxerit, aut libertinam senat<or>*’. There are no words in the original ‘stigmatised by the statute’, added in McGinn's translation, *Prostitution, Sexuality and the Law*, above n. 183, 94 of this passage.

¹⁸⁵ See *Digesta* 23.2.43 (Ulpian) discussed under the heading ‘*Notari/Notare*’ below.

can infer that they are related to a marriage prohibition, as is suggested by the external evidence referred to above and the passage currently under discussion, but such a prohibition is not expressly articulated.

A further hint of the existence of such a prohibition is contained in a discussion of whether a father or husband has the right to kill a *filia ignominiosa ... aut uxor contra leges nupta* ('an *ignominiosa* daughter or a wife married contrary to the statutes') apprehended *in flagrante delicto* in adultery.¹⁸⁶ This perhaps suggests that there was some doubt over the existence of a marriage to an *ignominiosa*, which therefore could be a specific legal category so as to enable the easy application of such a prohibition. However, for both this passage and the one discussed immediately before, the fact that this area is one where concerns beyond the strict letter of the law were apparent, makes it uncertain how strictly *ignominiosa* was intended to be interpreted.¹⁸⁷ It is likely that *infames* women were embraced by these provisions.

Ignominiosa occurs again in the context of marriage in discussion of whether the son of an emancipated man who *ignominiosam duxerit uxorem ... , ut dedecori sit tam ipsi quam patri mulierem talem habere* ('married an *ignominiosa* wife, so that such a woman is a source of disgrace as much for the father as the son') can be admitted to *bonorum possessio* of his grandfather. It is stated that such a child can be admitted, as it is open to the grandfather to disinherit the child.¹⁸⁸ *Ignominiosa*

¹⁸⁶ *Digesta* 48.5.25(24).3 (Macer): '*item si filia ignominiosa sit aut uxor contra leges nupta, an id ius nihilo minus pater maritusue habeat?*'. '*Ignominiosa*' is translated as 'bad reputation' in Watson (ed.), *Digest*, above n. 6, vol. 4, 811.

¹⁸⁷ See *Digesta* 23.2.42pr (Modestinus) = *Digesta* 50.17.197: '*Semper in coniunctionibus non solum quid liceat considerandum est, sed et quid honestum sit*'; a list of void marriages for Senators' daughters is then given: 23.2.42.1 (Modestinus).

¹⁸⁸ *Digesta* 37.4.3.5 (Ulpian).

in this passage has been translated as ‘low-born’.¹⁸⁹ It is not clear on the basis of the text of the *Digesta* whether this is the best meaning, or whether it is an *infamis* wife to whom reference is being made. The reference in this passage to the judge’s role in weighing up the wrongs of the father and merits of the grandson suggest that it is not a clearly defined legal category that is being discussed.

There are also, unsurprisingly, references to ignominious discharges from the army that utilise the term *ignominiosus*.¹⁹⁰

Notare/Notari

Worthy of more detailed discussion are the passages of the *Digesta* where the active or passive voice of the verb *notare* is used on its own. In *Digesta* 3.2, the context makes it clear that this such usage is referring to a person being ‘noted’ with *infamia*, for example, the title is ‘*de his qui notantur infamia*’. However, in other passages it is not so clear. There are two groups of examples in particular that require discussion in this regard. The first is contained in *Digesta* 3.1. Like title 3.2, this title discusses postulation. *Notari/notare* is used in this title in two contexts, the first is to refer to those contained in the third Edict, who are *notantur infamia*.¹⁹¹ The second is in relation to those contained in the second Edict, i.e., those who were forbidden to postulate for anyone other than themselves.¹⁹² Two categories are identified here: firstly, those forbidden to postulate for others by

¹⁸⁹ Watson (ed.), *Digest*, above n. 6, vol. 3, 279.

¹⁹⁰ *Digesta* 49.16.3.1 (Modestinus): penalties for soldiers include ‘*ignominiosa missio*’; 49.16.13.3 (Macer): there are three types of dismissal ‘*honestam causam ignominiosam*’. An ‘*ignominiosa causa*’ is ‘*propter delictum*’.

¹⁹¹ *Digesta* 3.1.1.8 (Ulpian): ‘*qui edicto praetoris ut infames notantur*’.

¹⁹² *Digesta* 3.1.1.5 (Ulpian).

reason of *sexus*, women, and *casus*, the blind;¹⁹³ secondly, those *item notauit personas in turpitudine notabiles* ('likewise he [the Praetor] *notauit* persons noteworthy in turpitude').¹⁹⁴ The latter category contains:¹⁹⁵

- catamites;¹⁹⁶
- those condemned on a capital charge;¹⁹⁷
- those condemned of *calumnia* before a petty judge (*iudex pedaneus*);¹⁹⁸ and
- those who have hired their services to fight beasts.¹⁹⁹

The verb *notari* is used four more times in relation to this group:

- it is said that catamites ought not *notari* if they were raped by the violence of robbers or the enemy;²⁰⁰
- only a person who hired their services to fight beasts is *notatur*, whether they do so or not;²⁰¹
- a person who hunts a beast that is harming a region outside the arena for money, that person is not *notatus*;²⁰² and
- referring again to all those *notantur* in the second Edict.²⁰³

In addition, the word *nota* is used once: that a person does not escape the *nota* if they fight for honour rather than money.²⁰⁴

¹⁹³ *Digesta* 3.1.1.5 (Ulpian): *exceptit praetor sexum et casum*.

¹⁹⁴ *Digesta* 3.1.1.5 (Ulpian).

¹⁹⁵ Although it is often assumed that these persons are categorised as *infames*, as will be pointed out below, the evidence for this designation in the *Digesta* is not straightforward, and that an argument has to be made to justify their inclusion.

¹⁹⁶ *Digesta* 3.1.1.6 (Ulpian): *'qui corpore suo muliebria passus est'*.

¹⁹⁷ *Digesta* 3.1.1.6 (Ulpian): *'qui capitali crimine damnatus est'*.

¹⁹⁸ *Digesta* 3.1.1.6 (Ulpian): *'etiam apud iudices pedaneos postulare prohibetur calumniae publici iudicii damnatus'*. On the *iudex pedaneus* see Berger, 'Encyclopedic Dictionary', above n. 9, 518.

¹⁹⁹ *Digesta* 3.1.1.6 (Ulpian): *'qui operas suas, ut cum bestiis depugnaret, locauerit'*.

²⁰⁰ *Digesta* 3.1.1.6 (Ulpian): *'si quis tamen ui praedonum uel hostium stupratus est, non debet notari'*.

²⁰¹ *Digesta* 3.1.1.6 (Ulpian): *'ergo qui locauit solus notatur, siue depugnauerit siue non'*.

²⁰² *Digesta* 3.1.1.6 (Ulpian): *'sed si quis operas suas locauerit, ut feras uenetur, uel ut depugnaret feram quae regioni nocet, extra harenam: non est notatus'*.

The word *infamia*, or an equivalent (such as ‘*ignominia*’), is never used to qualify *notari* in relation to this group. Does *notari* carry here, therefore, the meaning of *notari infamia*, as in Chapter 3.2, or another meaning, such as ‘to recognise or identify among a group’ or ‘to single out (for some purpose), designate’?²⁰⁵ There is one textual clue in Chapter 3.1 that *notari* here indeed carries the meaning of *notari infamia*. It is stated that *hoc edicto* [the third Edict] *continentur etiam alii omnes, qui edicto praetoris ut infames notantur, qui omnes nisi pro se et certis personis ne postulent* (‘This Edict contains *all others* who are noted as *infames* by the Edict of the Praetor, who may not postulate except for themselves and certain others’).²⁰⁶ As the only persons who are restricted to postulating for themselves and certain others are contained in the third Edict, *alii omnes* must refer to others elsewhere in the Edict who are noted by the Edict as *infames*. The use of *alii* therefore implies that in the other two Edicts there are *infames*, i.e. those *notantur* in the second Edict.

The second instance is in *Digesta* 23.2.43 (Ulpian). The Watson edited English translation of the *Digesta* uses the term *infamia* eight times,²⁰⁷ the corresponding Latin passage does not contain the term *infamia* even once. In each instance, *infamia* has been used in place of a form of *notari* in the Latin. However, the context of this passage suggests that *infamia* may here be an incorrect translation of *notari*. This passage is found in the title dealing with *De ritu nuptiarum* (‘On the ceremony of marriage’), and sits somewhat uncomfortably with its

²⁰³ *Digesta* 3.1.1.7 (Ulpian): ‘*quasi minus* [those in the third Edict] *deliquerint quam hi qui superioribus capitibus notantur* [i.e. those in the second Edict]’.

²⁰⁴ *Digesta* 3.1.1.6 (Ulpian): ‘*eos* [who fight for honour] *enim puto notam non euadere*’.

²⁰⁵ See *Oxford Latin Dictionary*, above n. 32, 1193, meanings 6 and 7 for ‘*noto*’ entry.

²⁰⁶ *Digesta* 3.1.1.8 (Ulpian).

²⁰⁷ Watson (ed.), *Digest*, above n. 6, vol. 2, 662-3.

surroundings. There is no explanation as to why prostitutes are suddenly discussed.²⁰⁸ The primary concern of this title is to outline whom a person may, or may not, marry, with the preceding and succeeding paragraphs both dealing with this issue.²⁰⁹ This suggests that what this passage is concerned with is also categories of people with whom marriage is prohibited. This is further suggested by the statement in the passage in question that: *Senatus censuit non conueniens esse ulli senatori uxorem ducere aut retinere damnatam publico iudicio ...* ('the Senate decreed that it was not fitting for any senator to marry and keep a wife who had been condemned in a public court ...').²¹⁰ However, no similar statement is made in relation to prostitutes, or *infames* for that matter. It is therefore unclear whether this passage is referring to *infames* as a group as prohibited marriage partners, or prostitutes and procurers²¹¹ and those convicted *in iudicio publico* as individual categories of prohibited partners.²¹² There are further problems with identifying this paragraph as a discussion of *infamia*. Firstly, actors, identified elsewhere as *infames*,²¹³ are discussed separately, without any reference to them being made *infamis* for the purposes of a marriage prohibition.²¹⁴ Secondly, women convicted in a *publicum iudicium* of *calumnia* or *praeuaricatio*, also elsewhere classified as *infames*,²¹⁵ are excluded from the

²⁰⁸ *Digesta* 23.2.43pr-9 (Ulpian).

²⁰⁹ *Digesta* 23.2.42 (Modestinus): marriage between a senator's grand-daughter or great-granddaughter and a freedmen or actor, or a person whose parents were actors; 23.2.44 (Paul): The marriage between a senator, his son or grandson and a freedwoman, actor or child of such.

²¹⁰ *Digesta* 23.2.43.10 (Ulpian).

²¹¹ *Digesta* 23.2.43pr-9 (Ulpian).

²¹² *Digesta* 23.2.43.10 (Ulpian).

²¹³ For example, *Digesta* 3.2.1 (Julian).

²¹⁴ *Digesta* 23.2.42 (Modestinus) and 23.2.44 (Paul).

²¹⁵ *Digesta* 3.2.1 (Julian).

ambit of this marriage prohibition.²¹⁶ However, it is also true that condemnation for adultery and, indeed, condemnation in *iudicia publica* in general is stated elsewhere to carry *infamia* as a penalty.²¹⁷ In this context, it would make sense to speak of condemnation in a *iudicium publicum*, such as that for adultery, resulting in a person being *notatur [infamia]*.²¹⁸ Yet, it can equally be argued that all references to a person being noted (*notari*) in this passage occur after the naming of an initial category of persons, either prostitutes, procurers or those convicted in a *iudicium publicum*, i.e. they are elaborating on the content of a specific category. In this context, *notari* could mean ‘to recognise or identify among a group’, i.e., prostitutes or those regarded as convicted under a *iudicium publicum*, so as to fall within the ambit of the prohibition. Similarly, it could also mean ‘to single out (for some purpose), designate’, i.e. as a person who cannot be married.²¹⁹ The passage is certainly difficult, the use of *notari* is unparalleled in the other *Digesta* texts on marriage, even in cases where other *infames* are referred to, but equally, using *notari* to signify ‘designate’ and such like is rare in the *Digesta*.²²⁰ Alternatively, *notari*, here may be translated simply by ‘stigmatise’,²²¹ i.e., stigmatised by being marked out as an unsuitable marriage partner, but not with the specific legal sense of making the named persons *infames*.²²²

²¹⁶ *Digesta* 23.2.43.11 (Ulpian): ‘*Si qua calumniae iudicio damnata sit ex causa publici iudicii et quae praeuarcationis damnata est, publico iudicio damnata esse non uidetur*’.

²¹⁷ *Digesta* 48.1.7pr (Macer).

²¹⁸ See *Digesta* 23.2.43.11, 12 and 13 (Ulpian).

²¹⁹ *Oxford Latin Dictionary*, above n. 32, 1193, meanings 6 and 7 for ‘*noto*’ entry.

²²⁰ But see 48.8.3.2 (Marcian): ‘*sed hoc [drug] solum notatur in ea lege*’ (‘but this [drug] alone is designated by the law’).

²²¹ *Oxford Latin Dictionary*, above n. 32, entry 3 under ‘*noto*’, 1193.

²²² See McGinn, *Prostitution, Sexuality and the Law*, above n. 183, 126 on the quasi-censorial role of the law and the use of *nota* and cognates.

The *ius accusandi* ('right of making an accusation') is said to be removed from those *notati calumnia* ('marked by *calumnia*').²²³ Here it is possible, but not certain, that *notatus* is being used with a meaning of 'marked with *infamia* by reason of *calumnia*' as *calumnia* is stated elsewhere to be a cause of *infamia*,²²⁴ and, as noted above, *infames* are restricted in their ability to bring accusations.

Notari is also used in *Digesta* 26.10.9pr (Modestinus), where it is stated that it is better to join a *curator* to a *tutor* who is tied by necessity or kinship to the *pupillus* than to have that *tutor* removed *cum notata fide et existimatione* ('with *notata* faith and reputation').²²⁵ We know from *Digesta* 3.2 that actions in *tutela* result in *infamia*. However, the usage of *notari* is different in this case, as here it is the *fides* and *existimatio* of the person that is *notatus*, rather than the person himself.²²⁶ The usage of *existimatio* here, coupled with *fides*, is hard to pin down as a purely legal concept, and a translation as 'stain' is probably more apt.²²⁷

Another somewhat different usage of *notare* is in *Digesta* 34.9.22 (Tryphonius). In this passage it is stated that a *tutor* who brings an action in the name of his *pupillus* at the instance of another person, '*nec quisquam iudicum calumnia notabit tutorem* ('nor will any judge mark [*notabit*] a *tutor* with *calumnia* ... '). Again, although condemnation for *calumnia* results in *infamia*,²²⁸ it is not clear

²²³ *Digesta* 48.2.4 (Ulpian): '*sed et calumnia notatis ius accusandi ademptum est ...*'.

²²⁴ *Digesta* 3.2.1 (Julian).

²²⁵ *Digesta* 26.10.9 (Modestinus): '*Si tutor aliquo uinculo necessitudinis uel adfinitatis pupillo coniunctus sit uel si patronus pupilli liberti tutelam gerit et quis eorum a tutela remouendus uideatur, optimum factum est curatorem ei potius adiungi quam eundem cum notata fide et existimatione remoueri*'.

²²⁶ See above.

²²⁷ See *Oxford Latin Dictionary*, above n. 32, entry 4 under '*noto*', 1193.

²²⁸ *Digesta* 3.2.1 (Julian).

that *notabit* is being used here in a strictly technical sense, rather than a more general meaning of ‘mark with disgrace’, i.e. the disgrace of *calumnia*.

A usage of *notare* not representing *infamia* is *Digesta* 39.2.4pr (Ulpian), in relation to the *cautio damni infecti*.²²⁹ Here it is stated that, if the *cautio* required by the Praetor is not given in time, it is the duty of the Praetor or governor ‘*uel reum notare uel protelare eum* [the defendant]’ (‘either *notare* or defer him [the defendant]... ’). However, it is clear from what follows that the meaning of *notare* in this passage is ‘to censure’²³⁰ as the consequence of failing to give *cautio* is elaborated upon as the granting of *missio in possessionem* against the defendant by the Praetor,²³¹ with eventual full possession if the defendant continued to refuse,²³² rather than any other consequence, such as *infamia*.²³³

A very problematic occurrence of *notare* is in relation to the action *de seruo corrupto*. It is stated that a person who incites slaves seems *edicto notari* (‘to be marked by the [Praetor’s] Edict’),²³⁴ which, in accordance with *Digesta* 3.2, one would expect to mean ‘marked with *infamia*’. However, it is also stated that the action for the corruption of a slave, in addition to those involving fraud (*dolus*) or

²²⁹ The *cautio damni infecti* was security that the Praetor could require to be given from the owner of a property on the application of a neighbouring landowner anticipating damages from that property: see *Digesta* 39.2, Thomas, *Textbook*, above n. 89, 111-2 and Kaser, *Roman Private Law*, above n. 53, 99.

²³⁰ As translated in Watson (ed), *Digest*, above n. 6, vol. 3, 381. See also *Oxford Latin Dictionary*, above n. 32, 1193 entry 3(c) under ‘*noto*’.

²³¹ *Missio in possessionem* was a coercive measure applied by the Praetor that allowed a party to enter into possession of the property of the defendant: see Berger, ‘Encyclopedic Dictionary’, above n. 9, 584.

²³² *Digesta* 39.2.4.4 (Ulpian): Thomas, *Textbook*, above n. 89, 112.

²³³ *Digesta* 39.2.4.1 (Ulpian), see also Kaser, *Roman Private Law*, above n. 53, 99 and Thomas, *Textbook*, above n. 89, 111-2.

²³⁴ *Digesta* 11.3.1.3 (Ulpian): ‘*qui igitur seruum sollicitat ad aliquid uel faciendum uel cogitandum improbe, hic uidetur hoc edicto notari*’; 11.3.3pr (Ulpian): ‘*dolo malo adiecto calliditatem notat praetor eius quie persuadet: ceterum si quis sine dolo deteriorem fecerit, non notatur, et si lusus gratia fecit, non tenetur*’.

deceit (*fraus*), *non sint famosae* ('are not *actiones famosae*').²³⁵ This passage is particularly problematic as *de dolo malo et fraus* are included as *actiones famosae* in *Digesta* 3.2.1. Either the statement that these *actiones* are not *famosae* is incorrect or it is necessary to understand *actiones* that *doli uel fraudis habent mentionem* are *actiones* that contain *fraus* or *dolus* as an element, but are not the *actiones* in *Digesta* 3.2.1. It is also interesting to note in this regard that *de seruo corrupto* is grouped with the *actiones famosae furtum, iniuria, and ui bonorum raptorum* and *similes* as *turpes actiones*, the proceeds of which are disgorged from partnership funds.²³⁶ The phrase *turpis actio* is repeated in connection with *actiones famosae* in discussion of the rationale for the *actio rerum amotarum*, which was created for goods unlawfully removed by a wife as it is not permissible to bring a *turpis actio*, i.e. *furtum* (an *actio famosa*), against a wife.²³⁷ Both these passages suggest that the statement that an action *de seruo corrupto* is not an *actio famosa* is incorrect, although such an action is not mentioned in *Digesta* 3.2. If the statement in *Digesta* 37.15.7pr (Ulpian) that an action *de seruo corrupto* is not an *actio famosa* is correct, this would mean that the expression *turpis actio* encompasses a broader spectrum of activities than the *actiones famosae* that entail

²³⁵ *Digesta* 37.15.5.1 (Ulpian): '*nec hae quidem, quae doli uel fraudis habent mentionem,*' (*Digesta* 37.15.6 (Paul)) '*nec serui corrupti agetur,*' (*Digesta* 37.15.7pr (Ulpian)) '*licet famosae non sint*'.

²³⁶ *Digesta* 17.2.56 (Paul): '*nec quicquam interest, utrum manente societate praestiterit ob furtum an dissoluta ea. Idemque est in omnibus turpibus actionibus, ueluti iniuriarum, ui bonorum raptorum, serui corrupti et similibus, et in omnibus poenis pecuniariis quae ex publicis iudiciis accidunt*'. Berger, 'Encyclopedic Dictionary', above n. 9, 346, regards *actiones famosae* as synonymous with *actiones turpes*.

²³⁷ *Digesta* 25.2.2 (Gaius): '*nam in honorem matrimonii turpis actio aduersus uxorem negatur*'.

infamia, perhaps also *actiones*, such as *de seruo corrupto*,²³⁸ that involve *dolus malus*.

Another example of *notare* where it is unclear whether the term should be interpreted as ‘censure’ or ‘noted/marked/censured with *infamia*’ is *Digesta* 47.10.15.5 (Ulpian), relating to *iniuria*, where it is stated that the Praetor does not ‘*notare*’ all loud calling, but only that which is faulted by sound morals and is directed to the discredit of another.²³⁹ Fortunately, it is not necessary to resolve this issue, as it is clearly stated elsewhere that *infamia* follows from condemnation for *iniuria*.²⁴⁰

Notatus is also used in relation to the examination of witnesses, where the judge is to inquire into their *condicio*, which involves consideration of, among other things, *utrum decurio an plebeius sit: et an honestae et inculpatae uitae an uero notatus quis et reprehensibilis ...* (‘whether he is a decurion or plebian whether he is of an honest and blameless life or indeed is *notatus* and reprehensible’).²⁴¹ The use of the non-specific terms *honestae et inculpatae uitae* and *reprehensibilis* in conjunction with *notatus*, suggests that *notatus* here is not referring specifically to *infames*, but to a person of more general ill repute.

²³⁸ See *Digesta* 11.3.1pr (Ulpian): ‘*Ait praetor: “Qui seruum alienum alienam recepit persuasisse quid ei dicetur dolo malo, quo eum eam deteriore faceret, in eum quanti ea res erit in duplum iudicium dabo”*’.

²³⁹ *Digesta* 47.10.15.5 (Ulpian): ‘*Sed quod adicitur a praetore “aduersus bonos mores” ostendit non omnem in unum collatam uociferationem praetorem notare, sed eam, quae bonis moribus improbat quaeque ad infamiam uel inuidiam alicuius spectaret*’.

²⁴⁰ *Digesta* 3.2.1 (Julian).

²⁴¹ *Digesta* 22.5.3pr (Callistratus): ‘*Testium fides diligenter examinanda est. ideoque in persona eorum exploranda erunt in primis condicio cuiusque, utrum quis decurio an plebeius sit: et an honestae et inculpatae uitae an uero notatus quis et reprehensibilis: an locuples uel egens sit, ut lucri causa quid facile admittat, uel an inimicus ei sit, aduersus quem testimonium fert, uel amicus ei sit, pro quo testimonium dat*’.

Notare is also used where it is stated that *ueteres notauerunt* a soldier who castigates a centurion.²⁴² As ignominious dismissal, which is known to have involved *infamia*,²⁴³ is not referred to here, but rather either a change of service or capital punishment, it is possible that the meaning of ‘censured’ is intended, rather than ‘noted with *infamia*’. Where, however, a soldier is *notatus* for desertion, it is possible that *infamia* is what is being implied.²⁴⁴

Digesta 48.19.32 (Ulpian), which states that a person pronounced to have committed *uis* in proceedings arising from an interdict *non erit notatus*,²⁴⁵ should be taken as referring to ‘*notatus infamia*’, rather than ‘censured’ or a similar meaning as it is stated elsewhere that interdicts are not *famosa*, i.e., do not entail *infamia* as a consequence.²⁴⁶

Where a jurist is termed in the *Digesta* *notatus* for his viewpoint, the most likely translation is that of ‘censured’.²⁴⁷

As *nota* is used in relation to disinheritance (see below) to indicate disgrace, so too is *notari* when it is stated that the Praetor thinks that persons *exheredatione notati* should not be admitted to *possessio bonorum*.²⁴⁸

²⁴² *Digesta* 49.16.13.4 (Macer): ‘*nam eum, qui centurioni castigare se uolenti restiterit, ueteres notauerunt: si uitem tenuit: militiam mutat, si ex industria fregit uel manum centurioni intulit, capite punitur*’. Contra Watson (ed.), *Digest*, above n. 6, vol. 4, 896 ‘branded with infamy’.

²⁴³ *Digesta* 3.2.1 (Julian).

²⁴⁴ *Digesta* 49.16.15 (Papinian): a soldier ‘*notatus*’ for desertion loses pay for the period between desertion and reinstatement if he is reinstated.

²⁴⁵ *Digesta* 48.19.32 (Ulpian): ‘*Si praeses uel iudex ita interlocutus sit ‘uim fecisti’; si quidem ex interdicto, non erit notatus nec poena legis Iuliae sequetur: si uero ex crimine, aliud est*’.

²⁴⁶ *Digesta* 43.16.13 (Ulpian): ‘*Neque unde ui neque aliud interdictum famosum est*’.

²⁴⁷ *Digesta* 31.1.24 (Ulpian): Marcellus ‘*merito notatus est*’ for his viewpoint on certain legacies.

²⁴⁸ *Digesta* 37.4.8pr (Ulpian): ‘*Non putauit praetor exheredatione notatos et remotos ad contra tabulas bonorum possessionem admittendos ...*’.

There are also numerous cases in the *Digesta* where *notare/notari* carries the meaning of ‘to mention in speech or writing, call attention to (a fact, etc)’.²⁴⁹

Existimatio

The term *existimatio* is a problematic one as it can very easily be read as ‘reputation’, as well as the legal state of *inlaesa dignitas* referred to in *Digesta* 50.13.5 (Callistratus), discussed above. In fact, it is quite probable that what affected one’s legal *existimatio* also affected one’s reputation. When *existimatio* is said to be affected by an *actio famosa*, it is easier to infer that the meaning of *inlaesa dignitas* is being conveyed. Such a usage occurs where it is stated that *qui*

²⁴⁹ See *Oxford Latin Dictionary*, above n. 32, entry 11 under ‘*noto*’, 1193. See *Digesta* 47.10.15.26 (Ulpian): ‘*sed uidetur et ipsi Labeoni (et ita se habet) praetorem eandem causam secutum uoluisse etiam specialiter de ea re loqui: ea enim quae notabiliter fiunt, nisi specialiter notentur, uidentur quasi neglecta*’; 50.8.6(4) (Valens): ‘... *et pecuniam eo legatam in id, quod maxime necessarium municipibus uideatur, conferre permittitur, ut in eo munificentia eius qui legauit inscriptione notetur*’. Numerous references exist to certain jurists, who ‘*notat*’ various matters, space prevents full quotation: 1.21.1.1 (Papinian); 2.1.9 (Paul); 2.14.54 (Scaevola); 3.5.9.1 (Ulpian); 3.5.30.2 (Papinian); 4.2.9.8 (Ulpian) ‘*Julianus ... notatus*’; 4.2.9.8 (Ulpian); 4.2.11 (Paul) – title of work; 4.3.7.7 (Ulpian); 4.4.11.4 (Ulpian); 4.6.41 (Julian); 5.1.16 (Ulpian); 5.1.75 (Julian); 5.2.13 (Scaevola); 6.1.61 (Julian); 6.2.16 (Papinian); 7.1.7.3 (Ulpian); 7.1.17.1 (Ulpian); 7.4.29.2 (Ulpian); 7.8.4pr (Ulpian); 7.8.6 (Ulpian); 8.1.18 (Paul) – title of work; 8.5.4.5 (Ulpian); 9.2.41pr (Ulpian); 10.3.6.12 (Ulpian); 13.4.2.7 (Ulpian); 15.1.7.1 (Ulpian); 15.1.16 (Julian); 15.3.14 (Julian); 16.1.8.2 (Ulpian); 17.2.30 (Paul) – title of work; 17.2.65.8 (Paul); 18.1.72pr (Papinian); 18.5.4 (Paul) – title of work; 18.6.11 (Scaevola) – title of work; 19.1.23 (Julian); 19.2.35.1 (Africanus); 20.1.27 (Marcellus); 22.1.1.2 (Papinian); 23.2.57a (Marcellus) – title of work; 23.3.12.1 (Ulpian); 23.3.48.1 (Julian); 24.1.11.6 (Ulpian); 24.1.63 (Paul); 26.4.1.3 (Ulpian); 26.7.28.1 (Marcellus); 26.8.12 (Julian); 27.9.13.1 (Paul); 28.1.16.1 (Pomponius); 28.4.4 (Papinian); 28.5.5 (Julian); 28.5.17.5 (Ulpian); 28.5.40 (Julian); 29.2.42pr (Ulpian); 29.2.63 (Pomponius); 29.7.9 (Marcellus); 30.1.80 (Marcellus) – title of work; 30.1.92pr (Julian); 30.1.104.1 (Julian); 30.1.114.7 (Marcellus); 31.1.24 (Ulpian); 32.1.36 (Claudius) – title of work; 33.1.9 (Papinian); 33.3.1 (Julian); 33.7.12.27 (Ulpian); 33.9.1 (Ulpian); 33.9.3.1 (Ulpian); 34.3.3.5 (Ulpian); 34.3.5.2 (Ulpian); 34.9.26 (Scaevola); 35.1.20 (Julian); 35.1.39pr (Iauolenus); 35.1.69 (Gaius); 35.2.34 (Marcellus); 35.2.56.2 (Marcellus); 37.4.4pr (Paul); 37.6.3.1 (Julian); 38.2.42 (Papinian); 39.6.15 (Julian); 40.2.4.2 (Paul); 40.2.24 (Paul); 42.4.3pr (Ulpian); 43.24.7.5 (Ulpian); 45.1.116 (Papinian); 46.1.8.8 (Ulpian); 46.3.36 (Julian); 46.5.8pr (Papinian); 47.10.11.7 (Ulpian); 48.5.8(7,1) (Papinian); 50.16.9 (Ulpian). Similarly, something is ‘*notando*’ in a treatise: *Digesta* 50.4.18.26 (Arcadius Charisius). A very similar usage is in 28.2.29.12 (Scaevola): where the first chapter of a will ‘*notauerit*’ certain circumstances. References are also made to points that ‘*notandum [est]*’: 1.8.9.2 (Ulpian); 3.4.5 (Ulpian); 3.6.3.3 (Ulpian); 4.6.21.1 (Ulpian); 9.2.25.2 (Ulpian); 10.4.3.2 (Ulpian); 11.5.1.2 (Ulpian); 13.6.1.1 (Ulpian); 21.1.25.7 (Ulpian); 25.3.1.6 (Ulpian); 25.4.1.5 (Ulpian); 33.9.3.6 (Ulpian); 37.4.10.3 (Ulpian); 38.10.10.14 (Paul); 39.6.13.1 (Julian); 43.15.1.6 (Ulpian); 43.32.1.5 (Ulpian); 48.5.28.16 (Ulpian).

famosam actionem intendit, non debet uagari cum discrimine alienae existimationis ... ('who intends an *actio famosa* ought not be vague in dealing with danger to the *existimatio* of another').²⁵⁰

Existimatio is also explicitly linked with *infamia* where it is stated that an action involving *infamia* is given preference over one involving a great sum of money, where *causa existimationis* is used as an equivalent to an action involving *infamia*.²⁵¹

As well as being classed as something affected by condemnation in civil *actiones famosae*, *existimatio* is also said to be affected by condemnation in certain criminal cases. It is worth noting in this regard that, while an apparent hesitancy to grant *actiones famosae* indicates that such *actiones* were considered the more serious, in relation to criminal cases, penalties touching only on *existimatio* were considered among the more moderate of the available punitive measures. Hence, in a criminal case, penalties involving money or *quae existimationem contingunt* ('that affect *existimatio*'), up to relegation, can be imposed upon a person who fails to appear through contumacy. However, more serious penalties, such as condemnation to the mines or capital punishment, cannot be imposed on those who fail to appear.²⁵² This division between penalties that may be imposed on persons who do not appear, and those that cannot, matches the division between

²⁵⁰ *Digesta* 47.10.7pr (Ulpian): 'Praetor edixit: "qui agit iniuriarum, certum dicat, quid iniuriae factum sit": quia qui famosam actionem intendit, non debet uagari cum discrimine alienae existimationis, sed designare et certum specialiter dicere, quam se iniuriam passum contendit'.

²⁵¹ *Digesta* 50.17.104 (Ulpian): *Si in duabus actionibus alibi summa maior, alibi infamia est, praeponenda est causa existimationis. Ubi autem aequiperant famosa iudicia, etsi summam imparem habent, pro paribus accipienda sunt.*

²⁵² *Digesta* 48.19.5pr (Ulpian): 'melius statuatur in absentes pecuniarias quidem poenas uel eas, quae existimationem contingunt, si saepius admoniti per contumaciam desint, statui posse et usque ad relegationem procedi: uerum si quid grauius irrogandum fuisset, puta in metallum uel capitis poenam, non esse absentibus irrogandum'.

punishments that merely diminish *existimatio*, and those that consume it.²⁵³ Hence, *infamia*, as a penalty that merely diminishes *existimatio*,²⁵⁴ was one that could be applied to a person *in absentia*. A very similar list is given elsewhere in the *Digesta* dividing punishments between capital penalties and *ceterae poenae ad existimationem, non ad capitis periculum pertinent* ('the remaining penalties, which pertain to *existimatio*, not to *caput*').²⁵⁵ Hence, *infamia* can be classified as a non-capital punishment. Although in the *Digesta capitalis* is used only to cover those involving death or loss of citizenship, in non-technical parlance, however, *capitalis* pertains to any case involving *existimatio*.²⁵⁶ It appears that a fine was another type of punishment again that did not affect *existimatio*.²⁵⁷

Someone who is removed from tutorship *ob segnitiam uel rusticitatem inertiam simplicitatem uel ineptiam* ('on account of dilatoriness, boorishness, want of skill, simpleness, or ineptitude') is said to have an *integra existimatio* ('intact *existimatio*').²⁵⁸ Whichever of these reasons forms the basis for allowing a person to leave the tutorship or curatorship must be stated *ut appareat de existimatione*

²⁵³ *Digesta* 50.13.5.1-3 (Callistratus).

²⁵⁴ *Digesta* 50.13.5.2 (Callistratus).

²⁵⁵ *Digesta* 48.19.28.1 (Callistratus). The *capitales poenae* are listed as condemnation to the *furca* (a cross or gallows), being burned alive, beheading, condemnation to the mines and deportation to an island: 48.19.28pr (Callistratus). '*Caput*' here refers to a person's civil status, i.e. having freedom ('*status libertatis*'), citizenship ('*status ciuitatis*') and belonging to a family ('*status familiae*'): Berger, 'Encyclopedic Dictionary', above n. 9, 381.

²⁵⁶ *Digesta* 50.16.103 (Modestinus): '*Licet "capitalis" Latine loquentibus omnis causa existimationis uideatur, tamen appellatio capitalis mortis uel amissionis ciuitatis intelligenda est*'.

²⁵⁷ *Digesta* 50.16.131.1 (Ulpian) notes that penalties may be pecuniary, capital or involve '*existimatio*: ... *poena autem non tantum pecuniaria, uerum capitis et existimationis irrogari solet*'. A fine is imposed where there is no set penalty.

²⁵⁸ *Digesta* 26.10.3.18 (Ulpian): '*Qui ob segnitiam uel rusticitatem inertiam simplicitatem uel ineptiam remotus sit, in hac causa est, ut integra existimatione tutela uel cura abeat*'. The phrase is repeated at the beginning of the following passage 26.10.4pr (Ulpian): '*haec enim causae faciunt, ut integra existimatione tutela uel cura quis abeat*'.

(‘so that it is clear with respect to his *existimatio*’).²⁵⁹ As removal from the position as *tutor* can involve *infamia*,²⁶⁰ *integra existimatio* appears to refer here to the opposite of *infamia*. This is supported by the following sentence, where a person who joins himself with a *tutor* whom he has failed to remove on account of fraud *non erit famosus*, terminology used in relation to *infamia* in *Digesta* 3.2 (see above).²⁶¹

There are also references to *existimatio*, meaning ‘reputation’, that do not appear to have any link to the effects of *infamia* as a legal concept. For example, *existimatio* is said to be affected by defamation, i.e., it is used for ‘reputation’ in a general sense.²⁶² Similarly, persons who have forced themselves onto another as a *procurator* are afforded a hearing to argue for their retention where they want to end abuse and would be rid of the procuratorship *si id inlaesa existimatione sua fiat* (‘if it might come about with their *existimatio* unaffected’).²⁶³ It is difficult to see what sort of abuse could result in a person becoming an *infamis*. It is also stated that if the surety of a debtor for money lent at interest does not follow the debtor’s request to plead a defence that the money was not lent on interest *propter suam existimationem* (‘on account of his own *existimatio*’), the surety should be

²⁵⁹ *Digesta* 26.10.4.1 (Ulpian): ‘Decreto igitur debet causa remouendi significari, ut appareat de existimatione’.

²⁶⁰ *Digesta* 3.2.1 (Julian).

²⁶¹ *Digesta* 26.10.3.18 (Ulpian): ‘sed et si quis ob fraudem non remouebit aliquem, sed ei adiunxerit, non erit famosus, quia non est abire tutela iussus’.

²⁶² *Digesta* 47.10.1.4 (Ulpian): ‘Et si forte cadaveri defuncti fit iniuria, cui heredes bonorumue possessores existimus, iniuriarum nostro nomine habemus actionem, spectat enim ad existimationem nostram, si qua ei fit iniuria’; 47.10.1.6 (Ulpian): ‘Quotiens autem funeri testatoris uel cadaveri fit iniuria, si quidem post aditam hereditatem fiat, dicendum est heredi quodammodo factam (semper enim heredis interest defuncti existimationem purgare)’.

²⁶³ *Digesta* 3.3.25 (Ulpian): ‘nec ferendus est procurator qui sibi adserit procurationem: nam hoc ipso suspectus est qui operam suam ingerit inuito. Nisi forte purgare magis conuicium quam procurationem exsequi maluit. Et hactenus erit audiendus, si dicat se procuratione quidem carere uelle, sed si id inlaesa existimatione sua fiat ...’.

able to sue the debtor for what he has paid, as the surety ought not suffer *si pepercisset pudori suo* ('if he has set it in motion through his shame'). The linking of *existimatio* here with *pudor*, not generally used in passages associated with *infamia*, suggests that *existimatio* here means general reputation. Similarly, it is difficult to see how *infamia* could result from the factual circumstances described.

Reference is made to the *dignitas* and *existimatio* of witnesses in the context of determining what weight should be accorded to their testimony.²⁶⁴ As noted above, *existimatio* is defined in relation to *dignitas*. Therefore, it is likely that these terms are being used here to carry a general connotation, rather than a specific reference to *existimatio* as a state of intact *dignitas*. Similarly, it is later stated that the evidence should be followed of persons *honestatis et existimationis* ('of honest *existimatio*'), which does not fit the definition of *existimatio* as *inlaesa dignitas*.²⁶⁵ The qualification *honestas* here suggests that, again, what is being referred to by *existimatio* is a more general 'reputation'. A similar addition of *honestas* is found in a passage dealing with the inquiry to be held in the appointment of *tutores* where one *tutor* has offered security. It is to be inquired *quales num forte eius existimationis uel eius honestatis sunt, ut non debeant hanc contumeliam satisfactionis subire* ('what quality they are, whether they are of such *existimatio* or *honestas* that they ought not go under the indignity of giving security').²⁶⁶ Again, this appears to be something wider than merely *infamia*.

²⁶⁴ *Digesta* 22.5.3.1 (Callistratus): ... 'Tu magis scire potes, quanta fides habenda sit testibus, qui et cuius dignitatis et cuius existimationis sint ...'.

²⁶⁵ *Digesta* 22.5.21.3 (Arcadius Charisius): 'Si testes omnes eiusdem honestatis et existimationis sint et negotii qualitas ac iudicis motus cum his concurrat, sequenda sunt omnia testimonia ...'.

²⁶⁶ *Digesta* 26.2.17.2 (Ulpian): 'Duplex igitur causae cognitio est, una ex persona eius qui optulerit satisfactionem, quis et qualis est, alia contutorum, quales sunt, num forte eius

Existimatio is again linked with *honestas* where it is stated that *nimum est licere tutori respectu existimationis pupilli erogare ex bonis eius, quod ex suis non honestissime fuisset erogaturus* ('it is too much to allow the *tutor*, with respect to the *existimatio* of the *pupillus*, to expend from his [the *pupillus*'] goods what he would not expend from his own with *honestas*').²⁶⁷ There could be no connection between expenditure as a reflection of the *pupillus*' *existimatio* and legal *infamia*.

In some cases it is difficult to determine whether or not *existimatio* is being used in what may be regarded as a 'technical' legal sense. In a discussion of circumstances where a former husband has, after a divorce, demanded an examination of his former wife to determine whether or not she is pregnant, it is stated that the former husband should know that such an examination *ad inuidiam existimationemque suam pertinere* ('pertains to his own reproach and *existimatio*') as, if the woman does not subsequently give birth, *possit uideri captasse hoc ad aliquam mulieris iniuriam* ('he could seem to have sought this [inquiry] for some injury ('*iniuria*') of the woman').²⁶⁸ *Iniuria* is an infaming action,²⁶⁹ which could be brought against a former wife.²⁷⁰ The fact that both *inuidia* and *existimatio* are said to be affected by such action, and the indefinite way the *iniuria* is referred to here ('*aliquam ... iniuriam*'), suggest that this passage is referring to the general 'reputation' of the husband, rather than specifically to the risk of *infamia* from an action for *iniuria*. It cannot be doubted,

existimationis uel eius honestatis sunt, ut non debeant hanc contumeliam satisfactionis subire?

²⁶⁷ *Digesta* 26.7.12.2 (Paul).

²⁶⁸ *Digesta* 25.4.1pr (Ulpian).

²⁶⁹ *Digesta* 3.2.1 (Julian).

²⁷⁰ See *Digesta* 25.2.1 (Paul) – 2 (Gaius), where an action having as a consequence *infamia* (*furtum*) is refused for stealing committed by a wife, but allowed in *Digesta* 25.2.3pr (Paul) against a divorced wife.

however, that the reduced *existimatio* of an *infamis* would have a detrimental effect on the evaluation by the judge of a person's evidence.

Another example that is difficult to categorise strictly as a reference to *existimatio* in a sense specifically related to *infamia* is the statement that a *filius familias*, appointed as heir under a condition disapproved of by the Emperor and Senate, may annul his father's will as *quae facta laedunt pietatem existimationem uerecundiam nostram et, ut generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum est* ('those acts which harm our *pietas*, *existimatio*, modesty ('*uerecundia*') and, if I may speak generally, are done against good morals, it must be thought we are not able to do').²⁷¹ The conditions disapproved of by the Senate and Emperor appear to be conditions not allowed in wills. The contravention of the *senatus consulta* or *decreta principis* referred to here could have involved *infamia*, so as to imperil *existimatio*. However, the catalogue of 'qualities' that the condition may harm appears to cast the net wider than *infamia*, implying that *existimatio*, here may not carry a precise meaning, but rather, again, be general 'reputation'.

In relation to the services to be performed by a *libertus*, it is stated that account is to be taken *ex existimatione* as services are to be carried out that are *dignitati facultatibus consuetudini artificio eius conuenientes* ('suitable for his *dignitas*, faculties, habit and skill').²⁷² The qualities used to elaborate *existimatio* here

²⁷¹ *Digesta* 28.7.15 (Papinian): '*Filius, qui fuit in potestate sub condicione scriptus heres, quam senatus aut princeps improbant, testamentum infirmet patris, ac si condicio non esset in eius potestate: nam quae facta laedunt pietatem existimationem uerecundiam nostram et, ut generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum est*'.

²⁷² *Digesta* 38.1.50pr (Neratius): '*Operarum editionem pendere ex existimatione edentis: nam dignitati facultatibus consuetudini artificio eius conuenientes edendas*'.

suggest that what is being discussed is wider than Callistratus' definition of *existimatio* discussed earlier.

When discussing who should be submitted to torture, it is stated that one of the means through which the truth comes to light is *ex eo ... cuius existimationis quisque in ciuitate sua est* ('from that *existimatio* everyone possesses in their community (*ciuitas*)').²⁷³ The fact that *existimatio* here is qualified by *in ciuitate sua* indicates that what is meant by *existimatio* here is, again, general reputation.

Existimatio is also used in the *Digesta*, as in Chapter 3.2, to refer to the 'opinion' held by a person.²⁷⁴

Fama

As noted above, when used in the context of Chapter 3.2, it is easy to read '*fama*' as something that is damaged by *infamia*.²⁷⁵ However, throughout the *Digesta*,

²⁷³ *Digesta* 48.18.10.5 (Arcadius Charisius).

²⁷⁴ See *Oxford Latin Dictionary*, above n. 32, 644. See *Digesta* 12.6.27 (Paul): '*Qui loco certo debere existimans indebitum soluit, quolibet loco repetet: non enim existimationem soluentis eadem species repetitionis sequitur*'; 22.6.9.4 (Paul): '*Qui ignorauit dominum esse rei uenditorem, plus in re est, quam in existimatione mentis*'; 39.6.43 (Neratius): '*... sufficere existimationem donantis hanc esse, ut moriturum se putet*'; 40.2.4.1 (Julian): '*... plus enim in re est, quam in existimatione et utroque casu uerum est Stichum uoluntate domini manumissum esse*'; 41.3.15.3 (Paul): '*Si ex testamento uel ex stipulatu res debita nobis tradatur, eius tempore existimationem nostram intuendam, quo traditur, quia concessum est stipulari rem etiam quae promissoris non sit*'; *Digesta* 41.3.36.1 (Gaius): '*Item si quis aliqua existimatione deceptus crediderit ad se hereditatem pertinere, quae ad eum non pertineat, et rem hereditatem alienauerit, aut si is, ad quem usus fructus acillae pertinet, partem eius existimans suum esse, qui et fetus pecundum ad fructuarium pertinet, alienauerit*'; 41.4.2.15 (Paul): '*Si a pupillo emero sine tutoris auctoritate, quem puberem esse putem, dicimus usucapionem sequi, ut hic plus sit in re quam in existimatione ...*'; 41.10.5 (Neratius): '*... sed id, quod quis, cum suum esse existimaret, possederit, usucapiet, etiamsi falsa fuerit eius existimatio*'; 43.12.1.1 (Ulpian): '*Flumen a riuo magnitudine discernendum est aut existimatione circumcolectium*'; 43.24.4 (Venuleius): '*Seruius etiam eum clam facere, qui existimare debeat sibi controuersiam futuram, quia non opinionem cuius et resupinam existimationem esse oporteat, ne melioris condicionis sint stulti quam periti*'; 45.3.34 (Javolenus): '*distat ista causa eius, qui liber emptus bona fide seruit, quia in eo ipsius et emptoris existimatio consentit*'; 47.9.6 (Paul): '*... rei hereditariae furtum non fit sicut nec eius, quae sine domino est, et nihil mutat existimatio subripiensis*'.

²⁷⁵ Particularly, *Digesta* 3.2.24 (Ulpian).

damaged *fama* is not necessarily the result of *infamia*. For example, where the *fama* of a *domus* is referred to as not being harmed by the corruption of a slave,²⁷⁶ it is difficult to conceptualise this as an explicit statement that such an action is not infaming in the legal sense. Rather, it appears to refer more generally to the ‘reputation’ of the *domus*.²⁷⁷ A similar meaning appears to be conveyed by references to the *fama* of marriage partners.²⁷⁸

In some cases, it is *prima facie* unclear whether *fama* has a general or specific meaning, for example, it is stated that slaves are punished more than free persons, and *famosos quam integrae fama homines* (‘*famosi* [more] than persons of intact *fama*’).²⁷⁹ The expression *integra fama* echoes the sense of unharmed *existimatio* used in relation to *infamia* and may thus be regarded as being used for persons who are not *infames*. *Integra fama* is certainly used in contexts where it means the opposite to *infamia*. For example, where a *tutor* is removed, but no reason is given, it is said that *hunc integrae esse fama* (‘that his *fama* is intact’).²⁸⁰ This clearly could be read as equivalent to ‘without *infamia*’, as a *tutor* removed for maladministration becomes an *infamis*.²⁸¹ Nevertheless, despite the combined use of *integra fama* and *famosi*, both of which elsewhere refer to *infamia*, modern

²⁷⁶ *Digesta* 11.3.14.1 (Paul): ‘... *et pauperiorem se factum esse dominus probare potest dignitate et fama domus integra manente ...*’.

²⁷⁷ On ‘*fama*’ as reputation see entries 5-7 under ‘*fama*’ in *Oxford Latin Dictionary*, above n. 32, 674.

²⁷⁸ *Digesta* 24.1.3pr (Ulpian): Where ‘*famae etiam coniunctorum*’ was taken into consideration in initiating the prohibition against gifts between spouses *inter se*, so that the marriage would not seem to have been made for a price (‘*pretium*’).

²⁷⁹ *Digesta* 48.19.28.16 (Callistratus): ‘*Maiores nostri in omni supplicio seuerius seruos quam liberos, famosos quam integrae fama homines punierunt*’.

²⁸⁰ *Digesta* 26.10.4.2 (Ulpian): ‘*Quid ergo si non significauerit causam remotionis decreto suo? Papinianus ait debuisse dici hunc integrae esse fama, et est uerum*’.

²⁸¹ *Digesta* 3.2.1 (Julian).

authors generally have regarded this passage on punishment as only a general reference to people of poor reputation.²⁸²

It appears that *fama* should be read as meaning ‘general reputation’ where it is stated that heirs accepted an inheritance ‘*famae defuncti conseruandae gratia*’ (‘for the sake of conserving the *fama* of the deceased’) despite the fact that the value of the estate was unlikely to meet the value of the deceased’s debts, as the dead could not posthumously become an *infamis*.²⁸³

There are several examples where attacks on *fama* are discussed, both in terms of actions for *iniuria*,²⁸⁴ and attacks on patrons by *liberti*.²⁸⁵ In both of these cases, it is likely that *fama* should be read as ‘general reputation’.

Where it is said that denunciations may be made to the *fiscus*, the phrase *fama non laeditur* (‘with *fama* unharmed’) could mean that *infamia* would not result, as it is hard to see how a legal text could control the social evaluation of a certain course of legal action.²⁸⁶ This text also suggests that denunciations, other than to the *fiscus*, could result in *infamia*.

²⁸² See, e.g., Kaser, ‘Infamia und Ignominia’, above n. 2, 267; A. H. J. Greenidge, *Infamia: Its Place in Roman Public and Private Life* (Oxford, Clarendon Press, 1894) 163.

²⁸³ *Digesta* 42.8.23 (Scaevola): ‘*Primo gradu scripti heredes cum animaduerterent bona defuncti uix ad quartam partem aeris alienis sufficere, fama defuncti conseruandae gratia ex consensu creditorum auctoritate praesidis prouinciae secundum constitutionem ea condicione adierunt hereditatem ...*’.

²⁸⁴ *Digesta* 47.10.1.4 (Ulpian): An action in *iniuria* is open to heirs ‘... *si fama eius, cui heredes exstitimus, lacessatur*’.

²⁸⁵ *Digesta* 48.5.39(38).9 (Papinian): ‘*Liberto patroni famam lacessere non facile conceditur ...*’; 47.10.15.29 (Ulpian): ‘*Si quis libello dato uel principi uel ali cui famam alienam insectatus fuerit, iniuriarum erit agendum ...* [it is doubtful a *libertus* can kill a patron having caught him in adultery] *nam cuius fama, multo magis uitae parcendum est*’.

²⁸⁶ *Digesta* 49.14.2pr (Callistratus): ‘*Ex quibusdam causis delatione suscipientium fama non laeditur, ueluti eorum, qui non praemii consequendi, item eorum qui ulciscendi gratia aduersarium suum deferunt, uel quod nomine rei publicae suae quis exsequitur causam et haec ita obseruari plurifariam principalibus constitutionibus praecipitur*’.

Some uses of *fama* are not easily susceptible to categorisation. For example, it is stated that cases of delayed manumission do not fall under the *senatus consultum Rubrianum*²⁸⁷ where the delay is due to, *inter alia*, *uel maior res familiaris aut capitis famaue periculum* ('either a greater danger to family estate, *caput* or *fama*').²⁸⁸ *Caput* has a specific legal meaning,²⁸⁹ which could perhaps imply that *fama* here is referring to some specific juristic concept, though it is by no means certain.

Vocabulary Beyond *Digesta* 3.2

Infamare/Infamari

The verb *infamari* bears an obvious connection to the noun *infamia* and is used in relation to *curatores* or *tutores* who marry their ward or who give their ward in marriage to their son or to anyone before she is 26 years old (unless she was betrothed to the person by the father's will).²⁹⁰ Which is likely to mean legal *infamia* since *infamia* is a penalty for other offences by *tutores* and *curatores*.²⁹¹

Infamare is also used to mean '[t]o attack the reputation or character of, blacken, defame' and similar.²⁹² For example, where an arbiter is not automatically removed *si eum infamauerunt litigatores* ('if the parties attacked his reputation'),

²⁸⁷ This *senatus consultum* allowed *serui* owed their freedom in a will to be granted it by the Praetor where the persons from whom the freedom is due fail to attend on summons by the Praetor: *Digesta* 40.5.26.7 (Ulpian).

²⁸⁸ *Digesta* 40.5.36pr (Maecianus).

²⁸⁹ See, e.g., Berger, 'Encyclopedic Dictionary', above n. 9, 381.

²⁹⁰ *Digesta* 23.2.66pr (Paul): '*Non est matrimonium, si tutor uel curator pupillam suam intra uicesimum et sextum annum non desponsam a patre nec testamento destinatam ducat uxorem uel eam filio suo iungat: quo facto uterque infamatur et pro dignitate pupillae extra ordinem coeretur*'.

²⁹¹ E.g., *tutela* in *Digesta* 3.2.1 (Julian).

²⁹² *Oxford Latin Dictionary*, above n. 32, entry 2, see also other entries under '*infamo*', 894.

but only where cause has been shown.²⁹³ A similar usage is found where it is stated that an arbiter *infamatus a litigatoribus* ('defamed by the parties') is compelled to make an award.²⁹⁴ *Infamare* is used in a similar sense in relation to *iniuria*, particularly to mean 'to defame'. For example, when something is spoken neither loudly nor in a crowd *infamandi causa* ('for the purpose of defaming');²⁹⁵ there is an action for *iniuria* wherever anyone says or does something *ut alium infamet* ('so as to bring disrepute on another');²⁹⁶ selling a pledge *infamandi mei causa* ('for the sake of denigrating me');²⁹⁷ an action for affront of a slave exists if a slave has been *infamatus ... uel facto aliquo uel carmine scripto* ('defamed either by some deed or a written poem');²⁹⁸ it is not right to condemn someone *qui nocentem infamauit* ('who shames a person who is doing harm');²⁹⁹ anything placed on a public monument *infamandi alterius causa* ('for the sake of defaming another') is to be removed.³⁰⁰

A similar use of *infamare* occurs in discussion of how a person is dealt with who instigates a slave to flee to the Emperor's statue *ad infamandum dominum* ('to

²⁹³ *Digesta* 4.8.9.4 (Ulpian): '*Iulianus ait, si eum infamauerunt litigatores, non omnimodo praetorem debere eum excusare, sed causa cognita*'.

²⁹⁴ *Digesta* 4.8.15 (Ulpian).

²⁹⁵ *Digesta* 47.10.15.12 (Ulpian): '*... quod autem non in coetu nec uociferatione dicitur, conuicium non proprie dicitur, sed infamandi causa dictum*'.

²⁹⁶ *Digesta* 47.10.15.27 (Ulpian): '*... proinde quodcumque quis fecerit uel dixerit, ut alium infamet, erit actio iniuriarum*'.

²⁹⁷ *Digesta* 47.10.15.32 (Ulpian): '*Item si quis pignus proscrisperit uenditurus, tamquam a me acceperit, infamandi mei causa, Seruius ait iniuriarum agi posse*'.

²⁹⁸ *Digesta* 47.10.15.44 (Ulpian).

²⁹⁹ *Digesta* 47.10.18pr (Paul): '*Eum, qui nocentem infamauit, non esse bonum aequum ob eam rem condemnari: peccata enim nocentium nota esse et oportere et expedire*'.

³⁰⁰ *Digesta* 47.10.37 (Marcian): '*Constitutionibus principalibus cauetur ea, quae infamandi alterius causa in monumenta publica posita sunt, tolli de medio*'

defame his master’).³⁰¹ An analogous usage to this is where a husband who suborns an adulterer *infamandae uxoris suae causa* (‘for the sake of defaming his wife’) by catching them in adultery is subject, along with his wife, to a charge of adultery.³⁰²

Where *infamare* is used to designate a possible consequence for a governor who gives advice on points of fact,³⁰³ the best possible meaning for *infamare* is probably ‘[t]o give a bad name to, bring disrepute ...’.³⁰⁴ This is especially as it only ‘sometimes’ (*nonnumquam*) *infamat*.

As with *infamis*, *infamare* clearly does not refer to *infamia* as a legal concept where it is used in relation to a nation, such as where the provenance of slaves is being discussed.³⁰⁵

Causa Famosa

Causa famosa is an expression not found in *Digesta* 3.2, nevertheless it appears to be used as an equivalent for an *actio famosa* in a passage, discussed above, restricting the ability of a *libertus* to bring either an *actio famosa* or an *actio* that *pudorem ... suggilat* (‘suggests shame’) against his patron.³⁰⁶ However, *causa*

³⁰¹ *Digesta* 47.11.5 (Marcian): ‘*In eum, cuius instinctu ad infamandum dominum seruus ad statuum confugisse compertus erit, praeter corrupti serui actionem, quae ex edicto perpetuo competit, seure animaduertitur*’.

³⁰² *Digesta* 48.5.15(14).1 (Scaevola): ‘*Si uir infamandae uxoris suae causa adulterum subiecerit, ut ipse deprehenderet, et uir et mulier adulterii crimine tenentur ex senatus consulto de ea re facto*’.

³⁰³ *Digesta* 5.1.79.1 (Ulpian): ‘*Iudicibus de iure dubitantibus praesides respondere solent: de facto consulentibus non debent praesides consilium impertire, uerum iubere eos prout religio suggerit sententiam proferre: haec enim res nonnumquam infamat et materiam gratiae uel ambitionis tribuit*’.

³⁰⁴ *Oxford Latin Dictionary*, above n. 32, entry 1 under ‘*infamo*’, 894.

³⁰⁵ *Digesta* 21.31.21 (Ulpian): there is a presumption that slaves are good ‘*quia natione sunt non infamata*’.

³⁰⁶ *Digesta* 2.4.10.12 (Ulpian): ‘*Praetor ait: “in ius nisi permissu meo ne quis uocet”. Permissurus enim est, si famoso actio non sit uel pudorem non suggilat, qua patronus*

famosa may not here be as precise as *actio famosa*, as it is also perhaps being used as an equivalent to an action that *suggilat pudorem*. Not so ambiguous is where it is also stated that, if money is owed from a *famosa causa* and one that is not *famosa*, the debt is regarded as paid that arose from the *famosa causa*.³⁰⁷ Attributing a debt paid to an obligation that, if not fulfilled, would give rise to an *actio famosa* is in accordance with the general hesitancy to grant *actiones famosae*, mentioned above, and supports an interpretation of *causa famosa* as a *causa* that gave rise to an *actio famosa*.

As noted above in discussion of the term *ignominia*, it is stated that *ignominia* is of no application in *condictiones*, even when arising from a *causa famosa*.³⁰⁸ The very vagueness of the term *causa*, which has the basic meaning of cause, reason, inducement, but is used in a variety of different senses, including the reason for judicial measures, the purpose for which an action is brought, the trial itself, and subjective motive or intention.³⁰⁹ If referring to the trial itself, *causa famosa* could perhaps be regarded as the equivalent to *actio famosa*, which is suggested by *Digesta* 2.4.10.2 (Ulpian), where *actio famosa* and *causa famosa* are used as equivalents.³¹⁰

conuenitur uel parentes. Et totum hoc causa cognita debet facere: nam interdum etiam ex causa famosa, ut Peditus putat,mittere debet patronum in ius uocari a liberto: si eum grauissima iniuria adfecit, flagellis forte cecidit.

³⁰⁷ *Digesta* 46.3.7 (Ulpian): ‘*Si quid ex famosa causa et non famosa debeatur, id solutum uidetur, quod ex famosa causa debetur*’.

³⁰⁸ *Digesta* 44.7.36 (Ulpian).

³⁰⁹ Berger, ‘Encyclopedic Dictionary’, above n. 9, 383.

³¹⁰ See above under discussion of ‘*Actiones Famosae*’.

Famosum Iudicium

The phrase *iudicium famosum* has an obvious connection to *actio famosa*, and is used with reference to an *actio* involving *infamia*.³¹¹

The term *iudicium famosum* is also used in the passage of the *Digesta* dealing with the method by which it was possible to avoid the consequences of *infamia*.³¹²

It is stated that if a person *famoso iudicio condemnatus* ('having been condemned in a *famoso iudicio*') has undergone *in integrum restitutio*, this *infamia eximi* ('frees [them] from *infamia*').³¹³ As the term *iudicium* could refer to both criminal and civil actions,³¹⁴ it is possible that this phrase here could refer to both those civil and criminal procedures that result in *infamia*. However, as *iudicium* is frequently synonymous with *actio*, the context must always guide this judgement.³¹⁵

The phrase *iudicium famosum* is repeated in a passage stating that when a person is condemned after an oath in a *famosum iudicium*, then the person is *famosus*.³¹⁶ Again, the link between *famosum iudicium* and *infamia* is clear.

A problematic issue, at first glance, is the status of *stellionatus*. Although it is stated in *Digesta* 3.2 that *stellionatus* involves *infamia*,³¹⁷ it is later stated that

³¹¹ *Digesta* 50.17.104 (Ulpian): '*Si in duabus actionibus alibi summa maior, alibi infamia est, praeponenda est causa existimationis. Ubi autem aequiperant, famosa iudicia, etsi summam imparem habent, pro paribus accipienda sunt*'.

³¹² Essentially, restoration of the former state of affairs, see Berger, 'Encyclopedic Dictionary', above n. 9, 682 and *Digesta* 4.1.

³¹³ *Digesta* 3.1.1.10 (Ulpian): '*... si quis famoso iudicio condemnatus per in integrum restitutionem fuerit absolutus, Pomponius putat hunc infamia eximi*'.

³¹⁴ Contrast Berger, 'Encyclopedic Dictionary', above n. 9, 520 (*iudicium*) with 341 (*actio*).

³¹⁵ Berger, 'Encyclopedic Dictionary', above n. 9, 520.

³¹⁶ *Digesta* 12.2.9.2 (Ulpian): '*Si damnetur quis post iusiurandum ex famoso iudicio, famosum esse magis est*'.

³¹⁷ *Digesta* 3.2.13.8 (Ulpian): '*Crimen stellionatus infamiam irrogat damnato, quamuis publicum non est iudicium*'.

stellionatus iudicium famosum quidem non est, sed coercionem extraordinariam habet ('*stellionatus* is not a *famosum iudicium*, but has extraordinary punishment').³¹⁸ However, this contradiction may be resolved by regarding this second statement as being concerned not with whether *stellionatus* involved *infamia*, but rather with the procedural nature of the action, i.e. that *stellionatus* is neither a *publicum iudicium* nor *priuata actio*,³¹⁹ but rather is dealt with *extra ordinem*.

Delictum Famosum

The phrase *delictum famosum* occurs only once, where it is stated that a *delictum famosum* cannot go to an arbiter, and if it does, that any order made cannot be enforced.³²⁰ As has been noted above, there was a general hesitancy in granting *actiones famosae*, indicative of their seriousness, with which this prohibition on a *delictum famosum* going to an arbiter is consistent. The fact that this rule applies to both *delicta famosa* and *iudicia publica*, which were regarded at least equally as serious as *actiones famosae* and for which *infamia* may have been a consequence, indicates that a *delictum famosum* is a delict included in the list of *actiones famosae* given in *Digesta* 3.2.1, i.e. *furtum, ui bonorum raptorum, iniuria* and *de dolo malo et fraude*.³²¹

³¹⁸ *Digesta* 47.20.2 (Ulpian).

³¹⁹ *Digesta* 47.20.1 (Papinian): '*Actio stellionatus neque publicis iudiciis neque priuatis actionibus continetur*'.

³²⁰ *Digesta* 4.8.32.6 (Paul): '*si per errorem de famoso delicto ad arbitrum itum est, uel de ea re, de qua publicum iudicium sit constitutum, ueluti de adulteriis sicariis et similibus, uetare debet praetor sententiam dicere nec dare dictae executionem*'.

³²¹ On *furtum* as a delict, see Berger, 'Encyclopedic Dictionary', above n. 9, 480; on *ui bonorum raptorum* (*rapina*), see Berger, 667 and 768; *iniuria*, see Berger, 502; and *de dolo malo et fraude* see Kaser, *Roman Private Law*, above n. 53, 216.

Causa Famae

Another term apparently used for actions that result in *infamia* is *causa famaе*. This term is used when emphasising that permission is not given easily for a *tutor* to be accused of being suspect through a *procurator quoniam famaе causa est*.³²² *Digesta* 3.2 states that condemnation in an action for *tutela* results in *infamia*,³²³ suggesting that this phrase is referring to *infamia* in a legal sense.

Nota

The noun *nota* is also used in some circumstances where *infamia* is the consequence under consideration, yet the context usually implies that this is a non-technical usage. In *Digesta* 27.2.6, where removal of a *tutor* in that *tutor*'s absence is being discussed, it is stated that the Praetor should remove him if *dignus tali nota uidebitur* ('he seems worthy of such a disgrace'). The use of the adjective *talis*, 'of such a kind', to qualify *nota* in this context implies that what is being referred to here is a general type of 'disgrace', rather some technical meaning. Yet, removal of a *tutor* for maladministration does result in *infamia* for the removed *tutor*.³²⁴

The expression *huius notae* is used to describe the profession of being an actor,³²⁵ which is a category of *infamis*.³²⁶ *Nota* is also used to indicate some form of ill-

³²² *Digesta* 3.3.39.7 (Ulpian): '*sed non facile per procuratorem quis suspectus [tutor] accusabitur, quoniam famaе causa est, nisi constet ei a tutore mandatum nominatim, aut si etiam absente tutore, quasi non defenderetur praetor erat cogniturus*'.

³²³ *Digesta* 3.2.1 (Julian).

³²⁴ *Digesta* 3.2.1 (Julian).

³²⁵ *Digesta* 23.2.44.5 (Paul): '*An et is noceat, qui antequam adoptaret artem ludicram fecerit? Atque si naturalis pater antequam filia nasceretur fecerit? Et si huius notae homo adoptauerit, deinde emancipauerit, an non possit duci? ...*'.

³²⁶ *Digesta* 3.2.1 (Julian).

repute where it is stated that the grandson of a patron is not excluded from *possessio bonorum* in relation to the grandfather's *libertus* on account of his father's *persona uel nota*.³²⁷ Related to this, there is also some debate as to whether an accusation of a capital crime is such a *nota* upon the father that it affects his children.³²⁸ As the *nota* referred to in this last passage is said to stem from an accusation, not a conviction, it can be regarded as referring to something other than *infamia* in the sense envisaged in *Digesta* 3.2. The term *infamiae nota*, which parents or patrons do not escape in the opinion of men even though not made *infames* by the Edict, has been discussed above in relation to the use of the term *infamia*.³²⁹ *Nota* clearly has a meaning of bad reputation when referring to a slave *notae extremae*.³³⁰

It is unclear when discussing the effect of a father's *nota* on his son's status as a decurion whether this is a general bad reputation or rather technical *infamia*.³³¹ The fact that *nota* is here used in a discussion of exile, a punishment that is known to involve *infamia*, suggests that a technical meaning should be understood.

Another fairly common usage of *nota* is as something incurred by someone who is disinherited, where it is perhaps best translated as 'a mark of disgrace or

³²⁷ *Digesta* 37.14.17pr (Ulpian).

³²⁸ *Digesta* 37.14.17.1 (Ulpian): '*Item quaesitum est, si patroni filius capitis accusauerit libertum, an hoc noceat liberis ipsius. Et Proculus quidem in hac fuit opinione notam adspersam patroni filio liberis eius nocere, Iulianus autem negavit: sed hic idem quod Iulianus erit dicendum*'.

³²⁹ *Digesta* 37.15.2pr (Julian).

³³⁰ *Digesta* 47.10.15.44 (Ulpian): a discussion of when *iniuria* will be granted for actions affecting slaves.

³³¹ *Digesta* 50.2.2.2 (Ulpian): in the context of discussing the effect of temporary exile on a decurion and the status of children born either before or after a person became a decurion, it is stated that if the grandfather is a decurion, then the immunity of decurions to flogging and the mines applies, '*ne patris nota filius macularetur*'.

disapproval, slur, stigma'.³³² In this regard, it is stated that many parents do not disinherit sons *notae causa*.³³³

Like many other words associated with *infamia*, *nota* is also used in relation to defamation.³³⁴

Nota is also used elsewhere, in the plural, to convey the meaning '(pl., in full *~ae litterarum*) written characters, lettering ...' or 'a shorthand character'.³³⁵

Similarly, *nota* is used for 'an indication, sign, token (of some fact, quality, condition etc) or a 'verbal indication, hint suggestion'.³³⁶

³³² See *Oxford Latin Dictionary*, above n. 32, entry 4(c) under 'nota', 1191; *Digesta* 37.4.20pr (Tryphonius): where an inheritance is not taken up, the disinherited son is admitted to *bonorum possessio* lest the will seem only to have taken effect '*ad notam exheredationis*'; 37.8.1pr (Ulpian): the children of an emancipated son who did not merit '*notam exheredationis*' in *possessio bonorum*; 38.2.47pr (Paul): disinherision '*non notae gratia*' does not preclude *bonorum possessio*; 38.4.1.5 (Ulpian): '*nota exheredationis*' of son to whom patron assigns a *libertus* does not prejudice a patron's rights.

³³³ *Digesta* 28.2.18 (Ulpian): '*Multi non notae causa exheredant filios nec ut eis obsint, sed ut eis consulant, ut puta impuberis, eisque fideicommissam hereditatem dant*'.

³³⁴ *Digesta* 47.10.5.10 (Ulpian): epigrams or writings '*in notam aliquorum*' subjected to penalty of becoming *intestabilis*. Contrary to the Watson (ed.), *Digest*, above n. 6, translation of 47.10.5.9, *intestabilis* should not be translated directly as infamous, see Buckland, *Textbook*, above n. 89, 92.

³³⁵ See *Oxford Latin Dictionary*, above n. 32, entry 6 under 'nota', 1192. See *Digesta* 4.6.33.1 (Modestinus): '*Eos, qui notis scribunt acta praesidium, ...*'; 28.5.9.4 (Ulpian): something is written in a will '*per notam*'; 29.1.40pr (Paul): '*Lucius Titus miles notario suo testamentum scribendum notis dictavit ...*'; 37.1.6.2 (Paul): '*Notis scriptae tabulae non continentur edicto, quia notas litteras non esse Pedius libro uicesimo quinto ad edictum scribit*'; 49.17.10 (Pomponius) – title of work; 50.13.1.7 (Ulpian): governor must not hear cases outside the regular system of workers or craftsmen other than those cases involving, *inter alia* '*notas*'.

³³⁶ See *Oxford Latin Dictionary*, above n. 32, entry 8 under 'nota', 1192; *Digesta* 28.1.21.1 (Ulpian): a '*nota*' added, verbally or written, added to a legacy indicating the quality of coins subject to the legacy; 28.2.11 (Paul): on inheritance, a *filius familias* is treated as if already owner, with the only '*nota*' added distinguishing father from son; 45.1.106 (Iauolenus): stipulating for a number of farms of same name '*sine ulla nota demonstrationis*' is to stipulate for an uncertain thing.

Dignitas

As discussed above, *existimatio* is defined as a state of *inlaesa dignitas*.³³⁷ This definition is interesting, as it implies that *dignitas* is initially set at the same level for all citizens, and is then reduced by various actions, it thus, as noted above, closely resembles *caput*. Relative comparisons of this type of *dignitas* would have been a very crude determinant in legal situations as, for the most part, all citizens would have had the same *dignitas* (assuming that those convicted and enduring penalties and those found listed amongst the *infames* in the Edict are in the minority).³³⁸ However, this understanding of *dignitas* appears to be confined to this one instance. There are other examples that could possibly be construed in this way, but not unambiguously.³³⁹ One example is where a *furiosus statum et dignitatem in qua fuit et magistratum et potestatem uidetur retinere* ('seems to retain the *status*, *dignitas*, magistracy and *potestas*').³⁴⁰ Other examples occur in discussions of the value to be attributed to the testimony of various witnesses. The weight to be accorded to testimony is variously stated as:

- depending on the *dignitas fides mores grauitas* ('*dignitas*, faith (*fides*), morals (*mores*) and solemnity/authority (*grauitas*)') of the witness;³⁴¹
- *Tu magis scire potes, quanta fides habenda sit testibus, qui et cuius dignitatis et cuius existimationis sint, et qui simpliciter uisi sint dicere utrum unum eundemque mediatum sermonem attulerint an ad ea quae interrogaueras ex tempore uerisimilia responderint* ('you know best how much faith is to be

³³⁷ *Digesta* 50.13.5.1 (Callistratus).

³³⁸ *Digesta* 50.13.5.1-3 (Callistratus).

³³⁹ For a discussion of '*dignitas*' see also Garnsey, *Social Status and Legal Privilege*, above n. 34, 224-5.

³⁴⁰ *Digesta* 1.5.20 (Ulpian): '*Qui furere coepit, et statum et dignitatem in qua fuit et magistratum et potestatem uidetur retinere, sicut rei suae dominium retinet*'.

³⁴¹ *Digesta* 22.5.2 (Modestinus): '*In testimoniis autem dignitas fides mores grauitas examinanda est*'. Garnsey, *Social Status and Legal Privilege*, above n. 34, 225 notes the ambiguity of meaning in this passage.

accorded to the witnesses, what their *dignitas* and *existimatio* are, how simply they seem to speak, whether they produce one and the same prepared speech or respond probable things to what you ask *ex tempore*'),³⁴² and

- *alias numerus testium, alias dignitas et auctoritas, alias ueluti consentiens fama confirmat rei de qua quaeritur fidem* ('sometimes the number of witnesses, sometimes their *dignitas* and *auctoritas*, sometimes harmonious opinion confirms the truth').³⁴³

In the first example, *dignitas* is used in conjunction with traditional moral terms; in the second with *existimatio*, which would be tautologous in accordance with the definition of *existimatio* as *inlaesa dignitas* discussed above, in the third it is paired with *auctoritas*. In a later section, it is stated that certain persons are *precluded* from giving evidence, i.e. their testimony is not weighed at all, most of whom are those who have reduced *dignitas*, in accordance with Callistratus' definition of *existimatio*. As *dignitas* is being used in these circumstances as a tool to balance, and most of those who would only have reduced, rather than consumed, *existimatio*, are *precluded* from giving evidence, it is unlikely that the *dignitas* being referred to in these passages is the narrow one contained in the definition of *existimatio*, although, it seems clear that *infames* would be either prohibited from giving evidence, or their testimony would be accorded little weight.

In a similar way, where there is a contest as to who will bring an interdict for the production of a *libertus*,³⁴⁴ it is stated that the one to be selected is the one *ad quem maxime res pertinet uel is qui idoneior est: et est optimum ex coniunctione, ex fide, ex dignitate actorem hoc interdicto eligendum* ('to whom the matter

³⁴² *Digesta* 22.5.3.1 (Callistratus).

³⁴³ *Digesta* 22.5.3.2 (Callistratus).

³⁴⁴ On this interdict see *Digesta* 43.29 and Buckland, *Textbook*, above n. 89, 371.

pertains most or the one who is more suitable: that is the best to be selected according to his connection, his faith and his *dignitas*').³⁴⁵

Similar problematic uses of *dignitas* can be found in the *Digesta* in relation to the criteria governing the selection of accusers,³⁴⁶ whether persons are permitted to appear in court on their own recognisances, and as a criterion in relation to the degree of severity of punishments.³⁴⁷ In relation to punishments, it is stated in the *Digesta* that *famosi*, i.e. *infames*, are punished more than those of *integrae famae*.³⁴⁸ Thus, in this context *dignitas* could possibly bear the meaning it does in the definition of *existimatio*. However, equally, someone *in aliquam dignitatem positus* ('placed in some *dignitas*') is contrasted with someone *humiliore loco positus* ('placed in a more humble position').³⁴⁹ The use here of *humiliore loco positum* implies the distinction between *honestiores* and *humiliores*, the latter of

³⁴⁵ *Digesta* 43.29.3.12 (Ulpian).

³⁴⁶ *Digesta* 48.2.16 (Ulpian): '*Si plures existant, qui eum in publicis iudiciis accusare uolunt, iudex eligere debet eum qui accuset, causa scilicet cognita aestimatis accusatorum personis uel de dignitate, uel ex eo quod interest, uel aetate uel moribus uel alia iusta de causa*'.

³⁴⁷ 47.11.10 (Ulpian): '*... secundum suam dignitatem ...*'; 48.13.8(6.1).1 (Ulpian): '*... prout dignitas personae, punitur ...*'; 48.19.28.9 (Callistratus): '*Uenenarii capite puniendi sunt aut, si dignitatis respectum agi oportuerit, deportandi*'; 48.19.38.2 (Paul): '*... pro qualitate dignitatis*'. Another case where *dignitas* governs punishment is where the person against whom the offence is committed is of a certain *dignitas*: 23.2.66pr (Paul): where a curator or tutor who marries their *pupilla* or their son to the *pupilla* are punished '*pro dignitate pupillae*' a higher punishment for such action where the *pupilla* was of a higher social rank would make sense as there would be potentially more for the curator/tutor and his son to gain from such a marriage, e.g., wealth or social prestige.

³⁴⁸ *Digesta* 48.19.28.16 (Callistratus). See discussion above where it is noted that modern opinion reads *famosi* more widely than *infames* by law.

³⁴⁹ *Digesta* 48.8.1.5 (Marcian): '*Sed et in eum, qui uxorem deprehensam in adulterio occidit, diuus Pius leuiorem poenam irrogandam esse scripsit, et humiliore loco positum in exilium perpetuum dari iussit, in aliqua dignitate positum ad tempus relegari*'. See also 26.10.3.16 (Ulpian): '*sed sciendum est non omnes hac seueritate debere tractari, sed utique humiliores: ceterum eos, qui sunt in aliqua dignitate positi, non opinor uinculis publicis contineri oportere*'.

which are subjected to harsher punishments than the former,³⁵⁰ rather than a distinction between legal *infames* and non-*infames*.

There are numerous other cases where *dignitas* is used as a discriminating criterion in such a way that it is unlikely that the meaning being conveyed is that contained in *Digesta* 50.13.5 (Callistratus). In the vast majority of cases, *dignitas* is clearly related to a position,³⁵¹ such as either specifically identified, linked³⁵² or contrasted with that of a Senator,³⁵³ or decurion.³⁵⁴ It can be inferred that *dignitas*

³⁵⁰ Garnsey, *Social Status and Legal Privilege*, above n. 34, 224 suggests that this passage is referring to position or office.

³⁵¹ *Digesta* 4.2.23pr (Ulpian): stating that it is not probable that someone ‘*qui claram dignitatem se habere praetendebat*’ was compelled to pay something that he did not owe. This cannot equate to the type of *dignitas* that is described in *Digesta* 50.13.5 (Callistratus), for which a qualifier such as ‘*clarus*’ would be inappropriate.

³⁵² *Digesta* 1.9.1pr (Ulpian): ‘... *sed uir praefectorius an consulari feminae praeferatur, uidendum. Putem praeferri, quia maior dignitas est in sexu uirili*’.

³⁵³ *Digesta* 1.7.35 (Paul): ‘*Per adoptionem dignitas non minuitur, sed augetur. Unde senator etsi a plebeio adoptatus est, manet senator: similiter manet et senatoris filius*’; 1.9.5 (Ulpian): ‘*Senatoris filium accipere debemus non tantum eum qui naturalis est, uerum adoptiuum quoque: neque intererit, a quo uel qualiter adoptatus fuerit nec interest, iam in senatoria dignitate constitutus eum susceperit an ante dignitatem senatoriam*’; 1.9.6.1 (Paul): ‘*A senatore in adoptionem filius datus ei qui inferioris dignitatis est, quasi senatoris filius uidetur, quia non amittitur senatoria dignitas adoptione inferioris dignitatis, non magis quam ut consularis desinat esse*’. 1.9.7.2 (Ulpian): ‘*Si quis et patrem et auum habuerit senatorem, et quasi filius et quasi nepos senatoris intellegitur sed si pater amiserit dignitatem ante conceptionem huius, quaeri poterit an, quamuis quasi senatoris filius non intellegatur, quasi nepos tamen intellegi debeat: et magis est ut debeat, ut aui potius ei dignitas prosit, quam obsit casus patris*’; 1.9.8 (Ulpian) ‘*feminis enim dignitatem clarissimam mariti tribuunt ... tamdiu igitur clarissima femina erit, quam diu senatori nupta est uel clarissimo aut separata ab eo alii inferioris dignitatis non nupsit*’: on ‘*clarrissimus*’ as a rank of a Senator, see A. H. M. Jones, *The Later Roman Empire 284-602: A Social, Economic and Administrative Survey* (Oxford, Basil Blackwell, 1964) 3 Vols., vol. 1, 8; *Digesta* 1.9.9 (Papinian): ‘*nam quaesita dignitas liberis propter causam patris remoti a senatu auferenda non est*’; 1.9.11 (Paul): ‘*Senatores licet in urbe domicilium habere uideantur ... quia dignitas domicilii adiectionem potius dedisse quam permutasse uidetur*’; 5.1.18.1 (Ulpian): in relation to an action by a *filius familias* – ‘*et finge senatorem esse filium familias qui patrem habet in prouincia, nonne augetur utilitas per dignitatem?*’; 23.2.27 (Ulpian) ‘*si quis in senatorio ordine agens libertinam habuerit uxorem, quamuis interim uxor non sit, attamen in ea condicione est, ut, si amiserit dignitatem, uxor esse incipiat*’ and 23.2.34 (Papinian) Senators’ daughters married by their *pater familias* against a prohibition of marriage to a freedman do not become wives ‘*nam quaesita dignitas liberis propter crimen patris auferenda non est*’: that ‘*dignitas*’ in these two passages refers to senatorial ‘rank’ is supported by 23.2.44pr (Paul), which states Senators and their children cannot marry freedpersons; 39.5.7.3 (Ulpian): assumption that the son of someone ‘*senatoriae uel cuius alterius dignitatis*’ would be granted the right to make gifts from a *peculium*; 50.1.22.5 (Paul): Senators, their children and grandchildren are detached from their

signifies the position of decurion where it is used in a passage interchangeably or in conjunction with *honor*.³⁵⁵ A similar conclusion follows where possessing *dignitas* is equated with holding rank in the *ordo*.³⁵⁶ Although there are passages that also make a distinction between *dignitas* and *honores*,³⁵⁷ implying a meaning for *dignitas* that does not equate to the position of decurion. It is even used for paternal rank.³⁵⁸ Another example is where a *procurator* who has increased in *dignitas* is not compelled to act.³⁵⁹ The most logical meaning to attribute to *dignitas* in this passage is rank, which would be an easy thing in which to

origins, '*licet municipalem retineant dignitatem*'; 50.1.23 (Hermogenian): '*Municeps esse desinit senatoriam adeptus dignitatem, quantum ad munera*'.

³⁵⁴ *Digesta* 48.10.13.1 (Papinian): A decurion, after exile, '*dignitatem .. recipere*'. That this *dignitas* here means rank as a decurion is suggested by the following line that a plebian may become a decurion after a period of exile '*eadem ratione*'; 50.2.6pr (Papinian): *spurii* can become decurions '*non enim impedienda est dignitas eius qui nihil admisit*'; 50.2.12 (Callistratus): Even persons who deal in and sell necessities (*utensilia*) may hold the '*dignitatem municipalem*', referred to earlier in the same passage as being received '*in ordinem*'; 50.2.14 (Paul): where a person who formerly held the position as a decurion is not tortured '*in memoriam prioris dignitatis*'.

³⁵⁵ On '*honor*' as referring to a position in a municipality, see Berger, 'Encyclopedic Dictionary', above n. 9, 488. On '*honor*' and '*dignitas*' and, for example, *Digesta* 50.2.2.3 (Ulpian), where '*ordo*' and '*honor*' are treated as equivalents: '*Sed si pater ipsius ordine motus sit, si quidem ante conceptionem eius moueatur arbitror eum quasi plebei filium in honoribus spectari*'; see *Digesta* 50.1.17.12 (Papinian): Where '*ad novos honores ante causam finitam admitti non oportet*' persons charged with capital crimes, although '*pristinam interim dignitatem retinent*'; 50.2.2.3 (Ulpian): if a father is '*ordine motus*' before conception, a child is considered that of a plebian, if the father '*dignitatem amiserit*' after conception, the child is considered that of a decurion.

³⁵⁶ *Digesta* 50.2.2.3 (Ulpian).

³⁵⁷ *Digesta* 50.2.13.1 (Papirius Justus): Where a person's '*dignitas*' brings '*spem eius honoris*' such that it is proper for the Emperor to grant a favour admitting a former exile to the *ordo*; 50.3.1pr (Ulpian): When recording decurions in the list, '*dignitates erunt spectandae, ut scribantur eo ordine, quo quisque eorum maximo honore in municipio functus est*'. In this passage, *honores* lead to *dignitas*, but they are not equivalents, a similar meaning is given in 50.4.6(Ulpian) where persons '*capiant honoris dignitatem*'; 50.3.2 (Ulpian): those who held '*dignitates*' by judgment of the Princeps are recorded in the album of decurions before those who '*municipalibus honoribus functi sunt*'. Here *dignitates* appear to be some sort of office, though distinguished from the *municipalis honor*; 50.4.3.15 (Ulpian): *munera* and *honores* are to be distributed in a city '*secundum aetates et dignitates*'; 50.4.14pr-1 (Callistratus): Where '*honor municipalis est administratio rei publicae cum dignitatis gradu*' and a public *munus*, however, is '*sine titulo dignitatis*'.

³⁵⁸ *Digesta* 1.7.13 (Papinian): '*... denique et patria dignitas quaesita per adoptionem finita ea deponitur*'.

³⁵⁹ *Digesta* 3.3.8.3 (Ulpian): '*... item [an action to compel a procurator ought not be given] si dignitas accesserit procuratori: uel rei publicae causa afuturus sit*'.

measure an increase. A slightly more ambiguous usage of *dignitas* is in relation to a marriage *secundum dignitatem tuam* ('in accordance with your *dignitas*').³⁶⁰ Most references to marriage appear concerned with rank, either in general, contrasting *inferioris gradus homines* ('men of inferior rank')³⁶¹ with *hi qui altioris dignitatis* ('those who are of higher *dignitas*'),³⁶² or with reference to a specific rank, such as Senator.³⁶³ In some circumstances, *dignitas* is referred to as according privilege directly, or as something that would otherwise accord privilege.³⁶⁴ In these circumstances it is easier to read the reference as being to social rank, and more difficult as a reference to the type of *dignitas* referred to in the definition of *existimatio* contained in *Digesta* 50.13.5. Similarly, where *dignitas* is used in conjunction with *auctoritas*, a word closely connected with office holding,³⁶⁵ this implies that what is being discussed is either the holding of a specific office or social position.³⁶⁶ Where it is stated that the greater the *dignitas* of a son, the greater the damage resulting from *iniuria*, it appears that

³⁶⁰ Quotation from a mandate in *Digesta* 17.1.60.1 (Scaevola): '... ideoque cum ex uoto meo nuptura tibi sit, uelim certus sis secundum dignitatem tuam contrahere te matrimonium'.

³⁶¹ On 'gradus' as a social rank see Garnsey, *Social Status and Legal Privilege*, above n. 34, 228 and *Oxford Latin Dictionary*, above n. 32, entry 8 under 'gradus', 770.

³⁶² *Digesta* 23.2.49 (Marcellus): 'Obseruandum est, ut inferioris gradus homines ducant uxores eas, quas hi qui altioris dignitatis sunt ducere legibus propter dignitatem prohibentur: at contra antecedentis gradus homines non possunt eas ducere, quas his qui inferioris dignitatis sunt ducere non licet'.

³⁶³ See *Digesta* 23.2.27 (Ulpian) and 23.2.34 (Papinian), quoted above n. 353.

³⁶⁴ *Digesta* 35.3.5 (Ulpian): all persons who '*cuiuscumque dignitatis sunt*' are required to give an undertaking to the treasury, implying that *dignitas* might in other circumstances be considered a ground for exemption from such an undertaking. Similarly, a person may be compelled to restore the inheritance of a gladiator or prostitute, although '*magna praeditus est dignitate uel auctoritate*'; 36.3.1.1 (Ulpian): an heir is always compelled to give security '*cuiuscumque sit dignitatis uel facultatum quarumcumque*'.

³⁶⁵ Garnsey, *Social Status and Legal Privilege*, above n. 34, 227.

³⁶⁶ *Digesta* 40.5.26.1 (Ulpian): where applications for manumission via *fideicommissa* are dilatory or never made '*per ignauitiam uel per timiditatem eorum, quibus relinquitur libertas fideicommissa, uel ignorantiam iuris sui uel per auctoritatem et dignitatem eorum, a quibus relicta est*'.

dignitas is again being used in relation to rank.³⁶⁷ *Dignitas* is also said to increase the seriousness of an offence in another context, that of unlawfully enlisting in the army, where it is generalised that the seriousness *et augetur, ut in ceteris delictis, dignitate gradu specie militiae* ('is increased, as in other delicts, by the *dignitas*, *gradus*, and type of military service').³⁶⁸ Here, *dignitas* and *gradus*, both terms associated with social rank,³⁶⁹ appear to carry a specific military connotation.³⁷⁰ This reading appears to be supported by another passage that states that the crime of insolence is *augetur ... dignitate praepositi* ('increased by the *dignitas* of the commanding officer').³⁷¹

A particularly interesting passage is where *damnum cum infamia* and *dignitatis aliqua depositio* are listed as two separate punishments.³⁷² In this example, *dignitas* cannot correspond to the meaning given in *Digesta* 50.13.5, as in that definition of *existimatio*, *damnum cum infamia* and *dignitatis aliqua depositio* are equivalents.

Also in relation to punishment, in some cases it is ambiguous whether the restoration of *dignitas* after serving a sentence equates to the restoration of the *inlaesa dignitas* that equates to *existimatio*, or instead means a 'return to the position of decurion'. A clear example of the latter is where a decurion, after exile, regains his *dignitas*. That *dignitas* here means rank as a decurion is

³⁶⁷ *Digesta* 47.10.31 (Paul): '*cum possit propter filii dignitatem maior ipsi quam patri iniuria facta esse*'.

³⁶⁸ *Digesta* 49.16.2.1 (Arrius Menander).

³⁶⁹ On '*gradus*' see Garnsey, *Social Status and Legal Privilege*, above n. 34, 228 and *Oxford Latin Dictionary*, above n. 32, entry 8 under '*gradus*', 770.

³⁷⁰ As translated in Watson (ed.), *Digest*, above n. 6, vol. 4, 893.

³⁷¹ *Digesta* 49.16.6.1 (Arrius Menander). On '*praepositus*' as a general term referring to officers, see Jones, *The Late Roman Empire*, above n. 353, vol. 2, 640.

³⁷² *Digesta* 48.19.8pr (Ulpian).

suggested by the following line that a plebian may become a decurion after a period of exile ‘for the same reason’ (*eadem ratione*).³⁷³ However, in other passages it is unclear, such as where it is simply stated that *si deportatus restitutus dignitatem quidem indulgentia principis reciperauit* (‘if having been deported and restored, indeed he has recovered his *dignitas* by the indulgence of the princeps’).³⁷⁴ Nevertheless, this passage is clearly connected with *infamia* as it is subsequently stated that an investigation of the offence for which the person has suffered the sentence is to be undertaken, as a person suffering a harsher penalty may be freed of *ignominia* once the period has passed, whereas someone suffering a lesser penalty may remain *inter infames* as investigation of the facts is in the power of the judges, but not the authority of the law.³⁷⁵

Dignitas is also used to stand for an office,³⁷⁶ such as that of the Praetor,³⁷⁷ or Consul.³⁷⁸

³⁷³ *Digesta* 48.10.13.1 (Papinian).

³⁷⁴ *Digesta* 48.23.2 (Ulpian); similarly 48.23.3 (Papinian): ‘*quod si bona cum dignitatis restitutione concessa reciperauerit ...*’; see also 50.1.15pr (Papinian): ‘*Ordine decurionem ad tempus motus et in ordinem regressus ad honorem, exemplo relegati, tanto tempore non admittitur, quanto dignitate caruit*’.

³⁷⁵ *Digesta* 50.1.15pr (Papinian): ‘... *cum facti quidem quaestio sit in potestate iudicantium, iuris autem auctoritas sit*’.

³⁷⁶ Garnsey, *Socail Status and Legal Privilege*, above n. 34, 224. See, e.g., *Digesta* 1.18.19.1 (Callistratus): with reference to a judge, who must conduct his court ‘*ut auctoritatem dignitatis ingenio suo augeat*’ (‘to augment the authority (*auctoritas*) of his *dignitas* through his talent’). This passage earlier states that ‘*nam ex conuersatione aequali contemptio dignitatis nascitur*’, which perhaps in context could also be taken as ‘office’; 24.1.40 9 (Ulpian): gifts between a husband and wife (usually invalid, 24.1.1 (Ulpian)) are valid ‘*apsicendae dignitatis gratia*’ to the extent ‘*quatenus dignitati supplendae opus est*’; 37.6.1.16 (Ulpian): reckoning in *collatio bonorum* (the contribution of monies by an emancipated child as a prerequisite to admission to the intestate succession, see *Digesta* 37.6 and Kaser, *Roman Private Law*, above n. 53, 312) monies paid or owed by a father for the seeking of office (*dignitas*): ‘*Sed an id, quod dignitatis nomine a patre datum est uel debetur, conferre quis in commune cogatur, uideamus. Et ait Pomponius ... non esse cogendum: hoc enim propter onera dignitatis praecipuum haberi oportere. Sed si adhuc debeatur, hoc sic interpretandum est, ut non solus oneretur is qui dignitatem meruit, sed commune sit omnium heredum onus hoc debitum*’.

³⁷⁷ *Digesta* 1.14.3 (Ulpian): ‘... *si seruus quamdiu latuit, dignitate praetoria functus sit, quid dicemus?*’

Occasionally, *dignitas* is used to refer to a non-specific ‘dignity’,³⁷⁹ such as where the restrictions on postulation imposed in the Praetor’s court are said to be based on the principle of protecting the *dignitas ... et decoris sui* (i.e., of the Praetor).³⁸⁰ This usage is clearly not in accordance with the definition of *existimatio* that is given in *Digesta* 50.13.5. Another such case is where a usury is to be allowed to utilise certain produce, as a usury should be treated more generously *pro dignitate eius, cui relictus est usus* (‘in accordance with the *dignitas* of one to whom a right of use has been left’).³⁸¹ Here it is implied that a certain *dignitas* adheres to a person by virtue of the fact that they have been considered worthy of receiving a right of use. Similarly, where what is being referred to is the *dignitas* of someone

³⁷⁸ *Digesta* 1.9.12 (Ulpian): ‘*Nuptae prius consulari uiro impetrare solent a principe, quamuis perraro, ut nuptae iterum minoris dignitatis uiro nihilominus in consulari maneat dignitate*’; 4.3.11.1 (Ulpian): that an infaming action ought not be given ‘*humili aduersus eum qui dignitate excellet ... puta plebeio aduersus consularem ...*’; *Digesta* 4.8.3.3 (Ulpian): That the Praetor compels persons to be arbiters ‘*cuiuscumque dignitatis ... etiam si consularis*’; 14.6.1.3 (Ulpian) on the *Senatus Consultum Macedonianum*: ‘*in filio familias nihil dignitas facit, quo minus senatus consultum Macedonianum locum habeat: nam etiamsi consul sit uel cuiusuis dignitatis, senatus consulto locus est ...*’.

³⁷⁹ *Digesta* 1.11.1 (Aurelius Arcadius Charsius): An ambiguous usage, the Praetorian Prefect is described as judging no differently to the Emperor due to his ‘*sapientia ac luce dignitatis*’ (wisdom and light of his *dignitas*) – possibly rank: see Watson (ed.), *Digest*, above n. 6, vol. 1, 28. 1.16.9.4 (Ulpian): another ambiguous reference is to *mediocres* who can neither find an *aduocatus* ‘*neque in aliqua dignitate positos aduocatos sibi prospexerunt*’ (‘nor look towards advocates not placed in any *dignitas*’). This phrase could equally bear the meaning ‘rank’ or ‘dignity’. 2.14.8 (Papinian): where creditors can agree to receive a proportion of their debts, where agreement cannot be reached, the Praetor follows the authority of the person ‘*qui dignitate inter eos praecellit*’, which could mean ‘rank’ or a more general dignity. However, the fact that there is likely to be only one person who surpasses the others in *dignitas* suggests that this is *not* the same *dignitas* referred to in *Digesta* 50.13.5 as this latter form would appear to pertain to any Roman who had not committed some form of delict; 32.1.49 (Ulpian): the difference between a wife (‘*uxor*’) and concubine (‘*concupina*’), for the purposes of a specific type of legacy, ‘*nisi dignitate nihil*’; 36.1.7 (Maecianus): on whether a person can be compelled to accept an inheritance, ‘*... ac dignitatis ratio habenda erit: quid enim si ... nomen uispellionis testatoris ferre?*’, implying that accepting the name of a *uispellio* (grave digger) would be contrary to *dignitas* (on *uispellio* as disreputable, see *Digesta* 46.3.72.5 (Marcellus), referring to a *uispellio* as a *turpis homo*: *Oxford Latin Dictionary*, above n. 32, entry under ‘*uispellio*’, 2077); 48.7.7 (Callistratus): allegedly quoting a rescript to the effect that ‘*non puto autem nec uerecundiae nec dignitati nec pietati tuae conuenire quicquam non iure facere*’.

³⁸⁰ *Digesta* 3.1.1pr (Ulpian): ‘*Hunc titulum praetor proposuit habendae rationis causa suaeque dignitatis tuendae et decoris sui causa ...*’.

or something other than an individual, it is difficult to identify *dignitas* here with that defined in *Digesta* 50.13.5. This is so even where the language is very similar to that used for legal *infamia* and *infames*. For example, the phrase *dignitate et fama domus integra manente* ('with the *dignitas* and *fama* of the *domus* remaining intact' contains vocabulary used for *infamia*').³⁸² However, the fact that it is the *dignitas* and *fama* of a *domus* that is in question, i.e., a family, suggests that what is being considered is not *infamia*. A similar meaning is conveyed by a passage stating that a slave should not be allowed to be take everything in a will in substitution for a child *ut ordinum dignitas familiarumque salua sit* ('so that the *dignitas* of the orders and *familiae* are safe').³⁸³ Further examples are a general expression such as *propter dignitatem hominum* ('on account of the *dignitas* of men')³⁸⁴ or where reference is made to the *dignitas* of a foreign people.³⁸⁵

Another ambiguous usage of *dignitas* is in relation to *iniuria*. *Iniuria* is said *aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere* ('either to be inflicted on the body or to pertain to *dignitas* or *infamia*').³⁸⁶ Curiously, although all *iniuria* is said to involve these three cases, this is the only reference to *dignitas* in

³⁸¹ *Digesta* 7.8.12.1 (Ulpian): '... aliquo enim largius cum usuario agendum est pro dignitate eius, cui relictus est usus'.

³⁸² *Digesta* 11.3.14.1 (Paul): 'De filio filiae familias corruptis huic edicto locus non est, quia serui corrupti constituta actio est, qui in patrimonio nostro esset, et pauperiorem se factum esse dominus probare potest dignitate et fama domus integra manente ...'.

³⁸³ *Digesta* 25.4.1.13 (Ulpian): 'Sed et si seruus heres institutus fuerit, si nemo natus sit. Aristo scribit, huic quoque seruo quamuis non omnia, quaedam tamen circa partum custodiendum arbitrio praetoris esse concedenda. Quam sententiam puto ueram: publice enim interest partus non subici, ut ordinum dignitas familiarumque salua sit ...'.

³⁸⁴ *Digesta* 21.1.44pr (Paul): 'Iustissime aediles noluerunt hominem ei rei quae minoris esset accedere, ne qua fraus aut edicto aut iure ciuili fieret: ut ait Pedius, propter dignitatem hominum'.

³⁸⁵ *Digesta* 49.15.7.1 (Proculus): 'hoc enim adicitur, ut intellegatur alterum populum superiorem esse, non ut intellegatur alterum non esse liberum: et quemadmodum clientes nostros intellegimus liberos esse, etiamsi neque auctoritate neque dignitate neque uiri boni nobis praesunt ...'.

³⁸⁶ *Digesta* 47.10.1.2 (Ulpian).

the *Digesta* title concerning *iniuria*. As discussed above, *infamia* here must mean something other than the legal *infamia* resulting either from a criminal conviction or the Praetor's Edict. The example given for *dignitas* is the abduction of the companion of a *matrona*, while the example pertaining to *infamia* is an attempt on chastity.³⁸⁷ What meaning, therefore, can be ascribed to *dignitas* in this passage? The difference appears to be that *dignitas* can be affected where the action, whether physical or verbal, is directed at a person within a *familia*,³⁸⁸ whereas the action pertaining to *dignitas* is a direct physical act against someone potentially outside the *familia*,³⁸⁹ but reflecting upon someone within the *familia*. The linking of the terms *dignitas* and *infamia* here could well equate to the *dignitas* and *fama* of a *domus* referred to above in the context of an action *de seruo corrupto*.³⁹⁰

The meaning of *dignitas* is also unclear where a *tutor* is required to appoint an agent where *aut dignitas uel aetas aut ualeitudo tutoris id postulet* ('either the *dignitas*, age or health of the *tutor* demand it').³⁹¹ As age and sickness are both excuses for not performing *tutela*,³⁹² it is possible that *dignitas* here represents an excuse based on office holding, such as the municipal magistracy.³⁹³ Another ambiguous usage is where the heirs of a *curator* are said not to take over the curatorship on account of having a greater or lesser *dignitas* than that of the

³⁸⁷ *Digesta* 47.10.1.2 (Ulpian): on these see McGinn, *Prostitution, Sexuality and the Law*, above n. 183, 331-5.

³⁸⁸ *Digesta* 47.10.1.3 (Ulpian): Persons against whom *iniuria* can be committed.

³⁸⁹ See the definition of 'comes' in *Digesta* 47.10.15.16 (Ulpian): 'Comitem accipere debemus eum, qui comitetur et sequatur (ut ait Labeo) siue liberum siue seruum siue masculum siue feminam: et ita comitem Labeo definit "qui frequetandi cuiusque causa ut sequeretur destinatus in publico priuatoe abductus fuerit". Inter comites utique et paedagogi erunt'.

³⁹⁰ *Digesta* 11.3.14.1 (Paul).

³⁹¹ *Digesta* 26.7.24pr (Paul).

³⁹² *Digesta* 27.1.2pr (Modestinus): age; 27.1.10.8 (Modestinus): ill-health.

³⁹³ *Digesta* 27.1.6.16 (Modestinus).

original *curator*.³⁹⁴ Furthermore, whether the status of a child prevents an injunction to restore an inheritance if the legatee dies without issue depends on the intention of the testator, which is judged *ex dignitate et ex uoluntate et ex condicione* of the testator.³⁹⁵

Dignitas is frequently used as a criterion, *inter alia*, for the allocation of things, such as the clothing, which a usufructuary should allocate to the testator's slaves,³⁹⁶ the number of slaves to be allocated to a *pupillus* by the *tutor*, municipal *munera*,³⁹⁷ or the quanta of a variety of expenses,³⁹⁸ including dowry quantum,³⁹⁹ and the types of services to be provided by a freedperson.⁴⁰⁰ In such cases as

³⁹⁴ *Digesta* 27.10.9 (Neratius).

³⁹⁵ *Digesta* 36.1.18(17).4 (Ulpian).

³⁹⁶ *Digesta* 7.1.15.2 (Ulpian): used in conjunction with 'ordo', which also carries connotations of rank and social status, see *Oxford Latin Dictionary*, above n. 32, entries 4 and 5 under 'ordo', 1267: '*Sufficienter autem alere et uestire debet secundum ordinem et dignitatem mancipiorum*'.

³⁹⁷ *Digesta* 50.4.3.15 (Ulpian): '*Praeses prouinciae prouideat munera et honores in ciuitatibus aequaliter per uices secundum aetates et dignitates ...*'.

³⁹⁸ *Digesta* 11.7.12.5 (Ulpian): funeral expenses are assessed '*pro facultatibus uel dignitati defuncti*'; similarly, 11.7.14.6 (Ulpian), what is fair in assessing the quantum of funeral expenses to be paid in an action to recover them depends '*ex dignitate eius qui funeratus est, ex causa, ex tempore et ex bona fide*'; also 11.7.21 (Paul) this action is also available against the *pater familias* '*pro dignitate et facultatibus*'; 26.7.12.3 (Paul): wages of teachers for a *pupillus* are to be constituted '*pro facultate patrimonii, pro dignitate natalium*'; 26.7.13pr (Gaius): number of slaves for a *pupillus* '*dignitatem facultatesque pupilli ... aestimare debet ...*'; 37.9.1.19 (Ulpian): a curator is to provide food, drink, clothing and shelter to a pregnant woman placed in possession of an estate on behalf of an unborn child '*pro facultatibus defuncti et pro dignitate eius atque mulieris*'; 37.9.4.1 (Paul) similarly, slaves of such a woman are provided with food '*secundum [her] dignitatem*'.

³⁹⁹ *Digesta* 23.3.60 (Celsus): the amount that a curator should allow a woman to promise as *dos* depends '*ex facultatibus et dignitate mulieris maritique*'; 23.3.69.4 (Papinian): an amount of *dos* can be fixed '*pro modo facultatum patris et dignitate mariti*'; 23.4.69.5 (Papinian): a tutor can constitute a *dos* '*pro modo facultatum et dignitate mariti*'; 32.1.43 (Celsus): Where a testator has directed that a dowry be left at the discretion of the tutor, it is to be treated as if at the discretion of a *bonus* ('good man'), which is not '*difficile ex dignitate, ex facultatibus, ex numero liberorum testamentum facientis aestimare*'; 33.1.14 (Ulpian): the value of legacy is to be assessed '*ex dignitate personae*'; 35.1.27 (Alfenus Varus): requirement to erect a monument '*secundum substantiam et dignitatem defuncti*'.

⁴⁰⁰ Of the patron's *dignitas*: *Digesta* 38.1.16.1 (Paul): (of the patron's *dignitas*) '*Tales patrono operae dantur, quales ex aetate dignitate ualeitudine necessitate proposito ceterisque eius generis in utraque persona aestimari debent*'. Of the freedperson's *dignitas*: *Digesta* 38.1.34 (Pomponius): the services owed by a *libertina* are extinguished

these, *dignitas* as defined in *Digesta* 50.13.5 would be an inadequate measure upon which to base these allocations as, for the most part, one would expect that the vast majority of Roman citizens would possess the same *dignitas*. The fact that, in these cases, *dignitas* is frequently used in association with some other criteria, in particular wealth,⁴⁰¹ suggests that what is being discussed has more to do with social position, than the *inlaesa dignitas* that would pertain to any person who has not committed a delict. *Dignitas* is also used as a criterion for determining which coins are referred to in a will that bequeaths only unspecified coins.⁴⁰²

Other *Infames* and the Edict

The references to postulation restrictions in the Praetor's Edict contained in the *Digesta* do not contain a general restriction on *infames, per se*. Rather, as we have seen, a catalogue *de his qui notantur infamia* is given. This list notably does not include reference to the other cases of *infamia*, identified above, referred to in the *Digesta* itself. This raises the question, does the *infamia* referred to in these other passages include the restrictions on postulation contained in the *Digesta*, or is it a different species of legal *infamia*? The *Digesta* does contain a reference to a provision stating:⁴⁰³

if '*ad eam dignitatem perueniat, ut inconueniens sit praestare patrono operas ...*'; 38.1.50 (Neratius): services depend on '*dignitati facultatibus consuetudini artificio*'.

⁴⁰¹ See Garnsey, *Social Status and Legal Privilege*, above n. 34, 232 on the relevance of wealth to social status. See also *Digesta* 50.16.125 (Proculus): Where the expression in a promise to pay a *dos* '*cum commodum erit*' is interpreted as '*cum salua dignitate mea potero*', perhaps indicating that spending at the wrong time could reduce *dignitas*, from which a connection between *dignitas* and wealth could be drawn.

⁴⁰² *Digesta* 30.1.50.3 (Ulpian): '*Si numerus nummorum legatus sit neque apparet quales sunt legati ... sed et mens patris familiae et legatarii dignitas uel caritas et necessitudo, item earum quae praecedunt uelque sequuntur summarum scripta sunt spectanda*'.

⁴⁰³ *Digesta* 3.1.1.8 (Ulpian).

[Q]ui lege, plebis scito, senatus consulto, edicto, decreto principum nisi pro certis personis postulare prohibentur: hi pro alio, quam pro quo licebit, in iure apud me ne postulent.

Those who by law, plebiscite, *senatus consultum*, decree of the *principes* are prohibited from postulating, except for certain persons, may not postulate before me other than on behalf of those for whom they are permitted to postulate.

There is no statement in the *Digesta* that such people are thus noted as *infames*, nor that the simple statement that a person is noted with *infamia* or becomes an *infamis* is sufficient to bring that case within the ambit of the clause quoted above. However, an argument can be made that noting a person with *infamia* was sufficient to bring them under this clause. There is no explicit prohibition on postulation in the *Corpus Iuris Ciuilis*. Hence, for this clause to have any operation at all, a simple reference to *infamia*, or something to that effect, must fall within the ambit of the clause. This is especially so as, following the promulgation of the *Corpus Iuris Ciuilis*, no laws could be utilised in legal proceedings extraneous to this body,⁴⁰⁴ any such explicit prohibition on postulation contained in the original laws, and not quoted in the *Corpus* could not be relied upon.

The *Iustiniani Institutiones*

Unlike the *Digesta*, the *Institutiones* has no specific title dealing with *infamia*. The vocabulary and cases identified of *infamia* in the *Digesta* will serve as a basis for identifying the references to *infamia* in the *Institutiones*.

⁴⁰⁴ *De Confirmatione Digestorum* 19.

Infamia

Infamia does appear to be used in relation to the type of *infamia* referred to in the *Digesta*. The term is used with reference to arguments that were formerly raised, before their abolition by Justinian, against the use of either *procuratores* or certain persons as *procuratores*. In these circumstances, mention is made of ... *eas uero exceptiones, quae olim procuratoribus propter infamiam uel dantis uel ipsius procuratoris opponerentur ...* ('the other exceptions, indeed, which on account of *infamia* once were opposed to a *procurator*, or the person giving a *procurator* ...').⁴⁰⁵ We know from *Digesta* 3.2 that *infamia* prevented a person from postulating on behalf of another. As acting as a *procurator*, or a person's legal representative, since it is not too far removed from postulating, it makes sense to regard this as *infamia*. Indeed, Book 8 of Ulpian's commentary on the Edict, which Lenel identifies as dealing with *procuratores* and *cognitores*,⁴⁰⁶ is extracted in *Digesta* 3.2 in discussion of *infames*.⁴⁰⁷

As in the *Digesta*, the term *infamia* is used in the context of *iniuria* with reference to a defamatory *libellus* or *carmen*, where it is stated that *iniuria* is committed *si quis ad infamiam alicuius libellum aut carmen scripserit* ('if someone writes a letter or poem to the disrepute of another').⁴⁰⁸

The *Institutiones* also notes that the main checks on the over-eagerness of plaintiffs are *modo pecuniaria poena, modo iuris iurandi religione modo metu infamiae* ('pecuniary penalties, the respect for an oath and the fear of *infamia*')⁴⁰⁹.

⁴⁰⁵ Justinian, *Institutiones*, 4.13.11(10).

⁴⁰⁶ Lenel, *Edictum Perpetuum*, above n. 5, xvii and *Palingenesia*, above n. 21, vol. 2, 447-9.

⁴⁰⁷ *Digesta* 3.2.15, 3.2.17, 3.2.19, 3.2.23.

⁴⁰⁸ *Institutiones Iustiniani* 4.4.1.

⁴⁰⁹ *Institutiones Iustiniani* 4.16pr.

This is consistent with the law that *calumnia*, vexatious litigation, carried *infamia* as a penalty.⁴¹⁰

The *Institutiones* also makes clear that *iudicia publica* result in *infamia*. A distinction is drawn between those *iudicia publica* that are capital, and those that are not. Those that are capital are said to result in the ultimate penalty, interdiction from fire and water, deportation or banishment to the mines. Non-capital *iudicia publica* are those that result in fines and *infamia*.⁴¹¹ It is interesting to note, however, that *infamia* is not specifically mentioned as one of the penalties inflicted for any of the statutes subsequently discussed, which all feature capital penalties except for: the use of unarmed force under the *Lex Iulia de Vi Publica seu Priuata*, which results in a fine; the *Lex Fabia de Plagiariis*, the *Lex Iulia Repetundarum*, *Lex Iulia de Annona* and the *Lex Iulia de Residuis*, some people are punished by ‘lighter’ or ‘other’ penalties,⁴¹² which could well include *infamia*.

Infamis

Infamis is used non-technically as an adjective in the *Institutiones* to qualify *iniuria* to describe the treatment meted out to slaves by their master that would justify them being sold after they had sought sanctuary at a statue, that is, when the slaves are perceived as *infami iniuria affecti* (‘having been afflicted with an infamous injury’).⁴¹³

⁴¹⁰ *Digesta* 3.2.1 (Julian).

⁴¹¹ *Institutiones Iustiniani* 4.18.2: *Publicorum iudiciorum quaedam capitalia sunt, quaedam non capitalia. Capitalia dicimus, quae ultimo supplicio adficiunt uel aquae et ignis interdictione uel deportatione uel metallo: cetera si qua infamia irrogant cum damno pecuniario, haec publica sunt, non tamen capitalia.*

⁴¹² *Institutiones Iustiniani* 4.18.3-11.

⁴¹³ *Institutiones Iustiniani* 1.8.2: ‘... si vel durius habitos, quam aequum est, uel infami iniuria affectos cognoueris, ueniri iube, ita ut in potestatem domini non reuertantur’.

Famosus

As in the *Digesta* a *tutor* who is removed as *suspectus* on account of *dolus*, though not *culpa*, is said to be *famosus*,⁴¹⁴ which must mean *infamis* in the legal sense.

Ignominia

Persons condemned of *furtum*, *ui bonorum raptorum*, *iniuria*, *de dolo*, *tutela*, *mandatum*, *depositum* are all said *ignominiosi fiunt* and, in the case of *furtum*, *ui bonorum raptorum*, *iniuria* and *de dolo*, not only those who are condemned, but those who settle *ignominia notantur*.⁴¹⁵ This list of actions matches that given in *Digesta* 3.2.1, making it clear that *infamia* is here being referred to by *ignominia* and *infames* by *ignominiosi*.

Improbis

In a passage discussing those who may witness, it is stated that those whom the laws make *improbis* and *intestabilis* are also prohibited from being witnesses to wills.⁴¹⁶ It is unclear whether this would only embrace *infames* or others who are *intestabilis*, but not necessarily *infamis*.

⁴¹⁴ *Institutiones Iustiniani* 1.26.6: ‘*Suspectus autem remotus, si quidem ob dolum, famosus est, si ob culpam, non aequè*’. The same distinction between *dolus* and *culpa* is found in an extract from Modestinus in the *Collatio* 10.2.4: ‘*Depositum damnatus infamis est: qui uero commodati damnatur, non fit infamis: alter enim propter dolum, alter propter culpam condemnatur*’. *Culpa* is unintentional fault, negligence: Berger, ‘Encyclopedic Dictionary’, above n. 9, 419; *Dolus* is intentional wrongdoing: Berger, 440.

⁴¹⁵ *Institutiones Iustiniani* 4.16.2.

⁴¹⁶ *Institutiones Iustiniani* 2.10.6: ‘*sed neque mulier neque impubes neque seruus neque mutus neque surdus neque furiosus neque cui bonis interdictum est nec is, quem leges iubent improbum intestabilemque esse, possunt in numero testium adhiberi*’.

Conclusion

An examination of the juristic texts in the *Corpus Iuris Ciuilis* reveals a relatively wide vocabulary utilised to describe the concept of *infamia* as it appears in Justinian's law. The nature of the vocabulary used, consisting of terms that are fairly elastic in their scope and at times imprecisely used, means that it is at times very difficult to determine where the exact boundaries of the concept of *infamia* lie, even though the legal documents were compiled with the overt aim of eliminating confusion. The vocabulary identified thus far consists of:

- *infamia* and *infamis*;
- *ignominia* and *ignominiosus*;
- *notare*;
- *famosus*, *actio famosa*, *causa famosa*, *iudicium famosum* and *delictum famosum*; and
- a negative effect on *existimatio* and, possibly, *dignitas*.

Particularly unclear is the relationship between persons made *infames* through conviction under various laws or for various activities and those *infames* under the Praetor's Edict: was it enough to fall within the postulation restrictions for the purposes of the Edict simply to have been termed by a law *infamis*? The extent of variation in the vocabulary used for *infamia* perhaps suggests that a uniform concept of *infamia* has not been imposed on the texts in the *Corpus*. A comprehensive compilation of *infamia* and its effects as represented in the *Corpus* will be postponed until after the *Codex Iustinianus* has been considered.

Chapter Three: *Codex Iustinianus*

The *Codex Iustinianus* is pivotal to understanding what, if any, changes Justinian introduced to the doctrine of *infamia* as it existed in the period of the classical jurists. This is because the *Codex* is the only source that preserves Justinianic legislative activity that affected the compilation of both the *Codex* itself and the *Digesta*, two of our main sources for classical law.

Imperial Laws

Before a discussion of *infamia* in the *Codices*, whether Justinianic or Theodosian, can be undertaken, the sources of law contained within the *Codices* must be examined to see how far the language of the imperial constitutions extracted from the *Codices* can be pressed with regards to their technical precision. This is because the laws were issued in the name of the emperor, very few of whom actually had any legal training. This examination encompasses essentially two questions: what were the types of law issued by emperors, and who authored these particular types of law?

Sources of Imperial Law

Imperial laws are called *constitutiones* and have three forms:¹

- *Decreta*: The judgments of the emperor in court. They mainly declared existing law.²

¹ Gaius, *Institutiones* 1.2 and 1.6; *Institutiones Iustiniani* 1.3 and 1.6 and *Digesta* (Ulpian) 1.4.1.

² W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd ed., Cambridge, Cambridge Uni Press, 1963) 18. See also H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (3rd ed., Cambridge, Cambridge Uni. Press, 1972) 368.

- *Edicta*: These were pronouncements, usually written but occasionally oral, made by the emperor.³
- *Epistulae*: *Epistulae* can be divided into two main classes that also fall within the rubric of *rescripta*. The first, *epistulae*, were written answers, embodied in a separate document, to officials or public bodies who asked the emperor for instructions, the settlement of a dispute or a *beneficium*. The second, *subscriptiones*, were answers to petitions (*libelli*) written at the bottom of the petition. In both cases, there was some ambiguity as to the degree to which the principles contained therein could form the basis of generalisations.⁴

In the late empire the emperor(s) legislated freely, enacting legislation known as *leges generales*, which usually took the form of a document addressed to an official, often the Praetorian Prefect, who then had the duty of publishing the document further.⁵ Most of these laws could be embraced within the traditional tripartite classification of *constitutiones*. Hence the absence of any modification to the scheme utilised by Gaius in his Justinian's *Institutiones* and the *Digesta*.⁶ Owing to the looseness in terminology, it was felt necessary in the fifth century to legislate when a law was to be observed by everyone.⁷

A further type of emperor-made law was *mandata*, although these do not appear in the jurists' classifications. These were instructions from the emperor to subordinate officials.⁸

³ Jolowicz and Nicholas, *Historical Introduction*, above n. 2, 367. See also Buckland, *Textbook*, above n. 2, 17-8.

⁴ Jolowicz and Nicholas, *Historical Introduction*, above n. 2, 368-9. See also Buckland, above n. 2, *Textbook*, 19-20.

⁵ Jolowicz and Nicholas, *Historical Introduction*, above n. 2, 460. See also Buckland, *Textbook*, above n. 2, 20.

⁶ Gaius, *Institutiones* 1.2 and 1.6; *Institutiones Iustiniani* 1.3 and 1.6 and *Digesta* (Ulpian, *Institutiones* 1) 1.4.1.

⁷ See *Codex Iustinianus* 1.14.3 (426 CE).

⁸ See Jolowicz and Nicholas, *Historical Introduction*, above n. 2, 370-1 and Buckland, above n. 2, *Textbook*, 20.

Law Makers

The processes by which the various types of imperial *constitutiones* were made, including the roles played by the emperor himself and the various persons working under him, are not clear in the sources. Despite the fact that *epistulae* could also embody legal principles, persons holding the office *ab epistulis* appear to have been chosen more for their rhetorical prowess than legal expertise.⁹

There was a clear convention that emperors should be able to compose their own letters and speeches and that passing judgment was very much part of the emperor's duties.¹⁰ It is clear that the emperor had access to legal advice as and when it was required. For example, Augustus is found summoning the *prudentes* to determine what effect should be accorded to codicils,¹¹ and Marcus Aurelius states that he learnt from Antoninus Pius to yield to those with expertise in law.¹² In the second and third centuries, jurists are attested in the emperor's service as *a libellis* or as *consilarii*, advisers in the *consilium*.¹³ Despite access to such legal advice, it is clear that emperors could and did make decisions at times at variance with it. For example, several extracts are preserved in the *Digesta* from Paulus'

⁹ See the survey of holders of the office *ab epistulis* in F. Millar, *Emperor in the Roman World*, (London, Duckworth, 1977) 87-94. Although there were some holders of the office who did possess legal expertise, for example, Tarutienus Paternus who authored a legal work *De re militari* who was *ab epistulis Latinis* under Marcus Aurelius in 171 CE: Millar, *Emperor in the Roman World*, 95.

¹⁰ Millar, *Emperor in the Roman World*, above n. 9, Chapter 5 *passim* and in particular 219 and 248-9 (on rescripts) and see Chapter 1 'The Emperor in the Legal World' in T. Honoré, *Emperors and Lawyers* (2nd ed., Oxford, Clarendon Press, 1994) for a summary of the evidence for the legal activities of emperors.

¹¹ *Institutiones Iustiniani* 2.25pr: J. Crook, *Consilium Principis* (Cambridge, Cambridge Uni. Press, 1955) 32.

¹² Marcus Aurelius, *Meditationes*, 1.16.6: Millar, *Emperor in the Roman World*, above n. 9, 60.

¹³ Millar, *Emperor in the Roman World*, above n. 9, 94.

Decreta,¹⁴ which records imperial judgments and the process of making them.¹⁵

In all the instances in the *Decreta*, the emperor appears to be giving judgment with a *consilium*, a group of advisers,¹⁶ to which it appears it was regular, at least by the Severan period, to co-opt legal experts,¹⁷ such as Paulus himself. However, in three of the four cases reported by Paulus, the Emperor gives a judgment divergent from the at times conflicting advice received.¹⁸

In addition to providing advice in the case of imperial trials, the *consilium* also probably provided advice on the drafting of *constitutiones*, although the procedures for drafting *edicta* and other such documents under the principate are not recorded.¹⁹

The *consilium* developed into the *consistorium* at some stage in the fourth century CE.²⁰ The *consistorium* differed from the *consilium* in the degree of formality surrounding its organisation,²¹ with its membership based around head officials

¹⁴ For the extracts see O Lenel, *Palingenesia Iuris Ciuilis* (Graz, Akademische Druck, 1960) 2 Vols., vol. I, 959-65.

¹⁵ That the process recorded in these has been the subject of amendment by the compilers seems unlikely as in some cases they preserve alternate opinions, which is contrary to the instructions of Justinian.

¹⁶ On this body see Crook, *Consilium Principis*, above n. 11, and Millar, *The Emperor in the Roman World*, above n. 9, see esp. references in the index p 640.

¹⁷ See *Digesta* 27.1.30pr (Papinian *libro quinto responsorum*): ‘*Iuris peritos, qui tutelam gerere coeperunt, in consilium principum adsumptos optimi maximique principes nostri constituerunt excusandos, quoniam circa latus eorum agerent et honor delatus finem certi temporis ac loci non haberet*’: Crook, *Consilium Principis*, above n. 11, 74; Millar, *Emperor in the Roman World*, above n. 9, 94-5.

¹⁸ *Digesta* 4.4.38 (Paulus); 14.5.8 (Paulus); and 29.2.97 (Paulus). In 49.14.50 (Paulus) the emperor follows the advice of two of the jursits.

¹⁹ Millar, *Emperor in the Roman World*, above n. 9, 259.

²⁰ Formal titles (*comites intra consistorium, comites consistrani*) do not appear until the middle of the fourth century, though Crook attributes its development to Constantine I: Crook, *Consilium Principis*, above n. 11, 101-3.

²¹ Crook, *Consilium Principis*, above n. 11, 102. For the functions and organisation of the *consistorium* see A. H. M. Jones, *The Later Roman Empire 284-602: A Social, Economic and Administrative Survey* (Oxford, Basil Blackwell, 1964) 3 Vols., vol. 1, 333-41 and J. Harries, *Law & Empire in Late Antiquity* (Cambridge, Cambridge Uni. Press, 2001) 38-42.

who represented both themselves and their areas of responsibility.²² The *consistorium* acted as both a forum for the discussion of new laws, a role that was formalised in the mid-fifth century,²³ and as an adjudicator of disputes. Indeed, the decisions of the emperor with his *consistorium*, or *acta consistorii*, were accepted as expressing generally applicable principles by the compilers of the *Codices Gregorianus* and *Hermogenianus* and as *leges generales* by the compilers of the *Codex Theodosianus*.²⁴

While the potential for the legal expertise of the members of the *consistorium* or *consilium* to influence the substantive content of laws existed, how this affected the wording of the laws is impossible to know.

There were several persons working under the emperor during the principate whose titles appear to indicate that they played some role in relation to imperial *constitutiones*, in particular, the *a libellis* and *ab epistulis*. Almost all our evidence for the process of the emperor writing *subscriptiones* to *libelli* dates from the second century CE and later.²⁵ As noted above, the sources speak of the issuing of *subscriptiones* as the activity of the emperors themselves and the wording of imperial letters and rescripts implies that the letters or replies were a personal matter. However, the way that the *subscriptiones* are written implies that they are written by people well versed in the law. Utilising a controversial method of

²² Harries, *Law & Empire*, above n. 21, 38.

²³ *Codex Iustinianus* 1.14.8 (426 CE): a formal reading of the law in the *consistorium* was the penultimate stage in the legislative process prior to the emperor's subscription. See also J. Harries, 'The Roman Imperial Quaestor from Constantine to Theodosius II' (1988) 78 *Journal of Roman Studies* 148-72, 165-6.

²⁴ Harries, *Law & Empire*, above n. 21, 39.

²⁵ Millar, *Emperor in the Roman World*, above n. 9, 242.

stylistic analysis,²⁶ Tony Honoré has argued that the style of imperial rescripts changes abruptly at various times that do not coincide with changes in emperor, implying that the rescripts were authored by persons other than the emperor, and has tried to identify some of these rescript authors with known jurists.²⁷ Although Honoré's method of stylistic analysis has been criticised, with its heavy focus on uses of particular words,²⁸ the method adopted in the second edition of his book *Emperors and Lawyers* also looks at the way the legal problem is addressed, i.e. the order in which the facts, legal principle and application of the principle are set out, and other aspects that cumulatively build a convincing case that different periods of style can be demarcated, indicating different authors. More important than this is Honoré's conclusion that the rescripts consistently approach the questions presented in the various *libelli* by means of the application of legal principles to the facts presented and utilise a technically correct vocabulary, which implies that they were written by people well versed in the law.²⁹ Hardly any emperors had specific legal training,³⁰ and it is extremely unlikely that teenagers, such as Gordian III and Alexander Severus, could have made such

²⁶ See, for example, F. Millar, 'A New Approach to the Roman Jurists' (1986) 76 *Journal of Roman Studies* 272-80, M. Gustafson, review of T. Honoré, *Emperors and Lawyers* in (1995) 95 *Bryn Mawr Classical Review* on-line 95.10.17: <<http://ccat.sas.upenn.edu/bmcr/1995/95.10.17.html>> (24 September 2003).

²⁷ This is argued in Honoré, *Emperors and Lawyers*, above n. 10.

²⁸ See, B. Frier, 'Law on the Installment Plan' (1984) 82 *Michigan Law Review* 856-9, 858-63, reviewing Honoré's book *Ulpian* (Clarendon Press, Oxford, 1982), on the weaknesses in Honoré's methodology.

²⁹ See A. Watson, 'Private Law in the Rescripts of Carus, Carinus and Numerianus' in Watson, *Legal Origins and Legal Change* (Hambledon Press, London, 1991) 45-60, esp. 59 and A. Watson, 'The Rescripts of the Emperor Probus', in *Legal Origins and Legal Change*, 61-6 on the technical nature of the wording and Honoré, *Emperors and Lawyers*, above n. 10, 69, 77, 94, 81-2, 86, 88, 96, 98, 103, 107, 111, 116, 119, 124, 126, 147, 148, 149, 120-2, 163, and 175 on the statements of law in rescripts over the period 193-305 CE.

³⁰ Honoré, *Emperors and Lawyers*, above n. 10, 3.

cogent arguments on issues of private law.³¹ Despite this, the direct evidence for jurists in the position of *a libellis*, or later *magister libellorum*, is very scattered. L. Volusius Maecianus, an *a libellis* of Antoninus Pius, wrote legal texts and Papinian is attested holding the position in the reign of Septimius Severus.³² Thereafter there is a break until Aurelius Arcadius Charisius in about 290-1 CE.³³ While the precise interrelationship between emperor, *a libellis* and even *consilium* in the production of rescripts cannot be discerned from the sources, it seems clear that legal experts were employed in the drafting of rescripts and produced material technically correct in its wording, at least until the reign of Diocletian. If such care were taken in relation to rescripts, it seems likely, though unprovable, that the same care would have been taken in relation to the other forms of legal documentation.

After Diocletian's reign, the nature of our source material changes from *constitutiones* derived from the rescript-based *Codices Gregorianus* and *Hermogenianus* to those derived from the *lex generalis*-based *Codex Theodosianus* and subsequent legislation, which was promulgated in a variety of forms.³⁴ With this change comes a noticeable change in the style of the *constitutiones*: they become turgid and full of elaborate rhetoric,³⁵ such that they

³¹ Honoré, *Emperors and Lawyers*, above n. 10, 135.

³² L. Volusius Maecianus: Millar, *Emperor in the Roman World*, above n. 9, 103; Papinian: *Digesta* 20.5.12 (Tryphonius, *libro octauo disputationum*): Millar, *Emperor in the Roman World*, 95.

³³ *Digesta* 1.11.1 (Aurelius Arcadius Charisius): Millar, *Emperor in the Roman World*, above n. 9, 94 and 97: the dating is debated, Honoré, *Emperors and Lawyers*, above n. 10, 69 identifies Charisius with the author of rescripts in the period 290-1. Others have dated him around 300, see Jones, *Later Roman Empire*, above n. 21, vol. 3, 3 n. 1.

³⁴ The different forms are discussed in Jolowicz and Nicholas, *Historical Introduction*, above n. 2, 460.

³⁵ Jolowicz and Nicholas, *Historical Introduction*, above n. 2, 462-3.

‘often fail to convey the impression of being laws at all’.³⁶ This change in style may well coincide with the creation of the imperial quaestor,³⁷ a continuation of the office of *quaestores Augusti* (and later *quaestores candidati*) who read the emperor’s speeches to the Senate.³⁸ The function of the quaestor was defined, by the early fifth century, in the *Notitia Dignitatum* as *leges dictandae*.³⁹ This phrase implies that the quaestor was responsible for the style, rather than the content of *leges*. Even their ability to govern the style of the *leges* may at times have been limited by the process of legislating, such as the initial proposal and the outcome of debate in the *consistorium*.⁴⁰ The level of legal expertise of quaestors was very variable. In the fourth century, the primary requirement was eloquence and, while most cultured men knew something of the law, legal expertise was not expected.⁴¹ In looking at the *Codex Theodosianus*, it is possible to discern three broad genres of style, with some hybrids into which the various quaestors can be classified:⁴²

- Literary: Who aim at rhetorical elegance, utilise unusual words and constructions and avoid technical terms and ‘plain speaking’.
- Bureaucratic: Who have a pedantic style and aim to be accurate and comprehensive.

³⁶ Harries, *Law & Empire*, above n. 21, 42.

³⁷ Zosimus, *Historia Nova*, 5.32.6, in an aside attributes the creation of the office to Constantine, regarded as ‘not impressive’ evidence by Harries, ‘The Roman Imperial Quaestor’, above n. 23, 153. This quaestor is often referred to in secondary literature as the *quaestor sacri palatii*, although this is not an ancient official title: Harries, ‘The Roman Imperial Quaestor’, 154-5.

³⁸ Harries, ‘The Roman Imperial Quaestor’, above n. 23, 151; Jones, *Later Roman Empire*, above n. 21, vol. 1, 104.

³⁹ *Notitia Dignitatum Orientis* 12 and *Occidentis* 10: Harries, ‘The Roman Imperial Quaestor’, above n. 23, 148. Early evidence gives them a much wider role: Harries, ‘The Roman Imperial Quaestor’, 155-9.

⁴⁰ Harries, ‘The Roman Imperial Quaestor’, above n. 23, 150, 152 and 164-9.

⁴¹ Harries, ‘The Roman Imperial Quaestor’, above n. 23, 158.

⁴² T. Honoré, ‘Some Quaestors of the Reign of Theodosius II’ in J Harries and I Wood (eds.), *The Theodosian Code: Studies in the Imperial Law of Late Antiquity* (Ithaca, NY, Cornell Uni Press, 1993) 68-94, 71-2.; Harries, *Law & Empire*, above n. 21, 42-3.

- Legal: Who utilise technically correct terminology, avoided by non-lawyers, where the law calls for it.

The fact that there were quaestors who tended to shun technical terminology means that, although quaestors had access to expert advice through the *scrinia* and consequently the constitutions authored by them can be regarded as being consistent with applicable legal principles,⁴³ the specific wording of the *constitutiones* has to be assessed on a case-by-case basis to determine whether or not the wording being used is technical or just rhetorical.

Codex Iustinianus 2.11(12): De causis, ex quibus infamia alicui inrogatur ‘The causes, for which infamia is imposed on someone’, and 10.59(57): De infamibus ‘On the infames’⁴⁴

Two titles of the *Codex Iustinianus*, 2.11(12) and 10.59(57), both appear to have been compiled from rescripts and deal explicitly with the causes and consequences of *infamia*.

Causes of *Infamia*

In *Codex Iustinianus* 2.11(12), the following are designated as *infames*:

- those pronounced as having committed *iniuria*, even through a slave, or having made a pact in relation to *iniuria*;⁴⁵

⁴³ Several past and present *Magistri Scriniorum* were included in the first *Codex Theodosianus* commission, presumably because of their legal expertise: See Harries, ‘The Roman Imperial Quaestor’, above n. 23, 159-60.

⁴⁴ Throughout this chapter, unless otherwise noted, *infamia* and *infamis* refer to the legal concepts.

⁴⁵ *Codex Iustinianus* 2.11(12).5 (198 CE): ‘uerum si iniuriam te fecisse proconsul uir clarissimus pronuntiauit, ignominia notatus es’; 2.11(12).10 (208 CE): ‘Iniuriarum ex persona quoque serui damnatus infamia notatur’; 2.11(12).18 (260 CE): ‘Non damnatos quidem dumtaxat iniuriae, sed pactos quoque perpetuum infamat edictum’; and 2.11(12).19 (260 CE) by implication, stating that a person is not subject to *infamia* if not specifically condemned of *iniuriam* or *uis*: ‘Interlocutio praesidis, quae indicta est, infamem eum de quo quaeris fecisse non uidetur. Cum non specialiter ob iniuriam uel

- those convicted of *uis* ('violence');⁴⁶
- those who have been condemned to the public works, *following* their period at the works;⁴⁷
- those convicted as having committed *furtum* ('theft'), including for plundering an inheritance;⁴⁸
- those sentenced for a (certain) crime;⁴⁹
- women who marry within the prescribed mourning period;⁵⁰
- those convicted of *calumnia* ('false accusation');⁵¹
- those who have committed usury;⁵² and
- those compelled to make satisfaction having sued in their own name in *socius* ('partnership').⁵³

There is some overlap between these cases and those listed in *Digesta* 3.2. Both texts refer to condemnation for *socius*,⁵⁴ *iniuria*⁵⁵ and *furtum*;⁵⁶ both refer to

admissam uim condemnatus, sed ita praesidis uerbis grauatus est et admonitus, ut ad melioris uitae frugem se reformet’.

⁴⁶ *Codex Iustinianus* 2.11(12).19 (260 CE) quoted above n. 45.

⁴⁷ *Codex Iustinianus* 2.11(12).6 (203 CE): ‘*Ad tempus in opus publicum dati pristinum quidem statum retinent, sed damno infamiae et post impletum tempus subiciuntur*’.

⁴⁸ *Codex Iustinianus* 2.11(12).8 (205 CE): ‘*Furti si condemnata es, citra uerbera quoque fustium famae damnum subisti*’; and 2.11(12).12 (224 CE): ‘*Si te expilasse hereditatem sententia praesidis constitit, non ex eo, quod non et alia tibi poena inrogata est, furti improbioris infamiam euitasti*’.

⁴⁹ This is by implication from *Codex Iustinianus* 2.11(12).14 (238 CE), where it is stated that a person’s uncle need not fear *infamia* following having been beaten if that beating was not preceded by a sentence imposing the stain of ignominy: ‘*Nullam existimationis infamiam auunclus tuus pertimescat, ictibus fustium subiectus ob crimen habita quaestione, si sententia non praecessit ignominiae maculam inrogans*’.

What crime this sentence may be for is not elaborated upon.

⁵⁰ *Codex Iustinianus* 2.11(12).15 (239 CE): ‘*Decreto amplissimi ordinis luctu feminarum deminuto tristior habitus ceteraque hoc genus insignia mulieribus remittuntur, non etiam intra tempus, quo lugere maritum moris est, matrimonium contrahere permittitur, cum etiam, si nuptias alias intra hoc tempus secuta est, tam ea quam is, qui sciens eam duxit uxorem, etiam si miles sit, perpetuo edicto labem pudoris contrahit*’.

⁵¹ *Codex Iustinianus* 2.11(12).16 (240 CE): ‘*Fustibus caesum, cui per praeconem ita dictum est: ‘katégorian aneu tinos dikaias hupostaseôs houtôs agenês huparchôn mê enistaso’ ut calumniatorem uideri notatum ideoque esse famosum manifestum est*’.

⁵² *Codex Iustinianus* 2.11(12).20 (290 CE): ‘*Improbum fenus exercentibus et usuras usurarum illicite exigentibus infamiae macula inroganda est*’.

⁵³ *Codex Iustinianus* 2.11(12).22 (294 CE): ‘*Fidem rumpens societatis cum infamiae periculo suo nomine pro socio conuentus ad faciendum satis urguetur*’.

⁵⁴ *Digesta* 3.2.1 (Julian) and *Codex Iustinianus* 2.11(12).22 (294 CE).

marriage with the period of mourning;⁵⁷ and both refer to *calumnia*.⁵⁸ Furthermore, both *Digesta* 3.2 and this Chapter of the *Codex Iustinianus* discuss the relationship between various punishments and *infamia*.⁵⁹ The only new case is that of usury.

In addition to these cases said to result in *infamia*, this title of the *Codex* contains several constitutions that indicate cases that do not fall within the ambit of *infamia*. These constitutions themselves are of interest as, since they are all issued to specified magistrates and represent the emperor's responses to particular problems presented to him, the subject matter of the initial enquiry can be discerned. These enquiries represent uncertainties held by the magistrates about where the boundaries of the concept of *infamia* lay and hence what they considered may have been the underlying rationale of the concept. Cases considered in this *Codex* Chapter as lying outside the boundaries of *infamia* are:

- those who are only bound or incarcerated as a penalty;⁶⁰
- where a judge pronounces a less severe sentence than was required, and only removed a person from the decurionate for a short period of time;⁶¹

⁵⁵ *Digesta* 3.2.1 (Julian); 3.2.4.5(Ulpian) and *Codex Iustinianus* 2.11(12).5 (198 CE) and 2.11(12).19 (260 CE).

⁵⁶ *Digesta* 3.2.1(Julian); 3.2.4.5 (Ulpian); 3.2.6.pr-5 (Ulpian) and *Codex Iustinianus* 2.11(12).8 (205 CE).

⁵⁷ *Digesta* 3.2.1 (Julian); 3.2.8 (Ulpian); 3.2.9 (Paul); 3.2.10 (Paul); 3.2.11 (Ulpian); 3.2.12 (Paul); 3.2.13pr (Ulpian) and *Codex Iustinianus* 2.11(12).15 (239 CE) (the praetorian Edict is explicitly mentioned in this constitution).

⁵⁸ *Digesta* 3.2.1 (Julian); 3.2.4.4 (Ulpian) and *Codex Iustinianus* 2.11(12).239 (CE).

⁵⁹ *Digesta* 3.2.13.7 (Ulpian) (excessive penalties); 3.2.22 (Marcellus) (beatings) and *Codex Iustinianus* 2.11(12).1 (no date, see below n. 60) (punishments); 2.11(12).4 (198 CE) (excessive penalties); 2.11(12).14 (238) (beating and *infamia*).

⁶⁰ *Codex Iustinianus* 12.11(12).1 (No date, issued by Severus and Antoninus – 198-209 CE? See Millar, *The Emperor in the Roman World*, above n. 9, 657. This period of years corresponds to that when Septemius Severus and Caracalla (Antoninus) were joint Augusti): '*Infamiae detrimentum minime tibi adfertur ob id solum, quod in carcerem coniectus es uel uincula tibi iussu legitimi iudicis iniecta sunt*'; and 2.11(12).14, quoted above n. 49.

- where a more severe sentence has been imposed than required;⁶²
- persons who abstain from parental goods;⁶³
- persons in possession of stolen goods, ignorant that they are stolen;⁶⁴
- where a person was defending their *patria*;⁶⁵
- a debtor who surrenders their property;⁶⁶
- persons who are disinherited;⁶⁷
- statements in petitions;⁶⁸ and
- those who appear on stage while a child.⁶⁹

There is also an overlap between the *Digesta* and *Codex* in relation to the rule that a person who has been sentenced more harshly than was required does not undergo *infamia*.⁷⁰

⁶¹ *Codex Iustinianus* 2.11(12).3 (197 CE): ‘*Etsi seuerior sententia dici debuit, tamen, cum proconsul uir clarissimus certis rationibus motus mitiorem sententiam dixerit et ordine decurionum te biennio abstinere iussit, transacto tempore non esse te in numero infamium palam est eo, ‘ex antidiastolés’ post biennium remisisse tibi prohibitionem decurionatus iudex uidetur*’.

⁶² *Codex Iustinianus* 2.11(12).4 (198 CE): ‘*Si Posidonium in tempus anni relegatum secundum sententiam non excessisse proconsulis probaueris, quinque annis exilio temporario damnandum inter infames haberis oportet, quando sententiae seueritas cum ceteris damnis transigere uideatur*’.

⁶³ *Codex Iustinianus* 2.11(12).7 (205 CE): ‘*Nemo ob id, quod bonis paternis se abstinuit, infamis est*’.

⁶⁴ *Codex Iustinianus* 2.11(12).8 (205 CE): ‘*quod si res furtiua, quam alter subripuit apud te ignorantem comperta est, non laesit existimationem tuam sententia durior*’.

⁶⁵ *Codex Iustinianus* 2.11(12).9 (208 CE): ‘*Neminem sequitur infamia ob defensa negotia publica patriae suae*’.

⁶⁶ *Codex Iustinianus* 2.11(12).11 (223 CE): ‘*Debitorum qui bonis cesserint, licet ex ea causa bona eorum uenerint, infames non fiunt*’.

⁶⁷ *Codex Iustinianus* 2.11(12).13 (229 CE): ‘*Ea, quae pater testamento suo filios increpans scripsit, infames quidem filios iure non faciunt, sed apud bonos et graues opinionem eius, qui patri displicuit, onerant*’.

⁶⁸ *Codex Iustinianus* 2.11(12).17 (242 CE): ‘*Verbum precibus insertum potius uerecundiam onerare quam ullam existimationis maculam uidetur adspargere. Etenim cum non causa cognita dictum est “sukophanteis”, sed ad postulatam patroni interlocutione iudicis responsum sit, nequaquam hoc infamiam inrogat*’.

⁶⁹ *Codex Iustinianus* 2.11(12).21: ‘*Si fratres tui minores dumtaxat aetate in ludicrae artis ostentatione spectaculum sui populo praebuerunt, inuiolatam existimationem obtinent*’.

⁷⁰ See *Digesta* 48.19.10.2 (Macer).

Consequences of *Infamia* in the *Codex Iustinianus*

There are clear parallels between the *Digesta* and *Codex Iustinianus* catalogues of *infames*. In the *Codex Iustinianus*, there is only one chapter dealing explicitly with the consequences of *infamia*, 10.59(57).1. In this constitution it is stated that:⁷¹

Infames personae, licet nullis honoribus, qui integrae dignitatis hominibus deferri solent, uti possunt, curialium tamen uel ciuiliu[m] munerum uacationem non habent: sed et sollempnibus indictionibus ob tutelam publicam eos satisfacere necesse est.

Infamous persons, although they are permitted no honours ('*honores*'), which are usually held by men of intact dignity, nevertheless they have no exemption from civil or curial duties; but, through solemn declarations, it is necessary for them to satisfy the customary impositions on behalf of the public care.

It is perhaps always open to argue, and impossible to prove either way, that the *infames personae* in this constitution includes all persons of no dignity, beyond merely those who are specifically designated as legal *infames*, whether in *Digesta* 3.2, *Codex Iustinianus* 2.11(12) or elsewhere in the *Corpus*. However, the use of the phrase '*integrae dignitatis*' recalls the effects of *infamia* on *existimatio* noted in Chapter 2 that is present in both the *Digesta* and the *Codex Iustinianus*. This suggests that the *infames* referred to in this title, are indeed the specific *legal infames* specifically discussed in *Digesta* 3.2 and *Codex Iustinianus* 2.11(12).

As discussed in the previous chapter, the consequence, explicit in the *Codex*, of debarment from public office is only ever implicit in the *Digesta*. This is perhaps the consequence of the compilers of the two documents eliminating, however imperfectly, repetition. This may well explain why the link between *infamia* and

⁷¹ Not dated, as it was promulgated by Diocletian and Maximianus it can only be dated to the period 286-305 CE: Millar, *The Emperor in the Roman World*, above n. 9, 657.

postulation, one of the key points of the *Digesta* concept of *infamia*, is not discussed in the *Codex*.

The Codex Iustinianus and Classical Law

As was discussed in Chapter One, it is difficult to generalise about the changes introduced by the Justinianic compilers to the constitutions collected in the *Codex Iustinianus*. Nevertheless, two possible avenues are open for investigating to what extent, if at all, there is any evidence supporting an argument that the doctrine of *infamia* was altered under the auspices of Justinian. The first is to investigate the doctrine of *infamia* as it appears in constitutions attributed to the reign of Justinian himself. The second is, as in the *Digesta*, where a passage paralleling one in the *Codex Iustinianus* exists in a source external to the Justinianic tradition, to investigate to what extent the *Codex* passage has been altered as compared to that in the external source.

Justinianic Constitutions

There is no Justinianic constitution specifically on *infamia* and only three constitutions even mention the doctrine. Two of these constitutions deal with *tutela*⁷² and one deals with removing soldiers from the army for breaching a prohibition on leasing land.⁷³

The first passage dealing with *tutela* states that a *tutor* or *curator* who has failed to act to defend a ward is removed as *suspectus* and *amissa eorum existimatione* ('with his *existimatio* lost').⁷⁴ Although the term *infamia* is not explicitly used

⁷² *Codex Iustinianus* 5.37.28 (531 CE) and 5.51.13 (530 CE).

⁷³ *Codex Iustinianus* 4.65.35 (530 CE).

⁷⁴ *Codex Iustinianus* 5.37.28 (531 CE).

here, elsewhere in the *Codex Iustinianus*, as noted above, the phrase *laesere existimationem* is used in a context clearly showing it to be referring to *infamia*.⁷⁵ Other passages in the *Codex* indicating that the removal of *tutores* for misconduct in relation to the tutorship resulted in *infamia* indicate that this is the meaning to be attributed here as well.⁷⁶ The other Justinianic constitution dealing with *tutela* states that *tutores* who failed to make inventories of their wards' property were removed and suffered the penalties of law and *perpetua macula infamiae notabuntur, neque ab imperiali beneficio absolutione huiusmodi notae fruitari* ('were marked by the perpetual stain of *infamia*, nor could they benefit from imperial absolution from this type of *nota*').⁷⁷ The question is whether Justinian is innovating or not in making *infamia* the applicable penalty, so that other references in the Justinianic corpus to *infamia* in relation to *tutela* are the result of interpolation, or whether he is following tradition in this regard. It appears that the latter is the case, as will be discussed in greater detail in a later chapter, Gaius refers to *tutela* as one action, condemnation for which results in the person so condemned becoming *ignominiosus*,⁷⁸ a term that, for Justinian's compilers at least, equated to *infamia*.⁷⁹

In relation to dismissal from the army, the *Codex Iustinianus* states that soldiers who ignore a prohibition on leasing property *ex militibus pagani, ex decoratis infames constituti* ('will be made citizens from soldiers, *infames* from decorated

⁷⁵ *Codex Iustinianus* 2.11(12).8 (205 CE): '*laesit existimationem*'.

⁷⁶ For example, *Codex Iustinianus* 5.43.9 (294 CE) and 5.62.4 (216 CE).

⁷⁷ *Codex Iustinianus* 5.51.14 (530 CE).

⁷⁸ Gaius, *Institutiones* 4.182.

⁷⁹ Gaius, *Institutiones* 4.182 speaks of persons being *notantur ignominia*, as a synonym for *ignominiosus* in relation to *iniuria*. As noted above, in the *Codex Iustinianus* 2.11.(12).5 (198 CE) a decurion condemned of *iniuria* is *notatus ignominia*.

men’).⁸⁰ There are numerous passages in the Justinianic corpus stating that ignominious dismissal from the military results in *infamia*, but none outside it.⁸¹ However, the concept that ignominy attached to such a dismissal goes back a long way. For example, Caesar in his *Bellum Ciuile* states that he *nonnullos signiferos ignominia notauit ac loco mouit* (‘he marked some standard bearers with *ignominia* and had them removed from their places’).⁸² As will be discussed in the last Chapter, it is likely that the legal penalisation of disgraced soldiers also has a long history, and is not a Justinianic innovation.

Parallel Passages

The most important parallel passages from our perspective are those dealing with *infamia* itself. A comparison between the passages of the *Codex Theodosianus*, *Constitutiones Sirmondianae* and *Novellae* that deal with *infamia* and their parallels in the *Codex Iustinianus* can provide guidance as to the extent to which the Justinianic compilers altered the doctrine of *infamia* as they found it in imperial constitutions from the fourth century CE onwards.

The two main chapters in the *Codex Iustinianus* dealing with *infamia*, 2.11(12) ‘*De Causis, ex Quibus Infamia Alicui Inrogatur*’ and 10.59(57) ‘*De Infamibus*’, do not contain any constitutions later than Diocletian and therefore have no parallels in the *Codex Theodosianus*. However, the vocabulary used in relation to *infamia* in these chapters provides a basis for beginning to search for other

⁸⁰ *Codex Iustinianus* 4.65.35.1 (530).

⁸¹ See, e.g., *Digesta* 3.2.1 (Julian).

⁸² Caesar, *Bellum Ciuile* 3.74.1: *Oxford Latin Dictionary* (Oxford, Clarendon Press, 1968) first example for entry 1(b) under ‘*ignominia*’, 824.

instances of *infamia* in the *Codex Iustinianus*, which can be used as a basis for comparison with the *Codex Theodosianus*:

- *infamia*: in addition to being used as a noun for *infamia*,⁸³ *infamia* is qualified in the *Codex Iustinianus* by nouns such as *macula*, *damnum* and *detrimentum*.⁸⁴
- *infamis*, alone or in conjunction with verbs (*esse*, *fieri*, *facere*, and *habere*);⁸⁵
- the phrase *notari ignominia*;⁸⁶
- the phrase *notari infamia*;⁸⁷
- *macula ignominiae*;⁸⁸
- *macula existimationis*;⁸⁹
- *laesere existimationem*;⁹⁰
- *damnum famae subiri*;⁹¹
- *labis pudoris*;⁹²
- *famosus*;⁹³ and
- *infamare*.⁹⁴

Similarly, the various cases that give rise to *infamia*, as listed above, can provide the basis for finding other parallel passages dealing with *infamia*.

⁸³ *Codex Iustinianus* 2.11(12).9 (208 CE): ‘*sequitur infamia*’; 2.11(12).12 (224 CE) ‘*infamiam euitasti*’; 2.11(12).22 (294 CE): ‘*infamiae*’.

⁸⁴ *Codex Iustinianus* 2.11(12).1 (No date, see above n. 60): ‘*infamiae detrimentum ... adfertur*’; 2.11(12).6 (203 CE): ‘*damno infamiae ... subiciuntur*’; 2.11(12).20 (290 CE): ‘*infamiae macula irroganda est*’.

⁸⁵ *Codex Iustinianus* 2.11(12).3 (197 CE): ‘*esse te in numero infamium*’; 2.11(12).4 (198 CE): ‘*inter infames haberi*’; 2.11(12).7 (205 CE): ‘*infamis est*’; 2.11(12).11 (223 CE): ‘*infames ... fiunt*’; 2.11(12).13 (229 CE): ‘*infames ... iure ... faciunt*’; 2.11(12).19 (284 CE): ‘*infamem ... fecisse*’; 10.59(57).1: ‘*infames personae*’.

⁸⁶ *Codex Iustinianus* 2.11(12).5 (198 CE): ‘*ignominia notatus es*’.

⁸⁷ *Codex Iustinianus* 2.11(12).10: ‘*infamia notatur*’.

⁸⁸ *Codex Iustinianus* 2.11(12).14 (248 CE): ‘*ignominiae maculam inrogans*’.

⁸⁹ *Codex Iustinianus* 2.11(12).17 (242 CE): ‘*existimationis maculam ... adspere*’.

⁹⁰ *Codex Iustinianus* 2.11(12).8 (205 CE): ‘*laesit existimationem*’.

⁹¹ *Codex Iustinianus* 2.11(12).8 (205 CE): ‘*famae damnum subisti*’.

⁹² *Codex Iustinianus* 2.11(12).15 (239 CE): ‘*labem pudoris contrahit*’.

⁹³ *Codex Iustinianus* 2.11(12).16 (240 CE): ‘*esse famosum*’.

⁹⁴ *Codex Iustinianus* 2.11(12).18 (260 CE): ‘*infamat*’.

There are 24 passages in the *Codex Iustinianus* using vocabulary associated with *infamia* (*infamia*, *infamis*, *infamo*, *fama*, *nota* and *existimatio*) that have parallels in passages external to the *Codex*.⁹⁵

None of these parallel passages appear to show a change in legal doctrine with regards to what cases *infamia* applies to or how *infamia* is used. In relation to *depositum*, *Codex Iustinianus* 4.34.10 does not refer to *dolus malus*, as in *Collatio* 10.6, which may reflect an alteration in the post-classical doctrine of liability,⁹⁶ but *infamia* remained the penalty for condemnation of *depositum*. The *infamia* that adheres to an insolvent whose goods were sold to his meet debts is referred to in the *Codex Theodosianus* in relation to the circumstances where an action *querella inofficiosi testamenti* ('complaint of an undutiful will') is available to siblings. It is stated that *infamia*, rather than the patrimony, is passed on to a slave instituted as heir by an insolvent and that the slave is therefore *infamiae aspergitur uitiiis* ('sullied with the stains of *infamia*'). Such a situation is one

⁹⁵ *Codex Iustinianus* 1.1.1 (380 CE) = *Codex Theodosianus* 16.1.2 (380 CE); *Codex Iustinianus* 2.14.1 (400 CE) = *Codex Theodosianus* 2.14.1 (400 CE); *Codex Iustinianus* 2.4.41 (395 CE) = *Codex Theodosianus* 2.9.3 (395 CE); *Codex Iustinianus* 3.28.27 (319 CE) = *Codex Theodosianus* 2.19.1 (319 CE) and *Codex Theodosianus* 2.19.3 (332 CE); *Codex Iustinianus* 4.34.10 (294 CE) = *Collatio* 10.6 (294 CE); *Codex Iustinianus* 5.27.1 (336 CE) = *Codex Theodosianus* 4.6.3 (336 CE); *Codex Iustinianus* 7.49.2 (319 CE) = *Codex Theodosianus* 1.16.3 (319 CE); *Codex Iustinianus* 9.1.20 (397 CE) = *Codex Theodosianus* 9.6.3 (397 CE); *Codex Iustinianus* 9.4.1 (320 CE) = *Codex Theodosianus* 9.3.1 (320 CE); *Codex Iustinianus* 9.8.5 (397 CE) = *Codex Theodosianus* 9.14.3 (397 CE); *Codex Iustinianus* 9.19.3 (349 CE) = *Codex Theodosianus* 9.17.2 (349 CE); *Codex Iustinianus* 9.9.30(31) (342 CE) = *Codex Theodosianus* 9.7.3 (342 CE); *Codex Iustinianus* 9.40.3 (421 CE) = *Codex Theodosianus* 10.10.29 (421 CE); *Codex Iustinianus* 9.43.3 (371 CE) = *Codex Theodosianus* 9.38.5 (371 CE); *Codex Iustinianus* 9.44.1 (385 CE) = *Codex Theodosianus* 9.36.1 (385 CE); *Codex Iustinianus* 9.44.2 (409 CE) = *Codex Theodosianus* 9.36.2 (409 CE); *Codex Iustinianus* 9.46.8 (385 CE) = *Codex Theodosianus* 9.39.2 (385 CE); *Codex Iustinianus* 10.32.33 (381 CE) = *Codex Theodosianus* 12.1.85 (381 CE); *Codex Iustinianus* 10.32.31 (371 CE) = *Codex Theodosianus* 12.1.76 (371 CE); *Codex Iustinianus* 10.32.34 (382 CE) = *Codex Theodosianus* 12.1.92 (382 CE); *Codex Iustinianus* 11.19.1 (425 CE) = *Codex Theodosianus* 14.9.3 (425 CE); *Codex Iustinianus* 12.50.13 (390 CE) = *Codex Theodosianus* 8.5.50 (390 CE); *Codex Iustinianus* 12.57(58).7 (389 CE) = *Codex Theodosianus* 8.4.16 (389 CE).

⁹⁶ See M. Kaser, *Roman Private Law*, (2nd ed., Trans. R. Dannenberg, London, Butterworths, 1968) 156-8 and 169.

where the action *querella inofficiosi testamenti* is available to siblings as the instituted heir is unable to take the inheritance *per turpitudinem aut aliquam leuem notam* ('through turpitude or some other light mark').⁹⁷ This passage is abbreviated in the *Codex Iustinianus*, which states that siblings can bring the *querella inofficiosi testamenti* where *scripti heredes infamiae uel turpitudinis uel leuis notae macula adsparguntur* ('the written heirs are besmirched with the stain of *infamia*, turpitude or some other light mark').⁹⁸ In the *Codex Theodosianus*, this instance of *infamia* is treated as an instance of *turpitudinis* or as a *leuis nota*, whereas the *Codex Iustinianus* appears to treat *infamia* as a third, separate instance. It is probable that *infamia* is redundant in the *Codex Iustinianus*, with *infames* falling within those bearing a 'stain' of *infamia* or either turpitude or a *leuis nota*. What is more intriguing is what is meant by a *leuis nota*. *Nota* is used in the *Codex Theodosianus* as a synonym for legal *infamia*; for example, a *iudex* who subjects a decurion to corporal punishment *perpetua infamia iniustus*, which *nota* not even a rescript can alleviate.⁹⁹ Elsewhere in the *Codex Theodosianus*, there appear to be references to a gradation in the gravity of a *nota*, such as where a person who neglects regulations with regard to dealing with records of court proceedings are subject to a *grauissima nota*.¹⁰⁰ *Grauis* is similarly used in relation to *infamia*.¹⁰¹ Whether the use of *grauis* and *leuis* in these cases in any way reflects an actual gradation in relation to *infamia* is difficult to tell as nowhere is such a gradation adumbrated. One possible gradation in *infamia*

⁹⁷ *Codex Theodosianus* 2.19.3 (332 CE).

⁹⁸ *Codex Iustinianus* 3.28.27 (215 CE).

⁹⁹ *Codex Theodosianus* 12.1.85 (381 CE) = *Codex Iustinianus* 10.32.33 (381 CE).

¹⁰⁰ *Codeex Theodosianus* 11.30.24 (348 CE).

¹⁰¹ *Codex Theodosianus* 9.10.4 (390 CE) = *Codex Iustinianus* 9.12.8 (390 CE): a *iudex* who delays punishing *uis* must know that '*grauis infamia sit notandus*'.

suggested by the *Codices* is in relation to the duration of the *infamia*. There are several references to *perpetua infamia*,¹⁰² even to an *infamia* that could not be removed by imperial rescript.¹⁰³ It is possible that *gravis infamia* was that of a permanent nature, perhaps even beyond repeal by imperial rescript. There are, unfortunately, no references to temporary *infamia* in the *Codex Theodosianus*. However, several constitutions contained in the *Codex Iustinianus* refer to cases where the *infamia* has only been for a specified time, such as accompanying temporary suspension from the decurionate.¹⁰⁴ Such a temporary *infamia* might be embraced by the phrase *leuis nota*. Nevertheless, it is more likely that *leuis nota* does not carry any specific, technical, connotation pertinent to *infamia*. That Justinian's compilers thought that this was the case is suggested by their inclusion of *infamia* alongside *leuis nota* as something by which an instituted heir could be tainted so as to enable siblings to institute the *querella testamenti inofficiosi*.¹⁰⁵ Another suggestion of a tiered *infamia* may be found in a constitution, noted below, that appears to go beyond *infamia* as contained in the *Digesta*, in that it states that such people are made alien to the laws of the Romans,¹⁰⁶ which implies a loss of citizenship.

The fact that these parallel passages contain no changes of any significance to the way *infamia* is used or to the vocabulary and means of expression used to describe *infamia* is suggestive that the doctrine of *infamia*, as contained in the *Codex Iustinianus*, is reflective of that contained in the *Codex Theodosianus*.

¹⁰² For example, *Codex Theodosianus* 16.5.7 (381 CE): *perpetua nota infamiae*; 16.7.5 (391 CE): *perpetua infamia*; *Codex Iustinianus* 5.51.13 (530 CE): *perpetua macula infamiae*.

¹⁰³ *Codex Theodosianus* 12.1.85 (381 CE) = *Codex Iustinianus* 10.32.33 (381 CE).

¹⁰⁴ For example, *Codex Iustinianus* 2.11(12).3 (197 CE).

¹⁰⁵ *Codex Theodosianus* 2.19.1 (319 CE) and 2.19.3 (332? CE) = *Codex Iustinianus* 3.28.27 (319 CE).

There is no trace in the *Codex Iustinianus* passages of any systematic attempt to harmonise the way that *infamia* is referred to or used. In Chapter Five, we will compare the passages dealing with *infamia* in the *Codices*, *Constitutiones Sirmondianae* and *Novellae* to determine whether this pattern is sustained.

Other Cases of Infamia in the Codex Iustinianus

Now that we have examined the vocabulary and instances of *infamia* contained in the chapters of the *Codex Iustinianus* explicitly concerned with the principle, it is possible to examine the remainder of the text for other cases of *infamia*, the vocabulary used and any further consequences that may ensue from *infamia*.

Cases of Infamia

New cases where persons endure *infamia* in the *Codex Iustinianus* stem from the fact that it encompasses texts from the period of the Christian Empire, as well as those of the pre-Christian Empire. In this regard, heretics are to sustain *infamia*,¹⁰⁷ as well as those who purchase a place in the episcopacy.¹⁰⁸

Another ground of *infamia* common in the *Codex Iustinianus*, but largely absent in the *Digesta*, is the use of *infamia* as a penal measure to control observance of imperial laws in general. A person who wishes to interpret imperial laws cleverly or to assail them is also subject to *infamia*.¹⁰⁹ Those who solicit imperial rescripts

¹⁰⁶ *Codex Iustinianus* 5.27.1pr (336 CE).

¹⁰⁷ *Codex Iustinianus* 1.1.1 (380 CE): ‘*hanc legem sequentes Christianorum catholicorum nomen iubemus amplecti, reliquos uero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere ...*’.

¹⁰⁸ *Codex Iustinianus* 1.3.30(31).6 (469 CE): ‘*perpetuae quoque infamiae damnari decernimus*’.

¹⁰⁹ *Codex Iustinianus* 1.14.2 (426 CE): ‘*notam infamiae subituro eo, qui uel astute ea interpretari uoluerit uel impetrato impugnare rescripto, nec habituro fructum per subreptionem elicti*’.

to evade laws are also subject to *infamia*, and a fine of a third of their patrimony, under the rubric of *ambitus*.¹¹⁰

Infamia is also utilised as a deterrent in relation to judicial proceedings.¹¹¹ *Infamia* is imposed on persons seeking to circumvent a pact by appeal or supplication to the Emperor, as well as losing their right of action and any property under the pact.¹¹² A judge who fails to convict or apply a penalty less than that required also *gravi infamia sit notandus* ('must be marked with grave *infamia*').¹¹³ In a similar vein, an accuser who fails to prosecute an action within a year is fined one quarter of his property and undergoes *infamia quam ueteres iusserant sanctiones* ('which the ancient laws demand').¹¹⁴ Similarly, a person who desists from a prosecution is *notari infamia*.¹¹⁵ People who accuse in another's name are also subject to *infamia*.¹¹⁶ Judges who torture *principales* or decurions are subject, *inter alia*, to

¹¹⁰ *Codex Iustinianus* 1.16.1 (384 CE): '*si quisquam speciali supplicatione eliciendum aliquod rescriptum temptauerit, ut transire ei formam liceat statutorum, tertia patrimonii parte multatus et damnatus ambitus crimine maneat infamis*'.

¹¹¹ A. H. J. Greenidge, *Infamia: Its Place in Roman Public and Private Life* (Oxford, Clarendon Press, 1894) 145.

¹¹² *Codex Iustinianus* 2.4.41pr (395 CE): '*Si quis maior annis aduersus pacta uel transactiones nullo cogentis imperio libero arbitrio et uoluntate confecta putauerit esse ueniendum uel interpellando iudicem uel supplicando principibus uel non implendo promissa, eas autem inuocato dei omnipotentis nomine eo auctore solidauerit, non solum iniuratur infamia, uerum etiam actione priuatus, restituta poena quae pactis probatur inserta, et rerum proprietate careat et emolumento, quod ex pacto uel transactione illa fuerit consecutus: itaque omnia eorum mox commodo deputabuntur, qui intemerata pacti iura seruauerint*'.

¹¹³ *Codex Iustinianus* 9.12.8.3 (390 CE): '*Iudicem uero nosse oportet, quod graui infamia sit notandus, si uiolentiae crimen apud se probatum distulerit omiserit uel impunitate donauerit aut molliorem quam praestiuimus poenam protulerit*'.

¹¹⁴ *Codex Iustinianus* 9.44.1 (385 CE): '*Quisquis accusator reum in iudicium sub inscriptione detulerit, si intra certum tempus accusationem coeptam persequi supersederit uel, quod est contumacius, ultimo die adesse neglexerit, quarta bonorum omnium parte multatus aculeos consultissimae legis incurrat, scilicet manente infamia, quam ueteres iusserant sanctiones*'.

¹¹⁵ *Codex Iustinianus* 9.45.2 (239 CE): '*eo qui destitit infamia nihilo minus notando et extra ordinem secundum iudicalem motum puniendo*'.

¹¹⁶ *Codex Iustinianus* 9.46.8.1 (385 CE): '*Atque ideo calumniosissimum caput et personam iudicio irritae delationis infamem supplicium sequatur, quo posthac singuli uniuersique congrosant non licere in eo quod non possit ostendi iudicum animos commouere*'.

perpetua infamia (which is also referred to as a ‘*nota*’).¹¹⁷ In further regulation of judicial procedure, a person who appeals to the emperor, ignoring the usual avenues of appeal, *ignominiae poena notabitur* (‘will be noted with the penalty of *ignominia*’).¹¹⁸ Those who insert the names of others in petitions are said *adficiendi sunt publicae sententiae nota* (‘must be inflicted with the mark (*nota*) of a public sentence’).¹¹⁹ The fact that, as discussed in relation to the *Digesta*, condemnation in a *iudicium publicum* results in *infamia* suggests that what is being referred to here is the legal concept, rather than just a general stigma. Similarly, people who allow their names to be inserted in a petition are *ueluti famae suae prodigos et calumniarum redemptores notari oportebit* (‘ought to be noted as wasteful of their reputation (*famae*) and buyers of calumnies’).¹²⁰

Judges are also prohibited from appointing anyone who has held a position as prefect, chamberlain (*palatinus*),¹²¹ or soldier as an intervener in litigation in his province. Breach is punished by *detrimentum famae, sed etiam patrimoniorum damna* (‘loss of reputation and condemnation of his patrimony’).¹²² A similar use

¹¹⁷ *Codex Iustinianus* 10.32.33 (381 CE): ‘*Quod si quis forte iudicium in hanc pertinaciam illiciti furoris eruperit, quod audeat principalem ac decurionem et suae, si sic dici oportet, curiae senatorem tormentis subdere, uiginti librarum auri illatione multatus et perpetua infamia inustus nec speciali quidem rescripto notam eluere mereatur*’.

¹¹⁸ *Codex Iustinianus* 1.21.3 (331 CE): ‘*Qui licitam prouocationem omiserit, perpetuo silere debeat nec a nobis impudens petere supplicationem auxilium. Quod si fecerit, desiderio suo carebit et ignominiae poena notabitur*’.

¹¹⁹ *Codex Iustinianus* 2.14(15).1.1 (400 CE): ‘*Ac ne in fraudem legum aduersariorumque terrorem his nominibus abutantur et titulis, qui huiusmodi dolo scientes coniuent, adficiendi sunt publicae sententiae nota*’.

¹²⁰ *Codex Iustinianus* 2.14(15).1.4 (400 CE): ‘*Eos sane, qui se sponte alienis litibus inseri patiuntur, cum his neque proprietas neque possessio competat, ueluti famae suae prodigos et calumniarum redemptores notari oportebit*’.

¹²¹ See Jones, *The Later Roman Empire*, above n. 21, vol. 1, 104.

¹²² *Codex Iustinianus* 1.40.8 (386 CE): ‘*Ne quis iudicium in prouincia sua praefectianum uel palatinum uel militem uel ex his etiam omnibus, qui antea in huiusmodi officiis fuerunt commorati, intercessorum (id est exsecutorem) cuiusquam litigatoris petitione in quolibet seu priuato seu publico negotio putet esse tribuendum. Nam peccantem circa consulta caelestia cum suo officio non solum detrimentum famae, sed etiam patrimoniorum damna comitentur*’.

of the term *infamia* is in a constitution marking with the *nota famae* those judges who go to their provinces taking with them persons upon whom they have placed the titles *domestici* or *cancellarii*.¹²³ Accusers who fail to prosecute their cases within a year are subject to *infamia*, i.e., they suffer *damnum famae*.¹²⁴ It is also stated that a person who loses an appeal should depart having been *notatus* ‘noted [with *infamia*]’.¹²⁵

Some cases overlap with those in the *Digesta*. For example, persons who have been condemned in their own name for failing to return a deposit run the risk of *infamia*.¹²⁶ The terminology *actio famosa* is also found in the *Codex Iustinianus*, often in the context of restricting who may bring *actiones famosae* against whom.

¹²³ *Codex Iustinianus* 1.51.8 (423 CE): ‘Nullus iudicum ad prouinciam sibi commissam quemquam secum ducere audeat, cui *domestici* uel *cancellarii* nomen imponat, nec profectum ad se undecumque suscipiat, ne *famae nota* cum bonorum publicatione plectatur’. *Domestici* and *cancellarii* were usual members of the staff of a provincial office holders, see Jones, *Later Roman Empire*, vol. 2, 598 (on *duces*).

¹²⁴ *Codex Iustinianus* 9.44.2pr (409). Not stated, but implied from ‘... et si persona uilior fuerit, cui *damnum famae* non sit iniuria, poenam patiatur exilii ...’.

¹²⁵ *Codex Iustinianus* 7.62.19.1 (331): ‘Superatus enim si iniuste appellare uidebitur, lite perdita *notatus* abscedet ...’.

¹²⁶ *Codex Iustinianus* 4.34.10 (274 CE): ‘Qui depositum non restituit, suo nomine conuentus et condemnatus ad eius restitutionem cum *infamiae* periculo arguetur’.

These restrictions include, between wives and husbands,¹²⁷ and *liberti* against their patrons,¹²⁸ just as in the *Digesta*.

Similarly, a discharge from the army for leasing the property of others contrary to the law reduces soldiers to being *infames*, in the same way as *missio cum ignominia* does in the *Digesta*.¹²⁹ In this light, the phrase *integra fama* carries the meaning of *non infamis est* when used to refer to a soldier dismissed after 20 years.¹³⁰ Soldiers are also stated not *notatos ... esse famosos* ('to be marked as *famosi*') once they have been discharged for events that occurred during their period of service. The rescript begins that the soldier fears *ne nota, quae propter delictum militare intercessit, existimationem tuam iam ueterani laesisse uideatur* ('lest the mark, which intervenes on account of military delict, would seem to harm your reputation, already a veteran').¹³¹

¹²⁷ *Codex Iustinianus* 5.12.1.2 (201 CE): Where a dowry that was *evicta* is discussed. (*evictio* is, *inter alia*, when something is given as dowry that was the property of another: see *Digesta* 21.2, *Codex Iustinianus* 8.44, 8.45 and 10.5: A. Berger, 'Encyclopedic Dictionary of Roman Law' (1953) 43 *Transactions of the American Philosophical Society*, 332-808, 457). In these circumstances, it is stated that where there was intervention by the *dolus* of the wife, an *actio in fatum* (i.e., one adapted to the circumstances of particular cases: see Kaser, *Roman Private Law*, above n. 96, 194-5) rather than an *actio famosa* would be given to the husband: '*dolo autem dantis interposito de dolo actio aduersus eum locum habebit, nisi a muliere dolus interpositus sit: tunc enim, ne famosa actio aduersus eam detur, in factum actio competit*'. A similar proposition is found in *Codex Iustinianus* 5.21.2 (290 or 293 CE) where, in the event of goods being removed by one former spouse following a divorce, an *actio in factum* is given in place of an *actio famosa*: '*Divortii gratia rebus uxoris amotis a marito uel ab uxore mariti rerum amotarum edicto perpetuo permittitur actio. Constante etenim matrimonio neutri eorum neque poenalis neque famosa actio competit, sed de damno in factum datur actio*'.

¹²⁸ *Codex Iustinianus* 5.55.1.1 (223): '*Tu autem, etsi contra patronum tuum famosam actionem instituere non potuisti, prouidere tamen, ne quid tutelae deesset, necessariis postulationibus apud eum, cuius de ea re iurisdictio fuit, potuisti*'.

¹²⁹ *Codex Iustinianus* 4.65.35.1 (Undated, Justinian): '*... ne, dum alienas res conductionis titulo esse gubernandas existimant, suas militias suamque opinionem amittant, ex militibus pagani, ex decoratis infames constituti ...*'.

¹³⁰ *Codex Iustinianus* 5.65.1 (213 CE): '*Qui causaria missione sacramento post uiginti stipendia soluuntur, et integram famam retinent et ad publica priuilegia ueteranis concessa pertinent*'.

¹³¹ *Codex Iustinianus* 12.35.7 (No date, Gordian, 238-244 CE, see Millar, *Emperor in the Roman World*, above n. 9, 657): '*Frusta ueraris, ne nota, quae propter delictum militare*

As in the *Digesta*, there are various constitutions utilising *infamia* in relation to intermarriage between a *tutor* or *curator* and a *pupilla*, as if such action were an occasion of maladministration in the tutorship.¹³² The terms *nota* and *infamia* are used interchangeably in a constitution governing the removal of a *tutor* unable to provide security. It is stated that *si inopia hoc faciat, sine infamia, si fraude, etiam cum nota* ('if this happens due to poverty, then it is without *infamia*, if because of fraud, then with the *nota*').¹³³ Again, *tutores* suspected of fraud become *infames* ('*infames fieri*').¹³⁴ And those who fail to make an inventory and are thus removed as suspect *perpetua macula infamiae notabantur* ('are marked with the perpetual stain of *infamia*').¹³⁵

Also consistent with the *Digesta*, a woman is *infamis* if she fails to observe the required mourning period¹³⁶ and *infamia* is imposed for bigamy.¹³⁷ However, a

intercessit, existimationem tuam iam ueterani laesisse uideatur, maxime cum nec ex eo delicto, quod et in paganorum potest cadere personam, notatos milites post missionem placuerit esse famosos'.

¹³² *Codex Iustinianus* 5.6.7 (Diocletianus and Maximianus, undated, but between 286-305 CE, see Millar, *Emperor in the Roman World*, above n. 9, 657): '*Si tutor uel curator pupillam uel adultam quondam suam sibi uel filio suo nullo diuino impetrato beneficio in matrimonio collocauerit, manet infamia contra eum uelut confessum de tutela, quia huiusmodi coniunctione fraudem administrationis tegere laborauit, et dos data per conditionem repeti potest*'; 5.62.4pr (216 CE): '*Amplissimi ordinis consulto, qui pupillam suam uxorem ducit, nuptias contrahere non intellegitur et tamen infamis constituitur*'.

¹³³ *Codex Iustinianus* 5.42.2 (260 CE): '*Et eum tutorem qui superest, si secundum praesidis praeceptum et iuris formam satis non dat, remoueri a tutela (si inopia hoc faciat, sine infamia, si fraude, etiam cum nota)*'.

¹³⁴ *Codex Iustinianus* 5.43.9 (294 CE): '*Suspectos tutores ex dolo, non etiam eos, qui ob neglegentiam remoti sunt, infames fieri manifestum est*'.

¹³⁵ *Codex Iustinianus* 5.51.13.3 (530): '*Scituris tutoribus et curatoribus, quod, si inventarium facere neglexerint, et quasi suspecti ab officio remoueantur et poenita legitimis, quae contra eos interminatae sunt, subiacebunt et postea perpetua macula infamiae notabuntur, neque ab imperiali beneficio absolute huiusmodi notae fruituri*'.

¹³⁶ *Codex Iustinianus* 5.9.1pr = 6.56.4pr (380 CE): '*Si qua mulier nequaquam luctus religionem priori uiro nuptiarum festinatione praestiterit, ex iure quidem notissimo sit infamis*'. A monetary penalty is also applied to the new husband (5.9.2). The *infamis mulier* cannot leave goods in her will beyond the third grade (5.9.4).

¹³⁷ *Codex Iustinianus* 5.5.2 (285 CE): '*Neminem, qui sub dicione sit Romani nominis, binas uxores habere esse ulgo patet, cum et in edicto praetoris huiusmodi uiri infamia notati*

law post-dating the work extracted in the *Digesta* imposes *infamia* for marrying against the law regulating divorce.¹³⁸

In another overlap with the *Digesta*, *ignominia* is used in relation to the dishonourable discharge of soldiers.¹³⁹ As in the *Digesta*, such persons are described as *cum infamia notantur* ('marked with *infamia*'), which is contrasted with *integra dignitas*.¹⁴⁰

In a further regulation of family matters by *infamia*, Senators, *duumvirales*, priests (*Phoenicarchiae* or *Syriarchae*) who wish to place among their legitimate heirs, by their own judgment or through an imperial rescript, their child born to certain 'disreputable' women¹⁴¹ are said *maculam subire infamiae et alienos a Romanis legibus fieri* ('to go under the stain of *infamia* and become alien to the laws of the Romans').¹⁴² This seems to go further than the doctrine of *infamia*

sint. Quam rem competens iudex inultam esse non patietur'; 9.9.18pr (257 CE): '*Eum qui duas simul habuit uxores sine dubitatione comitatur infamia*'.

¹³⁸ *Codex Iustinianus* 5.17.8.4a (449 CE): '*Quod si praeter haec [prohibition on marriage resulting from the woman sending a repudiation notice when this was prohibited] nupserit, erit ipsa quidem infamis, conubium vero illud nolumus nuncupari: insuper etiam arguendi hoc ipsum uolenti concedimus libertatem*'.

¹³⁹ *Codex Iustinianus* 9.41.8 (Undated, Diocletianus and Maximianus, between 286-305 CE, see Millar, *Emperor in the Roman World*, above n. 9, 657): '*Milites neque tormentis neque plebeiorum poenis in causis criminum subiungi concedimus, etiamsi non emeritis stipendiis uideantur esse dimissi, exceptis scilicet his, qui ignominiose sunt soluti*'; *Codex Iustinianus* 12.35.3 (Undated, made by Caracalla, between 211-217 CE, see Millar, *Emperor in the Roman World*, above n. 9, 657): '*Milites ignominia missi, cum infamia notantur, nullis honoribus, qui integrae dignitatis hominibus deferri solent, uti possunt. Habeant autem morandi ubi uelint potestatem, praeterquam in eis locis, quibus specialiter arcentur*'.

¹⁴⁰ *Codex Iustinianus* 12.35.3 quoted above.

¹⁴¹ I.e., children born to them from a slave girl or the daughter of slave girls, a freedwoman or the daughter of a freedwoman, an actress or the daughter of an actress, a tavern keeper or her daughter, a woman of degraded rank, a procuress, the daughter of an arena fighter or one who sells things to the public.

¹⁴² *Codex Iustinianus* 5.27.1pr (336 CE): '*Senatores, seu perfectissimos, uel quos in ciuitatibus duumiralitas uel sacerdotii, id est Phoenicarchiae uel Syriarchiae, ornamenta condecorant, placet maculam subire infamiae et alienos a Romanis legibus fieri, si ex ancilla uel ancillae filia uel liberta uel libertae filia uel scaenica uel scaenicae filia uel ex tabernaria uel ex tabernarii filia uel humili uel abiecta uel lenonis aut harenarii filia uel quae mercimoniis publicis praefuit susceptos filios in numero legitimorum habere uoluerint aut proprio iudicio aut nostri praerogatiua rescripti ...*'.

contained in the *Digesta*, as it implies that they lose their citizenship, which is not the case with other *infames*.

Another instance of *infamia* contained only in the *Codex Iustinianus* is the *infamia* imposed upon the sons of those who have rebelled against the state. They are explicitly stated to be extraneous to all inheritance.¹⁴³

The expression *subici infamia* is used in relation to adultery, where it is stated that a sister who has not been accused of adultery, though it is said that she has committed it, *nec poenae nec infamiae subici potuit*.¹⁴⁴ The apparent dichotomy represented here, *nec poenae nec infamiae*, might be thought to represent a distinction between a penalty imposed by the law (*poena*) and a bad reputation (*infamia*). However, the fact that the sister is already said to have committed adultery (*adulterium commissum dicebatur*) would have been enough to earn her *infamia* in the non-technical sense of a bad reputation, suggesting that this reference to *infamia* is to the legal concept. For the related offence of *stuprum*, it is stated that apprehension with an *ancilla* ('slave girl') rather than a *libera* ('free-born female') does not result in *infamia*, but rather affects a person's reputation (*opinio*).¹⁴⁵

¹⁴³ *Codex Iustinianus* 9.8.5.1 (397 CE): 'Filiis uero eius [one who has rebelled] quibus uitam imperatoria specialiter lenitate concedimus (paterno enim deberent perire supplicio, in quibus paterni, hoc est hereditarii, criminis exempla metuentur), a materna uel avita, omnium etiam proximorum hereditate ac successione habeantur alieni, testamentis extraneorum nihil capiant, sint perpetuo egentes et pauperes, infamia eos paterna semper comitetur, ad nullos umquam honores, nulla prorsus sacramenta perueniant, sint postremo tales, ut his perpetua egestate sordentibus sit et mors solacio et vita supplicio'.

¹⁴⁴ *Codex Iustinianus* 9.9.13(12) (240 CE): 'Etsi crimine adulterii damnatus restitutus non esset, ut proponis, si tamen soror tua, cum qua adulterium commissum dicebatur, non est accusata, nec poenae nec infamiae subici potuit, et multo magis, cum et accusatorem vita esse functum proponas'.

¹⁴⁵ *Codex Iustinianus* 9.9.24(25) (291 CE): 'Etsi libidine intemperate cupiditatis ex actorum lectione exarsisse te cognitum est, tamen cum ancillam comprehendisse et non liberam stuprasse detectum sit, ex huiusmodi sententia grauatum potius opinionem tuam quam infamia adflictam esse manifestum est'.

In another case of *infamia* not found in the *Digesta*, a *libertinus* who claim to be *ingenuus* is *adficitur cum infamia* ('afflicted with *infamia*').¹⁴⁶ Also outside the *Digesta* are teachers who teach in public, who *infamiae notam subeat* ('go under the mark of *infamia*').¹⁴⁷

Existimatio is contrasted with *infamia* when it is stated that pecuniary cases do not harm *existimatio*, but that criminal cases *famae existimationem laedere* ('harm the honour of a person's reputation').¹⁴⁸ It is interesting to note that a compound of two terms usually associated with *infamia* is used here to describe what is harmed by a conviction. That the penalty referred to here is *infamia* is suggested firstly, by the fact that *existimatio* is used to describe what is harmed by *infamia* and secondly, by the fact that there is no guarantee that conviction in a pecuniary case would not involve loss of *existimatio* in a non-technical sense, and it is difficult to see why a constitution would be issued regarding a person's reputation, presumably beyond the dictates of imperial legislation, as opposed to their legal status.

The term *infamia* also is used non-technically in the *Codex Iustinianus*. Men who marry as women are described as *infames*, yet the context of the law makes it

¹⁴⁶ *Codex Iustinianus* 9.21.1 (300? CE, Diocletianus and Maximianus, between 286-305 CE, see Millar, *Emperor in the Roman World*, above n. 9, 657): '*Qui autem libertinus se dicit ingenuum, tam de operis ciuilitate quam etiam lege Visellia criminaliter poterit perurgueri: in curiam autem se immiscens damno quidem cum infamia adficitur ...*'.

¹⁴⁷ *Codex Iustinianus* 11.19.1pr (425 CE): '*Uniuersos, qui usurpantes nomina magistrorum in publicis magistrationibus cellulisque collectos undecumque discipulos circumferre consuerunt, ab ostentatione uulgari praecipimus amoueri, ita ut, si qui eorum post emissos diuinae sanctionis adfatus quae prohibemus atque damnamus iterum forte temptauerit, non solum eius quam meretur infamiae notam subeat, ueram etiam pellendum se ex ipsa ubi uersatur illicite urbe cognoscat*'.

¹⁴⁸ *Codex Iustinianus* 9.40.3 (421 CE): '*In pecuniariis causis edictum contra latentem propositum existimationem eius non laedit. Criminalis uero programmatum tenor hanc tantum ferat de iure censuram, ut inter reos adnotati non iam patrimonium debeat transferre, sed fama existimationem laedere*'.

difficult to take this usage of the term as referring to a group of people subject to civic disabilities:

Cum uir nubit in feminam, femina uiros proiectura quid cupiat? Ubi sexus perdidit locum, ubi scelus est id quod non proficit scire, ubi Venus mutatur in alteram formam, ubi Amor quaeritur nec uidetur: iubemus insurgere leges, amari iura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt uel futuri sunt rei.

When a man marries as a woman, a woman about to reject men, what does he desire? When sex has lost its place, when that which it is not profitable to know is a crime, when Venus is changed into another form, when love is sought but not seen: we order the law to rise, to be armed with the just avenging sword, so that those *infames*, who are or who will be guilty, go under exquisite penalties.¹⁴⁹

This entire passage, from mutating love to personified laws, makes it difficult to regard *infames* as being used technically, although catamites are listed in the *Digesta* as among those excluded from postulating for all but themselves.¹⁵⁰

Another example is *Codex Iustinianus* 9.43.3:

Indulgentia, patres conscripti, quos liberat notat nec infamiam criminis tollit, sed poenae gratiam facit.

A pardon, o conscript fathers, marks those it frees and does not lift the infamy of crime, but grants dispensation from the penalty.¹⁵¹

Both *notat* and *infamia* are here being used to refer to a non-legal form of stigma, perhaps playing on the usual legal usage of the terms. The meaning is to grant a pardon is to acknowledge that there has been a wrong, hence those that are pardoned are marked, and the bad reputation arising from the commission of an offence is not removed by the pardon.

¹⁴⁹ *Codex Iustinianus* 9.9.30(31) (342 CE); the translation in S. P. Scott, *The Civil Law* (Cincinnati, Central Trust Co., 1932) 17 Vols., vol. 15, 16-7 ‘when a man marries, and his wife becomes pregnant ...’ is clearly incorrect.

¹⁵⁰ *Digesta* 3.1.6 (Ulpian): ‘*qui corpore suo mulierbria passus est*’.

¹⁵¹ *Codex Iustinianus* 9.43.3 (371 CE).

The term *nota* is also used to mean something other than *infamia* in a constitution dealing with the followers of Nestorius.¹⁵² Such persons are stated to be branded with the mark (*nota*) of an appropriate name, lest they use the appellation ‘Christian’, i.e. they are to be called ‘Simonians’ as the followers of Porphyrius are called ‘Porphyrians’.¹⁵³ Here *nota* clearly carries a general meaning of ‘a mark attached, imprinted etc, in order to identify or distinguish’ or ‘a mark of disgrace, disapproval’ or ‘[s]lur, stigma’,¹⁵⁴ rather than a reference to *infamia* as a legal concept.

A set phrase in the *Codex Iustinianus* where it is clear that *nota* is being used to mean ‘a mark of disgrace, disapproval’ or ‘[s]lur, stigma’¹⁵⁵ is *nota exheredationis* (‘the mark of disinheritance’).¹⁵⁶

The term *nota* is also used to convey the simple meaning of ‘[a]n indication, sign, token (of some fact or condition, etc)’¹⁵⁷ where, in the context of discussing the time period for an heir to prepare an inventory of an estate, it is stated that the

¹⁵² See Jones, *Later Roman Empire*, above n. 21, vol. 1, 213-5 on Nestorius, bishop of Constantinople for a short period under Theodosius II.

¹⁵³ *Codex Iustinianus* 1.5.6pr (435 CE): ‘*Damnato portentuosae superstitionis auctore Nestorio nota congrui nominis eius inuratur gregalibus, ne Christianorum appellatione abutantur: sed quemadmodum Ariani lege diuae memoriae Constantini ob similitudine impietatis Porphyriani a Porphyrio nuncupatur, sic ubique participes nefariae sectae Nestorii Simoniani vocentur, ut, cuius scelus sunt in deserendo deo imitati, eius uocabulum iure uideantur esse sortiti*’.

¹⁵⁴ See *Oxford Latin Dictionary*, above n. 82, entry 1 and 4(c) under ‘*nota*’, 1191.

¹⁵⁵ See *Oxford Latin Dictionary*, above n. 82, entry 1 and 4(c) under ‘*nota*’, 1191.

¹⁵⁶ *Codex Iustinianus* 3.28.18 (286 CE): ‘*Cum te pietatis religionem non uiolasse, sed mariti coniugium quod fueras sortita distrahere noluisse ac propterea offensum atque iratum patrem ad exheredationis notam prolapsam esse dicas, inofficiosi testamenti querellam inferre non uetaberis*’. The *querella inofficiosi testamenti* was a complaint by legitimate heirs (i.e. *sui heredes*, those in the *potestas* of a person, See J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam, Noth-Holland Publishing Co., 1976) Ch. L) who were omitted or unjustly disinherited in a testator’s will: Berger, ‘Encyclopedic Dictionary, above n. 127, 665. *Codex Iustinianus* 6.21.10pr (246 CE): ‘*Si, cum uel in utero haberetur filia inscio patre milite, ab eo paeterita sit, uel cum in rebus humanis eam non esse falso rumore prolato pater silentium huiusmodi exheredationis notam nequaquam infligit*’.

¹⁵⁷ *Oxford Latin Dictionary*, above n. 82, entry 8 under ‘*nota*’, 1192.

time period (60 days) begins to run from the point in time when the heir has received a notice (*nota*) that the tablets of the will have been opened.¹⁵⁸

Notari is also possibly used in the sense of ‘to censure stigmatize (persons, vices, etc, in speech, writing etc’¹⁵⁹ when it is stated that a person will be marked (*notari*) with *calumnia* if he fails to prove an allegation of *praeuaricatio*.¹⁶⁰ This could be translated in two ways, ‘noted with *calumnia*’ or ‘noted [with *infamia*] through *calumnia*’. The use of the phrase *infamia/ignominia notari* and the phrases *calumniatorem ... notatum*¹⁶¹ and *notam calumniae* (‘mark of *calumnia*’)¹⁶² suggest the former translation, although it is elsewhere stated in the *Corpus Iuris Ciuilis* that *calumnia* results in *infamia*.¹⁶³

A similarly problematic use of *notari* is with *sententia*.¹⁶⁴ Again this is used in the context of *calumnia*, when it is stated that *tutores* and *curatores* are not readily *sententia notantur, nisi euidens eorum calumnia iudicanti apparebit* (‘noted by the sentence, unless evident *calumnia* appears to the judge’). Similar to *nota*

¹⁵⁸ *Codex Iustinianus* 6.30.22.2 (531 CE): ‘*Sin autem dubius est, utrumne admittenda sit nec ne defuncti hereditas, non putet sibi necessariam delibearationem, sed adeat hereditatem uel sese immisceat, omni tamen modo inuentarium ab ipso conficiatur, ut intra triginta dies post apertas tabulas uel postquam nota ei fuerit apertura tabularum uel delatam sibi ab intestato hereditatem cognouerit numerandos, exordium capiat inuentarium super his rebus, quas defunctus mortis tempore habebat*’.

¹⁵⁹ See *Oxford Latin Dictionary*, above n. 82, entry 3(c) under ‘*noto*’, 1193.

¹⁶⁰ *Codex Iustinianus* 2.7.1 (213 CE): ‘*Si patronum causae praeuaricatum putas et impleueris accusationem, non deerit aduersus eum pro temeritate commissi sententia, atque ita de principali causa denuo quaeretur. Quod si non docueris praeuaricatum, et calumnia notaberis et rebus iudicatis, a quibus non est prouocatum, stabitur*’.

¹⁶¹ *Codex Iustinianus* 2.11(12).16 (240) quoted above, where ‘*calumniatorem ... notatum*’ is said to result in the person being *famosus*.

¹⁶² *Codex Iustinianus* 9.9.6.1 (223 CE): ‘*Et qui confidit accusationi, calumniae notam timere non debet ...*’.

¹⁶³ *Digesta* 3.2.1 (Julian).

¹⁶⁴ *Codex Iustinianus* 9.1.2.1 (205 CE): ‘*Nec enim facile tutores uel curatores, qui officio et periculo suo res pupillorum uel adulescentium administrant, sententia notantur, nisi euidens eorum calumnia iudicanti apparebit*’.

calumniae is the phrase *nota publicae sententiae*, which also may mean either *infamia* in a legal sense, or simply a bad reputation.¹⁶⁵

As with the term *infamia*, there are several uses of the term *nota* for instances where legal *infamia* is being used to regulate the judicial process. The term *nota* is used to designate the *infamia* that a judge who fails to prosecute a tomb violation undergoes. It is clear that this refers to *infamia* as the penalty for violating a sepulchre is elsewhere explicitly stated as *infamia*,¹⁶⁶ and this constitution refers to ‘*nota*’ as the *statua poena* (‘stated penalty’).¹⁶⁷

A judge who usurps, or subjects a decurion to a beating, is also stated to endure *perpetua infamia*, which is referred to subsequently in the same constitution as a *nota*, which cannot be avoided by special appeal.¹⁶⁸ *Nota* is used in a similar context, where it is stated that no judge shall attempt to inflict the *nota* by corporal injuries on decurions at Rome.¹⁶⁹ Here, however, it must mean ‘a mark of disgrace, disapproval’ or ‘[s]ur, stigma’¹⁷⁰ as it is elsewhere stated that a person is not an *infamis* merely due to having been beaten.¹⁷¹

Nota is also used to designate *infamia* when it is stated that a person who removes the harness from a horse in the imperial post *notam et multam ... subire cogetur*

¹⁶⁵ *Codex Iustinianus* 2.14.1.1 (400 CE).

¹⁶⁶ *Digesta* 47.12.1pr (Ulpian).

¹⁶⁷ *Codex Iustinianus* 9.19.3 (349 CE): ‘*Si quis sepulchrum laesurus attigerit, locorum iudices si hoc uindicare neglexerint, non minus nota quam uiginti librarum auri in sepulchorum uiolatoes statuta poena grassetur, ut eam largitionibus nostris inferre cogantur*’.

¹⁶⁸ *Codex Iustinianus* 10.32.33.1 (381 CE): ‘*Quod si quis forte iudicum in hanc pertinaciam illiciti furoris eruperit, quod adeat principalem ac decurionem et suae, si sic dici oportet, curiae senatorem tormentis subdere, uiginti librarum auri illatione multatus et perpetua infamia inustus nec speciali quidem rescripto notam eluere mereatur ...*’.

¹⁶⁹ *Codex Iustinianus* 11.14.2.1 (404 CE).

¹⁷⁰ See *Oxford Latin Dictionary*, above n. 82, entry 1 and 4(c) under ‘*nota*’, 1191.

¹⁷¹ *Codex Iustinianus* 2.11(12).1 (undated, see above n. 60).

(‘is compelled to go under the *nota* and a fine’).¹⁷² The language, *cogetur subire*, implies that *nota* here is referring to a specific punishment and is reminiscent of language used elsewhere to designate the infliction of *infamia*.¹⁷³

Infamia is also used in a non-legal sense in a passage stating that, in acting as a *procurator*, a decurion is *infamissimam suscipiens uilitatem* (‘undertaking a most infamous baseness’).¹⁷⁴ As in the *Digesta*, *infamia* is used in relation to *iniuria* stemming from slander.¹⁷⁵ Similarly, *famosus* is used in relation to defaming *libelli*.¹⁷⁶

Ignominia is similarly used non-technically in *Codex Iustinianus* 6.32.3, where parts of a will *ad ignominiam alicuius pertinere dicitur* (‘said to pertain to the disgrace of someone’) are discussed.¹⁷⁷

¹⁷² *Codex Iustinianus* 12.50.13.1 (390 CE): ‘*Quocirca per omnes iudices et curiosos miserabilis remoueat in iuria, scientibus cunctis, quod, si obseruata non fuerit nostra sanctio, non solum damna resarcire, uerum etiam notam et multam qui neglexerit subire cogetur*’.

¹⁷³ *Codex Iustinianus* 1.14.2 (426 CE): ‘... *notam infamiae subituro eo ...*’.

¹⁷⁴ *Codex Iustinianus* 10.32.34 (382 CE): ‘*Si quis procuracionem facultatum suarum curiali crediderit esse manandam, totius dignitatis exceptione depulsa grauissima poena plectetur. Ille uero, qui immemor libertatis et generis infamissimam suscipiens uilitatem existimationem suam seruili obsecundatione damnauerit, tradatur exsilio*’. Translation aided by C. Pharr, *The Theodosian Code and Novels and the Sirmondian Constitutions* (New York, Greenwood Press, 1952) translation of *Codex Theodosianus* 12.1.92, identical to the relevant parts of *Codex Iustinianus* 10.32.34.

¹⁷⁵ *Codex Iustinianus* 9.35.9 (294 CE): ‘*Qui liberos infamandi gratia dixerunt seruos, iniuriarum conueniri posse non ambigitur*’; 9.35.10 (294 CE): ‘*Si quidem auiam tuam ancillam infamandi causa rei publicae ciuitatis Comanensium dixit Zenodorus ac recessit, iniuriarum actione statim conueniri potest*’.

¹⁷⁶ *Codex Iustinianus* 9.36 ‘*De Famosis Libellis*’, esp. 9.36.2(1)pr (365 CE): ‘*Si quis famosum libellum siue domi siue in publico uel quocumque loco ignarus reppererit, aut corruptat, priusquam alter inueniat, aut nulli confiteatur inuentum*’ and 9.36.2(1).2: ‘*Sane si quis deuotionis suae ac salutis publicae custodiam gerit, nomen suum profiteatur et ea, quae per famosum perseguenda putauit, ore proprio edicat, ita ut absque ulla trepidatione accedat, sciens, quod si adsertionibus ueri fides fuerit opitulata, laudem maximam ac praemium a nostra clementia consequetur*’.

¹⁷⁷ *Codex Iustinianus* 6.32.3 (294 CE): ‘*Eius, quod ad causam novissimi patris uestri iudicii pertinet, de calumnia tibi iuranti praeter partem, quam aperiri defunctus uetuit uel ad ignominiam alicuius pertinere dicitur, inspiciendi ac describendi praeter diem et consulem tibi rector prouinciae facultatem fieri iubebit*’.

A fine does not impose *infamia* (*multa damnum famae non inrogat*),¹⁷⁸ which must mean the legal concept.

Other Consequences of *Infamia*

A possible consequence of *infamia* is the success of a claim in *querella inofficiosi testamenti* against an *infamis*. It appears, however, that the category of people against whom such an action would be a success may be broader than strict legal *infames*. The passage in question in the *Codex*, refers to people who *infamiae uel turpitudinis uel leuis notae macula adsparguntur* ('are marked with the stain of infamy or turpitude or the light mark').¹⁷⁹ This phrase is very loose, and two terms are used that, in other contexts, are used to refer to *infamia*: *infamia* and *nota*. The phrase *leuis notae macula* appears to refer to some technical concept, something contrasting with a *gravis nota*. Does this *leuis nota* contrast with *infamia*? What then is *turpitude*, just general moral turpitude? While the latter seems a reasonable proposition, there are no easy answers to the first question. However, there is reference in one passage to *gravis infamia*, discussed above.¹⁸⁰ Thus in this passage here, the expressions *infamia* and *leuis nota* probably refer to two different punishments, though no reference is made to what the distinction may be.

A similar imprecise catalogue is found in a constitution imposing a penalty under the *lex Iulia de ui publica* on *uiles autem infamesque personae et hi, qui bis aut saepius uiolentiam perpetrasse conuincuntur* ('vile and infamous persons and

¹⁷⁸ *Codex Iustinianus* 1.54.1 (205 CE): '*Multa damnum famae non inrogat*'.

¹⁷⁹ *Codex Iustinianus* 3.28.27 (319 CE).

¹⁸⁰ *Codex Iustinianus* 9.12.8.3 (390 CE).

those, who have been convicted of perpetrating violence twice or more’).¹⁸¹ The problems are, firstly, those convicted of *uis* are *infames*, hence, redundant if *infames personae* are also legal *infames* and, secondly, why *uiles infamesque*? This appears to refer to a group wider than legal *infames*.

A further imprecise catalogue is in a list of persons to whom *neque ... dignitatis portae patebunt* (‘the gates of dignity are not open’). The exclusion beyond the *portae dignitatis* is stated in this way:

Neque famosis et notatis et quos scelus aut uitae turpitudine inquinat et quos infamia ab honestorum coetu segregat, dignitatis portae patebunt.

For neither to the *famosi*, the *notati*, those whom the wickedness and turpitude of their life defile nor those whom *infamia* segregates from the assembly of honest people shall the gates of dignity lie open.¹⁸²

This passage graphically illustrates the problems with imprecision in language that besets the *Codex Iustinianus* in particular. Three expressions here, *famosus*, *notatus* and *infamia* are all elsewhere used singularly in contexts that clearly seem to refer to *infamia* the legal concept as understood at the time of Justinian. Yet, here, if this passage is read as using highly technical language, they appear to be directed at three different groups. That people actually classed as *infames* were caught by this constitution, which in essence mirrors 10.59(57).1, seems beyond doubt, but it would also have provided whoever had judicial power with a wide discretion as to whom they regarded as falling within its ambit.

Clearly related to this passage on the exclusion of *famosi* from *honores* is a passage stating that *infamia* deprives a decurion of his rank, which not even

¹⁸¹ *Codex Iustinianus* 9.12.8.2 (390 CE).

¹⁸² *Codex Iustinianus* 12.1.2 (313-5 CE).

blindness would do.¹⁸³ However, although *infames* hold none of the privileges of the rank of decurion, they also have no immunity from the obligations of the decurionate.¹⁸⁴ Those temporarily removed from the decurionate or the *aduocationes*¹⁸⁵ only endure *infamia* for the period of their expulsion.¹⁸⁶ The link between *infamia* and *dignitas* is again emphasised when those returning from exile are described as *regressus pristinam quidem dignitatem* ('having been restored to their former *dignitas*').¹⁸⁷

One final disadvantage said to follow from *infamia* is that soldiers discharged with *infamia* cannot enjoy their full *peculium*.¹⁸⁸

Despite their all these disadvantages flowing from their status, *infames* can still put a case for the removal of *tutores* or *curatores*.¹⁸⁹

Conclusion

Despite more rhetorical language and the imprecision that it creates, the concept of *infamia*, including the vocabulary used to describe it and its effects, as

¹⁸³ *Codex Iustinianus* 10.32.8 (294 CE): '*Infamia, quae tibi abominanda est, non eitam amissionis oculorum casus quaesitum adimit honorem*'.

¹⁸⁴ *Codex Iustinianus* 10.32.12 (293 CE): '*Nec infames immunitatem habere, cum hoc priuilegii, non notae sit, conuenit*'.

¹⁸⁵ Legal counsellors? See *Oxford Latin Dictionary*, above n. 82, entry 1 under '*aduocatio*', 59.

¹⁸⁶ *Codex Iustinianus* 10.61(59).1: '*Quibus posthac ordine suo uel aduocationibus ad tempus interdicitur, post impletum temporis spatium non prorogabitur infamia*'.

¹⁸⁷ *Codex Iustinianus* 10.61(59).2: '*Ad tempus exulare decurio iussus et impleto tempore regressus pristinam quidem dignitatem recipit, ad nouos uero honores non admittitur, nisi tanto tempore his abstinerit quanto per fugam afuit*'.

¹⁸⁸ *Codex Iustinianus* 12.57(58).7.2 (389 CE): '*Eos etiam, qui pro sceleribus suis soluto militiae cingulo addicuntur infamiae, ne integro peculio sub hac occasione laetentur, ita condignae ultioni uolumus subiacere, ut functioni quoque, quae extrema militiae debetur, nihil ex eorum facultatibus subtrahatur*'.

¹⁸⁹ *Codex Iustinianus* 5.43.6.3 (283 CE): '*Remouendi autem licentia non solum parentibus utriusque sexus, sed etiam cognatis et extraneis et infamibus et ipsi cuius res administrantur, si non impubes sit, arbitrio cognatorum bonae opinionis constituorum conceditur*'.

contained in the *Codex Iustinianus* overlaps to a large extent with that of the *Digesta*. Although there are some new additions: the application of *infamia* to the regulation of religious observance and the Christian church, the extensive use of *infamia* as a penalty in relation to judicial proceedings and further use of the concept in regulation of the family, these aspects appear to be an expansion of the use of *infamia* as a penalty as contained in the *Digesta*. There is also a suggestion of a tiered *infamia* system, although there are not enough systematic references to establish the existence or content of such a system. However, the existence of such a system may explain constitutions that appear to contain a more severe doctrine of *infamia*, such as those taking away citizenship. Alternatively, the division could be between permanent and temporary *infamia*. In the final Chapter of this part, an attempt will be made to summarise the concept of *infamia* as it is contained in the *Corpus*.

Chapter Four: *Infamia*: The Final Conception

The purpose of this Chapter is to enumerate succinctly the causes and consequences of *infamia* set out in the *Corpus Iuris Ciuilis* as discussed in the preceding two Chapters. As was often noted in those Chapters, deciding whether or not a legal concept of *infamia* is being referred to in the *Corpus* is not easy.

Causes of *Infamia*

As discussed in Chapters One and Two, there are two main ways in which a person is classified as an *infamis* in Justinian's law:

- Being listed among those referred to as an *infamis* in relation to restrictions on postulation, which includes persons undertaking certain professions, persons who adopt a certain lifestyle and persons guilty of certain civil delicts and criminal offences.
- Being referred to as *infamis* in a variety of ways throughout the *Corpus Iuris Ciuilis*, usually as a punishment, without reference to the postulation restriction in the praetorian edicts.

Postulation

The following are stated to be *infames* for the purposes of postulation:

- a person dismissed from the army with ignominy by either the general or one with power in the matter;¹
- one who has appeared on stage for the reason of a stage play or recitation;²
- one who has practiced the trade of a procurer;³
- one who has been judged guilty of *calumnia* ('malicious prosecution') or *praeuaricatio* ('collusion') in a *iudicium publicum* ('public court');⁴

¹ *Digesta* 3.2.1 (Julian); *Digesta* 3.2.2pr and 3.2.2.2 (Ulpian); *Codex Iustinianus* 12.35.3 (Antoninus); *Codex Iustinianus* 4.65.35.1 (530 CE).

² *Digesta* 3.2.1 (Julian); *Digesta* 3.2.2.5 (Ulpian); *Digesta* 3.2.3 (Gaius).

³ *Digesta* 3.2.1 (Julian); *Digesta* 3.2.4.3 (Ulpian).

- one who has been condemned in his own name or compromised in a case for *furtum* ('theft'), *ui bonorum raptorum* ('robbery with violence'), *iniuria* ('insult'), *de dolo malo et fraude* ('malice and fraud');⁵
- one who has been condemned in own name and not in a cross-action in an action for *pro socio* ('partnership'), *tutela* ('tutelage'), *mandatum* ('mandate') or *depositum* ('deposit');⁶ *tutores* are also made *infamis* for marrying their *pupilla*⁷ or for being removed in *de suspecto* proceedings in cases involving fraud;⁸
- a *pater familias* who has given a widowed daughter *in potestate* to be married before the expiration of the customary period of mourning; a man who has knowingly married such a woman; and a *pater familias* who has knowingly allowed a son *in potestate* to marry such a woman;⁹
- one who has entered into two agreements for betrothal or marriage at the same time either on his own or on behalf of one whom he has *in potestate*.¹⁰

As discussed in Chapter 2, although they are not anywhere specifically referred to as *infames*, it is likely that those contained in the Praetor's second Edict who are *in turpitudine notabiles*, and excluded from postulating for anyone, may also be considered as *infames*:

⁴ *Digesta* 3.2.1 (Julian); *Digesta* 3.2.4.4, 3.2.15pr and 3.2.19pr (Ulpian); *Codex Iustinianus* 9.46.3 (223-5 CE - *calumnia*); *Codex Iustinianus* 2.11(12).16 (240 CE - *calumnia*); *Codex Iustinianus* 9.46.8.1 (385 CE - *calumnia*); *Digesta* 47.15.4 (Macer); *Codex Iustinianus* 9.45.2 (239 CE - *praevarication*); *Digesta* 50.2.6.3 (Papinian); *Codex Iustinianus* 9.44.1 (385 CE); *Institutiones Iustiniani* 4.16pr (*infamia* as a check on over-eager plaintiffs).

⁵ *Digesta* 3.2.1 (Julian); *Institutiones Iustiniani* 4.16.2; *Digesta* 37.2.64 (Macer); *Digesta* 3.2.4.5 and 3.2.6.1 (Ulpian); *Digesta* 48.13.8.1 (Ulpian - *furtum*); *Codex Iustinianus* 2.11(12).8 (205 CE - *Furtum*); *Codex Iustinianus* 2.11(12).12 (224 CE - *furtum*); *Codex Iustinianus* 2.11(12).5 (198 CE - *Iniuria*); 2.11(12).10 (208 CE - *iniuria*); *Codex Iustinianus* 2.11(12).18 (260 CE - *iniuria*).

⁶ *Digesta* 3.2.1 (Julian); *Institutiones Iustiniani* 4.16.2; *Codex Iustinianus* 9.1.2.1 (205 CE - *tutores* and *curatores*); *Codex Iustinianus* 5.43.9 (294 CE - *tutores*); *Codex Iustinianus* 5.51.13.3 (530 CE - *tutores*); *Codex Iustinianus* 5.37.28.1 (531 CE - *tutores*); *Institutiones Iustiniani* 1.26.6 (*tutores*); *Codex Iustinianus* 2.11(12).22 (294 CE - *pro socio*); *Codex Iustinianus* 4.34.10 (294 CE) = *Collatio* 10.6 (*depositum*); *Codex Iustinianus* 4.35.21 (313-5 CE); *Digesta* 3.2.6.5-6 (Ulpian - *mandatum* and *depositum*).

⁷ *Digesta* 23.2.66 (Paul); *Codex Iustinianus* 5.62.4 (216 CE); *Codex Iustinianus* 5.6.7 (293-6 CE);

⁸ *Digesta* 1.12.1.7, 26.10.3.18, 26.10.4.2 (Ulpian); *Codex Iustinianus* 5.47.1 (197 CE).

⁹ *Digesta* 3.2.1 (Julian); *Digesta* 3.2.11.3, 3.2.11.4, 3.2.13.1 and 3.2.13.4 (Ulpian); *Codex Iustinianus* 2.11(12).15 (239 CE); *Codex Iustinianus* 5.9.1 (380 CE) = *Codex Iustinianus* 6.56.4 (380 CE); *Codex Iustinianus* 5.9.2 (381 CE).

¹⁰ *Digesta* 3.2.1 (Julian); *Codex Iustinianus* 9.9.18 (258 CE); *Codex Iustinianus* 5.5.2 (285 CE);

- catamites;¹¹
- those condemned on a capital charge;¹²
- those condemned of *calumnia* before a petty judge (*iudex pedaneus*);¹³ and
- those who have hired their services to fight beasts.¹⁴

Other Causes

In addition to the private actions mentioned above in relation to the postulation, it is clear that conviction in *iudicia publica* also involves *infamia* as a penalty. The *iudicia publica* are those held under the following statutes:¹⁵

- *Lex Iulia de maiestate*;¹⁶
- *Lex Iulia de adulteriis*;¹⁷
- *Lex Cornelia de sicariis et ueneficiis*;¹⁸
- *Lex Pompeia de parricidiis*;¹⁹
- *Lex Iulia peculatus*;²⁰
- *Lex Iulia de ui publica*;²¹
- *Lex Cornelia de testamentis*;²²
- *Lex Iulia de ui priuata*;²³

¹¹ *Digesta* 3.1.1.6 (Ulpian): ‘*qui corpore suo muliebria passus est*’.

¹² *Digesta* 3.1.1.6 (Ulpian): ‘*qui capitali crimine damnatus est*’.

¹³ *Digesta* 3.1.1.6 (Ulpian): ‘*etiam apud iudices pedaneos postulare prohibetur calumniae publici iudicii damnatus*’. On the *iudex pedaneus* see A. Berger, ‘Encyclopedic Dictionary of Roman Law’ (1953) 43 *Transactions of the American Philosophical Society* 332-808, 518.

¹⁴ *Digesta* 3.1.1.6 (Ulpian): ‘*qui operas suas, ut cum bestiis depugnaret, locauerit*’.

¹⁵ *Digesta* 48.1.7pr (Macer) and *Institutiones Iustiniani* 4.18; *Digesta* 48.14.1.1 (Modestinus – *ambitus*); *Digesta* 12.2.9.2 (Ulpian); *Codex Iustinianus* 1.14.6 (384 CE – *ambitus*); *Codex Iustinianus* 9.12.8.1 (390 CE); (see also *Digesta* 48.19.28.1 and 50.13.5.1-3 (Callistratus)).

¹⁶ See *Digesta* 48.4 and *Codex Iustinianus* 9.8.

¹⁷ See *Digesta* 48.5 and *Codex Iustinianus* 9.9.

¹⁸ See *Digesta* 48.8 and *Codex Iustinianus* 9.16.

¹⁹ See *Digesta* 48.9.

²⁰ See *Digesta* 48.13.

²¹ See *Digesta* 48.6 and *Codex Iustinianus* 9.12.

²² See *Digesta* 48.10 and *Codex Iustinianus* 9.22.

²³ See *Digesta* 48.7 and *Codex Iustinianus* 9.12.

- *Lex Iulia ambitus*;²⁴
- *Lex Iulia repetundarum*;²⁵
- *Lex Iulia de annona*;²⁶
- *Lex Fabia de plagiariis*;²⁷ and
- *Lex Iulia de residuis*.²⁸

Of these, all but the *Lex Iulia de ui priuata*,²⁹ *Lex Iulia ambitus*,³⁰ *Lex Iulia repetundarum*, *Lex Iulia de annona* and the *Lex Iulia de residuis* involve capital penalties for at least some offences,³¹ and would therefore fall under the Praetor's second Edict.

While not every criminal sentence involves *infamia*,³² there are numerous breaches of the law and other miscellaneous activities that involve *infamia* as a penalty, either on its own or in conjunction with other penalties:

- the violation of sepulchres;³³
- a *libertus* who has usurped the office of decurion;³⁴
- a governor who has taken domestics or *cancellarii* to the provinces;³⁵
- teachers who have taught publicly;³⁶

²⁴ See *Digesta* 48.14 and *Codex Iustinianus* 9.26.

²⁵ See *Digesta* 48.11 and *Codex Iustinianus* 9.27.

²⁶ See *Digesta* 48.12.

²⁷ See *Digesta* 48.15 and *Codex Iustinianus* 9.20.

²⁸ See *Digesta* 48.13.

²⁹ See *Digesta* 48.7.1pr (Marcian) and *Digesta* 48.7.8 (Modestinus) on *infamia* under the *Lex Iulia de ui priuata*.

³⁰ On *infamia* and *ambitus* see *Digesta* 48.14.1 (Modestinus).

³¹ See *Institutiones Iustiniani* 4.18. The *Lex Iulia de adulteriis*, *Lex Iulia de ui publica*, *Lex Iulia de ui priuata* and *Lex Fabia de plagiariis* are mentioned in this title as carrying non-capital penalties for some offences.

³² *Stellionatus*, though not a *famosum iudicium* (*Digesta* 47.230.2 (Ulpian)) involves *infamia* (*Digesta* 3.2.13.8 (Ulpian)).

³³ *Digesta* 47.12.1 (Ulpian).

³⁴ *Codex Iustinianus* 9.21.1.1 (300 CE).

³⁵ *Codex Iustinianus* 1.51.8 (423 CE).

³⁶ *Codex Iustinianus* 11.19.1pr (425/6 CE).

- possibly persons guilty of *de seruo corrupto*.³⁷
- a person who has harboured decurions deserting their *munera*;³⁸
- heretics and Manicheans;³⁹
- usurers;⁴⁰
- persons who have bought a place in the priesthood;⁴¹
- Senators, duumvirs and priests who have married forbidden classes of women;⁴²
- a woman who has divorced without good cause and remarries within five years.⁴³

In addition to these numerous largely unrelated categories of *infames*, there are numerous instances where *infamia* is used as a penalty to regulate the behaviour of participants in the judicial process, either judges or parties to the case:

- a person who fails to prosecute within a year;⁴⁴
- a judge who does not punish jailers for allowing the accused to die;⁴⁵
- a person who has appealed directly to the emperor rather than through the appropriate channels;⁴⁶
- a person who has lost an appeal;⁴⁷
- judges who have failed to prosecute tomb violations in their area;⁴⁸
- governors who have ignored the rigours of the law directed against deserters;⁴⁹

³⁷ *Digesta* 11.3.1.3 (Ulpian).

³⁸ *Codex Iustinianus* 10.32.31 (371 CE).

³⁹ *Codex Iustinianus* 1.1.1.1 (380 CE);

⁴⁰ *Codex Iustinianus* 2.11(12).20 (290 CE).

⁴¹ *Codex Iustinianus* 1.3.30(31).6 (469 CE).

⁴² *Codex Iustinianus* 5.27.1 (336 CE).

⁴³ *Codex Iustinianus* 5.17.8.4a (449 CE).

⁴⁴ *Codex Iustinianus* 9.12.8.3 (390 CE).

⁴⁵ *Codex Iustinianus* 9.4.1.5 (320 CE).

⁴⁶ *Codex Iustinianus* 1.21.3 (331 CE).

⁴⁷ *Codex Iustinianus* 7.62.19.1 (331 CE).

⁴⁸ *Codex Iustinianus* 9.19.3 (349 CE).

⁴⁹ *Codex Iustinianus* 12.45.1.4 (380 CE).

- a judge who has tortured a decurion;⁵⁰
- judges who have appointed prohibited persons as advocates;⁵¹
- judges who have delayed punishing *uis*;⁵²
- judges who have neglected to enforce a law on cutting off harnesses from the imperial horse;⁵³
- persons who have attempted to circumvent a pact by appealing to the *princeps*;⁵⁴
- persons who do not prosecute a case within the required time limit;⁵⁵
- a person who has attacked imperial laws;⁵⁶
- judges who have failed to uphold anti-heretical laws.⁵⁷

Infamia does not arise in certain types of proceedings. For example, proceedings arising from an interdict, at least for *uis*, do not result in *infamia*.⁵⁸ *Infamia* also has no application in *condictiones*.⁵⁹ Special rules also govern accusations to the *fiscus*, so that unsuccessful ones do not necessarily result in *infamia* for the accuser.⁶⁰ For example, a person does not become *famosus* if he has brought a case common to himself and the treasury and loses it.⁶¹ *Infamia* can arise in a *iudicium contrarium*.⁶²

⁵⁰ *Codex Iustinianus* 10.32.33 (381 CE).

⁵¹ *Codex Iustinianus* 1.40.8 (386 CE).

⁵² *Codex Iustinianus* 9.12.8.3 (390 CE).

⁵³ *Codex Iustinianus* 12.50.13.1 (390 CE).

⁵⁴ *Codex Iustinianus* 2.4.41pr (395 CE).

⁵⁵ *Codex Iustinianus* 9.44.2pr (404 CE).

⁵⁶ *Codex Iustinianus* 1.14.2 (426 CE).

⁵⁷ *Codex Iustinianus* 1.5.7.15 (455 CE).

⁵⁸ *Digesta* 48.19.32 (Ulpian).

⁵⁹ *Digesta* 44.7.36 (Ulpian).

⁶⁰ *Digesta* 49.14.2pr (Callistratus).

⁶¹ *Digesta* 49.14.18.7 (Marcian).

⁶² *Digesta* 3.2.6.7 (Ulpian). A *iudicium contrarium* was a counter-action brought by the defendant against the plaintiff where the plaintiff had sued him inconsiderately, admissible in only a few specific cases, such as the *actio iniuriarum*. If successful, the plaintiff was condemned for one tenth of his unsuccessful claim, even if he had acted without malice: Berger, 'Encyclopedic Dictionary', above n. 13, 521.

There is one rather interesting omission from this list, that of prostitutes. The omission of female prostitutes from the Praetor's Edict is understandable as they are included in the second Edict simply by virtue of their sex and male prostitutes presumably are caught by the clause in the same Edict on catamites.⁶³

Several rules govern the imposition and duration of *infamia* resulting from a conviction. *Infamia* does not follow if the sentence was excessive.⁶⁴ Where the sentence is for a confined time period, *infamia* does not necessarily continue beyond the period of the sentence. For example, *infamia* does not always extend beyond a temporary period of exile, temporary prohibition from acting as an advocate or temporary removal from the decurionate. In all cases an examination is made of the offence for which the person is removed in order to determine whether he continues to be numbered among the *infames*.⁶⁵ *Infamia* also does not immediately follow upon a sentence to an *opus publicum*, but rather only occurs following the period spent at the *opus*.⁶⁶

There are several procedural rules surrounding cases involving *infamia*. There was a reluctance to grant actions that resulted in *infamia*,⁶⁷ and they are required to be precisely worded.⁶⁸ A case in a *famosum iudicium* is given priority over one involving only money. Similarly, debts arising *ex famosa causa* are to be paid in

⁶³ See T. A. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome* (Oxford, Oxford Uni. Press, 1998) 48.

⁶⁴ *Digesta* 3.2.13.7, 3.2.13.8 and *Digesta* 3.2.14.7 (Ulpian); *Digesta* 48.19.10.2 (Macer); *Codex Iustinianus* 2.11(12).4 (198 CE).

⁶⁵ *Digesta* 50.1.15pr (Papinian); *Digesta* 49.16.4.4 (Arrius Menander); *Digesta* 50.2.5pr (Papinian); *Codex Iustinianus* 10.61.1 (212 CE).

⁶⁶ *Codex Iustinianus* 2.11(12).6 (203 CE).

⁶⁷ *Digesta* 4.3.1.11 (Ulpian); *Digesta* 4.1.7.1 (Marcellus).

⁶⁸ *Digesta* 47.10.7pr (Ulpian);

priority to those arising from a non *famosa causa*.⁶⁹ *Actiones famosae* are also not granted to husbands and wives *inter se*.⁷⁰ Nor are they usually granted to *liberti* against their patrons; to children against parents; to persons of lower rank against those of higher rank nor to those of moral disrepute against people of upright character. To these persons an *actio in factum* is given instead.⁷¹ Parents and patrons who are sued through a *procurator* do not become *infames* under the edict,⁷² and they can only be summoned with the Praetor's permission.⁷³ Appeals from pecuniary cases involving *ignominia* can be conducted through a *procurator*,⁷⁴ although permission is not easily granted for a *procurator* to make an accusation for the removal of a *tutor*.⁷⁵ A *famosum delictum* also can not go to an arbiter.⁷⁶

Consequences of *Infamia*

The following are the consequences in the *Corpus Iuris Ciuilis* said to apply to persons who are *infames qua infames*, while persons who are among the *infames* may undergo other disabilities, such disabilities are not stated as a consequence of

⁶⁹ *Digesta* 50.17.104 (Ulpian); *Digesta* 46.3.7 (Ulpian).

⁷⁰ *Codex Iustinianus* 5.12.1.2 (201 CE); *Codex Iustinianus* 5.21.2 (290/3 CE);

⁷¹ *Digesta* 2.4.10.12 (Ulpian); *Digesta* 4.3.11.1 (Ulpian); *Digesta* 37.15.5.1 (Ulpian); *Codex Justinian* 5.55.1 (223 CE) = *Codex Iustinianus* 6.6.1 (223 CE). An *actio in factum* was adapted to the specific circumstances of an individual situation. The *iudex* was directed to condemn if he found certain facts, otherwise to absolve: see W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd ed., Cambridge, Cambridge Uni. Press, 1963) 686-7; M. Kaser, *Roman Private Law* (2nd ed., Trans. R. Dannenberg, London, Butterworths, 1968) 194-5; Berger 'Encyclopedic Dictionary', above n. 13, 475 under entry '*formula in ius concepta*'.

⁷² *Digesta* 37.15.2pr (Julian).

⁷³ *Digesta* 2.4.4.1 (Ulpian); M. Kaser, 'Infamia und ignominia in den römischen Rechtsquellen' (1956) 73 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 220-78, 250.

⁷⁴ *Digesta* 49.9.1 (Ulpian)

⁷⁵ *Digesta* 3.3.39.7 (Ulpian).

⁷⁶ *Digesta* 4.6.32.7 (Paul).

infamia per se. The consequences of *infamia* can be divided into disabilities particularly associated with the legal system and more general restrictions.

Legal Disabilities

Those mentioned in the *Digesta* in relation to the Praetor's Edict are, in the case of the second Edict, excluded from postulating either for anyone other than themselves, while those in the third Edict are excluded from postulating for anyone other than themselves and certain other persons:⁷⁷

- parents;
- patrons;
- children or parents of a patron;
- children;
- siblings;
- wives;
- parents in law;
- children in law;
- step-parents;
- step-children;
- persons under the *infamis*' tutorship;⁷⁸ and
- the insane.

As these *infames* are not allowed to postulate, they cannot bring a *popularis actio*.⁷⁹

An important issue is whether other persons stated to undergo the punishment of *infamia*, especially in late imperial constitutions, also undergo this legal disability

⁷⁷ *Digesta* 3.1.1.11 (Ulpian, referring to Pomponius).

⁷⁸ I.e., a *pupillus* or *pupilla*, a minor under *tutela*.

⁷⁹ *Digesta* 47.23.4 (Paul). A *popularis actio* could be brought by anyone among the people and served to protect the public interest: Berger, 'Encyclopedic Dictionary', above n. 13, 347.

in relation to postulation. As noted in Chapter Two, an argument can be made for this, but the matter remains uncertain.

Several other procedural restrictions attach to *infamia*. The usual priority given to a husband over the *pater familias* in cases of adultery is reversed where the husband is an *infamis*.⁸⁰ It is also probable that *infames* do not have the right to bring accusations,⁸¹ except for *maiestas* and in relation to the *annona*.⁸² *Infames* are not, however, prevented from exercising the right to remove *tutores*.⁸³ It is likely that the *querella inofficiosi testamenti* would succeed and be granted to siblings where the heirs are *infames*.⁸⁴ *Famosi* are also said to be punished more than those of *integra fama*, which may extend beyond *infames*, but certainly embraces them.⁸⁵

Similarly to the prohibition on postulating contained in the Praetor's edicts, it appears that *infames* also can act neither as *aduocati*,⁸⁶ nor as *adsessores*.⁸⁷ It is likely, however, that *infames* can be arbiters.⁸⁸

Other Consequences

Infames are also excluded from *honores* which persons of *integra dignitas* are allowed to perform and are excluded them from the rank of decurion.⁸⁹ A person

⁸⁰ *Digesta* 48.5.3 (Ulpian).

⁸¹ *Digesta* 48.4.7pr (Modestinus); *Digesta* 48.2.8 (Macer);

⁸² *Digesta* 48.2.13 (Marcian) and 48.4.7 (Modestinus).

⁸³ *Codex Iustinianus* 5.43.6.3 (238 CE).

⁸⁴ *Codex Iustinianus* 3.28.27 (319 CE) = *Codex Theodosianus* 2.19.3 (319 CE).

⁸⁵ *Digesta* 48.19.28.16 (Callistratus).

⁸⁶ *Codex Iustinianus* 10.61.1 (212 CE).

⁸⁷ *Digesta* 1.22.2pr (Marcian).

⁸⁸ *Digesta* 4.8.7pr (Ulpian).

who underwent *infamia perpetua* is not permitted to serve in the army.⁹⁰ This essentially excludes them from any office holding in the imperial service and any *dignitas* from decurion up, including the Senate. However, *infamia* does not exempt people from *civilia munera*.⁹¹

Restitutio in integrum can, however, free a person of the consequences of *infamia*.⁹²

Conclusion

In the first Part of this thesis, the concept of *infamia* as represented in the works compiled under the auspices of Justinian has been examined. As was often seen, the language of the jurists is not always susceptible to easy interpretation in terms of whether they are referring to a strict legal concept of *infamia*. The relationship between the *infamia* mentioned in relation to the Praetorian Edict, and that discussed as a judicial penalty in the various constitutions issued under the names of the emperors remains uncertain. It now remains to trace back the various elements of *infamia* that have been identified in this Part to determine, as far as possible, the extent to which the Justinianic formulation of *infamia* differs from that which existed in earlier times.

⁸⁹ *Digesta* 48.7.1pr (Marcian); *Codex Iustinianus* 12.25.3 (Antoninus) exclusion repeated at: 10.59(57).1 (284-7 CE); *Codex Iustinianus* 10.32(31).8 (294 CE); *Codex Iustinianus* 12.1.2 (313-5 CE).

⁹⁰ *Digesta* 49.16.4.4 (Arrius Meander).

⁹¹ *Codex Iustinianus* 10.55.1 (Antoninus); *Codex Iustinianus* 10.59(57).1 (284-7 CE); *Digesta* 48.22.7.22 (Ulpian).

⁹² *Digesta* 3.1.1.10 (Ulpian).

Chapter Five: *Infamia* in the *Codex Theodosianus*, *Constitutiones Sirmondianae* and *Novellae*

Having established in Part One an overview of *infamia* as it existed under the law of Justinian, we now step back in time to examine *infamia* as it appears in the laws from the reign of Constantine I through to the late fifth century collected in the *Codex Theodosianus*, the *Constitutiones Sirmondianae* and the various *Novellae*. The degree to which the concept of *infamia* contained in these laws mirrors that contained in the *Corpus Iuris Ciuilis* gives us some scope for evaluating the extent to which Justinian's compilers altered the concept of *infamia* from that which existed prior to Justinian's codification and legislation.

The Novellae¹

Collections of *Novellae* have been published for five Augusti who reigned in the period between the promulgation of the *Codex Theodosianus* and the *Corpus Iuris Ciuilis*: Theodosius II (408-50 CE); Valentinian III (423-55 CE); Majorian (457-61 CE); Marcian (450-7 CE); Severus (461-5 CE) and Anthemius (467-72 CE).² References to *infamia* in the constitutions contained in these collections are few. In fact, there are only two references where we can be fairly certain that the constitutions are referring to legal *infamia*. The earliest is a law of Valentinian III, which states that those of higher rank who defile sepulchres *perpetua notentur*

¹ Throughout this chapter, unless otherwise noted references to *infamia* and *infames* are to the legal concepts.

² Dates from *The Theodosian Code and Novels and the Sirmondian Constitutions* (Trans. C. Pharr, Greenwood Press, New York, 1952) xxvi. The *Novellae* are published in P. Meyer and T. Mommsen (eds.), *Theodosiani libri XVI cum Constitutionibus Sirmondianis et Leges Novellae ad Theodosianum Pertinentes*; (Weidmann, Zürich, 1905) vol. II: *Leges Novellae ad Theodosianum Pertinentes*. The work O. Gradenwitz, *Heidelberger Index zum Theodosianus: mit Ergänzungsband* (Dublin, Wiedmann, 1970) proved invaluable in the composition of this chapter.

infamia ('should be marked with perpetual *infamia*').³ This shows that neither the use of *infamia* as a punishment for the defilement of sepulchres, referred to in the *Corpus Iuris Ciuilis*,⁴ nor *perpetua infamia* were Justinianic innovations.

The other clear reference to *infamia* is a law that states that persons who marry without a dowry *ambos infamiae maculis inurendos* ('both must be branded with the stains of *infamia*').⁵ This law is not repeated in the *Corpus Iuris Ciuilis*, but it shows the concept of the *macula infamiae* was also not a Justinianic innovation.

There is a possible reference to *infamia* in the case of persons who conduct cases in the court of a bishop when both parties do not assent, where it is stated that *iurisconsultum existimationis et interdictae ciuitatis damna percillant* ('the juris consult shall be smitten by the loss of his status and citizenship, which shall be interdicted to him').⁶ As with other texts, the loss of *existimatio* could mean the imposition of *infamia*, but the inclusion of the loss of citizenship goes beyond what normally results from *infamia*.

One final *Novella* that may well at least include *infames* lists the *humiles et abiectae* ('humble and degraded') women who were judged unworthy for marriage to senators *quas aut nascendi decolor macula aut uita probrosis quaestibus dedita sordentibus notis polluit et uel per originis turpitudinem uel obscaenitate professionis infecit* ('whom the discoloured stain of their birth or their life given to shameful gains has polluted with disgraceful marks or whom the turpitude of their origin or obscenity of their profession has disgraced').⁷

³ *Novellae Valentiniani* 23.4 (447 CE).

⁴ *Digesta* 47.12.1pr (Ulpian).

⁵ *Novellae Majoriani* 6.9 (458 CE).

⁶ *Novellae Valentiniani* 35.2 (452 CE).

⁷ *Novellae Marciani* 4.2 (454 CE)

Although, as discussed in Chapter Two, *nota* may mean *infamia*, the addition of *sordens* and the use of the plural, as well as the highly rhetorical nature of the passage, suggest that this is not a legally precise definition.

Codex Theodosianus

Constitutions in the *Codex Theodosianus* can be conveniently divided into two groups for analysis: those that have parallels in the *Codex Iustinianus* and those that do not. The former group provides a useful guide as to what changes, if any, were made under the auspices of Justinian.

Parallel Constitutions

As with the *Codex Iustinianus*, it is not always clear whether the texts discussed here refer to *infamia* as a legal concept or some other less precise form of ill repute. As the issue of whether or not the texts contained in this section deal with *infamia* has been discussed above in the chapter on the *Codex Iustinianus*, to avoid repetition the reader is directed to Chapter Three for discussion of whether these texts are related to *infamia*. Unfortunately, the incomplete state of the fourth and fifth century collections means that there are probably many more texts in the *Codex Iustinianus* that were originally extracted from the complete versions of these earlier texts that are unavailable to us for comparison.

Codex Theodosianus 2.19.1 (319 CE) and 2.19.3 (332 CE) were combined in *Codex Iustinianus* 3.28.27 (attributed to 319 CE). Both these laws deal with cases where a *querella inofficiosi testamenti* would succeed for siblings of the deceased. The earlier constitution states that such a case would succeed where it is proven that the instituted heirs have been marked with a *nota* through *detestabilis*

turpitude,⁸ whom the accompanying *interpretatio* refers to as *turpibus personis, id est infamibus*.⁹ The later constitution states:

Seruus neccessarius heres instituendus est, quia non magis patrimonium quam infamiam consequi uidetur. Unde claret actionem inofficiosi fratribus relaxatam, cum infamiae aspergitur uitiiis qui heres extitit omniaque fratribus tradi, quae per turpitudinem aut aliquam leuem notam capere non potest institutus.

A slave must be instituted as necessary heir, because thus it seems that *infamia* accompanies the patrimony. Whence it appears that the action for a inofficious will is open to the brothers, since the person who was instituted as heir is marked by the stains of *infamia* and everything is handed over to the brothers which, through turpitude or some other light stain, the instituted heir cannot take.

Again, the *interpretatio* states, *quia huiusmodi persona uidetur infamis, germanis fratribus, qui praetermissi sunt, agendi contra testamentum datur facultas, ut remota infami persona ...* ('because a person of this sort seems to be an *infamis*, the ability to contest against the will is given to the full brothers, who are permitted, as with the *infamis* person removed,').¹⁰

The *Codex Iustinianus* has combined these two passages to state that such a case will succeed if the heirs are *infamiae uel turpitudinis uel leuis notae macula adsparguntur* ('marked with the stain of *infamia*, turpitude or light *nota*').¹¹ The *Codex Iustinianus* seems to have done no more in this instance than combine the two constitutions into one, rather than making a new legal doctrine. Both Theodosian constitutions and the Justinianic constitution use the term *nota* associated with the term *infamia* as in the *Corpus Iuris Ciuilis*. However, while it

⁸ *Codex Theodosianus* 2.19.1 (319 CE): '*heredes, quibus inustas constiterit esse notas detestabilis turpitudinis*'.

⁹ *Codex Theodosianus* 2.19.1 (319 CE) and *interpretatio*.

¹⁰ *Codex Theodosianus* 2.19.3 (332 CE) and *interpretatio*.

¹¹ *Codex Iustinianus* 3.28.27 (319 CE).

is clear that to the authors of the *interpretationes* and the Justinianic compilers the persons referred to in these constitutions included *infames*, it also appears that the categories of persons referred to were not confined to *infames*. Hence the tripartite classification in the Justinianic corpus and the reference in *Codex Theodosianus* 2.19.3 to those who cannot take as heirs *per turpitudinem uel aliquam leuem notam* ('through turpitude or another light *nota*').

There is only one other parallel text dealing with the consequences of *infamia*. The *Codex Theodosianus* is the source for a law that *apparitores qui pro sceleribus suis soluto militiae cingulo addicuntur infamiae* ('who through their own crimes, with the bond of military service released, are sentenced to *infamia*') cannot enjoy their full peculium.¹²

Several parallel texts deal with the possible use of *infamia* as a control on the judicial process. Where persons have been corrupted by a bribe, revenge is granted by the loss ('*dispendia*') of their *existimatio* and a lawsuit.¹³ Furthermore, *non enim existimationis tantum, sed etiam periculi metus iudici imminebit* ('for not only the fear for *existimatio*, but also the fear of danger threaten the judge') who fails to punish jailers who let accused persons die.¹⁴ Similarly, a governor who ignores the rigours of a law directed against deserters *patrimonii atque existimationis damno subiciatur* ('is subjected to the deprivation of his patrimony and *existimatio*').¹⁵ As discussed above, it is the loss of *existimatio* in these texts, which elsewhere clearly refers to *infamia*, that suggests the imposition of *infamia* in the legal sense. *Infamia* is more clearly the consequence where it is stated that a

¹² *Codex Theodosianus* 8.4.16.1 (389 CE) = *Codex Iustinianus* 12.57.7.2 (389 CE).

¹³ *Codex Theodosianus* 1.16.3 (319 CE) = *Codex Iustinianus* 7.49.2 (319 CE).

¹⁴ *Codex Theodosianus* 9.3.1.1 (320 CE) = *Codex Iustinianus* 9.4.1.5 (320 CE).

¹⁵ *Codex Theodosianus* 7.18.4.4 (380 CE) = *Codex Iustinianus* 12.45.1.4 (380 CE).

judge who delays punishing *uis graui infamia sit notandus* ('must be marked with grave *infamia*').¹⁶ *Infamia* is also the consequence where it is stated that a judge who tortures a decurion is fined and *perpetua infamia inustus nec speciali quidem rescripto notam eluere mereatur* ('is marked with perpetual *infamia*, nor indeed may he deserve to escape this *nota* by a special rescript').¹⁷ A person who fails to pursue a charge is fined and *manente infamia, quam ueteres iusserant sanctiones* ('with the *infamia* remaining, which the ancient sanctions demand').¹⁸ A person who has failed to prosecute a case in time who *uilior persona fuerit, cui damnum famae non sit iniuria, poenam patitur exilii* ('is a lower-status person, for whom the loss of *fama* is not an injury, suffers the penalty of exile'). As discussed in relation to the *Codex Iustinianus*, this appears to imply that *infamia* was a punishment for failing to prosecute a case within the required time.¹⁹ A person who made an accusation in the name of another is judged calumnious *atque ideo calumniosissimum caput et personam iudicio irritae delationis infamem deportatio sequatur* ('and likewise deportation follows his most calumnious head and his person is *infamis* through the judgment that the accusation was hollow').²⁰ A possible case, discussed above in relation to the *Codex Iustinianus*, which also appears in the *Codex Theodosianus*, is where a person who lost an appeal was said to be *lite perdita notatus* ('marked by the defeated case').²¹ A more clear case of the use of *infamia* in the regulation of the appeals process is where persons who attempt to circumvent a pact by appealing directly to the emperor *inurantur*

¹⁶ *Codex Theodosianus* 9.10.4.1(390 CE) = *Codex Iustinianus* 9.12.8.3 (390 CE).

¹⁷ *Codex Theodosianus* 12.1.85 (381 CE) = *Codex Iustinianus* 10.32.33 (381 CE).

¹⁸ *Codex Theodosianus* 9.36.1 (385 CE) = *Codex Iustinianus* 9.44.1 (385 CE).

¹⁹ *Codex Theodosianus* 9.36.2 = *Codex Iustinianus* 9.44.2pr (404 CE).

²⁰ *Codex Theodosianus* 9.39.2 (385 CE) = *Codex Iustinianus* 9.46.8.1 (385 CE).

²¹ *Codex Theodosianus* 11.30.16 (331 CE) = *Codex Iustinianus* 7.62.19.1 (331 CE).

infamia, as well as losing the right of action and any property under the pact.²² An ambiguous use of *nota* is where it is stated that the *nota* and *statuta poena* should fall upon judges who fail to prosecute tomb violations in their area of jurisdiction.²³ A further use of *nota* that may refer to *infamia*, discussed above in relation to the *Codex Iustinianus*, is where a person who used the name of a powerful person falsely in a petition underwent the *publicae sententiae nota*. The same constitution also states that persons who allowed their names to be inserted *ueluti famae suae prodigos et calumniarum redemptores notari oportebit* ('ought to be noted just as one prodigious of their own *fama* and undertakers of calumnies').²⁴ In these cases, there are no relevant differences between the *Codex Theodosianus* texts and those that appear in the *Codex Iustinianus*.

The *Codex Iustinianus* has also taken laws from the *Codex Theodosianus* using *infamia* as a means to regulate marriage. The *Codex Theodosianus* is the source for the law that it is pleasing (*placet*) that senators, *duumviri* and priests who have married forbidden classes go under the stain of *infamia* (*maclua infamiae*).²⁵ A woman who marries within a year of her husband's death is said to be *probrosis inusta notis* ('marked by the vile *notae*').²⁶ The fact that marriages in violation of the period of mourning are elsewhere stated to incur *infamia* suggests that *nota* is here synonymous with *infamia*.²⁷ There is no relevant change in either case in the *Codex Iustinianus* text.

²² *Codex Theodosianus* 2.9.3pr (395 CE) = *Codex Iustinianus* 2.4.41pr (395 CE).

²³ *Codex Theodosianus* 9.17.2 (349 CE) = *Codex Iustinianus* 9.19.3 (349 CE).

²⁴ *Codex Theodosianus* 2.14.1 = *Codex Iustinianus* 2.14.1 (400 CE).

²⁵ *Codex Theodosianus* 4.6.3 (336 CE) = *Codex Iustinianus* 5.27.1 (336 CE).

²⁶ *Codex Theodosianus* 3.8.1 (381 CE) = *Codex Iustinianus* 5.9.2 (381 CE).

²⁷ *Digesta* 3.2.1 (Julian).

The *Codex Theodosianus* is also the source for a constitution in the *Codex Iustinianus* that states that a governor should not take domestics or *cancellarii* to the provinces *ne famae nota cum bonorum publicatione plectatur* ('lest he be punished by the *nota* of his *fama* and the confiscation of his goods').²⁸ As discussed above, this could well refer to *infamia*.

A clear-cut case of *infamia* in parallel texts is in reference to teachers who teach publicly and consequently go under the *nota infamiae*.²⁹

The *Codex Iustinianus* has also taken the law from the *Codex Theodosianus* that may have made persons who harboured decurions avoiding active service undergo *infamia*. The link to *infamia* is suggested by the use of the term *existimatio* as it is stated *praeter iacturam existimationis etiam rerum discrimen incumbat* ('beyond the loss of reputation, also the loss of property') threatens such persons.³⁰ There is no relevant change between the texts in the two *Codices*.

The two *Codices* also contain a parallel text dealing with heretics, who are stated *infamiam sustinere*, without any change between the texts.³¹

Infamia is also stated to be a criminal punishment in both *Codices*. A master who is cognisant of his slaves committing *uis* is pronounced *infamis* in accordance with the *Lex Iulia*.³²

It is important to note that, aside from the two texts dealing with the *querella inofficiosi testamenti* discussed above, there has been no relevant change in the *Codex Iustinianus* to any *Codex Theodosianus* text dealing with *infamia*. This

²⁸ *Codex Theodosianus* 1.34.3 = *Codex Iustinianus* 1.51.8 (423 CE)

²⁹ *Codex Theodosianus* 14.9.3 = 11.19.1pr (425/6 CE).

³⁰ *Codex Theodosianus* 12.1.76 (371 CE) = *Codex Iustinianus* 10.32.31 (371 CE).

³¹ *Codex Theodosianus* 16.1.2 (380 CE) = *Codex Iustinianus* 1.1.1.1 (380 CE).

suggests that the concept did not undergo any radical change in the time that elapsed between the compilation of the two *Codices*.

Independent Texts

The *Codex Theodosianus* also contains several constitutions possibly referring to *infamia* that were not extracted by the compilers of the *Codex Iustinianus*.

The *Codex Theodosianus* states that the laws inflict a penalty on the *iniuriosi* and *fama spoliunt* ('spoil them in respect of their *fama*').³³ The context of this passage, which is in a section of a constitution referring also to impudent language makes it clear that *iniuriosi* are those who commit *iniuria*, stated elsewhere to have *infamia* as a penalty,³⁴ hence it is likely that *fama spoliunt* here refers to *infamia*.

There are also a number of constitutions in the *Codex Theodosianus* that deal with *infamia* and judicial procedure. A text where it is not quite as clear as to whether *infamia* is the consequence deals with a person who neglects regulations with regard to the delivery of records to the emperor when a judge has referred a case to them. In these circumstances, the offender is pronounced to have gone under the *grauissima nota*.³⁵ *Nota* is used elsewhere in circumstances where *infamia* is implied, especially in relation to orderly judicial proceedings, as noted above, which suggests that *nota* in this constitution refers to *infamia*. A similar constitution states that a judge who sends Christians into the arena *grauiter*

³² *Codex Theodosianus* 9.10.4 (390 CE) = *Codex Iustinianus* 9.12.8.1 (389 CE).

³³ *Codex Theodosianus* 4.8.5 (320 CE).

³⁴ For example, *Digesta* 3.2.1 (Julian).

³⁵ *Codex Theodosianus* 11.30.24 (348 CE).

notabitur.³⁶ Here, this constitution could refer to either *infamia*, or to the judge being ‘gravely censured’, which could encompass a wide variety of punishments. A similar problematic usage of *nota* is where judges who have allowed convicted persons to escape on the pretext of an appeal *adfecti nota deformi* and others *similiter deformati*.³⁷ Here *nota* could refer to *infamia* or some other stigma. Another questionable occurrence of *nota* is in relation to persons who demand patrimonial or emphyteutic estates. Such a person is said *notam subeat*.³⁸ The use of *infamia* to control the judicial process suggests that *nota* could well be being used here to refer to *infamia*. *Nota* is also used ambiguously where it is stated that a judge who has acted counter to decrees of the senate *notam per[patrati] criminis sortietur* (‘receives the *nota* of the crime committed’).³⁹ It is more likely that this does not refer specifically to legal *infamia* as the concept of stigma fits the context better. Another ambiguous constitution in relation to judicial procedure states that a judge who allows a surreptitious rescript does so with a *reprehensione existimationis suae* (‘reprimand of his *existimatio*’).⁴⁰ It is unclear whether the damage done to *existimatio* referred to here is *infamia* or something else. Also in the context of judicial procedure, it is stated that a person who has lodged an unprovable complaint before a bishop should understand that *se iacturae famae propriae subiacere, ut damno pudoris, existimationis dispendio* (‘he will undergo the loss of his own *fama*, so that by the loss of shame and loss of *existimatio*’) and he will learn that it is not permitted to him to assail the

³⁶ *Codex Theodosianus* 9.40.8 (365 CE).

³⁷ *Codex Theodosianus* 9.40.15 (392 CE).

³⁸ *Codex Theodosianus* 5.15.21 (368 CE). This is translated in the Pharr translation, above n. 2, 114 as ‘brand of infamy’.

³⁹ *Codex Theodosianus* 6.4.22 (373 CE). This is translated in the Pharr translation, above n. 2, 125 as ‘receive the *brand* of the crime that he has perpetrated’ (emphasis added).

⁴⁰ *Codex Theodosianus* 15.1.43 (405 CE).

uerecundia of another.⁴¹ Here, *fama* is equated with *existimatio* and *pudor*. Both *fama* and *existimatio* are used elsewhere in contexts that imply *infamia*, and, as *calumnia*, or vexatious litigation, results in *infamia*, the loss of *fama* here could be understood as a reference to *infamia* as a legal concept. Another constitution that appears to use *fama* in relation to *infamia* is where it is stated that an accuser is required to pay a bond where a court action calls into question another's *famam fortunas caput denique sanguinem* ('*fama*, *caput* and finally blood').⁴² As any court action could bring a person's *fama* into question in the sense of their public reputation, the most likely meaning for *fama* in this constitution is a technical one, referring to damage to *fama* resulting from *infamia*.

There are also independent texts where *infamia* is used as a means of religious regulation. Manicheans were segregated *ut infamibus et probrosis a coetu hominum* ('as *infames* and disgraceful, from the intercourse of men').⁴³ That *infames* is used here in a technical sense, i.e., those who have undergone *infamia* is suggested by a later constitution, which explicitly states that Manicheans undergo the *nota infamiae*. This constitution states that *sub perpetua iniustae infamiae nota testandi ac uiuendi iure Romano omnem protinus eripimus facultatem* ('under the perpetual *nota* of inflicted *infamia*, we remove them [Manicheans] immediately from all capacity at Roman law of making a will and living') and thus they cannot leave or receive any inheritance.⁴⁴

In a different, but related, use of *infamia* as a means of religious control, it is stated that persons of rank giving themselves over to sacrifices bring it about *ut de*

⁴¹ *Codex Theodosianus* 16.2.41 (412 CE).

⁴² *Codex Theodosianus* 9.1.11 (367-8 CE).

⁴³ *Codex Theodosianus* 16.5.3 (372 CE).

⁴⁴ *Codex Theodosianus* 16.5.7pr (381 CE).

loco suo statuque deiectione perpetua urantur infamia ac ne in extrema quidem uulgi ignobilis parte numerentur ('so that they are removed from their own place and status, marked by perpetual *infamia* and not numbered even in the lowest part of the ignoble people').⁴⁵ A person who, while being present, knowingly allows Donatists to use his land, *iusta et enim per sententiam notabit infamia* ('will be marked through the sentence with just *infamia*').⁴⁶ Similarly, it is stated that Donatists and heretics have no power to enter a contract as they are *intestabiles, sed perpetua inustus infamia a coetibus honestis et a conuentu publico segregandos* ('are incapable of acting as a witness, but marked with perpetual *infamia* they are segregated from the intercourse of honest men and public assembly').⁴⁷

Another case that is not clear-cut is with reference to governors who have conducted troop recruitment in the provinces. Such governors are said to undergo *supplicium existimationis extremum et ultio inexpiabilis exceptura* ('the extreme penalty towards *existimatio* and inexpiable vengeance shall take [them]').⁴⁸ As noted in the preceding chapters, the loss of *existimatio* can be synonymous with *infamia*, which makes it possible that this text refers to *infamia* as a penalty for such misconduct.

There are two constitutions that deal specifically with the usurpation of Eugenius (392-4 CE) that use the term *infamia*. In the first of these, it is likely that *infamia* is being used technically as it is stated that those who held office shall not

⁴⁵ *Codex Theodosianus* 16.7.5 (391 CE).

⁴⁶ *Codex Theodosianus* 16.6.4 (405 CE).

⁴⁷ *Codex Theodosianus* 16.5.54 (414 CE).

⁴⁸ *Codex Theodosianus* 7.13.9 (380 CE).

undergo a *nota infamiae*.⁴⁹ In the second constitution, it appears that the term is being used to refer to a stigma, rather than a technical legal consequence, as it states that the *maculae infamia* was the office conferred upon people by Eugenius.⁵⁰

There are no independent texts dealing with the consequences of *infamia*.

Conclusion

In conclusion, it can be seen, both in the texts paralleled in the two *Codices* and in the independent texts in both the *Novellae* and *Codex Theodosianus*, that there the concept of *infamia* is largely consistent between the imperial laws of the fourth and fifth centuries and those contained in Justinianus' compilation. *Infamia* appears as being used as a means of regulation in:

- the judicial process;
- marriage;
- decurions' obligations;
- a criminal punishment;
- religious regulation; and
- protecting sepulchres.

Where a parallel text exists, with only one exception, it has not been changed either in substance or form with regard to *infamia*. Some of the differences between the two bodies of law, the fourth and fifth century laws and the *Corpus Iuris Ciuilis*, can be explained by the lapse of time, especially those dealing with religion, i.e. the disappearance of the relevant heresies and the christianisation of the empire, and those dealing with the usurpation of Eugenius. There are

⁴⁹ *Codex Theodosianus* 15.14.11 (395 CE).

⁵⁰ *Codex Theodosianus* 15.14.12 (395 CE): '*His, quos tyrannici temporis labes specie dignitatis infecerat, inustae maculae omnem abolemus infamiam*'.

differences in detail that cannot be so explained, especially in relation to the judicial process and conduct of judges and governors, such as what aspects of misconduct by judges or those using the judicial process result in *infamia*. It can only be postulated that these matters were considered by the compilers to be dealt with adequately by the laws that they chose to extract. The differences are not significant enough to propose any great change in the approach to *infamia* between the fourth and fifth centuries and the time of the compilation of the *Corpus Iuris Civilis*.

Chapter Six: Between the Codes

The two barbarian codes, the *Lex Romana Visigothorum* and the *Lex Romana Burgundionum*, and the *Leges Saeculares*, although strictly speaking not ‘Roman’ law, are based on Roman legal sources and fall between the *Codex Theodosianus* and the *Corpus Iuris Ciuilis*. They are interesting in that they contain a concept of *infamia* that is consistent with that outlined in the *Corpus Iuris Ciuilis* and in the *Codex Theodosianus*, suggesting that the doctrine presented in the *Corpus* represents that found in the original texts upon which the *Corpus* is based.

Lex Romana Visigothorum¹

Two constitutions taken from the *Codex Gregorianus* are preserved in the Appendix to the *Lex Romana Visigothorum* that deal with *infamia*. The first, of Gordianus, states that *infamia* does not follow when a person is beaten, if the sentence was not one that *ignominiae maculam inrogans*.² This Constitution is paralleled in the *Codex Iustinianus*, with the addition of the words *ob crimen habita quaestione*, which serves perhaps to make the constitution clearer, while leaving the actual legal doctrine unaltered: that *infamia* is not inflicted by a beating alone.³

The second states that a person should not fear that his *existimatio* will be harmed merely by the fact he has been incarcerated, if the sentence pronounced against

¹ Unless otherwise stated, references in this Chapter to *infamia* and *infames* are to the legal concept.

² *Appendix Legis Romanae Visigothorum* 1.1 (238): ‘Nullam existimationis infamiam auunculus tuus pertimescet ictibus fustium subiectus, si sententia non praecessit ignominiae maculam inrogans’.

³ *Codex Iustinianus* 2.11(12).14 (238 CE): ‘Nullam existimationis infamiam auunculus tuus pertimescat, ictibus fustium subiectus ob crimen habita quaestione, si sententia non praecessit ignominiae maculam inrogans’. (Underlined section added to *Codex*).

them did not carry the *detrimentum infamiae*.⁴ This is also paralleled in the *Codex Iustinianus*.⁵ The actual wording is altered so that the principle is generalised, as the original constitution refers to imprisonment through *iniuria*, the *Codex* constitution refers to imprisonment by a legitimate judge. However, the actual principle itself is unchanged: that *infamia* is not sustained by incarceration alone.

The vocabulary used here, *infamia* and *ignominia*, and the concept that *infamia* represents an injury to *existimatio*, are all found in the *Corpus Iuris Ciuilis*. It is also important to note that the chapter of the *Codex Gregorianus* from which these constitutions are said to have been taken from was that dealing with *De Postulando*, i.e., most likely discussing *infamia* in relation to the postulation restrictions contained in the Praetor's Edict. This suggests that sentencing a person to incur *infamia* was, *per se*, enough to bring into effect the postulation restrictions listed in the Praetor's Edict.

Lex Romana Burgundionum

The *Lex Romana Burgundionum* contains several references to *infamia* that, for the most part, are consistent with and paralleled in Roman legal texts.

It is stated in the *Lex* that masters conscious of violence committed by their slaves are *pronunciantur infames*.⁶ The same doctrine is contained in a text of the *Codex Theodosianus*,⁷ which is paralleled in the *Codex Iustinianus*, without any

⁴ *Appendix Legis Romanae Visigothorum* 1.2 (Severus and Antoninus): ‘*Si nulla sententia contra te dicta est, quae infamiae detrimentum adfert, sine causa times, ne existimatio tua laesa sit ob id, quod in carcerem per iniuriam coniectus est*’.

⁵ *Codex Iustinianus* 2.11(12).1 (Severus and Antoninus): ‘*Infamiae detrimentum minime tibi adfertur ob id solum, quod in carcerem coniectus es uel uincula tibi iussu legitimi iudicis iniecta sunt*’.

⁶ *Lex Romana Burgundionum* 8.3: ‘*Quod si per discussionem iudicis conscio domino uiolentia probatur admissa, domini pronunciantur infames, serui metallis deputantur*’.

⁷ *Codex Theodosianus* 9.10.4 (390 CE).

doctrinal change.⁸ In the two *Codices* the principle is said to come from an earlier *Lex Iulia*.⁹

The *Lex* also states that no *actio* can be entrusted to a *femina*, *minor* or a person *notatus infamia*.¹⁰ This essentially mirrors the rule on postulation stated in *Digesta* 3.1 and 3.2, that a minor, woman or *infamis* is prohibited in the Praetor's Edict from postulating for another.¹¹

It is also stated that where a person conducts a case for another, he must swear the appropriate oath (i.e. for *calumnia*), otherwise he will be condemned as a *calumniator*, expelled as an *infamis* and deported.¹² This is consistent with the *Corpus Iuris Ciuilis*, where *calumnia* results in *infamia*,¹³ and where refusal to take the oath results in a person being judged a *calumniator* and expelled from the court.¹⁴ Although the constitution in the *Codex Iustinianus* is one of Justinian, the presence of this law in the *Lex Romana Burgundionum* suggests that the rule was not a Justinianic innovation.

The *Lex Romana Burgundionum* also contains a law that women who remarry within a year *infames habentur*.¹⁵ This text appears to be sourced from a

⁸ *Codex Iustinianus* 9.12.8 (390 CE).

⁹ There were two *Leges Iuliae* on *uis*: *Lex Iulia de ui publica* and the *Lex Iulia de ui priuata*. Both are stated to result in *infamia* in the *Digesta*: see *Digesta* 48.1.1 (Macer) with 48.1.7 (Macer).

¹⁰ *Lex Romana Burgundionum* 11.2.

¹¹ Some exceptions were listed for *infames*, see above.

¹² *Lex Romana Bugrundionum* 11.3.

¹³ For example, *Digesta* 3.2.1 (Iulianus).

¹⁴ *Codex Iustinianus* 2.58(59).2.6 (531 CE).

¹⁵ *Lex Romana Burgundionum* 16.1.

constitution in the *Codex Theodosianus*, that is utilised in the *Codex Iustinianus*.¹⁶

The texts of the *Codices* do not use ‘*infamia*’, although the *interpretatio* to the *Codex Theodosianus* text does.

The *Lex Romana Burgundionum* also states that a special procedure utilising an oath, *sacramentum*, as a means of settling a dispute is not open to a person *notatus infamia*. We are fortunate that the source of this rule, the *Codices Gregorianus* and *Hermogenianus*, is stated in the section of the *Lex* itself, so it clearly derived from Roman law, although the constitutions from which this rule was derived no longer exist.

Another interesting comparison is between the *Lex Romana Burgundionum* and an earlier text, the *Pauli Sententiae*, with regard to the penalties imposed upon people who cut down trees at night. In the *Pauli Sententiae*, persons of better rank, *honestiores*,¹⁷ are either removed from the *curia* or relegated; humbler persons are condemned for a period to an *opus publicum*.¹⁸ In the later *Lex*, it is stated that a person who cut down trees at night is *infamis effectus*, with a *uilior persona* is relegated for a period.¹⁹ It seems that *infamis effectus* must be the equivalent to the punishment designated for *honestiores* of removal from the *curia* or relegation in the *Sententiae* text, which parallels the passages of the *Digesta* that equate removal from the *curia* and *relegatio* with *infamia*.²⁰

¹⁶ *Codex Theodosianus* 3.8.1 (381 CE) = *Codex Iustinianus* 5.9.2 (381 CE) see S. Riccobono et al. (eds.), *Fontes Iuris Romani Anteiusiniani* (Florence, S. A. G. Barbèra, 1941) 3 Vols., vol. 2, 279 n. 3.

¹⁷ See P Garnsey, *Social Status and Legal Privilege* (Oxford, Clarendon Press, 1970), esp. Part IV on this grouping.

¹⁸ *Pauli Sententiae* 5.20.6.

¹⁹ *Lex Romana Burgundionum* 18.5.

²⁰ For example, *Digesta* 50.1.15pr (Papinian) and 49.16.4.4 (Arrius Menander).

Again, in all these instances, the vocabulary and concepts associated with *infamia* mirror those found in the *Corpus Iuris Ciuilis* and the *Codex Theodosianus*.

Leges Saeculares

The *Leges Saeculares* twice refer to a woman becoming an *infamis* for marrying within 10 months of her husband's death.²¹ This rule is referred to in the *Digesta*.²² The prohibition on marrying within 10 months is also discussed in the *Fragmenta Vaticana*, although that text does not make an explicit link to *infamia*, rather to *cognitores* and *procuratores*.²³

Ignominia is used in a 'non-technical' sense to refer to the dishonour incurred by a father when his son(s) injure him.²⁴

Significantly, it is stated in the *Leges Saeculares* that men who became *infames* in accordance with the law are deprived of all *honor*. This means that they could not become *nuntii*, *sunchlêtichoi*, *sacerdotes*, *consilarii regis*, *iudices regionum*, or *principes in ciuitatibus*. Clearly, *honor* in this context means 'office'. This principle is found in two constitutions in the *Codex Iustinianus*, one dating from Diocletian,²⁵ the other from Constantine I.²⁶

Again, the principles contained in these laws, and the vocabulary used to express them, are consistent with the *Corpus Iuris Ciuilis*.

²¹ *Leges Saeculares* 16 and 61.

²² *Digesta* 3.2.1 (Julian).

²³ *Fragmenta Vaticana* 320.

²⁴ *Leges Saeculares* 68.

²⁵ *Codex Iustinianus* 10.59(57).1 (Diocletian and Maximian).

²⁶ *Codex Iustinianus* 12.1.2 (313-5 CE).

Conclusion

The principles and vocabulary utilised in the three texts surviving from the fifth and sixth centuries are consistent with the earlier *Codex Theodosianus* and the later *Corpus Iuris Ciuilis*. This provides further evidence that the principles contained in the *Corpus Iuris Ciuilis* are not a Justinianic innovation.

Part Two: The Development of *Infamia*

Chapter Seven: The Development of *Infamia*

The development of *infamia* in the period prior to Diocletian (284-305 CE) is problematic to discuss. This is because, as already noted, the vast majority of the source material comes from the *Corpus Iuris Ciuilis* and other writings that postdate the period. In each case, therefore, it is necessary to come to a judgement as to what extent the text excerpted in the *Corpus Iuris Ciuilis* represents the law that was contained in the original work. The concentration of legal evidence in this area begins with the various Republican *leges* preserved epigraphically and the forensic speeches of Cicero, and this will set the earliest boundary in time for this Chapter.¹

Some ‘Limbs of Authenticity’

There are several ‘limbs’ that support the proposition that, at least in relation to *infamia*, the texts as contained in the *Corpus Iuris Ciuilis* do not contain any significant doctrinal changes. Firstly, as we have seen, the law in relation to *infamia* contained in the *Corpus Iuris Ciuilis* contains extensive parallels to that contained in the *Codex Theodosianus* and *Novellae* and other post-Diocletianic writings external to the *Corpus*. Similarly, our survey of passages contained in the *Corpus Iuris Ciuilis* that have parallels in other sources showed that, in the vast majority of cases, changes to the texts were confined to wording, rather than doctrine.

¹ For a consideration of the the word group *fama, famosus, infamia* etc in the *XII Tables* see M. Kaser, ‘*Infamia und Ignominia*’ ‘*Infamia und ignominia in den römischen Rechtsquellen*’ (1956) 73 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 220-78, 222-4.

A further limb of authenticity is that all the constitutions contained in *Codex Iustinianus* 2.11(12), *De Causis, ex Quibus Infamia Alicui Inrogatur*, are dated from the Severans until 294 CE, i.e., they were all drawn from the *Codices Gregorianus* and *Hermogenianus*. This suggests that they were all taken from the same chapter in the *Codices*. Indeed, we know from the first appendix to the *Lex Romana Visigothorum* that at least some of the texts were drawn from the chapter in the *Codex Gregorianus* titled *de Postulando*.² This suggests that the doctrine of *infamia*, as contained in this *Codex* title, was fully formed by the time of the two third century *Codices*, and that there were no later unifying constitutions, especially Justinianic ones. The compilation of the *Corpus* could not help but be, after all, an exercise in self-promotion by Justinian – why would the compilers pass over an opportunity to include an exercise in legal reform by him?³

Further texts external to the Justinianic tradition that elucidate the development of *infamia* will be discussed where appropriate.

Praetor's Edict

The first category of *infames* it is necessary to discuss is that contained in the Praetor's Edict. This is the context in which the bulk of the *Digesta's* discussion of *infamia* occurs.⁴ We also know, as noted above, that it was in this context that

² Appendix 1 *Lex Romana Visigothorum* 1.1 and 1.2 = *Codex Iustinianus* 2.11(12).1 (Severus and Antoninus) and 2.11(12).14 (238 CE).

³ See, for example, the 102 references to the reforming work of Justinian contained in the *Institutiones Iustiniani* collected in T. Honoré, *Tribonian* (London, Duckworth, 1978) 190-198.

⁴ See *Digesta* 3.2.

the *Codex Gregorianus* discussed, at least in part, *infamia* and from which the *Codex Iustinianus* drew at least some of its constitutions on the matter.⁵

The *Digesta* commences the list of persons incurring *infamia* by supposedly quoting the Edict, as purportedly taken from Julian, stating *infamia notatur qui ...* [the list follows].⁶ We are fortunate enough to know that these opening two words (*infamia notatur*) are an interpolation as Gaius says as much.⁷ In a passage crucial for the understanding of the development of *infamia*, Gaius states:⁸

Quibus iudiciis damnati ignominiosi fiunt, ueluti furti, ui bonorum raptorum, iniuriarum; item pro socio, fiduciae, tutelae, mandati, depositi. Sed furti aut ui bonorum raptorum aut iniuriarum non solum damnati notantur ignominia, sed etiam pacti, ut in edicto praetoris scriptum est; et recte: plurimum enim interest utrum ex delicto aliquis an ex contractu debitor sit. Nec tamen ulla parte edicti id ipsum nominatim exprimitur, ut aliquis ignominiosus sit, sed qui prohibetur et pro alio postulare et cognitorem dare procuratoremue habere, item <pro>curatorio aut cognitorio nomine iudicio interuenire, ignominiosus esse dicitur.

Those condemned in certain actions become *ignominiosus*, such as theft, robbery with violence, and insult; likewise, partnership, trust (*fiducia*), tutelage, mandate and deposit. But in the case of theft, robbery with violence or insult, not only those condemned are marked with *ignominia*, but also those who make a pact, as is written in the Edict of the Praetor; and correctly, for there is much difference between whether someone is a debtor from delict or contract. It is not, however, expressly stated by any part of the Edict that someone become *ignominiosus*, but one who is prohibited from postulating, from giving a *congitor* or having a *procurator* and

⁵ See Appendix 1 *Lex Romana Visigothorum* 1.1 and *Codex Iustinianus* 2.11(12).1 (Severus and Antoninus) and 2.11(12).14 (238 CE).

⁶ *Digesta* 3.2.1 (Julian).

⁷ See, e.g., Kaser, 'Infamia und ignominia', above n. 1, 245, esp. n. 111. Though J. Gardner, *Being a Roman Citizen* (London, Routledge, 1993) e.g. 129, appears to accept these words as unproblematic: McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 46 n. 224.

⁸ Gaius, *Institutiones* 4.182.

likewise is prohibited from intervening in a case under the title of *procurator* or *cognitor*, is called *ignominiosus*.

This makes it clear that the Edict itself did not use the term *ignominiosus*, which, as we saw Chapter Two, is used in the *Digesta* as a synonym for *infamia*. It is also clear, due to the reference to the prohibition on postulating, that what the *Digesta* refers to as *infamia* is what is being discussed here.

This passage of Gaius appears to demonstrate that, at the time of Gaius in the mid-second century CE, *ignominia*, at least, was a descriptive term, used to describe persons who laboured under a specific set of legal disabilities and that these disabilities followed from condemnation in a specific set of private actions. It does not, however, appear to be a positive legal concept, i.e. the law itself did not say that people became *ignominiosus*, rather jurists used the term to describe persons undergoing specific disabilities. That this conception of *infamia* made sense to the compilers of Justinian's *Institutes* is shown by the fact that the passage is utilised, with only minor changes to the actions and the omission of reference to the Edict, in Justinian's *Institutiones*.⁹ Not all of these disabilities were relevant at the time of Justinian, who had, for instance, abolished *infamia* as a grounds for objecting to a *procurator*.¹⁰ This passage of Gaius also makes it clear that the appearance of a phrase such as '*ignominia/infamia notatur*', as used in this passage, would not be alien in a classical text, but would merely be a short hand descriptive method, a term of art, for stating that a person underwent certain legal consequences. It is impossible to tell from the *Digesta* when *infamia* and cognates evolved from having the purely descriptive meaning Gaius gives them to being a positive legal concept, i.e., where terming a person *infamis* had legal

⁹ Justinian, *Institutiones*, 4.16.2.

¹⁰ Justinian, *Institutiones* 4.13.11(10).

consequences in and of itself.¹¹ The earliest surviving apparently positive use is in a constitution of 198 CE, which states if you commit *iniuria ignominia notatus es* ('you are marked with *ignominia*').¹² It is in this later sense that the phrase *infamia notantur*, is used in the opening of *Digesta* 3.2.1 (Julian), i.e. the intent is to designate legally the persons listed as *infames*.

The short-hand usage of Gaius is well illustrated by a passage of the *Pauli Sententiae*, dealing with *iniuria* mentioned in Gaius 4.182: Importantly, this passage from the *Pauli Sententiae* also appears to confirm that the use of *infamia*, *infamis* and *famosus* was not necessarily a Justinianic innovation. Discussing *iniuria*, the text states:

18. Convicium iudici ab appellatoribus fieri non oportet: alioquin infamia notantur. 19. Maledictum itemque conuicium publice factum ad iniuriae uindictam reuocatur. Quo facto condemnatos infamis efficitur. 20 Non tantum is, qui maledictum aut conuicium ingesserit, iniuriarum conuictus famosus efficitur, sed et is, cuius ope consilioque factum esse dicitur.

18. A judge ought not be abused by appellants, otherwise they are marked with *infamia*. 19. Curses and abuses made publicly demand punishment in return, for which act those condemned are made *infames*. 20. Not only that person who made the curse or abuse is made *famosus* when convicted of *iniuria*, but also that person by whose counsel or resources it was said.¹³

Such usage as this, amply reflecting the variation of terminology of the commentators on the Edict, gives good support for the argument that the legal content of these commentaries has not been heavily tampered with.

¹¹ Therefore, in this Chapter, discussion of persons who are *infames* under the Edict reflects only that such persons would fall within the definition given by Gaius.

¹² *Codex Iustinianus* 2.11(12).5 (198 CE). The same period that Kaser identifies with the common usage of *infamia* in juristic texts: Kaser, 'Infamia und ignominia', above n. 1, 233.

¹³ *Pauli Sententiae* 5.4.18-20.

The extension of *infamia* as a descriptive concept beyond postulation to the giving of or being *cognitores* or *procuratores* in classical law, as mentioned in Gaius, also appears clear from the fact that texts utilised in the *Digesta* for the discussion of *infamia* are drawn from works of classical jurists discussing edictal provisions on *procuratores* or *cognitores*.¹⁴

On the basis of Gaius' description of what made a person *infamis*, it is probable that those persons mentioned in the extract from Ulpian in *Digesta* 3.1.1 as being included in the second Praetor's Edict, i.e. those who could postulate only for themselves, since they were *in turpitudine notabilis* would fit within the classical definition of *infamia*.¹⁵ Such persons were certainly excluded from postulating for another. That they were also excluded from being *cognitores* seems clear from a passage in the later *Pauli Sententiae*,¹⁶ and thus could neither give nor be given as *procuratores*.¹⁷

The Use of the Term *Infamia*

Gaius' use of *ignominiosus* raises two questions: firstly, when did persons undergoing these particular disqualifications become called *ignominiosus*? and secondly, when did the term *infamia* become used for what Gaius terms

¹⁴ *Digesta* 3.2.10 and 3.2.16: Paul, book 8 on the Edict; *Digesta* 3.2.15, 3.2.17, 3.2.19 and 3.2.23: Ulpian, book 8 on the Edict; *Digesta* 3.2.18: Gaius, Book 3 on the Provincial Edict: for the provisions of the Edict that the various books of the commentators covered, see: O. Lenel, *Das Edictum Perpetuum* (3rd ed., Leipzig, B. Tauchnitz, 1927), XVI-XVII.

¹⁵ The phrase itself *in turpitudine notabilis* is unlikely to be the wording of the Edict: Kaser, 'Infamia und Ignominia', above n. 1, 246 n. 118; Gardner, *Being a Roman Citizen*, above n. 7. 114, 117; T. A. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome* (Oxford, Oxford Uni Press, 1998) 46, n. 212.

¹⁶ *Pauli Sententiae* 1.2.1: 'Omnes infames, qui postulare prohibentur, cognitores fieri non posse etiam uolentibus aduersariis'.

¹⁷ *Fragmenta Vaticana* 323.

ignominia?¹⁸ Certainly, Gaius, in his *Institutiones* and in the relevant *Digesta* extract only uses the terms *ignominia/ignominiosus*.¹⁹

There is a tantalising suggestion that a legal term existed to describe the persons referred to by Gaius as far back as the early first century CE. The *Tabula Larinas* is unfortunately fragmentary at the crucial point, but nevertheless refers to people who *aut p[...] ut acciperent aut ut famoso iudicio condemnarentur dederant operam* ('bring it about that they either receive [...] or are condemned in a *famosum iudicium*') so that they lose their seats in the equestrian rows of the theatre and can therefore compete in the arena or appear on stage with impunity.²⁰ As will be discussed below, a *famosum iudicium* was probably one of those mentioned by Gaius as resulting in *ignominia*. This implies that whatever the *p[...]* is that removed a person from the equestrian theatre seats had a similar effect to condemnation in a *famosum iudicium*.²¹ The proposed restoration is *p[ublicam ignominiam]*,²² but unfortunately, this cannot be certain. The fact that condemnation in *famosa iudicia* is listed separately from the vague *p[...]* perhaps indicates that whatever it was, it was not identical to the effects of condemnation in a *famosum iudicium* or that the Praetor's Edict, which listed *famosa iudicia* together with other causes of disqualification from postulation, was not the reference point for *p[...]*. Hence, we cannot push *ignominiosus* back in time further than Gaius with certainty.

¹⁸ On this question, See Kaser, '*Ignominia und infamia*', above n. 1, 227 *et seq.*

¹⁹ See Gaius, *Institutiones* 2.154 and 4.182 and *Digesta* 3.2.3 (Gaius).

²⁰ *Tabula Larinas* ll. 12-3.

²¹ On this see Gardner, *Being a Roman Citizen*, above n. 7, 146-7.

²² See B. Levick, 'The *Senatus Consultum* from Larinum' (1983) 73 *Journal of Roman Studies* 97-115, 98: *Tabula Larinas* l. 12.

There are ‘quotations’ of earlier writers by jurists extracted in the *Digesta* that contain references to *infamia* and cognate terms, but we cannot be sure that these quotations are exact.²³ The earliest legal text to use the term *infamia* is a *Digesta* extract from Labeo, of the Augustan period,²⁴ who states that a debt should be paid at the earliest time it can be without incurring *turpitudō* and *infamia*.²⁵ It is clear from Gaius that *ignominia* attaches by law to the sale of goods that results from insolvency.²⁶ Hence, as noted in Chapter Two, insolvency would be a reason why *infamia* would attach to the payment of a debt and, while this passage is suspected as having been interpolated,²⁷ there is no *legal* basis for suspecting its doctrinal authenticity.

The next earliest passage is Julian, who states that certain *actiones* listed in the Praetor’s third Edict, *dolo* and *iniuria*, are not given against parents or patrons as *licet enim uerbis edicti non habeantur infames ita condemnati, re tamen ipsa et opinione hominum non effugiunt infamiae notam* (‘although they are not regarded as *infames* when condemned, they do not escape the *nota ingnominae* in fact or the opinion of men’).²⁸ There seems little reason to doubt the authenticity of this passage. Julian is writing within 20-30 years of Gaius,²⁹ and his use of *habeantur infames* here is compatible with Gaius’ discussion of the use of *ignominiosus*.³⁰

²³ See Kaser, ‘Infamia und Ignominia’, 232-3 and the sources referred to there.

²⁴ J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam, Noth-Holland Publishing Co, 1976) xvii.

²⁵ *Digesta* 23.3.79 (Labeo).

²⁶ Gaius, *Institutiones* 2.154, which stresses that the *ignominia* is the result of *ius*.

²⁷ Kaser, ‘Ignominia und infamia’, above n. 1, 231 n. 57. In light of Gaius 2.154, I disagree with Kaser that *infamia* here is an ‘unjuristische Sprachgebrauch’ (p. 231), though certainly *turpitudō* could fit this description.

²⁸ *Digesta* 37.15.2pr (Julian).

²⁹ See Thomas, *Textbook*, above n. 24, xviii.

³⁰ Gaius, *Institutiones* 4.182.

Furthermore, as was shown in Chapter Two, the compilers of the *Digesta* showed little inclination to impose a consistent terminology with regards to *infamia* on the works they are extracting that would have required them to change *ignominiosus* or some other cognate term to *infames* here. Even if one agrees with Kaser that Julian is more interested here with *ignominia* in the eyes of men,³¹ this does not in any way diminish the contrast clearly stated between a *legal* consequence and a non-legal one, making this probably the earliest clear reference we have to *infamia*. By the Severan period, the term *infamia* is common and used by Papinian, Ulpian, Paul, Macer, Menander, Marcian and Modestinus,³² and by the end of the classical period, *ignominia* is scarcely used in the same sense as *infamia*,³³ nevertheless, as noted in Chapter Two, it was not removed from the *Corpus*.

An effort will now be made to reconstruct the various persons whom Gaius termed *ignominiosus*. For the most part, we cannot tell with any precision when various groups were added or subtracted from the *ignominiosi*, the main concern being to reconstruct such a list as may have existed at the time of codification of the Edict under Hadrian and to note any developments before or after codification prior to the actions of Justinian.

³¹ Kaser, 'Infamia und Ignominia', above n. 1, 232

³² Kaser, 'Infamia und Ignominia', above n. 1, 233. It should be noted that Ulpian, as well as Papinian, whom Kaser singles out for this tendency, use both *ignominia* and *infamia* in the same sense, see, e.g., *Digesta* 3.2.4pr, 3.2.11.4, and 4.8.7pr (Ulpian).

³³ Kaser, 'Infamia und Ignominia', above n. 1, 230.

*Actiones Famosae*³⁴

There is a clear correspondence between the actions listed by Gaius as resulting in a person becoming *ignominiosus*, and the *actiones famosae* referred to in various parts of the *Corpus Iuris Ciuilis* as resulting in *infamia*. The most comprehensive list in the *Corpus* is in the *Digesta* in the title on *infamia* in the Praetor's Second Edict:³⁵

Qui furti, ui bonorum raptorum, iniuriarum, de dolo malo et fraude suo nomine damnatus pactusue erit: qui pro socio, tutelae, mandati, depositi suo nomine non contrario iudicio damnatus erit.

Who is condemned of theft, robbery with violence, insult, deception and fraud in his own name or though a pact, who is condemned in his own name and not in a counter action for partnership, tutelage, mandate or deposit.

This list matches that in Justinian's *Institutiones*, which is derived from Gaius.³⁶

Both Gaius and Justinian's *Institutiones* use *ueluti*, which indicates that the lists are not comprehensive. As noted above, the Justinianic *Institutiones* does not change the word *ignominiosus* from Gaius' text. This indicates that this term was regarded as synonymous with *infamis* into the time of Justinian.

There are some important differences between the lists contained in Gaius and those in the *Corpus*, namely, Justinian includes the action *de dolo malo et fraude*, not found in Gaius, but excludes the action *fiducia*. Fortunately, we possess other evidence containing lists of actions closely corresponding to these two, which helps us to determine the way in which these lists developed, not only between Gaius and the *Corpus*, but even from much earlier on. This is one of the few areas

³⁴ See, A. D'Ors, 'Una nueva lista de acciones infamantes' (1984) 6 *Sodalitas: Scritti in onore di A. Guarino* 2575-90.

³⁵ *Digesta* 3.2.1 (Julian).

³⁶ Justinian, *Institutiones* 4.16.2.

in relation to *infamia* where we can trace development with some degree of refinement. The absence of *fiducia* from the *Corpus* texts is explicable on the basis that the *actio* became obsolete at some point after the classical period and was eliminated from the sources contained in the *Corpus* by interpolation.³⁷

The earliest list of such actions is probably the fragmentary inscription known as the *Este Fragment*, probably dating to before 76 BCE,³⁸ which contains two chapters dealing with jurisdiction in *municipia*, colonies, and *praefecturae*.³⁹ The fragment allows certain types of action, all of which appear in other lists of *actiones famosae*, to be tried locally if the value is 10 000HS or less and the defendant consents. The fact that the defendant is required to consent for these *actiones* to be heard locally is indicative of their importance, and seems in accord with the general reluctance to grant *actiones famosae* identified in Chapter Two.⁴⁰

As it stands, the fragment starts:

[...]

Mandati aut tutelae, suo nomine quodue ipse earum rerum
| quid gessisse dicetur, †addicetur† aut quod furti, quod ad
ho|minem liberum liberamue pertinere deicatur, aut
iniuri|arum ag<e>tur

... Of mandate or *tutela*, in his own name, which either he
[the defendant] is said to have done in his own name, or
furtum which is alleged to pertain to a free man or woman,
or *iniuria*⁴¹

³⁷ M. Kaser, *Roman Private Law* (2nd ed., Trans. R. Dannenberg, London, Butterworths, 1968) 128; D. Johnston, *Roman Law in Context* (Cambridge, Cambridge Uni. Press, 1999) 91. Many *Digesta* texts on *pignus* originally dealt with *fiducia*: W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd ed., Cambridge, Cambridge Uni. Press, 1963) 432.

³⁸ M. Crawford (ed.), *Roman Statutes, Bulletin of the Institute of Classical Studies Supplement 64* (London, Institute of classical Studies, 1996) 2 Vols., vol. I, 315-6.

³⁹ See Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 313 ff.

⁴⁰ See, e.g., *Digesta* 4.3.1.11 (Ulpian); *Digesta* 4.1.7.1 (Marcellus).

⁴¹ *Este Fragment* ll. 1-4.

As the fragment starts in the middle of the chapter, it is unclear how many actions are missing. Cicero several times refers to actions that have a special effect on a man's reputation and were clearly grouped together in Roman legal thinking: these are *tutela*, *societas/pro socio*, *mandatum* and *fiducia*, which are variously described by Cicero as being *priuata iudicia summae existimationis, delicta* that entail more serious consequences, such that the case is heard more slowly, and even as *turpia iudicia*.⁴² On this basis, it appears likely that the actions *fiducia* and *pro socio* can be confidently restored here.⁴³ The action *de dolo malo* is probably later than the list here, and should not be included.⁴⁴

The most comprehensive list provided by Cicero is in his dialogue *de Natura Deorum*. This work is dated to around 45 BCE,⁴⁵ however, its content appears to have been carefully constructed to reflect accurately the *dramatic* date of the dialogue, 76 BCE.⁴⁶ This list contains *tutela*, *mandatum*, *pro socio*, *fiducia*, the *lex Plaetoria*, and *de dolo* all as what Cicero terms *iudicia de fide mala*.⁴⁷

The next text chronologically that contains a similar list of actions is the *Tabula Heracleensis*. No precise date can be given for the text, though its content appears to post-date the Social War and all the relevant sections appear to be of Caesarian date in their current form.⁴⁸ The text contains a list of grounds for disqualifying

⁴² Cicero, *Pro Caecina* 7-8; *pro Quinto Roscio Comoedo* 16 – though here only *fiducia*, *tutela* and *fiducia*, though see *Pro Roscio Amerino* on the seriousness of *mandata*; *De Officiis* 3.70 and *Topica* 42.

⁴³ Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 314.

⁴⁴ Crawford (ed.), *Roman Statutes*, above n. 38, vol. I 316.

⁴⁵ H. Rackam, 'Introduction' in Cicero, *De Natura Deorum, Academica* (London, William Heinemann, 1967) xii-xiii.

⁴⁶ Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 316.

⁴⁷ Cicero, *De Natura Deorum* 3.74.

⁴⁸ See Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 360-2.

persons from eligibility from local magistracies, including on the basis of condemnation in various actions:

Quei furtei quod i<ps>e fecit fecerit condemnatus pactusue est erit; | queiue iudicio fiduci<ae>, pro socio, tutelae, mandatei, iniuriarum deue d(olo) m(alo) condemnatus est erit; queiue lege | {P}Laetoria ob eamue rem, quod aduersus eam legem fec<i>t fecerit, codemnatus est erit; (Il 110-2).

Who has or shall have been condemned or shall have made a pact for *furtum* that he has committed or who has or shall have been condemned in a judgment of *fiducia*, partnership, *tutela*, mandate, *iniuria* or *de dolo malo* or who has or shall have been condemned under the *Lex Laetoria* because he has or shall have committed an act contrary to the statute.⁴⁹

The penal action under the *Lex Laetoria* seems a likely candidate for inclusion in the list of *actiones famosae*.⁵⁰ It is included in the list of actions in a Republican inscription, which otherwise matches the list in the *Corpus* sources for *actiones famosae*, condemnation for which excluded people from the municipal council.⁵¹ It is also linked in the passage of Cicero from the *De Natura Deorum*, discussed above, with *furtum*, *tutela*, *mandatum*, *pro socio*, *fiducia* and *de dolo malo*.⁵² The content of the law is imperfectly known, but it appears to have established penal and noxal actions based on the defrauding of *minores*.⁵³ The subject matter of the law therefore had something in common with the subject matter of *tutela*, further suggesting that it should be included among the *actiones famosae*. Finally, there

⁴⁹ *Tabula Heracleensis* ll. 110-2.

⁵⁰ See Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 385 *ad* ll. 110-2 and J. González, 'The Lex Irnitana: A New Copy of the Flavian Municipal Law' (1986) 76 *Journal of Roman Studies* 147-243, 228 *ad* ll. 6-16. See also Lenel, *Edictum Perpetuum*, above n. 14, 80-1, who would include the law in the relevant Praetorian Edict clause on postulation.

⁵¹ *Tabula Heracleensis* ll. 111-2.

⁵² Cicero, *De Natura Deorum* 3.74: They are included in the same sentence as springing from the same source, '*inde ... inde ... inde*', i.e. reason.

⁵³ Those between 12 and 25. On this law see Buckland, *Textbook*, above n. 37, 169-70.

is a *Digesta* text, referring to a *filius familias*' liability on account of *dolus*, that could refer to the provisions of this *lex*.⁵⁴ There is evidence that liability based on *dolus*, as opposed to *culpa*,⁵⁵ was important in determining whether an *actio* was *famosa* or not, although *dolus* could form the basis for liability in a non-infaming *actio*.⁵⁶ The exclusion of this action from the later lists contained in the *Digesta* and *Institutiones* can probably be explained by the law's obsolescence.⁵⁷

There is clear evidence that the *actio de dolo malo et fraude*, although absent from the list of *actiones* in Gaius, existed prior to his age as it appears in earlier lists, such as the list of *actiones* contained in the *Lex Irnitana*. This law contains a provisions strikingly similar to that of the of the *Este Fragment*, with some additional *actiones*, in a list of cases over which there was jurisdiction in the *municipium*, provided the matter was worth 1000 sesterces or less:⁵⁸

[Qu]i eiu[s] municipi municipes incolaeue erunt, q(ua) d(e) r(e) ii inter se suo alte[r]i<us>ue nom[i]n<e> qui municeps incolaeue sit priuatim intra fines eius [mu]nicipi agere petere persequi uolent, quae res HS (sestertium) ∞ (mille) minorisue [er]it, neque ea res diuidua quo fraus huic legi fieret facta sit fiatue aut de capite libero deueu maiore pecunia quam HS (sestertiis) ∞ (mille) praeiudicium futurum erit sponsioe {[s]pensioneue} facta futuraue erit, neque ea res agetur qua in re u[i] factum sit quod non ex interdicto decretoue iussuue eius qui iure dicundo praerit factum sit, neque de libertate, neque pro socio aut fiduciae aut mandati quod d(olo) m(alo) factum esse dicatur, aut depositi, aut tutelae cum quo qui{s} suo nomine [q]uid earum rerum fecisse dicatur, aut lege Laetoria, aut d[e] spo]nsione quae in

⁵⁴ *Digesta* 4.4.24.3 (Paul): Buckland, *Textbook*, above n. 37, 169 n. 10 for the possible relevance.

⁵⁵ On the distinction see Kaser, *Roman Private Law*, above n. 37, 152-4.

⁵⁶ See *Collatio* 10.2.4: '*Depositum damnatum infamis est: qui uero commodati damnatur, non fit infamis: alter enim propter dolum, alter propter culpam condemnatur*'. See also D'Ors, 'Una Nueva Lista', above n. 34, 2588.

⁵⁷ D'Ors, above n. 34, 2577, 2579 and 2582.

⁵⁸ *Lex Irnitana* 84.

probrum facta esse dic[a]tur, aut d(e) d(olo) m(alo) et [fraud]e, aut furto cum homine libero liberaue, aut cum seru[o dum i]d ad dominum dominamue pertinebit, aut iniur[iaru]m cum homine libero libera{m}ue agetur, eaue de re [aliquid] praeiudicium futurum sit de capite libero, de is re[bus etia]m, si uterque inter quos ambig{er}etur uolet, de ceteris quo[que o]mnibus de quibus priuatim agetur neque in iis pare[iudici]um de capite libero futurum erit, et omnium rerum [dumtaxa]t de uadimonio promittendo in eum [locum in] quo is erit qui [e]i prouinciae praeerit futurusue esse uidebitur eo die in quem ut uadimonium promittatur postulabitur, Iuir(i), qui ibi i(ure) d(icundo) praeerit, iuris dictio, iudicis arbitri recuperatorum, ex is qui ibi prop[osi]ti erunt, iudici datio addictio, it[e]m eadem condicione, de eo quod HS (sestertium) ∞ (mille) minorisue erit, aedilis qui ibi erit iuris dictio iudicis arbitri recuperatorum ex eodem genere iudicioque datio addictioq(ue) esto.

Whichever *municipes* or *incolae* of that *municipium* wish privately within the boundaries of that *municipium* to bring an action against or sue or claim against each other on any matter in their own names or in that of someone else who is a *municeps* or *incola*, provided that the matter is worth 1000 sesterces or less and has not been or is not divided in order to evade this statute, and provided that there will not be a *praeiudicium* concerning a free person or a larger sum than 1000 sesterces, and provided that there has not been and will not be a *sponsio*, and provided that the matter at issue is not one in which there has been *uis* other than under the interdict, judgment or order of the person who is in charge of the administration of justice, and provided the case is not over freedom, or over partnership or *fiducia* or mandate, involving an accusation of wrongful intent, or *depositum* or *tutela*, brought against someone who is accused of having done any of those things in his own name, or under the *Lex Laetoria*, or over a *sponsio* which is said to have been made *in probrum*, or over wrongful intent, or over *fraus*, or over theft brought against a free man or woman or brought against a slave so long as it relates to his master or mistress, or over *iniuria* brought against a free man or woman, and provided that there be no *praeiudicium* concerning a free person in this matter; the *duumuir* who is in charge of the administration of justice there is to have jurisdiction and the right of granting and assigning a *iudex* or arbiter or *recuperatores* from those (whose names are) displayed there, and a trial; and even about these matters if each of the two parties is willing; and about all other matters about which actions are brought privately and in which there will not be a prejudgment concerning a free person; and he is to have

jurisdiction [at any rate] over the promise of a *uadimonium* concerning all matters for the place in which the person who governs that province will be or is expected to be on that day for which the request for the promise of the *uadimonium* is made. And likewise the Aedile who is there is to have jurisdiction and the right of granting and assigning a *iudex* or arbiter or *recuperatores* from the same group and a trial, under the same conditions concerning anything which is worth 1000 sesterces or less.⁵⁹

This list contains actions listed in the Praetor's Edict by the *Digesta* and Gaius: *pro socio*, *fiducia*, *mandatum*, *depositum*, *tutela*, *de dolo malo et fraude*, *furtum*, and *iniuria*. It also contains three actions not listed either in the *Corpus* sources on the Edict or in Gaius: actions concerning liberty, the *sponsio in probrum facta* and an action under the *Lex Laetoria*, the last of which is found also in the *Tabula Heracleensis* and has already been discussed.⁶⁰ This raises the question as to whether these three actions should also be considered *actiones famosae*.

The nature of the *sponsio in probrum facta* is a difficult question to address. A specific *sponsio in probrum facta* is not addressed in detail in the *Corpus Iuris Ciuilis* or any other legal source.⁶¹ A *sponsio* was a judicial wager, where the parties made a wager for a nominal sum on the truth of either the plaintiff's claim or the defendant's assertion or counter assertion.⁶² The closest text we have is a passage of Livy, dealing with the dispute between the censors for 179 BCE, where Fulvius Nobilior alleged that his colleague had *in probrum suum*

⁵⁹ Translation: Crawford, in González, 'Lex Irnitana', above n. 50, 195.

⁶⁰ There is controversy surrounding the name, also referred to as the *Lex Plaetoria*: Thomas, *Textbook*, above n. 24, 467.

⁶¹ A fragment of the *Lex Coloniae Genetivae* appears to have dealt with it: *Lex Coloniae Genetivae*, Fragment 8 see Crawford (ed.), *Roman Statutes*, above n. 38, vol. II, 449.

⁶² See Gaius, *Institutiones* 4.93 *et seq* and H. Roby, *Roman Private Law in the Times of Cicero and of the Antonines* (Cambridge, Cambridge Uni. Press, 1902) 2 Vols., vol. 2 374-6 and J. Crook, 'Sponsione Provocare: Its Place in Roman Litigation' (1976) 66 *Journal of Roman studies* 132-8.

sponsionem factam ('made a *sponsio* to his (i.e. Fulvius') shame').⁶³ There are, indeed, several other texts where *sponsiones* were made, or offered, over matters that may be loosely grouped together as regarding personal reputation, such as:⁶⁴

- who should take credit for a particular naval victory;⁶⁵
- the truth or falsity of the charges for which a person was expelled from the Senate;⁶⁶
- eligibility for public office;⁶⁷
- whether a delict had been committed;⁶⁸
- whether a man was good or not;⁶⁹ and
- whether a man had slept with a free-born male or a prostitute.⁷⁰

D'Ors argues that *probrum* should be read as a synonym for *infamia*.⁷¹ *Probrum* is given a definition in the *Digesta*, where it is stated that something may be *probrum* by nature or by custom, *furtum* and adultery being examples of the former, condemnation of *tutela* the latter.⁷² These cases both resulted in *infamia*. However, *probrum* also has a wider meaning, for example, Cicero *de Legibus* 3.7 deals with the grounds for which a Censor might expel someone from the Senate, which, while overlapping with some grounds of legal *infamia* as in the Praetor's Edict, is not co-extensive with it.⁷³ It seems certain that what is covered is a *sponsio* that brings honour into question. It could equally be one that is made for

⁶³ Livy, 40.46.14. What the *sponsio* was about is unknown.

⁶⁴ These texts are drawn from Crook, '*Sponsione Provocare*', above n. 62, 132-4.

⁶⁵ Valerius Maximus, 2.8.2.

⁶⁶ Livy, 39.43.5; Plutarch, *Flaminius* 19; Plutarch, *Cato Maior* 17.

⁶⁷ *Tablula Herculanenses* 83 and 84 with Crook, '*Sponsione provocare*', above n. 62, 132 and 138.

⁶⁸ Cicero, *In Verrem* 5.54.141.

⁶⁹ Valerius Maximus 7.2.4 see also Aulus Gellius, *Noctes Atticae* 14.2.21.

⁷⁰ Valerius Maximus 6.1.10.

⁷¹ D'Ors, 'Una Nueva Lista', above n. 34, 2585.

⁷² *Digesta* (Ulpian) 50.16.42.

the sake of shaming another person, as in the first example from Livy quoted above,⁷⁴ (taking *in* as ‘for the purpose of *probrum*’)⁷⁵ or one where a person makes a *sponsio* to protect his own reputation, such as the issue of whether a sexual partner was free or a prostitute (taking *in* as ‘in relation to *probrum*’).⁷⁶ In either interpretation, the rationale for the inclusion of such an action in this list is the same as for the other cases, known to be *actiones famosae*: it would have serious implications for the reputation of the parties involved. Were these implications necessarily the imposition of *infamia*, either on the loser of the *sponsio* for making it to slander another, as D’Ors argues,⁷⁷ or because the loser had been found to have committed the shameful action about which the *sponsio* was concerned? I think that the evidence does not support such a claim. A claim for a *calumnia* type punishment seems unjustified as the *sponsio* could be used as both a means of defence and attack,⁷⁸ and the consequences of an adverse outcome from either tactic could be harmful to reputation. *Probrum* is also a wide enough term to embrace conduct that would not otherwise incur *infamia* in the legal sense. Further, the fact that *sponsiones* were used freely in political action, whereas cases of *iniuria* were not, suggests that the consequences attaching to a *sponsio* were less than to *iniuria*, a known *actio famosa*.⁷⁹ It is therefore difficult to determine whether a *sponsio in probrum* is an *actio famosa*, or rather an action included in this list due to its possible adverse affect on reputation.

⁷³ See Kaser, ‘*Infamia und Ignominia*’, above n. 1, 224-7.

⁷⁴ Livy, 40.46.14.

⁷⁵ This is what D’Ors argues for: ‘*Una Nueva Lista*’, above n. 34, 2585-6.

⁷⁶ Valerius Maximus 6.1.10.

⁷⁷ D’Ors, ‘*Una Nueva Lista*’, above n. 34, 2585-6.

⁷⁸ Crook, ‘*Sponsione Provocare*’, above n. 62, 136-7.

⁷⁹ See Crook, ‘*Sponsione Provocare*’ above n. 62, 136-8 on the lack of *iniuria* actions.

An action concerning liberty, while dealing with a serious issue, was unrelated to an *actio famosa*.⁸⁰

The *Lex Irnitana* does not contain the *actio ui bonorum raptorum*, contained in the list of Gaius. This is most likely because the *actio ui bonorum raptorum* is a later development, a subdivision of the *actio furti*.⁸¹

It seems clear that these actions existed as a group in Cicero's mind: he consistently describes such actions as *turpia iudicia*.⁸² Since Cicero puts these words into the mouth of an imaginary interlocutor in *Pro Caecina* 8, he evidently conceives that other people would recognise what he is talking about. The statutes, however, are instructive in that they never use a collective noun to describe the various actions contained therein, rather listing them all. This will appear as a distinctive pattern throughout the statutes discussed. Nevertheless, it appears that these actions did possess a technical collective term that is strikingly similar to the later *actio famosa* at a relatively early stage in the period under consideration: that is, *iudicium famosum*. This term is found in a *Senatus Consultum* of 19 CE found in the *Tabula Larinas* dealing with restrictions on members of the senatorial and equestrian orders participating either on the stage or in the arena.⁸³ In this SC, a penalty of non-burial is imposed upon members of the equestrian order who bring it about that *aut p[ublicam ignominiam?] | ut acciperent aut ut famoso iudicio condemnarentur* so that they are removed from

⁸⁰ D'Ors, 'Una Nueva Lista', above n. 34, 2586.

⁸¹ González, 'The *Lex Irnitana*', above n. 50, 228. D'Ors also sees it as being encompassed within the ambit of *furtum*, 'Una Nueva Lista', above n. 34, 2584.

⁸² Cicero, *Pro Caecina* 8; *Pro Roscio Amerino* 111: *Mandatum* as much a *turpe iudicium* as *furtum*. *Pro Cluentio* 119: Cicero refers to *turpia iudicia* for which persons are deprived of every honour, then gives the example of *furtum*.

⁸³ See in general, Levick, 'The *Senatus Consultum* from Larinum', above n. 22.

the equestrian order and can appear on stage or in the arena without penalty.⁸⁴

Suetonius makes a strikingly similar comment his life of Tiberius when relating events that appear to be associated with the SC, stating that:

Et ex iuventute utriusque ordinis profligatissimus quisque, quominus in opera scaenae harenaeque edenda Senatus consulto teneretur, famosi iudicii notam sponte subibant.

Also the most profligate from the youth of each order, lest they be prohibited by a *Senatus Consultum* from appearing on the stage or in the arena, were voluntarily undergoing the *nota* of a *famosum iudicium*.⁸⁵

In light of the close parallel between Suetonius' words and the SC, it is quite probable that Suetonius is using technical language. The phrase *famosum iudicium* appears in the *Digesta* as well in contexts where it must be referring to civil actions.⁸⁶ This also makes contextual sense in the SC. It is unlikely that the young *equites* being referred to were securing condemnation in *iudicia publica*, for the simple reason that, as will be discussed below, the majority of them in existence at this time involved either capital penalties or at least exile, which would have prevented any young aspiring actors or gladiators from appearing on stage or in the arena.⁸⁷ Of the four *iudicia publica* not involving capital penalties, the *Lex Iulia de Ambitus*, *Lex Iulia Repetundarum* and *Lex Iulia de Residuis* were

⁸⁴ *Tabula Larinas* ll. 12-3.

⁸⁵ Suetonius, *Tiberius* 35.2.

⁸⁶ *Digesta* 12.2.9.2 (Ulpian) from book 22 of Ulpian's Edict commentary, see O. Lenel, *Palingenesia Iuris Ciuilis* (Graz, Akademische Druck, 1960) 2 Vols., vol. II, 543-6; *Digesta* 50.17.104 (Ulpian) from Ulpian's second book on the Edict, see Lenel, *Palingenesia*, vol. II, 424-6. Ambiguous is 47.20.2 (Ulpian) that *stellionatus* is not a *famosum iudicium*, as *stellionatus* is also neither a public nor private action: *Digesta* 47.20.1 (Papinian).

⁸⁷ The texts containing the penalties under various *iudicia publica* are discussed below.

not readily available to people who had not stood for public office,⁸⁸ leaving only the *Lex Iulia de Annona*.

The existence at this early stage in a legal document of the phrase *famosum iudicium* raises the issue as to why such *iudicia* were known by this term. Was it because people convicted therein became *famosi* and as a consequence underwent a certain specified group of penalties? Suetonius says that they underwent a *nota*, a ‘disgrace’, but was it a disgrace with specific legal consequences, i.e. *infamia*? It is clear from Gaius that the Edict passages dealing with these delicts did not state that *infamia* or some other such term was a consequence, but this does not rule out the existence of a relevant term. One passage of Cicero touches on the issue, but is inconclusive:

‘Est enim turpe iudicium’ – Ex facto quidem turpi. Videte igitur quam inique accidat, quia res indigna sit, ideo turpem existimationem sequi; quia turpis existimatio sequatur, ideo rem indignam non uindicari.

‘For it is a disgraceful case [*tutela, mandata, societas*]’ – indeed, from a disgraceful act. Do you see, therefore, how unfairly it comes about, because the case is disgraceful, therefore a disgraced reputation follows; because a disgraced reputation follows, therefore the disgraceful case is not punished.⁸⁹

This passage implies both that disgrace followed conviction and that the adjective *turpis* was applied to *iudicium* due to the nature of the crime. More instructive perhaps is the lengthy disquisition on the nature and history of the *actio mandati* in the *Pro Roscio Amerino*. Here Cicero states that the ancestors, *maiores*, considering a negligent breach of trust to be highly dishonourable *itaque mandati constitutum est iudicium non minus turpe quam furti* (‘and thus an action of

⁸⁸ Levick, ‘The *Senatus Consultum* from Larinum’, above n. 22, 112. Non-capital: Justinian, *Institutiones*, 4.18.11.

⁸⁹ Cicero, *Pro Caecina* 8.

mandate was created, no less *turpis* than theft').⁹⁰ Here, *turpis* appears to go to the consequence of conviction, rather than the nature of the crime. The evidence is tantalising, but inconclusive.

Texts subsequent to Gaius, and external to the Justinianic tradition, use the term *infamis* or *famosus* to describe people condemned of these actions.⁹¹ The fact that these *actiones* form a coherent group throughout the imperial period explains the need for a collective descriptive phrase, such as *actiones famosae* or *famosa iudicia*. This makes it possible that the various references to *actiones famosae*,⁹² and variants,⁹³ in the *Corpus* are genuine.

Further support for the authenticity of the phrase *actio famosa*, at least in later writers, is the positioning of the noun and adjective in the various authors who use the phrase. Macer and Marcellus, who each use the phrase once, put the adjective second, i.e. *actio famosa*; Paul, who uses it once, divides the adjective from the noun; Ulpian, who uses the phrase seven times always puts the adjective first, i.e. *famosa actio*.⁹⁴ This preference for positioning of adjective before the noun is

⁹⁰ Cicero, *Pro Roscio Amerino* 111.

⁹¹ *Furtum: Pauli Sententiae* 22.31.15 ('*famosus*'); *depositum: Collatio* 10.2.4 (Modestinus) ('*infamis*'); *iniuria: Pauli Sententiae* 5.4.9 ('*famosus*').

⁹² *Digesta* 2.4.10.12 (Ulpian), 3.2.6.1 (Ulpian), 3.2.7 (Paul), 3.3.73 (Paul), 4.1.7.1 (Marcellus), 4.3.1.11 (Ulpian), 37.15.5.1 (Ulpian), 37.15.7pr (Ulpian), 40.14.6 (Ulpian), 47.10.7pr (Ulpian), 48.19.10.2 (Macer); *Codex Iustinianus* 5.12.1.2 (201 CE), 5.21.2 (290/3 CE) 5.55.1 (223 CE).

⁹³ *Famosa causa: Digesta* 44.7.36 (Ulpian), 46.3.7 (Ulpian), 49.9.1 (Ulpian); *causa famae: Digesta* 3.3.39.7 (Ulpian), *famosum iudicium: Digesta* 3.1.1.10 (Ulpian), 12.2.9.2 (Ulpian), 47.20.2 (Ulpian), 50.17.104 (Ulpian); *causa existimationis: Digesta* 50.17.104 (Ulpian); *delictum famosum: Digesta* 4.8.32.7 (Paul, referring to Julian); *turpis actio: Digesta* 17.2.56 (Paul), 25.2.2 (Gaius).

⁹⁴ *Digesta* 3.2.6.1, 2.4.10.12, 37.15.5.1, 37.15.7pr, 40.14.6, and 47.10.7pr (Ulpian).

found in respect to other Ulpianic phrases, including *famosa causa*⁹⁵ and *famosum iudicium*,⁹⁶ suggesting that these Ulpianic passages are genuine.⁹⁷

Calumnia and Praeuaricatio

Persons condemned of *calumnia* in a *iudicium publicum* are mentioned twice in relation to the Praetor's Edict – in the second Edict,⁹⁸ prohibiting postulation for another altogether, and in the third Edict, prohibiting postulation except for certain specified persons.⁹⁹ This apparent contradiction can be reconciled on the basis that, by *Senatus Consultum*, persons so condemned were prohibited from appearing on behalf of others before *iudices pedanei*,¹⁰⁰ but could do so before the Praetor himself.

Calumnia and *praeuaricatio* are also found in the *Tabula Heracleensis*, discussed below, as grounds of ineligibility for public office.¹⁰¹ Unlike the Praetor's Edict, there is no restriction in the *Tabula* to *calumnia* in a *iudicium publicum*.

Drawing on texts in relation to edictal restrictions on *procuratores* and *cognitores*, a specific instance of *calumnia* outside a *iudicium publicum* is included, that of a woman who claims possession through *calumnia* on behalf of an unborn child when she is either not pregnant or pregnant to someone other than

⁹⁵ *Digesta* 44.7.36, 46.3.7 (2.4.10.12 is an exception) (Ulpian).

⁹⁶ *Digesta* 3.1.1.10, 12.2.9.2 and 50.17.104 (47.20.2 is an exception) (Ulpian).

⁹⁷ Although this feature does not appear to qualify as a mark of Ulpian's style in T. Honoré, *Ulpian* (Oxford, Clarendon Press, 1982) Ch. 2.

⁹⁸ *Digesta* 3.1.1.6 (Ulpian).

⁹⁹ *Digesta* 3.2.1 (Julian).

¹⁰⁰ Delegated judges, see *Iudex Justinian* 3.3: A. Berger, 'Encyclopedic Dictionary of Roman Law' (1953) 43 *Transactions of the American Philosophical Society* 332-808, 518.

¹⁰¹ *Tabula Heracleensis* ll. 119-20.

the man against whom she is bringing the claim.¹⁰² This inclusion is the only reference to *infamia* resulting from *calumnia* in the context of civil proceedings in *Digesta* 3.2.¹⁰³ It is clear that a *iudicium calumniae* did exist in classical times for civil actions for one tenth of the amount claimed in the original action.¹⁰⁴ There is a suggestion that Gaius originally contained a reference to *infamia* in the context of *calumnia*, but this restoration is difficult to sustain.¹⁰⁵ Under the principate, when most cases were tried *extra ordinem*, it appears that a *calumniator*, in either civil or criminal cases suffered *extra ordinem* punishment, including exile, *relegatio* and removal from the *ordo*.¹⁰⁶

In addition, a Republican *Lex Remmia* also imposed penalties on a *calumniator*.¹⁰⁷

The law is referred to only twice in the legal writings of the principate, neither text specifying the applicable punishment.¹⁰⁸ Cicero mentions two penalties, the

¹⁰² *Digesta* 3.2.15-9.

¹⁰³ Indeed, a constitution in the *Codex Iustinianus* appears to imply that *calumnia* could only be claimed in relation to criminal proceedings: *Codex Iustinianus* 9.46.5 (Diocletian and Maximian): ‘*Qui calumniatores pronuntiantur, in publicorum dumtaxat iudiciorum quaestionibus, non etiam in liberalibus causis, quae priuatas disceptationes continent, periclitari solent*’.

¹⁰⁴ Gaius, *Institutiones* 4.174-81.

¹⁰⁵ There is a conjectured restoration to Gaius, *Institutiones* 4.171 of <modo metu infamiae> in relation to vexatious litigants based on Justinian, *Institutiones* 4.16pr. Justinian, *Institutiones* 4.16 is clearly drawn from Gaius, *Institutiones* 4.171-83, although modified to include later changes to *calumnia* proceedings and penalties; however, the inclusion of this phrase requires the postulation of a lacuna in the, admittedly fragmentary at this point, Veronese *Codex* of Gaius. It may be that the phrase was included in the Justinianic text to attempt to link the disparate contents of the chapter, which concludes with some text based on Gaius 4.182 (Justinian 4.16.2), which deals with *actiones famosae*, and Gaius 4.183 (Justinian 4.16.3) on the commencement of litigation, both passages being unrelated to the chapter title on the penalties associated with litigation. While 4.16.2 deals with *infamia*, this is unrelated to the penalties for vexatious litigants.

¹⁰⁶ See *Digesta* 47.10.43 (Gaius) and *Pauli Sententiae* 1.5.2 = *Digesta* 48.16.3: J. L. Strachan-Davidson, *Problems of the Roman Criminal Law* (Oxford, Clarendon Press, 1912) 2 Vols., vol. II, 138.

¹⁰⁷ In force before 80 BCE, see Cicero, *Pro Roscio Amerino* 55 and Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 205.

¹⁰⁸ *Digesta* 22.5.13 (Papinian) notes that there is nothing in the law preventing persons condemned under a *iudicium publicum* giving evidence. *Digesta* 48.16.1.2 (Marcian) notes simply that someone ‘*calumniatoribus poena lege Remmia irrogatur*’ without stating the penalty. Strachan-Davidson, *Problems*, above n. 106, vol. II, 137-8.

apparent branding of a *calumniator* with the letter ‘K’ and a prohibition on making future accusations.¹⁰⁹

The *Senatus Consultum Turpillianum* of 61 CE extended the consequences of *calumnia* to those who abandoned an action.¹¹⁰

Perhaps related to *calumnia*, it has also been suggested that unsuccessful delations to the *fiscus* resulted in *infamia* under the Praetor’s Edict.¹¹¹ No source, Justinianic or otherwise, states this. As noted in Chapter Two, there are two passages dealing with circumstances in relation to denunciations to the *fiscus* where *infamia* does not result. The first is a statement by Marcian, that a person is not *famosus* who brings a case common to himself and the treasury, even if he loses.¹¹² The second passage is one of Callistratus, that denunciations may be made to the *fiscus* that do not harm *fama* in certain circumstances, for example, where the denunciation is not for the sake of reward, where it is undertaken for the sake of revenge, or where the person is pursuing a case in the name of their *res publica*.¹¹³ The implication of the Callistratus passage is that merely *making* a delation could, except in certain circumstances, harm a person’s *fama*. That delation was punished in and of itself, possibly by something affecting *fama*, is supported by laws collected in the *Codex Iustinianus*, referring, for example, to

¹⁰⁹ Cicero, *Pro Roscio Amerino* 57: ‘[L]itteram illam, cui uos usque eo inimici estis, ut etiam Kal. omnes oderitis, ita uehementer ad caput adfigent, ut postea neminem alium nisi fortunas uestras accusare possitis’. Strachan-Davidson, *Problems*, above n. 106, vol. II, 139-42 doubts the historicity of the branding claim.

¹¹⁰ See *Digesta* 48.16; *Codex Iustinianus* 9.45 and *Digesta* 50.2.6.3 (Papinian): judges who abandon a charge are *notentur ignominia* in accordance with the *SC Turpillianum*. Tacitus, *Annales* 14.41 ‘Additur senatus consulto, qui talem operam emptitasset uendidissetue perinde poena teneretur ac publico iudicio calumniae condemnatus’. A. H. J. Greenidge, *Infamia: Its Place in Roman Public and Private Life* (Oxford, Clarendon Press, 1894) 85.

¹¹¹ Greenidge, *Infamia*, above n. 110, 140.

¹¹² *Digesta* 49.14.18.7 (Marcian).

¹¹³ *Digesta* 49.14.2pr (Callistratus).

the *macula* of being a *delator*.¹¹⁴ The implication of the Marcian passage appears to be that a losing case results in a person becoming *famosus*, unless the case was common to himself and the *fiscus*. The conceptual overlap between *calumnia* and an unsuccessful accusation of this sort is clear, but, the actual implications are opaque in terms of the relationship between the legal regime here, the Edict and exclusion from public *honores*, i.e., is a person *famosus* for the purposes of the Praetor's Edict, or for the purpose of exclusion from *honores*, or both? It is also unclear when this regime was put in place, both the jurists being late second/early third century and the earliest preserved constitution on the issue of punishing *delatores* from the early third century CE.¹¹⁵

Ignominious Dismissal from the Army

Ignominious dismissal from the army is only mentioned in the context of the Praetor's Edict in imperial texts contained in the *Corpus Iuris Ciuilis*. Is there any reason to doubt that people so dismissed were included in the Edict? There appears not to be, the *Digesta* passage discussing such dismissal at some length in relation to the Edict is from the appropriate book of Ulpian and makes referral to Pomponius, suggesting that the definition of who would fall within this classification had been a topic of legal discussion since at least the time of the codification of the Edict. As it is thought that Salvius Julian made few substantive additions to the Edict when he codified it,¹¹⁶ it seems likely that this category of persons was included in the second Edict prior to codification. Similarly to

¹¹⁴ See, in general, *Codex Iustinianus* 10.11. See especially *Codex Iustinianus* 10.11.3 (241 CE): 'nulla macula uel crimine delatoris adspersitur is ...'.

¹¹⁵ *Codex Iustinianus* 10.11.3 (241 CE).

¹¹⁶ The only explicit reference to additions by Julian is to a *noua clausula Iuliani* in *Digesta* 37.8.3 (Marcellus): H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (3rd ed., Cambridge, Cambridge Uni. Press, 1972) 357.

calumnia and the *actiones famosae*, persons dismissed ignominiously also appear in the *Tabula Heracleensis*.¹¹⁷

Professions

Two professions are referred to in the second Edict as bringing their practitioners under its ambit: actors and pimps. Again, as in relation to those ignominiously dismissed from the army, the pertinent *Digesta* excerpts from Ulpian refer to jurists as far back as Labeo, for actors,¹¹⁸ and Pomponius, for pimps,¹¹⁹ suggesting that these professions were the subject of legal discussion, presumably in the context of the Edict, prior to the Edict's codification.

As noted above, in the classical conception of *infamia* referred to by Gaius, beast fighters ('*bestiarii*'), listed in the second Praetor's Edict,¹²⁰ would be included as persons undergoing legal disabilities in relation to postulating for another and in relation to *cognitores* and *procuratores*. The inclusion of *bestiarii* in the second Edict raises the issue of the status of *lanistae* and *auctorati*, gladiator trainers and gladiators. It has been argued that they should be included among the *infames*.¹²¹ There are three items of evidence that support this proposition: at a general level, the disrepute in which such people were held in Rome;¹²² the inclusion of *auctoratii* and *lanistae* in lists contained in sources external to the *Corpus Iuris*

¹¹⁷ *Tabula Heracleensis* ll. 120-1.

¹¹⁸ *Digesta* 3.2.2.5 (Ulpian).

¹¹⁹ *Digesta* 3.2.4.3 (Ulpian).

¹²⁰ *Digesta* 3.1.1.6 (Ulpian).

¹²¹ E.g., Lenel, *Edictum Perpetuum*, above n. 14, 79.

¹²² See, e.g., G. Ville, *La gladiature en Occident des origines à la mort de Domitien* (Bibliothèque des Écoles françaises d'Athènes et de Rome 245, Rome, École Française de Rome, 1981) 341-3 and T. Wiedemann, *Emperors and Gladiators* (London, Routledge, 1992) 28: Tertullian, *De Spectaculis* 22.3, which, with rhetorical license, highlights the ambivalent attitude to gladiators.

Ciivilis of persons undergoing other legal disabilities that coincide to a large extent with the lists included in relation to the Edict; and, finally, the fact that an explanation can be given for their exclusion from the lists, i.e., gladiatorial combat, though not beast fights, had largely disappeared by Justinian's era, rendering mention of these professions superfluous.¹²³ The clearest example of the removal of references to gladiators is in an excerpt in the *Digesta* dealing with those excluded from giving evidence under the *Lex Iulia de ui Publica et Priuata*.¹²⁴ This list is also given in the *Collatio*,¹²⁵ though the excerpt is from a different writer. The *Digesta* reference to this passage omits the *auctoratii* included in the *Collatio*. On the basis of this omission, it has been argued that *auctoratii* could also be restored to the *Digesta* excerpt dealing with the *Lex Iulia et Papia*, where actors and *bestiarii* are excluded from a provision granting an exemption from *munera* to *liberti* who have two children.¹²⁶ Similarly, in the *Tabula Heracleensis*, discussed below, both are excluded from holding municipal office, along with other persons excluded from postulating under the Edict.¹²⁷ The evidence of these two lists, however, appears inconclusive. The former does not include *bestiarii*, and the latter makes no mention of *lanistae*. Gladiators and *lanistae* also appear with actors and *lenones*, found in the third Praetorian Edict in the *Tabula Larinas*, where the offspring of such persons are apparently exempted

¹²³ Wiedemann, *Emperors and Gladiators*, above n. 122, 29 see 156 *et seq* on the disappearance of the gladiatorial games and imperial legislation against them.

¹²⁴ *Digesta* 22.5.3.5 (Callistratus) Also referred to as two separate statutes, contrast *Digesta* 48.6 and 48.7 with *Codex Iustinianus* 9.12.

¹²⁵ *Collatio* 9.2.2 (Ulpian): '*quiue depugnandi causa auctoratus erit, quiue ad bestias depugnare se locauit locauerit ...*'.

¹²⁶ See *Digesta* 38.1.37pr (Paul) and the reconstruction of the passage in Crawford (ed.), *Roman Statutes*, above n. 38, vol. II, 801-9, especially the commentary *ad* Ch. 7 (Ch. B).

¹²⁷ *Tabula Heracleensis* ll. 112-3: '*queiue depugnandei caussa auctoratus est erit fuit fuerit*' and l. 123: '*queiue lanistaturam ... fecit fecerit*': Lenel, *Edictum Perpetuum*, above n. 14, 79.

from punishments applicable to people who act or appear in the arena.¹²⁸ These passages make it clear that this group of professions was closely associated in Roman legal thinking and present a strong case for the inclusion of gladiators and *lanistae* in the Praetor's Edict, although whether they appeared in the second or third Edict remains indeterminate.¹²⁹

Marriage within Mourning Period¹³⁰

Digesta 3.2.1 includes men who marry women within the traditional mourning period as well as *patres familias* who allow sons *in potestate* to marry women within the traditional mourning period for their husband's deaths or allow their daughters *in potestate* to marry within this period.¹³¹ A passage very similar to this is found in the *Fragmenta Vaticana*, which, in addition to those mentioned in the *Digesta*, includes women who do not mourn their husbands, parents or children as is customary and *sui iuris* women who marry within the mourning period.¹³² The context of this latter passage appears to be a discussion of *cognitores* and *procuratores*,¹³³ and, as we know from Gaius, *ignominiosi* included those who could not give or be given as *procuratores* or *cognitores*.¹³⁴ This passage makes it likely that *Digesta* 3.2.23, taken from the book of Ulpian's commentary on the Edict in relation to who may not give *cognitores* and

¹²⁸ *Tabula Larinas* ll. 15-6 text in Levick, 'The *Senatus Consultum* from Larinum', above n. 22, 98.

¹²⁹ Lenel, *Edictum Perpetuum*, above n. 14, 79 argues that *bestiarii* were more despised. Uncertainty: Greenidge, *Infamia*, above n. 110, 121; McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 47.

¹³⁰ This is referred to as a cause of *infamia* twice in the *Leges Saeculares*: 16 and 61.

¹³¹ *Digesta* 3.2.1 (Julian).

¹³² *Fragmenta Vaticana* 320: '... quaeue uirum parentem liberosue suos uti moris est non eluxerit, quaeue, cum in parentis sui potestate non esset, uiro mortuo, cum eum mortuum esse sciret, intra id tempus, quo elugere uirum moris est, nupserit'.

¹³³ See *Fragmenta Vaticana* 317-9 and 322-3.

procuratores has been interpolated.¹³⁵ The passage in the *Digesta* states that a person did not incur *infamia* for failing to mourn parents or children, whereas the passages in the *Fragmenta Vaticana* makes it clear that women were required to mourn these relatives.¹³⁶ This also explains the contradiction between the Ulpianic excerpt and *Digesta* 3.2.25, taken from Papinian, which states that a disinherited son is required to mourn his father and mother.¹³⁷ The exclusion of any reference to women from the *Digesta* passage dealing with postulation is explicable on the basis that they are included in the second Edict, people who cannot make applications on behalf of others, therefore making it redundant to include a reference to them in the third Edict, permitting applications on behalf of certain persons.¹³⁸ It appears likely that not observing customary mourning periods was a ground for inclusion both in the second Edict and being subject to restrictions in relation to both *cognitores* and *procuratores* in classical law. This is because in the *Digesta* passage dealing with mourning in relation to postulation excerpts are used from books of Paul dealing with both postulation, book 5,¹³⁹ and with *cognitores* and *procuratores*, book 8.¹⁴⁰ The restrictions in relation to *cognitores* and *procuratores* are discussed in greater detail below.

¹³⁴ Gaius, *Institutiones* 4.182.

¹³⁵ *Digesta* 3.2.23 (Ulpian), book 8 of his commentary: Lenel, *Edictum Perpetuum*, above n. 14, XVII. See also T. Mommsen, P. Krueger, R. Schoell and G. Kroll (eds.), *Corpus Iuris Civilis* (Dublin/Zürich, Weidmann, 1963) 3 Vols., vol. 1, *Digesta*, 67 n. 19a.

¹³⁶ *Fragmenta Vaticana* 321 discusses at length the duration of mourning for parents and children.

¹³⁷ *Digesta* 3.2.25 (Papinian).

¹³⁸ *Digesta* 3.1.1.5 (Ulpian); McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 48.

¹³⁹ Lenel, *Edictum Perpetuum*, above n. 14, XVI.

¹⁴⁰ Lenel, *Edictum Perpetuum*, above n. 14, XVII.

Bigamy

The inclusion of people who enter into two betrothals or marriages at the same time, either on their own behalf or on behalf of someone in their *potestas* is not mentioned in imperial texts outside the *Corpus Iuris Ciuilis*. With regard to whether this passage reflects classical law, all that can be said is that the excerpt from Ulpian that discusses the matter in detail, *Digesta* 3.2.13pr-4, is very similar in style to other Ulpianic excerpts in this title, whereby the relevant limb of inclusion is discussed point by point, and specific quotations of the Edict are included and discussed.¹⁴¹ Indeed, the authenticity of this section of the Edict has also been accepted by other modern sources.¹⁴²

Criminal Convictions

Iudicia Publica

Did conviction in a *iudicium publicum* entail *infamia*, as understood by Gaius, under the Praetor's Edict? The *Digesta* only specifically mentions convictions entailing a capital penalty as resulting in a postulation restriction under the Edict in the context of those who cannot make an application on behalf of others.¹⁴³ The *iudicia publica* that had capital penalties were:

- *Lex Iulia de Maiestate*;¹⁴⁴
- *Lex Iulia de Adulteriis Coercendis*;¹⁴⁵

¹⁴¹ See also, e.g., *Digesta* 3.2.2, 3.2.8, and 3.2.11.

¹⁴² For example, Lenel, *Edictum Perpetuum*, above n. 14, 78.

¹⁴³ *Digesta* 3.1.1.6 (Ulpian).

¹⁴⁴ Justinian, *Institutiones* 4.18.3.

¹⁴⁵ Justinian, *Institutiones* 4.18.4. By Justinian's time adultery and *stuprum* with a man received a capital penalty. In earlier times, it appears that only *stuprum* with a male child (execution) and incest (*deportatio*) received capital penalties under this law, with adultery receiving a non-capital punishment: *Pauli Sententiae* 2.26.12-5.

- *Lex Cornelia de Sicariis et Veneficis*;¹⁴⁶
- *Lex Pompeia de Paricidiis*;¹⁴⁷
- *Lex Cornelia de Falsis*;¹⁴⁸
- *Lex Iulia de Vi Publica*;¹⁴⁹
- *Lex Iulia Peculatus*;¹⁵⁰ and
- *Lex Fabia de Plagiariis*.¹⁵¹

Of the remaining *iudicia publica*¹⁵² – *Lex Iulia de Vi Priuata*;¹⁵³ *Lex Iulia Ambitus*;¹⁵⁴ *Lex Iulia Repetundarum*;¹⁵⁵ *Lex Iulia de Annona*;¹⁵⁶ and *Lex Iulia de Residuis*¹⁵⁷ – *infamia* is only explicitly mentioned as a penalty in relation to the *lex Iulia de Vi Priuata*, although the reference is ambiguous as it is a chapter of the *Codices* dealing with the *Leges Iuliae de Vi Priuata* and *de Vi Publica* as if they were one law.¹⁵⁸

It is stated elsewhere in the *Digesta* that those convicted in a *iudicium publicum* did indeed undergo *infamia*:¹⁵⁹

Infamem non ex omni crimine sententia facit, sed ex eo, quod iudicii publici causam habuit. Itaque ex eo crimine, quod iudicii publici non fuit, damnatum infamia non sequetur, nisi id crimen ex ea actione fuit, quae eitam in priuato iudicio infamiam condemnato importat, ueluti furti, ui bonorum raptorum, iniuriarum.

Not every criminal sentence makes a person *infamis*, but only that sentence which follows from a public trial. Thus, *infamia* does not follow for a person condemned for a crime that was not tried in a public court, unless that crime arose from an action, which carries *infamia* for the

¹⁴⁶ Justinian, *Institutiones* 4.18.5; *Digesta* 48.8.1.5 (Marcian); *Digesta* 48.8.3.5 (Marcian)

¹⁴⁷ Justinian, *Institutiones* 4.18.6; *Digesta* 48.9.9 (Modestinus).

¹⁴⁸ Justinian, *Institutiones* 4.18.7; *Digesta* 48.10.33 (Modestinus).

¹⁴⁹ Justinian, *Institutiones* 4.18.8; *Digesta* 48.6.10.2 (Ulpian).

¹⁵⁰ Justinian, *Institutiones* 4.18.9; *Digesta* 48.13.3 (Ulpian).

¹⁵¹ Justinian, *Institutiones* 4.18.10, for some offences only through imperial amendment.

¹⁵² For a catalogue, see Justinian, *Institutiones* 4.18.

¹⁵³ See *Digesta* 48.7 and *Codex Iustinianus* 9.12.

¹⁵⁴ See *Digesta* 48.14.

¹⁵⁵ See *Digesta* 48.11.

¹⁵⁶ See *Digesta* 48.12.

¹⁵⁷ See *Digesta* 48.13.

¹⁵⁸ *Codex Theodosianus* (390 CE) 9.10.4 = *Codex Iustinianus* 9.12.8 (390 CE).

¹⁵⁹ *Digesta* 48.1.7 (Macer)

condemned even in a private action, such as theft, robbery with violence and injury.

The specification of *actiones famosae* such as *furtum* suggests that the *infamia* being referred to here relates to the Edict. A similar conclusion is suggested by an extract taken from book 6 of Ulpian's edictal commentary, dealing with postulation, which states that *stellionatus* involves *infamia* even though not a *iudicium publicum*, i.e., crimes that involved *infamia* under the Praetor's Edict were expected to be *iudicia publica*.¹⁶⁰ Nevertheless, the picture is complicated by a passage of Marcian on the *Lex Iulia de Vi Priuata*, a *iudicium publicum*, which states that a person is deprived of every *honor* '*quasi infamis*' ('as if an *infamis*').¹⁶¹ That is, persons condemned under the *lex Iulia* underwent a penalty similar to an *infamis*, but were not *infames*, and the penalty was not related to the Edict, but office holding and other actions in civic life. One explanation of this passage is that the original statute stated specific penalties, the deprivation of various offices, rather than using the term *infamis*, and it was a later commentator that made an observation of the similarity between the specified penalties and those undergone by *infames*. It may even be possible to reconcile this passage with those stating that persons actually become *infames* for condemnation under the *Lex Iulia de Vi Priuata*,¹⁶² by regarding the statement *quasi infamis* as a post-Classical gloss, added either in transmission or by the *Digesta* compilers.¹⁶³

In fact, no juristic discussion of the penalties under individual statutes, as opposed to the general statement of Macer quoted above, mentions *infamia*, or a cognate,

¹⁶⁰ *Digesta* 3.2.13.8 (Ulpian).

¹⁶¹ *Digesta* 48.7.1pr (Marcian).

¹⁶² *Digesta* 48.1.7 (Macer) and 48.7.8 (Modestinus).

¹⁶³ It has also been suggested that there are other textual problems with this passage, namely the placing of the phrase *ex senatus consulto*: see Kaser, 'Infamia und ignominia', above n. 1, 262.

as a penalty. This is particularly striking in the lengthy discussion of criminal statutes and penalties in the *Pauli Sententiae*,¹⁶⁴ a work that is not adverse to using the generalising term *infamis* in places where the jurists excerpted in the *Digesta* would give a catalogue of persons.¹⁶⁵

The penalties actually mentioned in relation to the *iudicia publica* are:

- *Leges Repetundarum*: The penalties under several *Leges Repetundarum* are known. Under the *Leges Calpurnia* and *Iunia*, restitution was required; the *Lex Acilia* imposed a double penalty.¹⁶⁶ By the late 80s BCE, conviction in the *quaestio de repetundis* involved the inability to act in public life.¹⁶⁷ The *Lex Iulia Repetundarum* involved ineligibility to be a judge;¹⁶⁸ removal from the senate;¹⁶⁹ ineligibility as a witness in judicial proceedings;¹⁷⁰ ineligibility to witness a will;¹⁷¹ and the ineligibility to *postulare*.¹⁷² It is unclear whether

¹⁶⁴ For the penalties under the various statutes discussed in this work see: *Paulis Sententiae* 2.26.14 (*Lex Iulia de Adulteriis*); 5.23.1, 10, 12-9 (*Lex Cornelia de Sicariis et Veneficiis*); 5.24.1 (*Lex Pompeia de Paracidiis*); 5.25.1-2, 4, 7-10, 12-3 (*Lex Cornelia Testamentaria*); 5.26.1-2 (*Leges Iulia de Vi Publica et Privata*); 5.27.1 (*Lex Iulia Peculatus*); 5.28.1 (*Lex Iulia Repetundarum*); 5.29.1 (*Lex Iulia Maiestatis*); 5.30A.1 (*Lex Iulia de Ambitus*).

¹⁶⁵ For example, contrast *Pauli Sententiae* 2.26.4 – a husband can kill ‘*infames et eos qui corpore quaestum faciunt, seruos etiam*’ with *Digesta* 48.5.25(24)pr (Macer): a husband may kill ‘*qui leno fuerit quiue artem ludicram ante fecerit in scaenam saltandi catandiuue causa prodieret iudicouue publico damnatus neque in integrum restitutus erit, quiue libertus eius mariti uxorisue, patris matris, filii filiae utrius eorum fuerit ... quiue seruus erit*’.

¹⁶⁶ A. H. M. Jones, *The Criminal Courts of the Roman Republic and Principate* (Oxford, Basil Blackwell, 1972) 74.

¹⁶⁷ *Ad Herennium* 1.20: ‘*Lex vetat eum qui de pecuniis repetundis damnatus sit in contione orationem habere*’; Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 205.

¹⁶⁸ *Digesta* 1.9.2 (Marcellus); 48.11.6.1 (Venuleius Saturninus).

¹⁶⁹ *Digesta* 1.9.2 (Marcellus); Suetonius, *Diuus Iulius* 43.

¹⁷⁰ *Digesta* 1.9.2 (Marcellus); 28.1.20.5 (Ulpian); 48.11.6.1 (Venuleius Saturninus).

¹⁷¹ *Digesta* 22.5.15 (Paul).

¹⁷² *Digesta* 48.11.6.1 (Venuleius Saturninus). Jones, *Criminal Courts*, above n. 166, 75 discussing the *SC Caluisianum* in the Cyrene edicts, S. Riccobono *et al.* (eds.), *Fontes Iuris Romani Anteiustiniani* (Florence, S. A. G. Barbèra, 1941) 3 Vols., 1.68 ll. 98-9, also argues that there was a capital charge involved. This only refers to a person, providing he is not being brought on a capital charge, being subject to the special procedure of the *SC*. This appears to me to be inconclusive in the face of the absence of any other testimony to a capital penalty under the *Lex Iulia* as the clause in the *SC* as worded, applies to a capital penalty under any law. Although our sources on penalties are incomplete, Justinian’s *Institutiones* is quite explicit about the non-capital nature of the *Lex Iulia Repetundarum*

postulare here means to make a criminal accusation, or to postulate under the Edict or both.¹⁷³

- *Leges Ambitus*: We know of several penalties under several statutes for *ambitus*. Under the *Lex Cornelia*, persons were excluded from office and the senate for ten years;¹⁷⁴ under the *Lex Calpurnia* they were also fined and under Cicero's law, people were exiled for ten years.¹⁷⁵ By the time of the *Digesta*, the *Lex Iulia Ambitus* had fallen into desuetude in Rome.¹⁷⁶ This law seems to have imposed a fine, and although the *Digesta* refers to *infamia* as a punishment, this is stated to be via a *Senatus Consultum*, rather than the wording of the statute itself.¹⁷⁷ A person who conducted a successful prosecution under the statute underwent *restitutio in integrum*.¹⁷⁸
- *Lex Iulia de Maiestate*: the statute specified the capital penalty of interdiction from fire and water;¹⁷⁹ though the penalty was later intensified and differentiated according to a person's social status.¹⁸⁰
- *Lex Cornelia de Sicariis et Veneficis*: the statute specified interdiction from fire and water,¹⁸¹ although, as with the preceding law, the penalty was later diversified according to rank and intensified, especially for those of lower social status.¹⁸²
- *Lex Cornelia de Falsis*: interdiction from fire and water or deportation.¹⁸³

(*Institutiones* 4.18.11), something that is not without significance considering the general stiffening of penalties that occurred as time progressed (see P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford, Clarendon Press, 1970) chapter 4 for the increasing harshness of penalties).

¹⁷³ A. Watson (ed.), *The Digest of Justinian* (Philadelphia, Uni. of Pennsylvania Press, 1985) 4. Vols., vol. 4., 830 translates the text as 'bringing an accusation'.

¹⁷⁴ Dio 36.38-9; Jones, *Criminal Courts*, above n. 166, 57.

¹⁷⁵ Dio 37.29.1; Cicero, *Pro Murena* 89 and *Pro Plancio* 83; Jones, *Criminal Courts*, above n. 166, 74.

¹⁷⁶ *Digesta* 48.14.1pr (Modestinus)

¹⁷⁷ *Digesta* 48.14.1.1 and 3 (Modestinus).

¹⁷⁸ *Digesta* 48.14.2 (Modestinus).

¹⁷⁹ Cicero, *Phillipics* 1.23

¹⁸⁰ *Pauli Sententiae* 5.29.1.

¹⁸¹ *Collatio* 12.5.1 (Ulpian).

¹⁸² *Pauli Sententiae* 5.23.1, 10, 12-9. See also *Collatio* 12.5.1 (Ulpian); *Digesta* 48.8.3.5 (Marcian); Jones, *Criminal Courts*, above n. 166, 74.

¹⁸³ *Digesta* 48.10.33 (Modestinus) – interdiction from fire and water; *Pauli Sententiae* 4.7.1 – deportation; Jones, *Criminal Courts*, above n. 166, 74.

- *Lex Iulia Peculatus*: there appears to have been some dispute as to the penalty under this law. In the *Pauli Sententiae* the penalty is stated to be a fine of four times the amount taken.¹⁸⁴ In the *Digesta*, however, it is stated that the penalty was originally interdiction from fire and water, today deportation, accompanied by loss of property and legal rights.¹⁸⁵ The *Digesta* interpretation is, unsurprisingly, in accordance with the status of the offence noted in the *Institutiones*.¹⁸⁶
- *Lex Iulia de Vi Publica*: Interdiction from fire and water,¹⁸⁷ later execution or *deportatio* depending on social rank.¹⁸⁸
- *Lex Iulia de Vi Priuata*: As discussed above, Marcian states that persons convicted under this law are fined 1/3 of his property, barred from being a Senator, decurion, holding any *honor*, sitting in the *ordo* or being a judge, *quasi infamis*.¹⁸⁹ In contrast, the later jurist Modestinus also says that a person convicted under this law is fined 1/3 of their property, and actually becomes *infamis*.¹⁹⁰ Marcian's statement is more in accordance with the preceding statutes and should be preferred.
- *Lex Fabia de Plagiariis*: The penalty under this statute was originally pecuniary fines.¹⁹¹ However, later constitutions increased the penalty to capital, such that lower class persons were either crucified or sent to the mines, and persons of higher status were fined part of their goods and relegated.¹⁹²
- *Lex Iulia de Residuis*: A fine of 1/3 more than the amount owed.¹⁹³

¹⁸⁴ *Pauli Sententiae* 5.27.1.

¹⁸⁵ *Digesta* 48.13.3 (Ulpian): Jones, *Criminal Courts*, above n. 166, 74.

¹⁸⁶ Justinian, *Institutiones* 4.18.9.

¹⁸⁷ Cicero, *Phillipics* 1.23; *Digesta* 48.6.10.2 (Ulpian) – not *deportatio*, as per Jones, *Criminal Courts*, above n. 166, 74.

¹⁸⁸ *Pauli Sententiae* 5.26.1.

¹⁸⁹ *Digesta* 48.7.1 (Macer).

¹⁹⁰ *Digesta* 48.7.8 (Modestinus).

¹⁹¹ *Collatio* 14.2.2 (Paul) and 14.3 (Ulpian)

¹⁹² *Collatio* 14.2.2-3 (Paul) 14.3.6; *Digesta* 48.15.7 (Hermogenian). Jones, *Criminal Courts*, above n. 166, 74.

¹⁹³ *Digesta* 48.13.5(4,3).2(5) (Marcian).

- *Lex Iulia de Adulteriis Coercendis*: Several offences were punishable under this statute. Adulterers were deprived of one half of their property and relegated to an island; adulteresses were deprived of half of their dowry and a third of their property and relegated to an island.¹⁹⁴ Persons found guilty under the statute were also barred from acting as a witness or from making a will¹⁹⁵ and adulterers also could not serve in the army.¹⁹⁶ Men who allowed themselves to be seduced by other men had half their property confiscated.¹⁹⁷
- *Lex Iulia de Annona*: The only reference to a penalty under this law is to a monetary fine.¹⁹⁸
- *Lex Pompeia de Parricidiis*: The sources are in conflict as to the penalty that this law imposed. The *Pauli Sententiae* regards Pompey's law as originally imposing the ancestral penalty of sewing people in a sack, although at the time when the *Sententiae* was composed, parricides were burned alive or abandoned to wild beasts.¹⁹⁹ However, in the *Digesta*, it is stated that Pompey's law made parricides subject to the penalty of the *Lex Cornelia de Sicariis*.²⁰⁰ Another passage in the *Digesta* appears to imply that the ancestral penalty – *poena parricidii more maiorum* – of the sack is still in use if the sea is at hand, otherwise, in accordance with a constitution of Hadrian, parricides are thrown to beasts.²⁰¹ While the reconciliation of these passages is difficult,²⁰² it is perhaps unimportant for our purposes: what is clear is that the law imposed a capital penalty.

As can be seen from the above discussion, where the specific statutes in relation to *iudicia publica*, and the penalties established by them, are discussed by jurists

¹⁹⁴ *Pauli Sententiae* 2.26.14.

¹⁹⁵ *Digesta* 22.5.14 (Papinian); *Digesta* 22.5.18 (Paul); *Digesta* 28.1.20.6 (Ulpian); McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 142.

¹⁹⁶ *Digesta* 3.2.2.3 (Ulpian); *Digesta* 49.16.4.7 (Arrius Menander); McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 142.

¹⁹⁷ *Collatio* 5.2.2: S. Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Oxford, Clarendon Press, 1991) 290.

¹⁹⁸ *Digesta* 48.12.2.2 (Ulpian).

¹⁹⁹ *Pauli Sententiae* 5.24.1.

²⁰⁰ *Digesta* 48.9.1 (Marcian).

²⁰¹ *Digesta* 48.9.9pr (Modestinus).

the term *infamia* is almost never used, instead a catalogue of penalties is given. In fact, the only mentions of *infamia* are in relation to a *Senatus Consultum* on *ambitus* and the *Lex Iulia de Vi Priuata*, both by the third century jurist Modestinus. In the latter case, this contrasts with the catalogue of disqualifications given by his rough contemporary, Marcian.²⁰³ This means that modern authors who state that the penalty under a specific statute was *infamia* are being, at least in terms of the time the statute was passed, anachronistic.²⁰⁴ This strongly suggests that the statutes themselves did not use the term *infamia* or any of its cognates in relation to the effects of these laws on persons convicted thereunder. Thus, the later use of the term in relation to conviction under these statutes is because, as Marcian says, the results of conviction are such that they resemble what a person who undergoes *infamia* suffers, i.e. they are *quasi infamis*.²⁰⁵ On this understanding, the use of *infamia* by jurists in relation to criminal convictions is much the same as Gaius' use of the term *ignominiosus* in relation to civil actions, i.e. as a useful shorthand term to describe a recurring set of circumstances. If an exclusion from postulating had existed for all *iudicia publica*, it would either have been through a specific prohibition on postulating being included in each statute, such as the prohibition on *postulare* in the *Lex Iulia Repetundarum*,²⁰⁶ or in a general statute, such as the *Lex Iulia de Iudiciis Publicis*. Such a prohibition was then effective in relation to cases before the

²⁰² For an attempted reconciliation, see R. A. Bauman, *Crime & Punishment in Ancient Rome* (London, Routledge, 1996) 44-5.

²⁰³ *Digesta* 48.7.1 (Marcian).

²⁰⁴ For example, Bauman, *Crime & Punishment*, above n. 202, 23 on *repetundae* and 29 on *ambitus*.

²⁰⁵ Levick, 'The *Senatus Consultum* from Larinum', above n. 22, 109 n. 39 states that a 'a general concept is implicit' in this passage.

²⁰⁶ *Digesta* 48.11.6.1 (Venuleius Saturninus).

Praetor under the Edict through the edictal clause prohibiting persons from postulating before the Praetor who were prohibited by another law.²⁰⁷

Cognitio

As the empire developed, new courts, the Senate, that of the Emperor and that of the Praetorian Prefect, grew up along side the traditional *quaestiones perpetuae* that had tried *iudicia publica*, all of which adopted the *cognitio* procedure used by governors.²⁰⁸ In addition to the offences established by *iudicia publica*, a number of other actions were created over time for trial under a *cognitio extra ordinem*.²⁰⁹ The importance of this development is that under the *cognitio* procedure the court had discretion with regards to the imposition of penalties.²¹⁰ Although in the Severan period, when all *leges publicae* were tried by an *extra ordinem* procedure, the penalties specified by the statutes were still said to be applicable,²¹¹ and similarly there are both rescripts and juristic discussions dealing with the relationship between *infamia* and excessive penalties, implying set penalties,²¹² nevertheless the court still appeared to have had discretion. For example, Pliny the Younger, referring to a debate on penalties in the Senate states that *putaret licere senatui (sicut licet) et mitigare leges et intendere* ('he thought

²⁰⁷ See *Digesta* 3.1.1.8 (Ulpian).

²⁰⁸ The process by which this occurred is largely unknown: Jones, *Criminal Courts*, above n. 166, 96. On the different courts see Garnsey, *Social Status and Legal Privilege*, above n. 172, chapters 1-3; Strachan-Davidson, *Problems*, above n. 106, vol. II, Chapter XIX.

²⁰⁹ Many of these are contained in *Pauli Sententiae* book 5, see also Strachan-Davidson, *Problems*, above n. 106, vol. II, 162-3 and Jones, *Criminal Courts*, above n. 166, 107-8.

²¹⁰ W. Kunkel, *An Introduction to Roman Legal and Constitutional History* (2nd ed., Trans. J. M Kelly, Oxford, Clarendon press, 1973) 73.

²¹¹ *Digesta* 48.1.8 (Paul): Garnsey, *Social Status and Legal Privilege*, above n. 172, 93. For a brief summary of this proces, see Kunkel, *Introduction*, above n. 210, 69-74.

²¹² For example, *Digesta* 48.19.10.2 (Macer); *Codex Iustinianus* 2.11(12).4 (198 CE).

that it is permitted to the Senate (and thus it is) to mitigate or increase the law’).²¹³ Indeed, the emergence of the so-called ‘dual penalty’ system and the differentiated penalties according to status found in the *Pauli Sententiae* (see above) even for *iudicia publica* indicate the scope for penal variation. What place then did *infamia* as understood in relation to the Praetor’s Edict have in this *cognitio* system? Ulpian states that provincial governors, who would try cases by *cognitio*, could impose *infamia* as a penalty.²¹⁴ It is likely that Ulpian is here contemplating civic disabilities, such as *infamia* under the Praetor’s Edict, as opposed to exclusion from office (on which see below) as a fine with *infamia* is specifically mentioned as a penalty separate from removal from the *ordo*.²¹⁵

Two *extra ordinem* offences that do appear to have involved *infamia* under the Edict are *stellionatus* and the *crimen expilate hereditatis*. The relationship between *stellionatus* (‘swindling’) and the Edict is obscure. Indeed, as discussed in Chapter Two, there even appears to be a contradiction as to whether or not conviction for *stellionatus* had as a consequence *infamia* under the Edict, though this contradiction is more apparent than real.²¹⁶ Although none of the *Digesta* passages in title 48.20, *Stellionatus*, refer to the Edict or are taken from classical works dealing with the Edict, there is a sentence in *Digesta* 3.2, attributed to book 6 of Ulpian’s commentary on the Edict, which deals with postulation.²¹⁷ In further

²¹³ Pliny, *Epistulae* 4.9.17: Jones, *Criminal Courts*, above n. 166, 96. See also *Digesta* 48.19.13 (Ulpian): ‘*hodie licet ei, qui extra ordinem de crimine cognoscit, quam uult sententiam ferre, uel grauiorem uel leuiorem, ita tamen ut in utroque moderationem non excedat*’: Strachan-Davidson, *Problems*, above n. 106, vol. II, 160-1.

²¹⁴ *Digesta* 48.19.8pr (Ulpian).

²¹⁵ *Digesta* 48.19.8pr (Ulpian)

²¹⁶ As noted in chapter two, the difference between *Digesta* 48.20.2 (Ulpian) and 3.2.13.8 (Ulpian) is that the former is referring to the nature of the procedure, rather than the penalty following condemnation.

²¹⁷ *Digesta* 3.2.13.8 (Ulpian).

evidence that *infamia*, at least as it was understood at the time of the formation of the *Corpus*, was a consequence of conviction for *stellionatus*, it can be noted that the stated penalty in the *Digesta* for the upper orders was temporary relegation or removal from the *ordo*. This penalty appears also to entail *infamia*²¹⁸ for the period of relegation.²¹⁹

Like *stellionatus*,²²⁰ the *crimen expilate hereditatis*,²²¹ established by Marcus Aurelius, was tried *extra ordinem* and existed for the plundering of an estate where an action for *furtum* did not, i.e., where the inheritance had not yet been accepted.²²² Clearly analogous with *furtum*, it is perhaps no surprise that it is stated in the chapter of the *Codex Iustinianus* on ‘*De Causis, ex Quibus Infamia Alicui Inrogatur*’, the only reference to the penalty for the offence, that a person so convicted does not evade the *furti improbioris infamiam* (‘the *infamia* of dishonourable *furtum*’).²²³ This rescript clearly implies that the content of the penalty for conviction of despoiling an inheritance was the same as the disabilities encapsulated in the *infamia* that followed condemnation of *furtum*, which includes disabilities in relation to postulating and legal representation.

²¹⁸ *Digesta* 47.20.3 (Ulpian).

²¹⁹ See, e.g., *Codex Iustinianus* 2.11(12).3 (197 CE): *infamia* not prorogued beyond period of relegation.

²²⁰ *Digesta* 47.20.2 (Ulpian).

²²¹ See Berger, ‘Encyclopedic Dictionary’, aboven 100, entry ‘*Crimen expilate hereditatis*’, 418; *Digesta* 47.19 and *Codex Iustinianus* 9.32; Greenidge, *Infamia*, above n. 110, 141.

²²² Extraordinary process: *Digesta* 47.19.1 (Marcian). Circumstances: *Digesta* 48.19.2pr (Ulpian).

²²³ *Codex Iustinianus* 2.11(12).12 (224 CE).

Bankrupts²²⁴

On the basis of reassembling the excerpts contained in the *Digesta* into their original books, Lenel has been able to identify several other categories of persons who were probably mentioned in the context of postulation restrictions.²²⁵ In particular, definitions and concepts pertaining to debtors are discussed in other contexts in the *Digesta* in excerpts taken from the parts of classical works that originally discussed postulation restrictions. Excerpts from book six of Ulpian's commentary on the Edict, the book dealing with postulation,²²⁶ in the *Digesta* include a definition of *creditores*,²²⁷ and a brief discussion of the relative speed at which a person pays debts.²²⁸ Similarly, there is an entry in the *Digesta* from book one of Gaius' commentary on the Provincial Edict, which also dealt with postulation, that gives a definition of *creditores*.²²⁹ There is also a passage from Callistratus' commentary on the Monetary Edict dealing with postulation referring to the discharging of debts.²³⁰ All these excerpts cannot be related to categories of persons mentioned in the *Digesta*'s catalogues of persons in the second and third edicts on postulation.

There are also two other passages of Ulpian, taken from book six of his commentary on the Edict, that have no relevance to persons contained in the *Digesta*'s catalogues of persons subject to postulation restrictions. The first deals

²²⁴ For what follows, see Lenel, *Edictum Perpetuum*, above n. 14, 79 and Kaser, 'Infamia und Ignominia', above n. 1, 238 nn 86-9

²²⁵ Lenel, *Edictum Perpetuum*, above n. 14, 79-80.

²²⁶ See Lenel, *Edictum Perpetuum*, above n. 14, xvi, Lenel, *Palingenesia*, above n. 86, vol. II, 439-445, esp. 444 [286].

²²⁷ *Digesta* 50.16.10, 50.16.12pr (Ulpian).

²²⁸ *Digesta* 50.16.12.1 (Ulpian)

²²⁹ *Digesta* 50.16.11 (Gaius) with Lenel *Palingenesia*, above n. 86, vol. I, 192 [69].

²³⁰ *Digesta* 46.3.85 (Callistratus) with Lenel, *Palingenesia*, above n. 86, vol. I, 94 [56].

with the period of trial, noting that it is only rarely that judgments are executed before the statutory period.²³¹ The second passage notes that a soldier who is on leave is not to be regarded as absent on state business.²³²

As Lenel notes, these excerpts appear to be relevant to certain clauses found in the *Tabula Heracleensis*, listing categories of persons excluded from holding municipal office.²³³ This inscription, as will be discussed further below, has much in common with the list contained in the Praetor's Edict. In particular, the *Digesta* passages just mentioned appear relevant to the following section of the *Tabula Heracleensis*:

Queiue in iure <abiurauit> abiurauerit bonam copiam iurauit iurauerit; quei<ue> | sponsoribus creditoribus suis renuntiauit renuntiauerit se soldum soluere non posse aut cum eis | pactus est erit se soldum soluere non posse; ... quouisue bona ex edicto | eius, qu<ei> i(ure) d(eicundo) praefuit praefuerit, praeterquam sei quouis, quom pupillus esset reue publicae causa abesset | neque d(olo) m(alo) fecit fecerit quo magis r(ei) p(ublicae) c(aussa) a(besset), possessa proscriptaue sunt erunt.

or who at a pre-trial has or shall have sworn insolvency or who has or shall have sworn *bona copia*; or who has or shall have announced to his guarantors or creditors that he cannot pay his debts or who has or shall have made a pact with them that he cannot pay his debts; ... or whose goods have been possessed and sold in accordance with the Edict of him who has or shall have jurisdiction, except if the goods are those of a pupil or one who was absent for a reason of state and did not or shall not have brought it about that he was absent by deceit.²³⁴

The definitions of Ulpian and Gaius of *creditores* can be related to the *creditores* in the text; the discussions by Ulpian and Callistratus on the payment of debts can be related to the discussion in the text here on debts and Ulpian's discussion of a

²³¹ *Digesta* 42.1.2 (Ulpian).

²³² *Digesta* 49.16.1 (Ulpian).

²³³ Lenel, *Edictum Perpetuum*, above n. 14, 79.

²³⁴ *Tabula Heracleensis* ll. 113-7.

soldier absent on state business is relevant to the mention here of an exception for persons whose goods had been seized while they were absent on state business. Lenel also relates the discussion on court time frames to the phrase in the *Tabula Heracleensis* dealing with goods seized and sold in accordance with the Edict.²³⁵

Gaius also implies in his *Institutiones* that bankrupts underwent *infamia* under the Edict as he understood it. He states that *ignominia* defiles, *contingat*, a slave instituted as heir of an insolvent person, and implies that this happens as a matter of *ius*.²³⁶ Gaius also states that a person who is bankrupt or whose goods have been seized and advertised for sale is *suspectus*, and required to give security when defending an action *in personam*.²³⁷ This is also cited as evidence that bankrupts or debtors subject to this process became *infamis*.²³⁸ The *infamia* effects of bankruptcy could be avoided by making a voluntary concession of one's goods under a *Lex Iulia*.²³⁹ A *Senatus Consultum* of uncertain date also provided that a *curator* could be appointed for *clarae personae*, such as Senators, to avoid such eminent persons having to resort to bankruptcy proceedings.²⁴⁰

Actio Depensi

Lenel also argues that the phrase from the *Tabula Heracleensis* disqualifying someone *pro quo datum depensum est erit* from holding office also would have

²³⁵ Lenel, *Edictum Perpetuum*, above n. 14, 79 n. 4; *Palingenesia*, above n. 86, vol. II, 444 [287] n. 2.

²³⁶ Gaius, *Institutiones* 2.154: '*quamquam apud Fufidium Sabino placeat eximendum eum [the slave] esse ignominia, quia non suo uitio, sed necessitate iuris bonorum uenditionem pateretur: sed alio iure utimur*'.

²³⁷ Gaius, *Institutiones* 4.102.

²³⁸ Buckland, *Textbook*, above n. 37, 643 n. 14; Thomas, *Textbook*, above n. 24, 110 n. 4.

²³⁹ *Codex Iustinianus* 2.11(12).11 (223 CE); Buckland, *Textbook*, above n. 37, 645; Kaser, *Roman Private Law*, above n. 37, 357.

²⁴⁰ *Digesta* 27.10.5 (Gaius); Buckland, *Textbook*, above n. 37, 645; Kaser, *Roman Private Law*, above n. 37, 357.

appeared in the Edict.²⁴¹ His argument is that a passage of Ulpian,²⁴² which in the *Digesta* refers to *mandatum*, originally referred to an *actio depensi*, which Lenel regards as the subject matter of the *Tabula Heracleensis* clause.²⁴³ In further support of the inclusion of the *actio depensi* among the *actiones famosae* it can be noted that it was available in the same circumstances as the *actio mandati*, a clear *actio famosa*.²⁴⁴ The absence of any reference to the *actio depensi* in Justinianic texts can be explained on the basis of the abolition of *sponsio*, which formed the basis of the *actio depensi*,²⁴⁵ during Justinian's reign.²⁴⁶

Extensions of *Tutela*: The *Crimen Suspecti Tutoris*²⁴⁷ and the Marriage of a *Tutor* and Ward

The *accusatio suspecti tutoris* originated in the 12 Tables. In essence, it was a *postulatio* open to anyone, except the *impubes* that allowed the removal of the *tutor*.²⁴⁸ Where the basis for the removal was *dolus*, the sources state that the removed *tutor* became an *infamis*.²⁴⁹ The classical origin of this doctrine appears secure due to a fragmentary text of Ulpian in the *Fragmenta Vaticana*, which refers to an accusation of a *suspectus tutor* as a *famosa causa*.²⁵⁰ However, the

²⁴¹ *Tabula Heracleensis* l. 115. Lenel, *Edictum Perpetuum*, above n. 14, 79.

²⁴² *Digesta* 3.2.6.5 (Ulpian).

²⁴³ On the *actio depensi* see Kaser, *Roman Private Law*, above n. 37, 325.

²⁴⁴ Gaius, *Institutiones* 4.127

²⁴⁵ Gaius, *Institutiones* 4.127.

²⁴⁶ Kaser, *Roman Private Law*, above n. 37, 236.

²⁴⁷ Buckland, *Textbook*, above n. 37, 160-1; Kaser, *Roman Private Law*, above n. 37, 272; Justinian, *Institutiones*, 1.26; *Digesta* 26.10.

²⁴⁸ Buckland, *Textbook*, above n. 37, 160-1; Kaser, *Roman Private Law*, above n. 37, 272.

²⁴⁹ Justinian, *Institutiones* 1.26.6; *Digesta* 1.12.1.7 (Ulpian); *Digesta* 26.10.3.18 (Ulpian); *Codex Iustinianus* 5.43.9 (294 CE); Buckland, *Textbook*, above n. 37, 160.

²⁵⁰ *Fragmenta Vaticana* 340b. the text has a parallel text in the *Digesta* that facilitates reconstruction: *Digesta* 3.3.39.7 (not, as in *Fontes Iuris Romani Anteiustiniani*, above n. 172, 2.540 *Digesta* 3.3.9.7).

crimen or *accusatio suspecti tutoris* is not mentioned in the Edict, nor in any of the other lists, discussed below, of persons referred to as *infames*. In a practical sense, this does not matter, as presumably a person successfully removed in a *suspectus* procedure on account of *dolus* would then be successfully sued and condemned in an *actio tutelae*,²⁵¹ which does feature in lists of *actiones famosae*.²⁵² The contrast between this action and that of *tutela* is clearly that removal did not always entail *infamia*, such as where removal was for negligence, whereas the *actio tutelae* always involved *infamia* under the Edict.²⁵³ Kaser's suggestion here is probably correct, namely, that the clause in the Praetorian Edict referring to *tutela* was interpreted by jurists and emperors in their legal rulings as including a Quaestor removed for *dolus* under an *accusatio suspecti tutoris*.²⁵⁴

A further extension of the relationship of *infamia* under the Edict to *tutela* occurred via a *Senatus Consultum* of uncertain date, but prior to Caracalla, which prohibited the marriage of a Quaestor to his ward and imposed the penalty of *infamia* upon the Quaestor.²⁵⁵ The reasoning behind applying the same punishment as applicable in an *actio tutelae* is made explicit in a rescript by Diocletian and Maximianus, where it is noted that the *tutor* is regarded as having committed *fraus* in his administration.²⁵⁶ If this were included in the Edict, it

²⁵¹ See Kaser, *Roman Private Law*, above n. 37, 272-3 and Buckland, *Textbook*, above n. 37, 163-5 for the *actio tutelae*.

²⁵² For example, *Digesta* 3.2.1 (Julian).

²⁵³ Contrast Gaius, *Institutiones* 4.182 and *Digesta* 48.10.3.18 (Ulpian).

²⁵⁴ Kaser, 'Infamia und Ignominia', above n. 1, 253.

²⁵⁵ *Codex Iustinianus* 5.6.2.4 (216 CE); *Pauli Sententiae* 2.19.13 = *Digesta* 23.2.66 (Paul – not 23.3.66, Kaser, 'Infamia und Ignominia', above n. 1, 253 n. 152); *Codex Iustinianus* 5.6.7 (293-6, see T. Honoré, *Emperors and Lawyers* (2nd ed., Oxford, Clarendon Press, 1994) 181). See Kaser, 'Infamia und Ignominia', 253-4.

²⁵⁶ *Codex Iustinianus* 5.6.7 (293-6, see Honoré, *Emperors and Lawyers*, above n. 255, 181): 'quia huiusmodi coniunctione fraudem administrationis tegere laboravit'.

would clearly be by the provision providing for persons being prohibited from postulating in accordance with a *Senatus Consultum*.

*Actio Sepulcri Violati*²⁵⁷

Violation of a sepulchre was both actionable under the Praetor's Edict and punishable under criminal law, perhaps specifically under the *Lex Iulia de Vi Publica*.²⁵⁸ In relation to criminal law, the penalties specified varied according to the gravity of the offence: by the time of the *Pauli Sententiae*, the penalty was the *summum supplicium* or condemnation to a *metallum* for *humiliores*; *deportatio* to an island or *relegatio* for *honestiores*.²⁵⁹ For lesser offences, persons were either sent to the *opus publicum*, or exiled according to their status.²⁶⁰ In relation to the Edict, a monetary fine was specified and,²⁶¹ according to Ulpian, *infamia*.²⁶² The phrase attributed to Ulpian in the *Digesta*, '*infamiam irrogat*', is attributed to him twice elsewhere in the *Digesta*,²⁶³ suggesting that it is a genuine Ulpianic phrase. Furthermore, Book 2 of Ulpian's edictal commentary, from which this excerpt is taken, contains discussion of other infaming actions,²⁶⁴ also suggesting that this reference is genuine. The fact that the *actio* was also based on *dolus*,²⁶⁵ the

²⁵⁷ See, Lenel, *Edictum Perpetuum*, above n. 14, 228-9; *Digesta* 47.12 and *Codex Iustinianus* 9.19, Greenidge, *Infamia*, above n. 110, 141.

²⁵⁸ See Berger, 'Encyclopedic Dictionary', above n. 100, 'violatio sepulcri', 767 and 'actio sepulcri violati', 345 and *Digesta* 47.12.8 (Marcian) for the criminal aspect.

²⁵⁹ See *Pauli Sententiae* 1.21.4-5 and 5.19A.

²⁶⁰ *Pauli Sententiae* 1.21.12.

²⁶¹ See Lenel, *Edictum Perpetuum*, above n. 14, 228-9 for a restoration of an edictal clause based on *Digesta* 47.12.3pr (Ulpian).

²⁶² *Digesta* 47.12.1 (Ulpian).

²⁶³ *Digesta* 3.2.13.8 and 3.2.13.7 (Ulpian).

²⁶⁴ See Lenel, *Palingenesia*, above n. 86, vol. II, 425 [200]-[203] = *Digesta* 12.1.10, 17.2.32, 44.7.36 and 47.12.1 (Ulpian).

²⁶⁵ See in particular *Digesta* 47.12.3pr-1 (Ulpian):

ground of liability for other infaming actions under the Edict,²⁶⁶ also suggests the authenticity of the reference to *infamia* in this instance. All this strongly suggests that the *actio uiolati sepulcri* did in fact include *infamia* in the way that Gaius understood the term in relation to the Edict.

Usury²⁶⁷

A single constitution preserved in the *Codex Iustinianus* and dated to 290 CE refers to usurers being inflicted with the *macula infamiae*.²⁶⁸ Here we again strike the feature common in rescripts and in later juristic writings, in contrast to preserved statutes of the late republic and early principate, where the term *infamia* is the only term used to describe the penalty inflicted upon a person. Such usage is even found in rescripts preserved in sources external to the Justinianic tradition for this period, suggesting strongly that what we have here is a genuine reference to *infamia*.²⁶⁹

Cognitores and *Procuratores*²⁷⁰

Cognitores were formally appointed legal representatives, whereas *procuratores* were informally appointed.²⁷¹ It is clear from Gaius that the *ignominiosi* were also unable to give or be *procuratores* or *cognitores*.²⁷² That such persons were also

²⁶⁶ See in particular *Collatio* 10.2.4 (Modestinus).

²⁶⁷ Greenidge, *Infamia*, above n. 110, 140.

²⁶⁸ *Codex Iustinianus* 2.11(12).20 (290 CE).

²⁶⁹ *Collatio* 10.6 (294 CE) = *Codex Iustinianus* 4.34.10 (294 CE).

²⁷⁰ See Lenel, *Edictum Perpetuum*, above n. 14, 89-93 and 96-7; McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 48-53; E. Levy, *Pauli Sententiae: A Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law* (Ithaca, Cornell Uni Press, 1945), 66-75 and Kaser, 'Infamia und Ignominia', above n. 1, 247-9.

²⁷¹ See Berger, 'Encyclopedic Dictionary', above n. 100, 'Cognitor', 394 and 'Procurator', 653.

²⁷² Gaius, *Institutiones* 4.182.

considered *infames* by Justinian's compilers is shown by the fact that passages were excerpted from the sections in classical commentaries on the Edict dealing with *cognitores* and *procuratores* in order to illustrate those *infamia notantur* in *Digesta* 3.2.²⁷³ We know that Justinian made alterations to the law in relation to *cognitores* and *procuratores* in two respects, firstly, references to *cognitores* have been removed from the *Corpus*, which only refers to *procuratores*.²⁷⁴ Secondly, he abolished *infamia* as grounds for exclusion from being or giving a *procurator*.²⁷⁵ The Edict, as reconstructed by Lenel, contained three separate sections, one on who could not appoint a *cognitor*,²⁷⁶ one on who could not be appointed a *cognitor*,²⁷⁷ and one on who could not appoint a *procurator* or who could not be appointed a *procurator*.²⁷⁸

It appears that the passage on *procuratores* simply referred back to those on *cognitores*.²⁷⁹ Thus the two sections of interest are those referring directly to *cognitores*, which defines those who neither could give nor be *procuratores*.

²⁷³ *Digesta* 3.2.15, 3.2.19 and 3.2.23 from book 8 of Ulpian's commentary; *Digesta* 3.2.10 and 3.2.16 from book 8 of Paul's commentary and *Digesta* 3.1.7 and 3.2.18 from book 3 of Gaius' commentary on the provincial Edict. For a concordance of the books of the commentaries and the relevant Edict chapters, see Lenel, *Edictum Perpetuum*, above n. 14, xvii. Kaser, 'Infamia und Ignominia', above n. 1, 247-9; Lenel, *Edictum Perpetuum*, above n. 14, 89-93 and 96-7.

²⁷⁴ Berger, 'Encyclopedic Dictionary', above n. 100, 'Procurator', 653.

²⁷⁵ Justinian, *Institutiones* 4.13.11(10).

²⁷⁶ Edict § 25: Lenel, *Edictum Perpetuum*, above n. 14, 89-91.

²⁷⁷ Edict § 26: Lenel, *Edictum Perpetuum*, above n. 14, 91-3.

²⁷⁸ Edict § 30: Lenel, *Edictum Perpetuum*, above n. 14, 96-7.

²⁷⁹ See *Fragmenta Vaticana*, 322 and 323: 'Verba autem edicti sunt: "Alieno", inquit, "nomine item per alios agendi potestatem non faciam in his causis, in quibus ne dent cognitorem neue dentur Edictum comprehendit" (322). Quod ait "alieno nomine, item per alios" breviter repetit duo edicta cognitoria, unum, quod pertinet ad eos qui dantur cognitores, alterum ad eos qui dant; ut qui prohibentur uel dare uel dari cognitores, idem et procuratores dare dariue arceantur (322)'. See also Lenel, *Edictum Perpetuum*, above n. 14, 96-7.

Those who could not give a *Cognitor* or *Procurator*

There is some evidence that under this rubric, a catalogue of persons was given who could not appoint a *cognitor* in much the same way as a catalogue was given in relation to postulation. One quote from it has survived in the *Fragmenta Vaticana*:

Secuntur haec uerba: ‘et qui eam, quam in potestate habet, genero mortuo, cum eum mortuum esse tum sciret, in matrimonium conlocauerit eamue sciens uxorem duxerit, et qui eum, quem in potestate haberet, earum quam uxorem ducere passus fuerit, quaeue uirum parentem liberisue suos uti moris est non eluxerit, quaeue, cum in parentis sui potestate non esset, uiro mortuo, cum eum mortuum esse sciret, intra id tempus, quo elugere uirum moris est, nupserit’.²⁸⁰

These words follow: ‘and he who places in marriage her whom he has in his *potestas*, when her husband is dead, knowing him to be dead [within the period in which it is customary to mourn]; or he who knowingly marries her and he who allows him whom he has in his *potestas* to marry such a woman [within the period in which it is customary to mourn]; or she who has not mourned her husband, parent or children, as is customary; or she who marries within that time in which it is customary to mourn her husband whose husband is dead whom she knows to be dead when she is not in the *potestas* of her parent.’²⁸¹

This passage is almost identical with one extracted in the *Digesta* in relation to the Praetor’s Edict on postulation, with one crucial difference, the mention of women.²⁸² It is clear that a simple cross-reference to the postulation Edict was not used here or else there would have been no need to repeat the categories of men subject to the prohibition. Similarly, the fact that women are now referred to indicates that they are able to appoint *cognitores*, which again differs from the

²⁸⁰ *Fragmenta Vaticana*, 320, attributed to Ulpian by Lenel, *Palingenesia*, above n. 86, vol. II, 448. See Lenel, *Edictum Perpetuum*, above n. 14, 89-90 for suggested emendations to this passage to restore the text of the Edict.

²⁸¹ *Fragmenta Vaticana* 320.

²⁸² Lenel, *Edictum Perpetuum*, above n. 14, 90.

postulation Edict, where they were subject to a complete prohibition on postulating for others.²⁸³ The later *Pauli Sententiae* also notes that someone who fails to mourn *infamium numero habetur*.²⁸⁴

Excerpts from classical jurists contained in *Digesta* 3.2, taken from their edictal commentaries on this section, refer to another category of woman who was excluded from appointing a *cognitor* or *procurator*: the woman who claimed possession by means of *calumnia* in the name of an unborn child, as well as the *pater familias* who allowed this to happen.²⁸⁵

It seems likely in light of the use by the *Digesta*'s compilers of commentaries pertaining to this section of the Edict in *Digesta* 3.2 that all the persons included in the Praetor's edicts on postulation restrictions were included here as well.²⁸⁶ In addition, as McGinn argues, it can be 'asserted with confidence' that female prostitutes would also have been explicitly included in this section.²⁸⁷

Those Who Could Not Be Given as a *Cognitor* or *Procurator*

In contrast to the section on those who could not give a *cognitor*, the section on who could be given as *cognitores* appears to have used a cross reference to the Praetor's Edict sections on postulation. This rule is found in an excerpt from Gaius' commentary on the Provincial Edict, taken from the section of the work commenting on *cognitores* and *procuratores*: *Quos prohibet praetor apud se*

²⁸³ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 50.

²⁸⁴ *Pauli Sententiae* 1.21.13.

²⁸⁵ See *Digesta* 3.2.15 and 3.2.19 (Ulpian); 3.2.16 (Paul) and 3.2.18 (Gaius). Kaser, 'Infamia und Ignominia', above n. 14, 247-8 and Lenel, *Edictum Perpetuum*, above n. 14, 89-90.

²⁸⁶ Kaser, 'Infamia und Ignominia', above n. 1, 247; Lenel, *Edictum Perpetuum*, above n. 14, 90.

²⁸⁷ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 50.

postulare, omnimodo prohibet, etiam si aduersarius eos patiatur postulare ('Those whom the Praetor prohibits from postulating before himself he prohibits in everyway, even if the opponents would tolerate them to postulate').²⁸⁸ As Levy notes, this statement would only be relevant to this section of the Edict if postulation was mentioned.²⁸⁹ That such a cross-reference was utilised is also suggested by a highly suggestive passage of the *Pauli Sententiae: omnes infames, qui postulare prohibentur, cognitores fieri non posse etiam uolentibus aduersariis* ('All *infames*, who are prohibited from postulating, can not become *cognitores*, even if the other party is willing').²⁹⁰ As Gaius tells us in his *Institutiones*, the Edict clearly did not use the term *infames* at this point.²⁹¹ As with the statement of Gaius, this sentence both suggests that a cross-reference to postulation restrictions was involved, and that perhaps a category of person existed who could act as a *cognitor*, if the other parties are willing, with those restricted from postulating unable to be approved.²⁹² In essence, this makes sense as the inability to be a *cognitor* in another person's case is necessarily implied in the inability to postulate for another.²⁹³ Who exactly made up all these categories is unclear, as is whether the same tripartite system that applied in restricting postulation was applicable here.²⁹⁴ Lenel suggested, and Levy rejected, neither adducing any real evidence, the inclusion of people convicted in a civil suit of *calumnia* and persons

²⁸⁸ *Digesta* 3.1.7 (Gaius) taken from book 3 of his commentary on the Provincial Edict, which deal with *cognitores* and *procuratores*: Lenel, *Edictum Perpetuum*, above n. 14, xvii.

²⁸⁹ Levy, *Pauli Sententiae*, above n. 270, 67.

²⁹⁰ *Pauli Sententiae* 1.2.1. See Levy, *Pauli Sententiae*, above n. 270, 66-71 for a detailed discussion of this sentence.

²⁹¹ Gaius, *Institutiones* 4.182; Levy, *Pauli Sententiae*, above n. 270, 66.

²⁹² Levy, *Pauli Sententiae*, above n. 270, 68 and Lenel, *Edictum Perpetuum*, above n. 14, 91 both refer to two categories.

²⁹³ Levy, *Pauli Sententiae*, above n. 270, 67.

convicted in non-capital *iudicia publica* for inclusion in the category of persons who could be rejected by the opposing party.²⁹⁵

The statement of the *Pauli Sententiae* is interesting in how it illustrates the change in the usage of terms. In essence, what he says is compatible with Gaius who said that the *ignominiosi* were persons who, *inter alia*, could not give *procuratores* or *cognitores*.²⁹⁶ But, instead of providing a list of persons, the author of the *Pauli Sententiae* has simply looked at the categories of persons included and summarised them by the term *omnes infames*, in a similar way to that in which Gaius summarises the consequences of condemnation in an *actio famosa*. An unknown author of unknown date also referred to persons who *ob turpitudinem et famositatem prohibentur quidam cognituram suscipere*,²⁹⁷ perhaps illuminating the motive for the exclusions.²⁹⁸

Exclusion from Acting as an *Aduocatus*

Acting as an advocate and postulating are clearly closely linked, as is shown by an extract of Papinian, where temporary prohibition from acting as an *aduocatus* was included in his discussion of postulation²⁹⁹ and Ulpian's discussion of a prohibition on *aduocatio* in book 6 of his commentary on the Edict, the book where he discussed postulation.³⁰⁰ Similarly, a constitution in the *Codex* states that *infamia* is not prorogued beyond the period for which a person has been

²⁹⁴ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 49.

²⁹⁵ Lenel, *Edictum Perpetuum*, above n. 14, 93; Levy, *Pauli Sententiae*, above n. 270, 68 n. 324.

²⁹⁶ Gaius, *Institutiones* 4.182.

²⁹⁷ *Fragmenta Vaticana* 324.

²⁹⁸ Levy, *Pauli Sententiae*, above n. 270, 68.

²⁹⁹ *Digesta* 3.1.8 (Papinian) see Lenel, *Palingenesia*, above n. 86, vol. I, 815 [73]-[77], esp. 73.

prohibited from *aduocatio*,³⁰¹ i.e., a temporary prohibition from *aduocatio* was handled similarly to a temporary exclusion from the decurionate, discussed below.³⁰² It is unclear, however, whether a prohibition from acting as an advocate was necessarily synonymous with *infamia* under the Edict as Ulpian discusses the penalty in its own right at some length, without any reference to *infamia*.³⁰³

Beyond the Edict: Civic Disabilities and Infamia

Gaius' definition of *ignominia* confines its effects to disabling persons from very specific actions under the Edict.³⁰⁴ As was noted in Chapter Three, however, in the *Codex Iustinianus*, the explicit consequence of *infamia* is the exclusion from *honores* that are open to people of *integra dignitas*.³⁰⁵ Similarly, as discussed above, Marcian, commenting on the *Lex Iulia de Vi Publica*, notes that persons under that law may not hold any office, nor be in any *ordo*, nor be a Senator or decurion, just as (*quasi*) an *infamis*. This raises two questions; firstly, how far back in time can the use of the term *infamia* to describe the exclusion from office be pushed and, secondly, what is the relationship between the *infamia* and *infames* recognised by the jurists in relation to the Praetor's Edict and those termed *infamis* and the *infamia* in relation to exclusion from *honores*?

³⁰⁰ *Digesta* 3.1.6.1 (Ulpian).

³⁰¹ *Codex Iustinianus* 10.61(59).1 (212 CE).

³⁰² *Digesta* 50.2.3.1 (Ulpian).

³⁰³ See *Digesta* 48.19.9pr-8 (Ulpian).

³⁰⁴ Gaius, *Institutiones* 4.182.

³⁰⁵ *Codex Iustinianus* 10.59(57).1 (284-7 CE) under the heading *de Infamibus*.

Infamia and Exclusion from *Honores*

With regard to the use of *infamia* as a means of describing the penalty of exclusion from public office, the evidence is not as good as for the use of the concept in relation to the Edict. For Cicero, the consequence of conviction in a *turpe iudicium* was the loss of all honours and dignities: *ceteri turpi iudicio damnati in perpetuum omni honore ac dignitate priuantur* ('others condemned in a *turpis* case are deprived of all honour and dignity in perpetuity'). Cicero gives the specific example of *furtum*, an *actio famosa*, as having this consequence.³⁰⁶

This bears a striking resemblance to the passages in the *Codex Iustinianus* dealing with *infames*, for example, under the heading '*de Infamibus*':

Infames personae, licet nullis honoribus, qui integrae dignitatis hominibus deferri solent uti possunt...

Infames personae are admitted to no honours which persons of intact *dignitas* are accustomed to hold.³⁰⁷

As discussed above, it is unfortunately unclear whether what Cicero terms *turpia iudicia* are what later jurists term *actiones famosae* because of the nature of the act committed, or the nature of the penalty, or both. It is possible that the *p[ublica ignominia?]*, which, along with condemnation in a *famosum iudicium*,³⁰⁸ brought about disqualification from the equestrian seats at the theatre in the *Tabula Larinas* also involved a disqualification from office holding, but this is by no means clear. Leaving aside these two items of evidence, the earliest legal evidence to refer to exclusion from *honores* as a result of *infamia* is at the end of

³⁰⁶ Cicero, *Pro Cluentio* 119-20.

³⁰⁷ *Codex Iustinianus* 10.59(57).1 (Diocletianus and Maximianus).

³⁰⁸ *Tabula Larinas* ll. 13-4.

the second century, when it is referred to in constitutions of the *Codex Iustinianus* and by Papinian.³⁰⁹

The Decurionate

Although we are poorly informed as to when the earliest uses of *infamia* in relation to exclusion from *honores* might have been, we are better informed about those excluded from them who later would be termed *infames*. Given the logical principle that a person excluded from a lower position is excluded from a higher one also,³¹⁰ the appropriate place to start would appear to be the *ordo* of decurions, rather than the higher positions in Rome itself. Indeed, the most comprehensive list of persons disqualified from holding any *honor* is the list of disqualifications from the decurionate given in the *Tabula Heracleensis*. In addition to those condemned in *actiones famosae*, quoted above, the following were disqualified:

Queiue depugnandei | caussa auctoratus est erit fuit fuerit;
 queiue in iure <abiuravit> abiuraverit bonamue copiam
 iuravit iuraverit; quei<ue> | sponsoribus creditoribus suis
 renuntiauit renuntiauerit se soldum soluere non posse aut
 cum eis | pactus est erit se soldum soluere non posse;
 proue quo datum depensum est erit; quousue bona ex
 edicto | eius, qu<ei> i(ure) d(eicundo) praefuit praefuerit,
 praeterquam sei quous, quom pupillus esset reiue
 publicae caussa abesset | neque d(olo) m(alo) fecit fecerit
 quo magis r(ei) p(ublicae) c(aussa) a(besset), possessa
 proscriptaue sunt erunt; queiue iudicio publico Romae |
 condemnatus est erit, quocirca eum in Italia esse non
 liceat, neque in integrum resti<tu>tus est erit; queiue in eo
 | municipio colonia praefectura foro conciliabulo, quous
 erit, iudicio publico condemnatus est erit; quemue |
 k(alumniarum) praeuaricationis caussa accusasse fecisseue
 qu<i>d iudicatum est erit; quousue apud exercitum

³⁰⁹ *Codex Iustinianus* 2.11(12).3 (197 CE); *Digesta* 50.1.15pr, 50.2.5, and 50.2.6.3 (Papinian) all of which deal with decurions.

³¹⁰ *Digesta* 1.9.4 (Pomponius): ‘*quid indignus est inferiore ordine, indignior est superiore*’: McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 38.

ingnominae | caussa ordo ademptus est erit; quemue
 imperator ingnominae caussa ab exe<r>citū decedere
 ius<i>t iuserit; | queiue ob caput c(iuis) R(omanei)
 referendum pecuniam praemium aliudue quid cepit
 ceperit; queiue corpor<e> quaestum | fecit fecerit; queiue
 lanistaturam artem ludic<r>am fecit fecerit; queiue
 lenocinium faciet <feceritue>.

Who has or shall have hired himself for the sake of fighting as a gladiator; or who at a pre-trial has or shall have sworn insolvency or who has or shall have sworn *bona copia*; or who has or shall have announced to his guarantors or creditors that he can not pay his debts or who has or shall have made a pact with them that he cannot pay his debts; or on whose behalf a gift has or shall have been paid out; or whose goods have been possessed and sold in accordance with the edict of him who has or shall have jurisdiction, except if the goods are those of him who is a pupil or who was absent for a reason of state and did not or shall not have brought it about that he was absent by deceit; who has or shall have been condemned in a *iudicium publicum* at Rome in accordance with which he is not permitted to be in Italy, nor who has nor shall have his status been restored; or who has or shall have been condemned in a *iudicium publicum* in that *municipium, colonia, praefectura, forum* or *conciliabulum* to which he belongs; or who has or shall have been judged to have accused or done something by reason of *calumnia* or *praeuaricatio*; or who has or shall have had his rank removed in the army by reason of ignominy; or whom the commander has or shall have commanded to leave the army by reason of ignominy; or who has or shall have received money, reward or anything else for bringing the head of a Roman citizen; or who has or shall have made money with his body or who has or shall have been a *lanista* or appeared on stage or who has or shall have been a *leno*.³¹¹

One thing to note is the absence of the term *infamia* or any of its cognates in this law – a clear pattern in all the other statutes from which we have sections. The second thing to note is the large, but not exact, overlap between the persons disqualified from holding public office here, and those falling under the postulation and *procurator/cognitor* restrictions in the Edict. Appearing in both lists and requiring no further discussion are:

- persons condemned in *actiones famosae*;
- persons condemned in capital *iudicia publica*;
- *calumnia* and *praeuaricatio*, although the *Tabula Heracleensis* provision is wider, not being limited to *iudicia publica*;
- those dishonourably discharged from the army;
- actors; and
- procurers.

As discussed above, there are cogent reasons for restoring both gladiators and *lanistae* to earlier versions of the edictal list. It is curious that *bestiarii*, although clearly akin to gladiators, are not mentioned specifically in the *Tabula Heracleensis*. Also as noted above, bankrupts were probably subject to the same disabilities as other persons listed in the Praetor's Edict, although not listed in *Digesta* 3.2. Other matches are not so neat. For example, prostitutes under the *Tabula Heracleensis* may well fit into the category of catamites contained in the Praetor's second Edict, but the latter category is clearly wider than the former.³¹² Similarly, there is no exact match in the Edict for a person who has only been degraded in the army for dishonourable conduct, as opposed to dismissed.³¹³

The meaning of the phrase *queiue ob caput c(ivis) R(omanei) referendum pecuniam praemium aliudue quid cepit ceperit* appears disputed. Kaser relates it to prosecutions under the Cornelian *quaestio* laws.³¹⁴ However, I agree with Crawford that it instead refers to the Sullan proscriptions.³¹⁵ The relevant Sullan

³¹¹ *Tabula Heracleensis* ll. 112-23.

³¹² McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 48; Kaser sees the Edict term as referring exclusively to male prostitutes: Kaser, 'Infamia und Ignominia', above n. 1, 239 n. 93

³¹³ Kaser, 'Infamia und Ignominia', above n. 1, 241.

³¹⁴ Kaser, 'Infamia und Ignominia', above n. 1, 239 n. 92.

³¹⁵ Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 362 and 387 *ad* 122. Note the strong verbal similarity with Suetonius, *Diuus Julius* 11: 'atque in exercenda de sicariis quaestione eos quoque sicariorum numero habuit, qui proscriptione ob relata civium

quaestiones had a capital penalty already mentioned in the *Tabula Heracleensis*.

It is easy to see why a clause such as this would fall into desuetude, as it was only the Sullan proscriptions that were specifically exempted under the Cornelian laws.³¹⁶

McGinn argues that the law must be mostly tralatitious in character, depending to a large extent on earlier, similar laws. Some evidence can be found for earlier laws governing admission to local councils, although the content is largely unknown. Cicero does note that such laws did cover, for example, the minimum age, the professions of such people, their level of wealth and other matters.³¹⁷

There are also categories of persons found in the Edict that are absent in the *Tabula Heracleensis*, with both bigamy and the violation of mourning rules not being mentioned as grounds for exclusion from the *ordo*.³¹⁸

Despite the various differences, the striking feature of the *Tabula Heracleensis* and the Praetorian Edict is their overlap.³¹⁹ and Kaser's statement that the comparison of the two reveals that the common points are 'nicht so weit' is difficult to sustain.³²⁰ McGinn assigns the greater comprehensiveness of the

Romanorum capita pecunias ex aerario acceperant, quamquam exceptos Corneliis legibus'.

³¹⁶ As Suetonius says: *Diuus Julius* 11.

³¹⁷ Cicero *In Verrem* 2.2.122: see McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 34-5 and the texts cited there.

³¹⁸ Kaser, 'Infamia und Ignominia', above n. 1, 241.

³¹⁹ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 37-8; Greenidge, *Infamia*, above n. 110, 116.

³²⁰ Kaser, 'Infamia und Ignominia', above n. 1, 241.

Tabula Heracleensis to the fact that it deals with a greater privilege than the Praetor's Edict, hence the greater the number of exclusions.³²¹

Infamia, *ignominia* and cognate terms are explicitly referred to in the context of exclusion from municipal *honores* and the *ordo* of decurions in juristic commentaries and imperial constitutions of the late second century CE onwards. This is clearest in the *Codex Iustinianus* where it is stated that *infamia* takes away the *honor* of a decurion, i.e. excludes him from the *ordo*.³²²

In most of the uses of the concept of *infamia* as a basis for disqualification from the decurionate, the *infamia* referred to is clearly a penalty resulting from judicial proceedings. For example, Marcian includes exclusion from the decurionate as a consequence of condemnation under the *Lex Iulia de Vi Priuata*, which, as he says, results in a person undergoing consequences *quasi infamis*.³²³ A passage excerpted from Papinian states that those removed from the *ordo* are to be considered as analogous to persons relegated, i.e., punished judicially, and not admitted to the decurionate for as long as they are banned, just as *relegati* are excluded for as long as they are relegated. Furthermore, an inquiry is to be made into the reason that they were excluded since, if the penalty was less severe than the law allows, they remain *infames*.³²⁴ If a man is permanently removed for a *crimen* that imports *ignominia*, he can never rejoin the decurionate, though those condemned of a less serious offence do not remain *infames*.³²⁵ This extract could

³²¹ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 38. Although this does not explain why some grounds listed in the Edict are not mentioned in the *Tabula*, namely, bigamy and marriage within a mourning period.

³²² *Codex Iustinianus* 10.32(31).8 (294 CE).

³²³ *Digesta* 48.7.1pr (Marcian).

³²⁴ *Digesta* 50.1.15pr (Papinian).

³²⁵ *Digesta* 50.2.5 (Papinian).

provide a link between the *infamia* involved in removal from office and *infamia* under the Praetor's Edict as Lenel argues that it is taken from the section of Papinian's work *Quaestiones* dealing with postulation.³²⁶ However, as Book Two of Papinian's work also dealt with municipal matters,³²⁷ this fragment could perhaps also belong there, thus leaving the matter unclear. Similarly, Arrius Menander states that in order to determine whether men who have been relegated for a limited period can be enlisted in the army, an inquiry must be made as to whether their condemnation entailed *perpetua infamia* as, for as long as they cannot be in the *ordo*, they cannot enlist in the army.³²⁸ The *Codex Iustinianus* also contains constitutions to the effect that *infamia* does not go beyond a temporary period of exclusion from the *ordo*.³²⁹

Another passage that may provide a link between the Edict and disqualification from office is when Papinian states that persons condemned of abandoning a charge under the *SC Turpillianum*, incurring the same penalty as *calumniatores*, are marked with *ignominia* and cannot be decurions.³³⁰ As noted above, *calumniatores* were also included regarded as *infames* in relation to the Praetor's Edict.

The close analogy that developed between removal from office and *infamia* is illustrated by a comparison between a penalty in the *Pauli Sententiae* for the

³²⁶ See Lenel, *Palingenesia*, above n. 86, vol. I, 815 [74].

³²⁷ Lenel, *Palingenesia*, above n. 86, vol. I, 814-5 [67]-[71].

³²⁸ *Digesta* 49.16.4.4 (Arrius Menander).

³²⁹ *Codex Iustinianus* 10.61.1 (212 CE) this constitution is apparently one referred to in *Digesta* 50.2.3.1 (Ulpian): see the Latin text in Watson (ed.), *Digest*, above n. 173, 908.

³³⁰ *Digesta* 50.2.6.3 (Papinian).

cutting down of crops, removal from the *curia*,³³¹ and a similar law in the *Lex Romana Burgundionum*, where the penalty is that the person is made *infamis*.³³²

Although the bulk of our evidence appears to deal with *infamia* as a penalty in judicial proceedings and disqualification from *honores*, not all of it does. In addition to the two constitutions in the *Codex Iustinianus* that exclude all *personae infames* from *honores*, without specific restriction to those condemned in judicial proceedings,³³³ the only other reference to *infamia* and disqualification from office not involving judicial proceedings is in a passage of Callistratus, where it is stated that those who sell goods of daily use are not *infames* and, therefore, can be decurions or seek any other *honor*.³³⁴ This suggests that persons considered *infames* for some reason, other than being found guilty in judicial proceedings, were excluded from municipal office also. Such persons would include presumably those listed in the *Tabula Heracleensis* as being so disqualified, which overlaps to a great extent with the Praetor's Edict.

The Senate, Equestrian Order and Magistracies

Somewhat surprisingly, considering the *Tabula Heracleensis*, when one moves to consider the Senate and Equestrian orders at Rome, as opposed to the more humble municipal offices, it is much more difficult to identify concrete categories of persons excluded from office as a matter of law at least until the early Principate.

³³¹ *Pauli Sententiae* 5.20.3.

³³² *Lex Romana Burgundionum* 18.5.

³³³ *Codex Iustinianus* 10.59(57).1 (284-7 CE: Honoré, *Emperors and Lawyers*, above n. 255, 180); 12.1.2 (313-5 CE).

³³⁴ *Digesta* 50.2.12 (Callistratus).

As noted above, there were certainly judicial exclusions from the Senate. Cicero himself refers to *leges* that spelt out the grounds why persons could not be a magistrate, act as a *iudex* or accuse another.³³⁵ What such a general ban might have looked like is suggested by the fragmentary beginning of the *Lex Latina Tabulae Bantinae*,³³⁶ a statute of unknown purpose,³³⁷ which begins:

[--- c 50 ---]+in sena[tu seu]e in poplico ioudicio ne sen[tentiam rogato [--- c. 25 ---] | [--- c 25 --- ne iue is poplice testumon]ium deicito ne iue quis mag(istratus) testimonium poplice ei de[notatio ne iue d]e[n]ontari | [sinito ne iue eum iudicem ne iue arbitrum ne iue recupe]ratorem dato; ne iue is in poplico luuci praetextam ne iue soleas habeto ne iue quis | [mag(istratus) --- c 35 --- sinito]; mag(istratus) qu[e]iquomque comitia conciliumue habebit eum sufragium ferre nei sinito; | [mag(istratus) queiquomque censum habebit eum aerarium] relinquito.

[--- c 50 ---] either in the senate or in a *publicum iudicium* his opinion is not to be asked [--- c 25 ---] | [--- c 25 --- nor is he publicly] to give evidence nor is any magistrate publicly to service notice on him [nor allow notice to be served | nor allow allow him to be a *iudex*, arbiter or] *recuperator*; nor is he to wear publicly in the light the *toga praetexta* nor sandal nor is any | [magistrate --- c 35 - --] to allow [??]; whichever magistrate holds a *comitia* or *concilium* is not to allow him to vote; | [whichever magistrate holds the census] is to leave [him an *aerarius*].³³⁸

With regards to entry to and exclusion from the Senate in general, from 312 BCE until the reforms of Sulla, entry into and membership of the Senate depended entirely on the decision of the Censors. Over time, ex-magistrates acquired the right to be chosen as Senators either by statute or custom: by the time of the Punic

³³⁵ Cicero, *Pro Cluentio* 120.

³³⁶ Possibly of the late second century BCE: Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 195-7.

³³⁷ One view is that this clause, coming as it does towards the end of the statute and before a clause prohibiting the frustration of the statute, relates to something such as *calumnia* under the statute, rather than a person found guilty in relation to the statute's main purpose: Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 205-6 *ad* 1-6.

³³⁸ *Lex Latina Tabulae Bantinae* ll. 1-6.

Wars, the Consuls, Praetors and Curule Aediles, followed later by Plebeian Aediles and tribunes, until finally Quaestors were added as well under Sulla. After Sulla's reforms, there were enough ex-magistrates to fill the seats of the Senate, and thus the Censor's powers were in practice limited to removing persons from the Senate for loss of the appropriate census or for 'misconduct' as amorphously defined by the different censors.³³⁹

We have seen that disqualification from the Senate was a prescribed penalty under some criminal laws,³⁴⁰ for example the *Lex Iulia Repetundarum* and the *Lex Iulia de Vi Priuata*.³⁴¹ It is also clear from the *Senatus Consultum* from Larinum that condemnation in a *iudicium famosum* brought about exclusion from the right to sit in the equestrian seats at the theatre.³⁴² Cicero argues vigorously that this sort of judicial disqualification from office holding, which is clearly analogous to what is termed in the *Corpus infamia*, was different in nature from the *nota* of the Censor,³⁴³ particularly in relation to its permanence. Despite Cicero's clear prejudice in the matter³⁴⁴ (he is after all arguing a legal case) his point is valid.³⁴⁵ One may also note the arbitrary nature of the actions of the Censors, which,

³³⁹ Jolowicz and Nicholas, *Historical Introduction*, above n. 116, 32-3. On the activities of the Censors, see A. E. Astin, 'Regimen Morum' (1988) 78 *Journal of Roman Studies* 14-34 and A. H. J. Greenidge, *Roman Public Life* (New York, Cooper Sqr Publishers Inc, 1970) 216 ff.

³⁴⁰ T. Mommsen, *Le Droit Public Romain* (2nd ed., Trans. P. F. Girard, Paris, Libraire des Écoles Françaises d'Athènes et de Rome, 1893) 2 Vols., vol. 2, 140-2.

³⁴¹ *Digesta* 1.9.2 (Marcellus); Suetonius, *Diuus Iulius* 43; *Digesta* 48.7.1pr (Modestinus).

³⁴² *Tabula Larinas* ll. 13-14.

³⁴³ Cicero, *Pro Cluentio* 117-120. The so-called 'Censorian *Infamia*', see Greenidge, *Infamia*, above n. 110, Chapter 3, is a misnomer, see Kaser, 'Infamia und Ignominia', above n. 1, 224-7.

³⁴⁴ Greenidge, *Infamia*, above n. 110, 45.

³⁴⁵ Kaser, 'Infamia und Ignominia', above n. 1, 224-7.

despite being capable of classification into broad areas,³⁴⁶ was still the subject of the individual whims of the office-holders, rather than the specific, stated exclusions brought about by judicial proceedings, or listing in the Praetor's Edict.³⁴⁷ Nevertheless, the grounds that excited the *nota* of the Censor, and exclusion from the Senate and equestrian order, do overlap with several categories found listed in the Praetorian Edict, for example:³⁴⁸ military disobedience;³⁴⁹ theft, and possibly therefore other delicts;³⁵⁰ and actors.³⁵¹

Aside from expulsion or non-admittance by the Censor, the logical place where a prospective candidate for political office, and admittance to the Senate, would be rejected is following the *professio* of a potential candidate to the presiding magistrate prior to the election, or indeed the magistrate may even have refused to announce the result if an unacceptable candidate were successful.³⁵² It is tempting, and sensible, to regard, as Mommsen does, the grounds listed in the *Tabula Heracleensis* and Praetor's Edict as grounds on which candidates would have been rejected, although there is no certainty that there was a positive law to

³⁴⁶ Greenidge, *Roman Public Life*, above n. 339, 226-9; Astin, 'Regimen Morum', above n. 339, 19.

³⁴⁷ Kaser, 'Infamia und Ignominia', above n. 1, 225; Astin, 'Regimen Morum', above n. 339, 19.

³⁴⁸ See in particular, Greenidge, *Infamia*, above n. 110, Chapter 3. Greenidge, *Roman Public Life*, above n. 339, 226-9 is problematic in that it somewhat oddly cites the *Tabula Heracleensis* as evidence for the actions of the Censor.

³⁴⁹ Analogous, but not identical, with ignominious dismissal: Livy 24.18 and 27.11: Greenidge, *Roman Public Life*, above n. 339, 228.

³⁵⁰ Cicero, *Pro Cluentio* 120: persons removed by Censors for *furtum*, but acquitted by courts.

³⁵¹ Livy 7.2.12. Tertullian, *De Spectaculis* 22, cited by Greenidge, *Infamia*, above n. 110, 57 is both post-Censor and too hyperbolic to be used as evidence with any significant legal accuracy, for example, there is no evidence that any of the professions mentioned by Tertullian underwent *capitis diminutio* in any technical sense as understood by the jurists of loss of freedom, citizenship or family: *Digesta* 5.4.11 (Paul). See also McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 41-2.

this effect.³⁵³ Although, as noted above, Cicero does mention the existence of laws setting out grounds whereby persons were disqualified from holding magistracies.³⁵⁴

With the arrival of the Principate, the method of admission into the Senate also changed. By the Flavian period, it had become a requirement for persons, other than the sons of Senators, seeking office to obtain the *latus clauus* from the Emperor before they could stand for the Quaestorship, a rule that probably had its origins in the actions of Augustus.³⁵⁵ In 14 CE, the elections were also transferred from the *Comitia* to the Senate.³⁵⁶ By 23 CE the vigintivirate, apparently open to *equites*,³⁵⁷ was a necessary prerequisite for the Quaestorship.³⁵⁸ Augustus instituted an annual revision of the lists and, although no emperor after Domitian assumed the title censor, the Emperor effectively continued to function in this role with regards to the Senate's composition.³⁵⁹ Here the Emperor would have had the power of exclusion, though what excited it, other than certain judicial condemnations, was perhaps not legislated. Talbert states that the most common ground for withdrawal from the Senate was condemnation for *infamia*.³⁶⁰

³⁵² Mommsen, *Droit Public Romain*, above n. 340, vol. 2, 114; See Velleius Paterculus 2.92; A. H. M. Jones, 'Elections under Augustus' in A. H. M. Jones, *Studies in Roman Government and Law* (Oxford, Basil Blackwell, 1960) 27-50, 33.

³⁵³ Mommsen, *Droit Public Romain*, vol. 2, above n. 340, 143-6.

³⁵⁴ Cicero, *Pro Cluentio* 120.

³⁵⁵ See Jones, 'Elections under Augustus', above n. 352, 30-2.

³⁵⁶ Tacitus, *Annales* 1.15 with Jones, 'Elections under Augustus', above n. 352, 46-50.

³⁵⁷ Dio 54.26.5.

³⁵⁸ Tacitus, *Annales* 3.29; Jones, 'Elections under Augustus', above n. 352, 32.

³⁵⁹ Jolowicz and Nicholas, *Historical Introduction*, above n. 116, 325 and 327; J. A. Talbert, *The Senate of Imperial Rome* (Princeton, Princeton Uni. Press, 1984) 27.

³⁶⁰ Talbert, *Senate*, above n. 359, 28. Talbert makes reference to several cases of exclusion in Tacitus, *Annales* 3.17, 4.31, 6.48, 12.59 and 13.11 as well as Pliny, *Epistulae* 2.12.4 and 4.9.19. All these cases refer to removal from the Senate, but none refer to *infamia* or a cognate term. This cannot be pressed, however, as the authors are not writing legal texts

However, as has been noted above, there is no evidence for the use of *infamia* in relation to the inability to be a member of the Senate until the late second century, when Marcian notes that a person condemned under the *Lex Iulia de Vi Priuata* cannot be a Senator, *quasi infamis*,³⁶¹ and all the discussions of specific penalties under the laws we have, discussed above, indicate that in content they were much like the *Lex Latina Tabulae Bantinae*, i.e., they specify a list of exclusions, but do not use the term *infamia*.

Until 22 CE, membership of the *equites* was regulated largely like membership of the Senate: at first by the Censors, and then by the Emperor and, eventually, by the end of the first century CE, by the bureaucracy.³⁶² In 22 CE, a *Senatus Consultum*, followed by the *Lex Visellia* of 23 CE regulated membership of the equestrian order, importantly by making the ability to sit in the rows reserved for *equites* in accordance with the *Lex Roscia* of 67 BCE, which regulated seating arrangements at the theatre, a touchstone for membership of the equestrian order.³⁶³ Persons excluded under this law overlapped to a certain degree with those covered by the Praetor's Edict, and included actors,³⁶⁴ *auctorati*,³⁶⁵ and persons condemned in *famosa iudicia*.³⁶⁶

Thus it is difficult to imagine persons falling within those listed in either the Praetor's Edict or the *Tabula Heracleensis* as entering either the Senate,

and Tacitus is known for his desire to avoid technical language, see R. Syme, *Tacitus* (Oxford, Clarendon Press, 1958) 2 Vols., vol. I, 343-4.

³⁶¹ *Digesta* 48.7.1pr (Marcian).

³⁶² McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 29-30.

³⁶³ Pliny, *Naturalis Historia* 33.29-36; McGinn, *Prostitution, Sexuality and the Law*, 30.

³⁶⁴ Quintilian, *Institutio Oratoria* 3.6.18-19; McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 29.

³⁶⁵ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 29.

magistracies or equestrian order in the late Republic or Principate as presumably they would either have excited the Censor's, or later the Emperor's, action or would have been excluded from elections by the presiding magistrate. But, except where exclusion was a penalty under specific laws and where persons fell within the prohibitions listed in the *Lex Roscia* as adopted by the *Lex Visellia*, there is no evidence that the exclusion was based on any positive law, or the person's status *qua infamis* in particular.

The lack of a specific legal exclusion is highlighted through the confused and confusing evidence surrounding the participation in public performances on the stage or in the arena by members of the Senatorial and equestrian classes, much of which comes prior to the *Lex Visellia*. The earliest mention in the sources is where Senators are prevented, but *equites* permitted, by Caesar to take part in gladiatorial combat in 46 BCE.³⁶⁷ This appears an act of Caesar's whim, rather than the working out of any legal regulations. Should there have been an automatic exclusion for fighting in the arena, one would expect it to have occurred at this point. One possible explanation is that the participation was amateur, which may not have raised legal action, given the concern of the Edict and the *Tabula Larinas* with professional performances.³⁶⁸ The next incident mentioned in the sources is in 38 BCE, when an *ad hoc* prohibition on a Senator fighting as a gladiator was followed by a *Senatus Consultum* that no Senator would fight as a gladiator;³⁶⁹ the penalty for breach of this law is not mentioned.

³⁶⁶ This is the implication of the *Tabula Larinas* ll. 13-4: '*ut famoso iudicio condemnarentur dederant operam et postea quam ei des[er]uerant sua sponte ex | equ]uestribus locis*'.

³⁶⁷ Dio 43.23.5; Suetonius *Diuus Iulius* 39.1 – there appears to be some confusion over the name between the two sources. Levick, 'The *Senatus Consultum* from Larinum', above n. 22, 106.

³⁶⁸ Gardner, *Being a Roman Citizen*, above n. 7, 151-2.

³⁶⁹ Dio 48.43.2: Levick, 'The *Senatus Consultum* from Larinum', above n. 22, 106.

Again, if an automatic exclusion existed, why the need for the additional *SC*? Then in 22 BCE, a *Senatus Consultum* appears to have forbidden grandsons of Senators, who were *equites*, from appearing on the stage and in the arena.³⁷⁰ There is clearly quite possibly some law missing prior to 22 BCE that excluded Senators and their sons from the stage. The clearly *ad hoc* nature of the approach to this issue would not make it surprising if the issue of appearances on stage had initially been addressed separately from that of the arena.

The fact that *Senatus Consulta* were issued on the matter raises the issue of the relationship of appearing on the stage or in the arena and disqualification from the Senate or equestrian order. Livy appears to link disqualification of actors to the actions of the Censor.³⁷¹ The case of Laberius, an *eques* who appeared in his own mime, received 500 000 HS from Caesar and a gold ring and then sat in the equestrian seats at the theatre,³⁷² has often been cited for support of the proposition that appearing on the stage entailed automatic degradation from equestrian status.³⁷³ More recently, Gardner has argued against this interpretation, arguing that it is only the late evidence of Macrobius, who classifies the money given to Laberius as a fee,³⁷⁴ that provides any justification for assuming that Laberius underwent any form of degradation.³⁷⁵ However, this interpretation ignores the evidence of Seneca the Elder, who explicitly states *equestri illum*

³⁷⁰ Dio 54.2.5 (only refers to actors); Suetonius, *Diuus Augustus* 43.3 (actors and gladiators): Levick, 'The *Senatus Consultum* from Larinum', above n. 22, 107.

³⁷¹ Livy 7.2.12.

³⁷² Suetonius, *Diuus Iulius* 39.2; Seneca, *Controversiae* 7.3.9; Macrobius, *Saturnalia* 2.3.10, 2.7.2-3 and 7.3.8.

³⁷³ See, e.g., Levick, 'The *Senatus Consultum* from Larinum', above n. 22, 109.

³⁷⁴ Macrobius, *Saturnalia* 2.7.2.

³⁷⁵ Gardner, *Being a Roman Citizen*, above n. 7, 222 n. 70.

ordini reddidit ('restored him to the equestrian order').³⁷⁶ Given that Laberius began his performance with a statement of his equestrian status, the only real interpretation open is that appearing on stage had removed, at least, his ability to sit in the seats reserved for the *equites*.

In 11 CE, the prohibition on *equites* fighting as gladiators was lifted, because, according to Dio, they had been making light of the *atimia* that was normally imposed for this action.³⁷⁷ The *Tabula Larinas* refers to this law, which appears also to have imposed a minimum age limit on *ingenui* appearing at least in the arena, if not on the stage too.³⁷⁸ What Dio means by *atimia* is unclear,³⁷⁹ neither his, nor Suetonius' references to earlier decrees in this area refer to the penalty imposed for breach. Levick argues that it means loss of equestrian rank, but as Gardner points out, the evidence is simply not clear enough.³⁸⁰ The implication of the relaxation is intriguing, it appears to imply that *equites* could appear as gladiators with impunity, i.e., without losing their equestrian status automatically in accordance with some law.

The imprecision of these non-legal sources leaves the matter prior to 19 CE somewhat opaque. However, it seems clear that between the relaxation mentioned above, the situation had changed and a prohibition restored. Some of its provisions can even be reconstructed from the *Tabula Larinas*, which appears designed to reinforce these earlier enactments, and the evidence of Suetonius,

³⁷⁶ Seneca, *Controversiae* 7.3.9.

³⁷⁷ Dio 56.25.7: Levick, 'The *Senatus Consultum* from Larinum', above n. 22, 107.

³⁷⁸ *Tabula Larinas* ll. 17-21. The text is quite fragmentary at this point, with only persons hiring themselves to appear in the arena certain for inclusion.

³⁷⁹ Gardner, *Being a Roman Citizen*, above n. 7, 145.

³⁸⁰ Levick, 'The *Senatus Consultum* from Larinum', above n. 22, 108; Gardner, *Being a Roman Citizen*, above n. 7, 145-6.

which is in accordance with the decree. Suetonius states that during the reign of Tiberius, in order to evade a *Senatus Consultum*, young *equites* and members of the Senatorial order had been undergoing condemnation in *famosa iudicia*, so that they could perform on the stage or in the arena.³⁸¹ Tiberius punished such persons with exile. The *Tabula Larinas* also refers to people undergoing condemnation in *famosa iudicia* in order to remove themselves from the equestrian seats and then to hire their services to fight as gladiators or appear on stage.³⁸² The clear implication of these two passages is that Senators and equestrians were otherwise prohibited from appearing on the stage or in the arena unless they had previously forfeited their *dignitas*, in terms of a right to seats in the theatre under the *Lex Iulia Theatralis* by being convicted in a *iudicium famosum* or incurring the vague *p[ublica ignominia?]*. The *Senatus Consultum* from Larinum attempted to close this gap by imposing the penalty of denying proper burial to persons who attempted such activity.³⁸³ What the nature of the prohibition was that they were trying to circumvent is unknown; it could have been a heavier penalty than the loss of rights and status entailed in condemnation in a *iudicium famosum*,³⁸⁴ perhaps the exile imposed by Tiberius or maybe actual loss of senatorial or equestrian status. However, if this were the case, it would seem more appropriate simply to have rendered such persons liable to the penalties contained in the

³⁸¹ Suetonius, *Tiberius* 35.2: ‘*et ex iuuentute utriusque ordinis profligatissimus quisque, quominus in opera scaenae harenaeque edenda senatus consulto teneretur, famosi iudicii notam sponte subibant; eos easque omnes, ne quod refugium in tali fraude cuiquam esset, exsilio adfecit*’.

³⁸² *Tabula Larinas* ll. 12-4.

³⁸³ *Tabula Larinas* l. 15. Gardner’s statement that such an action would mean nothing to a gladiator, *Being a Roman Citizen*, above n. 7, 148, seems at odds with the copious evidence of funeral epitaphs, that she herself earlier refers to (p. 137), which appear to show that gladiators did indeed care for a proper burial, see, e.g., the inscriptions collected in H Dessau, *Inscriptiones Latinae Selectae* (Weidmann, Berlin, 1962) 3 Vols., vol. 2.1, 297-310.

original *Senatus Consulta* imposing the prohibitions. Another possibility is that the content of the original *Senatus Consulta*, being avoided by the *fraus* of the young elite, were not actually directed at potential equestrian or senatorial gladiators or actors, but at those who would hire them, indeed the subjects of concern of several lines of the *Tabula Larinas*, and made them liable to a penalty for hiring such persons.³⁸⁵

Thus, while it seems certain that, as a matter of fact, persons who were listed in the Praetor's Edict or the *Tabula Heracleensis* would have been excluded from the Senate, magistracies and equestrian order, it is not certain as a matter of law. Nor is it clear when the term *infamia* became used to describe such an exclusion.

Other Civic Disabilities

Exclusion from being a *iudex*³⁸⁶

To a large extent, the rules governing admission to the Senate and equestrian orders governed the right to be a *iudex* as, until the passage of the *Lex Aurelia Iudicaria* of 70 BCE, when the *tribuni aerarii* were added, the only persons who could be *iudices*, at least in Rome, were Senators and equestrians.³⁸⁷ Again, after the Principate was established, the juries consisted of Senators and equestrians. The presiding magistrate exercised some control over the jury list in between

³⁸⁴ See Levick, 'The *Senatus Constultum* from Larinum', above n. 22, 112-3 and Gardner, *Being a Roman Citizen*, above n. 7, 147-8.

³⁸⁵ See *Tabula Larinas* ll. 7-11.

³⁸⁶ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 31-2; Greenidge, *Infamia*, above n. 110, 155-6.

³⁸⁷ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 31.

censorial review.³⁸⁸ *Iudices* in municipalities were chosen either from among the decurions, the disqualification of whom is discussed above, or from among persons of free birth, age greater than 25 of a census of 5000 sesterces whose suitability was sworn to by the appointing magistrates.³⁸⁹ Eligibility was thus a mixture of law (i.e., the qualifications for the decurionate) and discretion. It is perhaps difficult to conceive that a magistrate would swear to support the suitability of a candidate who would be disqualified from holding the decurionate for one of the grounds enumerated in the *Tabula Heracleensis* that overlap with the Praetor's Edict.

In addition to the grounds for disqualification and removal from the Senate and equestrian order discussed above, specific laws contained rules disqualifying persons from being *iudices*.³⁹⁰ The *Lex Repetundarum* found in an inscription, possibly of Gracchan date, which excludes from being a *iudex* under that statute persons who [*quaestioneue iudicioque puplico conde]mnatus siet quod circa eum in senatum legei non liceat* ('who has been condemned in a *quaestio* or *iudicium publicum* because of which he may not be enrolled in the Senate') as well as persons specifically prosecuted under the *Lex Calpurnia*, *Lex Iunia* or the *Lex Repetundarum* itself.³⁹¹ As noted above, condemnation under the *Lex Iulia Repetundarum* also involved ineligibility to be a judge.³⁹²

³⁸⁸ See Cicero, *Pro Cluentio* 121: '*Deinde praetores urbani, qui iurati debent optimum quemque in lectos iudices referre*': McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 31.

³⁸⁹ See *Lex Irnitana* ch. 86; McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 37.

³⁹⁰ See Cicero, *Pro Cluentio* 120.

³⁹¹ *Lex Repetundarum* ll. 13, 16 and 23.

³⁹² *Digesta* 1.9.2 (Marcellus); 48.11.6.1 (Venuleius Saturninus).

Thus again, with the exception of laws specifying certain persons as disqualified from being a *iudex*, for which we only have examples of persons convicted of certain offences or where there was a law governing admission to the decurionate, it appears those whom Justinian would term *infames* would have been disqualified more as a matter of fact, than due to a specific law, and thus not because of any legal status as *infames*.

Infamia, Honores and the Edict

It is clear from Cicero in the *Pro Cluentio*, the *Tabula Heracleensis* and epigraphically preserved laws that by the end of the late Republic persons condemned in *actiones famosae* and certain *iudicia publica* were excluded as a matter of law from *honores*. It is also clear that by this time persons who were regarded as disreputable for certain conduct, such as bankrupts and actors, were disqualified as a matter of law from municipal *honores*, and at least as a matter of fact, from *honores* at Rome. It is clear that, as far as we can tell, any laws that imposed these restrictions on holding *honores* did not use the term *infamia*, but rather stated specific legal consequences, such as disqualification from being a *iudex* or exclusion from the Senate. However, it is also clear that, to a large extent, the people disqualified from *honores* overlapped with those who underwent disabilities under the Praetor's Edict that Gaius and later jurists termed *ignominia* or *infamia*. This leaves the question open as to when disqualification from holding *honores* became known as *infamia*. All the evidence allows us to state is that such usage appears common in the late second century.

One possible explanation of how this evolved is based on Gaius' use of *ignominiosus*. If, as Gaius suggests, *ignominiosus* was a term used by jurists to

describe a group of persons subject to identical legal consequences, there is no reason why the use of the term could not be expanded to embrace other legal consequences that this same group also underwent.

Beyond the Edict: Legal Disabilities and Infamia

In addition to disqualification from *honores* and disabilities under the Praetor's Edict, various other legal disabilities and consequences are linked in the sources with *infamia* or include either *infames* specifically or persons later termed *infames* among those affected by a specific law.

Actio Popularis

As noted in Chapter Two, the inability to postulate is linked in an excerpt by Paul to another restriction, that of the ability to bring a *actio popularis*.³⁹³ The excerpt taken to illustrate this is from Paul's commentary on the edictal passage on *de albo corrupto*.³⁹⁴ Kaser asserts that this passage does not represent an edictal prohibition, but rather juristic interpretation.³⁹⁵

Exclusion from Being a *Patronus*

In accordance with a *Lex Repetundarum*, possibly of Gracchan date,³⁹⁶ found in an inscription, it was possible for a *patronus* to be appointed to assist those bringing the case. Persons were disqualified for being so appointed who *quaestione iudicio publico condemnatus siet, quod circa eum in*

³⁹³ *Digesta* 47.23.4 (Paul): said to be permitted only to persons of *integra fama*, i.e., those who could postulate.

³⁹⁴ See Lenel, *Edictum Perpetuum*, above n. 14, 57.

³⁹⁵ Unfortunately, only stating that it 'offenbar' is juristic interpretation. Kaser, 'Infamia und Ignominia', above n. 1, 249-50.

senatum legeri non liceat ('has been condemned in a *quaestio* or *iudicium publicum* [because of which he may not be enrolled in the Senate]').³⁹⁷ Here again, it is not an *infamis* who is expressly disqualified, but a person condemned in a specific action.

Exclusion from Being a Witness

It seems that various laws each provided certain rules excluding persons from being witnesses under that particular law. As already noted, it is clear that conviction under the *Lex Iulia Repetundarum* and the *Lex Iulia de Adulteriis Coercendis* specifically carried with it as a penalty disqualification from being a witness.³⁹⁸

In the *Digesta*, a passage from Callistratus originally dealing with the limitation of witnesses under the *Lex Iulia de Vi* has been extracted to provide Justinian's law with a list of persons disqualified from being a witness.³⁹⁹ An extract from Ulpian on the same law was chosen by the compilers of the *Collatio* for a similar purpose.⁴⁰⁰ This suggests that this law was in some way considered representative of statutory disqualifications on being a witness. From these two extracts, it is possible to attempt a reconstruction of the original text of the law on disqualified persons:⁴⁰¹

³⁹⁶ Sometimes referred to as the *Lex Acilia* – *Fontes Iuris Romani Antejustiniani*, above n. 172, 1.7, see now Crawford (ed.), *Roman Statutes*, above n. 38, vol. I no. 1, 51-3 for date.

³⁹⁷ *Lex Repetundarum* l. 11.

³⁹⁸ *Lex Iulia Repetundarum*: *Digesta* 1.9.2 (Marcellus); 28.1.20.5 (Ulpian); 48.11.6.1 (Venuleius Saturninus); *Lex Iulia de Adulteriis Coercendis*: *Digesta* 22.5.14 (Papinian); *Digesta* 22.5.18 (Paul); *Digesta* 28.1.20.6 (Ulpian): McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 142.

³⁹⁹ *Digesta* 22.5.3.5 (Callistratus).

⁴⁰⁰ *Collatio* 9.2pr-3 (Ulpian).

⁴⁰¹ See Crawford (ed.), *Roman Statutes*, above n. 38, vol. II, no. 62, 791.

Qui se ab eo parenteue eius libertoue cuius eorum libertaue liberauerit, quie impubes erit, quie iudicio publico <condemnatus> erit, qui eorum in integrum restitutus non erit, quie in uinculis custodiaque publica erit, quie depugnandi causa auctoratus erit, quie ad bestias <ut> depugnaret se locauerit palamue corpore quaestum faciet fecerit, quie ob testimonium dicendum pecuniam accepisse iudicatus erit, ne quis eorum hac lege in reum testimonium dic<ito>.

Whoever shall have freed himself from him or his parent or from the freedman or freedwoman of them; or whoever shall be underage; or whoever shall have been condemned in a *iudicium publicum*, who shall not have undergone *restitutio in integrum*; or whoever shall be in bonds or public custody; or whoever shall have hired himself out for the sake of fighting; or whoever shall have hired himself out to fight beasts; or whoever shall or shall have openly made a living from his body; or whoever shall have been judged to have received money for the sake of bearing witness; none of these persons shall bear witness against the defendant in accordance with this statute.⁴⁰²

Callistratus, commenting on this list, notes that some people are excluded *propter notam et infamiam uitae suae* ('on account of the *nota* and *infamia* of their life'), but this is commentary on a particular passage, rather than a statement of a general rule.⁴⁰³ Although the excerpts taken pertain to the *iudicium publicum* for *uis*, the fact that the excerpts are taken from Ulpian's *de Officio Proconsularis* and Callistratus' *De Cognitionibus* indicates that the rule was extended to *cognitio* procedures.⁴⁰⁴ As can be seen, this clause has some overlap with the Praetor's Edict, especially the second Edict, and also thus with the *Tabula Heracleensis*. One curious omission, noted by McGinn, is the procurer, not mentioned in either list, and therefore unlikely to be a casual omission either by the jurists or compilers.⁴⁰⁵ One may perhaps add also the other categories contained in the

⁴⁰² *Lex Iulia de Vi* ch 88; Crawford (ed.), *Roman Statutes*, above n. 38, vol. II, 791.

⁴⁰³ *Digesta* 22.5.3.5 (Callistratus).

⁴⁰⁴ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 64.

⁴⁰⁵ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 63.

Edict and *Tabula Heracleensis* disqualified for their seemingly disreputable nature: ignominiously dismissed soldiers, *lanistae*, persons condemned of *calumnia* and persons condemned in *actiones famosae*. Was there then a statutory prohibition, omitted curiously by the compilers of the *Collatio* or *Corpus*? McGinn states in relation to procurers that ‘it is difficult to believe that they were not excluded, with prostitutes, from giving testimony in *iudicia publica* as a matter of law’.⁴⁰⁶ However, another solution is suggested by the *Digesta*’s answer to another curious omission, that of *calumnia*. An excerpt from Papinian, discussing the adultery law, notes that neither the *Lex Remmia* nor *Leges Iuliae on uis, repetundae* or *peculatus* forbids *calumniatores* from being witnesses, *uerumtamen quod legibus omissum est, non omittetur religione iudicantium ad quorum officium pertinet eius quoque testimonii fidem, quod integrae frontis homo dixerit, perpendere* (‘nevertheless, what is omitted by the laws, is not omitted by the scrupulousness of the judges whose task it is to weigh the trustworthiness of the testimony, even that which a man of good appearance says’).⁴⁰⁷ Similarly, the *Pauli Sententiae* states that

Suspectos gratiae testes et eos uel maxime, quos accusator de domo produxerit uel uitae humilitas infamarit, interrogari non placuit: in teste enim et uitae qualitas spectari debet et dignitas.

It is not pleasing to interrogate witnesses who are suspect through partiality and especially those who are either produced from the house of the accuser or whom the humility of their life disgraces: for in a witness it is pleasing to consider both his quality of life and his *dignitas*.⁴⁰⁸

⁴⁰⁶ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 63.

⁴⁰⁷ *Digesta* 22.5.13 (Papinian).

⁴⁰⁸ *Pauli Sententiae* 5.15.1 = *Collatio* 9.3.1. The *collatio*’s phrasing is slightly different: ‘suspectos testes [omits gratiae] et eos uel maxime, quos accusator de domo eduxit uel uitae humilitas infamauerit interrogari non placuit in testibus enim et uitae qualitas

The language here seems to be general, rather than referring to specific categories of persons, the term *humilitas* is clearly capable of extending beyond disgraced persons to even those of merely low status.⁴⁰⁹ Further, the use of *placet* suggests that it was perhaps not specifically required, but desirable, not to hear such witnesses.⁴¹⁰ Both these passages imply that a judge would discretionarily, and perhaps even routinely, either exclude the evidence of certain persons, or accord it little or no weight, without those persons being specifically mentioned in any statute. However, nowhere is it clearly stated that *infames*, as a category, are excluded from giving evidence.⁴¹¹

Persons who were *intestabiles*,⁴¹² as well as being unable to act as witnesses in criminal cases, also could not act as witnesses in private legal transactions requiring *honestae personae* or people of *optima opinio*, such as the opening of wills,⁴¹³ and judicial opinion probably held that those incapable of being a witness in judicial proceedings could not witness a will.⁴¹⁴ Whether persons incapable of being witnesses could actually make a will themselves seems to have been a matter of controversy. Ulpian states that persons who are *intestabiles* cannot make a will or witness a will.⁴¹⁵ Gaius, however, states that persons who are *intestabiles*

spectari debet et dignitas?. The inclusion of *gratia* in the *Sententiae* text, which explains why a witness is *suspectus* perhaps makes the *Sententiae* text preferable.

⁴⁰⁹ See in particular Garnsey, *Social Status and Legal Privilege*, above n. 172, 222 on ‘*Humiliores*’ and synonyms in legal texts.

⁴¹⁰ See *Oxford Latin Dictionary* (Oxford, Clarendon Press, 1968) entry on ‘*placeo*’, 1385.

⁴¹¹ Greenidge, *Infamia*, above n. 110, 168.

⁴¹² On *intestabiles* see T. Mommsen, *Le Droit Pénal Romain* (Trans. J. Duquesne, Paris, Librairie des Écoles Françaises d’Athenes et de Rome, 1907) 3 Vols., vol. 3, 341-5.

⁴¹³ *Digesta* 29.3.7 (Gaius); *Digesta* 16.3.1.36 (Ulpian) the delivering of money on deposit to an heir: McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 63.

⁴¹⁴ *Digesta* 22.5.14 (Papinian): A person found guilty of adultery cannot give testimony, therefore a will witnessed by them is invalid at civil law.

⁴¹⁵ *Digesta* 28.1.18.1 (Ulpian): referring to a *Senatus Consultum* on persons who write defamatory verses.

cannot be witnesses and, according to *some*, *quidam*, cannot have witnesses act for them,⁴¹⁶ rendering them incapable of making a will. The controversy between Ulpian and Gaius can perhaps be reconciled on the basis that Ulpian is referring to the content of a specific *Senatus Consultum*, whereas Gaius is talking of the consequences under the Edict in relation to *iniuria*.⁴¹⁷ Gaius shows that the matter clearly was not settled for the Roman jurists and Justinian's compilers, by leaving the indefinite *quidam* removed the controversy. *Infames per se* do not appear to have been *intestabiles*.

*Ius Accusandi*⁴¹⁸

Cicero makes it clear that in the Republic persons were debarred from accusing in accordance with various statutes.⁴¹⁹ A late third century rescript states that someone will not be prohibited from accusing if he is of *integra existimatio*, language used for *infamia*.⁴²⁰ Macer, Modestinus and Marcian all use the term *infamis* or *famosus* with reference to accusations, stating that *infames* cannot bring an accusation, *propter delictum*, except in relation to *annona*, *maiestas* or their own injuries.⁴²¹ That these texts accurately reflect the original language of the jurists is suggested by passages by Paul and Papinian from the *Collatio* referring to the Augustan adultery law. Papinian states that *infamia* does not

⁴¹⁶ *Digesta* 28.1.26 (Gaius).

⁴¹⁷ See Lenel, *Palingenesia*, above n. 86, vol. II, 231 [338]-[340].

⁴¹⁸ For a good account, see McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 58-61.

⁴¹⁹ Cicero, *Pro Cluentio* 120.

⁴²⁰ *Codex Iustinianus* 9.1.15 (294 CE): '*Criminis accusationem instituere cum periculo calumniae, si tibi existimatio integra est, minime prohiberis*'.

⁴²¹ *Digesta* 48.2.8 (Macer); *Digesta* 48.2.13 (Marcian); *Digesta* 48.4.7pr (Modestinus) and *Digesta* 48.3.11pr (Macer).

prevent someone from pursuing his own injury under the adultery law,⁴²² while Paul notes that *infames*, who *alias accusare non possit*, are admitted to such accusations after two months.⁴²³ In relation to this, Ulpian states that a father who proves that his son-in-law is an *infamis* displaces the husband's otherwise privileged right of accusation.⁴²⁴

All this being said, there is also a strong suggestion in the *Digesta* that the statutes regulating accusations did not include the term *infamis* but, rather, as we have seen in other statutes, provided a detailed catalogue of who could, or could not, accuse, to which later writers applied the 'shorthand' terms *infamis* and its cognates. The main evidence for this is an excerpt from Ulpian's work on adultery, listing people who could not accuse. The rule contained in the excerpt appears not, however, to have come from the *Lex Iulia de Adulteriis Coercendis* itself as it commences with a statement that a person condemned in a *iudicium publicum* can only bring an accusation in the case of the death of their own children, parents or patron or for matters touching themselves.⁴²⁵ In addition to persons condemned in a *iudicium publicum*, the other persons are familiar from other laws imposing restrictions: persons branded with calumny; those who have been sent into the arena to fight beasts; actors; pimps; persons judged as being guilty of *calumnia* or *praeuaricatio* in a *iudicium publicum* or those who have been judged as having received money for the sake of accusing or causing trouble

⁴²² *Collatio* 4.5.1 (Papinian): '... *sed ei non opponetur infamia uel quod libertinus rem sestertiorum triginta milium aut filium non habuit, propriam iniuriam persequenti*'.

⁴²³ *Collatio* 4.4.2 (Paul): '*sed tum post duos menses intra quattuor menses utiles expertus, licet talis sit, qui alias accusare non possit, ut libertinus aut minor uiginti quinque annorum aut infamis, tamen ad accusationem admittitur*'.

⁴²⁴ *Digesta* 48.5.3 (Ulpian).

⁴²⁵ *Digesta* 48.2.4 (Ulpian).

for someone.⁴²⁶ The inclusion of beast fighters makes it likely that the passage originally made references to gladiators and possibly *lanistae*, which were removed by the compilers.⁴²⁷ The question arises as to how many of the other persons included in other laws, such as the Edict, can be restored to categories of persons prohibited from making accusations. It appears from the writings of Macer that at least the *actiones famosae* should be included in the list. Lenel has collected seven extracts from Macer's *de Iudiciis Publicis*, which he has classed under the heading *Qui accusare possint*.⁴²⁸ The first states that *infames* are incapable of accusing *propter delictum proprium*.⁴²⁹ As Kaser notes, it is unclear whether or not Macer is referring to a general regulation of accusation stemming from a law such as the *Lex Iulia de Iudiciis Publicis*.⁴³⁰ The next passage discusses who is an *infamis* and notes that *infamia* follows not only from a *iudicium publicum*, but also from certain private actions, including *furtum*, *ui bonorum raptorum* and *iniuria*,⁴³¹ all of which, as noted above, were *actiones famosae*. Several other passages also discuss *calumnia* and *praeuaricatio*, *furtum* and *iniuria* as causes of *infamia*,⁴³² all of which seem relevant to Macer's discussion of who can accuse, but not to other sections of the work.

⁴²⁶ *Digesta* 48.2.4 (Ulpian). See also *Digesta* 47.15.5 (Venuleius Saturninus) An accuser convicted of praeviation is not allowed to accuse *ex lege* ('in accordance with a statute').

⁴²⁷ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 60.

⁴²⁸ Lenel, *Palingenesia*, above n. 86, vol. I, 567-8 [28]-[34]. These passages are discussed by Kaser, 'Infamia und Ignominia', above n. 1, 259-60.

⁴²⁹ *Digesta* 48.2.8 (Macer) = Lenel, *Palingenesia*, above n. 86, vol. I, 567 [28].

⁴³⁰ Kaser, 'Infamia und Ignominia', above n. 1, 259.

⁴³¹ *Digesta* 48.1.7 (Macer) = Lenel, *Palingenesia*, above n. 86, vol. I, 567 [29].

⁴³² *Digesta* 47.2.64 (Macer) = Lenel, *Palingenesia*, above n. 86, vol. I, 567 [30]; *Digesta* 47.15.1 (Macer) = Lenel, *Palingenesia*, vol. I, 568 [33]; *Digesta* 48.2.11 (Macer) = Lenel, *Palingenesia*, vol. I, 568 [34].

As McGinn notes, this consistent grouping, not only in this law, but in the others we have examined as well, probably encouraged the later jurists discussed, such as Macer, Modestinus and Marcian, to use the terms *infames* and *famosi* as shorthand when discussing those persons.⁴³³

Right to Kill Adulterers

In addition to criminalising adultery, the *Lex Iulia de Adulteriis Coercendis* created a legal regime surrounding the execution by a father or husband of an adulterous woman and her paramour. The same trend that we have observed in relation to other statutes is evident here as well, whereby the persons whom it was permitted to kill were originally specified by the statute, but later juristic commentaries referred to them by the shorthand term of *infames*.

The earliest text is probably an extract from Paul, found external to the Justinianic tradition in the *Collatio*, which lists the following as permissible categories of persons to be killed by the husband: a slave; a person who hired themselves to fight as a gladiator; a person who hired his services to fight beasts; a person condemned in a *iudicium publicum* and his own *liberti* or those of his father, mother, son or daughter and *dediticii*.⁴³⁴ The extract in the *Digesta*, taken from Macer, differs somewhat from this list, including pimps, not mentioning beast fighters or gladiators, but mentioning again freedmen and actors.⁴³⁵ A third list is found in the *Pauli Sententiae*, which lists *infames*, prostitutes and slaves and freedmen as permissible victims for the cuckolded husband.⁴³⁶ When the three

⁴³³ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 60.

⁴³⁴ *Collatio* 4.3.1-4 (Paul).

⁴³⁵ *Digesta* 48.5.25(24)pr (Macer).

⁴³⁶ *Pauli Sententiae* 2.26.4 (excluding *liberti*) = *Collatio* 4.12.3 (Paul).

lists are combined, they bear a close resemblance to the specific lists discussed above, including those condemned in *iudicia publica*, gladiators, *bestiarii*, actors, pimps and prostitutes. It is perhaps because of this that the author of the *Sententiae* was led to abbreviate the people mentioned as *infames*, though strangely not appearing to regard prostitutes as falling within this category. McGinn's suggestion is attractive, i.e. that the Praetorian edicts had, by the time of the fourth century and the compilation of the *Sententiae*, become the central basis for defining *infames* and, as those lists do not mention male prostitutes, they were included by the *Sententiae* compiler as a group external to the *infames*.⁴³⁷

It appears that persons excluded from accusing under the father's or husband's right under the *Lex Iulia de Adulteriis Coercendis* were precluded also from exercising the right to kill. As was noted above, persons described by the jurists as *infames* were precluded from accusing except where their own rights were affected and accused as *extranei* rather than utilising the husband's or father's right under the *Lex Iulia*.⁴³⁸

Marriage Restrictions

Marriage, including restrictions on who could marry whom, was regulated by two laws, the *Lex Iulia* and *Lex Papia Poppaea* passed during Augustus' reign.⁴³⁹ In one passage in the fourth century CE compilation the *Tituli ex Corpore Ulpiani*, reference is made to persons who *contra legem Iuliam Papiamque Poppaeam contraxerint matrimonium, uerbi gratia si famosam quis uxorem duxerit, aut libertinam senator* ('contracts a marriage against the *Lex Iulia et Papia Poppaea*,

⁴³⁷ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 204.

⁴³⁸ *Collatio* 4.4.2 (Paul).

⁴³⁹ See Crawford (ed.), *Roman Statutes*, above n. 38, vol. II, 801-2.

in accordance with the words of the statute, if anyone shall have married a *famosa* wife, or a senator a freedwoman’).⁴⁴⁰ Another passage in the same text makes it clear that the use of the term *famosa* here is a juristic gloss, rather than the wording of the statute. In fact, the *Tituli* provides support for the argument that, as in other statutes, the content of the statute was a specific list of persons who were prohibited as marriage partners to certain other persons:⁴⁴¹

1. Lege Iulia prohibentur uxores ducere senatores quidem liberique eorum libertinas et quae ipsae quarumue pater materue artem ludicram fecerit, item copore quaestum facientem. 2. Ceteri autem ingenui prohibentur ducere lenam et a lenone lenaue manumissam et in adulterio deprehensam et iudicio publico damnatam et quae artem ludicram fecerit: adicit Mauricianus et a senatu damnatam.

1. Senators and their children are prohibited from taking as wives freedwomen and those who themselves or whose father or mother was an actor, likewise she who prostitutes herself. 2. Other freeborn persons are prohibited from marrying a pimp; and a woman manumitted by a pimp; and a woman who has been caught in adultery; and a woman convicted in a *iudicium publicum*; and a woman who was an actor. Mauricianus added also a woman condemned by the Senate.⁴⁴²

The text here is clearly not comprehensive, for example, Paul purports to quote from the provision of the law itself, which extends the restrictions down to the great-grandsons of Senators.⁴⁴³

There is clearly also a conflict between this passage and one in the *Digesta*.⁴⁴⁴

According to Ulpian in the *Digesta*, it was by *Senatus Consultum* that women

⁴⁴⁰ *Tituli ex Corpore Ulpiani* 16.2.

⁴⁴¹ McGinn, *Prostitution Sexuality and the Law*, above n. 15, 72 and Treggiari, *Roman Marriage*, above n. 197, 63-4 both state that the law did not render marriages in contravention of these restrictions invalid. However, *Digesta* 23.2.42.2 (Modestinus) states that where marriages have occurred in contravention of the prohibitions *nuptiae non erunt*, the matter is uncertain.

⁴⁴² *Tituli ex Corpore Ulpiani* 13.

⁴⁴³ *Digesta* 23.2.44pr (Paul): McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 92.

⁴⁴⁴ See McGinn, *Prostitution Sexuality and the Law*, above n. 15, 92.

convicted in a *iudicium publicum* were deemed unworthy brides for Senators.⁴⁴⁵ If such women were included in the second category of women, those prohibited as brides to *ingenui*, then there would be no need for an *SC* to exclude them as potential brides to Senators. There are two possible solutions. One is to emend the *Digesta* passage to refer to *ingenui* rather than Senators.⁴⁴⁶ The other is to read the *Tituli ex Corpore Ulpiani* passage in such a way that *et in adulterio deprehensam et iudicio publico damnatam* is taken as a phrase, and that the law forbade women condemned in adultery or caught in the act from all free-born persons, and a later *SC* forbade women condemned in any criminal court to Senators. This would explain why women apprehended in adultery are discussed so closely with women convicted of it in the Ulpian *Digesta* passage.⁴⁴⁷ The problem with this latter interpretation is that it inserts a discussion about a purely senatorial prohibition into what appears to be Ulpian's discussion of the clause of women prohibited as marriage partners to anyone, as indicated by the preceding discussion of pimping and the following discussion of a woman apprehended in adultery, both categories that according to the *Tituli ex Corpore* pertain to *ingenui*.⁴⁴⁸

An attempt has been made to reconstruct the *ipsissima uerba* of the first clause, pertaining to Senators:

Qui senator est <erit> quiue filius neposue ex filio
proneposue ex <nepote> filio nato cuius eorum est erit, ne
quis eorum sponsam uxorem sciens dolo malo habeto
libertinam aut eam, quae ipsa cuiusue pater materue artem

⁴⁴⁵ *Digesta* 23.2.43.10 (Ulpian).

⁴⁴⁶ Lenel, *Palingenesia*, above n. 86, vol. II, 940 n. 4.

⁴⁴⁷ *Digesta* 23.2.43.10-3 (Ulpian); McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 92.

⁴⁴⁸ On problems with this text, see Gardner, *Being a Roman Citizen*, above n. 7, 124-5.

ludicram facit fecerit. Neue senatoris filia neptisue ex filio proneptisue ex nepote filio nato {nata} libertino eiue, qui ipse cuiusue pater materue artem ludicram facit fecerit, sponsa nuptaue sciens dolo malo esto neue quis eorum <sciens dolo malo> sponsam uxoremue eam habeto.

Who is or shall be a Senator or whoever is or shall be a son or grandson born from a son or great-grandson born from a grandson born to a son of a Senator, none of them is knowingly with wrongful deceit to have as a fiancée or wife a freedwoman or someone who was or shall have been an actor or whose father or mother has or shall have been an actor. Nor is the daughter of a Senator or a granddaughter born from a son or a great-granddaughter born from a grandson born from a son of a Senator knowingly with wrongful deceit to be the fiancée or bride of a freedman or of someone who himself or whose mother or father has or shall have been an actor nor will any of them knowingly with wrongful deceit have her as a fiancée or bride.⁴⁴⁹

There is clearly an inconsistency between this text and that in the *Tituli ex Corpore Ulpiani* in that prostitutes are not mentioned in this reconstruction of the first clause. The fact that prostitutes are also discussed in Ulpian's commentary together with pimps has resulted in the suggestion that prostitutes be included in the second category of prohibitions, i.e., those prohibited as marriage partners to *ingenui* as well.⁴⁵⁰

There is clearly some overlap between the persons mentioned here as excluded from being prospective marriage partners, and those included in documents such as the Praetor's Edict on postulation and the *Tabula Heracleensis*. An intriguing omission is any reference in the sources discussing the marriage laws of persons involved in the arena: beast fighters, gladiators or *lanistae*. As can be seen in all the provisions discussed in this chapter, they are fairly constant companions of actors and those condemned in *iudicia publica*, appearing in the Praetor's Edict,

⁴⁴⁹ *Lex Iulia et Papia Poppaea* ch. 1: Crawford (ed.), *Roman Statutes*, above n. 38, vol. II, no. 64, 807.

⁴⁵⁰ See *Digesta* 23.2.43pr-9: McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 92-3.

the *Tabula Heracleensis*, the *Lex Iulia de Vi* (though actors did not), and even in the *Tabula Larinas*.⁴⁵¹ A much later law of Constantine, which overlaps a great deal with the provisions of the *Lex Iulia et Papia Poppaea* as we have them, includes reference to slaves, daughters of slaves, freedwomen and their daughters, women of the stage and their daughters, tavern keepers and their daughters⁴⁵² and the daughter of a procurer or gladiator, which perhaps suggests that gladiators and their children were somewhere included in the restricted categories.⁴⁵³

However, despite the *Tituli ex Corpore Ulpiani*'s reference to a *famosa uxor*, noted above,⁴⁵⁴ and another passage of Terrentius Clemens, who refers to a patron not enjoying the privileges of the law where he marries a *ignominiosa liberta*,⁴⁵⁵ both of which read more like juristic glosses than precise terms, the extracts of the law have that survived make it clear that the law did not refer to *infamia* or *infames*, but rather certain specified persons. One problematic passage of Ulpian has, however, been interpreted as implying that this law had the consequence of imposing *infamia* on certain persons. As noted in Chapter 1, the Watson edited translation of the *Digesta* implies that the Augustan marriage laws actually branded with *infamia* women listed in the prohibited marriage categories.⁴⁵⁶ As argued in that chapter, what this extract appears to be discussing is actually the categories of women falling within those prohibited as marriage partners and that the verb *notare* is here either merely indicating those who were included with a

⁴⁵¹ *Tabula Larinas* 1. 16.

⁴⁵² See *Digesta* 23.2.43pr (Ulpian) with its reference to taverns in association with prostitution.

⁴⁵³ *Codex Theodosianus* 4.6.3 = *Codex Iustinianus* 5.27.1 (336 CE) see also *Novella Marciani* 4 for an interpretation of this law.

⁴⁵⁴ *Tituli ex Corpore Ulpiani* 16.2.

⁴⁵⁵ *Digesta* 23.2.48.1 (Terrentius Clemens).

specific category, or else indicating stigmatisation, but not in the specific sense of *infamia*. In support of this it can be added that all the women discussed in this passage, *Digesta* 23.2.43, prostitutes, women convicted in a *iudicium publicum* and *lenae*, are categories listed in the entry in the *Tituli ex Corpore Ulpiani*.⁴⁵⁷ Similarly, most of the excerpts taken from book one of Ulpian's *Ad Legem Iuliam et Papiam* deal with the definition of terms implied in the marriage restrictions, such as who is a senator or an *ingenuus*.⁴⁵⁸ It is perhaps McGinn who provides the best way of understanding *nota* and its cognates in this context. McGinn argues that the usage reflects the jurists' understanding of the law as exercising a quasi-censorial function. The law sought to maintain a social hierarchy by prohibiting persons from unions with people of superior status, just as censors maintained the social hierarchy.⁴⁵⁹ On this understanding, the law stigmatised persons by marking them out and keeping them out of certain levels of society by excluding them from marriage, but did not impose, in any sense, a positive legal consequence with resonance in other areas (the marriage laws are never used as the basis for any other legal consequences outside themselves in contrast to, for example, the laws establishing *iudicia publica*).

Exclusion from the Army

There is indirect evidence that *infamia*, as understood in the third century, resulted in persons being debarred from the army. Arrius Menander writes that where a person returns after temporary relegation, inquiry is to be made whether

⁴⁵⁶ See the translation of *Digesta* 23.2.43.4, 12 and 13 (Ulpian) in Watson (ed.), *Digest*, above n. 173, 662-3.

⁴⁵⁷ *Tituli ex Corpore Ulpiani* 13.

⁴⁵⁸ See Lenel, *Palingenesia*, above n. 86, vol. II, 939-40 [1977]-[1978].

⁴⁵⁹ McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 126.

the reason for condemnation involves *perpetua infamia*, if not, and the person can return to the *ordo* and seek *honores*, then they can enlist in the army.⁴⁶⁰ Similarly, persons convicted in *iudicia publica* are not permitted in the army.⁴⁶¹

Other Aspects of Infamia: Cognitio and Variable Penalties

Harsher Punishments

As already noted, the use of trial by the *cognitio* procedure introduced the scope for variable penalties and the development of the so-called ‘dual penalty’ system, whereby harsher punishments were applicable to lower status persons, often termed *humiliores*, than to persons of higher status, *honestiores*, has been much discussed in modern works.⁴⁶² It seems obvious that *infames* would have fallen into the class of *humiliores* and Callistratus states that *famosi* were punished more than persons of *integra fama*.⁴⁶³ This is generally regarded, however, as being a general statement, rather than a ‘technical’ use of *famosi* to refer only to persons suffering *infamia* in accordance with the law.⁴⁶⁴

Heavier and Lighter Sentences

The sources appear unanimous on the point that a more severe, non-pecuniary, penalty than is prescribed by law does not result in *infamia*.⁴⁶⁵ The sources,

⁴⁶⁰ *Digesta* 49.16.4.4 (Arrius Menander): McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 40.

⁴⁶¹ *Digesta* 49.16.4.7 (Arrius Menander): McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 40.

⁴⁶² See especially, Garnsey, *Social Status and Legal Privilege*, above n. 172, especially parts II and IV, see also Bauman, *Crime & Punishment*, above n. 204, chapter 11.

⁴⁶³ *Digesta* 48.19.28.16 (Callistratus).

⁴⁶⁴ Grenidge, *Infamia*, above n. 111, 163; Kaser, ‘*Infamia und Ignominia*’, above n. 1, 267.

⁴⁶⁵ *Codex Iustinianus* 2.11(12).4 (198 CE); *Digesta* 3.2.13.7 (Ulpian).

however, are confused as to what happens when a less severe penalty is imposed. In one constitution, it is stated that a person is not *infamis* after the two-year period for which they have been removed from the decurionate has elapsed after a judicial sentence, even if a more severe sentence ought to have been imposed.⁴⁶⁶ However, in the *Digesta* it is stated that a person who has been given a milder *relegatio*, cannot regain their decurionate even after the *relegatio* expires.⁴⁶⁷ The only plausible distinction here is between removal from the decurionate, and temporary *relegatio*, with only someone debarred from the decurionate by a milder sentence capable of regaining their position.

Cognitio and Temporary *Infamia*

As noted above, there are several cases where reference is made to persons only undergoing a temporary *infamia* or, indeed, without explicit reference to *infamia*, being excluded from performing certain functions, such as the decurionate or conducting *aduocatio*, while relegated, only to regain this capacity at the end of the period of relegation. Kaser has argued that such temporary *infamia* or exclusion is closely related to *cognitio*, which he contrasts with *iudicia publica*, which he argues resulted in permanent exclusion or *infamia*,⁴⁶⁸ barring *restitutio in integrum*. This principle seems well illustrated by a *Digesta* extract stating that a person removed temporarily from the decurionate, but *not* for a reason falling within the *iudicium publicum* established by the *Lex Cornelia de Falsis*, can recover his station after the period.⁴⁶⁹ He further argues that several texts have

⁴⁶⁶ *Codex Iustinianus* 2.11(12).3 (197 CE).

⁴⁶⁷ *Digesta* 50.2.3pr (Ulpian).

⁴⁶⁸ Kaser, 'Infamia und Ignominia', above n. 1, 269-72.

⁴⁶⁹ *Digesta* 48.10.13.1 (Papinian).

been interpolated to replace the distinction between *iudicium publicum* and *cognitio* with a distinction between more and less serious crimes.⁴⁷⁰ As was noted in Chapter One, detecting interpolations is often difficult, and I would argue that it is perhaps even unnecessary in these circumstances for Kaser's theory to hold true. It is well known that the *iudicia publica* had set penalties, that the finding of guilt automatically entailed the imposition of the set penalty and, as far as the evidence permits us to know (see above), temporary relegation was not one of these set penalties, aside perhaps from *ambitus*. Thus, discussion of temporary *infamia* was perhaps only going to occur in the context of *cognitio*. Much greater latitude existed in *cognitio* procedures in the imposition of penalties, even if imperial constitutions often did establish penalties for crimes tried *extra ordinem*.⁴⁷¹

Statutory Language

To a certain extent, the differences observed between the *Leges* passages, as far as we can reconstruct them, and other legal sources, such as constitutions and juristic writings, may be due to questions of genre. The enumeration of every possible circumstance that we have observed, rather than the using of a simple phrase such as '*infames*', is typical of all the Roman assembly legislation.⁴⁷² As has been observed, the phrasing in the other sources, especially constitutions, however, is not always so concerned to enumerate every possible circumstance and often

⁴⁷⁰ Kaser, 'Infamia und Ignominia', above n. 1, 271-2. The texts in question are *Digesta* 3.1.8 (Papinian), addressed Kaser, 272 n. 253; *Digesta* 50.1.15pr (Papinian), addressed Kaser, 271 n. 250; 50.2.3.1 (Ulpian), addressed, Kaser, 272 n. 252; and 50.2.5 (Papinian), addressed Kaser, 272 n. 251.

⁴⁷¹ See Bauman, *Crime & Punishment*, above n. 109, 136-9.

⁴⁷² McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 52; see also Crawford (ed.), *Roman Statutes*, above n. 38, vol. I, 16.

refers simply to *infamia* or *infames*, with the understanding that the terms conveyed a settled meaning in much the same way as Gaius understood *ignominiosus*.

Epilogue: Late Constitutions⁴⁷³

The *Codex Theodosianus* and *Codex Iustinianus* have already been discussed in some detail in constructing synchronic understandings of *infamia* at two different periods. What is proposed here is a brief recapitulation of laws from Constantine onwards as a means of contrast with earlier laws and illustrating the development of *infamia*. It is in this period that *infamia* appears as a positive concept, i.e., it is an actual punishment that people undergo, rather than, as in the time of Gaius, a merely descriptive term used in relation to persons subject to similar legal disabilities. *Infamia* is explicitly stated as a penalty in laws for:

- a *libertus* who usurps the office of decurion;⁴⁷⁴
- a governor who takes domestics or *cancellarii* to the provinces;⁴⁷⁵
- teachers who teach publicly;⁴⁷⁶
- a person who harbours decurions deserting their *munera*;⁴⁷⁷
- heretics and Manicheans;⁴⁷⁸
- persons who buy a place in the priesthood;⁴⁷⁹
- Senators, *duumviri* and priests who marry forbidden classes of women;⁴⁸⁰

⁴⁷³ See on this period, Kaser, 'Infamia und Ignominia', above n. 1, 272 ff.

⁴⁷⁴ *Codex Iustinianus* 9.21.1.1 (300 CE).

⁴⁷⁵ *Codex Theodosianus* 1.34.3 (423 CE) = *Codex Iustinianus* 1.51.8 (423 CE).

⁴⁷⁶ *Codex Theodosianus* 14.9.3 (425/6 CE) = *Codex Iustinianus* 11.19.1pr (425/6 CE).

⁴⁷⁷ *Codex Theodosianus* 12.1.76 (371 CE) = *Codex Iustinianus* 10.32.31 (371 CE).

⁴⁷⁸ *Codex Theodosianus* 16.5.3 (372 CE); *Codex Theodosianus* 16.1.2 (380 CE) = *Codex Iustinianus* 1.1.1.1 (380 CE); *Codex Theodosianus* 16.5.7 (381 CE); *Codex Theodosianus* 16.6.4 (405 CE); *Codex Theodosianus* 16.5.54 (414 CE).

⁴⁷⁹ *Codex Iustinianus* 1.3.30(31).6 (469 CE).

⁴⁸⁰ *Codex Theodosianus* 4.6.3 (336 CE) = *Codex Iustinianus* 5.27.1 (336 CE).

- persons who marry without a dowry;⁴⁸¹
- a woman who divorces without good cause and remarries within five years.⁴⁸²

As was noted in Chapter Four, in addition to these numerous largely unrelated categories of *infames*, there were numerous instances where *infamia* was used as a penalty to regulate the behaviour of participants in the judicial process, either judges or parties to the case:

- a judge who does not punish jailers for allowing the accused to die;⁴⁸³
- a person who appeals directly to the emperor rather than through the appropriate channels;⁴⁸⁴
- persons who neglect rules regarding the delivery of records;⁴⁸⁵
- possibly a judge who sends Christians into the arena;⁴⁸⁶ who violates the laws;⁴⁸⁷ or acts improperly in troop recruitment;⁴⁸⁸ or who connives to allow convicted persons to escape;⁴⁸⁹
- persons recording surreptitious rescripts;⁴⁹⁰
- a person who loses an appeal;⁴⁹¹
- judges who fail to prosecute tomb violations in their area;⁴⁹²
- governors who ignore the rigours of the law directed against deserters;⁴⁹³
- a judge who tortures a decurion;⁴⁹⁴

⁴⁸¹ *Novellae Majoriani* 6.9 (447 CE).

⁴⁸² *Codex Iustinianus* 5.17.8.4a (449 CE).

⁴⁸³ *Codex Theodosianus* 9.3.1 (320 CE) = *Codex Iustinianus* 9.4.1.5 (320 CE).

⁴⁸⁴ *Codex Iustinianus* 1.21.3 (331 CE).

⁴⁸⁵ *Codex Theodosianus* 11.30.24 (348 CE).

⁴⁸⁶ *Codex Theodosianus* 9.40.8 (365 CE)

⁴⁸⁷ *Codex Theodosianus* 6.4.22 (373 CE)

⁴⁸⁸ *Codex Theodosianus* 7.13.9 (380 CE).

⁴⁸⁹ *Codex Theodosianus* 9.40.15 (392 CE) – these laws are all ambiguous, see Chapter ‘*Infamia* in the *Codex Theodosianus*, *Constitutiones Sirmondianae* and *Novellae*’.

⁴⁹⁰ *Codex Theodosianus* 15.1.43 (405 CE).

⁴⁹¹ *Codex Theodosianus* 11.30.16 (331 CE) = *Codex Iustinianus* 7.62.19.1 (331 CE).

⁴⁹² *Codex Theodosianus* 9.17.2 (349 CE) = *Codex Iustinianus* 9.19.3 (349 CE).

⁴⁹³ *Codex Theodosianus* 7.18.4 (380 CE) = *Codex Iustinianus* 12.45.1.4 (380 CE).

⁴⁹⁴ *Codex Theodosianus* 12.1.85 (381 CE) = *Codex Iustinianus* 10.32.33 (381 CE).

- judges who appoint prohibited persons as advocates;⁴⁹⁵
- judges who delay punishing *uis*;⁴⁹⁶
- judges who neglect to enforce a law on cutting off harnesses from the imperial horse;⁴⁹⁷
- persons who attempt to circumvent a pact by appealing to the *princeps*;⁴⁹⁸
- persons who do not prosecute a case within the required time limit;⁴⁹⁹
- a person who attacks imperial laws;⁵⁰⁰
- judges who fail to uphold anti-heretical laws.⁵⁰¹

Conclusion

In conclusion, this examination has revealed that at least since the late Republic, a common group of persons had been subjected to a common set of consequences, either as a matter of law or of magisterial discretion: disabilities in law and exclusion from civic *honores*, namely:

- persons condemned in *actiones famosae*;
- persons condemned in *iudicia publica*;
- *calumniatores* and *praeuaricatores*;
- bankrupts;
- actors;
- prostitutes and procurers; and
- gladiators, beast fighters and gladiatorial trainers.

These people were subjected, with some variations, to many legal disabilities, including the exclusion from postulation, from acting as or having legal representation, the ability to make an accusation, the inability to be a witness,

⁴⁹⁵ *Codex Iustinianus* 1.40.8 (386 CE).

⁴⁹⁶ *Codex Theodosianus* 9.10.4 (390 CE) = *Codex Iustinianus* 9.12.8.3 (390 CE).

⁴⁹⁷ *Codex Theodosianus* 8.5.50 (390 CE) = *Codex Iustinianus* 12.50.13.1 (390 CE)

⁴⁹⁸ *Codex Theodosianus* 2.9.3pr (395 CE) = *Codex Iustinianus* 2.4.41pr (395 CE).

⁴⁹⁹ *Codex Theodosianus* 9.36.2 (404 CE) = *Codex Iustinianus* 9.44.2pr (404 CE).

⁵⁰⁰ *Codex Iustinianus* 1.14.2 (426 CE).

⁵⁰¹ *Codex Iustinianus* 1.5.7.15 (455 CE).

restrictions in whom they could marry and vulnerability to being killed if caught *in flagrante delicto* in adultery. This consistent subjection to legal disabilities enables this group of persons to be identified as what McGinn terms the ‘core’ of Roman *infamia*.⁵⁰² However, it is important to note that the various legal disabilities did not necessarily apply in the same way to all persons found in the ‘core’, an example of this was seen in relation to witnesses, where it is possible some were excluded by discretion, rather than the operation of the law.

However consistently these disabilities may have applied to these persons, a consistent term for these people and these consequences was a long time in developing. With the exception of the inconclusive *Tabula Larinas*, the earliest evidence pertains only to those persons in the Praetor’s Edict, and that indicates that *infamia* and cognates were descriptive terms used to describe persons who underwent similar legal disabilities in civil law, and it was not one used in the Edict itself. In fact, it is clear that the late Republican and early Imperial laws, including the Praetor’s Edict, did not use *infamia* or cognates to designate either the consequences of laws, or the persons who underwent certain disabilities, i.e. it was not a positive legal concept. Instead, the laws exhaustively listed both the person to whom specific consequences applied, and whatever those consequences were. In this regard, modern authors who use the term *infamia* to refer to a penalty under any of the *iudicia publica*, are being anachronistic in terms of the actual consequences of the laws.⁵⁰³ As noted above, the existence of the ‘core’ of persons subject to extensive legal disabilities makes it easy to see why the jurists

⁵⁰² McGinn, *Prostitution, Sexuality and the Law*, above n. 15, 65-9. McGinn omits those condemned in *iudicia publica* and *actiones famosae* from his discussion.

⁵⁰³ For example, Bauman, *Crime & Punishment*, above n. 208, 23 and 29; Talbert, *Roman Senate*, above n. 359, 28.

employed generalised expressions such as *infamis* and *famosus* to the people undergoing disabilities, and terms such as *infamia* to those disabilities. The later development of using *infamia* itself as a positive concept, as a penalty, probably grew out of this descriptive usage.

Conclusion

As noted at the beginning of this thesis, any investigation of *infamia* as a legal concept must begin with a discussion of the various evidentiary problems pertaining to the evidence for Roman law. These problems mainly revolve around the fact that we have very little contemporaneous evidence for Roman law for the period of the Principate. Furthermore, much of the evidence we do have is the product of the great legal codifications of the fifth and sixth centuries, the *Codex Theodosianus* and Justinian's *Corpus Iuris Ciuilis*. Nevertheless, an analysis of the instructions given to the compilers of these codifications gives us cautious optimism that these later texts can serve as a useful basis for the reconstruction of the law of the Principate. Both Justinian and Theodosius II, in their instructions to the compilers of their respective codifications display a respect for antiquity and neither explicitly authorises law reform. This optimism is further supported by an examination of the texts of the codifications themselves, especially in comparison with other texts outside the codifications that are parallel to texts within them. Similarly, although one may expect that legal texts would have been continually updated to reflect changes in the law itself, the evidence indicates that, in fact, the original texts as written by the classical jurists were what was desired for consultation. However, no schematic blueprint can be drawn up that reduces the changes made by the compilers of the codifications that fits every change and an effort must also be made, at least in the case of the *Digesta*, to try to restore the excerpts contained therein to their original context.

The only era for which it is possible to reconstruct a comprehensive understanding of *infamia* as a legal concept is that of Justinian, for which we possess a purportedly comprehensive codification of the law, the *Corpus Iuris Ciuilis*. In examining this *Corpus*, it is clear that, despite the intention of clarity that underlay the codification, it

is still very difficult at times to establish whether the concept being discussed was indeed a legal concept of *infamia*, or something else. This is largely owing to the fact that the vocabulary used for *infamia* overlaps significantly with that used for reputation in general:

- *infamia* and *infamis*;
- *famosus* and *fama*;
- *ignominia* and *ignominiosus*
- *existimatio*; and
- *dignitas*.

Nevertheless, it is possible to establish a group of *infames* and a series of consequences that follow from being designated an *infamis*. In particular, *infamia* stems from two main sources, either listing in the section of the *Digesta* on postulation, or by being condemned pursuant to one of the many laws that had *infamia* as a stated penalty. It is clear that at this stage, *infamia* is a positive legal concept, that is, saying in a law that a person becomes *infamis* as a consequence of the application of that law, has the effect of imposing on that person a series of specific legal consequences. Similarly, stating that a law applied to *infames* usually meant a designated group, although this is not always clear. Nevertheless, some areas of ambiguity remain, in particular the relationship of those who are designated *infames* as a penalty under a law and those who are designated *infames* in relation to postulation.

When the concept of *infamia* as found in the *Corpus* is compared with that in the *Codex Theodosianus* and the barbarian codes based on Roman law, it is clear that the concept as contained in Justinian's law is largely similar to that which can be found in these other late Roman laws. This reinforces the conclusion that was reached on the basis of an examination of the *Corpus* and the instructions to its compilers that the

law in relation to *infamia* had not been heavily interpolated in the process of compiling the *Corpus*. Nevertheless, it is clear that *infamia* was used as a penalty in areas under later law that it was not in the Principate, in particular, in relation to the judicial process and heretics, as well as various other offences.

When the evidence for the period from the late Republic to the reign of Diocletian is examined in light of our discussion of *infamia* under the *Corpus*, it is possible to identify a ‘core’ group of persons who undergo nearly all the consequences of *infamia* as understood in Justinian’s law throughout this whole period. This ‘core’ consists of:

- persons condemned in *actiones famosae* and *iudicia publica*;
- *calumniatores* and *praeuaricatores*;
- *bankrupts*;
- actors, gladiators, beast fighters and gladiatorial trainers; and
- prostitutes and procurers.

In effect, members of this ‘core’ were subject to legal disabilities under the Praetorian Edict, in particular in relation to having legal representation or acting on another’s behalf, and civic disqualifications, such as from being a member of the *ordo*, holding office at Rome and being a witness, as well as other legal disabilities not falling within the ambit of Justinian’s *infamia*. Nevertheless, these disabilities did not necessarily apply to all members of the ‘core’ in the same way.

As a unitary positive legal concept *infamia* was, as far as the evidence allows us to judge, alien to the laws of the late Republic and early Principate. The evidence that we have shows that these laws, rather than using an umbrella concept such as *infamia*, instead exhaustively list different legal or civic disabilities and the persons who underwent them. The evidence of the *Tabula Larinas* provides tantalising evidence that it may be possible that *infamia* existed as a concept before this, but unfortunately the inscription is fragmentary at the crucial point. In fact, as the evidence stands, it

appears from Gaius that *infamia* and cognate terms first appear as juristic terms of art used to describe succinctly persons who underwent certain legal consequences, in particular in relation to the Praetor's Edict. One can argue that the use of this term expanded, reflecting the fact that common groups of people continually appeared together suffering legal disabilities. At some point in time, on the current evidence probably between Gaius and the early third century, when it first appears in imperial constitutions, the usage that is found in the *Corpus* evolved, i.e., where *infamia*, *infamis* and cognates are used as positive legal concepts, so that stating a person undergoes *infamia* has an actual legal effect, rather than just *describing* someone's legal circumstances. Unfortunately, the process by which this change occurred, and the precise details of the time frame over which it occurred, remain obscure to us as the evidence currently stands.

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