THE HANDBOOKS *DE OFFICIO PROCONSULIS*: AUTHORSHIP AND AUDIENCE

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ABSTRACT

Rex B. Crews: The Handbooks *de officio proconsulis*: Authorship and Audience
(Under the Direction of James B. Rives)

The sixth-century Digest of Justinian preserves individual extracts from four juristic treatises, entitled *de officio proconsulis* or *praesidis* and composed during the late second and early third centuries A. D. In the late 19th century the legal scholar Otto Lenel attempted to reassemble these extracts by author and work, with the goal of providing some sense of their original form. The general assumption of many scholars since then has been that these treatises were composed as instructional manuals for the Roman governor, but their original purpose and original audience have been little studied. This dissertation explores the authorship and audience of the works *de officio proconsulis/praesidis* by comparing the extracts from these legal works with the actual juridical activities of Roman governors as found in literary and epigraphic sources. This comparison reveals many points of correlation between the two and demonstrates that these legal works could have been useful both to the governor and provincial litigants.

This study concludes that their authors likely conceived of these works more as theoretical legal treaties on the governor's *officium*; however, litigious provincials and the advocates serving them could have found their contents very useful in settling their political scores and legal disputes in the courts of Roman governors, while governors or the jurists on their *consilia* may have occasionally consulted these handbooks in resolving cases brought before them.

Optimis Parentibus and to the memory of Dr. Georgia Frothingham, my first Latin teacher and inspiration for my learning about the Classical world.

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INTRODUCTION

The *Digest* of Justinian represents the codification of Roman law extracted from the works of Roman jurists composed some three to five hundred years earlier. Since the original juristic treatises were suppressed after the publication of the *Digest* in A. D. 533, almost nothing of these survives beyond the individual extracts accompanied by author, title and book number, as preserved in the *Digest*. Consequently, many questions arise regarding these original works. What do we know about the authors? What was their intention in composing their treatises? Who was their audience? How were they meant to be used, and how in practice were they actually used?

For many years these questions received scant attention, because the texts preserved in the *Digest* were by and large the preserve of specialists in Roman law. For such scholars, questions of abstract legal theory were of more interest than practical matters of authorship or readership. Even when they turned their attention to issues concerning the original form of the juristic treatises, they tended to focus on their place in the development of legal theory rather than their practical application. In recent decades, however, other scholars have made increasing use of these works, particularly as an important source for social history: one can think of John Crook's pioneering work *Law and Life of Rome* (1967), or Jane Gardner's *Women in Roman Law and Society*

(1986), or more recently Ari Bryen's *Violence in Roman Egypt: A Study in Legal Interpretation* (2013). It is now relatively commonplace for these texts to be quoted in or to serve as primary sources for general Roman histories. For scholars interested in using juristic texts as a source for social history, the intentions behind and, even more importantly, the actual use of the original treatises become crucial issues. It is now clear that understanding the nature, purpose and audience of these texts in their original form as well as how they may actually have been used helps us elucidate Roman law and Roman society alike. The coming of age of this broader approach to legal texts is clearly in evidence in the forthcoming *Oxford Handbook of Roman Law and Society*, due to be published in August 2016.

In the context of this growing scrutiny of Roman legal texts, one particular group of them deserves individualized attention: the pronouncements collected under the titles *de officio proconsulis* and *de officio praesidis*. There are excerpts from four such treatises cited in the *Digest*. A few of these excerpts are grouped under the rubrics *De officio proconsulis et legati* (1.16) and *De officio praesidis* (1.18), but the majority are scattered here and there throughout the fifty books. These texts are particularly interesting for historians of the Roman empire, especially when we recall that much of Rome's "greatness" and legacy was staged in Rome's provinces and that the most powerful figure there was the governor. Although the city of Rome looms large in the modern historical imagination, much of its wealth and resources came from the provinces. In

recent decades the provinces, and the Roman administration of the provinces, have rightly become an increasing focus of scholarly attention, and in this context the unique value of the treatises *de officio proconsulis*/*praesidis* becomes all the more apparent.

Nevertheless, relatively little attention has been devoted to these works. The general assumption has been that they were composed as handbooks to instruct the governor, but no one has argued this case in detail. The few detailed studies that do exist, such as Dell'Oro's *I libri de officio nella giurisprudenza romana* (1960), tend to focus on textual considerations or legal content and theory to the exclusion of purpose or readership or the practical utility of these works. Consequently, they have had almost no impact on the study of Roman social and administrative history. It thus seemed to be a worthwhile project to focus on the practical rather than the theoretical side of these treatises, by investigating such questions as what considerations the authors might have had in mind in composing their works, who might have originally consulted them and to what end.

As I worked on these treatises, it gradually became clear that there is really no hard evidence to get at the author's intentions, about which we can therefore only speculate. There is, however, fairly abundant evidence for actual legal practice and the administration of justice in the provinces. This takes many forms: papyrological/epigraphic, legal and literary. Ben Kelly's recent book, *Petitions, Litigation, and Social Control in Roman Egypt* (2011), and

Serena Connolly's *Lives Behind the Laws* (2010) work respectively with papyrological and legal evidence, yet the literary evidence has not really been examined in this context. It thus seemed to me that there was a need for a study that would focus on the juridical activities of Roman governors and of the litigants in their courts as attested specifically in literary texts.

This dissertation examines the texts *de officio proconsulis/praesidis*, first, in their more legal context of the *Digest* by a survey of their contents, and then in their relationship to two depictions of a governor's activity that have been handed down in literature. By comparing what we know of the original treatises with these literary depictions of a governor's juridical activities, I hope to shed light on both the nature of the treatises and the ways that they were used in practice.

For the purpose of discussion, this study is divided into three chapters. In Chapter One I discuss the authorship and survey the surviving contents of the four treatises *de officio proconsulis/praesidis*. The survey reveals that the four works vary greatly both in terms of scope and content, and this raises important questions as to their nature, purpose and practical utility. Among these are: What purpose were such varied treatises meant to serve? Were they originally composed as manuals or handbooks to instruct the governor in his duties, as is commonly thought? Or was there some other audience who would have found these treatises useful?

In Chapter Two I investigate the juridical activities of the Roman governor from the perspective of both the governor and litigants, using two key literary texts as my primary sources. The first is Pliny's exchange of letters with Trajan. Here I focus in particular on those letters that provide some details about the procedures used in trials. The second literary depiction of a governor's juridical activities comes from Apuleius' *Apologia* (c. 156 A. D.), which presents itself as a courtroom speech that he delivered in his own defense against a charge of magic. In contrast to the letters of Pliny, this text provides us with a view of a Roman provincial trial from the point of view of one of the litigants rather than from that of the judge. Although both texts raise problems of interpretation, they at least purport to report actual proceedings undertaken by a governor.

An examination of these proceedings reveals that governors were often faced with tangled cases and legal puzzles. Further, the provincial elite and the advocates who assisted them were quite skilled at and tenacious in using the governor's tribunal and Roman law as a means to attack each other politically. And, in this process, to a surprising extent, they successfully manipulated the governor's court for their own purposes, using any means at their disposal to prevail over their adversaries.

In Chapter Three I attempt to answer the questions regarding the nature and purpose of the juristic treatises by comparing their contents with the activities of actual governors and litigants discussed in Chapter Two. This

comparison offers some insight into who might have originally consulted the *libri de officio proconsulis/praesidis* and to what end. Indeed, we can see many points of overlap between the cases in Pliny and Apuleius and the material in the handbooks. These numerous correlations demonstrate the pertinence of the material in the handbooks to actual judicial situations and suggest that they might have been useful to the governor and litigants alike. Ultimately, there seems little evidence to suggest they were instructional manuals for the governor, but there is, to my view, compelling evidence that local advocates would have found these treatises useful and were their de facto, if not perhaps their intended, audience.

CHAPTER 1: THE WORKS *DE OFFICIO PROCONSULIS* AND THEIR SOURCES

INTRODUCTION

The *Digest* preserves numerous citations on a wide variety of administrative and judicial topics concerning governors; these excerpts come from a group of earlier legal works, entitled *libri de officio proconsulis* or *libri de officio praesidis*. These juristic monographs are representative of a distinct genre of legal writing, which concern the *officium* of a number of the major magisterial offices at Rome and in the provinces from the mid-second century A. D. onwards.[1] Today these types of works are variously styled as monographs, treatises, handbooks or manuals in the scholarly literature; no complete or even nearly complete example survives. Within this genre, excerpts or fragments of only one or two monographs survive for most officials. For the office of provincial governor, however, we are fortunate to possess excerpts of four different works. Whether this means the office of governor received more thorough treatment by jurists than that of other officials is difficult to say. Likely the content of these works was simply more pertinent to the needs of the compilers of the *Digest* in the sixth century A. D., but whatever the reason,

[1]Peachin (1996: 58-59) provides a list of officials for which handbooks are known to exist (*consul; proconsul; praeses; praefectus urbi; praefectus vigilum; praefectus praetorio; quaestor; curator rei publicae; adsessor; consularis; astynomos; praetor tutelarius*) and quite interestingly points out that many types of officials which one would expect to be covered in this sort of literature are not.

extracts from handbooks outlining the duties of provincial governors survive in greater numbers than for any other official.

The original function of these works and their audience has been little discussed. Much of the past discussion has been confined to cursory mention in the various histories of Roman law, often concluding with the suggestion that they were manuals of some sort for the governor's use.[2] Perhaps it is for this reason that they are often called handbooks in the literature. Further, any detailed investigation of these works has been conducted almost entirely by legal scholars and generally confined to textual considerations and the principles of law contained in the surviving fragments.[3] In fact, until recent decades little attention has been paid to the original character of any legal texts or to their social and historical context. While this is understandable for the reasons just enumerated, legal texts make up a large portion of surviving Latin literature and contain, in addition to legal principles, evidence of the most compelling sort about life and society during the late second and early third centuries A. D. when most of these texts were written. Fergus Millar has identified this as the next great field of Classical scholarship and one that we must not ignore.[4]

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[2]This seems to have been the assumption of most scholars who have mentioned the subject of these treatises, though the perspective is slightly different in each case, e.g. Costa 1909: 80; Schulz 1946: 243; Arangio-Ruiz 1957:27; Barnes 1985: 157; Peachin 1996: 58; Nogrady 2006: 20-23.

[3]For example, Dell'Oro 1960 and Alexander Nogrady's *Römisches Strafrecht nach Ulpian: Buch 7 bis 9 De officio Proconsulis*, published in 2006.

[4]Millar (1986: 272-80). Serena Connolly's recent book, *Lives Behind the Laws* (2010), clearly demonstrates how legal texts can contribute greatly to our understanding of Roman history and society.

Until recently the only extensive treatment of the *libri de officio proconsulis/praesidis* was to be found in a comprehensive study of all the works *de officio* undertaken by the legal scholar Dell'Oro in 1960. Since that time several more legal scholars, e.g. Montavani, Marotta and Nogrady, have built on this foundation and written articles or monographs focusing primarily on the works *de officio proconsulis/praesidis*.[5] These studies variously attempt to find points of commonality within this genre, to provide commentary primarily on the points of law in the works, and to offer a thorough outline of their contents from a legal and judicial perspective. Marotta, in the manner of a modern-day Lenel, is very interested in the reconstruction of the text of these works.

Overall, however, with their focus on the legal content, form and textual aspects of the handbooks, these studies offer less treatment of the historical context of the works or the important question of why these sorts of handbooks appeared in such profusion during the late-second and early third centuries and who might have used them. In the case of the *libri de officio proconsulis/praesidis,* Dell'Oro briefly objects to the commonly held notion that they were intended to instruct the provincial governor in his duties. He suggests, rather, that these handbooks were a sort of wastebasket for points of law not considered in other works pertaining to the governor's duties.[6] Neither these legal scholars nor others have sought to set these so-called instructional

[5]Montavani 1995: 203-67; Marotta 2004; Nogrady 2006.

[6]Dell'Oro 1960: 277-80.

manuals against non-legal sources for the governor's judicial activities in his province.[7] So it is important to ask such questions as: Who was the intended second-century audience for these handbooks? Upon examination of their contents, does it still seem plausible that they were composed as practical legal manuals for the governor sitting as *iudex*? Do they establish or even represent normative practice?

We possess fragments of the works *de officio proconsulis/praesidis* from four different jurists: Venuleius Saturninus, Aemilius Macer, Iulius Paulus (Paul), and Marcus Domitius Ulpianus (Ulpian). The dates of composition range from the mid-second century to the early third century A. D., that is, from not long after the death of Hadrian up to and including the reign of Caracalla. More precise dating is difficult, however, because (as we shall see) so very little is known about the lives of their four authors. Moreover, since the lives of all four overlap, even placing the handbooks in chronological order of composition is difficult. As I discussed above, the *libri* of these four jurists have never received much scholarly attention except from a narrowly legal perspective. This is quite startling, given the facts that they provide much of what we know of the duties of provincial governors beyond the letters of Cicero and Pliny, and form the basis for much textbook discussion of the governor's duties during this period.

That said, to exploit this material as it appears in the *Digest* is a daunting prospect. Except for a small section in Book I with the title *de officio praesidis*,

[7]Burton (2002: 249-80) contrasts some citations from Ulpian's *de officio proconsulis* with literary and epigraphic evidence; however, he does not offer any specific insights into the original purpose of Ulpian's work.

the references are scattered here and there throughout the full fifty books. In addition, a few further fragments of Ulpian's handbook, which is far longer and divided into many more books than those of the other authors, survive elsewhere.[8] Fortunately most of the initial work of reassembly was done in the late 19th century by Otto Lenel as part of his great *Palingenesia Corporis Iuris Civilis*. Lenel has separated and organized the surviving citations of each handbook by book and rubric or section title, thus creating a vivid impression of the original structure and scope of each work. It is difficult to overstate the powerful impression of apparent coherence that the arrangement in the *Palingenesia* creates. However, it is possible, even at times necessary, to take issue with Lenel's assembling of the fragments and especially his rubrics, most of which do not in fact survive from antiquity but were invented by him, based on content and comparison with other works. Lenel's text is, however, basically accurate, and an essential starting point for any investigation of these handbooks.[9] The primary concern of this study is not to offer textual reconstruction or legal commentary, but to attempt to place these works in their proper historical context and to advance hypotheses as to their original aims and audience.

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[8]For a discussion of these other sources for Ulpian's work, see pp. 19-20 below.

[9]The Latin texts of each handbook followed by an English translation may be found in Appendix A. For the sake of clarity, citations from this Appendix will include both Lenel number and *Digest* number (where applicable), e.g. 50/1.8.5. Except where noted, the translations are taken from Watson's edition (1985) of the *Digest of Justinian* and Hyamson's 1913 edition of the *Collatio*.

I have organized the discussion in this chapter into the following sections: 1) History of the Works *de officio*; 2) Reconstructing the *libri de officio proconsulis/praesidis*; 3) The Authors and their Works; 4) Sources for Ulpian's *de officio proconsulis*; and 5) Summation.

HISTORY OF WORKS *DE OFFICIO*

Precedents for handbooks on the general subject of *officium* and public office are traceable to Republican times. Unfortunately, any similar works composed prior to the second century A. D. survive only as titles, such as *de censoribus, de comitiis,* or *de potestatibus,* usually mentioned in passing by much later encyclopedists, primarily Aulus Gellius and Festus.[10] The earliest of these titles, L. Cassius Hemina's *de censoribus*, dates from the mid-2nd century B. C. Schulz has noted that works on constitutional law in general were not abundant during this time, which may be illustrated by Pompey's well known request to Varro to compose for him a manual on the protocol of consulting the senate.[11] It is impossible to speculate on the basis of such meager evidence what relationship these Republican titles have with our citations, since all surviving fragments come from the epoch of a fully developed Principate when both the

[10]Dell'Oro 1960: 2.

[11]Aulus Gellius *NA* 14.7.2. Schulz 1946: 46. Since the senate proceeded by custom and not by law, Varro's handbook would not have been a legal treatise in the strict sense of the word; yet the distinction between custom and law is often difficult to distinguish, as Ulpian's *de officio proconsulis* will show.

law and the role of jurists vis à vis the imperial government were dramatically different.[12]

It can fairly be stated that during the late second and early third centuries A. D. there was a marked increase in juristic writing of all types. This process had begun with the rise of the juristic schools in the late republic. It received an added impetus with the need to recognize the role of the emperor as the supreme lawgiver*, iudex* and *vindex*, which had begun de facto with Augustus. The works of the great jurists of the second and third centuries, such as Paul and Ulpian, collectively created some order for the thousands of imperial constitutions which addressed the many and varied legal problems of Roman citizens throughout the empire and made those decisions more generally available. This impetus did not come from the desire of the emperor to impose his will on his subjects, but, as with most aspects of Roman governance, from the desire of citizens to have their needs met and problems resolved. In order to understand the legal atmosphere which gave rise to the works *de officio proconsulis* and to better understand the role of the emperor and the governor in provincial administration during this period, I shall now briefly outline the legal procedure of the early Principate and how the court of the emperor and hence that of the governor functioned to meet the needs of the citizens of the empire.

During the early imperial period, cases were tried before the praetor, governor or other competent magistrate by two procedures, the formulary

[12]It is noteworthy that the fragments of these handbooks all date from the second and early third century A.D. Perhaps it would not have been appropriate or necessary to have written such manuals during the formative years of the Principate.

procedure and that of *cognitio extra ordinem* (or also known as *cognitio extraordinaria*). The formulary procedure was used in civil cases, and the *cognitio extra ordinem* procedure was used initially for civil and later also for criminal cases.[13]

The formulary procedure was bipartite. In the first stage, the plaintiff was charged with presenting his claim as a legal formula which detailed the specific circumstances of his case, the procedure for the trial and the proposed penalty.[14] The two parties worked out the wording of the formula before a magistrate. Next, both parties had to agree on the choice of a judge. No legal experience was necessary for this position. In fact, Bablitz has recently shown that beyond this mutual agreement of the litigants there were almost no other qualifications for the position of *iudex*; it seems almost anyone other than a slave might be chosen to decide a case.[15] The presiding magistrate then appointed the agreed upon *iudex* to hear the case and render a judgment according to the formula. This was part two of the procedure. While many formulae were standardized and incorporated into the praetorian edict, the possibilities for modification and innovation were limitless; yet the procedure was involved and cumbersome, imposing as it did all sorts of restrictions on both parties that had

[13]Jolowicz 1952: 411-15. Both of these procedures were developed during the Republican period. In addition, criminal cases were also tried by jurors in the old *quaestiones perpetuae* or standing courts; however, the limited scope of the *quaestiones*, linked as they were to individual offenses and with different rules of procedure for each type of case, fell into disuse during the early imperial period in favor of the *cognito extraordinaria*.

[14]Schulz 1946: 50.

[15]Bablitz 2007: 100.

to be worked out in detail.[16] The wording of the formulae, while agreed upon by the two parties and sanctioned by the magistrate, was really the work of jurists, who were responsible for the wording of the formulae themselves and the edicts which institutionalized them.[17] The formula, then, strictly regulated the conduct of the trial itself, and the *iudex* was bound to follow without deviation. Yet, in a subsequent trial, no matter how apparently similar, the formula had to be fashioned anew.

By contrast, the *cognitio extra ordinem* procedure was not encumbered by the complications and strictures of a formula, nor was there a necessity to have a trial in two parts, first before a magistrate and then before a *iudex*. Further, and more importantly, *cognitio extra ordinem* operated on the premise that the *iudex* as a functionary of the state was imposing justice rather than facilitating the settlement of a dispute.[18] The procedure was simple and flexible to any situation. Upon agreement of the two parties before a *iudex* (usually a magistrate), the facts of the case were presented and a decision was rendered.[19] This did not mean that there was less need for juristic advice. The presiding magistrate often had jurists in his *consilium* to assist him in rendering a

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[16]Schulz 1946: 50; see also Kunkel (1973: 88-91) who discusses how the formulary procedure offered great innovation to the statutory oral formulae of the old *legis actiones*.

[17]Schiller 1978: 435.

[18]Berger 1953: 394.

[19]In criminal cases, the *iudex* replaced the panel of jurors of the standing courts or *quaestiones perpetuae*; see Harries (1999: 12) for some discussion of the survivial of the *leges* beyond the *quaestiones* themselves.

decision, and litigants still wanted to frame their petitions or *libelli* in such a way as to be heard and to present their evidence before the magistrate on a sound legal footing. In the provinces and the governor's court, which is our primary area of consideration, litigants received help from whatever jurisconsults they could afford, be they prominent jurists or local advocates or mere *tabelliones* (scribes trained in composing legal documents). While both of these methods of procedure existed during the early imperial period, due to the influence of the emperor and the greater freedom it offered both *iudex* and litigant, the *cognitio extra ordinem* procedure eventually replaced the formulary procedure by the end of the third century.[20]

The *cognito extra ordinem* procedure was especially suited to the court of provincial governors as it allowed them to hear any sort of case without the inconveniences of the formulary system. This meant that while knowledge of law was certainly helpful, it was really not essential.[21] As regards the governor, Burton has shown that the proconsul's jurisdiction via the *cognitio extra ordinem* procedure became increasingly flexible during our period, departing further and further from the old formulary procedure.[22] Millar's description of the emperor's *cognitio* as operating above these restrictions is no doubt based on the model of the governor's *cognitio,* and Connolly has shown this to be the

[20]For a discussion and further bibliography, see Peachin (1996: 1-9).

[21]See Connolly's discussion of this situation as it emanated from the emperor himself (2010: 150-52).

[22]Burton 1973: 135-45, esp.138.

case.[23] This procedural freedom gave great latitude for personal considerations to influence, and at times to perplex, or even corrupt, the governor.

Thus, from the time of Augustus, when the emperor himself began to sit as *iudex*, the dominant procedure was that of the *cognitio extra ordinem.*[24] This procedure put the responsibility for justice squarely upon the *iudex* as representative of the state and of the emperor without cumbersome legal formalities. It certainly suited the evolving persona of the emperor as the source of law.[25] Then, of course, there were the countless petitions sent to the emperor himself by both magistrates and citizens alike, wanting clarification on points of law. In addition, the *rescripta* of the emperor, inasmuch as they were judicial decisions, had the force of law, that is if they were accessible to the public and carried out.[26] The Edict of Caracalla in A.D. 212, known as the *constitutio Antoniniana*, granting citizenship to all inhabitants of the empire, likely had an impact on the legal system by offering access to Roman justice for many more people. This changing situation created a need for the expertise of jurists to assist every sort of judge from the emperor and his assistants to the provincial

[23]Millar 1992: 515-27; Connolly 2010: 16-27.

[24]Schiller 1978: 432-5.

[25]Berger 1953: 394.

[26]For a discussion of the various types of imperial pronouncements, see pp. 62-65 below.

governor as well as the advocates and litigants they served. This no doubt contributed to the great increase in juristic writing during the period.[27]

It was in the environment described above that all of the works *de officio* were composed. It seems only logical that the duties of the various magistrates should be laid out during this time, especially those whose responsibilities could bring them into potential conflict with the emperor, against whose power all else needed to be weighed. In addition, this information would certainly be useful to local advocates and students of the law as an aid to understanding the judicial competence of the various officials.

RECONSTRUCTING THE WORKS *DE OFFICIO PROCONSULIS/PRAESIDIS*

As mentioned above, the majority of the surviving fragments of the four known *libri de officio proconsulis/praesidis* are scattered throughout the sixth-century *Digest* of Justinian. In Book 1, Sections 16 and 18 of the *Digest*, a few of these fragments, along with citations from other legal works that mention the governor's duties, are grouped together under two separate rubrics, *De officio proconsulis* and *De officio praesidis*. These sections offer a very cursory overview of the duties of the governor. The vast majority of the citations from these works appear under the specific areas of law which they address. It is indeed curious that the two rubrics pertaining to the duties of the governor are so brief; however, this is the case with other types of officials as well.

[27]Honoré (2002: 24, 35) strongly believes Ulpian, in particular, was motivated to write by this grant of universal citizenship.

In addition to the *Digest*, several additional extracts are preserved in the surviving portions of the late-fourth century *Collatio Legum Mosaicarum et Romanarum.* This is a most intriguing text which sets Roman and Jewish law side by side. The *Collatio* is sixteen chapters in length; each chapter begins with a biblical quotation, followed by supporting citations from Roman legal texts. These citations come from many juristic sources as they would have existed before the compilation of the *Digest* and subsequent loss of the original works. The biblical citations are all from the Pentateuch. Various theories have been put forward regarding its unknown author and purpose. The work has been seen by some as that of a learned Christian apologist, while others have thought its contents are excerpts from an existing legal handbook of Roman law with Bible verses stitched in by a later less tutored hand.[28] Most recently, Robert Frakes has offered a new text and translation of the *Collatio* and concludes that the author was a Christian lawyer, attempting to give Roman law a Christian foundation. [29] Whoever its original author and whatever its purpose, the *Collatio* contains numerous citations from Ulpian's *de officio proconsulis*. These help to complete citations which have been truncated by the editors of the *Digest*, and they offer portions of the text not preserved elsewhere. Where the *Digest* and *Collatio* overlap, there is a high degree of consistency between the

[28]For a discussion of the composition of the *Collatio* see Schulz (1946: 311); Schiller (1978: 52-54). Hyamson's edition of 1913 offers a photographed text of the manuscript and translation with a lengthy introduction to the problems of this unique legal text. The most authoritative modern text with an English translation is found in Frakes (2011).

[29]Frakes 2011: 149-51; see also Frakes 2009: 129-47.

texts. The *Collatio* is a particularly important source because, while the *Digest* preserves references to book numbers, the *Collatio* quotes both the book number and the section title or rubric. In all, ten whole or partial rubrics from Ulpian's *de offico proconsulis* are cited, and these offer the only external indication of the original organization of the works.

In addition to the above, one citation (2165/27.1.6.6) from Ulpian's *de officio proconsulis* is preserved by the jurist Modestinus, Ulpian's student. Also, a single fragmentary rescript (2157/*Vat.* 119) is preserved in the *Fragmenta Vaticana*, a collection of legal texts likely compiled in the late fourth century. The collection derives its name from the Vatican manuscript containing these texts, which was discovered and published by Cardinal Mai in the early nineteenth century. Finally, a brief synopsis of a group of rescripts from Book 7 of Ulpian's *de officio proconsulis* is preserved by the Christian apologist Lactantius in his *Divinae Institutiones*, dating from the early fourth century.[30] His citation includes a book number but no rubric, and he only refers to the overall contents of the rubric without actually quoting any of it.[31]

Searching out the citations preserved in these four sources, Lenel in his monumental *Palingenesia* reunited the *disiecta membra* of these four handbooks. He arranged by author the citations of each in their original order,

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[30]Lactantius, *Divinae Institutiones*, 5.11; see p. 148 for the Latin text, English translation and further discussion.

[31]Also, Lenel (1889: 991n3) and Rudorff (1865: 233-321) cite some individual words, likely from Ulpian's *de officio proconsulis*, found in the *Lexicon* of Pseudo-Philoxenus, in the *Corpus Glossarum Latinarum II*. Schulz (1946: 245) offers a summary.

according to his best judgment. Thus, Lenel is the most convenient starting point for anyone who wishes to look at the surviving content and original organization of these works as a whole. As he states in his introduction, Lenel's organizational scheme is based on his vast experience and common sense. It cannot be a scientific process. Lenel has grouped the citations by book and under original-style rubrics, the majority of which he composed. He based these on the ten original rubrics which survive whole or truncated in the *Collatio* and on the earlier reconstructions of the German scholar Rudorff.[32] At many points, especially in his reconstruction of Ulpian's work, he expresses doubt about the rubric itself or the placement of the fragment under a particular heading. This is all very understandable given the state of the texts. When consulting Lenel, the user should bear in mind that his text is a scholarly reconstruction that attempts to give coherence to these fragments; however, the degree to which his reconstruction replicates the character and arrangement of the original works is debatable. Lenel's own concerns about the purpose and scope of the handbooks doubtless affect his presentation.

While helpful in organizing the fragments around a coherent theme, Lenel's hypothetical rubrics can also be misleading, for they impose upon a group of citations a thematic unity which they may never have possessed in their original context. Since the *Digest* itself preserves the author and book from

[32]The *Glossary* or *Lexicon* of Pseudo-Philoxenus (late fifth century A.D.) contains eight words/phrases cited without author from a work *de officio proconsulis*. Rudorff (1865: 233- 321) postulated that these words were perhaps taken from rubrics of Ulpian's work and offered reconstructions for the rubrics, most of which Lenel used. For more on the *Glossary* of Pseudo-Philoxenus and the work of Rudorff, see Lindsay (1917: 161) and the entire article, 158-63.

which each citation comes, we have a general idea of the content of a given book; however, more detailed organization of these fragments into chapter sections is speculative, and here one's preconceptions about the purpose of the handbooks would necessarily play an important role. If Lenel believed that the handbooks were intended to instruct the governor in his duties, this notion would naturally influence his reconstructions. In other words, Lenel's recreated handbooks may offer the modern reader a very different arrangement and perspective from the original. Lenel thus invites hasty judgment about their original purpose and how they represent the actual practice of that period. It is very easy to come away from Lenel with the impression that these works read rather like manuals and reflect the governor's typical routine. Consequently, in the following discussion of the handbooks, the reader should regard Lenel's reconstructions merely as a tentative guide to the original contents.

THE AUTHORS AND THEIR WORKS

Venuleius Saturninus (*PIR*² V 379)

Venuleius Saturninus is the author of the earliest surviving monograph, entitled *de officio proconsulis libri IV*.[33] Saturninus flourished during the reign of Antoninus Pius and the succeeding *divi fratres,* Marcus Aurelius and Lucius Verus, but beyond this we know almost nothing of his life.[34] In a famous passage (*Dig.* 45.1.138), he declares, *sed ego cum Proculo sentio.* This

[33]For the evidence for this assertion, see Rudorff (1865: 235-238).

[34]Kunkel 1967: 183.

concurrence is generally interpreted as exceptional, so he may tentatively be classed as a member of the purported more conservative Sabinian school.[35] The obscurity of his life is most unfortunate for us since, being of the generation prior to our other three authors, his work provides the earliest fragments of a work of this type. In addition to his *de officio proconsulis*, his chief surviving works are: *actiones, de interdictis, de iudiciis publicis, de stipulationibus,* and depending on one's interpretation, *de poenis paganorum.*[36] That he was a jurisconsult of no little authority is evidenced by the fact that Ulpian himself cites him several times. Perhaps for this reason Saturninus always makes the list of eminent Roman jurists. Of our four figures, Venuleius Saturninus is definitely the eldest and most obscure. He is little more than a name to us, and even his appellation is uncertain.

As I just mentioned above, Ulpian in his various legal treatises cites Saturninus as an authority several times.[37] Sometimes he refers to him as only as Saturninus (*Dig*. 1.9.1.1) but on two occasions as Quintus Saturninus (*Dig*. 12.2.13.5; *Dig.* 34.2.19.7). The compilers of the *Digest*, when citing his works, usually refer to him as Venuleius Saturninus; however, at 48.19.16 they make reference to an otherwise unknown Claudius Saturninus as the author of a treatise *de poenis paganorum.* That the Justinianic authorities thought that

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[35]Kunkel 1967: 183.

[36]See p. 24.

[37]Ulpian cites him twice in his *de officio proconsulis* (2221/47.14.1.4 and 2223/47.18.1).

Venuleius Saturninus and Claudius Saturninus were one and the same is shown by the fact that they list this particular fragment in the *Index* under Venuleius Saturninus.[38] The 19th century German scholar Fitting believed these various Saturnini were one in the same and he, followed by others, dubbed our man Quintus Claudius Venuleius Saturninus.[39] Lenel, following this lead, placed the lengthy passage of *de poenis paganorum* under Venuleius Saturninus and declared unhesitatingly, *quin ad unum eundemque spectant iuris consultum, non dubito*.[40] Kunkel, on the other hand, has pointed out that the cognomen Saturninus is "außerordentlich häufig" in this period and that it is unwise on such scant evidence to assume the two jurists are one and the same.[41] And indeed, in the recently published final fascile of *PIR*^{2} under V 379, the editors assert that these two men are definitely not the same, and assign Claudius Saturninus to C 1011. The same editors have little doubt that Ulpian's Quintus Saturninus is the same as the *Digest*'s Venuleius; however, they still record his praenomen as questionable.

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[38]Schulz (1946: 256) mentions this fact but without further comment.

[39]Fitting, cited in Kunkel (1967: 181n322); for further bibliography on this controversy, see Jolowicz 1952: 482n3, and now *PIR*^{2} V 379.

[40]Lenel 1889: 1207n1.

[41]Kunkel 1967: 82.

Venuleius Saturninus' *de officio proconsulis*

Since Venuleius Saturninus' *de officio proconsulis*, composed under Antoninus Pius, is the oldest such handbook attested, it is all the more unfortunate that so little of it survives: nine fragments from Books 1 and 2, and a final fragment which cannot be placed. Of these ten, two are paraphrases composed by Ulpian for his own handbook *de officio proconsulis.* Such limited material makes speculation about the scope and content of Saturninus' original work most difficult.

Lenel has assigned the title *de cognitionibus* to Book 1 since the surviving excerpts all have to do with civil or criminal procedure. One should keep in mind that this rubric is an informed guess; the original is lost. As I mentioned above, except for ten rubrics from Ulpian's handbook, which were preserved whole or in part in the *Collatio Mosaicarum et Romanarum Legum*, no section titles remain for any of these works.[42] We learn in 42/40.14.2 and 46/48.19.15 that Hadrian is dead (*divus*) at the time of writing, and from 45/48.8.6 that Neratius Priscus (the jurist) and Annius Verus have been consuls (A.D. 97).[43] This is the main evidence for dating Saturninus' work to the mid-second century.[44] The matters covered are quite diverse, ranging from cattle driving, to

[42]See pg. 20 above.

[43]The dates of their joint consulship was in doubt until Ronald Syme (1957) solved the puzzle; see also Cooley (2012: 466), who confirms this date in her list of consular *Fasti*.

[44]Note also the use of *ipsos principe*s (42), implying a terminus post quem of the first year there were joint emperors, i.e. 161.

the sale/release/castration of slaves, to the treatment of soldiers before the law. Of the five fragments of Book 1, two are based on imperial rescripts and a third on a *senatusconsultum*.[45]

Two fragments of Book 2 concern the governor's legates, and Lenel therefore assigned them to a section which he entitled *de officio legati*. Three others concern the responsibilities of town magistrates in affairs which touch on the governor's duties, such as making sworn statements (49/22.5.22) and the custody of prisoners (50/48.3.10). These are matters of great practical importance, considering the relatively small size of the governor's traveling entourage and his ultimate dependence on local authorities to carry out his rulings.[46]

The remaining citation (51/47.18.1) concerns the punishment of jailbreakers and lacks the specific reference of the other excerpts.[47] In this case Ulpian has again paraphrased Saturninus to support a rescript, presumably addressed to a proconsul, which stated that those who break out of prison are generally liable to capital punishment.

The diversity of content in the citations from Venuleius makes conjecture about the scope of his original work impossible. We know from the citations of

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[45]This *SC* dates from 97 A.D. and is #73 in Talbert's (1984: 444) list of known *senatusconsulta*.

[46]These authorities did not always carry out the governor's wishes; see pp. 91-92 and 101-05 below.

[47]There is no certainty that this paraphrase even belongs to *de officio proconsulis* rather than some other of Saturninus' works. See Dell'Oro 1960: 114.

the title of the work in the *Digest* that there were four books; however, no citations survive from Books 3 and 4, so the subject matter of these is entirely unknown. What we can see, however, is that the governor is seldom directly addressed by Venuleius. Only in 48/49.3.2 is he the subject of a sentence, and in 50/48.3.10, where a rescript is quoted, the second person is used as one would expect. In other words, most of these citations are not so much instructions to the proconsul as they are a presentation of legal precedents concerning the jurisdiction of the proconsul.

Iulius Paulus (*PIR*^{2} I 453)

Iulius Paulus was a contemporary of Ulpian and may be ranked along with him as one of the greatest Roman jurists. His writings were, like Ulpian's, voluminous, totaling over 300 books which treat every branch of legal science. Next to Ulpian, Paul is the most frequently cited author in the *Digest*, with extracts from his works comprising about one-sixth of its total. In addition, a separate, important work, the *Pauli Sententiae* or *Sententiae ad filium*, has come down to us. First compiled by an unknown hand circa 300 A. D. and subsequently altered several times, this handbook of Roman law compiled from Paul's writings is thought to have been a practitioner's quick reference manual.[48]

Despite the survival of much of his legal writing and his great esteem in antiquity, we know almost nothing about the life of Paul, and all of the scant

[48]Schiller 1978: 46-48. Liebs (1976: 315-19) has shown that this work contains excerpts from other jurists as well as those of Paul. For the Latin text, see Krueger 's (1878) edition: *Ulpiani liber singularis regularum: Pauli libri quinque sententiarum. fragmenta minora saeculorum p.Chr. n. secundi et tertii.*

information which has come down to us is open to debate. His place of birth is unknown, but Kunkel is confident that he is from a Romanized provincial family and not of Italian stock.[49] Certainly Paul was a contemporary of Ulpian and was likely the older of the two since his early writings are datable to the reign of Commodus.[50] He was still writing under the emperor Alexander Severus, so in all likelihood, Paul outlived the Tyrian jurist as well.[51] His references to the great jurist Scaevola as *Scaevola noster* have led to the undisputed conclusion that Paul was his pupil.[52]

Like Ulpian, Paul was also a lawyer in the emperor's service and therefore a member of the "bureaucratic group" of Roman jurists. Whether or not Paul followed the equestrian career of his peer, Ulpian, is open to speculation. The *Historia Augusta*, a source which should be used with due caution, places him along with Ulpian as an *assessor* to Papinian while the latter was praetorian prefect, but the nature of this appointment, as shown above, is unclear.[53] The same source informs us that Paul held the office *a memoria*, was himself *praefectus praetorio* under Alexander, and was a member of the *concilium*

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[49]Kunkel 1967: 245.

[50]Schiller 1978: 355.

[51]For a discussion of Paul's career and works, see Honoré, *SDHI* 28 1962: 216-26.

[52]Kunkel 1967: 244.

[53]*HA Niger* 7.4; *Alexander* 26.6; *Dig.* 12.1.40.

principis under Alexander Severus.[54] Almost no one believes the story that Paul was ever a praetorian prefect under Alexander, let alone with Ulpian as colleague, as was suggested by Bolag.[55] Honoré conjectures that Paul held some lesser praefecture during Alexander's reign, but points out that a joint praefecture with Ulpian (which is never stated directly in the ancient sources) is impossible since we now know the names of six prefects who served under him.[56]

The many parallels in the careers and writings of Paul and Ulpian have led scholars to suggest a professional rivalry between the two.[57] Amazingly, these two encyclopedists who frequently name their other sources never cite each other, though they are obviously well familiar with the other's material.[58]

In addition to his service to the emperor, Paul was also a highly sought-after legal advisor in private practice, to judge from the volume of his *responsa* and *quaestiones*. He also apparently managed to remain alive in a period when many of his prominent contemporaries, such as Macrinus, Papinian, and Ulpian, were not so fortunate.

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[54]*HA Niger* 7.4; *Alexander* 68.1; Kunkel (1967: 244) uses passages from the *Digest* to suggest that Paul was on the imperial council of Septimius along with Papinian.

[55]Cited in Kunkel (1967: 224) and Honoré (2002: 29-30).

[56]For further discussion, see Honoré (1982: 43). He further suggests (44) that Paul held the prefecture of the grain supply.

[57]For example, Berger, *RE* 10 1919: 693-94.

[58]In his article on Ulpian ("Ulpianus," p. 1103) for the second editon of the *OCD* in 1970, Berger still indirectly suggests the existence of a rivalry. Honoré (2002: 135-38) puts little faith in the idea of a rivalry and suggests that while Ulpian did not cite Paul, he did copy from Paul's works.

Paul's *de officio proconsulis*

Iulius Paulus' work *de officio proconsulis* is relatively short--only two books, which Lenel with his usual perspicacity has entitled civil and criminal jurisdiction respectively. There are only five citations from this work in the *Digest*, too few to place absolute confidence in Lenel's rubrics, but the rubrics do make sense of the surviving material quite nicely. The five citations represent the most authoritative original sources: two imperial rescripts and a *senatus consultum*.[59] The matters addressed are all quite pertinent to the proconsul's tribunal and illustrate the broad range of his jurisdiction. The two citations from Book 1 reference civil matters: the appointment of sons as tutors to incompetent fathers (1061/ 27.101.2), and the requirement that those who have pledged money to help in a disaster are obligated to follow through (1062/ 50.121.7). The three citations from Book 2 offer quite disparate criminal advice: persons cannot be charged for the same crime under several statutes (1062/ 48.21.14); the crushing of testicles amounts to castration (1063/ 48.8.5); and slaves returned to the seller cannot be tortured in a capital case involving the buyer (1063/ 48.18.11).

Why does this work by Paul receive so little attention from the compilers of the *Digest*? Dell'Oro speculates that by limiting himself only to matters connected with the proconsul's tribunal, Paul's work was easily subsumed by the

[59]This *SC* cited by Paul (1063/48.2.14.) prohibits anyone to be charged for the same crime under several statutes and is of unknown date. This is #227 in Talbert's (1984: 458) list.

much more comprehensive work of Ulpian.[60] Paul's work would, however, have great utility for the provincial or the local advocate who planned to present a case before the governor. In fact, Paul clearly has not set out to explain the general *officium* of the proconsul, but if the surviving passages are representative of the whole work, he confines himself to one important aspect of that *officium*, civil and criminal jurisdiction. Even with this arrangement, it is difficult to imagine such disparate and unusual topics as the ones that these citations address ever having been neatly or comprehensively organized in two books. One might imagine a sort of generalized synopsis of the governor's *officium* in two books. If so, however, the fine points of law expounded in these fragments are all the more puzzling. It is more plausible to say that we have a rather haphazard (from our perspective) but authoritative collection of legal opinions associated with the proconsul's civil and criminal jurisdiction. Obviously, Paul's work was not intended to be a thorough, point-by-point manual which would define for the governor his duties as *iudex*. Paul is recording imperial rescripts, legal opinion, both his own and others, and other sources of authority which deal with cases that he finds worthy of comment.[61] Whether or not the rescripts were useful would depend entirely on his audience

[60]Dell'Oro 1960: 117.

[61]It is worth noting that the governor's *officium* is the subject of countless references from other legal writings scattered throughout the *Digest*. We know Ulpian's output of personal *responsa* was small compared to that of Paul and most other jurists, who seem to have had a more extensive private practice. Perhaps this in part accounts for the brief treatment of the governor's duties in Paul and the extensive treatment in Ulpian.

and its needs, a topic which I shall discuss more thoroughly in the Chapters Two and Three of this study.

Aemilius Macer (*PIR*^{2} A 379)

From a passing reference in his own work (*de officio praesidis* 2.14), it is known that Aemilius Macer was active during the reign of Alexander Severus; otherwise we know nothing certain about his life.[62] From inscriptional evidence Wolfgang Kunkel has suggested that he is likely of African origin, for in this region no less than 16 inscriptions have been found concerning persons with this nomen and cognomen, in particular, a family of perhaps four generations: 1) M. Aemilius Macer, *legatus Augusti pro praetore* and *consul designatus* (A. D. 144); 2) M. Aemilius Macer Saturninus, *consul suffectus* in A. D. 174 and *legatus Numidiae*; 3) M. Aemilius Macer Saturninus, *proconsul Achaeae* before A. D. 212 and his brother M. Aemilus Macer Dinarchus; and 4) M. Aemilius Macer Faustianus, *vir clarissimus* and *princeps iuventutis* in A. D. 216.[63] No one claims that any of these aforementioned is our Aemilius Macer. Although the theory of African origin for him is attractive, it remains no more than that; equally, Macer has been connected through his own textual references to

[62]See also Dell'Oro 1960: 212.

[63]Kunkel (1967: 256-57); for other connections, see also Liebs (1976: 314-15), who quotes the texts of the inscriptions concerned. It should be noted that the last of these inscriptions was found in Tusculum, not Africa.

Achaea, Aquitania, and even Dalmatia.[64] It is only right to conclude with Kunkel: "Über die Herkunft der Aemilii Macri wissen wir nichts Sicheres."[65]

While we can say little about Macer as an individual, we do know him as the author of five monographs: *de appellationibus, de iudiciis publicis, ad legem vicensimam hereditatium, de officio praesidis,* and *de re militari.* It is noteworthy that each of these works is quite brief, comprising only two books, and written in a very straightforward style, most akin to what may be regarded as a manual or handbook. Several of these treatises cover topics whose interest to provincials is obvious by their titles, and in all of them the nature of the advice offered is unfailingly practical.[66] It is difficult to imagine that this obscure jurist who is mentioned in no literary or legal source outside his own writings as they are preserved in the *Digest* would possess sufficient *auctoritas* and legal renown to compose a book of instructions which provincial governors would be expected to follow.

Macer's *de officio praesidis*

The treatise of Aemilius Macer, like that of Paul, is in two books, though the subject matter of the surviving citations (ten in all) makes speculation about the general character of each book difficult. My sense is that the first book treats the jurisdiction of the governor, while the second book covers judicial

[64]Liebs 1976: 315.

[65]Kunkel 1967: 257.

[66]For a discussion of these works, particularly *de re militari* and *de iudiciis publiciis*, whose interest for provincials is not as readily apparant, see Liebs 1976: 314-25.

matters. A reference to Septimius Severus as *divus* (55/29.2.61) helps to place the work sometime during the reign of Caracalla or Alexander Severus. A reference to Ulpian (58/50.5.) indicates that he had read the latter's handbook, strongly suggesting that Macer is the latest of the four authors.

The work has drawn some attention both because of its different title, *de officio praesidis*, and the puzzling (but ultimately very logical) distinction that Macer makes between *praeses* and *proconsul*. Dell'Oro suggests that Macer was writing a handbook, on the pattern of Saturninus and Paul, but intended for imperial legates.[67] Dell'Oro even assigns this work a separate category in his catalogue. This idea seems at first to be borne out with a reference (51/1.22.3) to Mysia and Germania, both governed by imperial appointees; on the other hand, Macer later quotes from a rescript to a proconsul (51/1.21.4).

To become distracted by the title is to miss the mark. Macer is writing for a provincial audience. For this reason he is avoiding the technical appellation *proconsul* in favor of the more generic *praeses*, which has broad application to any sort of provincial administrator. The term is well attested in literary sources from the time of Tacitus onward as referring to any kind of provincial governor, whether appointed by the emperor or chosen by the senate. Macer's phrase, *licet senatores sint* (50), reflects the fact that governors of senatorial

[67]Dell'Oro 1960: 213.

rank were not all proconsuls.[68] Detlef Liebs supports this conclusion regarding the work's more generic title. Liebs points to Macer's "lokaliserung" (i.e., colloquial) tone, style, and vocabulary, which set him apart from the jurists writing at Rome. It is Liebs' sane suggestion that Macer is similar to Gaius in his learning and approach.[69] Perhaps Macer was one of the many provincial legal scholars and teachers who held the title *magister iuris*.[70] The existence of a brief work written by a provincial, who as we have seen earlier is quite unknown apart from his legal treatises, suggests there was certainly a demand for this sort of material. It would have been useful for provincial advocates, and it was surely not intended to instruct or assist the provincial governor.

Lenel divides the six citations from Book 1 into three rubrics: *de praeside et eiusque comitibus, de mandata iurisdictione,* and *de restitutionibus.* These citations are well founded in legal precedents. Macer uses two rescripts and a *senatusconsultum* in this section.[71] With so little of the work surviving, these section headings should be regarded as a topical guide only, not a reconstruction of the original section. The first two rubrics are certainly devised by analogy to

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[68]Ulpian in his much longer work frequently uses both *proconul* and *praeses* as if the terms were interchangeable. Modern scholars seem more keen on such semantic distinctions than the Romans.

[69]Liebs (1976: 313) detects provincialism in Macer's discussion of law and in his orthography.

[70]Liebs 1976: 312-313. We know of such office holders in several urban centers, such as Carthage and Beirut.

[71]This *SC* is of uncertain date and concerns the governor's jurisidiction over contracts entered into before provincial rulers and their aids prior to their entry into the province. This is #223 in Talbert's (1984: 457) list.

those Lenel supplies in Book 1 of Ulpian's *de officio proconsulis*, though even these are inventions.

Lenel's first extract, the definition of *praeses*, sets a tone which is as factual as it is pedestrian. In the ensuing citations concerning assessors and the governor's exercising of jurisdiction in contractual obligations (52/1.18.6), the level of engagement remains rather elementary and practical, more like a introductory work with careful documentation (*senatus consulto cavetur*) than a scholarly production. Macer's comments are also quite similar to those that Ulpian makes on the same subject at 2143/1.16.64.6, suggesting he is familiar with the work. In 53/1.21.4 Macer simply says, *Cognitio de suspectis tutoribus mandari potest*, and supports his statement with a *senatus consultum*. The passages surviving under *de restitutionibus* are similar in character to those above.[72]

In the four surviving extracts from Book 2, which relate to matters of criminal and municipal law, Macer alludes to imperial rescripts (56/48.3.7) and constitutions (59/50.10.3), and he even paraphrases Ulpian, citing him by name (*Ulpianus respondit*, 58/50.5.5). It is difficult to imagine under what general heading such disparate material could have been organized originally, unless perhaps penalties and exemptions were the subject of Book 2. 56/48.3.7 begins the book with the formula *solent praesides provinciarum ...* and describes the extradition of fugitives. Here Macer is simply describing what governors

[72]54/4.4.3 is now generally believed to have been attributed to Marcellus due to a scribal error. See Dell'Oro (1960: 211) for discussion.

typically do with fugitives. He is not so much instructing the officeholder, as he is offering information and general instruction about the extradition of criminals. Macer informs would-be prosecutors that governors customarily return fugitives for trial to the province in which the crime was committed.

At 58/ 50.5.5 Macer indicates that he has read Ulpian's views on exemptions from local office and cites him as an authority. This degree of dependence on juristic sources is not found among the other authors. Indeed, they never cite other jurists except to complement their own opinions or to present the opposing sides of a vexed question. Macer's comments on public works (59/ 50.10.3) are similar to those of Ulpian as well.[73] The respect shown Ulpian and the elementary and derivative quality of Macer's writing suggest that Macer's work was written later than the others and was much less authoritative.[74]

In conclusion, Aemilius Macer's *de officio praesidis* was likely written by a provincial lawyer, perhaps for provincial advocates and litigants. It may have originally been an elementary textbook on the Roman governor or even an epitomized version of Ulpian's longer work. It is certainly doubtful that it was composed for the governor, nor does it attempt in any way to guide or advise him. Macer's work is a descriptive manual, summarizing for someone, perhaps a local advocate, how provincial governors are likely to think and conduct their business.

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[73]Cf. 2147/1.1.7.1.

[74]On the derivative nature of Macer's treatise, see Marotta 2004: 19-21.

From the few surviving fragments of these shorter works, no definitive conclusions may be drawn about the character of the original texts or the audience to whom they were addressed. It seems doubtful, however, that any of these brief collections were composed solely, or even primarily, for the governor's use or instruction, especially the treatise of Macer. Perhaps the treatises of Saturninus and Paul were originally arranged in two parts, civil law and criminal law. Macer's work may have covered the jurisdiction of the governor in his Book 1 and matters relating to civil and criminal law in his Book 2. Whatever their original organization, they all contain legal information, both general and specific, which would have been helpful to anyone associated with the governor's tribunal. With that in mind, we venture that these works might have been in the personal libraries of both provincial governors and local advocates, as well as in the collections of law schools.

Marcus Domitius Ulpianus (*PIR*^{2} D 169)

Our final author, Domitius Ulpianus, is far from obscure. Perhaps more is known of his life, career, and legal writings than for any other jurist, yet even here, except for the many fragments of the works themselves, the details are relatively meager and contradictory. In addition, the reliability of some of the ancient sources is in serious doubt, so they should be used with caution. Perhaps for these reasons, the works of Ulpian, like those of the other Roman jurists, have been studied almost exclusively by legal scholars who have focused on textual considerations and the principles of law found therein.

By far the most complete modern study of Ulpian is that of Tony Honoré, who has attempted through careful stylistic analysis to reconstruct the order of composition of Ulpian's works and to offer us something of the personality of the jurist as well.[75] The extent to which Honré's conclusions can be considered valid has been hotly debated, especially as regards his reconstruction of Ulpian's writing plan, which not only suggests an order of composition but even provides precise dates.[76] If the process of evaluating legal writing for socio-historical purposes is fraught with difficulty, the material is potentially rich and worthy of close attention. This is particularly true in the case of Ulpian, who is the most influential and frequently cited of Roman jurists and the one most alive to us as an historical figure. To this end, Honoré's chapter on Ulpian's life and career is a most valuable discussion.

Ulpian was born sometime before 172 A. D. in the Phoenician city of Tyre.[77] Aside from legal texts, there is no ancient work in which Ulpian figures prominently, so what we can reconstruct about the details of his life and career comes from his own works and several ancient sources of varied reliability who make passing reference to him. We know little of his early life and education, but that he took great pride in being a citizen of Tyre is apparent from laudatory

[75]Honoré 1982 (1st ed.) and 2002 (2nd ed.).

[76]See Millar (1986: 272-80) for an evaluation of Honoré's methodology and some bibliography.

[77]For speculations regarding Ulpian's ethnicity, see Kunkel (1967: 247-54).

references to his mother city in his writings.[78] A water pipe with the inscription CNDOMITIAN . NIULPIANI has been found in the ruins of a large villa at Centumcellae along with a statue of the Tyrian Cynic philosopher Meleager. Honoré suggests that we read this: CN DOMITI ANNI ULPIANI, which would make his name Gnaeus Domitius Annius Ulpianus.[79] This, along with the fact that no other Domitii Ulpiani are known, has led scholars to the reasonable conclusion that Ulpian had a villa there.[80] That his name is in fact Domitius Ulpianus is confirmed by numerous ancient references to him.[81] When this evidence is added to Ulpian's status and connection with the imperial family, it is possible to imagine his coming from Italian stock, perhaps from a family of merchants well established in Tyre. But this is, of course, speculation.[82]

Piecing together several ancient sources has allowed us to learn something of Ulpian's career. The *Historia Augusta* relates that Ulpian, together with Paul, was an *assessor* to Papinian while the latter was *praefectus praetorio* under Septimius Severus.[83] He subsequently held the office *a libellis,*

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[78]*Dig.* 50.15.1.

[79]Honoré 2002: 9. For the text of the inscription see *CIL* XI.3587=XV.7773.

[80]Kunkel 1967: 252; Honoré 2002: 9.

[81]For a full list, see Honoré 2002: 8-9.

[82]Kunkel (1967: 252-53), who also points out that Domitius is not a common *nomen* in the eastern provinces; Honoré 2002: 9-14.

[83]*HA Niger* 7.3-4

which Honoré believes he occupied from 202 until about 209 A. D.[84] During the reign of Caracalla, we know of no office which Ulpian held, but it is during this period that most of his literary activity apparently occurs. Honoré has suggested through stylistic analysis that the bulk of Ulpian's legal writings (some 280 books in all) were composed as part of a carefully devised and well disciplined writing plan between 213 and 217 which spills over into the brief reign of Macrinus.[85] We shall have occasion to return to this topic later, but it cannot be overlooked that this effort, which amounts to an encyclopedic summation of Roman law, coincides with the issuing in 212 A. D. of the *constitutio Antoniniana,* making almost all provincial subjects Roman citizens.[86]

After completing this ambitious program of writing, Ulpian held the office of *praefectus annonae* in 222 A. D., and by late in the same year was made praetorian prefect.[87] In the latter office, Ulpian was initially placed over the two existing prefects, but shortly thereafter successfully plotted their murders and was for a time sole prefect until sometime in 223 when he was forced to take on colleagues.[88] During this same year, Ulpian lost prestige with the Praetorian Guard for reasons that are unclear in the ancient accounts. Finally, he was

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[84]Honoré 2002: 18-19.

[85]Honoré 2002: 25-26.

[86]Honoré (2002: 22-26) discusses how the *constitutio Antoniniana* may have affected Ulpian and gives a bibliography on the subject (2002: 8n30).

[87]*CJ* 8.37.4, 4.65.4; Honoré 2002: 29-30.

[88]For this account see Zosimus 1.11.2-4, Dio 80.2.2-3; for a complete discussion, Honoré 2002: 30-33.

himself assassinated by his own soldiers. The leader of this plot according to Dio was one Epathagus, who was himself murdered in 224 A. D. while governor of Crete.[89] This evidence shows that Ulpian must then have been killed in late 223 or early 224 A. D., and not in 228 as was previously thought.

During the period following 217 until his assassination, Ulpian was an intimate of the imperial family and likely one of the young Alexander's closest and most powerful advisors. In one rescript, Alexander refers to Ulpian as "my parent" (*meum parentum)* and the life of Alexander in the *Historia Augusta* speaks of him as the young emperor's closest advisor, while Zosimus says Julia Mamaea was responsible for Ulpian's promotion to prefect.[90] Dio tells us that during his short tenure as prefect, Ulpian put many things in order.[91]

Schulz classes Ulpian among the so called "bureaucratic group" of jurists who consistently held some sort of administrative position and drew a salary from the state.[92] Ronald Syme presents Ulpian as an ambitious opportunist who curried favor with the imperial family to insure a bright and safe political future for himself.[93] Honoré's analysis of Ulpian's personality is the most compelling and controversial. He interprets Ulpian's personality as "difficult," "critical,"

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[89]Dio 80.2.3; Honoré 2002: 30-33. For a comprehensive survey of this problem which does not include Honoré's most recent theories, see Schiller *(*1978: 360-63).

[90]*CJ* 4.65.4; *HA Alexander* 67.2; Zos. 1.11.2

[91]Dio 80.2.2

[92]Schulz 1946: 107.

[93]Syme 1972: 406-09.

and "self-centered," and views his military training as inadequate to maintain the respect of the Praetorians.[94] Yet despite these apparent personal failings, his religious devotion to the law and its explication had a profound impact on the Roman concept of constitutional government:

> To him [Ulpian] the law, since it incorporates those moral and philosophical notions which can be given effect in practice, is the key to good government. It is Ulpian, composing a rescript on behalf of Severus and Caracalla, who formulates the principle that, though the emperor is not bound by law, nothing so becomes him as to abide by it. It is he, among the jurists, who depicts the lawyer as a priest, and sees law as providing a guide to right and wrong and an incentive to choose the former.[95]

As an author Ulpian is not an original thinker, but a methodical encyclopedist whose simplicity of language and clarity of expression are unrivaled among his peers, and Honoré in an exhaustive study of Ulpian's style has suggested that he dicatated his works to an amanuensis.[96] His voluminous output seems to suggest that his goal was to offer the most authoritative and comprehensive presentation on any given subject. Indeed, Ulpian's works cover every branch of legal science, from the massive *ad Edictum libri LXXXI* and *ad Sabinum libri LXVI* to textbooks and monographs on individual *leges* and

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[94]Honoré 1982: 45; however, in his second edition, Honoré (2002: 30-32) relaxes this view of Ulpian's personality and attributes his assassination to other motives.

[95]Honoré 1982: 45. Such intimate speculations about Ulpian's character and personality as well as his relationship with other jurists are missing from Honoré's second edition of *Ulpian*, though he seems not to have changed his mind about Ulpian. He rather, as the revised title indicates, elevates Ulpian to a "pioneer of human rights."

[96]Ulpian's reputation as an author has waxed and waned at various times through the years. For a discussion, see Schiller 1978: 363-64 and Berger 1953: 750. Honoré (2002: 37-75) conducted an extensive study to demonstrate why he believes Ulpian dictated his works.

magistracies. Honoré argues that Ulpian was motivated by the *constitutio Antoniniana* to codify "Roman law as the law for a cosmopolis."[97] Honoré suggests that Ulpian's works foreshadow the *Digest* in their comprehensiveness and aims.[98] Notably lacking from this output is a large group of *responsa*, which suggest that unlike many of his peers, Ulpian did not have a large private practice.[99]

Synoptic Overview of Ulpian's *de officio proconsulis*

Reading the surviving fragments of the works *de officio proconsulis* which appear in Appendix A, one is immediately struck by two things: 1) the brevity of the works of Saturninus, Paul and Macer compared to the length of Ulpian's treatise in 10 books; 2) the idiosyncratic nature of the topics covered. The shorter works of Ulpian's peers, in so far as one can deduce from the few passages which survive, appear to cover highly selective points of civil and criminal law, divided accordingly. Ulpian by contrast adopts a more *ab-ovo-usque-ad-mala* approach, dramatically commencing with the arrival of the proconsul in his province and concluding with his departure at the end of his tenure, or at least this reflects Lenel's arrangement.

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[97]Honoré 2002: ix, 24-26.

[98]See Honoré's article in the *OCD*, 4th ed., "Ulpianus," 475.

[99]Honoré 1982: 21.

Book 1

The fragments of Book 1 have been divided into three sections by Rudorff and Lenel; they concern issues connected with the proconsul's arrival into his province and his initial activities (*de ingressu, de iurisdictione mandanda, de xeniis).*[100] Since this first section is paradigmatic of both Ulpian's style and Lenel's methodology in arranging the fragments, it merits closer scrutiny.

For those who would see Ulpian's handbook as a general instructional manual for the provincial governor, the work begins promisingly. The first entries address practical issues arising from the proconsul's entry into his province. Ulpian offers advice about how, where, and with whom the governor should enter his province--exactly the sort of guidance one might imagine the potential office holder would need. Of course, we do not know for certain that these lines were actually at or near the beginning of Book 1 originally, but Lenel's arrangement suits a logical order of discussion, especially since the last book contains advice about the proconsul's departure.

This treatment of the proconsul's arrival in Book 1 and his departure in Book 10 gives the impression of a literary framework and of thoroughness. Also, we can see from the outset that Ulpian is not merely concerned with citing legal authorities or offering opinions on legal questions. Rather, with an air of broad authority lacking in the other sources, he frequently offers professional or personal advice about issues unrelated to legal matters. For example, after

[100]See pp. 20-22 above for a discussion of Lenel and Rudorff's methodology.

suggesting that the incoming office holder send notification of his arrival to his predecessor, he concludes:

> Recte autem et ordine faciet, si edictum decessori suo miserit significetque, qua die fines sit ingressurus: plerumque enim incerta haec et inopinata provinciales et actus impediunt (2142/1.16.4).
>
> He will be doing the right and mannerly thing if he sends the edicts to his predecessor and gives him notice on which day he will arrive over the boundary. For uncertainties and unexpected events are especially upsetting to provincials, and they interfere with business.

He goes on to advise the proconsul on the proper way to enter his province:

> Ingressum etiam hoc eum observare oportet, ut per eam partem provinciam ingrediatur, per quam ingredi moris est, et quas Graeci ἐπιδημίας appellant sive κατάπλουν observare, in quam primum civitatem veniat vel applicet: magni enim facient provinciales servari sibi consuetudinem istam et huiusmodi praerogativas (2142/1.16.5).
>
> He must observe this point in making his entry, that he enters by that part of the province where such entries are customarily made, and that he pays attention to what the Greeks call ἐπιδημίας (stopping-off places) and κατάπλουν (port of entry), whatever be the *civitas* to which he first comes or at which he first lands. The provincials set a high value on fidelity to that custom and to prerogatives of this kind.

In these passages Ulpian is offering advice regarding questions of political etiquette and procedure, not justice. He has anticipated two likely practical problems the proconsul might encounter, and at the outset he offers measured solutions. He is also very much entering into the mindset of the provincials and presenting the situation from their perspective. In a sense not present in any of the other authors of such handbooks, Ulpian becomes an advocate of provincial privileges and customs. It might fairly be said that Ulpian is attempting to "legalize" or standardize custom and practice, using the *auctoritas* of his own position in the government to address all sorts of questions which may be

construed as pertaining to the *officia* of proconsuls.[101] The remaining topics on delegation of jurisdiction (2144/1.16.6) and the accepting of gifts (2145.1.16.6.3), in which Ulpian quotes from an *epistula* of the deified Severus and Caracalla, treat proper procedure and conduct. In the last entry (2146/1.8.83), he encourages the office holder to observe local custom and use common sense when there is no written law to guide him.

Perhaps some of these suggestions come from his own experiences during his tenure as *adsessor* to Papinian, although it is quite possible that this type of advice comes indirectly from imperial *mandata*.[102] Despite frequent references to *mandata* by ancient and modern authors, we actually know very little about the specific contents of *mandata*. Dio's assertion that proconsuls as well as imperial legates received some type of *mandata,* perhaps as early as the reign of Augustus has now been vindicated.[103] Fergus Millar has observed that the occasional quotations from imperial *mandata* are personal in tone and written in

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[101]That the emperor himself was involved in legalizing custom is shown by the ruling of Caracalla which Ulpian cites regarding the governor's approach to Ephesus by ship (1.16.5); see also Burton (2004: 311-42, esp. 335); see my discussion on pp. 155-56 of an inscription which records a plea from the Ephesians regarding their privileges and cites Ulpian.

[102]For a discussion of *mandata* see pp. 68-73 below.

[103]Dio (53.15.4) stated this but he was thought to be mistaken by many scholars, until G. Burton published an inscription from Cos from the first century A.D. which makes clear reference to the ἐντολαὶ (*mandata*) of the proconsul (Burton 1976: 63-80). However, we should not be too hasty to assume that every proconsul received *mandata* from the reign of Augustus simply because there is now an extant example. It is perhaps better to say that even proconsuls might from time to time receive *mandata* from this early date. See Talbert (1984: 403-07) for this more conservative view.

the first person to the office holder in the second person.[104] If we may judge from Pliny's correspondence with Trajan, *mandata* could potentially cover a boundless range of topics, many of which would have been particular to a given province, from the regulation of *collegia* to the investigation of municipal finances.

Synopsis of Books 2 - 10

In Book 2, Ulpian continues his instructive admixture of personal and legal advice by addressing a variety of topics familiar to us from other types of sources. The problem with classification of the material continues here as well, as the fragments have been grouped by Lenel under two rubrics: *de provincia circumeunda* and *de iure dicundo*. In contrast, Rudorff used three titles: *de foro agendo, de iurisdictione,* and *de postulando*. The extracts under Lenel's first rubric do not tell us what we would like to know about the particulars of *conventus* tours, but there is some advice on politely enduring the apparently endless and empty compliments of provincial orators. In 2147/1.16.7 pr.[105] Ulpian's instruction to the governor, *non gravate audire*, gives us a different perspective on those orations which Dio of Prusa, Menander Rhetor, and Libanius claimed held their audiences spellbound for hours. The next lines recall for us Pliny's letters that address his efforts to complete construction projects and maintain buildings in Bithynia. That Ulpian is so familiar with

[104]Millar 1992: 315.

[105]When an extract from the *Digest* contains more than one paragraph, the abbreviation pr. (*in principio*) designates the first paragraph, while the remaining paragraphs are given the numbers 1, 2, etc. For details see Roby (1886: 245).

this material lends credence to the theory that the letters were likely circulated as something of a handbook in their own right.[106]

Under Lenel's *de iure dicundo* the concept of the theoretically unlimited jurisdiction of the proconsul is outlined (2148/1.16.7.2 and 1.16.9), but Ulpian adds the very practical caveat regarding interference in the affairs of the imperial procurator, the negative results of which are all too familiar from Tacitus' *Agricola*. The remaining citations in this section cover the operation of the governor's *cognitio,* and mix comments on procedure with practical advice. In an original section likely covering which matters could be disposed of by writ and which could not, he reminds the governor that matters requiring a decree cannot be disposed of by writ (2149/1.16.9.1). A citation that tutors cannot excuse themselves by writ (2149/27.1.25) is included here but seems out of place. Then, he reminds the proconsul to exercise patience with advocates (2151/1.16.9.2). Other procedural matters are discussed, such as what charges can be handled out of court and an admonition to respect one's parents (2151/1.16.9.3). An important section follows addressing how the proconsul should rank applicants in civil cases (21521.16.9.4-6). The remaining citations in this section cover how the governor should decide certain types of civil cases.

[106]See Sherwin-White (1966: 533-35), who does not agree with this idea but who offers no better suggestion. At the least, Ulpian demonstrates that what Pliny did either was, or became, standard practice. Woolf (2006: 2015), Stadter (2006) and Noreña (2007) have all suggested that Pliny's aim was to create a model correspondence and that he may have survived to edit Book 10. For further discussion of their ideas and the purpose and publication of Book 10, see pp. 77-83 and 153-54 below.

Lenel has placed three citations for Book 2 under the rubric *de tutoribus et curatoribus*. Variously citing specific imperial rescripts and offering his own advice, Ulpian explains the governor's role in cases involving disputes related to the tutelage of minors and the curatorship of infirm parents, lunatics and prodigals (2158/26.5.12). That this is an important area of the governor's legal jurisdiction is suggested by the range and specificity of the extracts presented. He also advises the governor to investigate the sale of properties belonging to those under any type of guardianship before allowing it (2160/27.9.11). In light of estimates that only one elite magistrate existed during our period for every 400,000 subjects, this last counsel seems rather an academician's preoccupation than practical advice.[107] From the provincial point of view, it does suggest that such questions may be addressed to the governor with hope of a hearing.

The next section, entitled *de decurionibus*, provides a nice complement to what we know of the decurionate from the elaborate rules laid out in municipal charters such as the *lex Irnitana*. Ulpian treats matters including the disbarment of decurions who are exiled (2161/50.2.3); the co-option of bastards into the council (only if there are not enough legitimately born men to fill the seats!); and the exemption of Jews from duties of the decurionate which contradict their religion (2161/50.2.3). The order in which names are recorded on the list of decurions receives special attention. One can only imagine the

[107]Burton 2002: 426. I am not implying that such cases would not have been investigated--any case might gain the governor's attention--but his staff was not sufficient for such active involvement in the affairs of provincials, unless prompted by the status of those involved. Admittedly, the propertied classes would have represented a much more manageable number.

potential for squabbling and confusion which might fall to the governor to sort out. Ulpian's specific charge to keep the decurionate full at all times suggests that doing so presented a difficult problem, even requiring the proconsul's attention--though again one can hardly assume an active role for him in this sphere. Throughout this section, the terms *proconsul* and *praeses* are used indiscriminately.

Many of the citations in Book 3 treat the governor's dealings with the *municipia* and focus on the eligibility of officeholders. These have been collectively titled *ad municipalem I* by Lenel. Rudorff's *de muneribus vel honoribus* and *de vacatione et excusatione munerum* are more specific, but even a glance at the citations reveals problems with these titles. 2165/27.1.6, confirming that a doctor can be "struck off a city council," has nothing to do with *honores* or *munera*, nor need the question of the *immunitas* of veterans from road maintenance (2166/49.18.4) necessarily relate to *munera*.[108] While Lenel's suggestion is perhaps better, it cannot have resembled the original. Both scholars bestow a coherence upon these fragments which they do not, in fact, possess.[109]

Book 5 continues treatment of municipal laws (Lenel's *ad muncipalem II*) with a discussion of various kinds of legal exemptions, viz. tutelages,

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[108]2165/27.1.6.6 is preserved by who in his citation of this passage tells us it came from Book 4.

[109]The arrangement of the citations within each book is speculative. For instance 2170/1.3.34 seems to be connected with the exemptions mentioned in 2169/50.7.7, but the word is so vague that it could have been placed anywhere among the citations in this book. Many other examples of this problem could be adduced.

curatorships, personal and public *munera*. We know from literary sources that these were of particular concern to provincials and thus that the governor would be the arbiter of last resort in these matters. Citation 2175/5.1.79, which addresses frivolous lawsuits, and 2176/47.11.5, which deals with the coercion of slaves, are unrelated to each other and do not suit Lenel's vague rubric *de conventu*.

Lenel and Rudorff, perhaps following the *Digest* rubric, have entitled the first section of Book 6 *de collegiis*, but only one citation is offered there, referring to the legal penalty for establishing a *collegium illicitum* (2177/47.22.2). The duties of curators are the subject of the next citations, but since this has already been treated earlier, Lenel changes Rudorff's *de curatoribus* to *de bonorum possessionibus*. This is followed by a wholly unrelated item on manumissions, which Rudorff does not distinguish but Lenel entitles *de manumissionibus*.[110] As there is a later discussion of this topic, the heading here seems unlikely. It is indeed impossible to arrange these piecemeal fragments in a logical order or to speculate usefully from them about the precise organization of the original, pace Schulz in this statement that "In Book 6 the subject of *collegia illicita* led up to Part 5, on penal law, which extended into Book 10, the last."[111]

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[110]This passage may not actually even be from Book 6. See *Digest* 40.2.14, where it is likely that "Book 6" has been inserted into the text.

[111]Schulz 1946: 244. I am not arguing against this useful scholarly speculation, but it should be clearly marked as just that, so those who use the material may treat it with the appropriate caution.

Book 7 begins in earnest a lengthy discussion of criminal procedure, penalties and punishments under proconsular jurisdiction.[112] Ulpian's dictum that *Congruit bono et gravi praesidi curare, ut pacata atque quieta provincia sit quam regit* (2181/1.18.13.pr.), is conceivably the opening sentence of the book. This statement is often quoted or paraphrased by modern authors as a one-sentence summary of the governor's judicial role in his province. A discussion of madmen and fugitives (2183/1.18.13.1) introduces a section on court procedure, including accusations (2184/48.2.7.3), appearances in court (2184/48.2.7.3), sites for criminal trials (2186/48.2.7.4.5), custody of defendants (2187/48.3.3), trials in absentia (2189/48.19.5.1)--all very practical and useful information for both governors and local advocates. Penalties for *sacrilegium* (2190/48.13.7) are mentioned, and it is at this point that Lenel inserts the tantalizing statement from Lactantius which references Book 7: *Domitius de officio proconsulis libro septimo rescripta principum nefaria collegit, ut doceret, quibus poenis affici oporteret eo qui se cultores dei confiterentur*.[113] None of these rescripts found their way into the *Digest* nor are they quoted by Lactantius, a most unfortunate loss.[114] Lenel has labeled this section *de Christianis* and placed after it (perhaps

[112]The legal content and context of Books 7-9 have been extensively discussed by Nogrady (2006).

[113]2191/Lactantius, *Div. Inst.* 5.11; see Chapter Three pp. 147-48 for further discussion and translation.

[114]One would imagine that the correspondence of Trajan to Pliny regarding the trials of Christians were among these, for which see *Ep.* 10.96-97 and Sherwin-White's comments (1966: 691-712). It is also likely that the rescript of Hadrian regarding the trials of Christians and the *epistulae/edicta* of Antoninus Pius (if genuine) on their treatment in Greece, found in Eusebius

because it begins with *praeterea*) a passage addressing the types of penalties which astrologers and fortunetellers should suffer (2192/*Coll.*15.2).[115] This passage is notable because it comes from the *Collatio* and is headed by a surviving rubric, ***de mathematicis et vaticinatoribus***.[116] Beyond the fact that all of these sections are related to the concept of sacrilege, it is difficult to speculate about the rubrics or order of presentation within the book.

The next major section treats the various *leges* touching on criminal jurisdiction. Throughout the discussion of these *leges*, the old procedure of the *quaestiones* is alluded to (2194/*Coll.* 1.3, for example), but the emphasis is on the investigation and punishments set out in the statute that could easily be adapted to the *cognitio* of the governor. The section titles are *ad legem Iuliam de maiestate, ad legem Corneliam* ***de sicariis et veneficis***, and *ad legem Iuliam peculatus*. This discussion continues well into Book 8 with ***ad legem Iuliam de vi publica et privata****, ad legem Pompeiam de parricidiis,* and ***de poena legis Corneliae testamentariae***. This so-called *leges* section is particularly important as it contains several original rubrics or fragments thereof, as preserved in the *Collatio*. The rest have been invented on the model of these surviving rubrics. This procedure is certainly logical and helpful when pursuing content, but it does not mean that *leges* were the subject of this entire section. For example,

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(*E.H.* 4.9 and 4.13 respectively), would have been included. For further discussion see Chapter Three pp. 147-49.

[115]Lenel himself (1889:975n2) questions the rubric.

[116]Throughout this discussion I have indicated rubrics from the *Collatio* with bold italicized type and Lenel's conjectured rubrics with regular italicized type.

Collatio 1.3 (our 2194) preserves the title ***de sicariis et veneficis***, which becomes *ad legem Corneliam* ***de sicariis et veneficiis*** in Lenel.[117] The fact that *maiestas* is the subject of 2193/48.1.1 and is cited from Book 7 does not mean that the *lex Iulia maiestatis* received its own chapter.[118]

In Book 8 we encounter some of the same problems of arrangement. Two rubrics both relating to *leges* survive in the *Collatio*: ***ad legem Iuliam de vi publica et privata*** and ***de poena legis Corneliae testamentariae*** (2202/48.6.7 and 2203/*Coll.*9.2). The mention, then, of parricides in 2204 /48.9.6 does not necessarily mean that the *lex Iulia de parricidiis* is the reference.

The next topics in Book 8 deal with procedural questions in the *quaestio extraordinaria* of the governor. Lenel's *de testibus* and *de quaestionibus* give one a general idea, though the contents of the latter are quite detailed and suggest some more specific rubric. Treated under this title are application of torture (2209/48.18.1-20; 2210/48.18.1.21,22; 2211/48.18.23-26) and false confessions (2212/48.18.1.27) with an interesting conclusion that a governor does not have the power to revoke previous judicial decisions he has made without the permission of the emperor.[119] The remaining citations from Book 8 cover penalties so varied that it is difficult to offer suggestions about their original

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[117]Rudorff preserves only the *Collatio* title.

[118]See also 2200/48.13.8 and 2204/48.9.6 for similar examples.

[119]Lenel (1889: 978n1) conjectures that these sections were probably discussed in the context of *leges* as those above, but here he stops short of composing such a rubric. For further discussion of a governor revoking his sentence, see pp. 101-04 below.

arrangement. The following sections ***de dominorum saevitia*** (2213/1.6.2 = *Coll.* 3.3.1-4; 2214/*Coll.* 3.3.5) and ***de naufragiis*** *et incendiariis* are notable in that the rubrics are genuine and mostly come from the *Collatio*.[120] In the discussion of cruelty to slaves, shipwrecks and arson, some of the text comes from the *Collatio* alone, and some survives in both the *Digest* and the *Collatio*. The list continues with speculation in grain (2217/47.11.6), cattle-thieving,[121] thieving in general[122] (2222/*Coll.* 7.4.=47.17.1), jail-breaking and pillaging (2223/47.18.1), and concludes with a discussion of *stellionatus* or fraud (2224/47.20.3), which Ulpian regards as an all-encompassing charge for any sort of fraudulent behavior.

Book 9 continues this varied discussion of penalties which fall within the governor's extraordinary competence to execute: complaints against freedmen (2225/37.14.1), pickpocketing and embezzling (2226/47.11.7), collusion (2227/47.15.2), despoiling inheritances (2228/47.19.2), moving boundary markers (2229/*Coll.* 13.3),[123] interference with the grain supply (2230/48.12.2), jurisdiction and penalties for binding, buying or selling Roman citizens under

[120]The *Collatio* preserves only ***de naufragiis***, so Lenel has added the rest based on the contents of the paragraph.

[121]The rubric ***de abigeis*** survives from the *Collatio*, and much of the text under this rubric (2218/*Coll.* 11.7.pr. = 47.14.1.pr.; 2219/*Coll.* 11.8.1.2 = 47.14.1.2; 2220/*Coll.* 11.8.3.4) is found in both the *Digest* and *Collatio*, though there are a number of minor discrepancies, which Lenel (1889: 982) notes. See also Frakes (2011: 289).

[122]Preserved in the *Collatio* as ***de furibus***.

[123]This rubric ***de termino moto*** is preserved in the *Collatio* from which the text also comes.

the *lex Fabia* (2231/*Coll.*14.3); 2232/48.15.2),[124] public display of private records (2234/47.11.8), punishments of crimes peculiar to a province such as σκοπελίσμον[125] in Arabia or damaging the embankments of the Nile in Egypt (2234/47.11.9; 2235/47.11.10), failure to produce defendants entrusted to one's care (2236/48.3.4). Finally a lengthy section entitled by Lenel simply *de poenis I*, covers firstly, what to do with those who attempt to evade punishment by invoking the emperor's safety (2237/48.19.6) and the punishment of the governor's (or his staff's) own slaves (2238/48.19.6.1), and, secondly, a discussion of the sorts of punishments which the governor may inflict, based on the status of the defendant (2239/48.19./6.2.8.pr). This last section covers appropriate means of capital punishment (2240/49.19.98.1-3), the bodies of those so punished (2240/48.24.1), condemnation to the various mines, the use of the *carcer*, those who are termed *servi poenae*, and deportation (2241/48.19.8-4-13). Reading through this section on punishments, one is struck by Ulpian's thoroughness and specificity, such as his explication of who may be called *servi poenae* (2241.11/48.19.8.11) or the weight of the chains allowable to those condemned to the various mines (2241.6/48.19.8.6).

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[124]Text and rubric for 2231 are preserved by the *Collatio* under ***ad legem Fabiam***, while 2232 comes from the *Digest.* Lenel offers no explanation for placing this here rather than with the other sections treating specific *leges.*

[125]According to Mierow (1926: 38), σκοπελίσμον involves the placing of stones in the field of a personal enemy, thereby cursing your enemy to death by your own hands if he should cultivate that field.

Most of Book 10 continues the treatment of punishments begun in Book 9 and has been labeled *de poenis II* by Lenel. The first topic placed under this heading is the governor's right to relegate and the various types of relegation (2243/48.22.7pr.-19), another very exacting discussion. Next follow disbarment of decurions from their *ordo* and various political offices (2244/48.22.7.20-22), disbarment of advocates (2246/48.19.9.pr.-8), confinement to one's home (2245/48.22.9),[126] exclusion from public affairs and commercial contracts (2247/48.19.9.9.10), and fines for harboring relegated[127] persons (2248/48.22.11). The next extract treats circumstances that mitigate punishment (2249/48.19.9.11-16). Though the only factor mentioned is the status of the condemned, there were surely others originally. Lenel very logically concludes this section with *de bonis damnatorum*, which answers with authoritative precision the very logical question: Who owns the goods of those who are executed? This section, if indeed there was one, might have been inserted at any point in the discussion of punishments, but it seems dramatically fitting to place it here before the last rubric, *de discessu*, under which a single extract outlines when it is appropriate for the governor and his legates at last to leave their province. Thus, the work is brought to a dramatic close, that is, if there was an entire section on the

[126]This citation seems out of place.

[127]It seems logical that these last citations should be placed at the beginning where relegation is being discussed, unless Lenel believes Ulpian intended this crime not to have an exclusionary penalty like the others mentioned here.

governor's departure as there was on his arrival, and if that was in fact the final section.

Despite problems with many of the section titles and the specific placement of some citations, this survey of the surviving contents of Ulpian's handbook suggests four very general divisions: 1) Initial duties and jurisdiction of the proconsul (Books 1-2); 2) Matters of civil law (Books 3-6); 3) Matters of criminal law (Books 7-10); and 4) Final duties and departure of the proconsul (Book 10). From this general scheme, Schulz has suggested a more detailed topical arrangement in six parts: 1) The arrival and initial duties of the proconsul (Books 1 and a portion of Book 2); 2) The jurisdiction of the proconsul (Book 2); 3) *Tutela et cura* (Book 3); 4) Law of municipalities (Books 3-6); 5) Criminal law (Books 7-10); and 6) The departure of the proconsul (Book 10).[128] Schulz even offers subdivisions within each part based on content. However, such a detailed scheme seems to follow Lenel's arrangement of the extracts too closely, as if it were the original, and accounts neither for the questionable placement of a number of citations, nor for the many and large lacunae in the text.

Reading through Lenel, one can grasp some of the content of Ulpian's handbook. Nonetheless, blind adherence to his reconstruction is dangerous for reaching conclusions regarding the function and purpose of the work, or even for using individual citations to prove the governor's involvement in a given sphere.

[128]Schulz 1946: 244.

The citations may document exceptions as much as being illustrative of normal practice. Lenel is indeed helpful, but we simply cannot accurately reassemble these extracts within individual books. Ulpian's reconstructed handbook, as Lenel presents it, is open to question. The preconceptions of Lenel and Rudorff necessarily affect their reconstruction of the text. Their arrangement, combined with the fragments from the *Collatio*, in turn affects the devising of the rubrics; and these rubrics greatly influence the way we perceive, use and discuss the work. We cannot know what most of the original rubrics were, and theories put forward about the original context of the citations themselves may well be erroneous or misleading.

In an important article on the use of legal and epigraphic sources for reconstructing the system of provincial administration during the second and third centuries, Burton cautions that one must always bear in mind that the surviving evidence is at best lacunose as well as skewed, in the case of the legal sources, by the divergent aims of the compilers of the *Digest*.[129] For example, one of the main duties of a provincial governor was to settle disputes over boundaries and property lines, yet there is no mention of this important function in the surviving text of Ulpian's *de officio proconsulis*.[130] A confirmable example of this sort of omission is provided by the Christian apologist Lactantius who, as discussed earlier, mentions that in Book 7 of Ulpian's work there is a discussion

[129]Burton 2004: 249-80; see especially 256-57.

[130]Burton 2004: 257.

of the punishment of Christians; yet none of these citations survive nor do we know if they had their own section as the place marker in Lenel's reconstructed text suggests.[131] Thus, while Ulpian's handbook *de officio proconsulis* is the most complete of the four fragmentary works, very little of it in fact survives, and it remains difficult to speak with precision about the detailed contents and arrangement of the original work.

However debatable its organization, Ulpian's *de officio proconsulis* is truly "a literary genus apart," as Schulz has suggested, and is in keeping with Honoré's insights into Ulpian's desire to give the last word on a given topic. A broad range of topics relating to civil and criminal law is presented from a wide variety of legal sources discussed below. In addition, Ulpian frequently offers his own *sententiae*, sometimes with the force of law, sometimes merely as advice with the idea perhaps of institutionalizing custom and practice. This thorough collection would, of course, have been useful to the governor and his staff. But, Ulpian's handbook would also have been an invaluable resource to provincial advocates and litigants hopeful of bringing a case before the governor for trial. It certainly provides clear guidelines as to what each group may legally expect from the other.

[131]Lactantius, *Div. Inst.* 5.11; for discussion see Burton 2004: 262.

SOURCES FOR ULPIAN'S *DE OFFICIO PROCONSULIS*

Unlike the other three jurists, Ulpian has it in mind to present a comprehensive collection of official documents relating to the *officia* of governors. In the surviving text, he either quotes or alludes to legal sources over 100 times. These range from Republican *leges*, to *senatusconsulta*, to imperial pronouncements of various sorts and finally to the *mandata* issued to governors. It is significant that the vast majority of these citations and references are from imperial constitutions, which are quoted directly thirteen times and cited as a source over fifty times.

The term constitution or *constitutio* is somewhat general and can be confusing because it is used indiscriminately by jurists to refer to several distinct types of imperial pronouncements. Imperial *constitutiones* may be divided into three categories: 1) *edicta*, pronouncements on a specific issue with general applicability; 2) *decreta*, decisions made by the imperial court; and 3) *rescripta*, replies of the emperor to a *libellus* (petition) from an individual or community. *Rescripta* take the form of simple *subscriptiones* (replies to a *libellus* actually written on the bottom of the petition itself) or of *epistulae* (letters written in response to a *libellus*). The individuals addressed may be either private persons or Roman officials.[132] Some scholars carefully distinguish *decreta* from *rescripta*

[132]Kunkel (1973: 128) points out that *subscriptiones* were generally given to the *libelli* of persons of lesser rank while *epistulae* were reserved for those of high rank, other officials or provincial assemblies/communities. See also Connolly (2010: 7-8. 23), who in her discussion of the nomenclature of the rescript system suggests that the term *subscriptio* was superceded by the term *rescriptum,* while the petition itself was variously known as *libellus, supplicatio, petitio,* or *prex.*

and *epistulae* from *subscriptiones*; however, it is noteworthy that Ulpian, who is generally considered one of the more organized and careful legal writers of his time, seems less concerned with making such technical, even bureaucratic, distinctions.[133] In this respect, he follows in a long line of Roman jurists who eschew precise use of a technical vocabulary. As Alan Watson has said, "The (Roman) jurists were very interested in interpretation and equally uninterested in systematization."[134] Most often Ulpian uses the general term *rescriptum*, but he sometimes distinguishes an *epistula* from a *subscriptio*.[135] There seems to be no compelling reason for this distinction. Although Ulpian does mention *decreta* four times in his *de officio proconsulis*, in one case when he says he is citing a *decretum*, he subsequently refers to the same text as a *rescriptum*: *Exstat denique decretum Divi Pii ad Pacatum legatum provinciae Lugdunensis, cuius rescripta verba quia multa sunt* ….[136] Sometimes the type of imperial pronouncement in unable to be determined: *divi fratres putaverunt*.[137]

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[133]Kunkel 1973: 128.

[134]Watson 1995: 122.

[135]Hauken (1998: 292-93) points out that the term *subscriptio* was rarely used by ancient authors.

[136]2192/*Coll.* 15.2. Of course it is possible that the *Collatio* is the source of the confusion here, or that the word *rescripta* may also have its literal participial force here.

[137]2183/1.18.13.1.

What is clear is that however one categorizes the constitutions, for Ulpian the words of the emperor are synonymous with law. As he himself states in his *Institutiones* (*Dig.* 1.4.1):

> *Quod principi placuit, legis habet vigorem.... Quodcumque igitur imperator per epistulam et subscriptionem statuit vel cognoscens decrevit vel de plano interlocutus est vel edicto praecepit, legem esse constat. Haec sunt quas vulgo constitutiones appellamus.*
>
> That which has pleased the emperor has the force of law.... Therefore, whatever the emperor has decided by letter or rescript or declared upon hearing a case or decreed out of court or ordered by edict: all these stand as law. All these are what we commonly call constitutions.[138]

It is not surprising then that the various types of imperial pronouncements form the bulk of Ulpian's sources, for these pronouncements, not juristic opinions, became the driving force that shaped and developed public law.

When citing rescripts, Ulpian often preserves the name or names of the person to whom the rescript is addressed.[139] In fact, in the course of his ten books, rescripts are cited numerous times, naming some forty-two petitioners. A cross-reference of these petitioners with names in the second edition of the *Prosopographia Imperii Romani (PIR²)* reveals that sixteen of these are known to have been provincial governors or other magistrates.[140] Fifteen others are thought to have been provincial governors, mostly of unknown provinces; seven

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[138]This is my translation. For a discussion of the *interlocutio de plano* as a form of imperial pronouncement, see Millar 1992: 650 and Nörr 1983: 519-43.

[139]For a list and cross-reference, see Appendix B.

[140]See the table of these individuals in Appendix B.

petitioners are private citizens, two of whom are linked to specific provinces, and four are of unknown status. We can ascertain the place of service of eighteen of the forty-two petitioners. These known petitioners overwhelmingly hale from eastern provinces, and none of the datable *rescripta* are earlier than the reign of Trajan. Finally, the named petitioners tend to come in groups in the text, indicating, perhaps, that they were copied from the same source.

While imperial constitutions form the majority of Ulpian's legal references, he is not averse to quoting from *senatusconsulta* (seven times) or *leges* (nine times), and even other eminent legal authorities (three times). It is often difficult to distinguish between *senatusconsulta* and *leges* in our sources; e.g., in 2232/48.15.2.3, Ulpian refers to the *lex Fabia* which he has been discussing as a *senatusconsultum*. By his time, the two types of legislation have become so intertwined that the distinction is nominal and often impossible to determine. Since early imperial times, *senatusconsulta*, though not officially so, became *leges* almost be default because the authority of the senate and the support of the emperor gave them the force of law.[141] While the popular assemblies evidently ceased to convene by the end of the first century, the senate remained active as a legislative force until well into the third century.[142] It is

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[141]See Talbert (1984: 432-33), who quotes Gaius, *Inst.*1.4, *senatus consultum est quod senatus iubet atque constituit; idque legis vicem optinet, quamvis fuerit quaesitum*; and also Ulpian, *Dig*. 1.3.9, *non ambigitur senatum ius facere posse*. Talbert (1984: 432) sees the legally binding force of *senatusconsulta* to have been a convention by the late Republic that was further strengthened in the early Principate.

[142]Talbert 1984: 459.

doubtless the case that the driving force behind most senatorial legislation during the early principate was the emperor himself, who sometimes introduced legislation in the senate and occasionally even took measures before the popular assemblies before they ceased to convene.[143] For the purposes of our discussion, *senatusconsulta* and *leges* form one type of legal source and imperial constitutions another.

That Ulpian would quote *leges* surviving from the Republican period seems at first startling. One possible suggestion is that he has derived those sections of his work whose rubrics are securely named for *lege*s from the governor's provincial edict, which was in turn based on the praetorian edict.[144] He is perhaps attempting to add structure to the comparatively informal nature of the governor's court.[145] Pointedly, most of the citations of *leges* appear in Ulpian's discussion of criminal procedure. Perhaps, then, he is attempting in a juristic and scholarly fashion to urge the governor to base decisions on established precedents rather than personal whim. He is also putting valuable and reliable information on the evolution of these *leges* in the hands of provincial advocates--information which may help keep the governor honest and

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[143]For a thorough discussion of this problem, consult Talbert (1984: 431-59). A vexing question, as he points out, is why the emperor chose to settle some matters before assemblies, some before the senate and some via the rescript system. More recently Connolly (2010: 39-62, esp. 44) has demonstrated that for a number of reasons (travel, access, and ease among them) emperors increasingly found rescripts to be the most practical, advantageous, and desirable form of constitution.

[144]Burton 1973: 134.

[145]For a discussion of the *cognitio extra ordinem* procedure, see pp. 15-17 above.

industrious. I shall address the possible uses of the handbooks in Chapter Three.

That Ulpian should quote from other juristic authorities only three times is not so surprising in light of our earlier discussion of the emperor as an acknowledged source of law.[146] Yet of all the jurists from Labeo to Modestinus, Ulpian cites his colleagues by name most frequently.[147] Why does he not do so in this particular work? In his thorough stylistic analysis of Ulpian's corpus, Honoré has pointed out that Ulpian cites constitutions most often in his works on public law because these imperial pronouncements, however named, and not juristic works were the main creative legal force of the period.[148] Ulpian perhaps copied his rescripts from a larger authoritative collection, such as the *liber libellorum rescriptorum*, the *Semenstria*[149] of Marcus Aurelius, or Papirus Iustus' *Constitutiones*, which also often quotes the text of the rescript.[150] The probable use of such sources may also explain why *rescripta* are often quoted in continuous groups in Ulpian's *de officio proconsulis*. An equally important and very logical explanation may be that there was a pressing need for everyone in the system of provincial administration, especially the provincials themselves, to

[146]Peachin 1996: 4-5; Connolly 2010: 156-57.

[147]Honoré 1982: 236.

[148]Honoré 1982: 236.

[149]An early collection of rescripts commissioned by Marcus Aurelius.

[150]Honoré 1982: 237-38; Connolly 2010: 34-36; Schulz (1946: 153) identifies the *Constitutiones* as pre-Severan but says it was never quoted by jurists, and he further doubts the existence of any such collection created by the jurists themselves.

have access in reliable form to imperial constitutions which might directly affect their circumstances.[151]

Mandata as a Source

At least from the time of Hadrian and very likely earlier, every governor received from the emperor a set of instructions or *mandata*, outlining his duties and responsibilities during his tenure of office.[152] Exactly when every governor began to receive *mandata* from the emperor remains a matter of debate. Dio (53.15.4) makes the assertion that governors regularly received *mandata* (ἐντολαὶ) from the time of Augustus. For many years Dio was thought to be in error on this point, since no evidence for such *mandata* before the time of Hadrian was extant and since Dio himself is well known to be less than accurate in respect to such bureaucratic technicalities. However, in 1975, Burton published an inscription, found on the island of Cos and dating from Augustus' principate, whose content proved conclusively that at least one proconsul did in fact receive *mandata* from the emperor at an early date as Dio had claimed.[153] Still, some doubt remains whether *mandata* were regularly addressed to

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[151]Peachin (1996: 32n92) points out that unofficial collections of rescripts circulated in the book markets.

[152]There has been controversy (see below) over when governors began receiving *mandata* on a regular basis; for a survey of opinions and discussion, see Schiller (1978: 505-06). It was also thought that various other officials received *mandata*, based on a statement in Frontinus (*De aquae ductu*, 110-111), but M.I. Finley (1934:150-69 [published under Finkelstein]) asserted that only governors received *mandata* in the technical sense of the word, and that Frontinus was simply using the word in a generic sense. *Mandata* that pertained to other officials were contained in those of the governor. See also Marotta 1991: 75.

[153]Burton 1976.

proconsuls before the time of Hadrian. Richard Talbert, who urges a more moderate approach, has suggested that *mandata* might only have been occasionally sent to proconsuls during this early period.[154] More recently, Burton has speculated that during the second century alone, some 1,800 *mandata* were issued to provincial governors of senatorial rank.[155]

Mandata are sometimes mentioned in legal and literary sources, but we have very few actual quotations from *mandata* and therefore know relatively little about their scope and contents.[156] In his seminal study on the topic, Finley has documented only five actual quotations of *mandata*, all of which are composed in direct address with the emperor speaking in the first person and instructing the *praeses* in the second person; this Finley believed to be the format for all *mandata*.[157] He demonstrated clearly that while *mandata* often dealt with matters of great importance, the few surviving quotations concern themselves primarily with official conduct and questions of judicial procedure.[158] Finley, and later Millar, postulated that the contents and phrasing of *mandata*

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[154]Talbert 1984: 104.

[155]Burton 2002: 253.

[156]For a listing of all known quotations of *mandata* and an analysis of the various types, see Finley 1934: 150-69. For a general discussion of *mandata* and the most important legal and literary allusions to their contents, see Sherwin-White 1966: 546-55 and 589-91. The most thorough and recent study on this subject is Valerio Marotta's *Mandata Principum* (1991).

[157]Finley 1934: 156; Millar 1992: 315. Two of these direct quotations come from works *de officio proconsulis*.

[158]Finley 1934: 157.

were, despite their form of direct address, somewhat standardized but with room for the addition of detail to address circumstances in individual provinces.[159]

By their nature as guiding principles for the governor to follow, *mandata* would not be an innovative source of law. Rather they may be regarded as a kind of systematic codification of precedents, useful over a broad geographic region.[160] This would not preclude the insertion of personal instructions, applicable to a particular area. Again, however, these would not likely be innovations but an official collection of precedents, perhaps based on earlier decisions in imperial constitutions, especially *rescripta*. With this in mind, it is not surprising that *mandata* are seldom quoted by jurists as a source of law, since they rarely involve any legal innovation.

Still Ulpian, as well as other authors, does sometimes refer to or (very rarely) quote from *mandat*a as a source of law. In such cases the reader is usually directly informed with a phrase such as *mandatis … ita caveatur*.[161] In the surviving text of *de officio proconsulis*, Ulpian makes reference to *mandata* three times. The first instance (2145/1.16.6.3) is in reference to the proconsul's acceptance of gifts from provincials. In this citation, the *mandatum* is merely summarized; however, in the next instance, 2217/47.11.6, the *mandatum* relating to disturbance of the corn supply is quoted for full effect:

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[159]Finley1934: 164; Millar 1992: 315.

[160]Finley 1934: 164-69.

[161]Viz. 47.11.6.; see also 1.16.6.3; 24.1.3.1; 42.22.1; 48.3.10; 48.19.35.

> *Mandatis denique cavetur: "Praeterea debebis custodire, ne dardanarii ullius mercis sint, ne aut ab his, qui coemptas merces supprimunt, aut a locupletioribus, qui fructus suos aequis pretiis vendere nollent, dum minus uberes proventus exspectant, annona oneretur*."
>
> By imperial instruction it is provided: "You must further ensure that forestallers and regraters,[162] speculators generally, indulge in no commerce and that the corn supply is not incommoded either by those who hold back what they have bought or by the more affluent who do not wish to sell their wares at a fair price because they anticipate that the next harvest will be less fruitful."

This passage supports Finley's hypothesis that *mandata* dealt with common problems, this particular one being so widespread that Ulpian is able to make reference to an edict of Trajan on the subject in the same paragraph.

The final mention of *mandata* comes in 2218/*Coll.* 11.7, in the middle of Ulpian's treatment of forms of punishment suitable for cattle rustlers. In this instance again, the *mandatum* addresses what must have been a common problem—the timely dispatch of those condemned to be executed: *nam ad gladium damnati confestim consumuntur vel certe intra annum debent consumi: hos enim mandatis continetur*, "for those condemned to the sword are dispatched without delay, or at any rate ought to be dispatched within a year, and this instruction is contained in *mandata*."[163]

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[162]Forestallers and regraters are types of unscrupulous middlemen in the sale of grain. I am here, as elsewhere, using Watson's translation.

[163]For a discussion of the problems that the governor sometimes faced in carrying out the sentence handed down, see my discussion of Pliny as *iudex* in Chapter Two pp. 91-95. Saturninus also quotes from *mandata* (50/48.3.10) regarding the custody of prisoners.

The tone and typical contents of the known *mandata* perhaps suggest that *mandata* might be the unnamed source behind some of Ulpian's general advice to the governor regarding his arrival in his province (2142/1.16.4); his supervision of his staff and his conduct on the tribunal (2143/1.16.4.6, 2153/1.16.5.2); and his departure at the end of his tenure (2251/1.16.10). Each of these sections, though not composed in the second person, contain the type of advice found in *mandata*. Also, it is only in these passages that Ulpian uses the term proconsul in reference to the governor (except of course the title), who is consistently referred to as *praeses* elsewhere in the work.

Among our literary sources, Tacitus mentions the *mandata imperatoris* (*Ann.*15.17), and Lucian is perhaps referring to *mandata* with his "book of instructions written to governors" (*Pro lapsu* 12), but doubtless Pliny's communications with Trajan provide the best literary evidence for the content of *mandata*.[164] From his study of Pliny's correspondence with Trajan, Sherwin-White concluded that "*mandata* seem to have contained not a comprehensive code but a mixture of guiding principles, innovations and occasional instructions."[165] And indeed we know from Pliny's references that his particular *mandata* addressed a wide variety of topics, such as his use of troops (10.22.27, 30), instructions regarding relegations of condemned persons (10.56.3), a ban on

[164]For a discussion of the existence of a *liber mandatorum*, see Marotta 1998: 3-33.

[165]Sherwin-White 1966: 590.

collegia (10.96.7), and regulation of municipal finances (10.110-11).[166] While some may assert that Pliny's appointment was atypical, Sherwin-White has clearly shown that in terms of his actions, if not his title, that he was only doing what governors should have been doing in Bithynia all along.[167]

SUMMATION

The preceding survey of the contents and arrangement of the four surviving treatises *de officio proconsulis/praesidis* allows us to draw some general conclusions. Each of the four is primarily concerned with the judicial activities of the governor, and each work may be roughly divided into two parts, one addressing the governor's jurisdiction in civil proceedings and the other in criminal or capital cases. The much shorter works of Saturninus, Paul and Macer survive in such a fragmentary state that it is difficult to speculate about their specific scope beyond what has been said above.

The much longer work of Ulpian, while generally following a civil and criminal organizational scheme, may be broken down into many more subsections. While there is much room for debate as to the specific rubrics for these sections and even (in some cases) where individual citations fall within the work, we may safely say that Ulpian had a much more comprehensive scheme in mind, and by beginning and concluding his work with the arrival and departure of the proconsul, he appears to have offered a complete survey on the subject of the proconsular *officium*.

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[166]Sherwin-White 1966: 590; see also Vidman 1959: 219-25.

[167]For further discussion of Pliny's appointment, see pp. 83-86.

Finally, this survey of the works *de officio proconsulis/praesidis* brings into focus and refines the questions posed at the beginning of this chapter, all of which are interrelated: Who was the intended audience for these works? Are their contents meant to reflect actual practice or to present an idealized or theoretical view of the governor's duties? Is there any evidence for the original audience for these handbooks or, more importantly, for their use by the governor or anyone else? On a number of occasions, Ulpian addresses the proconsul directly with a tone of admonition or advice that would lead us to believe that the governor is the intended audience for his work. Indeed, material from Ulpian's handbook is often quoted, paraphrased or alluded to in modern sources as illustrative of normative practice. Is this really the case? In the following two chapters, I shall attempt to answer these questions.

CHAPTER 2: THE JURIDICAL ACTIVITIES OF ROMAN GOVERNORS AND LITIGANTS IN PLINY AND APULEIUS

One way of attempting to answer the questions about the practical utility and audience of the handbooks raised at the conclusion of Chapter One is to investigate the actual juridical activities of a governor and litigants over a period of time. Since the vast majority of the citations in each handbook concern the governor's civil and criminal jurisdiction, such an investigation will help us to determine the relevance of the material in the handbooks to actual practice. The two governors about whom we know the most are Cicero and Pliny the Younger. In a number of letters scattered through his correspondence, Cicero discusses some of the administrative details of his tenure in Cilicia (51-50 B.C.), and these form a valuable resource for any discussion of proconsular governors during the late Republic. While it is true that much of what Cicero reveals about the proconsular *officia* still applies in the imperial period, his historical remoteness from the publication of the handbooks and the fact that his letters are personal correspondence and discuss the discharge of his duties only in passing make him a less than ideal candidate for the present purpose. Pliny, on the other hand, is closer to the period of the handbooks, and Book 10 of his *Epistulae* contains what might cautiously be termed a body of "official" correspondence between governor and emperor that documents how the system of provincial administration functioned during the early second century. In addition, through the letters in

Book 10 we have the rare opportunity to observe the functioning of the governor's court and the activities of both the governor and litigants, as seen from the governor's perspective.

In order more closely to observe the functioning of the governor's court from the perspective of litigants, we are fortunate to have the *Apology* of Apuleius, another roughly contemporary literary source, which documents a judicial proceeding before the governor from the point of view of the defendant, Apuleius of Madauros, who found himself charged as a magician before the tribunal of the proconsul of Africa Proconsularis. The *Apologia* or *Pro se de magia*, as it is also known, is the speech he gave in his defense at this trial; aside from the speeches of Cicero, it is the only surviving courtroom speech in Latin literature. Thus, by observing the governor's court from both the perspective of the governor and the litigants, we should be in a better position to evaluate the relevance of the material in the handbooks to actual practice. We may thus gain some insights into the original audience for these treatises.

PLINY: GOVERNOR AND *ÉPISTOLIER*

The correspondence between Pliny the Younger and the emperor Trajan, preserved in Book 10 of Pliny's *Epistulae*, affords the student of Roman government a unique perspective from which to view the duties of a provincial governor at work and his attitude toward those responsibilities over an extended period, c. 110-112 A.D. When taken together with Trajan's rescripts, Pliny's queries on a range of administrative and legal questions reveal the mindset of

one governor and his emperor in establishing administrative policy for Bithynia-Pontus, with implications no doubt for other imperial and public provinces. From Pliny we can learn much about what a governor might be doing on a regular, even daily basis.

Naturally this is a large topic inviting comprehensive study, and I should like to examine only one of Pliny's many roles within his province, that of *iudex* in the trials over which he presided at assizes.[168] Both Pliny's attitude toward the governor's court and the provincials' perception of it (as represented by him) will be examined. The evidence for actual trials is meager---only some five verifiable, in-process trials are mentioned-- but perhaps the very paucity of such references is as important for an understanding of the governor's *cognitio* as the evidence from the trials themselves. I propose to examine five groups of letters: 10.58/59/60, 10.81/82, 10.56/57, 10.110/11, and 10.96/97. The evidence they provide may aid us toward a further understanding of the day-to-day judicial activities of the provincial governor during the period under consideration.

THE NATURE AND CONTEXT OF THE LETTER COLLECTION

For many years the prevailing scholarly opinion about Book 10 has been that proposed by Sherwin-White in 1966: Book 10 was assembled from a dossier maintained by Pliny, which contained the correspondence between Trajan and himself on administrative and judicial questions relating to his governorship, as well as a few letters on personal matters; this archive of letters was published

[168]Agnes Berenger's recent work (2014) on proconsular governors, *Le métier de gouverneur dans l'Empire romain: de César à Dioclétien*, is a significant contribution in this area.

more or less complete.[169] Sherwin-White went so far as to say "… the book only makes sense as intended to be the complete publication of Pliny's letters to Trajan of all sorts, so far as these survived, including the pre-Bithynian letters."[170] Further, it was believed that Pliny died toward the end of his tenure and that the letters in Book 10 were compiled and published posthumously by an unknown hand.[171] Ronald Syme voiced the view that this unknown hand was perhaps the Roman biographer Suetonius, who likely accompanied Pliny to Bithynia.[172] Inasmuch as Suetonius and Pliny were personal and literary *amici* and he would have had access to the imperial archives and/or Pliny's letters, this choice seems logical.

A posthumous editor would also perhaps account for the seeming infelicities in Book 10, such as chronological gaps, omission of Trajan's replies, missing appended documents, and the inclusion of letters that precede Pliny's tenure of office and are not directly related to his governorship. Various other theories have been advanced to account for each of these anomalies, while the stylistic differences between Book 10 and Books 1-9 have generally been attributed to the assumption that the letters in Book 10 are more-or-less

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[169]Sherwin-White 1966: 533-35; Williams 1990: 3-4.

[170]Sherwin-White 1966: 53.

[171]For a recent thorough discussion of this topic, see Noreña 2007: 263-77.

[172]See Syme (1958: 660), who also suggests Septicius Clarus, the addressee of *Ep.* 1.1, and Voconius Romanus, friend and addressee of several letters. See also Williams (1990: 4) and Stadter (2006: 62), who both name Suetonius as the most common choice. Even Pliny's third wife, Calpurnia, has been suggested as the editor (Noreña 2007: 263n78).

unaltered, official correspondence.[173] Indeed, in a recent lengthy but narrowly framed study in which she attempts to document bureaucratic language in Book 10, Kathleen Coleman upholds the theory that Pliny died in office and that his correspondence with Trajan was published by someone else after his death, largely as-found.[174]

In Coleman's view, Book 10 remains unaltered official correspondence, documenting a governor at work with no thematic connection to the first nine books:

> Whereas the publication of the first nine books deliberately presents us with Pliny the private citizen on show for the reading public, the survival of Book 10 accidentally lets us glimpse the public official toiling in private for his absent manager. The correspondence between Pliny and Trajan lets us overhear two bureaucrats running the empire at an absolutely nuts-and-bolts level. To do so, they employ the bureaucratic register that was recognized and understood across the Roman world, characterized by a lack of variety in diction, the repetition of standard formulae, and, above all, self-conscious observance—on both sides—of the proper codes inflecting the relationship between a civil servant and his imperial master. This is not the image of the suave, confident, urbane Pliny that he was so careful to project in Books 1–9. This is the fussy bureaucrat, trying to do things properly and not put a foot wrong. He seems to have died in the attempt.[175]

In the last decade, however, several scholars working from different points of view have up-ended these old ideas. Between them they have together reached some revisionist conclusions about the nature and purpose of the letters

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[173]Williams (1990: 2), following Sherwin-White (1966: 533-35), suggests some replies were lost and some letters never received a response. Millar (2004: 23-46) discusses the chronological gaps. For stylistic differences, see especially Gamberini 1983.

[174]Coleman 2012: 234.

[175]Coleman 2012: 234.

in Book 10, with which I am broadly in agreement. In 2006 Philip Stadter argued that Pliny did not die in office and that he himself edited and published the letters in Book 10 in order to showcase a properly functioning system of provincial administration and imperial rule:

> Pliny's tenth book is not a raw dossier, but a sophisticated exercise in imperial self-representation, on a par with that of the earlier books, but functioning in a quite different mode. Whereas the previous books present an idealized view of senatorial life, the tenth book, through selection and omission, presents the Trajanic ideology of rule. It serves equally as a standard and incentive to governors and other imperial administrators in the performance of their office and as evidence to those in the provinces of the Romans' care for them.

Stadter also sees the final exchange of letters (10.121/122) not as an abrupt cessation but as a very appropriate, even artful, conclusion to the collection, containing a mix of public and private that Pliny has pursued from the outset.[176]

At almost the same time, from a slightly different perspective, Carlos Noreña cautiously posited that Pliny likely survived to edit and publish his correspondence with Trajan. In Noreña's view, Pliny's and Trajan's epistolary personae are carefully devised to show each in the best possible light and to create what he calls "an illusion of intimacy" that served the needs of each:

> The epistolary personae of Pliny and Trajan in Book 10, as I argue, are interdependent, complementary, and mutually beneficial to both correspondents: interdependent, because each persona was critically shaped by its relation to the other; complementary, because each persona was more attractive as a result of its intimate connection to the other; and mutually beneficial, because the friendship implied by these intimately connected personae served the public interests of both. It is in this last respect in particular that one can speak of the "social value" that the correspondence had for both senator and emperor. As a friend of the

[176]Stadter 2006: 70; Woolf (2015: 149) also suggests that the conclusion of Book 10, though in his opinion somewhat weak, is deliberate.

> emperor, Pliny could represent himself as closer to the center of power than most of his aristocratic competitors, which will have increased his public standing. As a friend of a high-ranking and respected senator, Trajan could represent himself as a *civilis princeps*, simultaneously counterbalancing the autocratic aspects of his public image and distancing himself from the memory of Domitian.

Trajan emerges as the ultimate correspondent who must be treated in a different manner from the literary *amici* of the first nine books, but Noreña too argues that Book 10 was connected to the other books from the beginning by Pliny himself.

In a similar vein but with greater vigor, Greg Woolf has also argued that Pliny survived his governorship and carefully edited the letters in Book 10 for publication in order to illustrate a governor and emperor dealing with all manner of difficult problems in an exemplary way. To achieve this goal, the Bithynia of Book 10 is stripped of its particular character and becomes a model province administered by the ideal emperor and governor who are also to some extent themselves reduced to models.[177] The letters present the system of provincial administration functioning seamlessly, while problems and situations which do not fit this program are conveniently and deliberately omitted:

> His decision to mention no problems that could not be resolved at once must have been deliberate. This partiality strengthens the impression that the ethical themes of Letters 1-9 and the tenth book are not simply the product of a single mind writing on two different themes. Pliny's province has been carefully constructed and carefully edited, and book ten of the Letters is not a collection of confidential despatches from the Euxine front. It is an artfully constructed image of the good aristocrat in his province, and the best of emperors in Rome.[178]

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[177]Woolf 2006: 102-3.

[178]Woolf 2006: 103.

Woolf goes on to say that it is a "fantasy" to regard Book 10 as "a precious chance to look over the shoulder of a governor at work"; rather it offers "glimpses of the ideology of Roman government" from the perspective of a Roman aristocrat.[179] Woolf has refined this thesis in a recent article, in which he debunks Coleman, summarizes and contrasts the ideas of Stadter and Noreña with his own, and then develops his thesis further by asserting that Book 10 was in fact very deliberately meant to be a "sequel" to Books 1-9, one that puts a spotlight on Trajan, the best of emperors and ultimate correspondent, who has been largely and deliberately absent from the first nine books.[180]

While the theories of these three are by no means incontrovertible, it is very liberating from a scholarly perspective to entertain the idea that Pliny did not die in office. The previously accepted notion that he died sometime around 112 quashed efforts to connect Book 10 in any meaningful way with the other books, and caused it to be largely excluded from scholarly examination and especially literary analysis. These important articles have highlighted the unique character of the letters in Book 10 in a very positive way. At the same time they have demonstrated very plausible thematic and even stylistic connections between it and the other nine books—all of which suggest that Pliny may have edited the letters himself. As Stadter says, "As to the question whether the collection is truncated and that Pliny must have died in office, the

[179]Woolf 2006: 104.

[180]Woolf 2015: 139.

burden of proof, I think, is on those who think so."[181] To think of a united corpus of ten books is an intriguing idea that will likely gain a broader acceptance as it is investigated further.

In any case, however, the answer to this question of who edited and published Book 10 is not crucial to my investigation, since the letters stand as a valuable testament to the activities of the governor whatever the original intention or circumstances of their publication may have been; nevertheless, these new theories about the context and composition of the letters in Book 10 demonstrate that this material, like that in the handbooks, should be handled with due caution and not blindly taken at face value.

THE NATURE AND PURPOSE OF PLINY'S APPOINTMENT

Before turning to the letters themselves, a word must be said about the so-called special nature of Pliny's appointment. Since 27 B.C. Bithynia-Pontus had been a public province administered by a governor of propraetorian rank, i.e. an ex-praetor (though still styled a proconsul) chosen by lot in the Senate; however, sometime around A.D. 109 Trajan made the decision to change the status of Bithynia-Pontus to that of an imperial province administered by an appointee of the emperor. The reasons for this change of status are not entirely clear, but we know from Pliny's earlier letters (4.9, 5.20) that in recent years (c. 102) two previous proconsular governors, Julius Bassus and Varenus Rufus, had been tried on charges of *repetundae*; in fact, Pliny himself had spoken in their

[181]Stadter 2006: 69.

defense. We also know from letters in Book 10 and from the orations of Dio Chrysostom, a resident of the Bithynian city of Prusa, that a number of cities in the provinces suffered terribly from financial mismanagement.[182] It is likely that this mismanagement may have threatened the stability of the province and its ability to pay taxes, to requisition supplies for Roman troops and officials, and to meet other obligations to the Roman government. Hence fears of this type prompted Trajan to intervene.[183]

Pliny was an ideal choice for this mission, for much of his previous imperial service had been connected with financial administration, first during his military service in Syria as a very young man, where he had examined the accounts of units stationed in the province at the request of the governor (7.31), and later as *praefectus aerarii militaris* and *praefectus aerarii Saturni*. Additionally he had much experience with financial mismanagement at the provincial level, having prosecuted three governors for extortion and having defended two previous governors of Bithyinia-Pontus from the same charge, making him quite familiar with the province where he would serve. Perhaps also this made him a welcome governor from the provincials' perspective.

Once Bithynia-Pontus became an imperial province, it would have been administered by a *legatus Augusti pro praetore*, that is, the governor would have the powers and rank of an imperial legate. However, an inscription from

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[182]Williams 1990: 15; Sherwin-White 1966: 525-8.

[183]Williams 1990: 15.

Comum which documents Pliny's career describes his rank as propraetorian but with consular power (*legatus Augusti pro praetore consulari potestate*) and makes a point of saying that he was sent at Trajan's initiative.[184] Because Pliny was an ex-consul, this title gave a nod to his high rank and the circumstances of his appointment. He was after all a more senior figure than those previously sent out to govern the province. Sherwin-White asserted that the term *consulari potestate* acknowledges Pliny's *dignitas* as a man of consular rank and likely meant he was attended by six lictors, not the five normally assigned to a *legatus Augusti*.[185] Pliny would also have served at the emperor's pleasure, and not the general one-year term of a proconsul.

Some may still raise the objection that since Pliny was not a senatorial appointee and was issued special *mandata* regarding his mission by Trajan, he should not be considered a "normal" governor; therefore, his correspondence is not typical and should be used most cautiously as a basis for generalization about the "typical" activities of a governor. This notion has been thoroughly dispelled by several studies, all of which reach the same conclusion: in respect to his powers Pliny is not "anything other than a normal imperial governor."[186] In fact, as Fergus Millar has said, "It would be difficult to show that the actual

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[184]Smallwood 1967, no. 230, ll. 2-4 (= *CIL* V.5262 = *ILS* 2927). It should be noted that the previous proconsular governors of Bithynia-Pontus would actually have been men of praetorian rank.

[185]Sherwin-White 1966: 81-2.

[186]Millar 1977: 325.

range of affairs handled by Pliny was different from that dealt with by other governors."[187] Of course, since the correspondence in Book 10 is unique, being the only surviving example of sustained communications between a governor and the emperor, it is certainly difficult to speculate about how representative it is. This is all the more true in light of the recent theories of Stadter, Woolf and Noreña regarding the purpose of Book 10. We can, however, say with certainty that when Pliny sat as *iudex* he was resolving the same sorts of disputes that other provincial governors must have dealt with.

Any governor is all powerful in his province, below only the emperor himself, as Ulpian reminds us: *et ideo maius imperium in ea provincia habet omnibus post principem*, "and therefore he (the governor) has greater power in the province than everyone except the emperor" (*Dig.* 1.16.8). Pliny may have felt more free to exercise these powers since his *auctoritas*, by virtue of his consular rank and the special circumstances of his appointment by the emperor, greatly outstripped those of his predecessors. Pliny had problems to solve and the power and time to solve them. Williams suggests that Trajan likely felt that the unspecified tenure of an imperial legate, as opposed to a proconsul's single year in office, was more suited to the thorny situation in the province.[188]

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[187]Millar 1977: 325. If the recent theories discussed above that Pliny selected, edited and carefully arranged the letters in Book 10 are valid, this would certainly account for the omission or inclusion of some communications as uninteresting or unnecessary for his purpose.

[188]Williams 1990: 15.

THE LEGAL SYSTEM IN BITHYNIA-PONTUS

As always, the provincial litigant in Bithynia-Pontus during Pliny's tenure had a number of judicial options open to him for the settling of legal disputes. First, unless it was a very serious type of case, he might choose to seek adjudication through local courts attached to individual cities as there were no provincial courts with universal jurisdiction. Our knowledge of these local courts and how they functioned is rather limited. The extent of their jurisdiction depended on the status of the city, whether free from or subject to Roman rule. Pliny the Elder suggests that there were only two cities with free status in all of Bithynia-Pontus during his period, Chalcedon (*NH* 5.149) and Amisus (*NH* 6.7). In a recent, important study of local law and Roman law in the province of Asia, Georgy Kantor has shown that while courts in free cities had much greater autonomy over non-capital cases than those of subject cities, even free cities might look to Roman authorities to some extent, whether obligated to or not.[189] We know, for example, that litigants in the free city of Amisus brought their case before Pliny even though it was not technically under his jurisdiction (10.110).

It seems that persons of means and status might repeatedly seek redress for their grievances until they obtained satisfaction, and often the natural direction was toward the Roman authorities as the ultimate arbiter. This was especially true for persons of status who possessed Roman citizenship or other

[189]Kantor (2008: 76) traces this idea back to Mommsen and gives a bibliography on the topic.

privileges granted by the Roman government.[190] Kantor comments on this tendency, citing the well known complaint of Plutarch:

> Though it is difficult to determine the exact extent to which it happened, such privileges and to an even greater degree the spread of Roman citizenship among the civic elite should have gradually damaged the position of the local civic courts, probably in the free cities as well as in the subject communities. If Plutarch had good grounds to deplore the eagerness to submit to Roman authorities those disputes that should have normally been decided on the local level (Plut., *Praec. reip. ger.* 19, 815A; note that he addressed himself to a citizen of Sardis, a subject city), then this was even more to be expected when litigants had established the right to be judged by the Roman courts.[191]

At the highest level, provincial litigants might write directly to the emperor or attempt to appeal to his court, if they were Roman citizens. Connolly, building on the model of petition and response outlined by Fergus Millar, has ably demonstrated that the emperor offered adjudication by rescript on all manner of petitions from the trivial to matters of grave importance; he also answered petitions from persons of lower status as well as the elite. This process required a considerable investment of time and money in traveling to the emperor's location, submitting a petition and awaiting a response, and therefore it was not an option for most people.[192]

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[190]A good example of these privileges is the exemption from jury duty claimed by Archippus in *Ep.* 10.58 and discussed at length below.

[191]Kantor (2008: 89).

[192]Rarely a litigant such as Flavius Archippus (10.58) or the centurion of (10.106) were allowed to send their petitions by imperial post, but as Connolly (2010: 33) points out, this was very unusual.

Aside from the emperor, the court of the governor was the court of highest resort in the province. During much of the year, the governor traveled from one assize center to another throughout the province in order to administer justice. As I pointed out in Chapter One, the governor's exercise of *cognitio extra ordinem* permitted him to hear any sort of case he chose to hear, after which he may have decided the case himself or assigned it to a *iudex* of his own choosing.[193] One might gain access to the governor's court via petition-response or by direct appeal to the governor. Either method involved traveling to the governor's location to await his decision. This may have entailed a very extended waiting period and meant traveling to more than one assize center. The governor also had deputies or assistants, with the title *legatus*, to whom he designated authority to hear cases that would fall under his jurisdiction.[194]

Aside from the governor's court, there may possibly have existed in Bithynia-Pontus jury courts modeled after the *quaestiones* in Rome. In *Ep.* 10.58 Pliny mentions that he is in the process of selecting jurors for assizes (*cum citarem iudices, domine, conventum incohaturus*).[195] This statement has caused much controversy, with some thinking Pliny is referring to jurors for statutory courts, modeled on those outlined by Augustus in the Cyrene edicts, while others

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[193]See pp. 15-17 above.

[194]Sometimes if the governor were particularly overwhelmed with other duties, the emperor might appoint a judge, styled a *iuridicus*, to help manage the legal business of the province (Rogan 2011: 64).

[195]All Latin citations of Pliny's *Epistulae* are from the Teubner text of Mauriz Schuster, 3rd ed., 1958.

think that *iudices privati* are meant, perhaps members of the governor's court.[196] Sherwin-White believed the reference was to such *quaestiones*, but Kantor, after a consideration of the various arguments, suggests that we simply lack the evidence to know with certainty what sort of jurors were being summoned by Pliny.[197]

While the court of the governor or his designated appointees would have been the primary source for adjudication under Roman law for provincials, Connolly has demonstrated that desperate litigants might turn to any mutually agreed upon figure of authority to settle their disputes, from local officials to other nearby Roman magistrates such as the imperial procurator, or even an army officer such as a centurion.[198] Moreover, as Connolly sadly observes, in a world where almost every privilege was connected to personal patronage, the majority of people who lacked the status, time or money to solve their problems using one of the above systems of arbitration resorted to violence as the most common method for settling disputes: "Probably the most popular alternative to litigation was force. In the absence of police settlement by force went unchallenged and unpunished."[199]

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[196]Sherwin-White 1966: 639-40; Williams 1990: 112.

[197]Sherwin-White 1966: 639-40; Kantor 2008: 37-38.

[198]Connolly 2010: 23.

[199]Connolly 2010: 20.

PLINY AS *IUDEX*: FIVE CASE STUDIES

In the letters under consideration in the following pages, we can see Pliny at work as *iudex*, performing one of the primary tasks of every Roman governor, the administration of justice; from these letters, certain facts about the daily duties of the governor emerge. Of as great interest, however, is the subtext for these letters, the machinations outside the *cognitio*, which reveal, as we shall see, a governor who is as manipulated by his provincial litigants as he is in charge of them. It is they who know how to use the system of provincial justice to their own advantage and to produce all manner of legal documents to assist them.

1) 10.58/59/60

In the first group of letters, a situation which begins as a simple request escalates into a judicial nightmare. The complicated circumstances of this case, which are presented by Pliny in very synoptic form, may be outlined as follows. Pliny is at the assize center of Prusa, summoning jurors for service.[200] A certain Flavius Archippus approaches Pliny's tribunal and asks to be excused from jury duty, claiming the philosopher's exemption. Before this matter can be settled, however, he is hauled into Pliny's court by his enemies, represented by one Furia Prima, who claim that Archippus had been deprived of his Roman citizenship more than twenty-five years ago when he had been convicted (likely of forgery)

[200]For a discussion of what sort of jurors these were, see pg. 88-89 above.

and sentenced to the mines by the proconsul Velius Paulus.[201] She further claims (58.2) that he had never served his sentence but had "broken his fetters," i.e. escaped custody, and had been on the lam for years, an escaped felon, and that he should now be required to serve out his sentence![202] Though he can produce no official documents overturning his conviction or reinstating him, Archippus claims his status has been restored. As evidence of his status, he produces an honorific decree from the city of Prusa as well as a petition to the emperor Domitian, and letters from the emperor himself to a former procurator (Terentius Maximus) and proconsul (Lappius Maximus) of Bithynia-Pontus, attesting to his character and granting him a donative for a small farm.[203] For good measure, to these Archippus adds an edict and letter of the emperor Nerva, which in the most turgid and verbose manner confirm the *acta* of Domitian. As a final shocking punch, Archippus includes letters of Trajan written to him, the contents of which Pliny does not mention, but which likely attested to his character. In 10.59 Pliny informs Trajan that he has allowed both parties to

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[201]The published version of 58 does not mention an individual accuser, referring to the accuser(s) only as *fuerunt qui dicerent*.... However, in 59.3 Pliny mentions that the accuser is a woman (*accusatrici*, 59.3), and in 60.2.2-3 Trajan calls her by name. No doubt the name of the accuser was deliberately removed from 10.58 in the editing process.

[202]There has been much discussion over whether a man of Archippus' status should have been kept in custody at all. Kokkinia (2004: 493) points out that persons of high rank were not to be held in chains and that their conviction on a capital charge should have been reported to the emperor. For a bibliography of the various opinions, see Kokkina 2004: 493n12. It also seems possible that the words *fractis vinculis* (58.2*)* may refer to an escape during his sentence since persons condemned to the mines were generally kept in chains (2241/*Dig.* 48.19.8.6): see Williams 1990: 113 and my discussion in Chapter Three 142-43 below.

[203]On the nature of the decree of the Prusians, see Sherwin-White 1966: 642, and Kokkinia 2004: 491. For the identity of Terentius Maximus and Lappius Maximus, see Sherwin-White 1966: 643; Williams 1990: 113.

send by imperial post *libelli*, which here amount to depositions, stating each side of the case; neither of these documents remain in the published text. What a judicial nightmare! Surely Pliny was relieved to defer to Trajan in this matter.

10.58 is unique in that several of the documents actually remain attached in the published text when, in all others cases, documents referred to are missing or omitted.[204] The two letters of Domitian, the edict of Nerva and the letter of the same confirming the acts of Domitian are present, but Velius Paulus' sentence of condemnation presented by Furia Prima, the decree of Prusa, the petition of Archippus to Domitian, and the letters of Trajan are omitted. Sherwin-White speculates that the documents quoted are the only necessary documents and are "limited to the perfect presentation of a problem."[205] In fact, in the cases under review the acquisition and presentation of documents by litigants to bolster their case is an important common element to which we shall return.

There are some instructive legal details in this case, which will be discussed presently. More important than any points of law, however, is the fact that here the governor's *cognitio* has been appropriated by the litigants to settle a very old political score of much greater magnitude than any of the immediate charges. It is impossible to know whether Archippus has any legitimate defense against these charges other than the lapse of time. In his discussion of this case,

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[204]Cf. 10.22, 56, 79, and 114, all of which do not include the original attachments.

[205]Sherwin-White 1966: 642. Who might do that better than Pliny himself, if one accepts the idea of Pliny as editor?

A. H. M. Jones points out that Archippus was no doubt manifestly guilty of the charge when Velius Paulus sentenced him c. 84, or he would have appealed immediately to his friend Domitian; but perhaps, as Trajan himself suggests (60.1.1), Domitian was never aware that he was recommending an escaped felon to the proconsul Lappius Maximus c. 86.[206] At any rate, Archippus cannot prove that he was ever formally restored and had not simply evaded his sentence. In fact, he avoids this question altogether and instead produces a very compelling collection of documents (one from the present emperor himself) attesting to his character. In a study of this case, Christina Kokkinia has demonstrated that provincials in the Greek East were quite adept at promoting their connections with Rome and that documents such as those in Archippus' possession did indeed have the power to trump the facts of a case.[207] Perhaps for just this reason, Trajan gives the harried philosopher the benefit of the doubt, in light of the letters of Domitian and himself and the passage of time.

We can only speculate why Furia Prima chose this moment to revive these long antiquated charges. Perhaps Archippus' flaunting of his status by a claim for jury exemption was too much for his enemies to endure silently. At any rate, Archippus had brought himself to the governor's attention with this claim, and this presented the perfect opportunity for his enemies to attack him. One

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[206]A. H. M. Jones 1972: 101. For the proconsular *fasti* of Bithynia (supplemented by Sherwin-White 1966: 641), see Magie 1950: 1590-93.

[207]Kokkinia 2004.

wonders whether they had been trying without success to lodge these charges before a series of governors for more than twenty-five years.

An interesting legal question remains: how did Archippus, a Roman citizen, find himself condemned to the mines in the first place? Jones speculates that during this period persons condemned under statutory charges, even if they were Roman citizens, could be condemned and even executed by a proconsular governor; he cites the fact that Archippus nowhere protests the legality of his original sentence.[208] Peter Garnsey has suggested that the right of appeal only protected Roman citizens from *coercitio* and capital punishment and further that the exercise of the right of appeal depended on the discretion of the governor.[209] Pliny certainly does not exercise this license (if it existed) because he is more directly accountable to the emperor.

2) 10.81/82

Although Archippus emerges from this situation unscathed, this is not the last we hear of him; for before Pliny can pack up his tribunal and move on from Prusa, the philosopher is in court again, this time as the plaintiff, lodging charges against the famous Prusian orator, Dio Chrysostom. Their political disputes are of long standing, and apparently each would stoop to any depth to

[208]A.H.M. Jones 1968: 56-8. See also Sherwin-White (1963: 48-70) who discusses the case of St. Paul. For the increasing severity of penalties, see MacMullen 1990: 147-66.

[209]Garnsey 1968: 51-59. For an updated discussion of the governor's right of *ius gladii* from the Republican period forward, which includes some examples of governors executing Roman citizens, see Kantor 2008: 42-7.

destroy the other.[210] The facts as Pliny relates them in 10.81 are these. The orator Dio Chrysostom, on behalf of the city of Prusa, had undertaken the curatorship of the construction of a library complete with courtyard and colonnade, but now wished to return the project to the town uncompleted.[211] Dio's request has prompted Flavius Archippus to hire a local advocate, one Claudius Eumolpus, to bring charges in an interesting, rather indirect manner.

On what was to be Pliny's last day in Prusa, the chief archon of the city has come to Pliny's residence with an appeal (*appellatum*) from Claudius Eumolpus demanding that Dio produce the accounts for this project and insinuating financial mismanagement (*quod aliter fecisset ac debuisset*, 81.1.5).[212] To make certain the governor is sufficiently motivated to take up this dispute, Archippus wants a charge of *maiestas* thrown in, since Dio's late wife and child lay buried in the courtyard of the library. The justification for this additional charge, although Pliny does not state it explicitly, is presumably that these bodies were defiling the person of the emperor Trajan, appearing in the form of a statue situated nearby, though Eumolpus leaves that connection for

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[210]For factionalism in Bithynia in general, see C.P. Jones 1978: Ch. 11, "Local Politics;" see esp. 100-103; see also Fuhrmann (2015: 166-70), who discusses Dio's troubled building projects in particular and the political and financial corruption which surrounded these sorts of projects in Prusa.

[211]Williams (1990: 129-30) suggests this was likely a compulsory service. There is some debate as to whether this is the same structure as that mentioned by Dio (*Or.* 47.17.19-20) or some other--for a discussion see Willams 1990:129-30. We learn that the *opus* (81.1.3) is a library in 81.7.

[212]Sherwin-White 1966: 675-76; Hardy (1889: 192) comments that this would be an easy charge to make in Bithynia.

Pliny to make.[213] This second charge is so flimsy that Eumolpus seems embarrassed to make it, and he later clarifies that he is doing so at Archippus' request (81.6.1-3). Nevertheless, by not formulating a precise charge before the governor, he can use the *cognitio extra ordinem* to his advantage by allowing Pliny to decide the merits of his allegations.[214]

This was clearly a local dispute that the town council had likely been unable to resolve to Archippus' satisfaction, so he has hired Claudius Eumolpus to seek adjudication from Pliny on his behalf. Are these charges genuine or merely an attempt to embroil the governor in local political rivalries and use him to settle personal, petty disputes? Because of Pliny's special mandate to investigate the troubled finances of the Bithynian cities, he could scarcely ignore these allegations.[215] This is precisely the sort of Roman involvement in local matters that Dio had once begged his fellow Prusians to avoid (*Or.* 48.2), though he himself never shied from promoting his own connections to Roman power when it served his own needs.[216] The Bithynians, however, generally seem to

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[213]Sherwin-White (1966: 675-76) describes the complex as a colonnaded court with a library set in the *exedra*.

[214]Turpin 1999: 499-574, Sherwin-White 1966: 677n2. Sherwin-White (1963: 18) also points out that the informal wording which allows the case to be tried *extra ordinem* also places the onus of the decision as to its merits upon Pliny; see also Burton 1975: 102.

[215]See 10.28.

[216]On Dio's touting of his warm relationship with Roman emperors and governors, see Fuhrmann 2015: 164-65.

prefer revenge even at the cost of some autonomy, and if Dio did instigate the earlier suit against Archippus in 10.58/59, he himself is no exception.[217]

The first of Eumolpus' charges, that of financial mismanagement, could be immediately decided simply by having Dio produce the accounts in question, and Trajan in his reply reminds Pliny that Dio has not refused to do this (82.2.4). To the surprise of Eumolpus, Pliny agrees to hear the case on the spot, but Eumolpus now requests more time to prepare his arguments, so Pliny agrees to hear the case later in Nicaea.[218] The request of the prosecutor may have been legitimate, but in light of the questionable activities lurking beneath the surface of this and the other cases we have reviewed, there may well be an ulterior motive.[219] By waiting until Pliny's final day in Prusa, a change of venue was likely expected and would benefit the prosecution which seems to have very little basis for the case, but just enough to cause Pliny doubt.

Even in Nicaea, Eumolpus remains unprepared, but an exasperated Dio demands a hearing on the spot; yet Pliny, ever cautious, grants another adjournment and requires both parties to supply a summary (*memorandum*) of their arguments which he will send to Trajan, for he feels the decision may set a precedent. The second charge, or rather allegation, that of *maiestas*, was likely

[217]For a discussion of the Archippus case from Dio's perspective, see Fuhrmann 2015: 172-73. Fuhrmann describes Archippus as a fraud who, after his escape from the mines, was "posing as a philosopher."

[218]Sherwin-White (1966: 677) points out that if Pliny next goes to Juliopolis, then several days would intervene. Kantor (2008: 28-9) shows that such changes of venue were not uncommon in Asia Minor.

[219]Hardy (1889: 196) suggests that the motive is to prevent Pliny's investigating the case, but Sherwin-White points out that he did anyway (81.7).

Pliny's reason for referring the whole case to the emperor. Dio quickly supplies his *memorandum*, but after a long wait Pliny never receives anything from Eumolpus.

It seems very likely there were never any substantiated charges here. Eumolpus is dexterously using the *cognito extra ordinem* system to insinuate wrongdoing without actually charging it, thereby baiting Pliny to act, a tactic which may have worked well with previous governors. He also brings the charges on the last day, is granted a change of venue, and then delays further. Pliny did not take the bait as Eumolpus had hoped but forced his hand by granting him hearing after hearing. In the event no substance behind all of this bluster emerges, and Archippus is perhaps reluctant to bring himself to the attention of the emperor in a negative way for a second time.

Trajan, in his response, makes it clear that he thinks this tempest in a teapot is absolutely ridiculous. He tells Pliny to examine Dio's accounting (82.2), but first, rather tersely and almost with a tone of castigation, reminds poor Pliny that he already knew that his emperor would never entertain such insubstantial charges of *maiestas*:

> *Potuisti non haerere, mi Secunde carissime, circa id de quo me consulendum existimasti, cum propositum meum optime nosses, non ex metu nec terrore nimium aut criminibus maiestatis reverentia nomini meo adquiri* (82.1).[220]
>
> You could not have been in doubt, my dear Secundus, about this matter on which you thought I should be consulted, since you already knew my

[220]Harris (1964:16) suggests Dio's friendship with Trajan was the motive, but the charge is ridiculous nonetheless.

> position very well that I do not seek respect for my name through fear, terror, or accusations of treason.

Yet Pliny believes the case is of importance and will determine whether or not more people may be hauled into court for treason (81.8.4). He does not want to use his role as *iudex* to establish imperial policy for the province without involving the emperor directly. Having lived through the terrors of the *maiestas* trials of Domitian, Pliny is understandably cautious.

While Flavius Archippus is nowhere explicitly mentioned by Dio in any of his orations, which reveal much about factionalism in Bithynia, he is regularly identified by scholars among the enemies whom Dio obliquely mentions in *Or.* 43.5-6, 11-12.[221] The facts of 10.81/82 certainly suggest that the two men are bitter enemies and that there has been some sort of ongoing feud between them and their respective political factions. In fact, although Dio is nowhere mentioned by name in our first set of letters (10.58/59/60), he is generally thought to have been the political force behind Furia Prima. Both Sherwin-White (following Von Arnim) and, more recently, Christina Kokkinia suggest that this rare female accuser is merely a pawn of Archippus' real, longstanding enemy, Dio Chrysostom.[222]

It should be noted that Dio was exiled by the emperor Domitian for reasons which remain unclear, but which Dio attributes to the personal animus

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[221]Sherwin-White 1966: 640; see also C. P. Jones 1978: Chapter 11, "Local Politics."

[222]Sherwin-White (1966: 640, 675), following H. von Arnim (*Leben und Werke des Dio von Prusa*, Berlin, 1898). See also C. P. Jones 1978: 103. For a recent, thorough discussion of this question and the entire case, see Kokkinia 2004: 490-500.

of the emperor.[223] During the period of Dio's exile, Archippus had managed to evade his sentence and elicit letters of commendation from Domitian and the city of Prusa, all steps which point to an increase in political influence. Dio was eventually restored by the emperor Nerva and returned with a flourish, instituting a campaign to beautify his native city. His enemies, Archippus among them, did not appreciate having to share their political capital.

Kokkinia, following Von Armin, suggests that Archippus is the unnamed enemy in *Or.* 43, in which Dio defends his efforts to improve Prusa.[224] She also points out that Dio was quite adept at using his connections with provincial governors and the emperor and that he was especially fond of flaunting any imperial correspondence in his possession to impress his friends and intimidate his enemies.[225] As we shall see, this evasion of justice and this technique of re-lodging old charges and producing legal documents to support them are not limited to the political elite of the province; rather, they are illustrative of a long established pattern of political in-fighting.

3) 10.56/57

In the third pair of letters under consideration, Pliny finds himself having to deal with legal problems created by his proconsular predecessors of some years earlier, Servilius Calvus (date of tenure uncertain) and Julius Bassus,

[223]For a discussion and summary of views, see Kokkinia 2004: 495.

[224]Kokkinia 2004: 496.

[225]Kokkinia 2004: 497-99.

whom Pliny had defended against charges of *repetundae* in 102.[226] In the first instance, an unnamed litigant has approached Pliny with information that his adversaries in a suit had been relegated some years previously by the proconsul Calvus for three years but had remained continuously in the province.[227] His opponents counter that Calvus had reversed his own decision to banish them and they quote (*recitaverunt*, 56.2.4) from Calvus' edict.[228] We know that a trial is in progress from the presence of the opposing litigants, the use of *adiit* (56.2.1, "to go to court"), and the reference to a second case (56.4.1, *haec quoque species*). This is clearly not a typical sort of trial, for the matter at hand is brushed aside, and Pliny is faced with either restoring the defendants, based upon their recitation of Calvus' edict, or relegating them, which under the circumstances would amount to reopening an old case. Either would be unusual, but to restore them would require clarification from Trajan since Pliny's *mandata* forbid him to restore the status of anyone who had been exiled (3.1).

For Calvus to have reversed his decision would very likely have been highly irregular. Certainly there is a later rescript of Marcus Aurelius and Lucius Verus which states clearly that "it is not customary for governors of provinces on their own authority to rescind verdicts which have already been

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[226]For dates and a discussion of *repetundae* trials, see Brunt 1990: 55-95.

[227]Cf. 10.31 for lack of enforcement of verdicts; see also Sherwin-White 1963: 19-20. On sentences of *deportatio* see Drogula 2011: 230-66. On the origin of *deportatio ad insulam* see Cohen 2008: 206-17.

[228]Perhaps Calvus as a proconsular governor felt less inhibited about reversing his decision. See Sherwin-White 1966: 637.

rendered" unless fresh evidence should come to light, in which circumstance the emperor himself should reverse the decision.[229] Perhaps Pliny's judicious action in referring this case to Trajan set the precedent for this rescript. The comments of Husband on this passage of the *Digest* demonstrate that Pliny was rightly cautious:

> Callistratus, the writer of this passage of the *Digest*, continues by saying that, if it appears that the plaintiff in a case can be proved to have been guilty of perjury, or if the defendant has new evidence in his own favor which was not available at the time of the trial, the penalty may be diminished, or may be entirely annulled. The governor, however, has not power to do this himself, but must lay the case before the emperor for his decision: "*sed id dumtaxat a principibus fieri potest*." This rescript of the *divi fratres*, that is, of Marcus Aurelius and Verus, was issued about 165 A.D.; but it cannot be imagined that the governors of provinces in earlier times possessed greater privileges, and certainly they did not have such power in the imperial provinces.[230]

On the other hand, Calvus' reversal of his own decision suggests that at least some governors did as they pleased without seeking direction outside their *consilium*, and a proconsular governor might possibly feel even less inhibition since he was in theory more of an independent agent.[231] For his part, Trajan (57.1) will make a complete inquiry into the matter with Calvus himself. While we do not know the outcome of this case, it raises the general question of how frequently sentences handed down in the governor's *cognitio* were executed or

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[229]*non solere praesides provinciarum ea quae pronuntiaverunt ipsos rescindere* (*Dig.* 48.19.27); Sherwin-White 1966: 637; see also 2212/48.18.1.27, cited on p. 138.

[230]Husband 1917: 113.

[231]See pp. 83-86 above. Calvus might also have ignored the advice of his *consilium* (see p. 151).

modified in some way.[232] One also wonders why this evasion of justice has just now come to light after a number of years or whether the litigants had lodged these charges (or attempted to) with previous governors.[233]

The second case mentioned by Pliny presses the above questions even further, and in fact one wonders whether Pliny's cautious indecision in the first case did not elicit the second. Pliny relates that a man who had received *relegatio in perpetuum* from the proconsular governor Julius Bassus remained in the province. Bassus had been convicted for *repetundae* in 102/103, at which time his *acta* were annulled. Those whom he had convicted were given a two-year period in which to bring their cases forward for review. We can thus deduce that the man in question did not suffer relegation immediately, that he was unaware of or ignored the grace period, and that he had lived peacefully in the province for over a decade. Reminiscent of Archippus' evasion of justice, the entire scene presented by Pliny suggests a lack of communication between the governor and his subjects, or at least an avoidance of the governor by certain of his subjects. After the accused has been tried and convicted, the sentence of the governor is never carried out, and the accused slips into anonymity until some political enemy brings the matter to Pliny's attention. Unfortunately, unlike Archippus, this hapless fellow has no documents to help him, and now quite unexpectedly the wrath of the emperor himself and the letter of the law descend:

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[232]Cf. *FIRA* no. 59 = Abbott and Johnson 1926: no. 58, which details the long-standing contempt of a proconsular decision by a group of Sardinians involved in a boundary dispute with their neighbors. Sherwin-White (1963: 19-20) discusses this case.

[233]See pp. 138-39 below for further discussion of this question.

vinctus mitti ad praefectos praetorii mei debet neque enim sufficit eum poenae suae restitui, quam contumacia elusit, "He should be sent back in chains to my Praetorian Prefects, for it is not enough for him to suffer the same penalty which he has insolently eluded" (57.2.5-6).

In his seminal study of the provincial assize system and the governor's *cognitio*, Graham Burton has suggested that the justice administered by the governor was at best sporadic.[234] This pair of letters bolsters that position by suggesting that a conviction and sentence were in no way a guarantee that the punishment would be executed promptly, if at all; and, unless the convicted were unfortunate, the passage of time and a succession of over-burdened, lax or corrupt governors might just assign the case to oblivion.[235] The arrival of a governor so conscientious that he was willing to look into cases which were several years, or even decades, old must have startled the Bithynians and delighted those with old political scores to settle.[236] Perhaps because of the nature and circumstances of Pliny's appointment, though not by virtue of any special powers, the line between the theoretical and actual exercise of gubernatorial authority is somewhat narrowed. Yet one must ask how effective any semi-permanent, peripatetic system of justice could be for the provincial population.

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[234]Burton 1975: 105.

[235]Cf. 10.58, discussed above.

[236]Talbert (1980: 429-31) notes Pliny's concern for the missing furniture of one Claudius Polyaenus (10.70) as illustrative of his attention to detail.

4) 10.110/11

The circumstances of letter 110 are of a similar kind to those of the preceding letters. Pliny, now in his third year in his province, has stopped for a second time at Amisus, which Pontic city we know from 10.92.1 to be a *civitas libera et foederata*, and as such enjoyed the very privileged status of exemption from the governor's involvement in local affairs.[237] Despite this privilege, the *ecdicus* (public prosecutor) of the city has asked Pliny to hear a case against Julius Piso, who some 20 years previous had been granted 40,000 *denarii* by a vote of the *boule* and *ecclesia* of the city, donatives of this kind now being illegal by mandate of Trajan (110.1).[238] For his part Piso, now an old man, claims to have exhausted this money and most of his other resources in various benefactions to the city. The entire situation here affirms the earlier assertion that the inhabitants of Bithynia-Pontus were quite accustomed to, and adept at, using the governor's court to settle very localized personal and political grudges. The *ecdicus* is actually inviting Pliny to hear a case outside his jurisdiction, based on the retroactive application of an imperial mandate from which Amisus by its charter was technically exempt anyway![239] This is the very sort of

[237]Sherwin-White 1966: 687, 718. Pliny the Elder (*NH* 6.7) also mentions the free status of Amisus.

[238]Williams (1990: 150) explains that the *ecdicus*, lit. "avenger," was sometimes appointed for a specific case.

[239]Sherwin-White (1966: 718) makes much of this, but in light of the legal maneuvering in the three previous cases, it does not seem so surprising. Williams (1990: 150) suggests that using Pliny's court to enforce retroactively the mandate of Trajan was the Amisenians' only means of recouping these funds since it was not allowed by local law.

situation that Plutarch and Dio had exhorted their fellow citizens to avoid.[240] In the hyper-litigious atmosphere of Bithynia-Pontus, Pliny seems more the victim of factional in-fighting than an adjudicator of legitimate legal problems. Just how many cases, based on trumped-up charges such as these, were coming before the governor? No doubt, the financial nature of this charge induced Pliny to hear the case, but a less scrupulous *iudex* than he may have found it an open arena for bribery.

On the surface the entire suit seems ridiculous, but the fact that Pliny defers the case to the emperor and that Trajan implies Piso may actually have been convicted if he had accepted the donative more recently complicates the matter. A.H.M. Jones postulates that the policy regarding donatives which became a mandate under Trajan had been an "established principle" for a long time.[241] Still, Amisus would normally have been exempt from such provincial mandates, as it was clearly exempt from Trajan's ban on *collegia* which Pliny pursued with such vigor elsewhere. When Pliny inquires about the right of the Amisenians to permit the existence of *eranoi* or dining clubs (10.92), Trajan in reply (10.93) absolutely affirms this right via the city's charter. It is possible that since Pliny does not mention the status of the city in 10.81, Trajan or his secretaries may have momentarily forgotten that the city was exempt.[242]

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[240]Plut., *Praec. reip. ger.* 19, 815A; Dio *Or.* 48.2.

[241]A.H.M. Jones (1940: 135), cited by Sherwin-White (1966: 721).

[242]Sherwin-White 1966: 721.

Perhaps, because Pliny takes this queer case seriously enough to consult the emperor, a free city might opt to have imperial regulations apply to it or at least wish to conform to the emperor's wishes in order to safeguard its status. Here, as we saw earlier in the case of the litigants in 10.56, Trajan was opposed to enforcing laws retroactively, a most fortunate circumstance for Julius Piso.

5) 10. 96/97

Thus far we have examined four cases which seem to have arisen not so much from infractions of the law as from local political rivalries. Not surprisingly, the last case contains some of these elements, though it is more complicated and potentially more far-reaching. Pliny is still in Pontus, either in Amisus (if so again outside his jurisdiction) or Amastris, when a number of people are brought before him charged with being Christians. He has devised a procedure for trying those brought before him but would like confirmation that he is acting correctly, especially because the number of those charged is increasing day-by-day and he has even been presented with an anonymous list of accused persons. Since the details of this case are well known, I shall not rehearse them again here. Suffice it to say that it is from these two letters that much of our knowledge of legal procedure against Christians comes.[243] Except for the uniqueness of this charge (the *nomen* of Christian apparently being enough to convict and the denial of same enough to acquit), the legal procedure is almost as we would expect: an accusation is made; Pliny tries the accused in

[243]Sherwin-White 1966: 691 and his Appendix V, 772-87, and especially de Ste. Croix (2006: 105-52), who takes issue with certain elements of Sherwin-White's analysis.

his *cognitio*; those convicted are punished according to their status, the Roman citizens being sent to Rome, the rest executed. Under the *cognitio* system, the "charge" only amounts to a recounting of the facts; the judgment is at the discretion of the governor.[244] The procedure here is not so different from the informal charge of *maiestas* against Dio Chrysostom in 10.58, and the charge itself has the sort of potential to create a flood of accusations due to its vagueness.

Pliny, having considered the number of people involved, desires to have his procedure confirmed by the emperor. He is again sensitive that his role as *iudex* gives him a hand in shaping imperial policy. To assist Pliny and to prevent the situation from getting out of hand, Trajan insists that a strict legal procedure be followed: Pliny should not himself round up persons accused anonymously by *libelli*, and a formal charge must be made (97.1.4-5).

While most of the abundant scholarship on these two letters focuses on the unique issues involved in the allegations of Christianity, these procedural questions are less important for our purposes than the similarity of this case to the preceding ones. For once again defendants are being brought into court on very dubious grounds, sometimes on the basis of an offense committed years previous to the trial (96.6.2-4). Apparently some of the persons brought in under the anonymous accusation never had been Christians at all, only someone's enemy (96.5.2). Not only decurions and Roman citizens are involved in this

[244]Sherwin-White 1963: 18.

swelling tide of accusations, but persons of all ages, sexes, and social stations (96.9.4). This is truly the perfect charge to make against one's enemy, political or personal, and Pliny avows himself to be caught in the middle of it all. The only difficulty for the accuser is that the defendant in this case may be acquitted simply by denying the charges. As T. D. Barnes says, "What is illegal is being a Christian: the crime is erased by a change of heart."[245] Interestingly, of the three groups here--professing Christians, non-Christians and former Christians--it is the last group that causes Pliny hesitation.[246] These retroactive accusations remain troublesome for Pliny and have an all too familiar ring from the previous letters. While at the end of 10.96 he claims that his handling of the situation has fostered a return to normalcy with the locals once again visiting the temples (96.10), we never hear how many people were swept up in the increasing flood of accusations and what sort of measures Pliny employed to restore public order.

CONCLUSION

When these five case studies are laid side by side, it is apparent that the Bithynians are quite skilled at exploiting the peripatetic system of provincial justice to their advantage. The first two sets of letters, taken together and supplemented by information from other sources, provide us with enough detail that we can reconstruct with some confidence how two well known members of the provincial elite, Flavius Archippus and Dio Chrysostom, used Pliny's court to their own advantage in order to wage war against each other. Each uses

[245]Barnes 1968: 37.

[246]Barnes 1968: 36.

multiple means at his disposal to inflict loss of status, damage and destruction on the other. These include the exhumation of long antiquated charges (perhaps leveled multiple times before multiple governors), allegations of evasion of justice and financial mismanagement, and even the suggestion of capital crimes, such as *maiestas*. Taking full advantage of the flexibility of the *cognitio extra ordinem* procedure, these litigants display a preference for allegations that are difficult to substantiate or refute and amount more to smears than actual charges. In addition, they employ a battery of documents to lend credence or cast doubt on their charges and allegations. These documents are often old and sometimes confusing, irrelevant or unverifiable but are sufficient to give the governor pause and cause him to consult the emperor.

The other three cases, for which we have access to many fewer details, bear enough similarities to the first two that we may suspect that they too arose out of similar personal feuds among members of the local elites. The nameless litigants of 10.56/57 produce in turn conflicting documents, the first to verify a sentence which has not been carried out and the second to prove that the same sentence has been overturned. The original legal dispute is overwhelmed by these new, distracting allegations. In 10.110 a charge of financial mismanagement against Julius Piso practically forces the scrupulous *legatus Augusti* to adjudicate outside his jurisdiction in the free city of Amisus for fear he will be in some way neglecting *mandata* to correct the finances of the provinces; the unfortunate Piso narrowly escapes punishment for failure to

repay a donative he had exhausted decades previous. With these cases in mind, we can view the last pair of letters concerning the punishment of Christians (10.96/97) from a comparable perspective, for they show how skillful certain vindictive individuals or factions were at manipulating the *cognitio* system, and Pliny's scrupulousness, to launch a sea of allegations against each other. Word that the governor would admit such charges spread rapidly. The number of accusations submitted and the lapse of time between the "crime" and the charge (up to twenty years) suggest that the locals were vigorously using this nebulous charge to settle personal and political grudges. Though most of those charged were likely of low social standing, some at least were Roman citizens, and every class was affected (96.9.4). Pliny, in a moment of panic, even fears that the political and social order of the province could be at stake (96.9).

Except for the case against Dio Chrysostom, the exact time frame of which is difficult to establish, all of the charges stem from cases or offenses which are sometimes years, even decades old. For Pliny to reconstruct the details of these cases or verify the authenticity of the documents presented would, of course, be difficult, given the generally assumed poor state of proconsular archives.[247] Yet the documents produced in all of the cases above have an important bearing on the outcomes and demonstrate that some provincials were very proficient at

[247]Sherwin-White 1966: 604-05; Sherwin-White 1963: 106-07. For a detailed discussion of Pliny's dilemma with documents, see Kantor 2009: 258-65.

finding and producing any sort of legal document that would help their case or at least confound their opponent.[248]

Further, these provincials are quite adroit at formulating their charges. The *ecdicus* of Amisus in 10.81 knows enough not to make a statutory charge of *maiestas* against Dio; rather, he prefers the suggestion of the *crimen* and thereby places on Pliny the burden of how to proceed. Certainly Dio's accusers hope Pliny will consult the emperor, and in this case the emperor does become involved, unfortunately not to the advantage of Archippus and his faction on the town council. In 10.96/97, the Bithynians are using the *delatio* system to its fullest, even submitting a list of anonymous accusations.

Ulpian tells us that it is a primary function of every governor to take care *ut pacata atque quieta provincia sit quam regit* (*Dig.* 1.18.13). The *cognitio extra ordinem* system exists precisely for this purpose; thus, from an administrative point of view, the governor's role as *iudex*, especially in a province where there are few troops, is of primary importance. Pliny sees himself as helping to shape Trajan's imperial policy in the province as well as keeping the peace. On the other hand, if these few cases from Pliny's dossier serve as any indicator, the provincials have a different perception. In a highly civilized and politically well-organized province such as Bithynia-Pontus, the governor's court was frequently viewed not just as the ultimate source of justice for legitimate grievances but also as the arena for settling political squabbles, the petty details and

[248]I shall be exploring the topic of documents in more detail in the next chapter.

malignancy of which a transient Roman official could only be vaguely familiar with.

Further, if displeased with the governor's adjudication, the accused it seems may simply opt to ignore his sentence and hope that it will go unnoticed. This attitude of the provincial elite, when played against the lack of familiarity and manpower of the governor, created a perfect climate for judicial corruption, from the use of the court system to settle personal rivalries to the manipulation of the governor through some form of bribery or intimidation.[249] The degree to which a governor was cognizant of and cooperative/complicit with this collusory system might well determine his material, mental and even political happiness while in office and upon his return to Rome. As Daniëlle Slootjes has recently remarked, "If one considers all the local and supra-local people a governor had to deal with or who could put pressure on him, one might wonder if the position of a governor was an honor or more a burden, even a punishment?"[250] The most outstanding proof that the Bithynians knew how to manipulate Roman justice to their advantage lies in the number of former officials (seven in all) that they charged with *repetundae*, the highest attested for any province.[251] The boundless judicial and administrative competence of the governor that Ulpian describes (*Dig.* 1.16.9) is everywhere compromised by practical realities.

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[249]On the corruption of provincial governors, see Slootjes 2006: 61-68.

[250]Slootjes 2015.

[251]Brunt (1990: 95) confirms this figure.

Perhaps this rather negative perception of the *cognitio* system can be somewhat mitigated when one considers that of the dozens of inquiries Pliny addresses to Trajan, only very few concern actual trials, while a number more address legal questions of a more informal nature.[252] This paucity of evidence for legal difficulties encountered by Pliny suggests that he was likely able to adjudicate most cases and conduct the majority of the legal business of the province without reference to the emperor. Our evidence for the case load of the governor's *cognitio* is scanty and rather piecemeal in time and place, but if Pliny received even a fraction of the petitions which the Prefect of Egypt received during one day at Arsinoe (1,804), he was relatively busy![253] At each assize center, and sometimes elsewhere (as at Nicea, 10.58), we may safely assume Pliny heard any number of cases without incident. He doubtlessly denied meritless cases a hearing, though in the cases reviewed he seems almost oblivious to the probable fabricated nature of the charges and the political squabbles behind them, seeming to take everything at face value, a circumstance which must have delighted the litigious Bithynians. Whether the character of Pliny we have seen here is the deliberate result of his own self-fashioning, as Woolf, Stadter or Noreña would suggest, is a matter for further debate. It is quite clear that these letters are highly edited to present a model governor serving a model emperor. The scanty number of cases will not allow us to push

[252]See pg. 76 above.

[253]*P. Yale* 61, as cited by Burton 1975: 102n97.

these assertions too far, but they do help create a more realistic, balanced picture of the governor as *iudex.*

THE *COGNITIO EXTRA ORDINEM* PROCEDURE FROM A DIFFERENT PERSPECTIVE

In the preceding case studies from Book 10 of Pliny's *Epistulae* we were able to observe the functioning of the governor's court from the perspective of the governor himself as Pliny relates his judicial queries to the emperor Trajan. While it is clear that these letters have been edited either by Pliny himself or by another hand and that as such we should be cautious in reconstructing the events taking place before his tribunal and behind the scenes, we can state with some assurance that the flexibility of the *cognitio extra ordinem* procedure afforded litigants an opportunity to demonstrate their status and to settle or even extend their personal and political grudges against each other by using long antiquated charges or the mere suggestion of wrongdoing in hopes that the governor would grant them a hearing. The actual charges lodged are often then ignored in favor of a demonstration of the litigant's character by the production of various official documents, such as letters of commendation or condemnation from local and Roman officials and even the emperor himself.

I should like now to turn to another roughly contemporary source which shows in even greater detail the functioning of the *cognitio extra ordinem* procedure, this time, however, from the perspective of the litigants and from the other side of the Roman Empire. In A.D. 158/59 the sophist Apuleius of Madauros was tried before the governor of Africa Proconsularis on a charge of

magic, lodged against him by his brother-in-law, Sicinius Aemilianus. At some point shortly after the trial, Apuleius published the speech he delivered in his defense before the governor, which is known to us as the *Apologia*. This work is the only surviving forensic speech in Latin literature aside from the speeches of Cicero, and it affords the student of Roman law a unique opportunity to view a trial in progress from the perspective of a litigant who was himself well versed in law as well as many other subjects. The charge against Apuleius, that he was a *magus*, or practitioner of magic, is also very similar in its vagueness to the sorts of charges the Bithynians were making against each other in Pliny's court. Before turning to an examination of the pertinent legal points in the *Apology*, a few words should be said about the life of the author and the nature of the work and its reliability as a source.

We know little about the life of Apuleius beyond statements in his own works and some mostly pejorative information about him found in the works of his fellow African, St. Augustine.[254] There is even a question about his full name. He is commonly known as Lucius Apuleius, but the praenomen is taken from the narrator of his *Metamorphoses*, Lucius of Corinth, who bears striking similarities to what we know of the author himself. He was born in Madauros in the Roman province of Africa Proconsularis sometime in the 120s A.D. By his own account he was from a wealthy family, and his father held the post of *duumvir*. The family's wealth allowed him to be educated first in Carthage

[254]The main points of Apuleius' biography outlined here come from Harrison and Hunink's (2008) and Butler's (1911) introductions.

where he was introduced to philosophy; from there he travelled to Athens where he continued his studies in rhetoric and Platonic philosophy among other subjects popular with the Second Sophistic movement of the time. In addition to Punic, which was probably his native language, he was proficient in Greek and fluent in Latin, the language in which all of his extant works are composed.[255] We know he also spent time studying in Rome and was en route to Alexandria when he fell ill during the journey and stopped to stay with friends in the city of Oea in Africa Proconsularis.

While in Oea he made quite a name for himself as a sophist, public speaker and legal advocate, and at the behest of an old fellow student and friend he married the young man's mother, one Aemilia Pudentilla, a widow and one of the wealthiest citizens of the city. Their marriage created great resentment on the part of some members of her family who wished to control Pudentilla's assets, and it was while representing her on another legal matter that Apuleius was harassed with accusations of magic and even murder by Sicinius Aemilianus, his wife's former brother-in-law. Apuleius challenged Aemilianus to bring formal charges against him before the proconsul, Claudius Maximus. Aemilianus charged him *de magia*, and the trial began a few days later. The *Apologia* or *Pro se de magia*, as it is also known, is Apuleius' speech in his defense.

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[255]Apuleius nowhere states that his native language is Punic, and he certainly would not have advertised the fact in his trial; however, he does condemn his intellectually sluggish stepson, Pudens, for speaking only in Punic and making no attempt to learn Latin, the language of culture (98.26-28).

While we never hear the outcome of the trial, the unanimous scholarly assumption is that Apuleius was acquitted, as some years later he is in Carthage, holding high office there. We do not know when Apuleius died; he may have lived and been productive into the 190s, though the latest datable evidence ends in the 160s. Apuleius was a prolific writer on a wide variety of subjects and was well known in later antiquity as a sophist and philosopher, but it was for his knowledge of magic that he was perhaps best known to later ages. Aside from the *Apology*, Apuleius' most familiar surviving works are the *Florida*, which consists of golden passages taken from his speeches, the *Metamorphoses*, a satirical novel relating the adventures of one Lucius of Corinth, who by magic is turned into an ass and back again, and an academic lecture on the *daimonion* of Socrates, entitled *De deo Socratis*.

The particular circumstances of the *Apology*, mostly outlined in sections 73-74, are as follows: While studying in Athens, Apuleius became friends and roommates with a fellow African, Sicinius Pontianus. A number of years later, this friendship was renewed when Apuleius fell ill en route to Alexandria to further his studies. While recovering, he sojourned in the city of Oea where he quickly gained fame in the area as a public speaker and lecturer. His old friend Pontianus, a native of Oea, sought him out on a personal matter: He wished Apuleius to marry his widowed mother Pudentilla, a woman of great means, in order to protect the inheritance of himself and his younger brother Pudens from the advances of other suitors. With much reluctance at first because of his

desire to go to Alexandria and because Pudentilla was quite a bit older than he, Apuleius finally agreed to the match, for at Pontianus' insistance Apuleius had moved to Pudentilla's home to recuperate and there had observed her sterling character, which apparently offset her matronly appearance. Apuleius asked for a postponement of the union until Pontianus himself should marry and his younger brother Pudens should assume the *toga virilis*. However, after Pontianus married, he changed his mind and opposed Apuleius' marriage to his mother for a time. According to Apuleius, the young man was temporarily seduced by the greed of his new father-in-law, Herennius Rufinus, and his uncle, Aemilianus. Later he had a change of heart and composed a letter to Apuleius asking for forgiveness (96). Unfortunately Pontianus died while traveling back to Oea from Carthage and did not live to reunite publicly with his mother and stepfather (96), although Apuleius does tell us (94) that before his departure for Carthage he came to them in private and begged their forgiveness for ever opposing the union.

The happy couple married at one of Pudentilla's country estates, much to the chargin of the family of her deceased husband as well as the family of Pontianus' wife (87-88). They all feared Pudentilla's fortune would fall to Apuleius, and so they began to attack him, claiming he had bewitched Pudentilla into marrying him by means of sorcery and had brought about the death of Pontianus by black magic (1). This all came to a climax when Apuleius was representing his wife on an unrelated legal matter at the proconsular assize. He

publicly challenged the disgruntled in-laws to stop circulating insinuations and to bring charges against him. They immediately did bring charges but chose to dwell only on the accusation that Apuleius was a *magus*. The charge was made in the name of Pudentilla's own son, Pudens, who, because he was a minor, was represented by his uncle Sicinius Aemilianus and a professional advocate, Tannonius Pudens.[256] The proconsul Claudius Maximus agreed to hear the case a few days later.

As I stated earlier, the *Apology* is a published version of Apuleius' speech in his defense before the proconsul Claudius Maximus. It is quite a long speech, over 100 sections, and would have taken almost six hours to deliver if time is allotted for additional testimony and evidence.[257] In addition, it is filled with scholarly digressions and innumerable quotations from Greek and Latin authors, so much so that the speech as we have it has been called one long digression, and indeed Apuleius scarcely addresses the actual charges against him at all during his lengthy discourse. Rives has described the nature of the work well:

> Over the years, many scholars have expressed surprise and even disbelief that Apuleius' *Apology* contains so much material that seems so little to the point. The variety and length of what are apparently digressions are indeed striking on even the most cursory glance: anecdotes, quotations, erudite disquisitions, displays of learning of every sort are piled on top of

[256]Making the charge in the name of a minor would shield Aemilianus from a charge of malicious prosecution should he lose the case.

[257]Harrison 2000: 42n9.

> each other with an exuberance that seems entirely out of keeping with a serious court case.[258]

On the other hand, the speech has the appearance of an actual transcript from trial, as Apuleius addresses his accusers and the proconsul frequently as well as members of the audience and clerks and assistants who are asked to bring him documents.

There are three major schools of thought about the reliability of the *Apology* as an actual speech. Some scholars contend that the entire speech is a fiction, invented by Apuleius as an entertaining vehicle to display his encyclopedic knowledge of Greek and Latin literature, Roman law, magic, medicine and other topics.[259] These point to other forensic speeches which were never delivered, such as much of Cicero's *Verrines* or Isocrates' *Antidosis*. A second theory sees the speech as an actual transcript of the trial, published exactly as it was delivered, arguing that stenographers did record transcripts from trials and that there are too many telltale signs of an actual trial, such as the presence of the audience, the mention of the water clock, and the involvement of clerks and assistants.[260] A third group believes that the *Apology* is more or less the speech Apuleius delivered but was edited by him before publication, at which time many of the quotations and digressions were inserted;

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[258]Rives 2008: 17.

[259]McCreight 1991: 29-41; see also Riemer 2006: 178-90.

[260]Winter (1969: 607-12) developed this theory. For an updated discussion, see Hijmans 1994: 1708-84.

the idea here is that they were too numerous (and discursive) for Apuleius to have prepared them in so short a time. Within this group Harrison, for example, has argued that the speech is heavily edited and that the purple passages were inserted after the trial.[261] Because this text exists in a literary vacuum, or as Rives styles it "glorious isolation," and is only self-referential, there cannot be a definitive answer to the question of how "real" the circumstances and situation of the *Apology* are. After considering the various perspectives in his introduction to his translation of the *Apology*, Hunink offers this concluding observation:

> The text indeed does create the impression of being a literary performance, a work of brilliant art, and accordingly this is how we should interpret it. Everything in the speech is involved in a great move of 'literarization': numerous elements in the speech are clearly designed in advance to entertain and amuse the reader. The speech then would be a declamation with a practical function, rather than the reverse, a forensic speech with additional, declamatory elements. In the hands of the *de facto* sophist Apuleius, even his own trial becomes a literary event, with many touches of comedy and dramatic action.[262]

It seems, however, that the most persuasive argument regarding the veracity of the *Apology* as an actual forensic speech is that of Rives, who in a important article reviews the scholarly literature on these three interpretations and argues convincingly that the speech is only polished for publication and represents a faithful account of the trial.[263] He demonstrates that the many and varied sophistic *discursus* in the speech, entertaining as they may be, are an

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[261]Harrison 2000: 42.

[262]Hunink 2007: 24; see also Hunink 1997: 25-27.

[263]Rives 2008.

important part of his defensive strategy, which centers on establishing his philosophical, literary, and intellectual respectability before the proconsul Claudius Maximus as a means of addressing the inherently vague accusation of being a *magus*. Rives further supports the view of Harrison that the speech is not overly long, citing Cicero's *Pro Cluentio* as an example of a rather lengthy speech whose historicity no one has ever doubted.[264] In the event, whether or not Apuleius' *Apology* is an entirely faithful recounting of his trial before the proconsul, there can be little doubt that the procedures of the trial which frame the work are meant to reflect reality and are an accurate depiction of an *extra ordinem* trial, composed by a man who was himself a capable advocate. We thus have in the *Apology* a unique opportunity to view the *cognitio extra ordinem* procedure in practice.

Apuleius' *Apologia* may be roughly divided into three sections. Sections 1-25 address, amid numerous scholarly digressions, the various personal attacks against Apuleius' character as a philosopher and intellectual dilettante. Sections 25-66 address, in the most discursive manner, the specific charges that he is a *magus*, and Sections 66-100 treat the circumstances of his marriage with Pudentilla and the conclusion of the speech.

[264]Rives 2008: 18n6, who cites Harrison.

SIMILARITIES BETWEEN APULEIUS' *APOLOGY* AND THE CASE STUDIES FROM PLINY

The general and particular circumstances of Apuleius' case bear a number of striking similarities to those of the litigants in Pliny's letters. Among these are: 1) The use of vague accusations rather than statutory charges, 2) the presentation of myriad documents to support or distract from accusations, 3) the shifting of the focus away from actual charges to a discussion of character, 4) the presence of shadow accusers who stand behind those in the courtroom, and 5) the manipulation of the proconsul by the litigants. I should like now to discuss each of these points in order to demonstrate how litigants were able to use the *cognitio extra ordinem* procedure to their own advantage whether they were in Bithynia or across the Empire in Africa.

Apuleius was charged before Claudius Maximus as being a *magus* who had used his magical powers, among other things, to bewitch the wealthy Pudentilla into marrying him. In an examination of the charges lodged against Apuleius by Aemilianus, most previous scholarship has focused on connecting the charge of *magus* with a particular statute, namely the *lex Cornelia de sicariis et venificiis* of 81 B.C., which was generally directed against murderers, poisoners or anyone who caused "death by surreptitious means."[265] In the introduction to his translation of the *Apology*, Hunink supports this view: "…the law in question must have been the *lex Cornelia de sicariis et veneficiis* of 81 B.C. This law included a clause on magic, threatening those convicted with the

[265]For a review of the scholarship and a detailed discussion of this statute and its relevance to Apuleius, see Rives 2006: 47-67 and 2008: 19-22.

death penalty. The relevance of this law is beyond doubt, even though Apuleius does not refer to it himself."[266]

This desire to connect the charges against Apuleius with a particular statute seems to be missing the point. Apuleius is being tried under the *cognitio extra ordinem* procedure, and under this system there need be only a willingness of the magistrate to hear the accusations presented. As Rives has correctly said, "In a *cognitio extra ordinem*, charges were not limited to statutorily defined crimes; on the contrary, the presiding official could take action against anything he found to be an offence against public order and security."[267] In an extensive study of the word *magus* in Latin, Rives makes the following observation which is worth quoting in full:

> When the prosecution lodged a charge with Claudius Maximus that Apuleius was a *magus*, then, what they meant by this, and what Maximus would have understood by it, was that Apuleius had a specialized knowledge of arcane doctrines and secret rituals, that this knowledge gave him power that other people did not have, and that he used this power in ways that were subversive and anti-social. The claim that Apuleius was a *magus* was thus in essence a claim about the nature of his knowledge: according to his accusers, it took socially suspect forms and was used for socially subversive purposes.[268]

The "charge" of *magus* then, with its socially negative connotations, really amounts more to a smear on Apuleius' character and labels him as subversive and un-Roman. Apuleius himself acknowledges the vague and slanderous nature of this charge when he describes it as *calumniam magiae, quae facilius*

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[266]Hunink 1997: 12-13; see also Harrison (2000: 41) who supports this view.
[267]Rives 2008: 5.

[268]Rives 2008: 26.

infamatur quam probatur (*Apol.* 2.2). Under the *cognitio extra ordinem* procedure, the proconsul could hear any sort of case he wished; it need not be overtly connected to any particular law.

In this way the charges against the Christians (Plin. *Ep.* 10.96/97) and against Dio Chrysostom (10.81/82) that were brought before Pliny are quite similar. The *nomen* of Christianity carried many negative connotations for the Romans, and it could certainly be perceived to be a threat to public order. Pliny's willingness to hear charges based solely on the *nomen* led to an avalanche of charges, which threatened to overwhelm the community. Similarly, Eumolpus, the advocate for Flavius Archippus, merely makes the suggestion that Dio may have violated the law by burying his wife and child in a courtyard under the gaze of Trajan's statue; he avoids the direct charge of *maiestas* and leaves that connection for Pliny to make. As Sherwin-White observed:

> The procedure shows the difference between the Roman system of delation under a *lex publica* and the provincial *cognitio extra ordinem*. Eumolpus alleges the facts themselves without citing a statute, and leaves it to the governor to decide whether they constitute a particular offense.[269]

Or, as he says elsewhere, "This is the essence of the procedure *extra ordinem*: The accuser alleges a misdeed, and the judge decides how to deal with it." [270] In that case Pliny was concerned enough to refer the matter to Trajan, who dismissed it out of hand. In contrast, Claudius Maximus chose to hear Aemilianus' case, perhaps due to the seriousness of the allegations and because

[269]Sherwin-White 1966: 677.

[270]Sherwin-White 1963: 18, as quoted by Rives 2008: 5.

Pudentilla, the alleged object of Apuleius' sorcery, was a prominent citizen of Oea.[271] Thus, the flexibility of the *cognitio extra ordinem* could work to the advantage of litigants who wished to attack their opponents without making a statutory charge.

The entire *Apology* is not so much concerned with the specific charges of magic lodged against Apuleius as it is a general defense of his character. In fact, he does not deny that he possesses great knowledge of magic, as well as an encyclopedic knowledge of many other subjects which form the numerous, entertaining digressions comprising the bulk of the speech. He is at pains, however, to present himself as a philosopher, rhetorician and intellectual, the sort of person with whom the governor Claudius Maximus would identify; and, he is also very careful at every opportunity to label Aemilianus, Rufinus and their associates as semi-literate boors who are led only by their greed and physical appetites.

Rives has suggested that the highly digressive structure of the *Apology* with its torrents of learned display is actually an indispensible element of Apuleius' defense.[272] To defend himself against the vague charge of magic, Apuleius must summon Greek and Latin literature, philosophy, law and medicine to his side in order to present himself as a man of learning and culture who uses his many talents not for selfish or subversive ends but for the good of

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[271]Perhaps, too, as the entire *Apology* implies, Maximus' decision to hear the case was as much for his own entertainment as it was because he took the allegations seriously.

[272]Rives 2008: 35-47.

his family and the community. Confident he has brought his family together rather than torn it apart, he says near the end of the speech:

> *ego vero quietis et concordiae et pietatis auctor, conciliator, favisor non modo nova odia non serui, sed vetera quoque funditus exstirpavi* (93.8-10).
>
> In fact I am the champion, catalyst and promoter of peace, harmony, and family love! I have not merely refrained from sowing new hatreds, but I have even torn out old ones by the root.[273]

In the course of his scholarly disquisitions Apuleius does masterfully refute, even mock, the specific allegations of magical practices against him, such as his possession of exotic fishes (29-41) or his inducing seizures (29-42). However, he spends much more time speaking on subjects unrelated to the accusations at hand, overwhelming the proconsul and his audience with his vast learning. Interestingly, he never really answers the charge that he is a *magus*, but by the end of the speech everyone seems to have forgotten about that. At that point we, his audience, cannot help but feel that Apuleius is a man of incredible knowledge, eloquence and impeccable character who has been unfairly maligned out of the hatred, jealousy and wanton greed of his social and intellectual inferiors.

An important element of Apuleius' defense of his character, which he saves for the end of the speech, is the production of a letter from the previous proconsul of Africa Proconsularis, Lollianus Avitus (94/95). Apuleius had earlier written to Avitus explaining the circumstances of his dispute with Aemilianus, Rufinus, Pontianus, and the rest over his marriage to Pudentilla, and Avitus had

[273]The translations in this section are those of Hunink (2001).

written in reply (94). While we do not learn the specific contents of the letter, it is clear that Avitus praised Apuleius and attested to his sterling character in the most eloquent language (95). How could Maximus even consider condemning a man who had so recently been praised by the preceding governor, his personal friend? How could such a man be a *magus* in the sense that the ignorant and greedy Aemilianus suggests?

In addition to this letter of Lollianus Avitus, throughout the course of the trial Apuleius produces many other documents to support his defense and is often careful to say that he has acquired certified copies of those documents. Among them are: 1) a sealed copy of Pudentilla's will (100), 2) the marriage contract between Pudentilla and Apuleius (91/2), 3) letters of Pontianus attesting to his reunion with Apuleius (96), 4) Pudentilla's letter stating she had been bewitched by Apuleius (80-84) with authentication (83), 5) Pudentilla's birth certificate from the public archives (88), 6) a letter of Aemilianus in support of Pudentilla's marrying again (70), and 7) an official transcript of testimony of local officials showing a small estate "bought" for Apuleius was actually in Pudentilla's name (101). Throughout his defense Apuleius produces and reads from the texts of these letters and documents which gives us a real sense of a *cognitio extra ordinem* in process.

This use of official documents and letters from government officials attesting to one's character or supporting one's claim is not unlike the strategy of Archippus (Plin. *Ep.* 10.58), who produced letters of recommendation from

Domitian and Trajan himself. Even though these letters had little bearing on the particular case at hand and could not be independently verified, the good words of a former and sitting emperor overwhelmed any suggestion, even proof, that Archippus was an escaped felon. They were important enough in Pliny's eyes that he sent them to the emperor for authentication and review.

This leads to a further point of comparison. Aemilianus has hired a professional advocate to represent him in court, Tanonnius Pudens. Although Apuleius berates him at every turn as inept and incompetent (3, 30, 33, 46), Tanonnius may well have been helpful in the formulation of the vague charges and suggestions of wrong-doing that are made on Pudens' behalf and resulted in a hearing from Maximus. It seems clear that the prosecution also produced documents of their own, such as a sworn statement from Apuleius' associate, Crassus, in whose home some magical rites were supposedly performed (57), a statement which Apuleius thoroughly discredits by presenting Crassus as a glutton and drunkard straight out of comedy (57-60). Tannonius would also have had knowledge of the functioning of the governor's court and access to local officials and civil servants. Apuleius himself was *peritus legis*, having represented his wife in her earlier legal dispute with the Granii (1). During the trial he displays a thorough knowledge of Roman law and procedure and has complete access to archives, transcribers, and various other legal professionals whose services he uses throughout. In much the same way, Eumolpus represents Flavius Archippus and is quite successful in enticing Pliny to hear

the charges against Dio Chrysostom and in securing two postponements of the trial (Plin. *Ep.*10.81). Athough both Eumolpus and Tannonius Pudens are mentioned rather incidentally, we can well imagine that such professional advocates were commonplace in trials of this sort, a subject to which I shall return in more detail in the next chapter.

Another similarity between the case of Apuleius and the litigants in Pliny is the use of an accuser who is in reality a proxy for another powerful person seeking revenge on his adversaries. As I mentioned earlier, the suit against Apuleius is made in the name of Pudens, who had only recently assumed the *toga virilis* and was still a minor under Roman law. This would protect the real accuser Aemilianus from a charge of malicious prosecution by Apuleius should Pudens lose his case, and a boy would also likely gain much more sympathy from the court than an adult. Yet we learn much later (74) that the real accuser is neither of these people but Herennius Rufinus, Pontianus' father-in-law:

> *Hic est enim pueruli huius instigator, hic accusationis auctor, hic advocatorum conductor, hic testium coemptor, hic totius calumniae fornacula, hic Aemiliani huius fax et flagellum, idque apud omnis intemperantissime gloriatur, me suo machinatu reum postulatum* (74.16-21).
>
> Yes, he is the instigator of this little boy, he is the bringer of this accusation, the hirer of lawyers, the buyer of witnesses; he is the furnace where this whole calumny was forged, the torch and lash of our Aemilianus here. In front of everyone he keeps boasting without any self-control that it is through his machinations that I have been indicted.

If Rufinus thought he was successfully hiding behind Pudens and Aemilanius, he was very much mistaken. Apuleius launches one of the most

scathing *ad hominem* attacks against him in Latin literature since Cicero's condemnation of Marcus Antonius in the *Second Philippic*, denouncing him as a pathic homosexual, a prostitute, a pimp for both his wife and daughter, a gambler and a spendthrift, among other things (75/76).

This use of a shadow accuser is similar to the appearance of Furia Prima in *Ep.* 10.58, who is quite possibly standing in for Dio Chrysostom or members of his faction when she accuses Flavius Archippus of evading his sentence for forgery. Just as Pudens' youth would gain him more sympathy from the court, some might see a woman wronged as a more sympathetic accuser than a man.

Finally, though it seems quite clear the governor could hear any sort of case he chose under the *cognitio extra ordinem* procedure, he could clearly be influenced, even manipulated by the litigants (and their advocates) before him. The status of those charged or wronged along with their wealth, local influence and connections to Roman authorities, the nature of the charges, the threat to public order posed by the case, and even the persistence of the litigants could serve to sway the governor. Under the right circumstances and with the right governor, the legal merits of a case could well be secondary to these other considerations.

CHAPTER 3: THE PURPOSE, UTILITY AND AUDIENCE FOR THE HANDBOOKS *DE OFFICIO PROCONSULIS/PRAESIDIS*

In Chapter One we discussed the authorship and surveyed the reassembled contents of the surviving fragments of the handbooks *de officio proconsulis/praesidis* and determined that they were composed by near contemporaneous jurists of varied renown. Their length varied greatly, from two books to ten, but their contents all roughly fell into a discussion of points of civil and criminal procedure. We also concluded that their contents could have been of interest to both the governor and provincial litigants. In the preceding chapter we have seen the functioning of the *cognitio extra ordinem* procedure both from the perspective of the Roman governor and from that of litigants in the period slightly prior to the production of the earliest treatise *de officio proconsulis/praesidis* in the late second century. With these actual cases in mind, I should like now to bring these two bodies of evidence together in an attempt to answer the questions posed at the end of Chapter One regarding the practical utility of the handbooks, that is, who might have actually used them and to what end. While it is true that the judicial evidence presented in Chapter Two pre-dates the handbooks by some 50 to more than100 years, there is little reason to think the functioning of the governor's court or the *cognitio extra ordinem* procedure would have changed very much during this period. The gubernatorial *cognitiones* described by Pliny and Apuleius are the only examples

of in-process trials in the surviving literature. We may thus wonder: would provincial governors such as Pliny or Claudius Maximus have found a handbook such as Ulpian's *de officio proconsulis* useful in deciding the cases before them? Would Apuleius, Flavius Archippus, Dio Chrysostom and the other litigants appearing before Pliny have benefitted from an acquaintance with the treatises of Paul or Macer? Is the material in the handbooks relevant to actual practice, or do these works belong to the purview of legal scholarship and theory, more fitting for juristic debate and the academic classroom than actual use in the field? To answer these questions, I shall survey the reassembled handbooks found in Appendix A for any particular points of correspondence between them and the events of the trials in the preceding chapter. I shall then consider more general issues regarding the possible relationship between the juristic writings and actual legal disputes in the provinces.

JURISTIC OPINIONS AND LEGAL DISPUTES: POINTS OF OVERLAP

A comparison of the contents of the handbooks with the events outlined in the trials in Chapter Two reveals conservatively at least twenty-eight possible instances in which material in the handbooks has some relevance to the actual cases. Six citations address rather pointedly the circumstances of the cases, while the others are more tangential, not directly addressing our cases but perhaps supplying background material for an advocate or the governor.[274] Here is a list by author and Lenel number as found in Appendix A:

[274]Naturally one might debate the inclusion or exclusion of some of these indirect references.

Macer: 59

Paulus: 1062

Saturninus: 47, 49, 50

Ulpianus: 2144, 2147, 2148, 2150, 2152, 2163, 2174, 2177, 2181, 2184, 2191, 2192, 2193, 2194, 2203, 2206, 2212, 2232, 2237, 2240, 2241, 2246, 2249

Let us turn now to a discussion of the most pertinent and compelling of these correlations.

1. *Ep.*10.96/97

In 10.96/97, Pliny is in great consternation over how to proceed in the trials of Christians in his court, especially because of the number and rank of the persons accused, and is forced on his own to devise a procedure for trying them, for which he seeks Trajan's approval. When he writes to the emperor he is facing a tidal wave of accusations, including a list submitted by an anonymous accuser. We know that later governors also had questions about the proper handling of accusations of Christianity, to the extent that Ulpian, as I shall discuss below, devoted an entire section of his handbook to this topic, in which he apparently cited a number of different rescripts.

One of the particular problems which Pliny addressed was the issue of what to respond to an anonymous *libellus*, a question which prompted a "you should know better" reply from Trajan. This too was an issue that Ulpian addressed (2184/48.2.7.1), and his opinion on the matter not surprisingly closely parallels Trajan's response to Pliny: *Si cui crimen obiciatur, praecedere debet*

crimen subscriptio, "If a charge is to be brought against anyone, the charge must first be signed." Another problem Pliny was facing was the secret assembly of Christian congregations for the purposes of worship and fellowship. Such meetings were in direct violation of Trajan's *mandata* that Pliny had publicized via edict upon his arrival in the province. This very concern was also addressed by Ulpian in Book 6 of his handbook under the rubric *de collegiis*. There the assemblage of social and fraternal associations is strictly forbidden and liable to severe punishment (2177/47.224).

In addition to these specific parallels, more general ones may also be relevant. In the previous chapter, I supported the arguments of Sherwin-White and others that Pliny conducted his trials of Christians as *cognitiones extra ordinem*, which were based not on any specific law but simply on the governor's willingness to hear a case. What might have been the reasons for Pliny's willingness to hear these charges? Ulpian's handbook (2181/1.18.13) might provide one reason:

> *Congruit bono et gravi praesidi curare, ut pacata atque quieta provincia sit quam regit. Quod non difficile obtinebit, si sollicite agat, ut malis hominibus provincia careat eosque conquirat.*
>
> It befits a good and responsible governor to see that the province he rules is peaceful and orderly. He will achieve this without difficulty if he works conscientiously at ridding the province of wicked men and at seeking them out to that end.

Ulpian's views here, although expressed more than a century after Pliny's governorship, no doubt reflect a general principle that must have gone back to the very beginnings of Roman provincial administration. We thus find a number

of points on which Ulpian's opinions deal more or less directly with issues raised in this exchange between Pliny and Trajan. I will return to this overlap later in this chapter and consider in more detail the relationship between these two texts.

2. *Ep.* 10.56/57

The situation in 10.56/57, in which two unnamed persons had been relegated by the former governor Calvus but never left the province, creates a perplexing situation for Pliny. When the defendants produce an edict of Calvus reversing his decision, Pliny must consult Trajan. Ulpian's handbook (2212/48.18.1.27) directly addresses this issue:

> *Sed praeses provinciae eum quem damnavit restituere non potest, cum nec pecuniariam sententiam suam revocare possit. Quid igitur? Principi eum scribere oportet, si quando ei, qui nocens videbatur, postea ratio innocentiae constitit.*
>
> A provincial governor does not have the power to reinstate a person whom he has condemned, since he does not [even] have the power to revoke his own imposition of a fine. What then [must he do]? He should write to the emperor if at any time proof of innocence is subsequently established for a person who had appeared to be guilty.[275]

Calvus may have had some question about the defendants' innocence after the fact, or he may even have made a procedural error, as the opinions surrounding relegation as outlined in 2243/48.22.7-19 are quite complicated.[276] The most likely answer, however, is that the governor did just as he pleased, ignoring

[275]See also *Dig.* 48.19.27, quoted on pp. 102-03.

[276]If we had more of this rubric *de poenis* from Book 10 of Ulpian's handbook, there might have been a restatement of Callistratus' opinion from *Dig.* 48.19.27: *non solere praesides provinciarum ea quae pronuntiaverunt ipsos rescindere*, quoted on pp. 102-03.

whatever precedents may have existed at the time and never thinking it would come to the emperor's attention. For his part, Pliny remains the legal and gubernatorial model, since he immediately consulted the emperor about this matter.

3. *Ep.* 10.110/11

The legal quandary for Pliny in 10.110 is whether to make the near destitute Julius Piso repay the free city of Amisus a donative which he had received from the city many years previous. Piso claims that through his many benefactions to the city he has exhausted his means and cannot now repay this money, given him over twenty years before. For their part, the Amiseni are so intent on recovering their funds that they have secured an *ecdicus* or public prosecutor, who invites Pliny to hear the case even though it is outside his jurisdiction. While we do not know the specific reasons for this donative to Piso, it was likely connected to the political cronyism and factionalism in the province that Pliny had been assigned to address.[277] According to Piso, if he were forced to remunerate the assembly, he would no longer be able to maintain himself and would likely lose his decurionate, something his enemies would relish. Perhaps the trial itself represented a political vendetta against Piso more than an attempt to recoup funds.

Cases such as Piso's must have been common enough, and generated enough rescripts, that Ulpian eventually felt it necessary to devote a large

[277]On this see Williams 1990: 150, Sherwin-White 1966: 718-20, and Fuhrmann 2015.

portion of Books 4 and 5 to issues related to local offices and *munera* of various types. 2163/50.4.6 describes the sorts of people who should be allowed to hold office, and 2167/50.6.2 and 2174/50.12.6 reiterate that those who accept *munera* are bound to fulfill them; and another work of Ulpian, *de officio curatoris rei publicae*, directly addresses this problem, drawing perhaps on this very letter: *Ambitiosa decreta decurionum rescindi debent, sive aliquem debitorem dimiserint sive largiti sunt*, "self-seeking resolutions of decurions ought to be vetoed, whether they have released some debtor or bestowed a gift" (2074/50.9.4).[278] By the third century Ulpian's *de officio proconsulis* would at the very least have made very useful preparatory reading for litigants or advocates involved in similar disputes related to municipal offices and *munera.*

4. *Ep.* 10.58/59/60

When Flavius Archippus appears before Pliny asking for the philosopher's exemption from jury duty, Furia Prima accuses him of being an escaped felon, who has eluded his condemnation *in metallum* for twenty-five years. Though she can prove he had been condemned and he cannot demonstrate his innocence, by producing letters attesting to his character Archippus manages to exonerate himself in the eyes of Trajan and Pliny. As we discussed in Chapter Two, there is debate over whether the words *reddendumque poenae, quam fractis vinculis evasisset* (58.2) signify that Archippus escaped from the mines or had eluded

[278]The translation is Williams' (1990: 150). Macer (59/50.10.3) and Paul (1062/50.12.7) also discussed the topic of *munera*, probably at much greater length than the few surviving fragments suggest.

confined custody before being sent off to the mines.[279] All we know for certain is that he did not serve his sentence and that well over twenty years had passed when he was suddenly hauled into court by Furia Prima.

Several passages in Ulpian's handbook and one from Saturninus' clarify some of the legal controversies surrounding the circumstances of this case. First, in 2249/48.19.9.11 we learn that persons of the rank of decurion should not be condemned to the mines. We do not know Archippus' exact status when he was condemned (c. 84), but he received letters of commendation from Domitian shortly thereafter (c. 86), and he certainly was politically and socially prominent at the time of his trial. It therefore seems possible that the governor may have ignored his status. In 2152/1.16.9.4 Ulpian informs us that it was among the proconsul's duties to assign counsel to women, minors and other disadvantaged persons: *advocatos quoque petentibus debebit indulgere plerumque: feminis vel pupillis vel alias debilibus vel ….,* "It will also be his duty in most cases to allow the use of counsel by petitioners who are women, *pupilli*, those otherwise under a disability or…." Though no advocate is mentioned in our sources, Furia Prima would presumably have needed one to appear before Pliny.

Would such an advocate have found the handbooks helpful? Well, 2223/47.18.1.9 endorses the death penalty for those who break out of prison or escape custody, if that is what *fractis vinculis* (58.1) means: …*qui de carcere eruperunt sive effractis foribus sive conspiratione cum ceteris, qui in eadem*

[279]See Chapter Two, pp. 91-92 above.

custodia erant, capite puniendos…., "…those who break out of prison, whether by breaking down the doors or through a conspiracy with others detained like themselves, are to be punished with death."[280] In 2241/48.19.8.9 we learn that sometimes governors imprisoned or chained those condemned rather than sentencing them, and we may wonder whether Archippus escaped at this juncture while in some kind of confined custody:

> *Solent praesides in carcere continendos damnare aut ut in vinculis contineantur: sed id eos facere non oportet. Nam huiusmodi poenae interdictae sunt: carcer enim ad continendos homines, non ad puniendos haberi debet.*
>
> Governors are in the habit of condemning men to be kept in prison or in chains, but they ought not to do this; for punishments of this type are forbidden. Prison indeed ought to be employed for confining men, not for punishing them.

In 50/48.3.10, Saturninus weighs in and quotes from *mandata*:

> *Mandatis ita cavetur: "Si quos ex his, qui in civitatibus sunt, celeriter et sine causa solutos a magistratibus cognoveris, vinciri iubebis et his, qui solverint, multam dices."*
>
> …the rules provide as follows: "If you should establish that any person kept in fetters has been released by the magistrates hastily and without cause, you shall order them to be bound and shall impose a fine on those who release them."

Perhaps Archippus evaded his sentence in the way Saturninus describes above. For just as members of the local elite used the Roman courts to prosecute their rivalries, they might also call in favors to evade Roman justice. Apparently such evasion of justice was common enough that it had to be addressed by *mandata*, which were then quoted by Saturninus. This also raises the question of how

[280]This sentence in Ulpian's handbook (in 2223) is a quotation taken from Saturninus, likely from his *de officio proconsulis*; thus Lenel also places this citation under Saturninus (51).

much the handbooks may have duplicated what was already stated in mandata.[281]

If, on the other hand, *fractis vinculis* refers to an escape from the mines themselves (which seems to me more likely), Ulpian in 2241/48.19.8.6 has much to say about those fetters and how they relate to punishment:

> *Inter eos autem, qui in metallum et eos, qui in opus metalli damnantur, differentia in vinculis tantum est, quod qui in metallum damnantur, gravioribus vinculis premuntur, qui in opus metalli, levioribus, quodque refugae ex opere metalli in metallum dantur, ex metallo gravius coercentur.*
>
> The only difference between those condemned to the mines and those condemned to the *opus metalli* lies in their chains, that those condemned to the mines are weighed down with heavier chains and those to the *opus metalli* with lighter, and that those who abscond from the *opus metalli* are handed over to the mines [while those who abscond] from the mines are more severely punished.

In a study of imprisonment and hard labor in the Roman Empire, Huntzinger has investigated the difference between *damnatio in metallum* and *damnatio in opus metalli* and concluded that they are not truly distinct punishments. Rather, as Ulpian suggests above, they reflect the degree of condemnation (time, type of labor, and, of course, weight of chains), based on the nature of the crime and the social status of the accused.[282] If Pliny is being at all precise in his use of the phrase *damnatus in metallum* at 58.3, which is certainly debatable, then Archippus had likely received the greater punishment initially, and at least by Ulpian's time would have received a more severe sentence when apprehended, as

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[281]See my discussion on pp. 68-73 above.

[282]Huntzinger 2004: 28-32.

the above passage indicates. *Gravius* might even imply the death penalty, since no other punishment was considered more severe than condemnation *in metallum*.[283]

In addition to the other documents presented to Pliny, all of this juristic material would have been of advantage to Furia Prima and her faction. We may in any case guess that much was happening in these *cognitiones* outlined by Pliny that helped to generate the juristic opinions set down over a century later in the handbooks.

5. *Ep.* 10.81/82

Had he been forearmed with the *rescripta* and juristic opinions from the handbooks regarding *munera* and public offices, Archippus' *advocatus*, Claudius Eumolpus, might not have postponed his case against Dio Chrysostom again and again. 2167/50.6.2 and 2174/50.12.6, which discuss local offices and *munera* and were quoted previously in the discussion of Julius Piso, might broadly apply here, since Dio was attempting to give back to the city a project that he had pledged to complete. The material eventually collected in the handbooks regarding *munera* grew out of just such messy proceedings as faced Pliny in the Archippus/Dio affair. Finally, the material in the handbooks could potentially have helped an advocate game the *cognitio extra ordinem* system more easily. For example, in devising the suggestion of sacrilege he made to Pliny regarding the burial of Dio's wife and son near Trajan's statue, Eumolpus might have

[283]On this see Berger 1953: 581. *Damnatio in metallum* was seen as a virtual death sentence due to the oppressive nature of the work.

quickly consulted the section on the *lex Iulia maiestatis* (2193/48.4.1) in Ulpian's handbook instead of searching out the ancient republican statute. That would in any case have been a more useful expedient, since by the early second century the evolving application and juristic interpretation of the original statute would have meant that its applicability was different, and no doubt broader, than it has been in its original form.

6. The Case of Apuleius

In the previous discussion of the trial of Apuleius in Chapter Two, we saw that no reference to a particular statute was needed in the *cognitio extra ordinem* procedure beyond the governor's consent. Yet an advocate such as Tannonius Pudens might well have found useful as preparatory reading the discussion in Book 7 of Ulpian's work under the rubrics ***de mathematicis et vaticinatoribus*** (2192/*Coll.* 15.2) and especially *ad legem Corneliam* ***de sicariis et venificiis*** (2194/*Coll.* 1.3 - 2199/48.6.6). Nothing under the surviving rubrics directly parallels Apuleius' case, but the strong social prejudice against astrologers, soothsayers, magicians and the like is clearly demonstrated.

A couple of other passages relate more broadly to the case of Apuleius. Apuleius was careful to have all of his documents in order and properly signed and attested; he even had corroborating witnesses ready should they be needed, just as Saturninus suggests in 49/22.5.22:

> *Curent magistratus cuiusque loci testari volentibus et se ipsos et alios testes vel signatores praebere, quo facilius negotia explicentur et probatio rerum salva sit.*

> Local magistrates should see that they themselves and other witnesses and signatories are available for those who wish to make declaration before witnesses, so that transactions are facilitated and proof of them is available.

Apuleius often flatters Claudius Maximus during the course of his speech and makes us feel that the proconsul is delighted by his performance while scarcely concealing his irritation with Apuleius' adversary, the bumbling Aemilianus. In this he was presciently following the advice of Ulpian in 2150/1.16.9.2:

> *Circa advocatos patientem esse proconsulem oportet, sed cum ingenio, ne contemptibilis videatur, nec adeo dissimulare, si quos causarum cocinnatores vel redemptores deprehendat.*
>
> It behooves a proconsul to be patient with advocates but to do so shrewdly, so as not to seem contemptible; nor should he disguise his feelings if he should detect people who are committing maintenance or champerty.[284]

FROM DISPUTES TO OPINIONS (AND BACK AGAIN)

In the discussion above, I have called attention to many points of correlation that exist between the cases discussed in Chapter Two and the material in the handbooks. These are numerous enough to make it clear that the information in them was indeed pertinent in a general sense to real judicial situations in the provinces. Further, it seems at least possible that the sorts of cases we have examined in Pliny and Apuleius created legal precedents that ultimately found their way into the handbooks and could then have been consulted by a governor or litigant in a similar situation. We are now in a

[284]Maintenance is unauthorized financial or other support by a non-party in a lawsuit, and champerty is the submission of false testimony in return for money. I am here, as elsewhere, quoting Watson's translation.

position to consider in more detail the relationship between the handbooks and the specific legal issues in the provinces. Let us turn to illustrative examples of how this relationship might have developed.

Ep. 10.96/97 provides an excellent example of what may have been a precedent-setting exchange on a topic that affected the entire Empire—the judicial treatment of Christians. Pliny's letter and Trajan's rescript outline an approved procedure for trying Christians, an initial step, as it were. We know that the contents of 10.96/97 circulated (Tertullian paraphrases them, for example), and we may guess that there must have been many more such *rescripta* concerning Christians in individual circulation as well.

People who were affected by these responses were naturally very interested in them, and had good reason to circulate and preserve them. For example, the contents of Pliny's letter and Trajan's reply were known to Tertullian, writing in the early third century. He cites Trajan's rescript, which states that Christians should not be searched out but still tried if brought before the governor, as an example both of that emperor's clemency (*Apol.* 5) and of the cruel perversity of Roman justice toward Christians (*Apol. 2*). Similarly, a letter of Hadrian to the proconsul of Asia, declaring that Christians must be formally charged and tried in court, was preserved and cited by the early Christian apologists Justin Martyr and Melito of Sardis as an example of Hadrian's leniency.[285] In addition to those directly affected, we may guess that governors,

[285]Rives 2009: 120-21. See also Bickerman 1986: 152-71.

and those called upon to advise them, would also have been interested in these sorts of rescripts.

Ultimately, Ulpian collected a number of these rescripts in Book 7 of his *de officio proconsulis* under the rubric *de Christianis* vel sim. (2191/*Div. Inst.* 5.11) and deduced from them general legal principles for the treatment of Christians. We know about this because Lactantius had access to the rescripts in this form and commented quite negatively on Ulpian's efforts: *Domitius de officio proconsulis libro septimo rescripta principum nefaria collegit, ut doceret, quibus poenis affici oporteret eos qui se cultores dei confiterentur*, "Domitius collects in the seventh book of his *de officio proconsulis* the wicked rescripts of the emperors, in order to instruct by what penalties those who confess to be worshipers of God should be punished" (*Div. Inst.* 5.11). Unfortunately, as was mentioned previously, these particular rescripts are lost; however, given Ulpian's procedure of using rescripts to establish a general precedent, in addition to other later rulings, this section likely included Trajan's rescript and the legal procedure which Pliny himself devised and described to Trajan. It seems quite possible that some of Ulpian's material *de Christianis* would have come directly from 10.96/97, thereby creating or at least aiming for a universal application from these specific circumstances by making them more broadly available. One may also see this process at work by consulting Appendix B which lists all the named recipients of rescripts found in Ulpian's handbook. The

Appendix includes references to the specific extracts (found in Appendix A) that demonstrate how Ulpian used rescripts to establish a general precedent.

The flexibility of the *cognitio extra ordinem* procedure, which could admit at the governor's discretion vague accusations of wrongdoing, should also be considered in this process. The insinuation of *maiestas*, proposed by Claudius Eumolpus against Dio Chrysostom, and the vague but stigmatizing charge of *magus* brought against Apuleius, present further examples of the kinds of cases that would have eventually generated enough clarifying imperial rescripts and juristic *responsa* that they could be collected under entire rubrics in Ulpian's handbook, e.g. *ad legem Corneliam* ***de sicariis et veneficiis*** in Book 7. These then would be available to governors or local advocates to help them adjudicate or plan such cases in the future.

A final example of this process may be taken from the issues around the *damnatio in metallum* of Archippus in *Ep.*10.58. The very detailed procedures outlined by Ulpian regarding condemnation *in metallum* versus *in opus metalli* serve to illustrate that there was a need to clarify the distinction between these punishments and to address what should happen to those who absconded from either. This need for clarification may have arisen from the kind of situation presented to Pliny with Archippus. It would have eventually resulted in the sort of prescriptions that we find in the handbooks. The handbooks would then have made available to a local advocate or governor, in concise form, what the

punishments were supposed to be, so that they could either press for them or use them to point out inconsistencies or unfairness in sentencing.

Although we can trace how the legal disputes that we can observe in Pliny and Apuleius eventually resulted in the material we find in the judicial handbooks, what can we say about the role of these handbooks in such disputes? There are two questions: first, whether the authors intended them for this sort of use, and second, whether people so used them.

The traditional view of the activities of the Roman jurists during our period and beyond has been that they created "an abstract body of norms" that was useful to everyone.[286] Peachin summarizes this traditional perspective:

> … the Classical period of Roman law did much to remove the sorts of legal insecurity that had plagued the Republican period. Under the Empire, jurisprudents took over, created an abstract body of norms, and these could then (in principle) be applied with something like regularity in the courts.[287]

In this very important article, Peachin goes on to take issue to some degree with this perspective by arguing that the passivity of the Roman administration, the widespread inaccessibility of legal materials,[288] and above all the ignorance of the general public regarding law all worked against this model of universal justice. It now seems clear that after the Severan period, jurists no longer held positions of political power within the imperial administration. With them went

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[286]Frier 1985: 286, quoted by Peachin 2001: 109.

[287]Peachin 2001: 109.

[288]On this see Kantor 2009: 256 and deBlois 2001: 136-53.

their influence, and the political and military crises of the third century in the years following the great outpouring of juristic treatises brought it about that these works were in fact not so readily available.[289]

Further and quite importantly, there was no compulsion on Roman officials to follow the opinions of the jurists. Peachin cites ten examples from the *Digest* in which the emperor either disregards or overrules the opinion of the jurists on his *consilium*.[290] There is no reason to think that the governor would have behaved any differently in his own court, and, in fact, in the case of Flavius Archippus (10.58/59/60), Trajan and Pliny completely ignore the juristic perspective that Archippus was a condemned criminal and escaped felon in favor of the documents attesting to his character. Instead of returning Archippus to the mines or punishing him more harshly, as Ulpian later suggested (2241/48.19.8.6), they release him. Of course, this is no more startling than the fact that Archippus was convicted of a crime serious enough to earn him *damnatio in metallum* and yet had managed, directly under the gaze of his fellow citizens, not to serve his sentence. This again suggests that political patronage and influence were sometimes more powerful than the Roman provincial legal system, or perhaps more accurately, that the tribunal of the governor and Roman law were just another tool which prominent provincials could use to settle their political grudges.

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[289]deBlois 2001: 136-53.

[290]Peachin 2001: 113-18.

Peachin argues persuasively that the legal norms created by the jurists were never intended to create universal justice for the mass of Roman citizens, but were instead composed with the legal concerns of the aristocracy in mind, and further, that a jurist like Ulpian in composing and codifying law never had the expectation that he was actually making law for the ruling class:

> In sum when a Roman sat down to write a treatise on the law, he appears most usually to have been focusing principally on a small, elite group; moreover a group which itself could not absolutely expect that the regulations thus formulated would always govern its affairs. Thus, when (say) Ulpian wrote, he must have been aware of these (in our terms) limitations on what he was doing. And given that, he will not, I think, have presumed himself simply and purely to be "making the law" for the Roman world—in spite of the fact that we now read and employ this literature as if that had been the case.[291]

In this view, the work of Ulpian and other prominent jurists focused on creating or describing the legal framework on which Roman justice and governance rested rather than on imposing rules and regulations, particularly upon the ruling class. Thus, Ulpian's description of the duties of a proconsul, for example, was intended to be just that, a legal description of his *officium*, not a regulatory manual. Or, to put this another way: Ulpian's intention (and that of the great jurists in general) was more theoretical than practical.

Yet while this may well have been the view of the great jurists toward their work, the view of provincial elites, and of the local legal specialists who served them, may have been very different. In Chapter Two of this study we observed the near rapaciousness with which local litigants in Bithynia-Pontus

[291]Peachin 2001: 119-20.

grasped at any sort of pretext to drag their opponents into the governor's court. We further saw how they manipulated the flexibility of the *cognitio extra ordinem* procedure to their advantage. In this sort of litigious climate, legal adversaries and their advocates were keen to latch onto anything that might help them prevail, and the juristic opinions and rescripts contained in the handbooks could have provided much ammunition with which to wage war against each other.

Given this no doubt intense interest among provincial elites in anything that might give them an edge over their opponents, we may well wonder whether they may have seen possibilities in texts that their authors had not really considered. Almost seventy years ago, Marcel Durry made this suggestion about Pliny's own letters to Trajan:

> En tous cas les rescrits de Trajan disent le droit avec précision et j'y vois la raison majeure de la publication. Elle fut faite non seulement par flatterie à la mémoire de Pline et en hommmage à son talent d'épistolier, mais parce que cette double correspondence constituait un recueil de jurisprudence administrative, auquel Pline lui-même avait promis l'éternité. [292]

This notion was flatly rejected without comment by Sherwin-White in his commentary.[293]

I would agree that the creation of a compendium of provincial law was not the purpose of the composition of Book 10 in the early second century, whether

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[292]Durry 1947: v. 4, ix. To support his claim, Durry quotes Pliny's own statement in *Ep.* 112: *Nam quod in perpetuum mansurum est a te constitui decet, cuius factis dictisque debetur aeternitas*, "For it is appropriate that those things which will remain in place permanently should be decided by you whose words and deeds are worthy of eternal renown."

[293]Sherwin-White 1966: 535.

the compilation and publication of the book was due to Pliny himself or a later admirer. Yet it seems at least feasible that over time, especially as the authority of imperial *responsa* gained the absolute force of law, it may have been used in just such a way. As we have seen above, Book 10 contains a great deal of precedent-setting legal material, some of which found its way into Ulpian's handbook. Moreover, it was composed by a renowned author, advocate and a member of the most elite governing circles of the Empire, whose name carried *auctoritas*. Given the penchant of the Bithynians and other provincials for litigation, we can easily imagine that they appreciated Pliny's "model correspondence," to use Stadter's phrase, even more for providing access to important legal material.[294] As I mentioned above, the legal aspects of *Ep.* 10.96/97 were certainly known to Tertullian (*Apol.* 2) and other early Christian writers, just as Lactantius mentions the rescripts concerning Christians, collected in Book 7 of Ulpian's *de officio proconsulis*. This activity demonstrates that those with a "need to know" on both sides of a legal issue sought to inform themselves and no doubt took advantage of whatever material was available. Book 10 then might possibly be seen as a sort of informal and even accidental forerunner to the handbooks and other early attempts to codify imperial rescripts for wider circulation—and quite importantly, as a legal resource that was actually used to practical ends.

[294]Stadter 2006: 62.

EVIDENCE FOR USE OF THE HANDBOOKS

Though we can demonstrate that the legal material in Pliny was used by Christian writers to practical ends and that this same material likely found its way into Ulpian's handbook, thus far the evidence for the practical utility of the handbooks themselves has been speculative. The question remains whether there is any evidence for the actual use of any of the handbooks by a governor or litigant in such a way as I have suggested. The answer, happily, is "yes." There is one known instance of these handbooks being used in a hearing-- a fragmentary third-century inscription from the Greek city of Ephesus in which Ulpian's handbook is mentioned by name. The inscription is a letter likely from the proconsul to some Ephesians inquiring into the προεδρία or special privileges of their city. The governor instructs them to collect the laws pertaining to their προεδρία from Ulpian's works *de officiis* (ἐκ τῶν παλαιῶν νόμων ἐν τοῖς Δη ὀφφι[κιις παρ᾽ ?] Οὐλπιανῷ).[295] According to Kantor, this reference to juristic literature is unique in the surviving epigraphic record.[296]

It should be noted that the inscription is broken off at a critical point after ὀφφι, and there is some disagreement among those who have studied it as to the missing words/letters in the lacuna; however, they all agree that one or more

[295]For the complete text see Keil–Maresch 1960; see also *AE* 1966, 436. For a thorough discussion of the entire inscription with a copy of the text (including a photograph of the stone itself) and a suggested reconstruction of the missing letters in the lacuna, see Marotta 2004: 37-79. See also Kantor (2009: 250-56)

[296]Kantor 2009: 255.

work(s) *de officio* of Ulpian are meant.[297] Happily for the Ephesians, their city is mentioned in his *de officio proconsulis* at the end of 2242 as the customary landing-place for the governor upon his arrival in the province, something that was definitely among their προεδρία .[298] Perhaps the governor meant to help them with this suggestion, but perhaps he was also chiding them for not doing their homework before appearing before him. Thus, not only litigious provincials but also overworked governors might have appreciated the handbooks as a useful resource in practical matters. In any case, the inscription does demonstrate that Ulpian's works *de officio* were known and being used in the third century, not long after their production.[299] Interestingly, there is no suggestion in the inscription as to how or where these Ephesians were to obtain copies of Ulpian's work, but perhaps some evidence to help answer this question may be found in Pliny and Apuleius.[300]

LEGAL PROFESSIONALS AND THEIR USE OF THE HANDBOOKS

In each of the cases we examined from Pliny's *Epistulae*, it is likely that the litigants employed the services of professional advocates to assist them in pleading before the governor. We know that Archippus employed the services of

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[297]For the variant readings and discussion of the merits of each, see Kantor 2009: 251-52.

[298]For the relevance of this citation and further information on the privileges of Ephesus, see Kantor 2009: 250-51.

[299]We can also see that Ulpian's handbook was in the hands of the fourth-century author of the *Collatio*, who was likely some sort of legal professional (see p.19 above).

[300]Marotta (2004: 41-42) suggests a copy could have been deposited in the provincial archives. Ephesus was also known for its libraries where a copy may have been deposited. See Nicholls' (2013) chapter on libraries in the Roman Empire.

Claudius Eumolpus, and that the Amiseni appointed an *ecdicus* to seek remuneration from Julius Piso. We know from Book 2 of Ulpian's handbook (2144/1.16.6) that Furia Prima would have had an advocate, and it seems likely that most of the other litigants would likewise have sought legal advice from a local *advocatus* or other person with legal training and experience with the governor's court.

Connolly has listed three categories of such legal professionals to whom a litigant might turn: jurists or *periti legis*, *advocati* and *tabelliones*.[301] Apparently even law students (*studiosi iuris*) sometimes pled cases or searched out documents, since Ulpian says in 2246/48.19.9.8.4 that a governor can ban them from his court.[302] *Periti legis* such as an Ulpian or even a Macer were above the level and social status of most, and local professional *advocati*, such as Tannonius Pudens or Eumolpus, were also expensive, though not necessarily well trained, and often dependent "on handbooks and memory."[303]

We know that *tabelliones* were trained in the drafting of legal documents of various kinds, such as wills, petitions and the like. However, Connolly suggests that this description of their duties is too narrow. She believes they also offered legal advice, arguing that they were, in fact, the legal experts most frequently consulted by the average person because of their comparatively low

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[301]Connolly 2010: 17.

[302]See p. 158 for the quotation of 2246.

[303]On an advocate's ignorance of the law, see Connolly 2010: 17-18. She does not state what sort of "handbooks" she means.

fees.[304] It seems very likely they also had access to provincial archives, given that documents were their main area of expertise.

In a recent study of these local *advocati* and *tabelliones*, known in the Greek East as νομικοί, "learned in the law," or πραγματικοί, "draftsmen," Georgy Kantor has suggested that a primary part of their services was ferreting out legal documents and helping clients navigate the governor's court.[305] One of the pieces of evidence which he cites in support is the fact that in Book 10 of Ulpian's *de officio proconsulis* (2246/48.19.9.1-8) banishment from the archives or pleading before the governor's court is among the punishments a local advocate or *tabellio* can suffer:

> *Potest et ita interdici cui, ne apud tribunal praesidis postulet, …. Solet autem ita vel iuris studiosis interdici vel advocatis vel tabellionibus sive pragmaticis. Solet et ita interdici, ne instrumenta omnino forment nive libellos concipiant vel testationes consignent. Solet et sic, ne eo loci sedeant, quo in publico instrumenta deponuntur, archivo forte vel grammatophylacio.*
>
> He can again be forbidden to plead before the governor's court…. It is customary [as a penalty], however, to prohibit in this way law students, advocates and those who draw up documents or draftsmen. They are customarily forbidden to frame any sort of legal documents, to draw up petitions or to seal depositions. It is also customary [to forbid them] to sit in any place where legal documents are publicly deposited, for example a public record office or registry.[306]

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[304]Connolly 2010: 18 and 213n8.

[305] In a forthcoming (Aug. 2016) chapter for *The Oxford Handbook of Roman Law and Society*, Peachin equates the Greek νομικοί with *iuris prudentes* and refers to *adovcati* as σύνδικοι or ῥήτορες. However, he notes that none of these terms was used with great accuracy in primary sources. I would like to thank Prof. Peachin for sharing this article with me.

[306]Kantor (2009: 262) has also noted the importance of this citation.

The punitive measures outlined in this citation make it clear that access to archives and traffic in documents were essential elements of the work of *tabelliones* and other local legal experts.

While members of the provincial elite may have been the ones who most frequently employed the services of these specialists, they may not have been the only ones. Just as eminent jurists sometimes sat on the *consilium* of the emperor, so too these local experts may sometimes have been a part of the governor's *consilium.* Kantor points to an inscription from Smyrna which "attests a certain M. Aristonicus Timocrates, who was head of the Mouseion at Smyrna because of his legal knowledge and at the same time served as an assessor in the *consilium* of the proconsul of Asia."[307] Such men might have assisted a Claudius Maximus or Pliny in finding or verifying the authenticity of documents presented to them.[308] Indeed, such a legal advisor might also have pointed out the προεδρία found in Ulpian's handbook to the proconsul of Asia, who passed the information along to the Ephesians.

With the functions of legal advisors in mind and with the information from the inscription from Ephesus, which is roughly in our time period, it seems quite possible that these local experts could have found access to the *rescripta* and legal opinions in the handbooks *de officio proconsulis/praesidis* and other juristic sources, when these would help them prevail in the governor's court. So,

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[307]Kantor 2009: 264.

[308]In addition to the letters discussed here, Kantor mentions *Ep.* 10.72 in which a local expert on his *consilium* may have pointed out to Pliny the *SC* regarding foundlings. Perhaps Macer was a jurisconsult of this type, for which see p. 35 above.

again, perhaps the Roman governor writing to the Ephesians was not only assisting them but also suggesting that they or their advocates ought to have known where to find out about their προεδρία before appearing before him.

Concluding Thoughts

Although the jurisprudents who composed these four handbooks *de officio proconsulis/praesidis* might have intended them to belong more to the realm of legal theory, we have seen good reason to think that some of the readers may have found them to have practical utility. The many points of relevance, even from the small number of examples from Pliny and Apuleius discussed above, suggest that this material could have been useful both to the governor and to litigants; moreover, we have epigraphic evidence that in at least one recorded instance the handbook of Ulpian was put to practical use. Yet given that Roman government and provincial administration were more reactive than proactive, it seems unlikely that the average Roman governor would have used these handbooks or other legal works as any sort of manual to regulate his judicial or administrative affairs or even consulted them unless a specific point was brought to his attention. This seems especially likely given the existence of four (surviving) handbooks of uneven quality, authority and comprehensiveness, all of which point toward a different sort of audience.

It seems far more likely to the extent that they had practical utility (at least from our perspective) that they would have been employed by various sorts of local legal professionals, be they styled *advocati*, *tabelliones*, *studiosi iuris*, πραγματικοί or νομικοί. Although as we have seen there was no legal requirement

beyond the governor's consent to initiate a case under the *cognitio extra ordinem* procedure, local advocates might well have used these handbooks to plan and shape their cases: as preparatory reading for a trial, possible citation in a judicial setting, or even as a textbook or quick reference book on the duties of a governor.

CONCLUSION

The fragmentary state of the handbooks *de officio proconsulis/praesidis* and the paucity of examples of their use mean that any statements about the original audience for these works and the intentions of their authors are at best only tentative and provisional. We can say that the contents of each work treat the governor's civil and capital jurisdiction and that there is certainly some overlap in the sorts of topics discussed. Ulpian's work is the most comprehensive, Macer's treatise reads more like a textbook reliant on the authority of others, and the works of Paul and Saturninus are somewhere in between. While the contents of these handbooks seem pertinent to the needs of the governor or litigants, we are left wondering who might have originally consulted them and to what end.

In an effort to gain some understanding of the original audience and potential practical utility of these four handbooks, we examined a governor at work in Pliny's *Epistulae* and an advocate at work in the *Apologia* of Apuleius. In so doing we observed the *cognitio extra ordinem* procedure in process from the perspective of both the governor and litigants and saw that litigants and the advocates serving them on both sides of the Empire were quite eager to employ any means at their disposal to prevail in court. They frequently manipulated the flexibility of the *cognitio extra ordinem* procedure to their advantage by

ignoring the accusations of their opponents or by suggesting vague wrongdoing rather than leveling specific charges. They also searched out and presented numerous legal and personal documents in an effort to sway or distract the governor, often with great success.

Having surveyed the contents of the handbooks and examined a number of *cognitiones extra ordinem* in process, we could finally attempt to answer the questions about the audience and utility of the handbooks by comparing these two bodies of material. A comparison of the contents of the four handbooks with the judicial activities we examined in Pliny and Apuleius revealed many points of correlation. We were even able to trace a few possible instances in which precedent-setting rescripts may have ultimately found their way into Ulpian's handbook; we examined one instance in which that same handbook was actually used in a proceeding. While the original aim of the jurists in composing these handbooks was likely more theoretical than practical, both the governor and local advocates could have found them useful in actual proceedings. Yet considering the reactive nature of Roman provincial administration and the proactive attitude of litigants and the advocates representing them, it seems likely that the latter group would have more frequently consulted the handbooks in order to gain the advantage in the governor's court that they so desperately sought, while the governor and his legal advisors may have occasionally consulted them in response to evidence or inquiry but certainly not to regulate their own activities.

APPENDIX A: LATIN TEXT OF THE HANDBOOKS WITH AN ENGLISH TRANSLATION

Due to its size, Appendix A is available as a supplementary file.

APPENDIX B: TABLE OF *RESCRIPTA* IN ULPIAN'S *DE OFFICIO PROCONSULIS*

The following table contains rescripts issued to named petitioners only. They are divided into four groups by status: 1) Governors/Magistrates, 2) Possible Governors/Magistrates, 3) Private Citizens or Groups, 4) Persons of Unknown Status. Documentation of status is based on *Prosopographia Imperii Romani*, 2nd ed. and/or confirmation by Ulpian himself.

Group I: Known Governors (Confirmed by Ulpian and/or *PIR*)			
Lenel /*PIR*² #	**Name**	**Emperor**	**Province/City**
2157/ I 367	Julius Julianus	Severus /Caracalla	Achaea
2161/ H 40	L. Hedius Rufus Lollianus Avitus	M. Aurelius/L. Verus	Bithynia
2168/ V 369	Venidius Rufus	Unknown	Cilicia
2184/ I 4	Julius Candidus	Hadrian/Antoninus Pius	Achaea
2185/ S 131	Salvius Carus	Hadrian	Crete
2189/A 107/A 625	Adsidius Severus (likely Annidius Severus, consul)	Trajan	Rome (status at time of receipt uncertain)
2188 M 619	Minicius Natalis	Trajan	Pannonia
2192/ P 8	Pacatus	Antoninus Pius	Lugdunum
2209/ C 990	Ti. Claudius Quartinus	Hadrian	Uncertain
2209/ C 1421/22/23	Cornelius Proculus Messalinus	M. Aurelius/L. Verus	Lycia or Pannonia Sup. or Asia
2212/ V 921	Voconius Saxa	M. Aurelius/L. Verus	Africa
2213/ A 214	Aelius Marcianius	Antoninus Pius	Baetica
2229/ T 71	Terentius Gentianus	Hadrian	Macedonia
2241/42/ F 27	Fabius Cilo (as Urban Prefect)	Severus	Rome
2243/ M 59	Maecius Probus	Severus/Caracalla	Hispania
2251/ C 313	Calpurnius Rufus	Hadrian	Achaea

Group II. Persons assumed to have been governors or magistrates by *PIR* but not confirmed by an ancient source.			
Lenel / *PIR*² #	**Name**	**Emperor**	**Province/City**
2142/ A 392	Aufidius Severianus (context strongly suggests governor)	Serverus/Caracalla	Unknown
2158/ I 32	Instius Celer	Antoninus Pius	Unknown
2163/ R 249	Rutilius Lupus	M. Aurelius/L. Verus	Unknown
2165/ L 50	Laelius Bassus	Severus/Caracalla	Unknown
2184/ S 152	Salvius Valens	Antoninus Pius	Unknown
2186/ P 817	Pontius Proculus	Unknown	Unknown
2189/ I 323	Julius Fronto	Trajan	Unknown
2197/ E 34	Egnatius Taurinus	Hadrian	Baetica
2199/ G 160	Geminus	Antoninus Pius	Unknown
2209/ S 382	Sennius Sabinus	Hadrian	Unknown
2209/ M 705	Mummius Lollianus	Trajan	Unknown
2209/ T 200	Lucius Tiberianus	Unknown	Unknown
2223/ A 410	Aemilius Tiro	M. Aurelius/L. Verus	Unknown
2249/ S 139	Salvius Marcianus	Antoninus Pius	Unknown
2250/ A 987	Aquilius Bradua (Perhaps M. Metilius Bradua, cos. 108)	Hadrian	Unknown

Group III: Persons Known To Be Private Citizens (Not in *PIR*)			
Lenel #	**Name**	**Emperor**	**Province/City**
2166	Julius Sosianus	Unknown	Unknown
2166	Aelius Firmus	Unknown	Unknown
2166	Antonius Clarus	Unknown	Unknown
2169	Claudius Collatus	Severus/Caracalla	Unknown
2187	Inhabitants of Antioch	Antoninus Pius	Syria
2199	Domitius Silvanus	Antoninus Pius	Unknown
2218	Council of Baetica	Hadrian	Baetica

Group IV: Persons of Unknown Status (Not in *PIR*)			
Lenel #	**Name**	**Emperor**	**Province**
2163	Aufidius Herennianus	M. Aurelius/L. Verus	Unknown
2209	Lelianus Longinus	M. Aurelius/L. Verus	Unknown
2210	Calpurnius Celerianus	Hadrian	Unknown
2214	Alfius Julius	Antoninus Pius	Unknown

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