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# The Bar Kokhba War Reconsidered

New Perspectives on the Second  
Jewish Revolt against Rome

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Negotiating Difference:  
Genital Mutilation in Roman Slave Law  
and the History of the Bar Kokhba Revolt\*

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*Introduction*

Modern historians have posited a connection between the suppression of the Bar Kokhba revolt and the restrictions placed on the practice of Jewish circumcision in second century Roman legislation. In this paper, I argue, however, that this linkage has served to distort both the role of the Roman imperial administration in the conflict and the circumstances under which this primary sign of Jewish difference<sup>1</sup> emerged within Roman legal discourse as a juridically defined category. While it is certainly the case that this period saw an intensification of legal activity surrounding this practice, there is little, if any, evidence to support the notion that the Roman authorities waded into this highly contested terrain with the intention of altering the long-sanctioned customs of their Jewish subjects. I believe, instead, that this legal development is fundamentally un-

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\* I would like to thank Peter Brown, Christopher Jones, Robert Kaster, and Peter Schäfer as well as all those who participated in the Bar Kokhba conference at Princeton University in November 2001 for helping me steer clear of the myriad pitfalls scattered throughout the terrain of Roman legislative and administrative history. If I have nonetheless proceeded to fall into any of them, the responsibility is all mine.

<sup>1</sup> Tacitus, *Histories* 5.5.1–2 explicitly states that the rationale behind Jewish circumcision practice is to mark their difference: “They (the Jews) instituted circumcision of the genitalia so that they could be recognized by their difference” (Jackson LCL). On circumcision as a “typically Jewish” custom, see Zdzislaw Zmygrider-Konpka, “Les Romains et la Circoncision des Juifs,” *Eos* 33 (1931): 334–50; Peter Schäfer, *Judeophobia: Attitudes towards the Jewish in the Ancient World* (Cambridge: Harvard University Press, 1997), 96–102. Shaye Cohen, however, rightly warns that circumcision hardly constituted an infallible sign of Jewish identity (Shaye J. D. Cohen, *The Beginnings of Jewishness* [Berkeley: University of California Press, 1999], 39–49). On the wide geographic scope of the practice, see Jacob M. Sasson, “Circumcision in the Ancient Near East,” *JBL* 85 (1966): 473–6.

related to the complex dynamics of brutal armed conflict between Rome and the population of Judaea. Rather than analyzing it within the framework of religious and national conflict, we ought to view imperial legislation regarding circumcision within the context of the significant innovations that were taking place within Roman slave law at this time, in particular the novel legal protections being offered to slaves against all forms of genital mutilation.

Previous studies have often based their reconstruction of the process whereby circumcision came to be legislated by the Roman authorities on two erroneous assumptions. First, they follow the nearly unanimous consensus that Hadrian put into effect a ban on circumcision which is now lost to us.<sup>2</sup> Second, many scholars continue to believe that Rabbinic sources corroborate the historicity of this Hadrianic legislation, which

<sup>2</sup> The current *opinio communis* is articulated most clearly in Cohen, *Beginnings*, 46: "The situation (vis-à-vis circumcision) will have changed markedly during the principate of Hadrian (117–137 CE). Precisely when and why the Emperor Hadrian issued a general prohibition of circumcision, is debated, but that he did so is beyond dispute. In the Roman-Jewish war which erupted in the wake of this prohibition (commonly known as the war of Bar-Kokhba or Bar Kosba), circumcision was understood by both sides to be a marker of Jewishness; some Jews tried to remove it through epispasm. Hadrian's successor, the Emperor Antoninus Pius, issued a rescript permitting the Jews to circumcise their sons; that is, the *general prohibition* remained in place but the Jews were granted an exemption" (Italics mine). This position, although here cautiously formulated, follows a venerable line of less circumspect scholarship, most notably: Emil Schürer, *The History of the Jewish People in the Age of Jesus Christ, 175 B. C.–A. D. 135* (rev. and ed. G. Vermes and F. Millar; Edinburgh: T & T Clark Ltd., 1973), 1.536–40. Saul Lieberman, "The Martyrs of Caesarea," *Annuaire de l'Institut de Philologie et d'Histoire Orientales et Slaves* 7 (1939–1944): 395–446, esp. 423–24; idem, "Religious Persecution of the Jews," in *Salo Wittmayer Baron Jubilee Volume on the Occasion of his Eightieth Birthday* (Jerusalem: The American Academy of Jewish Research, 1974), 213–45, esp. 214; repr. in *The Bar-Kokhba Revolt* (ed. A. Oppenheimer; Jerusalem: The Zalman Shazar Center, 1980), 205–37 (Hebrew). E. Mary Smallwood, "The Legislation of Hadrian and Antoninus Pius against Circumcision," *Latomus* 18 (1959): 334–47; idem, "The Legislation of Hadrian and Antoninus Pius against Circumcision: Addendum," *Latomus* 20 (1961): 93–6; both *Latomus* articles appeared together in Hebrew translation as "The Legislation of Hadrian and Antoninus Pius Banning Circumcision," in *The Bar-Kokhba Revolt* (ed. A. Oppenheimer; Jerusalem: The Zalman Shazar Center, 1980), 71–83 (Hebrew); idem, *The Jews under Roman Rule: From Pompey to Diocletian* (Leiden: Brill, 1981), 428–31. Moshe David Herr, "Persecutions and Martyrdom in Hadrian's Days," *Scripta Hierosolymitana* 23 (1972): 85–125, esp. 93–4; idem, "The Causes of the Bar Kokhba War," *Zion* 43 (1978): 1–11; repr. in *The Bar-Kokhba Revolt* (ed. A. Oppenheimer; Jerusalem: The Zalman Shazar Center, 1980), 57–67 (Hebrew). Alfredo M. Rabello, "The Ban on Circumcision as a Cause of Bar Kokhba's Rebellion," *Israel Law Review* 29 (1995): 189–214; idem, "The Edict on Circumcision as a Factor in the Bar-Kokhva Revolt," in *The Bar-Kokhba Revolt: New Approaches* (ed. A. Oppenheimer and U. Rappaport; Jerusalem: Yad Yitzhak Ben-Zvi, 1984), 37–41 (Hebrew). Amnon Linder, *The Jews in Roman Imperial Legislation* (Detroit: Wayne State University Press, 1987), 101.

they view as an important component of the persecution of the Jews during the Bar Kokhba revolt.<sup>3</sup> Certainly, the notion that it was Hadrian's ban on circumcision that led directly to the outbreak of open rebellion has been largely undermined in recent decades.<sup>4</sup> I wish to take this insight a step further. I take it as methodologically preferable to make convincing use of available data rather than to produce historical reconstructions that are entirely dependent on the positing of no longer extant sources.

My own account presumes that no Hadrianic prohibition of circumcision ever existed in any form—neither as an empire-wide prohibition nor as one selectively applied to the Jews, neither before the outbreak of the war nor in its wake. In addition, I maintain that there is absolutely no evidence that the legal status of circumcision was addressed in Roman imperial legislation before the time of Hadrian's successor Antoninus Pius (138–161 CE), who first promulgated a rescript addressing the precise conditions under which the practice of Jewish circumcision could be carried out.<sup>5</sup> Finally, I suggest that, when Hadrian's successor did finally legislate Jewish circumcision, he did so as part of a general trend within imperial legislative policy to address the maltreatment of slaves. Mapping out the impact of Roman legal and cultural norms on Jewish circumcision is made all the more difficult because this process has become inextricably bound up with, and often subordinated to, the political and military history of this period. By severing the legal developments and administrative structures surrounding the practice of circumcision from the contentious questions concerning the causes and nature of the Bar-Kokhba revolt, I hope to show how the incorporation of Jewish circum-

<sup>3</sup> See especially Lieberman, "Religious Persecution," 214–5; Herr, "Persecutions and Martyrdom," 85–102; Rabello, "The Ban on Circumcision," 195–201; idem, "The Edict on Circumcision," 41–45. However, see the revisionist reading of the Rabbinic evidence for the ban on circumcision in Peter Schäfer, *Der Bar Kokhba-Aufstand: Studien zum zweiten jüdischen Krieg gegen Rom* (Tübingen: Mohr Siebeck, 1981), 43–50; idem, "The Causes of the Bar Kokhba Revolt," in *Studies in Aggadah, Targum and Jewish Liturgy in Memory of Joseph Heinemann* (ed. J. Petuckowski and E. Fleischer; Jerusalem: Magnes, 1981), 74–94, esp. 88–92; idem, "The Bar Kokhba Revolt and Circumcision: Historical Evidence and Modern Apologetics," in *Jüdische Geschichte in hellenistisch-römischer Zeit* (ed. A. Oppenheimer; München: Oldenbourg, 1999), 119–32.

<sup>4</sup> See especially Schäfer, *Aufstand*, 38–50; idem, "Causes," 85–88.

<sup>5</sup> This position has been argued most forcefully in Joseph Geiger, "The Ban of Circumcision and the Bar-Kokhva Revolt," *Zion* 41 (1976): 139–147; repr. in *The Bar-Kokhba Revolt* (ed. A. Oppenheimer; Jerusalem: The Zalman Shazar Center, 1980), 85–93 (Hebrew). Others have likewise questioned the historicity of a general ban on circumcision, most notably David Rokeah, "Comments on the Revolt of Bar Kokhba," *Tarbiz* 35 (1965–1966): 122–31; repr. in *The Bar-Kokhba Revolt* (ed. A. Oppenheimer; Jerusalem: The Zalman Shazar Center, 1980), 297–306 (Hebrew); Hugo Mantel, "The Causes of the Bar Kokhba Revolt," *JQR* 58 (1968): 231–6; Schäfer, *Judeophobia*, 103–5.

cision into long-standing legal restrictions on castration served paradoxically both to protect and to delimit the practice.

### I. Regulating Castration: The Limits of Hadrianic Legislation

By the end of the first century CE, the increasing rate of castration performed within the boundaries of the empire and the concomitant growth in trade in eunuchs had come under imperial scrutiny.<sup>6</sup> A variety of sources attest to the newly promulgated legislation against castration under Domitian and Nerva and the tightening restrictions on the general treatment of slaves.<sup>7</sup> Suetonius, in his life of Domitian, reports that "he prohibited the castration of males, and he lowered the price of the eunuchs who remained in the hands of slave-dealers."<sup>8</sup> This report is corroborated by the later historians Ammianus Marcellinus<sup>9</sup> and Dio Cassius<sup>10</sup> and is likewise refracted through the witticisms of Martial<sup>11</sup> and

<sup>6</sup> On the growing political and social importance of castrated slaves in the Roman Empire, see the classic studies of Keith Hopkins, "The Political Power of Eunuchs," in *Conquerors and Slaves* (Cambridge: Cambridge University Press, 1978), 172–96; idem, "Eunuchs in Politics in the Later Roman Empire," *Proceedings of the Cambridge Philological Society* 189 (1963): 62–80. See also Walter Stevenson, "The Rise of Eunuchs in Greco-Roman Antiquity," *Journal of the History of Sexuality* 5 (1995): 495–511; and Shaun Tougher, "Byzantine Eunuchs: An Overview, With Special Reference to their Creation and Origin," in *Women, Men and Eunuchs: Gender in Byzantium* (ed. L. James. New York: Routledge, 1997), 168–170. On the increasing visibility of castrated priests in foreign cults at Rome, see most notably Lynn Roller, "The Ideology of the Eunuch Priest," in *Gender and the Body in the Ancient Mediterranean* (ed. M. Wyke; Oxford: Blackwell, 1998), 118–35; Mary Beard, "The Roman and the Foreign: The Cult of the 'Great Mother' in Imperial Rome," in *Shamanism, History, and the State* (ed. N. Thomas and C. Humphrey; Ann Arbor: University of Michigan Press, 1994), 164–90; Gabriel Sanders, "Kybele und Attis," in *Die orientalischen Religionen im Römerreich* (ed. M. Vermaseren; Leiden: Brill, 1981), 264–97.

<sup>7</sup> For a comprehensive treatment of this topic, see Alan Watson, *Roman Slave Law* (Baltimore: The Johns Hopkins University Press, 1987).

<sup>8</sup> Suetonius, *Domitian* 7.1: *Castrari mares vetuit; spadonum, qui residui apud manganones erant, pretia moderatus est* (Rolfe LCL).

<sup>9</sup> Ammianus Marcellinus 18.4.5: "Although, unlike his father and his brother, he drenched the memory of his name with indelible detestation, yet he won distinction by a most highly approved law, by which he had under heavy penalties forbidden anyone within the bounds of the Roman jurisdiction to castrate a boy (*castraret quisquam puerum*)" (Rolfe LCL).

<sup>10</sup> Dio Cassius 67.2.3: "Accordingly, though he (Domitian) himself entertained a passion for a eunuch named Earinus, nevertheless, since Titus also had shown great fondness for eunuchs (*περὶ τοὺς ἐκτομίας*), in order to insult his memory, he forbade that any person in the Roman Empire should thereafter be castrated (*μηδένα ἐν τῇ τῶν Ῥωμαίων ἀρχῇ ἐκτέμνεσθαι*)" (Cary LCL).

<sup>11</sup> Martial 6.2: *Nec spado iam nec moechus erit te praeside quisquam at prius (o mores!) et spado moechus est; cf. Martial, 9.5(6).*

the poetry of Statius.<sup>12</sup> Concerning Nerva, Dio Cassius reports that "among (Nerva's) various laws were those prohibiting the castration of any man (*περὶ τοῦ μὴ εὐνουχίζεσθαι τινα*)."<sup>13</sup> This anti-castration legislation is in fact preserved in Justinian's *Digest* in a section from Venuleius Saturninus' *Duties of the Proconsul*, book 1: "It is provided by a *senatus consultum* given in the consulship of Neratius Priscus and Annus Verus that whoever has his slave castrated is fined half his property."<sup>14</sup> This *senatus consultum* no doubt reflected the newly acquired law-making powers of the Senate characteristic of the early Empire.<sup>15</sup>

Although regarded as general articulations of the emperor's will in close association with the Senate, *senatus consulta* reached the zenith of their legislative force only under Hadrian's passion for legal uniformity.<sup>16</sup> It is perhaps for this reason that Hadrian perceived the need to reiterate the emperor's legal position on castration. This legislation comes down to us in the form of a rescript, or negotiated appeal and response, recorded in Justinian, *Digest* 48.8.4.2 in a passage from book 7 of Ulpian's *Duties of Proconsul* (*fl.* 213–217 CE<sup>17</sup>):

The same deified Hadrian wrote in a rescript: "It has been determined that no one should make eunuchs and that those who are found guilty of this crime are to be liable to the penalty of the *lex Cornelia*, and their goods must deservedly be forfeit to my imperial treasury. Slaves, however, who castrate others are to be punished with the extreme penalty (i.e. death). If those who are liable on this charge fail to appear in court, sentence is to be pronounced in their absence as if they were liable under the *lex Cornelia*. It is certain that if those who have suffered this outrage announce the fact, the provincial governor must give those who have lost their manhood a hearing; for no one should castrate another, freeman or slave, willing or unwilling, nor should anyone voluntarily offer himself for castration. Should anyone act in defiance of my edict, the doctor performing the operation shall suffer a capital penalty, as shall anyone who voluntarily offered himself for surgery."<sup>18</sup>

<sup>12</sup> Statius, *Silvae* 4.3.13: *Qui fortem vetat interire sexum et censor prohibet mares adultos pulchrae supplicium timere formae.*

<sup>13</sup> Dio Cassius 68.2.4 (Cary LCL).

<sup>14</sup> *Digest* 48.8.6: *Is, qui servum castrandum tradiderit, pro parte dimidia bonorum multatur, ex senatus consulto, quod Neratio Prisco et Annio Vero consulibus factum est.* Neratius Priscus and Annus Verus were consuls during the reign of Nerva. Unless otherwise noted, the Latin text and all translations of the *Digest* are taken from Theodor Mommsen, Paul Krueger, and Alan Watson, eds. and trans., *The Digest of Justinian* (4 vols.; Philadelphia: University of Pennsylvania Press, 1985).

<sup>15</sup> Richard J. A. Taibert, *The Senate of Imperial Rome* (Princeton: Princeton University Press, 1984), 431ff.

<sup>16</sup> Andrew Borkowski, *Textbook on Roman Law* (2d ed.; London: Blackstone Press, 1994), 40.

<sup>17</sup> Borkowski, *Handbook*, 49–50.

<sup>18</sup> *Digest* 48.8.4.2: *Idem divus Hadrianus rescripsit: constitutum quidem est, ne spadones fierent, eos autem, qui hoc crimine arguerentur, Corneliae legis poena teneri eor-*

This legally-binding statement of unspecified date tightened the laws against castration by charging that anyone who had carried out such an operation should be punished under the *Lex Cornelia de sicariis et veneficis*. The crime was to count as murder, for which the penalty was exile and confiscation in the case of *honestiores*, or death in the case of *humiliores*.<sup>19</sup> Another passage in the same chapter of the *Digest*, this time cited from Marcian's *Institutes*, reports that the inclusion of castration legislation under the *lex Cornelia* was put into effect by a *senatus consultum*: "Again, anyone who castrates a man for lust or for gain is by *senatus consultum* subject to the penalty of *lex Cornelia*."<sup>20</sup> This legislation lacks a date or an attribution, making it impossible to say to which emperor it should be attributed or how it relates to Hadrian's rescript. Whatever the case, these laws banning castration are certainly compatible with the intensification of imperial slave law precisely in this period.<sup>21</sup> Thus, while not a single law survives that attests to Hadrian's interest in circumcision in general and Jewish circumcision in particular, we find an abundance of imperial legislation instituted before and during his reign concerning castration.

Indeed, the identification of circumcision with genital mutilation is far from inevitable. Recently, a number of scholars have suggested a revised understanding of Roman attitudes towards circumcision. Most notably, Pierre Cordier has argued that Roman elites did not originally view circumcision as genital mutilation, but instead regarded the unsheathed

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umque bona merito fisco meo vindicare debere, sed et in servos, qui spadones fecerint, ultimo supplicio animadvertendum esse: et qui hoc crimine tentur si non adfuerint, de absentibus quoque, tamquam Cornelia teneantur, pronuntiandum esse. Plane si ipsi, qui hanc iniuriam passi sunt, proclamaverint, audire eos praeses provinciae debet, qui virilitatem amiserunt. Nemo enim liberum servumve, invitum sinentemve, castrate debet, neve quis se sponte castrandum praebere debet. At si quis adversus edictum meum fecerit, medico quidem, qui exciderit capitale erit, item ipsi qui se sponte. With the help of Christopher Jones, I have slightly modified the overly squeamish translation in Mommsen et al., *Digest of Justinian*, 1.821.

<sup>19</sup> *Digest* 48.8.3.5: *Legis Corneliae de sicariis et veneficis poena insulae deportatio est et omnium bonorum adeptio*. Paulus, *Sententiae* 5.23.13 specifies the precise punishments for the different castes: *Qui hominem invitum libidinis aut promercii causa castravit castrandumve curavit, sive is servus sive liber sit, capite punietur, honestiores publicatis bonis in insulam deportantur* (Maria B. F. Vanzetti, ed., *Pauli Sententiae: Testa e interpretatio* [Milan: Cedom, 1995], 136).

<sup>20</sup> *Digest* 48.8.3.4: *Et qui hominem libidinis vel promercii causa castraverit, ex senatus consulto poena legis corneliae punitur*.

<sup>21</sup> Another law attributed to Hadrian reads: "The deified Hadrian also once ordered the relegation of one Umbricia, a lady of family, for the five-year census period on the ground that she had for the most trifling reasons subjected her serving women to appalling treatment" (*Digest* 1.6.2). This law is consistent with a general trend that began already in the first century under Claudius; cf. Suetonius, *Claudius*, 25.2. On the steady

penis of the circumcised Jew as a sign of unmanaged sexual behavior.<sup>22</sup> As a priapean character, the circumcised Jew was both laughable and socially subversive, but not the product of barbarous mutilation. Cordier thus rightly cautions against the pervasive assumption that circumcision naturally formed a subspecies of genital mutilation and would, therefore, automatically become incorporated into anti-castration legislation.

It is precisely this assumption that underlies the maximalist reading of Hadrian's castration legislation. Although many scholars continue to maintain that Hadrian did at some point ban circumcision, Alfredo Rabello is perhaps the only one who has refused to acknowledge the sheer absence of positive evidence for this legislation, arguing instead that Hadrian's proscription of castration actually encodes within it a ban on circumcision. He insists that the Latin word for excision, used twice in Hadrian's rescript but absent from earlier legislation, "could include both castration (*excidere testiculos*) and circumcision (*excidere praeputium*)... Both *castrare* and *circumcidere* were forms of *excidere*."<sup>23</sup> Several factors speak against this interpretation. First and most obviously, Hadrian could have included circumcision explicitly in the law had he wanted to, rather than depending on an overly subtle use of language requiring the philologist to decode Roman legal language like an exercise in *Rabbinic* legal exegesis. The word for circumcision (*circumcidere*) certainly existed in the standard Latin of Hadrian's period.<sup>24</sup>

The limited intent of Hadrian's rescript is further underscored by the existence of a second piece of legal correspondence elicited from Hadrian on the topic of castration. This *constitutio*, an imperial edict most likely generated in consultation with his judicial council, is preserved in book 2 of Paul's *Duties of Proconsul* (fl. c. 210<sup>25</sup>) and follows immediately after the above rescript in the *Digest*: "Under the constitu-

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enhancement of legal protection for slaves in the first and second century, see Watson, *Roman Slave Law*, 120-24.

<sup>22</sup> Pierre Cordier, "Les Romains et la Circoncision," *Revue des Etudes Juives* 160 (2001): 337-55. On the retraction of the foreskin and exposure of the glans as comic burlesque, see also Schäfer, *Judeophobia*, 96-105. While I strongly endorse Cordier's refutation of the common assumption that circumcision was understood by the Romans as belonging to the category of genital mutilation and was, therefore, automatically included in anti-castration legislation, I think his reading of the evidence incorrectly seeks a single, unitary explanation of the Roman abhorrence for circumcision. In addition, as should be clear from this paper, I do not see later Roman legislation against circumcision as an attempt to impose Roman *mores* on the unruly Jewish body, as does Cordier, but as a bi-product of the strengthening of Roman slave law.

<sup>23</sup> Rabello, "The Ban on Circumcision," 192-93.

<sup>24</sup> E. g., Tacitus, *Histories* 5.5.1-2 (first decade of the second century); Suetonius, *Domitian* 12.2 (first two decades of the second century); Juvenal, *Satires* 14.96-206 (first half of the second century).

tion of the deified Hadrian to Ninnius Hasta, those too who crush the testicles of others are in the same position as those who castrate them [with a knife]."<sup>26</sup> Ninnius Hasta is known to have served as proconsul precisely in the period of Hadrian's anti-castration legislation circa 128/9.<sup>27</sup> Contrary to a maximalist reading of the rescript, this *constitutio* makes it clear that Hadrian's rescript was understood according to its narrowest possible scope. Ninnius Hasta did not ask for clarification concerning the definition of excision itself, but instead questioned whether Hadrian's use of the term "excision" excluded "crushing" from the scope of the law. It was crystal clear to him at least that the direct object of *excidere* was *testiculos*, since the technical terminology used in the rescript naturally evoked for him the Greek medical language of castration, in which the crushing of the testicles (*thlibia*) was regularly juxtaposed with excision.<sup>28</sup> And, contrary to Rabello's reading of Roman law, the *constitutio* itself demonstrates the literalist approach to language operative in Roman legal practice. It was the established tradition of legislation regarding the production of eunuchs reviewed above that served as Ninnius Hasta's primary and, most likely, sole legal frame of reference, and not the hypothetical, undocumented and unprecedented intrusion of the emperor into the local religious rites of subject populations.

Any attempt to expand the scope of Hadrian's ban to include circumcision willfully ignores the *ad hoc* and provisional nature of rescript legislation in this period. Rescripts fell into two categories: the first conferred special grants of honors or privilege (*beneficia*), while the second established a provisional legal position on specific points of law (*ea quae ad ius rescribuntur*).<sup>29</sup> However, as Tony Honoré points out, "they (rescripts about the petitioner's legal position) were not self-executing, and there was no procedure for enforcing them. To issue a rescript was not to give judgment in the lawsuit that prompted the petition to the emperor... The rescript was only a ruling on the law, like a modern judge's direction to the jury, which leaves it to them to find the facts and apply the direc-

<sup>25</sup> Borkowski, *Handbook*, 49. Paul acted as assistant to Papinian who was executed by Caracalla in 212 CE.

<sup>26</sup> *Digest* 48.8.5: Hi quoque, qui thlibias faciunt, ex constitutione divi Hadriani ad Ninnium Hastam in eadem causa sunt, qua hi qui castrant. This law is also cited in Geiger, "The Ban of Circumcision," 141.

<sup>27</sup> Lieva Petersen, rev. and ed., *Prosopographia Imperii Romani* (2d ed.; 6 vols.; Berlin: de Gruyter, 1987), 361.

<sup>28</sup> Paul of Aegina, 4.68. Cited at F. Adams, trans., *The Seven Books of Paulus Aegineta* (3 vols.; London, 1844-1847), 2.379-80.

<sup>29</sup> On the rescript system, see Tony Honoré, "Rescripts: System and Style" in *Emperors and Lawyers* (2d ed.; Oxford: Clarendon Press, 1994), 33-70; see also the very dif-

tions."<sup>30</sup> A rescript was entirely dependent on local implementation for its effectiveness. In addition, its authority could be challenged by earlier legislation that had established a competing precedent. Yet, as Pliny's correspondence with the Emperor Trajan makes perfectly clear, rescripts were not only appended to specific petitions (*subscriptiones*), but could be issued by the emperor to high government officials with the clear intention of establishing imperial policy.<sup>31</sup> Nevertheless, even in such cases, rescripts carried the telltale signs of having been generated under particular circumstances and for specific purposes. Thus, as Jill Harries aptly puts it, "although dirigiste in its language, imperial law was in fact more often negotiated than imposed. No law was formulated in a political or juristic vacuum."<sup>32</sup> It was up to the lawyers, judges and magistrates to lend a given rescript its broader application. This form of legislation could be used as precedent, but could just as well be contravened by other sources of legal authority, at least until its inclusion in the provisional compilations of the jurists of the second and third centuries and, much later, in the vast legal corpora commissioned as prestige projects under Theodosius and Justinian.<sup>33</sup> Thus, although imperial rescripts could carry general and binding force once they entered circulation, their formulation continued to betray the exigencies of their creation.

Only one Greek or Latin source, the *Scriptores Historiae Augustae* (*SHA*), explicitly links anti-circumcision legislation to the outbreak of the Bar Kokhba revolt during Hadrian's reign. In the face of the contradictory evidence provided by the other Classical sources, scholars have perforce turned to this notoriously problematic compendium of imperial history as confirmation for Jewish reports concerning restrictions on circumcision. The report comes in an oblique and off-hand passage, in which the pseudonymous writer of the *Vita Hadriani*<sup>34</sup> records that "at that time the Jews, too, began war because they were forbidden to mu-

ferent version of this chapter in idem, "The Rescript System," in *Emperors and Lawyers* (London: Duckworth, 1981), 24-53.

<sup>30</sup> Honoré, "Rescripts," 38.

<sup>31</sup> Pliny, *Epp.* X, 65/66. I owe this citation and my awareness of the caution it demands to Christopher Jones.

<sup>32</sup> Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999), 36.

<sup>33</sup> Harries, *Law and Empire*, 15.

<sup>34</sup> The author of each of the lives is given a name, in this case "Spartianus." It has, however, long been a consensus of Roman historians that the multiple "authors" of the *SHA* are pseudonyms disguising a single hand, which compiled earlier source material at the end of the fourth century. On the authorship of the *Historia Augusta*, see most

tilate their sexual organs."<sup>35</sup> Despite the general tomfoolery so characteristic of the *SHA* as a whole, the *Vita Hadriani* does seem to contain much dependable source material.<sup>36</sup> Yet, even if we wish to hazard using this report as a valid source – a convention that has, of course, long come in for intensive interrogation<sup>37</sup> – its specific formulation makes basing historical reconstruction on it impossible. The technical language of both circumcision and castration customarily found in the legal documents is absent here, replaced instead by the polemical phrase *mutilare genitalia*. More importantly, this crude and hasty account nowhere addresses the nature of this ban, neither its administrative source nor the legal mechanisms through which it was enacted. In so far as the *Vita* attributes to its central protagonist no agency in this process, the imprecision of the phrase *mutilare genitalia* speaks eloquently against the introduction of formal legislation concerning Jewish circumcision by Hadrian himself. If trustworthy at all, this report should only be read in a highly circumscribed way as a possible indication that the practice of circumcision was somehow implicated in the larger conflict. Certainly, the emperor's direct role in legislating circumcision is not even alluded to in this elusive report. Finally, such a law would have been at odds with the general tenor of Roman policy towards the Jews. Hadrian may certainly have harbored a deep antipathy towards the Jews.<sup>38</sup> Yet, E. Mary Smallwood, one of the most eloquent advocates for the existence of Hadrianic legislation regarding circumcision, concedes that "the issue of a prohibition before the revolt raises a serious difficulty: legislation which thus cuts at the very roots of Judaism ran completely counter to the long established Roman policy of guaranteeing Jewish religious liberty."<sup>39</sup> Her suggestion that the legislation was "of empire-wide application" is met with the stunning silence of our sources.

notably T. D. Barnes, *The Sources of the Historia Augusta* (Brussels: Latomus, 1978); Ronald Syme, *Historia Augusta Papers* (Oxford: Clarendon Press, 1983).

<sup>35</sup> *SHA*, *Vita Hadriani* 14.2 = Stern, *Authors*, #511: Moverunt ea tempestate et Iudaei bellum, quod vetabantur mutilare genitalia.

<sup>36</sup> H. W. Benario, *A Commentary on the Vita Hadriani in the Historia Augusta* (Chico, Cal.: Scholars Press, 1980), 2–14; Barnes, *Historia Augusta*, 38–47.

<sup>37</sup> See especially Schäfer, *Aufstand*, 38–39; idem, "Causes," 85–86; and the studies cited in n. 5 above.

<sup>38</sup> As suggested by the revised reading of an inscription from Cyrene published in Christopher P. Jones, "A Constitution of Hadrian Concerning Cyrene," *Chiron* 28 (1998): 255–66.

<sup>39</sup> Smallwood, *Jews under Roman Rule*, 431. See also Peter Schäfer, "Hadrian's Policy in Judaea and the Bar Kokhba Revolt: A Reassessment," in *A Tribute to Geza Vermes*:

## II. Administrative Localism, Tineius Rufus, and the "Jewish Persecution"

If not through the agency of Hadrian, then under what circumstances did the category of Jewish circumcision enter into Roman political and legal discourse? Rabbinic sources offer an impressive collection of anti-Jewish measures enacted prior, during and after the Bar Kokhba revolt.<sup>40</sup> In these sources, the restriction on circumcision is variously grouped with measures against Sabbath observance and Torah study<sup>41</sup>; with Sabbath observance, Torah study and ritual ablutions<sup>42</sup>; with Sabbath observance and purification from menstrual impurity<sup>43</sup>; with reading from the Torah, eating *matzah* on Passover, and blessing the *lulav* on *Succot*<sup>44</sup>; and finally with Sabbath observance, eating *matzah*, sitting in the *succah*, blessing the *lulav*, and using phylacteries and *tzitzit*.<sup>45</sup> A variety of other sources attest to the ban on circumcision indirectly.<sup>46</sup> In an important article, Joseph Geiger pointed out that no source treats the alleged ban on circumcision as distinct from the other measures, nor is alleged ban on circumcision ever cited alone.<sup>47</sup> Instead, the ban on circumcision is variously grouped with shifting sets of similar measures,

Essays on Jewish and Christian Literature and History (JSOTSup 100; ed. P. R. Davies and R. T. White; Sheffield: JSOT Press, 1990), 281–303.

<sup>40</sup> For a full list of these measures and the Rabbinic sources reporting them consult Lieberman, "Martyrs of Caesarea," 424–26; Herr, "Persecutions and Martyrdom," 94–101. Lieberman argues that the repressive measures can be grouped into two stages based on the shift in nomenclature in the Rabbinic sources from Peril (סכנה) to Destruction (שמד): "Thus we should divide the decrees of Hadrian into two categories. The first (the prohibition of circumcision, reciting the Shema' and collecting assemblies to teach the Law) emanated from Hadrian's general policy and were not immediately directed against Judaism. The second, comprising the restrictions issued during and after the Jewish rebellion when most of the Jewish rites were proscribed, aimed at the destruction of Judaism proper." (426) Herr adds the highly questionable assertion that "the Romans, for various psychological and tactical reasons, only enacted prohibitions against the observance of positive precepts." (101) However, Schäfer, *Aufstand*, 194–235, largely vitiates these findings. Schäfer demonstrates here that Lieberman's two-stage development is merely a by-product of the shifting representation of these measures in Rabbinic literature, reflecting instead the difference between Tannaitic and Amoraic sources, in particular the Babylonian Talmud's distinct terminological use of גזר/גזירה in the context of reports regarding the anti-Jewish measures of the Romans. For a similar point, see also Geiger, "Ban of Circumcision," 89, who notes that, in a later study, Lieberman himself acknowledged the tenuous literary nature of the evidence from which he had drawn his historical conclusions (Lieberman, "Religious Persecution," 228–31.).

<sup>41</sup> *b. Ta'an* 18a; *b. Rosh. Hash.* 19a; *Meg. Ta'an.* 12.

<sup>42</sup> *Mek. de-R. Ish.*, Ki Tisa 1.

<sup>43</sup> *b. Me'il.* 17a.

<sup>44</sup> *Mek. de-R. Ish.*, Yitro 6.

<sup>45</sup> *Midr. Rabba Leviticus*, 32:1.

<sup>46</sup> *m. Shab.* 19:1; *b. Shab.* 130a; *Mek. de-R. Ish.*, Bahodesh 6; *m. 'Abot* 3.12; *b. Sanh.* 99a.

<sup>47</sup> Geiger, "Ban of Circumcision," 143–45.

which do not possess a stable core. These lists of anti-Jewish measures are, of course, far removed from the events of the early second century in both temporal and ideological terms. Like super-charged magnets, they seem to attract an ever-expanding catalogue of grievances. Their marked disagreement on the precise nature, timing and administrative mechanism of these measures makes it imperative that we not ask these sources to provide the details of historical reconstruction. At the most, they might be said to offer compelling testimony to the tenacity of Jewish collective memory of Roman persecution.

Geiger noted, however, that the primary Roman official mentioned in the Rabbinic sources in the context of the revolt is provincial governor Tineius Rufus. In opposition to official chronologies culled from Latin administrative sources, he is here remembered as having continued in the same administrative capacity even after revolt had been quelled. In one text, he is even given the moniker "Turanos Rufus" or "Turnus Rufus," no doubt a verbal play on the Greek word for tyrant (*tyrannos*) intended to depict him as the archenemy of the Jews.<sup>48</sup> In another, even the destruction of the Temple is attributed to him.<sup>49</sup> Indeed, it may not be an insignificant fact that Christian sources on the revolt, which possibly share common local traditions with Rabbinic accounts, likewise single out Tineius Rufus as the central Roman actor in the conflict.<sup>50</sup> Even more suggestive are the dialogues between Tineius Rufus the Evil One (הרשע) and R. Aqiva concerning the reasons that God established the commandment of circumcision.<sup>51</sup> Of course, as has been pointed out by Peter Schäfer, these dialogues are "without doubt literary *topoi* with different speakers, whose historical background is to be found in the Gentile-Jewish controversy."<sup>52</sup> The problematic nature of these Jewish sources make it difficult to draw from them concrete conclusions. At the very least, they demonstrate that in the Jewish literary imagination it was the provincial governor Tineius Rufus who was remembered as having undertaken the repressive measures enacted against the rebellious Jewish population of Judaea.

Based on these sources, Geiger proposed that the ban on circumcision was enacted under the governor's power of coercion, *coercitio*. The plausibility of this historical reconstruction is strengthened by Roman

<sup>48</sup> *b. Ta'an* 18b. Cf. *b. Ned.* 50b; *b. Avod Zar.* 20a; *b. B. Bat.* 10a; *Tanh.*, Tazria' 5; *Midrash Bereshit Rabbati* 72-3 (ed. Albeck).

<sup>49</sup> *b. Ta'an* 29a.

<sup>50</sup> Rufinus, *Chron.* 6,1; Eusebius, *Historia Ecclesiastica* IV, 6: 1 and *Chron.* Had. ann. 16; Syncellus (ed. Dindorf), p. 660; Jerome, in *Zach.*, 18:9.

<sup>51</sup> *Tanh. Buber*, Tazria' 7; *Midrash Bereshit Rabbati*, Gen. 17.1, (Albeck, p. 72-3).

<sup>52</sup> Peter Schäfer, "Rabbi Aqiva and Bar Kokhba," in *Approaches to Ancient Judaism* (2d vol.; ed. W. S. Green; Atlanta: Scholars Press, 1980), 113-30, esp. 120.

sources concerning the military management of the revolt. It was long assumed that Tineius Rufus maintained his position as commander of the legio X Fretensis even after the arrival of Julius Severus, previously governor of Britain, in Judaea.<sup>53</sup> We now know that this is impossible because Tineius Rufus attained consular rank in 127. More importantly, Werner Eck has recently pointed out the highly "irregular" nature of this replacement, commenting that "under normal conditions the choice of the successor to Tineius Rufus would not have fallen on a senior consular such as the governor of Britain, but on a young *consularis*, two or three years after his consulate."<sup>54</sup> For Eck, this departure from administrative norms is not only a sign of the severity of the crisis into which the province had fallen, but also attests to Tineius Rufus' failure to put down the revolt and perhaps to his direct mismanagement of affairs.

As Geiger pointed out, despite the paucity of data, ample parallels can be found for this model of local administration. In a seminal article published more than 30 years ago, T. D. Barnes concluded that the correspondence between Pliny the Younger, governor of Bithynia, and Hadrian's predecessor Trajan in the year 111/2 demonstrates that in this period the empire functioned on the basis of local initiatives and negotiations between provincial government and local interest groups into which the emperor was drawn only unwillingly.<sup>55</sup> In this view, legal action taken against the Christians before the Decian persecutions of 251-3 was not an imperial initiative or even juridically defined as such, but instead was an expression of an implicit *mos maiorum*, which mandated the protection of ancestral religion from *superstitio externa*. He writes:

There is no evidence to prove earlier legislation by the Senate or the emperor. Indeed, the exchange of letters between Pliny and Trajan implies that there was none. Given the normally passive nature of Roman administration, the earliest trial and condemnation of Christians for their religion should be supposed to have occurred because the matter came to the notice of a provincial governor in the same way as it was later brought to the attention of Pliny... The earliest magistrate to condemn Christians presumably had as little hesitation as Pliny in sentencing them to death and as little knowledge of the nature of their crime.<sup>56</sup>

Historians of the later Roman Empire now agree almost universally that the legal basis of the pre-Decian Christian persecutions derived from the local implementation of the provincial governor's power of *coercitio* and

<sup>53</sup> For this older view, see Smallwood, *Jews under Roman Rule*, 550-1.

<sup>54</sup> Werner Eck, "The Bar Kokhba Revolt: The Roman Point of View," *JRS* 89 (1999): 76-89, esp. 83. On Tineius Rufus' career, see also Shimon Appelbaum, "Tineius Rufus and Julius Severus," in *The Bar-Kokhba Revolt: New Approaches* (ed. A. Oppenheimer and U. Rappaport; Jerusalem: Yad Yitzhak Ben-Zvi, 1984), 147-52 (Hebrew).

<sup>55</sup> Pliny, *Epp.* X, 96/97; cf. Tertullian, *Apology* 2.6.

<sup>56</sup> T. D. Barnes, "Legislation against the Christians," *JRS* 58 (1968): 48.

were limited in their temporal and geographical scope. If Geiger is correct, it is equally plausible that Tineius Rufus, like his counterpart in Bithynia, probably acting at the local level, undertook measures to inflict hardship on the increasingly turbulent population of his province.

Whatever the ultimate validity of this highly hypothetical reconstruction, its main purpose is to draw attention to the fact that Rabbinic sources in no way indicate the existence of Imperial legislation specifically targeting circumcision. Rather, they suggest that, if in fact certain measures were put in place during the war, they were most likely part of the military campaign waged against the Judaeian insurrection at the local level. Certainly, the absence of evidence on comparable restrictions on the religious practices of Jews residing at Rome further undermines the notion that imperial legislation restricted circumcision during Hadrian's reign. Throughout this period, circumcision, like Christian identity, had simply not yet come to be defined juridically within Roman law. This does not entirely rule out circumcision as a factor in the conflict, but forces us to reckon with the very partial role of imperial legislation in administering the Empire. Whatever Hadrian's role might have been—a question about which our current sources remain mute—it is certainly the case that the Roman imperial administration did not function according to the mechanisms of centralized, systematic governmental bureaucracies of the modern nation-state.

### III. Jewish Circumcision And Roman Slave Law

In a widely cited passage, Suetonius reports that, in order to determine whether a certain old man was required to pay the Jewish tax (*fiscus Iudaicus*) levied following the first Jewish War (67–74), a judge stripped the man bare in the middle of the courtroom to inspect him for the mark of circumcision.<sup>57</sup> Shaye Cohen rightly reads the story as referring “to two categories of people: those who ‘live a Jewish life’ but have not declared themselves to be, or registered themselves as, Jews; and those who were born Jews but who mask their Jewish birth so that they would not have to pay the tax imposed on their nation.”<sup>58</sup> Whatever the outcome of this courtroom drama, this account makes it perfectly clear that

<sup>57</sup> Suetonius, *Domitian* 12.2 = Stern, *Authors*, 320.

<sup>58</sup> Cohen, *Beginnings*, 42. On the Jewish tax and Jewish identity under Roman rule, see also Martin Goodman, “Nerva, The Fiscus Judaicus, and Jewish Identity,” *JRS* 79 (1989): 40–44; L. A. Thompson, “Domitian and the Jewish Tax,” *Historia* 31 (1982): 329–42. But for critical evaluation of Goodman and Thompson, see Schäfer, *Judeophobia*, 113–16.

Jewish circumcision had already come within the purview of the Roman legal system in the first century. Yet, as we might expect, this confrontation between the imperial authorities and the Jewish community simply takes for granted the existence of circumcision as a legally binding mark of Jewish identity, in no way questioning the fundamental right of Jews to circumcise their own sons.

It is not until the accommodation of Jewish circumcision promulgated under Antoninus Pius that circumcision is explicitly addressed in Roman legal discourse. This rescript is preserved in the *Digest* from book 6 of Modestinus's *Rules* (*fl. c.* 225<sup>59</sup>): “The Jews are allowed by rescript of the divine Pius to circumcise only their own sons; whoever practices this on anyone who does not belong to their religion will be punished as a castrator (i. e. treated as a murderer in accordance with the *lex Cornelia*).”<sup>60</sup> It is worth dwelling for a moment on the long-dispute translation of this law. In her important article on the this law, Smallwood translated the phrase *Iudaeis filios suos tantum* to mean that the “Jews alone” were given permission by the emperor to circumcise their sons.<sup>61</sup> Soon thereafter, David Rokeah pointed out that this translation incorrectly applied the word *tantum* to *Iudaeis* rather than to *filios suos*.<sup>62</sup> Although Peter Schäfer has insisted on the correctness of Rokeah's translation,<sup>63</sup> Smallwood's misreading continues to be the crux of the misrepresentation of the law still current in much recent scholarship.<sup>64</sup>

The transmission of legislation regarding Jewish circumcision in the later Byzantine legal compilations demonstrates, however, that Rokeah and Schäfer's interpretation of the law is correct. We find the following Greek translation of Pius' rescript in the *Collectio Tripartita*, which records ecclesiastical law up until the time of Justinian:

Book 48, title 8, digeston 11. Modestinus. The Jews are permitted to circumcise their own sons (τὰ ἴδια τέκνα περιτεμεῖν). But if they should circumcise another (εἰ δὲ περιτέμωσιν ἕτερον), they shall be punished as castrators (ὡς οἱ εὐνουξίζοντες).<sup>65</sup>

<sup>59</sup> Borkowski, *Handbook*, 50. Modestinus was the pupil of Ulpian (*Dig.* 47.2.52.20).

<sup>60</sup> *Digest* 48.8.11.1 = Linder, *Roman Imperial Legislation*, #1: Modestinus libro sexto regularum: Circumcidere Iudaeis filios suos tantum rescripto divi Pii permittitur; in non eiusdem religionis qui hoc fecerit, castrantis poena irrogatur. The translation is adapted from Schäfer, “The Bar Kokhba Revolt and Circumcision,” 119.

<sup>61</sup> Smallwood, “The Legislation of Hadrian and Antoninus,” 344.

<sup>62</sup> Rokeah, “Comments,” 128–29.

<sup>63</sup> Schäfer, *Aufstand*, 40–43; idem, “The Bar Kokhba Revolt and Circumcision,” 119; idem, *Judeophobia*, 104.

<sup>64</sup> Notable examples are Rabello, “The Ban on Circumcision,” 211; Linder, *Roman Imperial Legislation*, 100; Moshe David Herr, “Persecutions and Martyrdom,” 93. Momen et. al., *Digest*, 1.821 unfortunately misreads the text as well.

<sup>65</sup> *Collectio Tripartita* 2.86. Cited at Amnon Linder, ed. and trans., *The Jews in the*

It is only in the late corpus of Roman law called the *Basilica*, which was compiled under the Macedonian emperors in the ninth century, that the law assumes the meaning given to it by Smallwood:

It was permitted to the Jews alone (Μόνοις τοῖς Ἰουδαίοις), in a law of Pius, to circumcise their own sons (τοὺς ἰδίους υἱοὺς περιτέμνειν); if anyone who is not a Jew (εἰ δὲ τις μὴ ὄν Ἰουδαῖος) should do this, he shall be subjected to the punishment of castrators (τῶν ἐδνουχιζόντων).<sup>66</sup>

Indeed, the version in the *Basilica* seems to be a distortion of the original intent of the law. Whereas the possessive ἰδίους is present in both Greek versions, the later collection adds μόνοις to the first clause. Moreover, in the second half of the law, the actor and the object of circumcision have become joined, thereby vitiating the contrast between Jew and one who is "not of the same religion." Modestinus' formulation should, therefore, be read to mean that Jewish circumcision, i. e. circumcision at the hand of a Jew, performed on someone not of the Jewish *religio* is constituted as juridically identical with castration. The distinction between the two is not the operation, but the religious identity of the body on which that operation is performed. This much is clear.

What is not clear are the circumstances under which such exceptions were granted. As we have seen, most scholars, reading the law as a partial repeal of the Hadrianic interdiction, have assumed that it provides evidence that Hadrian had previously prohibited circumcision during his reign. This assumption is entirely unfounded. Not only do we have no evidence of a Hadrianic prohibition of circumcision, but Pius' rescript can be explained much more effectively and accurately without claiming the hypothetical existence of legal precedent promulgated under Hadrian. I believe instead that Pius' rescript imposed a restriction on a previously unlimited and unlegislated freedom. The law should be read against the background of the anti-castration legislation that is explicitly alluded to in the rescript's second clause (*castrantis poena*). Modestinus' inclusion of this law in this portion of his compilation makes it certain that, at least by the early third century, the rescript was understood as a legal statement primarily about the treatment of slaves and was consequently categorized as such.<sup>67</sup> In the law, the juridical definition of cir-

*Legal Sources of the Early Middle Ages* (Detroit: Wayne State University Press, 1997), 54.

<sup>66</sup> *Basilica* 60.39.7. Cited at Linder, *The Jews in the Legal Sources of the Early Middle Ages*, 127.

<sup>67</sup> This legislation concerning circumcision is included in *Digest* 48.8.11 alongside legislation regarding the conditions under which a slave is protected from being thrown to the beasts. Both these fragments of legislation are drawn from book 6 of Modestinus' *Rules*. The theme of this section seems to have been the protection of slaves from physical harm inflicted on them by their masters. Ephraim Urbach has argued that, in the

cumcision performed within a given religious community (*religio*) is formulated as a sub-category of castration, the only legal precedent cited by the law. At the same moment that the law restricts Jewish circumcision, it affirms it as a right. Jews may circumcise, although only their own sons (*filios suos tantum*). We should not find the law's juxtaposition of Jewish religious rites and the castration of slaves odd. The law is using the older legislation against castration as its sole point of reference. The general prohibition from which Jewish circumcision emerges as a legally protected category is not an earlier prohibition against circumcision, but rather the familiar ban on castration. We thus witness in this legal enactment circumcision emerging from castration as a novel category within Roman law. And, in the act of restricting the practice of circumcision among Jews, the rescript for the first time formally recognizes its legality.

The law can now be understood for what it is, negotiated accommodation of an ethnic group whose internal legal definitions of community ran up against the Emperor's wider legal obligation to protect slaves from what the law unsurprisingly viewed as a form of genital mutilation. Pius did not issue his rescript with the aim of reversing his predecessor's legal innovations, as some would have it, but instead his law demonstrates his abiding commitment to protect slaves from their owners. Indeed, we find a number of laws promulgated by Pius that respond to specific cases of maltreatment. In a compilation of laws preserved in Justinian's *Institutes*, we read:

1. Slaves are in the power of their masters, which power, indeed, comes from the law of nations... 2. But nowadays, no one who is subject to our sway is allowed to treat his slaves with severity and other than for a cause recognized by the laws. For, by a constitution of the divine Antoninus Pius, anyone who kills his own slave

context of the expansion of Roman slave legislation, the *halakha* sought a compromise that allowed the holding of uncircumcised slaves for one-year trial periods (E. E. Urbach, "Halakhot Regarding Slavery as a Source for the Social History of the Second Temple and Talmudic Period," *Zion* 25 (1960): 141-89, esp. 166-170 (Hebrew); translated as "The Laws Regarding Slavery as a Source for the Social History of the Second Temple, the Mishnah and the Talmudic," in *Papers of the Institute of Jewish Studies London* (vol. 1; ed. J. G. Weiss; Jerusalem: Magnes, 1964), 1-94, esp. 50-54). On slavery in Jewish society in the Roman period, see most notably Dale B. Martin, "Slavery and the Ancient Jewish Family," in *The Jewish Family in Antiquity* (ed. Shaye J. D. Cohen; Atlanta: Scholars Press, 1993), 113-29; Paul V. M. Flesher, *Oxen, Women, or Citizens? Slaves in the System of the Mishnah* (Atlanta: Scholars Press, 1988); idem, "Slaves, Israelites and the System of the Mishnah," in *The Literature of the Early Rabbinic Judaism: Issues in Talmudic Redaction and Interpretation* (ed. A. J. Avery-Peck; vol. 1 of *New Perspectives on Ancient Judaism*; Lanham, MD: University Press of America, 1989), 101-109. However, study of the impact of Roman slave law on Rabbinic slave law in the second and third centuries remains an urgent *desideratum*.

without cause is to be punished in the same way as one who kills the slave of another. And even excessive harshness of masters is controlled by a constitution of the same emperor. For, on being consulted by certain provincial governors about those slaves who flee to a sacred temple or a statue of the emperor, he ruled that, if the severity of the masters appear insupportable, they are bound to sell the slaves on favorable terms and the price is to be given to the masters—and rightly: for it is in the interest of the state that no one should abuse his property. These are the words of the rescript dispatched to Aelius Marcianus: “The power of masters over their slaves should be unlimited, nor should any man’s rights be detracted from. But it is in the interest of masters that relief against cruelty, starvation or unbearable savagery should not be denied to those who rightly complain. Adjudicate, therefore, the complaints of those of the household of Julius Sabinus who take refuge at the statue and, if you find them treated more harshly than is seemly or affected by shameful harm, bid them be sold so that they do not return to the power of their master. And, if he seeks to circumvent my constitution, let this Sabinus know that, on my learning of it, I shall be severe in my dealing with him.”<sup>68</sup>

Although Pius’ primary aim may have been to prevent the unlawful destruction of private property rather than to foster humanitarian aims, the compilers of the *Institutes* clearly suggest that Pius had a reputation in later Roman legal compilations for his involvement in slave law. In fact, Wynne Williams has written that “two recurring principles [in Pius’ legislation] were a concern for the protection of slaves... and respect for precedents set by Hadrian.”<sup>69</sup> In light of this well-documented assessment of Pius’ distinctive legal persona, it seems very unlikely that he issued *rescript* concerning circumcision with the aim of reversing his predecessor’s legal innovations. In fact, considering the actual mechanics of the imperial *rescript* office, this rescript was no doubt generated in response to specific circumstances. It is highly plausible that this legal *responsum* was solicited by the Jews themselves or, to be more precise, by a Jewish master seeking to circumcise his slave. Or, perhaps, as Pius’ slave legislation suggests was possible, a non-Jewish slave faced with what he perceived to be the excessive violence and his Jewish master sought out legal protection from the Emperor. Whatever the actual circumstances, what we see in this legal enactment is Jewish circumcision emerging from castration law as a novel category within Roman slave law.

Of course, the Jewish situation was hardly unique. We know that in both Arabia and Egypt the practice of circumcision came under administrative control at various points throughout the second century. Bar-

<sup>68</sup> *Institutes* 1.8.1. Translated in J. A. C. Thomas, *The Institutes of Justinian* (Cape Town: Juta & Co. Ltd., 1975), 24–5. The rescript is also preserved (with only minor differences) at *Digest* 1.6.2, there drawn from Ulpian, *Duties of the Proconsul*, book 8.

<sup>69</sup> Wynne Williams, “Individuality in the Imperial Constitutions, Hadrian and the Antonines,” *JRS* 66 (1976): 78.

daisan of Edessa in his *Book of the Law of Countries* reports that, after their conquest of Arabia, the Romans enacted a ban on circumcision among the Arab tribes.<sup>70</sup> A number of papyrological documents from Egypt from the time of Antoninus Pius and Marcus Aurelius likewise indicate that restrictions were imposed on the practice of circumcision in the middle of the second century.<sup>71</sup> It is clear from these texts, the earliest one of which dates to the reign of Pius,<sup>72</sup> that a proper priestly lineage was a prerequisite for circumcision. As was the case with Jewish circumcision, it was the *identity of the individual* on whom the operation was to be performed that determined the legality of the practice. These sources, however, should not be read as evidence for a general ban on circumcision. According to the most recent editors of such texts, “es ist nicht ersichtlich, ob der in diesem Papyrus beschriebene Vorgang üblich war, eine Ausnahme darstellt oder von lokalen Umständen bedingt war.”<sup>73</sup> Just as the Jews outside Judaea most likely continued to circumcise their sons freely during the Bar Kokhba War, here, too, we find no clear indication that this phenomenon reflects a general imperial policy on circumcision, but rather it may very well have been no more than the consequence of the local administration of subject populations.

#### Conclusion: From Pagan to Christian Empire

Following the extension of citizenship under the *constitutio Antoniniana* (CA) of 212 CE, questions of religious identity and community became more pressing for the administration of the empire. The jurist Paul, who lived around the year 300, records the following law:

<sup>70</sup> H. J. W. Drijvers, *Bardaisan of Edessa* (Assen: Van Gorcum, 1966), 30. According to Drijvers, *Bardaisan*, 92 n. 3, this testimony refers to the later Arabian war of Septimius Severus in 195–6 C. E. or that of Macrinus in 217–18 C. E., not the conquest of the Nabataeans in 106 C. E.

<sup>71</sup> For examples of these Egyptian requests for permission to perform circumcisions on priests, see L. Mitteis and U. Wilcken, *Grundzüge und Chrestomathie der Papyruskunde* (2 vols.; Leipzig: Teubner, 1912), vol. 1, pt. 2, nos. 74–77; A. S. Hunt and C. C. Edgar, *Non-Literary Papyri: Public Documents* (vol. 2 of *Select Papyri*; Loeb Classical Library; Cambridge: Harvard University Press, 1970), vol. 2 nos. 244 and 238; Maarit Kaimio in *Festschrift zum 100-jährigen Bestehen der Papyrussammlung der österreichischen Nationalbibliothek Papyrus Erzherzog Rainer (P. Rainer Cent.)* (Vienna: Brüder Hollinek, 1983), 339–342 no. 58; P. J. Sijpesteijn and K. A. Worp, “Einige Papyri aus den Giessener Papyrussammlungen,” *Aegyptus* 67 (1987): 46–52. These sources are most comprehensively cited in Cohen, *Beginnings*, 54 n. 76.

<sup>72</sup> Kaimio, *P. Rainer Cent.*, no. 58 is dated 156 C. E.

<sup>73</sup> Sijpesteijn and Worp, “Einige Papyri,” 47.

Roman citizens, who permit themselves or their slaves to be circumcised in accordance with Jewish custom, are exiled perpetually to an island and their property confiscated; the doctors suffer capital punishment. If Jews shall circumcise purchased slaves of another nation, they shall be banished or suffer capital punishment.<sup>74</sup>

This law may have been adumbrated in the legislation ascribed in the *SHA* to Septimius Severus (193–211) forbidding proselytism to Judaism: *Iudaeos fieri sub gravi poena vetuit*.<sup>75</sup> Although undated and unattributed, the law seems to have been written after the extension of citizenship, since none of the other legislative measures concerning circumcision or castration in the period prior to the *CA* take citizenship as an operative category. Amnon Linder points out that “the term ‘Roman citizens’ is employed here as a synonym for ‘freemen’ and in contrast with ‘slaves’ rather than with ‘the Jewish custom.’”<sup>76</sup> Paul’s book certainly includes laws issued throughout the third century, although only a few of these date from after the reign of Diocletian.<sup>77</sup> The simplest reading of the law is that Jews, although citizens, are exempted from the restriction on circumcision, as they were in Pius’ legislation.

Yet, in this law we begin to detect a shift. The very same factor that had provided the grounds for exemption from restrictions on genital mutilation – the recognition of a distinct Jewish identity based on membership in a distinct *religio* – was fast becoming a mechanism for policing the boundaries of Jewish community. The function of circumcision as a mark of identity, as described in Suetonius’ courtroom drama, was merging with restrictions on Jewish circumcision of non-Jews, whether slave or free. This process, however, was gradual and advanced through the often unintended synthesis of distinct administrative and ideological aims.<sup>78</sup> Certainly, by the time of Constantine, converts to Judaism would be subject to censure and the Jewish community would be severely lim-

<sup>74</sup> *Sententiae* 5.22.3–4 = Linder, *Roman Imperial Legislation*, #6: *Cives Romani, qui se Iudaico ritu vel servos suos circumcidi patiuntur, bonis adeptis in insulam perpetuo relegantur medici capite puniuntur. Iudaei si alienae nationis comparatos servos circumciderint, aut reportantur aut capite puniuntur* (Vanzetti, *Pauli Sententiae*, 133–34). The translation is adapted from Linder, *Roman Imperial Legislation*, 117–20.

<sup>75</sup> *SHA*, *Vita Severi* 17.1.

<sup>76</sup> Linder, *Roman Imperial Legislation*, 118 n. 3. Smallwood sought to date the law before 212, since “after the *CA* Jews were Roman citizens and the law is self-contradictory” (Smallwood, *Jews Under Roman Rule*, 469 n. 7). Her reading is, however, overly rigid.

<sup>77</sup> E. Levy, “Paulus und der Sentenzenverfasser,” *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Romanistische Abteilung* 50 (1930): 272–94.

<sup>78</sup> See, for example, Martin Goodman’s account of the unwitting impact that Nerva’s modification in the collection of the Jewish tax exerted on Jewish identity after 96 C. E. (Goodman, “Nerva, The Fiscus Judaicus, and Jewish Identity,” 40–44).

ited in its ability to coerce members to stay within its bounds.<sup>79</sup> In this same period, Constantine and his successors would pass laws prohibiting the circumcision of non-Jewish slaves<sup>80</sup> and would eventually prohibit the buying of non-Jewish slaves altogether.<sup>81</sup> The concerns of the Christian community, actively advocated by Constantine and his successors, would make use of Roman legal categories and procedures that had long germinated under the pagan Emperors. Yet, throughout this whole period during which circumcision was subjected to increasing restriction, one thing remained true: Jews were never prohibited from circumcising their own sons by a Roman emperor.

<sup>79</sup> This law of 329 promulgated under Constantine the Great is preserved in *Codex Theodosianus* 16.8.1 = Linder, *Roman Imperial Legislation*, #8.

<sup>80</sup> This law of 335 also under Constantine the Great is preserved in *Consitutio Sirmondiana* 4 = Linder, *Roman Imperial Legislation*, #10.

<sup>81</sup> This law of 339 promulgated by Constantine II is preserved in *Codex Theodosianus* 16.9.4 = Linder, *Roman Imperial Legislation*, #11.