

PROCEEDINGS OF THE 27TH INTERNATIONAL CONGRESS OF PAPYROLOGY

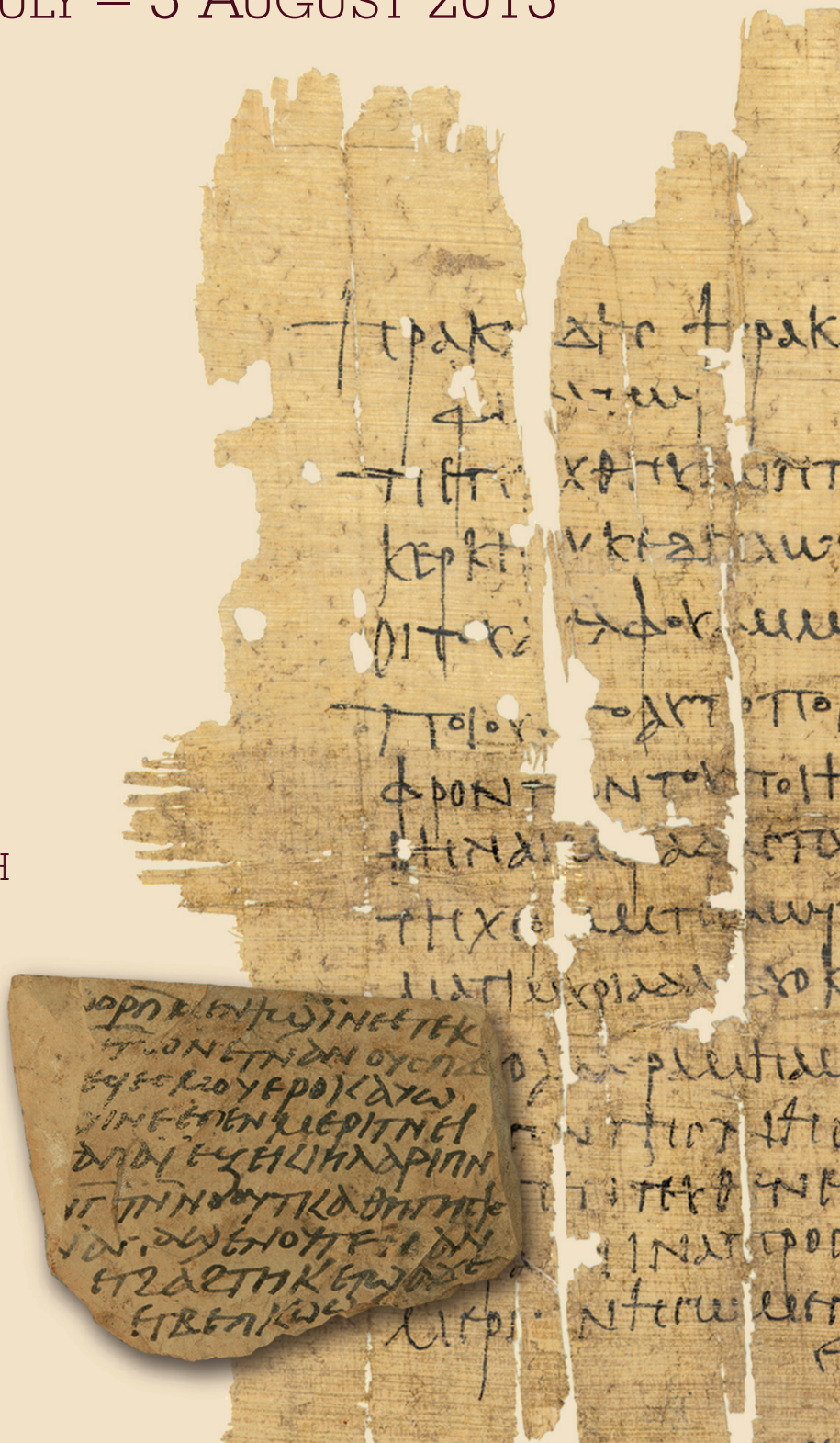
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EDITED BY
TOMASZ DERDA
ADAM ŁAJTAR
JAKUB URBANIK

IN COOPERATION WITH
GRZEGORZ OCHAŁA
ANDRZEJ MIROŃCZUK

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TOMASZ DERDA

ADAM ŁAJTAR

JAKUB URBANIK

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Roger S. Bagnall

**ILLEGITIMACY
IN ROMAN AND LATE ANTIQUE EGYPT***

A HANDFUL OF THE CONGRESS PAPERS I heard when young made deep impressions on me and shaped my thinking in important ways. Such were three of the papers I heard at my first congress of papyrology, that of Ann Arbor in 1968: those of Jean Bingen on *PSI V 502*, of Naphtali Lewis on the distinctions between Ptolemaic and Roman Egypt, and of Herbert Youtie on the literary aspirations and learning of the tax collector of Karanis who, we now know, was called Sokrates. Such also was Youtie's paper on illegitimacy at the Oxford congress of 1974, which in a much longer form became his contribution to the remarkable volume of *mélanges* produced to honor Claire Préaux in 1976.¹ It is this article that forms my starting point today.

In this article, Youtie set out to recover the social context and consequences of illegitimacy in Egypt under Roman rule. He was writing a couple of decades after Aristide Calderini's 1953 article that gathered the evi-

* I am indebted to Kyle HARPER for a number of valuable comments.

¹ H. C. YOUTIE, 'ΑΠΙΑΤΟΠΕΣ: Law vs. custom in Roman Egypt', [in:] J. BINGEN, G. CAMBIER & G. NACHTERGAEL (eds), *Le monde grec. Pensée, littérature, histoire, documents. Hommages à Claire Préaux*, Brussels 1976, pp. 723–740.

dence on illegitimacy,² and he began, as Calderini had, with a rescript of Gordian III, for which I quote Youtie's English translation: 'Failure to register children does not render them illegitimate if they are in fact legitimate, nor do entries in the registers, if they were indeed made, introduce outsiders into the family.' Youtie remarked, 'however obvious its content may seem to us, the impact of these juridical notions in the social atmosphere of Roman Egypt could be disturbing, even tragic.' As that last word suggests, Youtie's eloquent article was not merely learned and acute, as one would expect with him, but passionate.

The sources do not in general tell us much about the social realities of illegitimacy; as Youtie remarked, 'Most of it [the source material] offers nothing more than a neutral and indifferent mention of ἀπάτορες. What we should like to have, and do not have, are reports which would provide us with the social background of illegitimacy.' I should note that although Youtie consistently speaks of the ἀπάτορες, he was well aware of, and to some extent included in his analysis, the other means of designating such people, as these varied from region to region (p. 726 n. 3, citing already Ulrich Wilcken and Wilhelm Crönert at the beginning of the twentieth century). These include, for example, the use of χρηματίζων μητρός (only Oxyrhynchite) and the simple absence of patronymic and presence of μη(τρός) with the mother's name, or even without that word. These terms were discussed in detail by Myrto Malouta in another congress paper, at Helsinki.³ And yet we find him saying 'The texts which are useful in assessing the prevalence of ἀπάτορες in Egypt are all confined to the Roman period; they run from II BC to the reign of Constantine (AD 314)' (732). This statement (in which 'BC' seems to be an error for 'AD') will turn out to be an important pointer to a fatal weakness in his argument.⁴ Both Youtie and Malouta note the absence of indications of illegitimacy from the Ptolemaic period, but then again, it is clear that naming practices

² A. CALDERINI, 'Apatores', *Aegyptus* 33 (1953), pp. 358–369.

³ Myrto MALOUTA, 'The terminology of fatherlessness in Roman Egypt: ἀπάτωρ and χρηματίζων μητρός', *PapCongr.* XXIV, pp. 615–624.

⁴ YOUTIE does not cite an earliest example, but MALOUTA shows *PLond.* II 256d (AD II) as the earliest example.

changed significantly in the early Roman period, with mothers' names coming to be used in many types of Greek documents, as Mark Depauw has shown, arguing that Roman administrative practices are largely responsible.⁵ Malouta noted that there were some instances of *apator* after the lifting of the ban on soldiers' marriages.⁶

Youtie's essential argument was that illegitimacy was a status hardly known in Egyptian society but, rather, artificially constructed by the legal regimen in force in Roman Egypt, which restricted the capacity to marry, with the result that soldiers on active duty could not marry at all, and members of some status groups were unable to marry members of some other groups: thus, for example, Roman citizens could not marry anyone classified as Egyptian. The *Gnomon of the Idios Logos* is a rich source of information on these restrictions and on the consequences of violating them. These consequences consisted above all of deprivation of the right to inherit from a biological father who was not considered a legal father. It is clear from a number of cases that legal paternity was of great importance to the state, and that people known socially as the son of a particular man might not be entitled in official and legal contexts to claim their biological father as a legal patronymic.

In assessing the social matrix, Youtie was at pains to reject a view he found in the scholarly literature, which he summarized as seeing the illegitimate child as 'a natural consequence of the loose morals of a low-class population.' (He is not actually quoting any scholar specifically in that phrase, but he refers to a remark of Jacques Schwartz quoted by Naphtali Lewis (*BASP* 9 [1972], p. 33: 'Quant à la relative abondance des enfants naturels dans ce texte [*P. Stras.* 537], elle peut dépendre de circonstances locales. Pour ne citer qu'un exemple proche: les mœurs sont plus faibles dans les villages des bateliers sur le Rhin que dans les villages agricoles du

⁵ M. DEPAUW, 'Do mothers matter? The emergence of metronymics in early Roman Egypt', [in:] T. EVANS & D. OBBINK (eds), *The Language of the Papyri*, Oxford 2010, pp. 121–139. He notes that examples actually using the term *μητρὸς* are concentrated in the first three centuries of Roman rule (p. 121 n. 5). As we shall see, however, the use of metronymics (without patronymics) is not rare after the third century.

⁶ MALOUTA, 'The terminology of fatherlessness' (cit. n. 3), p. 615.

voisinage.’) For one thing, he pointed out that many of the people of *apator* status encountered in the papyri are not of low condition, but rather are people of middling status (as Calderini had already observed) and even include the propertied. Noting that their total number was proportionately modest in the papyri, he observed that any explanation of the status had to take account of this limited number, as also of their absence from the record in the Ptolemaic period. Even when cases where illegitimacy is not expressed by the word *apator* are added, the numbers are modest and remain concentrated in the Roman period. It is curious that with his sensitivity to the risks in adopting a patronizing attitude toward the morals of the poor, Youtie himself said ‘A largely landless peasant people in a predominantly agricultural country is not likely to be particular about the details of an individual’s pedigree’ (p. 733). And he cites the early average age at marriage for the conclusion that ‘the incidence of illegitimate births due to the natural exuberance [sic] of youth may have been kept very low’ (p. 734).

Youtie concludes by assessing the Roman erection of barriers to legitimate marriage as passing ‘into the realm of paranoia.’ The disciplinary rules restricting soldiers’ marriage he views as having become ‘a rigid and poorly functioning system for an army in residence.’ He adds, ‘The local people, the victims of Roman ambition, had no alternative to evasive action.’ Quoting *P.Cattaoui*, he observes of one striking case, ‘Since the boy was born to a soldier in service the prefect declares him to be illegitimate and not able to join the body of Alexandrian citizens, and he extends this ruling to two younger sons of Valens. In his exasperation, the father cries out: τί ἠδίκησαν οἱ παῖδες; ‘What crime have the children committed?’ With those dramatic words, Youtie ended his article.

Now one may sympathize with Youtie’s view of the cruelty of the effects of Roman formalism on provincial society, but there are two problems with his explanation of illegitimacy: first, not even all of the instances he cites seem likely to be explained by the status restrictions he mentions. For example, Youtie adduced *P. Bour.* 42.564, in which a lessee of government land at Ptolemais Nea was called Κάστωρ μη(τρὸς) Ταπασμούτ(εως) [ὁ] δι(ὰ) λόγων) Κάστωρ Ἰσίων(ος) τοῦ Διδᾶ, in his rendering, ‘Kastor, whose mother is Tapasmoutis, otherwise known in official documents as Kastor, son of Ision and grandson of Didas.’ There is

no sign at all that Ision was a Roman soldier, nor does the name Ision son of Didas suggest a Roman citizen, or even a citizen of a Greek polis.

Even more damaging is the fact that the principal means by which illegitimacy was constructed, in Youtie's view, came to an end, but illegitimacy continued. This problem, noted by Malouta, came forcibly to my attention in the course of preparing for publication the archive of the *nekrotaphoi* of Kysis, in the southern Kharga oasis, partly known since the 1890s but partly still unpublished. (I am preparing an edition of the full archive, most of which is kept in the Sackler and Bodleian Libraries in Oxford and in the British Library.) Of the members of the families of *nekrotaphoi* mentioned in the papyri, both male and female, some 40 have an indication of parentage. In 7 cases the legal parent was the mother, or 17.5 percent; slightly more among the women than among the men, but the difference is probably not significant. The texts of the archive range from 239 to 314, so we can exclude the possibility that the presence of illegitimacy in more than a sixth of the individual cases can be traced to the sources of the kind of illegitimacy Youtie was most interested in, namely the technical lack of a legal father produced by Roman legal restrictions on legitimate marriage between status groups. The archive belongs entirely to the period of universal Roman citizenship (which was, as Youtie observed, granted also to *apatores*) and after the Severan end of the marriage prohibition for soldiers.

What, then, was the meaning of illegitimacy? It lay, unquestionably, on the wrong side of the division between the respectable – free women, living in modesty, joined in marriages aimed at the procreation of children – and the shameful, the reverse in all aspects, in the Roman concept of sexuality and family.⁷ And we can no longer dismiss that social placement as a pure formality, as Youtie could those relationships and their consequent children that were not marriages because of Roman restrictions.

My first question about the illegitimate *nekrotaphoi*, then, was whether we should see the number of illegitimate persons mentioned in this archive as connected to their nekrotaphic status in some fashion. The

⁷ See K. HARPER, *Slavery in the Late Roman World, AD 275–425*, Cambridge 2011, pp. 281–325, at 307.

fact that of the 28 persons with known parentage who served as subscribers, witnesses, and document-checkers for the illiterate *nekrotaphoi* not a single one was illegitimate might lead one to suspect this. Should we indict the low-class habits of underakers? Or, I wondered, was the pattern independent of the *nekrotaphoi* and related instead to something that we do not yet understand in Oasis society – perhaps the frequent absence of the men on caravans to the valley? – or, more broadly, the society of Roman Egypt after the Antonine Constitution? I shall return to this question at the end of this paper.

Illegitimacy, in the sense of not having an officially mentioned father, certainly does not end in Egypt after the Antonine Constitution and the lifting of the marriage restriction on soldiers, but neither is it peculiar to the oases or unique to the *nekrotaphoi*. What matters from a social point of view is not the terminology in use in a particular place – for example, *apator*, which disappears from use after 314 – but actual statement of parentage in a context where we may expect it to have represented how the individual described himself or herself in official or public settings.⁸ I have computed the percentages of persons with mother's name rather than father's name in several major documentary sources dating after 212. They are as follows:⁹

| <i>Source</i> | <i>Date</i> | <i>Percentage</i> | <i>Total N=</i> |
|------------------------|-------------|-------------------|-----------------|
| Philadelphia land | 216/7 | 3.2 | 93 |
| Karanis land | 309 | 0 | 110 |
| Trimithis ostraka | III–IV | 3.9 | 231 |
| Hermopolis land | IV mid | 0.6 | 169 |
| Skar land | V late | 4.1 | 270 |
| Aphrodito tax register | 525/6 | 1.1 | 189 |
| Temseu Skordon land | 546 | 6.2 | 177 |

⁸ HARPER, *Slavery* (cit. n. 7), p. 452, discusses the emergence during the reign of Constantine – precisely the period at which the term *apator* disappears – of a new vocabulary for legitimacy used in both legal and ordinary Latin. He refers me to H. J. WOLFF, 'The background of the post-classical legislation on illegitimacy', *Seminar* 3 (1945), pp. 21–45, and G. LUCHETTI, *La legittimazione dei figli naturali nelle fonti tardo imperiali e giustiniane*, Milan 1990.

⁹ People without either patronymic or metronymic (i.e., with only occupational or official titles, or with place of origin) are not included. Entries for heirs are treated as if they were for the deceased himself or herself. Doubts are resolved in favor of male.

One would not want to push these data too far. Is it significant, for example, that the rate is very low in a metropolitan population compared to the village populations? Quite possibly, but not certainly. All of these registers (or volumes of documents in the case of the Trimithis ostraka) have lots of doubtful readings and missing data. Overall, however, it cannot be doubted that in most Egyptian villages of the third to sixth centuries there was still, as earlier in the Roman period, a small fraction of the population that had no official father. This shows that Youtie's approach needs reconsideration. With the *nekrotaphoi*, the small size of the set makes it impossible to be certain that its high percentage, which is a substantial multiple of the percentage found anywhere else, is significant. But we cannot escape the essential question posted by all of the post-Severan evidence: What is the origin of the illegitimacy documented in different places and times with some consistency?

In puzzling over this question, I have wondered if slavery is the explanation of the majority of the cases of illegitimacy, or at least of its persistence in the documentation after the Severan period. As we have seen, other explanations for the absence of a legal father are hard to come by or defend. On the other hand, a link to slavery is not immediately easy to identify. A child born to a slave woman was not officially described as 'son of Senosiris' but as 'slave of Didymos,' no matter who his biological father. If he was manumitted, he became 'freedman of Didymos,' his mother's name remaining legally irrelevant even though known. This would be true whether he was manumitted at the same time as his mother or, as would be more normal, considerably later. In other words, there is no scenario in which a child born as a slave would ever be identified legally as of unknown father but known mother.

On the other hand, a child born to a freedwoman after she was manumitted, if she had married, would be identified by his father's name and, in full legal parlance, also by his mother's. So one might ask why a freedwoman would be any more likely to be an unmarried mother than any other woman. There is in fact a possible explanation, that the biological father of the children was the same person (or one of the same persons) who might have fathered children by her while she was a slave. This might be the former master and now patron, who likely either had a wife

already or would not, even if widowed, marry his freedwoman for social reasons and preferred to have her as concubine;¹⁰ or it might be a man who was a slave, quite likely but not necessarily in the same household to which the woman had formerly belonged, perhaps even her sexual partner already while both were slaves. Both of these seem to me entirely credible situations; perhaps the first is the more plausible, if only because male slaves tended to be manumitted at younger ages than female slaves. Despite that fact, however, cohabitation of freedwomen with slaves was a phenomenon recognized in the SC Claudianum of AD 52 and by Hadrian in a decision reported by Gaius.¹¹ As long as the owner consented, the child would under Hadrian's rule be free. We must remember that something like two-thirds of the slaves in Egypt were female, which means that their percentage of the female population was twice as high as that of the male population: perhaps 13% of women vs. 7% of men, at a very crude guesstimate.¹² If even one-fifth of them entered into unions of either of these types, there would have been a steady flow of illegitimate children.

We cannot demonstrate the biological paternity of any of the individuals in the nekrotaphic archive who have only mother's names, of course. But we do find suggestive connections between the world of slavery and the world of illegitimacy among the *nekrotaphoi* on occasion, as in *SB VIII* 9873, a sale of nekrotaphic rights dated to 244, in which the seller is a man whose father had only a metronymic and the buyer the freedman of two brothers. The same freedman is joint petitioner with a man who has only a metronymic sixteen years later (unpublished). Five years later still (*SB III* 7206 in part) he engages in a transaction with a woman who has only

¹⁰ W. W. BUCKLAND, *A Text-Book of Roman Law: from Augustus to Justinian*, 3rd ed. rev. P. STEIN, Cambridge 1963, p. 89.

¹¹ BUCKLAND, *A Text-Book of Roman Law* (cit. n. 10), p. 412.

¹² It is possible, of course, that the rate of male slavery in the villages (from which most of the documentation cited above comes) was higher (as a result of their use in the agricultural labor force) and female lower, but the evidence for this is both earlier and of doubtful statistical reliability. On slaves as a proportion of the population, see R. S. BAGNALL & B. W. FRIER, *The Demography of Roman Egypt*, Cambridge 1994 [2nd ed, 2006], pp. 48–49, 60–63, 69–71, 156–159.

a metronymic. There are signs in the papyri that the *nekrotaphoi* we are dealing with seem to have had persistent concerns with demonstrating free status.¹³ If my hypothesis about illegitimacy is correct, these two aspects of the nekrotaphic family or families we are dealing with in this archive are but two parts of the same broader question of status. It is worth noting that the first *apator* attested in the papyri bears the name Aphrodisios, common among slaves.

But the situation must be more complicated than this would suggest. A freedwoman who gave birth to a child fathered out of marriage would herself be identified properly in documents as a freedwoman; she could not have a patronymic or metronymic. But some of the unmarried mothers we encounter do have parentage. In a mandate for representation (*SB I 4651* in part), a *nekrotaphos* named Besas gives his metronymic as Tmarsis and proceeds to identify her as the daughter of someone whose name is lost. From two other documents we know that that name is Paoutis: she had a patronymic. The same woman was apparently the mother of three *nekrotaphoi* figuring in the archive, so she is responsible for over 40 percent of the illegitimate individuals in it. Another case is Senosiris daughter of Isidora; Isidora was daughter of Petechon by one of his wives, and Petechon in turn was the son of Petosiris and Asklataria. So it does not seem that a servile background can be identified here either. On the other hand, the situation of Syros son of Sennesis, to which I have already alluded, is interesting; in both documents he appears jointly with Polydeukes alias Mersis, who was a freedman of two *nekrotaphos* brothers, Petechon and Petosiris. It would not be surprising if Syros was like Polydeukes alias Mersis of generally servile origins. One might imagine that Sennesis was in fact Polydeukes alias Mersis's mother when she was a slave, then that of Syros after manumission. In the other cases of illegitimate individuals in the archive, no information is given about the mother's legal self-identification, and there is not sufficient contextual material to help.

The obvious conclusion is that not all of the fatherless are the off-

¹³ For this and other statements about the *nekrotaphoi* archive and its documents, see my forthcoming edition.

spring of freedwomen. It would indeed be surprising if a single explanation would be sufficient. Prostitutes are sometimes adduced as another population whose children would not have had a legal father. But many of them were slaves, too, as the nexus legally, ideologically, and socially between slavery and prostitution was very close, and the children of slaves would have been slaves, perhaps eventually freedmen, not free persons without patronymics. At all events, I am inclined to think that some legal illegitimacy is indeed to be seen as closely linked to the institution of slavery. If this is anywhere near correct, the persistence of illegitimacy in late antique Egypt reflects not so much the loose morals of a lower-class population but in part the systemic habit of males, particularly of the economic elite, of having sexual relations with their female slaves and freedwomen;¹⁴ the loose morals of an upper-class population, one might rather say – from the standpoint of a Christian bishop, anyway. Roman society saw matters differently.

But, as we have seen, this also cannot be the full story. There were cases in which a woman of free, citizen parentage evidently entered into a union without legal marriage, even in the absence of barriers of status that we can detect.¹⁵ And it is worth reminding ourselves that these were not down-and-outs; most of the cases that I have tabulated come from registers of property-owners or payers of taxes on landed property, and although few seem wealthy, neither were they destitute. Their onomastics do not seem different, as far as I can observe, from those of people with patronymics. Because of the nature of the evidence, we do not know in most cases if the mothers had patronymics or were freedwomen; the registers do not give that many generations of identification. (I note in passing that the terms *apeleutheros* and *apeleuthera* are very rare in the later papyri; I have found only 13 instances after the year 300.)

¹⁴ See e.g. Jennifer GLANCY, *Slavery in early Christianity*, Oxford 2002, p. 53; in much more systematic fashion, HARPER, *Slavery* (cit. n. 7).

¹⁵ HARPER (by email) cites *CJ* V 27, 5 as support for the inference that some concubines were *ingenuae*, however much imperial policy under Constantine disfavored such unions, noting also Judith EVANS GRUBBS, *Law and Family in Late Antiquity*, Oxford 1995, p. 298.

I return to what I believe to be Youtie's most essential insight, namely that the children without fathers are not the products of casual liaisons, but of family situations not formally recognized. Tmarsis, with her multiple children working as *nekrotaphoi*, may be taken as emblematic. If neither slavery nor Roman legal restrictions suffice to explain these unions, what is the explanation for the practice of apparently respectable women from propertied families, themselves the offspring of married parents, entering into long-term quasi-familial relationships with men to whom they were not married?

In a legal sense, the situation is probably to be described as concubinage, just as Youtie described the informal marriages he identified. This relationship received extensive treatment from ancient jurists and legislators, as well as disapproving Christian writers. 'The line between concubinage and the sexual use of household slaves is harder to distinguish. When late antique men spoke, the two practice were often blurred,' says Kyle Harper in his comprehensive treatment of late Roman slavery (cit. n. 7, p. 315). From the point of view of many commentators in antiquity, it was obvious that concubinage was on the wrong side of the line between honor and shame. But it is far from clear that this view was shared throughout society, and Harper notes that we really have no good evidence to indicate what percentage of concubines were slaves or freedwomen and how many were instead of free birth, even of respectable station. It may well be that it was not so much absolute status of the woman as relative status of the parties that mattered. Despite Constantine's legislation (*Cj* V 26.1) forbidding men to have both wives and concubines simultaneously, there is plenty of evidence that they did so.

My hypothesis, then, is that many of the illegitimate individuals we encounter were the products of stable unions between men and women of substantially different social and economic status, even though juridically both free and perhaps even both property-owning. In the hierarchical society of Roman and late antique Egypt, there were plenty of social differentials wide enough to create suitable occasions for such unions, even if the man was not already married. I see no way of demonstrating this hypothesis either statistically or anecdotally, but I suggest that it combines the strongest element of Youtie's insights – the stability of

these unions – with an explanation less tied to temporally mutable legal restrictions and more founded on the abiding realities of social inequality in ancient Roman society.

It is with this question of inequality that I shall close. Although we may, like Youtie, feel ourselves beyond the classist assumptions about the morals of the poor expressed in both modern and ancient times,¹⁶ no American of the twenty-first century can ignore the fact that there are dramatic differences in the marital patterns of the economically comfortable and of the poor. The turmoil in marriage and divorce patterns seen in American society (and of course not uniquely there) since the 1960s has at present settled into a bifurcated situation, in which eventual marriage rates are high (even if marriage is later) and divorce less common among the middle and professional classes and marriage rates far lower, with births to unmarried mothers correspondingly higher, among the poor. In a dynamic modern economy, with expectations of economic mobility largely absent from ancient thought, such patterns can be seen as circumstantial and contingent rather than essentially linked to character.

Although we lack the kind of long-term, standardized series of data that would allow us to watch changes in inequality from Ptolemaic to Late Roman times, there are some indications of an increase in inequality during that span, probably driven by Roman policies.¹⁷ We can hardly exclude the possibility that this trend sustained the existence even after 212 of a population of freeborn women in a sufficiently disadvantageous position that they had to accept long-term unmarried relationships as their way of life. The oases, with as it seems a high level of concentration of property in the hands of those wealthy enough to invest in wells and an equally high level of need for long-distance transportation workers,

¹⁶ Harper points to Jerome, *Ep.* 125.7: ‘quantum vilior earum condicio tanto facilior ruina est’ (with specific reference to poor women).

¹⁷ This is a large topic that can hardly be treated here. See for the analytic foundations A. K. BOWMAN, ‘Landholding in the Hermopolite nome in the fourth century AD’, *Journal of Roman Studies* 75 (1985), pp. 137–163, and R. S. BAGNALL, ‘Landholding in Late Roman Egypt: the distribution of wealth’, *Journal of Roman Studies* 82 (1992), pp. 128–149. Most recently on the Ptolemaic to Roman transition, see A. MONSON, *From the Ptolemies to the Romans*, Cambridge 2012.

may have had a disproportionately large population of landless people on the economic margins, a natural population to suffer this kind of vulnerability. Whether this can legitimately be said of the relatively properted *nekrotaphoi* is harder to say, but it may at least help to explain the substantial numbers of metonymics in the ostraka from Kellis and Trimithis.

Roger S. Bagnall

560 Riverside Dr., Apt. 18J
New York, NY 10027
USA

e-mail: roger.bagnall@nyu.edu