The Marriage Legislation of Augustus: A Study in Reception

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Abstract. — The article examines various legal rules regarding children in light of the Augustan law(s) on marriage, the lex Iulia et Papia. It does so by construing "reception" broadly, so as to embrace a wide range of norms affecting children, not just those directly established by the lex Iulia et Papia and statutes passed pursuant to it, while examining the question of the laws' effectiveness on a narrow front, focusing above all on the efforts of emperors and jurists. The point of departure is work of fundamental importance on this subject by Dieter Nörr. What emerges is that the already favorable treatment of children under the law was considerably reinforced following passage of this legislation. Whatever one chooses to argue for their position in social life, it is clear that children were not marginal to the concerns of the Roman political and legal authorities.

I begin with the favorable treatment of the Augustan legislation itself by emperors and jurists. From there I examine the state-sponsored alimentary programs, which had privately-sponsored predecessors. Other initiatives inspired at least in part by the Augustan legislation that favor children are the SCC Tertullianum and Orfitianum. I then introduce the Edictum Carbonianum and a series of other measures that, while not pursuant to the lex Iulia et Papia, reflect a similar policy favoring children. After a brief look at changes in the rules concerning the guardianship of minors (tutela) a final section describes the transformation of patria potestas especially in the high and late classical periods of Roman law.

Keywords: alimenta, children, lex Iulia et Papia, marriage, patria potestas.

1. introduction. —The reign of Augustus witnessed the passage of a marriage law, the lex Iulia de maritandis ordinibus of 18 BC, followed at some remove by another statute, the lex Papia Poppaea of AD 9, which supplemented and partly recast the first. Scholars have for many years debated the impact of these laws on Roman society, specifically the question of whether they were effective, with many, if not most, adopting a pessimistic view. To a certain extent, the answers given to this question depend on exactly how it is framed. For example, an author will make certain assumptions, either explicitly or implicitly, about what “effective” means, assumptions that can exert a strong influence on the conclusions that follow.

Given the enormous challenges presented by the state of our evidence, such a situation is hardly surprising, and a strong argument can be made for an agonistic position. This is what one finds, broadly speaking, with Dieter Nör, who in a series of studies has produced what is to my mind one of the most useful and compelling approaches to this subject. At the same time, a close reading of the

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1 I would like to thank the editor of this journal, Salvo Randazzo, and the two referees, for their generous and helpful suggestions. A bibliography can be found on my personal web page at Vanderbilt University, accessible at www.vanderbilt.edu/classics.

2 The scholarly literature on the Augustan marriage laws is vast and can be cited only very selectively in what follows. See for the older literature T. A. J. McGinn, Prostitution, Sexuality, and the Law in Ancient Rome, New York- Oxford University Press, 1998; for a more recent discussion T. A. J. McGinn, Something Old, Something New... Augustus Legislation and the Challenge of Social Control, in AHB 22, 2008, 15-38. For the relationship between the two laws the study by Paul Jörs, published in 1882 under the title Über das Verhältnis der Lex Iulia des maritandis ordinibus zur Lex Papia Poppaea, remains fundamental. This is conveniently accessible in T. SPASINOLO VIGORITA ed., Paul Jörs: Iulianae Prostitutiones - Due studi sulla legislazione matrimoniale augustea, Napoli-Jovene 1985. Ancient and modern commentators tend as a point of convenience to treat the two laws as one, referring to them through a composite title, such as lex Iulia et Papia; see McGinn, Prostitution cit. 70-71. This is the practice adopted in what follows, except when a particular reason dictates reference to one statute or the other.


sources in light of Nör’s work suggests that greater progress on this score is possible. I propose in this article to examine the evidence for the reception of the Augustan legislation on the part principally of the political and legal authorities, and to a lesser extent of society at large, in the area of legal measures affecting children. The idea is to achieve an improved understanding of its effectiveness, at least in terms of its influence on key segments of elite opinion, insofar as this can be measured from various enactments of policy and of law. By key segments I mean persons who were well placed to have an impact on the lives of at least some members even of the lower orders, namely, emperors and jurists.

Our focus shall be on Roman children, who were in general treated well under the law. This favorable situation of theirs only improved with the passage of time. My article documents this phenomenon and attempts to explain it. Briefly put, I argue that, while the law always favored children, in the wake of the Augustan laws on marriage, the lex Iulia et Papia, this principle was considerably reinforced in many areas affecting children, not just those directly addressed by these statutes. The obvious challenge to this thesis is that it is frankly impossible to be certain that a number of the changes I describe would not have occurred anyway, without the Augustan legislation. Nevertheless, the overall trend is so striking that the explanation I propose retains, I think, a high degree of plausibility. Whatever one chooses to argue for their position in social life, it is clear that children were not marginal to the concerns of the Roman legal authorities.

One thing to emphasize at the start is that it is not all that obvious that the law should have favored children. While recent research has demonstrated that Roman society was no paradise for seniors, this was hardly, by modern standards, a youth culture. The ultimate explanation for the trend favoring children must, I believe, be sought in demography and the moral reception of this reality by the Roman elite. High mortality rates for both adults and especially for very young children meant first that the survival of the latter could not be taken for granted, and second that those who did survive were likely to be rendered half (meaning in most cases fatherless) or even full orphans at a relatively young age.
This article deals with the central period of Roman law, ranging from ca. 100 BC to ca. AD 250. It considers only Roman citizens, so not slave children, for example. For sheer reasons of space the treatment is extremely summary and selective in nature. The focus is on relatively young children. This means that for the most part our concern is with prepubescent children (impuberes), who were minors at law until they reached the legally defined age of puberty/majority, meaning twelve for females and ca. fourteen for males.

2. Emperors, Jurists, and the Lex Iulia et Papia — The Augustan statutes encouraged marriage and the raising of children for moral and demographic ends through the institution of a regime of rewards and penalties, the most important of which were testamentary in nature. They created two new privileged statuses - married persons and an even loftier category of married with children - while defining for each of these a corresponding underprivileged status, namely, caelibes and orbi. Another feature was to create a double series of marriage prohibitions in the context of which the ordo senatorius came to be defined for the first time at law.

Before considering the response to these statutes that developed over the years on the part of the political and legal authorities we do well to ponder, however briefly, their reception more generally in Roman society, at least on the level of the upper classes, a matter greatly clarified by the work of Nörr. His most important argument in this regard is that the legislation did not provoke a reaction that criticized its purpose and aims in a fundamental way. This is somewhat surprising because, as Nörr himself points out, these laws did inspire a response that was remarkable in its intensity, resounding more loudly perhaps than any other legislation in the history of the Romans. This fact in itself seems largely to explain the pessimistic conclusion of many scholars that it was unsuccessful. How could such an unpopular measure enjoy anything but failure? Nörr rightly emphasizes that the criticism, fierce as it is, is overwhelmingly if not exclusively devoted to other matters, above all, the impact of the laws' penalties, and not least the activities of the delatores they unleashed on the upper reaches of Roman society. The ancients register complaints about the quality of the drafting of the legislation, including its gaps and omissions, its inconsistency and illogic, just as some directed sarcasm at its sponsors, meaning Augustus himself and the consuls of AD 9, who were not in full (or in the latter case, as both were unmarried and childless, even partial) compliance with its norms, while still others attempted to evade these. Far from representing an attack on the laws' fundamental aims, at least some of this criticism might be read as aligning with these, or at least suggesting their effectiveness within certain limits.

The nature of the reception is also surprising because the laws were in conflict with values that were dear at least to some Romans. Not everyone wished to marry and have children, some evidently thought that their primary relationship in life, whether marital or not, should be dictated by personal choice and not by the law, and there was not only a longstanding tradition of loyalty to a decedent spouse that militated against remarriage, especially for widows, in the face of the widespread practice of remarriage, but even some admiration for those who declined to divorce a spouse on the ground of childlessness. Despite some very partial, limited precedents, the laws were in their subject matter in certain key aspects and especially in their scope strictly unprecedented, and so trespassed on the principle that law should not intrude in such a sphere to such a degree. It is in these areas, where the values represented by the laws were in conflict with other values held by at least some Romans, that we find perhaps the bitterest criticism, some of which appears to come close to a critique of the legislation's fundamental purpose.

The reason why it does not go any further in this direction can be found in Nörr's entirely plausible explanation that Augustus successfully appropriated the traditional moral standards most widely shared among Romans.

6 See Nörr, Rechtskritik cit. 76-78, 95; Nörr, Planung cit. 1094-1105; Nörr, The Matrimonial Legislation cit. 1372-1377. I should emphasize the point, obvious as it is to many readers, that the sources on which we must rely are invariably the products of (male) members of the elite, although the evidence examined by Nörr represents a broader sector of upper-class opinion than that which forms the main focus of this article.

9 Nörr is certainly conscious of the public policy precedents for the Augustan marriage legislation as well as - and this is equally important - their limitations in terms of subject matter and scope: see Nörr, Rechtskritik cit. 76; Nörr, Planung cit. 1094, 1102; Nörr, The Matrimonial Legislation cit. 1369. See further McGinn, Prostitution cit. 78-79. Despite their limitations, these precedents support Nörr's argument that the substance of Augustus' initiatives was grounded in deeply-rooted values to which the vast majority of contemporaries subscribed.

8 See above all Tacitus Ann. 3.25-28, a text that merits more discussion than can be offered here. Suffice it to say that I do not believe it refutes Nörr's thesis.
A great exception to this trend might be thought to be the work of the Augustan poet Ovid, above all, in the Amores and the Ars Amatoria12. Scholars have debated, and will presumably continue to debate, the precise nature of his reception of the Augustan legislation, which focuses most of all, though not exclusively, on the lex Julia de adulteriis rather than on the marriage laws. For example, does his poetry contain a deliberately anti-Augustan political message13? There is great difficulty, one must acknowledge, in the fact that, the greater the artist, the more resistant to such analysis his work is going to be. The challenges do not end there. A Foucauldian might quite correctly insist that reform has the characteristic of effectiveness of this legislation, because it is somewhat at odds with his anti-Augustan poet Ovid, above all, in the Amores and the Ars Amatoria12.

One final aspect of Nör's discussion that merits attention is his assessment of the effectiveness of this legislation, because it is somewhat at odds with his argument that Augustus was asserting a set of traditional, core values. In a broad sense, Nör, as stated above, is agnostic about the laws' impact, asserting that we simply lack the data to reach firm conclusions. From this perspective he develops a highly plausible argument that the statutes established a mechanism for enforcement that, insofar as it was balanced between the goals of revenue and reproduction, was in a sense fail-safe: the state could not lose in that one aim succeeded in proportion to the failure of the other. With regard to the demographic purpose itself, which Nör regards as primary, he is inclined to pessimism, though prepared to admit the possibility of some success with members of the Italian and provincial elites14.

It is my purpose to examine the question of the laws' effectiveness on a narrow front, by focusing on certain important aspects of its reception by later political and legal authorities. The treatment of the Augustan marriage legislation itself by subsequent emperors has been fairly well studied, so that it is possible to say here simply that its goals received broad support over time, though of course some emperors were more supportive than others15. As for the jurists, we have an unusual, and highly important, programmatic statement from the second-century jurist Terentius Clemens: "...the statute was enacted for the common good, namely, to promote the procreation of children, [and so] is to be furthered through interpretation"16.

The logic is, I believe, obvious, and its implications are easily discerned in juristic discussions of the legislation itself, which take a consistently favorable stance in support of its goals, without being quite as forthright as Clemens is about this. What matters for us is whether the position adopted by emperors and jurists with regard to the Augustan statutes translated into favorable treatment of children in other areas of social policy and the law. This is relatively easy to demonstrate regarding various measures that were, I argue, taken pursuant to the lex Julia et Papia, meaning that they favored children in a comparable manner. We examine the alimentary programs and the SCC Tertullianum and Orfianum. To be clear, I argue that even in examining the question of the laws' effectiveness on a fairly narrow front, meaning those key sectors of elite male opinion just described, the true measure of their influence in this area can only be taken from a relatively broad perspective, meaning that I adopt an expansive meaning of "reception" in what follows.

3. Alimenta — These are public foundations established by the imperial government and by private individuals to provide material support to children in the form of what some scholars have described as family allowances17. The first at-

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13 See the contrasting views of Spagnuolo Vigorita, Costa Domus cit. 41; Davis, Ovid and Augustus cit.
14 See McGinn, Something Old cit. 23.
15 See McGinn, Something Old cit. 23.
16 The Matrimonial Legislation cit. 1571-1377
tested example is from the Julia-Claudian period, a privally-sponsored foundation designed to support the children of children. A. T. Helvius Basila, leaving a will and possibly funds, set these programs on a more permanent footing than those of others. Basila's emphasis on a widespread support for the poor, both in time of need and in times of plenty, was a testament to the senatorial family's ability to support the city of Rome through the ages.

For the purposes of this study, we will focus on the financial aspect of these foundations. The funds were managed by the senator's family, and their distribution was subject to the regulations of the state. The administrators of these foundations were usually members of the senatorial family, and their decisions were subject to the approval of the state authorities. The funds were managed by a committee of administrators, who were responsible for the distribution of the funds to the poor.

The funds were used to support the poor in a variety of ways. The most common method was the distribution of food and clothing. The funds were also used to support the education of the poor, and to provide medical care. The funds were also used to support the construction of public works, such as roads and bridges.

The funds were managed with a high degree of efficiency, and the administrators were able to ensure that the funds were used for their intended purposes. The funds were also used to support the development of new industries, and to provide employment for the unemployed. The funds were also used to support the arts and culture, and to promote the welfare of the community.

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seems to have been a dedicated and energetic governor. Most striking for our purpose is the degree to which he seems to have taken an interest in the practice of the imperial cult, especially at Ancya. In fact, Basila seems to have played a key role in the installation of an important series of inscriptions on the walls of the Temple of Augustus and Rome in that city, including a list of priests of the imperial cult and their activities, as well as Greek and Latin versions of the Res Gestae.

It would be helpful if we knew more about Basila, but perhaps enough has been said to suggest that he is a very likely candidate for an early exponent of a program that, given the evidence to follow, seems well-attuned to the moral and demographic aims of the Augustan marriage legislation and the political message attendant upon this. In fact, as we shall see, the privately and publicly sponsored alimentary programs took this political project to a level of society where the impact of the laws themselves seems to have been relatively slight, and so represent a true extension of the first Emperor’s purpose.

Nerva likely, and Trajan certainly, instituted state-sponsored programs that continued under their successors at least until the early third century. Some fifty-five or so of these, at minimum, are attested for Italy. The public policy mo-

23 The provincial governor might function as regulator and even as initiator of the imperial cult, from the reign of Augustus onward, though some appear to have been more engaged in this than others. For the evidence from Asia Minor and nearby, see S. R. F. Price, Rituals and Power: The Roman Imperial Cult in Asia Minor, Cambridge-Cambridge University Press 1984, 51, 68-71, 77, 161, 171. For what it is worth, there is evidence of the imperial cult at Atina: S. L. Dixon, Community and Society in Roman Italy, Baltimore, MD-Johns Hopkins University Press 1992, 208.

24 Mitchell and French, The Greek and Latin Inscriptions cit. 150. Cf. A. E. Codley, Res Gestae Divi Augusti: Text, Translation, Commentary, Cambridge-Cambridge University Press 2009, 21-22, who sets out the following possible scenarios behind the installation of the Res Gestae, namely, that the governor was the prime mover in this, that the initiative came from the provincial council, and/or that the town councils in some or all of the three places we know to have displayed copies took a leading part. She recognizes that any one scenario does not exclude a high level of participation by the other parties just named and that it is likely the provincial governor played a significant role.

25 Uncertainty remains over the date of the bequest upon which the alimentary program at Atina depends. The inscription attesting this (ILS 977) we owe to Basila’s daughter Helvía Procula, the wife of G. Dullus Vocale, killed in AD 69 as a legionary commander: see PIR² H 82, with references. Mitchell and French, The Greek and Latin Inscriptions cit. 346 date Basila’s memorial on this basis to the forties of the earliest, and more likely the fifties.

26 See Woolf, Food cit. 199, on the lists compiled by Duncan-Jones and Eck; Lo Cascio, Il princeps cit. 282; Jongman, Beneficial Symbols cit. 65-9. Cao, Alimenta cit. 134-7

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The evidence of Pliny in the Panegyricus, the oration of thanksgiving he offered as consul in AD 100, shows that Trajan made an important conglirium, or distribution of money, in the capital the previous year that included children as beneficiaries, and instituted an alimentary program, also at Rome, that embraced just under 5,000 children. Pliny’s language is important for our understanding of how the Emperor’s purpose was received by contemporaries: “while enormous rewards and comparable penalties motivate the wealthy to raise children, there is only one way to encourage those less well-off - a good Emperor.” This is an obvious reference to the Augustan legislation and its limitations, con-

27 For the coins, etc., see Woolf, Food cit. 222-3; Lo Cascio, Il princeps cit. 265-7; P. Pavón Torrellas, La propaganda política de Trajano a través de sus emisiones monetarias, in Trajano, Óptimo Prínipe, de Italia a la corte de los Césares: Ciclo de conferencias, Sevilla, 14 al 16 de octubre de 2003, [ed. J. González Fernández], Sevilla-Fundación El Monte 2004, 106-20. The inscriptions were found at Veleta (ILS 6675), near Placentia, and at Ligures Baebiani (ILS 8509), near Beneventum.

28 Pliny Pan. 25-8. See Duncan-Jones, The Economy cit. 290 on the alimentary program; H. Lamotte, L’œuvre de Trajan en faveur des enfants de la plebe romaine: Un essai de politique nataliste?, in MÉTRA 119.1, 2007, 189 on the conglirium. I view these, as well as the imperial frumentationes, as separate but related Imperial initiatives, though there is a diversity of opinion among scholars on the nature of the relationship: see, for example, A. Abràminko, Zur Organisation der Alimentartüfung in Rom, Laverne 1, 1990, 125-31; Lo Cascio, Il princeps cit. 227; Jongman, Beneficial Symbols cit. 49-52.

29 Pliny Pan. 26.3: "Locupletes ad tollendos liberis ingestis praemia et pares poenae cohoniantur, pauperibus educandis una ratio est bonus princeps." Whatever view one takes of the precise status of the recipients, it is clear that Pliny refers to members of the sub-elites: see also the contrast he draws between processus and plebs neglecta in what follows (6). From my perspective the partition of the view that the recipients in alimentary programs did not rank among the utterly indigent have the better argument (see above in the notes for references), but the matter cannot be pursued here.
trusted with the more praiseworthy policies of the reigning Emperor. Pliny goes on to amplify the point, asserting that the fate of the Empire and the res publica are at stake. If the Emperor neglects the lower orders, the 'plebs', his concern for the upper classes, the procures, is revealed as futile. While the context is strictly that of the congeneral and alimentary program at Rome, which is Pliny's focus throughout this speech, the ideological justification surely extends to all imperial alimentary programs. The logic, evidently shared by the Emperor and others as well, is clear. Providing material assistance to children on this social level, which does not necessarily embrace the utterly indigent, was thought to encourage prospective parents to raise them.

We can gain a more precise idea of what Trajan was attempting through a consideration of the sculptural program of the Arch at Beneventum. Like Pliny's speech, the Arch emphasizes Trajan's role as father of his country (Pater Patriae). A connection with Augustus is made more explicit through the depiction of children, which is reminiscent of Augustan iconography as represented above all on the Altar of Peace, and through reference to several imperial initiatives designed as elements of a program encouraging growth and prosperity, including, of course, the alimenta. One can argue for a difference in that the Augustan monument sees these benefits as flowing from peace while the Trajanic

32 The legislation differed not only in terms of its effectiveness regarding the lower orders but also in the means it used, paene as well as preemio, whereas the alimentary schemes deployed only the latter, a fact implicitly emphasized in the rhetoric of imperial inscriptions: see Nöke, Planning cit. 1097-1100; Nökea, The Matrimonial Legislation cit. 1371-1373; Woods, Food cit. 222-5. The target group was therefore comprised of persons with insufficient property to be motivated by the provisions of the Augustan laws.

33 E. Lassus, Le Principe et son fondateur: L'utilisation de la référence à Auguste de Tibère à Trajan, Brussels-Éditions Latomus 2008 (= Collection Latomus 311), 338-40 points out that Pliny in this speech mentions Augustus explicitly only twice, and in a relatively trivial manner. The indirect references are of course far more important: see also Pan. 37-40 on Trajan's improvements to another Augustan law that introduced a tax on inheritances.

34 DUNCAN-JONES, The Economy cit. 293.

35 For what follows, which can only be a cursory treatment, see the fine discussion in S. CURRLE, The Empire of Adults: The Representation of Children on Trajan's Arch at Beneventum, in Art and Text in Roman Culture (ed. J. ELSNÁ), Cambridge-Cambridge University Press 1996, 283-81, 308-12. Most historians view the Arch, at least in part, as representing Trajan's alimentary measures, but for some - utterly unpersuasive - skepticalism on this score, see J. D. UZZI, Children in the Visual Arts of Imperial Rome, Cambridge-Cambridge University Press 2005, 41-45.

36 By now this was a fairly standard imperial title, but that a strong connection with Augustus still existed is suggested by HA Hadr. 6.4.

views them as deriving from war and military conquest. But the use of representations of children to suggest a moral and demographic renewal that looks backward and forward at the same time is very similar. Trajan clearly wishes to invoke the policy of his distinguished predecessor while emphasizing his own distinct contribution to the realization of the same ends.

The main idea behind the state-sponsored alimentary measures was, as part of a more general appeal to the example and authority of the first Emperor, to pursue the demographic and moral goals of the lex Iulia et Papia in a more effective manner, by offering explicitly material support that extended to some lower levels of society. The Augustan legislation itself was clearly designed to embrace at least some elements of the lower orders, but it does seem that its most effective incentives, both positive and negative, such as those governing testamentary dispositions, were aimed at, or had sense almost exclusively for, members of the elite.

Not only alimentary programs sponsored by the state but some established by private individuals are attested in the years that follow. Pliny himself famously established one for his hometown of Comum. If Nerva was in fact the originator of the state-sponsored programs, then Pliny and other benefactors were evidently influenced by that Emperor's exhortation to follow his example ad munificiendum. Trajan and his successors no doubt provided their own impetus to private giving, at minimum through setting an example. So we have numerous attestations of second-century foundations in Italy and elsewhere in the Roman world. There are some differences in the qualifications laid down for the recipients and the design of the programs in other respects, but nothing to
The statute, passed under Hadrian, it was assumed - would finds this lacking. For further references see McGinn, SC - not surprisingly 109-13, upon which this brief account depends, and the notes below. Here, sexes Cf. Y. I mit Einem Beitrag zur Oxford University 1967. Kinderfürsorge sored ones. See the useful discussion in dazianl' alimentari both referred applying Eligibility confirmed for the latest in turn by that same legislation on the level of ideology. By the second century at levels. It seems that the policy pursued and from the practice of private individuals as far as the method was concerned. We might reasonably suppose that the latter had been inspired in turn by that same legislation on the level of ideology. By the second century at the latest a broad social consensus emerges in favor of providing material support to children that resonates, as we shall see, in various areas of Roman private law.

4. Senatusconsultum Tertullianum. — This statute, passed under Hadrian, improved, under certain conditions, a mother's intestate succession to her own children

Previously she had, under the same law, no claim. The Praetor had admitted berty evidently served this purpose, if often on a more generous interpretation than that suggested by the law (see above, in the Introduction). Similarly, a ruling by Hadrian confirmed by Caracalla appears to have established fourteen years for females and eighteen years for males as the upper limits for the state-sponsored programs, which Upland suggests applying to privately sponsored ones where the benefactor has not specified an age but referred to the onset of puberty (usque in pubertatem): Ulp. 2.11.1.4.1. Eligibility for the state-sponsored programs is commonly assumed to have begun for both sexes either at birth or at three years of age, by analogy with the privately sponsored ones. See the useful discussion in A. Madroncalda, L'età dei beneficiari nelle 'fondazioni' alimentari private per l'infanzia durante l'alto impero, in SDHI 61, 1995, 327-64.

Significant are the instances in which publicly and privately sponsored programs existed together in the same town: S. Marenz, Zu der kaiserlichen und der privaten Kinderfürsorge in Italien im 2. und 3. Jh., in Klio 55, 1973, 281-4.


ted her among heirs of the third grade, the cognati, but she was outranked by her children's agnatic relatives, who qualified in the second grade as "statutory heirs" or legitimi. The SC granted her enhanced standing under the civil law, so that she was now promoted to that second grade in the praetorian system, among the legitimi, meaning ahead of the cognati. Only women with the ius liberorum were eligible and they had to be widowed in order to receive the benefit.

The SC Tertullianum has been convincingly explained as an effort to keep property within a child's family of origin and prevent its dispersal either among more distant relatives (favored under both the civil and praetorian rules of succession) or to a patron (if the woman were freed). The ultimate end was not so much as to benefit the woman herself as to preserve the property for her surviving children, to whom the decedent child's estate - it was assumed - would pass when she died. One sign of this is that the true concern is that, if the decedent child himself had children (meaning sui heredes or liberi in the two sets of classifications), they excluded the mother. Another is the rationale for the criterion of the ius liberorum, which was not just honorific (in the sense of rewarding a woman for producing so many children) but designed to heighten the chances that surviving children would succeed to the mother. In essence, she was granted a life interest in an estate that had originally belonged to her decedent husband and that she was expected to transmit to her surviving children together with her own property upon her death.

The SC is a statute that is in important ways obviously pursuant to the lex lilia et Papia but that takes a new direction as well. It borrows an important criterion of eligibility of the ius liberorum from the Augustan law(s), defining this in precisely the same way, meaning that three children qualified a freeborn woman, while four did so for a freedwoman44. Like its predecessor it deals with benefits upon succession, though with the important difference that while the Augustan legislation dealt only with succession under a will, the SC addresses intestate succession. This suggests a concern with providing material support for children below the level of the elite, but not too far below, in other words, at a level of society where there was some property to transmit, so it was not aimed at the utterly indigent45. Presumably there was some overlap with the elements of so-

43 Children dying in postestate had no property for others to inherit, while in the case of decedent emancipati fathers were preferred to mothers: see Th. Ulp. 26.8, with McGinn, Prostitution cit. 111.
44 PS 4.9.1.7.
45 Of course, even among the elite there might be reasons why wills went unwritten or - when written - failed, meaning we cannot exclude an intended application of the provision for intestacy also to this level of society. For a recent discussion, see J. F.
ciety targeted by the contemporary alimentary programs. In fact, the SC Tertullianum appears not so much to seek to reconcile the goals of these programs with those of the Augustan marriage law(s), which as we have seen were already consonant with each other, but to broaden the means employed to pursue these same goals.

This argument seems borne out by an important development that took place in the wake of the passage of the SC. The jurists before long extended the privilege to mothers with illegitimate children. It is not as if illegitimacy and intestacy were utterly unknown among the upper classes, but their incidence no doubt increased as one moved down the social scale. The intention of Hadrian and the jurists was that the material support contemplated by the law benefit children along as broad a social spectrum as possible. This was true to the extent that even mothers who were prostitutes were allowed to qualify for the benefit established by the SC.

5. Senatusconsultum Orfitianum. — This statute, passed in AD 178 under Marcus Aurelius and Commodus, built on the logic of the SC Tertullianum. It granted a woman's children preference, under the civil law, in terms of intestate succession to her estate. The SC accomplished this by raising them from the third praetorian class (unde cognati), to the second (unde legitiini), just as its predecessor did for mothers, but on a far more generous basis, ranking them above all members of her family, including her brothers, sisters, and other agnates. So, for example, if a woman died intestate and was survived by a brother and a daughter, the brother (as nearest agnate) took the entire estate before the passage of the SC Orfitianum, and her daughter took the entire estate after it. The mother did not have to possess the ius liberorum, for obvious reasons.

The more liberal disposition of this SC illuminates the purpose behind it and its predecessor, that of providing material support to as many children as possible across different social levels. Just as freedwomen received the benefit under

Gardner, Roman 'Horror of Intestacy?', In A Companion to Families in the Greek and Roman Worlds (ed. B. Rawson), Chichester, UK-Wiley-Blackwell 2011, 361-76. A similar point holds regarding illegitimacy, a subject that cannot be pursued here.

44 Iul.-Ulp. D. 38.17.2.1 (Ulpian credits Julian with this move). MEINHART, Die Senatusconsulta cit. 40-1, 47 unpersuasively dates the change later; cf. GARDNER, Family and Familia cit. 256-7. Illegitimate children were supported by the Imperial alimentary foundation at Veii, although in relatively small numbers: see CAO, Alimenta cit. 273. Most scholars believe that the lex Iulia et Papia provided benefits only for parents of legitimate children, although this principle was attenuated over time: see, for example, ASTOLFI, La Lex Iulia et Papia cit. 31-2, 56-7, 313-6.


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the SC Tertullianum, their children were eligible under its successor, and the jurists here too extended eligibility to illegitimate children. Modestinus observes that all children are eligible for a mother's estate, even if they are the product of different marriages, and Paul adds that even a child not sui iuris, that is, in someone's potestas, is eligible. So the child - ideally - benefits even if a father survives the mother, "ideally" in the sense that the father was expected to transmit the property in question to the child upon his own death. Once again a benefit to a child is implicated in a benefit to a parent. One is struck by the general irrelevance of patria potestas (and manus) under this statute.

6. The Edictum Carbonianum and Similar Measures — Aggressive assertion of the material interests of children at law as a matter of public policy was not limited to measures that can be defined as pursuant to the lex Iulia et Papia. That the jurists could and did take such a broad approach is shown by the following comment of the second-century jurist Pomponius on the interest of the community as a whole in dowries: "The legal institution of the dowry is always and everywhere of the greatest importance. For it is in the public interest that dowries be preserved for women, since for the procreation of offspring and the replenishment of the community with children it is emphatically necessary that women have dowries." The important point is that the jurist does not cite the Augustan legislation itself, but the public policy that this advanced.

46 Ulp. D. 38.17.1 pr.-2.
47 Mod. D. 38.17.4; Paul. D. 38.17.6 pr.
49 Ulp. D. 38.17.1.6.
51 McGinn, Prostitution cit. 111.
53 Pomp. (I5 ad Sabinum) D. 24.3.1: "Dotlum causa semper et ubique praecipua est: nam et publice interest dotes mulieribus conservari, cum dotatlas esse feminas ad subo-
My argument, again, is that while the favorable treatment of children predates the law(s), this approach received in their wake an important validation whose effects we can trace on the level of policymaking. A good example is the *Edictum Carbonianum*, in part because this is strictly undatable. Most scholars assign this provision of the Praetor’s Edict to the late Republic on speculative grounds, while the datable evidence we have for its elaboration, beginning with the reference to the Augustan jurist Labeo, comes after the passage of at least the first Augustan marriage law. Rather than tendentiously dating the provision to this period, I think it better to leave the question open.

The *Edictum Carbonianum* granted a particularly defined mode of *bonorum possesso* under any of the three basic categories, *contra tabulas*, *eae tabulis*, and even, though perhaps not from the start, *secundum tabulas* to a minor whose claim to rank among the *iberi* (as defined by this measure) of a decedent *pater familias* was impugned, and who had not been validly disinherited. This grant of *bonorum possesso* was designed to safeguard the property in question against dissipation, to provide material support for the child, and to avoid prejudice to the latter’s pursuit of his or her interests at law.

Such impugning of a minor’s claim to the succession amounted of course to an attack on his or her status as a legitimate heir to the decedent, so that the procedural questions surrounding the proof of this status were of paramount importance. It was from an early date routine, and at all times possible, to defer

additional matters from possession of the estate by giving security, they might degrade its value during a potentially lengthy postponement. His rather casual introduction of Hadrian’s rescript belies its importance, which is guaranteed by the Emperor’s own words. What this measure did was to take the policy goal behind this regime, that of protecting the child’s best interests, and refine it further, so that the Praetor no longer simply assumed that it was an advantage to delay resolution of the status-question, but was prepared to evaluate whether expediting it was better to leave the question open.

The text is important evidence for a policy of protecting the best interests of the child that is especially prominent in the legislation of the second-century emperors. It is far from an isolated instance, even within the scope of Hadrian’s own policymaking. Worth noting is that in cases involving the invocation of the Emperor’s own policymaking. Worth noting is that in cases involving the invocation of the

... divus etiam Hadrianus ita rescripsit: “Quod in tempus pubertatis res differri solet, pupillorum causa fit, ne de statu periclitenetur, ante quem se tueri possint. Ceterum si idoneos habeant, a quibus defendatur, et tarn expediatam causam, ut ipsorum interstit naturae de ea judicari, et tutores eorum judicio experti volunt: non debeat adversus pupilos observari, quod pro ipsis exegogitum est, et pendere status eorum, cum iam posse indubitatus esse.”

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53 On *bonorum possesso*, the possession of an estate granted by the Praetor to someone whose claim to it he recognizes, see Fuer and McGinn, *Casebook* cit. 329. For the status of minor at law, see the introduction to this chapter.

54 See Scaev. D. 5.2.20. One particular advantage enjoyed by the minor was that in the determination of status, provided a guaranty was offered, he or she played the role of defendant, meaning that the burden of proof fell on the adversary impugning that status: Segnauni, *L’editto Carboniano* cit. 174.

55 On the connection of a question between postponement and the minor’s ability to defend his or her interests, see Ulp. D. 37.10.1.11; next note.

56 Ulp. (41. ad edictum) D. 37.10.3.5: “...divus etiam Hadrianus ita rescripsit: ‘Quod in tempus pubertatis res differri solet, pupillorum causa fit, ne de statu periclitenetur, ante quem se tueri possint. Ceterum si idoneos habeant, a quibus defendatur, et tam expediatam causam, ut ipsorum interstit naturae de ea judicari, et tutores eorum judicio experti volunt: non debeat adversus pupilos observari, quod pro ipsis exegogitum est, et pendere status eorum, cum iam posse indubitatus esse.’”
Edictum Carbonianum the pater familias was as a rule deceased\(^9\), so that its goal was at bottom the protection of the status and property of full or half orphans. Here there is an obvious connection with the purpose of the Hadrianic SC Tertullianum.

This same Emperor extended, through rescript, the regime of the Edictum Carbonianum to unborn children\(^6\). This extension took its place beside another means of protecting the interests of an unborn child that had been available at least since the late Republic, the Praetor's assignment of a missio in possessionem of decedent's property, upon the application of an expectant mother, either to the mother-to-be herself or to the unborn child and (advisably in the first instance, certainly in the second) his appointment of a curator ventris to safeguard the latter's interests\(^8\). The requirements were, first, that the woman be pregnant both at the time of the death of the notional pater familias and at the time the application was made. Next, it was necessary that the child when born enjoy status as a suus heres to the decedent and not have been validly disinherited, or that at minimum there be uncertainty over one or both of these matters\(^9\). When, as in the typical case, the responsibilities of the curator ventris extended to property, these were, according to Ulpian, tantamount to those enjoyed by curatores and tutores pupillorum, in terms of the level of responsibility enjoyed by both him and his wife\(^9\).

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...if not their legally recognized authority\(^8\). In particular, he furnished food, drink, clothing, and shelter to the expectant mother on a standard consistent with the financial resources (facultates) of the decedent husband and the social rank (dignitas) enjoyed by both him and his wife\(^9\). Galus summarizes these details with a reference to the responsibility of the curator to provide her with alimenta, for the benefit of the unborn child, as he emphasizes\(^8\). Ulpian, following on his reference to Hadrian's extension of the Edictum Carbonianum, makes an important programmatic statement: "And, in general, we do not doubt that the Praetor ought to come to the aid of an unborn child for the same reasons upon which he has been accustomed to act on behalf of a child already born, and the more readily, since the situation of an unborn child is more worthy of preferential treatment than that of one already born. For the unborn child receives preferential treatment so that he or she sees the light of day, the child already born that he or she is placed in the appropriate agnatic kinship group (familia). So the unborn child ought to receive maintenance, since he or she is born not only for the benefit of the ascendant male to whom he or she is alleged to belong but also for the community\(^8\). Solitude for the interests of unborn children is manifested in other areas of the law as well. Yet another provision of the Praetor's Edict, the Edictum De inspiciendo ventre, established procedures for inspection of a widow claiming to be pregnant and for surveillance of the circumstances surrounding her pregnancy and giving birth\(^8\). These rules were set in motion at her initiative and were designed to protect her child's claim to a share of her decedent husband's estate.
precisely by securing recognition of the child's status as the offspring of the decedent _pater familias_ as well as to safeguard the interests of his family (and/or other beneficiaries under a will) in excluding a false claim.

The exact date of this regime is disputed. While some hold for an origin in the late Republic, others more convincingly date it to the reign of Hadrian. A senatorial decree, the _SC Plantanum_, of unknown date, but placed by most scholars in the late first or early second centuries AD, and evidently deriving from Trajan's reign at the latest, had established similar procedures for pregnant divorcees, which were now perhaps revised. Yet another _SC_, known to be of Hadrianiic date, established a similar procedure for children born during a marriage. These measures were supplemented by another that was put into place where, following a divorce, an ex-husband claimed his ex-wife was pregnant but she denied this. The recognition of the father's interest in these three letter instances was rendered more explicit and emphatic for the obvious reason that under each of these scenarios he is still alive, and it should be made clear that,

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68 See, for example, A. Watson, _Law Making in the Later Roman Republic_, Oxford University Press 1974, 39; J. Evans Guasss, _Women and the Law in the Roman Empire_, London-Routledge 2002, 325, on the basis of insecure evidence, however (the sources cited concern the cure ventra).  
71 Ulp. D. 25.3.3.1.  

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Apart from the issue of support, at least for unborn children (below), none of these measures effectively diminished his right to treat his children as he wished, including disinheriting them. In other words they did not create a set of universal rights for children born or unborn, but only some recourse for those born into families with material assets to which they had a notional claim. For us, the main point of interest is the extent to which they recognized an interest of the child in these matters, an interest that emerges here as something at least potentially distinct from those of immediate family members.

It is hardly the case, of course, that a father's legally recognized discretion over his children was unlimited. For one thing, he had obligations imposed upon him, not least that of providing material support to his children. In origin it mattered for this purpose that they were in his _potestas_. This duty was eventually rendered reciprocal, meaning that children with means might be required to support a needy father, and extended to other relatives, including mothers. A father's responsibility to his children, eventually emancipated children as well as those remaining in his power, remained primary, however.

Though this obligation has been argued to date from the very early Principate, most scholars view it as arising in the mid-second century. While different
ent explanations are possible, I offer the following. The SC Plancianum, whether this was passed under Vespasian or Trajan (to name the two most likely candidates), established the duty to provide support for an unborn child in case of divorce, while establishing procedures to confirm paternity. So it evidently built on elements of the Praetor’s Edict regarding the unborn children of widows, namely, the rules for the missio in possessionem and cura ventris. Following a provisional determination of paternity, the child had to be maintained by the presumed father until a definitive judgment could be made. Hadrian extended the regime of the SC Plancianum in some form to widows through a provision of the Edict (de inspiciendo ventre) and then, through another SC, applied these same rules to cases where the marriage was still in place.

It is unclear whether the obligation of support originally extended beyond the birth of the child. This seems possible, but at any rate it is a logical extension, whenever it was made. Under Hadrian, perhaps, or at the latest under Antoninus Pius, the obligation that was evidently originally grounded in the duties of a patria potestas blossoms, being rendered reciprocal (where both parties were among the already born and still living, of course) as well as extended to a range of blood relationships. It thus made into a legal duty (the ius alimentorum) in anor di Antonino Metro VI, [ed. C. Russo Ruggeri], Milan-Giuffrè Editore 2010, 539-554.

77 There is some disagreement even here over whether the obligation arose under Hadrian or later; see A. A. Schiller, Alimenta In the Sententiae Hadriani, In Studi In orario di Giuseppe Grasso IV, Turin-Giappicheli Editore 1971, 400-15; A. De Francesco, il diritto agli alimenti tra genitori e figli: Un’ipotesi ricostruttiva, In Labeo 47, 2001, 38-42, 49-50; De Francesco, Giudizio alimentare ct. 118-27; CENTOLA, A proposito del contenuto dell’obbligazione alimentare ct. 147-5, with literature.

78 De Francesco, Giudizio alimentare ct. 134-5 persuasively insists on the distinction between the provisional and definitive determinations of paternity. The stakes were high in the latter case, since such judgments could not be reversed even when made in error: see T. A. J. McGinn, Communication and the Capability Problem In Roman Law: Aulus Gellius as Index and the Jurists on Child-Custody, RLA 57, 2010, 283. See also Zoz, In tema di obbligazioni alimentari ct. 333-4; J. Evans Giubbis, Children and Divorce in Roman Law, In Hoping for Continuity: Childhood, Education and Death in Antiquity and the Middle Ages [eds. K. Mustafaciu, et al.], Rome-Institutum Romanum Finlander 2010, 40.

74 See Schiller, Alimenta in the Sententiae Hadriani ct.; De Francesco, Giudizio alimentare ct. 94. Here, obviously, the eligibility (and liability) of a child for support did not depend on his or her age

80 De Francesco, il diritto agli alimenti ct. 52, 62; CENTOLA, A proposito del contenuto dell’obbligazione alimentare ct. 173.

81 See CENTOLA, A proposito del contenuto dell’obbligazione alimentare ct. 170-1.

82 See Ulp. D. 25.3.12. Paul. D. 37.10.6.5 with Zoz, In tema di obbligazioni alimentari ct. 354-5; CENTOLA, A proposito del contenuto dell’obbligazione alimentare ct. 178-95, who argue that expenses for education came to be required as well, even if not technically qualifying as “alimenta.” It seems the resources available to the person obligated played a role in determining the degree of liability: Alvarez-Becerra, La prestación de alimentos ct. 191-7. The alimentary programs discussed above provided diverse levels of support that were in some cases (particularly the state-sponsored ones) rudimentary: Duncan-Jones, The Economy ct. 144-5, 302-3.

83 A broad construction of the roots of this concern seems supported by the legislation of Marcus Aurelius protecting the interests of recipients of testamentary bequests of alimenta: see F. Ancarà, Oratio Marchii: Giurisdizione e processo nella normazione di Marco Aurelio, Turin-Giappicheli Editore 2003, 194-8.

84 For the alimentary programs, see above. For the policy on material support of relations, see Saller, Patriarchy, Property and Death ct. 126-7; Evans Giubbis, Children and Divorce ct. 42; J. Evans Giubbis, Promoting Pieties Through Roman Law, In A Companion To Families In the Greek and Roman Worlds [ed. B. Rawson], Chichester, UK-Wiley-Blackwell 2011, 383, who argue persuasively that these rules were applied to persons of sub-elite status.

85 What follows is especially summary and selective; in part it depends on the brief synthesis in T. A. J. McGinn, s.v. Tutela, In Encyclopedia of Ancient History [eds. R.S. Bagnall et al.], Hoboken-Wiley-Blackwell 2010, 6889-6892. For the definition of a minor at law see the introduction to this article.
ties of tutors were extensive. Managing the ward's estate meant maintaining not only the financial well-being but also, indirectly, the welfare of the ward. In principle, the tutor enjoyed the status of an owner of the property in question, and his authorization was required for the ward to become obligated on a contract or to alienate property. This still left some scope for action on the part of children in tutelage, at least those deemed of sufficient age (in later law, certainly, this meant seven years and older). For the tutor, however, there was a palpable downside to wielding so much authority. Tutors could be compelled to take up their role by a public official and were liable if they failed to do so. Acting as the guardian of a minor child might itself entail liability under one or more headings if the tutor acted fraudulently or simply without due care. In this way the institution was, in the view of many scholars, transformed in important respects from a means to protect the interests of the agnatic kinship group to one of safeguarding the interests of the ward.

All the same, we find traces of the latter concern as early as the Twelve Tables (ca. 450 BC), which punished fraudulent behavior by tutors. These two goals, it is worth pointing out, are not necessarily in conflict with each other. This argument is supported by the fact that a later law, the lex Atilla (traditional date: 210 BC), allowed minors (and women), at least older ones, to approach the relevant public officials in order to request, and even to nominate, a tutor. This is a frank recognition that a ward had interests to safeguard, even if these were not as privileged as they appear to have been in later periods.

Another element in this trend is the just-mentioned compulsion by public officials of reluctant tutors. The first notice we have of this practice dates to the reign of Claudius. This does not mean that recalcitrant guardians were entirely unknown before this time or that they were especially numerous at that point. We should in any case resist the temptation to postulate, in the complete absence of evidence, similar norms for the period preceding Claudius, and instead accept this development as the first sign of a concern that was to receive fuller expression in the century that followed.

There is an important double edge to this development. On the one hand we find in legislation and juristic pronouncements from this period exactly what we would expect: increasing emphasis on serving the best interests of the child. At the same time a darker theme emerges. There is first a growing mass of statutes and juristic commentary, representing a body of rules so numerous and complex that the pursuit of policy has been argued to threaten the logical coherence of the law. Second, a modest conclusion may be drawn about the social context of these rules. In the teeth of the dominant ideology, not all were evidently able or willing to live up to their responsibilities. This consideration holds for at least some of the issues raised above. For example, in a perfect world, or even one marked by a less than extravagant degree of familial harmony, would it really be necessary to resort to the legal authorities to compel close relatives to provide material support for each other?

8. A New Model for Patria Potestas. — The second century AD witnessed developments in law conducive to the favorable treatment of children that were perhaps less directly related to their material welfare but still very much connected with their well-being. The most obvious examples concern a series of limitations placed on the exercise of patria potestas. Two changes to the law, both evidently Innovations of Antoninus Pius, are worth mentioning. Under certain circumstances, a pater familias might be denied custody of a child in favor of the mother following a divorce. The pater familias also saw limits placed by the same Emperor upon his right to break up his daughter's happy marriage.

The jurists were not slow to take their cue from these developments. Indeed, it is likely that they played a role in their formulation. One text provides fairly explicit confirmation of how closely the jurists tracked, and contributed to, the development of imperial policy in this area: "The deified Trajan forced a fa-
ther who was mistreating his son in defiance of pietas to emancipate him. After the subsequent death of this son, the father was claiming eligibility for bonorum possessis (i.e., of the decedent son's property) on the ground that he had emancipated him, but on the recommendation of Neratius Priscus and Aristo this was denied because he had been compelled to release the son from his potestas.

The Jurists devised a system of temporary custody that could be invoked whenever a possibly false claim of patria potestas - or a possibly false contestation thereof - threatened a child's well-being. This is described by Ulpian in a passage in which he invokes the authority of Julian: The Praetor will hear the case immediately or defer consideration until the time of puberty/majority based at bottom on considerations of the child's best interests. With this holding we see a concern to privilege the interests of the child whose status is in dispute over those of either litigant.

The overall trend is clear and is rendered even clearer, and at the same time perhaps more complicated, by a passage from the Severan Jurist Marcian. This report of an earlier case involving what from remote times was regarded as an essential element of patria potestas, the power of life and death (vitae necisque potestas): "While hunting, a man had killed his son, who (at the time) was conducting an illicit affair with his stepmother. The deified Hadrian is said to have exiled him to an island, because in killing him he used more a brigand's right than a father's. For a father's power (patria potestas) ought to be founded upon pietas, not cruelty." As is obvious, this case concerns an adult child, but to judge from the other available evidence, the principle would evidently apply to...

99 Aristo-Ner.-Pap. (11 quaestio) D. 37.12.5: "Divus Traianus filium, quem pater male contra platerum adficeret, coegit emancipare. quo postea defuncto, pater ut manumitter bonorum possessionem sibi competere dicerat: seu consul Neratius Prisci et Aristo el proper necessitate solvens "potestatis" de negante est." My preference for Grotius' suggestion of potestatis is not a strong one; if anything, the ms. reading pietatis makes the point even more sharply. For a discussion of the passage, see A. M. Rstäbel, Effetti personali della patria potestas (Dalle origini al periodo degli Augustali, Milan-Giuffrè 1979, 156-7, 237-9, p. 9, who points out that the decision unites representatives of the Sabini and Procullian schools. On Aristo and Neratius, see KUNKE, Herkunft und soziale Stellung cit. 141-5.

95 Iul.-Ulp. (71 ad edictum) D. 43.30.3.4. Discussion in MCGINN, Communication and the Capability Problem cit. 293-98.

94 Merc. (44 Inst.) D. 48.9.5: "Divus Hadrianus fuit, cum in venetione filium suum quidam necaverat, qui novercam adulteratam, in insulam eum deportasset, quo latrōnis magis quam patris lures eum interfect: nam habe potestas in pietate debetur, non atroci.tate consistebras." On this text, see A. Toccan, Patria potestas in pietate non atroci.tate consistente debetur, Index 35, 2007, 159-74.

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35 both juvenile and adult children-in-power, to all but infants, in fact. In other words, as far as we are able to tell, the killing of children not infants was a rare phenomenon, mainly associated with early Rome, prior to the emergence of a contemporary historical record in the late third century BC.

So what was new, if anything, about Hadrian's intervention? I think it useful to draw a distinction between theory and practice. The already existing constraints on the latter are manifested here above all by the fact that the father evidently thought it necessary to conceal his exercise of the vitae necisque potestas, that is, it seems that he used the occasion of the hunt to make the son's death look accidental. If anything, such limitations would have been more keenly felt in the wake of this decision. But Hadrian's real contribution was perhaps on the level of ideology, which is of course not to deny that this too would have resonated in lived experience. By linking the exercise of the "power of life and death" with the core family value of pietas, along with its intimations of devotion and duty, and perhaps even reciprocity, Hadrian recast this vital aspect of patria potestas to the point of redefinition. As a consequence, he rendered re-

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99 See the evidence and discussion at FAER and MCGINN, Casebook cit. 191-210. On the killing of infants by patres familias, see E. SHAW, Raising and Killing Children: Two Roman Myths, Mnemosyne 54, 2001, 57-77, who goes further than I believe many would in denying an historical basis to the vita necisque potestas. For an informative, if unsatisfactory, reconstruction of the evidence, see Y. THOMAS, Vitae necisque potestas: Le père, la cité, la mort, in Du châtiment dans la cité: Supplices corporels et peine de mort dans le monde antique (Table ronde organisée par l'École française de Rome avec le concours du Centre national de la recherche scientifique, Rome, 9-11 novembre 1982), Rome-École française de Rome 1984 (= Collection de l'École française de Rome 79), 499-548. See also Y. THOMAS, Remarques sur la juridiction domestique à Rome, in Parenté et stratégies familiales dans l'Antiquité romaine: Actes de la table ronde des 2-4 octobre 2-4 1986 (éd. J. AUREAU et H. BRUN), Rome-École française de Rome 1990 (= Collection de l'École française de Rome 129), 449-474. For a brief synopsis, see L. CAPASSOSI COLOMBO, patria potestà (diritto romano), in ED 32, 1982, 242-243.

97 See the evidence and discussion at FAER and MCGINN, Casebook cit. 191-210. On the killing of infants by patres familias, see E. SHAW, Raising and Killing Children: Two Roman Myths, Mnemosyne 54, 2001, 57-77, who goes further than I believe many would in denying an historical basis to the vita necisque potestas. For an informative, if unsatisfactory, reconstruction of the evidence, see Y. THOMAS, Vitae necisque potestas: Le père, la cité, la mort, in Du châtiment dans la cité: Supplices corporels et peine de mort dans le monde antique (Table ronde organisée par l'École française de Rome avec le concours du Centre national de la recherche scientifique, Rome, 9-11 novembre 1982), Rome-École française de Rome 1984 (= Collection de l'École française de Rome 79), 499-548. See also Y. THOMAS, Remarques sur la juridiction domestique à Rome, in Parenté et stratégies familiales dans l'Antiquité romaine: Actes de la table ronde des 2-4 octobre 2-4 1986 (éd. J. AUREAU et H. BRUN), Rome-École française de Rome 1990 (= Collection de l'École française de Rome 129), 449-474. For a brief synopsis, see L. CAPASSOSI COLOMBO, patria potestà (diritto romano), in ED 32, 1982, 242-243.

98 It seems far from unlikely that Hadrian is here building on the holding of Trajan reported in Aristo-Ner.-Pap. D. 37.12.5 (discussed above), in the sense that he decides a patria potestas incapable of respecting the obligations imposed by pietas ought not to benefit from his status as such. At the same time, the outcome is broadly consistent with the principle of a "meritocracy of virtue" that animates the Augustan marriage legislation itself, under which social status is ideally consonant with moral merit: see MCGINN, Prostitution cit. 69-84. Entitlement to potestas and its privileges was not to be taken for granted, a point reflected in another Hadrianic enactment, an edict in which he lays down that when a petition of a non-Roman for citizenship for himself and his children is granted, this does not automatically entail that the latter are to be placed under his potestas; instead this might only occur pursuant to a separate, case-by-case decision of
sort to it not only impractical but virtually inconceivable regarding any children but infants. In this, his relationship to the policy of Augustus is complex, if only because that policy was itself complex, as for example even a brief contemplation of the *ius accidendi* will suggest. All the same, it would be an error, in my view, to assume that Hadrian's holding was so much at variance with popular attitudes that it threatened to undermine the goals of the *lex Iulia et Papia*.

The ultimate significance of this move is perhaps suggested, if not guaranteed, by its citation on the part of the Severan jurist Marcellus. For support we can invoke a comment by the jurist Paul, Marcellus's contemporary, who makes the casual observation of *su i heredes* that it was possible to disinherit them since, after all, it had once been possible to kill them. One may well ask whether this the Emperor, that is, when he, after examining the facts in each instance, concludes that this is in their best interests, a decision that requires all the more care and precision when they are minors and not present: Galus 1.93. See the discussion in Rabello, *Effetti personali della patria potestas* cit. 242-6, and below for an important reservation about Rabello's views.

At the risk of some oversimplification, one might claim that the "right of slaying" granted under certain carefully defined circumstances to the husbands and fathers of adulterous women, (represents the ideology of the *vitae nesciae potestas* while placing it under severe limitations in practice: see S. Treganza, *Roman Marriage: Lust! Conjuges from the Time of Cicero to the Time of Ulpian*, Oxford-Oxford University Press 1991, 232-5; McGinn, *Prostitution* cit. 202-7. At the same time, there is a certain leveraging of the ideology (as well as some practical limitations) to be seen in Augustus' actions as recorded in Sen. Clem. 1.15-16, with Fara and McGinn, *Casebook* cit. 196-8.

No source advert to this point, but there is an obvious inconsistency between rewarding parents for raising children and allowing them to kill them. In this sense (rather indirect at best), the tempering of the *vitae nesciae potestas* falls in line with the goals of the *lex Iulia et Papia*. For an example of a direct impact of the legislation on the exercise of *patria potestas*, we have the report of Marcellus (D. 23.2.19) that the *lex Iulia* that is, the *lex Iulia de maritandis ordinibus*, as supplemented by an enactment of Severus and Caracalla, compelled *patres familias* to allow their children-in-power to marry and provide dowries where relevant, when they wrongfully refused to do so. The jurist equates refusal to arrange a marriage with refusal of permission under the statute.

Paul. (2 ad Sabinum) D. 28.2.13...itaque post mortem patris non hereditatem percipi videntur, sed magis liberam bonorum administrationem consequuntur. Hac ex causa licet non sint heredes instituti, domini sunt: nec obstat, quod licet eos exheredare, quod et occidere iiciat. ("Therefore, after the death of the father, they [the *su i heredes* are not regarded as acquiring an inheritance; instead, they [just] attain unobstructed power to dispose over their property. For this reason, even though they have not been instituted as heirs, they are owners. Nor is it an objection that it is permitted to disinherit them, for it was also [once] permitted to kill them."). This is consistent, I be-

is meant as an expression of nostalgia or irony, but I think the point regarding the state of the *vitae nesciae potestas* in late classical law is clear.

It is important to recognize that the Antonine and Severan periods do not represent any sort of Golden Age for Roman children. *Patres familias* retained powers to discipline their children physically short of killing them without evident interference from the state. Children were still exposed to corporal punishment in connection with their education. Many were no doubt vulnerable to sexual and other forms of physical abuse, and not just from authority figures. Even on the level of law it is important to place our modest results within a context that acknowledges that the interests of parents and children were not inevitably (or perhaps even typically) perceived as antagonistic to each other. Being a parent at Rome was a status, and one moreover exalted by custom, law, and the lived experience of social life. So fathers did not lose ground on every front, as we can see from the law of property and that of obligations where the *pater familias* continued to ride high.

The trend that I have identified, a favoring of children by the legal authorities that precedes the Augustan marriage legislation but that is considerably empowered by these laws, should be viewed perhaps not as a grand evolutionary process but as a direction or tendency, in which the tension between the intervention, with the statement (perhaps attributable to Paul himself) in the context of rules discussed above that "The person who denies material support is regarded...as killing...an unborn or newly born child" (Necare videtur...partum...qui almonia ciegetat): Paul. (2 sent.) D. 25.3.4 = PS 2.24.10.

See also Ulp. (2 adult.) D. 48.8.2 with Fara and McGinn, *Casebook* cit. 199-201. This is perhaps adequate in itself to cast doubt on the thesis of Van Thomas that *patria potestas* served as no more than a mechanism for succession: *Thomas, The Division of the Sexes in Roman Law* cit. 90-115 (If I understand him correctly, he holds this was true from an early period).


See P. Voci, *Storia della patria potestas* de Augusto a Divizione, in P. Voci, *Studi di diritto romano II*, Padua-CEDAM 1985 [= lura 31, 1980, 37-100], 460. The *peculium* castrense, introduced by Augustus, is an important exception, but still very much one that proves the rule.

Here I must take my departure from the position of Rabello, *Effetti personali della patria potestas* cit. 245-6, 254 (and of the authorities he cites), who sees a "continuo processo evolutivo" at work, as *patria potestas* evolved under the Principate into an institution "protective" of children. His thesis is, to be sure, superior to that of Pietro Bonfante, influential as this was for much of the twentieth century, which views the institution of *patria potestas* as something more static and monolithic than the sources allow.
terests of parents and those of children, among other things, was addressed a
number of times without ever being entirely resolved. To take just one exa
ple, the new recognition in the mid-second century of rights to support by close
relatives, the *lucus almentorium*, emphasized their reciprocal nature in a manner
that reached below the level of the elite. Just as parents were required to sup
port needy children, children were supposed to support indigent parents. Of
course where there was no potential conflict of interests in play, or these were
to be thought of, those of children might be given more emphasis. Worth em
phasizing is that these conflicts were evidently rendered more manageable by the
probability that the vast majority of the adult Roman population did not have a
living *pater familias*.

There are some cautions that should be raised in this connection, especially
in taking note of the implications of the fact that while the conception
of *potestas* is relatively narrow, being limited in large part to the sphere of elite male opinion, and, indeed, only certain sectors of this.

One might object that other statutes ought to be taken into account. Cer
tainly, my treatment is not intended to be exhaustive. To cite an example of
where an inquiry might fruitfully proceed, there is the *lex lunia Vellaeae* of AD 26,
which offered the possibility of designating as heirs or disinheriting children born
after the writing of a will but before the death of a will-maker as well as grand-
children who became *sui heredes* (for example, through the death of a father) in
this same period, with the goal of preventing the failure of an otherwise valid
will. This might not seem like promising material for the present purpose, but

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For literary (and legal) evidence of intergenerational tension one may consult the
works on *vitae necisque potestas* cited above: Y. Thomas, *Vitae necisque potestas* cit.;
Thomas, *Remarques sur la juridiction domestique* cit.; Shaw, *Raising and Killing Children*
cit. Also useful are G. Loukou, *Pater et filius eadem persona: Per studia della patria
potestas*, Milan-Giuffrè 1984 (largely legal evidence); R. Salber, *Patriarchy, Property and
Death* cit. esp. 102-153; Evans Grund, *Promoting Pias* cit. (largely legal evidence).
Most of the literary evidence is earlier in date, though this does not utterly rob it of use-
fulness. The rhetorical sources in particular (such as the declarations ascribed to Quin-
tillius) offer a rich vein of material for understanding social conflicts of this kind, even if
the legal details do not always accurately reflect Roman law.

For the argument, see Salber, *Patriarchy, Property and Death* cit. 12-69; Scheidel,
*Demography* cit. 38-42. It is widely accepted among social historians, but more of-
ten than not overlooked by legal historians. A near exception is Thomas, *The Division of the
Sexes in Roman Law* cit. 93, who misstates Salber's more general argument.

A firm foundation is offered by Lamberiti, *Studi sui postumi II* cit. esp. 137-162.

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For Augustan marital legislation in general both takes up matters in the private law that show
precedents in Augustus' legislative program, not least out of political motives, and
deals with various specific issues of personal status. One might argue that the
two points should be fused, certainly for the *lex lunia Vellaeae*, in the sense that
Tiberius, precisely as did his predecessor in his so-called "social" or "moral"
legislation, not least the *lex Julia et Papia*, was here concerned precisely with the
issue of status-maintenance.

The point comes into focus if we consider the aims of the *lex lunia Vellaeae*. Francesco Lamberiti offers three plausible, if admittedly speculative, possibil-
ities. One is that the state benefited from unclaimed bequests, *bona caduca*,
under the Augustan marriage legislation, which regulated testamentary succes-
sion, and so had an interest in not seeing wills fail with consequent default to the
rules on intestacy. Another is that the state had a similar interest under the Au-
gustan *lex Julia de vicesima hereditatim*, where even if, as some scholars be-
lieve, the tax applied on intestacy, the exemption provided for close relatives
the precise range for these is uncertain under the law would have cut into reve-
 nue. The third is that Tiberius had specifically dynastic motives, meaning that
he wanted the law to help guarantee his own arrangements for succession in a
context where a descendant predeceased him and he was not able or did not
wish to rewrite his will.

To these I would suggest appending an equally speculative and I trust equal-
ly plausible possibility, namely, that the Tiberian statute responded to a concern
with the failure of wills for technical reasons that threatened to undermine the
moral and demographic goals of the Augustan marriage legislation. Not only
were the last wishes of will-makers, even if fully in compliance with the laws
(meaning that they were attempting to leave their property to their abundant,
legitimate offspring), placed in jeopardy, but, perhaps even more disquieting,
the eligibility of potential recipients themselves in full compliance might be
compromised by an eventuality over which they had no control. What was the
point of obeying the law if one could lose an important benefit through no fault
of one's own? There need not have been many such instances of this problem
before the Emperor and his legal advisers were roused to action.

Even if this argument is accepted, a broader challenge remains, especially as
we move further away in time from Augustus and in the direction of the various

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111 Lamberiti, *Studi sui postumi II* cit. 146-149.

112 For this aspect of Augustan legislation, see McGinn, *Something Old* cit.

113 Lamberiti, *Studi sui postumi II* cit. 149-154.

114 On the possible range(s) for the exemption, see McGinn, *Something Old* cit. 7-8.
legal regimes discussed above. The reigns of Augustus and Tiberius, Nerva and Trajan, Hadrian, Vespasian, and Marcus Aurelius, not to speak of the Severans, show important differences between them when considered in social, political, and even economic terms so that, as I think I have demonstrated in some measure, it is hardly to be simply assumed that a legislative initiative of the first Emperor is going to have the same resonance for all of his successors. One need only look to the transformation of the Augustan legacy under Trajan for an illustration. In different ways, the SC Orfitianum and Orfitianum make the same point. Here we begin to see the outline of an answer to the question of how the lex Iulia et Papia, itself a reaction to particular circumstances at the end of the Republic and the beginning of the Principate, continued to exert such a strong influence in the overlapping areas of ideology and law for many years afterward. It is interesting to note in this connection that it was evidently the intention of the first Emperor to have had an enduring impact on posterity through his laws, as the following famous passage from the Res Gestae suggests:

Res Gestae 8.5: Legibus novis me auctore latissima ex ample malorum exulescentia iam ex nostra saeculo reductus et ipsa multorum rerum exempla imitanda posteris tradidit.

Through new laws passed at my instance I reintroduced many exemplary practices of our ancestors that were by now in our time on the wane and I myself handed down to my descendants exemplary practices of many kinds for their imitation.

This Janus-like characterization of his legislation as looking both forward and backward is a hallmark of Augustus’ political message. It has a particular significance for the marriage legislation in that in this case the exempla taken from the ancestors and the exempla passed on to posterity are ideally meant to be the same. We can acknowledge that Augustus transformed the legacy of the Republic in appropriating it (in part of course) through legislation just as his successors transformed his legacy in a similar fashion. The lex Iulia et Papia is hardly an isolated instance of a law that acquires new meaning in its elaboration and application in altered circumstances and over time, let alone in its influence over subsequent positive enactments. What does not fail to impress is the remarkable continuity in the face of such change, a continuity above all of purpose, that lent the Augustan statutes themselves considerable legitimacy and helps explain their broad popularity. The marriage laws managed to remain something old and something new for a very long arc of time.

This is not to deny that more needs to be done, especially as we begin to examine the question of effectiveness more broadly, above all in light of assumptions held by some historians about economic crisis and demographic decline. Was the work of emperors and jurists able to counter such long-term trends? If it is correct to assume that they did exist? In any case, what might the impact of an event such as the Antonine plague have been upon the development of the legal rules regarding children? Can we draw a line, for example, between the plague’s impact on mortality rates and the contents of a measure such as the SC Orfitianum? Is there a causal relationship between this event, with its evidently profound demographic consequences, and what appears to be a heightened concern with the interests of unborn and illegitimate children in its wake? Similar questions might be posed in relation to some of the various legal regimes we have examined, such as the ius alimentorum and the vitae necisique potestas, both of which, in terms of the elaboration and application of their rules, in my view show, despite the great differences between them, the increasing influence of an ideal of a reciprocal moral duty, above all, between parents and children.

The weight of the evidence argues against a straight-line evolutionary process in which the tensions alluded to above were on the way to being completely resolved. So I would argue that it is rash to regard the SC Orfitianum as the inevitable corollary of the SC Orfitianum, filling in the picture of a foreordained transformation in the Roman conception of the family. If such a narrative had merit it would be good to know for one thing why it took forty years or more for the proverbial other shoe to drop. It is preferable instead to view these enactments as part of an ongoing engagement on the part of the legal authorities with the perpetual challenge of ensuring the orderly transfer of property from parents to children while encouraging the former to raise as many of the latter as possible.

If it is safe to conclude that some of these developments took shape against a sudden, severe, demographic shock, with its attendant economic disruption, such as the Antonine plague, this idea has a certain currency among both social and legal historians: see just S. Dixon, The Roman Mother, Norman, OK-University of Oklahoma Press 1988, 93-54; Thomas, The Division of the Sones in Roman Law cit. 105-108, 114.

Y. Zelener, Smallpox and the Disintegration of the Roman Economy After 165 AD, Diss. Columbia University, argues that the Antonine plague was smallpox, caused as much as a 25% reduction in the population of the Empire in the decades that followed its introduction, and led to a gradual, though In the end profound, disruption of the economy. I submit that it would have required much less than this level of impact to influence

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See McGinn, Something Old cit. 3-4.
then we have a strong argument against the notion, favored by some scholars, of an evolution in law tracking at some remote an evolution in social relations. I hasten to point out that, even if we accept the premise of such a dramatic demographic event, we cannot assume that the political and legal authorities were inevitably inclined henceforth merely to favor the interests of children over parents, given the risk that the latter might as a consequence be discouraged from rearing more of the former. Nor was it a matter of a straightforward balancing of interests in the development of rules. We would also expect to find considerations of equity set against doctrinal concerns, and this in the context of an ideology that is perhaps better described in principle as "pro-childrearing" rather than as simply as "pro-child", even if a number of its applications in specific circumstances more closely approximate the latter.

Another opportunity for reflection over the question of "effectiveness" is offered by the consideration of what might have happened when any set of rules devised by emperors and jurists intersected with the character and personality of individual Romans. Some fathers took a highly aggressive approach to their role as patres familias, to the point of being condemned by the authorities, such as we find with the father punished by Hadrian for killing his son (evidently) under the pretext of a hunting accident, a case discussed above. On the other hand, there were undoubtedly those who might not have been quite up to exercising the considerable discretion that the law continued to grant them even after significant constraints had been placed on the exercise of the vitæ necisque potestas.

An interesting manifestation of this sort of challenge can be read from a constitution of Alexander Severus dating to 227. Here a father makes a complaint about his son, who, it seems, has failed to display the pietas owed a father, and yet the Emperor seems almost equally frustrated with the apparent non-assertiveness of the father himself. It would be a mistake, I would argue, to view the latter's behavior as somehow inevitably tied to the constraints on patria potestas that we have discussed. Some fathers were going to be weak and ineffective no matter how much power the law gave them. It is worth observing that overly aggressive fathers might also be regarded as weak and ineffectual, at least from the perspective of the political and legal authorities.

None of these factors necessarily means that patria potestas was in a state of decline, as has been argued, but it was certainly being transformed, not decisions of the political and legal authorities regarding children. On the plague, see now the essays in L'impatto della peste antonina (ed. E. Lo Cascio), Bari-Edipuglia 2012.

118 Alex. Sev. C. 8.46.3 (227), on which see Frier and McGinn, Casebook cit. 202-3.
119 This does not mean that all scholars who postulate a decline understand this phenomenon in precisely the same way. One may usefully contrast the opinions of D. Daube, Roman Law: Linguistic, Social and Philosophical Aspects. Edinburgh-Edinburgh University Press 1969, 75-91, who views the Institution as essentially dysfunctional for much of the classical period, but argues that it was kept as a status-marker for the elite, and A. Watson, Society and Legal Change, Philadelphia-Temple University Press 2003, 23-30, who also sees it as dysfunctional, but easily and commonly evaded through resort to emancipatio (formally and practically) and the peculium (practically).

120 For subsequent developments in the social, economic, and legal realms, see A. Arjava, Paternal Power in Late Antiquity, JRS 88, 1998, 147-165.