Sara Corrêa Fattori
Rute Corrêa Lofrano
Jorge Luis Nassif Magalhães Serretti
(Coordenadores)

ESTUDOS EM HOMENAGEM A
LUÍZ FABIANO CORRÊA
DIOCLETIAN ON BIGAMY AND INCEST

Thomas A. J. McGinn
Vanderbilt University

1. Introduction

Like some other Roman emperors of a reformist bent, Diocletian did not suffer sex crimes gladly.\(^{649}\) His handling of adultery cases may fairly be characterized as severe.\(^{650}\) His famous Edict repressing incest breathes an impressive ferocity, as we will see shortly. So it seems far from impossible that this emperor was the first to define bigamy, which for a long time had been repressed under the adultery law of Augustus and over an even longer period with civil penalties by the praetor, as a criminal offense in its own right.

This is a suggestion made by Riccardo Astolfi in his recent book on marriage law in late antiquity.\(^{651}\) He bases this claim on the following text:\(^{652}\)

Dioclet., Maxim. C. 5.5.2 Sebastianae (a. 285): Neminem, qui sub dicione sit Romani nominis, binas uxorres habere posse vulgo patet, cum et in edicto praetoris huiusmodi viri infamia notati sint. Quam rem competens iudex inultam esse non patietur.

---

649. It is a great pleasure to congratulate the honorand, Professor and Justice Luiz Fabiano Corrêa, who holds a special place in my esteem and affection. I am greatly honored to be asked to write for this volume. It affords a welcome opportunity to examine, in sharper focus and greater detail, some of the issues discussed in McGinn, “The Law of Roman Marriage in Late Antiquity” (forthcoming).
650. See the rescripts collected at C. 9.9.19-27(28), with Enßlin, s. v. Valerius Diocletianus RE (1948) 2477 for the general point.
652. The text is repeated below, together with a translation.
2. Bigamy: The Backstory

Before considering this text in detail we do well to review some vital aspects of the deeply-rooted Roman antipathy toward polygamy. In later times the Romans projected back onto “Numa Pompilius” rules repressing both polygyny and polyandry. which, rather than presenting us with reliable evidence for the early Regal Period, shows that a cultural bias in favor of monogamy existed from an early date, without offering certainty as to precisely what norms were introduced and when. Given the lack of process requirements for both divorce and marriage, if (of course) the capacity requirements were met, what mattered was the presence or absence of consent.

While this situation might be productive of ambiguity, it also assisted the resolution of some doubtful cases. In principle, one could only be married to one other person at a time as a matter of law. This means in theory the matter was one strictly “either...or”. Either the intention to end a prior marriage allowed the formation of a new one or the lack of such an intention rendered the subsequent relationship a non-marital one, e.g., concubinage. Needless to say, the outcome of this distinction had implications for the rights of offspring to inheritance on intestacy and in some cases their legitimacy.

These are the issues raised for us by a famous case from (probably) the second half of the second century BC reported by Cicero. An unidentified man leaves behind his pregnant wife in Spain and marries another woman in Rome with whom he has a child. One might perhaps define the issue facing the court in

653. Gell. 4.3.3; Fest. s.v. pelices 248L; Plut. Comp. Lyc. et Numae 3.1-2.
655. Cic. de orat. 1.183; 1.238.
656. Astolfi, Studi sul matrimonio (2012) 125 defines the question as turning not on whether the first marriage has ended in divorce or the second union
terms of having to decide whether the man’s remarriage at Rome was sufficient to end his marriage in Spain, without any requirement of notice to his first wife. Cicero implies that for him the answer was in the affirmative and presumably the court found the same. It was evidently accepted that the husband in this case intended the new marriage to exclude the old one and was not either sincerely or fraudulently attempting marriage with both women at the same time.

The upshot is that in principle it seems strictly impossible for a Roman to commit bigamy, a point long ago made by scholars such as Theodor Mommsen and Edoardo Volterra. This view is shared by Astolfi, despite some quibbling over whether in order to run afoul of the law it was necessary seriously to intend constitutes concubinage but on whether appropriate notice of divorce was given to the wife in Spain or the second union is concubinage. The point is stated with greater clarity at Astolfi, *Il matrimonio nel diritto romano classico* (2006) 159.

It is debated whether the second marriage ends the first by operation of law (*ipso iure*) or not. For the first view, see Volterra, “Per la storia del reato di bigamia” (1934/1999) 213; for the second, Huber, *Der Ehekonsens im römischen Recht* (1977) 58-62. The evidence supports the idea that a subsequent marriage, where no divorce has already occurred, simply serves as strong, all but conclusive evidence of a cessation of marital intent, i.e. evidence that the first marriage had in fact ended and does not itself dissolve the prior marriage. In this sense it functions like a notice of divorce, which is typically, though not always, conclusive evidence of a cessation of marital intent by one party: see the discussion at Frier and McGinn, *A Casebook on Roman Family Law* (2004) 161-168. Presumably not all contemporary legal authorities were satisfied with the outcome of the case, with some insisting on the expression of *certa quaedam verba* to dissolve the first marriage. But even if a process requirement had been adopted for divorce, this does not necessarily mean it would have been possible to be married to two persons simultaneously.


Volterra’s views on the subject of bigamy can be found in a number of places but the following offers a particularly useful point of reference: Volterra, “Per la storia del reato di bigamia” (1934/1999). In support of the point made in the text, see Gaius 1.63, who states in the context of a more nuanced discussion ... *neque eadem duobus nupta esse neque idem duas uxoribus habere* (“neither can the same woman be married to two men nor can the same man have two wives”). On other aspects of Volterra’s complex views on this subject, see above and below in the notes.

THOMAS A. J. MCGINN

marriage to a second party, as he insists, or simply feigning such an intention would suffice. The important point is that one of the "marriages" was in all cases void.

The praetor all the same denied male "bigamists" (and/or their patres familias if they bore responsibility for such unions formed by their children-in-power) the capacity to make judicial requests (postulare) for most others, placing them on a list that came to form a main building block of the civic disgrace known as infamia.\footnote{[Iul. (1 ad edictum)] D. 3.2.1 (below in the text). The same point held for patres familias of female "bigamists". It was not of course that female bigamists themselves were better tolerated but that all women were excluded from making judicial requests on behalf of anyone but themselves and so do not find themselves on this list: see Labeo-Ulp. (6 ad edictum) D. 3.1.1.5. See below in the notes.} The same consequences ensued for those who were engaged to more than one woman at the same time or (by juristic extension) who were simultaneously married and engaged to different women (in these cases too patres familias might be held responsible).\footnote{662. For the extension, see Ulp. D. 3.2.13.3.} Despite the absence of direct evidence, it seems likely that female "bigamists" were punished as well. While women were categorically excluded from postulare for anyone but themselves and also it seems from acting as cognitores ("legal representatives"), they were permitted to appoint a cognitor. This means that there existed for the classical law a separate list of disgraced persons including females that must have embraced "bigamists".\footnote{663. Only a fragment of this list exists, dealing with violations of the tempus lugendi: FV 320 with McGinn, Prostitution, Sexuality, and the Law (1998) 44-53.} The question arises – how was it possible for anyone in fact to commit this offense?

In truth, the penalty could only accrue to a man (leaving aside women and involvement by a pater familias) who intended to be married (and/or engaged) to two different women at the same time, or at least made it seem as though he did so intend. What provoked praetorian censure was precisely the ostensible attempt to form two simultaneous such unions, not the result, which would be only one valid marriage at most.\footnote{664. See Ulp. D. 3.2.13.4. Ulpian's logic would presumably apply to all capacity impediments, including an existing prior marriage: see in the notes.} Here is the difference with the
case of the man from Spain discussed by Cicero, who was not deemed guilty of intentionally wrongful behavior. In one important sense the result was the same, that the continued existence of a prior marriage would prevent conclusion of a second one. So the impediment to marriage was not precisely “bigamy” but a prior valid marriage. To state this as a capacity requirement one would say that in order to contract a valid marriage one could not already be validly married. We can use the terms “bigamy” and below. The emperors Valerian and Gallienus make a similar point in the constitution discussed below in the text. 665. Huber, *Der Ehekonsens im römischen Recht* (1977) 60-62 argues that because Cicero did not know the intention of the man in question he could not characterize him as a bigamist. The same point would in theory hold — as far as we can see — for the court that decided the case. But the question does not seem to have arisen in the first place. 666. This emerges with reasonable clarity from Gaius 1.63. So, logically, attempting to marry or become engaged to a second wife whom one could not marry because of the existence of some other capacity impediment, that is, some impediment other than the existence of a prior valid marriage, would not free one from praetorian sanction: Ulp. (*6 ad edictum*) D. 3.2.13.4. One would presumably have no better luck alleging the absence of the consent requirement, i.e., that one did not really intend a second marriage, all appearances to the contrary. 667. For a different way of stating the matter, see Astolfi, *Il matrimonio nel diritto romano classico* (2006) 159; Astolfi, *Studi sul matrimonio* (2012) 133: “La bigamia, come impedimento matrimoniale...”. Cf. Huber, *Der Ehekonsens im römischen Recht* (1977) 65, who more correctly speaks of an existing marriage as the impediment. 668. I must note an important difference with the position of Volterra and his followers who argue that a second marriage — all but inevitably it seems — trumps the first by operation of law, so that, in the classical period at least, a prior marriage cannot serve as an impediment to marriage. They see a change arising in late antiquity with the legislation limiting unilateral divorce, and culminating with Justinian, who allegedly considered bigamy to be a crime in itself, standing apart from *stuprum/adulterium*, while a marriage persisted even when one of the parties no longer wished to be married. See Volterra, “Per la storia del reato di bigamia” (1934/1999) esp. 212, 245-251, 255-260; Volterra, “La conception du mariage” (1940/1991) 64-65; Eisenring, *Die römische Ehe als Rechtsverhältnis* (2002) 111-116, 296-300, 354-356 (uncritical), with literature. There are two principal objections to raise. One is that the argument is sustained by unpersuasive criticism of a series of texts. Related to this is what I would describe as flawed assumptions about the content of the classical rule. The second union is only valid if (all other requirements being met) the previously married party had the legally
"bigamist" to describe the behavior that incurred punishment under the edict if we define this in something like the following terms: "The act of marrying one person while legally married to another." What this means is that for the Romans to attempt bigamy was in a legal sense to commit 'bigamy'.

We do well at this point to dispel a misapprehension that arose some years ago over the classical status of the praetorian denial of postulare to bigamists. Here is the text in question:

[Iul. (1 ad edictum) D. 3.2.1: ...[infamia notatur]...quive suo nomine non iussu eius in cuius potestate esset, eiusve nomine quem quamve in potestate haberet bina sponsalia binasve nuptias in eodem tempore constitutas habuerit.

[Julian in the first book on the Edict]: ...[He is marked with infamia]...or who in his own name, not at the command of him in whose power he was, or in the name of him or her whom he had in power has at the same time made two agreements for engagement or marriage.

The attribution of the passage to Julian and his otherwise unknown commentary on the edict as well as the words infamia notatur are very widely regarded as Byzantine interpolations and need not detain us here. Antonino Metro, relying on Volterra's thesis that bigamy is technically impossible, proposes to strike the words binas nuptias as a further Byzantine interpolation, since committing the offense in question was simply not possible. He recognized intent to be married to the new spouse. For this intent to be legally valid, a divorce, meaning the cessation of intent to remain married, had to have occurred with respect to the prior union. The Romans evidently believed that, as a matter of law, one could have affectio maritalis for only one person at a time, so that one relationship necessarily eclipsed the other as a valid marriage. This position is elsewhere adopted by Volterra himself: Lezioni di diritto romano: Il matrimonio romano (1961) 153-155, 202, but cf. 357, where the other view reasserts itself. See Longo, "Ancora sul matrimonio romano" (1977) 469-472 for a defense of Volterra's arguments against the criticism of Huber, Der Ehekonsens im römischen Recht (1977) 54-70, where Longo dissents, however, in key respects from Volterra.

offers a series of arguments in support of this contention: 671 1) the ending of *constitutas* as a modifier of the two substantives *sponsalia* and *nuptias* is grammatically incorrect; 2) *constituere* can be used with *sponsalia* but not *nuptias*; 3) there are a couple of passages in his commentary on this part of the Edict in which Ulpian treats engagement but not marriage: 672 where he does treat them both together, his reference to the *sententia Edicti* suggests the reference to marriage was not in the Edict; 673 4) finally Metro points to the impossibility, in his view, of *constituere nuptias* where an impediment based on non-fulfillment of a capacity requirement barred marriage between the parties even apart from the prior existence of marriage for one of them. 674

To these objections Cesare Sanfilippo adds another. 675 It is easy to imagine a *pater familias* who might *constituere*, which he understands to mean "contract", two engagements but not two marriages for someone in his power – the central problem for him too is that this verb can only really apply to engagement and not marriage.

One might point out that the reference to the *sententia Edicti* is better understood as a juristic extension by which one could not arrange a marriage and engagement to two persons simultaneously. If anything, it suggests that the Edict mentioned precisely two simultaneous marriages and two simultaneous engagements, and not one of each. Ulpian here relies on an obvious if implicit contrast between *sententia Edicti* and *verba Edicti*. As for the non-fulfilment of some other capacity requirement, given what we have seen above, this in fact undermines Metro’s assumption that these texts must be speaking of simultaneous arrangements that enjoy full legal validity.

Riccardo Astolfi offers a partial critique of Metro’s textual criticism. 676 He rightly urges that the alleged difficulty in the grammar is illusory – it is in fact common for a modifier of more than one substantive to take its ending from the closest one. He

---

673. Ulp. (6 *ad edictum*) D. 3.2.13.3.
674. The discussion turns on Ulp. (6 *ad edictum*) D. 3.2.13.4.
also points out that the phrase *nuptias alieno nomine constitueere* cannot refer to contracting marriage for another person, which is impossible, but means to decide on behalf of another, that is, in this context to arrange two simultaneous marriages for a child-in-power.

This last point can be developed further. The *Oxford Latin Dictionary* offers as a meaning for *constituere* "to bring about or set up (a state of affairs); to establish (a person in a state or condition)", citing a fragment of Ulpian's commentary on the Edict. Respecting marriage, it also shows the meaning "to appoint by agreement, arrange, agree upon", citing *inter alia* a passage of Plautus about setting a date for a marriage, clearly in the context of making all the necessary arrangements for this, and one from Terence, where the reference is directly to a marriage having been arranged (*constitutae nuptiae*). This shows the verb can apply to marriage, and this from an early date. Its use by Augustine demonstrates that this meaning continued to be valid for long afterward.

The agreement of the *pater familias*, where one existed, was required for both engagement and marriage to enjoy validity at law, in addition to the agreement of the principals, of course. There are various ways in which his consent might be given, ranging from a rather active to a rather passive mode. As we can see from the principal text, if he ordered a child-in-power to marry, the latter was not liable. Ulpian further informs us in another text that in this context *constituere* applies to the *pater familias* who simply permits a child-in-power to make such an arrangement; presuma-

679. *OLD* s.v. *constituo* 13, citing Plaut. *Trin.* 581; Ter. *Andr.* 269. L & S s.v. *constituo* II.D.1 cites the same two passages under the definition "to fix, appoint something (for or to something), to settle, agree upon, define, determine".
680. Augustin. *Civ. Dei* 14.22 CCSL 48.444: ...*nuptiarum, quas Deus...constituit...* ("...of marriage, which God...established..."). Here Augustine speaks, at least primarily, of the institution of marriage, as opposed to arranging an individual marriage, which meaning he appears to take for granted. Cf. Augustin. *Civ. Dei* 4.32 CCSL 47.126: *constituisset coniugia*, which is I believe an ironic reference to arranging marriages.
bly, the child-in-power would be liable as well, since he or she had not been “ordered” by pater. This passage is of interest because it sheds important light on the meaning of constituere in this context:

Ulp. (6 edictum) D. 3.2.13.1: Si quis alieno nomine bina sponsalia constituerit, non notatur, nisi eius nomine constituat, quem quamve in potestate haberet: certe qui filium vel filiam constituere patitur, quodammodo ipse videtur constituisse.

(Ulpian in the sixth book on the Edict): If someone arranged two (simultaneous) engagements in someone else’s name, he is not marked (with infamia), unless he arranges these in the name of him or her whom he had in his power. At any rate, he who allows a son(-in-power) or a daughter(-in-power) to arrange them is deemed in a certain manner to have arranged them himself.

As Metro points out, the text speaks of arranging engagement and not marriage. It may be that Ulpian views this as the more difficult case and so more worthy of discussion. At any rate, the same logic applies to arranging engagement or arranging marriage. This text shows that “arrange” (constituere) has a different meaning for the pater familias and the principals than it does for a third party, such as a marriage broker or another relative. This is because only a principal or a pater familias could agree to the marriage in a way that fulfilled the consent requirement and gave the union a foundation as a legally valid marriage.

Ulpian further indicates that a pater familias was liable only if he knew of the “doubling” at the time he gave his consent, not if he learned of it afterwards. The evidence suggests therefore that there would be circumstances in which either the child-in-power or the pater familias would be liable as well as those in which both would be, depending on the constellation of fault in each case. Only one such legally valid relationship could exist at the same time, a point often overlooked with regard to engagement. Here in some respects the rules governing agreement of the

682. Ulp. D. 3.2.13 pr.
683. For a different view, see Astolfi, Fidanzamento (1994) 136, who holds the pater familias liable in all cases where he grants consent, and then exclusively.
parties (and their patres familias, if any) were looser, but the fundamental principle that barred more than one from existing simultaneously at law was the same. The Romans regarded the intent to be engaged and the intent to be married in a very similar, rigorously monogamic way. It is unclear why some scholars appear to assume that either a principal or pater familias could make more than one legally valid engagement at the same time.

The criminalization of certain forms of non-marital sex by the Augustan adultery law raised the stakes for those committing bigamy. Now entering a new relationship without ending a prior one spelled liability under that statute for both parties, unless one or the other was motivated by genuine mistake, such as when a man deceived a prospective wife about his actual marital status, and then of course only that party was free of culpability. The first marriage continued and the second was void in any case. These points emerge with clarity from the following rescript of Valerian and Gallienus:

Val., Gall., Val. C. 9.9.18 Theodorae (a. 258) (= in part, with changes C. 5.3.5): pr.: Eum qui duas simul habuit uxores sine dubitatione comitatur infamia. in ea namque re non iuris effectus, quo cives nostri matrimonia contrahere plura prohibentur, sed animi destinatio cogitatur. 1: Verumtamen ei, qui te ficto caelibatu, cum aliam matrem familias in provincia reliquisset, sollicitavit ad nuptias, crimen etiam stupri, a quo tu remota es, quod uxorem te esse credebas, ab accusatore legitimo sollemniter inferetur. 2: Certe res tuas omnes, quas ab eo interceptas matrimonii simulatione deploras, restitui tibi omni exactionis instantia impetrabis a rectore provinciae: nam ea quidem, quae se tibi ut sponsae daturum promisit, quomodo repetere cum effectu potes quasi sponsa?

Emperors Valerian and Gallienus Augusti and Valerian Caesar to Theodora. pr. A man who had two

685. See also [Quint.] Decl. 347; Pap. D. 48.5.12.12. Such evidence argues against the promulgation of a process requirement for divorce outside circumstances specially defined by the Augustan adultery law. For another view, see Astolfi, Il matrimonio nel diritto romano classico (2006) 159-161, 313-329.
686. Volterra, "Per la storia del reato di bigamia" (1934/1999) 244-251.
wives at the same time is without doubt afflicted with legal infamy (*infamia*). For in this matter consideration is not taken for the effects at law (*ius*), under which our fellow-citizens are prohibited from contracting more than one marriage at the same time, but intention.

1. All the same, a man who, pretending to be unmarried, proposed marriage to you, when in fact he had left behind another "wife" (*mater familias*) in (another) province, will be liable to a formal charge of illicit sexual intercourse (*stuprum*) brought by a lawful accuser. You are not liable to such a charge since you believed yourself to be a wife.

2. At any rate, you will petition the Governor of the province for the restoration, with all (possible) perseverance in collecting, of all of your property that you complain has come into that man’s control under the pretense of marriage. For in what way can you successfully recover on the ground that you are a fiancée precisely those things that he promised he was going to give you as his fiancée?

This text makes clear in its *principium* that the infliction of the praetorian sanction(s) for bigamy did not depend on the existence of two valid unions, which was of course legally impossible. The same point holds, as the emperors make clear, regarding the penalties of the Augustan adultery law.\(^{687}\) In fact, liability under this statute is seen to depend on the non-existence of a second valid relationship, at least for any party who knows of the existence of the first. The phrase *animi destinatio* is of importance here.\(^{688}\)

---

\(^{687}\) One notes the expression *alia mater familias*, where *mater familias* has been taken to mean "wife", "wife married with manus", or "respectable woman": see Astolfi, *Il matrimonio nel diritto romano classico* (2006) 164 n. 121. In fact, the expression has a specific reference to a woman liable under the law on adultery: McGinn, *Prostitution, Sexuality, and the Law* (1998) 147-156. Here *alia* implies that the addressee, Theodora, was herself a *mater familias* as well, though she could not be a "wife" (*uxor*) to the man already married. Sex with her therefore entailed liability for her "husband", and under the circumstances only for him, under the adultery law.

\(^{688}\) This is not quite the same as *maritallis affectio*, despite the arguments to the contrary of Huber, *Der Ehekonsens im römischen Recht* (1977) 62-63. At the same time, the position of Astolfi, *Il matrimonio nel diritto romano*
3. Bigamy and Diocletian

The ancient evidence makes it clear that the Romans considered committing bigamy as highly offensive behavior. Why then was it never punished *per se* as a crime in the classical period? The fact that it was in a literal sense impossible to accomplish bigamy as a matter of law is one possible answer. Another is that after the passage of the adultery law such a move may have seemed unnecessary. Liability under that law had evidently existed for three centuries by the time of Diocletian's reign. Why should he be motivated to make a change?

The answers can be sought in our principal text:

Dioclet., Maxim. C. 5.5.2 Sebastianae (a. 285):

Neminem, qui sub dicione sit Romani nominis, binas uxores habere posse vulgo patet, cum et in edicto praetoris huiusmodi viri infamia notati sint. Quam rem competens iudex inultam esse non patietur.

Emperors Diocletian and Maximian Augusti to Sebastiana. It is commonly known law that no one who finds himself under the dominion of Rome can have two wives, since even in the praetor's Edict men of this type are marked with legal infamy (*infamia*). A judge with the appropriate jurisdiction shall not allow this matter to go unavenged.

Astolfi argues that problems with polygamy among certain peoples in the eastern part of the empire provoked the alleged *classico* (2006) 161-164 that since the man did not intend the second marriage he cannot be liable to praetorian sanction is refuted by this text. One might argue that the emperors leave open the question of whether the man entertained marital intent toward both women and it was simply therefore the fact that the prior marriage still existed that prevented the second. In other words, only his *maritalis affectio* toward his first wife could be legally valid. But the fact that he concealed his married status from the second woman argues that his *ani mi destinat io* was directed at engaging in an illicit affair with her and not at contracting a marriage. See Di Salvo, “Matrimonio e diritto romano” (1971) 385. The emperors indicate that in any case, that is, whether he intended the second union to be marriage or not, the second marriage was void and he was liable to praetorian sanction. His *ani mi destinat io* also explains how they find him liable for *stuprum*, which requires criminal, one might also say non-marital, intent. See further below on incestuous marriage.
innovation, invoking the parallel of Diocletian’s law on incest,\textsuperscript{689} which we will examine below. It is no argument that problems with polygamists in the wake of the \textit{constitutio Antoniniana} motivated such a change in the law since such concerns would just as easily motivate a restatement of the classical position, which is what we seem to have here.\textsuperscript{690} Worth observing is that the rescript of Valerian and Gallienus – dating to 258 – declares that “our citizens” (\textit{cives nostri}) are prohibited from contracting plural marriages, so hinting at precisely the concern with polygamy Astolfi posits for the post-212 period, while at the same time implicitly suggesting that adequate penalties were already in place.

The crux of Astolfi’s argument that Diocletian with this law established “bigamy” as a criminal offense turns on the last sentence of that emperor’s rescript quoted at the outset of our discussion: \textit{Quam rem competens iudex inultam esse non patietur}.\textsuperscript{691} This is not the most obvious way to understand these words, which at most directly and concretely convey the instruction to a lower court to inflict the penalty of \textit{infamia} where appropriate or perhaps even to establish the existence of liability under the adultery law, as we saw occur in the rescript of Valerian and Gallienus discussed above. Or they might simply indicate to the recipient of this rescript what she can expect to happen next if

\textsuperscript{689} Astolfi, \textit{Studi sul matrimonio} (2012) 128-129. He is anticipated by Sandirocco, \textit{“Binae Nuptiae et Bina Sponsalia”} (2004) 198-200 in viewing the constitution as establishing bigamy as a \textit{crimen}, for which it provides the penalty of \textit{infamia}. Strictly speaking, however, this remains a civil penalty here.

\textsuperscript{690} Diocletian’s phrase \textit{qui sub dicione sit Romani nominis} (“who finds himself under the dominion of Rome”) has been plausibly placed in the context of the \textit{constitutio Antoniniana}: Marotta, \textit{“La cittadinanza romana nell’ecumene imperiale”} (2009) 583. For a list of peoples said to practice polygamy, some but not all of whom would have received citizenship in the wake of that measure, see Mitteis, \textit{Reichsrecht und Volksrecht} (1891) 221-222.

\textsuperscript{691} Volterra, \textit{“Per la storia del reato di bigamia”} (1934/1999) 252-254 condemns the entire second half of the rescript, including this sentence, as an explanatory gloss, partly on the assumption that it suggests the establishment of bigamy as an independent criminal offense, a principle that he rejects, correctly in my view, though I do not share his suspicions of the text. On the latter point, see the refutation of Volterra’s criticism by Huber, \textit{Der Ehekonsens im römischen Recht} (1977) 67.
the facts are as they are alleged to be, while still perhaps serving implicitly as instructions to a lower court, perhaps that of first instance.  

In other words, the only possibly relevant word in our rescript – *inultam* – might as easily refer to the penalty of *infamia* as to criminal liability, and if to the latter, it is more likely to be a question of pre-existing liability under the adultery law than to a new theory of bigamy as an independent criminal offense. No criminal penalty is given, and no mention is made of the adultery law, even obliquely, which is odd if the intention was in fact to establish independent criminal liability for bigamy, given that such liability, where appropriate, already existed under that law.

Diocletian here seems to rely on settled law rather than to innovate. For that very reason, it is misleading, I would argue, to regard such a step as Astolfi attributes to Diocletian as the culmination of a process of legal evolution. The idea does not, moreover, align with the view that Diocletian is reacting to the fallout from the *constitutio Antoniniana*, since this development by itself undermines a general thesis of legal evolution. Finally, if Justinian’s compilers viewed Diocletian’s intentions in the same light as Astolfi does, it is perhaps surprising that they placed this constitution in Book Five and not Nine of the *Codex*.  

Was there ever a post-Augustan change in the status of bigamy as a criminal offense? The answer to this puzzle is given by the Byzantine sources. First, Theophilus in his *Paraphrasis* mentions that bigamy was punished through a capital penalty.

---

692. For Astolfi, such instructions to the court of first instance are otiose because *infamia* would follow “automatically” from a finding of bigamy: Astolfi, *Studi sul matrimonio* (2012) 129.

693. For this idea, see Astolfi, *Studi sul matrimonio* (2012) 128.

694. There are exceptions, to be sure, even in the same Title, where criminal matters arise in Book Five and not Book Nine. See the very next law, Constantinus C. 5.5.3 (a. 319) (= in part, with changes CTh. 12.1.6), repressing unions between decurions and slave-women belonging to others. If Diocletian had intended, and Justinian had accepted, a change in the status of bigamy as a crime from punishment under the adultery law to repression as an independent criminal offense, we might expect a clearer signal of this, such as placement in Book Nine and perhaps even Title Nine, which deals precisely with the *lex Iulia de adulteriis coercendis*. Its appearance in one book would not of necessity obviate appearance in the other. See Val., Gall., Val. C. 9.9.18 (a. 258) (= in part, with changes C. 5.3.5), discussed above.

695. Theophilus *Paraphrasis* 1.10.6.
Astolfi argues that here for the first time a penalty is laid down for bigamy as an independent criminal offense, filling in the gap left by Diocletian. It is strange that this development took so long and that it happened in this way. In fact, Astolfi is refuted by the Basilica scholia to Diocletian’s constitution, which specify liability on a charge of *stuprum* for bigamists, citing the rescript of Valerian and Gallienus we examined above that makes the same point.

Theophilus can cite the penalty as capital because the death penalty had been introduced for adultery and presumably *stuprum* long before his day, probably in the mid-fourth century. All of this shows that bigamy was never an independent criminal offense and continued to be punished under the regime of the Augustan adultery law, not of course that this statute mentioned bigamy expressly.

It is worth saying a brief word about developments after Diocletian. The Church was as hostile to bigamy as was pre-Christian Roman society, adopting if anything an even more austere position, given its negative stance on divorce, which meant effectively prohibiting what it would regard as serial, as well as simultaneous, polygamy. For all of the social, legal, and religious animus directed against marrying more than one person at the same time, it is fascinating to follow the policymaking of Valentinian I in his willingness to use bigamy as a means of securing adequate numbers of (male) heirs and the resonance this had among certain Christian authorities, not least Augustine.

---

697. Sch. 1 ad B. 28.5.35, citing Val., Gall., Val. C. 9.9.18 (a. 258) (= in part, with changes C. 5.3.5).
699. Astolfi, *Studi sul matrimonio* (2012) 130-132. As he notes, a claim has arisen in the scholarship that Valentinian’s (lost) law fostered divorce rather than bigamy; see also Arjava, *Women and Law in Late Antiquity* (1995) 180 n. 70. Beyond Astolfi’s own cogent criticisms of this view, it is difficult to see why at this time a law was necessary permitting divorce that was mutually agreed upon by the spouses, as would evidently have been the case here. In fact, given that Constantine’s law limiting unilateral divorce had been abrogated by Julian, and as far as we know had not been subsequently revived, one may question whether there was any need to liberalize the rules for divorce under any circumstances at this time. On this episode, see the full discussion in Sandirocco, “*Binae Nuptiae et Bina Sponsalia*” (2004).
4. Incest: The Damascus Edict

As we noted, a weakness of the argument that Diocletian’s rescript on bigamy effectively established this as an independent criminal offense is that this enactment does not specify a criminal penalty. The same is true of that emperor’s famous edict on incest, or better, incestuous marriage, which does present itself as a criminal offense in its own right. Astolfi cites the latter fact in order to explain the absence of such a penalty in the rescript on bigamy. This does not convince, because the better explanation is simply that the absence of a criminal penalty is occasioned by the fact that bigamy was not an independent criminal offense, but only punishable as a crime, that is, as either *stuprum* or *adulterium*, under the adultery law. All the same, the absence of a penalty in the law on incest is curious, especially given its fierce tone. It seems that an adequate explanation of this fact remains to be offered. First let us examine the text of the law:

Coll. 6.4.1: Gregorianus libro quinto sub titulo de nuptiis.

Exemplum litterarum Diocletiani et Maximiani Imp(eratorum) talem coniunctionem graviter punire commemorat:

Exemplum edicti Diocletiani et Maximiani <Aug(ustorum) et Constantii et Maximiani> nobilissimorum Caesarum. 701

Quoniam piis religiosisque mentibus nostris ea, quae Romanis legibus caste sancteque sunt constituta, venerabilia maxime videntur atque aeterna religione servanda, dissimulare ea, quae a quibusdam in praeteritum nefarie incesteque commissa sunt, non oportere credimus: cum vel cohibenda sunt vel etiam vindicanda, insurgere nos disciplina nostrorum temporum cohortatur. ita enim et ipsos inmortales deos Romano nomini, ut semper fuerunt, faventes atque placatos futuros esse non dubium est, si

700. On the similar formula *e*(xemplum) *s*(acrarum) *l*(itterarum) (= “a copy of the imperial letter”) attested from the third century onward, see Corcoran, “The Heading of Diocletian’s Prices Edict” (2008).
701. On this introductory note, see below.
cunctos sub imperio nostro agentes piam religiosamque et quietam et castam in omnibus mere colere perspexerimus vitam.

2. In quo id etiam providendum quam maxime esse censuimus, ut matrimonii religiose atque legitime iuxta disciplinam iuris veteris copulatis tam eorum honestati, qui nuptiarum conjunctionem sectantur, quam etiam his, qui inde deinceps nascentur, servata religione incipiat esse consultum et honestate nascendi etiam posteritas ipsa surgat sit. id enim pietati nostrae maxime placuit, ut sancta necessitudinem nomina optineant apud affectus suos piam ac religiosam consanguinitati debitam caritatem. nefas enim credere est <duratura> 702 ea, quae in praeteritum a conpluribus constat esse commissa, cum pecudum ac ferarum promiscuo ritu ad inlicita conubia instinctu execrandae libidinis sine ullo respectu pudoris ac pietatis inruerint.

3. Sed quaecumque antehac vel inperitia delinquentium vel pro ignorantia iuris barbaricae inmanitatis ritu ex inlicitis matrimonii videntur admissa, quamquam essent severissime vindicanda, tamen contemplatione elementiae nostrae ad indulgentiam volumus pertinere, ita tamen, ut quicumque in ante actum tempus inlictitae incestisque se matrimonii polluerunt, hactenus adeptos se esse nostram indulgentiam sciants, ut post tam nefaria facinora vitam quidem sibi gratulentur esse concessam, sciants tamen non legitimos se suscepisse liberos, quos tam nefaria conjunctione genuerunt, ita enim fiet, ut de futuro quoque nemo audeat infrenatis cupiditatibus oboedire, cum et sciens ita praecedentes admissores istius modi criminum venia liberatos, ut liberorum quos inlicite genuerunt successione arceantur, quae iuxta vetustatem Romanis legibus negabatur. et optassemus quidem nec ante quicquam eius modo esse commissum, quod esset aut elementia remittendum aut legibus corrigendum.

4. Sed posthac religionem sanctitatemque in conubiis copulandis volumus ab unoquoque servari, ut se

---

ad disciplinam legesque Romanas meminerint pertinere et eas tantum sciant nuptias licitas, quae sunt Romano iure permissae.

5. Cum quibus autem personis tam cognatorum quam ex adfinium numero contrahi non liceat matrimonium, hoc edicto nostro complexi sumus: cum filia nepte pronepte itemque matre avia proavia et ex latere amita ac matertera <sorore> sororis filia et ex ea nepte. itemque ex adfinibus privigna noverca socru nuru ceterisque quae antiquo iure prohibentur, a quibus cunctos volumus abstinere.

6. Nihil enim nisi sanctum ac venerabile nostra iura custodiunt et ita ad tantam magnitudinem Romana maiestas cunctorum numinum favore pervenit, quoniam omnes leges suas religione sapienti pudorisque observatione devinxit.

7. Quare hoc edicto nostro volumus omnibus palam fieri, quod praeteritorum veniam, quae per clementiam nostram contra disciplinam videtur indulta, ad ea tantum delicta pertineat, quae in diem III kal(endas) Ian(uarias) Tusco et Anullino co(n)s(ulibus) videntur esse commissa.

8. Si qua autem contra Romani nominis decus sanctitatemque legum post supra dictum diem deprehendentur admissa, digna severitate plectentur. nec enim ullam in tam nefario scelere quisquam aestimet veniam se consequi posse, qui tam evidentia crimini et post edictum nostrum non dubitabit inruere.

703. = (with changes) C. 5.4.17. The Justinianic version adds the words praeterea fratris filia et ex ea nepte (“and, moreover, a brother’s daughter or his granddaughter through that daughter”). This was evidently motivated by Constantius, Constans CTh. 3.12.1 (a. 342), which definitively restored the ban on marrying a brother’s daughter: Frakes, *Compiling the Collatio* (2011) 269. On the repeal of the earlier prohibition enacted in AD 49 to enable Claudius to marry Agrippina and its subsequent history see Astolfi, *Studi sul matrimonio* (2012) 98-102.

1. The *Codex Gregorianus* in the fifth book under the title on "Marriage".

A copy of the letter of emperors Diocletian and Maximian recalling that such a union is subject to serious punishment:

A copy of the edict of Diocletian and Maximian Augusti and Constantius and Maximian most well-born Caesars:

Because those things which are established in a pure and holy way by Roman statutes (*leges*) seem to Our minds, dutiful toward and respectful of religious obligation, to be especially worthy of reverence and bound to be preserved through everlasting regard for what is sacred, We believe that We ought not to ignore those things which have been carried out in the past by certain persons in an unspeakable and impure manner. Since these matters ought to be deterred or even punished, the good order of Our reign demands that We rise against them. So, accordingly, there is no doubt that even the immortal gods are going to be well-disposed and favorable to the Roman name, as they always have been, if We shall have seen to it that all those who find themselves under Our rule genuinely lead a life that is dutiful toward and respectful of religious obligation as well as tranquil and pure in all respects.

2. In this matter We have laid down that this too ought to be provided for as much as possible, that when marriages have been contracted with respect for religious scruple and validly in accordance with the rule of ancient law (*disciplina iuris veteris*) there begins to be, through the preservation of respect for religion, a concern both for

---

705. Barnes, "Damascus or Demessus?" (2005) suggests the edict was issued at Demessus, located between Singidunum and Viminacium, rather than Damascus. It is likelier to have emanated from a more eastern province, however.
the interest of the honor of those who seek the marriage union and for the interest of those subsequently born therefrom, and that even posterity itself is cleansed through respectable birth. For it has been greatly pleasing to Our sense of religious duty that the sacred names of kinship achieve among their subjects the dutiful and scrupulous affection that is owed to relations by blood. For it is sacrilege to believe that those things are going to endure that, it is established, have in the past been done by many persons, when in the promiscuous manner of herd animals and wild beasts they have rushed into inappropriate unions goaded by a deplorable lust without any regard for a sense of shame or a respect for religious duty.

3. But whatever things appear previously to have been perpetrated either through the lack of sophistication or the ignorance of law (ius) on the part of those doing wrong in the fashion of uncivilized monstrosity through inappropriate marriages, although they ought to have been punished most severely, nevertheless, out of consideration for Our mercifulness We wish them to fall within the scope of Our leniency in such a way however that whoever prior to now have defiled themselves in inappropriate and incestuous marriages shall know that they have benefited from Our leniency in such a measure that, following such unspeakable deeds, they shall congratulate themselves that their lives, at any rate, have been spared. They shall know all the same that the children they have raised are not legitimate, since they produced them in such a sacrilegious coupling. For it will turn out thus in future as well that no one shall dare to obey unbridled passions, since they too shall know that the past perpetrators of such crimes have been freed by pardon in such a way that they are not conceded rights on succession to the children whom they have inappropriately produced. These (rights) were something denied by the laws (leges) of the Romans since antiquity. And We would indeed have wished that nothing of this sort had been done beforehand, which had either to be indulged by mercy or corrected by legislation (leges).
4. But afterward We wish that respect for religion and the sacred be observed by each and every person in forming marital bonds, so that they recall that they are bound by the rules of Roman statutes and they know that only those marriages are appropriate which are allowed under Roman law.

5. What is more, in this edict We set forth those relatives by blood and by marriage with whom it is not permitted to contract marriage: with a daughter, granddaughter, or great-granddaughter, and likewise, a mother, grandmother, or great-grandmother, and, collaterally, with a father's or mother's sister, one's own sister, her daughter, or her granddaughter through that daughter, and likewise, among relatives by marriage, a stepdaughter, stepmother, mother-in-law, daughter-in-law, and all the rest forbidden by ancient legal principle (*ius antiquum*). We wish everyone to keep away from these (marriage partners).

6. For Our laws (*iura*) safeguard nothing but what is holy and worthy of reverence. It is thus that Roman greatness has arrived at such an eminence through the favorable disposition of all the gods, because it has bound all of its laws (*leges*) by a prudent deference to religion and respect for a sense of shame.

7. So through this edict of Ours We wish it to be known to everyone that the pardon for past offenses, which is seen to be granted by Our clemency in derogation of the rules, extends only to those misdeeds that are seen to have been committed up to the third day before the Kalends of January in the consulship of Tuscus and Anullinus (December 30, 295).

8. If, moreover, any offenses are shown to have been perpetrated against the glory of the Roman name and the holiness of the laws (*leges*) after the date given above, they shall be punished with worthy rigor. So let no one calculate that he can achieve pardon for so unspeakable a crime who even in the wake of Our edict does not hesitate to rush to the commission of so manifest a criminal act.

Given on the Kalends of May at Damascus in the consulship of Tuscus and Anullinus (May 1, 295).
This enactment was very likely to have been prompted in part by the fact that, while such unions as forbidden here appear to have been relatively rare over a long period, in the wake of the constitutio Antoniniana the Roman citizen body contained a greater number of persons who were prepared to practice not only what was permissible under the law though socially disfavored, but even what the law did not at all allow.

This is not to claim that such marriages were necessarily frequent overall. A phenomenon does not have to have been especially common to provoke the attention of a lawmaker in either the classical or late antique periods. To take the example of first-cousin marriage, at this point in time still permitted under the law, it is of course impossible to be precise over the frequency of the phenomenon in any period. Certainty is elusive even for a relatively well documented case such as late antique Egypt. There is also some reason to think it was on the decline even as it became the object of repressive imperial legislation.

The issue was, it seems, not merely one of law or legal status, but one of religion, politics, and cultural identity. Historians have adduced evidence of kin-endogamous Persian immigrants living in certain eastern provinces by the third century at the latest.

706. So in my view Volterra, Lezioni di diritto romano: Il matrimonio romano (1961) 342 has the better argument on this subject against Roda, “Il matrimonio fra cugini germani nella legislazione tardoimperiale” (1979) esp. 296.

707. See, for the western part of the empire, Shaw and Saller, “Close-Kin Marriage in Roman Society?” (1984), who have been widely followed; for an influential dissent, see Moreau, Incestus et prohibitae nuptiae (2002) 192, 299-329, 366-375, who points out (at 313), quite correctly, that Roman onomastic usage allows us to identify marriages between parallel patrilineal cousins much more easily than those between cross cousins or parallel matrilineal cousins. That does not mean such unions were common: see O’Roark, “Close-Kin Marriage in Late Antiquity” (1996).


710. Weiß, “Endogamie und Exogamie im römischen Kaiserreich” (1908) 344-345, 348-349, 366; Chadwick, “The Relativity of Moral Codes” (1979) 149; Lee, “Close-Kin Marriage in Late Antique Mesopotamia” (1988) 406, 412, who shows that such endogamous marriages were not just a matter of Roman anti-Persian propaganda and involved kin closer than first cousins. On
as well as of proselytizing in some areas of the Roman East in this period on the part of Zoroastrians, who placed a very high value on such endogamy.\textsuperscript{711} Zoroastrianism was by now the state religion of Persia, and war between Persians and Romans, which broke out in the following year, may have seemed imminent.\textsuperscript{712} Persia and its marriage practices are not explicitly mentioned in the text, though there may be an oblique reference in (3): \textit{barbaricae inmanitatis ritu} ("in the fashion of uncivilized monstrosity").\textsuperscript{713} Modern scholars sometimes invoke as a parallel Diocletian’s edict against the Manichees, of uncertain date but evidently later than the law on incest, which denounces their practices precisely as Persian, and therefore worthy of the most severe condemnation.\textsuperscript{714}

In any case, the language of the edict on incest leaves little doubt that the emperor aimed to invoke ancestral tradition in its legal and religious aspects as elements of a program of moral reform.\textsuperscript{715} Though Gaius, for example, characterizes incestuous marriage in terms of \textit{nfas} – something “unspeakable” or “sacrile-
gious”716 – “nothing in the classical period makes such concentrated use of religious language”717.

These factors suggest that Diocletian with his law intended in part to lay down a cultural and political marker, setting apart kin-exogamous Romans from the endogamous “Other”. Kin-exogamy – which can and should be contrasted with “social” endogamy718 – certainly seems to have served this function for him.719 And while the fact that, thanks to the broad extension of citizenship in 212, close-kin endogamy was now more widely practiced among “Romans” may have sharpened the sensibility of the lawmaker it would have all but guaranteed a difficult reception of his legislation in those parts of the Empire characterized by more frequent resort to such close-kin marriage, a reaction evidently both anticipated and realized by Theodosius’ later (lost) law prohibiting certain close-kin unions.720

Given what was at stake, not to mention the ominous tone of the edict, it is somewhat surprising that Diocletian’s law contains, apart from a denial to parents of rights of succession to their

716. Gaius 1.59, 64. See also Mod. (12 pandect.) D. 38.10.4.7. Puliatti, Incesti Crimina (2001) 23-27 has a useful survey of terminology.
718. The Romans were decidedly socially endogamous, at least on the level of the elite: McGinn, “The Augustan Marriage Legislation and Social Practice” (2002).
720. The argument of Roda, “Il matrimonio fra cugini germani nella legislazione tardoimperiale” (1979) 305-309 that Theodosius, at the prompting of Ambrose, sought to interfere with a practice of first-cousin marriage supposedly common – as well as longstanding, constituting a mos – among the pagan aristocracy, even as the (Christian) emperors allegedly granted numerous petitions from them for exemptions from the new rules, is implausible. Cf. Moreau, Incestus et prohibita nuptiae (2002) 192, 299-329, who correctly stresses the evidence for practice of close-kin marriage by both pagans and Christians (though at the risk of exaggerating its frequency, at least in the West), while Ubl, Inzestverbot und Gesetzgebung (2008) 48-49, 51-56, 58-63, points to criticism of close-kin endogamy, in particular first-cousin marriage, arising from both pagans and Christians.
children, no explicit mention of penalties, only an undertaking that those found in contravention of the rules *digna severitate plectentur* ("shall be punished with worthy rigor": 8). Scholars have often observed the anomaly, at times going so far as to "fill in the blank", without however offering a clear and compelling explanation for this absence, let alone developing a consensus on the matter.\(^{721}\)

5. Incest: The Next Generation

This absence of mention of a penalty is even more remarkable given the law of Diocletian that visited severe punishments on the children of incestuous relationships. I refer here to a law that is attributed to Diocletian and Maximian in a canon law manuscript from Paris and to Justinian in four other manuscripts containing an epitome of his Code, a law that Simon Corcoran has assigned persuasively to Diocletian.\(^{722}\) Here is the text of the law, which does not appear in the standard edition by Paul Krüger of

\(^{721}\) Klingmüller, s. v. *Incestus RE* 9 (1916) 1248 (death penalty); Liebs, "Unverhohlene Brutalität in den Gesetzen der ersten christlichen Kaiser" (1985) 90 (no new penalties); Corcoran, "The Sins of the Fathers" (2000) 13 (penalty not mentioned but death can be inferred from the tone, and *deportatio* cannot be excluded); Puliatti, *Incesti Crimina* (2001) 161-163, 166, 242, 254, 262, 274-275 (likely *deportatio* or *relegatio*, and not death; differential punishment by gender); Ubl, *Inzestverbot und Gesetzgebung* (2008) 43 (death or deportation can be read out of the reference to *digna severitas*); Astolfi, *Studi sul matrimonio* (2012) 129 (no speculation on the nature of the penalty). It has been argued that the constitution either introduced or abrogated the death penalty on the basis of the wording in paragraph 3, *vitam quidem sibi gratulentur esse concessam* ("they shall congratulate themselves that their lives, at any rate, have been spared"): see Puliatti, 162. But this is easier to understand as a communication of the emperor’s seriousness of purpose rather than as a reference to an actual penalty. See further below.

\(^{722}\) Corcoran, "The Sins of the Fathers" (2000). For a dissent, see Moreau, *Incestus et prohibita e nuptiae* (2002) 185-186, 365-366; Moreau, "Rome: The Invisible Children of Incest" (2010) 327-328, who argues for Justinian as the author. Moreau in my view is wrong to rely on the evidence of the Novels as evidence of Justinian’s position in the Codex on this matter and to insist that a reference to *sacrilegii poena* could only derive from a Christian emperor. On the latter, see further below.
Justinian’s *Codex* used by scholars, as it is published and translated by Corcoran:\(^723\)

Impp. Diocl(etianus) et Maximianus AA. Honorato. Iudicem, causidicum et procuratorem omnes, qui incesto matrimonio nati fuerint, fieri prohibemus et omni modo nullam professionem recipere, nisi tantum taxeotalem vel curialem si necessitas accedat. si vero prohibitum honorem ab aliquo susceperint, sacrilegi poena condemnapabantur. Si quis ex praedictis aliquem in ius vocaverit patrocinii causa, primum quidem omnino suis careat actionibus, sive iustam intentionem habeat sive non, ita quoque ut principali rescripto resuscitari non place\(\text{a}\)t, denique quicquid dampni adversario acciderit, sacramento resarciatur.

The emperors Diocletian and Maximian Augusti to Honoratus: We forbid all those born of an incestuous marriage from becoming judge, advocate or procurator, also in any way from undertaking any profession, except only ‘taxeotic’ or curial duties, if necessity demands. But if they accept from anyone a forbidden office, they will be condemned to the penalty for sacrilege. If someone from the aforementioned persons should summon someone to court for reasons of *patrocinium*, then first of all he will lose his actions totally, whether his claim be valid or not, so that his case cannot be revived even by imperial rescript, and, next, any loss suffered by his opponent must be recouped by means of an oath.

Owing to the absence of mention of the *Caesares* in its heading, Corcoran suggests a date before the first tetrarchy began in 293 and characterizes it as a letter to an official, “Honoratus”, perhaps to be identified with the Prefect of Egypt in 291-292.\(^724\) The constitution forbids children born in an incestuous marriage (*incesto matrimonio nati*) from holding the positions of judge (*iudex*), trial lawyer (*causidicus*), or legal representative (*procurator*), indeed any official post that was not financially burdensome. What this means is first that they were effectively

excluded from playing any role in court apart from that of a principal or a witness in a case, and second that they were banished from participation in public life where this might be a benefit to them. 725 Violators were punished with the penalty for sacrilegium, and any individuals who employed such persons in court were to lose their cases and pay for any loss suffered by their opponents. As Corcoran points out, although children of incestuous unions had always in principle been considered illegitimate since such marriages were void, a fact that produced some adverse consequences regarding their rights to succession, they did not labor under other disabilities and suffered no social stigma as far as we know. 726

A serious difficulty emerges in that such severity as exhibited by this law sits ill with the policy evinced in the following text:

Coll. 6.5.1: Hermogenianus sub titulo de nuptiis.
Imp(eratores) Diocletianus et Maximianus Aug(usti) Fl(avio) Flaviano. His, qui incestas nuptias per errorem contrahunt, ne poenis subiciantur, ita demum clementia principum subvenit, si postea quam errorem suum rescierint, ilico nefarias nuptias diremerint.
Prop(osita) id(ibus) Mart(iis) <Tiberiano> et Dione cons(ulibus).

2. Hanc quoque constitutionem Gregorianus titulo de nuptiis inservit, quae est tricesima et secunda, aliis tamen et die <et cons(ulibus)>, id est: constitutio prop(osita) V id(us) Iun(ias) Diocletiano ter et Maximiano Augustis.

1. The Codex Hermogenianus under the Title on “Marriage”.

726. Corcoran, “The Sins of the Fathers” (2000) 6. In other words, they were treated no differently than illegitimate children in general: see Moreau, “Rome: The Invisible Children of Incest” (2010) 319-323. For a different view, see Fiori, “La struttura del matrimonio romano” (2011) 210, 223-226, 227. It was relatively rare in Roman law, though not unprecedented, for children even of the most despised miscreants to be punished for their parents’ misdeeds: see the discussion in McGinn, Prostitution, Sexuality, and the Law (1998) 93. All the same, there might be further adverse consequences if one or both parents were sentenced to deportatio: below.
Emperors Diocletian and Maximian Augusti to Flavius Flavianus. Imperial mercy grants relief to those who contract incestuous marriage by mistake, in order that they not be subjected to the penalties, on the necessary condition that once they learn of their mistake they immediately put an end to the sacrilegious marriage.

Posted on the Ides of March, in the consulship of Tiberianus and Dio (March 15, 291).

2. The *Codex Gregorianus* also attaches this constitution to a Title on "Marriage", which is the Thirty-Second Title, though with another day and year, namely, "the constitution was posted five days before the Ides of June, in the consulship of Diocletian, consul for the third time, and Maximian Augusti" (June 9, 287).

The double citation of the constitution raises issues that need not detain us.\(^\text{727}\) The important point is that, as modern commentators point out,\(^\text{728}\) it states classical law, while that imposing disabilities on the children of incest proceeds in a very different direction. It is very difficult to see how these two policies can be reconciled with each other if we assume that the latter can be dated as early as Corcoran argues. Why treat the children of incestuous marriage so much more harshly than its perpetrators, or at least some of them?

One might argue that this is a matter more of appearances than fact. The excuse theory advanced by the 287/291 law — and this is, I believe, a matter of excuse rather than of justification — allows those contracting an incestuous marriage through ignorance to escape liability provided they end the union immediately upon learning of their mistake. The children, on the other hand, are punished under the undated constitution on the basis of their status rather than under any theory of fault, with no chance, as far as we can see, of the penalty being remitted.\(^\text{729}\) This is a much harsher rule.

---

\(^\text{727}\) See the discussion in Frakes, *Compiling the Collatio* (2011) 270. There is no way to choose between the two rival dates.


\(^\text{729}\) Cf. the classical perspective as reflected in Pap. D. 50.2.6 pr., where the absence of fault on the part of children of incest allows them to benefit with respect to their status.
I would suggest placing less weight on the wording of the
inscription for the law imposing disabilities on the children of
incest, in particular on its omission of mention of the Caesars. This
is a part of the text of imperial constitutions that is especially prone
to errors. For example, that containing the 295 edict quoted above
in the text eclipses the names of the Caesars, leaving only their
titles. For another example, that imposing disabilities on chil-
dren in fact attributes the constitution to Justinian, not Diocletian,
in four of the five manuscripts on which it is preserved, as we
noted above.

This allows for a more plausible reconstruction of the
actual sequence of events. Diocletian begins by upholding rules
deriving from the classical period in the constitution of 287/291.
He then takes a much harder line in the edict of 295, evidently
anticipating conflict with the kin-endogamous Persians. At some
later point he toughens the penalty regime by imposing disabilities
on the children of incest.

This is not to deny that other reconstructions are possible.
But it seems more difficult to place the last-named constitution
before the edict of 295 and extremely challenging to date it before
the law of 287/291. One particular element of the law on disabili-
ties supports my argument. This is the reference to the *poena
sacrilegi*. This seems much more suited to the wake of the 295
edict with its extensive and aggressive use of religious terminology
than to the context of the law of 287/291, which has one – per-
factly classical in tone – reference to *nuptiae nefariae*. It also helps
to confirm this as a law of Diocletian and not of Justinian. There is
further the fact that the 295 text denies in certain circumstances
rights on succession to parents from their children without
mentioning any disabilities to be inflicted on the latter. While far
from proving the point, if such disabilities already existed, the
omission seems strange.

So Diocletian’s approach to incestuous marriage changed
over time. I would hesitate to describe this as an “evolution”, since
both the 295 edict and the law on disabilities represent, each in its
own way, something of an abrupt departure from previous policy.

730. See the comments of Frakes, “The Collatio and the Codex Gregorianus”
(2005) 296, where he proposes dropping the reference to the Caesars in the
inscription. See further Frakes, Compiling the Collatio (2011) 171 n. 70.
At the same time, it is important not to overstate this element, especially if we are to arrive at an answer to our query over the absence of a penalty in the 295 edict. To that end, it is perhaps worth exploring in somewhat greater detail the legal regime Diocletian had inherited on the subject of incestuous marriage.

6. Incest: Late Classical Flexibility

Incestuous marriage is of interest not least because in principle it presents the cumulation of two criminal offenses, *incestum* and *stuprum*, the latter an offense punished by the Augustan adultery law. Despite this, the legal authorities in the late classical period were in principle disposed to take a generous view, mitigating or even canceling punishment owing to the circumstances of sex, age, and mistake. The last is particularly remarkable because it embraced instances of *error iuris*, something the Romans were not as a rule disposed to excuse, certainly in the areas of delict and criminal law. One might show good faith by public celebration of the wedding at its outset (while a clandestine union might suggest the presence of wrongful intent) or by immediate divorce upon learning of the mistake. The jurists drew a distinction, the precise nature of which is not always crystal clear, between *incestum iure civili* and *incestum iure gentium*. Both were repressed under Roman law, and the latter also by the legal systems of other peoples. Violation of the peculiar rules of the *ius civile* was more likely to be excused than violation of rules thought to be more widespread in their application. Even so, relief from a criminal penalty did not mean the marriage would be allowed to stand.

Though no explicit reference to this rationale can be found in the sources, one motive for clemency might have been the fact that the parties, however misguided, were attempting to fulfil their social responsibilities as enshrined in the Augustan marriage

732. See, for example, Pap. (36 quaest.) D. 48.5.39(38) pr. - 7.
legislation, two statutes known by the composite title *lex Julia et Papia*.\footnote{Moreau, "Rome: The Invisible Children of Incest" (2010) 323 makes this point specifically regarding the well-known case treated in a rescript of the *Divi Fratres* quoted in Pap.-Marci. D. 23.2.57a. It is downplayed as a factor by Pulitatti, *Incesti Crimina* (2001) 100-111.} To put it another way, their behavior was deemed to be characterized by a manifest good faith as opposed to wrongful intent.

All of these theories, it is worth noting, turn on the construction precisely of criminal intent.\footnote{See the discussion in Winkel, *Error Iuris Nocet* (1985) esp. 119-120; Pulitatti, *Incesti Crimina* (2001) 101, 122-123, 240, 267.} In cases where such intent was deemed present a severe criminal penalty awaited the offender.\footnote{Pulitatti, *Incesti Crimina* (2001) 101, 122-123, 240, 267.} Unfortunately the evidence for the penalty in the classical period is ambiguous, and scholars find themselves in disagreement on this matter.\footnote{See Astolfi, *Studi sul matrimonio* (2012) 110-111.} One view is that it amounted to the milder form of exile known as *relegatio* for *stuprum/adulterium* and for incest the harsher variety known as *exilium* or *deportatio*, which, certainly by the late classical period, entailed confiscation of all assets. Others hold that *relegatio* was the penalty for both offenses but that their cumulation spelled *deportatio*. The question of penalty aside, it is difficult to see how – where criminal intent was present – incest as an offense could not but cumulate with either of the two principal ones under the adultery law. This holds whether the incest was committed in the context of “marriage”, which would entail *stuprum*, where since the marriage was void the sexual relationship would qualify as criminal,\footnote{See Rizzelli, *Lex Iulia de adulteriis* (1996) 41. So the point made in the text remains firm.} or in the context of an affair (or sexual exploitation, such as of a child), which
would entail *adulterium* or *stuprum* depending on the status of the woman as married or not.\footnote{741} In his recent book, Astolfi sides with those who postulate a difference in penalty for the two offenses, though his argument depends in part on the assumption that Augustus expressly punished incest in his adultery law,\footnote{742} which is far from certain.

In the wake of the passage of the *lex Iulia de adulteriis coercendis*, it seems that incest could be committed without *stuprum* or *adulterium* only by a relatively few number of types, such as prostitutes, who were exempted from liability under this statute.\footnote{743} Here there is a difference with bigamy, in that after Augustus this offense would only be punished, under the criminal law, as either *stuprum* or *adulterium*, with the penalties, apart from the praetorian (that is, civil) sanction discussed above, laid down by the statute precisely for these crimes. Incest was punished as a separate crime in a technical sense but typically—aside from the exceptions just mentioned—as cumulative with one of these two offenses, so that it does not stand as fully independent from the adultery law.

7. Diocletianic Severity

As we noted above, a number of scholars have remarked upon the absence of explicit mention of a penalty in Diocletian’s edict on incest without offering a clear and convincing explanation for this. A very few, to be sure, have stressed the contrast between this emperor’s severity and the more indulgent approach taken by emperors and jurists in the late classical period, and so have come closer to an answer to the question of why the former sets no penalty in his fierce-sounding law.\footnote{744} We do well to begin our detailed

\footnote{741. Marci. (2 inst.) D. 48.18.5: *duplex crimen.*}
consideration of the matter with a more precise assessment of both the late classical and Diocletianic approaches, above all in light of the *constitutio Antoniniana*.

A pair of recent studies, while usefully pointing to genuine and very serious difficulties with the evidence, in my view risk underrating the significance of this measure, either by overstating the proportion of Roman citizens among those persons residing in Roman territory before its passage or understating the same in its wake.\textsuperscript{745} The persuasive position remains that of the dominant opinion, namely, that with this measure Caracalla in 212 granted Roman citizenship to vast numbers of persons, the majority of the free inhabitants of the Empire.\textsuperscript{746}

It has been claimed that the *constitutio Antoniniana*, with its implicit prospect of criminalizing the marital behavior of so many newly minted citizens, inspired the Severan jurists to develop their mild regime for incest, and in particular the distinction they drew between *iure civili* and that *iure gentium*.\textsuperscript{747} As plausible as this might seem, however, it is seriously undermined by the fact that Papinian, who seems to have played a key role in developing this distinction, wrote of it before 212, and evidently long before 212 at that.\textsuperscript{748}

\textsuperscript{745} For the former, see Mattiangeli, "La constitutio Antoniniana e la sua problematica" (2010); for the latter, Marotta, "La cittadinanza romana nell'ecumene imperiale" (2009).

\textsuperscript{746} This is not to deny the exceptional case of the (much-discussed) *dedictii*. See, for example, Sherwin-White, *The Roman Citizenship* (1973) 386-392; Modrzejewski, "L'Édit de Caracalla de 212" (2011) esp. 35.


\textsuperscript{748} On Papinian's role, see Pap. (11 quaest.) D. 12.7.5.1; Pap. (36 quaest.) D. 48.5.39(38).2, with Puliatti, *Incesti Crimina* (2001) 74-80. Book 36 was likely to have been written under the sole reign of Septimius Severus, while Book 11 may trace back to the reign of Commodus: Fitting, *Alter und Folge* (1908) 74-75; the point is unaffected by the revised dating of the work recently proposed by Babusiaux, *Papinius Quesestiones* (2011) 5-7. Given Papinian's murder in the immediate aftermath of the assassination of Caracalla's brother Geta, it seems highly unlikely he was still alive at the time of the enactment of the *constitutio Antoniniana* in early 212. See Kunkel, *Herkunft und soziale Stellung der römischen Juristen* (1967) 224; Potter, *The Roman Empire at Bay* (2014) 136-139.
One might be tempted to argue then that Papinian was responding to massive, or at least — in terms of their number — generous, grants of citizenship to persons practicing close-kin endogamy in the years preceding the sole reign of Caracalla. While not impossible, this is not necessarily what happened. In fact, the decisive influence for him may not have arisen from confronting sheer numbers of cases. Instead we can point to the rationales of doctrine and equity discussed above, especially insofar as these emerge in a case decided under Marcus and Verus that both Papinian and Marcian report.\(^{749}\) There is other important evidence that suggests that even if the distinction just mentioned had not already been developed, key aspects of the mild regime were in place already in the Antonine period. I refer to a passage of Gaius, who overall seems to have exhibited greater sensitivity to provincial matters than other jurists.\(^{750}\) Thus, without denying other jurists a role, what seems to have happened is that Papinian helped develop this relatively flexible and tolerant regime in part on the basis of a relatively small number of cases, which was later taken up and applied by his colleagues to a potentially much larger pool of cases in the wake of Caracalla’s initiative.

This mildness enjoyed a vogue of over a century until it was at first received and later rejected by Diocletian. His 295 edict is fascinating for its repeated allusion to a decisive reversal of policy that stops just short of acknowledging such a change explicitly. We can trace this in a series of statements such as the following (my emphasis in each case):

1. We believe that We ought not to ignore those things which have been carried out in the past by certain persons in an unspeakable and impure manner.

2. For it is sacrilege to believe that those things are going to endure that, it is established, have in the past been done by many persons, when in the promiscuous manner of herd animals and wild beasts they have rushed

\(^{749}\) Pap.-Marci. D. 23.2.57a. Papinian cites three other holdings of these emperors reflecting mildness in the matter of incestuous marriage: Pap. (36 quaest.) D. 48.5.39(38).4-6.

\(^{750}\) See Gaius 1.64. On Gaius’ interest in provincial concerns, especially relating to the Roman East, see, for example, the discussion in Kunkel, *Herkunft und soziale Stellung der römischen Juristen* (1967) 186-213.
into inappropriate unions goaded by a deplorable lust without any regard for a sense of shame or a respect for religious duty.

3. But whatever things appear previously to have been perpetrated either through the lack of sophistication or the ignorance of law on the part of those doing wrong in the fashion of uncivilized monstrosity through inappropriate marriages, although they ought to have been punished most severely, nevertheless, out of consideration for Our mercifulness We wish them to fall within the scope of Our leniency in such a way however that whoever prior to now have defiled themselves in inappropriate and incestuous marriages shall know that they have benefited from Our leniency in such a measure that, following such unspeakable deeds, they shall congratulate themselves that their lives, at any rate, have been spared.

And We would indeed have wished that nothing of this sort had been done beforehand, which had either to be indulged by mercy or corrected by legislation.

Of particular interest of course is the reference to offenses committed “either through the lack of sophistication or the ignorance of law” (in 3), since this language echoes that of the regime reflected in the works of the late classical jurists as well as in his own constitution of 287/291.

Against all this we have (in 5) a restatement of the close-kin relationships proscribed by Roman law that are here described in terms of “ancient legal principle” (ius antiquum) matched by an earlier reference (in 2) to marriages contracted “in accordance with the rule of ancient law” (iuxta disciplinam iuris veteris) as well as the attribution (in 3) to “antiquity” (vetustas) of the denial of rights on succession — evidently both under a will and on intestacy — to parents from their children produced in incestuous relationships. This sanction occurs in the context of a grant of pardon (venia, in 3) for those who have committed incest through marriage. We are entitled to ask — pardon from exactly what penalties?

The most plausible answer is: precisely those penalties associated with deportatio. By the late classical period, and evidently as early as the reign of Tiberius, such persons could neither
leave nor receive property either under a will or on intestacy.\footnote{751} This was true across-the-board, meaning it applied not just to their children born in incestuous relationships, and so held for all persons sentenced to “deportation”, and not just for those condemned for incest. This means that Diocletian’s invocation in the Damascus Edict of the Romanae leges “from antiquity” (\textit{iuxta vetustatem}) has a certain selective quality about it.\footnote{752} Insofar as this is only a “partial penalty” inflicted in the context of a pardon, it serves I believe as an indication of what the full punishment will entail once the grace period he lays down has ended.

What we find is that Diocletian does not innovate with respect to what relationships were forbidden or – apart perhaps from the very partial exception just canvassed – what penalties were prescribed. He simply throws out the juristic regime that allowed for mitigation of the latter. From now on, the rules would be enforced with rigor, without regard to such factors as sex, age, or mistake as had informed the late classical law.\footnote{753} He is careful to set forth the exact relationships that are not permitted, presumably in part because in issuing the edict at Damascus, he found himself in a part of the Roman world where there well might have been some lack of clarity on this score. There was no need to state the penalties associated with deportatio, since these not only


752. Worth noting is that the status of the children as illegitimate means that, in the absence of infliction of deportatio on their parents, their mothers would enjoy qualified rights to succession on intestacy, enhanced in some circumstances by the \textit{SC Tertullianum}: see Frier and McGinn, \textit{A Casebook on Roman Family Law} (2004) 339.

753. That Diocletian did not enjoy the last word on the subject is shown of course by subsequent imperial legislation, which is relatively well studied: see Astolfi, \textit{Studi sul matrimonio} (2012) 108-122. Also of interest is the fact that Justinian’s compilers preserve the late classical regime in the Digest, while omitting – apart from the section listing forbidden marriage partners – his Damascus Edict from the \textit{Codex}. Even the \textit{Collatio}, which preserves this law in full, also contains three excerpts from Severan jurists as well as the Diocletianic constitution of 287/291 that I argue to reflect their thinking: Ulp. \textit{Coll.} 6.2; Paul. \textit{Coll.} 6.3; Dioclet, Maxim. \textit{Coll.} 6.5 (a. 287/291); Pap. \textit{Coll.} 6.6.}
remained the same but were presumably well known to those in a position to inflict them.

8. Conclusion

Some modern scholars regard Diocletian as having taken an approach to classical law that is on the whole a conservative one. At least a couple of factors make this argument seem plausible. He faced political and military challenges that made reliance on legal certainty loom more important. More specifically, even decades after the massive grant of citizenship by the constitutio Antoniniana, great uncertainty seems to have reigned in some quarters as to the precise details especially of private law.

We can see evidence of a conservative approach under the headings of both bigamy and incest, at least initially, for the latter. His changes in policy on incest, or more precisely incestuous marriage, also suggest that his approach to the legal tradition was far from inert or unreflecting. When Diocletian had a motive to make changes, even dramatic changes, in the law, he did not hesitate to do so, and his policy – or rather policies – on incest serve as a useful demonstration of this fact. At the same time, he is careful to cite, as his references to ius antiquum/vetus and the vetustas of the Romanae leges show, the authority of the longstanding Roman legal tradition. He would not be the first emperor, nor the last, to attempt to present his innovations as a return to the past.

754. See the summary of views reported by Moreau, Incestus et prohibitae nuptiae (2002) 117. Much of his lawfinding survives in the form of rescripts, not a form especially well suited to promote innovation in the law: see the remarks of Connolly, Lives Behind the Laws (2010) 142-147. For this reason, perhaps, Diocletian found new use for the edict as an instrument for communicating his legal policies: Potter, The Roman Empire at Bay (2014) 292.

755. As does a constitution on adultery that sets out to eliminate the prisci iuris ambages (“the ambiguities of the old law”) as well as the praeestigiae versuti ius (“contrivances of craftily contorted law”), issued in the same year as the incest edict: Dioclet., Maxim. C. 9.9.27(28) (a. 295). This suggests he took an instrumental approach to the legal tradition: see Portmann, “Zu den Motiven der diokletianischen Christenverfolgung” (1990) 221-224.

756. On the mix of conservatism and innovation characteristic of the legal authorities responsible for the Diocletianic Codes, see Potter, The Roman Empire at Bay (2014) 291.
Bibliography


Enßlin, W. s. v. Valerius Diocletianus, RE (ser. 2) 7 (1948) 2419-2496.


Frakes, R. M. “The Collatio and the Codex Gregorianus (Observations on Coll. 1.10; 6.4; 15.3).” Index 33 (2005) 293-300.


Lee, A. D. “Close-Kin Marriage in Late Antique Mesopotamia.” Greek, Roman, and Byzantine Studies 29.4 (1988) 403-413.


