1. The field of Roman law abounds in neglected topics, but few perhaps are as compelling as that of underage brides. This is because the relevant evidence, not just legal but literary and epigraphic in nature, is sufficiently full, and of such a quality, to encourage the belief that this phenomenon was far from uncommon. And yet the opportunity it presents has remained largely unrealized, as the scholarship has, with few exceptions, either underplayed or ignored its significance. This is the state of affairs Isabella Piro sets out to remedy with this important new book. She succeeds admirably with her general argument that the practice was longstanding, surprisingly frequent, and of no small concern to the jurists. This book ought to have a profound impact on the way in which historians view Roman marriage.

A side from this brief introduction, this note breaks down into three parts. The first engages the contents of Spose bambine chapter by chapter. The second focuses on the question of the minimum legal age of marriage for males. The third contains an extended discussion of an important synthesis advocated by the author on the date of the introduction of the minimum legal age of marriage for females. Disagreement over this matter generates solid support for the author’s main argument for the importance of underage marriage at Rome.

2. Spose bambine consists of three chapters, followed by an index of sources. The first chapter offers an efficient and generous review of the mod-

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2. The terms “underage brides” and “underage marriage” are inherently ambiguous, because they suggest marriage below an age deemed “acceptable” without making clear exactly what that age is. In what follows, “underage marriage” refers to marriage with girls below the age of twelve, unless otherwise indicated. This is an important point, because marriage with girls aged twelve and even somewhat older is likely to appear “underage” from a modern perspective, and sometimes from an ancient one as well. By contrast, “early marriage” refers in what follows to legitimate marriage with girls aged twelve or slightly older.
ern scholarship. Here Piro ably demonstrates the need for the present study. Despite the relative abundance of evidence, modern scholars have tended to treat the phenomenon of girls younger than twelve 'marrying' only occasionally and typically as a sidebar to other concerns. The result is that it has been widely regarded as marginal. An exception to the trend is a flare-up in the mid-fifties that lasted about half a decade, provoked by an important article by Marcel Durry5.

The second chapter examines precocious, or, better, underage female marriage in its social context, meaning in concrete terms the literary and epigraphic sources. Key passages from Plutarch, Tacitus, Plautus, Catullus, and Petronius lay the foundation for the author's case that the practice traces to an early date and was more common than many moderns have assumed. With regard to the question of its antiquity, while we might hesitate to assign it to the regal period on the basis of a 'lex regia' attributed to Numa4, there is no question that the Romans themselves regarded it as ancient, a belief supported perhaps by the evidence of Plautus5.

The problem of its prevalence is more difficult to address. We will never be certain how widespread marriage to underage females was, of course6. The small number (about fifty, extending over several centuries) of inscriptions testifying to it is of little help here7, though the author is correct to claim that it is sufficient to indicate the phenomenon was not negligible (78-80). The evidence for members of the elite is also rather thin, enough to suggest a certain currency on this level of society as well; but greater precision about frequency remains beyond our reach (70-78). The literary evidence at times seems to take the practice for granted. Catullus appears to do so by celebrating it in the context of an elite union10, Petronius by satirizing it in a representation, in literal terms, of sub-elite practice that may (also) aim at loftier targets in terms of social rank11.

The most telling evidence derives from Tacitus and especially Plutarch12. This is because both authors use the example of underage (or at least early, for Tacitus) female marriage as a means for comparing Roman practices with those of other peoples, contemporary Germans and ancient Spartans respectively, among whom women tended to marry at a more ad

Age of Roman Girls at Marriage: Some Reconsiderations, in JRS. 77 (1987) 30-45 (at 36): “One must be aware of the element of the purely arbitrary in the sample. It does contain possibly at least one serious and misleading bias in which it would, specifically, give a false impression of the relative percentage of girls (out of all girls) married in their early teens. But, more important, the context of the data themselves is so arbitrary that the statistical modes derived from them bear an unknown relationship to the actual modes of age at first marriage for girls in Roman society.”

8 It must be conceded that phrases such as "surprisingly frequent", "not negligible" and "a certain currency" are frustratingly vague. One would like to know if underage marriages constituted 0.5%, 5%, 10% or more of first marriages for Roman females. Precision of this kind is simply impossible.

9 Here in my view the author would have done well to segregate the examples of underage marriage, where the bride is less than twelve years, from instances of early marriage, where she is twelve or slightly older. By my count she gives less than half a dozen of the former, not all of which are certain, and one of which concerns Octavia, the wife of Nero, who was 11, on one estimate, at the time of their marriage (76; cf. 78). Her method is defensible, insofar as she argues that there was no fixed minimum legal age for marriage for most of the classical period. Even so, for analytical purposes, it might have been better to sort matters out in light of these two categories. Evidence for early female marriage may also embrace underage marriage without serving as independent testimony of the same.

10 Plut. Germ. 20.2 (it should be noted that he is less precise than Plutarch, so that it is possible that he criticizes only early female marriage, but one can also understand him as referring to both early and underage marriage, or even just the latter); Plut. Comp. Lyc. et Numae 4.1-2 (he refers explicitly to both underage and early marriage: below).
vanced age. While far from guaranteeing that most Roman girls married before turning twelve (or just after), these comparisons suggest that such practices were somehow regarded as 'typically' or 'characteristically' Roman, thus providing the best evidence we have for a relatively broad diffusion. At the same time, both Tacitus and Plutarch criticize such marriage practices, which opens up the possibility that they (implicitly) exaggerate their popularity, a risk visible elsewhere in the tradition of ancient, especially Roman, moral criticism. In any case, Piro is adept at using this criticism to trace out the anxiety that underage female marriage, and evidently early marriage as well, came to inspire (see 62).

The last and longest chapter is devoted to an examination of the sources for law, embracing for the most part the works of the classical jurists. Its organization is essentially chronological, starting with a section on late Republican juristic thought, followed by one on the Augustan marriage legislation, then another devoted to the perspectives of Labeo, who seems to have taken a particular interest in the subject, and the fourth and final one on the work of the other classical jurists.

The meat of Piro’s argument is that the jurists (and the emperor Augustus, if we accept her claim that his marriage law is relevant here) regulated underage female marriage in such a way as not only to tolerate it but even to encourage it. This does not mean that they recognize it as legitimate marriage of course but that they treat it as an institution possessing a certain social value all the same, sometimes in a manner similar to engagement. The argument has much to commend it, and Piro is certainly correct to assert that the practice enjoyed greater significance than previously thought. The result has important implications for our understanding of the institution of Roman marriage. At the same time, I think some of her individual arguments are not as strong as others, so that one might question whether and to what extent the legal authorities show an inclination to validate and encourage this practice. In other words, some ambivalence on their part persists, and it is perhaps better to speak of an accommodation by them in some circumstances, while in others they show themselves less sympathetic to it, without, however, condemning it.

The nature and scope of the regulation of underage female marriage by the legal authorities, as it emerges in this book, is impressive. These discussions mainly concern gifts between the partners, the dowry and especially its return, and sexual infidelity, all issues that routinely arise in the context of marriage between two adults. While it is in principle unsafe to attempt to deduce the frequency of a practice from its appearance in juristic discussion, and in fact this subject would seem to present the kind of anomalous, liminal issue almost guaranteed to attract their attention regardless of its resonance in lived experience, there is enough here in my opinion to bolster the author’s claim that our phenomenon was not a negligible one.

Of no small importance is the fact that underage female marriage never seems to have been considered as giving rise to liability for *stuprum* between the partners themselves. Here is a telling instance of the principle “what the law would control, it first legalized,”. This lack of liability is remarkable when viewed both from an ancient and from a modern perspective. In instances, for example, of bigamy and incest, deliberate violation of the adultery statute in the context of attempted marriage-formation, when, as a matter of law, no marriage was possible, would risk the imposition of a severe penalty for offenders. An accommodation might be made for parties who were deceived about a partner’s actual marital status in the case of bigamy and for reasons of sex, age, and mistake in the case of incest. But we have no evidence of any discussion at all of the need for such in the context of underage female marriage. In other words, there is no sign that it was ever regarded as a problem. Piro convincingly demonstrates (74) that despite some

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13 The criticism is especially curious for Tacitus, who appears (see 71) to have married Iulia, the daughter of the great general Iulius Agricola, when she was barely 13 years of age. This fact by itself suggests the jurists were not the only Romans ambivalent about marriage with young girls.

14 Examples abound of Roman moral criticism that might well be thought to exaggerate various aspects, including the prevalence, of what is being deplored. Petronius himself can be cited (including his treatment of the subject under discussion) and Juvenal, not least in his Sixth Satire.

15 I note the view of G. Rizzelli, *Lex Iulia de adulteriis: Studi sulla disciplina di adulterium, inominium, stuprum* (Lecce, Edizioni del Grifo, 1997) 171-267 that the Augustan adultery law did not punish *stuprum*, i.e. criminal formation with an unmarried woman, *per se*. On the matter under discussion, see Rizzelli, *Lex Iulia* cit., 242-243, and below.


18 Caldwell, *Roman Girlhood and the Fashioning of Femininity* cit., 112-114 points out that the jurists show no interest in shielding the child bride either from cohabitation or from sex.
ambiguities in the evidence sex was a routine expectation in this context, as was cohabitation as a married couple\textsuperscript{19}. And yet, just as one might well wonder what sort of effective consent to marriage a twelve year old girl might be in a position to offer, the possibility of a younger girl being able to offer effective consent to sex seems as much if not even more problematic\textsuperscript{20}, a point to which we return below.

3. We can take the measure of the strengths and possible limitations of Piro’s argument from her discussion of an important issue, namely, when the minimum ages for marriage at law became fixed at fourteen for males and twelve for females. The situation for males is easier to read because the evidence is a bit clearer. First, there is a text of Gaius that concerns precisely twelve for females. The situation for males is easier to read because the evidence sex was a routine expectation in this context, as was cohabitation as a married couple\textsuperscript{20}.

This text can be supplemented by another, which is from a late-antique collection, but which most modern scholars believe largely reflects classical law\textsuperscript{22}:

(Excerpts from Ulpian’s Writings): Males, to be sure, are freed from guardianship (tutela) through the advent of adulthood. The Cassians, moreover, declare that only that male is an adult who is seen to have reached full biological puberty, and when eunuchs themselves were permitted to make wills: below.

Tt. 11.23: Liberantur tutela masculi quidem pubertate. puberem autem Cassiani quidem eum esse dicunt, qui habitu corporis pubes apparat, id est qui generare possit: Proculeiani autem eum, qui quattuordecim annos exploset: verum Priscus eum puberen esse, in quem utrunque concurret et habitus corporis et numeros annorum.

The central question raised in these texts is: when does a person cease being a child and become an adult? In both passages a controversy reached full biological puberty, and when eunuchs themselves were permitted to make wills: below.

\textsuperscript{19}For the latter point, see B.W. Frier, Roman Law and the Marriage of Underage Girls, in Journal of Roman Archaeology (forthcoming). For the former, see S. Treggiari, Putting the Bride to Bed, in Echoes du Monde Classique / Classical Views 38 n.s. 13 (1994) 311-331 (at 326-333).


\textsuperscript{21}This might represent a concession to the Proculian bright line of fourteen, but is more likely to refer to eighteen, the age of plena pubertas, by which time most men
emerges between two groups of early imperial jurists that was evidently not resolved until Justinian. The Sabinians or Cassians (Gaius’ “school”) emphasize physical development, requiring a boy to have the ability to procreate, while the Proculians simply set an age of fourteen for boys, reducing through resort to a one-size-fits-all solution what we might describe as potential “transaction costs” that were associated above all with a physical inspection. The Sabinian view in particular suggests that this controversy was relevant to the question not only of guardianship but of the minimum age for marriage, which is the position adopted by most modern historians. A third opinion, registered in the passage from the Tituli ex corpore Ulpianii and attributed to a jurist identified only as “Priscus”, attempts to resolve the debate by adopting both criteria.

In other words, the Proculians advocated a solution like that adopted for girls, in which legal majority would embrace at least some subjects who had not yet experienced full biological puberty, while the Sabinians held that the two ought better to align, meaning that for them the legal and (full) biological ages of puberty were ideally the same or at least closer. The most persuasive reason why the members of the latter school did not make a similar argument for girls is that they wished to accommodate an already existing practice of early female marriage. The usual reason given by modern scholars, namely, that the legal authorities wanted to avoid subjecting girls to an embarrassing physical inspection, is insufficient, since if they preferred to proceed on a case-by-case basis without relying on obtrusive measures they might have been content with evidence of the onset of menstruation. In any case, an important result is that legal puberty is not inevitably coincident with (full) biological puberty for the Romans.

23 On the controversy between the Sabinians and Proculians, and in particular on scholarly opinion over the identity of the jurist “Priscus”, see recently T.G. Leessen, Gaius Meets Cicero: Law and Rhetoric in the School Controversies (Leiden, Brill, 2010) 45-57, not all of whose conclusions I share. For what it is worth, she argues for Iulius as the Priscus in question while most scholars hold for Neratius. Certainty is impossible here.

24 The point is that menstrua was clearly not the standard and that all or most of the other discernible physical changes almost certainly required inspection; below. Worth noting in this connection is that the Romans had a method for ascertaining pregnancy deemed sufficiently discreet as to be adopted by the legal authorities. See the discussion in T.A.J. McGinn, The Marriage Legislation of Augustus: A Study in Reception, in Legal Roots: The International Journal of Roman Law, Legal History and Comparative Law 2 (2013) 7-45 (at 27-30). All of this suggests that a desire to accommodate early marriage was the primary motive, and a wish to avoid a physical inspection a secondary one.

Neither Gaius nor the author of the Tituli indicates that the controversy was ever resolved, and so it would seem at least for the classical period. Most scholars accept that Justinian put an end to the debate with the following law:

C. 5.60.3 (Imp. Justinianus A. Memae PP): Indecoram observationem in examinanda marum puberty tese ranies ibemus: quemadmodum feminae post impletos duodecim annos omnimodo pubescere indicantur, iva et mares post excessum quattuordecim annorum puberty existimentur, indagatione corporis honesta cessante.

(Emperor Justinian Augustus to Menas, Praetorian Prefect; AD 529): In terminating the indelicate practice of examining males to ascertain that they have reached adulthood, We order the following: in the same way that females, once they have completed twelve years of age, are deemed to have reached adulthood in every sense, so also males, after they have completed fourteen years, shall be considered to be adults, and the dishonorable physical examination is abolished.

In a technical sense, Justinian can indeed be said to eliminate once and for all the school controversy that had been raging for many years. At the same time, his wording suggests that in recent times, at least, one point of view had won out over the others. That would be, perhaps surprisingly, the Sabinian or, as we shall see in a moment, more precisely the Priscian position. I write “perhaps surprisingly” because any reliance on a standard so imprecise as to require physical inspection is awkward (as Justinian points out), somewhat self-contradictory (see Gaius’ remark about eunuchs), and almost sure to generate a degree of uncertainty about when adulthood (i.e., legal puberty) would occur, given different individual rates of development. One cannot but express a mild curiosity as to exactly what evidence the physical inspection of boys aimed to generate, and whether this can be deemed to be as unambiguous as, say, the onset of menstruation in girls. At minimum, the goal was to evaluate the growth of pubic hair and of genitalia.

Given (biological) puberty’s status as a process and not an event, however,
this seems far from straightforward. It is no great surprise perhaps that Justinian, that unabashed lover of bright-line rules, preferred the Proculian position. In so doing, he appears to collapse the concepts of legal and biological puberty.

A passage from his Institutes sheds more light on the question:

I. 1.22 pr.: Pupilli pupillaeque cum puberes esse coeperint, tutela liberantur. Pubertatem autem veteres quidem non solum ex annis, sed etiam ex habitus corporis in masculis aestimari volebant. Nostra autem maiores dignum esse castitatem temporum nostrorum bene putavimus, quod in feminas et antiquis impudicum esse visum est, id est inspectionem habitudinis corporis, hoc etiam in masculos extendere: et ideo sancta constitutione promulgata pubertatem in masculis post quartum decimum annum completum ilico initium accipere disposuimus, antiquitatis non, mam in femininis personis bene positam suo ordine relinquentes, ut post duodecimum annum completum viripotentem credantur.

(Justinian in the first book of his Institutes): Male and female minor wards are freed from tutela when they reach adulthood. Moreover, the ancient jurists admittedly used to prefer that adulthood be evaluated for males not only in terms of age but also according to physical development. Our Majesty however has well deemed it worthy of the chastity favored by Our reign to extend the principle that something which seemed in the case of females to be unchangeable even to the ancients, that is, an inspection of physical development, (is inap-

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27 The Tanner stages of development widely used among modern clinicians yield four pubertal stages for each of these phenomena, ranging from a mean age of 12.4 to 15.2 years for pubic hair and 11.6 to 14.9 for genitalia: J.A. Yanovski and G.B. Cutler, Jr., The Reproductive Axis: Pubertal Activation, in E.Y. Arash et al. eds., Reproductive Endocrinology, and Surgery 1 (Philadelphia, Lippincott-Raven Publishers, 1996) 75-101 (esp. 80; the authors estimate that pubertal onset in antiquity occurred "approximately 2 years later than the average age of pubertal onset today"; 76). Justinian's apprehensions about a possible compromise of chastity (below) do not quite resolve the matter. One cannot emphasize too highly here and in what follows that modern data can only be used for purposes of illustration. They cannot prove anything about conditions in antiquity, but only suggest possible ways to understand the often paltry ancient evidence. So here for example the modern data indicate a progression of pubertal development which helps us understand what criteria the Sabinians may have been using, without allowing any greater precision about this.

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28 An obvious reference to Iustinianus C. 5.60.3 (529), above in the text.

29 So, evidently, S. Tafaro, Pubes e viripotentem nell'esperienza giuridica romana (Bari, Cacucci Editore, 1988) 136-138 (the book is reprinted as La pubertà a Roma: Profili giuridici [Bari, Cacucci Editore, 1993]). For a different view, see D. Dalla, Pubes e viripotentem, in Labeo 39.3 (1993) 426-429 (at 429), who suggests that the Institutes passage synthesizes the two school positions. Elsewhere, Tafaro (215-218) argues that the Proculian position came to prevail by the late second century, on the basis of evidence regarding the capacity to make a will. See, however, D. Dalla, L'incompetenza sessuale in diritto romano (Milan, Giuffrè Editore, 1978) 207-212.

30 See, for example, T.A.J. McGinn, s.v. tutela, in Encyclopedia of Ancient History (2013) 6890-6892, with literature.
the Sabinians were holding out for full reproductive capacity and were not satisfied with criteria of physical as opposed to intellectual or emotional maturity. One can only speculate that the former were preferred because traditional, easier to implement, and perhaps alleviated to an extent in their effects precisely by the assignment of curatores to young adults. There is also to consider the sheer operation of demographics, meaning the fact that many a teenage boy was destined to find himself a half or full orphan before reaching majority, with its implications for capacity at private law, which helps explain why there was such a low age for legal puberty in the first place. For girls, this would have been a secondary consideration, since they exchanged one tutor for another, perhaps in some cases the same person, albeit of greatly reduced authority, upon reaching majority at the age of twelve, to say nothing of any role played by a curator. The minimum age for marriage was the central issue in their case.

While it is conceivable that under the Sabinian standard some Roman males might have been eligible for legal majority earlier than fourteen, consistently with differential rates of development, most probably would have had to wait longer. The insistence of the Sabinians on achievement of reproductive capacity certainly suggests this. A recent modern study makes the generalization that male humans typically mature a year or two after females.\textsuperscript{31} Roman females are said as a rule to have experienced menarche "around fourteen", males might have been eligible for legal majority earlier than fourteen, consistent with differential rates of development, most probably would have had to wait longer. The insistence of the Sabinians on achievement of reproductive capacity certainly suggests this. A recent modern study makes the generalization that male humans typically mature a year or two after females.\textsuperscript{31} Roman females are said as a rule to have experienced menarche "around fourteen", which is not quite the same as achieving full reproductive capacity, as we shall see below. This would mean that the latter came later for both sexes, but even later for boys than for girls.\textsuperscript{32} At the same time, it is far from clear that the Sabinians were holding out for full reproductive capacity and were not satisfied with some intermediate stage, which seems more likely.

Contemporary research draws a distinction between the adolescent development of boys and girls that raises something of a paradox, in that fertility can long precede full biological puberty for the former, who however tend otherwise to develop later than do females, so opening a gap between the initial production of sperm and full reproductive maturity.\textsuperscript{33} Since the Romans were not in a position to rely on urine tests to evaluate the onset of fertility, it is persuasive that they, or at any rate the Sabinians and Priscans among them, were guided more by the physical changes that, prompted by hormones (themselves of course unknown to the ancients), tended to occur, or were at any rate more visible, further along the process of maturation for boys. These would serve as signs of the capacity to procreate, which for many, if not most, would fall after, perhaps well after, their fourteenth birthday.\textsuperscript{34} All such changes are subsumable under the Sabinian phrase habitus corporis ("physical development"). Although not all of them require a physical inspection of the sort decried by Justinian in order to ascertain the proper degree of change,\textsuperscript{35} the more reliable ones, to judge from modern clinical procedure, perhaps did. The arrival of reproductive maturity after this point explains the curious assumption in a declamation attributed to Quintilian that a charge of adultery is unbelievable for males aged less than fourteen.\textsuperscript{36} So also for another assumption found in a similar exercise to the effect that a male could legally marry before achieving (full) biological puberty.\textsuperscript{37}

It might be asked why release from tutela for wards continued to depend on criteria of physical as opposed to intellectual or emotional maturity. One can only speculate that the former were preferred because traditional, easier to implement, and perhaps alleviated to an extent in their effects precisely by the assignment of curatores to young adults. There is also to consider the sheer operation of demographics, meaning the fact that many a teenage boy was destined to find himself a half or full orphan before reaching majority, with its implications for capacity at private law, which helps explain why there was such a low age for legal puberty in the first place. For girls, this would have been a secondary consideration, since they exchanged one tutor for another, perhaps in some cases the same person, albeit of greatly reduced authority, upon reaching majority at the age of twelve, to say nothing of any role played by a curator. The minimum age for marriage was the central issue in their case.


\textsuperscript{32} The fact that girls generally mature more quickly than boys was explained in terms of the greater heat of their bodies. So Macrob. Sat. 7.7.6 justifies the differential of 14 and 12 as recognized by law for the aetas pubertas.

\textsuperscript{33} B. BOGIN, Patterns of Human Growth\textsuperscript{2} (Cambridge, Cambridge University Press, 1999) 214-216.

\textsuperscript{34} See YANOFSKY and G.B. CUTLER, Jr., The Reproductive Axis cit., 76, 80 on the pubertal stages for growth of pubic hair and genitalia, adverting to a later age of onset in antiquity than in the modern world, as mentioned above.

\textsuperscript{35} One might suppose that the resort to such inspections represents a later development that perhaps arose as a response to the evident triumph of the relatively severe Priscan standard. Too much was at stake however to leave the matter so open to uncertainty and delay, so that we do better to take Justinian at his word regarding the antiquity of the procedure.

\textsuperscript{36} [Quint.] 355.7. The same principle does not hold for females under twelve below. Arist. HA 9.1 (581A) observes that males for the most part begin to produce sperm and grow pubic hair after turning fourteen. This appears to refer to pubertal onset, not reproductive maturity, a point supported by the assertion that the sperm are not ready for sexual activity until after accepting the toga virilis: see M. LENTANO, Nascere amoris iter: L'iniziazione alla vita sessuale nella cultura romana, in Rassegna di storia moderna e contemporanea 38 (1996) 271-282. Most recipients were 15 or older, to judge from the data collected by J. MARQUARDT and A. MATS, Das Privatrecht der Römer\textsuperscript{2} 1 (Darmstadt, Wissenschaftliche Buchgesellschaft, 1990) 129-130. Originally published in Leipzig, Verlag von S. Hirzel, 1886. So in choosing 14 as the cut-off the Proculians can hardly be assumed to have had no concern for physical development or to have been acting arbitrarily: below.

\textsuperscript{37} [Quint.] 279.
It is curious that when the legal authorities did not feel themselves as much bound by tradition as also perhaps more specifically by the social exigencies attendant upon coming into one’s property – important for both sexes, but especially for males – or those attendant upon being deemed marriageable – especially significant for females – they were capable of developing an age for puberty that more closely aligned the legal with the biological, in its fully developed state. I refer first to Hadrian’s ruling confirmed by Caracalla that seems to have established fourteen years for females and eighteen for males as the upper limits of eligibility for state sponsored alimentary programs, ages that Ulpian suggests applying to privately sponsored ones where the benefactor did not specify an age but simply referred to the arrival of puberty (usque ad pubertatem)39. Here a legal or administrative conception of puberty appears more closely linked to the biological, in the sense of (full) reproductive maturity, than we find in the sources reviewed above.

The result may be compared with the age at which eunuchs were permitted to make wills, namely eighteen, on the ground that this is “the time at which most males reach (biological) puberty”39. For those men adopting or adrogating another person, the rule was that they had to be older by a full eighteen years at minimum, a period Modestinus identifies as plena puberty39. There may be a connection here with the requirement that the person adrogated be vesticeps, that is, have assumed the toga virilis, if it is correct to argue that this was a pre-classical standard set back when this ceremony took place after one turned seventeen, later to be substituted by the lower classical benchmarks for legal puberty reflected in the juristic controversy described above41. This evidence suggests that when it came to realistic prospects for procreation, the minimum ages for marriage of fourteen and twelve were rather beside the point for the jurists. All the same, the potential gap between legal and full biological puberty looms larger if anything for girls than it does for boys.

We can see that the Romans understood that biological puberty was a process rather than a single event. Setting a requirement for legal puberty (i.e., adulthood), whether defined in terms of the number of years, a certain level of physical development, or both, involved picking a theoretically fixed point along this biological spectrum that did not end for all or nearly all Roman males until they reached the age of 18 or close to it. Setting on an “age of majority” below that threshold inevitably opened a gap between legal and full biological puberty for many if not most Roman boys. It is remarkable that for both “schools”, but especially it seems for the Proculianans, this was, as far as we can tell, set closer for most to the onset of puberty than its conclusion. Consideration not in principle of the appropriate age of marriage, but of that for coming into the management of one’s property in the teeth of an adverse demographic regime, played more of a role than reproductive maturity, though the latter is not completely out of the picture, looming larger for the Sabini ans of course. The matter stands, as we shall see, somewhat differently for Roman girls. Here too there is an evident disjunction between legal and full biological puberty in the preferred “age of majority”, but it is even more closely associated with the onset of puberty and seems intended precisely to accommodate early marriage for them, while it has relatively little to do with the ability to manage one’s property. This serves as a nice illustration of the willingness and ability of the Romans to manipulate biological

30 D. 34.1.14.1 (Ulp. 2. fideicommiss.). The passage suggests that the legal authorities knew the ages of (full) biological puberty. See R. ASIOLI, Il matrimonio nel diritto romano classico (Padua, CEDAM, 2006) 235-236 for evidence of seventeen as the age for military service, voting, and full procedural capacity before the prae tor. The age of assumption of the toga virilis varied but usually occurred by the age of seventeen, at least in the classical period: J. McWILLIAM, The Socialization of Roman Children, in J. EVANS GRUBBS and T. PARKIN eds., The Oxford Handbook of Childhood and Education in the Classical World (Oxford, Oxford University Press, 2013) 264-285 (at 271-272); A.M. SEELENTAG, lus pontificium cum iure civili coniunctum (Tübingen, Mohr Siebeck, 2014) 246-248 (who sees change over time below). All of this suggests that the Romans understood puberty as a social construct, as well as a biological fact, to be a process and not an event, though one reliably terminated by the age of eighteen for males. One may compare the following information offered by a modern textbook. “In boys, puberty commonly begins at ages 12-14 and is largely completed by age 18” C. VanPuttE et al., Seeley’s Essentials of Anatomy and Physiology3 (New York, McGraw-Hill, 2010) 537.

31 PS. 3.4a.2: ...ex tempore... quo plenius pubescunt...

32 D. 1.7.40.1 (Mod. 1 diff.), on which see now SEELENTAG, lus pontificium cum iure civili coniunctum cit., 362-375.
ical facts to suit cultural practices, here rooted in deeply held assumptions about ideal gender role.

4. These considerations, let it be said, grant no small measure of plausibility to what might be described as a major subthesis argued by Piro. She holds that, despite what Justinian asserts, for most of the classical period the age for legal puberty for girls was determined not by a black-and-white age cut-off, namely twelve, but was settled on a case-by-case basis until the former came to be established as the criterion in the late classical period. I find myself in disagreement with this conclusion, in part because I think the other view, that twelve existed as the cut-off for the entire classical period, better suits her entirely persuasive principal thesis, as qualified above, about the importance of underage marriage. The reader will decide for herself whom to follow of course, but I must emphasize that regarding the main ar-

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One difficulty that obtrudes for Piro from the start is that, unlike the situation for males described above, about which we have clear evidence of a juristic controversy that lasted many years, regarding the minimum age for females there is no sign that the jurisprudence disagreed at all. That is a chief reason why the dominant opinion holds that twelve was the cut-off from the time of Augustus if not before. As we shall see, there are late classical jurists who cite their high classical and even early classical predecessors in a manner that suggests that there was no daylight between them on this score.

As with males, this is hardly a trivial matter. For that matter, Piro denies that the new rule was effectively in place for the high classical jurists, despite signs to the contrary that I believe most scholars would accept. More importantly, if there was a change, when precisely did this occur, and why? These questions remain unanswered, I would argue, because the premise cannot be sustained. Things are especially sticky when a late classical jurist's reference to an important term such as *virginitas* is supposed to mean something significantly different from an early classical jurist's usage, without any sign at all that this is the case. In my view, the juristic refer-

ence to *iusta aetas, viriportens, minor duodecim annis* all amount to the same thing, a minimum age of marriage for females that was always twelve for the entire period of classical Roman law. In other words I argue for a single criterion for the minimum age of marriage for females in this period. Where I differ from the dominant opinion (and from the author) is that I believe that this cut-off was not linked directly to a girl's actual or supposed procreative capacity, or even to menarche, which is not quite the same thing.

One objection that can be posed to the argument that legal puberty was recognized for girls on a case-by-case basis is that, unless this was linked to menarche, which the ancients believed occurred mostly "around fourteen" (below), it almost certainly required some form of physical inspection, especially given the conservative mode of dress deemed appropriate for respectable women and girls. Menarche seems unlikely ever to have been the legal standard since it would have delayed such recognition for many. If there were a physical inspection during the classical period, Justinian is likely to have known of it, the more so the later it endured.

The origins of Roman thinking about minimum ages for marriage are murky. Riccardo Astolfi seems right to argue that it was from an early point left to a pater familias to determine at what age a child-in-power was ready to marry. The law was prompted to intervene in cases where this authority figure was absent owing to his (death or the child's emancipation), but per-

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44 See for example Piro (152-153 with n. 117). For Pomponius, see Pomp. D. 23.2.4; for Julian, see Labeo-Iul.-Pap.-Ulp. D. 23.1.9; Labeo-Iul.-Pap.-Ulp. D. 24.1.32.27. In the latter two texts Julian's position is in my view explicitly aligned with that of Ulpian on this issue, and there is no sign he or any of the others had a position on minimum age different from that of Labeo: see below.

43 For a thesis that dual criteria held, namely age and physical development, see FRIER, Roman Law and the Marriage of Underage Girls cit.

44 It seems less likely that the pubertal height spurt, the only discernible change apart from menarche that conceivably did not require an intrusive inspection, would have been used for this purpose. This may have been more challenging to measure and possibly allowed no direct connection to be made by the Romans with developing procreative capacity. Similar reasons perhaps motivated the Sabinius to discount reliance on the height spurt in the case of boys. Finally, it may have arrived too late in many cases, if it occurred just before menarche; see M. FERIN et al., *The Menstrual Cycle: Physiology, Reproductive Disorders, and Infertility* (New York, Oxford University Press, 1993) 86. Thus for girls as well the more likely available criteria would have been those that necessitated such an intervention, in their case those measuring the growth of breasts and pubic hair.

For what it is worth, these are commonly used by modern clinicians to track pubertal growth; see YANOFSKI and CUTLER, *The Reproductive Axis* cit., 80; S.A.B. PITS and C.M. GORDON, *The Physiology of Puberty*, in S.J. EVANS and M.R. LAUPER eds., *Pediatric & Adolescent Gynecology* (Philadelphia, Wolters Kluwer, 2012) 100-113 (at 104-105); and below.

haps out of a desire to avoid interfering with his prerogative, no general rule appears to have been laid down at first. This means that it is conceivable that a kind of double system existed for a time in which there was discussion of minimum ages for marriage only for those without a pater familias, an especially urgent matter as we have seen regarding boys' release from tutela. So despite evident disagreement over the criteria to employ, at least for males, there was a perceived need to develop the concept of an appropriate age, a iusta aetas, for legal puberty, and this eventually came to be applied to all children, not just to those who were not in power. The only question is: when did this occur?

Most scholars, as noted above, believe that the minimum age for marriage of twelve years for girls was introduced at the latest by Augustus in the context of his marriage legislation. Piro astutely points out that underage marriage was not strictly relevant to Augustus' purpose since it was not really marriage and unlikely to generate many children (101-102). By allowing engagement to count as marriage for the purposes of the law, a significant benefit, Augustus, as the author argues (104-105), validated and thereby encouraged an already-established practice. This exemption was a feature of the first marriage statute, the lex Julia de mariandis ordinium of 13 BC, which did not place a limit however on how long a period of time an engagement could so count.

Augustus evidently assumed that such engagements would increase in number, which appears to have been the case. He also assumed that, as in the period before the law, such relationships would routinely lead to marriage when the parties both reached the appropriate age, an assumption however that came to be belied by experience. Cassius Dio shows that the policy of allowing engagement with very young girls to count as marriage had the unintended consequence of encouraging some men to remain in this state for many years without moving on to marriage, let alone procreation.

46 One solution may have been to allow a tutor the same discretion in the matter as the pater familias, but, if so, for obvious reasons this would have revealed itself fairly quickly as unsatisfactory. See just MARQUARDT and MAU, Das Privatleben der Römer cit., I.127-128.


48 Dio 54.16.7.

His generous benefit revealed as an unforeseen and unwanted loophole, Augustus moved to remedy the situation by enacting a rule limiting the period in which an engagement would qualify the parties for benefits. Most scholars believe that this happened with the second marriage law, the lex Papia Poppaea of AD 9, which was designed in no small part to close loopholes in the statute of 18 BC and to emphasize better the procreation of children as opposed to the contracting of marriage, which had been the clear focus of the first law (see Piro 107 n. 39 for bibliography), so (unintentionally) setting up the perhaps biggest loophole of them all. Piro is in the minority arguing for a much earlier fix, and cites the adultery law, which followed the lex Julia de mariandis ordinibus by a couple of years at most, as a likely occasion for this (106-107, 113 n. 53).

This proposal risks in my view misprising the nature of the evasion that was evidently taking place. It was not the fact of underage engagement that caused difficulties. As noted, this practice preceded the law and Augustus may actually have been rather pleased by what we can reasonably assume was a spike in frequency in the years immediately following its passage. It required a bit longer to realize the true impact of the false incentive signaled by Dio. For example, an engagement with a two year old girl in 18 BC might easily have lasted ten years before being broken off, if for no other reason than the girl's family (not to speak of the girl herself) wanted her to be married while her longtime fiancé retained no interest in this outcome.

49 The view at first glance seems supported by the fact that Dio reports it in the context of 18 BC: see T. SANGUINOLLO VIGORITA, Custa domus: Un seminario sulla legislazione matrimoniale augustea (Naples, Jovene Editore, 2010) 34. But the historian is in my view looking ahead to the companion law here, just as he looks back to the first law in his account of AD 9: Dio 56.7.2 and below. It makes sense for him to set forth some of the attempts made to evade the first law in this place, even though they were not addressed until afterward: see T. SANGUINOLLO VIGORITA, La data della Lex Julia de Adulteriis, in Iuris Vincula: Studi in onore di Mario Talamanca 8 (Naples, Jovene Editore, 2001) 79-96 (at 84); D. WARDLE, Suetonius: Life of Augustus (Oxford, Oxford University Press, 2014) 277.

50 For a discussion, see T. SANGUINOLLO VIGORITA, La data della Lex Julia de Adulteriis cit., who would date the adulterity law as late as mid-16. In my view, it is unlikely to have passed later than early 17, though this matters little for the point under discussion. See also FRIEHER, Roman Law and the Marriage of Underage Girls cit., who argues for a remedy in an imperial edict issued precisely in 18 BC.

51 The jurists regarded as void sham marriages designed to circumvent the law and there is no reason to think they would have treated sham engagements any differently: R. ASTOLFI, La Lex Julia et Papia (Padua, CEDAM, 1996) 4. The challenge in this case
There was presumably a new cohort of two-year-old potential fiancées for him to choose from at that point. It will have been have reasonably clear at the latest within a couple of decades of the law's enactment, but perhaps not all that much sooner at the earliest, what needed to be done. In other words, while it is unnecessary to suppose that there were very many such egregious cases, some amount of time was required for the implications of the loophole to emerge. So the lex Papia Poppaea offers a stronger possibility for implementation of a reform than the adultery law, in my view. This shows that there was no motive under the of course by benefits I refer to the to emergence. So the lex Papia Poppaea offers a stronger possibility for implementation of a reform than the adultery law, in my view.  

Another way in which the first marriage law created a false incentive can be viewed from the perspective of the minimum ages it stipulated for compliance, twenty for women and twenty-five for men, meaning that below these limits one enjoyed the full benefit of the law, as though one were actually married — or engaged. This shows that there was no motive under the legislation itself for any woman or man below these ages to seek out the sort of sham engagement that eventually spurred reform. Our protagonists then are men older than twenty five who suffered from what we might call today “commitment issues”, avid for engagements with young girls well below an age appropriate for marriage in order to put the day of their own dreaded wedlock as far into the future as possible, without suffering disadvantages under the law, of course. The younger the girl the better for this purpose, saying nothing of the underage status of said girls. The context strongly suggests that the lex Papia Poppaea was the vehicle for this change in the law. 

An additional factor encouraging resort to engagements with such young girls lay in the general unavailability of adult women for such escapades. Adult Roman women were expected — and expected themselves — to be married, certainly on the level of the elite. It is unlikely that many of them would have been motivated to participate in a sham engagement. The result was a sharply reduced prospect of a phenomenon of 'friends with benefits' among persons closer in age — of course by benefits I refer to the praemia of the marriage law. 

Dio informs us that the reform in question laid down that no engagement would count as marriage under the law unless marriage followed within a maximum of two years, meaning, he says, that the girl would have to be at least ten years old for her partner to benefit at all from engagement with her, since twelve was regarded as the minimum for girls. Piro, following Sebastian Tafaro, argues vigorously that Augustus was responsible only for the saying nothing of the underage status of said girls. The context strongly suggests that the lex Papia Poppaea was the vehicle for this change in the law. 

52 On Paul Joes' (well-known) reconstruction, in AD 4 Augustus tried but failed to introduce a reform of the lex Iulia de maritandis ordinationibus: P. Joes, Die Ehegesetze des Augustus, in T. SPAGNOLI VIGORITA ed., 'Juliae Rationes': Due studi sulla legislazione matrimoniale augustea (Naples, Jovene Editore, 1965) 1-65 (at 49-63). Originally published in P. Joes et al eds., Festschrift THEODOR MOMMSEN zum fünfzigjährigen Doctorjubiläum (Marburg, N.G. Elwer'sche Verlagsbuchhandlung, 1993) 1-65. If he is right, this might have been another opportunity for reform, but there is no good evidence for such an attempt at legislation.

53 The first marriage law stipulated these ages for marriage while the second gave lower ones for procreation of children, an anomaly famously not resolved until Septimius Severus, in favor of the first. See ASTOLFI, Il matrimonio nel diritto romano classico cit., 250; Piro (116). 

54 See Suet. Aug. 34.2 on how Augustus' perception that the force of the law was being undermined by the immaturitas sponsarum prompted the reform, while of course especially if her parents entertained unreasonable expectations about the relationship maturing into marriage or were simply content with the arrangement as it stood. This was perhaps because it conferred a measure of social prestige, until it was time for her to be married, presumably to someone else, at a point when her stock on the marriage market might well have risen as a result of the sham engagement.

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55 Piro allows for the possibility of adult women engaging in sham engagements (113 n. 30). While undeniably possible it seems unlikely to have occurred on a large scale, for the reasons given in the text. 

56 Dio 54.16.7. 

57 See TAFARO, Papes e stirpetas nell'esperienza giuridica romana cit., 220 n. 225 who cites evidence for engagements with very young children long after the reform. These did not violate the law, of course; they simply did not qualify anyone for the legislative benefits, as Dio points out. Since males under twenty five enjoyed these benefits anyway, they lost nothing from engagements with such young partners. So these instances simply suggest that the upper-class custom that thrived before the first marriage law continued to do so afterwards, even after the false incentives that encouraged a distorted form of this practice were eliminated by the second law. For similar hesitations based on the same evidence, see P.A. BRUNT, Italian Manpower 225 B.C. - A.D. 14 (Oxford, Oxford University Press rev. ed., 1987) 566; THIEGLAND, Roman Marriage cit., 65. Eventually the jurists, or at least some of them, toughened the consent requirement for underage engagement by insisting that the parties be at least seven years of age: Mod. D. 23.1.14, with discussion in F. LAMBERTI, ‘Iuliae Rogationes': Due studi sulla legislazione matrimoniale nel diritto romano classico cit., 250; Piro et al. eds., Meditaciones de iure et historia: Essays in Honour of Laurens Winckel
two year window, and that the reference to the ten year minimum age for engagements represents Dio’s own contribution, counting backwards from the twelve year minimum for marriage that she argues existed in his own day but not in the reign of the first emperor (109, 114, 119).

Even on Piro’s reading, however, it is clear that Augustus demanded that marriage follow engagement for the latter to benefit the fiancé under the law. If engagements with girls younger than ten were permitted, how young was too young? Nine, eight, seven, so as to end in marriage at eleven, ten, or nine? Who determined in individual cases when such young girls were ready for sex and marriage, especially in the absence of a pater familias, and how? Any such uncertainty, if allowed to continue, would almost be guaranteed to lead to further attempts at evasion. By anchoring the two year window at ten, so that the two years directly preceded a minimum age for marriage of twelve, whether this limit was established by himself or predated the law, the emperor reduced the opportunity for fraudulent behavior. This might consist for example of stringing together a series of underage engagements, followed in each case by underage marriages, and even more quickly by underage divorces58. Moreover, it is clear that Augustus wanted to privilege the procreation of children in the lex Papia Poppaea, and encouraging marriage at any ages below twelve for girls was a poor way to achieve this goal. Finally, Dio, in the part of the text alleged to represent merely his personal reflection, shows himself to be keenly aware of how the underage engagement racket prior to the reform benefited the male partner exclusively under the law. Given his sophisticated understanding of the statute and its impact on social practice, we should not perhaps be too quick to accuse him of importing his own assumptions into his explanation of this matter.

What encouragement, then, for underage marriage? Dio might seem to allude to this in the words he attributes to Augustus in a famous speech, one of a pair, he places in AD 9, just before the passage of the second marriage law, the lex Papia Poppaea59. In this speech he has Augustus address a

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(Pretoria, Unisa Press, 2014) 518-526. This in itself suggests that the practice of underage (younger than age ten) female engagement continued even after benefits ceased to accrue under the marriage laws.

58 Fraudulent divorce, that is, divorce designed to evade the strictures of the marriage law, was a problem addressed by Augustus at the same time he tackled that of fraudulent engagement, to judge from Suet. Aug. 34.2.


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60 Dio 56.7.2. The precise meaning of the phrase is not crystal clear; cf. SWAN, The Augustan Succession cit., 230 ‘‘...that... you might lead a life profitable to your house’’; Piro (‘‘...che... formiate un nucleo familiare’’; 103 n. 28).
engagements with girls beneath the age of ten would no longer do. In a strict sense the law overwrote underage female marriage, leaving no room for it for those who wanted the full benefits under the law. But it also might easily have been interpreted as a tacit accommodation of the practice, at least from the age of ten onward, for those not so concerned about losing such benefits, such as male partners under the age of twenty five. It would also perhaps have had a double and somewhat paradoxical effect on the jurists, encouraging them in some instances to align more closely underage marriage with engagement and in others to draw a bright line between the two.

Did Augustus put forward an explicit encouragement to underage marriage in his legislation? Piro sees one in its provision for a tutor to arrange a dowry for a 

mulier or virgo obliged to marry under the law:

Tit. Ulp. 11.20: Ex lege Iulia de maritandis ordinibus tutor datur a praetore urbis ei mulieri virginine, quam ex hac ipsa lege nubere oportet, ad dotem dandum dicendam promittendamve, si legitimam tutorem pupillam habeat. Sed postea senatus censuit, ut etiam in provinciis quoque simulatur a praesidis eorum ex cadem causa tutores dentur.

(Excerpts from Ulpian’s Writings): In accordance with the lex Iulia de maritandis ordinibus a tutor is appointed by the urban praetor for that woman, whether previously married or not, who ought to be married under this very same statute, for the purpose of giving, declaring, or promising a dowry, if she has a minor ward as a statutory tutor. But afterwards the Senate laid down that also in the provinces tutores are to be appointed in exactly the same way by their governors for this same reason.

For Piro, mulier in this text refers to an adult woman, virgo to an underage girl (121-128). While not impossible, this interpretation seems unlikely for the following reason. The lex Iulia de maritandis ordinibus did not,

strictly speaking, require women to marry until they were twenty years old, as seen above. It is difficult to imagine these officials waited nearly that long to act, however. One might easily, and in my view should, construe oportet more broadly to refer to the fact that it was deemed appropriate under the law even for younger women to marry (and so for officials to assist them as described), but even so it is difficult to understand how this could apply to girls for whom marriage was impossible because of their age. So the terms mulier and virgo would in this context seem rather to refer to marital status and not to age. Comparison with a text dealing with assignment of tutores under the lex Avidia reveals itself as inappropriate. The question of how a woman might be expected to reach the age of twenty without ever being married will be taken up below.

Is there evidence for a minimum age of marriage from the Republic? Following Sebastiano Tafaro, Piro argues that the term iusta aetas, in an important discussion of underage female marriage where Neratius cites Servius, cannot refer to the specific ages of 14 and 12, because these had not yet been established:

D. 12.4.8 (Ner. 2 membr.) Quod Servius in libro de dotibus scribit, si inter eas personas, quarum altera nonnullum instam aetatem

61 So for ei mulieri virginine, on which see below.
62 The term for a never-married woman older than the minimum age (virgo virgintona) can be subsumed under mulier: Ulp. D. 50.16.13 pr. I would argue that this is not the case here, but even if it were the logic assumes that a minimum legal age for marriage existed, not only for Ulpian’s day, which Piro herself concedes, but also for the reign of Augustus: below.
habeat, nuptiae factae sint, quod dotis nomine interim datum sit, repeti posse, sic intellegendum est, ut, si divorcio intercesserit, priusquam utraque persona iustam aetatem habeat, sit eius pecuniae repetitio, donec autem in eodem habito matrimonii permanet, non magis id repeti posset, quam quod sponsa sponse dotis nomine dedet, donec maneat inter eos adfinitas: quod enim ex ea causa nondum colit matrimonio datum, cum sic detur tanquam in dotem perventurum, quamdiu pervenire potest, repetitio eius non est.

(Neratius in his second book of Parchments): What Servius writes in his book on Dowries, that if a wedding takes place between parties one of whom is still beneath the lawful age, what is given in the meantime under the title of dowry can be recovered, ought to be understood in the following way, so that if a breakup occurs before each party reaches the lawful age, there be a claim for that money. So long, however, as they persist in that same state of apparent matrimony, this can no more be claimed than what a fiancée gives a fiancé under the title of dowry (can be claimed), as long as the marital-like relationship (adfectitas) continues to exist between them. For as to what is given in connection with a marriage that has not yet taken place, when this is given in such a way as though it is going to end up as dowry, as long as it can end up that way there is no claim allowed for it.

Our author’s conclusion seems open to question, however. The words iusta aetas seem to presuppose a fixed minimum age limit, without saying exactly what this was. What receives emphasis is precisely age (aetas) as a criterion and not physical development (habitus corporis). The latter – as the text is written – is simply assumed to be present. The vagueness might simply represent a convenient way of representing the fact that two different age cut-offs existed, one for each gender, without proceeding to a degree of detail unnecessary for the point at issue. This idea seems persuasive to me if only because it seems to provide a better explanation for the phrase iusta aetas, which suggests that both Servius and Neratius did accept the existence of a minimum age for marriage that was fixed for at least one gender. In other words, the jurists seem to use the phrase as a convenience, to avoid the tedium of spelling out the gender-specific ages of 14 and 12, especially where some uncertainty reigned over the exact age for boys. If we can ascribe its use here entirely to Neratius, his aim may have been in part to mask a divergence of opinion, because irrelevant in this context, between Servius and himself on the issue of the minimum age for boys. The point would appear to hold especially (but not only) if he is the Priscus whose view on the age of legal puberty for boys was evidently an outlier during the classical period but later seems to have been broadly accepted (above)69. The exclusive focus on age as the criterion in this text is also to be explained by the fact that, as a practical matter, if one of the parties to a Roman marriage was underage, this was almost certainly the female. To all appearances, the jurists agreed on the minimum age of twelve for them.

Apart from the issue of minimum age for marriage, the text provides indirect though nonetheless important support for Piro’s main thesis69. Servius allows the condicio for recovery of the dowry in the context of an underage union. It is a simple matter for him of no marriage, no dowry – and of course no recourse then to the actio rei uxoriae. Neratius “improves” on this view by denying recovery under any action where the relationship subsists, i.e. there has been no breakup (divortium). As the jurists do elsewhere, he uses marital language to describe aspects of a relationship that might resemble marriage in important respects, but is technically not. Earlier in the passage appears the term nuptiae, “wedding”, suggesting that the parties went through a ceremony, perhaps the deductio, that manifested their consent to be married, but was not required by law, and could not result in a marriage if a capacity impediment prevented this, such as less than minimum age of one or both of the parties.

The question for Neratius appears to have been: can this “marriage” be saved? He introduces the analogy of engagement, where a claim for return of a dowry – again through condicio – must be preceded or at least accom-

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69 This is not to lay too much emphasis on this possibility. As a leading member of the Proculians (Pomp. D. 1.2.2,55), Neratius may simply have held for the cut-off of 14 for boys.

69 On what follows see TAFARO, Pubes e viripotens nell’esperienza giuridica romana cit., 162-164; ASTOLFI, Il matrimonio nel diritto romano classico cit., 240, both of whom see a clearer distinction between the opinions of Servius and Neratius than Piro is willing to accept.

69 See, for example, D.A. MUSCA, La donna nel mondo pagano e nel mondo cristiano: Le pose minime dell’età matrimoniale attraverso il materiale epigrafico (urbs Roma), in A.A.C. 7 (1985) 147-181 (at 155). At times the usage is qualified by a term such as quasi. See the reference to the quasi dos received from an underage bride in Ins-Ulp. D. 5.3.13.1, together with Ulp. D. 23.3.3.
paniced by an actual breakup. As long as there is a chance that either engagement or underage marriage will ripen into actual marriage, the dower should stay where it is.

The holding offers a subtle though significant support for Dio's account of the introduction of the marriage laws. Here the analogy between engagement and underage marriage is made explicit. Both serve the same purpose, ideally ending in legitimate marriage, a social good promoted by the Augustan legislation. Recognition of the authority of these statutes is what I believe prompted Neratius to rethink Servius' solution. The result is that underage marriage benefits from a certain accommodation, recognized not as marriage but as a step in that direction, that was inconceivable before 18 BC. This suggests in turn that Piro's argument for its importance is well-founded.

This suggests in turn that Piro's argument for its importance is well-founded. The idea that the age was fixed at twelve for girls from an early date receives support from the juristic use of the word *viripotens* used to describe marryable females. The meaning of the word is subject to some misunderstanding, as a number of scholars take it to refer to "puberty", implicitly or explicitly collapsing the concepts of biological and legal puberty. We can take as a point of departure two definitions offered by the leading Latin-English dictionaries. Lewis & Short defines the word as "fit for a husband, i.e. marryable, nubile", while the *Oxford Latin Dictionary* has "capable of having sexual relations with a man". Both are technically correct, but neither is complete in itself.

71 See, for example, C. BUSACCA, *Instaurare nipitana: L'evoluzione del matrimonio romano dalle fasi precristiane all'età classica* (Milan, Giuffrè Editore, 2012) 76-77. The correct meaning of the term is given by DUBRET, *Le mariage des filles impubères dans la Rome Antique* cit., 268-209; DUBRET, *Le mariage romain* cit., 241. Piro accepts this meaning only for its use by Laboe (133; cf. 136 and 138). She also concedes that not all girls reached full biological puberty by age 12 (152). More generally (see esp. 16-18) she follows the reconstruction of TATANO, *Pubes e viripotens nell'esperienza giuridica romana* cit., 148-153, who argues that the expression *viripotens* reflects a patriarchal ideology that defined the word in terms of a capacity not just for procreative sexual relations but for cohabiting with a husband, that is, sustaining the lived experience of marriage together. His views have been influential: see just G. POLO TÓRIBIO, *La edad de la mujer en Roma: La perfecta aetas*, in R. RODRÍGUEZ LÓPEZ and M.J. BRAVO BOSCH eds., *Múltiples Historias e Instituciones de Derecho Romano* (Madrid, Dykinson S.L., 2013) 179-197 (at 182, 194-197). These are not supported, as I argue, by Roman usage, and are simply contradicted by their predilection for underage marriage. The idea that "puberty" does not automatically coincide with readiness for sexual relations or that more generally the concepts of biological and legal puberty are not necessarily the same is hardly unique to ancient Rome: WATTS, *The Age of Consent* cit., 78, 153.

The word reflects a social construct articulated into a legal concept. It is not a reference to menarche, let alone to the capacity to bear children 72. In every society some girls mature more quickly than others. At Rome the average age for menarche has been identified as "probably thirteen plus". Some girls aged twelve years old or younger will have begun menstruating, as the evidence for very young mothers cited by Piro can at least be taken to suggest, and for an even larger group other physical changes will have been underway, as we shall see. The jurists, however, in their use of the word to signify a girl old enough to marry, were not concerned with a level of development approaching full physical maturity, or even marriage itself, for either individual girls or girls as a group 73. That much is indicated by the recurrence of

72 I note the widely recognized fact that the historical record shows significant differences in the average age at menarche between and even within societies, as well as changes in certain societies over time: see, for example, C.J. DIERS, *Historical Trends in the Age of Menarche and Menopause*, in *Psychological Reports* 34 (1974) 931-937; H. DANKER-HOPPE, *Menarchal Age in Europe*, in *Yearbook of Physical Anthropology* 29 (1966) 81-112; J.J. BRUNEBERG, "Something Happens to Girls": Menarche and the Emergence of the Modern American Hygienic Imperative, in *Journal of the History of Sexuality* 4.1 (1993) 99-127 (at 104-105); I. CODY, s.v. *Menarche*, in *Encyclopedia of Social History* (New York, Garland Publishing, 1994) 464. Menarche is followed by the onset of regular ovulation after a period that can vary, not least owing to the age at menarche, sometimes by a number of years, leading to a condition known as 'adolescent sterility': BOGIN, *Patterns of Human Growth* cit., 209-214; PITTS and GORDON, *The Physiology of Puberty* cit., 109. Once again, the modern data can only suggest possibilities for conditions in antiquity, and not offer proof of them.


74 The same holds for maturity of judgment, which is simply not a juristic criterion for legal puberty: ASTOLFI, *Il matrimonio nel diritto romano classico* cit., 237. Cf. TATANO, *Pubes e viripotens nell'esperienza giuridica romana* cit., 85-86, 151, 215, 223. While I think it very likely that the jurists knew of the age deemed typical for menarche from the works of the medical experts or developed an idea of it from their experience as husbands, fathers, and slave-owners, there is no positive sign that such knowledge played a role in their development of the rules regarding the *viripotens*. There is only the negative evidence that they never use language of such girls suggesting that they had experienced menarche, were thought capable of bearing children, or had achieved full biological puberty on any definition. Worth noting is that when girls are mentioned together with boys, a contrast is sometimes drawn between *viripotentes* and *puberes*: Ulp. D. 29.5.1.32; see
to a single, low age, lower than the age deemed typical for menarche.75
Twelve was instead the age the Romans identified as the minimum appropriate at law for a girl to have sexual relations with her husband. In this way, viriopes was thought— in many if not most cases— capable of procreating to a single, low age, lower than the age deemed typical for menarche.76 To be precise, it represents an attempt by the jurists to square the circle whereby girls married before they were thought— in many if not most cases— capable of procreating.77
The matter is clearer if we cease to identify biological puberty strictly with menarche and procreative capacity and look to the physical changes that herald their arrival. The modern medical literature shows that, despite variations according to race and ethnicity, in general these changes begin to manifest themselves two years plus before the onset of menses.78 If our au-
also Lex Malacitana 55.50-41; Tit. Ulp. 5.2 and the passage of Featus discussed below in the text. This suggests that their use of the term to signify legal, not (in any full sense) biological, puberty was conscious and deliberate. For ancient evidence on physiological changes associated with puberty, see now C. LAUSS AND J. STRUBBE, Youths in the Roman Empire: The Young and the Restless Years? (Cambridge, Cambridge University Press, 2014) 61-69.
77 While Piro (164-159) views some elements of juristic discussion, such as references to maturitas, as subjective in nature, that is, pertaining to biological puberty, I would argue that they reflect their concept of legal puberty for girls, which began at twelve years, regardless of physical development in individual cases, or even overall, if one is looking to menarche or procreative capacity as a possible standard.
78 Cf. the explanations offered by TAFARO, Pubes e viriopes nell'esperienza giuridica romana cit., 141-142, first, that the age minimum of twelve was introduced “per attrazione ed in parallelo con Petà fissata per i maschi” and second, that it represents the doubling of the number of weeks— six—to be required to be required for the constitution of the female fetus.
79 These developments are chiefly a height spurt, breast development, and the growth of pubic hair. PITTS AND GORDON, The Physiology of Puberty cit., esp. 105. Pubertal development may vary within a population; there is in particular a complex relationship between menarche, which “…does not represent reproductive maturity”, and the capacity to procreate. S. GOLUB, Periods From Menarche to Menopause (Newbury Park CA, Sage Publications, 1992) 26-28 (quotation on 27). See also BOGIN, Patterns of Human Growth cit., 212: “Full reproductive maturation, in human women, is not achieved until about five years after menarche”, referring to a phenomenon sometimes called “adolescent sterility”. For variations in the age of menarche, see above in the notes. Just as with males, Tanner pubertal stages have been developed for females. They are again four in number, in each of two independent categories in this case relating to growth of breasts and pubic hair, with mean ages ranging from 11.2 to 15.3 years for the first and 11.7 to 14.4 for the second: YANOWSKI AND CUTLER, The Reproductive Axis cit., 80. A recent text-


tories are correct, menarche occurred for most girls around fourteen, so that the appearance of these other characteristics might be expected about two years prior, signifying, for a Roman, that a girl was ready for sex and marriage, at least as a matter of law.70 In this sense, and in this sense alone was there a biological referent for legal puberty for females at Rome. That the minimum age had nothing to do with procreative capacity is shown by, among other things, the fact that it is bitterly criticized for this reason by Christian authors.79 Another sign can be seen in a text of Servius, the late antique commentator on Vergil:

(Servius in his commentary on the Aeneid): The phrase “by now sufficiently physically mature for a husband, by now marriageable in terms of her age” is not redundant, but formulated according to the legal principle in which the age (for marriage) is justified both in terms of the number of years and the physical development (of the girl). So the first part of the line goes to physical development, the second to the (number of) years.

It is far from certain that Servius has not simply confused the Priscian position for males, which we know he knew, with the standard for females or that he does not refer to a situation that prevailed (or was thought to prevail) before the age of twelve became set, when the pater familias determined when his daughter would marry. More likely, in my opinion, is that he gives us, in somewhat vague form, the minimum age of twelve years and the justification for this in terms of physical development— one notes there is no book offers a modern perspective on female pubertal development. “In girls, puberty... typically begins between ages 11 and 13 and is largely completed by age 16...”: VAN-PUTTE ET AL., Seeley’s Essentials cit., 545.
78 In fact, most Roman girls tended to marry for the first time at a later age. From this perspective on age, see above in the notes. Just as with males, Tanner pubertal stages have been developed for females. They are again four in number, in each of two independent categories in this case relating to growth of breasts and pubic hair, with mean ages ranging from 11.2 to 15.3 years for the first and 11.7 to 14.4 for the second: YANOWSKI AND CUTLER, The Reproductive Axis cit., 80. A recent text-


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- NOTE E DISCUSSION
mention of menarche or the ability to procreate. Vergil’s *matura viro* is then simply a paraphrase of the juristic *viripotens*, signifying that the girl (Lavinia) is deemed ready for sex with a husband. The true criterion for female legal puberty for both Vergil and the Scholiast is age (*aetas*), which remains in place in this conception from Rome’s distant origins down through the age of Augustus continuing on to late antiquity.

The (minimal) bodily development (*habitus corporis*) mentioned by Servius is simply assumed to be present at this age and is not validated by inspection. In other words, his reference to the criterion of a number of years means precisely the cut-off of twelve, set *secundam ius*, and moreover suggests that this had been in place as far as he knew since time immemorial. Like the jurists Servius and Neratius, the Scholiast assumes a fixed age cut-off without giving the age, which Dio and Festus (below) show was twelve.

The term *viripotens* represents a bridge concept enabling the legal authorities to align legal puberty with a minimal level of physical development, while recognizing that legal and (full) biological puberty were not coincident. *Viripotens* is attested as early as Plautus, though this is clearly a false start:

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Plautus, Persa 251-253:

Iosi opulentio, incluto, Ope gnato,
supremo, valida, viripotenti.
opes, spes bonus, copias commodanti...
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To Jupiter, wealthy, renowned, child of Ops, lofty, strong, powerful, bringer of wealth, high hopes, and resources...

The slave Sagariostio thanks Jupiter in grandiloquent terms for having prompted his master to supply him with cash ostensibly to purchase slaves

82 So there is not in my view a true dual criterion at work here, any more than at Inst. 1.22 pr., where reaching the minimum age of twelve by itself marks a girl as *viripotens* (above). The point holds for both Vergil and Servius. There is a possible insight to be gained for the Proculian position on male adulthood, in that we might conclude that instead of ignoring the issue of physical development, they simply assumed that an adequate level had been reached by age 14. This suggests in turn that their choice of this age as the cut-off was far from arbitrary: above.

83 Compare Macrobi. Sat. 7.7.6, who describes 14 and 12 as defining the *aetas pubertatis* for boys and girls respectively, *secundum iura publica*. This is consistent with classical juristic usage, at least regarding females, to judge from Ulp. (2 de adult.) D. 48.5.14.8, who describes a girl *minor duodecim annis* as *ante aetatem*.

but now able to be turned to other purposes. The word *viripotens* here has a different derivation and a different meaning than the version that concerns us; though they are spelled the same, the Plautine version has a long first I consistent with *vix*, while our first I is short, consistently with *vir*.

Sebastiano Tafaro seems right to argue that *viripotens* in our sense of the word traces its origins to juristic usage. Its earliest known appearance is in the Edict of the urban praetor:

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D. 42.4.5.2 (Ulp. 59 ad edictum): Ait Praetor: ‘si is pupillis in suam tutelam veniret exce pupilla viripotens fuerit et recte defendetur: eos, qui bona possident, de possessione decedere iubebo.’
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(Ulpian in the fifty-ninth book on the Edict). The praetor says ‘if a proper defense is offered for that male minor ward or that female minor ward who has come into majority I will instruct those in possession of his or her property to yield possession.’

The text, dealing with the grant of *missio in possessionem*, shows how different language was used regarding *su iuris* boys and girls no longer subject to tutelage of minors. At this point boys required no *tutor* at all, so are said in *suam tutelam venire*, while girls were assigned the less intrusive type associated with *su iuris* adult women, so that the same phrase could not apply to them. This opens a space for the use of *viripotens*. The concern with the material aspects of majority need not have predated concern with the marital aspects, at least for girls. The word *viripotens* itself suggests as much. Labeo offers us the closest we get to a definition for the classical period:

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D. 36.2.30 (Labeo 3 post. a lavoleno epist.): Quod pupillae legatum est ‘quandoque nuperisset’, si ea minor quam viripotens nuperisset, non ante ei legatum debetur, quam viripotens esse coeperit, quia non potest videri nupta, quae virum pati non potest.
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(Labeo in the third book of his *Posthumous Works as Epitomized by Lavoleno*): If something is given as a legacy to a female minor ward ‘whenever she is married’ and she has been wedded before she is *viripotens*, the legacy will not be due to her before she has begun to be


85 Though later, Inst. 1.22 pr., which baldly states that turning twelve qualifies a girl as *viripotens*, is relevant (above).
viripotens, because she cannot be deemed married who cannot physically engage in marital relations.

The passage offers a nice illustration of the actual or potential ambiguity of nubere, nuptiae, and their cognates, which can refer to a wedding, that is, a ritual signaling transition to the married state not required by law and having no legal effect, and to the fact of actually being or getting married, which required the consent of the parties, their patres familias if any, as well as fulfilment of the relevant capacity requirements, including minimum age. Any girl eleven years of age or younger can participate in a wedding but this cannot make her a wife. Labeo interprets nuptiae in the condition as referring to the fact of getting married—and this in gendered terms (nubere) of course—rather than to participating in the ceremony, dispelling its apparent ambiguity. Of course for an adult woman these would tend to coincide.

As we shall see, a similar point holds for the gendered language pertaining to males who marry. For them ducere (uxorem) can mean "marry", when all of the requirements for this are present, or it can refer to a ceremony that manifests the consent of one or both parties to marriage but fails to signal the start of an actual marriage, because one or more of the other requirements are left unfulfilled. So the experience of the traditional wedding procession, the deducetio, might not result in a marriage, a fact that Vergil exploits brilliantly in his account of Dido and "Aeneas", trip to the cave in Aeneid Book 4.

The juristic construct of the viripotens raises certain implications that might not seem to sit comfortably with a modern sensibility, or at least so one would think. It seems useful as a point of departure to distinguish between what we term underage marriage, that is, "marriage" with a girl less than twelve, and legitimate marriage, which embraced marriage with girls still of course very young. But it is not clear that the ancient critics always make such a distinction. Instead Tacitus and Plutarch seem to criticize marriage with girls on both sides of the line. As does Petronius, in the passage discussed above, if it is correct to read this as a sardonic take on the juristic concept of viripotens. We also have an interesting aside from Festus:

Festus s.v. Pubes 296L: Pubes: <Puer qui iam> generare potest, is incipit esse a quattuordecim annis: femina a duodecim viri potens, sive patiens, ut quidam putant.

(Festus under the entry Pubes): Male adult: <A boy who> can <already> procreate. He begins to be an adult from the age of fourteen, (while) a female (begins to be) ready for a husband from twelve, or capable of sex with him, as certain people think.

It is tempting to read this as a veiled criticism of the complicity of the jurists, if it is correct to take them as the quidam of the text, in the matter of legitimate marriage with very young girls, and a tacit acknowledgment that childbearing is not a realistic expectation for many at that age. Even so, worth noting is that in this text the concepts of legal and biological puberty are evidently conflated for boys, much as we saw with Justinian. This has the result that while the Proculian bright line of fourteen is adopted, the insis-

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86 So also D. 24.1.65 (Labeo 6 post, a Ioeloven eqip.). Piro (147 n. 107) is sensitive to the potential ambiguity of nubere etc. but I would argue that Labeo's own use of those terms is clear.
88 For criticism of the practice of underage marriage, strikingly rare among modern scholars, see Dreyer, Sur le mariage romain cit., 230; Musca, La donna nel mondo pagano e nel mondo cristiano cit., 148; C. Fayer, La famiglia romana: Aspetti giuridici e antiquari (sposa alla, matrimonio, dote) 2 (Rome, L'Erma di Breitschneider, 2005) 451.
tence on reproductive capacity is more consistent with the Sabinian position\textsuperscript{93}.

The testimony of Festus takes us back to Piro’s subthesis arguing for the late introduction of the twelve year limit for girls. While the consensus is that Festus himself dates from the second century, it also holds that he epitomizes the work of the Augustan grammarian M. Verrius Flaccus\textsuperscript{94}. When Festus appears to rely on other sources these tend to be earlier than or in a few cases contemporary with Verrius\textsuperscript{95}. This makes it very unlikely that Festus introduced new, that is, post-Augustan, information on this subject\textsuperscript{96}. If anything, the details he provides probably originate in an earlier period. The text then indicates that viripotens means a girl who has turned twelve, the minimum age for marriage even before Augustus\textsuperscript{97}. It aligns not only with the evidence of the praetorian Edict, of the jurists Servius, Labeo, and Neratius, and of Servius the commentator on Vergil, but also that of the historian Dio.

In the evidence of the jurists it is impossible to find any sign that the meaning of viripotens ever changed over the period of classical law. Instead there are indications that it did not, such as a pair of texts in which we find a juristic controversy over whether underage marriage should be construed as engagement, for example, for the purpose of deciding the validity of a gift made between the parties. Here we are confronted not with the term viripotens but with phrases such as ante duodecimum annum and in minore duodecim annis\textsuperscript{98}. On the one side is Julian, on the other Labeo, Papinian, and Ulpian. Piro (141-148) makes a detailed, interesting, and forcefully argued case that Labeo had a different conception of the minimum age than did later jurists, at least the Severans, but the form in which these passages have come down to us does not allow that element of his position to be isolated from the rest, in my view\textsuperscript{99}.

Perhaps a more important issue to arise from this discussion is the juristic emphasis on intention and its role in constituting consent to marriage (144-145)\textsuperscript{100}. Arguably the point is at least implicit in both passages. In one, however, the intent of the male partner, at any rate, receives emphasis when Ulpian writes, in justification of the majority position drawing a bright line between engagement and underage marriage, quavis iam uxorem esse putet qui duxit:

D. 24.1.32.27 (Ulp. 33 ad Sabinum): Si quis sponsam habuerit, indeae eadem uxorem duxerit cum non liceret, an donationes quasi in sponsalibus factae valeant, videamus. et Julianus tractat hanc quaestio­nem in minore duodecim annis, si in domum quasi mariti immatura sit deducunt; ait enim hanc sponsam esse, etsi uxor non sit, sed est ertis, quod Labeoni videtur et a nobis et a Papiniano libro decimo quiescam­num probatum est, ut, si quidem praecesserit sponsalia, darent, quam­vis iam uxorem esse putet qui duxit, si vero non praecesserit, neque sponsalia esse, quoniam non fuerunt, neque nuptias, quod nuptiae esse non posuerunt. ideoque si sponsalia antecesserint, valet donatio: si mi­num duodecim annis, число duodecim annis); D. 24.1.132.27 (Ulp. 33 ad Sabinum) (in minore duodecim annis).

(ulpian in the thirty-third book on Sabinus): If anyone has a fi­ancée and thereupon weds her when this was not permitted, let us see whether gifts are valid, as though they were made in the context of an

\textsuperscript{93} It is possible that Verrius Flaccus, Festus’ main source, is attempting to synthesize the two positions or has simply confused them, something perhaps easier to do before their articulation by the proponents of the two “schools”; on Verrius, see below in the text. Here is one more indication that the Sabinians did not use as their standard for boys full biological puberty.

\textsuperscript{94} More precisely, most scholars accept that Festus’ catalog is largely or even wholly an abridgment of Verrius’; see G.B. Conte (transl. J.B. Solodow, rev. D. Fowler and G.W. Most), Latin Literature: A History (Baltimore, MD, Johns Hopkins University Press, 1994) 386-387; the essays by Glinister, Lhomme, and North in F. Glinister et al. eds., Verrius, Festus, & Paul: Lexicography, Scholarship, & Society (London, Institute of Classical Studies, 2007).

\textsuperscript{95} Apart from the literature cited in the previous note, see Tafaro, Paeae e viripotens nell’esperienza giuridica romana cit., 55-97, who sees a possible reliance on the thought of Labeo on this matter. It is hardly far-fetched to see a connection with the language of Labeo as discussed above, where he describes the viripotens as someone who can circums: Labeo (3 post. a faro decipit) D. 26.2.30.

\textsuperscript{96} On the very few, and very minor, additions Festus may have made to Verrius’ text from sources postdating the latter, see F. Glinister, Constructing the Past, in Glinis­ter et al. eds., Verrius, Festus, & Paul cit., 11-32 (at 11).

\textsuperscript{97} For a later reflection of this meaning in a text of Justinian, see I. 1.22 pr., discussed above.

\textsuperscript{98} D. 23.1.9, Labeo-Iul.-Pap. (Ulp. 35 ad edictum) (ante duodecimum annum); D. 24.1.32.27 Labeo-Iul.-Pap. (Ulp. 33 ad Sabinum) (in minore duodecim annis).

\textsuperscript{99} See also Ulpian citing Julian in D. 27.6.11.3 Iul. (Ulp. 35 ad edictum) (mi­norem duodecim annis); 4 (intra duodecim annos). Both are discussed below.

\textsuperscript{100} See also Astolfo, Il matrimonio nel diritto romano classico cit., 36.
engagement. Julian too treats this problem of law in the case of a girl less than twelve years old, where she was led, though underage, to her purported husband’s home (i.e. through a deductio in domum). For he says that she is a fiancée, even if she is not a wife. But the better view is the one adopted by Labeo, and approved by myself as well as by Papinian in the tenth book of his Quaestiones, that if in fact the engagement preceded, it continued, although at this point he considers her to be his wife since he had wedded her, but if it did not precede, there was no engagement because it did not exist, and no marriage, because marriage was impossible. For this reason if an engagement occurred first the gift is valid; if not, it is void, because he did not make it to someone supposedly a non-family member but to someone supposedly his wife. And on this account the imperial legislative proposal (oratio) does not apply.

At first glance it looks as though Julian, who in both texts is ready to assimilate underage marriage to engagement, favors the former while Labeo, Papinian, and Ulpian, who refuse to do this except where an actual betrothal has preceded said marriage, do not. But the three latter jurists might be thought to grant the institution a greater share of dignity by insisting that what the parties wanted, and what they thought they were getting with their *deductio*, was a marriage, not an engagement. On this estimate, both sides might seem to regard underage marriage with some favor, Julian precisely by construing it as engagement, the others, paradoxically, by privileging marriage over betrothal. Once more the result is support for Piro’s main thesis.

At the same time, the position of neither side amounts to an unqualified endorsement of underage marriage. Julian can be thought to discount it by construing it as engagement, while the other three appear at first to deny it any legal effect at all. In fact they go further and, applying a rule meant for an actual husband and wife, invalidate gifts between “spouses” who are neither engaged nor married. Here the marital language used to describe a non-marital relationship has a certain piquancy. After all, Ulpian emphasizes the intent of the male partner, only to deny the effect the man sought, in the concessive clause *quamvis iam uxorem esse putet qui duxit*. The description of him making a gift to his partner as though she were a wife (*quasi ad uxorem*) sharpens the point. The consent of the parties to marriage is defeated by the capacity impediment. So all to no avail – and yet, according to Ulpian, the gift is still invalid, *as though she were a wife*. The intentions of the parties count for something after all, even if to their disadvantage. Interestingly, the jurist does not allow the imperial legislation on spousal gifts introduced by Severus and Caracalla to apply, which shows that he was far from considering the relationship to be marriage. Without falling into the trap of reading the frequency of a social phenomenon from the interest in it displayed by the jurists, it is difficult to escape the impression that they are grappling with an actual problem that admitted no perfect solution. So even on this more adverse line of analysis Piro’s main thesis retains great plausibility.

An argument can be made that the two sides grasp at different means of achieving roughly the same object. On this view, Julian follows the highly favorable line taken to engagement by the *lex Julia de maritandis ordinibus*, while the others hew to the implications of the reform set in place by the *lex Papia Poppea*, which established as we have seen a two year limit for engagement to be valid under the law, in a manner suggesting a sort of “best practices” that would elide underage marriage completely. Once more we

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101 On the role played by the parties’ intentions in the reasoning of the jurists see the trenchant remarks of Piro (172).

102 For P.O. CUNEO BENATTI, *Ricerche sul matrimonio romano in età imperiale* (I-V secolo d.C.) (Rome, Aracne Editrice, 2013) 119-120, the jurist’s focus is on validating the gift, rather than approving the relationship.

103 Piro (168-173) attributes this part of the holding exclusively to Ulpian, which is possible, though the break may in fact occur with et ideo, so that only the denial of the application of the *oratio* of Severus and Caracalla, and by implication of course the ensuing SC, is his own contribution. On this statute, see below in the notes.

104 Piro (173) interprets the phrase to signify that the jurist views her as *quasi uxor*.

105 In a text not considered by Piro, Ulpian treats the husband who knowingly *sciens* accepts a *quasi dos* from an underage bride as a *possessor pro possessore*, meaning that, like someone who knowingly buys from a lunatic, accepts a gift from a spouse, or takes a legacy despite knowing it is not due, he has no claim to title: D. 5.3.13.1 (Ulp. 15 ad editum). Here *quasi dos* means “a dowry that is not a dowry.” In the fragment immediately preceding this one, the jurist likens the position of the *possessor pro possessore* to that of a thief or a robber: Ulp. D. 5.3.13 pr.

106 This law, dated to AD 206, recognized as valid gifts between spouses where the marriage ended through the death of the donor and he or she had not revoked the gift: *see, for example, R.J.A. TALBERT, The Senate of Imperial Rome* (Princeton, Princeton University Press, 1984) 240. Neither *Labeo* nor *Papinian* (at the time of writing the tenth book of the *Quaestiones*) knew of the *oratio*, so that this element must derive from Ulpian.
have a reminder that the jurists are writing on the subject of underage marriage in the shadow of the Augustan marriage legislation.

The question of the intent of the parties, at least the males among them, and the role this played in the reasoning of the jurists arises with another text discussed at some length by Piro (157-164):

D. 27.6.11.3-4 (Ulp. 35 ad edictum). 3: Iulianus libro sicesimo primo digestorum tractat, an etiam in patrem debeat dari haec actio, qui filiam minoren duodecim annis nuptam dedit. et magis probat patri ignoscendum esse, qui filiam suam maturius in familiam sponsi perducere voluit: affectu enim propensiore magis quam dolo malo id videri ficesse. 4: Quod si intra duodecim annos haec decesserit, cum haberet dotem, putat Iulianus, si dolo malo conversatus sit is ad quem dos pertinet, possa maritum doli mali exceptione condicentem summo
vere in casibus, in quibus dotem vel in totum vel in partem, si constat
matrimonium, fuerat lucratum.

(Ulpian in the thirty-fifth book on the Edict): 3: In the twenty-first book of his Digests Julian discusses whether that action (on wrongful authorization) ought to be allowed also against that father who gave his daughter in marriage when she was less than twelve years old. And he thinks it is better that the father should be pardoned when he wished to settle his daughter before her time in the household of her fiancé, for (he says) he appears to have done this out of a rather benign affection rather than out of wrongful intent (dolus malus). 4: But if she dies before turning twelve having had a dowry, thinks Julian, if the person with a claim on the dowry had engaged in fraud (dolus malus) the husband can effectively counter his condicetio through an affirmative defense of fraud (exceptio doli mali) in cases in which, if the marriage had lasted, the defendant was going to profit by way of the dowry in whole or in part.

As Piro points out (159), it is strictly unclear in the first case whether an actual engagement had preceded the marriage, or Julian, with the use of the word sponsus, is simply construing the existence of one as in the passage discussed above. For that matter it is also uncertain if the relationship has yet ripened into legitimate marriage. Of interest is that our pater evidently thought it necessary to deceive his son-in-law about the girl’s true age, suggesting that there might have been resistance to underage marriage in some

quarters107. In any case, what matters for Julian is the father’s intent in marrying off his daughter even at a premature age. The jurist may be motivated in part by a desire to discourage suits between family members. More importantly, since the man was carrying out his socially approved responsibility as a pater, his motives Julian deems to be unimpeachable. He wanted to do what was best for his daughter, and to the Roman mind this meant arranging her marriage, albeit he acted overzealously108. Julian’s position can be compared to that of Neratius discussed above. Marriage or even the expectation of such represented a social good worthy of accommodation. I think it right to extend this analysis to the question of liability for stuprum. Since the parties to an underage marriage were trying, on a Roman estimate, to do the right thing they escaped criminal liability109. Indeed the question, as we have observed, never even arises in our sources.

In the second fragment, however, the jurist does allow for the possibility of the dolus malus of the pater when the girl dies before reaching the age of twelve110. If this is present, the husband can successfully resist his suit, a condicetio for the dowry. A difference here is that there is no marriage to protect and no prospect of another in future, given the death of the girl to whom the dowry belongs. Having shed their laudable telos, the father’s actions are capable of being viewed in a different light, and his son-in-law benefits from broad considerations of equity111. Worth noting is that the father’s

107 TAFARI, Pules e viripotesa nell’esperienza giuridica romana cit., 166 argues on the basis of magis that Julian was participating in a controversy and that therefore other jurists would grant the action on the basis of the father’s dolus. While not certain, this seems far from impossible. All the same, it need not betoken a judgment by the jurists on underage marriage itself, since it is the father’s (deceptive) conduct that is at issue.

108 The principle as stated operates independently of social class, but for some fathers (or mothers) in precarious financial circumstances underage marriage for their daughters might have seemed like a worthwhile strategy to pursue, both in terms of the daughter’s welfare and that of the entire family; see FRIER, Roman Law and the Marriage of Underage Girls cit.

109 Of course this is true for the “husband” in our case since he was deceived about the girl’s age, but I mean the point more generally.

110 Piro (161 n. 131) adroitly points out that, under the default rules, if a marriage is dissolved by wife’s death a claim for the dowry can only be advanced in the case of dos profecticia, and this only by her father or other male ascendant – the only possible referents for the circumlocution is ad quem dos pertinet.

111 Because the husband did not knowingly accept the dowry from an underage bride, he is not deemed a possessor pro possesso; see above in the notes.
ill intention is construed only in relation to the latter, so that again there is no question of criminal intent. At issue moreover is not precisely that he gave his underage daughter in marriage, but that he evidently lied about her age.

More insight on the kind of accommodation bestowed on underage marriage when viewed in light of the parties' intentions is offered by another text of Ulpian, in which an underage 'wife' betrays her partner with another man and is held to be liable for adultery. In principle, the intent to marry here excludes the intent to commit an offense under the Augustan adultery law (179-180). The fact that the relationship is deemed worthy of protection under the adultery law suggests in turn that the parties themselves were free from liability for sex with each other. Apart from the role played by the intentions of the parties, the interest of the state in protecting all marriages, even underage ones, provides a justification for the holding in this case. In fact, the latter can be argued to overshadow the former, to the extent that here Ulpian, unlike with his position on gifts, is willing to construe the existence of an engagement in order to find the girl liable for adultery.

This text offers an opportunity to reflect on the low level of autonomy or moral agency Roman girls enjoyed over their own bodies. In the matter of marriage, the law required their consent, but they were expected to go along with the wishes of their families, especially of their patres familias, and the jurists accommodated this expectation of passivity. There was no concept of marital or statutory rape in play. So a girl's consent might be disregarded, meaning to all appearances taken for granted, in the matter of marriage and sex within it, a point that holds also for extramarital relations, at least in the sense that she is deemed capable of granting (or withholding) consent. In that case, instead of being treated, as a modern perspective might suggest, like a victim of sexual exploitation, she is held accountable for her actions to the extent allowed by the regime of the law on adultery, and so treated as though possessing full agency before the age of twelve.

The interest of the state looms large in a text that all but guarantees in my view the correctness of Piro's main argument, as qualified above. This concerns the jurists' extension of the privilegium exigendi, meaning the status as a preferred creditor already granted to wives in the context of a suit for recovery of the dowry (actio rei uxoriae), to fiancées and underage 'wives' suing with a condicio:

D. 42.5.17.1 (Ulp. 63 ad edictum): Si sponsa dedit dotem et nuptias renuntiatam est, tametsi ipsa dotem condici, tamen aequum est hanc ad privilegium admiti, licet nullam matrimonium contractum est: idem puto dicendum etiam, si minor duodecim annis in domum quasi uxor deducta sit, licet nondum uxor sit.

(Ulpian in the sixty-third book on the Edict): If a fiancée gave a dowry and the marriage has been called off, though she herself sues


This is not to deny that this issue might have looked rather different from a Roman perspective. Roman girls, certainly on the level of the elite, were to an extent socialized to want marriage at a relatively early age; see CALDWELL, Roman Girlhood and the Fashioning of Femininity cit., 110-111, 124-127, for example. On consent, see also below.

On the historical absence of any presumption of a right to sexual consent in English law, see WAITE, The Age of Consent cit., 61; (within marriage) 65. Cf. the situation in later Byzantine law, which tended to treat seduction of a presupposition virgin as rape, with very severe penalties: A.E. LAIBU, Sex, Consent and Coercion in Byzantium, in

\[\text{Note and discussion}\]

112 Piro (158-159) proposes that the father did not lie about his daughter's age but about her physical development. It is difficult to see why Julian would raise an irrelevant detail if he did, in fact, deem it irrelevant, while remaining silent over a detail that actually mattered.

113 Ulpian on this point RIZZELLI, Lex Julia de adulterinis cit., 242-243 and n. 264. On the difference with the cases of bigamy and incest, see above.

114 See TREGGIARI, Roman Marriage cit., 146-147 (engagement), 170-180 (marriage); CALDWELL, Roman Girlhood and the Fashioning of Femininity cit., 110-119 on the legal evidence and what it suggests. Whatever the black letter of the law, the autonomy of children can easily be overrated: see WAITE, The Age of Consent cit., 30. It is difficult to ascribe to them any capacity for 'real' consent: WAITE, 19, 230.

115 On "the historical absence of any presumption of a right to sexual consent in English law", see WAITE, The Age of Consent cit., 61; (within marriage) 65. Cf. the situation in later Byzantine law, which tended to treat seduction of a presupposition virgin as rape, with very severe penalties: A.E. LAIBU, Sex, Consent and Coercion in Byzantium, in
for its recovery through a *condictio*, it is all the same fair that she be
granted privileged status as a creditor, although no marriage has taken
place. I believe the same ought to be held also in the case of a girl
younger than twelve years of age who has been led to her partner’s
home as though she were a wife, although she is not yet a wife:

To this the compilers append a passage from Paul:

D. 42.5.18 (Paul. 60 ad edictum): *(interest enim rei publicae et
hanc solidum consequi, ut aetate permittente nubere possit)*

(Paul in the sixtieth book on the Edict): *(For it is in the public
interest that she too recover in full, so that when her age allows she
can be married).*

They then return to Ulpian:

D. 42.5.19 pr. (Ulp. 63 ad edictum): *(dabimusque ex his causis
ipsi mulieri privilegium)*.

(Ulpian in the sixty-third book on the Edict): and we will grant
the woman herself the privileged status on these grounds.

This privilege did not depend on the woman’s property interest in the
dowry but on the public policy of protecting the interest of the community as
a whole in this matter *(favor dotis)*. Among such preferred creditors ranked
the imperial treasury *(fiscus)* and those entitled to recovery of burial costs. As
Paul and other sources point out, the aim was to enable the woman to marry
again if she had been married, or to marry for the first time if a capacity or
consent impediment had prevented the first union from ripening into mar-
rriage. In this sense the *condictio* launched by a fiancée or underage ‘wife’
enjoyed the same advantage as an actual (ex-) wife’s *actio rei uxoriae*. Jakob
Stagl has shown how the grant of this privilege represents a practical applica-
tion of a general principle that aggressively protected at law the interest of
state and society in fostering marriage and procreation precisely through the
vehicle of the dowry:

No other evidence arguably exalts as much the importance of under-
age marriage for the Romans. We have yet another piece of the answer to the
question of why there was no thought of liability for *stuprum* in the context of
such relationships. Here were people attempting, albeit perhaps over-hastily,
perhaps imprudently, to fulfill their social responsibilities. One can in fact
draw a connection with Augustus’ notably indirect approach to accommodating
underage marriage in his marriage legislation. The difference here is that
the policy emerges in the full light of day. This does not mean that the jurists
equated underage marriage with legitimate marriage in every respect, any
more than they did for engagement. But from the perspective of the core
principle of public policy advanced by the *lex Julia et Papia*, all three types
of unions are deemed to merit accommodation by the legal authorities in this
context. One can find evidence of ambivalence or worse on the part of the
jurists toward underage marriage in other areas of the law, but not here.

To make once more a point that by now should appear obvious, even
if my argument is correct about the date of introduction of the age of twelve
as the minimum age of marriage for females, this does not compromise Piro’s
central thesis about the importance of underage female marriage. If anything,
it tends to strengthen it. We find the jurists making accommodations for this
institution in various ways. They protect it under the adultery law and recon-
oscile it with the marriage legislation. Though underage marriage never
achieves the status of marriage itself – nor could it – it finds a modest place
of respect in their estimation, even though on some points they maintain an
air of ambivalence – at best – about it, and they show no overall concern to
validate it. The limits placed on underage marriage however seem to arise
less from a concern to discourage it than from a desire to protect the principle
of consent, both to marriage and to engagement. And even this point
comes to be disregarded in some instances, such as in the dramatic case of
premarital adultery discussed above, suggesting that the consent that is privi-
egledged – or at least explicitly taken into account – in the matter of the mar-
rriage of young girls is routinely that of males.

My biggest criticism of the book is that it lacks, besides a bibliogra-
phy and index of subjects and persons, a conclusion. This is because I fear

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119 See Hermogen. D. 23.3.74, with J.F. STAGL, *Favor Dotis: Die Privilegierung der

120 Here again with Ulpian’s use of *mulier* the meaning of marital state or history 
trumps that of age, so that it applies to adult or minor females whether married or in a 
relationship assimilated to marriage for the purposes of the holding, no matter their age. 
See the discussion above.

121 See Paul. D. 23.3.2; Pomp. D. 24.3.1 for the general point, with STAGL, *Favor
Dotis* cit., 301-304, 323.
the absence of such a feature, ideally placing the results of the study in a broader context, will obscure its true significance for some. What I propose to do by way of conclusion is to contextualize the contribution Spouse bambine makes and suggest why I believe its main argument, as qualified above, should have an impact on the way modern historians view Roman marriage.

First we should make note of the dominant opinion on age at first marriage for the Romans, to which this book makes a notable contribution. This view holds in essence that the phenomenon was characterized by a double tier rooted in social rank that was further differentiated according to gender. In very summary form, elite males tended to marry in their early twenties, elite females in their mid-teens, sub-elite males by about thirty, sub-elite females by twenty. Piro argues for a significant resort to underage marriage on both social levels. The data at our disposal are not in my view overwhelming in terms of amount or quality for either, but enough to suggest a presence that should not be ignored. While the evidence is far from sufficient to overthrow the dominant opinion this might well be modestly qualified all the same.

The question of age at first marriage has important implications for the size and shape of — meaning relationships within — the family, as well as the status of women in any society. Half a century ago John Hajnal developed a double typology for (first) marriage-ages in modern Europe, finding an eastern pattern in which both sexes married, as a rule, when young (in their teens) and a western one in which both men and women married later (in their twenties). Subsequently, scholars developed a third type, the “Mediterranean”, in which men tended to marry later (late twenties to thirties) and women earlier, by about a decade. This third type most closely corresponds to the Roman pattern, as reconstructed by demographers, which splits into two main subtypes according to social rank, as we just observed.

If we invoke the minimum ages for marriage, twenty five for men and twenty for women, stipulated by the first Augustan marriage law, we can see how that emperor easily accommodated typical upper-class marriage practices and sub-elite ones as well, at least those pertaining to women. Beyond that, these minimum ages in principle encouraged earlier resort to marriage, a conclusion supported by the evidence reviewed above, both for males and females, and more strikingly for the latter. As I have argued elsewhere, what Augustus appears to have done in actual fact is to take a...
practice of early marriage favored by most patricians and many nobles in the late Republic and to convert this into a standard to be followed by all aspiring office-holders in the future. Not surprisingly, at least some non-senatorial members of the elite imitated their betters, as no doubt the emperor intended. We might postulate the same for upper sectors of the sub-elites. What Piro shows is that for some persons early marriage could not be early enough, as the marriage laws continued to cast a long shadow over Roman society.

There is more to ponder here on the status of childhood as a distinct stage of the life course in the Roman world. Ancient and medieval historians have spent decades debunking Philippe Aribau’s contention that this concept did not exist before the modern period. Their argument seems unassailable in its main lines, but the question remains as to how much the Romans’ predilection for sexualizing children, at least some of them, erodes the line between child and adult. And if there was a “line” for child brides, just where did they draw it? The phenomenon contrasts with the tendency observed in other traditional societies to regard childhood as a pre-sexual state.

A related issue is that of citizenship. The jurist Paul in a well-known text offers only the three core elements of civil status, freedom, citizenship, and membership in a household or, better, agnatic kinship group (familia), though it is clear from other sources that gender and age were important components as well. In the case under examination, the combination of female gender and young age weighs heavily on the subject’s capacity to offer, or more importantly to withhold, consent to marriage and sex within it. The

120 See recently J. EVANS CRUBBS and T. PARKIN, Introduction, in J. EVANS CRUBBS and T. PARKIN eds., The Oxford Handbook of Childhood and Education in the Classical World cit., 1-13 (at 1-2), pointing out that Aribau did not categorically exclude the idea of childhood for classical antiquity, as he did for the Middle Ages. For a more extensive discussion of Aribau’s work and reactions to it see now LAES and STRUBBE, Youth in the Roman Empire cit., 7-10.

121 Petron. 23-26 is undoubtedly satire, but we lack a precise sense of just how exaggerated the facts as recounted are supposed to be (above). The point is especially important because it highlights the strikingly low age at which Romans judged girls to be “sexually mature”, a phenomenon worthy of greater attention by students of gender: see recently J.P. HALLETT, Intersections of Gender and Genre: Sexualizing the Puella in Roman Comedy, Lyric, and Elegy, in EuGeStA 3 (2013) 195-208, with literature, who discusses the concept (see 204, 206), without, however, defining it.


law does not explicitly deny this to her, but more or less takes her consent for granted.

Finally, there are important implications here for ideals and practice in Roman marriage, particularly concerning the hierarchical relationship between spouses. The nature of this relationship has been the subject of some debate in the scholarship. One can safely make the general point that there was a longstanding ideal of marriage — widely reflected, as far as we can tell, in actual practice, at least on the level of the elite — that required spouses to be of more or less equal status but, somewhat paradoxically, the husband to be of somewhat higher status than the wife. Piro’s welcome contribution is to cast both the ideal and — for a number of very young brides — the reality in a somewhat darker light.

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Abstract

Nonostante le fonti antiche, incluse quelle giuridiche, letterarie, ed epigrafiche, indichino che il fenomeno delle unioni nuziali conclusi con fanciulle di età inferiore a quella giudicata legale per sposarsi non era affatto raro, la dottrina l’ha per la maggior parte marginalizzato o addirittura ignorato. Isabella Piro dimostra nel suo libro la sua resilienza, diffusione e rilevanza giuridica, aprendo la via a riflessioni su vari aspetti rigrandanti gli ideali e la pratica del matrimonio romano. Il libro deve avere un impatto profondo sul modo in cui sia i romanisti che gli storici di Roma antica pensano a questo istituto-chiave.

Keywords

Marriage — puberty — Augustan matrimonial legislation — dowry — gifts — adultery — tutelage — consent.


132 See WATTS, The Age of Consent cit., 37, 78, 219 for the general point. On consent in Roman marriage, see above.