

INTRODUCTION TO THE JURISTS—MARRIAGE AND THE FAMILY

1. The name of the game in this, our last section of the course, is the relationship between the Roman jurists and Roman society. Our sources are much fuller here than they are in the case of the XII, and as a result we are going to have to study pieces of the puzzle. In the end, we may be able to come up with some tentative generalizations, but they must be tentative. There's too much evidence and not enough work of this kind has been done.
2. The first topic that I would like to consider is marriage and the family. [We'll probably spend some on it tomorrow, too, because we have only one paper on the *lex Aquilia* and we have a lot on this topic.] In terms of legal categories, we are dealing largely with the law of persons, though the law of succession also plays an important role. We have already seen that the inheritance from the past in this area was substantial. The Roman family was a basic unit from the time of the XII, and although that family was not quite a nuclear family in our sense, it was pretty close. Marriage with and without *manus*, *patria potestas*, adoption (both *adoptio* and *adrogatio*) are givens, as are intestate succession, testaments and dowries, the basic elements in the scheme of family property and succession. We will see that not only were these basic elements well in place, but that at least upper-class Romans were quite familiar with them, used them daily, manipulated them to achieve their purposes. Whatever other point comes out of an examination of a remarkable inscription known as the *Laudatio Turiae* that one must come out of it.
3. But the world of the classical jurists was hardly the world of Rome of the 5th century B.C. In particular, I would like to call attention to four developments. We lack, of course, a Kinsey report for Rome at any period, so our evidence for this must rely on moralists. Nonetheless, all our moralists report that in comparison with ancient Rome, traditional sexual morality was being flouted. Modern writers in the feminist tradition have put a feminist spin on this and have argued that what was really happening was that women were getting more independent. I'm not sure that we know enough to know whether this true, but we do know that the moralists argued that adultery was becoming a lot more common, and in Roman law adultery was an offense that could be committed only by or with a married woman. In a somewhat different vein the moralists also complain that divorce was becoming far too common. Thirdly, the birthrate among the upper classes was going down. At least some moralists blame this on women too, though not all. The fact, however, has been confirmed by modern studies of funerary inscriptions. (It has been suggested that lead was the cause.) Finally, and this, by and large is not a phenomenon that the moralists note, *manus* marriage was on the decline.
4. The first major legal reaction to these phenomena (except the last) came in the form of the remarkable legislation of Augustus on the topic of marriage and the family. [Write summaries of this stuff.]
 - a. *Lex Julia de adulteriis* (?18 B.C.) (omitted in 91)
 - no one after this is to commit adultery or *stuprum sciens dolo malo*, covers those who urge as well as those who commit both adultery and *stuprum*.
 - allows a father who has given his daughter *in manum* or who has a married daughter *in potestate* to kill the adulterer caught in the act if he also kills the daughter

the husband may kill only the adulterer caught in the act and only adulterers of certain kinds: pimp, actor, dancer, singer, condemned and unrestored criminal, a freedman of any of these or their children or slave; another source adds gladiators.

the husband must divorce his wife immediately after he slays the adulterer and must make a public acknowledgement to him whose jurisdiction it is in

he may retain the adulterer for 20 hours if he does not wish to kill him

very broad powers are given to accusers including having the slaves of the accused tortured

penalties stiff, loss of 1/2 of goods, power of testation, loss of dowry, relegation, death (but not completely clear)

if a man catches (*deprehensum* may not be the same thing as *in flagrante*) his wife in adultery and does not divorce her he is guilty of *lenocinium*, similarly if he does not prosecute the adulterer. He has 60 days to do so, after which a private accuser can charge him with *lenocinium* for not doing so. We don't know what the classical penalties for this were, but we know that *infamia* was one of them.

a man cannot sell dotal land, his wife unwilling.

women taken in adultery may not look at the games. [This provision is said to be in the *ll. Iuliae et Papia Poppaeae* (see below)].

What is this stuff all about? It may be a shocking piece of shenanigans.

b. *Leges Iuliae et Papia Poppaeae*: (18 B.C. and 4 or 9 A.D.)

all freeborn may marry freedwomen, except senators and their descendants

senators and their descendants for 3 generations may not marry a freedwoman, an actress or the daughter on either side of one nor may the female descendant of senator for 3 generations marry an actor or the son of one on either side nor may any of these knowingly have such a betrothed or wife. Freeborn cannot marry prostitutes, procuresses, those manumitted by pimps or procuresses, a woman taken in adultery or condemned by public judgment or an actress.

[i.e., prohibitions on cross-class marriages]

nor may the children of such a marriage be entered into the *albus*

the law does not apply to concubinage

conditions against marriage and having children are void

a widow compelled by will to remain such may keep the usufruct of her legacy if she swears an oath to have children

the consul with more children is first in honors

for 3 children in Rome, 4 in Italy, 5 in the provinces you're excused from being a tutor or curator

freedmen with 2 children are excused from *operae*

a freedman or woman is freed from an oath not to marry

a woman who has an underage tutor is given one by the urban praetor to marry and constitute a dowry

frees from perpetual tutelage a free woman with 3 and a freedwoman with 4 children [i.e., direct encouragement of child-bearing]

limits placed on divorce (a vague statement in a literary author—Suetonius)

husband and wife succeed to each other by a 10th with a 10th for each child and a usufruct of 1/3 the *lex Falcidia* notwithstanding?

husband and wife can take the whole inheritance between themselves if they are not s/t the rules of the *lex* (under or over age) or if they have the *ius liberorum*

incapacitates to take an inheritance those who marry contrary to the provisions of the rules

changes the rules on times for *sponsalia*—some kind of prohibition on extending the time of marriage

prohibits single persons from taking inheritances; allows those married but w/o children to take only 1/2 of an inheritance

certain persons excepted

provisions on the capacity of women

on time to get remarried

on dotal slave manumitted by the husband

*c.35 = D.23.2.19 forbidding marriage: ‘By the 35th chapter of the *lex Julia* those who wrongfully [*iniuria*] prohibit children whom they have in power from taking a wife or being married or who do not wish to give a dowry are compelled according to a constitution of Severus and Antoninus to be compelled by the proconsuls and provincial presidents to place and endow [them] in marriage. “Prohibit” moreover is understood to include those who don’t make a positive effort.’

provisions on freedmen’s wills, gives the patron the right to take if he has the *ius liberorum*

on escheat

on void legacies

- c. Whatever else we might say about this stuff, it is a clear example of policy. Anyone who thinks that policy arguments about the law is a product of the 19th century is looking way too far forward.
5. The role of the jurists with regard to the Augustan legislation concerning marriage.
 - a. Whatever the political purpose of the laws (and some of the possibilities, particularly of the law on adultery are quite grim) the problems to which the Augustan laws were expressly addressed had little or nothing to do with the law. The decline of *manus*, the prevalence of divorce, the sense that traditional sexual morality was being flouted, the declining birth rate, none of these things can in any way be seen as having been caused by the law. They are problems to which the law must react.

- b. The role of the jurists and the role of the legislator in formulating the Augustan laws must remain something of a mystery. None of our sources speaks of any jurist as having been involved, though one or more may have helped in the drafting. Contrast the situation in the later Principate. That the jurists were soon called upon to interpret the statutes is clear. What is not clear is the direction their interpretation took. There seems to be some evidence that they attempted to mitigate the harshness of the adultery law, but we know too little of the wording of the *leges Juliae and Papia Poppaeae* to be confident of the direction in which the juristic interpretation leaned. One may suspect that many jurists were not terribly sympathetic with them both because of their own class position and because of *humanitas* to the extent that the two can be separated.

LAUDATIO TURIAE

1. We began our discussion of the classical law of marriage and the family by outlining the Augustan legislation on the topic and suggesting that the jurists contribution was, at best, ambiguous. Now, I want to look at four topics, two and a half of which are the subject of papers: (1) the so-called *Laudatio Turiae*, (2) the problem of whether there were any formal requirements for marriage in classical Roman law, (3) the problem of parental consent to marriage, and (4) dowry.
2. My first point, however, has not to do with the jurists themselves but with the reality of the law of persons at least for upper class Romans. In this regard we are fortunate to have a remarkable inscription known as the *Laudatio Turiae*. It probably dates from the years between 10 B.C. and 1 B.C., and it was previously thought that the author was Q. Lucretius Vespillo, cons. 19 B.C., whose wife was named Turia. That now seems unlikely. But since Turia is a better name than Anonyma, it continues to be so called. The inscription is not complete, and parts of it are difficult to read, facts which only increases the interest in the game. Read and comment on the text focusing on:
 - a. I.3–6: “You became an orphan suddenly before the day of our wedding, when both your parents were murdered together in the solitude of the countryside. It was mainly due to your efforts that the death of your parents was not left unavenged. For I had left for Macedonia, and your sister’s husband Cluvius had gone to the Province of Africa.” — Turia avenges the death of her parents.
 - b. I.13–24 “Then pressure was brought to bear on you and your sister to accept the view that your father’s will, by which you and I were heirs, had been invalidated by his having contracted a *coemptio* with his wife. If that was the case, then you together with all your father’s property would necessarily come under the guardianship of those who pursued the matter; your sister would be left without any share at all of that inheritance, since she had been transferred to the *potestas* of Cluvius. How you reacted to this, with what presence of mind you offered resistance, I know full well, although I was absent.
“You defended our common cause by asserting the truth, namely, that the will had not in fact been broken, so that we should both keep the property, instead of your getting all of it alone. It was your firm decision that you would defend your father’s written word; you would do this anyhow, you declared, by sharing your inheritance with your sister, if you were unable to uphold the validity of the will. And you maintained that you would not come under the state of legal guardianship, since there was no such right against you in law, for there was no proof that your family belonged to any *gens* that could by law

compel you to do this. For even assuming that your father's will had become void, those who prosecuted had no such right, since they did not belong to the same *gens*."

Some of the issue here we can only guess at. The woman must have quite young, and she was, we know, married without *manus*. The argument must be that the *coemptio* of her father put her mother (perhaps her step-mother) in the position of a *postuma*. The argument seems to be weak unless the will was extraordinarily poorly drafted and did not include an *exhaeredatio*. *Postumi* could not be disinherited by anticipation in the civil law because they did not exist (Buckland). But, of course, this woman existed. Hence, it is unclear why the argument applies to her. Further, sometime in the Republic, the jurists came to an agreement that an *exhaeredatio* clause would work here. We don't know when this agreement was reached, but we do know that it was before a reform instituted by Aquilius Gallus. He was praetor in 66. Since the first triumvirate ended in 53, we seem to be covered. That the matter could be one of some doubt, however, seems to be indicated by the extraordinary steps that were taken so far as the next argument, the agnatic tutelage, is concerned. [Student suggests that the *coemptio* was with a new wife.]

- c. I.27–29: "Marriages as long as ours are rare, marriages that are ended by death and not broken by divorce. For we were fortunate to see our marriage last without disharmony for fully forty years. I wish that our long union had come to its final end through something that had befallen me instead of you; it would have been more just if I as the older partner had had to yield to fate through such an event." — this is generally taken as a comment on the prevalence of divorce.
- d. I.37–40 "We have preserved all the property you inherited from your parents under common custody, for you were not concerned to make your own what you had given to me without any restriction. We divided our duties in such a way that I had the guardianship of your property and you had the care of mine. Concerning this side of our relationship I pass over much, in case I should take a share myself in what is properly yours. May it be enough for me to have said this much to indicate how you felt and thought." — This, of course, is not what the law had in mind. That the Romans could achieve the rough equivalent of community property by common agreement seems to be indicated here.
- e. II.25–39: "When peace had been restored throughout the world and the lawful political order reestablished, we began to enjoy quiet and happy times. It is true that we did wish to have children, who had for a long time been denied to us by an envious fate. If it had pleased Fortune to continue to be favourable to us as she was wont to be, what would have been lacking for either of us? But Fortune took a different course, and our hopes were sinking. The courses you considered and the steps you attempted to take because of this would perhaps be remarkable and praiseworthy in some other women, but in you they are nothing to wonder at when compared to your other great qualities and I will not go into them."

"When you despaired of your ability to bear children and grieved over my childlessness, you became anxious lest by retaining you in marriage I might lose all hope of having children and be distressed for that reason. So you proposed a divorce outright and offered to yield our house free to another woman's fertility. Your intention was in fact that you yourself, relying on our well-known conformity of sentiment, would search out

and provide for me a wife who was worthy and suitable for me, and you declared that you would regard future children as joint and as though your own, and that you would not effect a separation of our property which had hitherto been held in common, but that it would still be under my control and, if I wished so, under your administration: nothing would be kept apart by you, nothing separate, and you would thereafter take upon yourself the duties and the loyalty of a sister and a mother-in-law.”

— The tragedy was that the marriage proved childless, and the question is what could this proposal possibly mean?

- f. II.51–53: “Would that the life-span of each of us had allowed our marriage to continue until I, as the older partner, had been borne to the grave—that would have been juster—and you had performed for me the last rites, and that I had died leaving you still alive and that I had had you as a daughter to myself in place of my childlessness.”. On the last Wistrand’s testamentary adoption suggestion seems to be right, but Huschke’s of a *coemptio* is not to be excluded. [Student points out that neither *coemptio* or adoption would have preserved the author’s name for very long, but, apparently, a woman who was a *sua* could perform the *sacra*.]
3. Normally we’d leave it at that, but one of you has been working hard on this inscription, and it seems worth while to take a bit more time with it.
- a. I.3–6—Turia avenges the death of her parents. [You will note, for example, that the key sentence for your argument about this part reads: ...me cum ego in Macedo... uir sororis tua... fricam prouinciam ... mors parentum. The amount of space gives us some clue as what must be filled in. Pretty clearly *Macedo* should be *Macedoniam* followed by something else, probably a verb. The beginning of the next gap should pretty clearly read *tuae*, and the last letter of the gap has to be *A* giving us *Africam*. Mommsen’s reconstruction gives us no verb to go with C. Cluvius, but the whole is pretty clearly a subordinate clause that probably said something along the lines of “since [or while] I had gone to Macedonia and Cluvius to Africa.” The question then becomes what did the main clause of the sentence say? Here, unfortunately, we’ve got a lot less to go on. *Per te maxime non remansit inulta mors parentum* (scilicet tuorum) is certainly possible, but something along the lines of *Per te sine me in quaestione ulta est mors parentum* (“Through you without me the death of [your] parents was avenged in a criminal proceeding”) is also possible.]

There are gaps in our text, and obviously, it makes a difference [which of the possibilities it is,] what it says and hence it is worth asking why it is that several successive editors have all come up with approximately the same reading for this sentence. The answer to the question may be that this is what Mommsen came up with, and one doesn’t disagree with Mommsen unless one has a reason. Recent work with this inscription (where more of the inscription shows up) shows us, however, that the best epigrapher can only guess accurately at a few letters. Usually, they get the sense of longer passages right, but almost never the exact wording.

Now assume the Wistrand reading. What does it tell us? All criminal prosecution in Rome was private prosecution. That is well known. (A possible qualification that such prosecutions were frequently undertaken by magistrates, though they were acting in their public capacity.)

That women could prosecute is also probably correct. That they did not ordinarily do it is also probably correct, though here the sources may need more exploration. That that is what our defective sentence is talking about is anybody's guess. One thing that I would point out is that Wistrand's translation ("through your efforts") makes it a little less likely that Turia was the prosecutor, whereas what the Latin may say (*Per te maxime*) is a little more direct. Others were clearly involved; but if Turia were the prosecutor, then those others would have been one or more advocates, witnesses, etc.

One possibility that might be considered is that legal proceedings were not the way in which the parents' death was avenged. (Remember that we don't even know for sure that the verb is *ulciscor*.) Could it be that Turia "put out a contract" on her parents' murderers? Such a thing is not inconceivable today, perhaps it is even more conceivable in the chaotic conditions that prevailed in Rome, probably at the time of the break-up of the first Triumvirate.

- b. What the last passage says is not completely clear from the inscription: [Utinam patiente utriusqu[e] aetate procedere coniugium [potuisset donec elato me maiore, quod iu[stius erat, suprema mihi praesta]res, ego vero superstite te excederem, orbitat[i] filia mihi supstituta. The Vulgate text has "antea" for "ego" and "orbitate" for "orbitati." Both readings create problems of syntax, and neither leaves us with the legal situation completely clear, but for a whole bunch of reasons, I find the arguments of Wistrand plausible, that the passage was more correctly reconstructed by Huschke and that the translation that he offers is the most plausible. [If this is going to go on the board, it ought to be copied before the class.]]
- c. But once more it probably says "had you as a daughter in place of my childlessness." The question then becomes what could that possibly mean? Huschke suggested a *coemptio*, and anything that Huschke suggested should not be dismissed lightly. Wistrand suggests testamentary adoption, citing the example of Augustus. He argues in the first place that the passage seems to contemplate that the predecease of the husband will achieve the result, whereas if *coemptio* is what we are dealing with here, then the *coemptio* would have had to have taken place *before* the husband's death. Secondly, there is no evidence that a wife in *manu* was ever called *filia* by anyone except lawyers, and even they say *filiae loco*, "in place of a daughter." A previous student in this class, however, rejected this argument by asking why it is that Turia and her husband would have wanted to do this. [A student suggests that the legal usage really only applies when the person dies, which might make sense out of the passage.] That in turn forces us back to the other problematical passage, 31–39.
- d. Both l.31 and l.53 use the term *orbitas*, childlessness, which we know was a technical term in inheritance law referring to the inability of one who was childless to take in inheritance more than 1/2 of the amount which had been bequeathed to them. But totally apart from the date of the law that enacted the prohibition that does not seem to be the focus of the problem here. Assuming that it is, the student has a point in that it is hard to believe either provision could have been evaded by such an obvious dodge as either *manus* marriage or testamentary adoption.
- e. Ll. 31–39 do, however, give us a clue as to what the problem was. The dominant theme is Turia's consideration for her husband's desire to have children. Now if it's not just a

legal dodge, what could lie behind it? We have a clue in the case of Augustus, it is a desire to continue his name. That could only be achieved by leaving a *suus* or a *sua*. A *suus* was better but a *sua* would do. He also had considerable affection for Turia and she had brought him considerable property. When she proposed divorce, he was horrified. On the other hand, the only way that one could legally achieve the merger of the two estates was by adoption or *coemptio*. I am rather attracted to the student's suggestion that *coemptio* was not something that Turia wanted. I am also attracted to the suggestion that the husband has probably lost at least part of her inheritance because she predeceased him. I am enough of a romantic, however, that I can also see genuine grief, particularly in the last line: *Te di manes tui ut quietam patiantur atque ita tueantur opto*. "I pray that your Di Manes (personal protective gods) will grant you rest and protection." That doesn't quite scan, but it comes close and certainly reminds us of Roman elegaic.

Lurking in the background are major issues about the relationship of law and society. More explicitly, the inscription raises fundamental issues about whether the attitudes towards women that seem to be reflected in "the law" (we must always be careful about personifying the law) correspond to social attitudes about women in the Rome of the second half of 1st century B.C. These issues are not only major; they are also difficult. "The law" does not tend in only one direction, and social attitudes are always difficult to figure out. We should not, however, lose sight of what it is that we are trying to achieve. We can, however, protect ourselves at this stage of the game by saying that we will divine an attitude of "the law" only about those portions of the law that are reflected in the inscription, and that we will divine social attitudes only about those whose attitudes are reported in the inscription (principally those of the speaker and Turia). Even here we must be cautious. Despite the harmony of their marriage, the speaker's social attitudes and Turia's may not have been totally in harmony. After all the speaker himself reports one major instance of disharmony (II.40).