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Ius vitae necisque: the politics of killing children

‘..the *pater* had originally had, or so the Romans believed, the power of life and death over children...’¹

According to the Antonine lawyer Gaius, when the emperor Hadrian published an edict concerning those who applied for Roman citizenship he implied that some petitioners were better prepared for it than others: ‘It does not escape my knowledge that the Galatians hold that male children (*liberos*) are in the power (*potestas*) of their parents (*parentes*).’² Gaius used the emperor’s statement to illustrate the uniqueness of *patria potestas* in a famous statement of his own: ‘this right is singular to Roman citizens, for there are hardly any other men who have such authority (*potestas*) over their sons (*filios*).’³

The starkest expression of the *potestas* of a *pater* over his children has long been understood to be the dramatic-sounding *ius vitae necisque*, the ‘right of life and death’.⁴ *Potestas* and the *ius vitae necisque* it enclosed were enjoyed by the Roman father for as long as he lived. Venerable handbooks like the third edition of Buckland’s *A Text-book of Roman Law from Augustus to Justinian*, reprinted as recently as 2007, mention the *ius* by way of illustrating the *potestas* of the Roman father which ‘both in content and in its lifelong duration...had an intensity unknown to the paternal power in any of the systems with which Rome came into contact.’⁵

Long-acknowledged, however, as a problem for those interested in the invoking of the *ius*, is the paucity of credible examples. If the right was so fundamental a component of *potestas*, how is it that nine centuries of Roman legal history should have provided fewer than fifteen examples of its alleged use? And all of the reports refer to the period of the Republic; there are none for the post-Augustan Empire.⁶ Conventionally, the explanation offered is that the *ius* is to be understood as a right that had its origins in a more primitive stage in the development of Roman law. By the time of the empire it had become ‘rather an embarrassment’ and a dead-letter.⁷ It proved eventually to be particularly objectionable to

¹ Gardner (1993), 54.

² Gaius *Institutes* 1. 55: Nec me praeterit Galatarum gentem credere in potestate parentum liberos esse.

³ Gaius *Institutes* 1. 5: Quod ius proprium civium Romanorum est (fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus). I do not here attach particular importance to the distinction made between ‘children’ and ‘sons’. The latter formulation – designed to highlight the continuity of *potestas* – should be understood to include the former.

⁴ ‘the notorious right’ according to Harris (1986), 81; ‘undoubtedly a reality in Republican times’ : Crook (1967), 107.

⁵ Buckland (1975), 102.

⁶ The cases collected by Harris (1986) and reproduced here as an Appendix.

⁷ Gardner (1986), 6; Arjava (1998), 153: ‘The extreme form of *patria potestas* was the father’s right to kill his children (*ius vitae ac necis*). However such power seems always to have been *mainly* [emphasis added] symbolic, and in Late Antiquity it was clearly considered obsolete.’ Gardner (1993), 54: ‘By the classical period...the so-called *ius vitae et necis*, survives in full (until AD 374)

late-fourth century emperors and lawyers and in November 365 Valentinian and Valens formally ended the right of fathers to take the lives of their children stating ‘if the youth should be guilty of a more serious fault, which cannot be corrected privately, this fault shall be brought to the notice of a judge.’⁸

The problem with the ‘dead-letter’ perspective is that it leaves the *ius* with an historic legal formality, albeit archaic. And it also absolves the historian from examining this formality. In fact, the historic technical legal status of the *ius* is open to question, with some rather significant implications for our understanding of particularly important aspects of both Roman law and Roman history.

In what follows, it will be suggested that the belief that the Roman *pater* enjoyed a formal, legal right to do his children to death is not tenable. The argument will proceed with a brief overview of the still-persisting idea that the *ius vitae necisque* was enjoyed, technically, by Roman fathers until its fourth-century ‘repeal’. The archaic evidence underpinning this traditional understanding will be assessed and important testimony from the late Republic directing us away from the law will be considered. A useful contribution from sociology that provides a valuable and different perspective on the *ius* will be considered but the shortcomings of this perspective will emphasize the need to turn to the politics of the era of Augustus, and specifically towards the identity of the emperor as a pre-eminent *pater* himself. Where historians have seen this pre-eminence as the key to understanding the character of Augustan autocracy, it will be argued that it actually mirrors what was expected morally of all Roman fathers in their relations with their children – the key to comprehending the real nature of the *ius vitae necisque*.

1. A *lex regia*?

According to Dionysius of Halicarnassus, no less a figure than Romulus had promulgated a law giving fathers ‘virtually full power’ over sons, including the right to kill them. This was a law, he wrote, that was still in force in his own times.⁹ At the very end of

only as the right of the *pater* to decide not to acknowledge and rear a newly born child..’; Rabello (1979), 246 and Frier and Mc Ginn (2004), 191 on the *ius* as ‘long obsolete’.

⁸ *CTh.* 9. 13. 1 = *CJ* 9. 15. 1.

⁹ *Roman Antiquities* ii. 26. 4-6: ‘But the lawgiver of the Romans gave virtually full power to the father over his son, even during his whole life, whether he thought proper to imprison him, to scourge him, to put him in chains and keep him at work in the fields, or to put him to death [ἐάν τε ἀποκτινύναι προαίρῃται], and this even though the son were already engaged in public affairs, though he were numbered among the highest magistrates, and though he were celebrated for his zeal for the commonwealth. Indeed, in virtue of this law men of distinction, while delivering speeches from the rostra hostile to the senate and pleasing to the people, have been dragged down from thence and carried away by their fathers to undergo such punishment as these thought fit; and while they were being led away through the Forum, none present, neither consul, tribune, nor the very populace, which was flattered by them and thought all power inferior to its own, could rescue them. I forbear to mention how many brave men, urged by their valour and zeal to proof some noble deed that their fathers had not ordered, have been put to death by those very fathers, as is related of Manlius Torquatus and many others.’ Cf. viii. 79. 4.

antiquity, Papinian, cited in the fourth-century *collatio legum mosaicarum et Romanarum* echoed Dionysius in claiming that a ‘lex regia’ had established the *ius*.¹⁰

Of the father’s apparent right to permit or deny life, however, the earliest expression of a Roman code of laws, the Twelve Tables, actually says rather little – even the term *paterfamilias* appears nowhere in the surviving text. As authoritatively reconstructed, Table IV. 1 states of a father’s responsibility towards a recently born child: ‘If he [the child] is born deformed, and if he [the father] does not pick him up, it is to be without liability.’¹¹ It is important to acknowledge that the text of the Twelve Tables is frequently very difficult to establish and the phrase quoted is among those considered particularly open to question by Michael Crawford.¹² But it is also important to be aware of the method deployed in reconstructing some of its terms. The reconstruction in question is based upon the testimony of Cicero and the 5th century palimpsest paraphrase of Gaius’ *Institutes* written by an anonymous lawyer from Autun (the so-called *fragmenta Augustoduniensa*), evidence, that is to say, between four and approximately nine hundred years after the mythical promulgation of the Tables themselves.¹³ This situation highlights an important method used in the exploration of early Roman legal institutions: the deployment of later material to elucidate the earlier. But without some vigilance, the apparent clarity of the later materials can lend a questionable authority to reconstructions of the earlier.

Polybius, reporting the conduct of Roman funerals and the recalling of ancestors’ deeds at them, explained the practice as being designed to inspire younger (male) members of the great families to emulate their forbears. They might thus distinguish themselves in war and also, he stressed, in public office: ‘There have also been instances of men in office putting their own sons to death, in defiance of every custom and law, because they rated the interests of their country higher than those of natural ties even with their nearest and dearest.’¹⁴ If the *ius vitae necisque* had been quite as deeply embedded in Roman law as many have suggested, why should Polybius express himself so negatively? Surely Polybius’ Roman friends might reasonably be expected to have intervened to tone down his comments by pointing out that *all* Roman fathers enjoyed the right of life and death over their children by both custom *and* law?

¹⁰ *Collatio* 4. 8. 1.

¹¹ si deformis natus est, ast non tollit, se fraude esto.

¹² See Crawford’s *sigla* in Crawford (1996) the text at 580-1 and the commentary at 630-1.

¹³ Cicero, *de legibus* III, 19: deinde quom esset cito †legatus† [the tribunate], tamquam ex xii tabulis insignis ad deformitatem puer, brevi tempore nescio quo pacato recreates...Crawford (1996), 630 discusses and rejects proposed corrections to ‘legatus’. Autun version of Gaius IV, 85-6: [---] cum patris potestas talis est ut habeat vitae et necis pot[estate]. (86) de filio hoc tractari crudele est, sed [---] non est [---] post r[---] occi[dere] sine iusta causa, ut constituit lex xii tabularum. For the latter, see Schiller (1978), 44. The text is demonstrably damaged but Kunkel (1962), 242-3 and Harris (1986), 82 upheld its apparent reference to the *ius* and the restriction upon it.

¹⁴ Pol. 6. 54.

The earliest explicit reference to the *ius* comes in fact from Cicero – and that precisely once.¹⁵ In the course of abusing Clodius, the great orator recalled the former’s adoption in March 59, with Julius Caesar presiding over the meeting of the Comitia Curiata as Pontifex Maximus. Seemingly the *formula* that had been used on the occasion was that of *adrogatio* which Richard Saller has called ‘the quintessential expression of the power of the *paterfamilias* over family members *in potestate*’ and which was required for the adoption of an adult male as son.¹⁶ Cicero declared ‘although in that adoption of yours nothing was done in a legal manner, still I suppose that you were asked, whether it was your object that Publius Fonteius should have the same power of life and death over you that he would have over an actual son.’¹⁷ And to Ap. Claudius Pulcher later in the same speech Cicero invoked the memory of Pulcher’s father who was, he reported: ‘of such severity, [that] if he were living you would be dead.’¹⁸

Aulus Gellius seems to corroborate Cicero when producing the very formula used at such ceremonies: ‘Express your desire and ordain that Lucius Valerius be the son of Lucius Titius as justly and lawfully as if he had been born of that father and the mother of his family, and that Titius have the power of life and death over Valerius which a father has over a son. This, just as I have stated it, I thus ask of you, fellow Romans.’¹⁹ But the formula cited by Gellius, as he makes clear himself, was actually drafted by a ‘Q. Mucius Scaevola’ when the latter was serving as Pontifex Maximus; a date therefore apparently no earlier than 89 B.C., when the famous lawyer and antiquarian took up the position.²⁰ Gellius makes it clear, furthermore, that in cases of *adrogatio* adoptees were ‘persons who are their own masters [who] deliver themselves into the control (*potestas*) of another, and are themselves responsible for the act.’²¹ The adoption by definition brought about the extinction of the family of the adoptee.²² The decision and the process were both a very solemn business. This is why the *adrogatio* ceremony took place in the Comitia Curiata. All in all, *adrogatio*, and the curious oath which brought it about, is hardly likely to have been a common form of adoption. So the earliest surviving evidence, and with it the suggestion that the *ius* is of the remotest origin in fact rests upon the antiquarian interests of a first-century *pontifex maximus* in uncommon cases of adoption.²³

In these circumstances, the traces of some important laws of the late republic and early empire are interesting. According to Marcian, Pompey’s *lex de parricidiis* of 52 B.C.

¹⁵ As Saller (1986), 19 points out, *patriapotestas* is not mentioned anywhere in Cicero’s letters.

¹⁶ Saller (1999), 185.

¹⁷ *De Domo* 77: ‘..ut in te P. Fonteius vitae necisque potestatem haberet ut in filio..’.

¹⁸ *De Domo* 84.

¹⁹ *NA* 5. 19. 9.

²⁰ *NA* 5. 19. 6: ‘an oath is administered which is said to have been formulated for use in that ceremony (*ius iurandum...conceptum dicitur*) by Quintus Mucius, when he was pontifex maximus.’ See Shaw (2001), 60. *RE* ‘Mucius’ 22; *OCD* 3rd edn., 999 ‘Mucius’ 3.

²¹ *NA* 5. 19. 4. The proximity in time of the fixing of the formula to the admission of new citizens as a consequence of the Social War is perhaps to be noted.

²² Crook (1967), 112.

²³ Admittedly ‘learned in the law’ according to Cicero *de Or.* 1. 180.

set out a list of those victims whose killing constituted *parricidium*.²⁴ Sons and daughters were not mentioned among the list of victims. This has seemed to some commentators to prove that the existence of the *ius vitae necisque* precluded sons and daughters from consideration under the terms of Pompey's law.²⁵ Further, the *ius* helped explain why this important law concerned *parricidium* and not 'murder' which remained undefined.²⁶ But there is an important distinction between attempting to define the *ius* and the definition of a specific crime. What Pompey's *lex* illustrates is that the killing of sons and daughters by *fathers* was not *parricidium* not because it was *permitted* by the *ius* but because it was considered – not surprisingly as we shall see – to be a crime of very special significance.²⁷

Another of the most significant interventions taken to illustrate the *ius vitae necisque* is the *lex Iulia de adulteriis* of 18 B.C. Famously, the law acknowledged the right of a father to kill his own daughter (*ius occidendi*) if she was demonstrably adulterous. The terms of the law as we have it stated that a father's action must, however, be taken when the crime was revealed by her being *in flagrante delicta* and not only she but her lover must be executed immediately.²⁸ Jane Gardner and others have seen the explicit delineation of the *pater*'s power as in reality a restriction of the *ius vitae necisque* since the chances of a father's coming across such circumstances were manifestly much less likely than his discovery of the adultery by other means.²⁹

But why did neither Pompey's *lex de parricidiis* nor Augustus' law not simply invoke the *pater*'s supposedly historic *ius vitae necisque* explicitly as the obvious context for setting out the new regulations? In the case of Augustus' law, its terms made it legal for a biological *pater* to kill a daughter but denied the authority to a grandfather, that is to say, a *paterfamilias*.³⁰ Centuries later, Papinian was having to field a troublesome question on the law from an interlocutor: 'Since ancestral law gives to a father the power of life and death over a child, please answer this, for I want to know: what was accomplished by including in the statute that there is also a power of killing a daughter?'³¹ 'He answered: Does not this addition, on the contrary, afford us a proof that the Statute is not to be regarded as conferring a new power (upon the father), but that it actually imposes upon him the duty of killing her, together with adulterer, so that, in killing the adulterer, he is seen to have been influenced by

²⁴ D. 48. 9. 1 (Marcian *Institutes*, book 14). The terms not accurately reproduced in Cantarella (2003).

²⁵ E.g. Fayer (1994), 171 n. 158 on the law proving that the *ius* 'era ancora in vigore'.

²⁶ Gaughan (2009), 50. According to Bauman (1996), 30: '*Parricidium* is the Roman crime most resistant to clear definition.'

²⁷ Marcian later in D 48. 9. 1 states interestingly that a mother who kills a son or daughter was liable under the law.

²⁸ The terms of the law reconstructed from later texts and especially the *Collatio* 4. 2. 3.

²⁹ Gardner (1986), 129. See too Fantham (2006), 42-3; McGinn and Frier (2004), 191: '[the *ius occidendi*] is so restricted by legal, practical, and psychological limitations as to cast doubt on its real utility.' Cf. Milnor (2005) 15, on the legislation as 'a sinister and cynical appropriation for the state of the last bastion of individual self-determination.'

³⁰ The point made in Saller (1999), 185.

³¹ 4. 8. 1. The interlocutor 'an interested dilettante enquirer' according to Shaw (2001), 65.

motives of higher justice, since he has not even spared his own daughter.’³² The exchange illustrates that some students of the law were experiencing precisely the difficulty at issue here: the contradiction between the sweeping authority seemingly granted by the *ius* and the highly circumscribed ways in which it was to be found in use. Significantly, Papinian in answering appealed to the *ius occidendi* as a means of upholding moral values and not its technical connection to any *ius*.³³

When William Harris examined the fewer than 15 cases (all from the Republic) commonly cited to illustrate the *ius*, he found no unambiguous evidence for the *ius* being invoked in any of them. He was struck, on the other hand, by the frequency with which a number of the episodes of fathers and sons in conflict were interwoven with the ideas of the heavy responsibilities of office-holding, the exemplary *severitas* of magisterial office or the participation of other interested parties, especially the Senate, when the state was in crisis. Harris’ cases 1, 3 and 4 (see Appendix) ‘teach that the ideal magistrate carries out his duties whatever the personal sorrow it may cost him’.³⁴ The mythical episode of Sp. Cassius (Harris’ case 2) during the first years of the Republic, for example, illustrated how ‘*patria potestas* assisted the authority of the Senate, of the *patres*’.³⁵ The tales emphasised that fathers might have an emergency role to play in politics *in extremis*. According to Harris, ‘[I]n principle any conflict between the authority of a magistrate and the authority of the *paterfamilias* to whom he was subject was resolved by giving the magistrate the status of a *paterfamilias* while he was engaged in public business – this at least was the late republican view.’³⁶

Harris upheld the existence of the *ius* but suggested that its utility and application were to be found not in the treatment of older children by fathers but in the widespread practice of infant exposure, the legality of which had been established by the Twelve Tables.³⁷ The idea of a ‘law of Romulus’ establishing the *ius* was thus ‘a convenient anachronism – a sort of protective umbrella for the real killing of sons and daughters that was going on, namely that of infants.’³⁸

³² 4. 8. 1. numquid ex contrario praestat nobis argumentum haec adiectio, ut non uideatur lex non habenti dedisse, [sed occidi eam cum adultero iussisse], ut uideatur maiore aequitate ductus adulterum occidisse, cum nec filiae pepercerit

³³ Papinian in the *Digest* (48. 5. 22. 4): ‘Hence the father, and not the husband, has the right to kill the woman and every adulterer; for the reason that, in general, paternal affection is solicitous for the interests of the children, but the heat and impetuosity of the husband, who decides too quickly, should be restrained’.

³⁴ Harris (1986), 90. Cf. Saller (1994), 115 n. 55: ‘In other words, such behaviour was not normative, but a display of loyalty to the state against custom and law.’

³⁵ Harris (1986), 89.

³⁶ Harris (1986), 89. Cases 1, 3, and 4 (see Appendix) ‘teach that the ideal magistrate carries out his duties whatever the personal sorrow it may cost him’.

³⁷ Harris (1986), 93.

³⁸ Harris (1986), 93, acknowledging evidence for opposition to this right: Dion. Hal. 2. 15. 2 and cf. its apparent restriction in *Dig.* 25. 3. 4: [Paulus] ‘It is not just a person who smothers a child who is held to kill it but also the person who abandons it, denies it food, or puts it on show in public places to excite pity which he himself does not have.’ See Tertullian’s claim that infanticide was illegal: *Ad*

Harris was right to highlight the Roman interest in the public man shouldering magisterial responsibility as well as the obligation to exercise jurisdiction over his own *domus*. But the apparent references to the *ius* in action clearly suggested that it was a life-long phenomenon and not, therefore, a justification for the exposure of infants.

According to Richard Saller, another and different reason for the failure of our sources to provide any details of the *ius* used against adult sons was the failure of many of those fathers to live long enough. Saller's projections of pre-industrial life tables for ancient Rome by suggested that most Roman men reaching 30 years of age, the median for marriage, had no father living.³⁹ Large numbers of sons and daughters were therefore *sui iuris*. A two- and especially a three-generation household was rare enough.⁴⁰ Excessive jurisprudential analysis of the powers of the Roman *paterfamilias* tends to overlook this sociological reality with the result that the modern depiction of the towering Roman *paterfamilias* can 'tend towards caricature', according to Garnsey and Saller.⁴¹

While we are certainly right to acknowledge the routine exposure of infants, the difficulty with Harris' view is that apparent references to the *ius* are invariably related to adult children; it is these relations that need to be understood. And Harris' idea of the *ius* quietly slipping into desuetude arguably abandons the search for a more concrete explanation prematurely. Garnsey and Saller similarly are right to explode the myth of Roman society as dominated at all levels by paternal tyrants but some statistical perspective is required. Garnsey and Saller's analysis notwithstanding, nine centuries are likely to have furnished Rome with tens of thousands of fathers of adult sons, forcing us to turn again to the very curious small number of reported cases of the *ius* in action and the similarly curious situation of no reported cases at all under the Empire.

3. Ideology

An altogether more promising avenue of enquiry, however, has been provided by sociology. Some years ago Yan Thomas suggested that the very imprecision of the phrase 'ius vitae necisque' was in fact the key to understanding it. It was not to be understood as a formally defined legal right at all. Instead, it represented an *abstraction* of a father's power (*patriapotestas*); a 'définir abstraitement la *patria potestas*... une equation de la puissance paternelle, prise dans l'absolu', what Brent Shaw paraphrased as 'a kind of hendiadys, a way

Nat. 1. 15. 3. The extent of infant exposure is much debated. See now Harper (2011), 81-3; Eyben (1991); Harris (1982); Harris (1994); Shaw (2001).

³⁹ Saller (1986), 11-15; at 16: 'the late age at marriage for men was one strategy that minimised the awesome legal powers of the father'; (1984), 120-1.

⁴⁰ Hölkeskamp (2004), 131-2; Saller (1994), 120-1.

⁴¹ Garnsey and Saller (1987), 138; Saller (1986); Saller (1999), 182 observes rightly that the term *paterfamilias* is much commoner in legal compared to non-legal texts. It occurs nowhere in *CIL* 6.

of describing a single spectrum of power'.⁴² Fittingly, when the *ius* was apparently referred to in the formula of *adrogatio* it could be understood in precisely this sense, as expressing the *symbolic and extreme* limits to a *pater*'s power.⁴³ There was no expectation that the doing to death of adult sons would actually *take place* except in the most extraordinary circumstances. In fact, fathers' cruelty towards children where it was mentioned in the sources was almost invariably the subject of condemnation.⁴⁴ According to this view, the reason why the *ius* was important was because it mirrored the authority of the state over *cives*. *Res publica* and *familia* were consequently symbiotically linked together and were mutually reinforcing. The *potestas* of the *pater* and in particular the restraints, legal or moral, on the *ius*, that is to say, on *potestas* itself, revealed how important the role of the *pater* was in the government of that state.⁴⁵ And at the very end of the Republic, Augustus himself was to be understood therefore as the grand late-republican *pater par excellence*, presiding over the state like a Roman father presiding over his own household.⁴⁶

The problem with these perspectives is that do not do justice to the complexity of the republican system with its numerous magistrates interacting with the Senate. On the one hand, if the early king of Rome was the Roman *paterfamilias par excellence* then we are invited to imagine the conceptual division of his *potestas* and its distribution among several magistrates and the censors.⁴⁷ On the other, we are to envision a situation where the *ius* – purportedly the fundamental element of *patriapotestas* – was given away and taken back again by Roman fathers as circumstances dictated. But whatever else we might say about *potestas*, its indivisibility was unshakeable in Roman law which took inordinate pains over establishing precisely who was subject to it and who was not. The fact that the consuls consulting the senate might *look* like a *pater* consulting his *consilium* does not make the *res publica* a *familia*. And *imperium* was not *potestas*.⁴⁸ Understandably, when the lawyer Pomponius under Hadrian came to define the responsibility of the *filius familias* acting 'for the public good' 'for instance, where he discharges the duty of a magistrate, or is appointed a guardian' he significantly made no reference to *potestas*; in a deliberately generalising phrase he said only that such a son 'took the place of' (*loco patris familias habetur*) a *paterfamilias*.⁴⁹

⁴² Thomas (1990), 451; Shaw (2001), 57 n. 67 summarising Thomas.

⁴³ E.g. Ps. Quint. *Decl. mai.* 6. 14: '...this name (*sc. Pater*) is greater than any law. It is we [fathers] who escort the tribunes, we who create the magisterial candidates. To us has been permitted the right of life and death.' Shaw (2001), 70 who cites the passage points out that the claim is unmasked as 'aggressive braggadocio' and 'paternal bombast' in the debate which follows.

⁴⁴ Thomas (1990), 451 with Saller (1994), 117.

⁴⁵ Gaughan (2009), 28: 'The *pater* in his position as a citizen of the polity of the *res publica* also had an obligation to preserve and protect the *res publica...vitae necisque potestas* often places the father firmly in the polity of the *res publica*.'

⁴⁶ See above all now Severy (2003) and, earlier, Lacey (1986). See my remarks on the title *pater patriae* at 000 below.

⁴⁷ As suggested, e.g. by Lacey (1986), 129.

⁴⁸ For a provocative alternative, see Dumont (1990).

⁴⁹ Dig. 1.6.9: (Pomponius 16 ad q. muc.): *Filius familias in publicis causis loco patris familias habetur, veluti ut magistratum gerat, ut tutor detur.*

The *ius* is thus too elusive to accept as a formal right in Roman law. Nor can it be satisfactorily understood as an ideological device designed to parallel and mutually reinforce state and domestic legal jurisdiction. When we reflect upon the historical context of the bulk of the surviving evidence upon which the debate has been founded, however, we actually find ourselves directed towards politics.

4. *Pater Patriae*

An under-appreciated aspect of the history of the *ius* is the fact that so much of the important surviving evidence used to reconstruct its terms as well as citations of the historic instances of its use actually date to the reigns of the early Julio-Claudians, and especially to that of Augustus. The key texts cited, those supplemented by later legal sources, are to be found in the works of Livy, Dionysius of Halicarnassus and Valerius Maximus. As we have seen, most of the instances of the *ius* in action are demonstrably mythical but the myths were apparently in broad circulation in the early years of Julio-Claudian government, an indication that they had an ideological and cultural hold upon their audiences and readers.

Famously, the Forum Augustum was built from Augustus' own resources on land that he himself had bought. Readers of Valerius Maximus' account of the deeds and sayings of great Roman men could themselves stroll around the Forum's *Statuengalerie* where myth and history were woven together 'into a vision of salvation' as the emperor's ancestors took their place among the *virī summi*.⁵⁰ Many of the same men featured in Livy's *annales* as a parade of *exempla* by which one might judge oneself and one's times.⁵¹ And Dionysius of Halicarnassus, as we saw, found himself detained by the *leges regiae* of Rome's earliest rulers.⁵² The latter part of the sixth book of Virgil's *Aeneid* offered the most famous roll-call in Roman literature of the great men (and fathers) of Rome. This was an idealised past: *exempla*, celebrations of *concordia* and the trumpeting of the conquest of peoples; as Kristina

⁵⁰ Zanker (1988), 195 with Ovid *Fasti* 5. 563-6. The publication of the *annales maximi* with its evocation of Rome's earliest great men was almost certainly an Augustan project, perhaps coinciding with his election in 12 B.C. to the position of Pontifex Maximus. See Frier (1979) and Luce (1990), 412.

⁵¹ Livy *praef.* 10. And of course the statues encouraged favourable comparison with Augustus himself, Luce (1990), 405: 'The chief message of the forum and of the *res gestae* is that Augustus matched or surpassed the deeds of all great men in Roman history.'

⁵² In addition to the passages above, note 2. 15. 2 on Romulus: 'In the first place, he obliged the inhabitants to bring up all their male children and the first-born of the females, and forbade them to destroy any children under three years of age unless they were maimed or monstrous from their very birth. These he did not forbid their parents to expose, provided they first showed them to their five nearest neighbours and these also approved. Against those who disobeyed this law he fixed various penalties, including the confiscation of half their property.' A clear invention according to Harris (1986), 93.

Milnor puts it: ‘an imagined Roman past...for an imagined Roman future.’⁵³ The most successful of these ‘constructions’ was arguably Augustus himself. The Augustan narrative cast Octavian as a youth untimely burdened with responsibilities beyond his years and Augustus as a man holding in tension his private and public lives as a *civis Romanus* – strikingly the theme of the most famous (Augustan) mythical accounts of the *ius*. One title above all caught the mood of the times and honoured the man who had steered the community beyond the recent traumas. The very last words of Augustus’ testament brought the account of his achievements to its historic *crescendo*: ‘In my thirteenth consulship [5th February 2 B.C.] the senate, the equestrian order and the whole people of Rome gave me the title *pater patriae* and resolved that this should be inscribed in the porch of my house and in the Curia Julia and in the Forum Augustum below the chariot which had been set there in my honour by decree of the senate’.⁵⁴ Alföldi considered the taking of the title to be a political masterstroke.⁵⁵

The title *pater patriae* was associated in the Republic with figures who were deemed to have saved or preserved the state. Marius and Cicero were both famous bearers.⁵⁶ But it was not a title that gave a man overlordship of the state. According to Cicero, ‘all are tyrants who have the power of life and death over the people, but prefer to be called kings in the manner of Juppiter Optimus.’⁵⁷ Under first Caesar and then Augustus, however, there is interesting evidence suggesting the apparently spontaneous use of the less formal appellation *pater* or *parens*, in Augustus’ case for some years prior to 2 B.C.⁵⁸ Again, the literature of the period shows the concept in broader circulation, Ovid for example addressing Augustus as ‘sancte pater patriae’.⁵⁹ As we have seen, to some modern commentators what was being achieved by the emperor was nothing less than the institutionalisation of his status as a salvific super-*paterfamilias*.⁶⁰ By virtue of his new, pre-eminent position, the *potestas* of Augustus *pater patriae* trumped that of other Roman fathers. And the discourse on Augustus

⁵³ Milnor (2005), 33. See too Toher (1990). Cf. Suet. *Aug.* 31. 5 on triumphally dressed statues in the porticoes of Augustus’ forum: ‘he declared in an edict that he had done so in order that the citizens might measure both himself and succeeding *principes* by the standard set by those men in their lives.’

⁵⁴ *RG* 35. 1.

⁵⁵ Alföldi (1971), 94: ‘ein echt augustisches Meisterstück der politischen Überlegung und Inszenierung’.

⁵⁶ See Alföldi (1971), 60-61; 80-89.

⁵⁷ *De Rep.* 3. 23. Interestingly, *ps.* Sallust’s *invectio in Ciceronem* 3. 5 criticised the orator for ‘robbing us all of our freedom, you alone took the power of life and death [*vitae necisque potestatem*] over all of us into your own hands.’

⁵⁸ E.g. *CIL* 10. 823 (Pompeii, 10 B.C.); *ILS* 6755 (Sion, Narbonensis, 8/7 B.C.). See Cooley (2009), 273 and Alföldi (1971), 80-102, esp. 92-3; Chen (2006), 49-59.

⁵⁹ *Fasti* 2. 127 – 28.

⁶⁰ Cooley (2009), 275: ‘we must appreciate that the grant of this title to Augustus was not simply just another meaningless honour, but that it had multiple legal and religious resonances and evoked ideas of someone acting as a saviour, patron, and god.’ Cf. Eck (2007), 75: ‘..it reflected the notion that through his far-sighted planning (*providentia*) he had ensured Rome’s welfare for the future, as a father would do for his family.’ See too Strothmann (2000), 73: ‘Sie bilden die Mitglieder der neuen Großfamilie Staat; es fehlt die Definition des Raumes, den die *patria* umgreift, die im Anschluß an die Bürgerkriegswirren mit ein neuen, emphatischen Gehalt belegt wurde.’ Alföldi (1971), 138.

as *pater patriae* was thus an important means of understanding what the *potestas* (and with it the *ius*) of the ordinary Roman *paterfamilias* was.⁶¹

But the use of the title *pater patriae* and the treatment of the emperor as a *paterfamilias* of the Roman state as a means of reconstructing the *ius vitae necisque* is, as suggested earlier, in fact methodologically somewhat unsafe. It involves on the one hand over-reading allusive and moralising testimony and, more seriously, it is in fact a circular argument in that it *assumes* the meaning of the paternal ‘*ius vitae necisque*’ of the emperor as proof of the unproven ‘*ius vitae necisque*’ of the Roman *pater*. In reality, if one acknowledges the scantiness of the evidence for the actual *use* of the *ius* as pointing to its ideological rather than literal existence then the moralising depiction of the emperor cannot be a reflection of the technical legal powers of either emperor or Roman *pater*.

Augustus’ creation of a new ‘*consilium principis*’, on the other hand, has some importance here. The innovation shows that Augustus the public *pater* also constructed for himself a public *consilium*. Frequently read as yet another instrument of control, this *consilium* was in part filled by members of the senate appointed by lot, an arrangement clearly designed to enhance the impression that its business was open to senators.⁶² As Peter Brunt argued some years ago, the creation of the *consilium* and this method of recruitment in particular took place in the context of Augustus’ promotion of the ideal of senatorial *participation* in the emperor’s work.⁶³ And it is surely no accident that Augustus’ title of *pater patriae* would later find itself inscribed on the Curia Iulia itself.⁶⁴ As Dio had Maecenas state: ‘it is doubtless a quality implanted by nature in all men that they take delight in any marks of esteem received from a superior which imply that they are his equals, and that they not only approve of all decisions made by another in consultation with themselves, as being their own decisions, but also submit to them as having been improved by their own choice.’⁶⁵ In the context of considering the private *pater*’s power, Augustus’ arrangement invites us to look again at the role of the Roman *pater*’s *consilium* when considering his power over his children.

5. The *pater*’s *consilium*

The precise legal standing and role of the *consilium* of the *pater* has long been a problem for scholars of Roman law. Did it represent a free-standing system of justice or did it in some way supplement the *iudicium publicum*?⁶⁶ Proceeding from the assumption that the

⁶¹ This case very clearly put by Chen (2006), 17-72.

⁶² Crook (1955), 9-10.

⁶³ Brunt (1984).

⁶⁴ *Res Gest.* 35.

⁶⁵ 52. 32. 1.

⁶⁶ Supporters of the former include Kaser (1971), 63. Among the sceptics Volterra (1948). The positions usefully set out in Donadio (2012) who offers the compromise that the *consilium* was convened only on occasions where the political standing of the broader *familia* was threatened constituting a ‘*harmonia*’ ‘..con i valori e con gli interessi preminenti

ius was a legal reality some have struggled to ascertain whether the summoning and consulting of a *consilium* was a necessary precursor to the exercise of it.⁶⁷ But when the ideological character of references to the father's *ius* is established, mirrored by the political character of Augustus' position as *pater patriae*, then important implications for our understanding of the purpose of the ordinary domestic *consilium* follow. It cannot have been a restraint upon a notional *ius* but was in fact a check upon the excessive use of *potestas*, just as the *consilium principis* signalled the public willingness of Augustus to be open to advice in the exercise of his own power. In the domestic sphere, a father enraged by a son's behaviour could take his chances on an extreme expression of his *potestas*, but such an action was not underwritten by any *ius vitae necisque*. In the case of Aulus Fulvius, for example, who killed his son for joining up with Catiline, there is no mention of a *consilium* and it is clear that the circumstances of the death did not prompt significant opprobrium from others.⁶⁸ Dio drew attention to the extraordinary nature of the period in which Fulvius' son met his death: '...and the latter [Fulvius] was not the only private individual, as some think (*hos ge tisi dokei*), who ever acted thus. There were many others, that is to say, not only consuls, but private individuals as well, who slew their sons.'⁶⁹ The cryptic reference to dispute on the matter is significant as it shows that some struggled to believe that fathers had really behaved in this way. In contrast, according to Valerius Maximus, the second-century Q. Fabius Maximus Eburnus, another former consul and censor, in bringing about the death of his son for alleged sexual excess, did attract disapproving attention and the father was exiled.⁷⁰

The situation is perhaps best illustrated by Valerius Maximus' story of the distinguished senator Lucius Gellius (*cos.* 72, censor 70 B.C.). With his son accused of adultery as well as plotting to kill his father, Gellius 'summoned almost the entire senate to his *consilium*, set forth his suspicions, and offered the young man the chance to defend himself.'⁷¹ The circumstances were precisely those which might lead a father into prompt and extreme action: the alleged crimes threatened fundamentally the standing of a Roman *pater*; and given Gellius' status, his home hosted what must have been a discussion of some of the deepest anxieties in the senatorial *domus*. As Valerius Maximus makes clear, however, the threat to the life of the son came from the temptation to *cruelty*, not the swift invoking of any *ius*.⁷² The 'cruelty' in question was peremptory punishment in the case of proven guilt (and

all'intorno della *civitas*...'. Loewenstein (1973), 296 imagined family courts sitting long into the Principate.

⁶⁷ Thus, Frier and McGinn (2004), 191: 'In practice, the right was hedged around with social restrictions that had grown up to prevent its arbitrary use; above all, the *pater* was expected not to act without first consulting a *consilium*, an informal council made up of relatives and close friends, whose functions seems often to have been to delay action until cooler heads had prevailed.' See Kunkel (1966), 219 ff. agreeing and Guarino (1967), 124 rejecting. Gardner (1986), 6 has further bibliography on the expectation.

⁶⁸ Sallust, *Bellum Catilinae* 39. 5; Valerius Max. 6. 1. 6; Dio 37. 36. 4.

⁶⁹ 37. 36. 4.

⁷⁰ Val. Max. 6. 1. 5; Quintilian *Decl. Maiores* 3. 17; Orosius 5. 16. 8.

⁷¹ Val. Max. 5. 9. 1.

⁷² 5. 9. 1: 'Now if, carried away by the force of anger, he had hastened to vent his cruelty [*Quod si impetus irae abstractus saevire festinasset*], he would more have committed a wrong than avenged

which *pater* would have condemned him for it?) but between them, Gellius and Senate displayed the kind of restraint that so impressed the writer – and so elevated *potestas* in the hands of a decent man.⁷³

Augustus' formalization of the title *pater patriae* along with his creation of the *consilium principis* are to be seen in this context. The title *pater patriae* lent a unique moral power to the emperor not as an *über-paterfamilias* but as a *consiliarius*; technically an interested observer of the – or indeed *every* – Roman *familia*. And the status granted the emperor a unique access to the relationship between fathers and children. And just as the Roman father unrestrained by a domestic *consilium* might fall victim to cruelty, so an emperor unrestrained by his *consilium principis* was vulnerable to the anxieties and passions that could result in bad government.

The first work in Roman literature dedicated to the subject of *clementia* was that of Seneca and was addressed to the young Nero.⁷⁴ In setting out the sweeping powers of the emperor which his *clementia* would ideally temper, he picked up the language that had served the writers of the Augustan era so well. Seneca's emperor was, accordingly, a man who could be the '*vitae necisque gentibus arbiter*'.⁷⁵

Seneca drew attention to the moral force of the title of *pater patriae*: 'we have called him this that he might know that *patria potestas* has been granted him, which is as moderate as can be, taking consideration for the children and subordinating his need to theirs.'⁷⁶ But the figure was not of course literally true; the individual *familia* continued under its own *paterfamilias*.⁷⁷ Invoking one of the most traumatic domestic crises of Augustus, Seneca praised him for not destroying those who had committed adultery with Julia.⁷⁸ Suetonius preserves the excruciating dilemma of Augustus the author of adultery legislation – or indeed the Augustan myth of the dilemma – in his phrase '[he] even thought of putting her to death (*etiam de necanda deliberavit*).'⁷⁹ But the moral force of the story lay in the fact that Augustus had not expressed his *potestas* in uncontrolled fury, like some of the controversial figures of the earlier Republic, even when he had himself upheld a father's *ius occidendi* in his own famous law. Dio's account completes the picture: 'when Augustus learned what was

one.' And *contra* Donadio (2012) with her emphasis on the process as protecting the political interests of high-born families.

⁷³ *Digest* 11. 7. 35 (Marcellus): 'our ancestors thought there was no need to mourn a man who set out to destroy his country and to kill his parents and children. They all decided that if such a man was killed by his son or father, it was no crime, and the killer should receive a reward.'

⁷⁴ Dowling (2006), 196: 'The *De Clementia* is the most detailed work describing the virtues of clemency in ancient literature but also the most unique, existing as it does as the first systematic attempt to integrate the quality of clemency into the greater world of Roman ethics.'

⁷⁵ *De Clem.* 1. 2.

⁷⁶ *De Clem.* 14. 2-3.

⁷⁷ Milnor (2005), 15 acutely points out that the effect of Augustus' marriage legislation was to turn the focus of citizenship onto *private* morality; that of the *familia*.

⁷⁸ *De Clem.* 10. 3.

⁷⁹ *Aug.* 65.

going on, he gave way to a rage so violent that he could not keep the matter to himself but *went so far as to communicate it to the senate*'.⁸⁰ The episode does not indicate that Augustus enjoyed any *ius vitae necisque* over his children; it illustrated that the civilized Roman *pater deliberated*. When Augustus wrote to the senate with an account of Julia's crimes, he identified the *patres* as his *consilarii*. The authority that Augustus demonstrated beyond his own home was not therefore a *legal* authority but a *moral* one.⁸¹

Seneca's *De Clementia*, according to Dowling, linked the ideal emperor's clemency to that of the ordinary Roman *pater* in his home.⁸² The coming together of the emperor as *pater patriae* and the individual Roman *paterfamilias* can be perfectly illustrated by the case of one 'Tarius'.⁸³ Seneca drew Nero's particular attention to the story: 'for it involves a good emperor whom you can compare to a good father.'⁸⁴ Tarius' son had been charged with *parricidium*. The father looked into the case and asked Augustus himself to attend his *consilium*. The emperor came to Tarius' house. Had he not done so 'the court (*cognitio*) would have been Caesar's, not the father's.'⁸⁵ That is to say that this was a *consilium* of an upper class man of the period. When the *paterfamilias* asked for the members' verdicts, Augustus suggested that those present write them down to avoid the possibility that his own thoughts, if spoken aloud, would influence the others present. The emperor recommended exile. As Dowling has put it: '...Seneca makes his definition of *clementia* explicit: clemency is showing moderation when the power to exact revenge is present; it is leniency when a superior punishes an inferior; it is moderation that keeps from exacting a punishment that is merited (2. 3. 1-2).'⁸⁶

6. The *ius vitae necisque* in later legal texts

Cases referring to the destruction of children subsequent to the Julio-Claudian period have, as we have seen, been interpreted as the dead wood of Roman law, persisting for some unspecified reason. But when the 'right of life and death' as an archaising circumlocution for *potestas* is connected to the pre-eminent moral position of the *princeps* as *consiliarius*, an altogether more plausible reading of the later texts becomes possible.

When Hadrian banished to an island a man who had contrived the death of his son during a hunt, '[because he acted] more [like] a brigand in killing him than as [one] with a

⁸⁰ Dio 55. 10. 14.

⁸¹ The episode 'a monument to Augustus' tragic and stalwart performance as a father rather than a failure on the part of imperial domesticity' according to Milnor (2005), 88. Macrobius (*Saturnalia*) recorded Augustus saying of himself, that he was a figuratively burdened *paterfamilias* with his errant daughter alongside the *res publica*.

⁸² Dowling (2006), 196.

⁸³ Seneca *De Clem.* 1. 15. 2 – 6.

⁸⁴ *De Clem.* 1. 15. 2.

⁸⁵ Sen. *De Clem.* 1. 15. 3.

⁸⁶ Dowling (2006), 201.

father's right [*ius*]; for paternal power ought to depend on compassion, not cruelty' he was illustrating the legacy of Augustus' emperor- *consiliarius*. The father's 'right' here was the right to look into the matter as a father – scrupulously, with wise friends - not the right to kill his own child. As Tacitus put it in down-playing one of the more colourful stories of the demise of Drusus at Tiberius' *hands*: 'what man of ordinary prudence...would force death upon a son whose defence was unheard?'⁸⁷ Richard Saller's deconstruction of the pervasive modern stereotype of the Roman *paterfamilias* noted how frequently the term was associated in legal texts with 'the prescriptive connotation with which the *paterfamilias* was supposed to act.'⁸⁸ Hadrian's intervention resolved the case, just as Seneca would have had it, by means of an imperial expression of support for the idea that *clementia* ought to accompany *potestas*.⁸⁹

Sextus Empiricus [160-210] drew a contrast between Solon's law "concerning things immune" by which he allowed each man to slay his own child' and the world around the writer: 'with us the laws forbid the slaying of children. The Roman lawyers also ordain that the children are subjects and slaves of their fathers and that power over the children's property belongs to the fathers and not the children, until the children have obtained their freedom like bought slaves; but this custom is rejected by others as being despotic' – an unproblematic if slightly overblown definition *patriapotestas*.⁹⁰ Ulpian gave clearer expression to the state of the law: 'a father cannot kill his son without giving him a hearing'.⁹¹

Meanwhile, the emperor's willingness to consult openly with *consilarii* continued to be a touch-stone of good government. As Fergus Millar put it: 'In the eyes of the subject the essential role of the *amici* was to be visibly present with the emperor in receiving delegations or petitions, or above all, in giving judgement.'⁹² And the most alarming manifestations of unrestrained imperial power frequently included episodes related to the emperor's own household affairs. It is no accident that the significant darkening of Tacitus' account of Tiberius should coincide with the emperor's withdrawal from the city of Rome and his senatorial *milieu*.⁹³ Juvenal's satire on Domitian depicted the emperor's *consilarii* as peremptorily summoned, uninformed and apprehensive about the matter to be discussed and put to eccentric use in the end.⁹⁴ And the reputation of Hadrian, whose conduct of affairs

⁸⁷ *Annals* 4. 11: 'quis enim mediocri prudentia...inaudito filio exitium offerret?'

⁸⁸ Saller (1999), 188. The commonest adjectives accompanying *paterfamilias* were *diligens*, *bonus* and to a lesser extent *prudens* and *idoneus*.

⁸⁹ *Digest* 48. 9. 5 (from Marcian *Institutes* book 14): '...quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.' Some do not regard the text as entirely secure. See Rabello (1979), 239-42.

⁹⁰ Sextus Empiricus 3. 211.

⁹¹ *Dig.* 48. 8. 2.

⁹² Millar (1977), 119. Pp119-22 important.

⁹³ *Annals* 4. 41.

⁹⁴ *Satire* 4.

reportedly featured routine consultation with the senate, never managed to escape the shadow cast by *Pater Patriae*'s worst abuse of power: the precipitate destruction of his peers.⁹⁵

7. Conclusions

The reason why we have so few apparent examples of the *ius vitae necisque* in action is because Roman fathers did not enjoy it as it continues to be understood by many modern legal scholars. From the earliest times Roman fathers demonstrably possessed the *physical* power (the *Macht*) as well as the opportunity to do their children to death, but there is no reason to think that they enjoyed the 'ius' to do so. As made clear in the formula for *adrogatio*, set down formally by a learned antiquarian of the first century B.C., the phrase *ius vitae necisque* was a convenient and rhetorical circumlocution for *patriapotestas* itself. But as Roman lawyers understood well, *potestas* was a power whose limits were difficult on occasion to delineate.⁹⁶ The *potestas* of individual fathers demonstrably expressed itself in a small number of recorded cases in the destruction of adult children by fathers – just as Dionysius of Halicarnassus had perceived when he had attempted to sum up what *potestas* actually was - but such cases were regarded as on the very margins of what was acceptable, which is why they provoked comment. The myth of the all-powerful father was an attractive literary trope, fixated upon the competing roles of the public and private *pater*. The theme resonated strongly, however, with the threat posed to the traditional organs of government witnessed during the late Republic and into the period of the civil wars. Augustus' formal assumption of the title *pater patriae*, a title to which he gave special place in recounting his deeds, was a characteristically astute participation in the general renegotiation of institutions that took place during his reign. By taking the title, however, he did not become a man formally holding *patria potestas* over the whole state. Rather, the title is to be seen in context alongside his innovation of the *consilium principis* as a means of strengthening his self-depiction as first among *patres*. The genius of the arrangement was that it permitted a moral usurpation not of the role of the *paterfamilias* but of that played by a *pater's* merciful *consiliarius*. Augustus became every *pater's* trusted and temperate family friend.

The emperor as *pater patriae-consiliarius* has, therefore, something important to contribute to our understanding of the *ius vitae necisque*. This new imperial identity partly coincided with and partly prompted reflection on how powerful Roman *patres* had managed their own *potestas* in extreme circumstances. The evidence shows the preoccupation in cases of ordinary fathers and emperors with restraint and *clementia* as a moral and legal ideal - and explains why the scholarly pursuit of a formal *ius* is doomed.

⁹⁵ SHA, *Hadrian* 9.3 for the early execution of 4 consulars and 24. 4 for Antoninus Pius 'rescuing' senators from Hadrian's orders to have them executed.

⁹⁶ See Seneca *Cont.* 2. 13. 11 where the exercise is designed to test the *pater's* power when charged with insanity; 9. 5. 7 tests a father-in-law's rights to protect an endangered child from mortal threat at the hands of a second wife: 'the only difference between father and grandfather is that a grandfather may keep his grandsons safe, the father may even kill his sons (*patri et occidere*)' which of course was true but not the exercise of a *ius vitae necisque*.

All of this does not of course presuppose that relationships between sons and fathers were not periodically very problematic. But what the debate on the *ius vitae necisque* has distracted us from is what must have been the routine legal means of resolving serious problems. Ulpian's statement that fathers could not kill their sons without giving them a hearing continues with a phrase that clearly indicates what must, in the absence of any literal *ius vitae necisque*, have been the normal means of redress for any fathers bringing a son to justice under both Republic and empire: '...he must accuse him before the prefect or the provincial governor.'⁹⁷ Far from bringing an ancient paternal *ius* to an end, Valentinian and Valens in 365 were in fact upholding the characteristically humane and practical Roman norm.

⁹⁷ *Dig.* 48. 8. 2. Cf. 1. 16. 9. 3 (Ulpian): 'the Proconsul has power to dispose of the following matters extrajudicially; he can order persons to show proper respect to their parents, and freedmen to their patrons and the children of the latter; he can also threaten and severely menace a son brought before him by his father and who is said not to be living as he should. He can, in like manner, correct an impudent freedman either by reproof or by castigation.' Saller (1994), 120 rightly points out that the extremely limited information on the activity of Republican censors cannot exclude the possibility that they, too, had intervened in family jurisdiction. Cf. *Dion. Hal.* 20. 13. 3: 'they believed that neither a master should be cruel in the punishments meted out to his slaves, nor a father unduly harsh or lenient in the training of his children..'. Cf. *CJ* 8. 46. 3 (Severus Alexander): 'If he [your son] should not show you the respect due to a father, you will not be prevented from punishing him by the right of paternal authority (*iure patriae potestatis*), and you can use even a harsher penalty if he should persevere in his obstinacy, for having brought him before the governor of the province, the latter will impose the sentence which you desire.' For daughters, see *CJ* 8. 46. 5 (Diocletian): 'If your daughter does not show you proper respect but also refuses to furnish you with the necessities of life, she can be compelled to do so by the Governor of the province.' And see the *interpretatio* to *CTh* 9. 13. 1 (C.E. 365): '...if the youth cannot be corrected privately, this fault shall be brought to the notice of a judge.' *Manilius Ast.* 4. 549: 'iudex examen sistet vitae necisque..'.

In the context of the foregoing discussion, the two trials of the sons of Herod the Great are particularly interesting.⁹⁹ As the holder of Roman citizenship, Herod was content to investigate the alleged crimes of his sons in accordance with Roman practice. Like the respectable man he aspired to be, the king twice summoned a *consilium* to assist him. On the first occasion, it included the emperor himself and culminated in what Josephus reports was an emotional reconciliation between father and sons brokered by the emperor.¹⁰⁰

When some years later news of a second hearing reached Augustus: ‘Caesar wrote to him [Herod] saying that he was distressed because of his sons, and that if they had been so reckless as to attempt an unnatural crime, he ought to punish them as parricides (*patraloias* – ‘father-slayers’) for this power was granted him – but if they had planned to flee, he should merely admonish them and not inflict irreparable punishment upon them.’¹⁰¹

The second hearing took place in Berytus and included the legate of Syria as the most senior Roman attending.¹⁰² The result of the second trial witnessed precisely the kind of extreme expression of *potestas* that moralising literature of the period found so compelling and the sons of Herod were strangled. Here, as in other ways, Herod was partly in and partly beyond Roman *mores*. But Augustus himself had made him *rex*, and as such the king presided over a household quite different from that of the Roman *pater*. Augustus had in addition given Herod special permission to make arrangements for his own succession. The peculiar and dangerous politics of Herod’s household accordingly made the elimination of potential threats an imperative. Augustus’ own arrangements had therefore placed him in a difficult situation. He may well have seen what was coming and was not disappointed at being unable to attend the second ‘trial’. The threat to Herod’s sons came not from any right that their father enjoyed over whether they lived or died but in a grim parody of what an outraged Roman *pater* was capable of doing in expressing his *potestas*. Unwilling to intervene and confront directly Herod’s *potestas*, Augustus responded to reports of the deaths of king’s sons with a famous apothegm which captured the temper of the reasonable *paterfamilias*: ‘I would rather be Herod’s pig than his son.’¹⁰³

⁹⁸ A fascinating (and unexplorable here) comparative aspect to the question being discussed in this paper is provided by the permission apparently granted by *Deut.* 21. 18-21 to the Jewish father to stone his adult sons, a right significantly never invoked, according to *BT San.* 69b.

⁹⁹ The 1st (12 B.C.): *BJ* 1. 452-454; *AJ* 16. 91-126. The 2nd (7 B.C.): *BJ* 1. 534-551; *AJ* 16. 356-94.

¹⁰⁰ *BJ* 1. 454; *AJ* 16. 126.

¹⁰¹ *Jos.* *AJ* 16. 356.

¹⁰² *Jos.* *BJ* 1. 541; *AJ* 16. 368.

¹⁰³ Macrobius 2. 4. 11.

Appendix: Harris' candidate cases for the exercise of the *ius vitae necisque*¹⁰⁴

1. L. Brutus, c. 509: Livy 2.5.5; Dion. Hal. 8. 79. 2; Val. Max. 5. 8. 1. Cf. Polybius 3. 22. 1. [Brutus' action proceeded from his holding of a consulship].
2. Sp. (Vecellinus) Cassius, *cos.* 502: Livy 2. 41. 10-12; Dion. Hal. 8. 77-80; Val. Max. 6. 3. 11; Dio *fr.* 19. Cf. Cic. *De Re Pub.* 2. 35. 60 (where a quaestor had accused the son prior to paternal involvement); Val. Max. 5. 8. 2; Pliny *NH* 34. 15; Florus 1. 17. 7. [Dionysius and Livy each offer two versions; they report the killing of the son by the father but also a public trial for *perduellio*. The latter version accepted by both ancient sources].
3. A. Postumius Tubertus (dictator of 431 B.C. who put son to death for desertion): Livy 4. 29. 6; Val. Max. 2. 7. 6; Aulus Gellius 1. 13. 7.
4. Decimus Silanus (son) and T. Manlius Torquatus (father and *cos.* 340) (son put to death for engaging an enemy commander in single combat without permission): Livy 8. 7. 19; Val. Max. 2. 7. 6. [An example of *military* authority, not the *ius*].
5. 'Fabius Censorius' (i.e. M. Fabius Buteo, censor 241 B.C.) (son put to death following a charge of theft): Orosius [!] 4. 13. 18. [Harris (1986), 84: 'Is it likely that a writer who so enjoyed the disasters of pagan Rome recorded accurately the single instance in Roman history in which a father put his son to death for a non-political, non-military crime with impunity?'].
6. Q. Fabius Maximus 'Eburnus' (*cos.* 116, censor 108) (put his son to death for some sexual offence):¹⁰⁵ Val. Max. 6. 1. 5 ('*dubia castitas*'). Cf. Quintillian *Decl. Mai.* 3. 17; Orosius 5. 16. 8; Cicero *Balb.* 28 (for the fate of the father, Q. Fabius Maximus 'Eburnus').
7. A. Fulvius (killed his son killed for joining Catiline): Sall. *Cat.* 39. 5; Val. Max. 5. 8. 5. Cf. Dio 37. 36. 4.
8. D. Iunius Silanus (convicted of peculation when governor of Macedonia by father. Silanus hanged himself): Val. Max. 5. 8. 3.
9. Aemilius Scaurus, son of M. Aemilius Scaurus, (*cos.* of 115 B.C.) (The son ostracised by father following cowardice in battle. The son committed suicide): Val. Max. 5. 8. 4.
10. Trichio and son: Sen. *De Clem.* 1. 15. 1 (the son killed by flogging) ['obscure in several respects' according to Harris (1986), 86].
11. The legend of Verginia: Livy 39. 18. 6.
12. Pontius Aufidianus (put daughter to death following inappropriate sexual relations with *paedagogus*): Val. Max. 6. 1. 3.
13. Freedman P. Atilius Philiscus (killed his daughter for committing *stuprum*): Val. Max. 6. 1. 6.

¹⁰⁴ This list consists of those cases examined by Harris (1986), in part a re-visitation and correction of what he regarded as the occasionally rather uncritical list in Sachers (1953).

¹⁰⁵ 'Conceivably the very first historical case': Harris (1986), 84.

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