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Marriage Plots:

A New Narratological Approach to the Augustan Marriage Laws

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Law is full of stories.[1]

Abstract

This article seeks to break new ground by adopting an innovative methodology—a legal-narratological approach—in order to take a fresh look at the narrative dynamics and narrative tiers of a two-thousand-year-old piece of marriage legislation – the late first century BCE *leges Iuliae*. We argue that these Roman laws, which brought hitherto private behaviours into the public jurisdiction and state control, sought to establish its legal authority as a new normative framework through the lawmaker's overt manipulation of the law *qua* narrative. In particular, we submit that it is through the explicit representation of the marriage legislation as a new chapter in an ancient cultural narrative that Augustus attempts to persuade the Roman senate and people of the constitutional validity of his radical legal reforms. We further propose that the ultimate failure of Augustus' marriage legislation can also be understood in terms of a failure to align this new statute with the 'master plot' of that wider cultural narrative.

Keywords

Narrative, Law, Roman, *Leges Iuliae*, adultery, family, marriage, stories, narratology

[1] Allison Tait and Luke Norris, 'Narrative and the Origins of Law' (2011) 5:1 *Law and Humanities* 11.

Introduction

The law, both ancient and modern, is 'full of stories' and this article seeks to break new ground by adopting an innovative methodology—a legal-narratological approach—in order to take a fresh look at the narrative dynamics and narrative tiers of a two thousand year old piece of marriage legislation – the controversial and ultimately short-lived *leges Iuliae*, introduced by the *princeps* Augustus as part of a major programme of reform and formalization in the late first century BCE.[2] We argue that these Augustan marriage laws, which set down a system of matrimonial rewards and punishments (*praemia et poenae*) for Roman citizens of all classes and brought hitherto private (including sexual) behaviours into the public jurisdiction and state control, sought to establish its legal authority as a new normative framework through the lawmaker's overt manipulation of the law *qua* narrative. In particular, we submit that it is through the explicit representation of the marriage legislation as a new chapter in a much older framing narrative (the 'macro-narrative' of ancestral custom) that Augustus attempts to persuade the Roman senate and people of the constitutional validity of his radical legal reforms – and thereby to convince them of the just authority of the state to intervene in family life. We further propose that the ultimate failure of Augustus' marriage legislation can also be understood in terms of a failure to align his new

[2] In this respect, we do not offer a study of the *leges* as law *per se* but a new narratologically inflected analysis of their exploitation of – and as – cultural discourse(s). Emerging research into the broad spectrum of narrative features and phenomena that are involved in legal processes (those associated both with law-making and law-breaking) and their reportage is already proving to be a valuable tool in the re-evaluation of ancient cultures and traditions. Simon-Shoshan, for example, has recently applied a legal-narratological methodology to the Mishnah (one of the oldest texts in the Rabbinic literary tradition) in order to examine its narrative operations and the ways in which these contribute to the construction of authority. See Moshe Simon-Shoshan, *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah*, (Oxford University Press, 2012). See also Assnat Bartor, 'Reading Biblical Law as Narrative' (2012) 32:3 *Prooftexts* 292, and Ulrike Babusiaux, 'Legal Writing and Legal Reasoning' in Paul J. Du Plessis, Clifford Ando and Kaius Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) who employs (albeit to a limited degree) what she characterizes as 'narrative analysis' in her study of legal writing and reasoning in Roman law (p.177).

statute with what we characterize as the 'master plot' of that wider cultural narrative.– and that the short-lived statutes of the *leges Iuliae* are quickly overturned precisely because they do not relate to a larger 'super-narrative' representing a higher narrative level in Roman culture and law that traditionally preserved and protected a separation between (public) state and (private) family jurisdictions.

A (Hi)Story of the *Leges Iuliae*

Reconstructing the precise details of the *leges Iuliae*, as with the reconstruction of most ancient statutes, is a complex business. The original legislation of 18 BCE (already, ancient sources suggest, a reworking of a failed statute from 28 BCE) proved highly unpopular so was revised in 9 CE and it is difficult to determine which particular provisions were specified in the preliminary attempt of 28 BCE, which were inscribed in the *leges Iuliae* of 18 BCE, and which in the revised *lex Papia et Poppaea* of 9 CE.[3] No extant record of the precise legal formulations for any of these laws survives, so we are largely dependent upon later legal jurists alongside a handful of inconsistent and often contradictory contemporary (and near contemporary) sources.[4] However, twenty-first century legal-narratological scholarship

[3] Augustus appears to have attempted to introduce his first legislation in this area as early as 28 BCE. See Propertius 2.7.1–4 and Livy, *Praef.* 9.

[4] See Sallust, *Bellum Catilinae* 10–15; and Cicero, *Pro Marc.* 23, *De Fin.* 2.73, and *Pro Cael. passim* on the apparent ubiquity of adultery and the attendant lack of regard for marriage in the period leading up to the Augustan marriage reforms. See Horace *Satires* 1.2.37–46 on the punishments that adulterers could and should fear *before* the introduction of the Augustan adultery laws; but see *Satires* 2.7 for a *volte-face* in which Horace's narrative *persona* is an active adulterer prepared to risk these penalties in order to pursue his immoral activities; see *Odes* 3.24 for similarly conflicting testimony, and Horace ostensibly castigating Rome's citizens for their licentiousness, and calling upon Augustus—as *pater urbium*—to rein-in their decadent and immoral behaviour, before pointing out that state legislation offers no practical solution to this social ill (33–6); see also *Odes* 4.15 (written after the legislation) in which Horace describes Augustus' successful reining-in of this licentiousness—'*frena licentiae'* (4.15.10)—and return to the old ways—'*veteres revocavit artes'* (4.15.12); and see *Odes* 4.5.22–4 and the *Carmen Saeculare* (17–20), which helps us to date the legislation to around 18 BCE. For contemporary evidence of the unpopular reception of the laws see also Propertius 4.5.27–9; Ovid, *Fast.*2.139–41, and *Am.* 2. 2.57–66, 3.14.48–50. Later sources include jurists such as Gaius, Papinian, Ulpian, Paul, and Modestinus. On the reliability of these sources' reconstructions of the *leges*, see in particular Leo Ferrero Raditsa, 'Augustus' Legislation Concerning Marriage, Procreation, Love Affairs and Adultery' (1980) 2.13 *ANRW* 278-339; Amy Richlin, 'Approaches to the Sources on Adultery at Rome' in Helene P. Foley (ed.),

concerning stories in and of the law reminds us not to raise too many objections to the unreliable, contradictory, and fragmented form in which the *leges Iuliae* have reached us. As Peter Brooks points out, in legal storytelling 'stories rarely are told directly, uninterruptedly' but are instead 'elicited piecemeal' in 'fragmented, contradictious, murky' narrative forms.[5] Brooks alludes here primarily to the stories or 'micro-narratives' found in modern law (such as charges, defence case statements, and witness testimonies) that contribute to the composition of a higher narrative tier – that is, a legal verdict (which would typically comprise a far more coherent and unified narrative form). However, any attempt to reconstruct the Augustan marriage laws from the decidedly 'murky' and frequently 'contradictious' extant source material involves an exercise analogous to judging and finding such a (narrative) verdict on the statutes themselves.

Thus, piecing together various fragments of evidence, modern scholars reach the verdict that the Augustan marriage legislation, or *leges Iuliae,* was one of the legislative cornerstones of Augustus' principate.[6] Comprised of two discrete laws (the *lex Iulia de maritandis ordinibus* and the *lex Iulia de adulteriis coercendis*), this package of legislation apparently sought to promote marriage and (legitimate) procreation, and to criminalise adultery. Historians, both ancient and modern, forward various competing theories to explain Augustus' motivations for driving forward the legislation.[7] Some present the legislation as part of a wider 'morality tale', with Augustus the hero of the story, on a quest to save Rome's morally bankrupt

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Reflections of Women in Antiquity (Gordon and Breach, 1981); Ernst Badian, 'A Phantom Marriage Law?' (1985) 129.1 *Philologus* 82-98;O.F. Robinson, *The Criminal Law of Ancient Rome* (The John Hopkins University Press, 1995) 58-69; and O.F. Robinson, *The Sources of Roman Law: Problems and Methods for Ancient Historians* (Routledge, 1997) 102-118. A broader bibliography on the legislation itself is given in n8.

[5] Peter Brooks, 'Narrative in and out of the Law' in James Phelan and Peter J. Rabinowitz (eds.), *A Companion to Narrative Theory* (Blackwell Publishing, 2005).

[6] The conventional dating of the legislation to 18 BCE looks to Dio. Cass. 54.16.1.

[7] Tacitus is clear on the *telos* of the laws: 'Augustus decreed [the marriage laws] in order to punish the celibate and increase revenue for the treasury—*Augustus … incitandis caelibum poenis et augendo aerario sanxerat*: *Ann*. 3.25.

aristocracy from itself; others suggest demographic, financial, and/or social engineering as the most plausible motivating factors behind Augustus' introduction of the controversial new laws—although it is impossible to securely account for the actual *mens rea* motivating Augustus in this case.[8]

What is clear from the available evidence is that the *lex Iulia de maritandis ordinibus,* the law on marriage, set down a system of incentives and penalties (*praemia et poenae*) for marriage between citizens of all classes.[9] Under the first phase of the marriage legislation, widows were expected to re-marry within a year of their husband's death, and divorcees expected to remarry within six months of their divorce—although these strict conditions proved to be hugely unpopular so the remarriage periods were extended (and rewards increased) in the revisions of 9 CE. Social, economic and political incentives accompanied the legislative provisions, with unmarried men and women penalised financially and unable to inherit under a will unless they satisfied certain stringent conditions.[10] And in a particularly petty part of its

[8] Richard Frank, 'Augustus' Legislation on Marriage and Children' (1975) 8 *California Studies in Classical Antiquity* 41; Dieter Nörr, 'The Matrimonial Legislation of Augustus: An Early Instance of Social Engineering' (1981) 16:2 *Irish Jurist* 350; Andrew Wallace-Hadrill, 'Family and Inheritance in the Augustan Marriage Laws' (1981) 27 *Proceedings of the Cambridge Philological Society* 58; Richard Bauman, 'The Resumé of Legislation in Suetonius' (1982) 999 *ZRG* 81; Jane F. Gardner, *Women in Roman Law and Society* (Croom Helm, 1986); David Cohen, 'The Augustan Law on Adultery: The Social and Cultural Context' in David I. Kertzer and Richard P. Saller (eds.), *The Family in Italy from Antiquity to the Present* (Yale University Press, 1991); Susan Treggiari, *Roman Marriage* (Clarendon Press, 1991); Richard Bauman, *Women and Politics in Ancient Rome* (Routledge 1992); Suzanne Dixon, *The Roman Family* (The John Hopkins University Press, 1992); Catherine Edwards, *The Politics of Immorality in Ancient Rome* (Cambridge University Press 1993); Andrew Wallace-Hadrill, *Augustan Rome* (Bristol Classical Press 1993); Mireille Corbier, 'Male Power and Legitimacy through Women: the Domus Augusta under the Julio–Claudians' in Richard Hawley and Barbara Levick (eds.), *Women in Antiquity: New Assessments* (Routledge, 1995); Phyllis Culham, 'Did Roman women have an empire?' in Mark Golden and Peter Toohey (eds.), *Inventing Ancient Culture: Historicism, Periodization, and the Ancient World* (Routledge, 1997); Jane F. Gardner, *Family and Familia in Roman Law and Life* (Clarendon Press 1998); Thomas A.J. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome* (Oxford University Press, 1998); Suzanne Dixon, *Reading Roman Women: Sources, Genres and Real Life* (Duckworth, 2001); Thomas A.J. McGinn, 'The Augustan Marriage Legislation and Social Practice: Elite Endogamy versus Male "Marrying Down"' in Jean–Jacques Aubert and Boudewijn Sirks (eds.), *Speculum Iuris: Roman Law as a Reflection of Social and Economic Life in Antiquity* (University of Michigan Press, 2002); Adam Kemezis, 'Augustus the Ironic Paradigm: Cassius Dio's Portrayal of the Lex Julia and Lex Papia Poppaea' (2007) 61 *Phoenix* 270. For the views of ancient historians see Tacitus *Ann*. 3.25., Suetonius, *Aug*. 34, and Dio. Cass. 56.1–10.

[9] On revisions to the earlier laws see Suetonius, *Aug*. 34 and Dio. Cass. 56.1–10.

[10] Dio. Cass. 54.16.1–10.

provisions, the statute also banned unmarried men over the age of twenty-five and unmarried women over the age of twenty from attending certain public entertainments.

Likewise, punishments involving the law of succession were created for those couples who were married but remained childless. They could receive only half of any legacy from relatives within six degrees of familiarity and could only inherit one-tenth of each other's estate. In contrast, those who married and did have children were financially rewarded, in particular those couples who had three or more surviving children. Known as *ius liberorum*, the 'right of (three) children', this gave married men preferential treatment in government appointments, and gave married women freedom from guardianship.[11]

The law also established a number of marital prohibitions, most notably forbidding members of the senatorial order to marry a proscriptive cast of special 'characters': that is, freedmen, freedwomen, actors, actresses, and anyone whose father or mother was an actor or actress. Further to this, the law also prohibited any freeborn person, including senators, from marrying those characters whose status was deemed *infamia*: that is, prostitutes, pimps, procuresses, and any persons publicly prosecuted for adultery.[12]

The concomitant *lex Iulia de adulteriis coercendis,* introduced alongside the *lex Iulia de maritandis ordinibus* as a supporting statute in the new package of marriage legislation, aimed to rule over a similarly broad range of hitherto personal matters, with a specific concern for *extra*-marital relations. Under the *lex Iulia de adulteriis coercendis*, adultery, which had previously been dealt with as a private concern within the family and between

[11] Gaius 1.145.
[12] Ulpian, *Digest.* 23.2.43. See also Paul *Digest.* 23.2.44.

families, was now made subject to public scrutiny and state involvement.[13] Formally criminalising adultery for the first time in Rome's history, this law established severe penalties for those caught in the act, and also set up strict rules dictating how those who discovered them must proceed. Sexual relations between a married woman and any man other than her husband were now punishable by (separate) exile to an island and confiscation of property.[14] If a wife's adultery was discovered by her husband, the husband was expressly forbidden from killing her, even if he were to catch her in the act.[15] He was, however, permitted to kill her lover, but only under strict conditions: if he discovered the pair actively engaged in the act of sexual intercourse, in his own house, and only then if he were prepared to carry out the killing of the lover with his own hands.[16]

Regardless of whether a husband was able to avail himself of the punitive options offered by the statute, he was obligated under the law to act immediately (or, at least, within a statutory time period of sixty days) to divorce his wife before witnesses and then to seek her public prosecution for adultery.[17] He was not permitted to make a private compensation settlement with the adulterer nor simply to dissolve his marriage and privately divorce: to do so would bring upon himself criminal charges of *lenocinium* (pimping or pandering), whose severe penalties matched those for adultery.[18] In fact, if no divorce or prosecution proceedings were initiated by the husband (or the woman's father) within the sixty day period following the alleged adulterous act, any member of the public could initiate legal action of their own—not

[13] It is impossible to identify the actual processes for this private prosecution of such offences (*iniuria*), but traditional accounts (such as those provided by Dion. Hal. *Ant. Rom.* 2.25.5-6) suggest that the *pater familias* would have been responsible for seeking redress and resolution for any such injuries or insults to those in his domestic jurisdiction (including married daughters).
[14] Paul, *Sent.* 2.26.14.
[15] Paul, *Sent.* 2.26.4.
[16] Paul, *Sent.* 2.26.7.
[17] Paul, *Sent.* 2.26.6.
[18] Ulpian, *Digest* 48.5.12[11].3.

only against the wife and her lover, but against her husband too.[19] The potential for this aspect of the law to be abused by third parties and *delatores* (denouncers or informers, who stood to gain financially from their part in a successful prosecution) would become one of the most controversial and unpopular aspects of the law.[20]

Crucially, the husband was not the only character upon whom the statute charged such rights and responsibilities in cases of adultery. The new laws specified that a father could also act and bring indictments. Like the husband, the woman's father was permitted by the new law to kill his adulterous daughter's lover, but again certain highly specific conditions had to be met: for instance, the father could only do so if—and only if—the pair were discovered *in flagrante*; if —and only if—they were discovered *in flagrante* in the father's own current residence or in that of his son-in-law (not merely in a house that either happened to own); *and* if he also killed his daughter along with her lover; *and* if he committed the double killing with his own hand (i.e., did not delegate the task to a son, slave, or other aide).[21] Once again, the permission provided by this statute is so carefully curtailed with legal conditions as to be no permission at all. For all its melodramatic and repeated references to permitted killing, the *lex Iulia de adulteriis coercendis* effectively rendered it *illegal* for a father to kill either his daughter or her lover—or for a husband to kill his wife or her lover – in any likely real-world scenario.[22]

Thus, the new provisions disallowing the enactment of the harshest punishments for adultery, in addition to the new necessity of a divorce if a wife's adultery were discovered, plus the

[19] Ulpian, *Digest* 48.5.2.2, Scaevola, *Digest* 48.5.15.2.
[20] See Tacitus, *Ann.* 3.25.1; See also 3.28.
[21] Ulpian, *Digest* 48.5.24.
[22] Unsurprisingly, there is no evidence to suggest that this state-sanctioned 'licence to kill' (*ius occidendi*) was widely, if at all, taken up by Rome's citizens in the wake of Augustus' marriage legislation.

new strictures against not marrying and not procreating, all together represented a wholly unprecedented legislative interference in Roman family life. We might well expect individual and societal resistance to such exceptional intrusion of the state into hitherto the most private of affairs in these circumstances. Nevertheless, we submit that there is more to the story of outright public defiance that Augustus' new marriage laws encountered in each of its various iterations. We argue that the introduction of any such laws seeking to control private behaviours are likely to prove 'futile' where a society views the interference of the state into family affairs as fundamentally unprincipled, where a society holds as part of its traditional cultural 'narrative' the basic understanding that public and private domains should remain separate jurisdictions.

'New' Laws and Ancient Custom

Dionysius of Halicarnassus nostalgically records in his first century BCE study of *Roman Antiquities* that the far-reaching authority of *patria potestas* had traditionally included the rights for fathers to punish their unchaste daughters (2.26-27), and that this same antiquarian custom granted husbands similar powers over their adulterous wives (2.25.6).[23] The Augustan adultery law thus represents (albeit with strict legal protocols and protections that effectively 'defang' its prominent teeth) a notional return to these traditional rights, and for extra-marital affairs to be dealt with privately – for family affairs to be regulated by family members.[24] Augustus' adultery law nostalgically appeals to and shows its respect for ancient

[23] Cato refers to the same law: Gellius, *NA* 10.23.5. Kristina Milnor, *Gender, Domesticity, and the Age of Augustus: Inventing Private Life* (Oxford University Press, 2005) also reads Dionysius of Halicarnassus' description of the early marriage laws of Romulus (2.35) as aligning the new Augustan marriage laws with the traditions of *mos maiorum* (p.148). On the role of Dionysus of Halicarnassus in constructing nostalgic (and fictional) fables about ancient Rome for his Augustan audience, see Treggiari (n8) 265.

[24] See Ari Bryen, 'Crimes Against the Individual: Violence and Sexual Crimes' in Paul J. Du Plessis, Clifford Ando, and Kaius Tuori (eds.) *The Oxford Handbook of Roman Law and Society* (Oxford University Press, 2016) who also notices that the conditions applied to the *lex Iulia de adulteriis coercendis* effectively render it 'impossible' to execute (p.330). Indeed, there is something inherently comical about the long checklist of conditions a cuckolded husband or disappointed father must be sure to meet in order to avoid exposing his actions under this law to separate prosecution (for example, for murder under the *lex Cornelia*).

precedent and its resemblance to the traditions of the ancestors – of the *mos maiorum* – even as it stages their reform into a new legislative package. The new law self-consciously draws attention to its resemblance to a familiar custom, and its resemblance to pre-existing laws already stored in cultural memory and tradition, even though the *lex Iulia de adulteriis coercendis* effectively withdrew the customary rights and responsibilities of the head of the household or *pater familias* to deal with any such private 'injury' (*iniuria*) to those within the (hitherto) private jurisdiction of his family.[25]

Indeed, as this analysis of some of the statutes of the *lex Iulia de adulteriis coercendis* serves to illustrate, the Augustan marriage legislation is simultaneously represented in Roman sources as both radically new and as respectfully traditional—as the 'same but different' to the legal codes governing marriage and adultery already inscribed in Roman custom and authorized according to the traditional 'ways of the ancestors' or *mores maiorum*.[26] Augustus himself insistently and consistently characterized his marriage legislation and the other new laws (*legibus novis*) that he introduced during his principate as representing a return to the

[25] Augustus explicitly figures himself in the role of princeps as the 'ultimate *paterfamilias*' and *pater patriae* (father of the fatherland), thus supplanting the traditional *pater familias* of the Roman family. See Edwards (n8) 60 on this role.

[26] The formulation 'same but different' is from Peter Brooks, 'Freud's Masterplot' (1977) 55/56 Yale French Studies 280. On the complex inter-relationships between exemplarity and the *mos maiorum* see Jane Chaplin, *Livy's Exemplary History* (Oxford University Press 2000); K.J Hölkeskamp, "Exempla und mos maiorum. Überlegungen zum kollektiven Gedächtnis der Nobilität", in H.J Gehrke and A. Möller (eds.), *Vergangenheit und Levenswelt. Soziale Kommunikation, Traditionsbildung und historisches Bewußtein,* reprinted in *Senatus Populusque Romanus* (Franz Steiner 2004); M.B. Roller, 'Exemplarity in Roman Culture: The Cases of Horatius Cocles and Cloelia' (2004) 99 Classical Philology 1; C. Kraus, 'From exemplum to exemplar? Writing history around the emperor in Imperial Rome' in J. C Edmondson, Steve Mason and J. B. Rives (eds.), *Flavius Josephus and Flavian Rome* (Oxford University Press 2005); Rebecca Langlands, *Sexual Morality in Ancient Rome* (Cambridge University Press 2006); Michèle Lowrie, 'Making an exemplum of yourself: Cicero and Augustus' in S.J. Heyworth with P.G. Fowler and S.J. Harrison (eds.), *Classical constructions: papers in memory of Don Fowler, classicist and epicurean* (Oxford University Press 2007); Rebecca Langlands, '"Reading for the Moral" in Valerius Maximus: the case of Severitas'(2008) 54 Proceedings of the Cambridge Philological Society/Cambridge Classical Journal 160; Andrew Wallace-Hadrill, *Rome's Cultural Revolution* (Cambridge University Press 2008); Rebecca Langlands, 'Exemplary influences and Augustus' pernicious moral legacy' in Tristan Power and Roy Gibson (eds.), *Suetonius the Biographer: Studies in Roman Lives* (Oxford University Press 2014); M. B. Roller, *Models from the Past in Roman Culture: A World of Exempla* (Cambridge Unviersity Press 2014); M. Lowrie and S. Lüdemann (eds.) *Exemplarity and Singularity*, (Routledge 2017); Rebecca Langlands, *Exemplary Ethics in Ancient Rome* (Cambridge University Press 2018).

ethical codes inscribed in the traditional *mores maiorum.* His new marriage law (like any statute or law), Augustus reminds us, is to be received as subtly the 'same but different' to the *mos maiorum.*

Indeed, law making through the Roman senate is notionally the 'same but different' to the law making traditionally realised through the *mores* and *exempla* of the Roman *maiorum.* And in the micro-narrative of Augustus' *Res Gestae* he describes his legislation as simultaneously reviving and improving upon such ancient custom (8.5):

> By new laws introduced by me as their author, I revived many ancestral models which were becoming obsolescent in our times, and I personally handed on many exemplary models for posterity to imitate.[27]
>
> *Legibus novis me auctore latis multa exempla maiorum exolescentia iam ex nostro saeculo reduxi et ipse multarum rerum exempla imitanda posteris tradidi.*

Augustus makes a number of such appeals to the *mos maiorum* and to the past in order to align his controversial marriage legislation with pre-existing 'ancestral models' or *exempla maiorum*. Indeed, he appears to do so self-consciously and self-reflexively, drawing attention to the *exempla maiorum* not only in relation to the substance of his new statute but in relation to its legislative passage through the senate – citing ancient precedent both for the law itself and the manner of its making. To take one salient example, in the late second century BCE the censor Metellus Macedonicus had famously made a speech before the senate arguing that

[27] All translations in this article are our own. On this passage, see also the treatment in M. Lowrie, *Writing, Performance and Authority in Augustan Rome* (Oxford University Press 2009) 279-308

marriage was a clear benefit to the state and the state should accordingly play a greater role in its protection and promotion.[28] A century later, in the late first century BCE, speaking in defence of his own latest attempts to bring marriage under state control, Augustus repeats Metellus' argument in a speech he himself gives before the senate and he cites Metellus as offering a legal precedent – effectively, an *exemplum* – authorizing the legitimacy of Augustus' own 'new' marriage legislation. According to Suetonius (*Aug*. 89.2), in this way Augustus: 'successfully persuaded them [the senate] that … the thing had not been first thought up by himself, but had already been a case of concern to their ancestors' – *quo magis persuaderet … rem non a se primo animadversam, sed antiquis iam tunc curae fuisse*.

As this account nicely demonstrates, Augustus induced the senate to interpret the central tenets of his new laws as if they were drawn from the old ways of custom (*mores maiorum*). Although the ancient *mos maiorum* to which Augustus repeatedly appeals was never formally constituted, it comprised an effective body of ethical rules and regulations establishing the norms and morals for Roman society and law, codified and communicated *narratively*—especially through myths and stories featuring narrative *exempla* (character tales offering models of positive and negative ethics, norms, and behaviours).[29]

In 56BC, Publius Sestius, who had been tribune designate the year before, was prosecuted for *vis* or political violence, and was defended by a number of high profile Republican figures, including Cicero (Cic. *Pro Sest*). In his defence speech *Pro Sestio*, Cicero details what appears

[28] Suetonius, *Aug*. 89.2; Aul. Gel. 1.6.1.
[29] Indeed, Michèle Lowrie, 'Roman Law and Latin Literature' in Paul J. Du Plessis, Clifford Ando, and Kaius Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford University Press 2016) suggests that 'the stories transmitting ancestral custom were as important as statute for the Roman Republican constitution'. On the importance of stories to the (Republican) Roman constitution see also A. Lintott, *The Constitution of the Roman Republic* (Oxford University Press 1999). For, as one of the anonymous reviewers for this journal ingeniously puts it (with a nod to our introductory epigram): 'Stories are full of law'.

to be an enumeration of the possible sources of constitutional law or *ius*: the laws or *leges*, and ancestral custom or the *mos maiorum* (Cic. *Pro Sest*. 73). Indeed, here Cicero himself is self-consciously (perhaps even playfully) following the *exemplum maiorum* – the example of his ancestors. His characterization of Rome's constitution as being rooted in tradition appeals to the 2nd century BCE Roman writer, Ennius, who had similarly claimed (almost two centuries earlier) that 'Roman affairs of state rest upon ancient customs and men' – *moribus antiquis res stat Romana virisque* (*Ann*. 156).[30] As Lowrie points out, Ennius' description of what defines Roman *ius* takes on foundational force 'because no other source offers a better articulation of the Roman Republican constitution. It defines the *mos maiorum* (ancestral custom) as a system of performative exemplarity [... and] conjoins the state (*res Romana*), constitution (*stat*), political action (*viris*) and archaic legal sphere based on custom.'[31]

In this context, stories featuring ethical and legal *exempla* offer a crucial link between any present generation of Romans and their ancestors – and therefore offer Augustus a powerful vehicle to help drive his new legislation through the senate. As Joshel suggests, 'the past provided the standards by which to judge the present: the deeds of great ancestors offered models for imitation'.[32] Hence, through the intersecting media of narrative and law, traditional *exempla* could convey the values, morals and ideal behaviour of the *mos maiorum* from one generation to the next. Indeed, *exempla* (singular, *exemplum*) could refer to a wide variety of forms and content. For Cicero, writing in his *De Inventione*, a handbook for orators and lawyers, an *exemplum* could be defined as operating thus (1.49):

[30] See also Cicero *Rep*. 5.1 where he appeals directly to Ennius on this point.
[31] Lowrie (n29) 71.
[32] S. R. Joshel, 'The body female and the body politic: Livy's Lucretia and Verginia' in Amy Richlin (ed.), *Pornography and Representation in Greece and Rome* (Oxford University Press 1992) 115.

> An *exemplum* supports or weakens a case by appeal to precedence or experience, citing some person or historical event.
>
> Exemplum est, quod rem auctoritate aut casu alicuius hominis aut negotii confirmat aut infirmat.

Most often, *exempla* took the form of a heroic figure performing a particular deed which illustrated certain morals and virtues, and which could be used as a rhetorical device in speeches to elucidate a line of argument or thinking in a variety of contexts – including the senate and the law courts. Throughout Rome's history, *exempla* characterised the interrelation, and indeed conflation, of 'great men, great deeds, a great past, great moral qualities, a great moral tradition, and a great literary and rhetorical tradition'.[33] However, as Christina Kraus explains, *exempla* were deployed throughout Roman culture as a means of understanding and negotiating both past and present alike.[34] *Exempla*, therefore, provided the tools that allowed the Romans not only to understand the past, but to process and make sense of the new. *Exempla* helped to lay the groundwork for subsequent understandings of any innovation or ostensibly new behaviours in society, through the repetition of familiar and meaningful stories and scripts already stored in Roman history and culture. Such was the importance of the *mos maiorum* and its stories of exemplarity that written accounts of such *exempla* abound in the works of Roman historians and orators, from Fabius Pictor, Cato Maior, Livy, Valerius Maximus, Macrobius and, of course, Cicero. What better story-set for Augustus to invoke, then, when trying to introduce new laws that threatened to overturn longstanding traditions concerning Roman family life?

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[33] Langlands (n26) 79.
[34] Kraus (n26) 186.

In the years preceding Augustus' attempts to introduce his marriage legislation we find an increasing supply of such exemplary character tales in popular circulation – each drawing from and celebrating the robust ethics and customs of the *mos maiorum*.[35] In the first pentad of Livy's *History of Rome* (*Ab Urbe Condita*), in particular (believed to have been completed by 27 BC) we find a written collection of such stories and an attempt to record the ethical lessons of the *mos maiorum.*[36] Here we encounter the story of Verginia, killed by her father to protect her from the shame of *stuprum* (3.47); and the story of Lucretia, who kills herself to avoid an (unwarranted) accusation of adultery after her infamous rape.[37] In Livy's version of the story, her attacker threatens Lucretia that he will kill her and place a murdered slave in her bed, staging a scene that would make it appear she had been caught and 'killed in the act of sordid adultery'— *in sordido adulterio necata* (1.58.4).[38] Lucretia demands that both her husband and father promise to see to it that her attacker, Tarquin the 'adulterer' (*adultero*), will not go unpunished (1.58.7). Lucretia then takes charge of her own self-imposed 'punishment' (*supplicio*) for her unwitting and unwilling role in this adultery and commits suicide (1.58.7–11). Indeed, at the narrative climax of this tale, Livy's Lucretia self-consciously identifies herself and her story as exemplary, as establishing a precedent against which future cases of sexual misconduct—including adultery—shall be compared (1.58.10–11):[39]

[35] See Chaplin (n26) 173-96; Kraus (n26) 194-5; Lowrie (n26); Langlands (n26).
[36] T. J. Luce, 'The Dating of Livy's First Decade' in Jane D. Chaplin and Christina S. Kraus (eds.) *Livy: Oxford Readings in Classical Studies* (Oxford University Press 2009).
[37] On Livy's narrative representation of Verginia and Lucretia see Joshel (n32). On the complex and contentious meaning of *stuprum* see Dixon (n8 1992).
[38] See Ovid *Fast*. 2.808–9, written after the introduction of the *lex Iulia de adulteriis coercendis*, which emphasizes (using explicit legal language) Tarquin's threat to 'give false witness to adultery'—*falsus adulterii testis adulter*.
[39] On Lucretia's exemplarity see Joshel (n32); Chaplin (n26); T. Stevenson, 'Women of Early Rome as "Exempla" in Livy, "Ab Urbe Condita", Book 1' (2011) 104:2 The Classical World 175.

> 'Although I acquit myself from any blame, I do not exempt myself from the punishment; let no immodest woman live through the example of Lucretia.' She plunged a knife, which she was hiding under her clothing, deep into her heart, and falling onto the wound, she fell dying.
>
> *'ego me etsi peccato absolvo, supplicio non libero; nec ulla deinde impudica Lucretiae exemplo vivet.' cultrum, quem sub veste abditum habebat, eum in corde defigit, prolapsaque in vulnus moribunda cecidit.*[40]

The stories of Verginia and Lucretia appear to be typical of the sub-narratives that comprise the Roman traditions – the wider narrative of the *mos maiorum* – appealed to by Augustus in his efforts to align his controversial marriage legislation with pre-existing 'ancestral models' or *exempla maiorum*. His new laws (*legibus novis*) are not really new at all – at least, this is what Augustus himself repeatedly insists.

The Narrative Dynamics of Sameness and Difference

In this respect Augustus' marriage legislation performs what Tzvetan Todorov has characterized as a *narrative* operation, 'an operation in two directions [that] ... simultaneously insists upon sameness and difference.'[41] Building upon Todorov's model (and thereby initiating his own 'same but different' theory of narrative), Peter Brooks argues that narrative works through 'its affirmation of resemblance', as 'it brings into relation different actions, [and] combines them through perceived similarities.'[42] However, the recognition that

[40] Livy's account of Lucretia's 'exemplary' suicide, which appears in the first pentad of his *Ab Urbe Condita*, is believed to have been completed by 27 BC – that is, before the passage of the *leges Iuliae* in 18 BCE, but shortly after Augustus' first attempt to introduce legislation in this area in 28 BCE.
[41] Tzvetan Todorov, *Poetique de la prose* (Seuil 1971).
[42] Brooks (n26) 280.

law and narrative share fundamental similarities in this double operation of re-presentation – that they are the 'same but different' – is not new. Plato's Athenian Lawyer in the *Laws* (7.817b-c) recommended the banishment of poets, playwrights, and other storytellers from a just society only to represent himself and other lawmakers as engaged in fundamentally the same narrative operation. He tells us that:[43]

> We lawmakers are also, to the best of our abilities, authors of the very finest and fairest kinds of stories. For the whole of our constitution (*politeia*) is framed as a representation (*mimesis*) of only the fairest and the finest things in real life – the truest of stories. We are authors of the same kinds of works as you. In fact, we are your rivals as authors of the very best stories – which the proper code of law (*nomos*) is uniquely able to produce.

There is an obvious equivocation in the Lawyer's argument here: stories and storytellers should be illegal in a just society; yet the constitution of that just society, its laws and lawmakers, are themselves (just) different kinds of stories and storytellers. Indeed, the Athenian Lawyer and his interlocutor in this exchange are themselves (just) characters in the story of the Law that the author Plato is narrating in the fictional dialogue framing this philosophical debate.[44] Nevertheless, Plato's Lawyer is clear: laws and stories closely resemble each other, in that both narrative and *nomos* are fundamentally concerned with mimesis – that is, not simply with representation but with re-presentation, with 'presenting again', with retelling familiar stories.

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[43] This is, coincidentally, the same book of Plato's *Laws* in which the Athenian Lawyer advises lawmakers against interfering in private family matters (7.788a-b) on the grounds that 'it is improper and undignified to impose penalties on these private practices by law.'

[44] On Plato's narrative techniques see Genevieve Liveley, *Narratology* (Oxford University Press 2019).

Drawing upon this (ancient) understanding that law and narrative are inextricably intertwined, then, pioneering narratological work conducted over the last few years by Monika Fludernik, Peter Brooks, Meir Sternberg, and others, has further helped to demonstrate how story form, phenomena, and dynamics operate in a range of legal contexts and discourses.[45] In fact, Brooks reminds us that legal advocates have known of the importance of narrative and the need to tell stories for millennia, since 'the discipline of rhetoric, including argumentation through narrative, was in antiquity primarily training for making one's case in a court of law', and in classical rhetoric, narration (*narratio*) is, after all, the 'statement of the case.'[46]

Narratives are, indeed, an essential part of any legal process (ancient or modern, adversarial or inquisitorial), with a range of different stories and different *levels* of narrative and narration often at issue or competing with one another. From the making, debating, and passing or repealing of laws according to the perceived best interests of society; to the larger (often unwritten) cultural stories that disseminate and frame ethical and other normative expectations; to the stories entailed in particular legal cases concerning the charges against and confessions of perceived law-breakers; through to the repetition of those narratives at prosecution, trial, verdict, and appeal—each of which involves the narrative testimonies of alibi witnesses, eye witnesses, character witnesses, expert witnesses, and multiple varying, even conflicting, accounts of the same event.[47]

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[45] See Peter Brooks, 'The Law as Narrative and Rhetoric' in Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996); Peter Brooks, 'Narrativity of the Law' (2002) 14:1 Law and Literature 1; Peter Brooks (n5); Peter Brooks, 'Narrative Transactions – Does the Law Need a Narratology?' (2006) 18:1 *Yale Journal of Law and the Humanities* 1; Meir Sternberg, 'If–Plots: Narrativity and the Law–Code' in J. Pier & J. A. García Landa (eds.), *Theorizing Narrativity* (de Gruyter 2008); Monika Fludernik, *An Introduction to Narratology* (Routledge 2009); Monika Fludernik, 'Erzählung aus narratologischer Sicht' in B. Engler (ed.), *Erzählen in den Wissenschaften: Positionen, Probleme, Perspektiven* (Academic Press Fribourg 2010).

[46] Brooks (n5) 416.

[47] See, for example, James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Little Brown 1973); Ronald Dworkin, 'Law as Interpretation' (1982) 9:1 Critical Inquiry 179;

Prosecutors, defence lawyers, juries, judges, and those reporting on the law in action (whether historians or journalists) are all typically faced with the task of making narrative sense—that is, reconstructing a coherent story—out of an inconsistent and often contradictory set of incidents and events. In this light, Sternberg argues that the most fundamental operations of the law, like those of narrative, involve making judgements about characters, along with the retrospective reconfiguration and retelling of events, rearranging events in their proper temporal-causal order.[48]

Some legal scholars accordingly distinguish between the competing 'micro-narratives' that make up a legal case (charges, statements, witness testimonies, and the like), and the 'meso-narrative' of the case itself—that is, the verdict made by a jury and its own reconstructed narrative of what most likely happened to whom, where, when, and why. Judge and jury must then decide whether or not those particulars are in accordance with a particular legal statute and its own overarching 'macro-narrative', made up of the legal precedents, legal

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Robert M. Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative'[1983] Paper 2705 Faculty Scholarship Series http://digitalcommons.law.yale.edu/fss_papers/2705 accessed 27 November 2019; Allan Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Carswell 1988); Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 Michigan Law Review 2411; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989); Bernard Jackson, 'Narrative Theories and Legal Discourse' in Christopher Nash (ed.), *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature* (Routledge 1990); Daniel A. Farber and Suzanna Sherry, 'Telling Stories out of School: An Essay on Legal Narratives' (1993) 45 Stanford Law Review 807; Linda LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (Pennsylvania State University Press 1995); Bernard Jackson, '"Anchored Narratives" and the Interface of Law, Psychology and Semiotics' (1996) 1 Legal and Criminal Psychology 17; Richard Weisberg, 'Proclaiming Trials as Narratives: Premises and Pretenses' in Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996); Brooks (n5); Adam Geary, 'Law and Narrative' in David Herma, Manfred Jahn, and Marie–Laure Ryan (eds.), *Routledge Encyclopaedia of Narrative Theory* (Routledge 2005); Greta Olson, 'Narration and Narrative in Legal Discourse' in Hühn et al (eds.), *Handbook of Narratology* (de Gruyter 2014).

[48] Sternberg (n40). Aristotle is traditionally credited as the first narratologist to recognize the temporal-causal '(re)arrangement of incidents' (*sunthesin ton pragmaton*) into a *muthos* (*Poetics* 6.1450a 3–4), according to a probable (*eikos*) or necessary (*anangkaios*) sequence of events (*Poetics* 9.1451a 37), as that which defines narrative.

histories, and cultural traditions that give individual laws their authority.[49] Tait and Norris add a further tier to this hierarchy of legal narratives:[50] the 'super-narrative' or legal 'master plot', the foundational or constitutional cultural narrative that serves 'to define law, and its essential qualities and goals, … and [to] lay the groundwork for subsequent understandings of how law should operate.'

Recognizing the hierarchy of these different levels helps to enhance our understanding of the narrative characteristics and dynamics of laws and legal systems (both ancient and modern). Courtroom trials, for example, may—by design or otherwise—become subject to some of the codes and conventions associated with literary narrative and dramatic genres. In jurisdictions where the death penalty is supported, capital punishment cases have been shown to demonstrate highly melodramatic qualities, and prosecutions succeed or fail depending upon the willingness of legal teams on both sides to model their narratives accordingly.[51] And in rape trials, jurors and judges have been shown to privilege the basic story form of impersonal, linear narrative testimonies evoking the norms of historiographical or realist narrative forms, to the disadvantage of trauma survivors who 'may testify in an affective, non-linear, and dissociative mode—qualities resembling norms of avant-garde or Modernist texts.'[52] In this light it is perhaps unsurprising that Lhulier describes law as like a novel or a play: 'with characters who wear masks and have specific roles; with multiple, changing texts that are both very ancient and forever updated; with a set and backdrop'.[53]

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[49] See Jackson (n42 1996). Some theorists and critics see the 'macro-narrative' as 'master-narrative'; see Ralph Grunewald, 'The Narrative of Innocence, or, Lost Stories' (2013) 25 Law & Literature 366; Olson (n42).
[50] Tait and Norris (n1) 11.
[51] See Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (Princeton University Press 2002).
[52] Olson (n42) 373. See also Christine Künzel, *Vergewaltigungslektüren: Zur Codierung sexueller Gewalt in Literatur und Recht* (Campus 2003) 249–54.
[53] Gilles Lhuilier 'Law & Literature (as an Epistemological Break in Legal Theory)' (2011) 5.1 Law & Humanities 5.

Modern narratologists explain the operations and effects of such generic patterns, character stereotypes, and quasi-dramatic sets and backdrops, with reference to the theory of narrative 'schemata' and 'scripts'. Script theory suggests that one of the ways in which we make sense of the new, both in the real world and in stories, is by regarding new data and experiences as essentially repeating and resembling old data and experiences already stored in stereotype form in our memories and in our cultural histories.[54] We make sense of the unfamiliar by assessing its resemblance to the familiar—testing its relation to so-called 'knowledge frames' or 'knowledge scripts.' As Tait and Norris explain:[55]

> readers understand one narrative because they have read other narratives that share analogous storylines, character development, and plot creation. Readers recognise, process, and ultimately understand narratives as they align with and fit into grooves created by other, similar narratives, and as they reflect common narrative elements that are not just formal but also substantive.

In this model, we draw upon an extensive 'experiential repertoire' of narrative typification—described by Barthes' as the 'patrimonial hoard of human experiences'—whereby our 'previous experiences form structured repertoires of expectations about current and emergent experiences.'[56] This 'patrimonial hoard' of knowledge cues our expectations about how different characters are likely to behave in different situations, about what actions and events are probable and improbable, about what behaviours conform to normative patterns or otherwise. Such sense-making through the lens of narrative typification

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[54] For definitions of script, schema and frame theory in modern narratology, see David Herman, 'Scripts, Sequences, and Stories: Elements of a Postclassical Narratology' (1997) 112:5 PMLA 1046; David Herman, *Story Logic: Problems and Possibilities of Narrative* (University of Nebraska Press 2002); Anthony Sanford and Catherine Emmott, *Mind, Brain and Narrative* (Cambridge University Press 2012).
[55] Tait and Norris (n1) 20.
[56] Herman (n49 1997) 1047. See Roland Barthes and Richard Miller, *S/Z* (Hill and Wang 1974)

applies to each of the narrative levels and types involved in legal storytelling – from the micro-narratives used in the courtroom as advocates reconstruct competing stories, through the meso-narratives made in the verdicts of jury and judge, through to the macro-narratives of precedent and tradition, and the super-narratives comprising the cultural narratives that shape and disseminate normative expectations. Thus, Bernard Jackson draws our attention to the ways in which a (typical) courtroom trial acts as a 'contest between competing narratives, which will be resolved [i.e., their respective probability and plausibility decided] on the criteria of *relative similarity to narrative typification*.'[57]

Indeed, already in republican Rome, Cicero can be seen exploiting this principle in his 'interrogation' of Clodia Metelli in the trial micro-narrative related and repeated in his *Pro Caelio*. Taking advantage of the timing of the trial on what should have been a public holiday, he appeals directly to generic expectations regarding the behaviours and morals exhibited by the stereotypical characters of Roman New Comedy—particularly in respect of the hapless young male *adulescens* (aligned with his client, Caelius) and the scheming *meretrix* (aligned with his client's former lover, Clodia Metelli).[58] Cicero's case in the *Pro Caelio* is won on the strength of his ability to persuade the jury of the 'relative similarity' of the various *dramatis personae* in his narrative to their familiar equivalent stereotypes in Roman (especially Plautine) comedy. They are the 'same but different'. As Matthew Leigh explains, if:[59]

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[57] Jackson (n42 1996) 28, emphasis in original.

[58] See K.A. Geffcken, *Comedy in the "Pro Caelio" with an appendix on the In Clodium et Curionem*, (Brill 1973); A.C. Scafuro, *The Forensic Stage: Settling Disputes in Graeco–Roman New Comedy* (Cambridge University Press 1997); Matthew Leigh, 'The Pro Caelio and Comedy' (2004) 99:4 Classical Philology 300; S.M. Braund, 'Marriage, adultery, and divorce in Roman comic drama' in Warren S. Smith (ed.), *Satiric Advice on Women and Marriage: from Plautus to Chaucer* (University of Michigan Press 2005).

[59] Leigh (n53) 303. Lowrie (n29) 77 highlights the preponderance of stock situations and character types in Roman law—no less than in Roman drama and literature. She does not adduce these specific characters and scenes as among her representative stereotypes, but the cuckolded husband, the irate father, the adulterous wife, the rebellious daughter, the prostitute, and the pimp, are all prominent stock characters among the *dramatis personae* variously featured in the *leges Iuliae*—as they are in Roman comedy and elegy. See Susan Fischler,

> Cicero can induce the jury to interpret the central events of the case as if they were drawn from a Roman comedy, he may also lead them to the same moral evaluation that they would have reached when faced with the plot of the comedies performed contemporaneously at the *Ludi Megalenses*, had they but been allowed the freedom to attend.

Just like a modern jury, Cicero's jury is required to reconstruct and recombine the central events of the case (the micro-narratives selected and re-presented to them by prosecution and defence witnesses and lawyers) and thereby configure a coherent interpretation and judgement (the macro-narrative of the case). Cicero, anticipating the insights of twenty-first century narratology, makes this easy for them: he provides his jury with a familiar plot pattern (or script) and a familiar cast of stereotyped characters on which to build that interpretation and its narrative.[60]

Macro Narratives and Master Plots

Indeed, the *Pro Caelio* case serves as an excellent legal-narratological 'precedent' for Augustus' new marriage legislation. Augustus had faced repeated opposition from the senate towards his new family laws, and an abortive attempt to legislate on marriage in the early years of his principate appears to have passed through the senate but failed in the face of

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'Social Stereotypes and Historical Analysis: The Case of the Imperial Women at Rome' in Leonie J. Archer, Susan Fischler and Maria Wyke (eds.), *Women in Ancient Societies: An Illusion of the Night* (Macmillan Press 1978).

[60] As observed by Don Fowler, 'Introduction' in Stephen Harrison (ed.), *Texts, Ideas, and the Classics: Scholarship, Theory, and Classical Literature* (Oxford University Press 2001), ascribing 'anticipation' of a modern idea to an ancient author or text is to highlight the omnipresence of plots and plotting in our own discourse and scholarly storytelling. See also Brooks (n5) 417–18, who notices that 'the way incidents and events are made to combine in a meaningful story … depends in large part on the judges' [and jurors'] view of standard human behavior … Any given narrative will be built to some extent on what Roland Barthes liked to call *doxa*, that set of unexamined cultural beliefs that structure our understanding of everyday happenings.'

fierce public protest. While the exact date and provisions of this earlier legislative package (introduced sometime around 28 BCE) are unclear, what is evident is that this first law was swiftly withdrawn in the face of 'protest and opposition'.[61] Livy appears to complain about these laws in the Preface to his *History of Rome* (completed around 27 BCE).[62] And the poet Propertius, in a collection published circa 26 BCE, certainly celebrates the fact when this unpopular law is lifted.[63]

In 18 BCE, however, Augustus tries again, winning his case and finally pushing his second legislation package through the senate by presenting his new *leges Iuliae* as the 'same but different' to pre-existing customs and norms. By appealing to the senate's 'knowledge frames' and 'knowledge scripts' concerning the just and proper way to deal with private family matters such as marriage, procreation, and adultery, Augustus convinces his senators that the new laws relate (to) a familiar story. By insisting upon the relation and resemblance between the *leges Iuliae* and the *mos maiorum* Augustus convinces the senate of the legitimacy and justice of his proposal to legislate for a radically new approach to state intervention in private family life. An approach necessary, according to Augustus' statement in his *Res Gestae*, in order to revive those customs that were fading away and those *exempla* that were becoming obsolete. In appealing to the *mos maiorum* as providing the legal precedent for his marriage laws, then, Augustus can plot his legislative programme not only as principled but as providing continuity through change: the new laws are just like the old ones and therefore *just* like the old ones, repeating a familiar pattern and story which emphasises the traditional imbrication between custom and/as law.

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[61] Ronald Syme, *The Roman Revolution* (Oxford University Press 1939). See also E. Badian, 'A Phantom Marriage Law?' (1985) 129:1 *Philologus* 82.
[62] See Livy, *Praef.* 9.
[63] Propertius 2.7.1–4: 'Cynthia is certainly delighted now that the law has been lifted, / those edicts we once cried so much over, / fearing that they might separate us' – *Gauisa est certe sublatam Cynthia legem, / qua quondam edicta flemus uterque diu, / ni nos diuideret.*

As Lawrence Friedman explains, constitutions, laws, and statutes are dependent for their authority upon their ability to reflect and represent (that is, re-present) the predominant cultural 'narratives' in which they are received.[64] Unless a law is already attuned to the cultural character and norms of the society it aims to rule (that is, unless it is already resembles, repeats, and relates to them), it will be ignored or resisted. Cover, in a landmark report on '*Nomos* and Narrative' from 1983, similarly suggests that the legitimizing authority endowed by such wider cultural narratives pertains to all legal, moral, and normative situations – 'some small and private, others immense and public'.[65] For Olson too, laws and legal narratives achieve their legitimacy and normative status only through the demonstration of their resemblances to other cultural narratives or 'plots'.[66] While for Brooks similarly, legal and constitutional precedent represents an important 'macro narrative' to which new laws and judgments must always be related 'in order that change or innovation appear to be principled.'[67]

Augustus evidently anticipated these narratological insights into the ways and means through which laws establish their legitimacy and authority, and took action to ensure that his marriage legislation demonstrated its resemblance to Rome's wider cultural and traditional 'macro narratives'. Indeed, the extant sources suggest that he took considerable care to relate his new laws to ancient customs in order that his radical innovations might appear to be – in Brooks' terms – 'principled'.[68] And Augustus clearly achieved some success with this

[64] Lawrence Friedman, 'Legal Culture and Social Development' (1969) 4 Law & Society 29.
[65] Cover (n42) 7. For Cover (n42) 4–5: 'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.'
[66] Olson (n42) 379.
[67] Brooks (n5) 426.
[68] Brooks (n5) 426. See also Milnor (n23) 154 who argues that: 'though the laws themselves may be new, what they represent are values which are enshrined in the Roman past and which look forward to the Roman future. If the laws overstep the boundary between public and private life, they do so only on the understanding that history requires it.'

approach – not least of all in persuading the senate to back his legislation package in 18 BCE, by reminding them that this 'had not been first thought up by himself, but had already been a case of concern to their ancestors', and that it was the 'same but different' to the traditional legal 'macro narratives' preserved in the *mos maiorum*.[69] Indeed, some of the specific points of detail included in the statutes of the *leges Iuliae* appear to correspond with (and clarify) pre-existing republican statutes: Aulus Gellius refers to a speech of Cato in which he claims that a husband who catches his wife *in the act of adultery* is permitted to kill her *on the spot* (10.23.4-5); Seneca the Elder refers to the right to kill an adulterous pair as legally granted to anyone *providing they kill both at the same time* (*Contr.* 1.4 and 9.1); and Julius Caesar reportedly sentenced a freedman to death for committing adultery with the wife of an *eques* – that is, a social inferior (*Jul.* 48.1).[70]

However, Augustus' new laws were widely disapproved, flagrantly ignored (including, infamously, by members of his own immediate family – his daughter and granddaughter), and ultimately overturned. Public opposition to this new state interference in private family affairs is well documented. Suetonius tells us that (34):[71]

> He withdrew some laws and introduced some new ones, such as the sumptuary law, the adultery and chastity law, the law against bribery, and the marriage law. His reform of the marriage law was more extreme than the rest and the people completely refused to obey it, unless the penalties were abolished or mitigated … and the incentives to marry increased. Once when the equestrian order was demanding the

[69] Suetonius *Aug*. 89.2.
[70] See Bryen (n24) 329 for the view that this licence to kill in Augustus' legislation represents an attempt 'to hearken back to an anachronistic ideal of domestic jurisdiction.'
[71] On Augustus' use of exempla see Chaplin (n26) 173–96; Kraus (n26) 194–5; Lowrie (n26); Langlands (n26). In exemplary fashion, Germanicus appears to have married young and fathered nine children.

> total abolition of the new marriage law at a show in the theatre, Augustus beckoned Germanicus' children, and showed them [to the crowd], some held on his own lap and some on their father's, signalling with his gesture and expression that they [the crowd] should imitate that young man's *exemplum* or suffer serious consequences. And when he realized that the force of the law was being evaded by long engagements/betrothals to young girls and an increase in the swapping of wives, he limited the time allowed for engagements/betrothals and imposed restrictions on divorce.
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> *Leges retractavit et quasdam ex integro sanxit, ut sumptuariam et de adulteriis et de pudicitia, de ambitu, de maritandis ordinibus. Hanc cum aliquanto severius quam ceteras emendasset, prae tumultu recusantium perferre non potuit nisi adempta demum lenitave parte poenarum et vacatione trienni data auctisque praemiis. Sic quoque abolitionem eius publico spectaculo pertinaciter postulante equite, accitos Germanici liberos receptosque partim ad se partim in patris gremium ostentavit, manu vultuque significans ne gravarentur imitari iuvenis exemplum. Cumque etiam inmaturitate sponsarum et matrimoniorum crebra mutatione vim legis eludi sentiret, tempus sponsas habendi coartavit, divortiis modum imposuit.*

Amongst the 'meso-narratives' and verdicts of those Augustan writers who comment directly upon the contemporary reception of the marriage legislation and its unpopularity, we again encounter the poet Propertius suggesting that prostitutes should 'smash the damnable laws of chastity'—*frange et damnosae iura pudicitiae*—and pretend to be married in order to raise the price they can charge their would-be-adulterous lovers, presumably for the extra *frisson*

of illegality thereby created under Augustus' new laws (4.5.27–9).[72] The poet Ovid in his *Amores* (2. 2.57–66) insists that his own adulterous affairs are no real crime (*scelus*), and complains about the risk of trouble-making informers or *delatores* bringing charges against him.[73] Ovid also encourages his unfaithful lover to lie to him, and advises that she should similarly avoid telling the truth to a judge if ever brought before a law court – presumably after breaking one of the statutes of the unpopular *leges Iuliae* (*Amores* 3.14.48–50).[74]

The 'meso-marrative' of Augustus' daughter Julia's indictment and banishment for breaking her father's laws is also narrated in lascivious detail in the ancient sources. Velleius Paterculus (a contemporary 'eye-witness' to the scandal and its aftermath), Seneca the Younger, and Pliny (both reporting after the event), each relate specific information in their respective 'verdicts' and versions of events that appears to draw upon the text and micro-narrative of a letter that was submitted to the senate by Augustus in the autumn of 2 BCE, to be read in his absence by the quaestor.[75] According to Seneca—reproducing the story as set out in Augustus' original letter (*Ben.* 6.32):

> [It was reported that] Julia had welcomed hordes of adulterers, had partied through the backstreets of the city at night, that the forum and the rostrum from which her

[72] On Propertius' testimony in the case of the *leges Iuliae* see Syme (n56) 443 and Treggiari (n8) 146.
[73] The later legal sources offer a number of details confirming that the *lex Iulia de adulteriis coercendis* raised the crime of adultery to the same heinous degree as the crimes of murder, rape, and sorcery. In adultery cases, evidence could be taken through the torture of slaves (Paul, *Digest* 48.18.8). See also Amy Richlin, 'Approaches to the Sources on Adultery at Rome' in Helene P. Foley (ed.), *Reflections of Women in Antiquity* (Gordon and Breach 1981) for the view that Augustus' attempt to align the crime of adultery with that of murder, rape, and sorcery was overkill.
[74] On Ovid's testimony in the case of the *leges Iuliae* see Pal Csillag, *The Augustan Laws on Family Relations* (Akademiai Kiado 1976), who regards Ovid as taking 'a firm stand against the Augustan policy to raise morals' and as writing 'in derision of the Augustan laws.' See also Synnove des Bouvrie, 'Augustan Legislation on Morals – Which Morals and What Aims?' (1984) 59 Symbolae Osloenses 93.cf. Ovid *Ars.* 1. 31–4; *Fast.* 2. 139–40; *Met.* 10.329–31; *Trist.* 2. 211–2; 251–2; 303–4 for further allusions to the Augustan marriage laws.
[75] See also Suetonius, *Aug.* 65, and Pliny *N. H.* 21.9. Seneca (*Ben.* 6) indicates that the letter was subsequently published as a formal edict.

> father had introduced the law against adultery had been the favourite places for her debaucheries.
>
> *admissos gregatim adulteros, pererretam nocturnes comissationibus civitatem, forum ipsum ac rostra, ex quibus pater legem de adulteriis tulerat, filiae in stupra placuisse.*

In his anger at discovering his daughter's outrageous – and, under the statutes of the law that bore her own name, criminal – behaviour, Augustus decreed that such extreme promiscuity put Julia 'beyond the reach of any formal indictment' (*ultra impudicitiae male dictum)*.[76] That is, beyond the reach of his own *lex Iulia de adulteriis coercendis*. Denying Julia the opportunity to defend herself in a public criminal trial in the *quaestio* or senate—and thus to tell her side of the story—Augustus immediately banished her to the island of Pandateria, disinherited her in his will, and forbade her future interment in the family mausoleum.[77] He also punished at least one of Julia's alleged lovers through forced suicide, and banished others to separate islands.[78] In taking this action, as Tacitus would later observe, Augustus apparently returned to the legal code authorized by the *mos maiorum* and took the very actions that his own adultery laws had attempted to legislate against: he punished his adulterous daughter and her lovers privately, in anger, and with unsanctioned severity.[79]

There was, it seems, such widespread and open resistance to the Augustan marriage laws that when Augustus eventually agreed to reform the legislation (albeit only the parts specifically

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[76] Seneca, *Ben.* 6.32.1.
[77] Public protests at this manifestly unjust treatment by the *princeps* meant that after five years under virtual house arrest in exile, Julia was allowed to return to the Italian mainland, and some of her freedoms were restored. See Suetonius, *Aug.* 65 and *Tib*. 50, Dio. Cass. 55.13.1. See further Elaine Fantham, *Julia Augusti: The Emperor's Daughter* (Routledge 2006).
[78] Vall. Pat. 2.100.4, Tacitus, *Ann.* 1.10.4, 3.24.2.
[79] Tacitus, *Ann.* 3.24.2.

concerning marriage and children) in 9 CE, the senate judged that a new name for the unpopular *leges Iuliae* was required – and the reformed legislation was rebranded as the *lex Papia et Poppaea.* The parts of the original statute dealing with extra-marital affairs (the *lex Iulia de adulteriis coercendis*) remained unchanged until after Augustus' death, however. At least until his successor Tiberius overturned the Augustan legislation – cynically invoking the same appeal to the authority of the *mos maiorum* as his predecessor once had, even as he revoked the Augustan statutes and declared his own new law a return to the custom of private settlement of private, family matters (Suetonius, *Tib*. 35.1):

> he authorized the nearest relations to punish any married women who had lost their chastity, in line with common consensus and the *mos maiorum.*
>
> *matronas prostratae pudicitiae ... ut propinqui more maiorum de communi sententia coercerent auctor fuit.*

Indeed, Suetonius' account of Tiberius' revocation of the *lex Iulia de adulteriis coercendis* is telling. For it reveals that, despite Augustus' attempts to align his new laws with the ancient custom enshrined in the *mos maiorum*, he ultimately failed to persuade people that his radical innovations were 'principled' or just.[80]

Conclusion

It seems puzzling that the legal-narratological principle that Augustus successfully exploits to persuade the senate of the legitimacy of his new laws should prove unsuccessful when employed in an attempt to persuade the wider populace of the same. But a more nuanced

[80] Brooks (n5) 426.

understanding of that legal-narratological principle can also help to explain this failure. For, as Friedman points out, some kinds of laws are essentially 'futile'— whatever incentives or penalties they may carry – simply because they do not align with the wider cultural narratives of that society.[81] Appropriately for our purposes, discussing the futility of adultery laws in western cultures, Friedman argues that:

> No one obeys adultery laws simply because they are laws. Large segments of the population disapprove of these laws; others feel the laws are not worth enforcing. Adultery laws, then, have an uphill battle for enforcement; state intervention in private sexual behaviour is culturally disapproved ... In some societies, adultery, as defined in the United States, is not considered immoral, and attempts to ban it by law would be even more futile. In still other societies, adultery is deemed a most serious offense; violators of the norm are punished swiftly and without social disruption.

Friedman's proposition reminds us that legal narratives operate across different levels. Individual laws (such as the *leges Iuliae*) must not only resemble and relate to the 'macro-narratives' of a society (such as the conservative family values of the *mos maiorum*) but must also resemble and relate to the 'super-narrative' of that society – its foundational cultural narrative, the wider story that serves 'to define law, and its essential qualities and goals, … and [to] lay the groundwork for subsequent understandings of how law should operate.'[82] Augustus takes considerable pains to align his *leges Iuliae* with the prevailing 'macro-narrative' of Roman society, but he fails to align his legislation with Rome's 'super-narrative'.

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[81] Friedman (n59) 42.
[82] Tait and Norris (n1) 11.

For the *leges Iuliae* introduce statutes that contravene the long held tradition that the Roman state should not intrude into private family life. Roman legal history is full of stories in which a legislator holds back from passing statutes which would break with this longstanding custom. Dionysius of Halicarnassus (writing in the Augustan principate) relates that Rome's first mythical founder and ruler, Romulus, considered but then rejected the idea of introducing laws giving a husband rights to divorce an adulterous wife. Instead, he offered incentives for married couples to stay married (2.25.1–3). Following the *exemplum* provided by Romulus, Cicero famously petitioned Julius Caesar to take action to curb the problem of growing immorality and shrinking families in the republic (*Pro Marc*. 23) – yet he also warned him about the political risks of the state attempting to introduce or impose any kind of legislation aimed at curbing the private lives and sexual activities of its citizens (*De Fin*. 2.73). In the event, Caesar appears to have heeded both aspects of Cicero's counsel by introducing a system of financial inducements to encourage people to have more children (Dio. Cass. 43.25.2) – but limiting the intervention of the state into private family life to these straightforward tax incentives. The Augustan poet, Horace, had similarly called upon Augustus—as *pater urbium*—to rein-in the decadent and immoral behaviour of Rome's populace – but then immediately pointed out that state legislation really offers no practical solution to this social ill (Horace *Odes* 3.24.33–6).[83] And if we look again at the salient stories of the *mos maiorum* that Livy's *History of Rome* narrates as part of the 'macro narrative' with which Augustus seeks to align his new marriage legislation, we see that here too Livy is effectively promoting a traditional cultural 'super-narrative' validating the idea of

[83] The biographer and historian Plutarch credits Sulla (early first century BCE consul and dictator) with the introduction of Rome's first formal marriage laws – the *lex Scantinia* (Comp. Lys. et Sul. 3.2). However, we know very little about the contents of this legislation – including whether it really was a marriage law at all. It appears to have dealt primarily with pederasty and/or financial matters. See Lilja 1983 for a review of the ancient sources and modern scholarship on the *lex Scantinia.*

private, family jurisdiction for private, family matters. It is Verginia's father – in his domestic jurisdiction as *pater familias* – who protects her chastity or *stuprum* (3.47). While, evoking the customary tradition by which any personal 'injury' (*iniuria*) would be resolved privately, it is noteworthy that following her rape Lucretia calls a private family council and demands that her husband and father see to it that her attacker is duly punished (1.58.7) – before taking charge of her own self-punishment (*supplicio*) for her unwitting 'adultery' (1.58.7–11). Augustus manages to align his *leges Iuliae* with the prevailing 'macro-narrative' of Roman society and the *nomos* of the *mos maiorum*, but he signally fails to recognize that his legislation does not align with Rome's wider cultural 'super-narrative' – and the *leges Iuliae* ultimately fail as a consequence of this. Indeed, although Augustus' legislative efforts show a proper respect for Plato's proposition in the *Laws* that lawmakers are fundamentally storytellers, Augustus overlooks one of the other key messages in this chapter of Plato's narrative: the Athenian Lawyer explicitly advises lawmakers against any state interference in private family matters (7.788a-b) on the grounds that 'it is improper and undignified to impose penalties on these private practices by law.' Such laws, as Friedman – and Plato – points out, will always prove to be 'futile' where a society views the interference of the state into family affairs as fundamentally unprincipled, where a society holds as its 'super-narrative' the basic understanding that public and private domains should remain separate jurisdictions. The law is, indeed, full of stories – and lawmakers ancient and modern should pay particular attention to those that describe the law's essential properties and values, to those that relate its 'master plot'.[84]

[84] With thanks to Rebecca Probert for her invaluable advice, and to the editors and anonymous reviewers of this paper for their generous feedback and comments.