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The extent of the *patria potestas* during the High Empire: Roman midwives and the decision of *non tollere* as a case in point

Ido Israelowich, Tel Aviv

Abstract: This article examines the legal aspects of child exposure during the High Roman Empire. It considers the relationship between child exposure and the legal authority of the *paterfamilias* over his household members and, more specifically, asks whether the decision to expose a newborn belonged under the exclusive jurisdiction of the *paterfamilias*. After demonstrating the various ways the Roman law curtailed the authority of the *paterfamilias* in this matter, most notably, through the growing medical authority embodied in the figure of the midwife, I shall examine the meaning of this dilution of the private sphere of domestic jurisdiction both legally, and from the perspective of social history.

1. Introduction

At least since the publication of the XII Tables, the Roman legislator seems to have left the decision over whether to raise a newborn child to the discretion of the *paterfamilias*. Moreover, the choice of *non tollere* appeared to have required no explanation on the *paterfamilias*' behalf.[1] It is therefore surprising to find two rescripts quoted by Ulpian, which guided provincial governors who tried cases of disputed maternity or paternity, where child recognition, and, by implication, child rearing clearly does not lie solely at the father's discretion. In the case of a recently deceased husband (whose pregnant widow was not acknowledged by the family of her late husband to be carrying his heir) and the case of a divorcee (who contested the claims of her ex-husband that she was carrying his child) the Roman law guided its courts to rely on examinations and reports of court-appointed midwives. It also explained under which circumstances the father could refute his paternity and had the right not to recognize the newborn. The legal implications of maternity and paternity were significant. They concerned such matters as inheritance rights and civic status. Together with a *senatus consultum* on the recognition of children, these two rescripts offer a better understanding of the legal boundaries of child exposure during the High Empire by depicting the legal, social, and administrative climate in which a decision of *non tollere* would have been reached. Much like the prohibition imposed on the *paterfamilias* to interfere in the marriage of those under his *potestas*, these rescripts and *senatus*

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1 Cf. P. *Oxy* VI 744, where a father orders his wife to expose their future child in case it is a girl. See also Quint. *Decl.* 306, where a father orders his wife to expose their child without offering a reason for exposure.

consultum curtailed the *patria potestas* of the private sphere of domestic jurisdiction.[2] They transfer power from the *paterfamilias* to the court, from authority rooted in the family to science and professionalism, and from the private sphere to the public. The Roman legal system's desire to extend its reach into the realm of family affairs, its willingness to rely on the verdict of professional midwives where the authority of the *paterfamilias* had once sufficed, and its readiness to compel a father to recognize his newborn child offer a better understanding of the scale and scope of child exposure and the *patria potestas* more generally.[3]

This article sets to examine the legal implications of child exposure on the institution of *patria potestas* firstly by analysing the *ius vitae necisque* and secondly by juxtaposing the *paterfamilias' ius exponendi* with the role the Roman courts assigned to midwives. It aims to compliment the valuable discussions of child exposure from the point of view of historians of childhood and the family, such as Suzanne Dixon, Mireille Corbier, and Judith Evans Grubbs.[4] An inquiry of the legal implications of child exposure in the Roman world, and its affect on the nature of the *patria potestas* is predominantly concerned with two institutes: *expositio* (or *ius exponendi*) and *patria potestas* (or *ius vitae necisque*). Jurists have for long engaged the meaning, scope, and application of the *patria potestas*. Many of these works, though varying in their particular interests, will be used and addressed here. Yan Thomas offered an authoritative and heavily documented study of the *vitae necisque potestas* and convincingly demonstrated that all instances of its application were an expression of Roman culture and values.[5] Reuven Yaron and Raymond Westbrook examined the meaning of the phrase *vitae necisque potestas* and were able to establish, using Near Eastern parallel *exempla*, that the *ius vitae* must have referred to the regal power of pardoning.[6] John Crook was concerned with the position of the *paterfamilias* with respect to

2 *Dig.* 23.2.21, 22, 28, and, more generally S. Dixon, *The Roman Family* (Baltimore and London 1992) 71–83.

3 Ulpian offered a legal definition of the Roman *familia* in *Dig.* 5016.195.1–4; for a modern discussion see R. Saller, "*Familia, Domus* and the Roman conception of the family", *Phoenix* 38 (1984) 336–353.

4 Dixon, *loc. cit.* (n. 2); M. Corbier, "Child Exposure and Abandonment", in S. Dixon (ed.), *Childhood, Class and Kin in the Roman World* (London 2001) 52–73; J.E. Grubbs, "Hidden in Plain Sight: Expositi in the Community", in V. Dasen and T. Späth (eds.), *Children, Memory, and Family Identity in Roman Culture* (Oxford 2010) 293–310; J.E. Grubbs, "(Not) Bringing up Baby: Infant Exposure and Infanticide", in J. E. Gtubbs and T. Perkins (eds.), *The Oxford Handbook of Childhood and Education in the Classical World* (Oxford 2014) 83–107; M. Kleijwegt and R. Amedick, "Kind", *Reallexikon für Antike und Christentum* 20 (2004) 865–947.

5 Y. Thomas, "Vitae necisque potestas. Le père, la cité, la mort", in *Du châtiment dans la cité* (Rome 1984) 499–548.

6 R. Yaron, "Vitae necisque potestas", *TvR* 30 (1962) 243–251; R. Westbrook, "Vitae necisque potestas", *Hist.* 48 (1999) 203–223.

the family's property during the Republic.[7] The nature of the *patria potestas* and its spread towards the *ius exponendi* were examined by William Harris and Tamás Nótéri.[8] The legal status of foundlings were discussed by Michael Memmer and Olga Tellegen-Couperus.[9] Antii Arjava examined the impact of the *Constitutio Antoniana* on family law, in light of Gaius' claim that the institution of *patria potestas* was unique throughout the known world.[10] Arjava argued convincingly that there can be no doubt that *patria potestas* continued to be the cornerstone of Roman family law, and also an essential element of the law of property and inheritance. However, through considering the *ius exponendi* as a derivative of the *patria potestas* in light of the evidence concerning the role of midwives in the Roman court, this article aims to offer a new perspective on the limits of the *vitae necisque potestas* in Roman classical law.

2. The *paterfamilias*

Since the time of the XII Tables, and most likely long before, the Roman family was regarded by the state as a legal unit.[11] This perception, which was slow to change, assigned to the head of the family, the *paterfamilias*, extensive jurisdiction, and saw him as the only full person known to the law.[12] As the head of the family, the *paterfamilias* was the only person who could own property and, according to some sources, even enjoyed the power of life and death over all members of his household (*vitae necisque potestas*).[13] This power meant that, at least in theory, the *paterfamilias* could have sentenced any of his household members to death, although custom required that he consult an informal council of advisors, whose function is best perceived as a domestic tribunal.[14] The exercise of

7 J. Crook, "Patria potestas", *CQ* 17 (1967) 113–122.

8 W.V. Harris, "Child exposure in the Roman Empire", *JRS* 84 (1994) 1–22, p. 12; W.V. Harris, "The Roman father's power of life and death", in R.S. Bagnall and W.V. Harris (eds.), *Studies in Roman Law in Memory of Arthur Schiller* (Brill 1986) 81–96; T. Nótári, "Remarks on two aspects of the *patria potestas* in Roman law", *Fiat Iustitia* 2 (2013) 29–49.

9 M. Memmer, "Ad servitutem aut ad lupanar...", *ZRG* 108 (1991) 21–93; O. Tellegen-Couperus, "Father and foundling in classical Roman law", *The Journal of Legal History* 34.2 (2013) 129–138.

10 A. Arjava, "Paternal Power in Late Antiquity", *JRS* 88 (1998) 147–165; Gai. 1.55, and Dion. Hal. 2.6.4; 2.27.1.

11 *Dig.* 50.16.195-6. Dixson *loc. cit.* (n. 2) 36–60.

12 B. Nicholas, *An Introduction to Roman Law* (Oxford 1972) 65. The sources for the legal status of the *paterfamilias* were likely to have found their origin in the *leges regiae*, cf. A. Watson, "Roman private law and the Leges Regiae", *JRS* 62 (1972) 100–105, p. 102.

13 For a critical review of this formula see B.D. Shaw, "Raising and killing children: two Roman myths", *Mnem.* 54 (2001) 31–77, pp. 56ff; Yaron, *loc. cit.* (n. 6); Westbrook, *loc. cit.* (n. 6).

14 Cic. *De Domo* 77; Gell. 5.19.9; Nicholas, *loc. cit.* (n. 12) 67. It is important not to confuse the *ius vitae necisque* with the right of a husband to kill his wife, because this right existed independently of the *patria potestas* in two cases: adultery and wine drinking. In these cases the husband acted as an agent of the state/law irrespectively of the *patria potestas* (Dion. Hal. 2.25.6; cf. Cato the Elder, *apud* Gell. 10.23.5). The only similarity between these two cases, as

this power was final.[15] There was no authority in the early Republic, which could have censored its application, let alone a mechanism of appeals.[16] Although the actual application of the *paterfamilias*' right to sentence any of his household members was a rarity, it is seen as the legal ground for child exposure.[17] In fact, one of (Pseudo?) Quintilian's *Minor Declamations* concerned a hypothetical case in which a father ordered his wife to expose their child before dying. The child was exposed but later sought to be recognized as the father's heir, and, in a different case, permission to wed his widowed mother.[18] Quintilian offered a speech in opposition of the child's request. Among other claims, Quintilian intended to portray the wife as having followed her late husband's order to expose their child with a heavy heart, but with an understanding that his command must be executed. She described herself during her pregnancy as carrying a dead person within her: *vivum funus gremino tuli*.[19] Having learned that her husband died she was almost tempted not to follow his explicit command and not to expose the child but finally yielded to his undisputed authority: *deinde periit ille, qui iusserat: quam paene potui non exponere*![20] Hence, the authority to expose is the father's and it is final, even posthumous.

Papinian writes in a *responsum*, is in the case of a father executing his adulteress daughter (*Coll.* 4.4.8.1), but this juridical action falls under the *lex Iulia de adulteriis*, rather than the *ius vitae necisque*.

15 The only potential cap on the *paterfamilias*' *vitae necisque potestas* is a law ascribed to Romulus which allowed the killing of a child under the age of three only if it is born a monster or befalls grave injuries upon birth, Dion, Hal. 2.15.2.

16 According to an incomplete text of Gaius, the XII Tables required a *iusta causa* in case of a grown son, *Inst. fragm. Augustodun.* IV. 86: *De filio hoc tractari crudele est, sed ... non est post ....r.... occidere sine iusta causa, ut constituit lex XII tabularum. Sed deferre iu<dicibus> debet propter calumniam. Cf.* Nótári, *loc. cit.* (n. 8) 32. According to Kunkel, the *iusta causa* meant that an exercise of the *patria potestas*, which culminated in capital punishment was only permitted if the son had committed a crime punishable by death in the eyes of the Roman law. Of course, this view implies that the *paterfamilias* was an agent of the Roman state: W. Kunkel, "Das Konsilium im Hausgericht", *Zeitschrift für Rechtsgeschichte, Romanistische Abteilung* 83 (1966) 219–251, p. 243. For the reading *iu<dicibus>* see *ibid.*, p. 244 and Nótári, *loc. cit.* (n. 8) 33. On this ground, Mommsen rejected the notion of *iurisdicium domesticum* as an oxymoron: T. Mommsen, *Römisches Strafrecht* (Leipzig 1899) 16–26.

17 G. Glotz, "exposition", *Daremberg-Saglio* (1892) 930–939. Harris, *loc. cit.* (n. 8) 12; A. Rousselle, *Pornea: de la maîtrise du corps à la privation sensorielle* (Paris 1983) 69. On the power of life and death see Yaron, *loc. cit.* (n. 6) 243–251; Harris, *loc. cit.* (n. 8) 81–96.

18 *Maritus peregre proficiscens praecepit uxori ut partum exponeret. Expositus est puer. Maritus peregre uxore herede decessit. Post tempus quidam adulescens, cuius aetas cum expositionis tempore congruebat, coepit dicere se filium et bona sibi vindicare. Inter moras iudicii bello idem adulescens fortiter fecit. Petit praemio nuptias eius quam matrem dicebat, manente priore iudicio*; Quint. *Decl.* 306.

19 Quint. *Decl.* 306.7.

20 Quint. *Decl.* 306.7.

3. Child exposure

It is generally assumed that child exposure was widespread in the Roman Empire.[21] In addition to the legal sources, the extensive habit of child exposure becomes evident from references to wet-nurse papyri contracts from Egypt and through the criticism of ethnic groups not inclined to the practice.[22] The collection of para-legal texts, known as *controversiae* and *suasoriae* also include several references to child exposure.[23] It is estimated that child rearing for the purpose of using unwanted children as slaves was lucrative.[24] By child exposure (*expositio*), the Romans understood either exposing or even a more violent act of killing of a child at birth. Unlike the more general category of abandonment, exposure denotes forsaking a neonate during the first week of the neonate's life, before the newborn has been accepted into the family, underwent purification rites, and was named.[25] According to Seneca, it was customary in his day to drown newborns that were born disabled or disfigured.[26] The legal foundation of this form of infanticide is thought to have originated from the power of the *paterfamilias* over his household members as an expression of the father's unwillingness to raise the newborn.[27] However, a ceremonial act of lifting (*tollere liberos*) the newborn as an expression of the father's consent to raise the child or an equally theatrical avoidance from so doing, which indicated exposure, is his-

21 Harris, *loc. cit.* (n. 8) 1.

22 J. Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (New York 1988) 53–179; W.V. Harris, "Towards a study of the Roman slave trade", in J.H. D'Arms and E.C. Kopff (eds.), *The Seaborne Commerce of Ancient Rome: Studies in Archaeology and History* (Rome 1980) 117–140, p. 123; Harris, *loc. cit.* (n. 8) 9–10, 18–19. Quantification: W. Scheidel, "Quantifying the sources of slaves in the early Roman empire", *JRS* 87 (1997) 156–169, p. 164–166; W.V. Harris, "Demography, geography and the sources of Roman slaves", *JRS* 89 (1999) 62–75, p. 74. Exposure common: Harris, *loc. cit.* (n. 8). Critique of ethnic groups who were not inclined to do so: Str. 17.2.5; Tac. *Hist.* 5.5 and *Ger.* 19.

23 Quint. *Decl.* 278, 306, 338, 376; Quint. *Inst.* 7.14.5–6; Sen. *Contr.* 104 with B. Huelsenbeck, "Shared speech in the collection of the Elder Seneca (*Contr.* 10.4)", in E. Amato, F. Citti, and B. Huelsenbeck (eds.) *Law and Ethics in Greek and Roman Declamation* (Berlin, Munich, and Boston 2015) 35–62.

24 I. Biezunska-Malowist, *L'esclavage dans l'Égypte gréco-romaine II: Période romaine* (Wroclaw 1997) 21–26; J.A. Straus, "L'esclavage dans l'Égypte romaine", *ANRW* II 10.1 (Berlin and New York 1988) 841–911, p. 854–856. Contracts: M.M. Masciadri and O. Montevecchi, *Contratti di baliatico* (Milan 1984) 10–20.

25 Grubbs, *loc. cit.* (n. 4) 83.

26 *Liberos quoque, si debiles monstrosique editi sunt, mergimus*; Sen. *De ira* 1.15.2. *Cf.* Liv. 27.37.5–6, 22, 27a, 32, 34, 36. It is noteworthy that the Republican evidence explicitly stated that it is hermaphroditism, which merits death. However, Plin. *Hat.* 7.34 confirms that this judgment was not without its opposition.

27 The role of the father as an instigator of a child exposure becomes visible via the papyri, cf. P. *Oxy* I 37–8, IV 744. For the scope of child exposure in Roman Egypt and its role as a source of slave force see Harris, *loc. cit.* (n. 22); Biezunska-Malowist, *loc. cit.* (n. 24) 129–133.

torically unfounded and is best understood as a myth.[28] An act of *tollere liberos* is unmentioned in papyri and in the works of the poets and Cicero the phrase refers to the continuous tasks and responsibilities of a parent.[29] From a legal point of view, exposure is distinguishable from abortion and a killing of a child who has already been enrolled under the *potestas* of the *paterfamilias*.[30] Thus, it is ascribed to Romulus' Sacred Law that it is obligatory to bring up all male children and the first-born of the females, and that it is unlawful to destroy any children under three years of age unless they were maimed or monstrous from their very birth.[31] This prohibition is followed by an explicit permission for parents to expose their newborns, provided they first showed them to their five nearest neighbours and these also approved.[32] Against those who disobeyed this law, Romulus fixed various penalties, including the confiscation of half their property.[33] Although this *lex regia* appears in no other source than Dionysius of Halicarnassus, it is safe to assume that as a Greek author writing on Roman history in the city of Rome Dionysius captured the *opinio communis* here. The motives behind child exposure include a noticeable physical abnormality, its legitimacy, poverty, and finally religious, ominous, and spiritual reasons.[34] Most cases must have been the result of conscious efforts to limit family size and to supply slaves for the

28 Shaw, *loc. cit.* (n. 13) 31–56 offers a compelling argument against the validity of the *tollere liberos* ceremony. According to Shaw this term referred more to the practicality of child rearing rather than to a ceremony, which created *patria potestas*. For literary references see: Plaut. *Am.* 501; Ter. *Andr.* 219, 401, 464; *Heaut.* 627, 665; *Hec.* 576, 704; *Phor.* 1006; Cic. *Att.* 11.9.3; *De div.* 1.121; *Har. resp.* 27; Quint. *Inst.* 3.6.97; 4.2.42; A. Watson, *The Law of Persons in the Later Roman Republic* (Oxford 1967) 77. On the meaning of *tollere* or *non tollere* see B. Rawson, "Adult Child Relationship in Roman Society", in B. Rawson (ed.), *Marriage, Divorce and Children in Ancient Rome* (Oxford 1991) 7–30, pp. 12–15; A.E. Hanson, "A Division of Labor: Roles for Men in Greek and Roman Births", *Thamyris* 1 (1994) 157–202, p. 195; T. Koves-Zulauf, *Römische Geburtsriten* (Munich 1990) 1–92.

29 *Ibid.*, but see contra S. Dixon, *The Roman Mother* (London 1988) 237–240, who accepts the validity of the *tollere liberos* ceremony.

30 The overall attitude of the Romans towards abortion was negative. However, if a choice had to be made, it was preferable to save the mother, rather than the foetus: R. Flemming, *Medicine and the Making of Roman Women* (Oxford 2000) 169. This unfavourable attitude was finally formalized by Caracalla, who prohibited women from aborting a child without the consent of the man whose heir the child was destined to be: *Dig.* 48.19.39, 47.11.4; cf. J. Gardner, *Women in Roman Law and Society* (London 1986)158–159. On vanity and adultery as a basis for abortion, *cf.* Sen. *Hlev.* 16.3; Gell. 12.1.8; Tac. *Ann.* 14.62-3; Flemming, *loc. cit.* 169; I. Israelowich, *Patients and Healers in the Roman Empire* (Baltimore 2015) 73.

31 Dion. Hal. 2.15.2.

32 *Ibid.*

33 πρῶτον μὲν εἰς ἀνάγκην κατέστησε τοὺς οἰκήτορας αὐτῆς ἅπασαν ἄρρενα γενεὰν ἐκτρέφειν καὶ θυγατέρων τὰς πρωτογόνους, ἀποκτιννύναι δὲ μηδὲν τῶν γεννωμένων νεώτερον τριετοῦς, πλὴν εἴ τι γένοιτο παιδίον ἀνάπηρον ἢ τέρας εὐθὺς ἀπὸ γονῆς. ταῦτα δ' οὐκ ἐκώλυσεν ἐκτιθέναι τοὺς γειναμένους ἐπιδείξαντας πρότερον πέντε ἀνδράσι τοῖς ἔγγιστα οἰκοῦσιν, ἐὰν κἀκείνοις συνδοκῇ. κατὰ δὲ τῶν μὴ πειθομένων τῷ νόμῳ ζημίας ὥρισεν ἄλλας τε καὶ τῆς οὐσίας αὐτῶν τὴν ἡμίσειαν εἶναι δημοσίαν; Dion. Hal. 2.15.2.

34 Harris, *loc. cit.* (n. 8) 11–15.

work force.[35] Plutarch went as far as saying that the poor do not raise their children.[36] Exposing a child due to physical abnormalities occurred soon after birth and it was encouraged that this was done quickly. Thus, Quintus Tullius Cicero, could ascribe a command for quick killing of a child who was born deformed (*insigniis ad deformitatem puer*) to the XII Tables and use it as a metaphor for the need to nip dissension among citizens in the bud.[37]

4. The role of the midwife

In order to understand the habit of child exposure, it is necessary to ask how such a verdict was reached on medical grounds. Medical attendance and supervision during child birth in the Roman world was ordinary.[38] Male physicians, female doctors, and midwives habitually wrote on childbirth and offered practical assistance during labour. More specifically, midwifery was seen as part of medicine and the use of midwives was prevalent throughout the Roman world.[39] The affinity between midwifery and medicine is confirmed both by a comparative study of the tasks male and female physicians were expected to fulfill, and by the comments of the jurists on their status and worth.[40] In addition, as we shall see, Ulpian recorded two rescripts in which the *praetor* were to appoint qualified midwives to examine disputed cases of paternity and maternity, thus marking their authority as similar to that of physicians in general and actively giving precedence to their authority over that of the *paterfamilias*.[41] The professional prestige of midwives is confirmed, amongst other sources, by the comments of Galen, who dedicated his treatise *On the Anatomy of the Uterus* to a midwife, and spoke kindly on the midwives who attended the wife of his friend, Justus.[42] However, the best source on the art of midwifery is the second century CE physician Soranus of Ephesus in his treatise *Gynaecology*. In this treatise Soranus guided his readership how to identify a good midwife. It is clear from Soranus' description of his faultless midwife that she has extensive medical training. According to Soranus, the responsibility of the midwife included the duty to recognize the newborn that is worth rearing.[43] Soranus explained that the midwife should lay

35 *Ibid.*
36 Plut. *De amore prolis* 5 = *Mor.* 497c.
37 Cic. *De leg.* 3.19.
38 Israelowich, *loc. cit.* (n. 30) 70–86.
39 Cf. the myth of Agnodike, who masterminded as a man in order to study medicine under Herophilus, and thereafter established the art of midwifery: Hyg. *Fab.* 274.1–13, with H. King, "Agnodike and the Profession of Medicine", *PCPhS* 32 (1986) 53–77. According to Pliny, some midwives composed professional treatises: Plin. *Hat.* 28.23.
40 Israelowich, *loc. cit.* (n. 30) 79-80; *CJ.* 6.43.3.1; *Dig.* 50.13.1.2.
41 For the role of physicians in the Roman courts see I. Israelowich, "Physicians as figures of authority in the Roman courts", *Hist.* 63 (2014) 445–462.
42 Gal. *Praecogn.* 8.
43 Sor. *Gyn.* 2.10.1.

the newborn upon the earth immediately after its birth, examine whether it is a male or a female and make an announcement. As the example of P. *Oxy* IV 744 will reveal, gender-preference was a habitual cause for exposure.[44] Soranus' midwife should then consider whether it is worth rearing or not on the basis of a physical examination (καί, πότερον πρὸς ἀνατροφήν ἐστιν ἐπιτήδειον ἢ οὐδαμῶς).[45] The list of tests the midwife should perform indicates that she has attended to the mother for some time. The infant worth rearing had a mother who passed her pregnancy in good health, because if this was not the case the newborn was likely to be of poor health for the whole duration of its lifetime. This judgment could only have been made by the midwife on the basis of prior acquaintance. A second indication of a child worth rearing is a delivery after a full term of parturiency, which is nine months, and not under seven. In addition, the newborn, having been laid on the ground after birth should cry at full vigour. A clinical inspection by the midwife should conclude whether it is perfect in all its parts, members, and senses; that all its cavities - that of the nose, ears, mouth, pharynx, urethra, and anus are free from obstruction. Moreover, all organs must work in a suitable manner, which means not sluggish. The joints should be operational. The overall size of the newborn should not be out of the ordinary, and it should not be displeasing to the eye. Soranus emphasized that this examination should include the midwife touching every part of the newborn, for otherwise an informed decision whether it is worth rearing could not be reached. It is therefore clear that the post-natal examination, which might lead to a verdict of exposure rested on profound medical training and experience, and on a long and intimate acquaintance between the mother and her healthcare provider. Moreover, the authority of the midwife on such a fundamental question indicates that a decision not to raise a neonate child on medical grounds was not taken lightly, nor that the knowledge and experience accumulated in the household was considered appropriate. The Roman legislator's desire to consult midwives indicates the rise of midwifery's professional authority and a decline in the authority of the *paterfamilias* and a breach of the private sphere of domestic jurisdiction.[46]

5. The legal ramifications of child exposure

Child exposure entails legal ramifications. Not all children who were exposed died.[47] Though most foundlings must have ended up as slaves, some were fortu-

44 See below, p. 225

45 Sor. *Gyn.* 2.10.2.

46 For a general discussion see M. Lentano, "Die Stadt der Gerichte. Das Öffentliche und das Private in der römischen Deklamation", in A. Haltenhoff, A. Heil, and F.-H. Mutschler (eds.), *Römische Werte und römische Literatur im frühen Prinzipat* (Berlin and New York 2011) 209–232.

47 Memmer, *loc. cit.* (n. 9).

nate enough to regain their freedom.[48] In fact, two of the protagonists of Suetonius' *De Grammaticis et Rhetoribus* were foundlings.[49] It was therefore necessary to confirm their legal status thereafter. In fact, the legal status of exposed-children seemed important enough for Pliny the Younger as governor of Bithynia to consult the emperor Trajan: *Magna, domine, et ad totam provinciam pertinens quaestio est de condicione et alimentis eorum, quos vocant 'threptous'*.[50] As Pliny himself mentioned, he was not the first Roman governor to turn to the emperor for guidance on this matter. Augustus had already replied on that matter to the Greek city of Andania, Vespasian to the Lacedaemonians, Titus to the Achaeans, and Domitian to two proconsuls again in the case of the Lacedaemonians.[51] In his reply Trajan confirmed that this issue was often discussed by his predecessors but that a universal reply has never been granted.[52] The question of Pliny, as well as the references to the many previous imperial replies on the matter of the legal status of the *expositi* confirms the widespread nature of this habit. In addition, Egyptian papyri provide ample evidence for the raising of foundlings as slaves. In fact, out of the thirty papyri concerning slaves from the Fayum village of Tebtunis, the vast majority involved wet-nurses who were contracted to raise slave children, while only five record an actual slave sale.[53] Though absolute numbers of slaves are notoriously elusive, these documents suggest a high ratio of foundlings amongst the slave population. This picture is only reinforced by numerous literary mentioning of foundlings, from the New Comedy to the Novel.[54]

As Olga Tellegen has noted, the near absence of foundlings from all legal and para-legal sources on the Roman Law of persons is striking.[55] In fact, a status of a foundling would only have been relevant in the event of it finding its parents later in life. The legal sources address such a future meeting between a parent

48 William Harris rightfully pointed out that the prohibition on adopting foundlings imposed by the Roman state were not easily enforced; Harris, *loc. cit.* (n. 22) 136, n. 58.

49 *M. Antonius Gnipho, ingenuus in Gallia natus sed expositus*; Suet. *Rhet.* 7. *C. Melissus, Spoleti natus ingenuus, sed ob discordiam parentum expositus, cura et industria educatoris sui altiora studia percepit, ac Maecenati pro grammatico muneri datus est*; Suet. *Rhet.* 21.

50 Plin. *Ep.* X.65.

51 *Recitabatur autem apud me edictum, quod dicebatur divi Augusti, ad Andaniam pertinens; recitatae et epistulae divi Vespasiani ad Lacedaemonios et divi Titi ad eosdem et Achaeos et Domitiani ad Avidium Tigrinum et Armenium Brocchum proconsules, item ad Lacedaemonios*; Plin. *Ep.* X.65.3.

52 *Quaestio ista, quae pertinet ad eos qui liberi nati expositi, deinde sublati a quibusdam et in servitute educati sunt, saepe tractata est, nec quicquam invenitur in commentariis eorum principum, qui ante me fuerunt, quod ad omnes provincias sit constitutum*; Plin. *Ep.* X.66.1.

53 P. *Mich.* 121, 123, 238.

54 For the theme of child exposure in New Comedy see G. Murray, "Ritual element in New Comedy", *CQ* 37 (1943) 46–54. Cf. Apul. *Met.* 10.23 with M. Zimmerman, *Apuleius Madaurensis Metamorphoses Book X: Text, Introduction and Commentary* (Groningen 2000) *ad loc.*; Longus, *Subl.* 1.2–3.

55 Tellegen-Couperus, *loc. cit.* (n. 9) 129.

and a foundling twice. On the first instance a foundling claimed his deceased father's inheritance and freedmen.[56] The second text is a constitution of Diocletian concerning a father who disallowed his foundling daughter to marry the person who educated her.[57] In these two texts, the question of the *patria potestas* over foundlings arises.[58] The earlier document discloses the circumstances, which led the parents to expose their newborn child, of the child's learning of his true origin, of the arguments made in courts, and of the court's ruling. It is worthwhile to quote the document in full:

> *Scaevola libro vicensimo tertio digestorum. Uxorem praegnatem repudiaverat et aliam duxerat: prior enixa filium exposuit: hic sublatus ab alio educatus est nomine patris vocitatus usque: ad vitae tempus patris tam ab eo quam a matre, an vivorum numero esset, ignorabatur: mortuo patre testamentoque eius, quo filius neque exheredatus neque heres institutus sit, recitato filius et a matre et ab avia paterna adgnitus hereditatem patris ab intestato quasi legitimus possidet. Quaesitum est, hi qui testamento libertatem acceperunt utrum liberi an servi sint. Respondit filium quidem nihil praeiudicii passum fuisse, si pater eum ignoravit, et ideo, cum in potestate et ignorantis patris esset, testamentum non valere. Servi autem manumissi si per quinquennium in libertate morati sunt, semel datam libertatem infirmari contrarium studium favore libertatis est.* (*Dig.* 40.4.29)

A man had rejected his pregnant wife and married another woman. The first wife gave birth to a son whom she subsequently abandoned. The boy was taken in and educated by someone else, always being called by his father's name. During his father's lifetime, neither parent knew whether their son was alive. After the father had died and his will had been read – in which the son was neither disinherited nor appointed heir – the son was acknowledged by his mother and by his paternal grandmother and he took possession of his father's inheritance as heir upon intestacy as if he were a *heres legitimus*. The question was raised as to whether those who had been freed under the will were free or slaves. He (Scaevola) answered that, to be sure, the son had not suffered any loss if his father did not know him, and that therefore, i.e., because he had been in his father's *potestas* even though the father did not know, the will was not valid. However, if manumitted slaves have lived in freedom for five years, then the invalidation of freedom once given is against the principle of favouring freedom.[59]

Of the two queries addressed here by Scaevola, namely whether a foundling remained under his father's *potestas* and is, therefore, a *suus heres* of his natural father, and whether his late father's slaves, which were released by his will more than five years before the case was addressed by the court, should resume their

56 *Dig.* 40.4.29 by the jurist Cervidius Scaevola.

57 *CJ.* 5.4.16.

58 In theory, this question is easily resolved positively. Cf. F. Lanfranchi, "Ius exponendi e obbligo alimentare nel Diritto romano-classico", *Studia et Documenta Historiae et Iuris* 6 (1940) 46–53. In note 150, he discusses the complication of the abandonment having been performed by the mother. See also Watson, *loc. cit.* (n. 28) 81–82.

59 Cf. n. 55

previous status and become the plaintiff's slaves, only the first one concerns us here.[60] As this *responsum* of Scaevola clearly demonstrates, foundlings were never released from their father's *potestas*.[61] In fact, the potential conflict between the *expositus*' natural father's *patria potestas*, and the authority of the *nutritor* was a common theme in Roman rhetorical textbooks.[62] Moreover, the identity of the jurist, whose opinion the *Digest* quoted is Q. Cervidius Scaevola, who was *praefectus vigilum* in 175 CE before becoming chief legal advisor of Marcus Aurelius.[63] As such, Scaevola must have enjoyed the *ius respondendi ex auctoritate principis*, thus his response is of particular value here. Furthermore, the fact that the plaintiff could have reunited with his mother and learn of the identity of his birth father suggests that the person who collected the exposed child was familiar with his background. It is otherwise unclear how such a future reunion could have happened. Acquaintance between exposing parent(s) and the person who collected and raised the foundling is, in all likelihood, also the case in the later constitution of Diocletian, where an exposing father prohibited the marriage of his exposed daughter with the person who raised her.[64] These two cases show that the *patria potestas* was unaffected by the exposure.[65] They also indicate that exposure was, at least on some occasions, more organized than the term alone indicates. Quintilian offered supporting evidence for the continuance of the *patria potestas* over foundlings and for the possible reunion of an exposed child with his father. In the seventh book of his *Institutio oratoria* Quintilian used the case of a father who wished to reclaim his exposed child in order to demonstrate a rhetorical point. In order to set the scene Quintilian quoted the law which stated that the father could claim his child back, provided he has paid the person who raised him the fees spent on his rearing: *Expositum qui agnoverit, solutis alimentis recipiat*.[66] Seneca also included the theme of recovering an exposed child in his work on the teaching of rhetoric. In his *Controversiae* he

60 See Tellegen-Couperus, *loc. cit.* (n. 9) for a compelling analysis of the legal aspects of this case.

61 Grubbs, *loc. cit.* (n. 4) 297.

62 Quint. *Inst.* 7.1.14; Quint. *Decl.* 278; Sen. *Contr.* 9.3; Sulpicius Victor, *Institutiones oratoriae* 48 (*Rhetores Latini minores*, ed. Halm). Boswell, *loc. cit.* (n. 22) 60–62, 124–125; cf. Grubbs, *loc. cit.* (n. 4) 298. Literature on the relations between law and rhetoric is vast, but see F. Lanfranchi, *Il diritto nei retori romani* (Milan 1938); M. Lentano, *Retorica e diritto. Per una lettura giuridica della declamazione latina* (Lecce 2014).

63 On Q. Cervidius Scaevola see W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen* (Cologne and Vienna 1967) 217–219.

64 *Imperatores Diocletianus, Maximianus: Patrem, qui filiam exposuit, at nunc adultam sumptibus et labore tuo factam matrimonio coniungi filio desiderantis favere voto convenit. Qui si renitatur, alimentorum solutioni in hoc solummodo casu parere debet*; *CJ*. 5.4.16.

65 The prevalence of the *patria potestas* is consistent with the XII clause, which relieved a child from his father's *patria potestas* only if the father sold his child for three times, XII Tab. IV. 2.b: *si pater filium ter venum duit filius a patre liber esto*.

66 Quint. *Inst.* 7.1.14. For this payment: Quint. *Decl.* 278. Alexander Severus ruled that as long as the natural father paid back the expenses he had a legal right over his natural child: *CJ* 8.51(52).1.

included a case of a man who asked for one of his two exposed sons to be brought back to him.[67] It is, therefore, clear that the legal status of an exposed child was, at least in theory, a subject of his natural *paterfamilias* and that a future reunion was not outside the realm of possibility and legal debate. Like Quintilian, Seneca was aware that a man who acknowledges a child he has exposed may take him back only after paying for his upbringing: *expositum qui agnoverit solutis alimentis recipiat*.[68] The existence of this law, and its recurrence in rhetorical works, which were used to train jurists such as those of Quintilian and Seneca suggests that previous acquaintance between an exposing parent and the person who reared the foundling was not an odd occurrence.[69]

6. The evidence of the papyri

Papyri offer further evidence. P. *Oxy* I 37 is a report of a lawsuit relating to the identity of a child dated to 49 CE. A woman by the name of Saraeus was employed to act as a nurse to a foundling, which had been adopted by the instigator of the lawsuit, Pesorius. Pesorius himself picked the foundling from the gutter, where it is assumed he was left. The nurse claimed that the foundling died while under her care. Pesorius argued that Saraeus lied and that the child she claimed as her own was in fact the foundling he collected. The court of Tiberius Claudius Pasion, the *strategus*, ruled that the child should not be removed from the custody of Saraeus, but ordered her to pay back her wages as a nurse. It is noteworthy that Pesorius took the foundling as a son, although such an adoption was explicitly prohibited: Ἀριστοκλῆς ῥήτωρ ὑπὲρ Πεσούριος ... ἐγένετε ἐνθάδε ἡ τροφεῖτις εἰς υἱόν τοῦ Πεσούριος.[70] While it is true that the court of the *strategus* was open to everyone, not merely to Roman citizens, the law exercised in this court was Roman. Another papyrus, this one a personal letter dated to the reign of Augustus, discloses the role of the father as the instigator of child exposure, and hints as to the reason behind it.[71] It is a letter of one Hilarion to a woman by the name of Alis, whom the author described as his sister, although it is inferred that she is also his wife. Hilarion was concerned with her well-being, and the well-being of two other women, Berous, and Apollonari‹o›n (presumably of the household staff) and the well-being of their child. In addition he asks Alis if she bears a child. He instructed her that if she bears a boy she should keep it, and if

67 Sen. *Contr.* 9.3.

68 Sen. *Contr.* 9.3.1.

69 S.F. Bonner, *Roman Declamation in the Late Republic and Early Empire* (Liverpool 1949) 125; Lanfranchi, *loc. cit.* (n. 62) 268 ff.

70 P. *Oxy* I 37, line 4–9; for the prohibition see S. Riccobono (ed.), *Il Gnomon dell'Idios Logos* (Palermo 1950) 41, 107.

71 N. Lewis, *Life in Egypt Under Roman Rule* (Oxford 1983) 54; D. Braund, *Augustus to Nero: A Sourcebook* (London 1985) Nr. 723; R.K. Sherk, *The Roman Empire: Augustus to Hadrian* (Cambridge 1988) 245; J. Rowlandson, *Women and Society in Greek and Roman Egypt: A Sourcebook* (Cambridge 1998) 230.

a girl she should expose it: ἐὰν πολλά πολλῶν τέκῃς ἐὰν ἦν ἄρσενον ἄφες ἐὰν ἦν θήλεα ἔκβαλε.[72] Hence, the choice of exposing is portrayed as an unrestricted prerogative of the father and the reason being that he only wanted a son. The choice not to raise a newborn because it is female is alluded to in the *lex regia* of Romulus recorded by Dionysius of Halicarnassus and quoted above. In addition, the requirement of the midwife to pronounce the newborn's gender immediately and the mentioning of it in a section dealing with how to recognize which child should be reared by Soranus might also suggests that gender preference was important enough to parents, to the extent of exposing the less coveted females. This letter, though not a legal document, alludes to the habit of child exposure in Roman Egypt and to the preference of boys over girls as sufficient reason for exposure.

7. Disputed maternity and paternity

The legal report recorded in P. *Oxy* I 37 is an example of the Roman court's aptitude and willingness to rule on contested maternity and paternity. In fact, Tiberius Claudius Pasion was confident enough to determine that the boy was Saraeus' from its features: ἐπεὶ ἐκ τῆς ὄψεως φαίνεται τῆς Ζαρεῦτος εἶναι τὸ παιδίον.[73] The willingness of the Roman court to rule on matters of disputed maternity or paternity is also exemplified in two rescripts on the examination of pregnant women and the observation of delivery. These rescripts belong at the heart of family law. They demonstrate the interest and evolution of the Roman private law in family life. They reveal the concern of the Roman legislator with the well-being of the child, even at the price of the *potestas* of the *paterfamilias*. These rescripts are relevant to a discussion of the legal implications of child exposure and the nature of the *patria potestas* both because they reveal the legislator's state of mind, and, more concretely, because they entail scenarios, which could fall under child exposure. Ulpian quoted a rescript of Marcus Aurelius and Lucius Verus (161–167 CE), which concerned a husband who claimed that his recently divorced wife was pregnant, while she denied it.[74] The addressee of this rescript, an urban praetor by the name of Rutilius Severus, is ordered to appoint three skilled and trustworthy midwives (*tres obstetrices probatae et artis et fidei*) who will examine the woman and compile a report. It is noteworthy that the mid-

72 P. *Oxy* IV 744. Stephanie West suggested that Hilarion's command to have the prospective daughter exposed is only reasonable if Apollonarion, rather than the wife Alis, is the expectant mother: S. West, "Whose Baby? A Note on P. Oxy. 744", *ZPE* 121 (1998) 167–172. However, Paul McKenchnie offers a renewed claim for the more widely accepted reading: P. McKenchnie, "An Errant Husband and a Rare Idiom (P.Oxy 744)", *ZPE* 127 (1999) 157–161.

73 P. *Oxy* I 37 col. II, line 3–4.

74 *Ulpianus libro 24 ad edictum: pr. Temporibus divorum fratrum cum hoc incidisset, ut maritus quidem praegnatem mulierem diceret, uxor negaret*; *Dig.* 25.4.1.

wives were to be appointed by the praetor himself, not by the parties concerned.[75] If the midwives conclude that the wife is pregnant, she were to give birth at the house of a respectable woman approved by the praetor.[76] This rescript is concerned with the father's future recognition of the child and relies on an existing *senatus consultum* on the recognition of children. More explicitly, the rescript stated that only if the woman appeared before the praetor and refused to answer when asked if she is pregnant the father will be excused from recognizing his child. According to Ulpian - our source for both rescripts and *senatus consultum* - it is clear from the rescript on contested pregnancy that the senate's resolutions on the recognition of children will not apply if the woman pretended she was not pregnant or even denied it: *Ex hoc rescripto evidentissime apparet senatus consulta de liberis agnoscendis locum non habuisse, si mulier dissimularet se praegnatem vel etiam negaret.*[77] The *senatus consultum* on the recognition of children has two parts, only one of which is relevant here.[78] This law allowed a wife to inform her husband that she thinks that she is pregnant within thirty days from their divorce, provided that she is bearing the husband's child. According to this *senatus consultum*, the husband is thereupon forced to recognize the child, unless he is able to prove in the praetor's court that he is not the father. It is assumed that the praetor presiding is the authority, which determined if the husband is indeed the child's father.[79] If the husband does not contend his ex-wife's claim he is compelled to recognize the child. Hence, recognition, and its immediate consequence of expressing intention to raise the child was not an unrestricted prerogative of the father. If the husband challenges his wife's claims he will only be compelled to recognize the child if it really is his.[80] The first part of this clause would have been unnecessary if the father would have had an unmitigated right of *non tollere*. The second part assumes that the court was capable of asserting contested paternity.[81] Both parts of the rescript confirm that under certain circumstances recognition was forced upon the father. Though not explicitly stated, it is to be understood that exposure was thereafter prohibited, or simply not feasible. It is also to be understood that the court's interest here is the well-being of the child, as it showed detailed awareness of the child's future inheritance rights.

75 *Et notandum, quod non permittitur marito vel mulieri obstetricem adhibere, sed omnes a praetore adhibendae sunt*; *Dig.* 25.4.5.

76 *Dig.* 25.4.1.

77 *Dig.* 25.4.1.1.

78 *Dig.* 25.3.1.

79 *Dig.* 25.3.1.3.

80 *Poena autem mariti ea est, ut, nisi aut custodes praemiserit aut contra denuntiaverit non esse ex se praegnatem, cogatur maritus partum agnoscere: et, si non agnoverit, extra ordinem coercetur. Debebit igitur respondere non esse ex se praegnatem aut nomine eius responderi: quod si factum fuerit, non alias necesse habebit agnoscere, nisi vere filius fuerit*; *Dig.* 25.3.1.4.

81 Cf. P. *Oxy* I 37, 38.

A second rescript concerning the examination of pregnant women and observation of delivery concerns women claiming that she is pregnant by their late husband. After ensuring against the wife's possible attempts to deceive her husband's family, the legislator explained that the child is to be raised by the (male) person its parent directs to do so: *Apud eum educatur, apud quem parens iusserit.*[82] If the child's parent has no such orders in place, the praetor will appoint a person who will raise the child after cause is shown: *Si autem nihil parens iusserit aut is, apud quem voluerit educari, curam non recipiet: apud quem educetur, causa cognita constituam.*[83] The person appointed by the praetor has to produce the child to the praetor on certain intervals until the child can speak. This duty of rearing the child by a person nominated by the praetor calls to mind the role of the tutor, whose curatorial duties are also determined and monitored by the praetor. This rescript too would have been redundant if the decision to recognize a newborn was an unrestricted prerogative of the father or of the father's *paterfamilias*.

8. The impact of Christianity on the habit of child exposure

The rise of Constantine and future Christian Emperors instigated a noticeable shift in the legislator's attitude towards infanticide and child exposure.[84] Though this paper is concerned with child exposure and its implications on the nature of the *patria potestas* during the High Empire, later evidence can shed light on earlier phenomena. It is therefore crucial to examine the relevant legislation of Constantine and his successors. An early constitution of Constantine made it legal to purchase a newborn child. A sale of an unwanted newborn must have relieved its parents from the harsh measure of exposure.[85] The same constitution, though not yet prohibiting, posed substantial difficulties on parents who wished to restore their exposed children, by forcing them to defend their right over the exposed child as to a slave, which meant reimbursement not only of the former *alimenta*, but a more explicit value as a slave. Moreover, this law made its attempted circumvention punishable: *poenae subiciendis his, qui contra hanc legem venire temptaverint.*[86] Though child exposure was deemed by moralists like Seneca and Pliny harsh before the rise of Christianity, this critique did not get expression in legislation during the Principate.[87] This law was a part of Constantine's effort to

82 *Dig.* 25.4.1.10.

83 *Ibid.*

84 While there is an entry in the Digest attributed to the Severan jurist Paul equated child exposure with murder: *Paulus libro second sententiarum: Necare videtur non tantum is qui partum praefocat, sed et is qui abicit et qui alimonia denegat et is qui publicis locis misericordiae causa exponit, quam ipse non habet.* It's authorship has been convincingly disputed: Harris, *loc. cit.* (n. 8) 19, n. 171.

85 *C. Th.* 5.10.1.

86 *Ibid.*

87 Sen. *De ira* 1.15.2; Plin. *Hat.* 7.34.

impose Christian values in the Roman Empire. In fact, an edict of 322 CE aimed to further discourage child exposure.[88] This law was soon followed by an explicit abolition of the power of life and death by Constantine.[89] Thus, the picture which emerges from Constantine's legislation on the existing habit of child exposure is one in which exposing a newborn child lay within the rights of the *paterfamilias*. Exposure often enough concluded with the foundling being raised by a person who knew the natural origin of the child, hence making later reunion possible. A father kept his *potestas* over the child, and, in consequence, the child held to its status as the father's, even if restoration was conditioned by the payment of the *alimenta*.

9. Conclusion

This paper set to examine whether the right to expose one's child - as an expression of the *patria potestas* – was curtailed by the Roman state. The paucity of evidence for the exercise of the *vitae necisque potestas* over those who have been accepted into the family, together with the lack of critical analysis of its nature and extent in the legal sources provided grounds raises questions about the practice. A single mentioning of a *lex regia*, which regulated child exposure by an Augustan author, Dionysius of Halicarnassus, does not provide conclusive evidence for uncensored authority of a *paterfamilias* to expose a newborn under his *potestas*. Furthermore, the central role of the midwife in diagnosing a child who should not be reared on medical grounds provides positive proof that during the High Empire the Roman legislator deemed the *paterfamilias* under qualified to make such a decision himself. This view was then supported by two rescripts, which assigned midwives official roles by the *praetor* and the Roman court, thus limiting the power of the *paterfamilias*. Similarly, an analysis of the legal ramifications of child exposure showed that exposure did not terminate the *patria potestas* and even offered strong hints that it was not uncommon for an educator of the foundling to have known the identity of the exposing parent, hence creating an opportunity for future reunion. Jurists, as well as rhetors and teachers habitually addressed the legal aspects of such a union. In addition, the Roman legislator instructed the courts to restrict the right of the father not to rear an unwanted child by an explicit *senatus consultum* on the recognition of children. Finally, an examination of later evidence from the age of Constantine onwards offered evidence that the path for a reunion of an exposing father with his exposed child merely by paying the fees for the child's upbringing had to be blocked by the new regime. It therefore appears that child exposure as an expression of *patria potestas* was not unrestricted. Moreover, the absence of all queries on this restrictive measure on the legal rights of the *paterfamilias* offers strong proof

88 *C. Th.* 11.27.2.
89 *C. Th.* 11.15.1.

that Roman jurists never perceived the *vitae necisque potestas* of the *partia potestas* literally.

Correspondence:
Ido Israelowich
Department of Classics
Tel Aviv University
Israel
ido0572@post.tau.ac.il