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**The status of women in Roman and Frankish law**

**Bradley, Susan Paige, M.A.**

**Rice University, 1990**

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RICE UNIVERSITY

THE STATUS OF WOMEN IN ROMAN AND FRANKISH LAW

by

SUSAN BRADLEY

A THESIS SUBMITTED  
IN PARTIAL FULFILLMENT OF THE  
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#### Abstract

Under sixth century Roman law (Corpus Juris Civilis) and Frankish law (Pactus Legis Salicae), women, while lacking full juridical equality with men, nevertheless possessed many legal rights and freedoms. While similarities existed between the legal standings of women in both worlds, a fundamental difference underlay the laws and legal systems. Over centuries, the Roman legal system evolved from dependence on family for justice to dependence on the state. The presence of a relatively strong and stable Roman government, legal system, and policing force gradually decreased Roman women's legal dependence on their families and weakened the legal control of male agnates and husbands on Roman women's lives, creating a system which gave women legal recourse against kin (paterfamilias excepted). Frankish law was more dependent on family and kin for enforcement; hence, Frankish women, lacking legal recourse against family, were subject to greater legal control by male relatives.

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Their marriage code, however, is strict, and indeed no part of their manners is more praiseworthy. Almost alone among barbarians they are content with one wife, except a very few among them, and those not from sensuality, but because their noble birth procures for them many offers of alliance. The wife does not bring a dowry to the husband, but the husband to the wife. The parents and relatives are present, and pass judgement on the marriage-gifts, gifts not meant to suit a woman's taste, nor such as a bride would deck herself with, but oxen, a caparisoned steed, a shield, a lance and a sword. With these presents the wife is espoused, and she herself in her turn brings her husband a gift of arms. This they count their strongest bond of union ... the woman ... must live with the feeling that she is receiving what she must hand down to her children neither tarnished nor depreciated, what future daughters-in-law may receive, and may be so passed on to her grand-children. Thus with their virtue protected they live uncorrupted by the allurements of public shows or the stimulant of feasting. Clandestine correspondence is equally unknown to men and women. Very rare for so numerous a population is adultery, the punishment for which is prompt, and in the husband's power. Having cut off the hair of the adulteress and stripped her naked, he expels her from the house in the presence of her kinsfolk, and then flogs her through the whole village. The loss of chastity meets with no indulgence; neither beauty, youth, nor wealth will procure the culprit a husband. No one in Germany laughs at vice, nor do they call it the fashion to corrupt and to be corrupted. Still better is the condition of those states in which only maidens are given in marriage, and where the hopes and expectations of a bride are then finally terminated. They receive one husband, as having one body and one life, that they may have no thoughts beyond, no further-reaching desires, that they may love not so much the husband as the married state. To limit the number of their children or to destroy any of the subsequent offspring is accounted infamous, and good habits are here more effective than good laws elsewhere. In every household ... every mother suckles her own offspring, and never entrusts it to servants and nurses ... The young men marry late, and their vigour is thus unimpaired. Nor are their maidens hurried into marriage; the same age and a similar stature is required; well matched and vigorous they wed,<sup>1</sup> and the offspring reproduce the strength of the parents.

Thus wrote the historian Tacitus in his Germania (A.D. 98), describing the system of marriage and family among the Germans, characterized by its simplicity, strictness, and virtue. In his eyes, the German ways of marriage and family were quite superior to the declining, decadent Roman ways. For, in the Roman society of the first century, many of the old patriarchal controls over marriage and family were breaking down as Roman women were gradually being emancipated from the control of their male kin.<sup>2</sup> The resulting freedom for Roman women inspired Tacitus' lament. To Tacitus, the German ways were more noble than those of Roman society, closer as they were to his perceptions of the venerable Roman institutions of his ancestors where there was no divorce, no wet-nurses, no tolerance for adultery, no frivolous gifts to women.

In the next centuries, many of the institutions of the German peoples changed as they came in more frequent contact with the Roman world. No less did Roman laws and institutions change, partly as a result of contact with the Germans, especially contact in the form of periodic Germanic invasions. There were many results of such contact. One result was gradual change in those laws and institutions which affected the status of women, both Roman and German, including the institutions Tacitus so deplored in the Romans and admired in the Germans. Another result was that in the fifth and sixth centuries much of the western Roman Empire was lost to Roman control and came to be under the dominion of different Germanic groups: Visigoths,

Vandals, Ostrogoths and Franks among others. The eastern part of the Empire and parts of the western Empire were still under "Roman" or Byzantine control. The juxtaposition of the two worlds, Roman and Germanic, in the area where there had for centuries been only the former, has led many historians to question and compare the different systems, much as Tacitus did. This paper examines a narrow field of comparison, one facet of Roman and German societies, the legal status of women in Roman and Frankish law. Under both Roman and Frankish laws, women, although they did not have full juridicial equality with men, did have many legal rights and freedoms. The main difference between the two legal systems was the mechanism of enforcement. Roman law was more effectively and impartially enforced and Roman women's rights better upheld. Therefore the status of women in sixth century Roman law was somewhat better than that of Frankish women.

The fifth and sixth centuries saw several attempts to codify laws, both Roman and German. For Roman law, this thesis depends on the sixth century legal codification, the Corpus Juris Civilis, compiled at the instigation of the Emperor Justinian.<sup>3</sup> Since there were several different Germanic law codes compiled in the West, I chose to work with the laws of one group of Germans, the Franks, commonly held to have been the least Romanized of the Germanic groups that entered the Empire (saving perhaps the Saxons, Angles and Jutes who invaded Britain),<sup>4</sup> in order to present a greater contrast between sixth century Roman and German law. The law codes of most of the other Germanic groups showed greater Roman influence than did the

Frankish code; the codes of the Anglo-Saxons, while free from Roman influence, were seventh century codifications and thus somewhat out of the time frame of the promulgation of the Roman codes. The Frankish laws, (Pactus Legis Salicae) were probably collected circa A.D. 507 and, with the attached Capitularies, spanned the sixth century.<sup>5</sup> The Corpus Juris Civilis was assembled between A.D. 528 and 534, and along with some later Imperial legislation that was subsequently included, also roughly spanned the sixth century.<sup>6</sup>

Previous scholarly works on the status of women in the Late Empire are scarce. While in the last decades the interest in women's studies has resulted in a series of books concerning women in Roman society, including Sarah B. Pomeroy's Goddesses, Whores, Wives, and Slaves,<sup>7</sup> Jane F. Gardener's Women in Roman Law and Society<sup>8</sup> and J. P. V. D. Balsdon's Roman Women,<sup>9</sup> these works have dealt with Classical Roman law and society and women of the Republic, Principate, and Early Empire, not with women and laws of the Late Empire (A.D. 300-600). Additional information can be gleaned from the works of Peter Brown, including The World of Late Antiquity, and The Body and Society,<sup>10</sup> and from histories of women in Christianity, Ruth A. Tucker and Walter Liefeld's Daughters of the Church<sup>11</sup> and Joan Morris' The Lady was a Bishop,<sup>12</sup> but these mention only a little about the legal status of fifth and sixth century Roman women. Similarly, Suzanne Wemple's Women in Frankish Society<sup>13</sup> and David Herlihy's Medieval Households,<sup>14</sup> touch briefly, if not always correctly, upon Roman law. The books that deal best with women in

later Roman law are somewhat older. The most thorough is Percy Corbett's The Roman Law of Marriage (1930),<sup>15</sup> although the author tends sweepingly to attribute most of the changes to the influence of Christianity. Somewhat more recent, but less detailed about later Roman law is Fritz Schulz' Classical Roman Law (1951).<sup>16</sup> Thus, there is little recent scholarship about the legal status of women in the Late Empire. However, there is quite a bit of primary material, especially that contained in the numerous volumes of the Corpus Juris Civilis.

The opposite is true for Frankish law. There has been much recent scholarship concerning Frankish law and society, although little agreement, primarily because the primary legal source material is sparse. The Pactus Legis Salicae is only a small collection of laws, encompassing a 65-title code attributed to King Clovis and the sixth century additions (Capitularies) of a few of his descendents. Some of the more recent scholarly works on Frankish law include: Katherine F. Drew's Law and Society in Early Medieval Europe,<sup>17</sup> Edward James' The Franks,<sup>18</sup> Theodore J. Rivers' The Laws of the Salian and Ripuarian Franks,<sup>19</sup> Suzanne F. Wemple's Women in Frankish Society, J. M. Wallace-Hadrill's The Long-Haired Kings.<sup>20</sup> However, there is little agreement among scholars as to the legal status of women in Frankish society, or on the questions of legal rights, marriage, divorce, and particularly, of inheritance of land and types of land tenure, all issues which influenced the status of women. Nor, from the small amount of legal information can definite conclusions be

drawn, so more value is placed on the legal information provided by sources other than law codes. Consequently, although this paper focuses on Roman and Frankish law, it is necessary to include legal information from non-legal Frankish sources to make valid comparisons between the legal status of Roman and Frankish women. The main supplemental sources include Gregory of Tours' History of the Franks,<sup>21</sup> Bernard S. Bachrach's translation of the anonymous Liber Historiae Francorum,<sup>22</sup> and J. M. Wallace-Hadrill's translation, The Fourth Book of the Chronicle of Fredegar.<sup>23</sup>

The political turmoil of the fifth and sixth centuries causes additional problems for modern scholars studying this period. Because the mechanisms of Roman government broke down at various times, and the mechanisms of Frankish government were not yet established, the enforcement of the laws in the sixth century was haphazard. The question of the enforcement of the laws is an important one. Law as it was written and law as it was enforced was often quite different. Thus, the study of law is, by its nature, somewhat theoretical. In the case of Roman law of the Late Empire, the system for the enforcement of the law, magistrates, soldiers, courts, lawyers, etc., was thorough enough to back the laws in those areas where Roman rule was strong. In the cities and the central regions of the Empire, the laws were well enforced. On the fringes of the Empire where the hold of Rome was weaker, and during times of political anarchy or invasion, the laws would not have been so well enforced. In the fifth and sixth centuries under the pressure of anarchy and invasions, the Roman

Empire fractured and the Western half was lost to Roman rule; the Eastern Empire remained relatively intact and the Roman mechanisms of government and law enforcement remained in effect.<sup>24</sup> For this reason, the Roman part of this paper is based on the law of the Eastern Empire, the Corpus Juris Civilis, rather than other Roman law codes.

The Corpus Juris Civilis was promulgated in the Eastern Empire and introduced into the west by Emperor Justinian's armies.<sup>25</sup> However, the temporary Imperial reconquest of Italy was ended soon thereafter by the invasions of the Lombards. People in those small parts of Italy which remained under Imperial control might have been familiar with parts of the Corpus Juris Civilis,<sup>26</sup> but on the whole, the Roman law which survived in the West in various Germanic codifications<sup>27</sup> or in Church law,<sup>28</sup> was based on the Codex Theodosianus (Theodosian Code A.D. 438), a compilation of all imperial decrees since the Emperor Constantine.<sup>29</sup> There were some differences between the Corpus Juris Civilis and the Theodosian Code, particularly in the area of divorce and remarriage. Marriage and divorce laws tended to vary by Emperor, especially the Christian Emperors of the fourth and fifth centuries. While Roman law continued in the west even after Roman rule had been lost, it had to change somewhat. Roman Law, particularly the laws concerning women, was based on the presence for the enforcement of law of some type of state "police" force, and to a lesser degree on the protection of the individual's family. A person with a complaint was responsible for bringing the offender before the

Roman magistrate. If the complainant and his household or family were weaker than the offender and were unable to bring the offender before the magistrate, the magistrate would send men to help.<sup>30</sup> Thus Roman law was not completely dependent on the family for enforcement. Roman women, therefore, did not need to depend entirely on their menfolk to protect them and had become fairly free from control of their male kin, except for their patresfamilias. When the Empire broke down, that method of enforcement of the laws disappeared. It is difficult to know the legal status of Roman women where there was not the Roman mechanism of magistrates and soldiers to uphold the law. Would women have become more dependent on their menfolk? If so, many of their legal rights and freedoms vis a vis their male kin might have been curtailed. Added to this, the Roman law which remained in much of the West was codified by order of Germanic kings in Germanic kingdoms, and could have had Germanic interpolations: Hans Wolff describes this process:

Roman law here frequently suffered further barbarization and corruption by admixtures derived from the customs and conceptions of those Germanic peoples who became the dominant element in these lands.<sup>31</sup>

Thus Roman law as it survived in the Germanic kingdoms would have been somewhat less "Roman" than its counterpart in the Empire. The blurring of racial distinction between Romans and Germans in some kingdoms in the West would have further weakened the effect of Roman law in the West. Therefore, this paper deals with the legal status of Roman women within the Empire, based on the Corpus Juris Civilis, not



on the status of Roman women in those areas of the West that were theoretically under the laws of the Theodosian Code.

While Roman rule was periodically unstable in the fifth and sixth century, Frankish rule was worse. In the late fifth and early sixth century, one of the tribes of the Salian Franks, under the ruthless leadership of their King Clovis, expanded by conquest, alliances, and timely murders to rule almost the whole of Gaul.<sup>32</sup> Clovis' wars of conquest and the wars and power struggles among his descendants added to the instability of the period. Thus, the problem of interpreting how effectively the laws were enforced is greater in studying the Frankish laws than the Roman. Also, the mechanism for the enforcement of Frankish law was not magistrates and soldiers but the family and the kin. If a Frank were injured, he needed the help of his family to bring the offender to court, and to give witness by swearing oaths on his behalf. Similarly, a person charged with a crime and brought into court by his "victim's" family, would have needed the help of his own family to swear oaths for him and to help pay the fine incurred if he should be found guilty. Thus Frankish law was dependent on the Frankish family for enforcement. A person with a large family and kin group was better off. A person without a family or kin group had to acquire a lord or master in order to survive. Thus, the effectiveness of Frankish law and the rights and protections given to women in the Frankish law is questionable.

A final aspect of Roman and Frankish law which affects modern understanding of the laws is the notion of law itself. In both Roman and Frankish societies, laws were not absolute or perfect but:

"imperfect" - i.e., they forbade, but did not render void, the objectionable transaction - or "less than perfect" - i.e., they provided a penalty for disobedience, without depriving a transaction made in violation of the law of its legal effect. <sup>33</sup>

For instance, Roman laws that forbade certain divorces would not have rendered such divorces illegal. Instead, the couple would have been penalized, assuming anyone cared enough to bring them to court, but marriages contracted after the divorce were legal. Similarly, Frankish law penalized men who married by abducting a bride but did not necessarily separate the couple. Again, if no one brought the offender to court, no penalty was imposed. In both Roman and Frankish law, if someone broke the law, but no one sued them, no penalties would ensue. The governments did not take a prosecutorial role in civil law. This imperfection of the law added to the weak mechanisms of legal enforcement and the political instability of the era construct the background for understanding the status of women in Roman and Frankish law.

## Notes to the Introduction

1. Tacitus, Germania 18-19 in Complete Works of Tacitus, ed. Moses Hadas (New York: Random House, Inc., 1942) 717-718.
2. Percy Ellewood Corbett, The Roman Law of Marriage (Oxford: Clarendon Press, 1930) 91, 180, 219.  
and Fritz Schulz, Classical Roman Law (Oxford: Clarendon Press, 1951) 103, 115.
3. I used S. P. Scott's translation of Roman law which included the Corpus Juris Civilis. S. P. Scott, trans., and ed., The Civil Law. 17 vols. (Cincinnati: The Central Trust Company, 1932). I also referred to Paul Krueger and Theodor Mommsen, ed., Corpus Juris Civilis (Berlin: 1894).
4. Theodore J. Rivers, trans. and ed., Laws of the Salian and Ripuarian Franks (New York: AMS Press, Inc., 1986) 2-4.
5. Ibid. For Frankish law I depended on two recent translations: Theodore J. Rivers, trans., and ed., Laws of the Salian and Ripuarian Franks, and Katherine F. Drew, "The Laws of the Salian Franks," Unpublished Translation, Rice University, 1989. These are translations of the 65-title code of Clovis plus the Capitularies of Childebert I, Chlotar I, and Chilperic I.
6. Hans Julius Wolff, Roman Law: An Historical Introduction (Norman: University of Oklahoma Press, 1951) 163.
7. Sarah B. Pomeroy, Goddesses, Whores, Wives, and Slaves: Women in Classical Antiquity (New York: Schocken Books, 1975).
8. Jane F. Gardner, Women in Roman Law and Society (London: Croom Helm Ltd., 1986).
9. J. P. V. D. Balsdon, Roman Women: Their History and Habits (London: The Bodley Head Ltd., 1962).
10. Peter Brown, The World of Late Antiquity (London: Thames and Hudson Ltd., 1971).  
  
Peter Brown, The Body and Society (New York: Columbia University Press, 1988).
11. Ruth A. Tucker, and Walter Liefeld, Daughters of the Church: Women and Ministry from New Testament Times to the Present (Grand Rapids: Academie Books, 1987).

12. Joan Morris, The Lady was a Bishop: The Hidden History of Women with Clerical Ordination and the Jurisdiction of Bishops (New York: The Macmillan Company, 1973).
13. Suzanne F. Wemple, Women in Frankish Society: Marriage and the Cloister, 500 to 900 (Philadelphia: University of Pennsylvania Press, 1985).
14. David Herlihy, Medieval Households (Cambridge: Harvard University Press, 1985).
15. Corbett, see above fn 2.
16. Schulz, see above fn 2.
17. Katherine F. Drew, Law and Society in Early Medieval Europe (London: Variorum Reprints, 1988).
18. Edward James, The Franks (New York: Basil Blackwell Inc., 1988).
19. Rivers, see above fn 4.
20. J. M. Wallace-Hadrill, The Long Haired Kings (New York: Barnes and Noble Inc., 1962).
21. Gregory of Tours, History of the Franks, trans. Lewis Thorpe (1974; New York: Viking Penguin Inc., 1985).
22. Bernard S. Bachrach, trans., and ed., Liber Historiae Francorum (Lawrence: Coronado Press, 1973).
23. J. M. Wallace-Hadrill, trans. and ed., The Fourth Book of the Chronicle of Fredegar with Its Continuations (New York: Thomas Nelson and Sons, 1960).
24. The Roman Empire between the first and sixth century A.D. was an empire centered on the Mediterranean Sea. The center of the Empire, the ancient cities of the Mediterranean, would have been more Romanized than the Northern European fringes, Britain, the area of the Rhine, etc. In the fifth and sixth centuries, much of the Western Empire (North Africa, Britain, Gaul, Spain, Italy) was lost to the political control of the Roman Empire, which had its capitol at Constantinople. The richer part of the Empire, the Eastern Empire, remained relatively intact through the fifth and sixth centuries. The Eastern Empire spanned the Balkans, Asia Minor, Syria, Lebanon, Palestine, and Egypt, although borders and territory tended to fluctuate with German invasions and Persian wars. Also, in the sixth century, the armies of the Emperor Justinian under Belisarius and Narses reconquered North Africa and parts of Italy and Spain. These conquests were not

permanent additions to the Eastern Empire but were almost entirely lost within a century.

25. Wolff, 183.
26. Ibid.
27. Ibid., 175.
28. Ibid., 184.
29. Ibid., 161.
30. J. M. Kelly, Roman Litigation (Oxford: Clarendon Press, 1966) 1-30. In Roman law, there was no case unless the defendant was brought before the magistrate (praetor). It was up to the plaintiff to bring the accused to court, although there were court officials whose job it was to help a weaker party bring the offender to trial, and to enforce the judgement if necessary. Kelly argues that this system had its limits, for the number of assistants to the praetor charged with bringing in an offender would have been small. Thus, the Roman system would work only if the two litigants were fairly equally matched in social or political power, or if the plaintiff was stronger than his opponent. If the accused was wealthy or powerful, and armed his slaves, Kelly does not see how he could have been brought to court. For more references to the use of force by the magistrate see: S. P. Scott, The Civil Law. The Digest, hereafter cited as D, D.4.2.3.1 and D.4.2.8.
31. Wolff, 173.
32. The territory of the Salian Franks was (roughly) between the Rhine, the Loire, and the Moselle. The Ripuarian Franks settled West of the Rhine but were later conquered by the Salian Franks. Also, in the sixth century under Clovis and his descendents, the Salian Franks expanded and conquered Southern Gaul, Allemannia, and Burgundy. These newer conquests were allowed to keep their own laws. Thus, the Pactus Legis Salicae was the law of the territory in which the Salian Franks had settled, not the lands they later conquered from the Visigoths, Burgundians, Allemans, Ripuarian Franks, etc.
33. Wolff, 68.

## Chapter 1: Women in Post-classical Roman Law

The Roman world lasted over a millenium in the West and close to two millenia in the East. The law of the Roman world thus developed over more than a thousand years. As a result, Roman law was not a static entity, but it evolved and was adapted over hundreds of years, sometimes varying from generation to generation. The vastness of the body of Roman law causes difficulties for many scholars. For instance, Suzanne Wemple states that under Roman law "a wife had to tolerate her husband's infidelities with lower class women and prostitutes. Only if he had sexual relations with a married woman of his own class could she obtain a divorce..."<sup>1</sup> On the other hand, David Herlihy claims "Germanic laws, like the Roman, continued to allow husbands to divorce their wives, but not wives their husbands."<sup>2</sup> To which Roman law do these scholars refer? The Law of the Twelve Tables? Classical Roman law? Post-classical Roman law? These two statements, both inaccurate if not completely incorrect, demonstrate one of the most frequent errors perpetrated by modern scholars who discuss Roman law, especially scholars writing women's history: the writers take laws completely out of the context of legal history, picking and choosing from a thousand years of law to prove their arguments, without emphasizing that Roman laws changed and adapted over centuries. Wemple's statement that under Roman law women could not divorce their husbands for infidelities, while accurate for Roman women of the fourth century B.C., ignores the fact that Roman wives of the first century A.D., no longer under their husbands' control, could

initiate a divorce even when a husband had not given any cause for divorce such as infidelity. Similarly, Herlihy's statement that only husbands could initiate divorce would be accurate in context of the Law of the Twelve Tables but inaccurate for the Classical law or post-classical law. Consequently, while this chapter focuses on the legal status of women in the sixth century, under post-classical law, there is a brief summary of old Roman law, and a more detailed treatment of Classical Roman law in order to keep in perspective the legal context of the changes in the legal status of Roman women.

The era of old Roman law corresponded approximately to the fifth through first centuries B.C., the period of the Roman Republic. Classical Roman law developed from the first century B.C. to the mid-third century A.D., the period of the late Republic, the Principate, and the Early Empire. Post-classical Roman law occurred from the late third century to the sixth or seventh century A.D., corresponding with the period of the Late Empire.<sup>3</sup> The periods are not clear cut because there was overlap of laws and legal trends between each era of law. Also, Roman law was slow to change. Normally the laws changed only after social and economic changes had rendered the old laws obsolete. The social, political, and economic changes of the Late Republic were only recognized in the laws of the Principate and Empire; the changes of the second and third centuries A.D. were recognized in post-classical law of the Late Empire. Thus the delineation between the periods of law was not absolute.

The earliest preserved codification of Roman law was the Law of the Twelve Tables, promulgated in the fifth century B.C. as a result of political struggles between the patricians and plebeians of Rome.<sup>4</sup> As the name implies, the laws were carved on twelve tablets and probably were displayed in public so that all Romans, patricians and plebeians, could know their legal rights.<sup>5</sup> The laws were fairly few in number and very concise. Only a few pertained to women, but enough to give an idea of their legal status. Roman women under old Roman law were extremely restricted. As S. P. Scott summarizes: "the position of a woman under the (old) Roman system was one of absolute dependence during life."<sup>6</sup> As daughters, women were subjected to the absolute despotic power (potestas) of their fathers. If unmarried when their fathers died, women and their property passed into the legal guardianship (tutela) of their male agnates. When women married (in manus), they passed from the potestas of their fathers to the potestas of their husbands. Thus Roman husbands had the power of life and death over their wives and owned absolutely any property wives owned or brought to the marriage.<sup>7</sup> Wives as well as children were legally like slaves to the father of the family, the paterfamilias. As a result, a husband could institute a divorce but a wife could not.<sup>8</sup> This was the status of women in the Roman Republic under old Roman law.

The era of the Roman Republic, however, was a period of change. Through wars of conquest Rome expanded from a city-state to a Federation to an Empire, and the power of Rome expanded throughout the



Mediterranean and Europe. The conquests brought both foreign wealth and peoples to Rome. Such an influx of foreign money, slaves, merchants, and cultures had a large influence on Roman government and society. As a result, new laws developed to deal with the changing environment. The Twelve Tables had created a base from which the civil law developed. Decisions of Roman jurists and magistrates who interpreted the law, as well as legislation, statutes, and plebiscites of the Roman assemblies, expanded Roman law enabling it to deal with specific situations not covered in prior laws.<sup>9</sup> The wars and the social, political, and legal changes they wrought dramatically affected the lives and status of Roman women; the changes in the status of Roman women of the late Republic were manifested in Classical Roman law of the Principate and Empire.

During the period of Classical Roman law (c.50 B.C.-250 A.D.) the legal status of Roman women changed dramatically. The evolution and dominance of free marriages (sine manus),<sup>10</sup> the passing of women's tutela from agnates to less interested parties and later to its complete abolition,<sup>11</sup> the passing of the rights of a husband to discipline his wife (no longer in manus),<sup>12</sup> the restrictions placed on a husband's use of his wife's dowry,<sup>13</sup> the ease of divorce for either spouse,<sup>14</sup> and other similar legal and social trends gave Roman women of the Principate and early Empire more freedom from male control than their ancestresses of the Roman Republic had known. Fritz Schulz summarizes the classical law of marriage as:

An imposing, perhaps the most imposing, achievement of the Roman legal genius. For the first time in the history of civilization there appeared a purely humanistic law of marriage ... founded on a purely humanistic idea of marriage as being a free and freely dissoluble union of two equal partners for life.<sup>15</sup>

This "humanistic" view of marriage and consequently of women was preserved, with a few limitations, in the post-classical or late imperial period which began in the late third century A.D.

In the third century A.D. the Roman Empire nearly collapsed under the weight of invasions and civil war. The rapid disintegration of the Empire was halted by Diocletian who drastically changed the political, economic and administrative structure of the Empire. Under Diocletian and Constantine in the late third and early fourth centuries the Roman Empire was reorganized and consolidated. According to Hans Julius Wolff: "the final period of Roman history began,...called the Dominate because the emperor now in law as well as in fact was absolute, the master (dominus) of his subjects...All governmental functions were concentrated in the hands of the emperor."<sup>16</sup> While the Late Empire might not have been "the final period of Roman history," it was a period of change: legal, economic, religious, military, and social. These changes affected the position of Roman women and altered the legal status of women in the post-classical world of the Dominate.

Some legal trends which influenced law under the Dominate originated (not surprisingly) in the Early Empire. Similarly, events of the late second and early third centuries influenced the legal changes of the fourth through sixth centuries. One significant trend was the increasing influence of the Roman Emperors on the law. Imperial legislation, decrees, judicial decisions, orders to governors and magistrates increasingly became part of the law. While early Emperors like Augustus cloaked their decrees with the stamp of the Roman Senate, later Emperors abandoned the pretense. By the time of the Dominate, law-making was in the power of the Emperors and their legal advisors.<sup>17</sup> As a result, the personal whims and biases of individual Emperors were sometimes felt in Roman law and the Roman world. For instance, the influence of the Emperor Caracalla, who ruled only six years (A.D. 211-217), was widespread through one of his laws. Caracalla's Constitutio Antoniniana of A.D. 212<sup>18</sup> affected Roman law in general and thus marriage law and the legal status of women. By extending Roman citizenship to all free people within the Empire, Caracalla extended the right of legal Roman marriage (conubium) to the new citizens.<sup>19</sup> In the three centuries between the reigns of Caracalla and Justinian, the previous classical bans and penalties imposed on non-legal marriages (conternubium) between different groups such as citizens and aliens, patricians and freedwomen, gradually faded.<sup>20</sup> Because of the Emperor

Justinian's passion for the actress/prostitute Theodora, a law was promulgated allowing senators to marry even prostitutes or actresses, let alone freedwomen, assuming the repentant woman petitioned the Emperor for permission to contract a legal marriage.<sup>21</sup> These laws increased the number of people within the Roman Empire permitted to participate in legal Roman marriages.

Another development of the Early Empire which affected the laws of the Late Empire was the spread of Christianity and its adoption by Roman Emperors.<sup>22</sup> With the conversion of Constantine in the early fourth century, Christianity had a gradual influence on the laws, varying Emperor by Emperor, negligible on the whole, but noticeable in particular areas. Certainly anti-Jewish legislation was influenced by Christianity. For instance, whereas polygamy had been allowed to Jews who were not Roman citizens in accordance with their laws,<sup>23</sup> it was banned by the Christian Emperors Theodosius I, Arcadius, and Honorius, in A.D. 393.<sup>24</sup> While this would have affected a small minority of people, other legislation, such as the laws against concubinage which culminated in its abolition in the Emperor Leo's Novel 91 in the early eighth century, affected a more widespread portion of the population.<sup>25</sup>

The expanding influence of Emperors on the law, the social and legal changes implicit in the Constitutio Antoniniana, the extension of conubium, and the expanding influence of

Christianity constructed the background for post-classical law, and the changing status of women in the law.

In addition to these general political, religious and social trends, some specifically legal trends also began in the classical period and developed in post-classical law. One such legal trend in the Late Empire appeared in laws which tended to support the importance of the matrimonial bond against the potestas of the paterfamilias. Another specific trend which began in later Classical law was the weakening and then elimination of perpetual tutela of women. A third trend was the change in marriage gift and dowry giving: the burden of providing property to support the new household, traditionally the bride's responsibility, shifted to the groom.

Beginning under the Antonines, and continuing into the Late Empire, a series of laws decreased the power of the paterfamilias, the eldest living ascendant of a family. Under the Classical Roman law of the Republic and Early Empire, the paterfamilias had been the all-powerful head of his family.<sup>26</sup> The Roman family normally consisted of the nuclear or conjugal family plus dependent slaves, freedmen or freedwomen, foster or adopted children. The paterfamilias controlled (patria potestas) the lives of his family and their descendants until he died or emancipated a member.<sup>27</sup> All legitimate children fell under the potestas of the paterfamilias at birth.<sup>28</sup> Under Classical law, the paterfamilias could expose a newborn, and discipline, sell,

or kill any person under his potestas.<sup>29</sup> Similarly, the paterfamilias could betroth his children or grandchildren as he saw fit, so long as they were old enough to understand the vows, and so long as they (theoretically) consented.<sup>30</sup> Until the time of the Antonines in the second century, a paterfamilias could legally have his children's betrothals or marriages dissolved;<sup>31</sup> thus, marriages contracted by someone under patria potestas were null if they were against the will or occurred without the knowledge of either of the couple's paterfamilias.<sup>32</sup>

Post-classical law in the Late Empire limited patria potestas. Beginning in the third century the power of the paterfamilias, while never abolished, was checked in certain areas. During the reign of Valentinian and Valens in the fourth century, the paterfamilias lost the power to expose or kill a newborn, or kill a child<sup>33</sup>; he could, however, still sell his children.<sup>34</sup> Patria potestas was limited especially concerning marriages and divorces of those under a paterfamilias' potestas. Debatably during the time of the Antonines,<sup>35</sup> but definitely by the time of Diocletian in the late third century,<sup>36</sup> a paterfamilias was forbidden from "breaking up, by a capricious divorce on his own initiative, a bene concordans matrimonium."<sup>37</sup> This prevented a paterfamilias from breaking up a marriage so that he could take back his daughter's dowry.<sup>38</sup> Similar legislation seemed to tie the dowry more firmly to the married couple, rather than to either spouse's paterfamilias. Whereas in

Classical law, for the duration of the marriage, the dowry was owned and administered by the husband, or his paterfamilias if he still were alive,<sup>39</sup> in post-classical law, the husband's paterfamilias did not own the dowry unless it had been given specifically to him.<sup>40</sup> Otherwise, the dowry was owned by the husband, and his father only had usufruct and administrative power.<sup>41</sup> The situation was similar for daughters. "Any acquisitions made by reason of betrothal or marriage were in the late empire part of her bona adventitia of which she remained owner, her father only having a usufruct."<sup>42</sup> By the time of Justinian in the sixth century, the law had recognized the ability of a child under potestas to own acquired property, although the paterfamilias normally had the right to the usufruct and administration.<sup>43</sup> While these legal changes did not deprive a paterfamilias of much of his control over his children's property, or of his power over his family, these laws did alter somewhat the legal notion of the omnipotent paterfamilias and the limitless power of patria potestas. Since the most distinctive aspect of Roman family law as compared to family law of other cultures was the unlimited power of the paterfamilias, these changes were important. Also, these limitations placed upon patria potestas favored and reinforced the bond of marriage.

The result of such changes, at least for women, would seem to have increased their control over whom they married, if not for a first marriage, at least for a second, since the

paterfamilias legally could not break up his daughter's marriage to marry her to another without her consent. A law of Valentinian, Valens, and Gratian (A.D. 371) while extending somewhat the paterfamilias' control over his emancipated minor daughters, reinforced the idea of needing their consent.

Widows under the age of twenty-five, even though they may have obtained the freedom of emancipation, still cannot marry a second time without the consent of their fathers. If, however, in the choice of a husband, the desire of the woman is opposed to that of her father, and other relatives, it is established (just as has already been decreed with reference to the marriage of virgins), that judicial authority should be interposed for the purpose of examination, and if the parties are equal in family, and in morals, he shall be considered preferable whom the woman has selected for herself. <sup>44</sup>

This was a far cry from the absolute control over daughters (and family) wielded by a paterfamilias of the Rome of the Twelve Tables.

Classical Roman law provided that after a woman's paterfamilias died and she no living male ascendent, or if her paterfamilias were alive but had emancipated her, the woman became sui juris, under no one's potestas, and could acquire property of her own. The same conditions would render a man sui juris. A man, however, upon the death of his paterfamilias would normally become a paterfamilias himself unless he were minor, or still had a living male ascendent. <sup>45</sup> Women and minors were appointed tutors. In the old Roman law of the Republic, most tutors were tutor legitimus. Tutor legitimus was an



agnatic male relative, patron (if she were a freed woman), or her emancipating paterfamilias.<sup>46</sup> Women and minors needed the consent of their tutor before any major action like marriage and before any major economic transaction, for example before they could sell or alienate any part of their inheritance. A woman could use the income from her inheritances as she wished, but not the capital itself, which the agnate (i.e. her tutor) would stand to inherit, should she die.<sup>47</sup> This put a check on sui juris women under the Republic.

Under Classical Roman law the tutor, however, might not have been a tutor legitimus, but simply a guardian chosen in the father's will or by a magistrate. These tutors would not have been so concerned with a woman's alienating her property because they were not her heirs. If the guardian were not tutor legitimus, a woman could take him to court to force his consent to a particular transaction.<sup>48</sup> Although at first, most tutors were agnates (tutor legitimus), gradually non-agnatic tutors became the rule, so that by the early Principate, tutors existed more to protect the woman from exploitation than to check her economic independence. Augustus, attempting to encourage Roman women to marry and have children, made it possible for a woman to free herself from tutela (having a tutor) if she bore a certain number of children (three for a free woman, four for a freedwoman).<sup>49</sup> Claudius abolished agnatic tutela (of women not minors) altogether.<sup>50</sup> Thus, the legal power of the family and male kin over female relatives who were sui juris, manifested in the

kinsmen's economic and legal control as tutors, was decreased during the Classical period.

While the power of tutors was weakened, other legal guardians for minors were created. Toward the end of the Classical period, curators also were assigned to minors who were sui juris. Curators administered the finances and property of minors, female and male, between the ages of fourteen and twenty-five, whereas tutors did not administer the property but had to approve major economic transactions.<sup>51</sup> Thus, at the end of the classical era, women were subjected to tutors for life, unless they freed themselves by childbirth, and to curators until they were twenty-five.<sup>52</sup> While women were thus still subject to legal protections and restraints, magistrates had replaced male relatives. The function of the male agnatic guardians was broken down into the responsibilities of two officials, tutors and curators, from whom Roman women had some legal recourse if those officials should abuse their power.<sup>53</sup> Women had no protection or legal recourse against the decisions of their agnatic tutors under old Roman law and early Classical law. Consequently, while the role of tutors and curators in Classical law could be construed as the Roman government's usurpation or replacement of the patriarchal control of the family over its female kin, Roman women at least had legal recourse against the governmental patriarchy.

In the post-classical period the role of tutors and curators was limited. Between the reigns of Severus in the late second century Diocletian in the late third century, successive laws restricted the

power of tutors and curators.<sup>54</sup> Some time after Diocletian, the perpetual tutela was abolished; a woman would have a tutor until she was twelve, and a curator until she was twenty-five.<sup>55</sup> Therefore, in the Late Empire, a woman sui juris could marry whom she pleased, no longer needing a tutor's consent once she reached her majority.

In questions relating to marriage, neither the authority of the curator (which only extends to the administration of property of a minor) nor that of the blood-relatives or connections can be interposed, but the will of the person whose marriage is in question should be considered.<sup>56</sup>

Post-classical law, therefore, not only saw a gain in the legal capacity of children, especially married children, at the expense of the paterfamilias, and the consequent gain in legal reinforcement of the matrimonial bond at the expense of patria potestas, but also saw the continuation of the classical trend away from the tutela for women. Therefore, in the late Roman Empire, Roman women (sui juris) were freer from the legal controls of male kin and appointed officials in the form of tutors and curators than women of the Roman Republic and early Empire had been.

Another area which saw substantial changes was marriage law, encompassing laws of betrothal, dowry, marriage, divorce and remarriage. In the Classical law, betrothal preceded marriage. A betrothal could have been dissolved by either party without penalties by a declaration (although the gifts or dowry would be returned), and, generally, it was of "a social and non-legal character;"<sup>57</sup> that is, betrothals were not regulated much by law, although some legal

elements were involved.<sup>58</sup> Under post-classical law, the legal character of betrothal was increased, ascribed by Fritz Schulz as occurring "apparently under the influence of Eastern and Christian ideas."<sup>59</sup> Penalties were attached to breaking off the betrothal.<sup>60</sup> Betrothal often, but not always, included an exchange of property between the engaged couple or their families. Foremost among these marriage gifts for many centuries was the dowry.

In the old Roman law of the Republic and in Classical Roman law, the main gift during betrothal was the dowry. The dowry was normally given by the bride or her paterfamilias to the groom or his paterfamilias. In marriages in manus, the husband or his paterfamilias owned the dowry completely.<sup>61</sup> In marriages sine manus, the husband would only have use of his wife's dowry while they were married, the dowry being the wife's contribution to household expenses.<sup>62</sup> The checks on a husband's management of the dowry were the knowledge that if a divorce occurred the dowry would be returned to his wife or her family, and that if a husband sold or alienated his wife's dowry and a divorce occurred thereafter, he would have to return the dowry to her, unless he had had her consent to the alienation.<sup>63</sup> Augustus' lex Julia et Papia in the first century B.C. forbade a husband's selling of his wife's Italian estates without her consent and his pledging of his wife's Italian estates even if she consented.<sup>64</sup> A wife could divorce her husband if he started alienating her dowry; if her husband became insolvent during the marriage, the wife could legally force him to restore her dowry to her

immediately.<sup>65</sup> If a wife had any property other than the dowry, her husband had no control over it.<sup>66</sup> In the Late Empire the dowry continued to be given by the bride or her family to the groom during the betrothal; however, marriage gifts given by the groom to the bride increasingly began to equal or outstrip the value of the dowry.

Attributed to Eastern influence<sup>67</sup> and becoming an institution associated with betrothal in the Late Empire was the arra, earnest money or deposit exchanged at the time of betrothal, normally given from the groom or his family to the bride or hers.<sup>68</sup> If the betrothal were broken by the suitor, he lost the arra. If it were broken on the woman's side, it had to be restored in multiple: early in the fourth century, quadruple the value of the arra;<sup>69</sup> by the end of the fifth century (496), double the arra's value.<sup>70</sup> Under certain conditions when there were legitimate reasons to break the betrothal, return of the arra alone was enough.<sup>71</sup> Thus, during the fourth century the "arra sponsalia" developed as a recognized, legally defined institution in the Roman Empire. Although it did "not become a unified or essential part of the betrothal agreement,"<sup>72</sup> the arra, where it occurred, was an addition to the Roman dowry system, and in contrast to the Classical dowry, the arra normally was given by the groom's side to the bride's.

Besides the dowry and the arra, during the betrothal there were other gifts conveyed between the betrothed couple or their families. To be legal, these gifts had to be given before marriage, for there were laws forbidding gifts between spouses.<sup>73</sup> Jurists classified

these gifts depending upon whether they passed unconditionally into the control of the recipient (donationes simplices), or whether they were to be returned if the marriage failed to occur (donationes adfinitatis contrahendae causa).<sup>74</sup> These were frequently gifts from the groom to the bride.<sup>75</sup> By the early fourth century the distinction between the donatio simplex, and the donatio adfinitatis contrahendae causa was abrogated,<sup>76</sup> so that all gifts were "considered as having been given in consideration of future marriage,"<sup>77</sup> and the party who committed an unjustified breach of promise lost the right to the gift.<sup>78</sup> These now undistinguished gifts were deemed the dona nuptialis or the sponsalicia largitas (marriage gift).<sup>79</sup>

Another classical "marriage gift" was the donatio ante nuptias, a gift the suitor gave to his bride-to-be to become part of her dowry, which he then might or might not receive back again.<sup>80</sup> The donatio ante nuptias differed from the sponsalicia largitas. The sponsalicia came to be, upon marriage, "the absolute and irrevocable property of the wife."<sup>81</sup> The donatio, under Justinianic laws, became the counterpart to the wife's dowry, "serving partly as a penalty for unjustified divorce by the husband and partly as an extra provision for the widow."<sup>82</sup> In Justinian's laws the donatio became more important than the sponsalicia, although the sponsalicia could still be given.<sup>83</sup> The donatio under Justinianic legislation was transformed into a type of reverse dowry: it could be given during marriage and increased during marriage, so long as the dowry was increased proportionally.<sup>84</sup> Since, like the dowry, it was no longer

just a gift before marriage, Justinian ordered "the changing the name of the gift, which shall hereafter be called not an ante-nuptial donation, but a donation on account of marriage" (donatio propter nuptias).<sup>85</sup> This donatio had to equal the value of the dowry.<sup>86</sup> As with the dowry,<sup>87</sup> the husband could not alienate or pledge the immovable property without the wife's consent.<sup>88</sup> Thus the donatio propter nuptias had developed into a type of dowry, only a dowry given by the husband to his wife. The arra, sponsalicia largitas, donatio ante nuptias, and donatio propter nuptias all demonstrate a legal trend in the Late Empire, a trend in which evolved a system complementary to the older dowry system. Men began to bring "dowries" to women, too. While the dowry did not completely disappear, the burden of supporting the marriage had shifted. In classical times, the bride and her family provided the dowry to support the new household; in post-classical times, the burden was gradually shifted to the groom and his family.<sup>89</sup>

It is uncertain why the donatio evolved this way. David Herlihy proposed a "supply-and-demand" type explanation.<sup>90</sup> Christian thought and teaching, and the monastic movement increasingly emphasized the value of celibacy for both men and women.<sup>91</sup> Many Christians such as St. Jerome, praised the life of virginity and widowhood over marriage.

For the first time marriage is criticized from the perspective of women. Thus St. Jerome claims that widowhood was for women an "occasion of freedom." At last she gained control of her own body, she was no longer the slave of her husband.<sup>92</sup>

This theme was often expressed in the lives of saints, particularly female virgins.<sup>93</sup> Thus in Late Antiquity, while the orthodox view of marriage was that it was a "dignified state," it was considered inferior to celibacy.<sup>94</sup> Such religious influences were translated into law as early as the time of Constantine, who in A.D. 320 annulled the Augustan marriage laws and their penalties against celibacy and childlessness.<sup>95</sup>

At the same time another alternative to marriage for women emerged. According to Herlihy, because of depopulation, and a shortage of labor in the Late Empire, "women at least in the towns seem to have become capable of pursuing a career and supporting themselves if they chose. Economic independence meant that they did not have to marry if they did not wish to."<sup>96</sup> The increasing cultural acceptance of celibacy, the popularity of monastic movements, the ability of single women to support themselves, added up to a "growing reluctance of women to enter marriage."<sup>97</sup> In this way Herlihy offers an explanation for the increasing value of the donatio, a dowry given by the groom to the bride, as having evolved out of the reluctance of women to marry - i.e. a shortage of women developed, so men had to offer more to get a bride. Justinian's law (Novel 97, A.D. 529) which declared that the donatio could not exceed the dowry, was an attempt to keep the donatio from outstripping the dowry in value.<sup>98</sup> In any case, for whatever reason the donatio emerged, it played a significant role in the post-classical laws of marriage, and especially, divorce.



Until the late Republic, most marriages were in manus; upon marriage women passed from the family and potestas of their fathers to the potestas of their husbands. There were three ways a woman could pass into her husband's manus, ranging from the highly elaborate marriage ceremony of confarreatio; to coemptio, the pretended sale of the bride to the groom; to the simple usus or "continuous cohabitation for a year."<sup>99</sup> Only in the case of usus could a woman escape passing into the manus of her husband; she had only to leave the common home for three nights a year to avoid becoming married.<sup>100</sup> By the late Republic all of these became obsolete and marriage sine manus became the dominant form. Confarreatio survived, continuing to be used in marriages and qualifications for certain priesthoods.<sup>101</sup> In Classical law and post-classical law, marriages were sine manus, or "free" marriages. A woman who married sine manus remained subject to her paterfamilias, not her husband or his paterfamilias, but as she was living in her husband's house, out from the immediate daily control of her paterfamilias, his control would not have been so strong. If a woman were also sui juris (either because she had been emancipated by her paterfamilias or he had died), she would have been subjected to no one's potestas,<sup>102</sup> and thus would have been fairly free from male control, allowing for tutors and curators who might have been as distant as her paterfamilias. However, since she lived in her husband's house, and he provided for her, she was expected to obey him in most reasonable things or commands.

As was mentioned before, in the Late Empire the right of legal Roman marriage (conubium) was extended to more people in the empire. The Constitutio Antoniniana of the early third century created more citizens (and thus fewer aliens); soldiers were allowed to contract legal marriages; <sup>103</sup> the prohibited degrees of kinship within which marriages were forbidden (incestuous) were reduced from six to three degrees (first cousins); <sup>104</sup> and, some prohibitions against marriages between people of different ranks or status (Senators and freedwomen or prostitutes) were loosened or abolished. <sup>105</sup> The classical prohibitions against such marriages had not in practice annulled such "marriages". Rather, the couple was penalized by not being exempt from the Augustan penalties for celibacy and childlessness as well as being denied intestate succession to each other. <sup>106</sup> However, Constantine had abrogated the Augustan marriage laws (lex Julia et Papia) in A.D. 320, so even marriages (conternubium) still lacking conubium after Justinian's reforms no longer suffered such penalties. With the extension of conubium, and the withdrawal of the Augustan penalties against conternubium, the legal institution of marriage in the Late Empire was drastically changed. An interesting example of these changes was the marriage of Justinian, son of Gothic parents from Illyrium, who became a citizen, a senator, and an Emperor, and married Theodora, daughter of the circus bear-feeder, an actress, prostitute, and concubine, who became Empress and co-ruler of the Roman Empire. <sup>107</sup> Such a marriage (conubium) for a woman like Theodora would have been impossible in the classical period.

Another institution associated with marriage which was transformed in post-classical law was concubinage. In the classical period, concubinage was a social rather than legal distinction.<sup>108</sup> The difference between marriage (contubernium) and concubinage might merely be the intent of the couple. Concubines could only be women not covered under the laws against stuprum (liaisons with unwed upper class women) and adultery (liaisons with married Roman women), that is, non-respectable women, freedwomen, slaves, and free women with bad reputations.<sup>109</sup> Since the relationship was not legal marriage, gifts could be exchanged between partners; children born of concubines were illegitimate, taking the mother's status (slave or free); and an unfaithful concubine could not be charged with adultery.<sup>110</sup> A wife could divorce her husband for having a concubine (and get her dowry back), or could pre-stipulate in a marriage contract a penalty for taking a concubine.<sup>111</sup>

In the post-classical period, perhaps due to Christianity's hostility to concubinage, the law changed.<sup>112</sup> Emperors tried to eliminate concubinage by placing restrictions on men and by making the status and rights of concubines more like those of wives. Constantine, and later Justinian, forbade married men to have concubines.<sup>113</sup> Justinian also made polygamous concubinage illegal for unmarried men; single men could only have one concubine at a time.<sup>114</sup> In general, concubinage was made more similar to marriage: a minimum age for concubines (12 years old) was set; semi-incestuous taboos created (a man's former concubine could not become his son's or

grandson's); unfaithful concubines could be punished for adultery; respectable freeborn women could become concubines; and children of concubines had to be maintained by their father and could be legitimized.<sup>115</sup> Justinian also granted intestate inheritance to concubines.<sup>116</sup> Eventually, concubinage was made illegal:

In accordance with the precepts which we have received from God, and which are becoming to Christians we prohibit such practice as being injurious not only to religion, but also to nature.<sup>117</sup>

At the same time that concubinage was being transformed by the Christian Emperors, especially Justinian, to the eventual advantage of the marriage bond, Justinian was changing the laws of intestate succession, also to the advantage of married couples. Under Classical law, the head of a Roman family was the paterfamilias, the eldest living male ascendant of a family. His heirs if he did not leave a will were all the people (sui heredes) in his potestas. Sui heredes did not distinguish either sex or whether a child was adopted, married into the family by manus or born into the family; all were heirs in equal portion.<sup>118</sup> If there were no heirs sui heredes, the next in line were the proximus agnatus, again of either sex, "the agnate person to the nearest degree, or persons if there are more than one in that degree,"<sup>119</sup> for instance, sisters and brothers. Originally, the system prevented a woman from passing her inheritance out of the family, if she had not left a will. Only a man could have someone in his potestas, and thus have sui heredes. A woman's proximus agnatus,

her brothers, sisters, or children (if she were married in manus) would have been her heirs.<sup>120</sup> However, although a woman did not have potestas over her children, she still had legal controls over them if their father were dead or absent - i.e. she could become their legal guardian, and could arrange, and had to approve their marriages.<sup>121</sup> Initially, in "free" marriages (sine manus), since the wife did not pass into her husband's potestas, she did not become one of his agnates. Therefore, she was not one of his heirs (sui heredes, or proximus agnatus).<sup>122</sup> In the praetor's edict, sine manus wives were granted intestate inheritance rights but only in the seventh degree.<sup>123</sup> Under the Augustan marriage laws, childless spouses could only bequeath each other up to one-tenth of his or her property, and the usufruct of up to one-third of the estate.<sup>124</sup> For a couple with children, the amount increased per child.<sup>125</sup>

Post-classical Emperors changed the laws of inheritance in a manner consistent with the growing emphasis on the marriage bond in other areas of law. Again, the beginnings of the shift in emphasis began in the late classical period. Under the Severan dynasty in the early third century, the Augustan prohibition against gift giving between spouses was repealed when the donating spouse died without revoking his gift.<sup>126</sup> In A.D. 410, a law of Honorius and Theodosius altered these laws and allowed spouses to bequeath their entire property to each other.<sup>127</sup> In A.D. 537 (Nov.53.c.6.) Justinian allowed impoverished surviving spouses "the right of intestate succession to one-quarter of the defunct consort's estate."<sup>128</sup> This law

was later modified (A.D. 542) to apply to only the widow left without resources, and only the usufruct if there were children.<sup>129</sup> Thus, these laws increased inheritance rights between consorts of "free" marriages, at the expense of some other traditional heirs, agnates and cognates, and so placed further emphasis on the ties between a married couple.

Not all laws pertaining to marriage, however, changed or increased the importance of the marriage bond. Some laws continued unchanged which were hostile to certain marriages or relationships. One such legal trend which remained consistent with past laws dealt with women who had relationships with men of lesser legal status. While free men might marry or have liaisons with slaves or freedwomen, free women were forbidden to marry or have liaisons with slaves or freedmen. Under the lex Julia et Papia in the late first century B.C., women who married freedmen or slaves were punished: free women who cohabited with another man's slave were penalized by the loss of legal status or freedom. If the slave's master had consented to the liaison, the free woman derogated to the status of freedwoman and any children of the union became slaves.<sup>130</sup> If the master had withheld consent or had not known, the woman and any offspring became slaves.<sup>131</sup> Any man, slave, freed, or free who had an affair with a "freeborn or respectable unmarried woman"<sup>132</sup> (stuprum) was punished along with his partner.<sup>133</sup> Constantine (A.D. 326,329), although he annulled the penalties for celibacy and childlessness in the lex Julia et Papia, reaffirmed capital punishment for any woman consorting with slaves, or

any married woman consorting with any man other than her husband; <sup>134</sup>  
 and, while he established that only kinsmen could accuse a married  
 woman of adultery (so as to prevent outside mischief from harming a  
 marriage) <sup>135</sup>, any person could bring charges against the woman who  
 had an affair with a slave.

All persons shall have the right to bring an accusation of  
 this public crime...even a slave shall have permission to  
 lodge information and freedom shall be granted to him if the  
 crime is proved, although punishment threatens him if he  
 makes a false accusation. <sup>136</sup>

The severity of these laws was maintained throughout the fifth and  
 sixth centuries. Novel 1.c.1. of the Emperor Antemius Augustus (A.D.  
 468) dealt with women who had liaisons with slaves or freedmen. <sup>137</sup>  
 While it allowed women who had married freedmen (since Constantine's  
 law had dealt only with slaves) to remain married without penalty, it  
 forbade such unions in the future. For women who in the future  
 married slaves or freedmen, the marriages would not be legal; the  
 children born would be slaves to the fisc; and, the women would lose  
 their land and be deported. <sup>138</sup> Under Justinian (Nov.22.c.18.) free  
 women were forbidden to marry serfs, and were threatened with penal-  
 ties, <sup>139</sup> but children of these marriages would be free. <sup>140</sup>

Post-classical law like classical law was also consistently  
 hostile towards adultery. In Roman law adultery was defined as a man  
 having a sexual liaison with a married woman. The man did not have to  
 be married himself, but the woman did. Thus a husband could be  
 unfaithful without being an adulterer, but an unfaithful wife was

always an adulteress. In the Early Empire, adultery was treated as a public crime. A woman's paterfamilias had the first right to punish her; if he did not, it was her husband's public duty to divorce her and bring her to trial for adultery; failing to do which he could be convicted of lenocinium, and then anyone could bring the adulteress to trial, assuming her paterfamilias had not decided to prevent scandal and exercise his right to have her killed.<sup>141</sup> Only if the husband refused to divorce her for adultery could a charge of lenocinium be brought against him, and a charge of adultery against his wife, by an outsider.<sup>142</sup> A wife also could divorce her husband for adultery, but was not required to do so.<sup>143</sup> The husband who divorced his wife for adultery was allowed to keep one-sixth of her dowry; the punishment for adultery could be exile, loss of property or death for both the wife and her lover.<sup>144</sup>

The laws of the Late Empire concerning adultery demonstrated considerable change, consistent with the decreasing power of the paterfamilias and the growing emphasis on the marriage ties. Adultery was no longer considered a public crime unless the wife's lover was a slave. As noted above, Constantine had limited the right to accuse a woman of adultery to her near kin, particularly her husband.

The husband, above all others, should be considered the avenger of the marriage bed, for he is permitted to accuse his wife on suspicion, and he is not forbidden to retain her  
 ...<sup>145</sup>



In other words, it was left up to the husband's discretion as to whether or not he prosecuted his wife for adultery. The charge of lenocinium against the husband was no longer valid. Justinian decreed that a husband could divorce his wife for adultery, but only after she or her partner had been convicted,<sup>146</sup> thus reversing the Augustan legislation.

The following are good causes for repudiation...Where the husband thinks that he can convict his wife of adultery; but he must previously file a complaint against her, as well as the adulterer, and if the accusation is shown to be true, the husband after having served notice of repudiation, will be entitled to an amount equal to the ante nuptial donation, as well as the dowry....<sup>147</sup>

The husband would get less if there were children.<sup>148</sup> If the husband failed to prove the charge, his wife could divorce him and get the donatio as well as the dowry.<sup>149</sup> Constantine had decreed harsh punishment for adultery, stipulating that "Those who have violated the sanctity of marriage should be punished with death."<sup>150</sup> Justinian mitigated the severity somewhat for the woman. The adulterer was still punished by death; the adulteress might be allowed to live and even resume married life if her husband took her back.<sup>151</sup>

The adulteress shall suffer corporal punishment, and be confined in a monastery, and if her husband desires to take her back within two years, We permit him to do so; he can cohabit with her without subjecting himself to any risk on this account; and the marriage shall not be prejudiced on account of what occurred in the meantime. If however, the aforesaid term should elapse, or the husband before he takes

his wife back, should die, we order that she shall receive the tonsure, assume the monastic habit, and reside in the monastery for her entire life. <sup>152</sup>

Thus, the punishment for an adulterous wife whose husband refused to take her back was the forced celibacy of the monastery. Percy Corbett implies that the punishment for adultery became more severe over time due to the "Christian detestation of adultery." <sup>153</sup> It would seem, however, that the opposite was true. Justinian's penalties were less severe for women than Constantine's, and Constantine's laws seem hardly worse than Augustus' lex Julia et Papia, as both in the extreme punished adultery with death or exile, and Constantine's at least allowed the husband not to prosecute his wife if he so chose. Thus the influence of Christianity on the severity of the laws of adultery seems to have been negligible, or at least indistinguishable from pre-Christian influences.

Besides adultery, there were other reasons for divorce, and the transformation of laws concerning divorce in the post-classical period was dramatic. Under Classical law, there was great freedom of divorce. Any marriage could be dissolved by mutual consent, or "by notice given by one of them," <sup>154</sup> with the only stipulation being the return of the dowry or parts of it. <sup>155</sup> If the wife had misbehaved, or was divorcing her husband without showing blame on his part, the husband was allowed to retain parts of her dowry. <sup>156</sup> If the husband had misbehaved (infidelity, physical abuse, selling parts of her dowry, for instance), his wife could divorce him and receive all her

dowry immediately or in six months (rather than in installments) depending on the degree of misconduct.<sup>157</sup> For divorce by mutual consent or the wife's sterility (childlessness was blamed on the wife), the dowry would be returned to her intact.<sup>158</sup>

Post-classical divorce law, perhaps under Christian influence, limited divorce, accepting as valid only certain reasons, and imposing penalties on divorces that did not fall under such valid reasons.<sup>159</sup> Nevertheless, as Schulz points out:

In Justinian's law the classical principle was maintained to the extent that even the forbidden divorce was valid, though penalized, and the former spouses might therefore conclude a new marriage. It was canon law which abandoned this principle.<sup>160</sup>

Constantine limited cause for divorce. A woman could divorce her husband and retain her dowry only if "her husband were a homicide, a sorcerer, or a destroyer of tombs."<sup>161</sup> If she divorced him for any other reason, she would lose all the dowry and the donatio and was deported to an island.<sup>162</sup> Likewise a man could divorce his wife for three reasons, adultery, sorcery, or procuring.<sup>163</sup> Otherwise he had to return her dowry and not remarry; if he did remarry, his ex-wife could seize his second wife's dowry.<sup>164</sup>

Later laws enlarged upon what actions justified divorce. A law of Theodosius and Valentinian (A.D. 449) set out that a woman could divorce her husband if he were:

an adulterer, a homicide, a poisoner, or one who is plotting anything against our government; or has been convicted of

perjury or forgery; or is a violator of sepulchres... a robber... cattle thief... kidnapper; or in contempt of his house and of her, or in her presence, has consorted with dissolute women... or if he has attempted to deprive her of life... or if she should prove that he had beaten her... 165

The husband's list of lawful causes for divorce included most of the above, plus his wife's having been:

... one given to frequenting banquets where strange men are present, her husband either being ignorant of the fact or having withheld his consent; or where without his permission, and without good reasonable cause, she has passed the night in some public resort, or frequented the circus, theatre or the exhibitions of the arena... in spite of his opposition... 166

The harshest penalty for the wife who divorced without cause was the loss of dowry and donatio, plus the suspension of conubium for five years. 167 The husband could lose the dowry and donatio, plus possibly conubium for two years. 168 These suspensions of conubium did not apply if the divorce occurred by mutual consent; under this circumstance, the wife could remarry after one year. 169

Justinian first added more to the list of causes for divorce (A.D. 528), then changed his mind and reduced the list (A.D. 542). The wife could divorce a husband who had been impotent for two years, but he was allowed to keep the donatio. 170 Abortion, bathing "lasciviously" with other men, and bigamy on the part of the wife were added. 171 At this point, the list seems to have been fully expanded. In the Novel 117, Justinian eliminated some of the reasons for

divorce. Divorces by common consent were no longer valid, except where the couple wished to live in chastity, with the dowry and the donatio being preserved for the children and the property of either spouse who later neglected the chaste life given to the children or to the fisc (if there were no children).<sup>172</sup> Similarly, if they divorced by mutual consent for reasons other than chastity, the dowry and donatio were forfeited to the children or the fisc.<sup>173</sup> Several common crimes were removed: homicide, forgery, robbery, violation of tombs, kidnapping;<sup>174</sup> also deleted was wife beating, the punishment for which, when committed without cause (cause being divorceable behavior on the wife's part), was a "sum equal in value to the amount of the ante nuptial donation."<sup>175</sup> Also, women who were married to soldiers were not allowed to divorce absent or missing husbands, but had to "await their husbands' return no matter how many years they may be absent, even though they may not have received any information, or answers to letters they may have written"; even if she had heard her husband was dead, she had to get sworn proof.<sup>176</sup> For other women, if their spouses were "retained in captivity for a considerable time" divorce was permissible.<sup>177</sup>

While post-classical divorce laws were less liberal than Classical law, they still allowed divorce, subject to the loss of dowry or donatio if the divorce did not have valid grounds. Thus, if the limitation of divorce was due to Christian influence on the law, such influence was not very strong, for divorce remained legal. It is clear that divorces occurred because post-classical law like Classical

law regulated the redistribution of property when a divorce occurred. Classical law designated "retentions" of part of the dowry to be kept for the children if there was a divorce or if one parent had died.<sup>178</sup> Justinian eliminated classical "retentions" of parts of the dowry for the children of a divorce, so that unless the wife was the guilty party, the husband did not keep parts of her dowry for the children. If she was the guilty party, the husband still normally received only usufruct of the dowry; if there were any children of the marriage, they all got the property.<sup>179</sup> A woman on the other hand, kept her dowry if her husband died or was the guilty party and the donatio or the usufruct on the donatio if there were no children.<sup>180</sup> However, if she remarried after being divorced or widowed, she might lose the donatio or its usufruct to her children of her first marriage. Thus, the law attached some penalties to second marriages.

Negative attitudes toward women's remarrying were not new to Roman law but had existed throughout Roman legal history; thus attributing such negative attitudes solely to Christian influence on Roman sentiment in the Late Empire is too simplistic. However, because of dropping birth rates among Romans in the first centuries B.C. and A.D., Augustus had tried to encourage people to have more children. Consequently, in reversal of previous attitudes and laws, Augustus actively encouraged women and men to remarry and have children, although to prevent confusion of paternity and to pay homage to the notion of loyal widowhood, widows had to wait a year before remarrying while widowers could remarry at once. Widows who failed to mourn

their late spouses for a year suffered monetary penalties.<sup>181</sup> The laws of post-classical Emperors reverted to pre-Augustan attitudes toward remarriage, albeit prompted by Christian sentiment. "The tendency of the Christian Emperors was to treat second marriage as a vice ... abstention from it was positively rewarded,"<sup>182</sup> claims Corbett. While negative attitudes toward second marriages had permeated Roman law in varying degrees for centuries, the Christian influence added to and fortified the attitude of censure in post-classical law. Worthy spouses who did not remarry were rewarded.

We think that women who do not contract second marriages are worthy of a larger share than those who do... where a woman ... refrains from marrying again she shall as formerly have the usufruct of the ante nuptial donatio, as well as ownership of a share of the same, equal to that of one of her children.<sup>183</sup>

Post-classical law fairly often deprived people who remarried of property or the usufruct in favor of their children. The Emperors Gratian, Valentinian and Theodosius imposed penalties on women's remarrying. Women who remarried and had property from former husbands were reduced to the usufruct of that property; those who had had usufruct, lost that.<sup>184</sup> Their children from the first marriage gained the property or the usufruct that their mothers lost.<sup>185</sup> Such were the penalties for a "mother ...(who)... disgraced herself by a second"<sup>186</sup> marriage. However, these penalties might also have been the results of the changes inheritance laws, to prevent the family property from passing out of the family by preserving it for the

children rather than for a spouse. After all, in Classical law spouses were strictly limited in what they could inherit from each other, so there was little danger of one spouse's inheriting all the other's property and excluding the children of a previous marriage. When post-classical law allowed spouses to inherit from each other, it was necessary to protect children from being disinherited, especially in favor of a step-parent from a second or third marriage.

Justinian, while praising the widow who did not remarry, accepted that many people would remarry, and it would be unwise to discourage remarriage completely for fear of the alternatives. In answer to a suit over an inheritance brought by a daughter against her mother who had remarried, Justinian revoked the inheritance penalties against women who remarried.

We do not prescribe severe penalties against women who marry a second time, nor do We reduce them to bitter necessity ... through a fear of lawful nuptials... of abstaining from such a marriage and descending to forbidden unions and perhaps even to the corruption of slaves, and as they are not permitted to live chastely, to illegally indulge in debauchery... Hence the opinion which is best, as well as most praiseworthy and deserving... is that wives... having once been married... will preserve inviolate the pledge made to their dying husbands, so that We may consider women of this kind worthy of our respect... But where a woman does not consent to this (whether perhaps she is young and cannot restrain herself), or resist the passions of nature, she should not be molested on this account, nor should she be forbidden the benefits of the... laws; but she can honorably contract a second marriage, and abstain from every kind of



licitiousness, and she shall enjoy the succession of her children. For just as We do not deprive fathers who marry a second time of the estates... so We do not deprive mothers... when they marry a second time...<sup>187</sup>

The remarriage of men or women was treated the same with the exception of the time between remarriages.<sup>188</sup> A man could remarry immediately; a woman, probably so as not to confuse the paternity of any offspring, had to wait a year.<sup>189</sup>

Perhaps in the equality of penalties toward remarriage, instituted by Justinian, Christian influence can be seen. Christian morality in terms of infidelity, chastity, virginity, applied the same laws to men as to women.<sup>190</sup> Thus Christian sentiment frowned upon remarriage equally for men and women, and the laws concerning marital property and inheritance by descendants in case of one spouse's remarriage, reflect this. Justinian's laws reflect a sort of equality.

As We long since introduced a law forbidding men and women to serve notice of repudiation upon each other, and to dissolve their marriages (unless for some cause that the law referred to permits), and as We punished persons who violate this provision... We hereby decree, by way of amendment, that no distinction shall exist between those to which the man and the woman are liable... but We desire that men who do this shall be subject to the same penalty which women incur when they dissolve their marriages without causes authorized by Our law; and that the penalty shall be equal for both parties, for We think that it is only just for them to undergo the same punishment when they commit the same offense.<sup>191</sup>

But however penalized, divorce and remarriage were legally possible, and if not so liberally treated as in Classical law, they were a long way away from the later strictures of canon law. If women or men were wealthy enough to afford the loss of the dowry or the donatio to their children (and if their children were minors, the parent might have usufruct of the property they managed for their children), divorce was still easily obtained. Since the dowry and donatio normally were only part of a person's property, immediate repayment might be difficult, but not impossible. If the divorce was by mutual consent, the couple might settle the property issue themselves, without appealing to the courts.

What was the status of women in Roman law of the sixth century? Post-classical law strengthened the marriage bond, by weakening patria potestas, limiting divorces and penalizing those who did not comply, refocusing inheritance on spouses and descendants, rather than agnates and cognates, and limiting and eventually abolishing concubinage. The result both freed women somewhat from the control of their paterfamilias over their marriage, and curtailed somewhat the freedom of women within marriage; whereas in the Early Empire it was easy for women (sui juris) to escape from an unwanted marriage or an abusive husband, in the fifth and sixth century it was not so easy, though it was still possible. At the same time, the same laws which limited women's freedom limited men's. Also, Classical law had placed restrictions on the husband's use of the dowry, and the alienation of the wife's dowry as a means of providing for women in case of divorce.

"It was in the interest of the state that she should not be left destitute, but should have the wherewithal to secure another marriage." <sup>192</sup> Thus security for (wealthy) women and facility of remarriage were the purposes of these laws. Justinian's laws, while not oriented toward encouraging remarriage, nevertheless were also intended to protect women from being divorced and left without any means on which to live, as well as intended to limit divorce in general. As a side effect, upperclass Roman women lost some of the economic freedom the liberal divorce laws had provided. Again, the facility in dissolving marriages in Classical law had helped to guarantee mutual consideration within the marriage. <sup>193</sup> As Justinian removed physical abuse as a reason for divorce, "mutual consideration" lose some of its emphasis. Still, if when a man beat his wife without cause he would have had to pay her a fine equal to the donatio, <sup>194</sup> it would have become rather an expensive habit for the husband to indulge in. The marriage law of Justinian was somewhat less "humanistic" (in Fritz Schulz' words) <sup>195</sup> than Classical marriage law, if only because post-classical law regulated marriage more and tightened the marriage tie, protecting it from outside interference, at the cost of the freedom of the individual, male or female.

At the same time, women gained freedom in other areas. Patriarchal power was weakened, so women gained more control over whom they married. <sup>196</sup> Perpetual guardianship of women was abolished. <sup>197</sup> In the towns, women were able to have "careers." <sup>198</sup> Concubinage, especially polygamous concubinage was abolished. <sup>199</sup> These

developments would lead to more legal independence for women. Thus the status of women in the Late Empire was paradoxical: outside of marriage, they seemed to be able to be fairly independent; within marriage, they lost some of the independence their ancestresses had possessed.

Why did these changes occur? Scholars have proposed many explanations: Christian influences, Greek influences, oriental (Persian) influences, declining population, the personal whims of emperors and empresses; some of these have been touched on in this paper. In a sense all explanations are partially, but not entirely, correct. Roman law was a reflection of the values and concerns of Roman society, filtered by the point of view of the upperclass male jurists. New social, economic, or religious problems and trends which developed in the Late Empire would have prompted the judges, magistrates, or regular citizens who had to deal with them to seek legal advice. These judges, magistrates, and citizens often sought advice by writing the Emperor or his judicial advisors for instructions on how to deal with the new circumstances. For instance, if, as David Herlihy suggests, more women were choosing to remain celibate rather than marry, eventually legal questions would arise concerning how to deal with such a trend, since celibacy challenged many of the notions of marriage, family, alliances, property, etc., which were of great concern to Romans. It was as a response to such concerns that Emperors like Augustus, Trajan, or Constantine, Julian, Theodosius, or Justinian, changed the laws. Thus, most of the forces or trends

acting on or within Roman society of the Late Empire influenced the laws and contributed to changes in the legal status of women.

## Notes on Chapter 1

1. Suzanne Wemple, Women in Frankish Society: Marriage and the Cloister, 500-900 (Philadelphia: University of Pennsylvania Press, 1985) 17.
2. David Herlihy, Medieval Households (Cambridge: Harvard University Press, 1985) 51.
3. Post-classical law is rather open ended. In the West, the period of post-classical law ended in the fifth century with the gradual loss of political control to the Germans. For the purpose of this paper, which focuses ultimately on the sixth century, the era of post-classical law was the late third to sixth century.
4. Hans Julius Wolff, Roman Law: An Historical Introduction (Norman: University of Oklahoma Press, 1951) 54-56.  
While the Twelve Tables was the earliest surviving collection of law, there were probably laws of the early Roman kings (leges regiae) as well, although no royal code was preserved. Since the kings were overthrown and replaced with a republic, it is not surprising that royal laws were not cited and preserved, since the validity of kings and thus kings' laws was no longer accepted. The Twelve Tables developed out of the political struggles between the patricians and the plebeians in the fifth century B.C. The plebeians wanted a code to restrain the arbitrary and biased judgements of patrician magistrates. The patricians opposed the idea of a code, but eventually ten patricians were chosen and empowered to write down the law (451 B.C.). Initially, there were ten tables. Later another two were produced. However, because of the abuses of these ten men, as well as the unpopularity of some of the added laws (especially Table XI, Law II which forbade marriage between plebeians and patricians), the last two Tables were disputed. Nevertheless, all Twelve Tables became law. Wolff, 54-57.
5. S.P.Scott, trans. and ed., The Civil Law. 17 Vols. (Cincinnati: The Central Trust Company, 1932) 8.  
Scott states that the laws were engraved in twelve bronze tablets which were displayed in the Forum in Rome. Scott, 8. Wolff speculates that the original ten tablets were carved in wood. He adds that a bronze copy of the Twelve Tables was displayed in the marketplace of the Roman colony of Carthage during the Early Empire. Wolff, 55-56.
6. Scott, 41.
7. Ibid.

8. Scott argues that although the laws do not state that wives could divorce their husbands, wives could do so. (p. 11) However, it seems unlikely that a wife could divorce her husband without his consent, since she was under the potestas and he could beat her or kill her if he so pleased.
9. For a concise treatment of Republican law making, see Wolff, 62-68, 70-84.
10. Percy Ellewood Corbett, The Roman Law of Marriage (Oxford: Clarendon Press, 1930) 91.
11. J. A. Crook, "Women in Roman Succession," The Family in Ancient Rome: New Perspectives, ed. Beryl Rawson (New York: Barnes and Noble, 1986) 67.
12. Fritz Schulz, Classical Roman Law (Oxford: Clarendon Press, 1951) 115.
13. Corbett, 180. and,  
S. P. Scott, trans. and ed. The Civil Law. 17 Vols. (Cincinnati: The Central Trust Company, 1932). The Code, hereafter cited as C., C.5.23. The Digest, hereafter cited as D, D.23.5.5-16. The Institutes, hereafter cited as In, In.2.8. The Novels of Justinian, hereafter cited as Just.Nov., Just.Nov.61.
14. Corbett, 219.
15. Schulz, 103.
16. Wolff, 19.
17. Ibid., 69-70, 84-90.
18. Naphtali Lewis and Meyer Reinhold, ed. Roman Civilization, Sourcebook II: The Empire (New York: Columbia University Press, 1966) 427-428.
19. Corbett, 24. Conubium was an "element necessary to constitute a justum matrimonium in which a Roman citizen begets children who will come under his patria potestas." Alien status, slavery, blood kinship within the prohibited degree, difference of rank or status, age, physical condition, were all obstacles to conubium. Less "dignified" marriages lacking conubium were deemed conter-nubium; in these marriages the only legally recognized blood relationships were between the children, or the children and their parents, but not between the parents/spouses. p.24.
20. Ibid. see also:  
Herlihy, 7.

21. C.5.3.23., 5.4.15., 5.4.19.
22. A. H. M. Jones, The Decline of the Ancient World. ed. Denys Hay. 7th ed. (New York: Long Man Inc., 1984) 323. While Christianity was adopted by some Emperors, many of the old Roman senatorial class and the Roman and Greek intelligentsia resisted attempts to change the old ways and the old gods. Consequently, while the Emperor Constantine banned pagan sacrifice, Emperor Julian lifted the ban in A.D. 361. The Emperor Theodosius I banned pagan cults in A.D. 391, but apparently the ban was not well received or enforced and so the ban had to be repeated periodically. p. 323.
23. Schulz, 112. and C.9.9.18., 1.9.7., 5.5.2.
24. C.1.9.6.
25. Emperor Leo Novel 91, in Scott, The Civil Law.
26. Schulz, 142. and D.2.4.5., 1.6.6., 1.5.12., 38.16.3.11-12.
27. Beryl Rawson, "The Roman Family," The Family in Ancient Rome: New Perspectives, ed. Beryl Rawson (New York: Cornell University Press, 1986) 8.
28. Illegitimate children belonged to their mother and took her family name, thus falling under the control of her paterfamilias who would decide whether the child would be raised. When Julia the Younger, the granddaughter of the Emperor Augustus, bore an illegitimate child, Augustus as her paterfamilias "refused to allow (it) to be acknowledged or reared." Suetonius, The Twelve Caesars, trans. Robert Graves (Great Britain: Penguin Books, 1986) 89-90.
29. Schulz, 150.
30. A son needed the consent of both his father and his paterfamilias. Corbett, 4. Also, a girl could only withhold her consent to the proposed marriage on the grounds that the prospective groom was of bad moral character. Consent was assumed in the absence of opposition by the daughter. Rawson, "The Roman Family," 21.
31. Schulz, 152. and C.5.17.5.
32. Corbett, 62. and D.1.5.11., 23.2.2, 25.35., In.1.10.
33. Clyde Pharr, trans. The Theodosian Code and Novels and the Sirmondian Constitutions. (Princeton: Princeton University Press, 1952). Theodosian Code, hereafter cited as Th.C., Th.C.9.14.1.



34. Th.C.4.8.6. Schulz suggests that such sales went out of practice during classical times, but "in post Classical times the sale of new born children revived." Schulz, 151-2.
35. Marcus Aurelius or Antoninus Pius. Corbett, 122-123., D.43.30.1.5., C.5.17.1.5, Just.Nov.22.c.19.
36. C.5.17.5.
37. Corbett, 122. and C.5.17.5., D.43.30.1.5., Just.Nov.22.c.19 and Paulus, The Opinions of Julius Paulus 5.6.15. in Scott, The Civil Law.
38. Corbett, 186. and C.5.17.5.
39. Corbett, 177.
40. Ibid. and C.6.61.1-4.
41. Ibid.
42. Corbett, 113. These daughters were not sui juris.
43. Schulz, 155.
44. C.5.4.18,20.
45. A paterfamilias was not necessarily one's father. Grandfathers, great-grandfathers, adopted fathers, all could be a Roman's paterfamilias. Therefore, the death of a woman's paterfamilias did not automatically render her sui juris, for if her paterfamilias had been her grandfather, when he died she would fall under the potestas of her father, if her father were alive. Similarly a man who was a paterfamilias could lose the status if he were adopted as another man's son. For instance, the Emperor Augustus had no sons to succeed him, only Julia, a daughter by an early marriage. Augustus adopted his step-son Tiberius who was paterfamilias of his own family. However, once adopted, Tiberius lost the position of paterfamilias and fell under the potestas of Augustus. Suetonius, 117.
46. Suzanne Dixon, "Family Finances: Terentia and Tullia," The Family in Ancient Rome: New Perspectives, ed. Beryl Rawson (New York: Cornell University Press, 1986) 100.  
A man or woman whose paterfamilias emancipated him or her became sui juris (but not sui heredes). Minors and women needed tutors, but emancipated men did not. Dixon, 100. The age of majority was 12 years for girls and 14 years for boys. Scott, 46.
47. Crook, 63.

48. Dixon, 100.
49. Crook, 67.
50. Ibid.
51. Corbett, 66-7. and C.5.4.18-20.
52. Ibid., 113. Women frequently had both tutors and curators. Corbett notes, however, that due to the disappearance of perpetual guardianship, the functions of the curator and tutor dealing with dowries were confused in the Corpus Juris Civilis. Corbett, 169. See also D.23.3.61., 26.7., 43.1.
53. Tutors and curators were held liable for their management of their wards' estates. Once a minor was of age, he/she could sue the tutor or curator for restitution or sue to have the tutor or curator replaced with another. Wards could sue their tutors or curators or have them removed for conflicts of interest, corruption, ineptitude, mismanagement, arbitrary behavior, etc. C.5.28.6-7., 31.7., 34.8., 5.35.2., 5.38-50. Just.Nov.72.c.2.
54. C.5.37.9., 5.37.22., D.27.9.1., and Corbett, 170.
55. Corbett, 113. and C.5.4.18-20.
56. C.5.4.8. Corbett points out that the curator did determine the amount of a woman's dowry "in accordance with her station and resources and subject to magisterial revision. Where the amount promised was in excess of the capacity of the estate to pay, the undertaking was void as to such excess." Corbett, 169.
57. Schulz, 109.
58. Classical betrothal had a few legal effects, such as the need to dissolve the betrothal before legally concluding another and the exemption of the fiancée, like a son-in-law, from giving evidence against his future father-in-law. Schulz, 109.
59. Ibid.
60. Leo Nov.18. These penalties went beyond the normal returning of the dowry, or the giving of twice the value of the dowry; these penalties were "damages and interest set forth in the marriage contract." Leo Nov.18.
61. Since wives married in manus were under the patria potestas of their husbands, anything the wives "owned" would have belonged automatically to her paterfamilias, her husband.

62. Corbett, 146.
63. Ibid., 149, 180. The husband had to return only the original capital of the dowry. The fruits of the dowry - the revenues collected from the dowry during the marriage - belonged to the husband.
64. Ibid., 180
65. Ibid., 198
66. Ibid., 115
67. Corbett, 19. - "arra sponsalicia," Schulz, 110. - "arrha sponsalicia," and Herlihy, 7. - "arrhae."
68. Corbett, 21. and Th.C.3.5.11.
69. C.5.1.5., Th.C.3.6.1., and Corbett, 20.
70. C.5.1.5. (A.D. 496), and Corbett, 21-2.
71. C.5.1.5., 1.4.16. These conditions included "anything in the relationship or personal status of the parties making their intermarriage illegal... disgraceful or immoral conduct, difference of religions, impotence or other just cause of excuse..." Corbett, 22.
72. Corbett, 21.
73. Ibid., 15. See also D.24.1.3,32,22., 39.5.1., C.5.3.4.
74. Corbett, 205.
75. Ibid.
76. Ibid., 206. and C.5.3.15.
77. C.5.3.15. A.D. 319, Constantine. (Th.C.3.5.2.)
78. Ibid.
79. Corbett, 206.
80. Schulz, 120. See also C.5.3.1.,15.17.8,46.
81. Corbett, 206.
82. Ibid.

83. Ibid., 19, 207.
84. C.5.3.19. (A.D. 527), C.5.14.9. (A.D. 468), C.5.14.10. (A.D. 529). Post classical law allowed the husband to give his wife the fruits of the dowry. This was no longer considered an illegal gift between spouses. Schulz, 125.
85. C.5.2.19. (A.D. 531-2)
86. Just.Nov.97.c.1-2. (A.D. 539)
87. Corbett, 180. See also C.5.23., D.23.5., In.2.8.
88. Just.Nov.61. (A.D. 537) As with the dowry, "the alienation or pledge is valid only if the husband continues to have sufficient property to make up the donatio." The wife's consent had to be reaffirmed every two years. Corbett, 180,210.
89. Herlihy, 16.
90. Ibid., 21.
91. Ibid., 22.
92. Ibid.
93. Ibid.
94. Ibid. Pagan movements, Stoicism, Neo-Pythagoreanism, Neo-Platonism, and mystery religions also contained a "strong ascetic element." p.22.
95. Th.C.8.16.1., 8.17.1-3., C.8.57.1. These penalties included fines, and limits on the size of gifts, inheritances and legacies, that unmarried and childless people could accept.
96. Herlihy, 21. This would probably not refer to upperclass women. See also C.5.27.1. (Constantine) which lists the different professions of women that made them ineligible for upperclass men to marry: actresses, tavernkeepers, daughters of tavernkeepers, merchants, etc.
97. Herlihy, 21.
98. Ibid., 16.
99. Corbett, 72-3. In the ceremony of confarreatio "there is a sacrifice to Jupiter, consisting of a sheep, bread of spelt, fruits, and salt cakes. Whether all these articles are offered to the god, or some at least partaken by the celebrants, is not clear. The officiating priests are the Pontifex Maximus, whose

presence emphasizes the solemnity and importance of the institution..., and the priest of Jupiter. The right hands of bride and groom are joined and they are made to sit on two joined chairs over which is thrown the fleece of the sacrificed sheep. A fixed formula of ritualistic words is pronounced..." perhaps "there was some interchange of fire and water." p.72-73.

100. Sarah B. Pomeroy, Goddesses, Whores, Wives and Slaves: Women in Classical Antiquity (New York: Schocken Books, 1975) 152.
101. Priests had to be born of such a marriage, and themselves marry by confarreatio. Rawson, "The Roman Family," 20.
102. Schulz, 158.
103. Septimus Severus allowed soldiers to marry, thus affecting the legal status of many women. Schulz, 121. see also Herlihy, 180.
104. C.5.4.17., C.5.4.19. It had been six degrees - for example, second cousins. Herlihy, 7.
105. C.5.3.23., 5.4.15., 5.4.19.
106. Corbett, 38.
107. Procopius, The Secret History. trans. G. A. Williamson. 1966 (New York: Viking Penguin Inc., 1985) 12-13.
108. Schulz, 138.
109. Ibid. and D.45.1.121.1., D.25.7. Roman law defined adultery as a man's having a sexual liaison with a married woman. If a married Roman man had a sexual liaison with a respectable Roman free woman who was not married, the crime was deemed stuprum not adultery. Adultery by definition involved a married woman. An unfaithful wife was always an adulteress, but an unfaithful husband was not always an adulterer.
110. Schulz, 138. and D.25.7.1.2., 25.7.3.1., C.5.16.2.
111. Ibid., 139. and D.45.1.121.1., D.25.7.1.1.
112. Schulz, 139.
113. Ibid., 140 and D.48.5.35., 25.7.1-3., C.5.26.1.
114. Schulz, 140.
115. Ibid., 140, 148, 160. See also C.5.27.3-11., D.25.7.3.
116. Schulz, 140. and C.5.27.

117. Leo Nov.91.
118. Crook, 59. Likewise a child born to a family could be emancipated and not sui heredes.  
There were different types of legal Roman marriages. Early in the Republic most women were married in manus, but by the late Republic sine manus or "free" marriages were more common. A woman who contracted a marriage in manus became a part of her husband's family, subject to his paterfamilias, and no longer subject to her own family's paterfamilias. Her legal status in terms of inheritance became that of a "daughter" to her husband, and she was his heir along with his children. She became part of her husband's family, renouncing her father's gods, and adopting those of her husband's house. "His ancestors became hers." Pomeroy, 152.
119. Ibid., 60.
120. Ibid., 61.
121. C.5.4.20., Also, for more on the education of children see Rawson 8., Pomeroy, 170., and:  
Tacitus, The Complete Works of Tacitus. ed Moses Hadas (New York: Random House, Inc., 1942) 678-9.
122. Corbett, 117.
123. Ibid. and In.3.9.
124. Corbett, 119. He adds that in In.8.5.19., a man could leave one-quarter of his estate to his mistress but only one-tenth to his wife. p.119.
125. Corbett, 119. "One living child gave the parents full capacity as also did a deceased son or daughter who had reached the age of fourteen or twelve, respectively. One child dying after the ninth day added one-tenth, two added two-tenths, and three gave full capacity. Each surviving child of a prior marriage gave an additional tenth." p.119.
126. Schulz, 121. This law was enacted by a senatus consultum under Caracalla, A.D. 206.
127. Ibid. and C.8.57.2.
128. Corbett, 118. and Just.Nov.53.c.6.
129. Corbett, 118-119.
130. F. R. C. Weaver, "The Status of Children in Mixed Marriages," The Family in Ancient Rome: New Perspectives. ed. Beryl Rawson (New

- York: Cornell University Press, 1986) 151. - Under Hadrian, the children born when the parents had the consent of the master were free; the woman still became freed. p.151.
131. Ibid., 152. The woman must have been warned three times and still persist. After that, she would be enslaved by a formal legal process. p.152.
  132. Schulz, 138. and C.5.16.2., D.25.7.1.1.
  133. D.48.5.6.1.
  134. Th.C.9.7.9.
  135. Th.C.9.7.
  136. Th.C.9.9.
  137. Athemius Novel 1 in Pharr, The Theodosian Code and Novels and the Sirmondian Constitutions.
  138. Ibid.
  139. Just.Nov.22.c.18.
  140. Just.Nov.54.c.1.
  141. Corbett, 143-144. See also Pomeroy, 159-160., D.48.5.12.10,27., C.9.9.11. For the first sixty days after being divorced, her father and husband had exclusive rights of prosecution. Corbett, 144.
  142. Corbett, 143-4, and Pomeroy, 159-160. No charges would be accepted beyond six months from the divorce, or five years after the crime. Corbett, 143-144. D.48.5.1-4.
  143. Pomeroy, 159-160, and D.48.5.14.5.
  144. Corbett, 193. and Pomeroy, 159-160.
  145. C.9.9.30. (A.D. 326)
  146. Corbett, 146. and Just.Nov.117.c.8.
  147. Just.Nov.117.c.8. "and where there are no children, he will also be entitled to an amount equal to the third of the dowry, out of the other property of his wife... But where the husband has children by the same marriage... the ownership of the property, as well as that of the other possessions of the wife, shall be preserved for their benefit." Nov.117.c.8.

148. Ibid.
149. Just.Nov.117.c.9. If childless, she got one-third the value of the donatio, otherwise the entire estate of the husband was set aside for the children.
150. C.9.9.30.
151. Just.Nov.134.c.10.
152. Ibid.
153. Corbett, 146.
154. Schulz, 132. The exception was when a freedwoman "married" her patron. She needed his consent for a divorce. p.134. and D.25.7.
155. Schulz, 134.
156. Corbett, 192-3. If a woman or her paterfamilias instituted the divorce without showing blame on the husband's part, the husband (or his paterfamilias) was allowed to retain one-sixth of the dowry for each child, up to a maximum of one-half the dowry (retentio propter liberos). If the wife had died, one-fifth was kept for each child, without limit. If the wife misbehaved, the husband could divorce her and retain parts of her dowry (retentio propter mores). For adultery, he kept one-sixth of the dowry, for lesser crimes, one-eighth. Corbett, 192-3.
157. Ibid., 197.
158. Pomeroy, 158.
159. Schulz, 134.
160. Ibid.
161. Th.C.3.16.1. "In the classical law the person against whom a judgement of aquae et ignis interdictio or of deportation had been rendered, being civilly dead, ceased to be married in the Roman legal sense." Corbett, 211. When during the late empire the punishment for serious crimes such as homicide, sorcery, and destruction of tombs resulted in banishment or in the accused being banished or declared legally dead, divorce may have been automatic.
162. Ibid.
163. Ibid.



164. Ibid.
165. C.5.17.8.
166. Ibid.
167. Ibid. and Corbett, 245.
168. Corbett, 245.
169. C.5.17.9. (Anastasius, A.D. 497)
170. C.5.17.10.
171. C.5.17.11. -one-fourth her property.
172. Just.Nov.117.c.10.
173. Ibid.
174. Corbett, 247. and Just.Nov.117.c.8-9.
175. Just.Nov.117.c.14.
176. Just.Nov.117.c.11.
177. Ibid.
178. C.5.13.1.
179. Corbett, 202. and Just.Nov.c.1,2. (A.D. 539)
180. Corbett, 210. and Just.Nov.c.1.
181. Corbett, 249-250 and C.5.9.1,2 (A.D.580-1).
182. Corbett, 250.
183. Just.Nov.127.c.2.
184. C.5.9.3. (A.D. 382)
185. Ibid.
186. Ibid.
187. Just.Nov.2.3.
188. C.5.9.1,3,5.

- 189. Just.Nov.22.c.22.
- 190. Schulz, 115., and Herlihy, 21-25.
- 191. Just.Nov.127.c.4.
- 192. Corbett, 181-2.
- 193. Ibid., 126.
- 194. "Cause" was something the wife did for which her husband could divorce her. Corbett, 247.
- 195. Schulz, 104.
- 196. See above, fn. 28-40.
- 197. See above, fn. 45,46.
- 198. See above, fn. 82.
- 199. See above, fn. 99.

## Chapter 2: Women in Frankish Law: Legal Sources

The status of women in Frankish law in the sixth century is not so clear cut as in Roman law of the same era. The Pactus Legis Salicae was not a comprehensive codification of civil law, as was the Corpus Juris Civilis, its approximate Roman contemporary. As Theodore J. Rivers defines, the early Frankish law codes were "not codes of law; rather, these ... legal collections comprise laws that needed constant reiteration, were unclear, or were continuously consulted."<sup>1</sup> Whereas the Corpus Juris Civilis is an editing and codification of over a millenium of written law, the Pactus Legis Salicae represents the first attempt to codify Frankish laws in writing.<sup>2</sup> Thus many gaps exist in the Salic laws concerning the status of women at law: were women legally competent? Could they take someone to court? Could a wife divorce her husband? If not, how were marriages dissolved? Could women arrange their own marriages? It is necessary to look at non-legal texts to fill in such gaps. In this sense the Pactus Legis Salicae is more similar to the laws of the Twelve Tables than to the Corpus Juris Civilis or even the Theodosian Code.

There are two different collections of early Frankish laws, the Pactus Legis Salicae of the Salian Franks, and the Lex Ribuaria of the Ripuarian Franks.<sup>3</sup> For several reasons, this paper depends on the Salic laws not the Ripuarian laws. First, the Ripuarian laws in many ways closely follow or duplicate the pattern of the Salic laws. Second, although the Salic laws were written in Latin, presumably with the help of Gallo-Roman lawyers and scribes, and legislate concerning

Romans and Roman institutions, the laws were generally free from Roman, and especially Christian influence, <sup>4</sup> although some Christian influence crept into the later capitularies. <sup>5</sup> The Ripuarian laws, however, were promulgated more than a century later, in the early seventh century. <sup>6</sup> The Roman influence on these laws, at least vis-a-vis Christianity, was considerably stronger. <sup>7</sup> Finally, the Salic laws and their Capitularies spanned the sixth century, in a manner roughly comparable to the Corpus Juris Civilis and Justinian's Novels, thus affecting the same era. The Salic laws give some picture of the legal status of Frankish women in the sixth century, upon which can be drawn comparisons to that of sixth century Roman women.

The legal position of women in Frankish society was strong: Frankish women were granted many rights and protections at law. However, neither Frankish women nor Frankish men were totally free or independent. Freedom was valued as a legal status; personal freedom or independence, in the modern sense, was not a valued commodity. In the Frankish world of the sixth century, and to a lesser extent in the Roman world, survival for the individual was dependent on ties with others. Interdependence, not independence was valued by society. An independent individual in Frankish society would have quickly been killed or enslaved. The most important ties of interdependence were to one's family and kin; lacking a family, a person needed a master or a patron. In old Germanic societies the family and kin provided protection by the threat of the blood feud. If a Frank were killed, his family would pursue the feud against the murderer and the

murderer's family. Thus the larger and stronger an individual's family, the greater the protection the family could provide. In the fifth and sixth centuries, the blood feud was beginning to be replaced, not entirely successfully, by a system of monetary compensation for crimes as described by the provisions of the Pactus Legis Salicae. The family and kin remained important since they were the people called on to help defend a man in court by providing oath helpers and by helping pay compensation if a kinsman were found guilty. Similarly, the family and kin would help a kinsman bring an offender to court. Consequently, the Frankish legal system depended on the family for the process and enforcement of justice, and an individual's rights depended on the strength of his or her family and kin group and its willingness to help. <sup>8</sup>

The dependence on the family for the process and enforcement of justice is a major distinction between Roman and Frankish law in the fifth and sixth centuries. Written Roman law had evolved for over a millenium, from a system more dependent on the family, to one dependent on a strong government. The presence of a strong and relatively stable government, legal system and police force, gradually lessened women's dependence on their families for support and justice, and concomitantly, weakened the legal control of the family, that is, the male relatives, over a woman's life, her marriage, property, divorce, etc. In the fifth and sixth centuries the Frankish political development lacked the centuries of empire and relative stability for the Roman. Therefore, in the Frankish family the male members still had a

greater degree of control over their female kin and provided a greater degree of protection. In the Salic laws, however, there did not appear any Frankish equivalent to the absolute, omnipotent, classical Roman paterfamilias, who controlled the lives and property of all his descendants and legal dependents until his death, at which point his children, female and male, were sui juris, free from anyone's potestas, with state appointed tutors or guardians for minors and young women.<sup>9</sup> Instead, Frankish women appear to have been legally dependent on their families, or their husbands' families all their lives, although the extent of that dependency is questionable.<sup>10</sup> This legal control of a woman, her mundium, was purchased by her husband from her family, or from her in-laws if she were a widow, and gave the holder the right to receive compensation for offenses committed against her.<sup>11</sup> Thus it is within the context of the Frankish family that the laws which protected women from abuse, the laws which regulated inheritance and property, and the laws governing betrothal and marriage - in short, the legal status of Frankish women - should be examined.

Salic law protected free women from a list of offenses and insults, ranging from touching to killing. The penalties were normally fines, which varied according to the severity of the crime, the status and age of the victim, and the status and age of the offender. While the Frankish kingdom was composed of different peoples, all people living within the territory of the Salian Franks were subject to Frankish law. However, penalties varied for different groups. The fines for crimes perpetrated against Romans were half the value of

those for crimes committed against Franks. Thus, generally the penalties imposed for offenses against Roman women, freedwomen and maidservants were half the values of those occurring against free (Frankish) women.<sup>12</sup> In the Salic law, a free man who touched a free woman, depending on where or how, was liable for various penalties: fifteen solidi for touching her hand, arm or finger; thirty solidi for pressing her arm; thirty-five solidi for touching above her elbow; forty-five solidi for touching a woman's breast or causing it to bleed.<sup>13</sup> Similar penalties existed for touching women's hair or veils. If a free man untied a woman's hair so that only her veil fell off, he had to pay fifteen solidi; if her hair fell to her shoulder, he had to pay thirty solidi.<sup>14</sup> A slave would lose his hand for either offense.<sup>15</sup> A free man who cut a girl's hair without her parents' consent was liable for one hundred solidi.<sup>16</sup> The intent of these laws was to protect women against molestation by strangers.

Compensation increased for the more serious crime of abduction, again varying with the status and willingness of the girl, the time and place of abduction, and the status and number of men involved. If three men abducted a free woman from her house or workshop, they had to pay thirty solidi. If there were more than three, they paid five solidi each; armed men paid three solidi each.<sup>17</sup> In an early capitulary the penalties increased; the participants in an armed band that abducted a free woman were fined two hundred solidi each, forty-five solidi each if they had only been onlookers;<sup>18</sup> if the girl were under the king's protection, the penalty was sixty-two and one

half solidi.<sup>19</sup> If an abductor were a freedman or a king's servant, he was to be killed, unless the girl were a freedwoman; then the fine would be twenty solidi paid to the girl's master, her return to her master, and an additional fine of ten solidi paid to the king's official.<sup>20</sup> The abduction of a betrothed girl or a wife brought higher fines. A free man who abducted and raped a free girl had to pay her family sixty-two and one half solidi, or forty-five solidi if she had been willing.<sup>21</sup> If a free man stole another man's betrothed, he had to pay sixty-two and one half solidi to her family and another fifteen solidi to her fiancée; the abductor was fined two hundred solidi if he abducted her when she was on her way to be married.<sup>22</sup> A free man who abducted another man's wife was liable for two hundred solidi, paid to her husband.<sup>23</sup> The punishment for all rapes was harshened in a capitulary of King Childebert (A.D. 595) which made death the punishment for a rapist, unless the women had "agreed to be seduced"; then both of them were to be exiled, or if they fled to a church, they were to be killed.<sup>24</sup> Thus penalties for abduction of women were harsher if the women were of higher status, if the men were of lesser status, and if an armed band was involved. These laws were attempts to reduce social violence.

The compensation due for killing someone in Frankish society was known as the wergeld. Just as compensation for lesser crimes varied depending on the age, status, sex, race, of the victim and the person who had committed the crime, so the wergeld varied: the greater the value Frankish society placed on the function of a person, the higher



that person's wergeld. The basic wergeld was two hundred solidi for free Frankish men and women. Free Romans had wergelds equal to half that of equivalent Franks (one hundred solidi).<sup>25</sup> An individual's wergeld changed from age to age and status to status, again, depending on the value society placed on the function of the individual. Boy children were highly valued as potential warriors, so a free Frankish boy had a high wergeld of six hundred solidi, which dropped to two hundred solidi when he was twelve and had his long hair cut off, a symbol of his passage to manhood.<sup>26</sup> Frankish society obviously valued women for their ability to bear children, so their wergelds increased at puberty and decreased after menopause. Free Frankish girls less than twelve years old and Frankish women over the age of sixty had wergelds of two hundred solidi.<sup>27</sup> Between those ages, their wergelds rose to six hundred solidi.<sup>28</sup> Newborn children and fetuses also had wergelds; compensation was due when one was killed. If someone killed a child within the womb or killed a newborn "within nine nights before ..." it was named, the penalty was one hundred solidi.<sup>29</sup> If the mother died also, the compensation due was seven hundred solidi.<sup>30</sup> If it could be proven that the fetus was a boy, the compensation increased to twelve hundred solidi (six hundred solidi for the mother, six hundred solidi for the boy child).<sup>31</sup> A later capitulary increased some of these wergelds. It provided that if someone struck a pregnant woman and nearly killed the fetus, the compensation due was two hundred solidi.<sup>32</sup> If the fetus were killed, the fine was six hundred solidi.<sup>33</sup> If both the mother and fetus were

killed, the penalty was nine hundred solidi, or twelve hundred solidi if she were under the king's protection.<sup>34</sup> Twenty-four hundred solidi were due if the fetus were a girl.<sup>35</sup> The compensation was half if the mother were a Roman, a freedwoman, or a maidservant.<sup>36</sup> Again, the penalties increased during the sixth century. This increase could have meant general lawlessness was increasing and the previous penalties were not strong enough deterrents. Equally, this could have meant that kings were striving for greater political control over their wealthy nobles and thus were creating higher compensations which might deter wealthier individuals. These two possibilities were not mutually exclusive.

These laws provided some protection for women from harm by outsiders and gave women fairly strong legal protection within society. However, it is difficult to know how such offenses were treated if they occurred within the family. Since the family was responsible for bringing offenders to court, and for helping pay fines for a relative who was found guilty, it seems unlikely that such offenses toward women within the family would have been taken to court. More probably, they would have been dealt with (or ignored) within the family. The exception might have occurred if the individual had a patron, who could also help bring charges against an offender. A man's lord might help him bring an offender to court if he had no family or his family were unwilling.<sup>37</sup> Technically it was possible for a woman to have had a patron, such as the church or the king, who could have given her protection from a member of her family.

<sup>38</sup> Possibly also, her kin might have protected her from abuse by her husband or in-laws since a woman's family was not responsible to pay the fines for her in-laws. Also, a few laws granted a family the right to kill one of its members without being liable for compensation, implying that normally the state would have exacted a punishment for killing one's kin. This was particularly true for illegal marriages. For instance, if a free woman married a slave, and it was discovered, she could be outlawed, and her property forfeited to the treasury. The laws allowed anyone in her family to kill her without being answerable to "either her relatives or the public treasury for this death." <sup>39</sup> Similarly, incest, particularly a man's marrying his father's wife, was punishable by death. <sup>40</sup> Another situation where laws regulated behavior within a family dealt with men who were outlawed and had had their property confiscated for not appearing for trial or for not paying an adjudged compensation. The family (including the wife) of such a man could have been fined fifteen solidi if they gave him food or shelter, until such time as he rendered compensation. <sup>41</sup> These instances indicate that the laws or the court did attempt to interfere with intrafamily behavior, so it is possible that laws protecting women from abuse might have applied to her relatives (and her husband, or in-laws). However, since the woman would have needed her family's help bringing such a kinsman to trial, and the same relatives would have been liable to help pay the offender's fine, it seems unlikely that such a case would be pursued often, particularly if the offender held the woman's mundium. Thus

while Frankish law theoretically protected women from molestation, the mechanism for the enforcement of law - the family - limited the effectiveness of that protection. Unlike Roman law of the same period in which women had legal recourse against their family (except their patresfamilias), in practice Frankish women probably did not have legal recourse against abuse by their family or kin.

Besides having some legal protection against strangers, Frankish women also had relatively strong economic rights. Free Frankish women could inherit, acquire, hold, and administer in their own right property, both landed and movable, although some of their property, such as their dowries, might also have been administered by their husbands or their guardians. Also, the Salic law differentiated between two types of land, allodial and Salic, and different rules of inheritance governed each. The first type of property was the family land or alodis which could not be alienated but had to stay within control of the family, generation after generation.<sup>42</sup> Laws designated the order in which members of the family might inherit the land. A person's heirs were his sons and daughters equally, and their descendants.<sup>43</sup> When there were no children, a person's parents were his heirs, or if they were dead, his brothers and sisters.<sup>44</sup> If there were no heirs within the immediate family, the property would pass first to his mother's sisters, then to his father's sisters.<sup>45</sup> If he had no aunts, the land would go to his father's nearest kin,<sup>46</sup> and then his mother's nearest kin.<sup>47</sup> No one could be disinherited from the family land, unless he had legally separated himself from his

family or committed a serious crime, such as incest.<sup>48</sup> This inheritance pattern was presumably for allodial land, and any property left intestate, except for the Salic land.

The second type of land recognized in the Salic laws was the Salic land (terra salica), from the succession to which women were initially excluded in the early sixth century.

But of the land belonging to the Salian Franks (terra salica), no portion shall be inherited by a woman, but the entire land shall belong to the male sex, [and only those] who are brothers.<sup>49</sup>

Since this passage came at the end of a list of laws which detail how the alodis should be inherited by both sexes, as described above, it seems likely that alodis and terra salica were different types of land. The terra salica was probably land held as a grant or benefice from a lord or king for services rendered, and restricted to men, who could continue to provide military or administrative service.<sup>50</sup> However, even this exclusion did not last long. The pressure or desire to keep any land within the family, especially within the line of descendants would have grown as a benefice remained in a family's hands for a few generations. Consequently, a capitulary of Chilperic I (A.D. 561-584) specified that "if the sons have died, let the daughter in a similar manner receive the land, just as the sons would have possessed it if they were living ..." and if there were no daughters as well, the brothers then the sisters should inherit the land, not the neighbors.<sup>51</sup> Thus fairly early in the development of

the Salic law (within two to three generations after its first promulgation by Clovis) women could inherit both types of property.<sup>52</sup> Indeed, sometimes the female line was favored over the male, since a mother's sisters were heirs before a father's sisters, and only after those sisters could the father's or mother's brothers and male kin inherit.<sup>53</sup> Thus, these laws showed that while some land could be owned but not alienated by its owners, female or male, and the Salic land could only be inherited by daughters or sisters when there were no closer male heirs, women could inherit and hold property in their own right, even if they were legally dependent on their families or in-laws. Also, there were no provisions in the law dealing with land purchased or acquired otherwise which was neither allodial nor Salic. Could women have inherited or purchased such land? Since the population of the Frankish kingdoms was mixed and possibly numerically dominated by the Gallo-Romans who had lived on the land before the invasions, much of the land belonged to the Gallo-Romans who could will the land as they saw fit. Only a relatively small part of the Frankish kingdom would have been land designated alodis or terra salica.<sup>54</sup> As Gallo-Romans and Franks intermarried in the sixth century, the distinction between alodis and terra salica would have been further diluted, perhaps almost obsolete at the upper levels of society. In later centuries, as the distinction between Gallo-Romans and Franks faded, Frankish kings reissued the Pactus Legis Salicae.<sup>55</sup> The laws would have interpreted all land as either Salic or allodial,

thus limiting women's ability to inherit land. However, in the sixth century, Frankish women could inherit most of the land.

The laws give further indications of Frankish women's relative economic independence, albeit within the context of the economic dependence which bound all members of a Frankish family. A Frank brought to court and found guilty of breaking the law had to redeem himself by paying compensation.<sup>56</sup> When someone could not afford to pay the compensation, he could call upon his kin to help him (his kin did not include his wife).<sup>57</sup> In the case of murder, where compensation was high, the guilty party probably would have needed help paying. The Salic law provided that after a man's mother and brother had helped pay, and if he still needed more money, he had to appeal next to his mother's sister or her sons.<sup>58</sup> If he did not have any maternal aunts or cousins, he had to appeal to three relatives from his mother's side and three from his father's, then to any of his kin who could help him pay. If his family could not redeem him, he was given as a slave to the relatives of the person he had killed, to work off the wergeld.<sup>59</sup> These legal provisions for the payment of compensation indicate the degree of economic interdependence within a family (but not between spouses), as well as the financial independence of its female members. Since women as much as their male kin were separately liable to help pay compensation, they had to be able to control their own money or property. Yet since their property could be drawn upon to pay a kinsman's debt, they were not truly financially independent, any more than men were. Just as women were

able to inherit family land, but the family land was inalienable, making ownership more like usufruct, so women's ability to own property in their own right was tempered by their liability to help pay family debts. Nevertheless, within this context of family interdependence, further laws dealing with legal liabilities reinforce the idea that Frankish women were economically independent to a degree similar to men.

While according to some scholars women did not possess full legal rights in terms of swearing oaths in court or participating in judicial combat,<sup>60</sup> some laws indicate that Frankish women were legally liable to pay fines for their own misdeeds if they were found guilty. The first group of laws which named women as legally responsible for the fulfillment of laws dealt with marriage and remarriage. If a childless widow wished to remarry, she had to call together nine witnesses and her in-laws and publicly pay her in-laws the achasius which released her mundium and prepare certain furniture to be left behind with them when she went to her new husband; having fulfilled her legal obligations to her in-laws, she could take two-thirds of her first dower with her to her next marriage.<sup>61</sup> If she failed to do this, she was penalized by being fined sixty-two and one half solidi and being allowed to keep only one-third of her first dower.<sup>62</sup> Obviously a widow would have had to be able to own her own property if she were to be legally liable to be fined for her actions; possibly she would have appeared in court. If she failed to meet the legal requirements, yet kept two-thirds of her dower, her in-laws might have



had to take her to court over her dower. According to the Salic law, disputes over dowers required twelve oathtakers.<sup>63</sup> Would a widow who was taken to court need to find oathtakers, or would she have been represented by someone in court? The answer is uncertain, but the possibility exists that women would have been legally responsible in court even to provide oathtakers.

The second group of laws which specifically named women as legally liable if they broke the law dealt with poisoners and witches. If it were proven that one woman gave another woman a magic potion to make her barren, the poisoner would have to pay a compensation of sixty-two and one half solidi.<sup>64</sup> If a female witch cursed a man and he died, she would be liable for two hundred solidi.<sup>65</sup> The proviso in these laws, "and it can be proven,"<sup>66</sup> when used in context of crimes committed by women, implies that such a woman would stand trial in court, and if found guilty by compurgation or ordeal, would have to pay compensation on her own and appeal to her relatives if she could not pay, just as a man would. Since these laws, while distinguishing between the sex of the offenders, did not distinguish between the punishment for witches or poisoners whatever their sex,<sup>67</sup> it seems likely that Frankish women were legally competent to go to court, and thus were not perpetual minors at law. And, as before, since these laws assessed women separately from their families, it reinforces the argument that women owned and controlled their own property.

The third category of laws which fined women for misdeeds dealt with outlawed kinsmen. Men who refused to answer a charge in court,

or to pay compensation if they were found guilty, were temporarily outlawed, i.e., had their property confiscated, until such time as they appeared in court or paid their fines. The laws stated that any wife or family member who gave food or shelter to an outlaw was liable for a fine of fifteen solidi. As above, women would have had to be economically independent and legally competent to have fulfilled such laws. Therefore, if Frankish women were not legally competent, it is not apparent in the Salic laws. No laws described how a woman would respond to legal charges, if the manner differed from the way men responded. While several laws in the Salic code gave elaborate descriptions of legal proceedings, how to bring people to court, the number of oath helpers required, etc.,<sup>68</sup> none listed any separate processes for those occasions when women committed crimes. Thus it probably was common knowledge, and therefore unnecessary to record in the code, that either women were included under the general instructions for legal proceedings, (and hence were liable for all penalties for crimes, murder, theft, etc.), or that women did not appear in court but were represented by their guardians, their male kin, when necessary. While the former explanation seems more likely since the laws indicated that women were liable for some crimes, it is not possible to tell simply from the laws.

Another area of law which influenced the status of women regulated betrothal and marriage. These laws were neither so complex nor so numerous as those regulating Roman marriage; the institutions of betrothal and marriage were not completely defined in the Salic law.

Unlike Roman law which recognized marriage as legal only between free Roman citizens, no penalties appeared in the Salic law against the intermarriage between free Romans, foreigners, or Franks, so long as they were not closely related. Frankish law also varied from Roman in that in Roman law there were distinctions in the laws between legal marriage (conubium) and non-legal marriages (conternubium).<sup>69</sup> Frankish law did not have such elaborate distinctions. The Salic law was similar to Roman law in its prohibitions and penalties for certain types of marriage, or types of liaisons. Marriages/liaisons between slaves and free were harshly punished; somewhat less severely punished were marriages between free and freed. A free man who slept with another's female slave, had to pay her master fifteen solidi, thirty solidi if she belonged to the king.<sup>70</sup> Yet if the freeman were lower class (swineherd, vinedresser, blacksmith, miller, carpenter, groom or overseer) and seduced another's maidservant (worth fifteen to twenty-five solidi), the penalty was seventy-two solidi plus her value.<sup>71</sup> This law clearly tried to discourage marriages between slave and free, especially of the low end of the social and economic ladder where such marriages occurred with greater frequency. A male slave who slept with or married another's female slave either received three hundred lashes on his back or had to pay three solidi to her master; if the woman died as a result of the affair, the slave had to pay six solidi to her master or be castrated.<sup>72</sup> If a free person, female or male, publicly married another's slave, the penalty was enslavement. (72) In addition, a later capitulary harshened the

punishment for free women who married slaves from loss of property and enslavement, to loss of property and outlawry, therefore encouraging anyone to kill her without penalty.<sup>74</sup> However, another late capitulary also indicated that marriages with female slaves or freedwomen were legal, and even regulated the dowry for the remarriage of widowed slaves and freedwomen.<sup>75</sup> From the number of laws regulating such liaisons/marriages between slave, freed and free, it seems likely that there was a lot of intermarrying (probably more so at the lower end of the social and economic scale), and that at first the laws tried to prevent it, but later the laws were relaxed at least concerning marriage to unfree women. At the same time, the punishment for free women marrying unfree men was increased.

Other illegal marriages in Frankish law were marriages within prohibited degrees of kinship. The Salic law provided that if a man married his sister, or his brother's daughter, or a near cousin, or his brother's or uncle's wife, the marriage was to be dissolved (under threat of punishment), and any children were illegitimate and could not inherit.<sup>76</sup> The list and penalties were increased in a later capitulary. A wife's sister and blood relatives also were forbidden, on pain of excommunication by the bishop and loss of property. Marriage to one's father's wife became punishable by death.<sup>77</sup> Other than these restrictions and those concerning slaves, the laws were silent on the matter of who could be betrothed or married to whom.

The Salic laws gave little direct information about the betrothal and marriage of Frankish maidens. There was no information at all

about divorce. Most of the betrothal and marriage laws dealt with the remarriage of widows and widowers. The legal emphasis on widows and second marriages was understandable considering the complexity of inheritance between family and kin group. Since a husband and wife, although forming a new family, might have different heirs, there was a need to keep each partner's, or late partner's, property strictly separated.<sup>78</sup> Betrothal of Frankish maidens was arranged between the suitor and the woman's parents or guardians, or possibly between the groom and the woman "in the presence of her relatives,"<sup>79</sup> i.e., with the agreement of her family. Also, it is possible that men and women could have arranged their own marriages, by abduction or elopement. While a man who abducted a woman and married her was fined, the laws did not invalidate the marriage.<sup>80</sup> And, if the girl had been willing, the fine was less, and again no provisions were mentioned for separating the couple.<sup>81</sup> However, if anyone outside the family arranged a marriage without the consent of the couples' families, he was punished by loss of property and death (but the couple was not necessarily broken up).<sup>82</sup> Thus, some marriages did not begin with a formal betrothal contract between families. If a man withdrew after a formal betrothal had occurred, he had to pay his fiancée's family sixty-two and one half solidi, presumably the dowry he had given to her or her family upon the acceptance of the betrothal.<sup>83</sup> The lack of laws penalizing women for breaking the betrothal could mean that the woman's family could break off the betrothal without penalty,<sup>84</sup> or that only men could break the contract.<sup>85</sup> At the time of

betrothal the suitor gave the woman a dower, <sup>86</sup> which her father might have increased with a gift of property on her marriage. <sup>87</sup> During the betrothal, the woman remained in her family home, moving to her husband's home when they were married. <sup>88</sup> On the morning after the marriage, the groom gave the bride another gift, the morgangaben. <sup>89</sup> All this property acquired by a woman from betrothal and marriage became hers, not her husband's even though he had given her much of it. The property was held separately by the wife, although the husband might have administered and enjoyed the usufruct of the dowry at least. <sup>90</sup> The purpose of the dowry and morgangaben was to provide the wife with economic security when her husband died, or if she predeceased him, to provide for her children. <sup>91</sup> Wives also could acquire and control more property during marriage. <sup>92</sup> When a married woman died, her dowry went to her children. For minor children, the father would "administer the property or the dower of the former wife carefully until they ... reached maturity," but he could not sell it, give it away, or use it to dower a new wife. <sup>93</sup> If a wife died childless, her heirs (her family and kin) inherited two-thirds of the dower, provided they left behind two prepared beds with quilts, and two tables with chairs. If they failed to do this, and such an eventuality had not been pre-contracted, they received only one-third the dower. <sup>94</sup> This was later amended in a capitulary of King Chilperic (A.D. 561-584). According to the later law, only half the dower went to the deceased wife's kin; the other half went to her husband. <sup>95</sup> Similarly, when a husband died childless, his wife kept

half the dower and his kin got the other half.<sup>96</sup> Hence, while women were not members of their husbands' kin, they did have legal ties to their in-laws which had to be formally severed. Such ties were consistent with the need of the individual in Frankish society to be interdependent in order to survive in the violent world.

While it is uncertain how much choice the law gave girls over their first husbands, women seemed to have been able to choose second husbands without restraint, provided both parties were free and not related within prohibited degrees of kinship. Widows who wished to remarry had to go through a series of public rituals. If a free man wished to marry a widow, he took her before the judge or hundredman,<sup>97</sup> where he had to publicly pay her in-laws three solidi and one denarius (ring money) as a type of earnest money.<sup>98</sup> If he failed to do this, and married the widow, he had to pay sixty-two and one half solidi to her in-laws.<sup>99</sup> The ring money went to her late husband's nearest heirs in the following order: his children; his parents; his sister's eldest son; his niece's eldest son; his paternal aunt's eldest son; his maternal aunt's son; his maternal uncle; his brother; and finally, to the next nearest kin. If there were no kin, the ring money went to the public treasury.<sup>100</sup> Again, while women were not kin to their in-laws, widows still had legal ties to them which had to be legally severed before a widow could remarry.

A widow with children was supposed to ask her children's relatives (her in-laws) for advice before remarrying.<sup>101</sup> However, the laws did not specify that she needed their approval. Before a widow

could remarry, she had to pay her husband's nearest relative a fee known as the achasius which released her mundium from his control. When she had no children, the achasius went to her late husband's father or mother (a woman could hold her daughter-in-law's mundium). After his parents, his brother, then his brother's son inherited the right to hold the mundium. If these were dead, the widow was under the king's protection, and her suitor had to ask the judge or count for her hand and pay the ring money to the public treasury. <sup>102</sup> The value of the achasius varied by the size of the dowry; if her dowry had been twenty-five solidi, she had to pay them three solidi; if it had been sixty-two and one half solidi, she had to pay six solidi. <sup>103</sup> The dowry itself had to be preserved for her children. <sup>104</sup> A childless widow, however, could take most of her dowry with her to a second marriage. Her suitor had to pay the ring money to her in-laws, and she paid the achasius to her husband's heirs. In front of nine witnesses and her in-laws, she had to prepare a table, chair, and a bed with a quilt, before leaving to go to her new husband. Having done this, she could take two-thirds of the dower with her to her next marriage (a later law allowed her to keep half, and her in-laws to keep half). <sup>105</sup> If she did not do these things, she was allowed to keep only one-third the dowry, and had to pay a fine of sixty-two and one half solidi to the treasury. <sup>106</sup> It is interesting to note that while marriages without the consent of guardians, or lacking the proper procedures, were penalized by fines, there were no provisions in the laws which made such marriages illegal or the children



illegitimate, so long as both spouses were free and unrelated. Thus, if an individual were wealthy enough to afford the fines, he or she could arrange his or her own marriage. And, while girls probably were not able to choose their first spouse without parental input or consent, and boys would need help from their parents to provide their first dower, women and men would have been fairly free to choose their second spouse.

What then was the status of women in sixth century Frankish law? While women were not legally, socially, or economically equal to men, the provisions of the Pactus Legis Salicae gave free women, and to a lesser extent freedwomen, many legal, social and economic rights, limited by the mechanism of law enforcement. The laws provided deterrents against the harassment and physical abuse of women. During their lives women were relatively free of male control, considering the individual's need for ties of interdependence in order to survive. Women were economically competent, being able to inherit and manage property in their own right, separate from the property of their male kin and their husbands. And, while this would not have guaranteed them complete freedom from male control, it would have given them some input and influence on their families and societies. Probably, despite their mundiums, women were also legally competent, at least liable for their own actions and able to be brought to court. Free widows in particular seemed quite independent. They could control their own property, could control the lives of their children by holding their children's mundiums, could have their own households,

and could arrange their own marriages. Even freedwomen had some economic freedom and legal protection. The same laws which affected free women allowed freedwomen to marry, own property, and be protected from physical abuse and harassment. Therefore, the legal status of women within the provisions of the Salic Code seems to have been relatively liberal for the era, assuming those legal provisions were able to be enforced. Whether the laws were effectively enforced or not, cannot, of course, be determined simply from the Salic laws. As with many other questions concerning Frankish women (was there divorce? were women completely competent at law? could they inherit land? etc.) it is necessary to look at non-legal sources for answers.

## Notes

1. Theodore J. Rivers, trans. and ed., Laws of the Salian and Ripuarian Franks (New York: AMS Press, Inc. 1986) 2.
2. Katherine F. Drew, "The Family in Frankish Law," Law and Society in Early Medieval Europe (London: Variorum Reprints, 1988) 1.
3. Drew, "The Family in Frankish Law," 1. The Salian Franks lived primarily west of the Rhine and were unified by Clovis in the late fifth century. The Ripuarian Franks lived mostly east of the Rhine. Drew, 1.
4. The greatest influence of Roman law on Frankish law was "the fact that the Salic laws were put into writing and did not remain oral." Rivers, 4.
5. Rivers, Pactus Legis Salicae, hereafter cited as Pac.Leg.Sal., Capitulary.II.90.1-2., Capitulary IV.114., Capitulary.VI.2.2.,3.6-7.,6.5.
6. Rivers, 2. The Salic laws are believed to have been first promulgated by Clovis after 507 A.D. The Ripuarian laws were possibly promulgated by Chlotar II in 613, but were more likely promulgated by Dagobert I in 633-634. Rivers, 2-8.
7. Rivers, trans. Lex Ripuaria, 11.3. The punishment for abducting a churchman equaled that of abducting a king's man. Lex. Rip. 14. The fine for killing a churchwoman equaled that of killing a king's woman (300 solidi). Similarly, see Lex. Rip. 39.3., 40.5-9., 38.2. etc. The church had developed enough influence on the laws to afford different status and sometimes higher compensation for its people.
8. Drew, "The Family in Frankish Law," 2., and Katherine F. Drew, "The Law of the Family in the Germanic Barbarian Kingdoms: A Synthesis," Law and Society in Early Medieval Europe (London: Variorum Reprints, 1988) 17-18. The Germanic family consisted of the small group of husband, wife, children and dependents. Husband and wife would form a family yet not be in the same kin group. A wife's kin group would be comprised of her heirs, her children, her parents, siblings, cousins, aunts, uncles, etc., but not her husband, or her in-laws. Likewise, the husband's kin group would consist of his heirs, his children, parents, siblings, aunts, uncles, cousins, but not his wife or his in-laws. Thus, allowing for remarriages, adoptions, etc., the family and kin groups could become rather complex. (p.17-18) See also Pac.Leg.Sal. Cap.I.70.1., Cap.VI.2.2-3.3.
9. See chapter 1, "Women in Post-classical Roman Law."

10. Rivers, 21.
11. Suzane F. Wemple, Women in Frankish Society: Marriage and the Cloister, 500 to 900 (Philadelphia: University of Pennsylvania Press, 1985) 32.
12. Pac.Leg.Sal. Capitulary 104.9-10.
13. Pac.Leg.Sal.20.1-4. For a relative sense of the degree of the offenses. If someone mounted another person's horse without permission, the fine was 30 solidi. Pac.Leg.Sal.23.
14. Pac.Leg.Sal.104.1-2.
15. Pac.Leg.Sal.104.
16. Cap.III.97.2. The fine for shearing a boy's hair was 45 solidi. Cap.III.97.1. An earlier law stated that the penalty for shearing the hair of a girl or boy was 45 solidi. Pac.Leg.Sal.24.3.
17. Pac.Leg.Sal.13.1-3. The oddness of this law, which seems to punish armed bands less than individuals contrary to the pattern of other laws, was probably the result of a scribe's error.
18. Cap. I.72.
19. Pac.Leg.Sal.13.6.
20. Cap.IV.130.1-3.
21. Pac.Leg.Sal.15.2-3
22. Pac.Leg.Sal.13.12-14., Cap.VI.6.7.
23. Cap.V.133.
24. Cap.VI.2.2.
25. See Drew, "The Family in Frankish Law," 8, for a discussion of Roman wergelds. Also, Pac.Leg.Sal.14.3-4., 32.1-4., 41.1,8,9. 42.4. Cap.III.97.2., 104.9-10.
26. Drew,8., Other people with wergeld of 600 solidi were royal officials: counts, royal antrustians, and Sagibarons. Pac.Leg.Sal.54.1., 41.5., 54.3.
27. Pac.Leg.Sal.65e.2-4. A woman's wergeld increased to 1800 solidi if the murderer tried to hide the body (cremate it). (Cap.I.70). And, in a very late capitulary (A.D. 596) a woman of child bearing age was given a wergeld of 1800 solidi. (Cap. VI.8.4).

28. Pac.Leg.Sal.24.8., 65e.3.
29. Pac.Leg.Sal.24.6.
30. Pac.Leg.Sal.24.5.
31. Pac.Leg.Sal.65e.1.
32. Cap.III.104.4.
33. Cap.III.104.5.
34. Cap.III.104.6-7.
35. Cap.III.104.8.
36. Cap.III.104.9-11. Sometimes the wergeld of maidservants was not half the wergeld of free women. If anyone aborted the fetus of a maidservant and she were "an ordinary girl," the fine was 62-1/2 solidi. If she were employed in "her master's pantry or textile workshop," the fine was 100 solidi. Cap.III.104.10-11. Similarly, if a slave killed a maidservant, the penalty was 15 solidi plus her wergeld, unless she had been a "menial" maidservant, then the fine was only 15 solidi. Cap.V.121.
37. Drew, "The Family in Frankish Law," 8., Cap.VI.8.6. Also, in certain circumstances there was some collective responsibility on the part of witnesses to a crime. Pac.Leg.Sal.43.1.
38. Pac.Leg.Sal.13.6., Cap.III.104.7.
39. Cap.III.98.1-2.
40. Cap.VI.1.2.
41. Pac.Leg.Sal.55.4.,56.6., Cap.I.73.6.
42. Drew, "The Family in Frankish Law," 6. There is no agreement among scholars as to the interpretation of alodis and terra salica. Thus the question of whether women could inherit land is debated. T. J. Rivers argues that the alodis was movable property, and the terra salica was the family land. Therefore, only sons could inherit land, until the late sixth century, when pressure to keep the land in the hands of the family rather than one's more distant relatives ("neighbors"), led to Cap.IV.108. which allowed daughters to inherit the land when there were no sons, and sisters to inherit when there were no sons or brothers. (Rivers, 26-27). Suzanne Wemple (46-48) also interprets alodis as movable property, and terra salica as land, based on a legal text from c. 700, known as Marculf's Formulary (II.12) in which a

father bemoans "the ungodly custom ... that forbids sisters to share with their brothers the paternal land." (Wemple, 48) However, she argues, also based on this document, that the Salic law only provided for the intestate inheritance of land, since the father in the formulary declared "Against this exclusive claim of your brothers, my own sons, with this letter I make you, my beloved daughter, an equal and legitimate heir in all my patrimony ... so that you will not receive in anything a lesser portion than they." On the other hand, Edward James in The Franks (New York: Basil Blackwell Ltd., 1988) argues that clearly girls could originally inherit the land, but by the seventh century, the terra salica came to be interpreted as all the land held by the Salian Franks. Marculf's Formulary then demonstrated that these laws could be circumvented by writing a will; he sees wills as Roman influence on Germanic law. (190) In any case, since Marculf's Formulary was dated c.700, and this paper deals with sixth century Frankish law, I am in agreement with the arguments (Drew, 6-7) that the alodis was a type of land, not just movable property, and thus women could inherit land in the sixth century, and that as Edward James suggests in later centuries the Salic land might have come to mean all land. See also the discussion of allodial land tenure in the Middle Ages, Marc Bloch, Feudal Society, trans. L. A. Manyon, 2 vols. (Chicago: University of Chicago Press, 1961) 177, 248.

43. Drew, "The Family in Frankish Law," 7., Pac.Leg.Sal.59.1., Cap.VI.1.1.,
44. Pac.Leg.Sal.59.1-2.
45. Pac.Leg.Sal.59.3-4.
46. Pac.Leg.Sal.59.5.
47. Drew, "The Family in Frankish Law," 4.
48. Rivers, 27., Pac.Leg.Sal.13.11., 60.1-3., Cap.VI.1.2.
49. Pac.Leg.Sal.59.6.
50. Drew, "The Family in Frankish Law," 7.
51. Cap.IV.108.
52. Cap.VI.1.1., also indicated that even if women did not inherit the land, their male descendants could. "It was agreed that a grandson of a son or a daughter shall inherit property with an uncle or an aunt after the death of the father or the mother, just as if the father were living. Nevertheless, concerning those who are begotten from these grandsons, it was agreed to be

observed (only) regarding those who might be born of a son or a daughter, but not to those who might be born of a brother or a sister." Rivers (27) states that this law as well as Cap.IV.108. indicate that there was a tendency to try to keep the inheritance land within the line of direct descendants; thus daughters were allowed to inherit if there were not sons.

53. Drew, "The Family in Frankish Law," 6., Pac.Leg.Sal.59.1.
54. Henri Pirenne, Mohammed and Charlemagne, trans. Barnard Miall (Totawa: Barnes and Noble Books, 1980) 54-58, 75-78. Since the Franks were less populous than the Gallo-Romans in Gaul and probably held only part of the land, there would have been a lot of land which was neither alodis nor terra salica. It is unclear how such land would be inherited if acquired later by Franks. Also, starting in A.D. 542 and recurring throughout the century, the bubonic plague swept through Europe, hitting Gaul and Italy especially hard in the 540's, and again in 570-571. The death and famine which usually accompanied the plague would have left more land abandoned and available for acquisition. It is not clear, either, what category such land would have fallen into. For more information on the delining population in the late Empire see: A. M. H. Jones, The Decline of the Ancient World, ed. Denys Hay, 7th ed. (New York: Long Man Inc., 1984) 114-115, 307.
55. While the first promulgation of the Frankish laws is attributed to Clovis (A.D. 481-511), the Frankish laws were reissued periodically with changes. In the sixth century, Clovis' sons and grandsons added their own laws (Capitularies) to Clovis' original 65-title text. This version of the Salic law, the 65-title text of Clovis and the Capitularies of Childebert I, Chlotar I, and Chilperic I, was reissued, recopied, and modified during the Merovingian period. As a result, the Carolingian kings redacted and reformed the laws. Pepin I produced a 100-title text which included the 65-title text and the sixth century Capitularies (A.D. 763-764). Charlemagne adapted and reissued the 100-title text as the Lex Salica Emendata (A.D. 798). Charlemagne later issued another version, Lex Salica Karolina (A.D. 802-803). Oddly, this version was a 70-title version of Clovis' 65-title text without the Capitularies. Despite the reformed versions, apparently all the versions continued to be used, recopied, and passed on. Katherine F. Drew, "The Laws of the Salian Franks," Unpublished Translation, Rice University, 1989, 102-107. Rivers, 2-7.
56. Drew, "The Family in Frankish Law," 2-4., Pac.Leg.Sal.58.1-6.
57. Ibid.
58. Pac.Leg.Sal.58.3.

59. Pac.Leg.Sal.58.5-6.
60. Rivers, 21. For a different opinion, see Wemple, 31. She claims "a widow ... did not need a man to act on her behalf in court and financial transactions," 31.
61. Cap.III.100.2.
62. Cap.III.100.3.
63. Cap.I.68.
64. Pac.Leg.Sal.19.4.
65. "If a witch eats a man and it can be proven that she did this, let her be liable for ... 200 solidi." Pac.Leg.Sal.64.2-3.
66. Pac.Leg.Sal.64.3.
67. Pac.Leg.Sal.64.1-3.
68. Pac.Leg.Sal.55.4-5., Cap.I.73.6.
69. In classical Roman law, conternubium covered marriages with non-citizens, foreigners, soldiers; between provincial officials and provincial women; and between patricians and freedwomen or "actresses." The only legal result of such marriages which Roman law recognized was the blood relation between the children, or between the children and their parents, but not between the parents. These marriages were not punished (in the provinces, they might be recognized as legal by the local people's laws), except that the Roman was not exempt from the Augustan penalties for celibacy. This type of marriage became less common in the late Empire, since more marriages were granted conubium. (Soldiers could marry; patricians could marry freedwomen and "actresses," etc.) See Percy E. Corbett, The Roman Law of Marriage (Oxford: Clarendon Press, 1930), 24,30,97.
70. Pac.Leg.Sal.25.2.
71. Pac.Leg.Sal.10.6.
72. Pac.Leg.Sal.25.6-7.
73. Pac.Leg.Sal.13.8-9., 25.3-4. If such a marriage took place, and no one objected, there would not have been any punishment.
74. The slave was tortured to death. Cap.III.98.1-2.
75. Cap.III.100.4.



76. Pac.Leg.Sal.13.11.
77. Cap.VI.1.2.
78. Drew, "The Law of the Family in the Germanic Barbarian Kingdoms," 18.
79. Drew, "The Family in Frankish Law," 5., Wemple, 32., Pac.Leg.Sal.65a.
80. Pac.Leg.Sal.13.12-14. The penalties for marriages by abduction were much higher when men abducted and married women of higher status. Such mesalliances would not have been to the benefit of a woman's family, and so they were legally discouraged.
81. Pac.Leg.Sal.15.1-3.
82. Cap.III.99.1.
83. Pac.Leg.Sal.65a., Cap III.100.2.
84. Drew, "The Family in Frankish Law," 5.
85. Wemple, 33.
86. Cap.III.101.1.
87. Cap.I.67.
88. Pac.Leg.Sal.13.12-14.
89. I found no mention of the morgangaben in the Salic Laws. However, both Rivers, 20., and Wemple, 12,45., mentioned it, without noting their sources. The only primary source in which I found a mention of the morgangaben was Gregory of Tours' The History of the Franks (Book IX,20). See Gregory of Tours, The History of the Franks, trans. Lewis Thorpe (1974; New York: Viking Penguin Inc., 1985) 505.
90. Cap.III.101.1.
91. Cap.III.101.1-2.
92. Presumably through inheritance if a relative died, and probably through purchase.
93. Cap.III.101.1.
94. Cap.III.100.3. The widow's responsibility to leave behind household articles for her in-laws was probably due to the fact

that much of a wife's marital property was given to her by her husband. Thus, the in-laws would have had some claim on the marital property. The tables, chairs, beds, and quilts would have been the in-laws' share.

- 95. Cap.IV.110.
- 96. Ibid.
- 97. Pac.Leg.Sal.44.1-2.
- 98. Rivers, 20.
- 99. Pac.Leg.Sal.44.3.
- 100. Pac.Leg.Sal.44.6-12.
- 101. Cap.III.100.1.
- 102. Ibid., and Rivers, 22.
- 103. Cap. III.100.1.
- 104. Cap.III.100.1-2.
- 105. Cap.III.110.
- 106. Cap.III.101.2-3.

### Chapter 3: Women in Frankish Law: Non-legal Sources.

Non-legal sources provide additional information about the legal status of women in Frankish law of the fifth and sixth centuries. These histories, chronicles, hagiographies, and letters delineate how effectively or ineffectively the Salic laws were applied and enforced, as well as the ways they were interpreted. They also gave information concerning areas pertaining to women on which the laws were silent or obscure. The primary historical source for the Franks of the fifth and sixth centuries was Gregory of Tours' History of the Franks, written in the last decades of the sixth century by a man who had been involved in, and sometimes eyewitness to, Frankish government.<sup>1</sup> Other lesser histories for the period were the Chronicles of Fredegar,<sup>2</sup> and an anonymous Neustrian chronicle Liber Historiae Francorum,<sup>3</sup> which, added to Gregory's work, gave a fairly continuous history of the Merovingian Franks. Naturally, like many histories, these sources focused primarily on the lives of the Frankish kings and queens, somewhat less on the wealthy and powerful nobles and bishops, and only marginally on the lives of the common Frankish folk. Somewhat more information on the lives of average people can be gleaned from sixth century hagiographies, such as Gregory of Tours' Life of the Fathers,<sup>4</sup> or Jonas' Life of St. Columbanus.<sup>5</sup> Nevertheless, the bulk of information available to determine the legal statute of women dealt with upperclass and especially royal women. Since Frankish kings and queens (no less than Roman Emperors and Empresses), often acted contrary to the laws and could themselves change the laws, their deeds

probably did not provide entirely accurate pictures of legal behavior. Unpunished murder, torture, incest, polygamy, assassinations, etc., while common actions of early Merovingian royalty, were not legal behavior according to the Salic laws. Therefore, the examples of a Clovis or a Lothar, a Brunhild or a Fredegund, may provide exceptions to, as well as examples of, the rules.

Another difficulty arises in dealing with examples providing information about the upper and middle classes. Unlike other Germanic societies, where there was one law for Germans and one for Romans, the Salic law was the law for all people living in the territory of the Salian Franks.<sup>6</sup> Therefore, it is not always possible to distinguish whether an individual was a Roman or a Frank. Examples of royalty are easier to interpret because the ethnic origin of the kings and many of the queens is clear. Where the ethnic origin of Merovingian royalty is not clear, it is not so important, since wives apparently were subject to the laws of their husbands' land when they married, which in the case of Merovingian royalty meant Frankish law.<sup>7</sup> However, this problem is particularly pertinent where non-royal women were concerned because their examples may not be those of Frankish law, but of the vestiges of Roman law which functioned side by side with Frankish law. Thus, if the histories give an example of a daughter inheriting land along with her brothers, it could well be an example of the slow fading of Roman ways of inheritance, rather than an example of Frankish inheritance. At the same time, such an example might

indicate that the Frankish terra salica was minimal in comparison with the extent of Gallo-Roman lands or allodial lands.

Nevertheless, one picture the histories drew for all levels of society and nationality was the ineffectiveness of the Salic law in protecting individuals, female or male, who did not have the strength of their family, their followers, or their patrons to help them, and the threat of the bloodfeud to protect them. This was particularly true for the laws which protected women from insult and violence.

While the Salic laws which fined offenses against women<sup>8</sup> theoretically gave them protection, in practice, these laws appeared ineffective. Gregory of Tours told of many men, Prince Chramm, Count Eulalius, Count Leudast, Duke Amalo, and Chuppa to name a few, who attempted to abduct women, with varying degrees of success. King Lothar I's son Chramm ordered "by royal decree ... the daughters of certain senators to be abducted forcefully for ... entertainment" for himself and his band of "young and dissolute people from the lower classes."<sup>9</sup> Eulalius, Count of Clermont-Ferrand, not content with neglecting, abusing, and stealing from his wife Tetradia, until she fled from him, also abducted and married a nun.<sup>10</sup> After being outlawed by King Chilperic, Leudast, Count of Tours, took sanctuary in a church but made occasional forays against women on the church porchway until Queen Fredegund had him expelled.<sup>11</sup> On the other hand, not all abductors were successful. Duke Amalo was killed by a free woman whom he had had his servants abduct and beat for resisting. She fled to his lord, the King, for pardon and protection from Amalo's

family.<sup>12</sup> Chuppa, King Chiperic's Master of the Stables, gathered some of his men and attempted to abduct the daughter of Badegisel, Bishop of Le Mans, and his wife Dame Magnatrude (whom Gregory described elsewhere as a cruel and malicious shrew).<sup>13</sup> Dame Magnatrude "assembled her servants and sallied forth against him (Chuppa)," killing several of his men and forcing Chuppa to flee.<sup>14</sup> King Childeric was forced by outraged fathers to give up his kingdom because he had taken to meddling with his subjects' daughters.<sup>15</sup> Another king, King Chilperic, after murdering his Visgothic queen Galswinth, was driven out of his kingdom by his brothers.<sup>16</sup> Thus, the Salic laws notwithstanding, crimes committed by nobles against women seem to have been quite common, prevented not by the threat of compensation - which a wealthy man could pay should he be forced into court - but by the interference of a woman's family, servants, protectors, or occasionally by the woman herself. Perhaps the laws which required compensation for touching, abducting or killing women were more effective among the common Franks. For people living on farms or in villages, and certainly for poorer people, the fines would have been more of an economic threat. Similarly, the less mobile common people needed to remain in the vicinity of their family in order to have some protection from a violent world, as well as some source for survival, their property. Since the common people were less mobile than the nobles, it would have been easier to bring the local offenders to court. The Dukes, Counts, and Princes of Gregory's stories were quite mobile, especially when they got into trouble.

Those Franks who were less powerful, wealthy and mobile, would have been less able to flout the laws and flee the punishments.

Also, in the non-legal sources, the laws, backed by the threat of the bloodfeud, did regulate intrafamily behavior, sometimes protecting women from abuse by her relatives, or in-laws, sometimes allowing families to punish relatives who transgressed legal or social taboos. Gregory of Tours told of dealing with a priest from Le Mans who made a free woman of good birth his mistress. He cut her hair, dressed her as a boy, and moved with her to another city to avoid detection. Her relatives later discovered this and pursued the couple, killing the woman and imprisoning the priest. The priest was ransomed, but no punishment was meted out to the family for killing their kinswoman.<sup>17</sup> On the other hand, an individual who wished to escape retribution from his family could be protected by a patron. Pappolen, having been separated by her relatives from the woman he wished to marry, helped her to escape the nunnery in which her family had placed her and then married her. He was able to get the king's formal approval "so that she was able to disregard the threats of her relations."<sup>18</sup>

For women with strong families, the threat of the bloodfeud seems to have provided them protection from their husbands. Many of the bloodfeuds which riddled the Frankish histories began when a bad husband, who abused or insulted his wife, was attacked or threatened by her family. The most famous of these feuds involved Merovingian kings and queens. The Catholic Frank, Princess Clothild, married the Arian Visigoth, King Amalaric, who insulted her when she went to

church and beat her. Clothild sent her brother King Childebert a towel stained with her blood. Childebert responded by invading Spain, killing Amalaric, and returning to his kingdom with his sister and most of Amalaric's treasure.<sup>19</sup> Another Frankish princess who had trouble with her Visigothic in-laws was Ingund. Ingund was abused by her Arian mother-in-law Goiswinth (who was also her grandmother).<sup>20</sup> Ingund's brothers at the time were minors, and her mother was struggling to establish her regency, so no help was forthcoming from her kin. Her in-laws abandoned her, and she was captured by Imperial troops. She died enroute to Constantinople. Years later, Ingund's uncle Guntram pursued the feud until King Recared (Ingund's brother-in-law) sued for peace and offered to pay 10,000 gold pieces to compensate and end the feud.<sup>21</sup>

Not all the royal feuds were with the Visigoths. Theodoric the Ostrogoth King of Italy married Audofleda, Clovis' sister, and they had a daughter Amalasuntha, who was later murdered by King Theudat of Tuscany. Amalasuntha's cousins Kings Lothar, Childebert, and Theudebert threatened Theudat with invasion and deposition in revenge for her murder. Theudat paid them 1000 pieces of gold for compensation to avoid the feud.<sup>22</sup>

Occasionally, the feud would be turned against a woman's own kin, i.e. be carried out between different branches of the family. Queen Clothild, widow of King Clovis, urged her sons to revenge the murder of her parents by killing their murderers, her uncles King Sigismund and Godomer of Burgundy. Clothild's son Clodomer killed Sigismund and



his wife and children and drove Godomer out of his kingdom.<sup>23</sup> Another feud which lasted for generations also occurred between two branches of a family. When Chilperic murdered his wife Galswinth, his brothers, one of whom was married to Galswinth's sister Brunhild, sought to punish him. Eventually the feud was forgotten by the brothers but taken up by the wives and children. Chiperic's Queen, Fredegund, who had replaced Galswinth and may have instigated her murder and possibly that of Brunhild's husband, frequently tried to have Brunhild and her son King Childebert II assassinated. Brunhild and Childebert continually demanded the return of Galswinth's property (since Brunhild was her heir) as well as the death of Fredegund. Neither party was entirely successful although Brunhild did recover the property. The feud was ended only when Fredegund's son Lothar II defeated the armies of Brunhild and her great-grandsons and had Brunhild and her descendants murdered.<sup>24</sup>

While royal feuds were more famous, the bloodfeud was pursued by other Franks as well. A Parisian woman who had left her husband was accused by his kin of living with another man. Her family, as the law provided, swore in court the accusation was untrue, but a feud broke out between the families anyway and ended only when the woman killed herself.<sup>25</sup> Another feud, in Tournai, arose when a woman's brother rebuked her husband "for neglecting his wife and going after loose women."<sup>26</sup> The husband continued his ways, so the woman's family attacked and killed him.

In the end not a single member of either family remained alive except one ... survivor for whom there was no opponent left. The next thing ... was that the relations of each of the two families started quarreling with each other ...<sup>27</sup>

The feud ended only when Queen Fredegund invited the three survivors to dinner and had them beheaded at the table. Of course, their kin wanted Fredegund arrested and executed and called out more of their relatives, but Fredegund "escaped and found refuge somewhere else."<sup>28</sup> Thus sometimes the feud could not be pursued if the offender were powerful. The same Queen Fredegund, who was able to stop that feud so ruthlessly by murdering townsmen in Tournai, was unable to protect her daughter Rigunth, who had her dowry stolen from her on her way to be married. Several powerful nobles stole Rigunth's wealth at a time when Fredegund, having just been widowed and left with a four month old son, was struggling for her own survival and was relatively powerless.<sup>29</sup>

The protection of the kin might encompass more than the blood feud. When the princesses Clothild and Basina rebelled against their abbess and left their convent, they went to their royal kinsmen, Kings Guntram and Childebert II, for help. Similarly, after the revolt had been put down and judgement rendered on the leaders, Clothild and Basina refused to return to the convent as the bishops had ordered and were consequently excommunicated. King Childebert persuaded the bishops to lift the ban, and Basina returned to the convent. However,

Clothild refused and went to live on the estates given to her by the king.<sup>30</sup>

It appears that while there were many examples of violence against women, the Salic laws, backed by the threat of the feud, would have acted as a deterrent to crime, although even the threat of compensation or feud would not prevent crime entirely, for powerful individuals or individuals with powerful patrons, could escape both. For the average Frankish woman, the system provided some protection from abuse by outsiders, in-laws, and even relatives. Women (or men) with powerful families, patrons, or supporters would have been fairly protected. For those with weaker families, the laws were less effective in providing protection from or deterrents to crime.

Gregory of Tours and the other chroniclers also provided information concerning land tenure, information which helps interpret the rather ambiguous laws.<sup>31</sup> Could women inherit land? From the histories it would appear that they could, or at least that most Frankish women could. Royal women, however, presented a contrast: Frankish princesses often inherited movable wealth, not land. When a king died, his sons inherited his kingdom, not his daughters. Instead, Frankish princesses got "dowries" and "treasures." However, the royal family provided examples of the extraordinary, rather than what was probably the norm. When Frankish princesses married, they normally married foreign princes. It would not have been reasonable for their brothers or fathers to have given them Frankish territory which would have then fallen under the control of their foreign

husbands. Considering the efforts of the Frankish Kings like Clovis, Lothar I, and Chilperic to conquer more territory from neighboring kings and the internecine struggles, murders, and confiscations among the land-hungry Merovingian princes,<sup>32</sup> it is unlikely that they would have given away their hard won land (to the kings they may have taken it from) as part of their kinswomen's dowries. Two examples from the histories seem to confirm this. When Galswinth was murdered by her husband Chilperic, Brunhild became her heir to the properties given her by Chilperic, that is, Galswinth's morgengaben. Why Brunhild? Why not Galswinth's parents or other siblings? Brunhild was the only member of Galswinth's family living among the Franks; therefore she was the heir, and even then, Brunhild was not automatically given the dowry but had to struggle to get it. Many years after the murder, in a treaty with her brother-in-law Guntram, who had managed to acquire Galswinth's property, Brunhild was allowed to inherit her sister's property, although some of it would revert to her only after Guntram's death. This treaty, the Treaty of Andolet, signed by Guntram, Brunhild, and Chilperic II, had another provision which implied that princesses could inherit land but not as part of their dowries. A provision promising protection to, and confirming Brunhild, Childebert's wife Faileuba, their daughters, and his sister Chlodosind in possession of the "cities, lands, revenues, rights of all sorts of wealth of all kinds ..." which they held, added the qualifying clause concerning Chlodosind, "as long as she remains in the land of the Franks."<sup>33</sup> In other words, if the Frankish princess married outside

the kingdom, she would lose her rights to Guntram's protection and possibly also to the lands. Therefore, the fact that Frankish princesses were given movable property for their dowries while their brothers got the landed property, i.e. the kingdom, probably just reflected the political realities of the time rather than the laws of inheritance.

Concomitantly, since Frankish kings often married foreign princesses, Radegund, Galswinth, Brunhild, Clothild, etc., or dowerless women of poor lower-class origins, Fredegund, Veneranda, Marcovefa, Merofled, etc.,<sup>34</sup> initially these queens would not have had any substantial amount of Frankish lands of their own. The Frankish kings then provided their wives with dowries and/or morgengabens, which included lands as well as "treasure." Chilperic gave Galswinth several cities as part of her morgengaben: Bordeaux, Limoges, Cahors, Lescar, and Cieutat.<sup>35</sup> Fredegund was given cities as part of her morgengaben and manors as gifts from her husband Chilperic.<sup>36</sup> When Chilperic dismissed Audovera, he gave her "many estates and villas."<sup>37</sup>

These queens could dispose of these lands as they saw fit. Queen Clothild, among others, "endowed churches, monasteries, and other holy places with the lands necessary for their upkeep."<sup>38</sup> The Treaty of Andolet (A.D. 587) had several provisions protecting the property of royal women, and their rights to dispose of it as they saw fit.

It is ... specifically agreed, and it shall be observed ... that whatsoever King Guntram has donated to his daughter Clothild, or may ... in the future donate, in property of all kinds, in men, cities, land or revenues, shall remain in

her power and under her control. It is agreed that if she shall decide of her own free will to dispose of any part of the lands or revenues or monies, or to donate them to any person ... they shall be held by that person in perpetuity ... Moreover, she herself shall under the protection and guardianship of King Childebert, hold secure, in all honour, and dignity, everything of which she shall stand possessed at the death of her father.<sup>39</sup>

King Guntram's sons had all died, and he had adopted Childebert as his heir to his kingdom and political power.<sup>40</sup> Nonetheless, his daughter inherited land from him. While this might have been because Clothild had no brothers to inherit the "terra salica," it seems unlikely since her father had adopted a male heir to his kingdom. Instead, this provision suggests that the princesses, who were ostensibly removed from inheriting their father's kingdoms, might have been left land as well as "treasure," or at least could have legally acquired land by using that "treasure." And, another provision of the treaty, concerning Childebert's female relatives, mother, sister, wife, and daughters, was quite similar, confirming their possessions, goods, cities, land, revenues and wealth, and their right to dispose of it as they so chose; yet, Childebert had sons.<sup>41</sup> From this treaty, it seems clear that royal Frankish women could inherit, acquire, sell and manage lands, even when they had brothers. No distinction was made by Gregory or their other historians as to whether this land was Salic or allodial. Thus, at least Frankish royal women enjoyed considerable economic freedom.

The histories tell of other women besides queens who held and inherited land. Beretrude, having bequeathed some of her wealth to the convents she had founded and to different churches, made her daughter heiress to the rest of her property, including several country estates.<sup>42</sup> A mother and daughter, Ingitrude and Berthegund, quarrelled over who should inherit Ingitrude's deceased husband's property. The king ruled that Ingitrude was entitled to three-fourths of the estate to be shared with her grandchildren (her son's children), and Berthegund was entitled to a quarter share.<sup>43</sup> Thus, the land went to a man's widow and all his descendants, female or male. When Ingitrude died, Berthegund appealed to the king and was allowed to inherit all the property, including Ingitrude's convent, thereby dispossessing her brother's children.<sup>44</sup> Bagdesil, Bishop of Le Mans, also managed to steal his siblings' inheritance; according to Gregory, he "behaved extremely badly towards his own brothers and sisters, and indeed despoiled them ... they never succeeded in establishing with him their rights over what they should have inherited from their own mother and father."<sup>45</sup> In another property dispute, a woman Domnola was killed by a neighbor who was laying claim to a vineyard she had inherited from her father.<sup>46</sup> Yet another woman, Ranichild, who had inherited land from her father, sold some of it to her father's friend Brachio, who wanted to build a monastery.<sup>47</sup>

Some people willed their lands long before they died. Before going into battle, the wealthy Duke Desiderius divided his property between his wife and children.<sup>48</sup> On a lesser scale, a group of female

and male serfs, gathered up from the royal estates by King Chilperic to be sent to Spain with his daughter Rigunth as part of her dowry, "made their wills, leaving all their property to the churches and stipulating that, as soon as it was known that the Princess had reached Spain, these wills should be acted upon at once, as if they themselves were dead and buried."<sup>49</sup> Unless all the serfs were related, it would seem that their kin had no claim on the land when wills were written.

Clearly from both the legal and non-legal sources, women were not excluded from holding land and could acquire land through gift, inheritance, or purchase. While there were laws excluding daughters or favoring sons in the inheritance of specific land, in the sixth century those laws appear to have been ineffective. Otherwise, the terra salica could not have been terribly extensive. It would also seem that the laws of inheritance as outlined in the Pactus Legis Salicae (59.1-6), either were laws of intestate inheritance or also applied only to a small classification of land; the examples in the histories show that it was common on all levels of society to bequeath land contrary to the laws of inheritance. Those inheritance laws were often, at least in the upper-classes, circumvented by wills, royal decrees, and force of arms.

The non-legal sources also provide information about the legal liability of women. The laws which fined women separately from men added to the impression that women controlled their own property.<sup>50</sup> These laws also imply that women were legally competent. The non-



legal sources confirm this impression, giving several examples of women's standing trial, swearing oaths, collecting compensation, pursuing the bloodfeud, and controlling their childrens' properties and marriages. From the examples, it appears at first that owning a woman's mundium was only a token act, for Frankish women appear competent at law.

Gregory of Tours gave several examples of Frankish women standing trial. Additionally, although the descriptions of court procedure in the Salic law made no reference to Church involvement in the court process,<sup>51</sup> the examples in the histories show that secular and church procedure were often mixed in law courts. When the relatives of the Parisian women accused of adultery went to court to swear their oaths, they did so in church over the tomb of St. Denis. When that procedure failed to resolve the problem, the woman herself was summoned to trial, but it is not clear whether the summoner was the king, who had fined the feuding families, or the bishop in whose church the feud had started. The summons was not answered since the woman committed suicide, perhaps with the "encouragement" of her family which would have stood to lose more money if she were found guilty.<sup>52</sup>

Count Eulalius sued his ex-wife Tetradia, attempting to recover his property which she had taken when she left him; she was summoned before a court composed of "the bishops and the leading laymen."<sup>53</sup> Tetradia did not appear but was represented by Agin while Eulalius pleaded his own case. Tetradia was found guilty and ordered to repay her ex-husband fourfold the value of the property she had taken from

him, but she was allowed to keep the property she had recently inherited from her father.<sup>54</sup> Secular law having been satisfied, the bishops added another sentence, declaring her second marriage invalid and her children by her second husband Duke Desiderius illegitimate. However, since these sons were probably adults in possession of their father's land, it is doubtful that the latter sentence could have been enforced.<sup>55</sup>

A third trial was brought by rebellious nuns against their abbess and by angry bishops against the nuns, Clothild and Basina. While this problem would appear to be strictly a church matter, the bishops themselves were unable to quell the riots and bring the combatant nuns to trial. The Kings Guntram and Childebert II chose the tribunal of bishops and sent troops to put down the revolt. Once in court, both Clothild and Basina argued their own cases.<sup>56</sup> These trials indicate that there was considerable overlapping between the church and the secular law. Under either jurisdiction, women were legally liable and could be brought to court for any offenses they committed.

Upon at least three occasions, Queen Fredugund became involved in legal proceedings. First, after a complaint had been brought before King Guntram that Fredegund had had several important people murdered, Fredegund "denied everything, ... so she could not be punished."<sup>57</sup> It is possible, but unclear, that her denial took the form of formally swearing an oath. Second, Baddo, one of Fredegund's messengers to King Guntram, was suspected of being an assassin and was taken before the king to be tried for treason. However, Guntram offered "if

Fredegund can clear him of the charge which is brought against him, and have the support of men of good repute in doing so, Baddo ... (may) ... go free."<sup>58</sup> However, "no one put in an appearance to represent Fredegund and to establish his innocence."<sup>59</sup> Queens, it would appear, could gather oathhelpers to swear, or could themselves swear, to support one of their men in court. Upon a third occasion Fredegund was called to gather oathhelpers, this time to give "incontrovertible evidence" to Guntram that her son Lothar was sired by her deceased husband Chilperic.

Queen Fredegund ... assembled the leading men of her husband's kingdom. Three Bishops came and some three hundred of the more important leaders. They all swore an oath that King Chilperic was the boy's father. This put an end to King Guntram's suspicions.<sup>60</sup>

This seems a clear picture of the Frankish process in which an accused provides oathhelpers to give evidence. Fredegund was an example of a Frankish woman, although admittedly an extraordinary one, who participated in the legal process.

Fredegund was not the only queen who was called upon to answer a charge in court. King Guntram charged Brunhild with conniving with her son King Childebert to overthrow him.

Guntram ordered a council of bishops to be convened on the first day of November. Quite a few set out for this council from the uttermost ends of Gaul. However, Queen Brunhild cleared herself on oath, and they all went home again.<sup>61</sup>

These examples demonstrate that in Frankish law, women, especially queens, could swear oaths, gather oathhelpers or oathmakers, and appoint legal representatives or appear in person in their own defense or the defense of one of their followers. However, while there were many examples of women being charged and summoned to court, there were no examples of women bringing charges against someone else. While Eulalius had stolen Tetradia's property and Tetradia had stolen his, Tetradia, not Eulalius, was sued in court.<sup>62</sup> Perhaps it was in this matter, pursuing offenders, that women were legally restricted, like minors, and the person holding a woman's mundium would act for her. Thus, unlike Roman women in the Empire, who could take someone to court or be brought to court themselves, Frankish women appear to have been able to be sued but not to sue.

Other legal questions concerning women that the laws did not fully explain concerned marriage and divorce. The non-legal sources provided some answers. Unfortunately, the examples of royal marriages often confuse rather than explain the issue. While the majority of Franks appear to have been monogamous, most of the royal princes were polygamous, having several wives and concubines at the same time. Thus it is not always possible to decipher the question of divorce among the royal wives and concubines. Did all the wives live together simultaneously, or did the princes occasionally shed one before taking another? Many of these polygamous princes also married women forbidden by the laws (slaves, freedwomen, aunts, sisters-in-law).

Nevertheless, some information about legal marriage, betrothal, and divorce, can be sifted from the stories of the Merovingian princes.

Betrothals did not universally precede marriage; when betrothals occurred, they seemed to have been arranged by the man and woman's family. As the laws imply,<sup>63</sup> the suitor would give the bride or her family a dowry to which her family added, or vice-versa. King Amalaric of Spain asked Clothild's brothers for her hand in marriage. They agreed and sent her to Spain with "a great dowry of expensive jewelry."<sup>64</sup> King Sigibert sent gifts to Spain and asked for the hand of the Princess Brunhild. Her father, Athangild sent her to Sigibert with a large dowry.<sup>65</sup> Sigibert's brother Chilperic sent to Spain to ask Athanagild for his other daughter Galswinth in marriage at the same time promising to dismiss all his other wives and make her his only queen. Galswinth was sent with a large dowry, which made her much beloved of Chilperic: "He loved her dearly, for she had brought a large dowry with her."<sup>66</sup> Mothers also might dower their daughters. Legates from Spain arrived with gifts to offer King Chilperic for one of his daughters, and after deliberation he decided on Rigunth. He provided her with "a tremendous dowry," to which her mother Fredegund added "a vast weight of gold and silver, and many fine clothes."<sup>67</sup>

Ordinary people also might give dowries. The swindling freedman Andarchius, a servant of King Sigibert, made an offer to the wife of Ursus for her daughter.

He placed a mail shirt in a case in which legal documents were usually kept and said to the wife of Ursus: I have put in this case a quantity of gold coins ... 16,000 ... They

might perhaps become yours, if you were to let me marry your daughter ... The woman was taken in ... and in the absence of her husband, she promised Andarchius that he should marry the girl.<sup>68</sup>

When Ursus returned, and refused to countenance the marriage, Andarchius forged a betrothal contract and sued for the return of the dowry of 16,000 gold pieces. Ursus was ordered to repay the dowry although he got it back when fraud was revealed.<sup>69</sup>

The tale of Ursus seems to show, as Suzanne Wemple argues, that a betrothal contract was unbreakable on the woman's part.<sup>70</sup> However, other instances made betrothal seem less binding to both parties. Pappolen became engaged to the niece of Felix, Bishop of Nantes, but the Bishop refused to accept the betrothal, so Pappolen abducted her. Nevertheless, Felix managed to separate the couple before marriage and shut his niece up in a convent. She got a message to Pappolen, and he abducted her again and married her. Yet although her family broke the betrothal, it was necessary for Pappolen to go to the king for protection against her kin.<sup>71</sup>

Frankish saints' lives are also filled with forced betrothals that were broken by the religious partner once his/her parents had died. St. Venatius, having been betrothed by his parents and having given the girl "her presents of cups, and also shoes," was inspired to become a monk and abandon his betrothal.<sup>72</sup> St. Leobardus was also forced into betrothal by his parents, and giving in after many parental lectures, "gave a ring to his betrothed, offered her a kiss,

bestowed shoes on her, and celebrated a feast on the day of her betrothal."<sup>73</sup> He also later broke the betrothal, after his parents had died, in order to pursue a religious life.<sup>74</sup> Lupus, a widower who wanted to enter the church, was persuaded to remarry by his brother (who feared the loss of his inheritance if his brother entered the church). He fixed a date to exchange betrothal gifts, but Lupus died before that.<sup>75</sup> While forced betrothal and marriage are standard formula for many saints' lives, the stories nevertheless give descriptions of betrothals and broken betrothals among the common folk.

Royal families also failed to fulfill betrothal agreements without being penalized. Rigunth, having been betrothed to Recared of Spain, was not too eager a bride, and having approached her betrothed's lands, "began to contrive reasons for delay."<sup>76</sup> Consequently, when her father died, the nobles escorting her took the opportunity to steal her treasure. Eventually, Fredegund had Rigunth brought back home where she grew old quarrelling with her mother and "sleeping with all and sundry."<sup>77</sup> Nevertheless, Recared was not reimbursed for the broken betrothal. He later offered for Chlodosind, Brunhild's daughter, and was accepted by her mother.<sup>78</sup> However, her brother had previously received gifts and betrothed her to the Lombard King Authari.<sup>79</sup> One of these contracts had to have been broken, probably the first one to Authari.

King Theudebert, betrothed by his father to Princess Wisigard, refused for many years to honor the contract because he had met and married Deuteria, a woman he preferred. However, his nobles pressured

him to keep the contract, so, tiring of Deuteria, he finally married Wisigard.<sup>80</sup> Betrothal contracts therefore, were probably not legally binding although either party was probably required to return the gifts. And, if the person who broke the contract was powerful enough, he might not even have to do that.

Not all legal marriages began with betrothal contracts between a suitor and a woman's family. The histories gave examples of many women who arranged their own marriages. The Burgundian Princess Clothild, orphaned when her uncles murdered her parents, arranged her own marriage with the Frankish King Clovis. She accepted a ring and "betrothal ornaments" from a Frankish legate sent by Clovis then hid the ring in her uncle's treasury. Clovis sent to her uncle for her, but he refused. However, Clovis' ring was found in the treasury and was taken as proof of a contract, so Gundobald reluctantly handed Clothild over to Clovis.<sup>81</sup>

Not all princesses were as successful in arranging marriages. After the death of King Charibert, one of his Queens sent to King Guntram, offering marriage. Guntram accepted and offered her an honorable place and high position. Once she arrived with her treasure, he robbed her of it and placed her in a nunnery. Angry but not daunted Queen Theudechild,

sent messages to a certain Goth, promising him that if he would carry her off to Spain and marry her there, she would escape with what wealth remained to her and set off with him

...<sup>82</sup>

He agreed, but unfortunately her vigilant abbess caught her escaping



and had her beaten and locked up.<sup>83</sup>

Many of the Frankish kings married without betrothal contracts. When they married servant women or their concubines or captives, there appeared to have been no betrothal, but the kings might give the women dowries and morning-gifts. For these kings, betrothal or even marriages was not important since all sons of kings were heirs, regardless of whether their mothers were princesses or concubines, free or slave.<sup>84</sup> Childeric (d.481) married Basina, Queen of Thuringia, after she had left her husband; she bore Childeric his heir Clovis, who united/conquered the different Frankish tribes.<sup>85</sup> Clovis' son Lothar (d.561) had several wives, none of whom were acquired by betrothal: Ingund, her younger sister Aregund, Chunsina, Radegund, a captive, and Guntheuc, his brother's widow.<sup>86</sup> Radegund was a Thuringian princess captured by Lothar and kept as part of his booty. Since she was eight when captured, Lothar had her guarded, educated, and brought to court when she was old enough to wed him; he gave her wedding gifts and a morgengaben.<sup>87</sup> Chiperic, Lothar's son, had many concubines and three wives. Audovera, his first wife by whom he had three sons, was dismissed and later murdered; Galswinth, a Visigothic princess, he murdered; and Fredegund, a "serving-woman" "from a family of low rank," whom he made his queen and partner in crime, outlived him (and possibly had him murdered). Fredegund's origins as a servant and concubine to the king did not affect her status or power. She ruled his lands as Queen-regent for her son Lothar II.<sup>88</sup> Lothar I's son King Charibert also married without betrothal contracts. He first married Ingoberg. She had two servants, Merofled, and Marcovefa (a

nun), daughters of a poor wool worker. He married both of them and dismissed Ingoberg. He also had another queen, Theudechild, who was the daughter of a shepherd.<sup>89</sup> Another brother, Guntram, had a servant-girl mistress, Veneranda. He also married Marcatrude and Astrechild, one of Marcatrude's servants.<sup>90</sup>

Several of the royal wives of lower class origins were given wedding gifts or morning-gifts by their husbands: Fredegund, Rade-gund, Theudechild, Audovera.<sup>91</sup> All their children who survived, inherited. Thus at least at the royal level, little distinction was made between marriages formally contracted between families and marriages conducted without such formalities.

Among non-royal Franks, the same informality in marriage existed in the form of marriage by abduction: Pappolen was separated from his betrothed and was able to marry her only by abducting her;<sup>92</sup> Chuppa tried but failed to abduct a bride.<sup>93</sup> Eulalius abducted a nun and married her.<sup>94</sup> Gregory did not indicate that any of these marriages were less than valid because of their origin.

Although the Salic laws did not mention divorce, it appears from the non-legal sources that some type of divorce existed. Normally, it involved one partner's leaving the other. Basina, Queen of Thuringia left her husband and went to King Childeric saying:

I know that you are a strong man and I recognize ability when I see it. I have therefore come to live with you. You can be sure that if I knew anyone else, even from far across the sea, who was more capable than you, I should have sought him out, and lived with him instead.<sup>95</sup>

Childeric was pleased and married her.

Prince Theudebert besieged the city of Cabieres. Deuteria, a "married woman full of energy and resource,"<sup>96</sup> whose husband was out of town, sent messengers to Theudebert offering to let him into the city. When he had entered the town, Deuteria went to him and became his mistress. They lived together and had a daughter. After his father died, Theudebert married Deuteria although his father had arranged a betrothal for him to a princess.<sup>97</sup> Eventually (seven or more years later), he left Deuteria and married the princess who died soon after. "He refused to take Deuteria back and married another woman."<sup>98</sup>

Tetradia, "through her mother a young woman of noble blood, but of humbler origin on her father's side,"<sup>99</sup> was the wife of the unfaithful and abusive Count Eulalius who also stole her jewels and money from her. Eulalius' nephew Virus wanted to marry Tetradia, so he helped her escape to Duke Desiderius. She took her eldest son and all her husband's property. Eulalius killed Virus, but he could not recover his wife because Duke Desiderius had married her. Eulalius twice tried to sue her for leaving him and going to live with Desiderius, but "he became the subject of so much ridicule and humiliation that he decided ..." to drop the lawsuit.<sup>100</sup> Years later after Desiderius had died, Eulalius again brought suit against Tetradia, but this time not for leaving him but for restitution of his property which she had taken when she left him. He won that case, and she had to repay him fourfold the value of all that she had taken.<sup>101</sup>

Berthe Gund was invited by her mother, the Abbess Ingitrude, to join her at the convent and become the next abbess. Berthe Gund left her husband and entered the convent. Her husband protested to the Bishop of Tours (Gregory), who persuaded her to return to her marriage or be excommunicated.<sup>102</sup> Three years later, she again left, taking with her one of her sons, all of her possessions, and some of her husband's. Her mother sent her to Berthe Gund's brother, Bertram, Bishop of Bordeaux. Her husband again followed, but Bertram sent him away. He appealed to the king; she sought sanctuary. He gathered a group of men to try to abduct her. Berthe Gund resisted, and in the end, her husband gave up. Having gotten him to let her leave, she changed her mind and lamented having lost her husband and children; Berthe Gund did not, however, return to her husband.<sup>103</sup>

Another woman who left her husband was the Parisian woman over whom a feud started. She had left her husband and was accused of living with another man. Her husband's kin went to her family and accused her of adultery.<sup>104</sup> Thus, it would appear that simply leaving a husband and moving in with another man or entering a convent did not constitute a divorce unless the husband were willing to let his wife go. This was also true for royal women.

Radegund, one of Lothar's queens, left him to enter a convent. Since he had brought her back by force when she had left him before, she left him the second time under a pretense, then took sanctuary and the veil.<sup>105</sup> Like Berthe Gund's husband, Lothar did not give in but followed her and alternately tried to threaten and cajole her back.

She sent many religious people and bishops to argue for her. Eventually, Lothar gave in and even became her patron and helped her found a convent. In a letter St. Radegund sent to her bishop she wrote:

Here in the town of Poitiers I founded a convent for nuns. Lothar, my lord and king of glorious memory, instituted this and was its benefactor. When it was founded, I made over to it by deed of gift all the property which the King in his munificence had bestowed on me ... (and) the property which our most noble Lothar and the most glorious Kings his sons ... bestowed upon me.<sup>106</sup>

Lothar's son Sigibert helped her to acquire relics for her convent.<sup>107</sup> While Lothar originally was reluctant, once he accepted her desire to be a nun, they established friendly relations.

Another queen who wanted to leave her husband was Galswinth. She even offered to leave her dowry and morgengaben behind (although her father might not have let it go so easily). Since Chilperic would have had difficulty keeping her from leaving, he had her killed so that he would not lose the dowry.<sup>108</sup> Perhaps he remembered the example of his aunt Clothild who, with her brother's help, left her husband, taking with her her dowry and most of his treasury.<sup>109</sup> It seems from these examples that when women left their husbands, they could take the property given to them by their husbands or fathers even when their husbands did not want them to leave. These examples were of women who left their husbands. Husbands often left their wives, too.

The sons of Lothar kept several wives at once. However, sometimes they "dismissed" a particular wife. King Charibert was so angry at his wife Ingoberg that "he dismissed Ingoberg and took Merofled in her place."<sup>110</sup> Guntram was estranged from his wife Marcatrude and "dismissed" her.<sup>111</sup> Chiperic dismissed his wife Audovera and "asked her to dress in the habit of a nun along with her daughter. He gave her many estates and villas ... then he made Fredegund his queen."<sup>112</sup> Brunhild's grandson Theuderic sued for the hand of the Visigothic Princess Ermenberga, promising her father that she would never be deposed. Nevertheless,

His grandmother saw to it that Theuderic's marriage was never consummated: the talk of Brunechildis his grandmother and his sister Theudila poisoned him against his bride. After a year, Ermenberga was deprived of her dowry and sent back to Spain.<sup>113</sup>

An ambitious patrician Alethius approached Lothar II's Queen, Bertetrudis telling her that her husband would die within the year and proposing that when Lothar died, he, Alethius, would give up his wife and marry her so that he could be the next king and she remain the queen.<sup>114</sup>

From these examples, it seems clear that some type of divorce was practiced by the Franks, at least divorce by mutual consent. When the couple simply separated, the wife took with her her dowry, mor-gangaben, and gifts given during marriage. When the divorce was not by mutual consent, complications arose, although if the deserting spouse remarried, the divorce was probably accepted as legal. Since a

man could abduct and marry a woman, it is not surprising that men could abduct wives who left them and force them to remain in the marriage. On the other hand if the husband were reluctant but the wife found a protector or an ally such as a priest, bishop, king, duke, or family, she could put pressure on her husband until he agreed to the divorce. Even when the husband was reluctant, it seems that the wife could take all her property with her, including that given to her by her husband during marriage. While wives essentially needed the consent of their husbands or at least the lack of opposition from their spouses, the husbands could divorce their wives without needing their consent.

The non-legal sources gave additional information concerning the legal status of women in sixth century. While the provisions of the Pactus Legis Salicae appear to have given women many legal, social, and economic rights, the information in the non-legal sources modifies that impression in some areas. The laws which provided deterrents against the harassment and physical abuse of women were effective in deterring offenses only when the parties involved were backed by families or patrons of fairly equal power. When there were inequality in status or wealth between the victim and the offender, the histories demonstrate that the laws were ineffectively enforced. It would appear also that in those instances where the status of the individuals was not too far apart, the laws, backed by the threat of the bloodfeud and to a less extent compensation, provided relatively

effective protection for women, both from strangers and from husbands or in-laws but not necessarily from their family or kin.

The non-legal sources reinforce the impression that Frankish women were economically competent, being able to acquire land and wealth by purchase, inheritance, or gift, property which they held in their own right and took with them when they entered or left a marriage. While this economic independence and the option of divorce would not have freed them from male control, it gave them some input and influence on their families and society. Women were practically legally competent as well: they could swear oaths, gather oathhelpers, appoint legal representatives or appear in person in court. The only legal restriction would appear to be the inability to bring charges against another person; for that, they probably had to rely on the person who held their mundium. As widows, they could control their own property and that of their children, and could arrange their own, and their children's marriages. Therefore, the legal status of women as provided in the Salic code, seems to have been relatively good judged by the degree of freedom and self-determination Frankish women seem to have enjoyed.



## Notes to Chapter 3

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2. J. M. Wallace-Hadrill, trans. The Fourth Book of the Chronicle of Fredegar, With Its Continuations (New York: Thomas Nelson and Sons, 1960). Hereafter cited as Fred.
3. Bernard S. Bachrach, ed. and trans., Liber Historiae Francorum (Lawrence: Coronado Press, 1973). Hereafter cited as L.H.F.
4. Gregory of Tours, Life of the Fathers, trans. Edward James (Liverpool: Liverpool University Press, 1985). Hereafter cited as L.F.
5. Edward Peters, ed., Monks, Bishops and PAGans: Christian Culture in Gaul and Italy, 500-700 (1949; Philadelphia: University of Pennsylvania Press, 1981) 75-113.
6. Katherine F. Drew, "The Family in Frankish Law," Law and Society in Early Medieval Europe (London: Variorum Reprints, 1988) 8.
7. Suzanne F. Wemple, Women in Frankish Society: Marriage and the Cloister, 500 to 900 (Philadelphia: University of Pennsylvania Press, 1985) 1.
8. Theodore J. Rivers, trans., and ed., The Laws of the Salian and Ripuarian Franks (New York: AMS Press, 1986) Pactus Legis Salicae Capitulary III.104., Cap. III.97., Cap.I.72., Cap.IV.130., Cap.V.133. Cap.VI.2., Pact.Leg.Sal.13,15,24,65e.
9. Gregory, H.F. IV.13.
10. Ibid., X.8.
11. Ibid., X.49.
12. Ibid., IX.27.
13. Ibid., VIII.39.
14. Ibid., X.5.
15. Ibid., II.12.
16. Ibid., IV.28.
17. Ibid., VI.36.

18. Ibid., IV.16.
19. Ibid., III.10. and L.H.F. chapter 23.  
Clothild and Childebert were children of Clovis and Clothild.
20. Gregory, H.F. IV.38., V.1-2.  
Ingund was the daughter of Brunhild and Sigibert. Brunhild was the daughter of Goiswinth and Athanagild.
21. Ibid., VI.40., VIII.26.
22. Ibid., III.31.
23. Ibid., III.6. and L.H.F. ch.20-21.
24. L.H.F. ch.40, Fred. ch.42.
25. H.F. V.32.
26. Ibid., X.27.
27. Ibid.
28. Ibid.
29. Ibid. VI.45-46., VII.7-10. VII.15.
30. Ibid. IX.40., X.20.
31. Pac.Leg.Sal.59.
32. H.F. II.27-43., III.6-37.
33. Ibid., IX.20.
34. Ibid., II.28 - Clothild, III.4. - Radegund, IV.27. - Brunhild, IV.28 - Galswinth, IV.25. - Veneranda, IV.26. - Marcovefa and Merofled, IX.34., L.H.F. ch.31. - Fredegund.
35. H.F. IX.20.
36. Ibid., V.34., VI.45.
37. L.H.F. ch. 31.
38. H.F. III.18.
39. Ibid., IX.20. The Treaty of Andolet (A.D. 587) coincided approximately with the Capitulary of Childebert II which allowed

daughters and sisters to inherit the Salic land when there were no sons or brothers. Cap.IV.108.

40. H.F. VII.33.
41. Ibid., IX.20.
42. Ibid., IX.35.
43. Ibid., IX.33.
44. Ibid., X.12.
45. Ibid., VIII.39.
46. Ibid., VIII.31., VIII.43.
47. Gregory, L.F. XII.3.
48. H.F. VIII.45.
49. Ibid., VI.45.
50. Pac.Leg.Sal.19.4., 55.4-5, 64.1-3., Cap.III.100., Cap.I.68., 73.6.
51. Pac.Leg.Sal.48., 49., 53., 56., 57. Cap.I.69., 73., Cap.IV.115., Cap.VI.3.
52. H.F. V.32.
53. Ibid., X.8.
54. Ibid.
55. Ibid., X.8., VIII.45.
56. Ibid., X.15.
57. Ibid., VIII.31.
58. Ibid., IX.13.
59. Ibid.
60. Ibid., VIII.8.
61. Ibid., IX.32.
62. Ibid., X.8.

63. Cap.III.101.1.
64. H.F. III.1.
65. Ibid., IV.27.
66. Ibid., IV.28., L.H.F. ch.31.
67. H.F. VI.45.
68. Ibid., IV.46.
69. Ibid.
70. Wemple, 33.
71. H.F. VI.15.
72. L.F. XIV.1.
73. Ibid., XX.1.
74. Ibid., I.2.
75. H.F. VI.3.
76. Ibid., VII.9.
77. Ibid., IX.34.
78. Ibid., IX.15.
79. Ibid., IX.24., and:  
Paul the Deacon, History of the Lombards, trans. William Dudley Foulke (1907; Philadelphia: University of Pennsylvania Press, 1974) 146., Hereafter cited as H.L., H.L. ch.28.
80. H.F. III.23-27.
81. L.H.F. ch.12.
82. H.F. IV.26.
83. Ibid.
84. Ibid., V.20.
85. Ibid., II.27,30,37,41,42.
86. Ibid., IV.3.

87. Augustin Thierry, Tales of the Early Franks: Episodes from Merovingian History, trans. M.F.O. Jenkins (Alabama: University of Alabama Press, 1977) 113-177.
88. H.F VI.46., IX.34., L.H.F. ch.32,35.
89. H.F. IV.26.
90. Ibid., IV.25., V.20.
91. Ibid., IX.42 - Radegund, V.34. - Fredegund, IV.26., -Theudechild, L.H.F. ch.31 - Audovera.
92. H.F. VI.16.
93. Ibid., X.5.
94. Ibid., X.8.
95. Ibid., II.12.
96. Ibid., III.21.
97. Ibid., III.20,22,23,27.
98. Ibid., III.27.
99. Ibid., X.8.
100. Ibid., VIII.27.
101. Ibid., X.8.
102. Ibid., IX.33.
103. Ibid.
104. Ibid., V.32.
105. Ibid., III.7., and Thierry, 113-117.
106. H.F. IX.42.
107. Ibid., IX.40.
108. Ibid., IV.28.
109. Ibid., III.10.
110. Ibid., IV.26.

111. Ibid., IV.25.

112. L.H.F. ch.32.

113. Fred. ch.30.

114. H.F. III.24.

### Conclusion:

How did the legal status of Frankish women compare to that of Roman women? On the whole, despite differences in the laws and societies, Roman and Frankish women of the fifth and sixth centuries had much in common. In both worlds, women had fairly liberal economic rights. Both systems allowed women to own property, including land, although the Frankish laws limited women's intestate inheritance rights to some lands. Women under both legal systems could manage their own property although it seems from the laws that the property of Roman women was often managed by men, their fathers, husbands, and occasionally, curators.<sup>1</sup> Nevertheless, Roman law did not forbid or limit women who were sui juris from managing their own property if they so wished. The husbands and fathers of Frankish women probably also managed some of the estates (dowries) of their female kin,<sup>2</sup> but it seems clear from the non-legal sources that Frankish women played a fairly active role in the management of their lands.<sup>3</sup> While both Roman and Frankish law separated the property of husbands and wives, the Roman laws of the sixth century were becoming somewhat more lax than the Classical laws had been, for post-classical Roman law increasingly emphasized the marriage bond, granting spouses intestate inheritance rights and increasing the amounts of property an individual could will a spouse, to the detriment of a husband or wife's agnates and cognates.<sup>4</sup> In contrast, in Frankish law the marriage tie and the claim of one's spouse was weaker; a woman's intestate heirs were her children and her kin, not her husband and his kin.<sup>5</sup>

Consequently, in the fifth and sixth centuries, the property of Frankish wives seemed to have been kept more strictly separated.<sup>6</sup> The husbands in the histories, however, seem to have been rather generous in bestowing their property upon their wives.

Conversely, while the property of Frankish women was less under the control of their husbands, the person of the Frankish wife seemed more under the control of her husband than that of a Roman wife did. No laws in the Pactus Legis Salicae punished husbands for beating, abusing, or neglecting their wives; few laws dealt with intrafamily behavior at all. It was left up to a wife's male kin to prevent her abuse at the hands of her husband or in-laws. Roman women, however, even after the laws of divorce were tightened, still had legal protection from abusive husbands. Through the fifth and much of the sixth centuries a Roman wife could divorce her husband and take the dowry and donatio with her if he physically abused her or if he insulted her by bringing a concubine into the common home; the penalties were the same for both offenses. These were rights it seems Frankish women did not have.<sup>7</sup> Even after Justinian attempted to limit divorce and removed abuse as cause for divorce, abusive husbands were still punished.<sup>8</sup> Thus Roman women had more legal protection from insult and abuse by their families (excepting of course abuse from their paterfamilias), than did Frankish women of the same era. This brings up an interesting paradox: Roman women (and men) under potestas had only a few rights more than slaves and had considerably fewer legal rights than Frankish women.<sup>9</sup> But Roman women who had been emancipated



or were sui juris were freer than most Frankish women, even Frankish widows, for no one held the "mundium" or its equivalent for a woman who was sui juris.

In Frankish law, widows had considerably more personal rights and freedom than unwed girls, Roman widows did too, although for Roman women it was not widowhood specifically that gave a woman more freedom, but rather being sui juris. Widows could control their own property, their own children, their own lives. In Frankish society, some of the most powerful individuals were royal widows acting as queen-regent; such women had all the power of kings: they appointed officials, made laws and treaties, even possibly rallied or led their son's troops. (10) Empress-regents enjoyed similar powers.<sup>11</sup> Thus, at least at the very top of society, women had political power.

Under Roman law and probably under Frankish law, women had the freedom to leave a marriage; although Roman law gradually limited that freedom, it never abolished it entirely. In both societies there was probably divorce by mutual consent. In Frankish society the wife or husband simply left, taking with her or him all her or his property. In Frankish law, if the divorce was not by mutual consent, the stronger spouse (i.e. the husband) could normally block the divorce by simply taking his wife back. Thus, the Merovingian kings often dismissed their queens, but seldom did a queen "dismiss" her husband. On the other hand if the Frankish wife/queen left her husband, taking her property with her, and had allies (counts, bishops, kin) to help her avoid being brought back the husband might have to give in. Thus,

Duke Desiderius and Virus helped Tetradia leave Eulalius and prevented Eulalius from getting her back; Berthegund was aided by her brother Bertram, Bishop of Bordeaux; and Radegund was helped by religious leaders.<sup>12</sup> Roman divorce was more complex, because it was more regulated: Frankish law does not mention divorce at all. If a Roman wife wished to divorce her husband, she could, whether he agreed to it or not. However, if she did not have cause, she would be fined. Thus, Roman women could not simply leave and take all their property with them, for the law gave their children and occasionally their husbands a claim on some of the wife's property (dowry and donatio).<sup>13</sup> Divorce also differed under Roman law: since marriage by abduction was not valid in Roman law, the abduction of an ex-spouse would not reconstitute the marriage.

While there were many similarities in the legal status of Roman and Frankish women as the law codes described them, there were some differences that underlined the larger issues which distinguished Roman law from Frankish. These differences appeared partly in the behavior of Frankish kings towards their families. While Frankish kings apparently left some land and property to their daughters, they left the kingdoms to their sons or nephews. This pattern of inheritance in itself was not different from the behavior of Roman Emperors. The differences arose in their treatment of their daughters. In Imperial Roman families, perhaps because of a dearth of competent sons, daughters were important. Frequently an emperor would marry his daughter to his adopted heir or a military strongman and

thus continue his dynasty through her.<sup>14</sup> In the Roman world a daughter could be a very useful asset. In the Frankish world, royal daughters were expendable political non-entities, either sent to marry foreign princes, who seem to have treated them badly, or placed in convents. None of the Frankish princesses in the histories married a Frank, and only a few remained single outside of a convent.<sup>15</sup> Ambitious men who wished to usurp a throne or a kingdom did not abduct a princess; they approached the queens, especially, but not always, the widowed queens,<sup>16</sup> as if the kingdom could be passed on through the widow but not the daughters. In the non-legal sources, royal daughters were given some land, and treasure by their fathers, but the queens, even when a king had several, were fabulously enriched by their husbands. The emphasis in the Salic laws on widows and their marriages and the exclusion of daughters from intestate inheritance of the Salic land adds to this impression that daughters were not so important, for women had to marry to gain real social or economic status. In Roman law, on the other hand, economic and legal freedom were not dependent on marriage, but on being sui juris. The freedom associated with sui juris was a result of the gradual emancipation of women in the Classical law of the Principate, and Early Empire, changes made possible by several centuries of relative political stability.

Thus while there were similarities between the legal standing of women in both worlds, there was a fundamental difference underlying the laws and legal system, a difference based on centuries of

political and judicial development under centuries of empire. As a result of a millenium of fairly stable government and empire, the Roman legal system evolved out of a system in which a person was dependent completely on the help of his family and friends to bring offenders to court to one where the state assumed part of the responsibility for justice. Thus the individual, female or male, was less dependent on family and kin and more dependent on the state. Consequently, the family and kin lost some of its control over the individual. The presence of a strong and stable government and legal system and policing force gradually decreased women's dependence on their family for protection and justice and consequently weakened the control of the family, the husbands and male relations in particular, on women's lives, their property, marriage, divorce, etc. By the Late Empire, even the power of the paterfamilias was lessened. Roman women were legally protected not only from strangers, but also from their relatives. Frankish women, dependent upon their kin for protection, were as a result subject to the control of their male relatives. Therefore, all other things being equal, the ability to own property, to divorce, etc., the status of women in Roman law, was better, freer, and stronger than that of women in Frankish law.

## Notes to the Conclusion

1. C.5.2.8., 5.4.18-20., Corbett, 66-67.
2. Pac.Leg.Sal.Cap.III.101.1.
3. Gregory, H.F. V.34., IX.30.
4. Schulz, 115., Herlihy, 21-25.  
Just.Nov.117.c.10.
5. Drew, "The Law of the Family in the Germanic Barbarian Kingdoms: A Synthesis," Law and Society in Early Medieval Europe (London: Variorum Reprints, 1988) 18.
6. Pac.Leg.Sal.55.4-5., Cap.I.73.6.
7. D.25.7.1.1., 25.7.1-3., 45.1.121., 48.5.35.
8. Just.Nov.117.c.14.
9. Schulz, 150-151.
10. H.F. III.17., IV.12., V.2., VII.44., VIII.41-2., IX.15,20,28.  
Fred. ch.17., L.H.F. ch.36.
11. Stewart I. Oost, Galla Placidia Augusta: A Biographical Essay (Chicago: University of Chicago Press, 1968) 191.  
  
Procopius, The Secret History, trans. G. A. Williamson (1966; New York: Viking Penguin Inc., 1985) 88.  
  
Nov.118.c.5.
12. Thierry, 113-117., H.F. X.8., IX.33.
13. Just.Nov.127.c.2., C.5.9.3.
14. Oost, 56-57.
15. H.F. IX.20.
16. Ibid., V.5.

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