Reading Roman Women

Sources, *Genres* and Real Life

Suzanne Dixon

Bristol Classical Press

To my darling, Rob
viro perfectissimo

This impression 2011
First published in 2001 by
Bristol Classical Press
an imprint of Bloomsbury Academic
Bloomsbury Publishing Plc
50 Bedford Square, London WC1B 3DP

A catalogue record for this book is available from the British Library and the Library of Congress.

ISBN 978 0 71562 981 9

Printed and bound in the USA by
IBT Global, Troy, NY

www.bloomsburyacademic.com

Contents

documents from wills to local petitions, dating from the early to late imperial period; speeches delivered by Cicero in political assemblies or law-courts of the first century BCE, along with his letters and Pliny's (late first/early second century CE) contain legal references and information about financial activities in their own social circles. It is not surprising that there are so many gaps in our knowledge of the content of Roman laws, let alone of their rationale and development.

Views of Roman women through the ages have been dominated by the creations of literature – the boring and errant wives of Juvenal's sixth satire, Tacitus' scheming palace adulteresses, Livy's mythologised heroines of Rome's distant past. The women who emerge from the legal and inscriptional sources present us with other views, of women at work and at business, of women as patrons and petitioners, but constructed in each case according to codes and contexts. Some of these constructions represent women's actual behaviours (making wills or shoes, for example) but are not necessarily free from symbolism because of that. Women's voices might be embedded in the petitions they present to the emperor or in the inscriptions and depictions which they commission for their own shop-signs or in commemoration of their patrons and their dead or to dispose of their property. But they are still constructions, shaped by the conventions of each medium which determine how a woman presents herself to the world.

6

Womanly weakness in Roman law

Gender stereotypes, ancient and modern, are variable. They can be manipulated according to context or change over time. The little woman with no head for business co-exists in Roman culture (as in our own) with the grasping gold-digger. And both characters appear among the *dramatis personae* of Roman law, which is no more objective or reflective of reality than most of the other written sources created by members of the same social group and gender.

This chapter, reproduced here by kind permission of the editors of *Tijdschrift voor Rechtsgeschiedenis* (*Revue d'histoire du droit*), first appeared in 1984 as '*Infirmitas sexus*: womanly weakness in Roman law' (vol. 52: 343-71) in response to a paper presented by J.A. Crook (then Professor of Ancient History at Cambridge University) at the first Roman Family Seminar in Canberra, 1981 and published in Rawson (1986).

I have heavily edited the extended jurisprudential and philosophic elements from my 1984 article, but retained most of the discussion of Roman female stereotypy which I marshalled to support my contention that *tutela mulierum perpetua* ('perpetual guardianship of women') was instituted to safeguard masculine control of family property, but rationalised by later generations as a safeguard of 'womanly weakness'. The concept of 'womanly weakness' was subsequently incorporated in other legal systems to justify restrictions of women's legal and financial activities until quite recently.

I have seen (and actively promoted) great changes in my lifetime to the legal bars affecting women and to the public representations of women's roles. I would like to think there has been some improvement (although Ally McBeal is not necessarily an advance on Mrs Cleaver). Unlike my mother in the 1950s and 1960s, I can now legally take out a loan without my husband's permission and men (even the most foolhardy) no longer make jokes in my presence about women drivers, rape or wife-bashing. But in the 1970s and 1980s, when I first presented in several countries the arguments which appear below, I regularly came up against the firm conviction that 'Romans' (i.e. Roman men) believed women could not and should not engage in business (and therefore benevolently protected them from themselves), and, indeed, that women *were* incapable of under-

standing business. So this chapter, like Chapter 4, has itself become part of an historical narrative of change.

I have done my best to make it more reader-friendly. I have cut back the legal element with that in mind. The full article can be consulted by those with serious legal interests. I have, however, retained some Latin terms in this version, preferring to use *tutela* and *tutor / tutores* rather than 'guardianship' and 'guardian(s)', which are not quite the same. In my analysis of Roman gender stereotypes, I have also retained conceptual words with obvious English parallels ('*infirmitas*' = infirmity, '*fragilitas*' = fragility etc.). I have explained all necessary terms and legal concepts in the chapter,[1] but the law-less reader will find additional help in Appendix 3, which has a glossary of legal terms. If that is not enough for comprehension or curiosity, I recommend chapter 4 of John Crook's excellent 1967 book or some of my earlier publications (e.g. 1988: 41-70; 1992a: 42-5), where the legal basics of Roman family relationships, marriage and inheritance are spelt out.

*

Lawyers and ladies

mulieres omnes propter infirmitatem consilii maiores in tutorum potestate esse voluerunt. (Cicero *Pro Murena* 27)

Our ancestors determined that, on account of the weakness of their judgement, all women should be in the power of their guardians (*tutores*).

This throw-away line of Cicero's before a jury of 63 BCE was to be very influential. It is one of a series of entertaining lawyer jokes – *academic lawyer* jokes – produced to divert the jury in every sense of the word. At his most flippant and flamboyant, Cicero piously tut-tuts about the smart-arse legal pedants who have contrived to subvert the revered ancestors' original aim of monitoring female economic activity. But Cicero's disingenuous reference to the lifelong 'guardianship' of legally independent (*sui iuris*) Roman women was itself a lawyer's trick. A barrister's smokescreen. In defending his friend Murena, Cicero wisely avoided the substance of the charge of electoral bribery in favour of crowd-pleasing comic routines designed to undermine the prosecutors, including the jurist Servius Sulpicius, respected for his expert opinions on points of law.

This particular court-room joke had a long life. And the joke has been on the women hedged about with discriminatory laws in so many societies until the recent past, allegedly to protect them from their own weakness of judgement, particularly in money matters.

There was some truth in Cicero's claim. Every legitimate Roman citizen began life in the power (*potestas*) of his or her father (or the father's father)

and remained in it until the father's death, unless he chose to release them from his power by a specific legal procedure.[2] While in power, the 'child', of whatever age, was unable to inherit, make a will or own anything. On the father's death, all those in his power became independent (*sui iuris*) and normally inherited his estate in equal portions unless he had made some other provision in a will. But young children, though legal owners and heirs, had guardians (*tutores*) to safeguard their estate until puberty in the case of boys, who then took full control of their holdings. Girls, however, passed from one kind of guardian to another. The only real alternative for a woman (other than a Vestal) was to enter the 'hand' (*manus*) of a husband or father-in-law by a particular type of marriage which involved the transfer not only of her property but of herself to her husband's family. On her husband's death, the process was repeated. The widow inherited her share of her husband's estate along with her children and again acquired a *tutor* ('guardian'). It was true, then, in a sense, that the ancestors had arranged things so that a woman's property dealings could always be checked by a male, usually a relative by blood or marriage, even when she was technically independent.

It is not clear when these procedures had been established. They are referred to in the fifth century BCE Twelve Tables, which we know in fragmentary form (Table V.3 & 6).[3] By Cicero's day, these ancient provisions still applied but they seem to have had no impact on the exercise by women of their financial and legal independence. In court, playing – as we have seen – to the gallery – Cicero guesses at the reasoning behind the original institution of 'lifelong (*perpetua*) *tutela* of women' and half-seriously attributes it to an ancestral notion of female mental 'infirmity'. In this chapter, I trace the subsequent development of this idea and its association with measures restricting women's financial and legal activities. The gist of my argument is that *tutela mulierum perpetua* was instituted to safeguard family property, not people, and that adult women were subject to it because, unlike their brothers, they were likely to transfer their birth-right to a different family unit. Exogamous marriage, whereby women transfer themselves and their reproductive rights away from the family of their birth, is essential to the workings of patrilineal cultures (in which property, names and family membership pass through the male or agnatic line) but it often results in this kind of institutional suspicion of women, who constitute a dynamic and mobile element in a system which places great weight, economically and morally, on stability.

Tutela mulierum perpetua was clearly part of a land-based agnatic system of inheritance and marriage. Over time, Roman marriage preference changed and inheritance practices changed with it, until for many women and their male relations *tutela mulierum perpetua* had no significant relation to the direction of family property. The institution itself came to be perceived differently. It was weakened by successive amendments.

The identity of the *tutores* changed. Once 'guardians' of their own sister and her property – which would be theirs on her death – *tutores* were as likely to be compliant family friends or even freed slaves of the woman in question by the late Republic. But while the *tutela* of women declined, the *tutela* of children became more important and was increasingly constructed as a protective institution to safeguard youth against its own inexperience. This, I suggest, is why puzzled Roman observers increasingly associated *tutela mulierum perpetua* in its decline with the idea of female 'infirmity' or 'frailty' in a culture which did accept women's participation in business and loans.

An analysis of Roman gender stereotypes reveals that traditional misogyny attributed greed and cunning to women rather than financial helplessness. Any concern with keeping women out of masculine spheres was driven by the usual wish of insiders to keep the goodies to themselves, not by a paternalistic impulse to protect fuzzy-headed little dolls from the wicked world of business.

The argument which follows, though simplified from the original, is still complex and ranges over many centuries of legal and literary sayings. Eventually, the idea of 'womanly weakness' took on a life of its own in Roman legal thinking. It outlasted *tutela mulierum perpetua*, which had given rise to its expression. The concept was not consistently believed or applied, but it was invoked and ultimately had a great impact on European legal tradition. It is part of the history of western thought.

Two kinds of guardianship

As far as we can tell, in their original form, *tutela mulierum* (guardianship of women) and *tutela impuberum* (guardianship of children), were both likely to be administered by the heir(s) of the people in guardianship. By the mid-Republic, women were able to make wills, but in early Rome neither they nor children had that capacity.[4] A Roman *paterfamilias* did have the power to make a will disposing of his property as he wished (within the bounds of complex requirements) and appointing a *tutor* to the wife in his 'hand' or the children in his power and this became important to the historical development of the institutions, but the early scheme seems to have been based on the expectation that *tutores* normally had a personal interest in preserving the estate and other forms of *tutela* were almost treated as variants of that central notion. Women slaves who were freed and became Roman citizens passed into the *tutela* of their former male owners, who also stood to inherit from the women.This type of guardianship is not as far as we know mentioned in the Twelve Tables but, on the analogy of the guardianship of relatives in the male line (agnates), it, too, was styled 'statutory guardianship', *tutela legitima* (Gaius 1.165). All 'statutory' *tutores* of women and children therefore had a personal

interest in seeing that the estate was not unnecessarily eroded (*Digest* 26.4.1 *pr.*, Ulpian 14 *ad Sabinum*). Their duties stressed this negative aspect. The permission ('authority', *auctoritas*) of a *tutor* was necessary to validate certain legal acts which might reduce the estate (Ulpian *Titles* 11.27).

Our information about the early institutions is meagre, so we cannot tell if the *tutela* of women originally operated in the same way as the *tutela* of young children, but by the early empire, there was a clear distinction. The *tutor* actually administered the estate of a ward (*pupillus / a*) until he or she attained puberty,[5] but an adult woman conducted her own affairs, calling on the *tutor(es)* to bestow his *auctoritas* for certain specified acts (most of them involving a legal ritual) which might reduce the estate drastically. This distinction was later summarised by Ulpian (late second century CE):

> *Tutores* of wards both conduct their business and grant their permission (*auctoritas*). But women's *tutores* only grant their permission.

This must have been the situation for centuries before Ulpian's statement. The literary evidence from the second century BCE onwards seems also to indicate that fatherless children's estates were managed *for* them, but that women managed their own, with major transfers of property subject to the veto of male relations. The fact that women customarily took their share of the family wealth in the form of dowry to a different family group was presumably a factor in the desire to limit their freedom. It remained necessary for a woman to secure the permission of her *tutor* before promising a dowry or contracting a marriage which would bring her into her husband's 'hand' and all her property under his ownership (or that of his father, if he were alive).

Two developments were to have a great impact on the meanings of *tutela mulierum perpetua*: the practice of women making wills and the change in marriage preference. The female capacity to make a will was not the same as the male equivalent. As well as requiring the prior permission of the *tutor(es)*, women had to undergo a formal ceremony, *coemptio*, which, like many Roman legal rituals, took the form of a symbolic sale. Like other significant Roman socio-legal developments, the shift in marriage style is essentially undateable. It had always been possible for a Roman woman to retain membership of her birth family after marriage (although she lived with her husband and their children were in the husband's power), and stratagems to avoid coming within a husband's 'hand' had been practised at least as early as the Twelve Tables, but in the early and mid-Republic it seems to have been the norm for a Roman wife to be in the *manus* of her husband. By the late Republic, that trend had been reversed

until *manus* became an oddity, then probably disappeared in the early Empire (Watson 1967).

With all the qualifications which need to be built into such a generalisation, it is safe to state that from the second century BCE Roman women exercised greater economic independence apparently unhampered by the restrictions of *tutela mulierum*, which were whittled down by law and custom in the ensuing centuries.

We know that by 186 BCE (Livy 39.19.4) it was possible for a husband whose wife was in his 'hand' to grant her in his will the 'option of a *tutor*', the right to choose her own *tutor*. Cicero's allusion in the first century BCE to women who were able to exercise authority over their *tutores* probably refers to women who were in the *tutela* of a freed slave – either their own or their husband's. The Herculaneum Tablets and sundry inscriptions bear witness to the existence of such socially subordinate *tutores*.[6] The women of Cicero's letters and speeches – Sassia, Clodia and Terentia, to name only the most obvious – are seen as conducting their affairs independently, as if the permission of the *tutor(es)* were no practical bar.[7] This seems similar to the situation observed by the jurist Gaius two centuries later:

> For women who are of full age conduct their own business for themselves and in certain cases the *tutor* applies his permission (*auctoritas*) for form's sake. (Gaius 1.190)

Massive economic changes took place in Italy during the last two centuries of the Republic. The greater and more fluid wealth of the upper classes during this period probably underlay many of the changes in patterns of marriage and inheritance and, incidentally perhaps, the growing economic independence of Roman women. Yet these changes took place within a framework of legal stability – the laws on intestate succession changed little, while the practice seems to have developed separately.

In the Republic, such changes were very piecemeal. But with the change to a more centralised system, imperial legislation seemed to continue the same tendency, namely to weaken the impact of this institution on the lives of Roman citizen women. As part of his promotion of families, Augustus introduced the 'right of children' as an incentive to parenthood. It freed free-born women with three children or freed slave-women with four from *tutela*.This was the first of a series of legislative blows to the principle that all women should be subject for life to *tutela* (Gaius 1.145, 194). The emperor Claudius abolished the agnatic *tutela* of women, which meant that free-born women were henceforth liable to a less stringent form of *tutela*, not to 'statutory' *tutela*.[8] A *tutor* could, for example, be replaced in his absence by the praetor on the woman's application – and his permission could be compelled for a specific act if his refusal were deemed by the praetor to be unreasonable (Gaius 1.190).

In terms of the revered ancestors' intentions, a *tutor* who could be compelled to grant permission against his will was surely a contradiction in terms. And the 'option of a *tutor*' had apparently expanded some time between the early second century BCE to the second century CE, for Gaius mentions the possibility that deceased husbands could grant multiple options to their widows, who were thus able to appoint a *tutor* for a single transaction, then replace him at whim.[9] Claudius' abolition of agnatic *tutela* also struck at the heart of the original institution, which had been designed to serve the interests of the women's agnates.

The emperor Hadrian's abolition of the need for a testatrix to undergo a special ceremony before making a will marked a late stage in the separation of *tutela* from its origin in the early system of inheritance and its general deterioration (Gaius 1.115a). *Tutela mulierum* was maintained in form long after it had lost its teeth – even after Hadrian's reform, women who had a *tutor* still required his permission to make a will. The last recorded example of *tutela* was in conservative Roman Egypt, in 293-294 CE.[10] It finally expired from desuetude. It does not figure in the legal code of Theodosius (promulgated 438 CE).

The history of *tutela mulierum perpetua* was thus one of fairly steady decline. The development of *tutela impuberum*, the guardianship of minors, was otherwise. The institution which had originated as a private arrangement to safeguard family wealth gradually came to be viewed as a public concern, with the emphasis shifting to the interests of the ward (*pupillus/a*), though it remained the property rather than the personal welfare of the minor which was at issue. On reaching puberty, and therefore legal majority, a minor could bring a suit against a fraudulent *tutor*.[11] No such remedy was open to a woman *in tutela* because, as Gaius rightly observed (1.190-1), her *tutor*'s offices were of a rather formal character and he did not have the same access to her fortune.

Children and minors were increasingly viewed as in need of protection. A law of the early second century BCE, for example, extended the protection of the law to males over puberty but under twenty-five years, who claimed to have been defrauded by any person. They could claim an *exceptio* against pressing creditors, on the ground that their inexperience had been exploited.[12] By the very late Republic, when ethics and legal theory became the object of systematic study, the responsibility of a *tutor* was classed as a duty worthy of inclusion in moral taxonomies, likening the duties of a *tutor* to his ward to that of a patron to his client.[13]

When moralists or jurists of the late Republic or the imperial period spoke of *tutela*, it was of the 'guardianship' of children (*Noctes Atticae* 5.13.2.4). Where it does occur, the *tutela* of women is generally an afterthought, as in a learned dispute recorded by Aulus Gellius about moral priorities. One participant argues that a man's obligation to a ward should come before the obligation to a guest, which takes priority over obligation

to a client, then to a relative, and finally to an in-law. The general rule, that obligations to women take precedence over those to men, those to children over those to women (*Noctes Atticae* 5.13.2.5), represents a hierarchy of need.[14]

This style of reasoning was characteristic of the rhetorical education of the late Republic. Determining the origin of *tutela* was an academic exercise for élite men with antiquarian interests. The connection between the *tutor* and the right of hereditary succession had been obscured over the centuries until it seemed reasonable to associate its origins with the anachronistic aim of protecting the interests of those too young to manage their own estates.[15]

The extension of this protective rationale to the original institution of the *tutela* of women would not stand much examination, as Gaius was later to point out, but it clearly made enough superficial sense to be used, as Cicero used it, in a passing appeal to jurors' prejudices and a popular notion of ancestral thinking.[16] Schulz (1951: 181) felt the concept of female 'infirmity of judgement' (*infirmitas consilii*) was conspicuously inappropriate in Roman society, where matrons had always occupied a position differing from that of women in the Greek-speaking world, and pointed to Cicero's knowledge of his own wife's business competence. It is, of course, possible for people to entertain such preconceptions in the face of factual evidence to the contrary, but in this case Cicero was surely presenting what he imagined (or pretended) to be a traditional belief about the nature of women. His point was that academic lawyers had thwarted the ancestral intention, which was posited on archaic reasoning.[17]

Gaius (1.144) also represented the reasoning as traditional:

> For the ancients wished women, even if they were of age, to be in *tutela*, on account of the levity of their nature (*propter animi levitatem*).

Ulpian (*fl. c.* 202-223 CE), elaborated slightly:

> *tutores* are appointed to males, too, before they attain puberty on account of the infirmity of their age, but to women before and after puberty both because of the infirmity of their sex (*propter sexus infirmitatem*) and because of their ignorance of legal matters. (*Titles* 11.1)

Tutela had greatly declined by the end of the second century CE. Gaius and Ulpian – more than Cicero – were explaining a vestigial institution in terms of its original formulation, as they imagined it to have been.

Tutela as duty

The divorce of female *tutela* from the *tutor*'s self-interest apparently reduced its appeal to *tutores*. Imperial statutes and judicial reasoning on

the subject focus on acceptable pretexts for the release of *tutores* from this sacred trust.[18] The protective characterisation of *tutela* was belied by law which accrued around statutory *tutela* and acknowledged the interests of the statutory (*legitimus*) *tutor* as patron or parent, entitled to a prior right of succession to the person *in tutela*.[19] Agnatic *tutores* were apparently viewed by themselves and praetors as overly burdened by their lifelong obligation to female relatives as against the briefer obligation to the estates of children in their *tutela*. Unable to refuse the office outright, they were permitted to 'cede' it to another.[20] Claudius' abolition of agnatic *tutela* over women seems to reflect this official sympathy at a time when coercion was increasingly applied to *tutores* of children to perform their duty. While both forms of *tutela* were thought a nuisance, one was deemed essential and the other a puzzling anachronism (Ulpian 11.25, 27).

Patterns of inheritance had altered since the time of the Twelve Tables, though the rules of intestate succession had not. While patron *tutores* accepted the privileges and burdens of *tutela* over their former slave-women, agnatic *tutores* were more eager to evade the office because custom had deprived them of their traditional material advantage. Brothers no longer seem to have hoped to inherit from their sisters, who were now expected to name their children as heirs in their wills (Dixon 1988: 51-60). Under Hadrian, the long-standing rituals that a free-born woman must undergo before making a valid will were reduced.[21] A woman who had a *tutor* still required his permission to make a testament, but it was even possible for a will composed without such authorisation to be upheld.[22] *Tutela* had thus ceased from early in the second century CE to function even formally in the interests of the agnates, though it still protected the rights of fathers and patrons over a woman's estate unless the woman gained the 'right of children' which from the time of Augustus liberated her entirely from *tutela*.

Thus *tutela*, which had originated as a prerogative of male heirs, a matter to be arranged within the circle of family and friends, ended with the judicial and executive arm of government forcing the erstwhile 'privilege' on outsiders as a civic duty. The 'protective' conception of *tutela* gave rise incidentally to the doctrine of female 'infirmity' which took on a life of its own after the disappearance of the 'perpetual guardianship of women'. Neither the original function of *tutela* nor its later rationale could support its continued application to the women at the heart of the Empire. The latest recorded examples of *tutela mulierum* occurred in Roman Egypt, but it is impossible to tell whether that is because Egypt was more conservative, because records of that type survived better in that environment, or because *tutela mulierum* there operated as a variant on Hellenic (and Hellenistic) *kyria*, in which brothers and husbands were expected to act for women in financial matters (Sijpesteijn 1965: 174; Modrzejewski 1974: 292).

Keeping the little woman out

The oddity is that the concept of female 'infirmity/fragility' (*infirmitas* and *fragilitas*) seemed to gain ground at just the time when the reason for the original institution of *tutela mulierum* had declined. The contradiction is embedded in Cicero's own rationalisation – he had, after all, invoked the presumed ancestral intention in order to point to its subsequent frustration by lawyers (*Pro Murena* 27) and Gaius' doubts about the usual rationale were based on its contradiction in everyday practice. Servius' definition – however mutilated – makes it clear that the usual juristic explanation of *tutela* was, by the very late Republic, in terms of the helplessness of the person *in tutela*.[23] This virtually necessitated a theory of female incapability on the juvenile model.

This presumptive feminine defectiveness became a literary commonplace – a characteristic of the sex which could be referred to in passing without explanation, as in Valerius Maximus 9.1.3 on the weakness (*imbecillitas*) of the female mind, which makes it rather difficult to pin down the precise nature of the well-known defect.[24] The assumption of physical inferiority seems to underlie extravagant praise of female courage for exceeding the expected standard, as in Lucretia's 'masculine spirit ... assigned by an evil error of fortune to a female body' (6.1.1).[25] This physical weakness is then generalised. Women were expected to be less restrained in mourning (Livy 3.48.8), naturally susceptible to flattery and persuasion rather than capable of regulating their own morality (Tacitus *Annals* 3.35), and easily tricked because of their gullibility (Gaius 1.196).

It seems fairly certain that educated opinion from the very late Republic onwards assumed a low *ancestral* estimate of female business sense; it is even probable that jurists endorsed this tradition, although there is evidence that some at least continued to appreciate the link between *tutela* and the succession rights of *tutores*. In trying to trace the development of such ideas and their legal application, it is particularly important to avoid the trap of inserting into Roman generalisations the prejudices of our own culture. It is also important to distinguish between statements made in a speech to a Republican jury, the considered definition of an academic lawyer and the legislative adoption of a line of reasoning.

Crook (1986b) held that the *senatus consultum Velleianum* passed under the emperor Claudius had been occasioned by the decline of *tutela mulierum* after Augustan legislation made it possible for women with the 'right of children' to have no *tutor*. His implication is that Roman women were not only perceived by the ancestral legislators to suffer from 'infirmity' but that they actually displayed this flaw – that in the absence of male guidance, legally independent women without effective *tutores* were being cheated. This clearly contradicts Gaius' own observation of second-century CE practice.

Cicero's suggestion that 'infirmity of judgement' underlay the institution of *tutela mulierum* (*Pro Murena* 27) is the first example of an attempt to link a legal construct with female incompetence. Later references from Gaius 1.144 and Ulpian 11.1 suggest that this connection had become a commonplace by the third century – to be repeated, if not wholly endorsed, by the jurists. Roman Republican authors and classical jurists agreed that it was more appropriate for women to be protected by men than vice versa (Paul at *Digest* 47.10.2). Women, though allowed to appear on their own behalf in court, were forbidden – probably from the early Empire – to appear for others (Ulpian 6 *ad edictum*, *Digest* 3.1.1.5), a principle upheld much later in the *Codex Iustinianus* (2.12.8). The prohibitions of the *senatus consultum Velleianum* seem to have been intended to keep women from intervening financially to relieve others, and this idea of women as properly needing rather than giving protection perhaps underlay the Severan confirmation that women could not exercise *tutela* over their own children.[26]

These imperial restrictions formalised a notion which had existed in Republican times.[27] In spite of exceptions and contradictions, the concept could be invoked as a rationalisation for a variety of legal measures. Sometimes the exclusion of women from certain spheres or offices rests on a tradition of gendered roles.[28] The jurist Paul points out that it is convention rather than nature which determines the exclusion of women and slaves from sitting in legal judgement.[29]

Earlier public statements about the exclusion of women from masculine spheres had sometimes been aggressive. Livy records a female demonstration of 195 BCE. The women had turned out to petition men attending the meeting to discuss the repeal of a sumptuary law under discussion that day in the male assembly. In his account, Cato the Elder (consul that year) appealed to traditional strictures on the female sex:

> Our ancestors decreed that women should not even conduct private business without the authority of a *tutor* but should be in the control of their fathers, brothers or husbands. But we – gods help us! – are now even allowing them to seize commonwealth business and to stick themselves into the approach to the forum and the public meetings and assemblies! (Livy 34.2.11)[30]

Gods help us, indeed. In Tacitus' account of a senatorial debate about the roles of provincial governors' wives more than two centuries later, a speaker argued that the husband was to blame if his wife exceeded the proper limits – in this case, by assuming masculine duties in the provinces, such as inspecting the troops or receiving influential petitioners.[31]

In his commentary on the praetor's edict, Ulpian explained the prohibition on female representation in court as having arisen historically from praetorian reaction to the disrespectful persistence of the unspeakable advocate Carfania.[32] The idea that modesty in public is proper for women

is expressed in these statements, but it is not linked with female vulnerability or incapacity so much as an insistence on excluding from the public sphere women who are only too likely to force their way into it. As in the case of freed slaves, *nouveaux riches* and upstart provincials, a firm line was taken to maintain traditional distinctions. They are the remarks of a ruling group defending the bastions of privilege against real or anticipated assault.

The small surviving fragment of Cato the Elder's actual speech in favour of the Voconian Law of 169 BCE (limiting, among other things, the testamentary inheritance rights of women of the top property group) seems to take the line that women were already lording their economic independence over their husbands, and could not be allowed any more leeway (*Noctes Atticae* 17.6.1).[33] It is this argument which Livy uses to build up the portrait of Cato in the debate of 195 BCE. It can be associated with the idea of 'proper spheres' but at bottom it is exclusive. Ulpian, on the edict, says that women might not plead for others 'lest they involve themselves in the business/causes of other people contrary to the proper modesty of their sex, and lest women usurp the functions of men' (*Digest* 3.1.1). Both Tiberius and Nero demurred at their distinguished mothers' attempts to overstep the bounds of diplomatic propriety.[34] The idea was entrenched that women ought not to push themselves forward publicly.

This aggressive masculine exclusiveness differs in essence – if not in effect – from the argument that women, being in need of protection rather than able to provide it, should be *relieved* of certain masculine duties (or penalties), which seems to be the reasoning behind such rules as the praetorian dictum that a wife's honour is her husband's concern but an injury to his might not be prosecuted by her (*Digest* 47.10.2, Paul 50 *ad edictum*) and the confirmation by the senate *c.* 46 CE that a woman could not take on the debt of another 'because it is not reasonable (*aequum*) that women should perform masculine offices and be bound by obligations of that kind'.[35] Such obligations could have their advantages, as loan sharks through the ages have found, but the intention of the senate here, as of the emperors Augustus and Claudius, was seemingly to protect a woman from the danger of an open-ended obligation, particularly in favour of her husband.[36]

Does this mean that the assumption of womanly weakness – which Cicero had in the late Republic anachronistically attributed to the ancestors – actually became a factor in imperial policy-making? I think not. In the first place, it does not square with practice: for women *did* come to the rescue of men, in their capacity as patrons. Cicero sneered at Clodia and Sassia for hovering in the background of prosecutions, but deferred respectfully to Caecilia Metella, who virtually engaged him to defend her dependant, Roscius of Ameria (*Pro Roscio Amerino* 27). Women *did* lend money to men, and were legally free to do so, either as a favour or as a

speculation, without the permission of a *tutor* (cf. *Pro Caelio* 31; Chapter 9 on Clodia Metelli). Sassia freed her slave doctor and set him up in a shopfront business (*Pro Cluentio* 178-9). Women such as Cicero's friend Caerellia and Pliny's mother-in-law Pompeia Celerina engaged in speculative buying and loans to build up their already considerable fortunes. Though barred for so long from being *tutores* to their own children, widows did bring them up and protect their economic interests.[37] Later imperial rulings acknowledged a number of female financial obligations to relations, both male and female – such as the one that a woman, though unable in general to bring a prosecution or defend another, could summon a defendant in the interests of a relation or pledge herself as surety to save her father from exile or provide a dowry for a daughter or dependant.[38] So, even given the general pronouncements made and reiterated over the generations about the proper limits to female activity, many of them were either disregarded in practice or inconsistently applied.

In the preamble to the *senatus consultum Velleianum*, Ulpian explains that, in response to an appeal by the consuls M. Silanus and Velleius Tutor, for clarification 'on the correct policy as to obligations undertaken by women on behalf of others', the senate ruled 'that the interpretation followed until now in the courts has been that no suit lies to creditors against women under that heading, on the ground that it is unreasonable that women should take on masculine functions and be bound by obligations of that nature'.

The *senatus consultum Velleianum* was thus a procedural measure to deal with an existing legal problem.[39] It needs to be distinguished from the interpretations, amendments and analyses which soon accrued about it.[40] The notion of female weakness soon plays its part in this later literature and was retrospectively attributed to the legislators, who were probably protecting women's property from their husband's creditors. By the late Republic, women were generally marrying without entering the husband's 'hand' (*manus*) and thereby kept their holdings distinct from those of the husband. The only exception to the longstanding principle banning substantial gifts between husband and wife under this regime was dowry, which was the husband's legal property for the duration of the marriage, but returnable on its dissolution by death or divorce.[41] Under Augustus, it became illegal for the husband to alienate or pledge dotal land without consulting his wife.[42] This would ensure the husband's ability to return the land or its cash value to the wife on the dissolution of the marriage.[43] Husband and wife were not responsible for each other's debts but if the husband were owner and administrator of the dowry it would in practice be fairly easy for him to pledge it as if it were his own – the Augustan rule and the praetorian interpretations of the early imperial period made it a little less easy.

A sixth-century Justinianic ruling preventing her from giving the husband

permission to alienate dotal land certainly assumes her vulnerability: 'lest the fragility of the female sex might be exploited, to the detriment of their estates' (Justinian *Institutes* 11.8 *pr.*), but the Augustan legislation had assumed her rationality to the extent that her permission was a just ground for alienation. Justinian's concern, to help women in spite of themselves, post-dates the *senatus consultum Velleianum* by a good five hundred years, and even the juristic comments which viewed the *senatus consultum* as an antidote to female frailty are third century or later. The wish to preserve family holdings had not yet been quite as suffused with sentimental paternalism in the first century CE. There probably was a vague feeling that women would find excessive debt difficult – consider Pliny's sympathy with Calvina, who had entered on an encumbered inheritance which would have been burdensome 'even for a man' (*Letters* 2.4.1). But it was the vulnerability of the dowry and of the wife's personal fortune which inspired the legislation, not her gullibility. Though not liable at law for her husband's debts (*Digest* 1.5, 3-4), she might find the status of dowry in the event of his bankruptcy or *damnatio* to be more dubious, since the dowry was technically part of the husband's property for the duration of the marriage.[44] Perhaps it was this very dubiety which inspired the rulings, first applied to husbands, then extended to others – rulings which progressively became more protective of the woman's interest as such, though always considerate of the extreme claims of those whose interests were identified with hers – her father or daughter but emphatically not her husband.

Rationalising exclusion

A body of exceptions and explanations accumulated around the *senatus consultum Velleianum*, which later passed into various European codes and was only removed from the South African Roman-Dutch legal system in 1969.[45] This body of interpretation, which grew up over many years, has obscured the function of the original.[46]

If we look at the actual measure, we find that even after its passage through the senate women were still able (and expected) to promise dowry, to incur debts of other kinds on their own behalf, or to pay off the debt of another person who then became their debtor. Even later, when it was viewed as a means of protecting women from oppressive debt which they had taken on unwittingly, women were not permitted to invoke the *senatus consultum* willy-nilly to escape legitimate obligations, as minors could do. Ulpian recorded that Pius and Severus had disallowed the excuse if the woman concerned had set out to dupe a creditor – the ruling had been designed, they said, to help women who were deceived, not those who did the deceiving, and was inspired by woman's helplessness, not her cunning.[47]

The argument that Claudius' abolition of agnatic *tutela* over women exposed them to the depredations of unscrupulous men and made it necessary to provide them with a general escape-clause (namely, the *senatus consultum Velleianum*) simply does not hold up. To my mind, Claudius' action actually shows how far *tutela mulierum* had declined by the first century CE. His abolition of this more demanding form of *tutela* was absolute, not a reward for some women (like Augustus' 'right of children'). It was surely a concession to male irritation rather than a surprise gift to Roman women.[48] By the same token, the *senatus consultum Velleianum* was introduced not in response to the new helplessness of women but to the separation of property within marriage. Goods, rather than people and their presumed inadequacies, were the concern of Roman law.

Roman concepts of feminine infirmity concerned physical, emotional and moral weakness.[49] The debate of 195 BCE (as passed on by Livy two centuries later) yielded two opposing arguments: that women, if unchecked, will simply hike up their outrageous demands until they are men's masters, versus the view that women – who *wish* to be governed by their male relations in personal matters – should be indulged by men in acknowledgement of their emotional vulnerability (Livy 34.7.7). Women, then, are emotional and more easily upset than men, they are not expected to be as brave as men, but there is no suggestion that they are witless with money or in need of masculine protection in business affairs: that is part of later western gender stereotypy and we must be careful about assuming it without sound evidence, or anticipating its appearance in Roman thought.

When a developed notion of female 'infirmity' surfaced, it was used both to justify the exclusion of women from certain spheres and to underline the need for protective measures. The former are often spheres which traditionally excluded women, and there were always dissenting voices (Gaius on 1.190, Paul on the edict, *Digest* 5.1.12.2), voices which at least suggest that these rulings were grounded in convention rather than posited wholly on a notion of female incompetence. The exclusion of women was the usual monopoly exercised by any ruling group. Feudalism, patronage and other forms of social and economic oppression commonly give rise to developed rationales about the incapacity of the oppressed group to exercise power, but it would be rather naive to read them literally.

Gradually, however, the notion of female incompetence crept into imperial judgements and – apparently – praetorian rulings (*CJ* 5.5.1 224 CE) and it is embedded in the legislation of Justinian (esp. *Institutes* 11.8 *pr.*). The exclusion seems to me to be grounded in traditional keep-'em-out misogyny. I suspect that the protective line, whether genuine or not, began to appear in juridic literature surrounding the *senatus consultum Velleianum* as awkward cases forced judges and commentators to speculate

more closely as to its function. Later commentators and the emperors themselves – doubtless acting on legal advice – interpreted the *senatus consultum Velleianum* in terms of their own perception of its rationale and contemporary ideas about women.[50]

Tutela of women had been severely eroded by common consent and by successive legislation at the time that expressions like 'infirmity of judgement' made their way finally into the juridic vocabulary. *Vatican Fragment* 325 (Diocletian and Constantius 293 CE) is the latest reference to the institution. The abolition in 410 CE of the 'right of children' (*Codex Theodosianus* 8.17.3) contains no specific reference to women. The institution seems to have survived longest in Roman Egypt, and even there women who ought to have been *in tutela* transacted business without a *tutor*.

The retention of the form of *tutela mulierum* is testimony to Roman conservatism. The ancient institution had a long existence, but it survived in very weakened form: The 'option of a *tutor*', compellable permission, the 'right of children', all contributed to this, but it was the abolition of agnatic *tutela* and the greater simplicity of female testamentary procedures, combined with a shift in marriage fashion, which stripped *tutela mulierum* of its very foundation. Roman reluctance to tamper with venerable institutions stopped short of outright abolition – the 'lifelong guardianship of women' was left to dwindle away from desuetude. It remains a legal curiosity that its decline should have coincided with the growing juridic respectability of a notion of feminine frailty.

7

Profits and patronage

Ladies, loans and largesse

Roman sexual activity receives more coverage in the surviving literary sources than economic activity. Yet both had moral meanings for the wealthy upper classes of Roman Italy on whom this chapter concentrates. Following Rome's victory over Hannibal in 201 BCE and its subsequent expansion into the Greek East, members of the ruling senatorial order became the prime beneficiaries of the slaves and wealth which poured into Italy, transforming social and economic structures and the range of status markers (Hopkins 1978: 1-56). The new aristocratic taste for specialist goods and Greek rhetoric and the visible proliferation of elaborate public and private buildings provided the historical backdrop for recurrent literary laments about contemporary luxury and the perennial decline from ancestral simplicity.[1] We have seen that élite women as a group were often characterised as prime examples of these modern vices, yet the last two centuries of the Republic, *c.* 201-27 BCE, also saw upper-class women honoured with individual statues and inscriptions for their beneficence and generosity, and in family tombs for their frugality and selflessness.[2]

The combination of investment and commercial speculation in the same chapter with patronage might seem odd to the modern reader, but it reflects the Roman conflation of social and economic categories. Loans which yielded interest also extended patronage relations and were a form of social investment. In a highly stratified society, kinship and patronage were crucial safety nets and economic lubricants. Manumitted slaves continued to show gratitude and deference to their former owners (masculine *patroni*, feminine *patronae*) and lifelong exchanges went in both directions. It was in the interest of the *patrona* (f.) or *patronus* (m.) to lend start-up capital to establish the former slave in a business based on skills acquired in slavery. Such investment was profitable to the owner but its characterisation as a 'favour' (*beneficium*) to the protégé(e) distanced the superior party legally and morally from direct commercial involvement (d'Arms 1977; Pleket 1984: 15). This distance was important to the self-image of the upper classes (Wiseman 1971: 79). The fact that senatorials are known to have exploited the system to maximise their own financial