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THE *SC* FROM LARINUM AND THE REPRESSION OF ADULTERY AT ROME

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The SC from Larinum and the Repression of Adultery at Rome¹

Just over a decade ago, a bronze tablet was discovered near the ancient town of Larinum, in the Italian province of Molise. On one side there is part of a *senatusconsultum* from A.D. 19 containing measures designed to prevent the appearance of members of the senatorial and equestrian orders on stage and in the arena.²

¹ I want to thank Professors Robert Drews, Bruce Frier, Ludwig Koenen, Wolfgang Lebek, Jerzy Linderski, Susan Treggiari and Miss Barbara Levick for having made innumerable contributions to this paper. Michael Crawford kindly provided a copy of the photograph. Librarians Floriana Bettini of the Istituto di diritto romano at the Università di Roma and Lucilla Marino of the American Academy in Rome and their staffs provided a helpful and pleasant environment for the research and writing of this article. Mr. James Toplon and his staff at the Vanderbilt University Interlibrary Loan Service merit a hearty expression of gratitude as well. Research was conducted with the generous support of the National Endowment for the Humanities and the Vanderbilt Research Council.

This paper was originally scheduled for publication in the fall of 1990. This was delayed at the last minute so that I might take into account the first of Lebek's two articles.

² The initial oral presentation by A. La Regina was followed by a rich scholarly discussion; I here list a selected bibliography (see also the publication in *AE* 1978, 145) and include other relevant works. I shall refer to these studies in abbreviations. Those that treat the Larinum decree are shown with an asterisk (*).

- *E. Baltrusch, *Regimen Morum. Die Reglementierung des Privatlebens der Senatoren und der Ritter in der römischen Republik und frühen Kaiserzeit* (1989).
- R. Bauman, "Some Remarks on the Structure and Survival of the *Quaestio de Adulteriis*", *Antichthon* 2 (1968) 68-93.
- *B. Biondi, *Labeo* 26 (1980) 227-228.
- P.E. Corbett, *The Roman Law of Marriage* (1930).
- *D. Daube, "Fraud No. 3", in N. MacCormick and P. Birks eds., *The Legal Mind: Essays for Tony Honoré* (1986), 1-17.
- *S. Demougin, *L'ordre equestre sous les Julio-Claudiens*, Collection de l'École Française à Rome, 108 (1988) 555-585.
- *W. Formigoni Candini, "Ne lenones sint in ullo loco reipublicae Romanae", *AFer.*, n.s. 4 (1990) 97-127.
- P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (1970).
- *V. Giuffrè, "Un senatusconsulto ritrovato: Il *Sc. de matronarum lenocinio coercendo*", *AAN* 91 (1980) 7-40.
- A. Guarino, "I *gladiatores* e l'*auctoramentum*", *Labeo* 29 (1983) 7-24.
- *W.D. Lebek, *ZPE* 81 (1990) 37-96 and 85 (1991) 41-70.
- *M.A. Levi, *Studi Biscardi* I (1982) 69-74.
- B. Levick, "*Poena Legis Maiestatis*", *Historia* 28 (1979) 358-379.
- *B. Levick, *JRS* 73 (1983) 97-115.
- *M. Malavolta, *Studi pubblicati dall'Istituto italiano per la storia antica* 27 (*Sesta miscellanea greca e romana*) (1978) 247-282.
- *T.A.J. McGinn, *Prostitution and Julio-Claudian Legislation. The Formation of Social Policy in Early Imperial Rome* (Diss. Univ. of Michigan, Ann Arbor, 1986) 284f. and 345f.
- T. Mommsen, *Römisches Staatsrecht*³ (1887; 3 vols.).
- T. Mommsen, *Römisches Strafrecht* (1899).
- *P. Moreau, *REL* 61 (1981) 36-48.
- *M.-T. Raepsaet-Charlier, *Prosopographie des femmes de l'ordre sénatorial* (I^{er}-II^e siècles), 1 (1987) 3-6.
- G. Rizzelli, "Il *crimen lenocinii*", *AG* 210 (1990) 457-495.
- C. Sanfilippo, "Gli *Auctorati*", *Studi Biscardi* I (1982) 181-192.
- *L. Sensi, "*Praescriptio* del s.c. *Larinate*", *Colloquio internazionale AIEGL su epigrafia e ordine senatorio*, 1 (1982) 515-520.
- R. Syme, "Personal Names in *Annales* I-VI", in *Ten Studies in Tacitus* (1970) 58-78 (= *JRS* 39 [1949] 6-18).
- R. Syme, "Domitius Corbulo", *Roman Papers* 2 (1979) 805-824 (= *JRS* 60 [1970] 27-39).

The earlier commentators, prompted by the coincidence in chronology and inferences drawn from literary and legal sources, attempted to link this *SC* with a series of measures, also dated to A.D. 19, designed to repress adultery.³ Levick showed that the non-epigraphical evidence—which consists of a passage each from Tacitus, Suetonius, and Papinian in the *Digest*—is inconclusive for this view, while the extant parts of the decree offer no support for it at all.⁴ Recently, scholars have turned ever more decisively against the earlier view.⁵ Now that the close identification of the Larinum *SC* with the measures taken in the same year to repress adultery has been rejected without qualification, evidence for both legislative items can be better understood.

I. THE LARINUM DECREE

What follows is limited to an analysis only of those places in the text of the *SC* where a connection with the repression of adultery has been argued. For the rest, the reader is referred to the magisterial article by Lebek (1990).

There survive only the first 21 partially preserved lines of the *SC*, each one estimated to be no more than 100 letters in length. Malavolta and Giuffrè thought the inscription to have run to c. 63 or 84 lines, depending on the shape of the tablet, while Levick, comparing the photographs of this document with the *Tabula Hebana*, proposed c. 50 lines.⁶

The decree as extant forbids members of the senatorial and equestrian orders to appear on stage or in the arena. It deals directly with dodges employed to circumvent previous bans of this type, such as the deliberate pursuit of social degradation, and thus an automatic exemption, through condemnation in a *iudicium famosum*.⁷

R.J.A. Talbert, *The Senate of Imperial Rome* (1984).

A. Wallace-Hadrill, *Suetonius: The Scholar and his Caesars* (1983).

*M. Zablocka, "Le modifiche introdotte nelle leggi matrimoniali augustee sotto la dinastia giulio-claudia", *BIDR*³ 28 (1986) 379-410 (at 403-407).

My debt to these scholars, particularly to those who have written on the *Tabula Larinas*, and most especially to Levick and Lebek, will be evident throughout.

³ Malavolta (1978), esp. 348f.; Giuffrè (1980), esp. 10f.

⁴ Levick (1983), esp. her commentary on the decree at 98f. and the remarks at 113-114. She expresses deep skepticism, but draws back from an outright rejection of the earlier view. Similarly, Levi (1982) 74 cautions that, given what survives, the *SC* should not be classified as *de libidine* (or *de lenocinio*) *matronarum coercenda*, but leaves open the possibility that, after the text breaks off at v. 21, some measures relative to this theme might have appeared. Zablocka (1986) agrees with Malavolta and Giuffrè; Raepsaet-Charlier (1987) leaves the matter open.

⁵ A detailed examination of the question, coupled with a firm rejection of the arguments made by Malavolta and Giuffrè, appears in my doctoral thesis, McGinn (1986) 284f. and 345f. Demougin (1988) and Formigoni Candini (1990) also repudiate unequivocally this thesis, largely on the ground that it finds no support in the text of the decree as extant. In agreement is Lebek (1990), who has the most complete survey of the literature and is the first to proceed beyond repudiation and make comprehensive suggestions on how the *lacunae* should be filled.

⁶ This is important, because the possibility that as much as three-quarters of the *SC* is lost has decisively influenced the interpretation of the document. It is regrettable that the Larinum decree has not yet been published with full epigraphical apparatus, including a photograph, dimensions, letter-sizes, and so on.

⁷ Mention of another means of social degradation is lost to a lacuna at vv. 12-13. Lebek (1991) 46f. suggests that this consisted in the deliberate "flunking" of the annual equestrian review at the *transvectio* on 15 July.

While no reference to the repression of adultery is found anywhere in the text that survives, Malavolta and Giuffrè read four such references into the *lacunae* found in these lines: (1) in the title, (2) in the *relatio*, and (3-4) twice in a part of the decree that seems to be a citation of an earlier SC passed in A.D. 11. Another possibility (5) has been sought in the portion of the decree lost after the break at v. 21.

(1) The titles proposed for the SC, such as *de matronarum lenocinio coercendo*,⁸ all encompass the repression of unacceptable forms of female sexual behavior. The photograph of the document shows that a title could not possibly have followed the broadly-spaced letters SC at the top of the inscription (Levick [1983] 97; Moreau [1983] 37).⁹

(2) Next, the *relatio* (vv. 4-6):¹⁰

- 4 [Quod M. Silan]us L. Norbanus Balbus co(n)s(ules) v(erba) f(e)cerunt commen-
tarium ipsos composuisse sic uti negotium iis [— — —]
5 [.]rum pertinentibus aut ad eos qui contra dignitatem ordinis sui in scaenam
ludumv[e se darent, et facere iuvenes ad-]
6 [vers]us s(enatus) c(onsulta) quae d(e) e(a) r(e) facta essent superioribus annis,
adhibita fraude qua maiestatem senat[us minuerent, q(uid) d(e) e(a) r(e) f(i-
eri) p(laceret), d(e) e(a) r(e) i(ta) c(ensuere):]

4-5 iis [d(atum) e(rat) de rebus—or s(enatus) c(onsultis)—ad magistros—or lanistas—\ ludo]rum pertinentibus McGinn : iis [datum erat—"de s(enatus) c(onsultis) ad liberos senatorum pertinentibus Lebek whose parenthesis ending with erat begins at 4 sic; he marks the report of the consuls as a direct quotation, sc. 4 "commentarium — — — composuisse" and "de — — — 6 p(laceret)?" : iis [— — — ad fraudes adultera]rum—or muliere]rum or matrona]rum pertinentibus Levick : iis [— — — ad curam \ ludo]rum pertinentibus Baltrusch : iis [datum de rebus ad libidinem \ femina]rum pertinentibus Malavolta and Giuffrè; for criticism of other supplements proposed by La Regina and Malavolta see Levick (1983) 101
5-6 suppl. by Lebek; ludumv[e prodirent ?seve auctorarent] u(ti) s(ancitur) s(enatus) c(onsultis) quae — — — Levick

The readings given for vv. 4-5 by Malavolta, Giuffrè, and Levick can be rejected outright (admittedly, the latter's suggestions are both more pointed and more accurate¹¹), a conclusion borne out by an examination of the entire *relatio*.

⁸ Malavolta's suggestion of *de fraude infamiae* is criticized by Giuffrè (1980) 19 n. 44 (and by Levick [1983] 99), on the grounds that it implies an overly technical conception of *infamia* for this early date. To Malavolta's other suggestion, *de libidine feminarum*, Giuffrè prefers another title, *de matronarum lenocinio coercendo*, originally proposed by Volterra for the separate enactment, referred to in this paper as the *Vistilia SC*, described in the non-epigraphical sources.

⁹ Even if this were not true, it is unlikely that the title was exclusively, or even primarily, about the repression of adultery, given the contents as extant.

¹⁰ For the sake of clarity and economy, I give as unadorned as possible a version of the text here and of that at vv. 17-21 below. For those parts of these passages which are not the focus of discussion, the reader is referred to the reconstruction, translation, and commentary given by Lebek (1990) 60f. and the revised version of the text at *idem* (1991) 54f.

¹¹ The crucial element of *fraus* is introduced. The repression of *fraus* on the part of the aspiring upper-class performers was without doubt a leading motive of the Larinum decree, and is also relevant to the *Vistilia SC*. See Giuffrè (1980) 31f. and the discussion below.

Levick's supplement also avoids an exclusive emphasis on *lenocinium*. *Vistilia* registered with the aediles as a prostitute, not as a procuress, although the senate may have closed another loophole regarding *lenocinium* (see below). The argument that the SC had *lenocinium* in a "non-technical" sense is belied by the extant parts of the decree. These betray a technical specificity, which may be partly explained by the role of the jurist Ateius Capito as senior member of the redacting committee (v. 2). The decree confirms his close association with Tiberius (Tac. *Ann.* 1.76, 79, 3.70, 75; Suet. *Gram.* 22; Dio 57.17).

We see from the *aut* in v. 5 that a phrase must stand parallel to *ad eos* -- [- *se darent*]. The remainder of the *relatio* up to the transitional formula (i.e. *u(ti)* -- [- *minuerent*]) should then refer to both phrases and not just to the latter.¹² This would tend to exclude any reference to the repression of adultery, since such sanctions were contained, at least so far as we know, in no *SCC* previous to A.D. 19. Such measures are not impossible, but this text should not be emended in the absence of evidence. And it is difficult to see how the *maiestas* of the senate would have been compromised through infringement of the *lex Iulia de adulteriis coercendis*.¹³

Because they go to the heart of the decree as extant, the suggestions made by Baltrusch and Lebek are plausible and quite possible. However, Baltrusch's insertion seems too general in its reference to the *cura ludorum*. Lebek strongly criticizes all previous readings for relying on the *de rebus* formula. This he regards as too vague for the language of a legislative enactment and for the meaning of *commentarius*, a document which contained a summary of previous legislation on the subject of prohibitions of public performance by members of the upper orders.

I agree that the *commentarius* must have had such a legislative summary and would suggest only that its contents were not thereby exhausted. The *relatio* informs us that the consuls themselves drew up the document after being charged with this responsibility by the senate. The *commentarius* is likely to have contained some analysis of the ways in which previous decrees had been circumvented,¹⁴ a necessary prelude to the construction of this enactment, which betrays a high level of sophistication in legislative craft. Another feature may have been suggestions for the new legislative design, as embodied in the *SC*. The latter notion gains in probability if we assume that the senators who witnessed the decree, above all the jurist C. Ateius Capito, cooperated in this preliminary task. The *de rebus* formula might not be inappropriate for a *relatio*, where some form of legal shorthand can be expected.¹⁵

More vigorous doubts may be entertained of the phrase [*ad liberos* | *senato*]rum.¹⁶ The reference is too limited; the body of the decree relates to children of the equestrians as well—indeed, they receive more attention.¹⁷ Instead, the *lacuna* would have contained a reference to

¹² *Quae d(e) e(a) r(e) facta essent* in v. 4 can also be read as *quae d(e) e(is) r(ebus) facta essent*.

¹³ True, Augustus in the *Res Gestae* claims a senatorial initiative for his moral legislation (6.2). The *decreta patrum* at Hor. *Saec.* 17-20 concern the *lex Iulia de maritandis ordinibus*. We know that the problem of sexual misconduct was discussed in the senate (Dio 54.16.1-5), but no legislation is recorded: see the list given by Volterra, *NNDI* 16 (1969) s.v. *senatus consulta* 1047-1078 (at 1063-1065) and that by Talbert (1984) 438-9.

¹⁴ On the *commentarius* and its contents, see v. Premerstein, *RE* 4 (1909) s.v. *commentarii* 726-759 (esp. 731f., 747f., 751f.); Bömer, *Hermes* 81 (1953) 210-250 (esp. 226f., 232, 234, 243-245, 248).

¹⁵ As in the phrase *quae d(e) e(a) r(e) facta* in v. 6 and the transitional formula (traditionally abbreviated) *quid de ea re* etc. The *de rebus* would anticipate both the *SCC* mentioned in v. 6 (why are these qualified as *facta essent superioribus annis* if an explicit reference had gone before in v. 4?) and the youthful offenders mentioned in the same line.

¹⁶ Lebek (1990) 68 argues from the *ad eos* in v. 5 that we should assume the parallel [*ad*] referred to persons as well. From the mention of senatorial progeny in the first part of the decree itself (v. 7) he deduces a reference to them in the *relatio*. I agree only with the first point.

¹⁷ A similar criticism may be advanced against Crawford's suggestion (*apud* Levick, 101): *iis [d(atum) e(rat) de rebus ad dignitatem pat]rum pertinentibus*.

the impresarios who contracted for the services of members of the upper classes on stage or in the arena, since it is they who are censured in the initial part of the decree proper (vv. 7-11).¹⁸

(3-4) Two more references to the repression of adultery have been suggested for *lacunae* at vv. 18-19 and 20-21, a part of the text which appears to be a citation from an earlier SC dating to A.D. 11:¹⁹

- 17 [Quodque s(enatus)] c(onsulto) quod M(anio) Lepido T. Statilio Tauro co(n)s(u-
libus) referentibus factum esset, scriptum compre[sum esset—ne cui in-
genuae quae]
- 18 [minor qu]am an(norum) XX neve cui ingenuo qui minor quam an(norum) XXV
esset auctorare se operas[ve suas -- -]
- 19 [.]s locare permetteretur, nisi qui eorum a divo Augusto aut ab Ti. Cae-
sare Aug[- - -]
- 20 [. co]niectus esset; qui eorum is qui ita coniecisset auctorare se operasve
suas [locare - - -]
- 21 [.]arem redducendum esse statuissent—id servari placere praeterquam
[- - -]

18 *operas[ve]* Moreau : *opera[sve]* previous editors 18-19 *operas[ve suas ad (or in) harenam ludosve | scaenico]s* McGinn (see *TLL* s.v. *auctoro* 1234.43, 55f.; s.v. *loco* 1561.12f.) : *operas[ve suas in scaenam turpesve | ad res alia]s* Lebek who marks 17 *ne - - -* 21 *statuissent* as a quotation : *opera[sve suas ?ad harenam scaenamve |]s* Levick : *opera[sve suas ad harenam scaenamve spurcosve quaestu]s* Malavolta and Giuffrè

19-20 *Aug(usto) [creditori addictus et ab eo | in vincla co]niectus esset* Lebek : *Aug[usto in | co]niectus esset* Levick : *Aug[usto in ludum scaenam spurcosve | quaestus co]niectus esset* Malavolta and Giuffrè

The issue raised by the initial attempts to fill the first *lacuna* (in vv. 19-19) was settled by Levick, who questioned *operas ad spurcos quaestus* as the object of *locare*, noting also that the supplement proposed by Malavolta and Giuffrè is much too long. Lebek's supplement (published in small print) is phrased too broadly. The *relatio* may admit more freedom, but it is difficult to accept such open-ended language in the text of the decree proper. How would the jurists have understood these *turpes res aliae*? My reading avoids this problem; cf. Tac. *Hist.* 2.62 for a similar pairing.

As to vv. 19-20, Levick thought it "extraordinary to find Augustus consigning persons to *spurcos quaestus* ... the brothel and the stage are incredible as punishments at this date."²⁰

¹⁸ We need not assume that their activities were addressed by previous senatorial enactments, only that they had assisted others in thwarting the intent of those enactments. (Previous legislation on contracts for public performance appears to have taken into account only the performers; see below, nn. 105 and 107.) For a discussion of the relevant legislative history, see Levick (1983) 105-108; Lebek (1990) 43-58.

¹⁹ Levick suggests that the reference to this SC extends almost to the end of the text as extant (*statuissent* in v. 21). Lebek (1990) agrees.

²⁰ Our chief concern is with the former: there is in fact no firm evidence for consignment to the brothel as an official punishment before the reign of Septimius Severus. See Augar, *Die Frau im römischen Christenprozess*, Texte und Untersuchungen zur Geschichte der altchristlichen Literatur, n.F. 13.4 (1905); Crescenti, *La condanna allo stupro delle vergini cristiane durante le persecuzione dell'impero romano* (1966; uncritical, but even the evidence he relies on does not speak for forced prostitution, in the technical sense demanded here). Levick, taking *conicere* as "to consign to a certain status" provides three alternatives: *in numerum gladiatorum* or *infamosorum*, or *inter infames*. But the first seems too narrow a category, while the other two predicate a conception of *infamia* that is overly technical for this date.

Lebek concurs, pursuing a different course of restoration here and in the *lacuna* in vv. 20-21.²¹ Whatever solution one accepts, the terms of the debate now exclude any reference to the repression of adultery.

5) Somewhere from just under three-fifth to three-quarters of the original *SC* is lost, a fact which encouraged the earlier commentators to argue that this part of the document contained extensive references to the repression of adultery.

The contents of the decree where the text breaks off provide a clue as to what might have followed. The *SC* of A.D. 11, introduced just before the break, formed part of a series of such enactments (Levick [1983] 105f.). The Larinum document presumably went on to cite previous *SCC* from the years 38 and 22 B.C. (so Lebek [1990] 95-96),²² and perhaps others as well.²³ Then one might look for a brief rehearsal of the sort of behavior that motivated the passage of this *SC*. The *sanctio* would have concluded the document.²⁴ Given the complete absence of any reference to the regime on adultery in the *relatio* and the decree proper as we have them, no such reference belongs here either.

Thanks principally to Levick and Lebek, the main question concerning this *lacuna* may now be regarded as settled. However, the approach taken by the earlier commentators encourage a few observations on method and substance, with implications not so much for the decree itself as for the general problem of the legal regulation of sexuality, with particular reference to prostitution and marriage.

One such observation concerns the type of evidence that may fairly be used to supplement a document of this kind. Malavolta bases part of his restoration on a phrase found in another inscription, *CIL* 1² 2123:²⁵ *qui quaestum spurcum professi essent*. But it is doubtful that this phrase applied, at least exclusively, to prostitutes.²⁶ In fact, the phrase *operas suas ad spurcos quaestus locare* seems without parallel as a description of a prostitute.²⁷ Given the

²¹ For the latter, Lebek prefers "— — — 'is, qui ita coniecisset, auctorare se operasve suas [locare aere si sisset, ei id aes | ad rem peculij]arem reddendum esse' statuissent."

²² A break in the chronological order would be justified by the more direct relevance of the *SC* of A.D. 11, which mentions a ban on contracts, and is to some extent taken as a point of departure by this decree: note *id servari placere praeterquam* in v. 21.

²³ Levick (1983) 113 raises the possibility that another *SC*, passed between A.D. 15 and 19, reestablished the ban for equestrians abrogated in A.D. 11 (Dio 56.25.7-8) and stipulated penalties heavier than those consequent upon social degradation. This decree would have motivated various attempts at evasion, which were then countered by the Larinum decree itself.

²⁴ Other penalties, above all *exilium*, must have been added to what has been construed as the denial of (official) burial honors (*libitinam habere*) given at v. 15 (on how this difficult clause should be understood, see Levick [1983] 99; Baltrusch [1989] 198; Lebek [1990] 92). Lebek, 96 suggests that a confirmation of previously enacted sanction(s) was contained in the lost part of the decree.

²⁵ On this, Mommsen, *Jur. Schr.* 3 (1907) 198-215 (at 202 n. 1).

²⁶ *Spurcus* (like *turpis* and *sordidus*, the alternatives proposed) often refers to prostitutes, but caution is necessary. The inscription, found at Sarsina and dating perhaps to the end of the second century B.C., contains a series of regulations for a burial ground put at the disposition of the community by one Horatius Balbus. Excluded from the site are *auctorati*, suicides, and those *qui quaestum spurcum professi essent*. The phrase is decidedly non-technical, and might refer to (besides prostitutes) pimps, *lanistae*, and gamblers, to name a few. In short, one should not treat this inscription as a legal text.

²⁷ The closest parallel to the proposed reading seems to be Cato (*Orat.* fr. 212M): *qui...se lenoni locavisset*. But Cato specifically opposes this type of prostitute to those who work independently of pimps (cf. Firm.

concise and serviceable phrase employed for prostitute in earlier legislation, *quae (palam) corpore quaestum facit fecerit*,²⁸ it is difficult to see why this strange circumlocution should be read into the text.²⁹

Next, the importation of a legal regime wholesale into this kind of text is a difficult enterprise in itself. Any attempts to interpret Malavolta's phrase for prostitute would be a problematic affair. Are we to understand the hire-lease contract as standing between prostitute and pimp or prostitute and customer?³⁰ What sense would either alternative have? Why is there no reference to evasion of the adultery statute, if this was the root problem? Acceptance of the phrase would mean that the SC of A.D. 11 denied the validity of such agreements made with males under 25 and women under 20, which in turn implies legal approval of such agreements when made with older men and women not from the upper orders.³¹

The problem cannot be resolved by assuming one, generalized juridical status for all such professions and their practitioners at this time.³² This is simply does not hold for some important legislative enactments,³³ and in others these professions are grouped with many others.³⁴ No other legislative enactment from the early empire or earlier argues for placing *ars ludicra*, *lenocinium*, and *lanistatura* together here.

Another pitfall has been the relationship between the Larinum decree and the Augustan social legislation. Levick ([1983] 104) notes that the age limits given correspond to those granting exemptions under the "*lex Papia Poppaea*" (UE 16.1), and suggests that free persons had been evading the penalties for celibacy by adopting professions which made them ineligible to marry *ingenui*; the SC of 11 responded to such evasion.

Mat. *Math.* 3.6.22, 4.13.4, 5.2.3; Varro *Men.* 432 is of no relevance). Ovid's (*Am.* 1.10.30) *sola locat noctes, sola locanda venit* seems more poetic fancy than common usage, especially given the context (note that Barsby, *Ovid: Amores I* [1979] *ad loc.* prefers the alternative ms. reading *licenda* for *locanda*). See also *Itala Mich.* 1.7 with *TLL* s.v. *locatio* 1555.72-74. Most of the relevant examples (i.e. where the purpose of hiring is explicitly prostitution: *TLL* s.v. *conduco* 159.48-61) can be taken as slang or non-technical usage (see, for example, the *scortum conductum* of Plautus *Amph.* 288. *Conducere* and its cognates, used in a technical sense, do appear in late-antique legal texts: Theod., Val. CTh. 15.8.2 (a.428) = C. 11.41 [40].6); *eidem*, Nov. 18.1 (a. 439); cf. the references to hiring agreements in Justinianus Nov. 14 (a. 535). See, in general, the treatment of descriptions of prostitutes in Adams, *RhM* 126 (1983) 321-358.

²⁸ It appears in the *Tabula Heracleensis* (v. 122, with the masculine pronoun and *fecit* for *facit* and without *palam*) and the *lex Iulia et Papia* (see Ulp. D. 23.2.43 pr. -5).

²⁹ The phrase does not suit the context, given the position of the word *locare* in v. 19, nor would it fit in the subsequent lacuna at vv. 19-20, where *spurcosve quaestus* has also been proposed.

³⁰ The latter agreement is treated in private law as an "innominate contract": Ulp. D. 12.5.4.3 and Sturm, *Fg. Kaser* (1986) 281-288 (at 283).

³¹ Members of the senatorial and equestrian orders both seem by now to be categorically excluded from public performances, the real issue here: Levick (1983) 105f.

³² Malavolta (1978) 377: "generalmente *ars ludicra*, *lanistatura*, *lenocinium* sono raggruppate nei provvedimenti legislativi che discriminavano queste attività ..." Giuffrè (1980) 23 n. 64 agrees.

³³ In the *lex Iulia de adulteriis coercendis*, female prostitutes and procuresses are exempted, while actresses are not (reasonably enough, *lanistae* receive no mention). In the *lex Iulia et Papia*, members of the senatorial class are forbidden to marry actresses, who are permitted to the *ceteri ingenui* (while prostitutes and procuresses are not). None of the sources that describe measures designed to keep members of the upper orders off the stage and out of the arena mentions prostitution and its practitioners: Levick (1983) 105f.

³⁴ For example, in the *Tabula Heracleensis*, among the nearly two dozen categories forbidden to serve as decurions (vv. 108f.).

There are two objections to this view. First, the age limits in this law cannot establish a direct connection with the Augustan marriage legislation, which forms a separate legislative tradition.³⁵

Second, even if the age limits were derived from the *lex Iulia et Papia*, this does not prove that the evasion described by Levick actually took place. There is no evidence that members of the senatorial and equestrian orders sought to escape the marriage law's penalties by declaring themselves prostitutes or actresses. And the potential benefits were apparently outweighed by the disadvantages.³⁶

In sum, no direct connection between the *SC* of 11 (and thus the Larinum *SC* which quotes it) and the *lex Iulia et Papia* should be assumed.³⁷

II. TACITUS, SUETONIUS, AND PAPINIAN

In turning to the three literary and legal texts, we should first attempt to reconstruct what developments took place in the repression of adultery in A.D. 19, and then see if this evidence supports a direct connection between these developments and the *SC* from Larinum. Tacitus provides the fullest information on the repression of adultery, recording the punishment meted out to a woman who had sought to evade prosecution under the *lex Iulia* as well as an outright

³⁵ The 25 year limit for males, a feature of the Augustan laws on marriage and adultery, goes at least as far back as the *lex Laetoria*, passed in the first decade of the second century B.C.: on this law, see Weiss, *RE* suppl. 5 (1931) 578-582; Kaser, *Das römische Privatrecht* 1² (1971) 276-277; Di Salvo, *Lex Laetoria* (1979). The 20 year limit is more problematic. The *lex Aelia Sentia* (Gaius 1.40) stipulated this as a minimum age for manumitters of both sexes. Most importantly, the marriage laws themselves were inconsistent. The *lex Iulia de maritandis ordinibus* gave twenty years as its minimum for women to marry, but the *lex Papia Poppaea* laid down a younger age limit for the bearing of children; the two were reconciled by Septimius Severus: Astolfi, *La Lex Iulia et Papia*² (1986) 1f. on Tert. *Apol.* 4.8.

A similar confusion has arisen over the question of membership in an order as defined by family relationship. Demougin (1988) 559f. assumes that the *lex Iulia et Papia* and the Larinum decree contained identical definitions of membership in the *ordo senatorius*: this extends for four generations in the male line of a member of the senate. In fact, this is true only of the former statute (Paul. D. 23.2.44pr., quoting the law); the Larinum *SC* (v. 7) has *filius senatoris, filia, nepos, neptis, pronepos, proneptis*. In other words, cognatic descendants are included, so that the children and grandchildren of a senator's daughter were liable to the *SC* but not the marriage law. As for Demougin's suggestion (571) that the precise definitions of relationship embodied in later legislation originated in an *SC* of 22 B.C. dealing with public performances by members of the upper orders, Dio (54.2.5), our sole source, mentions only the sons and grandsons of senators. It is generally difficult to desume details of a legal regime from the writings of Dio and Suetonius; on this, see Lebek (1990) 53.

³⁶ The most important sanctions imposed by this law involved testamentary incapacity and thus would have affected primarily the upper classes. Even so, there were important loopholes, such as the one which allowed violators to receive bequests from close relatives. No professions were exempted completely; prostitutes might receive a quarter of bequests not otherwise allowable (Quint. *IO* 8.5.19). One may doubt the power of this provision to motivate women (at least those for whom such bequests mattered) to declare themselves prostitutes.

³⁷ Levick (1983) 101 states with reference to the Larinum *SC*: "the persons now forbidden stage and arena are the same as those barred from marriage to freedmen and freedwomen and actors and their children under the *lex Iulia de maritandis ordinibus* of 18 B.C. (Paul. D. 23.2.44), except that the latter affected only descendants in the male line ..." This has to be modified, because the prohibitions in the Larinum decree extend to equestrians (vv. 7-8; cf. vv. 12-14), while the marriage prohibitions Levick speaks of were limited to the senatorial order (Paul. D. 23.2.44 pr.; *UE* 13.1). Demougin (1988) 573-574 suggests that the equestrians were originally included as a separate category in the marriage legislation, but there is not a trace of evidence to support this argument in the relatively abundant sources.

ban imposed on the practice of prostitution by women of the equestrian and (*a fortiori*) senatorial orders (Tac. *Ann.* 2.85.1-3);³⁸

1. Eodem anno gravibus senatus decretis libido feminarum coercita cautumque, ne quaestum corpore faceret cui avus aut pater aut maritus eques Romanus fuisset.
 2. Nam Vistilia praetoria familia genita licentiam stupri apud aediles vulgaverat, more inter veteres recepto, qui satis poenarum adversum impudicas in ipsa professione flagitii credebant.
 3. Exactum et a Titidio Labeone Vistiliae marito, cur in uxore delicti manifesta ultionem legis omisisset. atque illo praetendente sexaginta dies ad consulendum datos necdum praeterisse, satis visum de Vistilia statuere; eaque in insulam Seriphon abdita est.

These events are placed by the historian at the end of his narrative for the year 19.³⁹ Vistilia, a woman of praetorian family,⁴⁰ has attempted to escape prosecution for adultery by claiming the exempt status of a prostitute.⁴¹ Her husband is threatened with a charge of *lenocinium*, but escapes punishment through appeal to a statutory time provision. The senate decides, apart from a penalty for Vistilia, that henceforth no woman whose grandfather, father, or husband had been a Roman *eques* will be permitted to prostitute herself and closes the "loophole" in the adultery law that Vistilia had attempted to exploit.

Tacitus' account raises several important questions. First, when did the practice of prostitutes registering with the aediles begin and what was its purpose? Second, did Vistilia's behavior motivate the senate to take action, or was she simply the first to be punished? Third, how many SCC were there and what precisely did they lay down? Fourth, what was the nature of her punishment: *exilium* or the somewhat less drastic penalties of the *lex Iulia* itself?

1) The date and purpose of the aediles' list. The words *more inter veteres recepto* imply longstanding practice, presumably dating long before the passage of the *lex Iulia*.⁴² Largely on the basis of this passage, Mommsen ([1887] 2.510-511) assigns a general

³⁸ Commentators generally assume this extension, owing to Vistilia's senatorial status. Compare the principle laid down by the jurist Marcellus, who asserts that the marriage prohibitions of the *lex Iulia et Papia* designed for individuals of lower social status apply also to those of higher status (D. 23.2.49). It is therefore not necessary to suppose that Vistilia's husband was an equestrian (see Eck, *RE* Suppl. 14 [1974] s.v. Vistilia [2] 910-911; Demougis [1988] 557 n. 13). The reason why equestrian women were included under the ban is explored below.

³⁹ Tacitus groups this together with other items of note in standard annalistic practice. Thus the position of the notice does not determine its date within the year (see below).

⁴⁰ For her connections, and those of her husband, see Pliny *NH* 35.20; Syme (1949/1970) 74-76; *idem* (1970/1979) 2.810-811. He suggests that her father was the ex-praetor Sex. Vistilius, forced to commit suicide in A.D. 32 (Tac. *Ann.* 6.9.2). Titidius was an amateur painter, whose work was ill received: Pliny *NH* 35.20.

⁴¹ The *lex Iulia de adulteriis coercendis* specifically exempted from its penalties prostitutes and perhaps procuresses. The exemption of slavewomen was regarded as implicit, and that accorded to convicted adulteresses was the product of juristic treatment of the law. For the exemptions, see Pap. D. 48.5.6 pr.; Dioclet., Maxim. C. 9.9.22 (a. 290); *idem*, C. 9.9.23 pr. (a. 290); Quint. *IO* 7.3.6; Ulp. D. 25.7.1.2; Suet. *Tib.* 35.2; Pap. D. 48.5.11(10).2 (*PS* 2.26.11 is a post-classical extension).

⁴² The practice is often assumed to have predated the law; at any rate, no firm link between the two has been drawn. Mommsen (1899) 159 n. 2 sees a connection between this list and a register kept by the *tresviri capitales* in Plautus' day (*Asin.* 131). But we do not know if such women appeared on the list *qua* prostitutes or if, as the other evidence of such magisterial record-keeping suggests (*Aulul.* 416: carrying a weapon; *Truc.*

supervision of brothels to the aediles.⁴³ As with other enterprises that were privately operated for public use, such as baths and eating places, their chief concern was the preservation of public order, a lesser one the supervision of commercial activity.

Longstanding aedilician oversight may be conceded for the brothels. But the maintenance of a list of prostitutes is another matter altogether. Vistilia's conduct makes sense only if prostitutes were exempt under the adultery law and the list guaranteed the exemption.⁴⁴ Tacitus implies as much with his justification for the list, which suggests an attempt to punish or discourage prostitutes. A third possibility is that the law assigned a new purpose to a preexisting register. The better view is that the registration of prostitutes with the aediles was stipulated by the *lex Iulia* itself, since it would have served no purpose before the introduction of the statutory exemption for prostitutes. The list was designed to validate legitimate exemptions under the law and at the same time to discourage too many women from taking advantage of this dubious privilege.⁴⁵

Besides this passage from Tacitus, Mommsen cites two other authorities for his views on the nature of the list. One is the passage of Suetonius (*Tib.* 35.2) discussed below. The other, a text of Origen, has nothing to do with the list of prostitutes.⁴⁶ We are thus left with only two pieces of evidence, both of which report an event that occurred in A.D. 19.⁴⁷

The discontinuation of the list is only suggested, not proven, by the complete lack of further evidence.⁴⁸ The hypothesis is strengthened, however, by some other considerations. The Vistilia incident resulted in an *SC* which flatly prohibited the practice of prostitution by senatorial and equestrian women. After this, registration may have been less necessary (though, to be sure, none of these women had ever registered before). In any case the practice was perhaps discredited by the entire affair. Second, when Caligula imposed the tax on

759f.: again prostitutes, but at issue is a racket in suppositious children), they were simply included with other individuals considered a threat to public order. A third possibility exists, namely, that Plautus has retained a reference to an Athenian practice and inserted the appropriate Roman magistracy. At all events, nothing indicates a connection between this list and that of the aediles, which allowed an exemption from the adultery law. Guarino, *Labeo* 24 (1978) 116 rightly discounts Krenkel's suggestion that an official register of doctors, fashioned on the analogy of the list under discussion, was kept at Rome.

⁴³ A *lex lenonia* mentioned in a fragment of Plautus (preserved at Festus p. 127L) may have granted the aediles some authority in this area (if this is a reference to a genuine law and not a Plautine witticism). See the remarks of Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vor-sullanischer Zeit* (1962) 123 n. 449 and now Formigoni Candini (1990) 104-105

⁴⁴ Insofar as procuresses were exempted under the statute, they would perhaps be included on the list.

⁴⁵ On this aspect, see Daube (1986) 4.

⁴⁶ Orig. *Cels.* 4.63 makes no mention of a list, or even of regular oversight of the brothels by aediles. Moreover, while the passage calls the officials *agoranomoi*, the usual Greek equivalent for *aediles*, there is no evidence for the latter's existence after Alexander Severus, as Mommsen (1887) 2.522 points out. Chadwick's translation (*Origen: Contra Celsum*² [1965] 235) "public authorities" or some equivalent, such as "city officials," is to be preferred. In fact, the text seems to refer to the suppression of male homosexual prostitution, an act attributed by Aurelius Victor (*Caes.* 28.6-7) to Philip the Arab, under whose reign the *Contra Celsum* was written (Chadwick, o.c. xivf.).

⁴⁷ To these can be added Ovid *Fasti* 4.866, which, given the date of the poem (the six books were more or less finished by A.D. 8: Bömer, *P. Ovidius Naso. Die Fasten* 1 [1957] 17), supports the argument made in the text as to the list's date of origin.

⁴⁸ Sen. *Vita Beata* 7.3 shows the aedilician oversight of brothels, at any rate, continued to be exercised. This is consistent with the argument that this was a separate function, dating from a period before the introduction of the list under Augustus.

prostitutes in A.D. 40, all responsibility for record-keeping in this area may have passed to the tax-collectors, first the publicans and later the army.⁴⁹ Of interest also is the fact that jurists writing at a later date make no mention of the register in constructing their definition of prostitutes.⁵⁰ Even an incomplete list might have served as a point of departure.

Tacitus' justification of the list suggests its intimate association with the *lex Iulia*. The phrase *more inter veteres recepto* does not really conflict with this notion. For one thing, *veteres* does not always mean "the ancients" in our sense of the term.⁵¹ Tacitus might properly use the word to refer to a legislative provision that was almost a century and one-half old when he wrote.⁵² This is credible if, as seems likely, the practice had since been discontinued. But it is also possible that Tacitus wished to render Vistilia's conduct all the more shocking by making it look like an abuse of a *mos* that was long-standing in her own time.

Why would the aediles be entrusted with the registration of prostitutes under the adultery law? As noted, they may already have had responsibility for supervision of the brothels themselves, along with other businesses that catered to public amusements. Another aspect of their magisterial competence was the prosecution, through the *iudicia populi*, of men and women for adultery and other sexual offences, a practice that evidently extended far back into the Republic.⁵³ This in itself might have suggested to the legislator a role for them in the enforcement of the *lex Iulia*, an idea which is strengthened by the fact that, with the disappearance of the censorship as an independent magistracy under Augustus, the aediles were now called to act as a sort of petty censor. One aspect of this is their newly assigned responsibility, noted by Mommsen,⁵⁴ of ensuring that persons appearing in public wore the clothing appropriate to their status.

The implications of the legislative provision for registration may now seem clearer. As Tacitus suggests, the maintenance of a register would have acted to discourage any woman

⁴⁹ See the discussion in McGinn, *Helios* 16 (1989) 79-110.

⁵⁰ Marcel. D. 23.2.41pr.; Ulp. D. 23.2.44pr.-5. Admittedly, these are constructed for the regime laid down by the *lex Iulia et Papia*, but the adultery law is taken into account, both implicitly and (by Ulpian) explicitly.

⁵¹ For example, Quintilian uses it to refer to Cicero: *omnes veteres et Cicero praecipue* (*IO* 9.3.1). Cicero himself uses the word to refer to the Gracchi and Appuleius Saturninus (*Sest.* 105). Tacitus includes Livy among the *veteres* (*Agricola* 10.3). To be sure, the status of Cicero and his contemporaries as such might be questioned, at least as late as Vespasian's reign: *Dial.* 16.4f. But this argument has the air of a challenge to the conventional wisdom: cf. *Dial.* 25.1f.; see also *Hist.* 2.38.2, 3.24.2, *Ann.* 2.88.3, 4.32.1, 14.42.2, with Mommsen (1899) 631 and n. 1; Koestermann *ad. loc.*

⁵² The *lex Iulia* was passed in 18 or 17 B.C.: Arangio-Ruiz, *Scritti di diritto romano* 3 (1977) 249-294 (at 250; = *Augustus: Studi in occasione del bimillenario augusteo* [1938] 101-146).

⁵³ Livy 8.22.3, 10.31.9, 25.2.9 and Mommsen (1887) 2.493; Jones, *The Criminal Courts of the Roman Republic and Principate* (1972) 15. They seem to have exercised exclusive jurisdiction over offenses committed by women: Garofalo, *SDHI* 52 (1986) 451-476, especially 455 and 475. Also relevant is their prohibition against castrating slaves; on this and more generally on the aedilician *cura morum*, see Sabbatucci, *Mem. Acc. Lincei* 6.3 (1954) 255-334 (at 320f.; the argument that a common religious basis is behind the repression of adultery and the oversight of prostitution is implausible); Dalla, *L'incapacità sessuale in diritto romano* (1978) 74f.; Velasco, *AHD* 52 (1982) 733-749. On their repression of gambling, see Baltrush (1989) 103.

⁵⁴ Mommsen (1887) 2.509, who cites Suet. *Aug.* 40.5: *negotium aedilibus dedit, ne quem posthac pateantur in foro circave nisi positus lacernis togatum consistere*. The language has the ring of a legislative enactment.

with pretensions to respectability from entering prostitution.⁵⁵ For those who did become prostitutes, the social stigma was punishment enough, at least from an upper-class perspective. But this was far from being the only or even the major purpose behind this provision. The real intent was to create another objective boundary between respectable women and the outcast class of prostitutes.⁵⁶ It fits in well with Augustus' larger purpose of redefining and reinforcing social and moral boundaries weakened by years of revolution, civil war, and rapid social change.

2) The motive for the SC. Giuffrè has vigorously argued that Vistilia herself did not motivate the passage of the *SC*: her case formed "la prima applicazione, non l'*occasione*" ([1980] 11). This is untenable. First, Tacitus himself evidently believed otherwise.⁵⁷ Second, in order to explain how someone of Vistilia's station came to violate so flagrantly a decree so recently passed, Giuffrè implies that she must have received poor legal advice, though there is absolutely no evidence for this rather improbable assumption.⁵⁸

Finally, Giuffrè claims Vistilia could not have been liable, under the terms of the *lex Iulia*, to the charge on which she was convicted, before the passage of the *SC* introduced that particular sanction. But Vistilia violated more than just the spirit of the law, that is, her behavior amounted to more than *fraus legis*.⁵⁹ Tacitus' account implies that she registered with the

⁵⁵ Was the list comprehensive? It is sometimes assumed that only freeborn prostitutes were supposed to register. However, since *libertinae* were liable to prosecution under the adultery laws, they presumably were placed under the same obligation to have their names entered on the list, at least in theory. So the register was evidently intended for every Roman prostitute or procuress, apart from slaves, who were excluded from criminal liability under the statute *ipso iure*. In reality, it is difficult to imagine that the list was ever extensive, let alone complete. Any woman with a claim to respectability or hope of such for the future would not dare approach the magistrates. Many poor women who worked as prostitutes on a part-time or temporary basis had perhaps less to fear from a prosecution for adultery than they did from the consequences of such a public admission of disgrace. The reluctance of English prostitutes to be registered under the nineteenth-century Contagious Diseases Acts is instructive: see Walkowitz, *Prostitution and Victorian Society* (1980). As for the question of official intent, Tacitus gives the impression that the list was thought to function best when it contained no names at all. This may be regarded as an exaggeration, given the complex role prostitution played in Roman sexual politics, but it is telling nonetheless. The theory was that Roman women, caught between the prospect of public disgrace through registration and disgrace and worse if they did not register, would turn instead to the practice of virtue. Finally there is nothing in the evidence to suggest that the aediles' role was anything but passive. In other words, they did not seek out women in order to register them, but awaited the initiative of those bold (meaning shameless, on the Roman estimate) spirits who wished to claim the privilege of exemption. The aediles had no motive to act otherwise, unlike the collectors of Caligula's tax. The obvious conclusion is that the Roman register never was, nor was intended to be, a comprehensive list, a sort of precursor to the rolls of prostitutes kept by modern bureaucracies (for an example of this practice, see the massive study of Corbin, *Women for Hire. Prostitution and Sexuality in France After 1850* [1990]).

⁵⁶ Compare the distinguishing form of dress for prostitutes, the toga. On the creation of boundaries between prostitutes and respectable women, see the works of feminist historians and anthropologists cited by Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918* (1982) 49.

⁵⁷ The sentence introducing Vistilia begins with an explanatory *nam* (Giuffrè's contention demands *deinde* or the like) and the tense of *vulgaverat* shows past action.

⁵⁸ Giuffrè allows that Vistilia's husband, who manages "to get off on a technicality," had access to better advice of counsel.

⁵⁹ I do not share Daube's view (1986) 1f. that Vistilia's action constituted a "dodge" that would "stand up to judicial scrutiny"; see below in the notes. Acts that contravened the spirit, but not the letter, of a statute were *fraus legis*: Paul. D. 1.3.29; Ulp. D. 1.3.30; Honsell, *Fs. Kaser* (1976) 111-126; Behrends, *Die Fraus Legis* (1982); Fascione, *Fraus Legi* (1983). Throughout the Republican and Augustan periods, such behavior was punishable only through fresh legislation. At some point in the first century A.D. extensive interpreta-

magistrates after the fact of her adultery, not as a precaution. At all events, the distinction, if one is to be made, may well have been overlooked by the senate, which responded out of a sense of outrage provoked by her actions and aggravated by her high social position.⁶⁰ Certainly this was neither the first nor the last time that conspicuous misbehavior moved the senate both to punish the offending party, and then to issue a general rule against such activity for the future.⁶¹

3) The Number of SCC and their Contents. Brunt's suggestion, that the senate's punishment of Vistilia was separate from a more general decree, is possible; but it is more likely that Tacitus is here indulging his taste for the rhetorical plural,⁶² and that only one SC was passed.

It is true that two separate measures can be discerned in the phrase *libido feminarum coercita cautumque ne quaestum corpore faceret cui ...*⁶³ The *libido feminarum coercita* refers to the closing of the apparent "loophole" in the *lex Iulia* through which women could conceivably escape the penalties laid down for adultery by adopting one of the two professions exempted under the law. The scope of this provision went beyond Vistilia's offense, in that it anticipated women who would actually practice prostitution, not just register as Vistilia did. The aim was not simply to punish Vistilia, but to discourage further such attempts at evasion.⁶⁴ The principle would have applied to all women liable under the adultery statute, that is, all free women who were not prostitutes, procuresses, or convicted adulteresses.

The prohibition of the practice of prostitution by women of the senatorial and equestrian orders obviously does not embrace all women liable under the *lex Iulia*, but it too is a generalized enactment motivated by the specific instance of Vistilia. The common motivation of the Vistilia affair explains how these two different provisions came to be joined in the same decree

tion of existing laws began to fill the gap (so Honsell; see Behrends and Fascione for other views on the evolution of the concept).

⁶⁰ In this period the senate heard cases involving senatorial defendants and scandalous offenses, above all adultery. See Garnsey (1970) ch. 1, esp. 21f. and 99 and Talbert (1984) ch. 16 (with literature). On the senate's freedom of discretion with respect to both procedure and penalty, see also Levick (1979) 374f. On the later history of the adultery *quaestio*, Garnsey (*JRS* 57 [1967] 56-60) and Bauman (1968) *passim*.

⁶¹ McGinn (1986) 289; similarly, Lebek (1991) 58 n. 30. Two examples may suffice. The ban on appearances in the arena by members of the senatorial class in 38 B.C. (Dio 48.43.1-3) was motivated by the case of a single senator; he was forbidden to perform, and a general prohibition issued (apparently in the same SC). In A.D. 61 the wrongdoing of Valerius Ponticus was punished and provision for the future laid down in the *SC Turpillianum* (Tacitus *Ann.* 14.41); see Garnsey (1970) 27f. For another possible case, see Scaev. D. 48.5.15(14).1 with the remarks of Rizzelli (1990) 492 n. 74.

⁶² P.A. Brunt *apud* Levick (1983) 111. For the rhetorical plural, add to *Semproniis rogationibus ... Serviliae leges* (*Ann.* 12.60.3), cited by Levick, *Oppiis ... legibus* (*Ann.* 3.33.4), *Lollianas Varianasque clades, interfectos Romae Varrones, Egnatios, Iullos* (*Ann.* 1.10.4), *Iulias rogationes* (*Ann.* 3.25.1). The last example is somewhat controversial (Furieux, Koestermann *ad loc.*), but the better view is that it refers simply to the *lex Iulia de maritandis ordinibus* of 18 B.C. See Jörs, *Die Ehegesetze des Augustus* (1894) 8 n. 3.

⁶³ I cannot agree with Koestermann *ad loc.* that the two phrases are an example of "das Allgemeine und das Besondere." Note that the latter, at least, seems to echo the actual wording of the decree. First, *quae corpore quaestum facit fecerit* was probably the definition of a prostitute in the *lex Iulia* itself (Mod. D. 23.2.24 and Marci. D. 25.7.3 pr.). Second, Tacitus' phrasing *cui avus aut pater aut maritus eques Romanus fuisset* reflects the specificity characteristic of Roman legislation (cf. the Larinum SC at vv. 6-9, and Paul. D. 23.2.44 pr.); he may even have abbreviated a somewhat longer and more precise phrase.

⁶⁴ The passages of Papinian and Suetonius discussed below mention *lenocinium* as the dodge. This suggests that the SC was phrased in broad terms.

and why Tacitus places them together the way he does. Vistilia combined a relatively high social position with adulterous behavior—hardly a rare combination, but when she took the further step of registering with the aediles as a prostitute, it was this concurrence of factors that both provoked an immediate reaction from the senate and piqued Tacitus' interest.

4) The Penalty. It is generally assumed that Vistilia herself and putative offenders against the *SC* were punished under the terms of the *lex Iulia*, with loss of one-half dowry and one-third other property, as well as *relegatio in insulam*.⁶⁵ But a closer examination suggests a harsher penalty was imposed.

Tacitus says of Vistilia *eaque in insulam Seriphon abdita est*; Suetonius, at *Tib.* 35.2 (below), is more specific, naming *exilium* as the penalty for both this *SC* and that dealing with upper-class performances. If Suetonius uses the term in its strict sense, Vistilia's punishment would have included loss of citizenship (only possibly, at this date), greater limitations on property ownership (not yet, it seems, confiscation of all property), and banishment, usually to a predetermined locale.⁶⁶ Tacitus' language (explained by Koestermann, *ad loc.*) is sufficiently vague to suit either alternative.

All the same, other considerations weigh in favor of the argument that the harsher penalty, the *exilium* known in its developed form as "capital" exile, was prescribed for offenders under this *SC*. First, the ban on the practice of prostitution by senatorial and equestrian women is, strictly speaking, irrelevant to the *lex Iulia*; thus there is no reason to assume that the penalties would be identical. Second, as far as regards the closing of the "loophole" in the adultery law, it is perhaps more logical to suppose that the senate prescribed sharper penalties than those contained in the original legislation—otherwise women anticipating prosecution might have had little to lose from emulating Vistilia's example. With respect to Vistilia herself, the senate, to all appearances in a punitive frame of mind, was free to propose a penalty different from those stipulated by the statute, like any court sitting *extra ordinem* (Giuffrè [1980] 29). *Exilium* would better address the twin goals of punishment and deterrence. Thus it seems correct to see in this decree a sharpening of the penalties provided for adultery.⁶⁷

⁶⁵ *PS* 2.26.14, which insists on separation of the guilty couple: *dummodo in diversas insulas relegentur*. The convicted adulteress would also have been forbidden to remarry (Ulp. D. 48.5.30 [29].1), barred from giving testimony in the criminal courts (Paul. D. 22.5.18), and compelled to wear the toga (Iuv. 2.68-70). We do not know if the *relegatio* was permanent or *in tempus*: Sehling, *SZ* 4 (1883) 160-163 (at 162) holds for the latter. There is disagreement as to whether the *lex Iulia* originally introduced the penalty of *relegatio* or this became imposed later through the *cognitio extra ordinem*: Branca, *Enciclopedia del diritto* 1 (1958) s.v. *adulterio (diritto romano)* 620-622 (at 621); Bauman (1968) 80 n. 95. The former is the more convincing view: the stipulation about separate islands looks legislative; cf. the cases given below in the notes where *exilium* is meted out as an aggravated penalty and see Biondi, *Scritti giuridici* 2 (1965) 47-74 (at 50f.) = *Studi Sassaesi* 16 (1938) 63-96; and Garnsey (1970) 116.

⁶⁶ True, Suetonius' use of the term *exilium* cannot be taken at face value. Garnsey (1970) 111f. shows that *exilium* and *exul* were sometimes used as "umbrella terms" referring both to *relegatio* and to the harsher penalty (*exilium* in the technical sense, later called *deportatio*). However, Suetonius had a penchant for technical vocabulary (Wallace-Hadrill [1983] 20, 90). And although in Tiberius' reign these penalties were still in a state of evolution, a distinction between *relegatio* and *exilium* was made as early as Ovid's exile (*Tr.* 2.137; 5.11.21). On banishment as a criminal penalty in the early imperial period, see Grasmück, *Exilium: Untersuchungen zur Verbannung in der Antike* (1978), esp. 127f. and Levick (1979) especially 376f.

⁶⁷ See the comments of Giuffrè (1980) 31 on the penalties imposed under the *Larinum SC*. Note Tac. *Ann.* 4.42.3, where Tiberius sharpens the statutory penalty for adultery: *exilium* for *relegatio* (Zablocka [1986]

The desperation of Vistilia's ploy is patent: she must have feared imminent prosecution.⁶⁸ The words *delicti manifesta*⁶⁹ and the fact that her husband was at least conceivably liable to a charge of *lenocinium*⁷⁰ indicate that her case was treated like that of an *uxor in adulterio deprehensa*. Although it is not certain whether this resulted from the actual circumstances surrounding the putative act of adultery or was construed through her public registration as a prostitute, the latter seems more likely.⁷¹ In any case, her strategy must have seemed a dangerous one even to her, given the likelihood of a public uproar.⁷²

Attempts to legislate morality can give rise to paradox and folly. An adulteress claimed to be a prostitute in order to escape punishment for sexual misbehavior. Her solution—resort to a dubious legal technicality—backfired and she suffered a penalty worse than what the *lex Iulia* prescribed, had the case been tried in a regular *quaestio*. Vistilia's husband was able to escape punishment by invoking a real loophole: technically, his behavior did not violate the terms of the adultery statute.⁷³

399, with literature). *Deportatio* is given where adultery is combined with incest (*duplex crimen*, Marci. D. 48.18.5).

⁶⁸ No evidence supports Syme's contention ([1949/1970] 76; *idem*, *Tacitus* I [1958] 373 n. 5; *idem* [1970/1979] 2.811) that Vistilia's declaration was meant as a "paradoxical comment" on the marital habits of her aunt of the same name. The assertion of Daube (1986) 1f. that Vistilia's action was a "dodge," defined as "the attempt to thwart an irksome restriction by means which will stand up to judicial scrutiny," must be qualified. Vistilia's adultery was illegal. The penalties that threatened her were more than "an irksome restriction." It was not registration with the aediles, but the actual status of a prostitute that held out the prospect of exemption; Vistilia could only aspire to the former.

⁶⁹ For the Tacitean use of this construction, see Koestermann *ad loc.* The use of *delictum* for what was now a *crimen* is interesting (cf. *Sen. Ben.* 3.16.4).

⁷⁰ Thus he was questioned before the senate as to why he had not divorced his wife and taken action against her lover as the law demanded: Ulp. (4 *de adult.*) D. 48.5.30(29) pr.; cf. *PS* 2.26.8.

⁷¹ Tacitus' language, especially *licentiam ... vulgaverat*, makes the second alternative likelier.

⁷² Among the reasonably foreseeable adverse results must be counted the fact that, since her husband was freeborn, by declaring herself a prostitute she rendered her marriage immune to the rewards and liable to the penalties of the *lex Iulia et Papia* (Vistilia's marriage would not have become void at this early date): Corbett (1930) 35.

⁷³ The senate agreed, at any rate, that Titidius should not be punished: *satis visum de Vistilia statuere*. A later text, *PS* 2.26.8 (= *Coll.* 4.12.7) stipulates immediate divorce for an *uxor in adulterio deprehensa*, but the phrasing is against this being an original feature of the law (the verb *placuit* suggests the rule given was not found in the legislative text, but was of later, perhaps imperial, origin: see Rizzelli [1990] 464 n. 18). The *lex Iulia* evidently did require the husband who had exercised the *ius occidendi* to divorce his wife immediately (Macer D. 48.5.25[24].1), but this set of circumstances was entirely different, as seen in the fact that the duty to divorce was tied to the husband's obligation to give notice to a competent magistrate within three days of the killing (*PS* 2.26.6; Paul. *Coll.* 4.3.5). The passage under discussion suggests the statute itself allowed more time in flagrant cases where the "privilege of slaying" was not invoked. Ordinarily, a husband could decide himself whether or not to divorce his adulterous wife. But if she had been caught in the act, he had no choice: if he did not divorce her, he could be accused of *lenocinium* (Ulp. D. 48.5.2.2.3; 30[29].pr.). Divorce paved the way for prosecution by himself, the woman's father, or an *extraneus*. Tacitus tells us (in very indirect fashion) precisely how long he had to act. After the divorce, he had another sixty days in which to exercise his privilege of prosecuting her *iure mariti* (Ulp. D. 48.5.30[29].5). Tacitus is usually understood as referring to the latter time-period (e.g. by Rogers, *Criminal Trials and Criminal Legislation Under Tiberius* [1935] 15), but if this view were correct one would expect Titidius to claim divorce as a defense. Daube (1986) 6-7 suggests that the senate's real concern was to discover evidence of actual aiding and abetting (statutory *lenocinium*). But this is not supported by the phrasing of the interrogation (*cur ... omisisset*); moreover, Titidius' assertion, however the sixty day period is defined, could not have stood as a defense to such a charge.

Both with respect to penalty and procedure, the senate, in punishing a violation of the adultery law, acted with a freedom that a *quaestio* presumably did not possess. According to the terms of the statute as understood by the jurists, Vistilia could not be prosecuted by anyone *iure extranei* until either her husband was first convicted of *lenocinium* or, if he had divorced her, two months passed without a prosecution by either husband or father.⁷⁴ The senate acts with a speed, and a severity, that suggests only Vistilia as its immediate concern.

As seen, the passage of Tacitus, while full of information on the repression of adultery in A.D. 19, contains nothing to link this incident with the SC from Larinum.

Next there is the passage from Suetonius (*Tib.* 35.2):

Feminae famosae, ut ad evitandas legum poenas iure ac dignitate matronali⁷⁵ exsolverentur, lenocinium profiteri coeperant, et ex iuventute utriusque ordinis profligatissimus quisque, quominus in opera scaenae harenaeque edenda senatus consulto teneatur, famosi iudicii notam sponte subibant; eos easque omnes, ne quod refugium in tali fraude cuiquam esset, exilio adfecit (sc. Tiberius).

The item, couched in an elegantly structured sentence, at once betrays some typical Suetonian concerns, above all his interest in the vicissitudes of social rank and in the problem of public morals, especially among the upper classes.⁷⁶ It is found amid a recitation of Tiberius' moral measures, third in a series relating to the *lex Iulia de adulteriis coercendis*. This fact by itself explains why the *feminae famosae* come first, although it can be argued that Suetonius ordered his material here, as so often, with an eye to social hierarchy.⁷⁷ In any case, one should not assume that the material is simply ordered chronologically within the year 19 (as suggested by Levick [1983] 114).⁷⁸ The fact that both measures were passed in this same year, as well as the generous parallels in theme and substance, so admirably worked out in the construction of the sentence, sufficiently explain why the biographer placed them together in this way. We need not go further and suppose that they formed part of the same SC.

All the same, the report of Suetonius is inconsistent with Tacitus' account in several respects; these inconsistencies, although minor in themselves, have encouraged scholars to lump the two separate enactments together.

The most important discrepancy is that Suetonius gives plural, unnamed *feminae famosae* as a motive for the decree, while Tacitus names one woman. Certainly the fact that Vistilia's

⁷⁴ For the procedure, see the references given in the previous note and the discussion in Corbett (1930) 143-4. Giuffrè (1980) 13 n. 5 assumes that Vistilia was accused *iure extranei*. The senate was not, to all appearances, following standard procedure. In most circumstances a woman could not be prosecuted for adultery without a divorce: Mommsen (1899) 697 with n. 3. Otherwise, at this early date, a formal accusation, if not actual condemnation, of the husband on a charge of *lenocinium* would have been an absolute prerequisite to prosecution of the wife by anyone. (Most take Ulp. D. 48.5.27[26] pr. to refer to successful prosecution, e.g. Thomas, *Études Macqueron* [1970] 637-644 [at 641]).

⁷⁵ This reading is to be preferred to the alternative *matrimoniali*: Giuffrè (1980) 14 n. 23.

⁷⁶ See Wallace-Hadrill (1983) 108f., 134, respectively.

⁷⁷ This is to accept the argument (made below) that *feminae famosae* represent the senatorial Vistilia, and to recognize that, although upper-class performers were *utriusque ordinis*, the problem was especially acute with the equestrians, as the Larinum SC makes clear. For Suetonius' organization of his material in terms of social hierarchy, see Wallace-Hadrill (1983) 101f.

⁷⁸ See McGinn (1986) 298f.; Lebek (1991) 60 n. 33 concurs.

registration with the aediles provoked the senate to take action does not mean that other women had never employed the same device. But I believe we should hesitate before concluding, with Malavolta and Giuffrè, that "molte donne" were involved.⁷⁹

It is imprecise to say that Suetonius was uninterested in the senatorial order, or that he wrote with primarily an audience of fellow equestrians in mind.⁸⁰ But that he omits explicit mention of Vistilia and her lineage (*praetoria familia genita*) as well as the precise details of her conduct and its consequences, is adequate demonstration that his concerns differed quite significantly from those of Tacitus, who saw here a useful, in its own way unparalleled, *exemplum* of this order's moral decline under the Julio-Claudians. In this instance, as elsewhere, Suetonius allows an indication of status to serve in place of a proper name.⁸¹ Of course, too much emphasis on Vistilia would have destroyed the carefully wrought balance with the upper-class performers, where no single person (as far as we know) combined such high social status with such shocking conduct. The contrived sentence structure and vague language suggest a certain striving for effect. It seems easier to conclude that Suetonius is simply generalizing here.⁸²

The alternative to adopting this view is to attempt to determine precisely what Suetonius meant by *feminae famosae*, but this has proved difficult. Malavolta ([1978] 349) argues that the phrase referred to "donne di elevata condizione sociale (figlie, nipoti, e spose di cittadini di rango senatorio o equestre)." Giuffrè ([1980] 14-15) rightly points out that *famosae* refers primarily to moral reputation, albeit with strong implications for social position. This is an important point, since it illustrates how the adultery statute and the legal regime it created manipulated women's sexual and social status. But Giuffrè is surely not right in limiting the scope of these concerns to equestrian and senatorial women.⁸³

Levick ([1983] 111) perceives a contrast between the emphasis of Tacitus and Suetonius on senatorial and equestrian women and the broader language of Papinian. She suggests that the application of the law was widened in the period of time between the passage of the SC

⁷⁹ Malavolta (1978) 357; Giuffrè (1980) 11; also Rawson in *eadem ed.*, *The Family in Ancient Rome* (1986) 1-57 (at 35); Baltrusch (1989) 201 with n. 36 and 202; Formigoni Candini (1990) 112f. *Contra*, McGinn (1986) 296f., and now Lebek (1991) 57.

⁸⁰ See the remarks of Wallace-Hadrill (1983) 23-25 and ch. 5.

⁸¹ Examples are given by Wallace-Hadrill (1983) 104. The word *famosa* refers both to moral and social status, as seen below.

⁸² One is reminded of Tacitus' resort to the rhetorical plural, noticed above. He himself multiplies Vistilia, when he writes *libido feminarum*. Compare Suetonius' use of the word *legum* in this passage (*ad evitandas legum poenas*). Only the *lex Iulia de adulteriis coercendis* can be meant; cf. the more precise phrasing of Papinian (below). On the biographer's penchant for generalization, see Bauman (SZ 99 [1982] 81-127 [at 99, 108, 109 n. 133]). A parallel instance where Suetonius generalizes but Tacitus names a specific senatorial individual (again a woman) occurs at *Ann.* 2.50 and *Tib.* 35.1. Rietra (*C. Suetoni Tranquilli Vita Tiberi: C. 24-C. 40* [1928] 36), Bringmann (*RhM* 14 [1971] 268-285 [at 276 n. 27]), and Bauman (o.c. 100) justly see two references to the same person. Cf. Tac. *Ann.* 5.9.1-2; Suet. *Tib.* 61.5 (the daughter of Seianus), and *Ann.* 4.70; *Tib.* 61.2 (Titius Sabinus).

⁸³ Giuffrè claims that Roman society did not concern itself with "il comportamento delle donne d'umile condizione," emphasizing the phrase *utriusque ordinis* in Suetonius. The phrase refers, strictly speaking, to the substance of the Larinum SC. Its only possible relevance to the Vistilia SC lies in the prohibition extended to members of both orders against prostituting themselves, which left the scope of liability under the *lex Iulia* unchanged. This extended to all women, aside from a few limited exceptions, at least as a matter of law.

and Papinian's day, "if *matronae* is not used simply (sc. by Papinian) as an imprecise term for women of senatorial and equestrian rank." However, Suetonius' reference to *utriusque ordinis* does not concern the Vistilia SC, so that the postulated contrast is less evident. Also, Papinian speaks of a *mulier*, not *matronae*, which leaves the question of status open.

Recapitulating the main provisions of the Vistilia decree may dispel the controversy surrounding *feminae famosae*. Aside from punishing Vistilia, the senate passed two separate but related measures: 1) all women liable under the *lex Iulia* were forbidden to make use of the exemptions recognized under this law in order to escape the penalties for adultery, i.e. the false "loophole" Vistilia had attempted to avail herself of was explicitly closed; 2) senatorial and equestrian women were barred from practicing prostitution outright. Papinian and Suetonius refer only to the first provision, Tacitus to both.

Another apparent discrepancy between Suetonius and the others concerns the profession of the woman involved. Suetonius and Papinian give only *lenocinium*, Tacitus only prostitution, as examples of the type of activity that fell within the scope of the SC, that is, the profession which could be or actually was claimed in an attempt to escape the law's penalties. Giuffrè ([1980] 16 n. 30) argues that either Suetonius and Papinian use the word in a "non-technical" sense to refer to prostitution or the SC itself (if not its interpreters) was more concerned with *lenocinium* as an exploitable loophole. The first suggestion is not supported by any specific parallels⁸⁴ and the usage is difficult to ascribe to these authors.⁸⁵ The second is belied by the evidence, which, as noted, points up Vistilia's registration as a prostitute as the sole motive for the SC. The two professions should not be regarded as indistinguishable in either a social or a legal sense, as Giuffrè himself recognizes.⁸⁶

A simpler explanation is that the senate, when it closed Vistilia's "loophole" and prohibited the practice of prostitution by members of the upper orders, did the same for the only other profession exempted under the adultery statute, *lenocinium*.

One further problem raised by the earlier commentators is that Tacitus and Papinian speak of action by the senate, while Suetonius emphasizes the role of the emperor. As Levick argues,⁸⁷ the biographer's failure to mention the senate's role is of no significance by itself.

The remaining text, from Papinian, offers little additional evidence (Pap. [2 *de adult.*] D. 48.5.11[10].2):

⁸⁴ Giuffrè offers none, and the standard entries for *lenocinium* (*OLD*, *L&S*, *TLL*) offer only pimping defined as a profession, not prostitution. Although the word often refers to prostitutes and behavior germane to them, such as enticement or wearing certain types of clothing or other ornament, it never defines prostitution as a profession.

⁸⁵ On Suetonius' fondness for technical vocabulary, see Wallace-Hadrill (1983) 20, 90. On Papinian's, see Honoré, *Emperors and Lawyers* (1981) 56f.

⁸⁶ *Contra*, at least in the legal sense, Levick (1983) 111, esp. n. 60. There is a tendency to give a broad interpretation to Ulp. (1 *ad legem Iul. et Pap.*) D. 23.2.43.6: *lenocinium facere non minus est quam corpore quaestum exercere*. Strictly speaking, this should be understood to hold true only in the context of the *lex Iulia et Papia*, and even so is perhaps not meant to equate totally the juridical status of these professions.

⁸⁷ Levick (1983) 111. Suetonius' concentration on the emperor and his actions is so pervasive that it can be regarded almost as a stylistic trait: Wallace-Hadrill (1983) esp. 19. To be sure, Tiberius throughout his reign kept a close watch on the senate and the conduct of its business: Fanizza, *Labeo* 27 (1981) 36-53. See now Formigoni Candini (1990) 112 and Lebek (1991) 57f.

Mulier, quae evitandae poenae adulterii gratia lenocinium fecerit aut operas suas in scaenam locavit, adulterii accusari damnarique ex senatus consulto potest.

This text tends to confirm two points made above, namely, that the enactment took the form of a single SC and that *lenocinium* was one of the exempted professions dealt with by the senate. Although he does not mention prostitution, Papinian's language otherwise seems to reflect the wording of the SC.⁸⁸ Note the precision of the phrase *quae evitandae poenae adulterii gratia*: only those women who act as procurers for the purposes of avoiding the penalties for adultery, not those who do so for any other reason, are specified. Conceivably, one test for the application of the statute would be whether the appeal for exemption or the practice of prostitution came before or after the alleged commission of the offense.

The fact that acting is included as a putative example of an exempted profession must raise questions. The possibility that the adultery law included acting among the professions exempted can be ruled out.⁸⁹ Most commentators take their cue from the disjunction in tense between *fecerit* and *locavit* and identify the phrase *aut ... locavit* as a gloss.

This is the simplest and perhaps most persuasive solution, but it is a bit strange that precisely this phrase is used to define "actress," rather than a variation of one of the more commonly used expressions, such as *quae artem ludicram fecit fecerit* or *quae (artis ludicrae causa) in scaenam prodierit*.⁹⁰ In fact, according to Gaius (D. 3.2.3), *operas suas locare* was considered less dishonorable than actually appearing on stage:⁹¹ *qui autem operas suas locavit, ut prodiret artis ludicrae causa neque prodit, non notatur: quia non est ea res adeo turpis, ut etiam consilium puniri debeat*.⁹²

III. TWO SENATUS CONSULTA

The answer to this puzzle goes to the heart of the question of the relationship between the Larinum SC and the Vistilia decree. As noted above, we are not fully informed on the chro-

⁸⁸ The senate envisages the case of a woman who has actually practiced procuring/prostitution in an attempt to evade the adultery statute; again, this is inconsistent with the events, as reconstructed above, that motivated the decree. The two infinitives (*accusari damnarique*) may echo the wording of the SC: Bauman, ANRW 2.13 (1980) 103-233 (at 150 n. 279).

⁸⁹ For example, actresses could marry non-senatorial *ingenui* under the *lex Iulia et Papia*, and it seems wrong to suppose such marriages were not "protected" by the adultery statute.

⁹⁰ For the former expression, see Paul. D. 23.2.44 pr. - 7; Ulp. D. 3.2.4.1; for the latter, see also [Iul.] D. 3.2.1; Ulp. D. 3.2.2.5. On both, see Spruit, *De Juridische en Sociale Positie van de Romeinse Acteurs* (1966) 14.

⁹¹ In this sense, the status of gladiators as *auctorati* was worse than that of other performers: Levick (1983) 101. Of course, *locatio* was also possible for gladiators: Giuffrè (1980) 24 n. 69. Even here, there was perhaps a difference; note, for example, that *bestiarii* working under a *locatio* agreement and *auctorati* are included side by side in some earlier legislative enactments that impose certain legal disabilities: they were unable to testify under the *lex Iulia de vi*, could be killed by the husband if caught in adultery with his wife, and (probably) could not *postulare pro aliis* (see Sanfilippo [1982] 185; Guarino [1983] 9-10). There are, to be sure, parts of the Larinum SC (vv. 5-6, 9, 14) where it appears that *auctoramentum* is, within the scope of the decree, recognized as equivalent to actually appearing on stage, as opposed to merely making a contract for this purpose. The document should contribute to the lively debate on *auctoramentum*, on which see also Guarino, *Index* 13 (1985) 461-465 (with literature).

⁹² The objections of v. Beseler (*TR* 10 [1930] 161-240 [at 208]) to the phrase *quia ... debeat* are not justified.

nological sequence; we know only that the Larinum *SC* fell in the first six months of the year. One text might suggest that the Vistilia *SC* was passed in the last six.⁹³

In fact, certain characteristics of the Vistilia *SC* betray the direct influence of the Larinum measure. For one thing, the senate forbade prostitution to senatorial and equestrian women. Vistilia herself was of a senatorial family, and neither the *lex Iulia de adulteriis coercendis* nor the *lex Iulia et Papia* isolated equestrians as a separate category. The behavior of equestrians was a serious preoccupation at the time the Larinum *SC* was passed,⁹⁴ and this may explain the emphasis placed by the Vistilia enactment on the *equester ordo*. Not only are equestrian women explicitly forbidden the practice of prostitution, but their status as such is defined in a way that suggests the influence of the Larinum *SC*: *cui avus aut pater aut maritus eques Romanus fuisset*.

Two other examples may be detected in the identical penalty imposed by both decrees (*exilium*)⁹⁵ and the conception (technically, unsuitable for Vistilia) of the offense as a type of *fraus*. Without doubt, the symmetry of offenders' motives (avoidance of the legal consequences of a wrongful act) and means (*fraus*, or the appearance of this) suggested a syncretistic manner of presentation to Suetonius⁹⁶ and the borrowing of some elements from the earlier measure to the framers of the Vistilia *SC*.

Some or all of these borrowings point up an aspect of the Vistilia *SC* that has not received sufficient emphasis: its illogic. Why prohibit prostitution to equestrians if the woman herself was not a member of this order; indeed, why prohibit the practice of prostitution to upper-class women, in the absence of any evidence that this was a serious problem or even a possibility?⁹⁷ After all, Vistilia only pretended to be a prostitute. The answer lies in more than just the availability of the Larinum decree as a fresh model. The outrage generated by Vistilia's conduct bore fruit in a legislative measure that smacks of overkill.⁹⁸ The aim, of course, was to ensure that there would never be another Vistilia.

⁹³ The position of the passage in Tacitus has no chronological value, as noted above. Val., Gal. C. 9.9.16 (a. 256) mentions an *SC* and a *lex Petronia* in connection with a provision of the adultery law. The name of the law suggests a sponsor in P. Petronius, who on 1 July 19 took the place of L. Norbanus Balbus, one of the consuls who introduced the Larinum decree (v. 4): Degraffi, *I fasti consolari dell'impero romano dal 30 a.C. a 613 d.C.* (1952) 8. It is possible that a comitial law sharpened the rules on the adultery prosecution *iure mariti* following the discreditable behavior of Titidius Labeo. To be sure, the *lex* is usually associated with the *SC Turpillianum* and its sponsor, Q. Petronius Turpillianus: Rotondi, *Leges Publicae Populi Romani* (1912) 468 and, recently, Ankum, *RIDA*³ 32 (1985) 153-205 (at 177f.).

⁹⁴ The Larinum *SC* (vv. 11f.: note the translation given by Levick [1983] 99) suggests that the transgressors who moved the senate to take action were from the equestrian order. See McGinn (1986) 298f. and Lebek (1991) 60 n. 33.

⁹⁵ The Larinum *SC* also apparently denied *libitinam habere* to offenders (above).

⁹⁶ See the elegant adumbration of this point in Lebek (1990) 86-87.

⁹⁷ The example given at Paul. D. 23.2.47 should be understood as hypothetical.

⁹⁸ The entire incident may be viewed against the background of tension that characterized the early years of Tiberius' principate, when concerns about social status and sexual honor were deeply felt. See the discussion in Newbold, *Athenaeum* 52 (1974) 110-161, and note especially the case of Paulina (also dating to A.D. 19: Ios. *Ant. Iud.* 18.65-84, with Philo *Leg.* 159-161, *Flac.* 1; Tac. *Ann.* 2.85.2; Suet. *Tib.* 36, 63.1; Dio 57.18.5-5a), for an extreme official reaction to behavior that compromised the honor of a socially prominent Roman woman.

The same reasoning explains the presence of the acting profession in the passage from Papinian and thus in the *Vistilia* decree itself. The emphasis on agreements for performances, manifested in the phrase *quae ... operas suas in scaenam locaverit*, serves as a point of departure. The Larinum SC emphasized the outlawing of agreements between members of the senatorial and equestrian orders on the one hand and stage and arena impresarios on the other.⁹⁹ Commentators attempt various explanations for the importance attributed to these contracts by the SC, but they are, for different reasons, less than completely satisfactory.¹⁰⁰

The senate's goal, simply put, was to prevent public performances by members of the upper orders. Previous bans had not worked, primarily because exemptions (through a renunciation of equestrian or senatorial status)¹⁰¹ were sought in order to evade the sanctions. The decree sought first of all to declare such behavior to be *fraus legis*. At the same time, the absolute ban on public performances by actual equestrians and senators was confirmed.

So far the parallel to the circumstances of the *Vistilia* SC will seem obvious. In fact a dilemma similar to that which subsequently arose with regard to prostitution also appears here: how to distinguish between "mere" social degradation and social degradation sought for the purpose of evading statutory penalties. *Vistilia*'s case was more clear-cut: if it were not formulated carefully, the ban on performances would not, at least technically, apply to someone who was no longer an equestrian or senator. Before the passage of the Larinum SC, one would have had to enquire as to whether the former equestrian or senator was "truly disreputable—entitled to perform—or only a pretender—having engineered the infamy and therefore not entitled" (Daube [1986] 5). However, an important distinction between the two situations should be stressed. One of the solutions preferred later in the *Vistilia* decree, namely, prohibiting the means of exemption outright to members of the upper classes, could not be pursued here; resort to the *iudicia famosa* could not be forbidden to members of the upper classes in the same way as prostitution.

So the framers of the Larinum decree cast their net wide. First, persons to whom the ban applied were defined not simply¹⁰² in terms of their membership in an order *per se*, but of their

⁹⁹ References to this practice occur at vv. [5], 9, 11, 14, [15], 18, [19], 20.

¹⁰⁰ Malavolta asserts that the contracts were the means by which persons of high standing incurred the social disgrace that allowed them to perform (his views on *infamia* are criticized by Giuffrè [1980] 8 n. 7). Giuffrè believes (20f., 33 n. 99) that the new ban on contracts represented an effort to outlaw performances in every way possible. But the ban on contracts is prefigured by the SC of A.D. 11 concerning minors (see below in the notes); more importantly, a blanket ban could conceivably have been put into effect without outlawing the very agreements; again, Gaius shows that performing and agreeing to perform were, or at least could be, juridically distinct. Levick (1983) 110 argues that pay was the aggravating factor. But this seems to have been true neither for *auctoramentum* (the religious aspects of which seem to predominate; see Sanfilippo [1982] 187, Guarino [1983] 7, 12f.) nor (given the Gaius passage) *locatio-conductio* contracts for the stage; moreover, as far as we can tell, the prohibition against making contracts does not entail a more severe penalty than that imposed for simply performing.

¹⁰¹ Lebek (1991) 41f. argues on the basis of Suet. *Aug.* 40.1 that, before the passage of the Larinum SC, neither loss of the requisite patrimony (a minimum of HS 400,000) nor even simple renunciation of status would suffice to deprive one of the right to sit in the equestrian seats at the theater and thereby afford a release from the penalties for violating the regime on upper-class public performances. Condemnation in a *iudicium famosum* or (in Lebek's reconstruction) deprivation of status at a *transvectio* was necessary.

¹⁰² Lebek (1990) 73 reasonably includes personal membership in the *ordo equester* in his supplement of the *lacuna* in v. 7. On senators, see below in the notes.

relationship to a member of that order;¹⁰³ a change in an individual's status would thus not exempt him or her from the ban.¹⁰⁴ Second, the senate now made impresarios who hired upper-class actors and gladiators liable.¹⁰⁵ This reduced the role of the courts in screening the validity of certain exemptions and so aimed at choking off the problem at its source. Presumably it would have been difficult to appear on stage or in the arena without at least the complaisance of such men.¹⁰⁶

If the *SC* dealing with adultery and prostitution followed a few months later, the ban on upper class performances would have been in place, a ban which strongly emphasized the prohibition against forming contracts.¹⁰⁷ Given the closeness in chronological sequence, the broad similarities in the social and legal background outlined above, and especially the fact that, after the *Latinum SC*, it would have been superfluous to forbid performing on stage to upper-class women, it is not surprising to find this profession appearing in the *Vistilia SC* as well. Acting is, in Papinian's phrasing, defined exactly as in the previous *SC*, that is, in terms of making a contract. Those concerned are not the senatorial and equestrian women prevented from making such contracts under the *Latinum SC*. Instead they are the women whose lower social status exempted them from this statute, but not from the adultery law.

Even to draw this distinction, however, may be attributing too much to the framers of the *Vistilia SC*. The point is that the conclusion of a contract to perform on stage did not exempt one from the operation of the adultery law, and can only be understood as a carry-over from the *Latinum SC*. In short, if the phrase is not a gloss, it serves as a further instance of the illogic and incoherence of the *Vistilia* decree. The senate's vigorous action was partly informed by anger over the scandal at hand and partly by the example of the recent measures taken against upper-class performers. The result was not a brilliant piece of legislation,¹⁰⁸ at least

¹⁰³ Even so, doubtful cases might arise which the courts would treat as questions of fact: note the caution at vv. 11f. This suggests that the exemptions were not simply eliminated, as Giuffrè (1980) 30f. asserts.

¹⁰⁴ On the theory that such status was subject to change but blood-relationships were fixed in stone. Cf., for example, the definition of status given by the *lex Acilia repetendarum: FIRA 1²#7* 13-14. Professor Treggiari observes that the language employed by the *Latinum* decree in defining these terms is somewhat awkward. The text seems to imply that a senator without senatorial ascendants would be free from the ban—except that such persons would be deterred by the clause on equestrian kin, which all senators must have had. Why did the framers of the *SC* not include a simple clarification along the lines of *senatorem quive senator fuerit* in the definitions of status provided in v. 7? One explanation for the omission of such a phrase might be faulty drafting; another might lie in the evident interest of the senate here in the activities of young men—both those with senatorial ascendants, but not yet senators themselves, and equestrians proper. See now Lebek (1990) 46f. and 74-75.

¹⁰⁵ Previously, the senate had outlawed agreements to this end, at least under some circumstances (*SC* of A.D. 11 at *Tab. Lar.* vv. 17f.; Lebek [1990] 50f. places the ban on agreements as early as 38 B.C.). But only the would-be performers were punished (Lebek, 74).

¹⁰⁶ Baltrusch (1989) 196-197 makes a similar point about the sponsors, the *editores ludorum*. For another example of how the *SC* extended the scope of application for this type of legislation, see Lebek (1990) 79.

¹⁰⁷ Malavolta and Giuffrè regard the ban on contracts as new. But Levick observes that the lines toward the end of the extant text of the *Latinum* document (vv. 17-21) refer back to the *SC* of A.D. 11. It follows that the references to contracts (with minors) in these lines (vv. 18-19, 20) predate the *SC* of 19, which generalizes this ban.

¹⁰⁸ This holds true despite its evident technical sophistication, for example, in the definition of status. In this the *Vistilia* decree perhaps displays a certain affinity with the Augustan law on adultery, which was characterized both by a deft manipulation of symbol and status and by a technical terminology so unwieldy that

when measured by the standards of rationality and coherence that we often insist on, or simply assume, for the ancient sources.

I have argued that a clean separation of the *Vistilia* and *Larinum SCC* can contribute to a better understanding of both and at the same time shed light on the subtle connections between them. The two can be reconciled further, on the plane of public policy, but this is another task altogether.

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it provoked complaints by the jurists. On the latter point, see Pap. D. 48.5.6.1 and Mod. 50.16.101pr. with Rizelli, *BIDR*³ 29 (1987) 355-388.