THE LEGAL DEFINITION OF PROSTITUTE IN LATE ANTIQUITY

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1. Introduction: Defining Prostitution

On an October day in 1894 the city council of Buenos Aires was engaged in debate over a new ordinance dealing with prostitution when a disagreement arose over the definition of "prostitute." Some councillors insisted that no definition was necessary; for example, it had not been required to define traveling salesmen in order to regulate their trade. Another view maintained that a distinction was necessary between the "profligate" who "without pecuniary need" engages in promiscuous sex, transmitting disease, and the "prostitute." A member held that class and marital status were more important components of a definition than commerce or contagion (he used the empress Messalina as an illustrative example). Toward the close of the debate still another definition emerged: "a prostitute is a woman who sells her body and enjoys the experience." Members of council could not in the end agree on a definition, so the new ordinance passed without defining the behavior it sought to regulate.

The aporia of the Buenos Aires city council contains useful lessons for the problem of defining prostitution. The debate not only shows that more than one definition is possible in a given culture but suggests how competing definitions are influenced by various assumptions entertained, in this case, as in most other examples drawn from the historical record, by elite males, about the moral character of women and in particular the relationship of women's character to social status and economic necessity. Other features of this incident which merit emphasis are the attempt to distinguish prostitution from other forms of nonmarital sexual behavior and the teleological tendency to define prostitution in terms of the purpose of the definition, which in this context was to discourage the spread of gonorrhea and syphilis. Finally, the council's difficulties show that the enactment of a legal definition for prostitute is not necessarily easy or straightforward.

This paper makes two points. The main body of the discussion argues that late antique law constructed a number of analogues to the classical legal type of prostitute, a development I trace in two separate areas where legislative initiatives were directed at prostitution and its practitioners: marriage and adultery. In the conclusion I suggest that these analogues...

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1 What follows summarizes the narrative offered by D. J. Guy, Sex and Danger in Buenos Aires: Prostitution, Family, and Nation in Argentina (Lincoln, Nebr. 1991) 87–89.

2 Two other areas of the law regarding prostitution that were addressed by the late antique legislator—taxation of prostitution and repression of procuring—are irrelevant to either the problem of analogues or that of definition.
are evidence that the Roman legal conception of prostitute underwent a profound change in the postclassical period. Because the classical legal definition (below) deals only with females, and for reasons of economy, I omit male prostitutes from the discussion. The ambivalent position of women in this period has provoked conflicting assessments among scholars. It is important, and well known, that expectations of virtue for women were a function of their rank in society, but the way in which these differing standards come to be reflected in the law is neither uniform nor predictable.

The first area under study deals with the law on acceptable marriage partners. Three successive sections treat legislation enacted by Constantine, a follow-up by Marcian, and the evidence of the postclassical Tituli ex corpore Ulpiani. Constantine's law implicitly forbade marriage with certain types of women, including some construable as analogues with prostitutes, whom Augustus in his social legislation denied as marriage partners to freeborn Romans (explicitly in fact to nonsenatorial ingenui). Marcian's enactment attempts to interpret the meaning of one of Constantine's types, the humilis vel abiecta, whose status as an analogue is unproven, to say the least. The Tituli lists as ineligible to marry ingenui a prostitute-analogue, the woman who has been manumitted by a pimp or procurer.

A second area of lawmaking concerns liability for adultery. Just as Augustus exempted prostitutes (and very few others) from the penalties of his law on adultery, so Constantine frees the woman who serves drinks in taverns. Another postclassical juristic text, the Pauli Sententiae, exempts women who oversee the sale of merchandise to the general public or the operation of taverns. I argue that these, too, are analogues to the classical legal type of prostitute. Another law, which at first glance appears to equate actresses with prostitutes, does not in fact create another such analogue. A final section on law takes the measure of Justinian's position, which is marked by a considerable degree of contradiction.

The reason for the creation at law of these "quasi-prostitute" types is explored in the context of long-held attitudes toward women, social rank, commercial activity, and sexual behavior. During the classical period and in late antiquity, upper-class Roman males tended to assume that low-status women, in particular those employed in the service sector of the economy, were sexually promiscuous. Moreover, they were inclined to conflate promiscuity with prostitution. In the latter period, we see these attitudes, though qualified to an extent, enshrined in two areas of the law, those pertaining to marriage and adultery.

As a means of evaluating Roman legal definitions of prostitution, I would like to introduce the "sociological definition" of prostitution, which contains three components: promiscuity, payment for sex, and lack of an emotional bond between the partners. I prefer this approach as an analytical tool because it facilitates the important task of distinguishing prostitution from other forms of nonmarital sex, including adultery and concubinage, and because it is sufficiently flexible to allow for the great variety these forms of sexuality exhibit in different societies, present and past. This definition is potentially of great usefulness in isolating and

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3 The subject of male prostitution is of undeniable importance. It represents an identifiably separate problem from female prostitution in terms of its social profile and the approaches taken by lawfinders toward it. It is therefore difficult in many cases to discuss male and female prostitution together without a great deal of qualification. Discrete treatment is to be preferred where possible.

4 Brought out for the postclassical age in general in the two volumes by Beaucamp. For Byzantine society, see Fisher, esp. 287, 289, 293.

5 See Beaucamp, 1.22-23.

identifying legal definitions as a type, that is, apart from moral and (in the modern age) medical definitions for venal sex. It is far from inevitable, however, that it will precisely coincide with any Roman legal definition of prostitution.

The only extensive classical legal definition of prostitute we possess survives in the context of juristic comment on the Augustan marriage legislation, the *lex Iulia et Papia*.[7] A full treatment of this definition is of course not feasible here,[8] but the essential lines may be set forth in summary form. The two main components of this are promiscuity and payment for sex. Of the two, promiscuity receives greater emphasis. It is even allowed to stand on its own as a criterion for defining “prostitute.”[9] The factors of lifestyle and social class enter the account as well, supporting the stress laid on promiscuity.[10] The classical legal type of prostitute thus defined prefigures developments in late antiquity, though it does not go quite as far, in concrete terms. For this reason, it can serve as a benchmark for evaluating the postclassical law, as we shall see in the concluding section of this paper.

### 2. Marriage Partners: Constantine

A number of legislative initiatives were taken in late antiquity pursuant to the two pillars of Augustan social legislation, the *lex Iulia et Papia* and the *lex Iulia de adulteriis coercendis*. Under the first category we have an edict of Constantine issued in 336.[11] This directly concerns children born to members of the elite, in the sense that it denies the latter the possibility of legitimizing children produced by unions with certain types of women and forbids the transfer of property to such children as well as to their mothers.[12] By implication, the law forbids marriage with the types of women it names as concubines[13] and redefines the notion of imperial elite with the types of men it lists as liable to its strictures.

Constantinus CTh. 4.6.3 (a. 336): Senatores seu perfectissimos, vel quos in civitatibus duumviralitas vel quinquennalitas vel fla<monii> vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdotii provinciae vel sacerdo

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[12] I give what I regard as the most unproblematic summary of the law's purpose. The evidence of Zeno C. 5.27.5 (a. 477) suggests Constantine had (in a lost statute most likely previous to this law) allowed, within certain limits, men to legitimate their children with concubines through marriage after the fact. The exact relation of this law to the lost CTh. 4.6.1 and to the only partially preserved CTh. 4.6.2 (a. 336), as well as to the statute under discussion, is unknown. There is a range of views on these subjects; see, for a sample of the extensive literature, Evans Grubbs 1995, 283–300; Arjava 1996, 210–17.

[13] This implication is confirmed by Nov. Marc. 4 (a. 454) (below).

[14] Mommsen ad loc. The version of this law preserved in the *Codex Iustinianus* (C. 5.27.1) omits the phrase vel quinquennalitas vel fla<monii>.

[15] In place of this word, C. 5.27.1 has id est Phoenicarchiae vel Syriarchiae.

[16] C. 5.27.1 has alienos in place of this word.

scaenica vel scaenicae filia, vel ex tabernaria vel ex tabernari filia vel humili vel abiecta vel lenonis vel harenarii filia vel quae mercimonii publicis praefuit, susceptos filios in numero legitimorum habere voluerint aut proprio iudicio aut nostri praerogativa rescribti, ita ut, quidquid talibus liberis liberis pater donaverit, sive illos legitimos seu naturales dixerit, totum retractum legitima suboli reddatur aut fratri aut sorori aut patri aut matri.

Sed et uxori tali quodcumque datum quolibet genere fuerit vel emptione conlatum, etiam hoc retractum redditi praecipimus: ipsas etiam, quorum venenis inficiuntur animi perditorum, si quid quaeritur vel commendatum dicitur, quod his reddendum est, quibus iussimus, aut fisco nostro, tormentis subici iubemus.

Sive itaque per ipsum donatum est qui pater dicitur vel per alium vel per suppositam personam sive ab eo emptum vel ab alio sive ipsorum nomine conparatum, statim retractum reddatur quibus iussimus, aut, si non existunt, fisci viribus vindicetur. quod si existentes et in praesentia rerum constituti agere noluerint pacto vel iureiurando exclusi, totum sine mora fiscus invadat.

Quihus tacentibus et dissimulantibus a defensione fiscali duum mensuum tempora limitentur, intra quae si non retraxerint vel propter retrahendum rectorem provinciae interpellaverint, quidquid talibus filiis vel uxoribus liberalitas inpura contulerit, fiscus noster invadat, donatas vel commendatas res sub poena quadrupli severa quaestione perquirens.

Licin[i]ani autem filius, qui fugiens comprehensus est, constituitur ad gynaecei Carthaginis ministerium deputetur.

It is laid down that senators and perfectissimi, as well as those in the towns distinguished by the position of duumvir or quinquennalis or that of flamen or priest of a province shall suffer the disgrace of infamia and loss of citizenship if any of them through his own action or on the authority of my rescript should wish to treat as legitimate the children born to him from a slavewoman, the daughter of a slavewoman, a freedwoman, the daughter of a freedwoman (whether she enjoy full citizen status or that of a Junian Latin), an actress, the daughter of an actress, a tavern-worker, the daughter of a tavern-worker, a lowborn and degraded woman, the daughter of a pimp or gladiator, or a woman who has charge of merchandise for sale to the general public, so that whatever a father has given to such children, whether he describes them as legitimate or biological, shall be seized in its entirety and restored to his legitimate offspring, or to his brother, sister, father, or mother.

So also if any property of any sort should be given in any way to such a wife or bestowed upon her through a sale, we order that this too be seized and returned: we command as well that the women themselves, by whose black arts the minds of ruined men are poisoned, shall be given over to torture, should something be sought (from them) or said to have been handed over (to them) which ought to be restored to those whom we have so ordered, or to the imperial treasury.

Thus whether a gift is made by a person alleged to be the father or by another or by a suborned person, or something is purchased by such a father or by another person or it is acquired in the name of (the children and mother) themselves let it be seized and restored immediately to those whom we have so commanded or, if there are no such persons, it

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18 Justinian’s Codex (C. 5.27.1) has aut in place of this word. 20 C. 5.27.1 omits this sentence.
19 C. 5.27.1 has interpositam in place of this word.
shall be surrendered to the coffers of the treasury. But if they do exist and, when present,\textsuperscript{21} refuse to bring suit because prevented by private agreement or oath, the treasury shall seize the property in its entirety without delay.

If such persons should remain silent and feign ignorance, a period of two months shall be set for them to exclude the claim of the treasury, within which if they have not recovered the property or made application to the governor of the province with the aim of recovering it, our treasury shall seize whatever a disreputable generosity has bestowed upon such children and wives, seeking out by means of a severe enquiry and through the imposition of a fourfold penalty whatever property has been given as a gift or entrusted to them.

Moreover, the son of Licinianus, who has been apprehended as he fled, shall be bound in fetters and consigned to the service of the weaving mills at Carthage.

Augustus\textsuperscript{22} had forbidden members of the senatorial order, which comprised senators and their descendants to the fourth generation in the male line, to marry actors, actresses, the sons and daughters of actors and actresses, and freedpersons. Later legislation added persons convicted in a standing criminal court, a category to which the jurists, evidently, appended those found guilty before the Roman senate. Unions forbidden the senatorial order were rendered void by an enactment of Marcus Aurelius and Commodus late in the second century.\textsuperscript{23} Constantine expanded the scope of these "senatorial" prohibitions in two ways. First, he went beyond the\textit{ ordo senatorius} to include the high-ranking equestrians known as\textit{ perfectissimi}, as well as holders of the duumvirate and municipal and provincial priesthoods. Constantine's concern clearly lay not only in protecting the prestige of the members of his new elite, but in safeguarding their patrimony.

Second, the category of women forbidden to men of rank now expanded to embrace slaves, freedwomen, actresses, and the daughters of each, women who worked in taverns, as well as the\textit{ humiles vel abiectae}, the daughters of pimps, gladiators, and workers in taverns, and all women who sold merchandise to the general public.

The relationship of these regulations to the classical prohibitions on marriage is far from per lucid and so is controversial.\textsuperscript{24} It has even been argued that the tendency of Constantine's law is generally restrictive with respect to its Augustan predecessor.\textsuperscript{25} Most scholars believe this law supplemented and did not replace the Augustan prohibitions.\textsuperscript{26} Constantine's evident "carelessness" in establishing the relationship of his marriage prohibitions to the classical regime may serve as an early sign of the postclassical tendency to legislate on a single problem without regard to the coherence of the law as a whole.\textsuperscript{27}

\textsuperscript{21} The phrase \textit{in praesentia rerum constituti} is difficult: I prefer what is given in the text to, e.g., "in full possession of the facts." Less likely in my view are "they should be living" and "being alive": the first is given by C. Pharr, \textit{The Theodosian Code and Novels and the Sirmondian Constitutions} (Princeton 1952) 86, the second by Evans Grubbs 1995, 285.

\textsuperscript{22} See Astolfi, chap. 6 and McGinn 1998, chap. 3 (esp. 91–94) for these prohibitions. Senatorials were held by the jurists to the prohibitions ordained by the Augustan law for nonsenatorial freeborn persons (\textit{ceteri ingenui}).

\textsuperscript{23} Cardascia 1953, 662.

\textsuperscript{24} For a refutation of the older (though still current) idea that Constantine aimed to translate Christian morality into law, see Sargenti 1986a; Evans Grubbs 1995, 284–300. The "son of Licinianus" mentioned by this law (and its fragmentary predecessor) was not the son of the emperor's erstwhile rival Licinius: Sargenti 1986a, 39–41.

\textsuperscript{25} Astolfi, 109–14.

\textsuperscript{26} See, for example, Evans Grubbs 1995, 283; Astolfi, 132–40.

\textsuperscript{27} Noticed by Archi 1970, 216.
What matters for our purposes is the evident creation of more than one analogue to the classical type of "prostitute." These are the woman who worked in taverns (tabernaria) and the woman who saw to the sale of merchandise to the general public (quae mercimoniis publicis praefuit). These types appear in other late antique legal sources with a similar function, as we shall see. An argument can be made to include the daughters of pimps, as well as the daughters of tabernarii, who themselves might be considered analogues to pimps, given the common practice of prostitution in taverns.\(^{28}\) The humilis vel abiecta type remains as enigmatic to us as it evidently did to the ancients. Fuller treatment is reserved for the next section, but one may note here the recent assertion\(^{29}\) that prostitutes and procuresses implicitly ranked among Constantine's humiles vel abiectae. This fails to persuade, since the point should have been true of a number of the other types as well. If the lawmaker thought lenonis filia worth specifying, why not lena?

Constantine's reforms were aimed at accomplishing a comprehensive redefinition of elite strata throughout the empire.\(^{30}\) They found expression, as we should expect, in laws designed to correct morals and combat vice.\(^{31}\) The lex Iulia et Papia, in addition to the prohibitions addressed specifically to the senatorial order, laid down that nonsenatorial ingenui were not to marry prostitutes, pimps/procuresses, and adulteresses, whether condemned in a court or caught in the act.\(^{32}\) The question of whether any of these are fairly regarded as prostitute-analogues is addressed in the concluding section below, but the point, one that is often overlooked, should be made that nonsenatorial ingenui is a very broad category that embraces persons of both equestrian and decurional status. In other words, there is some overlap between Augustus' two categories of senatorial and nonsenatorial freeborn and Constantine's new definition of political elite.

3. Marriage Partners: Marcian

Constantine's measure was taken up into the Codex Theodosianus in 438 and in modified form was later incorporated into the Codex of Justinian. In 454 the eastern emperor Marcian issued a law in an effort to interpret the reference to humilis vel abiecta.\(^{33}\)

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\(^{28}\) This fact receives recognition in classical legal sources: Ulp. D. 23.2.43 pr.; Alex. Sev. C. 4.56.3 (a. 225). It is inexact, however, to say with Astolfi, 134 that the tabernarius-father is "colui, che gerendo una locanda o osteria che dir si voglia, gerisce solitamente la prostituzione." Such a man would be identified as a pimp under the classical law, and his daughter would qualify as filia lenonis in Constantine's law.

\(^{29}\) By Beaucamp, 1.286.


\(^{31}\) For a nice statement of the official ideology, see Nazarius, Pan. Const. 38.4.

\(^{32}\) The evidence is notoriously difficult, in part because the law apparently did not explicitly forbid these types to members of the senatorial order. I follow Astolfi, 97–103. See also J. F. Gardner, Being a Roman Citizen (London 1993) 123–26. Convicted adulteresses were simply forbidden to marry at all, under the Augustan law of adultery.

\(^{33}\) Nov. Marc. 4 (a. 454) (= [in summary form] C. 1.14.9 + 5.5.7), accepted in the West (Voci 1985a, 395). Beaucamp, 1.290, n. 68 suggests that concern with the meaning of the phrase was caused by revival of the Constantinian statute in the Codex Theodosianus. It was not a dead letter, at least as late as 397. Valent., Valens, Grat. CTh. 4.6.4 (a. 371) introduced a modification, which explicitly
Nov. Marc. 4 (a. 454): Leges sacratissimae, quae constringunt omnium vitas, intellegi ab omnibus debent, ut universi praescripto earum manifestius cognito vel inhibitae declinent vel permissa secuentur. si quid vero in isdem legibus latum fortassis obscurius fuerit, oportet id imperatoria interpretatione patefieri. Nov. Marc. 4 (a. 454) ut omnis sanctionis removeatur ambiguus et in suam partem iuris dubia derivare litigatorum contentio alterna non possit, negotiorum quoque cognitores ac tribunalium praesides apertam definitionem legum secuti suspensis multitubusque sententiis inter scita incerta non fluctuunt, plana enim et facilis ad pronuntiandum via patet iudici, quotiens non est illud ambiguum, iuxta quod necesse est iudiciaria.

1. Magnificentia tua in causis omnibus terminandis rectum semper tramitem studens te-nere iustitiae consuluit clementiam nostram super Constantinianae legis ea parte, in qua aliquid existere videtur ambiguam. nam cum sanciret, ne senatori, perfectissimo, duumviro, flaminio municipali, sacerdoti provinciae habere licetuxorem ancillam ancillae filiam, libertam libertae filiam, sive Romanam vel Latinam factam, scaenicam vel scaenicae filiam, tabernariam vel tabernarii filiam, vel lenonis aut harenarii filiam aut eam, quae mercimonii publicis praefuit, vetitis interdictisque personis adiecit etiam humilem abiectamque personam. exinde de matrimonio magnam dubitationem in iudiciis nasci tua adseruit celsitudo, utrumne haec nomina etiam ad pauperes ingenuas feminas referri debeant easque a matrimonio senatorum praescriptum legis excludat. absit hoc nefas illis penitus temporibus, ut credatur cuiquam dedecori data esse paupertas, cum saepe plurimis multum paraverint gloriae opes modicae et continentiae fuerit testimonium census angustior. quis arbitretur inclitae recordationis Constantinum, cum genti senatorios contaminari pollutarum mulierum faece prohiberet, fortunae munera bonis naturalibus praetulisse e divitiis, quas varietas casuum tam potest adimere quam tribuere, postposuisse ingenuitatem, quae auferer non potest, si semel nata sit?

2. Ille vero honesti amantissimus et morum sanctissimus censor eahumiles abietasque iudicavit esse personas et matrimoniis senatorum duxit indignas, quas aut nascendi decolor macula aut vita probrosis quaestibus dedit macula aut vita probrosis quaestibus dedit macula aut vita probrosis quaestibus dedit. ideoque omnem Dubitationem, quae quorumandam mentes inutila fuerat, auferentes, mundaneus et solidissima in perpetuum firmata durantibus cunctis his, quae super matrimoniis senatorum sanxit constitutio divae memoriae Constantini, humilem vel abiectam feminan minime eam iudicamus intellegi, quae, licet pauper, ab ingenuis tamen parentibus nata sit. Sed 36 licere statuimus senatoribus et quibuscumque amplissimus dignitatis praedictis ex ingenuis natas, quamvis pauperes, in matrimonium sibi adscire nullamque inter ingenuas ex divitiis et opulentiore fortuna esse distantiam.

3. Humiles vero abietasque personas eas tantummodo mulieres esse censemus, quas enumeratas et specialiter expressas copulari matrimoniis senatorum lex praedicta non passa est: hoc est ancillam ancillae filiam, libertam libertae filiam, sive Romanam vel

affirms all other aspects of Constantinian legislation de naturalibus libris. Arc., Hon. CTh. 4.6.5 (a. 397) evidently restores the full Constantinian regime, mentioning this emperor by name. Justinian, in Nov. 89.15 pr. (a. 539), claims that Constantine's law, known to us as CTh. 4.6.3, had already fallen into desuetude. All the same, in Nov. 117.6 (a. 542) he expressly permits marriage with those women whom Constantine, in the interpretation of Marcius, had forbidden as abiectae. This is understood to mean all of the types given in Constantinus CTh. 4.6.3 (a. 336).

34 C. 1.14.9 adds the phrase duritiamque legum nostrae humanitati incongruam emendari.

Mommsen shows a crux at this word, proposing to read iudicia dari or the like.

35 C. 5.5.7 has unde in place of this word.

36 Kruger has adsciscere in C. 5.5.7.

37 C. 5.5.7 omits quas enumeratas...hoc est.
Latinam factam,\textsuperscript{39} scaenicam vel scaenicae filiam, tabernariam vel tabernari vel lenonis aut harenarii filiam aut eam, quae mercimonii publice praefuit. quod quidem hau dubie credimus ipsum divae memoriae Constantium in ea, quam promulgavit, sanctione sensisse\textsuperscript{40} ideoque huiusmodi inhibuisse nuptias, ne\textsuperscript{41} senatoribus harum feminarum, quas nunc enumeravimus, non tam conubia quam vitia iungentur.

4. Cetera etiam, quae ab inclitae recordationis Constantino vel ab aliis post eum divis principibus super naturalibus filiis eorumque matribus, de concubinis quoque ingenuis et de his, quae post uxoris obtum in nuptias convenuerunt, quaecumque sacris constitutionibus definita sunt, iubeamus inviolabiliter custodiri: ita tamen, ut promulgatas prius leges eae, quae postmodum latae sunt, auctoritate praecedent et quaecumque ex ipsis est posterior tempore sit validior sanctione, Palladi p(arent) k(arissime) a(tque) a(mantissime).

5. Inl(ustris) igitur et magnifica auctoritas tua hanc serenitatis nostrae legem perpetuo in aevum omne valituram edictis ex more propositis ad omnium notitiam faciat pervenire.

\textit{Interpretatio:} Hac lege permisson est, ut exceptis vilibus infamibusque personis, quas lex ista commemorat, pauperes et sine ulla dignitate natalium, dummodo honestas et honestis parentibus procreatas, senatores, si voluerint, uxores eligendi et ducendi habeat testatem. quod et omnibus exemplo legis huius sine dubitatione permittitur.

The most sacred laws, which constrain the lives of everyone, ought to be understood by everyone, so that all persons, having formed a more precise idea of their content, avoid what is forbidden or, rather, pursue what is permitted. If, to be sure, any feature contained in these same laws should perhaps be a bit uncertain, this must be clarified through imperial interpretation, in order that the ambiguity of every statute be removed, that the adversarial striving of litigants cannot twist the doubtful elements of law to their own advantage, and that those who try cases and those who preside over courts, having followed the manifest content of the laws, do not hesitate over unsettled and wavering opinions amid uncertain enactments. For a path that is level and easy for delivering sentence is open for the judge, whenever the very substance of the law, in light of which judgments must be given, is not open to dispute.

1. Your Magnificence, ever desirous of pursuing the proper path of justice in bringing all cases to a close, has consulted Our Clemency concerning that part of a statute of Constantine, in which there appears to be some ambiguity. For when he laid down that no senator, \textit{perfectissimus}, duumvir, municipal flamen, or priest of a province be permitted to marry a slavewoman, the daughter of a slavewoman, a freedwoman, the daughter of a freedwoman (whether she enjoy full citizen status or that of a Junian Latin), an actress, the daughter of an actress, a tavern-worker, the daughter of a tavern-worker, the daughter of a pimp or gladiator, or a woman who has charge of merchandise for sale to the general public, he added to this list of forbidden and prohibited persons the type of the “lowborn and degraded” (\textit{bumilis abiectaque}). From this, as Your Excellency has pointed out, a great uncertainty on the subject of marriage has arisen in the courts as to whether these words ought to refer even to freeborn poor women, and (so) the rule given by the statute excludes them from marriage with senators. Let this abomination lack the slightest

\textsuperscript{39}C. 5.5.7 omits \textit{sive Romanam . . . factam}; Junian Latinity had been abolished through Justinian. C. 7.6.1 (a. 531).

\textsuperscript{40}C. 5.5.7 omits quod quidem . . . sensisse.

\textsuperscript{41}C. 5.5.7 omits ne.
association with those celebrated times, so that poverty be believed to have been imputed to anyone as a disgrace, when in very, very many cases modest resources secured a great deal of renown and a limited patrimony was proof of self-restraint. Who could suppose that Constantine, of distinguished memory, when he prohibited the marriage beds of senators to be stained with the dregs of defiled women, preferred the gifts of fortune to innate virtues, and ranked wealth as superior to free birth, although the vicissitudes of chance can as easily take away riches as provide them, while freeborn status cannot be removed once acquired at birth?

2. To be sure, that most ardent lover of the honorable and most pious censor of morals judged to be “low and degraded” (humiles abiectaeque) persons and deemed to be unworthy of marriage with senators those whom either a sordid stigma of low birth or a life given over to disgraced professions sullied with ignominious ill-repute and defiled either through the baseness of their status at birth or by means of the shamefulness of their profession. Therefore, in removing every doubt which had been cast upon the minds of certain persons, as all of those rules remain and for all time endure in the most unshakable validity which the statute of Constantine of distinguished memory laid down, we determine that the “low and degraded” (humilis vel abiecta) woman is not at all she, who although poor, is all the same born from freeborn parents. So we decree that it be permitted for senators and whoever is distinguished by high rank to marry women born from freeborn parents and that, among freeborn women, there exist no gulf in status on the basis of wealth and relative size of patrimony.

3. Indeed, we decree to be “low and degraded” (humiles abiectaeque) persons only those women whom the aforesaid statute, in prohibiting them to marry senators, lists and expressly indicates, namely, a slavewoman, the daughter of a slavewoman, a freedwoman, the daughter of a freedwoman (whether she enjoys full citizen status or that of a Junian Latin), an actress or the daughter of an actress, a tavern-worker or the daughter of a tavern-worker, the daughter of a pimp or gladiator, and a woman who has charge of merchandise for sale to the general public. And, what is more, we believe with certainty that this is what Constantine of distinguished memory meant in that law which he promulgated, and that therefore he discouraged wedded unions of this kind, so that senators would not so much avoid contracting marriage-bonds with those women, whom we have listed, as avoid contracting their vices.

4. We command that all of the other rules be observed inviolably which have been set forth in imperial statutes by the emperor Constantine of distinguished memory, as well as by his renowned successors, regarding biological children and their mothers, also concerning freeborn concubines and those women who enter into marriage following the death of a (man’s previous) wife, with this proviso, however, that those laws promulgated later in time should take precedence over those enacted earlier, and that whichever of these is later in time should be stronger in its legal force, Palladius, Dearest and Most Beloved Father.

5. Your Illustrious and Magnificent Authority therefore should, through having posted edicts in the usual manner, bring to the attention of all persons this statute enacted by Our Serenity, which shall be valid for all time to come.

Interpretatio. Through this law it is permitted that, with the exception of degraded and notorious persons, which the statute names, senators, if they should wish, have the prerogative of choosing as wives and marrying women who are poor and lack any recognized status at birth, provided that they are respectable and born of respectable parents. This is also permitted without doubt to all persons on the authority of this law.
According to Marcian, Constantine cannot have been thinking of freeborn poor women, themselves born of freeborn parents; his intent, subsequently misunderstood in application by the courts, was rather to prohibit "the marriage beds of senators [from being] stained with the dregs of defiled women." This is explained in a twofold manner as referring to either the stigma of low birth or a life devoted to the practice of a shameful profession. In other words, Marcian interprets Constantine's edict restrictively, so that the meaning of *humilis vel abiecta* is exhausted by the other types specifically enumerated by his legislation.

For years, moderns have attempted to understand *humilis vel abiecta* in terms of a postulated dichotomy in the legal sources between *honestior* and *humilior*. Perhaps the most original view is that of Solazzi, who argues that *humili vel abiecta* was inserted into the law unofficially after Constantine. De Robertis and Sargenti have argued that *humilis vel abiecta* properly, that is, as used by Constantine and Marcian, means *humilior*, or a woman of subdecurional status, in contrast to a general change in meaning for *humilis* and its cognates that De Robertis posits for this period to "poor." This view is criticized for reasons of form and substance by Cardascia, who believes Constantine and Marcian mean a woman who is sexually disgraced, *turpis*. Grodzynski follows De Robertis in seeing *humilis vel abiecta* as a near equivalent to *humilior*, while, like Cardascia, she rejects his "economic" interpretation for *humilis* in the late antique sources overall. Astolfi argues that the phrase, as used by Constantine, generalizes for all of the other types, which merely serve as examples.

Grodzynski points out that it is possible for a *humilis* to be wealthy. At first sight an unacceptable paradox, the claim has merit if one considers the possible examples of a successful actress or of a "courtesan." It is telling, however, that the most obvious examples of this paradoxical notion concern members of dishonorable professions, which are, or could have been, listed separately in the law. What is more, the late classical and postclassical periods witnessed a need for broader participation of the wealthy in the *ordo decurionum* and a

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42 Moderns tend to take Marcian at his word, which is to say they assume that the novel gives the true interpretation of Constantine's rule. See A. Bouché-Leclercq, "Les lois démographiques d'Auguste," *Revue historique* 57 (1895) 241–92, at 289; Cardascia 1953, 662, 667; Daube 1967b, 384, n. 23; Voci 1985a, 380, id.; "Il diritto ereditario romano nell'età del tardo impero II: Le costituzioni del V secolo," in *Studi di diritto romano* (Padua 1985b) 2:177–275, at 205; Gebbia, 83; G. Luchetti, *La legittimazione dei figli naturali nelle fonti tardo imperiali e giustinianee* (Milan 1990) 210, n. 61, 211, n. 63; Beaucamp, 1.287. So also Justinian, in Nov. 117.6 (a. 542), on which see below (Section 9).


45 Sargenti 1986a, 41–42.


48 Grodzynski, 176–79.

49 Astolfi, 135.

50 Grodzynski, 176.

corresponding tendency to incorporate rich social risers in that body, providing no objective bar to this existed.52

This suggests that the status dissonance of the “wealthy humilis” tended to resolve itself on a practical level, except where a dishonoring profession or status made this impossible. We will see below that as a type, that is, aside from occasional exceptions, the Constantinian humilis was poor, among the poorest of the poor, in fact.

Recent work has emphasized the fact that the dichotomy of honestiores/humiliores did not function as a basic division of society in classical law and that the contents of these categories were not closely defined.53 In the postclassical Pauli Sententiae (= PS), one finds a more consistent application of the dichotomy, though even in this work its articulation is complex, and other criteria for sociolegal categorization appear along with it.54 One can summarize the difference by saying that while the PS treats the classical contrast (not “dichotomy”) between honestiores and humiliores substantially the same, it expresses this contrast in a much more general way.55 We should conclude that an analysis of the Constantinian humilis must proceed apart from oversimplifying assumptions about the content of the category humilior in classical and early postclassical law.

Another way of putting the matter is to observe that humilis vel abiecta is not a legal category but a term of social and moral description. As such it is, I believe, inevitably and perhaps deliberately imprecise. That is what has caused Marcian and moderns problems in understanding it. When such markers are introduced into the law in a direct and unmediated way, as here, difficulties are almost bound to ensue. So the attempt to discover the precise meaning of humilis vel abiecta by reference to legal concepts and categories is based on a premise that is doubly false.

At first glance, it seems that Marcian is in broad agreement with his predecessor’s position on sexual honor and social status; at most, he simply draws the line between respectable and nonrespectable women differently. This interpretation, however, cannot be sustained. At best, Constantine’s meaning is unclear.56 Nothing in the classical juristic sources suggests that humilis vel abiecta might mean anything but a lowborn (that is, “poor”) free woman:57 this is precisely how the courts criticized by the novel propose to understand the


54 Rilinger 1988 (as n. 53) 264–66, 273.

55 So Bretone (as n. 53) 48.

56 Note his rather vague use of mediocris in his laws: Grodzynski, 158.

57 Vocabularium Iurisprudentiae Romanae, s.v. abiectus, humilis, with Garnsey (as n. 53) chap. 9 (esp. 222–23). In classical usage, these words were roughly synonymous with plebeius, vilis, tenuior: Garnsey, ibid. and the sources collected in A. H. J. Greenidge, Inamia: Its Place in Roman Public and Private Law (Oxford 1894) 195, n. 3. See also Gebbia. A qualification imposed by Constantine’s ban on marriage in CTh. 4.6.3 with freedwomen and their daughters restricts the meaning somewhat to “lowborn (or ‘poor’) freeborn women born of freeborn mothers.” Nov. Marc. 4.2 generalizes to “born from freeborn parents.” The qualification is overlooked by Astolfi, 135.
term. Broad Latin usage suggests such a meaning, although our sources, deriving as they do from members of the elite, tend toward a morally negative evaluation, as though the poor and low-born were morally suspect as a matter of course.

Nor does Constantine’s text suggest that he understood the term any differently, meaning it to serve as a *genus* absorbing the other types as *species*, exhaustively or not. The term is inserted into the midst of the list without any sign that it is meant as an all-embracing rubric. The idea that the specific types forbidden by Constantine—which our novel is careful to list twice—exhaust the range of meaning of *humilis vel abiecta* seems contradicted by the absence of prostitute and procuress from the list. The omission of these two figures seems especially strange in light of the novel’s emphasis on the practice of dishonorable professions as a disqualification for marriage with members of the elite. Of course, under the Augustan statute, unions with prostitutes and procuresses were still forbidden, on the most likely view, to all *ingeni*. Without pretending to certainty, at any rate, a certainty greater than that possessed by Emperor Marcian, we may postulate that the Constantinian *humilis vel abiecta* served as a vague, catch-all category, standing independently of the other types listed and potentially quite broad in its application. To take the argument a step further, one may ask, was this category intended by its founder to embrace, *inter alios*, those types forbidden the freeborn under the Augustan *lex Iulia et Papa?* And were some of these then added separately by Constantine by error or for emphasis?

Answers to these questions are not forthcoming. We cannot be certain if Constantine made an idealizing assumption about the correlation between social rank and moral worth—a quite conventional assumption—or if he wanted to allow discretion in the application of the law out of a perceived dissonance between worth and standing, or if the statute is simply not drafted very well, its lack of clarity underscoring a confusion of purpose, even if a degree of vagueness was intended. It is only possible to state that Constantine by this phrase evidently meant to exclude the children of low-status poor women, even freeborn women, as the heirs of members of his new elite.

In what precedes, I follow the fifth-century courts, Marcian, and modern commentators in understanding Constantine’s *vel humili vel abiecta* as a hendiadys. Marcian even transforms of Roman women is so intimately connected to their sexual status it may not be possible to split this atom, and very unlikely that Constantine meant to do so.

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58 Nov. Marc. 4.1: *pauperes ingenuas feminas*; cf. 4.2. *Pauper* and *paupertas*, as used in the Theodosian Code, seem to cover a broad range of individual situations: Grodzynski, 160–68; Gebbia, 73–82.


60 See the novel suggestion of Astolfi, 135, in which *humiles et abiectae* (his phrase) constitute two separate rubrics, one containing the types of low social condition (*humiles*), the other those of very doubtful morality (*abiectae*). In other words, all of the female types given in Constantine’s law (as well as others not named) fall into one or the other category. The phrase *humilis vel abiecta* is, however, usually understood as a hendiadys (below). Even if this is formally incorrect, the social rank

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61 Nov. Marc. 4.1, 3.

62 Nov. Marc. 4.2: *vita probrosis quaestibus dedit a sordentibus notis polluit et ... obscenitate professionis infecti*.

63 See the section that immediately precedes (Section 2).


65 See, for example, De Robertis 1939 (as n. 44) 189, n. 5. *Abiectus*, especially when used of persons, often stands in a hendiadys with adjectives such as *humilis, villis*, etc.; TLL, s.v. *abiectus*, 90.72–91.9, 91.16–26.
the phrase into *humilem abiectamque personam*. In fact, all the other categories Constantine gives in his statute are discrete ones, separated by *vel*. It is possible the emperor envisioned two different types, one perhaps "humble by birth," the other "humble by circumstances after birth," that is, through a dishonoring profession or bad behavior. But such an "analytical" understanding of the phrase is highly speculative. It seems foreign to Constantine, given the way in which he lumps together different types in CTh. 4.6.3, is rejected by Marcian, and is contradicted by the elite prejudice which, as we have just seen, tended to collapse these categories. More likely, the emperor was simply casting his net wide and did not mean two absolutely separate types here. So the hendiadys may stand, at least as a matter of interpretation. The difficulty does suggest, however, that Marcian's understanding of his predecessor's law was far from lucid and gives the lie to his implication that this was unambiguous.

With regard to the eternal tension, visible in policy making of this kind, between social mobility and social hierarchy, Marcian's interpretation is much closer to the line taken by Augustus himself, a fact that should put us on guard against assuming that the postclassical development of this legal institution was a linear one or in any sense foreordained. His idealism stands in stark contrast to Constantine's realism, which, incidentally, makes the latter an even less likely candidate for translating Christian moral teaching into law.

This law is hardly an isolated example where a harsh rule of Constantine's is mitigated by one of his successors; what stands out is the evident denial of the original meaning of the policy. Given the uncertainty, which, despite our best efforts, remains, over the precise meaning of *humilis vel abiecta*, this stands as a poor candidate for a new prostitute-analogue. Constantine may have assumed that desperately poor women were likely to prostitute themselves or were, at any rate, of dubious morals. But the obviously low social status of these women was sufficient in itself to rule them out as acceptable marriage partners for his newly formed elite, a point that may be made also, for example, of freedwomen. Proof either way is lacking. We are not entitled simply to assume, as some have done, that *humilis vel abiecta* was meant to suggest moral, as opposed to social and economic, unworthiness.

Though for much of this discussion I have treated CTh. 4.6.3 notionally as a marriage law, a consideration of its literal purpose as a regulation of concubinage is perhaps more

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66 Nov. Marc. 4.1; *humiles abiectasquae . . . personas* (2); *humiles . . . abiectasque personas* (3); cf. *humilem vel abiectam feminam* (2).

67 See Evans Grubbs 1995, 293; Astolfi, 135. The latter rewrites, curiously, the phrase to *humiles et abiectae*, a form found in neither Constantine's law nor that of Marcian.

68 For the general point, see the section on the social context below (Section 10).

69 See Nov. Marc. 4.3.


72 For two other apposite examples, see Beaucamp, 1.201.

73 Of particular interest is Theod. CTh. 15.8.2 (a. 428) (= C. 11.41.6 = [with modifications] C. 1.4.12), which mentions women compelled to prostitution by poverty: *conductive pro paupertate personis, quas sors damnavit humilior*. See also Ulpian's refusal of the "plea of pov­erty": Ulp. D. 23.2.43.5.

74 For the sake of convenience, I refer to the statute below as a marriage law.

75 This is the way in which most scholars have under­stood Constantine's statute. Astolfi, 134–37 argues that
helpful for understanding the import of *humilis vel abiecta*, even if it cannot resolve the basic problem of its meaning. The Roman elite knew a respectable form of monogamous concubinage in which children were rare and the female partner was of vastly inferior status. Persons of more comparable status should ideally be married, a principle that corresponds to the upper-class usage in choosing marriage partners over the first three centuries. Constantine was attempting, with all of the types he lists in his law, to prevent men from treating as legitimate children born from women whom, as members of the political and social elite, they should never have contemplated marrying. The category of *humilis vel abiecta* stands as a stark illustration of the importation of social values into law, as well as the awkward consequences that might flow from such a move.

4. Marriage Partners: The Tituli ex corpore Ulpiani

On an elementary level, of course, Marcian’s concern about inappropriate marriage partners for men of high status does grasp the essence of Constantine’s policy: one notes, for example, that all of the prostitute-analogues are themselves ratified. A further illustration of the implications of this policy is drawn from another postclassical text, dating broadly from 320–342, which gives a flawed summary of the Augustan marriage prohibitions:

*Tituli ex corpore Ulpiani* 13. De cael<ib>e orbo et solitario patre.
1. Lege Iulia prohibentur uxores ducere senatores quidem liberique eorum libertinas et quae ipsae quarumve pater materve artem ludicram fecerit, item corpore quaestum facientem.  
2. Ceteri autem ingenui prohibentur ducere lenam et a lenone len<a>ve manumissam et in adulteri<o> deprehensa<m> et iudicio public<o> damnata<m> et quae arte<m> ludicram fecerit: adicit Mauricianus et a senat<u> damnatam.

On the unmarried man, childless man, and unmarried man with children.
1. By the *lex Iulia*, senators and their sons are indeed forbidden to marry freedwomen, and those who themselves or whose father or mother has been an actor or actress, likewise, a prostitute.  
2. Moreover, all other freeborn men are forbidden to marry a procurress and a woman manumitted by a pimp or procuress and a woman caught in the act of adultery and she who has been an actress: Mauricianus adds also a woman condemned by the senate.

The *Tituli ex corpore Ulpiani* (= *Tit.*) is dated by most moderns to Constantine’s reign at the earliest: a recent examination argues its genesis to lie with a colleague and/or student of Ulpian’s who edited the master’s material and dates the revised version we possess to 320–342. This text cannot be earlier than 320, when most of the penalties established by Augustus it is literally a marriage law, that implicitly forbids concubinage with the types of women listed.

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78 F. Mercogliano, “Un’ipotesi sulla formazione dei *Tituli ex corpore Ulpiani*,” *Index* 18 (1990) 185–207 (the article also contains a useful discussion of modern scholarly opinion).
for the celibate and the childless were removed.\textsuperscript{79} The question of the date is of crucial import­ance, because it suggests that the recognition of a prostitute-analogue found in this pas­sage may be traced to Constantine’s reign or soon thereafter.

Some of the problems the text raises are readily apparent.\textsuperscript{80} There is the erroneous repet­tion of actress in the category of prohibitions imposed on nonsenatorial freeborn, or \textit{ceteri ingenui}; we know from the \textit{Digest} that it does not belong there. The same holds for the posi­tioning of prostitute in the senatorial category: scholars since Mommsen have preferred the better evidence of the \textit{Digest}, which confirms what the awkward syntax suggests, namely, that this is a later insertion and cannot be classical law.

Though the state of the text has importance for a number of points, our most immediate interest is the appearance of the woman manumitted by pimp or procuress, the type described as the \textit{a lenone lenave manumissa}. Although Riccardo Astolfi’s assertion that this represents a specific application of the generic prostitute type seems plausible at first sight,\textsuperscript{81} it is, I believe, more accurate to say that the phrase was an expansion, by analogy, of the prostitutetype known to the classical law.

Why, in brief, should brothel-workers be treated as prostitutes in terms of the marriage law? First, the identification of the \textit{a lenone lenave manumissa} as a brothel-worker seems fairly secure. There is no reason, of course, on the face of it, why a freedwoman of a pimp or procuress could not have been a prostitute, or an ex-prostitute, as many such women no doubt were. But this explanation does not suit the context. If the lawfinder who edited this text had wanted this phrase to mean “prostitute,” there is no obvious reason why he would not have written a Latin equivalent for “prostitute,” most likely in some form of the wording used by the \textit{lex Iulia et Papia},\textsuperscript{82} such as we see with \textit{corpore quaestum facientem} in Tit. 13.1. Euphemism is out of place here.

It may also be doubted that the phrase refers to ex-prostitutes. They were included in the classical definition of prostitute with respect to the Augustan marriage legislation, by Ulpian’s day at any rate.\textsuperscript{83} And it is worth pointing out that manumitted prostitutes were not assumed by the jurists simply to abandon their trade.\textsuperscript{84} The phrase \textit{a lenone lenave manumissa} is an equally strange euphemism for “ex-prostitute” in this context.

Pimps and procuresses are known to have employed persons other than prostitutes in the course of operating their businesses. A large brothel might retain a support staff of some size, including assistants to look after the prostitutes, cooks, water-boys, hairdressers, touts for rounding up customers, and others.\textsuperscript{85} \textit{Lenones} and \textit{lenae} who prostituted women in con­nection with some other business, such as running an inn or a cookshop, are even more likely to have employed staff not selling their bodies. For the sake of this discussion such persons may also be counted as “brothel-workers.”

\textsuperscript{79} Constantinus CTh. 8.16.1 (a. 320), on which see Astolfi, 39–40.

\textsuperscript{80} A full discussion is not possible here: see Astolfi, 101–3.

\textsuperscript{81} \textit{Ibid.}, 101, n. 20. This does not compromise the obser­vation of O. Karlowa, “Zur Geschichte der \textit{Infamia},” \textit{Zeitschrift für Rechtsgeschichte} 9 (1870) 204–38, at 225 (226), n. 36 that the rule does not contradict Severus’ concession of the right to \textit{postulare pro aliis} to ex-slave prostitutes.

\textsuperscript{82} I reconstruct this phrase as \textit{qui quaeve palam corpore quaestum facerit} fecerit: McGinn 1998, 99–102.

\textsuperscript{83} Ulp. D. 23.2.43.4.

\textsuperscript{84} See Call. D. 38.1.38 pr.

Why then treat such persons as prostitutes, if they were not in fact prostitutes? Corrections experts in the mid-nineteenth century United States debated a similar question. “Was a girl chaste who worked as a domestic in a brothel, though she did not serve customers? Or was she already fallen, though ‘technically pure’?” One notes that on this argument, a woman might be regarded as “fallen,” that is, a notional prostitute, even though she was acknowledged not to be sexually promiscuous. It is strictly unclear whether the late antique legal authorities who discovered the rule concerning the a lenone lenave manumissa assumed such women to be promiscuous or simply regarded them as unchaste “by association.” The survey of popular prejudice given below (in Section 10) suggests, to be sure, that such a distinction would have been entirely foreign to them, so that a woman who was unchaste was promiscuous and vice versa, and no one concerned himself with the question of a woman’s “technical purity.” There is no question that such persons were socially despised. It is also worth emphasizing that in our case the issue at stake, though it has broader resonance for the cultural construction of chastity, shows a more direct application to the limited context of the marriage law.

The sensitivity over such women as prospective marriage partners for freeborn Romans can be illuminated with regard to the classical position. The juristic definition of “prostitute” as it concerns the lex Iulia et Papia emphasized promiscuity as the fundamental element, as we have seen in the introductory section to this article. It is therefore very extensive, embracing some women who are likely to be excluded by other definitions such as the sociological one set forth in the same place above. This has three elements: promiscuity, payment for sex, and absence of an emotional bond between the partners.

The classical definition, as extensive as it is, ultimately finds its limits—in the final analysis a woman is either a prostitute or she is not. The brothel-worker in the Tituli text is simply assumed to be promiscuous (or, if you will, “unchaste”) and is therefore assimilated to a prostitute. So there is a connection with the classical position, but the important point, the true characteristic of the late antique approach, is to transfer this assumption wholesale to another occupation, which does not by itself constitute prostitution.

In practical terms this would mean that to qualify for the disability, a brothel-worker’s promiscuity would not have to be demonstrated (promiscuity of course might qualify her for the disability under the classical definition of prostitute). It was enough to show that she had been manumitted by a pimp or procurer.

It would be helpful to relate the inclusion of this type in the list of marriage prohibitions given in the Tituli to the marriage law of Constantine enacted in 336, but this is difficult. A complex theory would view its insertion into the list of prohibitions as motivated by the displacement of prostitute into the senatorial category. This latter transfer in turn might represent an attempt by the postclassical editor to account for the changes made to this category by Constantine’s edict of 336 without making extensive changes to the text. On this theory, the a lenone lenave manumissa was added to the category forbidden ceteri ingenui in compensation.


87 Proof of this, if it is needed, is found in the Syriac Life of Pelagia of Antioch (38) where the actress and prostitute dismisses her servants upon her conversion to Christianity: “Henceforth you shall no longer work for me, and you will no longer have the reputation of belonging to a prostitute” (trans. S. P. Brock and S. A. Harvey, Holy Women of the Syrian Orient [Berkeley, Calif. 1987] 56).
A simpler, and more persuasive, explanation is that the new rule’s ultimate origins lay in judicial practice. It arose perhaps as a response to a case where marriage between an ingenuus and a brothel-worker was in question. The woman, it might be conjectured, was shown not to have been a prostitute—or at any rate could not be proven to have been a prostitute—and yet a feeling subsisted, for the reasons given above, that there was something unsavory about the relationship. No actual motive for the displacement of prostitute into the senatorial category in Tit. 13.1 needs to be adduced: given the state of the text, sheer carelessness cannot be ruled out of court.

It is true that this alternative is less useful for dating the rule in relation to Constantine’s marriage law. All the same, it is striking how the transfer of the assumption of promiscuity from prostitution to another profession that appears to lie behind the inclusion of the a lenone lenave manumissa type also marks some of the categories of women listed in this statute, namely, the types I identify in the preceding section as prostitute-analogues. If the a lenone lenave manumissa type preceded Constantine’s law, it is surprising that this is not included in his list. Its absence raises the possibility, though not, I emphasize, the certainty, that it came later, which would mean in the period 336–342. If it did arise earlier, this may not have been much earlier, given the fact that the text as it stands traces to 320 or later. Admittedly, evidence to exclude absolutely a pre-320 date is not to hand; however, as we shall see below, a date in Constantine’s reign or soon thereafter suits the origin of this rule best.

5. Liability for Adultery: Constantine

The a lenone lenave manumissa of the Tituli finds a parallel, not coincidentally, in another piece of Constantinian legislation. This law, drawn from our second area of investigation, the law of adultery, dates to 326. It deals obliquely with the role played by prostitutes in the Augustan lex Iulia de adulteriis coercendis:

Constantinus CTh. 9.7.1 (a. 326): Quae adulterium commisit utrum domina cauponae an ministra fuerit, requiri debebit, et ita obsequio famulata servili, ut plerumque ipsa intemperantiae vina praebuerit; ut, si domina tabernae fuerit, non sit a vinculis iuris excepta, si vero potantibus ministerium praebuit, pro vilitate eius quae in reatum deductur accusatone exclusa liberi qui accusantur abscedant, cum ab his feminis pudicitiae ratio requiratur, quae iuris nexibus detinentur, hae autem immunes a iudiciaria severitate praestentur, quas vilitas vitae dignas legum observatione non credidit.

Interpretatio: Tabernae domina, hoc est uxor tabernarii, si inventa fuerit in adulterio, accusari potest: si vero eius ancilla vel quae ministerium tabernae praebuit in adulterio fuerit deprehensa, pro vilitate dimittetur. sed et si ipsa tabernarii uxor tam vilis ministerii officium egerit et in adulterio fuerit deprehensa, accusari non poterit a marito.

88 The Tituli passage implicitly excludes marriage with all ingenui, whereas CTh. 4.6.3 concerns high-status ingenui, so that a fortiori the a lenone lenave manumissa should have been included in the latter.

89 After years of inattention, this text and its companion (PS 2.26.11: below) have received a series of studies in the last decade or so: Bassanelli Sommariva; Manfredini; Rizzelli 1988.

90 The version of the law preserved in the Justinianic Codex, C. 9.9.28(29), adds at this point et matris familias nomen obtinent ("and enjoy the status of mater familias"). See R. Bonini, Ricerche di diritto giustinianeo, 2nd ed. (Milan 1990) 151, n. 163.
If any woman should commit adultery, it must be inquired whether she was the mistress of a tavern or a servant girl and thus in the performance of her servile duty she herself frequently served the wines of intemperance. If she should be mistress of the tavern, she shall not be exempt from the bonds of the law. But if she should give service to those who drink, in consideration of the mean status of the woman who is brought to trial, the accusation shall be excluded and the men who are accused shall go free, since chastity is required only of those women who are held by the bonds of law, while those who, because of their mean status in life, are not deemed worthy of the consideration of the laws shall be immune from judicial severity.

Interpretatio: If the mistress of a tavern, that is, the wife of a tavern-keeper, should be discovered in adultery, she can be charged (with adultery); but if her slavewoman or she who has given service in a tavern should be caught in the act of adultery, she shall be released on account of her degraded status. But even if the wife of the tavern-keeper herself shall have acted in the capacity of providing such a degraded service and has been caught in the act of adultery, she cannot be accused by her husband.

The lex Iulia explicitly exempted from its penalties only prostitutes and procuresses. Slaves were exempted by implication, a principle that was firm and unchallenged, and reasserted as central to the regime of the adultery statute as late as Diocletian. Constantine does not exempt the barmaid on the basis of slave status, which would have required only a straightforward application of the rule. In fact, he does not say she was a slave, only that the work she does is servile in nature.

The justification given for the holding supports the view that Constantine is expanding a set category of exemptions rather than simply applying a preexisting rule, whereby women working in such places were not liable under the adultery law, and making it clear that the domina cauponae was not included in this group.

My view runs counter to the dominant interpretation of this text since Gothofredus, which relies chiefly on the assumption that the holding in PS 2.26.11 is earlier in date. This interpretation holds that Constantine extends liability for adultery to the female manager of the tavern. In recent years, justification for this view has been sought in the theory that the


93 See in the text ministra, obsequio famulata servili, and—perhaps—(of the manager) domina cauponae; on the language, see Bassanelli Sommariva, 311, 317, n. 19; Manfredini, 326–27, 340; Grodzynski, 192, n. 100. The point is evidently not well understood by the author of the Interpretatio, who numbers ancillae among those exempted by the rule (and who understands domina cauponae as uxor tabernarii).

94 As we shall see in the next section, it is strictly impossible to be certain which text contains the earlier rule, and a strong argument can be put forth that the one given by the Pauli Sententiae is later.


96 Bassanelli Sommariva, esp. 312 (cf. 317–19); Manfredini, esp. 330–33; Rizzelli 1988, esp. 739, n. 14, 741–42 (with some hesitation). See also Edwards, 94, n. 71, who is ignorant of the principal text and the literature given here. I note that this argument was advanced more than a half century ago by C. Castello, In tema di matrimonio e concubinato nel mondo romano (Milan 1940) 118.
famous Ulpianic definitions of prostitute and procuress, given in his commentary on the *lex Iulia et Papia*, assimilate *ministrae* to prostitutes and managers of *cauponae* to *lenae*. In fact, Ulpian merely states that prostitutes are liable to the marriage law even if they practice their profession in places other than brothels (for example, in *tabernae cauponae*), while women who control and/or directly profit from prostitutes are defined as *lenae* under this law, in whatever venue they operate. The interpretation offered by these writers is also unsatisfactory from the standpoint of policy. The implication of their argument is the result, extreme in my view, that all female retail workers, not just prostitutes and procuresses, would be denied under the classical law as marriage partners to all *ingenui*. 

In the principal text, Emperor Constantine lays down that the waitress, exposed to the intemperance of customers, is regarded as too vulnerable to be held to the strictures of the adultery law. In fact, we know that many of these women were prostitutes, but Constantine does not rely on this theory either, which provides another possible exemption. The barmaid is assimilated to the exempt categories of both slave and prostitute (we see here how, as permissible sexual outlets, these two types may be regarded as functional equivalents). It is easy to see how the postclassical editor of the *Tituli ex corpore Ulpiani* was able to do the same for the freedwomen of pimps and procuresses, that is, equate them to prostitutes. To state baldly the difference between this perspective and that of the classical jurist: Ulpian knows that prostitutes work in bars (and elsewhere), while Constantine assumes the barmaid is, *ipso facto*, a prostitute or, at minimum, a woman whose sexual honor must be discounted in an analogous manner.

While the rule discovered in this text is an innovation at law, it reflects traditional upper-class attitudes, as argued below, in Section 10.

Constantine's edict contains a strong implication that if the *domina cauponae* herself serves wine to customers, she is then sexually vulnerable and therefore exempt. This implication

and refuted by M. A. De' Dominicis, *Riflessi di costituzioni imperiali del basso impero nelle opere della giurisprudenza postclassica* (s.l. 1955), 36 with n. 52.

97 Ulp. D. 23.2.43 pr., 9. This is not to say that some prostitutes were not *tabernariae*, but that they were, under classical law, liable to the law *qua* prostitutes, and thus that *tabernariae* were thus not automatically so liable.

98 The Augustan law forbade prostitutes, pimps/procuresses, and adulteresses, whether convicted or caught in the act, to nonsenatorial *ingenui*, a prohibition understood by the jurists to apply to members of the senatorial order: Astolfi, 97-103.

99 Bassanelli Sommariva, 320 argues from this detail that the edict cannot be a *lex generalis*, but there is no reason why a specific case involving a worker in a tavern (*domina* or *ministra*, though more probably the latter) could not motivate the promulgation of a general enactment. Manfredini, 325-26 raises a similar objection, though his argument (328-29) that Constantine's law embraces female workers in every type of shop ignores the justification for the rule given in the text and places too much reliance on the *Interpretatio*, which is, after all, a separate, later norm: on the (late fifth-century) *Interpretations*, see Archi 1970, 105. To be sure, a rescript cannot be ruled out: see now Evans Grubbs 1995, 208.

100 One may point out that if the *ministra* were exempted *qua* prostitute, it would be difficult not to exempt the *domina cauponae*, *qua* procuress.


appears inevitably to raise the tangled issue of the consumption of wine by Roman women. Despite the increase in the interest of scholars on this subject in recent years, fundamental questions remain unanswered. Some of these may not have a definitive answer, and it will not be my purpose to set one out in this place, for a reason given below. All the same, little is to be gained by ignoring or evading them. Among such articles of interest, I would place: was there an absolute ban on drinking of wine by women or was the prohibition directed against excessive consumption of this beverage? If there was such an absolute ban, did it concern wine tout court or merely unmixed wine? Was there a historical development whereby attitudes toward wine drinking by women changed over time, and, if so, what was the nature of this development? Was the prohibition, whatever its nature, attenuated in ideology or practice by certain occasions, such as festivals, or through permission granted by an authoritative male, such as a husband? Finally, what was at the root of the sensitivity over women’s drinking? Was this act, for example, equated with adultery, or was it thought simply to render women more vulnerable to seduction or (a separable question) notionally impure?

Without doubt, the last issue has received the lion’s share of attention from scholars, though it is arguably the most intractable of all the questions I raise, not only owing to the state of the sources, but because it involves the problem of the Roman cultural construction of chastity, a large and complex subject at best. Of direct interest is a discussion by Manfredini,104 who suggests, in the context of an examination of the principal text, how consumption of, or even access to, this beverage was equated by some with disapproved sexual behavior, specifically adultery, a fairly common view in the scholarship.105 Even greater interest lies in his argument106 that by the late Republic or early Empire the concern with mere access to or consumption of wine by women had been transformed into a prohibition against excessive drinking.

Other scholars hold wine drinking by females not to be countenanced at all, with the only exception occurring in the context of the rites for the Bona Dea, at which, significantly, no males were present.107 In the most sophisticated presentation of the problem known to me, Purcell argues forcefully against the notion of an historical development.108 The more permissive attitude may occur as early as the beginning of the second century B.C. (194 or 192 B.C.), when a wife loses her entire dowry to her husband in a divorce as a...
consequence of excessive drinking, or drinking, at any rate, that was deemed inappropriate in some way. Drunken wives were thought beyond the control of their husbands. What is interesting is that this position is contemporaneous with the earliest reliable evidence for the stricter attitude that would utterly deny women wine. The literal truth of the sources on women's drinking in the early regal period is simply not possible to accept, including the famous "law of Romulus" punishing wine drinking and adultery with death that is attested by Dionysius of Halicarnassus. What this tradition does suggest is continuing unease in some quarters with the more relaxed attitude evidently in vogue in the late Republic and early Empire.

It is possible to argue, if not to prove, that the stricter view is actually the more junior one, at least in the ideologically charged form known to us, that was articulated as a response to a perceived decline in mores, and that latched on to a putative ancestral custom in a classic appeal to authority. It seems to fade from view for a while, though this is deceptive: one should not, in my view, discount in this sense the hearkenings to the reign of Romulus found in the moralists. At minimum it represents implicit rejection of the more lenient attitude. Criticism of wine consumption by women unambiguously reappears, as early as the late classical period, and it is probably correct to hold that it was never completely absent. All of this suggests that it makes better sense simply to posit the existence of two contemporaneous points of view on this subject, one more tolerant, one less, each of which enjoyed an ascendancy in different periods.

What is remarkable is that the rule in Constantine's statute looks past both attitudes. The edict does not mention women drinking wine but serving it. This is not to deny that Constantine was concerned about the effect of the wine on the ministrae, though mere proximity to the beverage, not its consumption, appears to be the concern, a harsher standard even than that advanced by the stricter view just examined. The law's focus is the effect of the wine on the customers and the consequences this has for the sexual vulnerability of the female servers.

The language of Constantine's enactment, above all the phrase vilitas vitae, suggests

109 Plin. HN 14.90: Cn. Domitius iudex pronuntiavit mulierem videri plus vini bibisse quam valitudinis causa viro inscience, et dote multavit. The text suggests that a woman could drink wine for health reasons; otherwise, her husband's knowledge (tacit permission?) was required. Breach of this convention might be deemed a serious offense, in this case leading to loss of the dowry. On the date, see A. Watson, The Law of Persons in the Later Roman Republic (Oxford 1967) 70.

110 Iuv. 6.425–33.

111 Cato epud Gell. 10.23.4.

112 Dion. Hal. 2.25.6; cf. Plut. Rom. 22.3. For skepticism, see Guarino (as n. 105); id., "Il lus Osculi e Romolo," in Pagine di diritto romano (Naples 1994) 4:57–59; Gardner (as n. 32) 210, n. 17. Guarino justly criticizes the attempt of P. Giunti, Adulterio e leggi regie: Un reato fra storia e propaganda (Milan 1990), esp. chap. 2 to attribute this law to Numa.

113 Ael. Var. Hist. 2.38: in the midst of a critique of regulations on wine drinking, Aelian praises a Roman nomos that prohibited free women, slaves, and men from elite families between adolescence and the age of thirty-five from drinking wine; in other words, respectable women do not drink wine; Tert. Apol. 6.4–6: once upon a time—during the reign of Romulus and for a time afterwards—women did not drink at all. Cf. Manfredini, 339–40, who attributes the reappearance of this attitude entirely to the Christians.

114 The practice at the rites of the Bona Dea has little or nothing to say for the stricter position if the wine drunk was undiluted (vinum merum), as it appears to have been: note the equivocation in Kraemer, 54–55; Bettini (as n. 107), esp. 225.

115 Compare Grodzynski, 181, who appears to assume the server must be drunk.

116 In Constantius CTh. 15.8.1 (a. 343), vile ministerium
that certain free poor women might be regarded as prostitutes for some legal purposes, especially where there was a tie, even an indirect one (or one that is simply assumed), to venal sex, which was commonly practiced in such places. The enactment placed them outside the circle of respectable women. The fact that an exemption granted a woman also shields her sexual partner from prosecution further suggests the grant was hardly meant as a favor to her.

6. Liability for Adultery: The Pauli Sententiae

Another important text is from the Sentences of Paul, a postclassical collection which, in the communis opinio, dates from the very late third century. This work received official approbation from Constantine only two years or so after the edict just discussed.117

\[
PS 2.26.11: \text{Cum his, quae publice mercibus vel tabernis exercendis procurant, adulterium fieri non placuit.}
\]

It is generally agreed that those women who oversee the selling of merchandise to the general public or the operation of taverns are exempt from the penalty for adultery.

The Pauli Sententiae has recently received an important study from Detlef Liebs.118 Liebs concurs with the central thesis of Ernst Levy, namely, that the PS is a postclassical work created in the late third century in a western province,119 departing from Levy’s thesis in one way relevant to this discussion.120 He rejects Levy’s complicated scheme of layers, that is, an analysis of a series of additions and alterations supposedly made over the two centuries following the work’s composition, and insists on the essential coherence of the PS as a single entity composed by one man at one time.

If this last point holds true in the absolute, there can be no question about the relationship of the rule in the PS text to that in the law of Constantine just discussed. The latter has to be later, that is, it must represent a specific application of the principle laid down in the juristic work. At first glance, this seems like a simple and obvious solution.121 It presents difficulties on closer inspection, however. Constantine’s law, whether a rescript or not, appears to derive its holding from a specific case. If such a rule preceded CTh. 9.7.1, why does this text not invoke it? And where did such a significant departure from the classical regime arise in the first place?

These difficulties encourage a modification of Liebs’ “unitarian” thesis for the PS.122

\begin{itemize}
\item \textbf{118} Liebs 1993, which builds on the author’s earlier work.
\item \textbf{119} Liebs follows Lauria and Gaudemet in identifying \textit{vilis} and \textit{vilitas} in the Theodosian Code, see Grodzynski, 180–89, esp. 181, where she points out the opposition between \textit{vilitas} and \textit{pudicitia} in the principal text.
\item \textbf{119} Liebs follows Lauria and Gaudemet in identifying \textit{vilis} and \textit{vilitas} in the Theodosian Code, see Grodzynski, 180–89, esp. 181, where she points out the opposition between \textit{vilitas} and \textit{pudicitia} in the principal text.
\item \textbf{120} He also rejects Levy’s idea that Paul was the chief source of the new work.
\item \textbf{121} It would vindicate the orthodox interpretation of CTh. 9.7.1 (see above), though for a different reason.
\item \textbf{122} Liebs himself is hardly inflexible about the unity of the work, since in order to accommodate his dating he is prepared to admit the edict of Diocletian on the Manichees as a possible later insertion: Liebs 1993, 37. \textit{Cf. id.}, “Römische Jurisprudenz in Africa,” \textit{Zeitschrift} for Africa as its provenance.
\end{itemize}
Without revisiting Levy's cumbersome system of layers, one can, I think, posit one more or less significant editing of the PS. This occurred at about the time Constantine explicitly accepted the work as authoritative, in or around 328.\textsuperscript{123}

Given the inclusion of the tabernaria and her daughter, as well as the woman quae mercimonii publicis praefuit, in his reformed marriage prohibitions a decade later,\textsuperscript{124} it seems possible that the PS passage represents a rethinking by Constantine himself.\textsuperscript{125} In other words, the fact that in the law of 336 Constantine gives only tabernaria, without making the distinction between supervisory and service staff that he draws in the law of 326, itself suggests a broadening of the original type. The sixth-century jurist Thalelaeus may get at this point when he states, apropos of the Constantinian adultery statute, that the barmaid is only an example, that the principle applies to all shops.\textsuperscript{126} Such an interpretation seems to have been accepted by the time the marriage law was enacted in 336, since this also includes the other type given in the principal text, those women quae publice mercibus . . . procurant.

Against my thesis is the fact that the PS does not offer an absolutely up-to-date version of the law in 328. But it seems unlikely that the editor/compiler of the PS aimed at a complete codification of the contemporary law, and even less likely that he was capable of effecting this had he so desired.\textsuperscript{127} This holds true no matter when, among the range of possibilities canvassed, one prefers to date the work.\textsuperscript{128}

While our passage cannot be dated beyond every shadow of doubt, a strong case can be made that the PS rule is the later one. It is telling that the first precisely datable expansion of the classical exemptions, Constantine's edict in 326, gives only the ministra cauponae as exempt, while the expanded version given in the PS passage is reflected in norms that are

\textsuperscript{123} Constantinus CTh. 1.4.2 (a. 328?). I advisedly alter the usual formula, which holds that Constantine accepted the work as authentically Pauline: see, for example, D. Liebs, \textit{Die Jurisprudenz im spätantiken Italien}, 6 (1930) 33-108, esp. 67 allows that "molte regole" in the PS might date to the period after Constantine's "reception" of the work.

\textsuperscript{124} Constantinus CTh. 4.6.3 (a. 336) (= [with modifications] C. V. 57; 1): above.

\textsuperscript{125} I agree with Rizzelli 1988, 739, n. 13, who counters De' Dominicis' assertion that the rule in this PS text depended in part on the new law on marriage prohibitions (this dates to 336, not 331), because the exemptions (pursuant to the adultery law) and prohibitions (pursuant to the marriage statute) are, strictly speaking, separate issues. Liebs' criticism of Levy's thesis makes this argument even more difficult to accept. By the same token, Rizzelli's argument that the new marriage prohibitions are not consistent with the PS rule, since without marriage there can be no adulterium, is in my view misleading, since these prohibitions apply only to a very small, if prominent, section of the population (and even for marriages that violated the prohibitions, it may not be accurate to say that prosecution of adulterium/stuprum was excluded).

\textsuperscript{126} B. 60.37.66.1S, a passage that may represent an attempt to reconcile the two laws of Constantine on another level as well, regarding stuprum and adulterium.

\textsuperscript{127} For examples of legal change not reflected in the text of the PS, see Liebs 1993, 36-38. The PS may display some of the attributes of a codification, such as a striving for clarity and certainty, but can hardly qualify as one. For a definition of the concept of codification, see J. Gaudemet, "La codification: Ses formes et ses fins," in \textit{Estudios en homenaje al profesor J. Iglesias} (Madrid 1988) 1:309-27, esp. 309-10.

\textsuperscript{128} It is worth noting that some of the omissions go back to Diocletian's reign and were once used to date the work earlier: E. Levy, \textit{Pauli Sententiae: A Palingenesia of the Opening Titles as a Specimen of Research in West Roman Vulgar Law} (New York 1969, rpt. of Ithaca 1945 ed.) 35; H. J. Wolff, review of E. Levy, \textit{Pauli Sententiae,} in \textit{Traditio} 3 (1945) 412-16, at 415.
securely dated after the edict, such as the Visigothic Interpretatio of the latter and Constantine’s law reforming the classical marriage prohibitions issued in 336. Thus it is reasonable to suppose that the rule given in PS 2.26.11 also postdates 326, and the better view is that it dates from 326 to 328. To be sure, this holding represents a considerable extension of the rule enacted by Constantine in 326. As noted, it ignores his fine distinction between management and service personnel in taverns. And it reaches beyond these establishments to embrace every field of retail sales.

Remarkably, the rule is presented as settled law, as denoted by placuit. Placuit in the PS typically refers to rules derived from the interpretation of a norm, often by the emperor himself sitting as a judge or issuing a rescript. On this ground, Bassanelli Sommariva rejects the idea that the PS rule dates later than the edict of Constantine discussed above. This begs the question of how we should reconcile a rule notionally discovered by Constantine, no matter when this is thought to have occurred in his reign, with Liebs’ dating of the PS to ca. 300. There is in fact no reason why placuit cannot refer to lawfinding by this emperor in the wake of the edict. Placuit does not necessarily imply a rule of long standing.

For all this, proof is elusive. In the final analysis we are left with two alternatives. One is the traditional view that the PS rule predates that in the Constantinian edict on liability for adultery discussed above. Though strictly undatable, the rule is not classical and suits the context of the early fourth century, when the PS was created. The other, which I find more persuasive, is that the PS text builds on this law in extending the scope of its exemption.

The holding contained in the principal text is such an egregious piece of misogyny that it must give pause. Is it possible that the text simply employs a periphrasis for prostitue? In other words, does it use nonclassical (or nontechnical, in a legal sense) language to describe this same type? At first glance, there is evidence to support this assumption in the language used in the phrase quae . . . procurant, above all the words publice, merces, procurare, but

129 Bassanelli Sommariva, 313; Rizzelli 1988, 742.
131 Note Constantine’s concern, expressed two years before the passage of the edict, with the threat posed to the pudor and verecundia of respectable women when they appear “in coetu publico”: Constantinus CTh. 2.17.1 (a. 324) (= [with modifications] C. 2.44[45].2).
132 As Manfredini, 383 assumes. See, for example, Ulp. (1 inst.) D. 1.4.1 pr. (a general statement); Ulp. (43 Sab.) D. 12.6.23.1 (quia placuit transactionem nullius esse momenti: hoc enim imperator Antoninus cum divo patre suo rescripsit); Tryph. (2 disp.) D. 27.1.44.2 (quo placuit et rescriptum est; cf. the principium: the rescript is one that imperator noster cum divo Severo patre suo issued); Ulp. (36 ad edictum) D. 27.3.1.3 (reference to a decreatum of divus Severus); Iul.-Pap. (17 quaest.) D. 31.66 pr. (reference to a constitutio of Severus). Most of the instances of placuit in the Digest refer to rules that are strictly undatable, but on occasion a jurist appears to transmit the holding drawn from a contemporary court case. See, for example, Ulp. (4 opin.) D. 4.3.33; Paul. (1 decre.) D. 10.2.41; Iul. (2 Urs. Fer.) D. 10.2.52.2; Pap. (11 resp.) D. 20.4.3 pr.
133 This point is treated in the next section below (7).
135 On the etymological and sociological significance of, for example, meretrix, see Adams, esp. 324. The word publice signals that the woman works “appunto a contatto con i clienti, pubblicamente”: Rizzelli 1988, 740. It also has a moral resonance, much like that of palam in the classical phrase for prostitute (on this point, see McGinn 1998, 102), and so emphasizes the assimilation of these women to prostitutes accomplished in this text. The
closer examination yields no definite identification with “prostitute,” a fact supported, in my view, by the translation of the passage given above in the text. The fact that two types are given also suggests that prostitutes themselves are not meant. These women are, after all, assimilated to prostitutes, a fact that itself explains such phrasing.

If it is true that the political, social, economic, and cultural developments of late antiquity came to prevail on the formation of law in this period,136 so that normfinding reflected these factors in a more direct manner than one expects to find in classical law, this seems particularly true for those areas of the law, such as sexuality and the family, where the connection is especially close even in the classical period itself. Such a proposition would certainly help explain the shocking, though not original, premise at the heart of this text. In a sense, the wheel has come full circle and it is assumed, as the etymology of meretrix suggests, that if a woman is selling anything, she must be selling her body.

7. Prostitute-Analogues and the Reign of Constantine

If we look apart for a moment from the novel of Marcian discussed above, which is really a sort of coda to the “marriage law” of Constantine, a structure emerges, whereby in two cases a firmly dated piece of legislation is accompanied by a postclassical “juristic” text containing a rule of uncertain date. The issue arising under the Augustan adultery law, and the postclassical modifications made to it, repeats the pattern set for the Augustan marriage law. I have made arguments for dating the holdings set forth in the Tituli ex corpore Ulpiani and the Pauli Sententiae to the period immediately following the relevant imperial statute. This means the reign of Constantine, or very soon thereafter, in the first instance.

The especially-hard-to-date rule given by the Pauli Sententiae concerning the woman quae mercimonis publicis prae/uit illustrates an important point. We cannot assume ourselves to possess every significant source of imperial law. This rule, which perhaps traces its origins to an imperial judicial decision or rescript, may derive from Constantine’s lawfinding early in his reign or even from that of his erstwhile rival Licinius. Evidence of the latter’s legislation has been detected in the Codex Theodosianus, Codex of Justinian, and the Fragmenta Vaticana.137 One might speculate further that the harsh rule in question suitably arose in the context of the eastern half of the empire, where attitudes toward women, particularly in the matter of their deportment in public, might be deemed to have been more conservative than in the West.138 If so, it must have found some resonance in sectors of the western half, and it would on this estimate be no coincidence that the rule appears in a “juristic” work theorized to have been produced in North Africa, an area known for its traditional values.139 Of course,

138 This is belied, at any rate, by the evidence for the popular attitudes surveyed below in Section 10, which yield no precisely identifiable geographic distribution.
139 For conservative values in North Africa, see for example the study of commemorative patterns by B. Shaw, “The Cultural Meaning of Death: Age and Gender in
one may pursue an even more ingenious line, arguing that Constantine’s pronouncement on the *ministra cauponae*, delivered in 326, and followed in very short order by the broader principle now enshrined in the *PS*, represents the first in a two-step accommodation to eastern *mores* in the wake of this emperor’s conquest of that half of the empire in 324. But by now the argument seems to have long since gone off the rails.

Pure speculation aside, what can be said is that the early fourth century, in particular the reign of Constantine, provides the most persuasive context for our two undatable rules. This is first because the two securely dated laws examined above guarantee that women’s status was opened to examination and redefinition at this time, precisely in those same two areas of the law, marriage and adultery. Constantine’s initiatives here formed part of an attempt to confront problems similar in important respects to those Augustus had faced three centuries before. Like his famous predecessor, Constantine responded to these challenges with a legislative program marked by a fusion of traditional approaches and new realities.\(^{140}\)

Both emperors sought to redefine the center, that is, the imperial elite, in part by developing the margin, or in this case specifying women whose lack of sexual honor and social status made them ineligible as respectable marriage partners and/or immune from the penalties of the adultery law, an exemption reserved for the most degraded of Roman women. In both areas, the results show a clear expression of upper-class prejudice, even more markedly so in the case of Constantine, as we will see in Section 10 below.

This difference may be explained with reference to the fact that, in another sense, Constantine had less of a margin to play than Augustus had. The crisis he faced, in global terms, was longer and deeper. Whatever the case, for complex reasons, postclassical law comes to reflect prevailing social morality less ambiguously than in previous centuries, a trend highly visible precisely in Constantine’s reign. In the classical period, emperors and jurists, more especially the latter, acted to hold the line, asserting the autonomy of law against the claims of social attitudes that were, to be sure, more easily and directly translated into law in the fields of marriage and sexuality than one finds in other areas of the law, even at this time.\(^{141}\) The results may appear more rational, and even more equitable, to us. What is worth emphasizing is the profound disjunction at play in the early fourth century between the old and the new. Constantine’s reign is therefore a fruitful time for the creation, at law, of a series of prostitute analogues.

The story, of course, does not end there. It is interesting to see how, for all of the dramatic success his program enjoyed in general terms, some of the particular solutions adopted by Constantine created weighty problems for his successors. The perplexities suffered by Marcian more than a century later in the matter of the *humilis vel abiecta* are instructive in this regard. Various explanations of this change in perspective are available, more than one of which may be true. One might argue that Marcian lived in less interesting times, or at least confronted a different mix of problems, than his distinguished predecessor. There is also the fact that, with the passage of time, a revitalized legal profession, now entrenched in prestigious schools of law, begins to assert itself, above all in the

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\(^{140}\) See M. Sargenti, “Rescritti e costituzioni nella legislazione di Costantino,” in *Studi sul diritto del tardo impero* (Padua 1986b) 375–85, at 381.

\(^{141}\) This point is a central argument of McGinn 1998. See esp. chaps. 1 and 10.
Though lacking the independence and authority of the classical jurists, these men were perhaps better placed than their postclassical predecessors to raise the claims of the legal system against the demands of popular prejudice.

Above all, and much more certainly at that, there is the injection of a new system of values to complicate matters. Christianity, whose influence, despite the assumptions of many moderns to the contrary, is nowhere in evidence regarding the legislation examined above, had since the advent of the Theodosian dynasty at the latest played an increasingly aggressive role in influencing social legislation. For the "new" religion, poverty is a badge of honor, not the automatic social disqualification it represented for generations of pagan Romans. So Marcian is moved to deny the contrary implication of Constantine’s law.

Marcian’s concern to rescue the undeserved reputation of Constantine as a Christian legislator is worthy of note in its own right. It forms part of a long process of “spin control” that has fooled many moderns. The first Christian emperor, either because he was distracted by more pressing problems or because he was one of those Christians, more numerous than they might at times seem to nonbelievers, who are less than enthusiastic about transforming the social morality of their religion into law, set a poor standard for his successors, who took a far different line. Constantine’s failure—or refusal—to legislate Christian social morality created problems not only of policy narrowly construed, but of political, not to say theological, legitimacy. These were problems later Christian rulers like Marcian were at pains to resolve.

Marcian’s ambitious piety cannot fail to impress, at least in its intent. When viewed against la longue durée of prevailing Roman attitudes on acceptable marriage partners, it almost seems as if he aims to repeal the law of (social) gravity. One wonders about the result, that is, whether now that the legal hurdles were overcome, members of the elite began to seek prospective wives in significant numbers among the ranks of poor, though respectable, women. Optimism is, to be sure, not one’s first and automatic reflex in response to this question, though Justinian, at any rate, was not discouraged from pursuing an even more radical approach a century later.

What should not go unnoticed is that Marcian explicitly ratifies the true prostitute-analogues given in Constantine’s marriage law of 336. All of these, like the ministra cauponae found in his adultery law of a decade before, had been taken up by the Codex Theodosianus. No challenge is on record to the new types embedded in the texts of the Tituli and PS. Here posed by Augustus on caelibes and orbi: Euseb. Vit. Const. 4.26. The law is Constantinus CTh. 8.16.1 (a. 320). See Evans Grubbs 1995, 128–30 for criticism of the older view accepting Christian influence as an explanation of this law.

The tension between Constantine’s non-Christian policies and his role as first Christian emperor is touched on, I believe, by Zeno in the first line of a constitution reviving a lost law of his predecessor that allows the legitimizing through marriage of children born in concubinage to freeborn concubines: Zeno C. 5.27.5 (a. 477).

145 For a survey of this subject, see Treggiari 1991, chap. 3.

147 See Section 9 below.
then lies a certain continuity between the Christian rulers of late antiquity and the prejudice of the pagan past. At the same time it is interesting that, with the passing of Constantine's reign and (perhaps) its immediate aftermath, the creation of new prostitute-analogues at law appears to cease.

8. Adultery and Actresses

One more enactment pursuant—at even greater distance—to the Augustan adultery law may be mentioned here. Theod., Arc., Hon. CTh. 15.7.12 (a. 394) (= [abbrev.] C. 1.4.4 + C. 11.41.4) prohibits mime actresses and prostitutes, that is, *mimae et quae ludibrio corporis sui quaestum factiunt*, from wearing in public the garb of "those virgines who are dedicated to God." At first glance, this text seems to assimilate mime actresses and prostitutes. In fact, they are given as two separate types, with prostitutes described by a rhetorically charged version of the classical legislative phrase. The law names them as the two obvious examples of highly visible degraded women—and need not have taken account of any putative overlap between the categories.

What is strange about this result is the obvious point that the Romans, in classical times and in the postclassical period, did egregiously identify actresses as prostitutes. The most outstanding example of this tendency from our period may well be Procopius, for whom Theodora's activity as actress is perfectly indistinguishable from behavior *qua* prostitute. The truth of this characterization is open to sharp dispute, as we shall see in the next section below. What lies behind it is the tendency, familiar from misogynistic discourse, to articulate criticism of a woman as an indictment of her moral character, in particular, allegations of promiscuity. So it is almost inevitable that criticism of an actress' profession is expressed in

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149 The translation by Pharr (as n. 21) 435, "actresses of mimes and other women who acquire gain by the wantonness of their bodies" (my emphasis), is inaccurate. It has evidently misled H. Magoulias, "Bathhouse, Inn, Tavern, Prostitution, and the Stage as Seen in the Lives of the Saints of the Sixth and Seventh Centuries," *Epeteris Hetaireias Byzantion Spoudon* 38 (1971) 233–52, at 247. His statement, moreover, "for the Church . . . actresses or *mimae* were synonymous with harlots" is not proved by the evidence he cites. See also J. Herrin, "In Search of Byzantine Women: Three Avenues of Approach," in A. Cameron and A. Kuhrt, eds., *Images of Women in Antiquity*, rev. ed. (Detroit 1993) 167–89, at 170: "actresses, mimes, dancers and other entertainers were treated almost like prostitutes by law, indeed there can have been only a narrow dividing line between the two"; J. Blänsdorf, "Der spätantike Staat und die Schauspiele im Codex Theodosianus," in J. Blänsdorf, ed., *Theater und Gesellschaft im Imperium Romanum* (Tübingen 1990) 261–74, at 267–68; Edwards.

150 On the general point, see Daube 1967b, 395 with n. 67.


152 This syndrome has been well described by feminists: see, for example, M. R. Lefkowitz, "Invente against Women," in *Heroines and Hysterics* (New York 1981)
terms of her sexual behavior. It is naive to take such statements as literal truth and worth pointing out that a woman did not have to work as an actress to become the target of such invective. Any woman with a claim to respectability was at least potentially liable to such a characterization, as readers of Cicero on Clodia Metelli, Seneca on Augustus' daughter Julia, or Juvenal on Empress Messalina will already know for themselves.

This is not to deny, of course, that some actresses worked as prostitutes. The presentation of Pelagia of Antioch in the hagiographical sources may be cited as an example. So in repressing prostitution of slaves and free women, Emperor Leo made special provision against the activity of dancers and actors as procurers and banned forcing women to appear on stage against their will. Justinian himself comes close to collapsing the categories of actress and prostitute—if he is not merely confused about existing legislation.

Why, in the face of such widespread, in this case, upper-class, prejudice, did the law keep separate the figure of the prostitute from that of the actress? Both types had a long pedigree, overlap was not technically a difficulty, and the law had some greater interest in precision. One result of this conservatism was the evident refusal of the late antique lawmaker to interpret "prostitute" extensively—instead inventing a series of "quasi-prostitute" types. "Actress" might, in certain contexts, qualify as one of these, but caution is enjoined. Overall, late classical law does not appear to have regarded prostitutes and actresses as analogues.

9. Justinian

Like the novel of Marcian discussed above, the evidence of public opinion cautions against seeking a linear pattern of development on either the social or legal level. Popular attitudes,


153 See the cogent observations of Webb (as n. 151) 123, 131.

154 Cic. Cael., esp. 38, 49; Sen. Ben. 6.32.1; Iuv. 6.115-32. Roman misogynistic discourse breeds an interesting paradox, in which a woman actually a prostitute tends to stand beyond the pale of moralizing invective, while women of some status are more liable to criticism for their behavior, which criticism, aimed at their sexual comportment, often assimilates them to prostitutes.

155 The detail is, I believe, realistic, whatever position one adopts as to its literal truth. Vita Sanctae Pelagiae, Meretricis 2, trans. B. Ward, Harlots of the Desert: A Study of Repentance in Early Monastic Sources (Oxford 1987) 67 (see also 59, 61); the Syriac Life of Pelagia of Antioch 4, 18, trans. Brock and Harvey (as n. 87) 43, 47. See also Leontsini, 28–29; L. L. Coon, Sacred Fictions: Holy Women and Hagiography in Late Antiquity (Philadelphia 1997) xv–xvi, xx1, 77–84.

156 Leo C. 1.4.14 (anno incerto) (= ? C. 11.41.7).

157 Nov. 51 (a. 536), on which see Beaucamp, 1.131–32. Cf. the deliberate description of some concubines as prostitutes in Nov. 18.5 (a. 536) and Nov. 89.12.5 (a. 539).

158 Note also in this connection that the Interpretatio to Constantinus CTh. 2.19.1 (a. 319) (= [with modifications] C. 3.28.27) gives meretrices and thymelicae as distinct types.

159 On a practical level, it may have been true that problems of proof played a role. Proving a woman was an actress may have been notionally easier than proving status as a prostitute, though both were in essence "public" professions. On this last point, see Edwards, who, however, goes too far in attempting to locate a common denominator for the imposition of legal disabilities on gladiators, actors/actresses, and prostitutes. Despite protestations to the contrary, her conception of infamia is unitary for all periods, obscuring an important historical development.

160 To judge perhaps from Tit. 13.2 (if this is not simply a mechanical error) and Nov. 51 (a. 536).
examined at length in the section that follows, were keyed to social status and lifestyle, and perhaps never underwent any significant change, while various policies were adopted by the legal authorities at different times. A demonstration of this latter tendency is given by Justinian, who makes the wheel turn once more by reinstating the full classical definition of prostitute as elaborated by the jurists. This was accomplished by including it in the Digest, promulgated in 533. Meanwhile his second version of the Codex, which appeared in the following year, features the two laws of Constantine discussed above, with their prostitute-analogues. Is there a way to explain this evident contradiction?

In coming to grips with Justinian’s position on prostitutes and the law, moderns have too readily availed themselves of Procopius’ characterization of Theodora as a prostitute. Procopius mirrors upper-class opinion in this representation, that is, a perspective shared by him with his audience, who, as seen in the previous section, were disposed to criticize some high-profile women, for example, actresses, by identifying them as prostitutes. But there are two difficulties here. First, it is far from clear that Theodora was indeed a prostitute. Second, even if she was, is it at all likely that Justinian molded his compilation to suit this fact?

It is easy to discount the hostility of Procopius, and in fact the other evidence is no more convincing. The popular conflation of actresses with prostitutes outlined in the previous section may explain the curious statement of John of Ephesus (curious because as a fellow Monophysite he was presumably sympathetic) that Theodora came from the brothel. John, to be sure, may not have been as troubled by this possibility as Theodora’s critic Procopius. For a devout Byzantine, a repentant prostitute was a figure of formidable holiness. This solution is, in my view, to be preferred to the theories that the remark is interpolated or that John was confused by the name of a street, Pornai, which had a theater where Theodora appeared as an actress. To be clear, I do not argue that Theodora was not a prostitute, only that the evidence for this is not as certain as often assumed. Uncritical reliance

161 Procop. Anec. 9.1–28 with Beck (as n. 151) 70–71, 93–96; Leontsini, 23. Moderns have been too quick to credit the direct claims or insinuations of the ancient sources, above all, Procopius, that Theodora was an actual prostitute before marrying Justinian. See Fisher, esp. 287, 305–6. The trend continues: Spruit, 405 calls her “l’ancienne actrice et hétairé.”


163 For skepticism on Procopius’ claims about Theodora, see Cameron 1985, 77.

164 I give in the text the evidence that is direct and contemporary. Cameron 1985, 77 cites the apparent reference in the eighth-century Parastaseis Syntomoi Chronikai to Theodora as an empress “formerly shameless but later chaste”: Parast. 80. This proves nothing in my view about her identity as a prostitute.


167 So J. B. Bury, History of the Later Roman Empire from the Death of Theodosius I to the Death of Justinian (New York 1958) 2:28, n. 5. John’s remark is admittedly obscure and may suggest he accepted Theodora as a brothel-worker, either as an entertainer or in some other capacity. As a brothel-worker, she would qualify as a prostitute-analogue, from a postclassical perspective: see above on Tit. 13.2.

168 See Daube 1967a, 80, 81–84.
on the sources has encouraged extreme speculation, for one thing.\textsuperscript{169} And it is unsettling to reflect that the identification of the empress as a prostitute may have served the interests of both her enemies and her friends.

Let us assume for a moment that Theodora had been a prostitute. What are the implications for the content of her husband’s compilation? It is inconceivable that her status had any measurable impact in this area. True enough, the more restrictive Ulpianic definition of prostitute falls in line with a series of initiatives undertaken by Justinian with regard to the marriage prohibitions that may generally be described as “liberalizing.” Before the compilers finished work on the Digest, Justinian laid it down that the marriage of an ordinary citizen with a freedwoman remained valid even if the former became a senator.\textsuperscript{170} What is important, however, is the limited field of application intended for this liberalization. The principle that members of the senatorial order could not marry freedpersons remained in essence unimpaired.\textsuperscript{171} It could not apply to prostitutes even by analogy, since all \emph{ingenui} were forbidden to marry such women, and free birth was a requirement for membership in the senate.

Repentant actresses had been given leave to marry senatorials through a law promulgated by Justin, evidently at his nephew Justinian’s instigation.\textsuperscript{172} Ex-prostitutes were, to be sure, never granted the forgiveness accorded former actresses in Justin’s constitution, apart perhaps from a very subtle concession designed to meet Theodora’s personal circumstances.\textsuperscript{173} Of course it was the official position, and perhaps a fact, that Theodora was not a woman \textit{qua palam corpore quaestum facit fecerit}. What is more, the return to the classical position in the Digest comes to look less “liberal” in this light. The reinstatement of Ulpian’s definition of prostitute, following in 533, might have served as a silent, subtle exclusion of some women from the ranks of the respectable, insofar as they qualified as the prostitute type forbidden to marry freeborn Roman men. Let us say only that this is a possible effect of the reform, without prejudice to the question of its intent. And “possible” cannot be overstressed, given the evident laxity shown by Justinian himself in implementing the details of his own codification.\textsuperscript{174} We are on very thin ice here.

Controversy, spurred by speculation over Theodora’s status and role, has reigned over the broad issue of Justinian’s position on prostitutes as marriage partners. Spruit\textsuperscript{175} points out that since Nov. 117.6 implicitly accepts Marcian’s definition of \emph{abiecta} it cannot embrace prostitutes. Beaucamp\textsuperscript{176} contests this claim by reference to the scholia to the Basilica, which

\begin{itemize}
  \item \textsuperscript{169} Such as the theory of J. Körbler, “Die Krebserkrankung der byzantinischen Kaiserin Theodora (Ein Beitrag zur Geschichte der Syphilis),” \textit{Janus} 61 (1974) 15–22 that Justinian contracted syphilis from his wife, who later died of this disease.
  \item \textsuperscript{170} Justinianus C. 5.4.28 (a. 531 vel 532): the same rule is given for the woman, married to a freedman, whose father becomes a senator. Justinian is thought to suggest the existence of a classical juristic controversy, which is however doubted by Schindler, 218–19. If the \emph{oratio Marci}, and not the \emph{lex Iulia et Papia}, voided unions that violated the senatorial prohibitions, the theory of a controversy seems plausible. Cf. Paul. D. 23.2.16 pr.; Ulp. D. \textit{eod.} 27; Paul. D. \textit{eod.} 44.6–7.
  \item \textsuperscript{171} This changes with Nov. 78.3 (a. 539).
  \item \textsuperscript{172} Justinus C. 5.4.23 (a. 520–523).
  \item \textsuperscript{173} Daube 1967b, 393, 395, 1967a, 80–82. Liberalizing legislation for marriage with actresses continues with Justinianus C. 1.4.33 (a. 534), C. 5.4.29 (sc. a. 534), and (evidently) Nov. 117.6 (a. 542).
  \item \textsuperscript{174} See N. Van der Wal, “La codification de Justinien et la pratique contemporaine,” \textit{Labeo} 10 (1964) 220–33.
  \item \textsuperscript{175} Spruit, 409 with n. 61, criticizing a view of Max Kaser.
  \item \textsuperscript{176} Beaucamp, 1.209. So also Astolfi, 140, who, however, simply assumes that Nov. 117.6 abolished all existing marriage prohibitions, i.e., including those of Augustus, not just those of Constantine as interpreted by Marcian, as the novel itself specifies.
\end{itemize}
allege that Nov. 117 abolished the ban on marrying prostitutes.\footnote{177 B. 28.4.13.8S, 10S, with Beaucamp, 1.209, n. 59. Despite attribution to “Enantiophanes,” they are evidently both from the hand of the Anonymus, a jurist who lived in the early seventh century: see F. Pringsheim, “Enantiophanes,” \textit{Seminar} 4 (1946) 21–44, at 22, 36; P. E. Pieler, “Rechtsliteratur,” in H. Hunger, ed., \textit{Die hochsprachliche profane Literatur der Byzantiner} (Munich 1978) 2:341–480, at 436.} Beaucamp further argues from Nov. 14 that marriage for prostitutes was a realistic possibility at law (in other words, the Augustan prohibition did not hold for them any longer) and that forced prostitution was the norm—since Justinian ruled that the act of forcing a woman to appear on stage annulled the marriage restrictions for actresses, the same held true for prostitutes.

This conclusion, while possible, is not proven. It is perhaps unnecessary to point out that neither of the statutes Justinian expressly abolishes, that is, those of Constantine and Marcian, mentions prostitutes\footnote{Conceded by Beaucamp, 1.209.} or that it is unpersuasive simply to apply by analogy the rules for actresses to prostitutes. Justinian’s regrets about prostitutes being denied opportunities to marry have the ring of a sociological or moralizing observation rather than an affirmation of the law (according to which they were, at all events, able to marry freedmen since Augustus’ day).\footnote{For that matter, they might marry—provided the parties were prepared to live with the penalties laid down by the law—even nonsenatorial \textit{ingenius}. Only unions contracted with members of the senatorial order in violation of the marriage law were void, and this only from the reign of Marcus Aurelius: Astolfi, 109–14.} Procopius\footnote{Procop. \textit{AneC}. 9.51.} claims that through the law known to us as C. 5.4.23 and his marriage to Theodora, Justinian paved the way for marriage with prostitutes for all men. A palpable exaggeration, and no more worthy of trust than his other assertions concerning Theodora.\footnote{Procop. \textit{AneC}. 9.51.} 

Beaucamp\footnote{Beaucamp, 1.208 with n. 30, 209.} further argues that in the law of the compilation prostitutes were forbidden only to high officials. She cites Procopius’ observation\footnote{Procop. \textit{AneC}. 9.51.} that Justinian could not at first marry Theodora because marriage between a man of senatorial rank and a prostitute was forbidden “from the outset, by the most ancient laws.” This is clearly, I think, a reference to the \textit{lex Iulia et Papia}, as interpreted by the classical jurists. They found senators unable to marry persons forbidden to the \textit{ceteri ingeni}.\footnote{Paul. D. 23.2.44.8; Marcel. \textit{eod}. 49.} These texts show that the category of the \textit{ceteri} existed for the purposes of the compilation. What types were forbidden to it if not prostitutes?

If we exclude the possibility that he had Theodora in mind, two explanations of Justinian’s reception of the classical definition of prostitute are possible. One is that it was grounded in policy, that Justinian had a specific purpose in mind. The general trend of his legislation, as we have seen, was in favor of a relaxation of the marriage prohibitions. Less than six years after the \textit{Digest} was completed, Justinian affirmed the desuetude of Constantine’s marriage law of 336, and three years later explicitly abolished this statute, as it had been interpreted by Marcian.\footnote{Nov. 89.15 (a. 539); Nov. 117.6 (a. 542); see also Nov. 78.4 (a. 539). Cf. E. Nardi, “Norme sulla carta,” \textit{Archivio giuridico} 187 (1974) 33–45, at 37–41, who argues that by Justinian’s day that aspect of the law dealing with the succession rights of such children was no longer observed.} This did, of course, eliminate the central contradiction under study, in a sense by cutting the Gordian knot. But it is difficult to draw any useful conclusions from this move.


\footnotetext[178]{Conceded by Beaucamp, 1.209.}

\footnotetext[179]{For that matter, they might marry—provided the parties were prepared to live with the penalties laid down by the law—even nonsenatorial \textit{ingenius}. Only unions contracted with members of the senatorial order in violation of the marriage law were void, and this only from the reign of Marcus Aurelius: Astolfi, 109–14.}

\footnotetext[180]{Procop. \textit{AneC}. 9.51.}
For one thing, without treating the elements of the *Corpus Iuris* in utter isolation from each other, it is inadvisable to read the law of the Novels back into the earlier sections of the *Corpus Iuris*. In this case, the restatement of the classical regime in the *Digest* finds its counterpoint in the assumption of Constantine’s edict into the *Codex* of Justinian.

It may be asked whether an alternative, Justinian’s classicism, gives a more plausible explanation for the restoration of the juristic definition than any specific motive of policy. It is by now well recognized that this emperor’s conservative bent informs the entire *Digest*, to such an extent that many legal anachronisms are preserved therein. A striking example of this tendency is found in the same *Digest* title that harbors Ulpian’s definition of a prostitute. The compilers retained the classical rule that even ex-actresses were forbidden to marry senators and their kin. They did this in spite of the fact that, as noted above, about a decade before Tribonian and his team set to work, Justin, Justinian’s uncle and imperial predecessor, ordained, evidently at his nephew’s prompting, that repentant ex-actresses (and their daughters) were exempted from the prohibition.

This constitution was taken up into the *Codex*, with not a hint of the contrast with the rule contained in the *Digest*. Our understanding of the relationship of these rules to each other, as well as to contemporary practice, is hampered by the lack of relevant excerpts from sixth- and seventh-century commentaries, as preserved in the scholia to the *Basilica*. A glimpse of how contradictions over the status of women at law might have been resolved is perhaps afforded by Thalelaeus, a jurist contemporary with Justinian, when he interprets extensively the import of Constantine’s exemption of the barmaid from the penalties of the adultery law. The obvious conclusion is that the search for a single, specific explanation for the restoration of the classical solution is almost bound to be arbitrary, if not tendentious.

We return to a central problem of Justinian’s compilation. An easy way out of the dilemma is to invoke the widely credited suggestion that the *Digest* played no significant role in contemporary practice or that it was intended primarily as a textbook in the service of legal education. But whatever view one takes of Justinian’s purpose or the actual role of the

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186 Bonini (as n. 90) v-viii; Astolfi, 138. On the relationship of the different parts of the *Corpus Iuris* to each other, especially the Novels to the rest, see Schindler, 344; Archi 1970, 124 (cf. 140, 204, 208, 220). Archi makes a strong case for the coherency of the entire *Corpus Iuris*, a coherency that does not of course guarantee that the content of the Novels can be securely used to explain the substantive law, in particular detail, of the *Institutiones*, *Digesta*, *Codex*: see also Archi 1988a, 74–77, id., “Il potere normativo imperiale nella Costantinopolis di Giustiniano,” *Sub sectiva Groningana: Studies in Roman and Byzantine Law* 4 (Groningen 1990) 9–25; Beaucamp, 1.114, n. 50, 127, 143, 159, 192, n. 47.

187 On Justinian’s classicism, see Schindler; Archi 1970.

188 So Daube 1967b, 386–87; Spruit, 410–13 (who goes further and sees Theodora herself at work); Honoré (as n. 165) 10 on Iustinus C. 5.4.23 (a. 520–523).

189 The rules for the daughters are too complex to discuss here.

189 Evidently suppressed because Nov. 117.6 (a. 542) repealed Constantine’s law on marriage prohibitions: Beaucamp, 1.286, 287, n. 53, 290, 295 (with 291), cf. 208.

190 In CTh. 9.7.1 (= [in modified form] C. 9.9.28[29]). See B. 60.37.66.18: for Thalelaeus, the serving woman in the tavern is only an example, “since the same rule applies for any kind of shop.”


Digest in the law system of his reign, it is unnecessary and quite beside the point to attempt to neutralize our problem in this way. The contradiction still stands.

Justinian was a master in the art of invoking tradition as a means to legitimize reform. An important political aim behind the compilation was to restore in part the grandeur of the imperial past, just as, for example, the military was deployed to reconquer lost territory. It is, after all, easier to supply motives for the entire Corpus Iuris than to attempt this on the level of particular rules. The emperor had the task or rather the prerogative of sorting out contingent conflicts between discordant elements, as well as of resolving the tension between solutions successfully adopted in the past and the changing needs of the future. So the Digest rule might be revived, and placed alongside its postclassical revisions, only to be reconciled with the rest and tempered by the reigning emperor’s sense of justice.

Some may find this a bit too optimistic, at least for the areas of the law concerning the definition of prostitute. The long record of lawfinding on this subject, examined above, did not bode well for a solution at this stage. Justinian’s restatement of the classical rule found in the Digest suggests in fact that an absolutely satisfactory solution to the dilemma of defining “prostitute” at law was impossible, even where only a single area of the law was in play. The attempts forged by his predecessors are likewise revealed to be failures. Each represents a choice wherein some social goals are accorded preference over other, equally desirable ones. These revolved around the central issues of social status and sexual honor. Assumptions about the chastity of lower-class women clashed with notions of personal moral responsibility and broad considerations of equity.

The jurists had adopted a particularistic line of approach, designing a definition for very specific ends and eschewing anything like a universal legal category of “prostitute.” This helps explain their extreme emphasis on the element of promiscuity. Their task was to accommodate legal principles to the perceived realities of human behavior.

Although thoroughly permeated with moral concerns, the juristic version proved unsatisfactory to the postclassical legislator, who desired a more accurate, more realistic rendering of social prejudice, upper-class prejudice, at all events. The result was a creature sufficiently ill-defined (though it was limited in its field of application to the very same areas of the law, marriage and adultery) as to be vague and unwieldy—undesirable traits in any legal definition.

There was also, as I have suggested, a delicate moral question at stake. Poverty was at all times an effective social bar to marriage with the higher orders, a convention stronger than any law. This fact illuminates the harshness of the postclassical regime, a quality that was considerably aggravated through application to a society governed by notions of sexual shame. Justinian’s return to the greater precision and authority of the classic promised no better.

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195 See Archi 1970; Gaudemet, 321.

196 For a brief summary of different ways of understanding the diverse material found in the compilation, see Archi 1988a, 75.

197 See Archi 1988a, 76-77; id. (as n. 186), esp. 9-10, 19, 22-23.

198 The jurists’ comments on the phrase for prostitute in the lex Iulia et Papia, which form the substance of the classical legal definition of prostitute, left Justinian plenty of leeway: see the introduction to this article.
Instead, it may be taken as a final sign of the ancient inability to resolve the tension inherent in the social and sexual status of many Roman women.

10. The Social Context

The attitudes that lay behind the late antique changes in the law, reflected most strikingly perhaps in the *Pauli Sententiae* with its assimilation to prostitutes of female tavern-workers and vendors for the purposes of the adultery law, may be illuminated with reference to epigraphical and sculptural representations that commemorate, indeed celebrate, Roman working women and their professions. The fact that most, if not all, of the evidence dates to a period before the fourth century might lead one to conjecture that the new line of policy reflects an across-the-board change in popular attitudes over time. But the disruptive consequences of third-century upheavals on social and economic life provide a satisfactory explanation for the lack of late antique material evidence and so encourage the search for an alternative rationale for the creation of a new legal conception of prostitute in the postclassical period.

A more convincing explanation for the change may be sought in class-specific notions of gender and social status. Women depicted on monuments commissioned by socially prominent Romans and those—such as wealthy merchants—whose material success encouraged them to adopt an upper-class outlook are as a rule not shown directly engaged in a business occupation. In this milieu, women of the same status as the male patron (they are typically members of the family) are depicted as idle, even though it is well known that such women frequently ran businesses themselves. Lower-status women on these monuments are shown performing a service for their patron(s): even here the presentation is often idealized.

Direct, that is, nonidealized, depictions of women engaged in everyday labor are associated with only a small segment of the population, one composed of persons prosperous enough to commission the work but of sufficiently low status to remain unaffected by the upper-class ideology that held the notion of women’s work in low esteem. The core profession represented is that of vendors of various merchandise (one finds examples of poultry, vegetables, shoes, and drinks in a tavern). The pride taken in such professions by women and their male relatives is also demonstrated by inscriptive evidence. The following is deeply influenced by the work of Kampen 1981 and 1982.

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201 See Kampen 1981, 44, 88, 132.

202 See *ibid.*, 81 on the stylistic tradition; *ibid.*, 85 and Kampen 1982, 75 on the status of these patrons; cf. *ibid.*, 72 on the much fuller variety of men’s occupations depicted on reliefs. For more extensive treatment of the epigraphical evidence, see now Joshel, esp. 111, 141–42.

203 See Kampen 1981, 49–69, 103–4. The last example is uncertain.

204 For example, CIL 14.3709 (= *ILS* 7477), a monument to a *popinaria* from Tibur, on which Kampen 1981, 110. See also the evidence given *ibid.*, 115, n. 38, 129, Kampen 1982, 66 and, further, at S. Treggiari, “Lower-Class Women and the Roman Economy,” *Florilegium* 1 (1979) 65–86, esp. 73–75; Joshel. There were limits even on this level, however, if we can trust what remains to provide an accurate reflection of true attitudes: no funerary monuments survive explicitly dedicated to prostitutes and only one to a *lena* (CIL 9.2029, from Beneventum).
As expected, the sentiments of writers of the classical period are in tune with the values of high-status patrons and their imitators and could not be more removed from those expressed by vendors. For these authors, the low social rank of such women was further compromised by the routine imputation of unchastity. An unbridgeable divide stood between a Cicero, Seneca, or Gellius and the women represented on reliefs and in inscriptions. It is tempting to dismiss the views of these upper-class males as sheer prejudice and therefore of relatively little value for our understanding of Roman social reality, but the evidence of graffiti and more reliable literary evidence suggest that this reality was indeed complex, more complex than even the "subjective" evidence shows by itself. In other words, a number of such women were almost certainly involved directly or indirectly with the practice of prostitution.

Even so, the categorical assumption at the heart of the new rule introduced in the Pauli Sententiae marks this as a fairly unambiguous manifestation of upper-class prejudice. This is confirmed by the linkage of the other female vendors with tabernariae, who typically ranked beneath them and were more obviously associated with the practice of prostitution. This linkage may be explained by the fact that the female vendors behaved in a manner precisely like that of their male counterparts in the context of an occupation that required routine contact with the general public and was unambiguously associated with money-earning. All three characteristics made these women liable to be assimilated to prostitutes in the minds of upper-class male policy makers.

A final observation may be made about the phrasing of the rule in the PS, which simply describes what a professional does, eschewing a summary tag like negotiatrix or caupon. This precision may have been partly intended to distinguish respectable women who have invested in a given industry or trade or who own but do not operate a tavern from the types given in the passage.


208 Kampen 1981, 113.

209 There is, for example, the anecdote about the old woman selling vegetables who turns out to be a lena at Petron. 6–7 (one may contrast with this incident Ascytus' experience [8]: he was led to the same brothel by a pater familiae interested in sex with him). The Greeks knew a similar prejudice. Aristophanes' insinuations against Euripides' mother as a greengrocer are picked up by his biographers: J. Fairweather, "Fiction in the Biographies of Ancient Writers," Ancient Society 5 (1974) 231–73, at 245. Note also the defensiveness over the charge that the speaker's mother was a vendor at Dem. Eub. 34–36.

210 That is, in terms of social status: Kampen 1981, 129; 1982, 75.

211 See Magoulas (as n. 149) 242; Kampen 1981, 47; Leontsini, 133–37 (Justinius forbade monks from visiting kapēleia: Nov. 133.6 [a. 539]); Kazhdan (as n. 151) 136; Evans, 133–36 with n. 136 (a caution about similar assumptions on the part of modern scholars).

212 On women working with men, usually family members, see Evans, 120–21, 124, 153, n. 67.

213 Kampen 1982, 75: "Both men and women worked as vendors, performing the same actions, using the same gestures, selling the same goods to the same people in the same setting. . . . Perhaps most important, however, is the fact that this was a public occupation which could not be mistaken for anything other than money-earning. It represented one of the very few instances when men and women were seen doing exactly the same work in circumstances that were undeniably the same—public and economically motivated. These conditions of work must, I believe, have caused the public to perceive male and female vendors as more similar than men and women in other jobs." As one might expect, the consequences for male vendors, in terms of social prejudice and disabilities at law, were not nearly so severe as for women, to judge from Call. D. 50.2.12.

214 On this word's range of meaning, see Evans, 154, n. 74, with literature.

215 In an interesting parallel with the domina cauponae of Constantine's edict, these women were free from censure, which means they were not ranked as sexually "expendable" along with tabernariae et al.: see Kampen 1981, 114.
The phenomenon under study can be explained as a reflection of the enormous gulf between upper and lower orders that seems characteristic especially of late antique society. This gap receives increased recognition at law: during the late classical period in the field of criminal law, a range of distinctions based on social status had already begun to mature. The effects of this development are seen chiefly in the areas of procedure and penalty, but it was inevitably felt also in such areas as the legal rules on marriage and sexual honor.

A development of equal or greater importance was the leveling of status distinctions among the lower orders from the third century on. One aspect of this was the decline of slavery; what is more, the social and legal distinctions between the slave and free poor were eroded. A chief cause was crushing poverty, and the consequence was a more homogeneous lower stratum of society.

Now a broad section of lower-class women were consigned wholesale to the ranks of the disgraced. The new rules fall into place alongside other late antique enactments that took a normative interest in (and one might say an extremely pessimistic view of) nonurban, nonelite morals and manners across the empire. The solutions to these problems grasped by Constantine and his successors were far from arbitrary. This emperor’s edict on suitable marriage partners can be regarded as perhaps overdue in its extension of the outdated senatorial category. The expansion of the category of forbidden women was hardly a radical step either. Instead, it seems to correspond to long-standing social practice. As for exemptions from the adultery law, a text of the Severan jurist Marci suggests that it was possible to take a low-status free woman as a concubine without fear of liability for stuprum. This opinion was not settled law, but it may reflect what some courts in that era were willing to accept.

Before the advent of the Augustan legislation, there was no motive for the elaboration of a legal definition of female prostitute. Broad upper-class prejudices about the sexual promiscuity of lower-status women were not balanced by any need for precision about an individual’s character or personal experience.

An illustration of this tendency can be seen in the division in cult between mulieres bonestiores and humiliores, where on the common view the former were admitted to the worship of Venus Verticordia, while the latter were relegated to that of Fortuna Virilis.
Prostitutes undoubtedly ranked among the latter in this instance, without, however, exhausting the category. In the ordinance of the cult of Juno Lucina attributed by Gellius and Festus to Numa Pompilius, the *paelex* was excluded. Paelex, often employed as a euphemism for prostitute, has a broader sense here. It refers to a low-status woman, in contrast to the socially respectable *mater familias* or *matrona*, specifically as an alternative sexual partner, and therefore rival, to the *matrona*. In both cases, nonrespectable women were lumped together and set apart from the rest. Before Augustus, the traditional contrast drawn between *meretrix* and *mater familias*/*matrona* has the flavor of an abstract moral paradigm.

In reality, sexual honor was inextricably linked with social class and lifestyle.

The Augustan marriage and adultery laws gave a stark, schematic clarity to the status categories laid down for Roman women and at the same time introduced a certain degree of liberalization. An example is seen in the explicit encouragement of marriage with freedmen granted nonsenatorial freeborn citizens. The statutes were written chiefly for the Roman upper classes; the legislative text did not directly address the moral condition of lower-class persons. In this way it exercised a kind of benign neglect, which presented those outside the elite with the opportunity to practice virtue when it suited them and to ignore the law otherwise.

1993, 321–35. The quality of the evidence has encouraged speculation. Kraemer, 60–61 makes the interesting suggestion that Ovid’s conflation of the cults of Venus Verticordia and Fortuna Virilis was intended to elide the distinction between respectable and nonrespectable women. Boëls-Janssen 1993, 324 argues that both groups of women worshiped the same deity, Fortuna Virilis: the difference in ritual for the two can in her view be traced back to the time of Servius Tullius. Staples (n. 107) 103–13 holds that both groups worshiped Venus Verticordia.

225 So Gagé, 14, 43, 46; Humbert, 51. Ovid’s reference to women without *vittae* or *stola* at Fasti 4.134 is a more direct reference to women without *paelex*. Cf. Ioh. Lydus, *Mens.* 4.65: *baid tou plēthous gynaikes.* Boëls-Janssen 1993, 334–35 assumes that *humiliores* in this context refers to sexually promiscuous women, in particular prostitutes. S. B. Pomeroy, *Goddesses, Whores, Wives, and Slaves: Women in Classical Antiquity* (New York 1975) and Kraemer, 57–58 assert “courtesans and prostitutes” to have exhausted the category of *humiliores*. It has, at minimum, a social as well as a sexual component: see the discussion of this term in Section 3 above.


227 Adams, 355. So Gagé, 6 argues for this meaning here, which is too narrow. Better, but still inexact, is Humbert, 53: “des concubines ou des femmes illégitimes.”

228 I take a different tack from that of Adams, 355, who, building on the *Oxford Latin Dictionary* definition, “a mistress installed as a rival or in addition to a wife,” argues that “paelex in origin had a highly specialized sense.” See also A. Biscardi, “Mariage d’amour et sans amour en Grèce, à Rome, et dans les évangiles,” in *Éros et droit en Grèce classique* (Paris 1988) 3–11, at 7. I agree with Adams that, at a much later date, no distinction seems to have been made between *paelex* and *meretrix*.

229 Another example drawn from cult is the festival of the *Nonae Capratinae*, where a contrast was drawn between respectable (*matronae* or *matres familias*, *virgines*) and nonrespectable women (here, *ancilae*, *familiae*), a contrast that operated on both the level of the etiology of the cult and that of ritual, where the first group were denied their badge of the *stola*, which was permitted in turn to the nonrespectable. See, for example, Macrobi. 1.11.35–40; Auson. *Fer. Rom.* 9–10. More evidence and discussion in J. N. Bremmer, “Myth and Ritual in Ancient Rome: The Nonae Capratinae,” in J. N. Bremmer and N. M. Horsfall, *Roman Myth and Mythology* (London 1987) 76–88; Boëls-Janssen 1993, chap. 8.


231 See the comments of Adams, 352, n. 87 and the evidence he cites; also, the discussion of *PS* 2.26.11 above (in Section 6).

232 Such unions were not outlawed before Augustus, though they were socially disparaged. See, for example, Treggiari 1991, 64.
Of course, upper-class assumptions about the state of lower-class morality remained at all times bleak.\(^{233}\) Roman society was hardly unique in this regard.\(^{234}\) Beyond the bedrock of legislative text and a thin strand of juristic commentary subsisted an ocean of prejudice. An example is found in the elder Seneca’s second *controversia*, which turns on a rather improbable question: was a woman captured by pirates and sold to a pimp for installation in a brothel eligible for a priesthood? One of her opponents, in a phrase that might have been written by the postclassical editor of the *Tituli ex corpore Ulpiani*, observes that “one doesn’t purchase *maidservants* for a priestess from the brothels.”\(^{235}\) These words are found in the context of an argument that assumes that any woman associated even incidentally with a venue where prostitution flourished could be characterized as a prostitute. To be sure, the theme concerns qualification for a position that demanded a high standard of sexual purity, but the argument taken both as a whole and in its detail suggests that a number of women not prostitutes were considered to be, for some purposes, equivalent to prostitutes.

For an even more direct connection with the legal sources examined above, we can turn to the third-century Menander Rhetor. He observes that in some hellenized cities there was a feeling that “women should not engage in buying and selling or anything else that belongs in the agora.”\(^{236}\) This is a statement of upper-class prejudice, of course, and probably an accurate reflection of attitudes widespread on the local level, given the author’s experience as a traveler.\(^{237}\) The status of Apuleius’ Meroe\(^{238}\) and that of the heroine of the pseudo-Virgilian *Copa* guarantee the point.

Where did these attitudes, now enshrined in postclassical law, originate? This evidence suggests that it is not necessary to posit lower-class or regional influences on the development of the postclassical legal definition of prostitute.\(^{239}\) No significant geographical differences have emerged: lower-class attitudes point, if anywhere, in a direction that is more tolerant than what the legal texts evince.\(^{240}\) The question of Christian influence is an even more

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\(^{233}\) A striking exception occurs in Eunapius, who uses a vegetable seller to demonstrate the excellent condescension of one of his heroes: *Vit. Soph.* 482. Cf. the barmaid in a classy tavern who doubles as a midwife (463). For the overall point, see Beaucamp, 2.344–45 (perhaps overgeneralized: cf. 368–69).


\(^{235}\) Sen. *Contr.* 1.2.7 (cf. 3): *ancillae ex lupanaribus sacerdoti non emuntur.*


\(^{237}\) So MacMullen (as n. 207) 144, whose translation I have adapted (cf. D. A. Russell and N. G. Wilson, *Menander Rhetor* [Oxford 1981] 67: “in other (sc. cities) it is thought wrong . . . for a woman to keep a shop or do any other market business”). The emphasis on the (female) gender of the retailers in these sources is perhaps remarkable in light of the lack of any trace of this in Cicero’s famous criticism of sellers of merchandise at *Off.* 1.150, which focuses exclusively on social ranks.

\(^{238}\) Apul. *Met.* 1.7.

\(^{239}\) A. Arjava, “Divorce in Later Roman Law,” *Arctos* 22 (1988) 5–21, esp. 16–18 discusses the role of such influences on late antique divorce law. For a more general application to the social legislation of Constantine, see Evans Grubbs 1995, 321–42.

\(^{240}\) Cf. the result obtained by R. MacMullen, “Women in Public in the Roman Empire,” rpt. in *Changes in the Roman Empire* (as n. 207) 162–68, at 168, who concludes, apropos of women’s public deportment, that status differences rather than geography explain a conflict in
obvious red herring.\textsuperscript{241} We can only guess at the ways in which these attitudes regulated behavior by informal and customary means, whose influence should not, at all events, be underestimated.\textsuperscript{242}

11. Conclusion: Analogues and Definitions

The discussion has identified the following female types given by late antique legislation as analogues for prostitutes: the woman who worked in a tavern, the woman who sold merchandise to the general public, the daughters of pimps, the daughters of tavern-workers,\textsuperscript{243} as well as the woman manumitted by a pimp or procuress.\textsuperscript{244} I have attempted to show how in each case upper-class assumptions about such women's lack of sexual honor encouraged their assimilation to prostitutes. On a more general level, it is clear that all but one of them are closely associated with the milieu of prostitution, in the sense that they lived and/or worked in brothels or in taverns, which were commonly venues of prostitution. The exception is the woman selling merchandise to the general public, who, as we saw in the previous section on elite attitudes, is sometimes identified as a prostitute, at others simply assumed to be promiscuous—in other words, a partial exception at best. The \textit{humilis vel abiecta} type listed among Constantine's marriage prohibitions, though its precise nature remains unclear, is perhaps better regarded as a socioeconomic category construed in moral terms, rather than a legal one, even though, alas, it appears in a law.

The interest of Emperor Constantine in constructing prostitute-analogues cannot be denied, whatever view one takes of the origins of those texts resistant to certain dating. The idea that he might have been legislating a Christian morality emerges as unlikely and even unnecessary as an explanation, given the deep roots of the phenomenon in pre-Christian Roman social prejudice. This result is consistent with the conclusions reached by important recent work on Constantine's social legislation, as seen above, and raises the interesting question of why Constantine failed to take up the challenge of enacting Christian teaching into law, above all when such an opportunity presented itself on more than one occasion.

No definitive answer to this question can be sought here, if one is indeed possible, and yet some of the elements it might contain seem obvious enough. Constantine may have been distracted by other problems more directly concerned with keeping Roman society and the empire from falling apart. Christianizing the content of its laws on this estimate seemed an unaffordable luxury. He may have been unwilling to settle the issue of whose morality was to be legislated. Christianity was at no time the doctrinal monolith it is often supposed to be, and many issues of social morality were (and are) still being worked out.

In times of great change, the fusion of church and state does not always have a guaranteed evidence: only it is the lower orders of society who display the more conservative usage.

\textsuperscript{241} Evans Grubbs 1995, 317–21 has an important caution against assuming the influence of Christian doctrine on the social legislation of Constantine.


\textsuperscript{243} All of the types that precede are found in Constantinus CTh. 4.6.3 (a. 336); the tavern-worker and the woman selling merchandise to the general public reappears in \textit{PS} 2.26.11. Constantinus CTh. 9.7.1 (a. 326) distinguishes between the mistress of the tavern and the serving-girl or barmaid, a distinction that disappears in \textit{PS} 2.26.11.

\textsuperscript{244} \textit{Tit.} 13.2.
appeal, for various reasons. It has been observed that whereas the framers of the U.S. constitution kept the two separate to safeguard religion from the tyranny of the state, the concern in postrevolutionary France was to protect the state from the tyranny of religion. 245 Deep moral conviction does not always carry with it the impulse to make law. One can regard abortion, for example, as a great moral and social evil, and yet refuse to see it outlawed, either out of a concern that greater wrongs will result or a recognition that a strong countervailing principle is in play, such as the rights of women or the notion that personal liberty should be left as free as possible from the interference of official regulation and that some issues are better left to the counsels of moral suasion than the enforcement of the criminal law.

When morality and law combine, the stakes can be very high. The question is, of course, not whether morality influences law, 246 but whether this influence is in every instance inevitable or free from difficulties. Too great an overlap between these two spheres may compromise the interpretation of law or corrupt criticism of it. Refusal or inability to recognize this fact, as when legal validity is understood as an automatic and exhaustive guarantee of justice, means that law and morals can exert a corrosive force on one another. 247 Separation of the two can be viewed as necessary, because it meets the demands of rationality, fairness, and a higher justice, though it still occasion disquiet.

The remarkable fact about Constantine then is not that he failed to translate Christian morality into law, whatever his motives for this omission might have been, but that this occurred in light of his evident readiness to legislate morality of a different order. It is precisely this trait, this inclination to ratify moral values through law, that he shares with his Christianizing successors, including Marcian and, ultimately, Justinian. The concrete effects can vary, as for example when the marriage law of 336 saw one of its elements interpreted away and was in the end canceled in its entirety. But the readiness to have the law reflect directly and without equivocation a set of moral beliefs is an important trend in late antique lawfinding, one that might, with caution, be thought useful in setting it apart from earlier periods. Whatever their ultimate fate, the prostitute-analogues enjoyed a long vogue at law.

The legal professionals of the classical period struck a different balance, maintaining some greater distance between moral values and law, though they too were far from deaf to the claims of social morality, articulated above all in the sense of the needs and prejudices of the elite. On an official level, the Romans took little interest in prostitutes, except insofar as they served as approved sexual outlets or threatened to breach the upper ranks of society through a marriage connection. These were areas of social life that positively invited legislative intervention, it being important to determine with precision which women were available for casual sex and were accordingly denied, as potential partners in respectable unions, to men of status.

Not surprisingly, the need for a legal definition of prostitute became especially acute with the appearance of the Augustan legislation on marriage and morals. From this legislation the jurists derived a legal definition of prostitute and procuress. As we have seen, the

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indispensable element in the classical definition developed in light of the Augustan marriage law was promiscuity. Because there existed no compelling reason to develop a universal legal definition of prostitute, in the classical law “prostitute” was defined extensively solely with reference to the laws on marriage and adultery.\textsuperscript{248}

In a similar way, and for the same reasons, prostitute-analogues in late antiquity were developed only in these areas of the law. They have no independent significance; in fact, the ad hoc quality of these types shows up in their evident inconcinnity with each other. Because the daughter of a tavern-worker is implicitly forbidden to marry members of the Constantinian political elite, this does not necessarily mean she can commit adultery with impunity. The contrast between Constantine’s law on liability for adultery, with its nice distinction between management and service personnel in taverns, and his edict containing what are effectively marriage prohibitions, which simply lists \textit{tabernaria}, is an illustration of this point. My attempt to reconcile the two in terms of a chronological development by reference to the text of the \textit{Pauli Sententiae} can remain only an hypothesis, and, even if true, does not really eliminate the contradiction.

Why did the classical legal authorities approach this problem through an expansive definition of prostitute, while late antiquity developed a series of analogues? The first point to make is that the contrast is not as absolute as it might seem. The earlier period knew its own prostitute-analogues. Chief among these was the adulteress, whom the Augustan law on adultery cast as a prostitute, mainly through imposition of the toga as a mode of dress, the Roman scarlet letter.\textsuperscript{249} The jurists took up the implications of this identification by exempting the partner in concubinage of the convicted adulteress from the penalties laid down for \textit{adulterium stuprum}.\textsuperscript{250} The adultery law itself punished the man who married such a woman as a criminal pimp (\textit{lena}).\textsuperscript{251} In a similar vein, the Augustan marriage law placed the woman convicted of adultery or caught in the act among its prohibitions for nonsenatorial \textit{ingenui}. Indeed, the only other female type ranked in this category, apart from the prostitute herself, is the procuress, who may fairly be regarded as another analogue—she too was exempt from the penalties of the adultery law.\textsuperscript{252}

What linked prostitute, \textit{lena}, and adulteress together is a direct or indirect association with sexual promiscuity. The same holds for the postclassical types. What the law does in both cases is to fasten on sexual promiscuity as the essential component of the definition of prostitute and expand this definition through synecdoche, evaluating the other categories of women in the light of long-standing elite male prejudice. The two other criteria of the sociological definition of prostitute—payment for sex and lack of affection between the partners—are nowhere in evidence.\textsuperscript{253} Promiscuity stands alone, with this difference: under the classical regime a woman had to be shown to be promiscuous to qualify as a prostitute, while after Constantine certain women were assumed to be promiscuous and therefore notionally

\textsuperscript{248} We do not possess an independent juristic definition of prostitute for the Augustan law on adultery, though I believe Dioclet., Maxim. C. 9.9.22 (a. 290) betrays evidence of one. Ulpian, in his definition of prostitute for the marriage law, does account for the adultery statute: Ulp. D. 23.2.43 pr.–5.

\textsuperscript{249} McGinn 1998, 156–71.

\textsuperscript{250} Ulp. D. 25.7.1.2, with McGinn (as n. 222) 343, 351.

\textsuperscript{251} McGinn 1998, 171–94.

\textsuperscript{252} On the marriage prohibitions, see \textit{ibid.}, 91–102; on the exemptions under the adultery law, see \textit{ibid.}, 194–202.

\textsuperscript{253} The “sociological definition” of prostitution has three elements, including promiscuity, payment, and the absence of an emotional tie between the parties: Davis (as n. 6); see the introductory section to this article.
prostitutes. This assumption, as we have seen, was in turn grounded in perceptions of the women's social class and lifestyle on the part of male members of the elite.

Once more, it is important to emphasize the particularism of policy at work, involving only limited areas of the law: adultery and marriage. In late antiquity, absent the expertise of the classical jurists to produce an adequate synthesis, this approach bordered on incoherence. This is softened to an extent by the association of all of the postclassical types with the milieu of prostitution, which does not, to be sure, hold for the classical type of the adulteress. All the same, there is no question that late antiquity witnesses an expansion of the legal definition, albeit one founded on a shaky conceptual basis. One might better speak of legal definitions, to avoid implying the existence of a single, unitary concept that operated for the law as a whole. For that matter, the conception of prostitute in both periods, with its reliance on the element of promiscuity at the expense of other factors, scarcely qualifies as a legal definition at all. Instead, it may be viewed simply as a moral definition that comes to be enshrined in law.

By definition, the prostitute was a woman without sexual honor. In grouping other women without this honor into the same categories of law, the postclassical legal authorities expanded the category of women assimilated to prostitutes and by implication broadened the legal definition of the same. All of the new types prohibited under the marriage law or exempted under the adultery law had one important thing in common with prostitutes: they were assumed to be sexually promiscuous. This is the fulcrum on which the postclassical analogy turns. Now, more emphatically than before, the law recognizes no distinction between "prostitute" and "whore."

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