

CONCUBINAGE AND THE *LEX IULIA* ON ADULTERY¹

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The social and legal status of Roman concubinage has long been a subject of debate.² In this paper, I hope to clarify some aspects of this institution through an examination of the legal texts. The line of approach is an inquiry into the notion of how liability for sexual offenses was constructed by the adultery law of Augustus,³ undertaken through an exploration of the ways in which the statutory regime was applied, and not applied, to persons who were not legally married, but who were united in a respectable and recognized relationship.

Much of what follows is devoted to the status of concubinage as a legal institution. But the dualistic frame of analysis traditionally maintained in the scholarship, which attempts to define concubinage as either social or legal in

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² For bibliography, see the notes below and the appendix at the end of the article. I depend most of all on the work of Rawson and Treggiari. B. Rawson, *TAPA* 104 (1974) 279–305 finds a heavy concentration of partners of freed or slave status and concludes that objective impediments, especially involving status, were often a bar to marriage and so encouraged concubinage as a substitute. I differ from her in that I believe with most scholars that an act of the will rather than cohabitation (Rawson, 279) created and maintained the marriage bond and that the marriage prohibitions of the *lex Iulia et Papia* did not preclude, but only penalized, unions that violated the law. S. Treggiari, *PBSR* 49 (1981) 59–81 examines the relative status of partners within this type of relationship and takes Rawson's conclusions one step further, showing that the men were generally of higher status than the women (59). Her review of the legal sources suggests that Augustus did not exclude *ingenuae* as possible concubines, and that among the poor, where the incentives of the marriage law were not as keenly felt, "concubinage may have seemed a normal alternative to marriage"; moreover, society in general approved concubinage where the male partner was of significantly higher status. As for the relationship of this institution to the adultery law, she concludes "although concubinage with a freeborn woman probably did not constitute *stuprum*, there was probably some feeling that a freeborn woman should become a wife, if the man was of comparable social status, so that they could produce second-generation freeborn children."

³ The law referred to the woman potentially liable to its penalties as *mater familias*, whether she was married or not: Paul. D. 48.2.3.3; Pap. D. 48.5.9(8) pr.; *Idem* D. eod. 11(10) pr. On *mater familias*, see W. Kunkel, *RE* 28 (1930) s.h.v. 2183–84; W. Wolodkiewicz, *Studi Sanfilippo* 3 (Milan 1983) 733–56. Still essential on the adultery law are A. Esmein, *Mélanges d'histoire du droit* (Paris 1886) 71–169 and T. Mommsen, *Römisches Strafrecht* (Leipzig 1899) 688–701. For more of the vast literature on this subject, see the notes below.

nature, must be viewed with skepticism. To inquire whether concubinage enjoyed *full* juridical status overlooks the fact that marriage itself was largely an institution of fact, not law. Kaser's description is apt: "Nach wie vor (i.e. the beginning of the classical period) ist die Ehe ihrem Wesen nach primär kein Rechtsverhältnis, sondern ein faktisches Verhältnis des sozialen Lebens, 'verwirklichte Lebensgemeinschaft'."⁴

Even while positive law governed aspects of marriage and concubinage, these institutions were largely self-regulating.⁵ Social convention was a broader and stronger influence than statute law, or even juristic law. Many details, such as the marriage ceremony, were relegated entirely to the social sphere. Evidently, widely-held, uncontroversial social norms were often transformed into law in straightforward fashion, as with the requirements for age and degree of relationship.⁶

There were occasions when the legal authorities assumed the responsibility of defining what was socially acceptable, not an easy task where convention clashed with positive law. Emperors and jurists were compelled to choose between competing standards of behavior, which ultimately depended on conflicting policies over such issues as sexual honor, suitable partners, the relative worth of different types of relationship, and the transmission of status from one generation to the next.

With concubinage, as with marriage, ethical norms were transformed into positive rules, but the process was less predictable and more problematic. This point is easily derived from the writings of the jurists, where a steady reference to the bedrock of policy on which the rules rested can be observed. One cannot speak directly of "choosing" a convention, but in this area choices aimed at the regulation of convention had to be made. The elaboration of a legal regime for concubinage, like that for marriage, is the more readily distinguished from its societal context by the result of such hard choices. Ethical rules, as legal principles, have a different content and a different application than purely social norms.⁷ Most important, neither marriage nor concubinage was a creature born exclusively of the social or the legal sphere.

Kaser's description, then, holds true for concubinage, at least the serious, stable type of relationship that the jurists take in hand.⁸ As with marriage, they

⁴ M. Kaser, *Das römische Privatrecht* 1² (Munich 1971) 310 (hereafter Kaser, *RP* 1²). Contrast J. G. Fuchs, *Fs. Gerwig* (Basel 1960) 31–54 (at 35), who describes marriage as utterly removed from the legal sphere, being governed entirely by the *mos maiorum*. See also R. Villers, *ANRW* 2.14 (Berlin 1982) 285–301.

⁵ This point is obvious for concubinage; for marriage, see M. T. Raepsaet-Charlier, *L'Egalité* 8 (Brussels 1982) 452–77, esp. 462–65.

⁶ For these, see P. E. Corbett, *The Roman Law of Marriage* (Oxford 1930) 47–51.

⁷ A good illustration is found in the legal conception of *boni mores*: see T. Mayer-Maly, *Fg. Kaser* (Vienna 1986) 151–67.

⁸ Thus marriage and concubinage were supposed to be mutually exclusive: Ulp. D. 24.2.11.2; *PS* 2.20.1; cf. Pap. D. 45.1.121.1; Constantinus C. 5.26.1 (a. 326); Iustinianus C. 7.15.3.2 (a. 531). (This principle was once judged to be post-classical: E. Volterra, *ACIB* 1 [Pavia 1934] 34–165 [at 134]). Treggiari (above, note 2) 61 shows that keeping multiple *concubinae* was widely disparaged, citing Cael. *apud* Quint. *IO* 4.2.124; Tac. *Hist.* 1.72.3, 3.40.1. The

largely filled in the legal contours of this institution, for example, by establishing analogous requirements concerning age and degree of relationship.⁹ But the most difficult question they faced was this: in what circumstances, and in particular with what sorts of women, could concubinage be realized without risk of a criminal charge being raised under the *lex Iulia de adulteriis coercendis*?

The answers given varied a good deal, from personal conviction or in response to policies dictated by specific emperors. Sometimes the context in which the reply is found, be it a record of a court decision, a commentary on the *lex Iulia et Papia*, advice on how to avoid liability for *stuprum* (these categories are not mutually exclusive), seems to affect its content. An important influence must be sought in contemporary upper-class practice, which tolerated, even encouraged, concubinage when a man with children by a former wife (given the high rates of mortality and divorce, such situations would have been common) wished to have as a companion a woman of lower status without jeopardizing the arrangements for inheritance that were already in place.¹⁰ So we find several emperors who perhaps served as examples,¹¹ and members of the senatorial

jurists were uninterested in simple *amicae*: Treggiari, 60. In special circumstances slave concubines are mentioned, as when they are exempted from a general pledge or sale of debtor's goods: Ulp. D. 20.1.8; *PS* 5.6.16; Paul. D. 42.5.38 pr. (= *PS* 1.13a.1g).

⁹ See Ulp. D. 23.2.56; *Idem* D. 25.7.1.3–4; discussion in J. Plassard, *Le concubinat romain sous le haut empire* (Paris 1921) 40–45.

¹⁰ On this important point, see B. Kübler, *SZ* 17 (1896) 357–65 (at 360–61); R. Saller, *Slavery and Abolition* 8 (1987) 65–87 (at 71–76).

¹¹ Of interest are Vespasian (Suet. *Vesp.* 3 [“paene iustae uxoris loco”], 21, *Dom.* 12.3; Dio 65.14.1–5; *CIL* 6.12037) with Caenis, a freedwoman of Antonia, mother of the emperor Claudius (*PIR*² A 888); Antoninus Pius (*HA Pius* 8.9; *CIL* 6.8972) with Galeria Lysistrate, a freedwoman of his deceased wife; and Marcus Aurelius (*HA Marcus* 29.10) with the daughter of his deceased wife's procurator, name unknown and status uncertain (see note 79 below). That the concubine steps into the shoes of a departed wife is reported explicitly for Vespasian and Marcus, to be inferred for Pius from the death of Faustina early in his reign. For the children from a preexisting marriage, see Suet. *Vesp.* 3; *HA Pius* 1.7, *Marcus* 29.10. Children are rarely attested for concubinage: Treggiari (above, note 2) 68–69. The legal bar to marriage between senators and freedwomen laid down by the *lex Iulia et Papia* (which did not spell invalidity until late in the classical period: see note 28 below) may also have helped determine that these women became concubines, not wives: B. Rawson, in *Eadem* ed., *The Family in Ancient Rome* (Ithaca 1986) 1–57 (at 14). However, the point should not be pressed too hard. Presumably, emperors were able to find suitable marriage partners if they wanted them. If affection for a particular freedwoman was decisive as a motive for the union, the legal penalties might be tolerated or even ignored by such men. In a sense, to take a concubine was to ignore the law, although it is unlikely that *caelibes* with three or more children were penalized: Rawson, 49 n. 94. The point is important for the general question of upper-class practice; if merely taking a concubine did not exempt one from the law's penalties, the statute is unlikely by itself to have motivated a decision to live in concubinage instead of marriage. Not one of these emperors took up with a *sua liberta* (below), perhaps another sign that the marriage law was not uppermost in their minds. The purely social concern with the relatively low status of the woman and the wish to avoid complicating the issue of succession to property take pride of place as motives.

order.¹² Epigraphical evidence suggests the practice was fairly widespread, at least among the propertied classes.¹³ For young men, who typically married at around age 30,¹⁴ concubinage provided a means to companionship and sexual gratification in the years between puberty and marriage.¹⁵

Concubinage was also an option where objective obstacles to marriage existed. Soldiers and sailors, who were forbidden to marry while on active duty, frequently took concubines as partners.¹⁶ A shortage of marriageable women, at least on some levels of society, presented an obstacle of another kind.¹⁷ Frequently men married down, but when the gulf in status between the partners was especially broad, as between *patronus* and *liberta*, concubinage was regarded as the more respectable relationship.¹⁸ It is worth noting that the jurists typically deal with relationships for which no objective impediment to marriage existed, but which were characterized by the lack of intent to be married or, to prefer a positive description, by the intent to live with one's partner in concubinage.

Finally, it is likely that the Augustan laws on adultery and marriage indirectly encouraged the rise of respectable concubinage as an institution recognized in its own right. The adultery statute set aside frivolous liaisons with most types of women as unacceptable, while the *lex Iulia et Papia* conferred a degree of legitimacy on one or more types of concubinage.

Ideally, concubinage did not distract upper-class men from the responsibilities of marriage and family, but provided a way of ensuring that these were met in proper season. As an institution, it tended to reflect received opinion over the proper articulation of a social hierarchy based on rank and gender: low status

¹² There is Marcus Aurelius' grandfather (M.A. 1.17.2), Pontius Paulinus and his freedwoman during the reign of Severus (Ulp. D. 24.1.3.1: like the following text, a finding of fact by a court), and a close contemporary, Cocceius Cassianus and an *ingenua* (Pap. D. 34.9.16.1). Rawson (above, note 2) 291–92 gives two epigraphical instances; the senatorial status of one is challenged by Treggiari (above, note 2) 66. Not all of these are known to be “second marriages.”

¹³ *CIL* 5.1918, 6.14027, 9.944, 9.2255, 10.1267, 11.1471 (doubtful), 14.4454. In most or all of these examples, a concubine was taken after dissolution of a marriage: M. Humbert, *Le remariage à Rome* (Milan 1972) 105–6.

¹⁴ R. Saller, *CP* 82 (1987) 21–34.

¹⁵ Augustine *Conf.* 4.2; Treggiari (above, note 2) 76; Saller (above, note 10) 74.

¹⁶ C. Starr, *The Roman Imperial Navy*² (New York 1960) 82–84, 90–94; G. R. Watson, *The Roman Soldier* (Ithaca 1969) 133–42. A number of these relationships can fairly be characterized as *matrimonia iniusta*, where the parties intended marriage.

¹⁷ Dio 54.16.2 asserts that there were far more males than females in the elite population of 18 B.C. Noteworthy is the fact that most women married and typically remarried upon dissolution of a union, while many men remained celibate, that some males were willing to take as marriage partners females who had not yet reached sexual maturity, and that there appear to have been a great number of marriages where the husband was of notably superior status. See the discussion in S. B. Pomeroy, *Goddesses, Whores, Wives, and Slaves* (New York 1975) 164–66; P. A. Brunt, *Italian Manpower* (Oxford 1987 rev. ed.) 148–54; Saller (above, note 10) 68–71. The imbalance in sex ratio is explained plausibly as a consequence of the more frequent exposure/infanticide of females.

¹⁸ See below, note 54. The marriage law raised another objective obstacle, as seen above.

women were the ideal concubines for upper-class men.¹⁹ When it functioned properly (of course, it did not always do so), concubinage helped assure social reproduction, in the sense both of biological reproduction and of transmission of property and status. At the same time, commonly held notions about sexual honor were respected, insofar as concubines, like prostitutes and slaves, might serve as an approved sexual outlet for males of any age.

At the same time, the potential for conflict is evident. It is not just that reality did not always measure up to the ideal. The various demands made upon and expectations invested in the ideal itself were not easy to reconcile. To be understood properly, concubinage must be viewed in the context of a system, a moral economy wherein different values and practices in the areas of marriage, sexuality, and social reproduction coexisted, often uneasily, side by side. The neat picture delineated in the preceding paragraphs does only partial justice to this complex scheme, for reasons set forth below.

The argument that follows is often intricate, the juristic texts reluctant to yield their meaning. For the convenience of the reader, I offer a general summary here.

The incidental treatment of concubinage by the Augustan statutes is readily revealed as unsatisfactory. It was left to the jurists to steer a troubled course between the devil of the adultery law and the deep blue sea of social convention. Given the lack of sufficient guidance from positive law and the complexity of the issues of social policy posed by this problem, it is not surprising to find the jurists adopting solutions that differed from each other in significant ways. More than this, the opinions rendered by some jurists are themselves ambivalent or even somewhat self-contradictory.

In the sections of the paper that follow the survey of statute law, I set forth a three-fold division in juristic opinion. A conservative group of three jurists (Atilicius, Marcellus, Ulpian) is the most reluctant to expand the range of acceptable concubinage beyond a narrow base. Two others constituting a middle group (Papinian, Marcian) temper their more liberal stance with various qualifications. The broad interpretation, represented by one jurist (Paul), appears to allow a fairly generous discretion in the choice of a concubine. The difficult evidence of Modestinus is introduced in a separate section, where I attempt to chart his position on the map of this juristic debate. He is seen to emerge as one of those most hostile to the practice of concubinage and to stand outside, in a certain sense, the parameters of this discussion. In the concluding section, I explain why the jurists ultimately failed to come up with an adequate response to the challenge posed by concubinage.

¹⁹ Saller (above, note 10) 73: "This peculiarly Roman notion of propriety in concubinage embodies a combination of the social subordination expected by the master class from servile classes and the sexual subordination expected by men from women."

1. Statute Law.

Augustus, acting on the basis of his *tribunicia potestas*, promulgated the *lex Iulia de adulteriis coercendis* in 18 or 17 B.C.²⁰ This statute had as its principal aim the repression of those forms of non-marital sexual relations considered unacceptable by Roman society, particularly adultery.²¹

Such acts were now punished for the first time by trial in a standing criminal court, the *quaestio perpetua de adulteriis*.²² This court continued to function

²⁰ Dio 54.16.3–6. Better evidence on the date is lacking: see G. Rotondi, *Leges publicae populi Romani* (Milan 1912; repr. Darmstadt 1962) 445–47. It falls in with the series of *leges Iuliae* passed at this time: V. Arangio-Ruiz, *Scritti* 3 (Naples 1977) 249–94 (at 250–51).

²¹ Apart from adultery and criminal fornication (*stuprum*), there has been disagreement as to what the law punished. A. Guarino, *SZ* 63 (1943) 175–267, argued against P. Lotmar, *Mélanges Girard* 2 (Paris 1912) 119–43 and others that it also punished incest, but even the late classical jurists treat this as a separate crime (see above all Pap. D. 48.5.39[38] pr.–7), to the extent that incestuous marriages might receive protection under the statute (Ulp. D. *eod.* 14[13].4). *Stuprum* with *ingenui* was punished by the Republican *lex Scantinia*, though the details are uncertain: Mommsen (above, note 3) 703–4; I. Pfaff, *RE* 4.A1 (1931) s.v. *stuprum* 423–24; A. Berger, *Encyclopaedic Dictionary of Roman Law* (Philadelphia 1953) s.v. *lex Scantinia, stuprum cum masculo*. This offense was almost certainly not punished by the adultery statute: G. Rizzelli, *BIDR*³ 29 (1987) 355–88 (at 383n. 97) (I thank Dr. Rizzelli for having allowed me to see a copy of this article before its publication). By the late classical period, it may have been brought within the ambit of the *lex Iulia* (perhaps through legislative action). So two texts of Papinian and Modestinus (barring interpolation): Pap. D. 48.5.9(8) pr.; Mod. D. *eod.* 35(34).1. G. Flore, *Studi Bonfante* 4 (Milan 1930) 335–52 (at 348–52), argued that rape was repressed by the statute. This is untenable, though the offense was punishable *qua* adultery. On adultery as the main offense of the *lex Iulia*, see Corbett (above, note 6) 139; Guarino, 185–86; J. A. C. Thomas, *Iura* 12 (1961) 65–80 (at 65); Rizzelli, *passim*.

²² Before the passage of the *lex Iulia*, the repression of sexual misbehavior was generally conceded to the private sphere. Most of our information concerns adultery, the offense of the married woman and her lover. If an adulterous pair were caught in the act, the husband might kill with impunity both parties on the spot (for the wife, see Gell. 10.23.5; short of death, a variety of insults might be visited upon the lover: Hor. *Serm.* 1.2.37–46, 64–79, 127–34; Val. Max. 6.1.13). Other cases were dealt with by a *iudicium domesticum* convened by the father of the offending woman if she were still *in potestate*, and by her husband if she were wed *cum manu* or (perhaps) if she were *sui iuris*. Women guilty of adultery might lose one-sixth of their dowry under the *actio* (or *exceptio*) *de moribus* (UE 6.12). Cases that were especially notorious, or (perhaps) where a domestic tribunal could not be constituted, were prosecuted by the aediles through the *iudicia populi* (Cic. *Rab.* 3.8; Livy 8.22.2–4, 10.31.9, 25.2.9; Val. Max. 8.1 *absol.* 7). Some legislation existed on the subject, to judge from the statement by Paul (*Coll.* 4.2.2) that the first chapter of the Augustan statute obrogated many laws and the report attributed to Sallust by Plutarch (*Comp. Lys. et. Sul.* 3.2) to the effect that Sulla introduced legislation on marriage and “*sophrosune*” (Val. Max. 8.1 *absol.* 8 is not convincing evidence on pre-Augustan legislation, but see the reference at Hor. *Serm.* 1.3.105–6). On the situation prevailing before the introduction of the *lex Iulia*, see Esmein (above, note 3) 73–74; W. Kunkel, *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit* (Munich 1962) 121–23 (who refutes Mommsen’s extreme

throughout the classical period of Roman law, until as late as the early third century.²³ Afterwards, offenses were addressed exclusively through the *cognitio extra ordinem*.²⁴

Criminal penalties were ordained for the adulterous female spouse and her lover. These were chiefly patrimonial in nature, dictating the confiscation of one-half of the adulterer's property, one-third of the woman's, as well as one-half her dowry.²⁵ Upon conviction, neither one could deliver oral or written testimony before a court, and the adulterer could not witness a will.²⁶ In addition, there was *relegatio in insulam* for both parties,²⁷ while convicted women were forbidden to remarry.²⁸ Later law established the death penalty.²⁹ Those

pessimism over the "inadequacy" of the pre-Augustan regime); A. H. M. Jones, *The Criminal Courts of the Roman Republic and Principate* (Totowa 1972) 15, 30; G. Pugliese, *ANRW* 2.14 (Berlin 1982) 722–89 (at 732n. 17) (who argues that Sulla's proposals never became law); L. Garofalo, *SDHI* 52 (1986) 451–76 (especially 455–56, 474–76), and *Il processo edilizio* (Padua 1989) 121–34 (who shows how the competency of the aediles in all criminal matters involving women defendants derived from their responsibility for prosecuting sexual offenses). On the rules attributed to the regal period, see now P. Giunti, *Adulterio e leggi regie: Un reato fra storia e propaganda* (Milan 1980).

²³ That the *quaestio* persisted this long is the dominant thesis, represented by U. Brasiello, *Studi Betti* 4 (Milan 1962) 551–70 and W. Kunkel, *Kleine Schriften* (Weimar 1974) 33–116 (at 74). It is defended by R. A. Bauman, *Antichthon* 2 (1968) 68–93 against Garnsey, *JRS* 57 (1967) 56–60. On the late development of a specialized juristic literature on criminal law, see Bauman, *Index* 5 (1974/5 [1979]) 39–48.

²⁴ On the *cognitio* procedure, see I. Buti, *ANRW* 2.14 (Berlin 1982) 29–59.

²⁵ *PS*. 2.26.14.

²⁶ The latter is apparently a juristic extension: see Pap. D. 22.5.14; Paul. D. *eod.* 18; Ulp. D. 28.1.20.6.

²⁷ *PS* 2.26.14, which insists on separation of the guilty couple: "...dummodo in diversas insulas relegentur." We do not know if the *relegatio* was permanent or *in tempus*: E. Sehling, *SZ* 4 (1883) 160–63 (at 162) holds for the latter, basing his conclusion on the provisions against remarriage and giving testimony. Some have questioned whether any form of *relegatio* was imposed by the law itself: U. Brasiello, *Repressione penale* (Naples 1937) 93–96; G. Branca, *Enciclopedia del diritto* 1 (Milan 1958) s.v. *adulterio (diritto romano)* 620–22 (at 621); Bauman, *Antichthon* (above, note 23) 80n. 95; C. Venturini, *SDHI* 54 (1988) 66–109 (at 88n. 61). The contrary view is more convincing: compare the early cases where *exilium* (a harsher form of exile) is meted out as an aggravated penalty (Tac. *Ann.* 2.50.1–3, 2.85.1–3 [with Suet. *Tib.* 35.2], 4.42.3; Pliny *Ep.* 6.31.4–6); *deportatio* (a later term for *exilium*) is given where adultery is combined with incest (*duplex crimen*: Marci. D. 48.18.5). See B. Biondi, *Scritti* 2 (Milan 1965) 47–74 (at 50–57); P. Garnsey, *Social Status and Legal Privilege in the Roman Empire* (Oxford 1970) 116; R. Rilinger, *Humiliores Honestiores* (Munich 1988) 157–80.

²⁸ For the prohibition against remarriage, see Ulp. D. 48.5.30(29).1. The husband was guilty of *lenocinium*, and where lovers in adultery married each other, their union was void: Pap. D. 34.9.13. An SC pursuant to the *lex Iulia et Papia* forbade a woman *deprehensa* (but not convicted) to marry a member of the senatorial order: Ulp. D. 23.2.43.10–13 (*UE* 13.2 shows a post-classical extension of the principle). Marriage contracted in violation of this ban rendered the spouses *caelibes* under the marriage statute; an SC passed under Marcus and Commodus declared void unions that violated the prohibitions imposed on the *ordo senatorius*: R. Astolfi, *La lex Iulia et Papia*² (Padua 1986) 114–19.

found guilty of a type of complicity identified by the law as *lenocinium* were subjected to the same penalties as adulterers; in fact, all accessories to the main crime were punished, by the late classical period at least, in the same way as the principals.³⁰ We are not informed as to the statutory penalties for *stuprum*.³¹

The law did not, to all appearances, offer a definition of the acts it outlawed. There was a simple prohibition of *adulterium* and *stuprum*, qualified by the requirement of a *mens rea*.³² The jurists complain that the statute did not distinguish adequately between the two principal crimes, but used the words *stuprum* and *adulterium* indiscriminately.³³ Properly speaking, *stuprum*, although in a generic sense it might refer to any type of unapproved sexual activity (including adultery), meant, under this law, fornication with an unmarried woman who was not exempt from the statutory penalties, while *adulterium* was the sexual offense committed with a non-exempt married woman.³⁴

This point is of crucial importance. The question of liability under the law always depended, as we have seen, on the status of the female partner to the sexual act at issue, a status which the *lex Iulia* defined only (aside from scattered references to the *mater familias*) in the negative. This was accomplished by setting forth, expressly or by implication, certain categories of women with whom sexual relations might be enjoyed without fear of prosecution. In this way, Augustus drastically curtailed the range of possible sexual partners for Roman males outside of marriage, insofar as this range was defined at law. Strictly speaking, only prostitutes, procuresses, slaves, and peregrines were left

²⁹ The references to this penalty in Alex. Sev. C. 9.9.9 (a. 224); Diocl., Max. C. 2.4.18 (a. 293); and Constantinus C. 9.9.29(30).4 (a. 326) are convincingly shown to be interpolated by M. Wlassak, *Anklage und Streitbefestigung im Kriminalrecht der Römer* (1917) 63–64 and Biondi (above, note 27) *passim*, against the view of Mommsen (above, note 3) 699, who argued for introduction in the third century. Aside from a special case regarding slaves convicted of adultery, the capital penalty makes its first legitimate appearance in Constantius, Constans CTh. 11.36.2 (a. 399). Worthy of note is Inst. 4.18.4, which falsely claims to derive this penalty from the statute itself. The post-classical development itself is disputed. Biondi rather improbably attempts to derive the death penalty from the *ius occidendi*, the conditional “privilege of slaying” granted outraged husbands and fathers by the statute. Better are Venturini (above, note 27) 68, and R. Bonini, *Ricerche di diritto giustiniano* 2 (Milan 1990) 109–12, 151–53.

³⁰ For *lenocinium*, see Pap. D. 48. 5.9(8) pr.: “quasi adulter.” In time, most accessory crimes under the statute came to be identified as species of *lenocinium*. Note that the wife who accepts money “ex adulterio viri” is punished “quasi adultera”: Marci. 48.5.34(33).2.

³¹ Sehling (above, note 27) 160 argues that they were identical to those laid down for adultery.

³² Ulp. (1 *de adult.*) D. 48.5.13(12): “Haec verba legis ‘ne quis posthac stuprum adulterium facito sciens dolo malo’ et ad eum, qui suasit, et ad eum, qui stuprum vel adulterium intulit, pertinent.”

³³ See Pap. D. 48.5.6.1; Ulp. D. *eod.* 14(13).2; Mod. D. *eod.* 35(34) pr.; *Idem* D. 50.16.10.1.

³⁴ The terminology has been given careful study by Rizzelli (above, note 21) *passim*.

as possible concubines.³⁵ The jurists added one more category, convicted adulteresses:

Ulp. (2 *ad legem Iuliam et Papiam*) D. 25.7.1.2: Qui autem damnatam adulterii in concubinato habuit, non puto lege Iulia de adulteriis teneri, quamvis, si uxorem eam duxisset, teneretur.

I do not think that a man who keeps as a concubine a woman convicted of adultery is liable under the *lex Iulia* on adultery, although he would be liable if he married her.

The law forbade anyone to marry a convicted adulteress; by Ulpian's day offenders were charged with *lenocinium*.³⁶ By compelling these women to wear the toga, the same statute reduced their status to that of a prostitute. Ulpian invokes this analogy³⁷ and in this sense simply applies a provision which he accepts as implied by the law. Far from serving as a privilege, it is a confirmation of the low status imposed on convicted adulteresses.

Another factor in the deliberations of the jurists was the evident mention of concubinage by the *lex Iulia et Papia*. This is suggested first by a passing reference to the statute made by the jurist Marcian in a context that guarantees its significance for the question of liability for *stuprum*, but does not shed any light on the legislative provision itself.³⁸ Other evidence, equally circumstantial in nature, points in the same direction. All of the passages in the *Digest* title D. 25.7 ("*De Concubinis*") come from juristic works or sections of works that comment on the *lex Iulia et Papia*,³⁹ as do two relevant texts of Modestinus.⁴⁰ Naturally, much of this material applies rules on marriage to concubinage by

³⁵ These are the types of women exempted under the regime of the adultery law. On prostitutes, see Tac. *Ann.* 2.85; Dioclet., Maxim. C. 9.9.22 (a. 290); Salv. *Gub. Dei* 7.3. Procureuses are included through analogy with prostitutes. Slaves were not explicitly exempted, but they were understood not to qualify as *matres familias*: see note 3 above and Mod. D. 23.2.24; Pap. D. 48.5.6 pr.; Mod. D. *eod.* 35(34) pr.; Dioclet., Maxim. C. 9.9.23 pr. (a. 290), C. *eod.* 24(25) (a. 291); *PS* 2.26.16. *HA Aurel.* 49.4–5 suggests a change in the law: very temporary, if true. For peregrines, I follow L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians* 1 (Leipzig 1908) 70.

³⁶ See Ulp. D. 48.5.30(29).1.

³⁷ I do not mean to suggest this rule must be original to Ulpian.

³⁸ Marci. D. 25.7.3.1, controversial, but see Biondi, *Scritti giuridici* 2 (Milan 1965) 77–188 (at 159–60); Kaser, *RP* 1² 328–29 and below.

³⁹ The first four are from Book 2 of Ulpian's *Libri ad legem Iuliam et Papiam* (Iul.-Ulp. D. 24.2.11 pr. and Ulp. D. *eod.* 11.1–2 are from the third book), the next from Book 10 (corrected from the ms. 12 by O. Lenel, *Palingenesia iuris civilis* 1 [Leipzig 1889, repr. Graz 1960] cols. 1125n. 3, 1134n. 1 and 3 [hereafter Lenel, *Pal.* 1, 2]) of Paul's commentary on the same law. The following two texts are from Book 12 of Marcian's *Institutiones*, which like the preceding two books (Lenel, 1 cols. 667–69) deal with this law, as does part of the 19th book of Paul's *Responsa*, the origin of the next fragment (Lenel, 1 col. 1250), and the last is from the second book of the *Pauli Sententiae*, part of which concerned this legislation (Lenel, 1 col. 1298; cf. # 1968 and 1969). Paul. D. 50.16.144 (below) also comes from Book 10 of his commentary on this law.

⁴⁰ Both are from the first book of his *Regulae*, which dealt with, among other things, the marriage law: Mod. (1 *reg.*) D. 23.2.24; *Idem* (1 *reg.*) D. 48.5.35(34) pr., with Lenel, *Pal.* 1 cols. 732–733.

analogy, which helps account for its placement. But not all of it can be explained in this way.

Of interest is a text of Paul,⁴¹ which contains the definitions given *pellex* or *paelex* by two scholars. For the sake of clarity, I reverse the order preferred by Paul himself for the two sets of definitions. The antiquarian Granius Flaccus gives "a woman who has sex with a married man" as the common contemporary definition, and "an unmarried woman *uxoris loco*," the equivalent of Greek *pallake*, as a secondary meaning.⁴² The jurist Masurius Sabinus observes that the latter was the meaning of *pellex* "apud antiquos,"⁴³ but that in his day different words were used to describe such a woman, *amica*, and the more respectable *concubina*: "quam nunc vero nomine amicam, paulo honestiore concubinam appellari." Paul reports these definitions in his commentary on the marriage law, evidently in order to illustrate a change in usage. The jurists consistently use *concubina* to refer to the partner in the respectable relationship mentioned by Flaccus in his secondary definition.⁴⁴ Sabinus says outright that

⁴¹ Gran.-Mas.-Paul. (10 *ad legem Iuliam et Papiam*) D. 50.16.144: "Libro memorialium Masurius scribit 'pellicem' apud antiquos eam habitam, quae, cum uxor non esset, cum aliquo tamen vivebat: quam nunc vero nomine amicam, paulo honestiore concubinam appellari. Granius Flaccus in libro de iure Papiriano scribit pellicem nunc volgo vocari, quae cum eo, cui uxor sit, corpus misceat: quosdam eam, quae uxoris loco sine nuptiis in domo sit, quam *παλλακὴν* Graeci vocant."

⁴² Pacius (Mommson, Krüger ad loc.) reads "quondam" for "quosdam." The change relegates the second definition to a period before Flaccus' day, which at first glance better corresponds to Sabinus' "apud antiquos." It is unnecessary, however, since it is possible, even plausible, that two definitions existed simultaneously (both at the time Flaccus wrote and before); moreover, Sabinus' *antiqui* themselves cannot be pushed *en bloc* far back into the past: see note 43.

⁴³ All three appearances in the *Digest* of *antiqui* used as a substantive synonymous with *veteres* (*VIR* s.h.v.) are attributable to Sabinus. See Paul. (17 *ad Plautium*) D. 5.4.3 with Lenel, *Pal.* 1 col. 1174n.1; Mas.-Ulp. (18 *ad edictum*) D. 9.2.27.21 with G. MacCormack, *TR* 51 (1983) 271–93 (at 275–76). These other instances suggest "apud antiquos" should be translated "in the writings of the Republican jurists," not "among earlier generations," as the *Pennsylvania Digest* has it. See also P. M. Meyer, *Der römische Konkubinat nach den Rechtsquellen und den Inschriften* (Leipzig 1895) 9–14; J. Plassard (above, note 9) 18–19. For Sabinus, then, *antiqui* has the meaning given *veteres* by jurists of the imperial period (including S. himself). On this usage, see F. Schulz, *History of Roman Legal Science* (Oxford 1946) 100. (The narrower view of the meaning of *veteres* proposed by O. Behrends, *RHD* 55 [1977] 7–33 is difficult.) On Sabinus' reliance on the *antiqui* or *veteres*, see P. Stein *BIDR*³ 19 (1977) 55–67 (at 62).

⁴⁴ This is the only example of *paelex/pellex* in the juristic sources: *VIR* s.h.v. The jurists use *amica* only two other times. One instance is irrelevant (Scaev. D. 34.2.40.2: a woman's friend). The other appears in a quotation from a will, which appears to reflect popular usage (see below, note 89): Paul. D. 34.2.35 pr. As expected, non-legal usage is far more varied. *Concubina* and its cognates, while not widely attested before the law (a fact which suggests it did not yet enjoy status as a term of art), are employed afterwards to refer even to non-respectable relationships: *TLL* s.v. *concubina*, *concubinatus*, *concubinus*. The primary meanings of *paelex* and its cognates have a pejorative force—mistress of a married man, member of an oriental harem, woman of loose morals (sometimes it functions simply as a term of abuse). There are a few examples (mostly late)

this is the more honorable term. Granius Flaccus wrote in the period just before the passage of the marriage law and Masurius Sabinus not long after.⁴⁵ This may be taken to imply that the law itself used *concubina* and/or a cognate word and that this term was thereby endowed with a measure of prestige.

We are left with the suggestion that, at minimum, the law conferred a degree of legitimacy on concubinage through a passing reference,⁴⁶ and this influenced the jurists in their discussions of the adultery statute.

What precisely did the *lex Iulia et Papia* have to say about concubinage? It is significant that the juristic discussions on the question of liability for *stuprum* typically take as their point of departure the case of concubinage between patron and freedwoman.⁴⁷ This is because the marriage law took an interest in relationships between these parties.

Marriage between freedpersons and members of the senatorial order was prohibited by the marriage law, though such unions remained legally valid;⁴⁸ marriage between freedpersons and other *ingenui* was permitted.⁴⁹ Before

where it appears as the equivalent of *concubina*, but only *sensu lato*; I know of no example where it refers unambiguously to a respectable form of concubinage, aside from the citations of Flaccus and Sabinus in the principal text. See *TLL* s.v. *paelex*, *paelicator*, *paelicatus*; Meyer (above, note 43) 7–8; J. N. Adams, *RhM* 126 (1983) 321–58 (at 355). *Amica* can refer to any type of non-marital sexual partner: *TLL* s.h.v. I do not share the conclusion of A. Watson, *The Law of Persons in the Later Roman Republic* (Oxford 1967) 1–10 that “*concubinae* were in a special social position as early as Plautus.” The evidence he discusses (20 instances of *concubina* and *concubinatus* in Plautus’ plays [15 of which are from the *Miles*] and one use of *concubina* at Cic. *De Orat.* 1.40.183; on the Cicero passage, see Rawson, *Family* [above, note 11] 48n. 35) does not prove that respectable concubinage under the Republic was strictly, or even typically, characterized by *concubina* and its cognates. To be sure, the respectable form did exist, as is suggested by the text of Paul under discussion (evidence dismissed by Watson, 9n. 2), which also shows that the terminology was not fixed before the Augustan legislation was passed. See Adams, 348–50. Caution is necessary: the respectable version itself may not have been readily distinguishable from the non-respectable forms of concubinage before Augustus; the uncertain terminology simply reflects this situation. Even afterwards, as Sabinus’ remark suggests, the terms used to describe concubine varied, though *concubina* was now established as the prestige form for the respectable type: see Plassard (above, note 9) 62.

⁴⁵ On Flaccus, who dedicated a work on pontifical formulas of evocation (*De Indigitamentis*) to Caesar, see Schulz (above, note 43) 41; E. Rawson, *Intellectual Life in the Late Roman Republic* (Baltimore 1986) 93, 113, 213, 303, 305. On Sabinus, who received the *ius respondendi* from Tiberius, see Schulz, 102–3, 119–20; W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*² (Graz 1967) 119–20, 341–42.

⁴⁶ Treggiari (above, note 2) 74–75 is correct to argue that Augustus had sufficient motive to allow concubinage, against earlier authors, who protested that this was inconsistent with the social policy pursued by his legislation. An extreme statement of this view is given by Kübler (above, note 10) 360.

⁴⁷ This is true of Ulpian, Marcian, Marcellus, Papinian (by implication) and perhaps Paul. Modestinus is an exception.

⁴⁸ This remained true until an SC of Marcus and Commodus rendered such unions void: see note 28 above.

⁴⁹ Dio 54.16.1–2, 56.7.2; Celsus D. 23.2.23; Paul. D. *eod.* 44 pr.; *UE* 13.1. See Watson (above, note 44) 32–38; S. Treggiari, *Roman Freedmen During the Late Republic* (Oxford 1969) 82–86.

Augustus, all such marriages had been considered disgraceful, at least from an upper-class perspective, and potentially liable to the censorial *nota*, but while those with senators continued to be penalized under the new statute, the permission granted *ceteri ingenui* (to judge from the language of Dio and Celsus, this was express) afforded these marriages a new degree of legitimacy.⁵⁰ Augustus went even a step further and granted outright protection to one type of such relationships, by refusing to allow a freedwoman married to her patron to divorce him without his consent.⁵¹

The protection of the consent requirement applied only to the special case of marriage with the *sua liberta*, and even this relationship was perhaps felt to be somewhat less respectable where the patron himself was freeborn. At most, this suggests that the prohibition against unilateral divorce by the *sua liberta* was accompanied by the bare recognition that concubinage between such parties was to be preferred to marriage, a position later adopted by Ulpian, as seen in the section that follows. When the strong probability that the *lex Iulia et Papia* made some concession to concubines of a right to receive testamentary bequests⁵² is added to these considerations, the logical conclusion is that the law made a concrete reference to concubinage.

The jurists took this oblique statutory grant of legitimacy as a foundation for constructing categories of concubines who might be taken without fear of prosecution for *stuprum*. Their method was to integrate the types of women immune under the *lex Iulia de adulteriis coercendis* into the discussion. Three

⁵⁰ See the sources cited in note 49, with Watson (above, note 44) 37; Treggiari (above, note 49) 85; Astolfi (above, note 28) 104–5; M. Humbert, *Index* 15 (1987) 131–48 (at 135–36).

⁵¹ Evidently, this was a simple prohibition with no penalty stipulated. A controversy resulted, with Julian holding the divorce to be void, and Ulpian allowing it but depriving the offender of *conubium* with future partners. On the prohibition, Ulp. D. 23.2.45 pr.–6; *Idem* D. 24.2.11 pr.–2; Astolfi (above, note 28) 164–66. On the controversy, A. Watson, *TR* 29 (1961) 243–59 (at 249–52).

⁵² The question of the concubine's *capacitas*, or eligibility to receive inheritances and legacies, under the *lex Iulia et Papia* has long been debated: Astolfi (above, note 28) 31–34, 60–61. L. Mitteis, *SZ* 23 (1902) 274–314 (at 314) holds for full *capacitas*, on the ground that respectable concubines were not among the *feminae probosae* who were deprived of this by Domitian (Suet. *Dom.* 8.3). This is certainly correct, but begs the question of whether they were disqualified *qua caelibes*. The evidence (dismissed by Astolfi, 60n. 14) suggests otherwise: Celsus (*pater*)-Celsus (*filius*) D. 31.29 pr.; Casc.-Treb.-Lab.-Iav. D. 32.29 pr.; Scaev. D. *eod.* 41.5; Ulp. D. *eod.* 49.4; Pap. D. 33.2.24.1; Scaev. D. 34.1.15.1; Tryph. *ibid.*; Paul. D. 34.2.35 pr. One might suppose that the *sua*, whose concubinage with *patronus* was recognized under the statute, was exempted from its penalties, at least to the extent of being treated as an *orba*, if she had no children: see Humbert (above, note 13) 147 (148)n. 5. By the mid-second century at latest, children *vulgo quaesiti* made their mothers eligible for the law's privileges: Astolfi, 31–34, 79. There is no implication that the *capacitas* of these women was affected by their unmarried status. Concubines with children will have benefitted from this recognition, and perhaps all respectable childless concubines were by now classed as *orbae*. Another explanation is that the law permitted bequests only from the male partner (all of the texts cited deal exclusively with bequests of this type). Either view seems possible, although it should be emphasized that the evidence does not speak directly of any limitation on a concubine's *capacitas*, so that Mitteis' view cannot be refuted.

basic categories were created, and all were a source of controversy, to a greater or lesser extent. These were the *sua liberta* (one's own freedwoman taken as concubine), *aliena liberta* (someone else's freedwoman taken as concubine), and *ingenua*. The fact that the marriage law itself made explicit mention only of the first seems guaranteed by the fact that Marcellus, who bases his recognition of immunity from *stuprum* in concubinage on legislative authority, does not proceed beyond this category.⁵³ This suggests that as late as the mid-second century a strict constructionist view of the *lex Iulia et Papia* permitted women to be taken as concubines only if they had been manumitted by the male partner, that is, some jurists recognized as legitimate only the *concubina patroni*.

My exposition of juristic opinion is not chronological, because it is impossible to trace an evolution over time. The debate over this issue exercised jurists who were roughly contemporaries of each other; indeed, our only evidence, aside from scattered references, comes entirely from the late classical period. No solution is therefore to be found in a pattern of linear development.

2. The Conservative Interpretation: Atilicinus, Marcellus, and Ulpian

Of the three jurists who, I argue, represent the conservative view, Ulpian has the fullest surviving evidence. He addresses the problem of acceptable partners in concubinage in the context of a discussion about the regime that governed the *patronus/liberta* relationship:⁵⁴

Ulp. (2 *ad legem Iuliam et Papiam*) D. 25.7.1 pr.: Quae in concubinatu est, an⁵⁵ ab invito patrono poterit discedere et alteri se aut in matrimonium aut in concubinatum dare? ego quidem probo in concubina adimendum ei conubium, si patronum invitum deserat, quippe cum honestius sit patrono libertam concubinam quam matrem familias habere.

Can a woman living in concubinage leave her patron against his will and either marry someone else or become his concubine? I think that a concubine should be deprived of the right to marry (*conubium*) if she leaves her patron without his consent, since it is more respectable for a patron to keep his freedwoman as a concubine than as a wife.

To understand the nature of the issue confronted by Ulpian in this text, one should begin by restating the principle already laid down above, namely, that the *lex Iulia et Papia* prohibited a freedwoman married to her patron from divorcing him without his consent. Ulpian held, against Julian, that a *liberta* wed to her *patronus* might end the marriage, but was denied *conubium* with other

⁵³ See below at notes 71–82.

⁵⁴ This passage has been much criticized, but not all of this criticism is well-informed about the purpose or even provisions of the *lex Iulia et Papia*: *Index Itp.* ad loc. Better is V. Arangio-Ruiz, *Aegyptus* 5 (1924) 104–9 (at 107n. 1), who objects to “aut in concubinatum” on the ground that the rules should only apply in case of marriage. Even so, the jurists repeatedly apply the regime already developed for marriage to concubinage, for reasons given below.

⁵⁵ Krüger ad loc. proposes the insertion of this word.

men.⁵⁶ In the principal text, Ulpian applies the rule to the same types living in concubinage, justifying this with the observation that it is "more respectable" for a man to keep his freedwoman as his concubine rather than as his wife—here called *mater familias*.

The justification does not, at first glance, flow naturally from the holding that precedes it. In fact, commentators⁵⁷ have pointed up a difficulty in the construction of the last phrase, for which two translations have been proposed. One takes *mater familias* as "wife," the other as "woman of respectable status."⁵⁸ The second version is patently unacceptable. It conflicts with other legal texts which grant this status—and with it liability for *stuprum* committed with third parties—to freedwomen who are concubines of their patrons. Ulpian himself does as much, in language that must refer to the status of *mater familias* as defined under the adultery statute, when he permits the male partner to prosecute his concubine *iure extranei*, provided the relationship is a serious and respectable one: "si modo ea (sc. concubina) sit, quae in concubinatum se dando matronae nomen non amisit, ut puta quae patroni concubina fuit."⁵⁹

As we have seen with the requirements for age and blood relationship, the regime for marriage is often extended to concubinage. In one text, the *liberta* leaving her reluctant patron is punished with loss of *conubium*, as if their relationship were marriage. In the second, the privilege of prosecuting an act of adultery, albeit *iure extranei*, is extended to the male partner in concubinage. But if we assume Ulpian intended to equate the two institutions, the last phrase of the principal text is rendered unintelligible. Another passage shows that he recognized a clear distinction between them.⁶⁰

⁵⁶ Julian argued that marriage still existed, with the result that the freedwoman could not even enter into concubinage with another man: Iul.-Ulp. D. 24.2.11 pr. On the interpretation of this text, I agree in principle with Watson (above, note 51) 249–52. For a different view, see A. Wacke, *RHD* 67 (1989) 413–28 (at 424–25).

⁵⁷ Meyer (above, note 43) 28; Kübler (above, note 10) 361–62; see further Plassard (above, note 9) 64–65.

⁵⁸ This is the meaning of the term in the *lex Iulia* on adultery: see above, note 3.

⁵⁹ Ulp. (2 *de adult.*) D. 48.5.14(13) pr. (For the phrase *nomen matronae*, see also Tert. *Uxorem* 2.8.3). Concubinage with the *sua* is given as an example *par excellence*, and is consistent with the position adopted in the principal case, but this does not mean that Ulpian limited the privilege to this instance: his language (*ut puta* instead of *id est* or the like) suggests that he is allowing himself some flexibility, so that he might, for example, allow the *ius extranei* where the concubine was an *aliena* manumitted by a woman: see at notes 77–79 below. (*Contra*, Plassard [above, note 9] 68, who argues that the scope of the privilege granted in this text is exhausted with the *sua*). The acknowledgment of potential liability of the woman for *stuprum* suggests Ulpian contemplated a wider range of possible concubines when it was not a question of insulating the male partner from liability under the adultery law. That a jurist could hold somewhat contradictory opinions on the subject is a fair illustration of its complexity. See also Iul.-Ulp. D. 24.2.11 pr., where Ulpian's disagreement with Julian implies he is prepared to accept concubinage of the *aliena liberta* with another man after the freedwoman has divorced her own patron.

⁶⁰ Despite some doubts, the text is classical: R. Orestano, *La struttura giuridica del matrimonio romano* (Milan 1951) 368n. 979.

Ulp. (22 *ad Sabinum*) D. 32.49.4: Parvi autem refert uxori an concubinae quis leget, quae eius causa empta parata sunt: sane enim nisi dignitate nihil interest.

It makes little difference if it is to a wife or to a concubine that someone makes a legacy of things bought and acquired for her. The only real difference between them is that of social status.

The observation that the “only real difference” concerned *dignitas* must be understood in context. Ulpian employs it as a rationale for this particular rule, which does not mean, for example, that he disagrees with Papinian about the different effects of gifts to wives and concubines.⁶¹ In that situation the distinction in rank leads to a different result.⁶² In this text it simply makes no difference. In the passage about *conubium* (D. 25.7.1 pr.), it is used to justify an equivalent result. This is largely because the difference in status between the partners made the less respectable relationship more socially acceptable, a conclusion suggested by the literary and epigraphical evidence.⁶³

In sum, Ulpian, like other jurists, was responsive to what appears to have been widespread upper-class practice and notions about acceptable forms of concubinage. It is precisely this background, more than just an oblique mention of this institution (or even, as I believe, an explicit grant of testamentary rights to

⁶¹ Ulp. D. 24.1.3.1; Pap. D. 39.5.31 pr. (*FV* 253b); see also Scaev. D. 24.1.58 pr.–1.

⁶² The same is perhaps implied by Paul. D. 25.7.5 (= *PS* 2.20.2): provincial administrators can take as concubines women from their provinces, whom they were forbidden to marry. See Ulp. D. 25.2.17: a concubine can be prosecuted for *furtum* and does not enjoy, as wives do, the privilege of liability being construed under the less-damaging *actio rerum amotarum*. Also, Ulp. D. 48.5.14(13).6: the right to prosecute adultery *iure mariti* is denied where the offense was committed before marriage, even when the woman is a concubine who subsequently became a wife, or a *filia familias* whose *pater* later consented to the marriage; the “husband” is permitted only the *ius extranei*. Cf. *Idem* D. *eod.* 14(13) pr., which makes the same point with regard to the unfaithful concubine (evidently as if she were an *iniusta uxor*: see Afric.-Ulp. D. *eod.* 14[13].1 and the argument in note 149 below). In the latter case, even the *ius extranei* is permitted only where the woman has not given up respectable status by entering into the relationship; for example, she is a *concubina patroni*.

⁶³ The principal texts, as well as the other legal evidence examined here, are therefore in full agreement with Treggiari’s conclusions (above, note 2) 76 on this point; cf. note 19 above. The same holds for women involved with their social inferiors, even as common prejudice rendered any such union problematic. A *clarissima femina* lost her status by marrying a man not of senatorial rank: Ulp. D. 1.9.8. Concubinage was a means of avoiding this severe consequence, a fact evidently recognized by Pope Callistus (217–22) in his famous decision allowing upper-class Christian women to choose this form of relationship with lower-status believers: Hippol. *Refutatio* 9.12.24. This move was, however, controversial: Hippolytus (25) characterizes this arrangement as *moicheia*. The dispute thus supports the argument that in respectable concubinage the male partner was ideally of higher status, even if this principle did not always hold as strongly as it did for marriage. On this text, see J. Gaudemet, *Studi Paoli* (Florence 1956) 332–44 (G. does not distinguish adequately between marriages void at law and those simply penalized through loss of status imposed on one of the partners); M.-T. Raepsaet-Charlier, *RIDA*³ 29 (1982) 253–63; P. Brown, *The Body and Society* (New York 1988) 147.

some concubines) contained in the marriage statute, which informs his stance on the *sua liberta* taken as either concubine or wife. We can therefore explain the paradox implied by “honestius” and “matrem familias” in the notorious final phrase of D. 25.7.1 pr. It is more respectable to keep the lower status woman in the lower status union.⁶⁴ *Mater familias* means “wife,” but is more pointed than *uxor*, precisely because it brings in the idea of social status, which is essential for the jurist’s argument. It is difficult to escape the impression that the issue of respectability is treated exclusively from the (upper-class) male’s point of view.⁶⁵

What other types of concubines might be recognized? Ulpian was reluctant to proceed to the second category of potential concubines, that of the *aliena liberta*. Instead he invoked the narrow limits of the adultery statute itself:

Atil.-Ulp. (2 *ad legem Iuliam et Papiam*) D. 25.7.1.1: Cum Atilicino sentio et puto solas eas in concubinato haberi⁶⁶ posse sine metu criminis, in quas stuprum non committitur.

I agree with Atilicinus’ view that one can keep as concubines, without risk of criminal liability, only those women with whom *stuprum* is not committed.

Ulpian’s position is often regarded by modern scholars as extreme, even unrealistic, insofar as it is contradicted by the opinions of other jurists and by a mass of epigraphical and literary evidence.⁶⁷ Ulpian does represent one extreme of the debate, but it is important to take his remarks in context. He here gives his opinion on how best to take a concubine while avoiding the penalties of the *lex Iulia* on adultery. His citation of the first century jurist Atilicinus shows both that his position was not a personal idiosyncrasy and that it was of long standing.⁶⁸ It has a certain justification. By adopting the exempt categories as a principle, the jurist grasps an easy solution to the twin problems of avoiding

⁶⁴ See note 63 above and Paul. D. 25.7.2, a text which has a double implication. A man keeping his freedwoman as a concubine goes mad; it is *humanius*, says Paul, to regard the woman as his concubine. At one blow both marriage (the less respectable relationship for these parties) and criminal liability for *stuprum* are excluded. See also Val. D. 38.1.46: a claim for *operae* against a *concubina patroni* is denied, just as if she were the man’s wife. Sometimes the difference is simply regarded as trivial. Scaev. D. 38.10.7: illegitimate children, as well as those born in concubinage, qualify as *privigni* when their mother marries a man not their father, just as if they had been born in a earlier marriage.

⁶⁵ This is especially true since the status of wife would have seemed much more preferable from the lower-rank female’s point of view: Kübler (above, note 10) 361; Saller (above, note 10) 75.

⁶⁶ So the editors for ms. “habere.”

⁶⁷ See, for example, Mitteis (above, note 52) 309: “...es sich hiebei um einen reinen Doctrinarismus handelt...”; Plassard (above, note 9) 83–84.

⁶⁸ On Atilicinus, Kunkel (above, note 45) 129–130. Mitteis’ dismissal (above, note 59) 309 of the citation (“...Ulpian sich hiefür auf Niemand anderen zu berufen weiß als auf den um fast anderthalb Jahrhunderte älteren Atilicinus...”) is tendentious: Ulpian was under no compulsion to cite anybody. In fact, the antiquity of the opinion enhanced its authority. Mitteis is followed by C. S. Tomulescu, *Studi Scherillo* 1 (Milan 1972) 299–326 (at 305 [306]n. 19).

the commission of *stuprum* with one's concubine and having to avenge this crime when committed by the latter with third parties.

Upper-class Roman males, toward whom the passages in this title are presumably directed, were especially vulnerable to prosecution under the adultery statute. This explains the jurist's caution. Nor, even in this text, do we find Ulpian to be utterly deaf to the claims of social convention. As will be seen below, concubinage with the *aliena* was often not considered to be as respectable as concubinage with one's own *liberta*. Again, it is evident that Ulpian was reluctant to proceed beyond the latter category.

Ulpian's holding (D. 25.7.1.2)⁶⁹ that convicted adulteresses were, on the analogy of prostitutes, acceptable as concubines is of interest in this context. It suggests that the position of this jurist is not quite as extreme as it is usually taken to be. True, Ulpian postulated a narrow category of permissible concubines (again, this included the *sua* plus women exempt under the statute). However, for what it is worth, he was willing to expand the limits of the category itself, by allowing this exemption for convicted adulteresses.

Ulpian in fact goes further than his brief statement of the rule in D. 25.7.1.1 implies. His position on the *sua liberta*, buttressed by a vague legislative sanction, shows that there were circumstances in which he was prepared to allow concubinage with respectable women. If the evidence we have can be trusted,⁷⁰ he may, in making concessions to widely approved social practice, be argued to go a step beyond Atilicinus, who appears to stick closely to the exemptions, express or implied, of the adultery law. More than this, Ulpian applies part of the regime for marriage to such relationships, above all, by granting protection from *stuprum* committed with interlopers. By implication, in respectable concubinage there can be no liability for *stuprum* between the partners themselves. But if Atilicinus' rule, as understood by Ulpian, is not meant to exhaust all the possibilities (apart from the *sua*) that fall outside its scope, further extensions were problematic, though they might still be granted recognition on a case-by-case basis.

The manner in which Ulpian addresses the problem of concubinage and the *lex Iulia* on adultery sheds light on an isolated text of a predecessor, Ulpian Marcellus:⁷¹

Marcel. (26 *digest.*) D. 23.2.41.1: Et si qua se in concubinato alterius quam patroni tradidisset, matris familias honestatem non habuisse eam dico.

If a woman lives as a concubine with anyone other than her own patron, I say that she does not preserve the honorable status of *mater familias*.

⁶⁹ Quoted at note 36 above.

⁷⁰ By this I mean that Ulpian cites Atilicinus only for his opinion on the status of exempt women; we simply do not know if the latter expressed himself on the question of concubinage with the *sua*.

⁷¹ Ulpian Marcellus served on the *consilia* of Pius and Marcus: Kunkel (above, note 7) 213–14. H. Fitting, *Alter und Folge der Schriften römischer Juristen*² (Halle 1908) 60 dates his *Digesta* to the period between 161 and 167.

What precisely does Marcellus mean by *matris familias honestas*? It is significant that this text derives from a book of his *Digesta* that dealt with the *lex Iulia et Papia*.⁷² Like Ulpian (and Marcian, whose views are examined below), Marcellus has evidently conceded concubinage with *sua liberta* but (unlike Marcian) will go no further. Marcellus uses the expression *mater familias* in the technical sense it enjoyed under the adultery law,⁷³ to refer to a woman potentially liable to its penalties,⁷⁴ in contrast with Ulpian's usage in D. 25.7.1 pr. above.

Under the regime for the adultery law, the determination of a sexual partner's status as *mater familias* had a double implication. It meant that the relationship was sheltered from charges of *stuprum* committed between the partners themselves, while sexual relations by the woman with other men were punishable under the law. Without this status,⁷⁵ the *aliena liberta* taken as concubine might not be assumed to have a particular debt of loyalty toward the man, both while the relationship lasts and after it ends (unlike the *sua liberta*, she can leave her partner without his consent, and not be penalized). There is an obvious parallel between the the issue of liability for *stuprum* and the requirement of partner's consent to end a relationship. At the same time, the man might be liable to a prosecution for *stuprum* for his role in the disapproved union itself—another illustration of the ambiguity that often follows upon attempts to regulate sexual behavior.⁷⁶

⁷² Lenel, *Pal.* 1 col. 630–32.

⁷³ To be sure, Ulpian employs the expression in the context of a discussion of the *lex Iulia et Papia*, not the *lex Iulia de adulteriis coercendis*. It is also true that the jurists' use of technical language at times falls short of absolute precision: see notes 103 and 104 below.

⁷⁴ See above, notes 3, 35, 58, and note 75 below.

⁷⁵ Potential liability under the adultery statute was positively defined by the use of the term *mater familias*: see note 3 above. In losing this status, the concubine prejudiced her position (and, by implication, that of her partner) under the adultery law. Two possibilities emerge. The relationship was not respectable because the partners were guilty of *stuprum* committed with each other. The relationship was not respectable because the woman had shed her honor and was therefore, like the prostitute Marcellus discusses in the previous fragment (D. 23.2.41 pr.), exempt from the charge of *stuprum* with anyone (this would give a juristic extension of this exemption, for which there is no other evidence). Logically, these two positions should have been mutually exclusive, but I am inclined to think that Marcellus deliberately left the matter open, in the absence of settled law. Uncertainty over which of two undesirable alternatives might be adopted by the legal authorities in a given case might have been thought to serve as a deterrent to taking such women as concubines. Both may have applied: see further next note.

⁷⁶ This is a difficult point. As seen in the previous note, the loss of status as *mater familias* may be considered to imply complete exemption from liability. But I do not believe Marcellus here simply expands (as moderns often assume) the category of women in *quas stuprum non committitur*. The law itself, when it fixed liability for the *mater familias* and specified certain exempt types, was not so constructed as to deny the jurists any room to maneuver (I do not mean to imply this must have been deliberate on the part of the legislator). As seen, no definition of *mater familias* was given; moreover, given the fact that reality could not have conformed precisely to the black-and-white schematism of the law (because a woman was not a slave, adulteress, peregrine, procuress, or prostitute,

The sensitivity of the jurists over the *aliena liberta* category is remarkable. It cannot be explained simply in terms of the law's silence. We want to know why the statute went no further than the mention of *sua liberta*, or why several of the jurists, faced with a widespread social practice at odds with their position, hesitated. The limits imposed by the adultery law provide a partial answer. The rest may be sought in the ambiguous status of the *aliena* as a "respectable" concubine. Like all slaves and former slaves, she was a victim of the presumption that she had been sexually exploited by her master.⁷⁷ The same was true of the *sua*, but she enjoyed an advantage in that her partner in concubinage was the same man, so that her sexual integrity was not open to question on these grounds. The *sua* therefore enjoyed a superior status, insofar as socially accepted norms in concubinage went.

There was evidently a partial exception to this rule. A former slave of a female master would not fall under the same suspicion and so was preferred. This is the explanation behind the high proportion, noticed by Treggiari,⁷⁸ of concubines who were freed by women. One notes that of the three emperors known to have had "respectable" concubines, at least two kept freedwomen, and both of these had been freed by female owners.⁷⁹

This last qualification appears nowhere in the legal sources, but it helps explain why the courts and some jurists were willing to accept the second

did that automatically qualify her as a *mater familias*?), it was perhaps inevitable that these classifications came to be manipulated by the jurists. Indeed, Marcellus seems to have discovered a new application, unforeseen by the legislator: a type of relationship with a type of woman that was (potentially) ineligible for the "benefits" (right of prosecution for infidelity of female with third party), but (potentially) liable to the penalties of the *lex Iulia de adulteriis coercendis* (prosecution of both partners for *stuprum*). In problematizing concubinage with the *aliena liberta*, Marcellus sought to reconcile the legal regime to social practice and opinion, for the reasons given in the text below. If this reasoning holds true, Marcellus is, on a doctrinal level, somewhat more consistent (one might say rigid) than Ulpian (see note 59 above), although their position is practically the same.

⁷⁷ See, for example, Sen. *Contr.* 4 *praef.* 10; Val. Max. 6.1 *ext.* 3; Sen. *Nat. Quaest.* 1.16.1–9 *Ep.* 123.10; Petron. 43.8; Muson. 63–67H; Quint. *IO* 5.11.34–35; Mart. 12.96, 97; Plut. *Mor.* 140B; F. Gonfroy, *DHA* 4 (1978) 219–62; R. Martin, in Varron, *grammaire antique et stylistique latine* (Paris 1978) 113–26 (especially 123–25); M. Garrido-Hory, *Index* 10 (1981) 298–315 and *Martial et l'esclavage* (Paris 1981) 163–68; J. Kolendo, *Index* 10 (1981) 288–97; M. A. Cervellera, *Index* 11 (1982) 221–33; R. MacMullen, *Historia* 31 (1982) 484–502 (at 495–99); Saller (above, note 10) 65, 72, 78–79; J. Bodet, *CP* 84 (1989) 224–31 (at 224–25, 230–31). It has been argued that the passage from Seneca's *Controversiae* is poor evidence, since the advocate Q. Haterius' line about sexual *officia* was thought ludicrous and became a joke. In my view, Haterius was guilty of an unfortunate choice of words (*officium* used to describe a freedman's sexual submission to *patronus*), not an error of sociological description. His remark supports the other evidence for the sexual exploitation of slaves and freedmen.

⁷⁸ Treggiari (above, note 2) 71.

⁷⁹ Vespasian and Pius: see note 11 above. The status of Marcus' *concubina* is unknown: J. Crook, *Law and Life of Rome* (Ithaca 1967) 101 holds for freeborn, Rawson, *Family* (above, note 11) 48n. 37 for freed; see note 11 above. If the latter possibility is admitted, it is significant that her father was a procurator of the emperor's wife.

category. At the same time, Ulpian comes off as far less isolated and unreasonable. Nothing dictated an unqualified acceptance of this type of concubine. A line can be traced from him through Marcellus⁸⁰ and Atilicinus, all the way back to the Augustan legislation. Atilicinus asserted the claims of the adultery law without (as far as we can tell) reconciling this to the *lex Iulia et Papia*. Marcellus took up the cause of the latter statute without (again, to our knowledge) integrating this with the *lex Iulia* on adultery. This task was left, it seems, to Ulpian himself.⁸¹ Finally, the gingerly manner in which Papinian and Marcian (the “moderates” whose views are treated in the next section of this paper) address the problem of extending the scope of acceptable concubinage is better explained.

Marcellus’ refusal to accept the *aliena* category has broad policy implications. It marks him as unsympathetic to most forms of concubinage and as a firm supporter of the goals set by the adultery statute. This does not mean that the citation of him by Marcian, who held a different opinion (below), is mistaken or specious. Marcellus is used by his successor only to show that some form of concubinage was considered acceptable because the *lex Iulia et Papia* allowed it. There is a strong implication that Marcellus accepted the *sua* category based on the authority of the statute. The original context of his remarks must have been directed at this issue, taking as a point of departure the one relationship granted recognition by this law.⁸² Marcian’s invocation of Marcellus loses none of its relevance because he used it to help justify a significant expansion of the set of acceptable concubines.

3. Two Middle Approaches: Papinian and Marcian.

Other jurists were willing to go further in granting explicit approval to certain types of concubines. Our first text comes from a work of Papinian composed late in his career:⁸³

Pap. (8 *resp.*) D. 34.9.16.1: Quoniam stuprum in ea contrahi non placuit, quae se non patroni concubinam esse patitur, eius⁸⁴ qui concubinam habuit, quod testamento relictum est, actio non denegabitur. idque in testamento Coccei Cassiani clarissimi viri, qui Rufinam ingenuam honore pleno dilexerat, optimi maximique

⁸⁰ As noted, in the fragment immediately preceding that under discussion, Marcellus treats the definition of a prostitute: Marcel. D. 23.2.41 pr. Lenel, *Pal.* 1 Marcel. # 254 preserves the order. This fact further suggest that Marcellus, like Ulpian and Atilicinus, admitted women exempted under the adultery statute as concubines. In other words, his position on this point is difficult to distinguish from theirs.

⁸¹ Once more, the inadequacy of the evidence is freely acknowledged: it is possible that the positions of the three jurists were in all respects identical.

⁸² To be sure, the passage under discussion derives from the 26th book of the *Digesta*, while Marcian cites Book 7.

⁸³ Fitting (above, note 71) 76–78.

⁸⁴ Mommsen proposes “ei” on the basis of a text from the *Epitome*, but this passage simply supports the argument made above (note 52) that some concubines can receive legacies: C. E. Zachariä von Lingenthal, *Ius Graeco-Romanum* 2 (Leipzig 1856) 265–454 (at 270); J. Zepi and P. Zepi eds. (Zachariä von Lingenthal), *Ius Graeco-Romanum* 4 (Athens 1931) 261–619 (at 268).

principes nostri iudicaverunt: cuius filiam, quam alumnam testamento Cassianus nepti coheredem datam appellaverat, vulgo quaesitam apparuit.

Since the prevailing view is that *stuprum* is not committed with a woman who has allowed herself to become the concubine of someone not her patron, an action for what was left in the will of the man who had the concubine will not be denied. This is the judgement that our best and greatest emperors (Severus and Caracalla) reached in the case of the will of Cocceius Cassianus, a senator, who treated the freeborn woman Rufina with the utmost respectful affection. It was decided that Rufina's daughter, whom Cassianus appointed as co-heir with his own granddaughter, and referred to in his will as his "foster-child," had been begotten illegitimately.

Mitteis was the first to give a persuasive account of this text.⁸⁵ The will of a senator named Cocceius Cassianus has been attacked on the ground that his relationship with a freeborn woman named Rufina constituted *stuprum*. At issue is the regime of *indignitas*, which imposed itself in cases of testamentary bequests between partners in *stuprum* or *adulterium*.⁸⁶ Often promulgated by a *delator* or private accuser, such cases were pursued by *advocati fisci* in the court of the *procurator a rationibus*; the proceeds went to the imperial treasury.⁸⁷

The first sentence is tortured and difficult to comprehend. One strategy is to prefer, with Mitteis, Mommsen's substitution of "ei" for "eius" in the phrase "eius qui...habuit." The assumption is that a testamentary bequest made to Rufina was the object of the suit, as might be expected in such cases.⁸⁸

But there are two problems with this interpretation. It leaves high and dry the relatively lengthy disquisition about the couple's daughter, who has been named co-heir and is recognized by the court as Cassianus' illegitimate child.⁸⁹

⁸⁵ For a review of previous attempts at exegesis, see Mitteis (above, note 52) 305–7. Mitteis is right to argue that Rufina was not a prostitute (as had been assumed) simply because she had an illegitimate child. The first sentence has been wrongly impugned: see below.

⁸⁶ P. Voci, *Diritto ereditario romano* 1² (Milan 1967) 459–60. The source of the rule was perforce legislative: Voci, 464.

⁸⁷ First the *aerarium*, later the *fiscus*: Voci (above, note 86) 466.

⁸⁸ So most scholars who follow Mitteis understand the text. See Astolfi (above, note 28) 33–34.

⁸⁹ That this is a determination of fact made by the court is persuasively argued by Mitteis (above, note 52) 312–13, who also asserts that the testator's ambiguous characterization of his daughter as *alumna* had opened the way to the court challenge. This too is plausible. Cf. Paul. (14 *resp.*) D. 34.2.35 pr., where the words of a will (perhaps adapted from a real will, despite the formulaic "Titia": note 44 above) are quoted: "Titiae amicae meae, cum qua sine mendacio vixi, auri pondo quinque dari volo." The use of *amica*, in place of the more respectable *concubina*, may have opened the way to a challenge (i.e. an assertion that the relationship constituted *stuprum*: the text, to be sure, contains only an oblique reference to this assertion, though it perhaps can be read from the fact that a bequest to a concubine is at issue). However, the phrase *sine mendacio* ("without hypocrisy": *Pennsylvania Digest*), as a straightforward expression of intent over the nature of the relationship, will have helped set matters straight. It is possible that Cassianus attempted to obviate a challenge to the will through the use of *alumna* (so B. Rawson, in *The Family in Ancient Rome* [Ithaca 1986]

Second, the position of the pronoun before the clause “qui...habuit” makes for difficulties in attributing it, whether “ei” or “eius” is correct, to anyone but the subject of the clause, the male partner of the concubine.⁹⁰ The second sentence makes clear that this man, now deceased, had written the will in dispute, which renders such an attribution impossible. It seems preferable to recognize this text as evidence that the regime on *indignitas* was extended to the progeny of criminal liaisons.⁹¹ In other words, the ms. “eius” should be retained.

The determination that the daughter was the illegitimate daughter of Cassianus is important, since it explicitly acknowledges the legality, under the adultery statute, of the relationship between father and mother. The implication is that the child is the product of a respectable relationship, which was not, however, *iustae nuptiae*.⁹² It is the reasoning behind the decision which interests us. The issue seems to have been particularly urgent in this case because the woman was freeborn. Two factors were decisive, both of which go to the question of intent. First, there is the way Cassianus treated Rufina: “honore pleno dilexerat.” In other words, he regarded the relationship as a serious and stable one. As Mitteis argues, it is precisely this criterion which is used to

170–200 [at 179]), but it seems equally likely that he innocently chose the affective designation *alumna* over a more neutral, more accurate term (an example might be *filia naturalis*; on terms used to describe the children of concubinage, see Meyer [above, note 43] 34–52; Plassard [above, note 9] 128–33). On *fili* and *liberi naturales* in the classical period, see M. Niziolek, *RIDA*³ 22 (1975) 317–44; H. Stiegler, *Reformen des Rechts: Festschrift zur 200-Jahr-Feier der rechtswissenschaftlichen Fakultät der Universität Graz* (Graz 1979) 81–94 (at 84–87); G. Luchetti, *La legittimazione dei figli naturali nelle fonti tardo imperiali e giustinianee* (Milan 1990) 1–12. On *alumni*, the frequent recipients of testamentary largess, see Rawson, 173–86.

⁹⁰ So the *Pennsylvania Digest*, which translates the first sentence, “since it is agreed that a woman who allows herself to be the concubine of someone other than her patron cannot be the victim of *stuprum*, the man in question will not be denied an action for that which is left to him in the woman’s will.” Mitteis construes “ei” with “relictum est” instead of “denegabitur,” but this is less natural, given the word order.

⁹¹ I agree in principle with Orestano, *Struttura* (above, note 60) 366 (367)n. 977 that an explanation of the text should, if possible, neither assume information not provided nor ignore that which is given. We might indeed suppose that the central challenge was to a bequest made to Rufina, so that the daughter’s inheritance came to be treated as *a fortiori* valid. This still assumes the omission of the information that the latter bequest was called into question as well. Rufina (if one can assume she was still alive at the time that the suit was brought) may have posed an indirect concern to the court authorities even if she herself were not bequeathed anything. The rule desumed here against bequests to the progeny of illicit relationships was probably designed less as a moral measure (“the sins of the fathers...”) than as a bulwark against (or response to) a dodge whereby children were employed as a vehicle for transferring property to one’s partner. Paul. D. 28.2.9.1, which deals with the institution as heir of a *postumus* to be born to a woman married to another man, may represent a development of this rule. For a different interpretation of this text, see M. Kaser, *SZ* 60 (1940) 95–150 (at 126).

⁹² So most occurrences in the juristic sources of the phrase *vulgo quaesitus* and its cognates should be understood, despite *OLD* s.v. *vulgo* b.

distinguish an acceptable form of concubinage from *stuprum*.⁹³ The second point must be inferred from the apparent difference in the social rank of the two parties.⁹⁴ Rufina is a plain *ingenua*⁹⁵ and Cassianus a senator (*vir clarissimus*): the information is hardly gratuitous. Papinian himself considered the relative social position of the parties important in distinguishing concubinage from marriage.⁹⁶ Here marriage is not at issue, but the criteria employed to evaluate the relationship are the same.⁹⁷

⁹³ Mitteis (above, note 52) 308. The language raises a striking parallel with the chief criterion used to define a relationship as marriage: *honor matrimonii, affectio maritalis* (cf. Cic. *Cluentio* 5.12: *nuptiae plenae dignitatis*). This has led some commentators to mistake this relationship for such: they are refuted by Mitteis. R. Orestano's argument, *ACIV* 3 (Milan 1951) 47–65 (at 56–58) (see also *Idem, Struttura* [above, note 60] 369–72) that the relationship between Cassianus and Rufina was assumed to be marriage before the will was opened and read presses the text too hard. There is no question of marriage, only a dispute over concubinage and *stuprum*. For the former, of course, consent, or the intent to be married, was required under classical law: E. Volterra, *Enciclopedia del diritto* 25 (Milan 1975) s.v. *matrimonio (diritto romano)* 726–805 (at 732). *Affectio* can be both the subjective, psychological requirement and its external manifestation, *honor matrimonii* is more strictly the latter. So we find concubinage distinguished from marriage on the basis of intent. Ulp. (32 *ad Sabinum*) D. 24.1.3.1: "...quia non erat affectione uxoris habita, sed magis concubinae." See the discussion in G. Longo, *Ricerche romanistiche* (Milan 1966) 301–21 (esp. 313–14). The adultery statute required intent for the commission of both *stuprum* and *adulterium*: Ulp. D. 48.5.13(12). Intent can thus distinguish "marriage" from *stuprum* (in the case of incest). Pap. (11 *quaest.*) D. 12.7.5 pr.: "...non enim stupri, sed matrimonii gratia datam (sc. dotem) esse" (on this text, see H. H. Seiler, *Fs. Felgentraeger* [Göttingen: 1969] 379–92 [at 386–88]; cf. Pap. D. 48.5.39[38] pr.–7). It is therefore not surprising to find the same criterion used to distinguish concubinage from *stuprum*: see below.

⁹⁴ That this was crucial in defining acceptable concubinage among the upper classes is emphasized by Treggiari (above, note 2) 76.

⁹⁵ Since we are given no more information on Rufina, I cannot follow Astolfi (above, note 28) 33–34, who argues that she is "da bassa estrazione sociale." The more alike the social status of the two parties, the more difficult it would have been to accept a non-marital relationship as concubinage and not to treat it as a relationship punishable under the adultery statute. This was precisely the issue before the court, so that the difference in status between Cassianus and Rufina should not be overstated. On the other hand, such a gulf in status would have made it difficult to accept a relationship as marriage over concubinage. This helps explain the rule instituted by the obscure (and perhaps classical) *priscae leges*, which required documentation where marriage partners were of unequal status: Iustinus C. 5.4.23.7 (a. 520–23). Of course, the documentation would have provided a safeguard against charges of *stuprum* as well.

⁹⁶ Mitteis (above, note 52) 311. See Pap. (12 *resp.*) D. 39.5.31 pr., which distinguishes marriage from concubinage on the basis of relative social rank (*personae comparatae*) and the nature of the relationship (*vitae coniunctio*): these are the same two criteria given in the principal text, in reverse order. Such factors are crucial to establishing the presence of *affectio maritalis* and *honor matrimonii*. The passage has been attacked by those who considered *affectio maritalis* to be non-classical: *Index Itp.* ad loc. The prevailing view holds it to be fully classical: Kaser, *RP* 1² 73, 321–22. Cf. *FV* 253b, which, although fragmentary, confirms much of the text. See F. Wieacker, *Textstufen klassischer Juristen* (Göttingen 1960) 348–51. Ulpian was similarly minded: Ulp. (32 *ad*

The first part of the passage, “quoniam...patitur” seems to have been abridged (perhaps two sentences have been fused), probably by the compilers.⁹⁸ At first glance, it is surprising to see this phrasing used in a case which involves a freeborn woman. Why does the jurist not simply say that *ingenuae* taken in concubinage are immune from charges of *stuprum*, or even that all concubines are exempt, provided the relationship is a respectable one? One might attempt to escape the difficulty by attributing the entire phrase to the compilers,⁹⁹ but in fact Papinian’s own reasoning appears to be preserved.

The answer to this question takes us to the heart of the controversy over concubinage and *stuprum*. All the positions adopted by the jurists on this score depend to some extent on the status of the woman, as one would expect. Several take as their point of departure the case of a relationship between *patronus* and *liberta*. Some will allow concubinage with an *aliena liberta*, others with even a freeborn woman. It is significant that the court and the jurist reporting the case explain a decision involving the third category with language appropriate to the second. The most likely explanation is that, previous to this case, settled law (“*placuit*”) had recognized relationships of the first two types. To be sure, this recognition was probably qualified, especially with respect to the controversial second type, the *aliena liberta*, but the latter may have been taken up by the counsel for the *alumna* in an attempt to extend its scope to cover the case of freeborn women.¹⁰⁰ Concerning them it may be stated, oddly if not inaccurately (given that *ingenuae* have no *patronus*), that they can indeed be the concubines of someone who is not their patron.¹⁰¹

Concubines of this stripe were hardly admitted without qualification. The test of intent, as measured by quality of relationship and difference in status, still had to be applied. But this explains nicely why the trial court’s *decretum* adopted such ambiguous language and why this is retained by the jurist. Papinian’s words can be seen as an attempt to explain the court’s decision while limiting its implications. It was clearly not desirable, at least in his eyes, to extend to all *ingenuae* the principle that they could not be held liable for

Sabinum) D. 24.1.3.1, reporting another Severan *decretum* (this one pertains to a senator and a *sua liberta*).

⁹⁷ This is especially appropriate given the presence of a child, an atypical feature of concubinage in the classical period: Rawson (above, note 2) 289–90, Treggiari (above, note 2) 68–69.

⁹⁸ This seems the most likely possibility (see at note 101 below). On the post-classical fate of the *Responsa*, see Wieacker (above, note 96) 340–73.

⁹⁹ Since Mitteis, most scholars have held either for *non liquet* or for attribution to the compilers (in several cases the latter alternative is preferred precisely because the text is deemed unintelligible): Orestano, *Struttura* (above, note 60) 365–68.

¹⁰⁰ G. Castelli, *Scritti giuridici* (Milan 1923) 143–63 (at 154) suggests that opposing (i.e. prosecuting) counsel emphasized that Rufina was not a *sua liberta*, but it would have been an even greater advantage to dwell on her status as *ingenua*.

¹⁰¹ This is, I think, a reasonable way of understanding the roundabout expression “*quae se non patroni concubinam esse patitur*.”

stuprum as partners in a non-marital relationship.¹⁰² Thus the language of the *aliena liberta* category, or rather the category itself, was retained, though it was expanded to cover some cases which involved freeborn women.¹⁰³

Next is Marcian:

Marci. (12 *inst.*) D. 25.7.3 pr.-1: In concubinato potest esse et aliena liberta et ingenua et maxime ea quae obscuro loco nata est vel quaestum corpore fecit. alioquin si honestae vitae et ingenuam mulierem in concubinatum habere maluerit, sine testatione hoc manifestum faciente non conceditur. sed necesse est ei vel uxorem eam habere vel hoc recusantem stuprum cum ea committere: 1. nec adulterium per concubinatum ab ipso committitur. nam quia concubinatus per leges nomen assumpsit, extra legis poenam est, ut et Marcellus libro septimo digestorum scripsit.

Another person's freedwoman can be kept as a concubine; so too a freeborn woman, especially where she is of low birth or has been a prostitute. But if a man would rather have a freeborn woman of respectable background as his concubine, he is not permitted to do this without a *testatio* making his intentions clear. But (apart from this) it is necessary for him either to marry such a woman or, if he refuses, to commit *stuprum* with her. 1. A man does not commit adultery simply by having a concubine;¹⁰⁴ for, because concubinage has been recognized under statute, it is not penalized by the law (on adultery), as Marcellus also wrote in the seventh book of his *Digesta*.

Both fragments have been subjected to withering criticism.¹⁰⁵ In the first, everything from "et maxime" on has met with objections, although there is little agreement on the precise extent of interpolation. The phrase "et maxime...fecit" was attacked by Mitteis,¹⁰⁶ but defended by Castelli,¹⁰⁷ who

¹⁰² Aurelian is said to have forbidden concubinage with *ingenuae*: *HA Aurel.* 49.8. This notice, understood at face-value, is not reliable, but can be taken as evidence of continuing sensitivity on the subject.

¹⁰³ The reasons behind Papinian's evident reluctance to approve concubinage with *ingenuae* outright are illustrated by another text, where he holds that a soldier involved sexually with his sister's daughter is liable for *stuprum* if the parties intended concubinage, not marriage: Pap. D. 48.5.12(11).1 (note the incongruent reference to the *adulterii poena*). Lenience was generally accorded to partners in incestuous relationships if these aimed at marriage and were entered upon in ignorance of the law (even so, violations of the *ius gentium* were punished severely), although the union was ordered to be broken up: *Idem D. eod.* 39(38) pr.-7. Partners in non-marital incest faced a *duplex crimen*, consisting of incest and *stuprum*: *Idem D. eod.* 39(38).1; Marcii. D. 48.18.5 Obviously, concern with concubinage serving as a screen for, or simply amounting to *stuprum* existed where incest was not a factor, above all where the juridical and especially social status of the parties was similar.

¹⁰⁴ Treggiari (above, note 2) 73n. 69 comments on the unsuitability of translating "ab ipso" as "by itself," the way it is typically understood. "Ipso" is better taken as referring to the male partner, that is, the "ei" of the clause preceding and the subject of "maluerit" in the previous sentence. Note that *adulterium* is again used for *stuprum* (see note 103 above).

¹⁰⁵ Here only the main lines are treated. For further literature, see the *Index Itp.*

¹⁰⁶ Mitteis (above, note 52) 309.

¹⁰⁷ Castelli (above, note 100) 150-59. C. rejects only the words "et maxime."

also accepts "alioquin...conceditur," except for "sine...faciente."¹⁰⁸ Plassard¹⁰⁹ defends "alioquin" as well as the expressions "honestae vitae," "adulterium...committitur" and "et maxime..." while refusing to accept "sine...faciente" and "per...assumpsit." Rebro¹¹⁰ accepts the text almost in its entirety. Of late, there has been some acceptance of the earlier criticism.¹¹¹ For this reason, and because the text as it stands demands a fair amount of exegesis, a full discussion follows.

Like Ulpian, Marcian is engaged in dispensing advice on how safely to reconcile concubinage with the *lex Iulia* on adultery. He takes the same point of departure. As Meyer observed,¹¹² the section immediately preceding the part of the commentary we possess would have treated concubinage between a *patronus* and his *liberta*. Marcian passes to the second category, accepted by Papinian, of concubinage with an *aliena liberta*. Indeed, he goes even further, in conceptual terms, than Papinian does, for he explicitly adopts the third category of the *ingenua*, albeit with qualification. This is the meaning of the "et maxime" phrase, attacked by Mitteis as "juristischer Nonsens." Mitteis' criticism would stand if Marcian were simply stating what sorts of women make the best concubines,¹¹³ instead of performing a narrow, cautelary function with regard to the *lex Iulia*. Indeed, his mention of the prostitute can be reconciled with Ulpian's position. There was no problem in taking a freeborn prostitute as a concubine because she enjoyed immunity from *stuprum*.

The *obscurum loco nata* is another matter altogether. The phrase refers to low social status,¹¹⁴ so that an inequality between the partners is assumed. Such disparity accords, as we have seen, with contemporary practice and was a factor in the court decision reported by Papinian. Marcian elevates a criterion previously employed by the courts in such cases into a general principle. But in

¹⁰⁸ Kübler (above, note 10) 361 also rejects this phrase. Although he prefers to regard it as Byzantine, he concedes that the wording may suit the "decadent morality" of the Severan period ("...sondern höchstens den laxeren Anschauungen der Zeit des Marcian und Modestin entstammen"). The long-held view that this era witnessed a pronounced moral decline is not now accepted (P. Veyne, *Annales ESC* 33 [1978] 35–63; P. Garnsey and R. Saller, *The Roman Empire: Economy, Society and Culture* [1987] 132–36). But, even if the current view were false, it is doubtful that this phrase should be understood as a sign of decadence.

¹⁰⁹ Plassard (above, note 9) 79–81.

¹¹⁰ K. Rebro, *Konkubinát v práve rímskom* (Bratislava 1940) 176–77. He demonstrates the falsity of Castelli's assumption that Ulpian's view was the only one possible under classical law.

¹¹¹ For example, Treggiari (above, note 2) 73.

¹¹² Meyer (above, note 43) 26–27. Also P. Bonfante, *Corso di diritto romano* 1 (Milan 1963 repr.) 321.

¹¹³ Mitteis (above, note 52) 309 and Plassard (above, note 9) 81 assume this, even where they defend the text. So also, to an extent, Treggiari (above, note 2) 71–73.

¹¹⁴ I follow Treggiari (above, note 2) 73 and 75. C. Castello, *In tema di matrimonio e concubinato nel mondo romano* (Milan 1940) 135–38, argues strangely that the phrase refers to women born in dishonorable places such as brothels or taverns. S. Solazzi, *Scritti* 5 (Naples 1972) 61–69 also objects to this, but wrongly holds the phrase to be post-classical: see T. P. Wiseman, *New Men in the Roman Senate* (Oxford 1971) ch. 4.

openly embracing the category of *ingenuae*, he does not limit this to exempt women and the lowborn, as “et maxime” makes clear.

At the same time, Marcian hesitates to allow *carte blanche*. Too much discretion permitted with respectable women would defeat the purpose of the adultery law. Given the uncertainty over the legal situation, it would have been risky to take as a concubine a freeborn woman who did not fall in either of these groups. This is why, in the case of concubinage with a respectable *ingenua*, he recommends recourse to a *testatio* affirming the honorable intentions of the partners.¹¹⁵ This is the most important point, but has often been doubted. Such documents¹¹⁶ were used to testify to the existence of a marriage, with the aim of satisfying the requirements of the *lex Iulia et Papia*. The purpose behind Marcian’s *testatio* is different, but it stands as another example of an analogy drawn from contemporary marriage practice by the jurists and applied to concubinage.¹¹⁷

The next sentence, which runs into fragment 1, is difficult. “Sed necesse...committere” at first sight poses two alternatives which exclude concubinage as a possibility. Taken this way, the phrase would not only contradict the first part of the passage but overreach the position adopted by Ulpian and

¹¹⁵ If this is correct, the entire sentence “*alioquin...conceditur*” is classical in content. On *alioquin*, see Plassard (above, note 9) 79–80. Castelli (above, note 100) 156–57 defends “*maluerit*,” but on the assumption that *malle* cannot mean *velle* in classical Latin. The verb surely means “*voluerit*” here, a usage attested by the second century A.D.: B. W. Frier, *Landlords and Tenants in Imperial Rome* (Princeton 1980) 73n. 45. *Manifestum facere* in the sense of “to make plain” is patently classical: *OLD* s.v. *manifestus* 3b.

¹¹⁶ L. Wenger, *Akademie der Wissenschaften in Wien: Phil.-Hist. Klasse: Sitzungsberichte* 219.1 (Vienna 1941) 1–40. *Testationes* were also used to record the birth of certain children in accordance with the dictates of the *lex Papia Poppaea* (the illegitimate child) and the *lex Aelia Sentia* (the *filius anniculus*): E. Cuq, *Mélanges Fournier* (Paris 1929) 119–33; F. Schulz, *JRS* 32 (1942) 78–91 and 33 (1943) 55–64; E. Weiss, *BIDR* NS 10/11 (1948) 316–26; F. Lanfranchi, *Ricerche sul valore giuridico delle dichiarazioni di nascita in diritto romano* (Modena 1951); J.-P. Levy, *Études Macqueron* (Aix 1970) 439–49; Astolfi (above, note 28) 292–95. (For the rules on documenting divorce established by the adultery law, see Astolfi, 295n. 12, with literature.) The documents were not required for marriage: they were simply evidentiary in nature, not the constitutive element. Overall, they are hardly to be distinguished from marriage agreements, *tabulae nuptiales*, which had broader purposes, typically setting forth the financial arrangements for the marriage. See B. Kübler, *RE* 4A2 (1932) s.v. *tabulae nuptiales* 1949–55; J. Gardner, *Women in Roman Law and Society* (London 1986) 47–50, 144–46, 196–200. E. Karabélias, *RHD* 62 (1984) 599–603 argues for the existence of oral *testationes* in marriage. *Priscae leges* (perhaps classical) evidently required documentation where the status of the marriage partners was unequal: see note 95 above. For post-classical practice, see C. Van de Wiel, *RIDA*³ 25 (1978) 307–50 (at 341–44) and the other literature at note 133.

¹¹⁷ The word “*recusantem*” is of interest. Orestano (above, note 93) 54 sees in this evidence of a declaration before a magistrate and cites the censorial oath concerning marriage as an analogy. But the typical situation where these disputes arose would have been a challenge to the status of the offspring when both parents were dead. Marcian may with this word refer to a practice that he regards as so widespread and/or desirable that failure to observe it was tantamount to refusal; more likely, he means refusal to marry, as translated above.

Atilicianus. Perhaps the compilers omitted a qualifying phrase such as “sine hoc.” Understanding this frees Marcian’s formulation from the stark, unacceptable antithesis suggested by the text. The sentence would then summarize the alternatives implied by the cautelary advice on concubinage with the *honestia ingenua* just given. This is precisely what we should expect. There follows a transition to a justification for the jurist’s opinion, which is based on both legislative and juristic authority.¹¹⁸

4. The Broad Interpretation: Paul.

One other passage from the *Digest* title on concubines is of interest:¹¹⁹

Paul. (19 *resp.*) D. 25.7.4: Concubinam ex sola animi destinatione aestimari oportet.

A woman must be considered to be a concubine on the basis of intention alone.

Plassard¹²⁰ takes this text to draw a distinction between concubinage and marriage. But the coincidence of its original context in a book of Paul’s *Responsa* dedicated to the *lex Iulia et Papia*¹²¹ and its collocation by the compilers with other passages that deal with concubinage and *stuprum* make it just as likely that Paul treats the latter issue.¹²² As it stands, the text shows Paul granting the widest discretion possible for the choice of a concubine. There is no talk of a *testatio*.¹²³ All the same, even if one understands the jurist to

¹¹⁸ An alternative explanation is to take “uxorem” originally to have read “uxorem iniustam,” as suggested by two of the passages from Ulpian discussed elsewhere (D. 48.5.14[13] pr.–1: see notes 59 and 149). These texts indicate that Ulpian’s notion of the *uxor iniusta* is conceived broadly so as to include concubines, just as his *matrimonium iniustum* in these texts embraces concubinage. That Marcian saw an analogy between *concubina* and *uxor* is guaranteed by his insistence on resort to the *testatio*. The sentence under examination was perhaps abbreviated by the compilers, just as an expression qualifying the *uxor* has been suppressed. In any event, the phrase both summarizes the point of the holding and provides a transition to the justification, a transition consisting of the observation that *adulterium* (see note 104 above) is not committed by the male partner through having a concubine. Both alternatives have the virtue of elaborating the ambiguous phrase in the fullness of its context, but that given above in the text is to be preferred as easier and more economical.

¹¹⁹ The doubts of E. Albertario, *Studi* 1 (Milan 1933) 195–210 (at 208) about the classicity of *destinatio* are misplaced: see *OLD* s.h.v.

¹²⁰ Plassard (above, note 9) 83n. 3.

¹²¹ Like other juristic texts that deal with concubinage and *stuprum*: see note 39 above.

¹²² To split a hair, the text is phrased broadly enough to serve both purposes. Note *PS* 2.20.1: “Concubina igitur ab uxore solo dilectu separatur”; also Paul. D. 25.7.2. The principle was once held to be post-classical: Volterra (above, note 8) 134.

¹²³ The rule is that which holds for marriage itself. Book 19 of the *Responsa* was written under Alexander Severus (Fitting [above, note 71] 98) while Marcian wrote his *Institutiones* in the reign of Macrinus or that of Elagabalus (Fitting, 122). Paul may be responding to Marcian (or an earlier jurist) in taking the *ingenua* category a step forward.

hold that any woman may be taken as a concubine without fear,¹²⁴ presumably he would require some manifestation of intent to shield the parties from prosecution under the adultery law. Plainly, this need not be as formal as the *testatio* proposed by Marcian.

Of course, it would be useful to have more of Paul's opinions on this subject; an examination of the texts of Ulpian and Marcian cautions sufficiently against placing too much weight on juristic *sententiae* isolated from their context. But if the remark about *destinatio animi* is taken at face value, as it perhaps should be, it is unlikely that the compilers have eliminated something from the context that materially qualified Paul's position in light of the adultery law. The jurist evidently viewed the problem as analogous to that of distinguishing marriage from *stuprum*; other Pauline texts support this view.¹²⁵

It seems reasonable, then, to suppose some distance between his views and those of Marcian. This enables us to establish that a range of opinion existed among the jurists.¹²⁶ Ulpian, Marcellus, and Atilicianus stand at one end, Papinian and Marcian in between, and Paul at the other end. Papinian and Marcian, especially the latter, are closer in substance to Paul.¹²⁷

5. Modestinus' Position.

There remain two texts of Modestinus, which are extremely difficult. The first has sparked controversy among scholars over the issue of requirements for Roman marriage:

Mod. (1 *reg.*) D. 23.2.24: In liberae mulieris consuetudine non concubinatus, sed nuptiae intellegendae sunt, si non corpore quaestum fecerit.

A stable sexual union with a free woman is to be understood as marriage, not concubinage, unless she has been a prostitute.

¹²⁴ Elsewhere, Paul allows administrators to take women in their province, whom they were forbidden to marry, as concubines: Paul. D. 25.7.5 (= *PS* 2.20.2). A fairly broad discretion seems implied: Tomulescu (above, note 68) 305 (306)n. 19. For what it is worth, *HA Alex. Sev.* 42.4 alleges that Alexander Severus provided a concubine for each of his unmarried provincial governors who was in need of a female partner.

¹²⁵ In other words, the question is purely that of determining intent. Observe the practical problem raised in Paul. D. 25.7.2, where the male partner has gone mad and is thus incapable of forming an intent. (See Plassard [above, note 9] 35 on this point). So also *Idem* D. 34.2.35 pr. (see notes 44 and 89 above), where the deceased male partner's intent is desumable from the wording of his will.

¹²⁶ My conclusions differ from the view usually taken by the partisans of the "juristic controversy model." These scholars prefer a dualistic version, with Ulpian and Atilicianus at one end and "the majority" at the other. See, for example, Mitteis (above, note 52) 308–10; Plassard (above, note 9) 76–78. As Plassard notes, Papinian makes no mention of a *testatio*. However, his reluctance to proceed to a blanket admission of *ingenuae* emerges from his treatment of the Rufina case. This makes him more conservative than Paul, though not much more so.

¹²⁷ Their relative position depends to an extent on what stance one adopts on formal requirements versus manipulation of concepts. As noted, the position of at least one jurist (Ulpian: see note 59 above) is not wholly consistent.

The passage has been variously attacked. Several scholars have argued that the Byzantines substituted "liberae" for "ingenuae," or at least deleted a reference to the latter.¹²⁸ Solazzi¹²⁹ condemned the entire passage, on the ground that the exception of the prostitute is too narrow. How could the Romans simply assume marriage with the likes of procuresses, actresses, and convicted adulteresses? He does not go on to ask how, if his assumptions are correct, the compilers came to establish such a rule.¹³⁰ Orestano leaves aside the question of what types of women were implied and instead focusses on the principle that emerges from the text.¹³¹ He concludes that the presumption of marriage over concubinage, invoked where proof was lacking, is indeed classical.

Longo has criticized this view, so that it is worth reexamination.¹³² Orestano points out that the presumption would have come into play only when uncertainty existed over the real status of the relationship. This important qualification is ignored by Longo, who assumes that such a presumption would have threatened the decisive role of *affectio maritalis* in constituting marriage. Modestinus' principle is evidentiary, not constitutive. It presumes not marriage but the presence of *affectio* in the circumstances given, where other evidence is lacking. Longo also overlooks Orestano's detailed demonstration that, under Byzantine law, with its imposition of formal requirements for marriage, such a presumption was less likely to originate.¹³³ Orestano explains the retention of the classical principle enunciated by Modestinus as a manifestation of Justinianic "nostalgia," which is persuasive, given what we know of this emperor's conservative attitude toward the classical legal tradition.¹³⁴

Orestano's conclusion stands despite the criticism:¹³⁵ "...il non lievo valore etico e sociale (sc. of Modestinus' presumption)...si fonda sull'impossibilità

¹²⁸ Literature in Orestano (above, note 93) 51.

¹²⁹ Solazzi (above, note 114) 67.

¹³⁰ The legal conception of prostitute expanded in post-classical times, making this qualification, couched as it is in the language of the statute, unlikely to have been inserted then.

¹³¹ Orestano (above, note 93) 51.

¹³² Longo, (above, note 93) 333-37.

¹³³ Orestano (above, note 93) 58-63 takes the view that it is impossible, but this is too strong. Much of the legislation in question (for the exceptions, see C. Van de Wiel, *RIDA*³ 26 [1979] 453-73) deals with the issue of subsequent legitimation of children, after the relationship has been transformed from concubinage into marriage. It is easy to see the need for documentation in such cases. In general, see, for example, Van de Wiel (above, note 116) especially 341-44, and the other literature on this subject given in the bibliographical appendix. Other post-classical enactments required documentation where marriage was contracted with actresses and other socially inferior types or, conversely, with persons of the very highest social rank: Kübler, *RE* (above, note 116) 1953-54.

¹³⁴ The best statement is that of M. Kaser, *Österreichische Akademie der Wissenschaften: Phil.-Hist. Klasse: Sitzungsberichte* 277.5 (Vienna 1972) especially 16-19.

¹³⁵ Orestano (above, note 93) 64. Longo's argument is flawed in other respects. He takes an extreme position on source criticism, and draws erroneous conclusions from assumed interpolations. For example, he argues from the phrase in the Marcian passage (D. 25.7.3 pr.-1), which he takes to be largely post-classical, that the principle that the relationship without *testatio* must (" *debba* ")

morale di supporre (...salvo prova del contrario) che non sia stata voluta come matrimonio un'unione fra persone tra cui il matrimonio sarebbe stato giuridicamente possibile e socialmente da attendersi." At the same time it can be admitted that the analysis does not go far enough. No sustained attempt is made to examine Modestinus' view in relation to the other texts that deal with concubinage and *stuprum*.¹³⁶ The significance of the juristic controversy goes unnoticed and unexplained. Thus Orestano assumes, on the basis of excessive source criticism, that respectable freeborn women could not be concubines.¹³⁷

Another text of Modestinus provides a clue as to his position in the debate:

Mod. (1 *reg.*) D. 48.5.35(34) pr.: Stuprum committit, qui liberam mulierem consuetudinis causa, non matrimonii continet, excepta videlicet concubina.

He who keeps a free woman for the sake of a sexual relationship, and not for marriage, commits *stuprum*, unless, to be sure, she is a concubine.

The word "liberam" has met with similar objections as in the first text.¹³⁸ The phrase "excepta videlicet concubina" has been suspected by Kübler and Castelli, and afterwards accepted as interpolated by others.¹³⁹ Their views have been challenged by Arangio-Ruiz, who thought the exception accorded well with Ulpian's position on concubinage and *stuprum*, and more recently refuted by Treggiari, who demonstrates that the phrase is perfectly classical in form.¹⁴⁰

When the passage is examined from a substantive point of view, it displays a remarkable resemblance to the difficult sentence in the Marcian text above (assuming to be true the more likely interpretation of its meaning, which is given in the text). Aside from (accepted forms of) concubinage, one either marries a woman of free status or commits *stuprum* with her. This does not mean that Marcian and Modestinus were of the same mind. The formulation of the latter's text is unsatisfactory—taking the "excepta" phrase to be classical—because it does not give any idea of what sort of concubinage is acceptable: the types of women and other requirements, if necessary. Without the phrase,

be understood as marriage is therefore post-classical. Not only is the phrase classical, but Longo misstates its point. Another assumption is that Justinian's policy on concubinage was unequivocally favorable—not at all true, as Rebro had already shown.

¹³⁶ Orestano does cite the Marcian text and the passage of Papinian reporting the Rufina case. In the first instance he argues the *testatio* phrase to be interpolated, despite Wenger's evidence. Orestano assumes that Marcian's insistence on the *testatio* is inconvenient to his argument, but this is hardly true. The jurist is concerned with dispensing cautelar advice and distinguishing legitimate concubinage from *stuprum*, not with establishing a requirement for marriage.

¹³⁷ I derive this from the remarks of Orestano (above, note 93) 53, 58, cf. 56–57. See also, *Idem*, *Struttura* (above, note 60) 374–76.

¹³⁸ Literature in Orestano (above, note 93) 52.

¹³⁹ Kübler (above, note 10) 361; Castelli (above, note 100) 144–45. Cf. *Index Itp.* ad loc. Add H. J. Wolff, *Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law* (Haverford 1939) 96n. 357.

¹⁴⁰ Arangio-Ruiz (above, note 54) 107; Treggiari (above, note 2) 73.

however, we are left with only the two alternatives of *stuprum* and marriage, an extreme opinion, given the parameters of the juristic debate examined above.

Here the first passage can help. This directly concerns not *stuprum* and concubinage, but the distinction between marriage and concubinage.¹⁴¹ Nevertheless, it is the only indication of Modestinus' opinions on acceptable concubinage that we have. It is clear from this that the jurist did take the question of immunity from *stuprum* into account. Once more, the central problem is that of intent. Theoretically, this was all that mattered,¹⁴² but it could not be permitted to serve as a screen for *stuprum* or as a means of evading the responsibility of marriage. The criteria of the quality of the relationship, the relative status of the parties, the *testatio*, were all directed to this point. Modestinus adopts a radically different approach. In all cases where evidence of intent was lacking, marriage is to be assumed over concubinage (if the woman is not a prostitute).

Modestinus' attitude towards this institution is not very favorable. All doubtful cases of stable sexual union with a free woman should be understood as marriage, except when the woman is a prostitute. The position is intelligible in light of the exemptions permitted under the law. The qualification of "liberae" is significant and should be retained. At least potentially, all women not slaves were subject to this law. Modestinus specifically excludes from his presumption prostitutes, who enjoyed the statutory exemption *par excellence*. This may be understood not to rule out application of the principle to the other possible exclusions, not mentioned perhaps because not worth mentioning.¹⁴³ Peregrines were of little significance after the *constitutio Antoniniana* and, like slaves, were irrelevant to the presumption, insofar as, lacking *conubium*, they were incapable of contracting a *matrimonium iustum*, the type of union treated in this passage (below). Convicted adulteresses were barred from remarriage. *Lenae* were perhaps fewer in number than prostitutes and may be regarded as having been subsumed under this rubric.

The text shows a double orientation. Prostitutes (and perhaps procuresses) were the only women otherwise eligible for marriage considered unsuitable for the marriage presumption. The obvious explanation lies in their sexual disgrace. At the same time, the jurist sidesteps the thorny problem of concubinage and *stuprum*. In doubtful cases, one might assume the existence of marriage, so that the issue of acceptable concubinage did not even arise.¹⁴⁴ The only women for whom the assumption did not operate were those whom the law exempted. Here there could be no ambiguity.

¹⁴¹ This point assists the understanding that Modestinus uses *consuetudo* in two different senses, neutral in D. 23.2.24, negative here.

¹⁴² If intent could distinguish concubinage from *stuprum* (see above, notes 89, 93, 96, 125), it also helped justify a given relationship as an instance of socially approved concubinage.

¹⁴³ So Orestano (above, note 93) 53 seems to imply.

¹⁴⁴ It is interesting that Modestinus does not address the question of the relative social rank of the partners. This makes it even more imperative to retain *libera* in both texts. Such a *favor matrimonii* is entirely consistent with the aims and juristic treatment of the *lex Iulia et Papia*. The man evidently took a broad view on the question of suitable marriage partners.

This way of looking at the passage does not conflict with Orestano's main conclusion. Certainly Modestinus emerges as more of a strict constructionist than Ulpian *et al.*, since we do not find so much as a hint of approval for concubinage between *patronus* and *liberta*.¹⁴⁵ In this way, the safeguarding of sexual honor, advanced chiefly by the *lex Iulia de adulteriis coercendis*, is asserted in extreme fashion. However, the goals pursued by the companion statute, the *lex Iulia et Papia*, are not ignored. For Modestinus, it seems likely that the same broad considerations of social policy that lie behind the jurists' *favor matrimonii*¹⁴⁶ are extended to the relationship between these parties as well.¹⁴⁷ It is hard to imagine Ulpian, who takes the traditional line that concubinage between *patronus* and *liberta* was more respectable than marriage, to be in agreement.

Returning to the second passage, one notes that here as well "liberam" is an entirely appropriate reading. *Stuprum* was impossible with slaves, but both *ingenuae* and *libertinae* were potentially liable. Given this, we might expect to find, after the statement that a sexual relationship with a free woman must be either *stuprum* or marriage, a qualifying phrase referring to the exemptions, for example, that granted prostitutes. Instead there follows what appears to be a very broad exception made for concubines, which begs the question of which concubines were suitable.

As a result, Modestinus is difficult to place in the spectrum of juristic opinion. Lacking the motives—present in the first passage—of a bias toward marriage and the prospect of avoiding the issue of liability for *stuprum* altogether, he may have wanted to leave the matter open. But it seems risky to deduce from the second passage that, where intention was manifest, Modestinus would have accorded a wide discretion in choosing a concubine, particularly given the negative attitude towards this institution he displays in the first text. It is tempting to agree with Arangio-Ruiz and place him in Ulpian's camp, but it is also possible to regard him as more extreme, given his apparent denial of the suitability even of the *patronus/liberta* type, on the grounds that it was

¹⁴⁵ For what it is worth, the *patronus/liberta* relationship is not strongly attested in the inscriptions: Treggiari (above, note 2) 67 and *Phoenix* 35 (1981) 42–69 (at 55).

¹⁴⁶ For this principle, see Ulp. D. 23.2.27, where a freedwoman "married" to a senator (such a union was void in Ulpian's day: Astolfi [above, note 28] 114–19) begins to be a wife when the one impediment is removed, that is, the husband loses his status. The rule can of course be regarded as a logical extension of the *lex Iulia et Papia*, which aimed to encourage marriage and the raising of children.

¹⁴⁷ The rationale for this may be located in another pronouncement of this jurist which asserts that social norms of respectability should serve as an interpretative canon in the Roman law of marriage. Mod. (*lib. sing. de ritu nupt.*) D. 23.2.42 pr. (= D. 50.17.197): "Semper in coniunctionibus non solum quid liceat considerandum est, sed et quid honestum sit." This can be distinguished from Ulpian's reference to "honestius" on the ground that the latter jurist does not accord it the same weight in his decision. More than this, it seems that Modestinus' definition of *honestum* differs in substance from that of his teacher, insofar as it is a function of the type of relationship more than it is dependent on the status of the two parties. On Modestinus' statement of the marriage ideal, see note 149 below.

irreconcilable with the adultery law, and ultimately at odds with the policy goals of the *lex Iulia et Papia* itself.

In a sense, Modestinus redefines the issue raised by his fellow jurists by ignoring, or so it would seem, the entire question of respectable concubinage and choosing instead to infer marriage in cases where intent was not manifest. Through his implicit refusal to acknowledge prevailing ideas and practice in concubinage (insofar as these can be recovered), he appears more radical in his approach than any other jurist whose position is known to us. Both in his presumption of sexual respectability for all women not exempted from the penalties of the adultery law and in his pro-matrimonial stance, he is faithful to the spirit of the Augustan legislation, meaning, respectively, the *lex Iulia de adulteriis coercendis* and the *lex Iulia et Papia*. Given the ambivalence of this legislation—both conservative and innovative at once—it is perhaps not surprising that a strict constructionist approach can inform the development of a position that seems radical when it is viewed in light of social conditions.

With some investment of effort, Modestinus' position might be reconciled with any of those examined in this paper, be they conservative, moderate, or broad. This is true insofar as all the other jurists demand, explicitly or implicitly (note the argument made above for Paul's view), some manifestation of intent by the parties living in concubinage. Modestinus refuses to hold the sword of the adultery statute over the heads of those who have not been sufficiently clear as to their motives. This leaves marriage and concubinage as alternatives: the more prestigious union is given pride of place. In this way, the moral and demographic interests of society at large are allowed a better chance of fulfillment, children whose status might be questioned are rendered legitimate, and the innocent (or at least those not obviously guilty) are rescued from the coils of the *lex Iulia* on adultery.

Even as Modestinus seems to sail so effortlessly past the complexity of social practice and prejudice, one is entitled to wonder how well this neat, rather abstract expression of principle would have been viewed by a Roman court of law. The answer is, of course, unrecoverable. One might conclude that the widespread tolerance of concubinage described above would augur a hostile reception. But not everyone practised concubinage, and unanimity of opinion cannot be assumed. Modestinus wrote in an age when marriage enjoyed great prestige as the preferred sexual relationship and an ideal of affectionate relations between spouses was popular, at least among those orders of society from which the bulk of our evidence derives.¹⁴⁸

In sum, Modestinus, far from holding a view that was isolated and doctrinaire, gave voice to the widespread enthusiasm for marriage prevailing in his day.¹⁴⁹ His evidence, murky as it may be for the problem of what constituted

¹⁴⁸ See Veyne (above, note 108) *passim*, who argues that this development was peculiar to the Principate. A cogent objection is raised by Garnsey and Saller (above, note 108) 133, who cite evidence from the late Republic. See now also S. Dixon, in B. Rawson, ed., *Marriage, Divorce, and Children in Ancient Rome* (Oxford 1991) 99–113.

¹⁴⁹ Important for our understanding of this jurist's position is his own statement of the marriage ideal. Mod. (1 *reg.*) 23.2.1: "Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris com-

acceptable concubinage, can be read as an illustration of just how directly and decisively social values might influence the construction of a legal regime. Given its uncertainties and inconsistencies, the juristic treatment of concubinage was especially vulnerable to this sort of intrusion. To the minds of some Romans, this institution could not withstand a straightforward challenge from that of marriage, except in very narrow circumstances where there was no ideal relationship to safeguard. Concubinage with a prostitute serves as one of the very limited number of examples of the sort of union that lay beyond the application of Modestinus' principle.

municatio." This can hardly be understood as a pure statement of legal doctrine; instead, it is an expression of the valuation placed on marriage by Roman society. On the passage, see Kaser *RP* 1² 73n. 6, 310n. 2 (with literature). We might compare the "idealistic" language of Africanus and Ulpian in the following text. Afric.-Ulp. (2 *de adulteriis*) D. 48.5.14(13).1: "nec enim soli...Atridae uxores suas amant." The Homeric tag (the line [*Iliad* 9.340]) is given in Greek as well) is used to justify an extension of the right to advance the unprivileged adultery accusation (*ius extranei*) where the union was *matrimonium iniustum*. A similar extension is made in the case of respectable concubinage in the preceding fragment (Ulp. D. *eod.* 14[13] pr.: see note 59 above). Can a clean distinction be drawn, on the basis of these texts, between the position of Modestinus and that of his colleagues? An answer to this question begins with a double caveat. We cannot assume without argument that the Homerism refers back to concubinage in the preceding fragment and we do not know for certain that Modestinus excluded *matrimonium iniustum* from his encomium on marriage. However, even if we go as far as to accept that, in cases where the intent of both parties to live in concubinage was manifest, Modestinus agreed with the conservatives on the range of permitted relationships, a strong contrast emerges. Modestinus certainly cannot have shared Paul's position (D. 25.7.2) that concubinage should be assumed where the male partner/patron was mad. Presumably, even Ulpian *et al.* would have agreed with Paul: we have seen that concubinage with the *sua* was not only regarded as more socially respectable than marriage but probably enjoyed a legislative sanction, however minimal. More generally, the passages quoted suggest that Africanus and Ulpian were willing to grant limited recognition, *qua* marriage, to certain relationships that were serious and stable, but which did not enjoy the status of full Roman marriage. This accords well with the subjective view frequently taken of such unions, to judge from epigraphical evidence, where partners and relationships are often described with terminology appropriate to marriage. See the evidence collected by Meyer (above, note 43) 60–77; Plassard (above, note 9) 119–27. Modestinus heads in the other direction, bestowing the status of marriage upon unions where clarity as to the partners' intent was lacking. In this way, doubtful cases are objectively transformed into marriage. It seems more logical to assume that the jurist is thinking of unions where intent alone is at issue and objective impediments are not present. In other words, he means primarily, if not exclusively, *matrimonium iustum* in D. 23.2.24. The same can be said of the marriage encomium: see his comment on the role of *honestum* in evaluating relationships, quoted in note 147 above. Modestinus is writing a decade, at minimum, after the introduction of the *constitutio Antoniniana*, which removed one of the main impediments to full Roman marriage for most inhabitants of the empire. (On the date of composition of the *Regulae*, see Fitting [above, note 71] 129–30).

6. Conclusion.

As represented by Atilicinus, Marcellus, and Ulpian, the conservative approach to the problem examined in this paper was safe and schizophrenic. It responded to two very different questions with answers that were contradictory. What concubines were preferable in terms of upper-class practice? Those women who lacked the *dignitas* appropriate for wives, yet were respectable enough for a stable, serious relationship. Who made the best concubines with respect to criminal liability? The choice narrows to prostitutes and their analogues, that is, women who were exempt from the penalties for *stuprum*. They were safe, but hardly desirable partners for respectable men looking for something more than sex, but less than marriage, in a relationship. This view was at odds with the widespread social practice attested by literary sources and inscriptions.

It is not surprising, then, that other jurists cast about for another solution. Papinian sought to build on the conceptual apparatus offered by the marriage law. His approach is evidently *ad hoc*, with authoritative approval dependent on careful sifting of all relevant circumstances. The result did not meet with universal assent, not only because it strained the meaning of the second category to the breaking point, but also because the manner in which these three categories were defined was not fully satisfactory for the purposes of the *lex Iulia* on adultery. Marcian's answer is pragmatic, in that it attempts to account both for the adultery law and social practice. It had the advantage that the male partner might try to protect himself in advance, rather than waiting until matters reached a court for decision. But only by taking as concubine a woman exempted under the statute could one be completely secure from prosecution. Like Ulpian and the other conservatives, Papinian and Marcian are sensitive to the claims of widespread social practice. Both go a step further, however, in acknowledging a modicum of freedom of discretion. They seek to shelter this discretion from the threat of criminal penalties, albeit only within certain limits.

At first glance, Paul's holding seems completely to ignore the *lex Iulia*. There is a surface plausibility to the argument that, over the two centuries since this law was passed, the weight of custom and the lack of a serious social interest in prosecuting cases of respectable concubinage made for a partial desuetude of the statute. On this estimate, Paul joins Papinian and Marcian in the search for a solution that ran against the grain of the adultery law, leaving Ulpian and his student Modestinus isolated in a position they share with earlier jurists.

However, this scenario emerges as rather improbable. The Severan emperors were markedly aggressive in repressing adultery and *stuprum*.¹⁵⁰

¹⁵⁰ The argument relies on more than the number of imperial measures adopted (they were numerous, but evidence for Severan legislation is relatively abundant); their content and tone are decisive. Note, for example, Paul, *Coll.* 4.3.6, which reports a rule laid down by Caracalla granting a total release from the penalty for wrongful exercise of the *ius occidendi*. Alexander Severus introduces a rescript on the *crimen lenocinii* with the slogan *castitas temporum meorum*: C. 9.9.9 (a.

Despite some modern assertions to the contrary, the cooperation of contemporary jurists in this enterprise was far from reluctant.¹⁵¹ The efforts of the jurists to come to grips with the renewed interest in combatting these offenses explains how concubinage came to be problematized at the time they wrote, in the face of longstanding social practice that might have been thought to condone it.

Paul was no exception to the trend toward sexual repression. He viewed the problem of acceptable partners in concubinage as analogous to that of distinguishing *stuprum* from marriage. A claim to be married might serve as a screen for *stuprum* as easily as a claim to be living in concubinage: what mattered was intent, which had to be desumed from the circumstances. Paul's position is not radically different from that of the moderates, who are more cautious. There was in fact no absolute guarantee on the avoidance of criminal liability when the woman herself was not exempt.

It is noteworthy that even the conservatives (with the possible exception of Atilicinus) display a degree of sensitivity to upper-class practice and values. In exploring the approaches taken by the jurists, the analysis has tended to confirm the validity of conclusions reached by others, above all, Susan Treggiari. Concubinage was not only required to be monogamous (this meant more than the requirement that neither partner was supposed to be married to another person), but was to be preferred to marriage under certain circumstances, especially when the male partner enjoyed a significantly superior status to that of the female. Concubines themselves, provided they fell into the category of "respectable," were loved, honored, and expected to remain faithful. Of course, the legislation of Augustus, in particular, the adultery statute, was itself an expression of Roman social values. It played a key role in the formation of policy too, but with a difference worth stressing. As positive law, the *lex Iulia de adulteriis coercendis* presented the jurists with a more direct challenge.

Modestinus does not, once again, fit easily into this picture, so that one further caution is necessary. Unlike the others, this jurist is, to all appearances, not dispensing cautelary advice but enunciating a generalized, fairly abstract principle. It is one thing to recommend a *testatio* where a respectable freeborn woman is taken as a concubine and another to condemn, even implicitly, all such relationships without the document as *stuprum*. This is an opinion which we should have difficulty ascribing to Marcian and even to Ulpian himself. To be sure, every jurist knew that situations of fact were not always predictable, and Modestinus may have been allowing himself some room to maneuver. However, before we praise him for his flexibility, we should reflect on the potential for confusion and practical problems of application that his "solution" would have generated. It is surely correct to view this as a suggestion of the

224). See also Dio 76.16.4, which shows not every such initiative was followed through.

¹⁵¹ The interest displayed by the Severan jurists in the repression of adultery can be measured both by the substance of their holdings (see D. 48.5, the *sedes materiae*) and by the curious fact that the *lex Iulia* is the only criminal statute that received a special commentary from any jurist. Papinian, Ulpian, and Paul all wrote such works. See R. A. Bauman, *ANRW* 2.13 (Berlin 1980) 103–233 (at 129).

inadequacy of the different categories evolved by the jurists to deal with this problem. Caught between the insufficient guidance offered by statute law, and the almost intolerably high degree of variety and ambiguity found in practice, these categories faced an eventual, perhaps inevitable, breakdown.

The truth is that none of the alternative approaches developed by the jurists was enough by itself to resolve the dilemma posed by concubinage. 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, the transmission of property from one generation to the next, sexual honor, and freedom of discretion in the private sphere. An absolutely satisfactory solution was impossible, and a compromise or preferred solution was never attained. This explains why the juristic controversy on the issue survives in the Justinianic *Corpus*, not completely intact, but in a form which allows its main lines to be reconstructed. As long as these competing claims continued to be invested with an independent and roughly equivalent validity, the value-conflict could not be resolved through any amount of deletion or rewriting of existing texts, or even by legislating anew.

Bibliographical Appendix.

In spite of the recent, steadily increasing interest in the subject displayed by scholars, Roman concubinage has never received a critical bibliographical assessment. The literature is not so much extensive as obscure, largely consisting of long-forgotten monographs or tucked away in periodicals that are difficult of access. Given its importance, particularly the resonance it has for such areas of contemporary concern as sexuality, marriage, and the status of women, a guide to the general trends and most important individual works recommends itself. What follows does not attempt absolute completeness, but aims to lay down the main lines of a discussion that began, in its modern form, almost exactly a century ago. References to a number of more specialized works (often of great value, it must be said) can be found in the notes to the article above.

On the general subject of concubinage, the early comprehensive studies by P. M. Meyer, *Der römische Konkubinat nach den Rechtsquellen und den Inschriften* (Leipzig 1895) and J. Plassard, *Le concubinat romain sous le haut empire* (Paris 1921) are all but entirely superseded, groundbreaking as they were in their day. Meyer's reviewers, B. Kübler, *SZ* 17 (1896) 357–65 (at 359–60) and E. Costa, *BIDR* 11 (1898) 233–43 (at 234–35), as well as Plassard, criticized the thesis that concubinage under the Empire was an *Ersatzinstitut*, introduced as a compensation for the various bars to marriage established by Augustus. Nevertheless, the view that concubinage developed under the Principate as a social, not legal, response to the Augustan laws found widespread acceptance: see E. Weiss, *Institutionen des römischen Privatrechts*² (1949) 456–57; F. Schulz, *Classical Roman Law* (1951) 137–41; cf. the argument of Rawson outlined below.

L. Mitteis, *SZ* 23 (1902) 274–314 (at 304–14) suggested, against Meyer's view of an historical evolution, that the ambiguity and contradictions in the legal sources are the reflection of a classical juristic controversy, and this is the prevailing view today.

Taking up a view propounded earlier by Costa, G. Castelli, *Scritti giuridici* (Milan 1923) 143–63 argued that the institution was not, aside from the indirect influence of the Augustan marriage legislation, really defined by the law until Justinian. In effect, under classical law, only women exempted from the penalties laid down by the adultery law could be taken as concubines. Castelli's views are accepted and elaborated by P. Bonfante, *Scritti giuridici vari* 4 (Rome 1925) 563–67 (cf. *Idem*, *Corso di diritto romano* 1 [Milan 1963 repr.] 315–26; E. Volterra, *Studi Sassaresi* 17 [1928] 1–63 [at 5]; *Idem*, *NNDI* 3 [1959] s.v. *concubinato [diritto romano]* 1052–1053), but most scholars now regard his method of source criticism as too extreme.

H. J. Wolff, *Written and Unwritten Marriages in Hellenistic and Postclassical Roman Law* (Haverford 1939) 93–97 saw the classical juristic distinction between concubinage and marriage as a mixture of subjective and objective elements, a view which owes much to assumptions about the presence of interpolations in the legal texts that are no longer acceptable. This prejudices

W.'s presentation of the juristic controversy, which comes off as overly schematic and simplified.

C. Castello, *In tema di matrimonio e concubinato nel mondoromano* (Milan 1940) is correct to argue that concubinage was not a unitary institution, but goes too far in postulating a dichotomy between those types which are treated by the jurists as an institution analogous to marriage and which could become marriage, when a legal impediment was removed, and those for which this was, in his view, impossible, because one of the parties was stained with "infamia con una vita scostumata."

K. Rebro's study, *Konkubinát v práve rímskom od Augusta do Justiniána* (Bratislava 1940) (German summary, 175–91) has received little attention. Besides setting forth an energetic refutation of the interpolationist criticism practised by earlier authors, above all Castelli and Bonfante, he develops more fully the theme of juristic controversy first put forward by Mitteis.

More recent work has returned to a treatment of the epigraphical data, first examined in detail by Meyer. All serious attempts to come to grips with Roman concubinage must rely heavily on the work of Rawson and Treggiari. B. Rawson, *TAPA* 104 (1974) 279–305 refutes the moralizing interpretations of Meyer and Plassard. She finds a heavy concentration of partners of slave or freed condition and concludes that objective impediments, especially those involving the status of one or both partners, were often a bar to marriage and so encouraged resort to concubinage as a substitute (a variation on Meyer's thesis regarding the *Ersatzinstitut*). I differ from her in that I believe with most scholars that an act of the will rather than cohabitation (Rawson, 279) created and maintained the marriage bond and that the marriage prohibitions of the *lex Iulia et Papia* did not preclude, but only penalized, unions that violated this statute.

S. Treggiari, *PBSR* 49 (1981) 59–81 examines the relative status of partners within this type of relationship and takes Rawson's conclusions one step further, showing that the men were generally of higher status than the women (Treggiari, 59). Her review of the legal sources suggests that Augustus did not exclude *ingenuae* as possible concubines, and that among the poor, where the incentives (and penalties) of the marriage law were not as keenly felt, "concubinage may have seemed a normal alternative to marriage"; moreover, society in general approved concubinage where the male partner was of a significantly higher status. As for the relationship of this institution to the adultery law, she concludes that "although concubinage with a freeborn woman probably did not constitute *stuprum*, there was probably some feeling that a freeborn woman should become a wife, if the man was of comparable social status, so they could produce second-generation freeborn children" (Treggiari, 76). See also Treggiari, *Phoenix* 35 (1981) 42–69, which describes *contubernium*, a type of concubinage where at least one of the parties was a slave during the union.

Some recent work must be approached with caution. O. Robleda, *El matrimonio en derecho romano* (Rome 1970) 275–83 employs a method at odds with contemporary standards of source criticism, and is overly dismissive of previous objections to this approach. A. Rousselle, *Opus* 3 (1984) 75–84 assumes, against the view that prevails today, that it was customary and accepted for a man to keep wife and concubine simultaneously; she also misses

the juristic debate, as does P. Csillag, *The Augustan Laws on Family Relations* (Budapest 1976) 143–46 (for summaries of C.'s earlier work on concubinage, see G. Polara, *Iura* 15 [1964] 484 and K. Visky, *Iura* 17 [1966] 499).

Finally, some relatively specialized work on concubinage can be canvassed briefly. For a valuable examination of some of the implications of concubinage for Roman family life, see R. Saller, *Slavery and Abolition* 8 (1987) 65–87 (at 71–76). For the legal status of children born in concubinage during the classical period, see the literature cited in note 89. On concubinage in post-classical law, see R. Danieli, *Studi Arangio-Ruiz* 3 (Naples 1952) 175–79, better than C. S. Tomulescu, *Studi Scherillo* 1 (Milan 1972) 299–326, who, in the wake of Bonfante, overstates the case for Justinianic recognition of this institution. See now E. Karabélias, *Atti Acc. Rom. Cos.* 7 (Naples 1988) 183–201, and *Atti. Acc. Rom. Cos.* 8 (Naples 1990) 439–53. On the legal status of children born in concubinage during the post-classical period, see C. Van de Wiel, *RIDA*³ 25 (1978) 307–50 and *RIDA*³ 26 (1979) 453–73; and now M. Navarra, *Atti Acc. Rom. Cos.* 7 (Naples 1988) 459–75; G. Lanata, *Atti Acc. Rom. Cos.* 7 (Naples 1988) 487–93; H. Wieling, *Atti. Acc. Rom. Cos.* 8 (Naples 1990) 455–71; G. Lucchetti, *La legittimazione dei figli naturali nelle fonti tardo imperiali e giustinianee* (Milan 1990). Post-antique approaches to concubinage are treated by C. Nardi, *Arch. Pen.* 19.1 (1963) 108–23 (at 114–23) and J. Goody, *The Development of The Family and Marriage in Europe* (1983) 75–82 (with further bibliography); on Goody's general argument, see B. D. Shaw and R. P. Saller, *Man* 19 (1984) 432–44.

Finally, when this article was already in press, I had the opportunity to consult S. Treggiari's important book, *Roman Marriage: Iusti Coniuges from the time of Cicero to the time of Ulpian* (Oxford 1991). The reader is referred to her treatment of concubinage (esp. 51–52, 55–56, 311), the requirement of intent/consent to marry (54–57, 170–80), the marriage ideal (esp. 229–61), Mod. D. 23.2.1 (9–10, 251), the pre-Augustan legal regime on adultery (264–77), and the *lex Iulia de adulteriis coercendis* (277–98).