

# MATER FAMILIAS

## SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

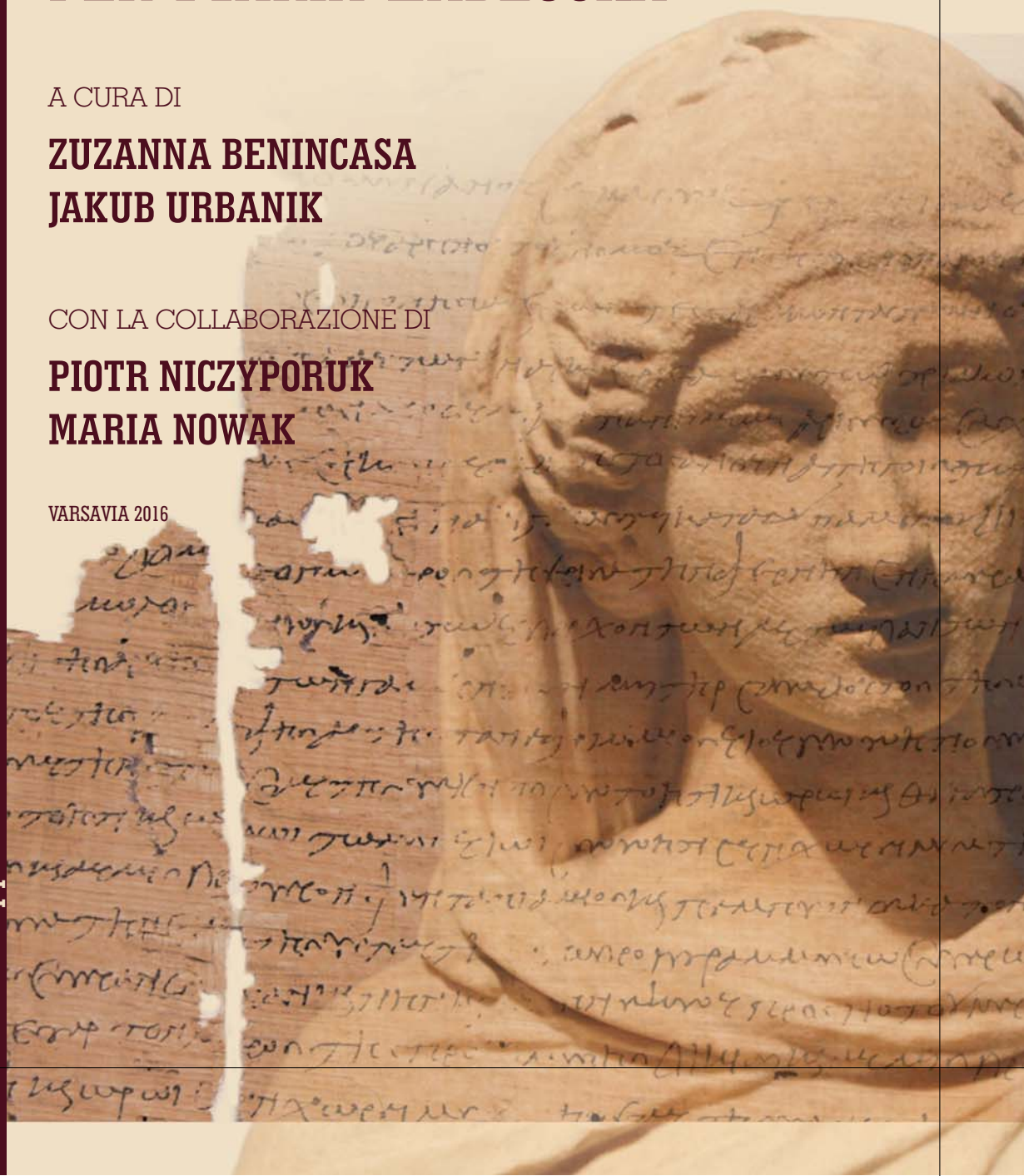
A CURA DI

**ZUZANNA BENINCASA  
JAKUB URBANIK**

CON LA COLLABORAZIONE DI

**PIOTR NICZYPORUK  
MARIA NOWAK**

VARSAVIA 2016



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*Supplements to The Journal of Juristic Papyrology* are jointly published by the Faculty of Law and Administration of the University of Warsaw, the Institute of Archaeology of the University of Warsaw, and Fundacja im. Rafała Taubenschlaga, Krakowskie Przedmieście 26/28, 00-927 Warszawa 64 tel. (+48 22) 55 22 815 and (+48 22) 55 20 384, fax: (+48 22) 55 24 319 e-mails: g.ochala@uw.edu.pl, t.derda@uw.edu.pl, kuba@adm.uw.edu.pl web-page: <<http://www.taubenschlagfoundation.pl>>

Cover design by Maryna Wiśniewska  
Computer design and DTP by Jakub Urbanik

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Warszawa 2016

ISBN 978-83-938425-9-9

Wydanie I.  
Druk i oprawa: Sowa Sp. z o.o., Piaseczno



*Mater Familias*  
*Scritti per Maria Zabłocka*

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**LENOCINIUM IN THE LEX IULIA DE ADULTERIIS**

THERE ARE NO GROUNDS IN THE SOURCES to assume that all conduct associated with adultery and prohibited under the *Lex Iulia de adulteriis*, on pain of the punishment prescribed for *adulterium*,<sup>1</sup> were described in the act as *lenocinia*.<sup>2</sup> It would be futile to try to justify this forcibly advanced hypothesis that the offences enumerated by the Justinianic compilers on the grounds of Ulpian's Book Four on adultery in *D.* 48.5.30(29) *pr.*–4 are types of statutory criminal *lenocinia*.<sup>3</sup> Ulpian was unambiguous in defining which offences penalised by the *Lex Iulia* were *lenocinia*. His remarks on the statutory criteria of *lenocinium* are clear and

<sup>1</sup> The list of offences in the Justinianic *Digests* is not in an enumerative arrangement. Tryphoninus gives the following examples of crimes for which offenders were punished in the same manner as adulterers: the contracting of marriage with a woman convicted of adultery, failure to repudiate a wife caught in adultery, drawing profit from adultery committed by one's wife, accepting a gain for the discovery of a *stuprum*, and making premises accessible for adultery. *D.* 4.4.37.1. Cf. also *D.* 48.2.3.3.

<sup>2</sup> Cf. T. A. J. MCGINN, *Prostitution, Sexuality, and the Law in Ancient Rome*, New York – Oxford 1998, pp. 172–173; p. 221. Cf. Carla FAYER, *La familia romana. Aspetti giuridici ed antiquari* III: *Concubinato. Divorzio. Adulterio*, Roma 2005, pp. 252–253.

<sup>3</sup> Cf. G. RIZZELLI, 'Il crimen lenocinii', *Archivio Giuridico* 210 (1990), pp. 457–458; IDEM, *Lex Iulia de adulteriis. Studi sulla disciplina di adulterium, lenocinium, stuprum*, Bari 1997, pp. 125–126.

consistent. In comparison with other classical sources on *lenocinium* in connection with the *Lex Iulia*, they present a well-knit and logical discourse, which makes them particularly credible.

I am going to return to the sources, which I shall read literally assuming that their texts are authentic;<sup>4</sup> only in absolutely obvious cases and for certain transformations<sup>5</sup> shall I assume that the source texts I am analysing have been interpolated. I shall rely chiefly on the records left by the classical jurists on the grounds of the descriptions of *lenocinium* in Ulpian as drawn from the Justinianic *Digests* to determine the following: the perpetrator of *lenocinium*, the variants of this offence, the criteria determining the causative act, and the necessary criteria in the offender's attitude. I shall not try to determine the variants of *lenocinium* in conduct penalised by the *Lex Iulia* but not described directly in any juridical source. I shall also try to determine the circumstances calling for the need to classify the given offence according to the variants under the *Lex Iulia*.



# I. PERPETRATOR AND THE TYPES OF *LENOCINIUM*

Under the *Lex Iulia de adulteriis coërcendis*, generally any offence could be committed only by a free person who had reached the age of maturity by the time of the offence.<sup>6</sup> The commission of *lenocinium* was determined by an additional, particular property of the subject of the offence:

<sup>4</sup> W. BOJARSKI, 'Remarks on Textual Reconstruction in Roman Law', [in:] W. WOŁODKIEWICZ & Maria ZABŁOCKA (eds.), *Le droit romain et le monde contemporain. Mélanges à la mémoire de Henryk Kupiszewski*, Varsovie 1996, p. 89: '... the text in the *Corpus Iuris Civilis* should be treated as genuine and as originating from the authors named in the inscriptions'.

<sup>5</sup> Textual authenticity is assumed by A. SOKAŁA, *Meretrix i jej pozycja w prawie rzymskim*, Toruń 1998, p. 6; and Joanna MISZTAŁ-KONECKA, *Incestum w prawie rzymskim*, Lublin 2007, p. 12.

<sup>6</sup> *D.* 48.5.6 *pr.* (Pap. 1 *adult.*): 'Inter liberas tantum personas adulterium stuprumve passas lex Iulia locum habet ...' – The Julian Law applies only to free persons who have committed *adulterium* or *stuprum* ...; *D.* 48.5.37(36) (Pap. 3 *quaest.*): 'Si minor annis adulterium

*D. 48.5.2.2 (Ulp. 8 disp.):* Lenocinii quidem crimen lege Iulia de adulteris praescriptum est, cum sit in eum maritum poena statuta, qui de adulterio uxoris suae quid ceperit, item in eum, qui in adulterio deprehensam retinuerit. – The crime of *lenocinium* is defined in the *Lex Iulia de adulteriis*, since there is a penalty laid down in this law for a husband who accepts anything for his wife's adultery, or who keeps her after she has been caught in the act of adultery.

*Lenocinium* could be committed only by a married man. The perpetrator was not referred to by the term *leno*,<sup>7</sup> but descriptively – 'qui de adulterio uxoris suae quid ceperit; qui in adulterio deprehensam retinuerit'.<sup>8</sup>

The *Lex Iulia* defined two types of *lenocinium*. The nature of the causative act was determined by the husband drawing a profit from his wife's adultery or by retaining her after she had been caught in adultery.

*D. 48.5.30(29).4 (Ulp. 4 adult.):* Quaestum autem ex adulterio uxoris facere videtur, qui quid accepit, ut adulteretur uxor: sive enim saepius sive semel accepit, non est eximendus: quaestum enim de adulterio uxoris facere proprie ille existimandus est, qui aliquid accepit, ut uxorem pateretur adulterari meretricio quodam genere. Quod si patiatu uxorem delinquere non ob quaestum, sed negligentiam vel culpam vel quandam patientiam vel nimiam credulitatem, extra legem positus videtur.<sup>9</sup> – A man who has accepted anything in return for his wife committing adultery is considered to draw a profit from his wife's adultery. He cannot be exempted from punishment regardless of whether he has received anything many times or only once, since he is justly considered to be drawing profit from his wife's adultery if he has received anything at all in return for his consent for his wife to commit adultery in the manner of a prostitute. If he allows his wife to commit the offence not for the sake of profit but through the fault of his own negligence, or due to a certain degree of indifference or excessive trust, he shall be deemed beyond the law.

commiserit, lege Iulia tenetur, quoniam tale crimen post pubertatem incipit'. – If a minor [under twenty-five] commits adulterium, he is liable under the Julian Law, since the ability to commit an offence of this kind starts at puberty.

<sup>7</sup> Cf. MCGINN, *Prostitution* (cit. n. 2), p. 172.

<sup>8</sup> Cf. RIZZELLI, *Lex Iulia* (cit. n. 3), p. 125; p. 141.

<sup>9</sup> Cf. MCGINN, *Prostitution* (cit. n. 2), p. 222.

*D. 48.5.30(29) pr. (Ulp. 4 adult.):* Mariti lenocinium lex coercuit, qui deprehensam uxorem in adulterio retinuit adulterumque dimisit: debuit enim uxori quoque irasci, quae matrimonium eius violavit. Tunc autem puniendus est maritus, cum excusare ignorantiam suam non potest vel adumbrare patientiam praetextu incredibilitatis: idcirco enim lex ita locuta est ‘adulterum in domo deprehensum dimiserit,’ quod voluerit in ipsa turpitudine prehendentem maritum coercere.<sup>10</sup> – This Law penalised a husband for *lenocinium* if he kept his wife after she had been caught in adultery and allowed the adulterer to go; for he should be angry with his wife for having violated the marriage. The husband is liable if he cannot provide an excuse for his ignorance or hide his tolerance under the guise of disbelief; that is why this Law ruled that ‘he let the adulterer who had been caught on the premises go’ because its intention was to punish the husband who had surprised [them] in the very act of turpitude.

#### 1) *Quaestum ex adulterio uxoris facere*

In the first type of *lenocinium* the purpose of the offender’s conduct was to gain an advantage – any advantage (*aliquid*), presumably material gain (an increment in his material assets or a reduction of his debts), and/or personal gain, which could have taken a variety of forms. His gain was associated with his wife’s adultery. The meaning of the concept of *adulterium uxoris* is absolutely clear: a married woman having sexual intercourse with a man who was not her husband. One of the elements which had to be established in the offender’s act was the husband’s consent to his wife’s adultery. The expression *qui quid accepit, ut adulteretur uxor* shows that the consent was issued prior to the adultery. The reference to prostitutes, who openly and repeatedly engage in fornication with random partners,<sup>11</sup> confirms that the wife’s misconduct was not a fortuitous

<sup>10</sup> Cf. *PSent.* 2.26.8 = *Coll.* 4.12.7. E. VOLTERRA, ‘Alcune innovazioni giustiniane al sistema classico di repressione dell’adulterio’, [in:] *Scritti giuridici 1: Famiglia e successioni*, Napoli 1991, p. 337, considers passage *D. 48.5.30(29) pr.* contains an interpolation. Cf. also MCGINN, *Prostitution* (cit. n. 2), p. 177.

<sup>11</sup> *D. 23.2.43.2.* A. SOKALA, ‘*Palam corpore quaestum facere*. Glossa ad *D. 23, 2, 43 pr.-3*’, *Prawo Kanoniczne* 37 (1994), No.3–4, p. 163; IDEM, *Meretrix* (cit. n. 5), p. 69. Cf. also P. CSILLAG, *The Augustan Laws on Family Relations*, Budapest 1976, pp. 181–182.

occurrence, and that the gain which the husband accepted was not merely a form of compensation for the violation of his marriage, but a specific kind of payment made on a prior agreement. The adultery came about as a result of the husband's impropriety (*cf. D. 24.3.47*). The sequence of prohibited conduct was obvious, and there was no need to describe it; what had to be determined was whether the husband's offence made any difference to the assessment of the adulterer and adulteress, whether the man accused of adultery could bring legal proceedings against the perpetrator of the *lenocinium*, and whether a charge of *lenocinium* would affect the husband's situation in proceedings he lodged concerning his wife's adultery.

*D. 48.5.2.4 (Ulp. 8 disp.):* Qui hoc dicit lenocinio mariti se fecisse, relevare quidem vult crimen suum, sed non est huiusmodi compensatio admissa. Ideo si maritum velit reus adulterii lenocinii reum facere, semel delatus non audietur.<sup>12</sup> – Anyone who claims he did it [committed adultery] due to the husband's *lenocinium* probably wants to diminish his own offence thereby, but this kind of interchange is inadmissible. Therefore if a man who has been accused of adultery should want to accuse the husband of *lenocinium* his complaint shall not be heard once he has been accused.

*D. 48.5.2.5 (Ulp. 8 disp.):* Si publico iudicio maritus uxorem ream faciat, an lenocinii allegatio repellat maritum ab accusatione? Et putem non repellere: lenocinium igitur mariti ipsum onerat, non mulierem excusat. – If a husband is accused of *lenocinium*, does this charge prevent him from bringing criminal proceedings against his wife? In my opinion it does not: *lenocinium* is the liability solely of the husband, but it does not exonerate the woman.

According to Ulpian the *lenocinium* committed by the husband of the adulteress did not cancel out the criminality of the adulterer's offence. The physical intercourse engaged in 'in consequence' of the *lenocinium* was still against the law. Charges could still be brought against the adulterer – the *lenocinium* did not exonerate him of the offence. A man who was accused of *adulterium* could not bring proceedings for *lenocinium* against the husband of the woman with whom he had committed adul-

<sup>12</sup> *Cf. D. 48.5.2.7.*

tery. The accused were prohibited from lodging an *accusatio*. In Ulpian's opinion an accusation of *lenocinium* against a man once he had initiated proceedings concerning his wife's adultery did not deprive him of the status of accuser. His own *lenocinium* did not rule out his wife's culpability for adultery. The adultery had been committed by the woman of her own doing, and under the provisions of the *Lex Iulia* her husband's *lenocinium* had no effect on the assessment of her own misconduct, viz. it was not a mitigating circumstance. The wife who had committed adultery and the husband who drew a profit from her adultery were both liable, each within the scope of their respective offence.<sup>13</sup>

Thus there can be no doubt that the sole criterion for *lenocinium* was the husband's *prior* consent, not his acquiescence to an act of adultery discovered in the course of its commission, nor to one that had been committed in the past. There are no grounds in the sources for the claim that the *Lex Iulia* treated the husband's impropriety by keeping his knowledge of the adultery secret in return for a 'gain' as a *lenocinium*.<sup>14</sup> It is indisputable that under the *Lex Iulia de adulteriis* a person who took hush-money for the discovery of an act of *stuprum* (*qui comperto stupro accepit*) was subject to prosecution.<sup>15</sup> The offence of concealing information on an adultery in return for a gain is mentioned by Paulus, Tryphoninus, Papinian, and Ulpian, as well as in Alexander Severus' rescript of 225 AD.

*D. 4.2.8 pr. (Paul. 11 ed.):* Isti quidem et in legem Iuliam incidunt, quod pro comperto stupro acceperunt. Praetor tamen etiam ut restituant intervenire debet: nam et gestum est malo more, et praetor non respicit, an adulter sit qui dedit, sed hoc solum, quod hic accepit metu mortis illato. – Those who have accepted [a gain] for having discovered an act of *stuprum* are certainly liable to prosecution under the Julian Law. However, the praetor should intervene to make them return the gain, for such gain is a bad custom; it is not for the praetor to establish whether it was the adulterer who gave the gain, but only that its recipient took it on making a death-threat.

<sup>13</sup> Dorota STOLAREK, 'Ustawa julijska o karaniu za cudzołóstwa, 5 tytuł 48 księgi Digestów. Tekst – tłumaczenie – komentarz', *Zeszyty Prawnicze* 12.1 (2012), p. 215.

<sup>14</sup> Cf. RIZZELLI, *Lex Iulia* (cit. n. 3), pp. 134–138; IDEM, 'Il crimen lenocinii' (cit. n. 3), pp. 473–477.

<sup>15</sup> Cf. MCGINN, *Prostitution* (cit. n. 2), pp. 174–175; pp. 225–226.

*D.* 4.4.37.1 (Tryph. 3 *disp.*): ... pro adulterio eadem lex punit, veluti si ... pretium pro comperto stupro acceperit ... – under this Law anyone who takes a payment for the discovery of an act of stuprum is liable to punishment as for adultery ...

*D.* 48.5.11(10).1 (Pap. 2 *adult.*): Mulieres quoque hoc capite legis, quod domum prae buerunt vel pro comperto stupro aliquid acceperunt, tenentur. – Women who make their houses available, or have received anything for a *stuprum* which they have discovered, are also liable under this chapter of the Law.

*D.* 48.5.30(29).2 (Ulp. 4 *adult.*): Plectitur et qui pretium pro comperto stupro acceperit: nec interest, utrum maritus sit qui acceperit an alius quilibet: quicumque enim ob conscientiam stupri accepit aliquid, poena erit plectendus. Ceterum si gratis quis remisit, ad legem non pertinet. – Anyone who accepts a payment on the discovery of an act of *stuprum* is liable to punishment regardless of whether the recipient is the husband or any other person, for anyone who receives anything in the knowledge that *stuprum* has been committed is liable to punishment. But should he allow [the adulterer] to leave freely he shall not be liable under this Law.

*Cf.* 9.9.10 (Imp. Alexander A. Demetrianus): De crimine adulterii pacisci non licet et par delictum accusatoris praevaricatoris et refugientis veritatis inquisitionem est. Qui autem pretium pro comperto stupro accepit, poena legis Iuliae de adulteriis tenetur.<sup>16</sup> – If the crime of adultery has been committed collusion [with the adulterer] is prohibited, and both the colluding accuser as well as the defendant who tries to obtain a verdict of not guilty and evade the truth are liable to prosecution for their respective offences. For whoever takes a payment for having discovered an act of *stuprum* is punishable under the *Lex Iulia de adulteriis*.

As regards this situation (accepting a gain for the discovery of *stuprum*), *stuprum* indubitably means any sexual act liable to punishment under the *Lex Iulia*, which is not consistent in its use of *stuprum* and *adulterium* as terms.<sup>17</sup> The time when the prohibited conduct was undertaken

<sup>16</sup> *Cf.* also *Cf.* 2.4.18.

<sup>17</sup> *D.* 48.5.6.1 (Pap. 1 *adult.*): 'Lex stuprum et adulterium promiscue et καταχρηστικῶς τερρον appellat. Sed proprie adulterium in nupta committitur, propter partum ex altero

was a relevant factor: the offence of accepting of hush-money or any other 'gain' could be committed only once the *stuprum* had been committed. A person who did not take a compensatory 'gain' did not commit the offence. A person guilty of taking a 'gain' was liable to the same punishment as an adulterer, and anyone, both men and women, including the husband who kept quiet about his own wife's adultery, could commit it.<sup>18</sup>

The mention of restitution of the gain accrued counter to good custom in consequence of a death-threat (*D.* 4.2.8 *pr.*) is not a sign of the limited subjective scope of the offence: the assumption that *metus mortis* is associated with *ius occidenti* does not seem to hold.<sup>19</sup> In the first place, it

conceptum composito nomine: stuprum vero in virginem viduamve committitur, quod Graeci *φθορὰν* appellant'. – The Law mixes the terms *stuprum* and *adulterium*, and makes no distinction between them. But properly *adulterium* is the offence committed with a married woman, and the term is derived in consideration of the child begotten by another [in *adulterium*]; while *stuprum* is the offence committed with a virgin or a widow, which the Greeks call 'corruption.'; *D.* 48.5.35(34).1 (Modest. 1 *reg.*): 'Adulterium in nupta admittitur: stuprum in vidua vel virgine vel puero committitur'. – *Adulterium* is the offence committed with a married woman; and *stuprum* is the offence committed with a widow, a virgin, or a boy. *D.* 50.16.101 *pr.* (Modest. 9 *diff.*): 'Inter stuprum et adulterium hoc interesse quidam putant, quod adulterium in nuptam, stuprum in viduam committitur. Sed lex Iulia de adulteriis hoc verbo indifferenter utitur'. – Some think the difference between *stuprum* and *adulterium* is that *adulterium* is committed with a married woman, and *stuprum* with an unmarried woman. But the *Lex Iulia de adulteriis* uses these words indiscriminately. E. VOLTERRA, *Per la storia dell'accusatio adulterii iure mariti vel patris*, Città di Castello 1928, p. 5, observed that the philological meaning of *stuprum* was broader than of *adulterium*, and the exact equivalent of the Italian word *impudicizia*. Cf. also V. ARANGIO-RUIZ, 'La legislazione', [in:] *Augustus. Studi in occasione del bimillenario augusteo*, Roma 1938, p. 112; Eva CANTARELLA, *Secondo natura. La bisessualità nel mondo antico*, Roma 1988, p. 182; RIZZELLI, *Lex Iulia* (cit. n. 3), pp. 257–262.

<sup>18</sup> Women could not lodge accusations for adultery, no matter how much they had been hurt personally by the crime. Cf. 9.9.1. Cf. Olivia ROBINSON, 'Women and the criminal law', [in:] *Raccolta di scritti in memoria di R. Moschella*, Perugia 1985, p. 558; EADEM, *The Criminal Law on Ancient Rome*, London 1995, p. 63. The *Lex Iulia de adulteriis coërcendis* did not exclude women from participation in court proceedings; they could appear as witnesses providing they had not been convicted. *D.* 22.5.18 (Paul. 2 *de adult.*): 'Ex eo, quod prohibet lex Iulia de adulteriis testimonium dicere condemnatam mulierem, colligitur etiam mulieres testimonii in iudicio dicendi ius habere'. – Since the *Lex Iulia de Adulteriis* prohibits a woman who has been convicted of adultery from testifying, it follows that even women have the right to give evidence in court.

<sup>19</sup> Cf. RIZZELLI, *Lex Iulia* (cit. n. 3), pp. 135–136; IDEM, 'Il crimen lenocinii' (cit. n. 3), pp. 473–474.

would lead to irrational conclusions. To confirm its validity we would need to accept that this offence (of taking a 'gain') could be committed only by a husband who had the right to exercise *ius occidendi*, which would mean only a husband whose wife had committed adultery (in his house) with a slave, freedman, or individual who had been declared *infamis*<sup>20</sup> – the scope of the husband's *ius occidendi* was narrow.<sup>21</sup> Accordingly, a husband who had taken money or any other gain from a man who was free-born, not a slave, and had not been declared infamous, whom he had caught in the act of adultery with his wife would not have been liable to punishment provided he repudiated his adulterous wife<sup>22</sup> – but such a provision would have been absurd. Secondly, there are no grounds to assume that a person who threatened the adulterer with death was acting

<sup>20</sup> *Coll.* 4.3.2–4; *D.* 48.5.25(24)*pr.*; *PSent.* 2.26.4 = *Coll.* 4.12.3. Cf. FAYER, *La familia romana*, (cit. n. 2), pp. 248–249. Cf. also Eva CANTARELLA, 'Adulterio, omicidio legittimo e causa d'onore in diritto romano', [in:] *Studi in onore di G. Scherillo* 1, Milano 1972, p. 250.

<sup>21</sup> *Coll.* 4.10.1 (Pap. 1 *de adul.*): 'Si maritus uxorem suam in adulterio deprehensam occidit, an in legem de sicariis incidat, quaero. Respondit: nulla parte legis marito uxorem occidere conceditur: quare aparte contra legem fecisse eum non ambigitur ...' – 'If a man kills his wife who has been taken in adultery, is he liable under the *Lex de sicariis*?' I asked. He replied, 'In no part of that Law is the husband permitted to kill his wife, and hence he would certainly be overtly in breach of the Law.' *PSent.* 2.26.7 = *Coll.* 4.12.6 (*Paulus l. sent. 2 s. tit. de adul.*): 'Inuenta in adulterio uxore maritus ita demum adulterum occidere potest, si eum domi suae deprehendat'. – If a woman is taken in adultery her husband may kill the adulterer only if he catches him in the act of adultery with his wife in his own house.

A husband had the right to exercise *ius occidendi* if he caught the adulterers in the act in his house, but this did not permit him to kill his wife. If he killed the adulteress he was criminally liable. If a husband whose wife had been unfaithful killed the adulterer his deed could still be in breach of the law. Its legality was determined not only by the adulterer's social status, but also by two other conditions: first, he had to repudiate his wife, and secondly, he had to report the situation to the appropriate magistrate. *Coll.* 4.3.5 (Idem Paulus eodem singulari libro et titulo [*Paulus l.s. de adul. s. tit.*]): 'Debet autem profiteri apud eum, cuius iurisdictio est eo loco, ubi occidit, et uxorem dimittere. Quod si non fecerit, in punie non interficit'. – However, the husband should notify the person exercising jurisdiction in the place where the adulterer was killed and repudiate his wife. If he does not do this [it will mean that] he did not kill with impunity. *D.* 48.5.25(24).1; *PSent.* 2.26.6 = *Coll.* 4.12.5. Dorota STOLAREK, *Adultera w świetle lex Iulia de adulteriis coërcendis*, Lublin 2012, pp. 38–44.

<sup>22</sup> Cf. *infra*, pp. 919–923.

within the scope of his rights. Anyone could issue a threat (*D.* 4.2.7.1). Moreover, there is nothing to confirm the assumption that extortion of a gain was the sole constituent element of the offence. It is more likely that the concept of *accipio* was understood more generally as the taking of something given by another person, who could take the initiative and offer it rather than be forced into giving it (*D.* 48.5.30[29].2).

According to Ulpian's precise description in *D.* 48.5.30(29).4, *lenocinium* was an offence against marital propriety. It is impossible to give a similar description of what was given legal protection in the provisions penalising an offender's acceptance of a gain for keeping quiet about a *stuprum* he had discovered. The juxtaposition of this offence in (*Cf.* 9.9.10) alongside *praevaricatio* (collusion) verifies the observation that, like *praevaricatio*,<sup>23</sup> the receipt of *pretium* (hush-money or some other gain) for the discovery of a *stuprum* was an offence against justice: the offender's improper conduct prevented the exaction of punishment on the adulterer. In a certain sense the recipient of the *pretium* was in collusion: by keeping quiet about the adultery in return for a gain he obstructed or prevented the adulterer's prosecution, but he did not promise to assist the adulterer prior to the commission of the *stuprum*. He was an accessory after the fact, helping the adulterer to escape criminal liability.<sup>24</sup>

The essence of this type of *lenocinium*, which was an individual offence, was the offender's drawing of a personal or material gain from his wife's adultery, to which he had given prior consent. The essence of 'collusion'

<sup>23</sup> *D.* 47.15; *D.* 48.16.1.1; *D.* 48.16.1.6. *Praevaricatio* meant the accuser colluding with the defendant in order to secure his acquittal or a more lenient sentence. W. LITEWSKI, *Rzymski proces karny* [Roman Criminal Procedure], Kraków 2003, p. 110.

<sup>24</sup> Under the *Lex Iulia de adulteriis*, being an accessory (abetting) meant helping other persons to commit adultery by making premises accessible for the offence (*D.* 48.5.9[8] *pr.*; *D.* 48.5.9[8].1; *D.* 48.5.10[9] *pr.*-2). The criterion for abetting was providing premises in conditions where the offender's conduct met the criteria for *stuprum* and/or *adulterium* as understood by the *Lex Iulia* (*D.* 48.5.9[8] *pr.*; *D.* 4.4.37.1; *D.* 48.2.3.3). For criminal liability the deed had to be committed wilfully, and the offender, whether a man or a woman, was liable to the same penalty as for *adulterium* (*D.* 48.5.9[8] *pr.*). The interpretation of the statutory provisions eventually led to the extension of the catalogue of behaviours within the scope of 'abetting' (*D.* 48.5.10[9]). STOLAREK, *Ustawa julijska* (cit. n. 13), pp. 223–224. There are no grounds whatsoever in the sources for the assumption that 'abetting' was described in the *Lex Iulia* as a *lenocinium*. Cf. MCGINN, *Prostitution* (cit. n. 2), p. 180.

in *Lex Iulia*, which was a general crime, was keeping quiet about the adultery, obstructing or preventing the adulterer's prosecution, in return for a personal or material gain. In the *Lex Iulia* these two types of misconduct are treated as two different offences. The use of the term *lenocinium* for the offence of 'collusion' is unwarranted.

## 2) *Deprehensam uxorem in adulterio retinere*

In the second type of *lenocinium* the offender continued to cohabit as husband and wife with the adulteress after she had been caught in the act (*D.* 48.5.2.2; *D.* 48.5.30(29) *pr.*). The grounds for the offender's criminal liability were his failure to repudiate the adulteress<sup>25</sup> once her misconduct was patent (she had been caught in the act).

The criterion determining the offence, described as 'deprehensam uxorem in adulterio retinere' or alternatively 'in adulterio deprehensam uxorem non dimittere' is recorded not only in the two passages by Ulpian I have already cited (*D.* 48.5.2.2; *D.* 48.5.30[29] *pr.*),<sup>26</sup> but also in another fragment from *Disputationes* (*D.* 48.5.2.6),<sup>27</sup> as well as by Tryphoninus (*D.* 4.4.37.1),<sup>28</sup> Paulus (*PSent.* 2.26.8 = *Coll.* 4.12.7),<sup>29</sup> and in Septimius Severus and Caracalla's constitution of 199.<sup>30</sup>

<sup>25</sup> For the form of divorce, cf. *D.* 24.2.9; *D.* 38.11.1.1; STOLAREK, *Adultera* (cit. n. 20), pp. 151–156.

<sup>26</sup> Cf. *supra*, p. 911.

<sup>27</sup> *D.* 48.5.2.6 (Ulp. 8 *disp.*): 'Unde quaeri potest, an is, qui de adulterio cognoscit, statuere in maritum ob lenocinium possit? Et puto posse. nam Claudius Gorgus vir clarissimus uxorem accusans cum detectus est uxorem in adulterio deprehensam retinuisse, et sine accusatore lenocinio damnatus est a divo Severo'. – Hence it may be asked whether he who has cognizance of the prosecution for adultery can decide against the husband accused of *lenocinium*? I think that he can do so. For when it turned out that Claudius Gorgus, a most illustrious man who had accused his wife, still kept her even though he had caught her in adultery, he was convicted by the Divine Severus of *lenocinium*, without any accuser having appeared against him.

<sup>28</sup> *D.* 4.4.37.1 (Tryph. 3 *disp.*): '... pro adulterio eadem lex punit, velutisi ... in adulterio deprehensam uxorem non dimiserit ...' – ... this same law punishes [a husband] for adultery ... if his wife is caught in adultery and he does not repudiate her.

<sup>29</sup> *PSent.* 2.26.8 = *Coll.* 4.12.7 (Paulus *l. sent.* 2 s. *tit. de adult.*): 'Eum, qui in adulterio deprehensam uxorem non statim dimiserit, reum lenocinii postulari placuit.' – It is accepted

Paulus also used the expression *adulterum deprehensum dimiserit* in his account of this type of *lenocinium* (D. 48.2.3.3).<sup>31</sup> Ulpian gave a fuller description of the offence, with a remark on the discoverer of the adultery permitting the adulterer to leave, and gave grounds for the harm done by this offence with a reference to the *Lex Iulia*: ‘adulterum in domo deprehensum dimiserit’ (D. 48.5.30[29] *pr.*). However, the adulterer’s non-detainment was not a necessary element which had to be confirmed for the offender to be accused of this type of *lenocinium*.

Under the *Lex Iulia de adulteriis* it was legal to detain an adulterer.

*PSent.* 2.26.3: Capite quinto legis Iuliae cavetur, ut adulterum deprehensum viginti horas attestando vicinos retinere liceat. – In the fifth chapter of the Julian Law there is a provision that an adulterer who has been caught may be detained for twenty hours and neighbours may be called in as witnesses.

D. 48.5.26(25) *pr.* (Ulp. 2 *Iul. adult.*): Capite quinto legis Iuliae ita cavetur, ut viro adulterum in uxore sua deprehensum, quem aut nolit aut non liceat occidere, retinere horas diurnas nocturnasque continuas non plus quam viginti testandae eius rei<sup>32</sup> causa sine fraude sua iure liceat. – In the fifth chapter of the Julian Law there is a provision whereby a husband may detain an adulterer who has been caught in the act of adultery with his wife and whom he did not want or did not have the right to kill, for no longer than twenty consecutive daytime and night hours, without infringing his rights, so that witness may give evidence on the incident.

that a husband who does not at once put away his wife whom he took in adultery, may be charged with *lenocinium*.

<sup>30</sup> *Cf.* 9.9.2 (Impp. Severus, Antoninus): ‘Crimen lenocinii contrahunt, qui deprehensam in adulterio uxorem in matrimonio detinuerunt, non qui suspectam adulteram habuerunt’. – Those who remain married to a woman caught in the act of adultery commit the crime of *lenocinium*, but those who kept their wife if she was suspected of adultery do not.

<sup>31</sup> D. 48.2.3.3 (Paul. 3 *adult.*): ‘Sed et si aliud crimen obiciat, veluti ... adulterum deprehensum dimiserit ...’ – But if he makes an accusation of another crime, as for instance, ... that of having released a man caught with her in adultery ... .

<sup>32</sup> D. 48.5.26(25).5 (Ulp. 2 *Iul. adult.*): ‘Quod adicitur “testandae eius rei gratia”, ad hoc pertinet, ut testes inducat testimonio futuros accusatori deprehensum reum in adulterio.’ – The addition of the clause ‘In order to obtain evidence of the crime,’ means that he can call witnesses who will afterwards testify that the accuser caught the offender in adultery.

However, detaining the adulterer was not the husband's duty, but his right.<sup>33</sup> He had the right to detain the culprit for no longer than twenty consecutive hours. The adulterer could be held in detention continuously for twenty day- and night-hours, but once he was released he could not be 're-arrested'.<sup>34</sup> The adulterer's detention allowed the husband to give public notice of the adultery and show him to neighbours, who could then testify as witnesses that the man had been caught in the act of adultery.<sup>35</sup>

The husband of the adulteress had the right to detain the adulterer also if he did not have the right to kill the adulterer (*ius occidendi*), or if he did not want to kill him.<sup>36</sup> Ulpian emphasised that the husband had the right to detain the adulterer even if he did not catch him in his own house.

*D.* 48.5.26(25).2 (Ulp. 2 *ad legem Iul. de adult.*): Sed et si non in domo sua deprehenderit maritus, poterit retinere. – But the husband may detain [the adulterer] even if he should capture him not in his own house.

Ulpian does not seem to have given this provision a broad interpretation. Neither the record in the Justinianic *Digest* (*D.* 48.5.26[25] *pr.*), nor in *Pauli Sententiae* (*PSent.* 2.26.3) indicates the place where the arrest could take place. The only relevant circumstance was the discovery of the culprits in the act. The fact that in giving reasons for the penalisation of *lenocinium* Ulpian mentions the statutory provision containing the phrase *adulterum in domo deprehensum dimiserit* (*D.* 48.5.30[29] *pr.*) does not provide any grounds for an attempt to find an analogy with the scene of the crime with respect to *ius occidendi*. If the place where the adulterer could be apprehended and detained were limited only to the husband's house, then the wording of the relevant provision in the *Lex Iulia* would have contained the phrase *depre-*

<sup>33</sup> Cf. MCGINN, *Prostitution* (cit. n. 2), p. 177–178.

<sup>34</sup> *D.* 48.5.26(25).3. According to Ulpian an adulterer who managed to escape could be apprehended again. *D.* 48.5.26(25).4.

<sup>35</sup> STOLAREK, *Adultera* (cit. n. 20), pp. 44–45.

<sup>36</sup> For *ius occidendi*, cf. *supra*, p. 917.

*bensum domi suae*, as for *ius occidendi*.<sup>37</sup> Ulpian's term *domus* (D. 48.5.30[29] *pr.*) means any premises where adultery could take place.

D. 48.5.9(8).1 (Marcian. 2 *adult.*): Appellatione domus habitationem quoque significari palam est.<sup>38</sup> – Obviously the term 'house' means premises of any kind whatsoever.

The restriction of the meaning of the term *domus* to the husband's house is not in accordance with the literal sense of the text.

<sup>37</sup> *PSent.* 2.26.7 = *Coll.* 4.12.6 (Paul. 2 *s. tit. de adult.*): 'Inuenta in adulterio uxore maritus ita demum adulterum occidere potest, si eum domi suae deprehendat'. – Where the wife is taken in adultery, the husband may only kill the adulterer if he catches him in the act in his own house. *Coll.* 4.3.2–4 (Idem Paulus eodem singulari libro et titulo [Paulus libro singulari de adulteris sub titulo]): 'Ergo secundum leges viro etiam filiofamilias permittitur domi suae deprehensum adulterum interficere seruum, et eum qui auctoramento rogatus est ad gladium, uel etiam illum qui operas suas, ut cum bestiis pugnaret, locauit. Sed et iudicio publico damnatum licet interficere in adulterio deprehensum, uel libertinum uel suum uel paternum, et tam ciuem Romanum quam Latinum. Sed et patris et matris et filii et filiae libertum permittitur occidere, quo loco et dediticius habetur.' – Therefore in compliance with the law the husband, even if he is a *filiofamilias*, is permitted to kill an adulterer whom he has caught in the act in his own house, if the adulterer is a slave, a gladiator, or a hired animal-fighter. He is also allowed to kill an adulterer he has caught in the act who is his or his father's freedman, a Roman or a Latin citizen. He may also kill his father's, mother's, son's, or daughter's freedman who has the status of a *dediticius* (a foreigner compelled to surrender); D. 48.5.25(24) *pr.* (Macer 1 *public.*): 'Marito quoque adulterum uxoris suae occidere permittitur, sed non quemlibet, ut patri: nam hac lege cavetur, ut liceat viro deprehensum domi suae (non etiam soceri) in adulterio uxoris occidere eum, qui leno fuerit quive artem ludicram ante fecerit in scaenam saltandi cantandive causa prodierit iudicio publico damnatus neque in integrum restitutus erit, quive libertus eius mariti uxorisve, patris matris, filii filiae utrius eorum fuerit (nec interest, proprius cuius eorum an cum alio communis fuerit) quive servus erit'. – A husband is also permitted to kill his wife's lover, but not every adulterer, unlike the father; under this Law he is permitted to kill his wife's adulterer only if he catches him in the act in his own house (but not in his father-in-law's house), if the adulterer was formerly a pander or a theatre performer dancing or singing on stage, or if the adulterer has been convicted in public proceedings and has not yet been restored to his previous status, or if the adulterer is his wife's, father's, mother's, son's or daughter's, freedman (regardless of whether he had been owned by one of the above exclusively or jointly), or if the adulterer is a slave.

<sup>38</sup> The meaning of the term *domus* is explained in the Justinianic *Digest* in the context of the offence of providing premises for adultery. Cf. *supra*, p. 915.

In view of the above, it has to be observed that the husband's failure to exercise his right to detain the adulterer (or his decision to withdraw from using it) could not be held against him. A husband whose wife had been unfaithful could only be accused if he continued marital relations with the adulteress, contrary to his statutory duty to repudiate her if her offence was patent.

The criteria determining this type of prohibited conduct did not entail the man contracting marriage with an adulteress. Neither are there any reliable records in the sources to indicate that such behaviour was classified under the *Lex Iulia* as a *lenocinium*.<sup>39</sup>

The only source text (legal evidence) in which the contracting of marriage with a convicted adulteress is expressly termed a *lenocinium* shows such far-reaching editing that it can hardly be regarded as authentic material.

*Cf.* 9.9.9 (Imp. Alexander Severus): *Castitati temporum meorum convenit lege Iulia de pudicitia damnatam in poenis legitimis perseverare. Qui autem adulterii damnatam, si quocumque modo poenam capitale evaserit, sciens duxit uxorem vel reduxit, eadem lege ex causa lenocinii punietur.* – It befits the purity of manners in my times that a woman who has been lawfully convicted under the Julian Law on chastity should be liable to the penalties prescribed by the law. Therefore anyone who knowingly marries a woman convicted of adultery, if she has evaded the death penalty in any way, or remarries her, shall be liable to the penalty under the same law for *lenocinium*.

There can be no doubt that the passage *si quocumque modo poenam capitale evaserit* is a post-classical interpolation.<sup>40</sup> The authenticity of the rest of this passage may be defended if we can find a tendency to apply the term *lenocinium* in a broader sense still in the classical period. Signs of such a tendency may be observed, but only in one instance:

<sup>39</sup> *Cf.* MCGINN, *Prostitution* (cit. n. 2), p. 180.

<sup>40</sup> In the reign of Alexander Severus the penalty for *adulterium* was not the death sentence. *Cf.* E. G. VITALI, 'Premesse romanistiche a uno studio sull' *impedimentum criminis* (Adulterio e divieti matrimoniali)', [in:] *Studi in onore di G. Scherillo* I, Milano 1972, pp. 289–290; BONFANTE, *Corso* (cit. n. 27), p. 279; FAYER, *La familia romana* (cit. n. 2), pp. 355–357.

*D. 48.5.15(14) pr.* (Scaev. 4 *reg.*): Is, cuius ope consilio dolo malo factum est, ut vir feminave in adulterio deprehensi pecunia aliave qua pactione se redimerent, eadem poena damnatur, quae constituta est in eos, qui lenocinii crimine damnantur. – Anyone who is an accessory by his assistance or advice enabling a man or woman caught in the act of adultery to escape punishment either by a financial bribe or any other form of corruption shall be liable to the same penalty prescribed for those who are convicted for *lenocinium*.

In the original version of the *Lex Iulia de adulteriis* there are no provisions relating to abettors, who assisted or advised the adulterer to avoid prosecution by corrupting a witness viz. a potential accuser.<sup>41</sup> The penalisation of this type of conduct was a result of the interpretation of the provisions of the *Lex Iulia*. What is noteworthy in the passage quoted above is the way the prescribed penalty is defined, which differs from the description of the penalties for offences under the Law for the prosecution of adultery. Scaevola indicated that abetting was liable to prosecution by making a reference to *lenocinium*, whereas the *Lex Iulia* laid down that offenders who committed crimes associated with adultery would be punished in the same manner as adulterers (adulteresses).<sup>42</sup> In practice the difference was of no effect, since the perpetrator of *lenocinium* was punishable in the same manner as an adulterer,<sup>43</sup> however, the modification is noteworthy.<sup>44</sup>

<sup>41</sup> Cf. MCGINN, *Prostitution* (cit. n. 2), pp. 223–224.

<sup>42</sup> *D. 4.4.37.1*; *D. 48.5.9(8) pr.*; *D. 48.5.34(33).2*.

<sup>43</sup> *D. 48.5.30(29).3* (Ulp. 4 *adult.*): ‘Qui quaestum ex adulterio uxoris suae fecerit, plectitur: nec enim mediocriter deliquit, qui lenocinium in uxore exercuit.’ – Anyone who draws a profit from his wife’s adultery is liable to a penalty, for one who practises *lenocinium* with respect to his wife commits an offence which is by no means small. *D. 48.5.9(8) pr.* (Marcian. 2 *adult.*): ‘Qui ... quaestum ex adulterio uxoris suae fecerit ... quasi adulter punitur.’ – Anyone ... who draws a profit from his wife’s adultery ... is punishable as an adulterer. *D. 4.4.37.1* (Tryph. 3 *disp.*): ‘... pro adulterio eadem lex punit, veluti si ... in adulterio deprehensam uxorem non dimiserit, quaestumve de adulterio uxoris fecerit ...’ – This same law punishes [a husband] for adultery ... if his wife is caught in adultery and he does not repudiate her.

For the penalties prescribed for *adulterium*, cf. B. BIONDI, ‘La poena adulterii da Augusto a Giustiniano’, [in:] *Scritti giuridici* 11, Milano 1965, pp. 48–74; T. A. J. MCGINN, ‘Concubinage and the lex Iulia on adultery’, *Transactions of the American Philological Association* 121 (1991), p. 341; Susan TREGGIARI, *Roman Marriage. Iusti Coniuges from the Time of Cicero to the Time of Ulpian*, Oxford 1991, p. 290; Olivia ROBINSON, *The Criminal Law on Ancient Rome*, London 1995, pp. 66–67; FAYER, *La familia romana* (cit. n. 2), pp. 337–359.

It is hard to say whether this was an enduring tendency: it cannot be observed in the mid-third century AD constitution:

*Cf.* 9.9.17.1 (Impp. Valerianus et Gallienus): Is enim committit in poenam, quam lex certo capite denuntiat, qui vel publice adulterio damnatam habet vel adulteram sciens, ut ignorationem simulare non possit, retinet uxorem.<sup>45</sup> – Also a man who knowingly keeps a woman publicly convicted of adultery as his wife, or who knows that his wife is an adulteress is liable to the penalty prescribed by the relevant chapter of the Law, since he was unable to feign ignorance of the fact.

The fact that this imperial constitution puts two statutorily prohibited types of conduct next to each other, viz. the contracting (or continuation) of marriage with a convicted adulteress, and the continuation of marital relations with an adulteress whose husband had not repudiated her despite having caught her in the act, does not mean that such acts were *lenocinia*, but only that both were prohibited under the *Lex Iulia de adulteriis*.

Ulpian gave a precise list of the offences punishable under the *Lex Iulia* as *lenocinia*,<sup>46</sup> and marrying a convicted adulteress is not on it.

*D.* 48.5.30(29).1 (Ulp. 4 *adult.*): Quod ait lex, adulterii damnatam si quis duxerit uxorem, ea lege teneri, an et ad stuprum referatur, videamus: quod magis est. Certe si ob aliam causam ea lege sit condemnata, impune uxor ducetur. – The Law says that anyone who marries a woman convicted of *adulterium* is liable to a penalty, but let us see if the same applies in the case of *stuprum*: all the more so. Certainly if she had been convicted of any other offence under this Law he could marry her with impunity.

This passage from Ulpian's Book Four (on adultery) says that under the *Lex Iulia* marrying a woman convicted of adultery was prohibited – and the fact that this law is not specifically mentioned with reference to the same prohibition with respect to women convicted of *stuprum* sug-

<sup>44</sup> STOLAREK, 'Ustawa julijska' (cit. n. 13), pp. 223–224.

<sup>45</sup> On alleged modifications in the text, see RIZZELLI, *Lex Iulia* (cit. n. 3), p. 134.

<sup>46</sup> *Cf. supra*, p. 911.

gests the ban was extended by way of interpretation – as also that a man who married a woman convicted of any other offence associated with adultery did not break the law thereby.<sup>47</sup> But there are no grounds to maintain that the statutorily prohibited conduct Ulpian describes here was described in the *Lex Iulia* as a *lenocinium*.<sup>48</sup> The fact that the Justinianic compilers put the passage on the prohibition of marriage contracted with a convicted adulteress (*D.* 48.5.30[29].1] next to references to *lenocinium* (*D.* 48.5.30[29] *pr.*; *D.* 48.5.30[29].3–4) does not mean that it, too, was a *lenocinium* on the grounds of the *Lex Iulia*. In the light of the passages drawn from it and referred to only in two places of Justinian's *Digest* (*D.* 48.5.10[9] and *D.* 48.5.30[29]), Ulpian's Book Four on Adultery appears to have applied in general to offences penalised under the *Lex Iulia*. This is suggested not only by *D.* 48.5.10(9), on the offence of making premises available for adultery, the criteria for which are given a broad interpretation in Ulpian,<sup>49</sup> but also by issues connected with the statute of limitations on proceedings for all the offences punishable under the *Lex Iulia*, which Ulpian discusses in *D.* 48.5.30(29).6 and elsewhere.

*D.* 48.5.30(29).6 (Ulp. 4 *adult.*): Hoc quinquennium observari legislator voluit, si reo vel reae stuprum adulterium vel lenocinium obiciatur. Quid ergo, si aliud crimen sit quod obiciatur, quod ex lege Iulia descendit, ut sunt qui domum suam stupri causa praebuerunt et alii similes? Et melius est dicere omnibus admissis ex lege Iulia venientibus quinquennium esse praestitutum. – The legislator has laid down a five-year statute of limitations for proceedings in which the defendant, either the man or the woman, is charged with *stuprum*, *adulterium*, or *lenocinium*. What of other offences under the Julian Law, such as making premises available for the commission of *stuprum* and other similar offences? It should rather be said that the five-year limitation has been prescribed for all the offences which come under the Julian Law.

<sup>47</sup> Women were liable for providing premises for adultery and for accepting payment for keeping quiet about an adultery (*D.* 48.5.11[10].1); also for drawing a gain from their husband's adultery (*D.* 48.5.34[33].2). Dorota STOLAREK, 'Quasi adultera. Rozważania na gruncie *lex Iulia de adulteriis coërcendis*', *Roczniki Nauk Prawnych* 20.2 (2010), pp. 139–152.

<sup>48</sup> Cf. RIZZELLI, 'Il crimen lenocinii' (cit. n. 3), p. 457, p. 470; IDEM, *Lex Iulia* (cit. n. 3), p. 132; FAYER, *La familia romana* (cit. n. 2), p. 260.

<sup>49</sup> STOLAREK, *Ustawa julijska* (cit. n. 13), pp. 223–224.

Taking into consideration the fact that by *lenocinium* Ulpian meant two different types of offences (viz. a man drawing a profit from his wife's adultery, and a man's failure to repudiate his wife if she was caught in the act of adultery, *D.* 48.5.2.2), we have to observe that the offence of contracting marriage with a woman convicted of adultery, and likewise of making premises accessible for adultery, came under the *Lex Iulia* (*ex lege Iulia venientibus*). Although the *Lex Iulia* penalised such misconduct ('quod ait lex, adulterii damnatam si quis duxerit uxorem, ea lege teneri', *D.* 48.5.30[29].1), it did not specify a statute of limitations on proceedings for them. However, the five-year term prescribed for *stuprum*, *adulterium*<sup>50</sup> and *lenocinium* was generally applied for all offences connected with adultery.

The penalisation of any particular type of conduct under the *Lex Iulia de adulteriis* does not necessarily mean that it was qualified as a *lenocinium*; neither the identical penalties nor the same limitation on proceedings qualify all of these offences as *lenocinia*.



## II. LENOCINIUM. THE CRITERIA FOR THE OFFENDER'S ATTITUDE

*Lenocinium* was committed wilfully. The offences punishable under the *Lex Iulia de adulteriis coërcendis* could not be committed unless the offender was aware of their fraudulence (*sciens dolo malo*).

*D.* 48.5.13(12) (Ulp. 1 *adult.*): 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. – The Law says, 'Henceforth no-one shall commit *stuprum* [or] *adulterium* wilfully and with bad intent,'

<sup>50</sup> Charges could be brought against a woman suspected of adultery within a term of six months (the *tempus utile*), commencing on the day on which her marriage was dissolved or the day on which her husband was convicted for *lenocinium*. Her liability expired after five years from the time of the offence, counting all the calendar days. The *Lex Iulia* probably did not prescribe a statute of limitations for the prosecution of *stuprum* other than the general five-year term. Cf. STOLAREK, *Adultera* (cit. n. 20), pp. 162–185.

and this applies both to any person who encourages another to commit *stuprum* or *adulterium* as well as to the person who commits it.

The word *sciens* indicates that the offender knew perfectly well that he was committing an offence, and *dolus* that he committed it wilfully in the knowledge that it was against the law. From the legal point of view *dolus malus* (evil intent) is a synonym for *dolus*. The addition of the adjective *malus* had no effect on the form of his guilt.<sup>51</sup> A perpetrator could only be liable for *lenocinium* if he could be accused of it, and the condition for personal liability was the concurrence of his knowledge that the act was against the law with his wilful commission of the illegal act.<sup>52</sup> The perpetrator of a *lenocinium* had to be aware that all the criteria necessary for this offence had occurred in his particular situation.

A particularly important point regarding *lenocinium*, the offender drawing profit from his wife's adultery, was that his erroneous judgement of the legality of his conduct did not exculpate him – he was still guilty even if he committed the deed just once. *Lenocinium* need not have applied only to recurrent acts, as the reference to prostitutes might suggest (though Ulpian dismisses such a supposition outright – *D.* 48.5.30[29].4), since professional prostitution involves recurrent acts of sexual intercourse.<sup>53</sup> An offender's lack of awareness that a single instance of the deed was in breach of the law just as well did not make him any less liable.

If the wife's adultery was not preceded by the husband's prior consent and his wilful intent to draw a profit from his wife's misconduct he could not be accused of *lenocinium* on the grounds of his wife's adultery (*D.* 48.5.30[29].4). Similarly, a man who continued to live with his wife

<sup>51</sup> K. AMIELAŃCZYK, *Rzymskie prawo karne w reskryptach cesarza Hadriana* [Roman Criminal Law in Hadrian's Rescripts], Lublin 2006, p. 66. Cf. also K. AMIELAŃCZYK, '*Dolus malus – animus occidendi*. The problem of guilt in the *lex Cornelia de sicariis et veneficis*', [in:] J. KRZYNÓWEK, Zuzanna SŁUŻEWSKA, J. URBANIK & Maria ZABŁOCKA (eds.) *Au-delà des frontières. Mélanges de droit romain offerts à Witold Wołodkiewicz* 1, Varsovie 2000, p. 1-???

<sup>52</sup> Cf. MISZTAŁ-KONECKA, *Incestum* (cit. n. 5), p. 98.

<sup>53</sup> SOKAŁA, *Palam* (cit. n. 11), p. 162.

after her adultery could not be charged with *lenocinium* unless the adultery was patent.

*Cf.* 9.9.2 (Impp. Severus et Antoninus): Crimen lenocinii contrahunt, qui deprehensam in adulterio uxorem in matrimonio detinuerunt, non qui suspectam adulteram habuerunt. – Those who have kept their wife after she had been caught in adultery are guilty of *lenocinium*, but not those whose wife was merely suspected of adultery.

The mere suspicion that his wife had committed adultery was not enough to make the husband culpable: he could be unaware of it, or not believe rumours [*D.* 48.5.30(29) *pr.*]. Moreover he could exculpate himself by successfully feigning ignorance.<sup>54</sup>

*D.* 48.5.2.3 (Ulp. 8 *disp.*): Ceterum qui patitur uxorem suam delinquere matrimoniumque suum contemnit quique contaminationi non indignatur, poena adulterum non infligitur. – In addition he who allows his wife to commit the offence, neglects his marriage, and is not appalled at its defilement is not liable to the penalty for adultery.

A tolerant husband could not be accused on the grounds of his ‘successfully concealed’ indulgence, even though his conduct was improper and contrary to marital propriety. Ignorance of his wife’s adultery or his personal, genuine or declared belief that she was faithful to him ceased to be exonerating circumstances if he was an eye-witness of the offence.



### III. VERIFICATION OF THE TYPES OF LENOCINIUM

There are a limited number of source texts referring directly to *lenocinium* in the context of the *Lex Iulia*, and they do not provide grounds for the description of types of prohibited conduct as *lenocinia* other than

<sup>54</sup> *Cf.* 9.9.17.1. *Cf.* MCGINN, *Prostitution* (cit. n. 2), pp. 231–234.

those described as *lenocinia* by Ulpian (*D.* 48.5.2.2; *D.* 48.5.30[29] *pr.* & 4). The relevant records relate to the situation in proceedings of a husband accused of *lenocinium*, and of the adulterer and adulteress, which I have examined above;<sup>55</sup> but also to the exceptions to criminal liability for adultery and to issues associated with the subsequent marriage of a woman suspected of adultery.

There can be no doubt that on the grounds of the *Lex Iulia* the continuation of an adulteress' married life was a circumstance precluding the possibility of her prosecution. This is confirmed by strong evidence in the source materials. A different scope of protection was offered a woman whose marriage continued after the adultery, and one who was suspected and contracted a subsequent marriage.<sup>56</sup> If a marriage which had been violated by adultery was not dissolved no-one had the right to bring charges against the adulteress – neither her nearest relatives (viz. her husband or her father), nor a third party.<sup>57</sup> In that situation her partner in the adultery could not be prosecuted, either.

*D.* 48.5.27(26) *pr.* (Ulp. 3 *disp.*): Constante matrimonio ab iis, qui extra maritum ad accusationem admittuntur, accusari mulier adulterii non potest: probatam enim a marito uxorem et quiescens matrimonium non debet alius turbare atque inquietare, nisi prius lenocinii maritum accusaverit.<sup>58</sup>  
– A woman cannot be accused of adultery while she is married by anyone who (apart from her husband) has the right to bring such an accusation, if her husband approves of her; an outsider should not disturb and harass a quiet marriage, unless he has accused the husband of *lenocinium*.

*D.* 48.5.12(11).10 (Pap. 1 *adult.*): Volenti mihi ream adulterii postulare eam, quae post commissum adulterium in eodem matrimonio perseveraverit, contradictum est. Quaero, an iuste responsum sit. Respondit: ignorare non debuisti durante eo matrimonio, in quo adulterium dicitur esse

<sup>55</sup> Cf. *infra*, p. 911 for the analysis of the source texts on the situation of husbands accused of *lenocinium* and adulterers in proceedings against them.

<sup>56</sup> Cf. MCGINN, *Prostitution* (cit. n. 2), p. 176.

<sup>57</sup> For *accusatio iure mariti vel patris* oraz *accusatio iure extranei*, cf. STOLAREK, *Adultera* (cit. n. 20), pp. 46–57; 168–179.

<sup>58</sup> Cf. RIZZELLI, *Lex Iulia* (cit. n. 3), pp. 67–75.

commissum, non posse mulierem ream adulterii fieri: sed nec adulterum interim accusari posse. – When I wanted to bring a charge of adultery against a woman who remained married after having committed adultery my intention was countered. I wonder whether this response was right. He answered, ‘You should have known that no proceedings for adultery can be brought against the woman during the marriage in the course of which the adultery is said to have occurred; no charges can be brought even against the adulterer for that length of time.’

The reason why a woman suspected of adultery was not punishable while she remained married was to allow the marital relation to continue in an appropriate manner and to protect her against unwarranted harassment by third parties. Proceedings for adultery could only be initiated if the marriage was dissolved not later than five years (counted without intermission) as of the day on which the offence was committed (cf. *D.* 48.5.30[29].6–7; *D.* 48.5.32[31]), or in consequence of the adulteress’ husband being convicted of *lenocinium*.

Given such circumstances it seems self-evident that to make the statutory protection afforded married women a reality and not merely theoretical, only conduct on the part of the husband could be penalised as *lenocinium* which was an outright violation of marital propriety, not just associated with adultery. The *Lex Iulia* gave a precise list of which types of conduct fell in this category.

The structure of *lenocinium* as an offence was not controversial; the jurists use the term *lenocinium* in the same way. Hence even records which are not contextualised are uncontroversial.

*D.* 48.5.40(39).1 (Pap. 15 *resp.*): Nupta quoque muliere, tametsi lenocinii vir prior non postuletur, adulterii crimen contra adulterum ab extraneo potest inferri. – Even if the woman’s previous husband has not been accused of *lenocinium*, a third party may bring proceedings for *adulterium* against the adulterer.

Papinian is referring to an issue directly related to the temporary suspension of the possibility of proceedings against a woman suspected of adultery who has remarried. The *Lex Iulia de adulteriis* does not contain a prohibition on the contracting of a marriage with a woman suspected of adultery.

*D.* 48.5.41(40).1 (Paul. 19 *resp.*): Item quaeritur, an idem maritus destituisse videatur vel lenocinium commisisse, qui eandem reduxit uxorem. Paulus respondit eum, qui post crimen adulteri intentatum eandem uxorem reduxit, destituisse videri et ideo ex eadem lege postea accusandi ei ius non superesse. – Paulus was also asked whether a husband who had remarried the same wife would be considered to have withdrawn the charge or to have committed *lenocinium*. He replied that a man who remarried the same woman having previously brought an accusation of adultery against her would be considered to have withdrawn the charge, thereby forfeiting the right to bring proceedings later under this Law.

Nor were there any statutory counter-indications against a couple whose marriage had been dissolved due to adultery remarrying, even if charges had been brought against the adulteress.<sup>59</sup> This circumstance appears to have been used to evade liability for *lenocinium*.<sup>60</sup> The negative consequence of a man remarrying a wife he had repudiated was his forfeiture of the right to prosecute her for her adultery in the former marriage;<sup>61</sup> therefore the man's conduct did not meet the criteria for *lenocinium*.<sup>62</sup> Moreover, in the subsequent marriage the wife's protection against prosecution was limited: her partner in the adultery could be prosecuted, and the restoration of her liability for adultery did not depend on her husband's conviction for *lenocinium*.

<sup>59</sup> On the contracting of marriage with a woman accused of adultery, cf. Dorota STOLAREK, 'Amor contra legem Iuliam de adulteriis', *Studia Prawnicze KUL* 57 (2014), No. 1, pp. 162–168.

<sup>60</sup> *D.* 48.5.34(33).1 (Marcian. 1 *publ. iud.*): '... Sed si dimissam reduxerit, verbis non tenetur: sed tamen dicendum est, ut teneatur, ne fraus fiat.' – But if he should remarry the repudiated woman he shall not be liable under the letter of the law; however he should be found liable, so as to avoid the commission of fraud.

<sup>61</sup> *D.* 48.5.14(13).9 (Ulp. 2 *adult.*): 'Sed et si qua repudiata, mox reducta sit non quasi eodem matrimonio durante, sed quasi alio interposito, videndum est, an ex delicto, quod in priore matrimonio admisit, accusari possit. Et puto non posse: abolevit enim prioris matrimonii delicta reducendo eam.' – But also if a woman who has been repudiated should be shortly afterwards taken back, not in the continuation of the previous marriage but in a new one, as if there had been another marriage in the interval, we should consider whether she can be accused of the offence she committed in the previous marriage. And again I do not think she can, for by taking her back her husband has erased the offences committed in the previous marriage.

<sup>62</sup> Cf. MCGINN, *Prostitution* (cit. n. 2), p. 237.

*D. 48.5.5 (Iul. 86 dig.):* Nuptam mihi adulterii ream postulari posse in priore matrimonio commissi dubium non est, cum aperte lege Iulia de adulteriis coercendis caveatur, siquidem vidua sit, de cuius adulterio agetur, ut accusator liberum arbitrium habeat, adulterum an adulteram prius accusare malit: si vero nupta sit, ut prius adulterum peragat, tunc mulierem. – There is no doubt that my wife can be accused of adultery in her previous marriage, since the Julian Law expressly says that if the woman whose adultery is at issue is unmarried the accuser shall have a free choice as to which charges he is going to bring first – against the adulterer, or against the adulteress; but if she is married he has to get the adulterer convicted first, and then the woman.

*D. 48.5.20(19).3 (Ulp. 2 Iul. adult.):* Nupta non potest accusari, non tantum ab eo, qui adulterum accusavit nec optinuit, sed nec ab alio quidem, si adulter absolutus est. Proinde si per collusionem cum adultero constituerit fueritque absolutus, dedit mulieri nuptae adversus omnes securitatem. Plane si nupta esse desierit, accusari poterit: neque enim aliam lex tuetur quam eam, quae nupta est, quamdiu nupta erit. – Proceedings for adultery cannot be brought against a married woman if the adulterer has been acquitted. Neither the party who brought the proceedings against the adulterer and lost, nor by anyone else can she be accused. Thus, if the adulterer was acquitted as a result of collusion with the accuser, the married woman is secure against all [potential accusers]. Of course if she ceases to be married proceedings may be brought against her, because the Law protects only married women, for as long as they are married.

The conviction of the adulterer opened up the road for the conviction of the adulteress. If the man suspected of being her partner in the adultery was acquitted, the woman could not be prosecuted during her subsequent marriage, even if the accused man was acquitted due to an error of impunity caused by the accuser's collusion (*praevaricatio*) with the defendant to bring about the acquittal of the latter. Ultimately, there was always a possibility to bring proceedings against the adulteress if her marriage was dissolved – providing it was dissolved within five years of the offence.<sup>63</sup>

<sup>63</sup> *D. 48.5.30(29).6.* An adulteress' ex-husband could completely deprive her of security against prosecution. *D. 48.5.2 pr. (Ulp. 8 disp.):* 'Ex lege Iulia servatur, ut, cui necesse est ab adultero incipere, quia mulier ante denuntiationem nupsit, non alias ad mulierem possit pervenire, nisi reum peregerit. peregissem autem non alias quis videtur, nisi et condemnaverit.' – It is provided in the Julian Law that if the woman contracted a marriage before she was served notice of an accusation against her, the person required to bring proceed-

The protection given to married women against a charge of adultery and the restoration of liability for the offence not only verify the classification of *lenocinium* as an offence under the *Lex Iulia*, but also provide its grounds.



*Lenocinium* was defined and classified in the *Lex Iulia de adulteriis* as an individual offence with two variants. It could only be committed by a married man. Its necessary criterion was the drawing of a personal or material gain from his wife's adultery, for which he had to give his prior consent; and (for the second variant) the continuation of the marriage with the adulteress in the event of the patency of the offence. As an offence against marital propriety, *lenocinium* could not be committed in any other way than with wilful intent. The *Lex Iulia* gives an unambiguous definition of the criteria for this offence. If the husband of an adulteress was convicted of *lenocinium* the statutory protection given by the law to married women against prosecution for adultery was lifted and proceedings could be brought against her.\*

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ings must first file an accusation against the adulterer. She cannot be accused until proceedings against the defendant have been concluded, and their conclusion is understood in no other wise but as his conviction.

The ex-husband notified the repudiated wife by serving a *denuntiatio* on her that he intended to accuse her of *adulterium*. *D.* 48.5.18(17).4. The *denuntiatio* allowed him to prosecute the adulteress first, without the need to have the adulterer convicted. There was one condition: he had to serve the *denuntiatio* within the prescribed term, viz. before she remarried. STOLAREK, *Adultera* (cit. n. 20), p. 160.

\* Translated by Teresa BAŁUK-UŁEWICZOWA