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Feminine Resistance to Moral Legislation in the Early Empire

Katrina E. York

Moral legislation was one of the defining aspects of Augustan culture, and rarely does any serious discussion of the early empire conclude without at least passing reference to the *lex Iulia* or its sister laws. Certainly no treatise on marriage, family, or morality would be complete without some attention to the laws regulating adultery. These laws are often invoked to illuminate the use of morality as a political weapon, or to discuss strategies by which imperial expansion could be justified. Likewise, the written hostility towards the policies, such as the subversive verses of the elegists, has captured the attention of scholars for many years. Considerably less discussion, however, is dedicated to the issue of conscious feminine resistance to these restrictions. Rebellious females or odd exceptions appear scattered throughout the discourse surrounding the marriage laws, but usually remain isolated. This paper seeks to bring together a small selection of feminine voices as they can be heard in relation to the moral legislation of the early empire, in hopes that by so doing a more complete understanding of imperial Rome's deeply nuanced society may be obtained.

THE LEGISLATION

The transition from the republic to the empire in the latter first century B.C.E caused much more than a change in the political hierarchy of the Roman elite. Despite a certain amount of lip service from the imperial house, the *res publica* became essentially the *res Augusti*. As such, the

senatorial order found one of the cornerstones of their identity — the power they exercised in the republic — severely compromised.

In this uncertainty Augustus found ample room to reshape the very character of the Roman elite into something that could support his new system. Declaring himself a restorer of the past, Augustus advocated a return to the *mores* of the past, bringing back the "numerous traditional ways that were falling into abeyance" (Augustus *Res Gestae* 8). The institution of marriage and its associated crime, adultery, became a focal point of his moral reform.

The *Lex Iulia de adulteriis coercendis* went into effect in 18 B.C.E.,² and was modified by the *Lex Papia Poppaea* of 9 C.E.³ Later sources frequently combine the two as the Julian/Papian law, making it often unreasonable to separate the two for discussion. Under these laws, the prosecution of adultery moved from the private sphere and became a crime under the jurisdiction of the state. Augustus established permanent courts to hear the cases, and solidified procedures for prosecution.⁴ The laws compelled a man, upon the discovery of adultery, to divorce his wife, and either the injured husband or the wife's father could bring forward a formal accusation of adultery within sixty days of discovery.⁵ Sixty days after the divorce itself, any third party could

¹Caesar Augustus, "Res Gestae," in Rome The Augustan Age: A Source Book edited by Kitty Chisholm and John Ferguson (Oxford: Oxford University Press, 1981), 5.

²This date is subject to some debate, but it could not have been in effect any later than 16 B.C.E. See Karl Galinsky "Ideas, Ideals, and Values," in *Augustan Culture: An Interpretive Introduction (Princeton: Princeton University Press*, 1996), 130 and Susan Treggiari, *Roman Marriage:* Iustia Coniuges *from the Time of Cicero to the Time of Ulpian*, (New York: Oxford University Press, 1991), 278.

³Galinsky, 130.

⁴Catharine Edwards, *The Politics of Immorality in Ancient Rome* (Cambridge: Cambridge University Press, 1993), 39.

⁵Amy Richlin, "Approaches to the Sources on Adultery at Rome," *Women's Studies* 8 (1981): 225, *Academic Search Premier*, EBSCO*host* (accessed October 18, 2006) 227 and Treggiari, 287.

file accusations for another four more months. A man who failed to divorce his wife made himself vulnerable to a charge of pandering (*lenocinium*).⁶

Families did not lose complete control over the punishment of adultery. If the *paterfamilias* of the woman were actually to catch her and her lover in the act of adultery, so long as they were in either his house or that of his son-in-law, he was legally able to kill them both without fear of reprisal.⁷ The law, however, was specific in the fact that he had to kill them both, or face charges for murder. Likewise, the husband had a right to kill the lover, and only the lover, if said lover was *infamis*, or of low class.⁸ Scholars speculate that the strict limitations of the right to kill the adulterous pair served more to discourage than encourage fatalities.⁹

Law also regulated penalties for conviction. An adulteress lost half of her dowry and one third of her property, while an adulterer had half of his property confiscated. ¹⁰ Both were exiled to *different* islands. ¹¹ Beyond exile and a monetary fine, convicted adulteresses faced other social repercussions. The laws forbade them to remarry any freeborn citizen, denying them access to the upper class and any social status they may have previously enjoyed. ¹² As a visible advertisement of their loss, they shed the *stola* of a Roman matron to take up the *toga* of a prostitute. ¹³

⁶Treggiari, 288 and Richlin 1981, 227.

⁷Edwards, 38-39. See Treggiari, 282-285, for the citation of the law and a more complete discussion of its caveats.

⁸Treggiari, 283-285.

⁹Jane F. Gardner, *Women in Roman Law & Society* (Bloomington and Indianapolis: Indiana University Press, 1986), 130. Certainly, ascertaining the rank of the male would be difficult in first flush of discovery, as he almost certainly wouldn't be wearing anything that might signify his social status.

¹⁰Edwards, 40.

¹¹Treggiari, 290.

¹²Gardner, 129.

¹³Edwards, 40. Gardner, 128, also suggests that the *toga* may have become assigned to the adulteress because many adulteresses actually did become prostitutes after they fell into disgrace.

The Augustan marriage/moral legislation did more than merely make adultery a state crime. They also forced remarriages of widows or divorcees and created legal disabilities for men and women not married by a certain age. ¹⁴ Cross-class marriages, especially those between senatorial class males and freedwomen, were outlawed. All freeborn males were forbidden to marry "[a woman who earns her living as a prostitute,] a procuress, a woman manumitted by a procurer or procuress, a woman taken in adultery, a woman condemned in a public court, and any woman who has formerly practiced the stage profession" (*Tituli Ulpiani* 13.2). ¹⁵

Why Augustus would choose such a potentially explosive focus for his reform is a question that has intrigued scholars for quite some time. According to Galinsky, Augustus was seeking to solidify the existing mores of the past in order to justify imperial expansion by right of moral virtue. He Edwards credits Augustus with using the theme of morality for "establishing the credentials of his autocratic regime," encouraging contemporary writers to form an explicit contrast between his laws and the violent disorder and immorality of the late republic. Augustus could have been creating a political red herring, attempting to focus the diatribe of commentators on a minor issue so as to distract the majority from the near-complete loss of power in the senate. Treggiari believes the answer to incorporate all of the above and more, the laws responding as they did to "a complex situation and shifting political possibilities," but being linked to a "need to encourage nuptiality and reproductivity in order to supply Rome with soldiers and administrators."

¹⁴Edwards, 42.

¹⁵Treggiari, 62. The category of prostitute is omitted in the Latin, so editors tend to add it in brackets as a category too obvious to merit citation.

¹⁶Galinsky, 128.

¹⁷Edwards, 36.

¹⁸Treggiari, 60.

EVIDENCE OF RESISTANCE

Vistilia and the Aedile's List

Evidence abounds to declare that Augustan moral legislation was not met with overwhelming enthusiasm. Suetonius reports plainly that Augustus "found the people utterly averse to submit to [the legislation on marriage]" (Suetonius *Augustus* 34). Tacitus repeatedly utilizes the application of the *Lex Papia Poppaea* to illustrate what he sees as "the premier example of the invasion of private life by the principate through the agency of *delatio*" (Tacitus *Annals* 3.28). Ovid and his fellow poets mock Augustus's ideal *matrona* or *materfamilias* by making adultery a form of art in elegy. If the scholar is willing to believe, there is even a fair amount of evidence that women themselves found ways to resist or subvert the letter of the law.

The strongest argument for some form of feminine resistance can be located in the case of Vistilia. Tacitus relates her story in Book Two of his *Annals* (2.85).

That same year [19 CE] the profligacy of women was checked by stringent enactments, and it was provided that no woman whose grandfather, father, or husband had been a Roman knight should get money by prostitution. Vistilia, born of a praetorian family, had actually published her name with this object on the aedile's list, according to a recognized custom of our ancestors, who considered it sufficient punishment to unchaste women to have to profess their shame. Titidius Labeo, Vistilia's husband, was judicially called on to say why with a wife whose guilt was manifest he had neglected to inflict the legal penalty. When he pleaded that the sixty days given for deliberation had not yet expired, it was thought sufficient to decide Vistilia's case, and she was banished out of sight to the island of Seriphos.

The motive Tacitus attributes to Vistilia's actions seems dubious. It is not entirely logical that Vistilia, wishing to establish a business dealing in extra-marital pleasures, would make that

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¹⁹Delatores were third-party accusers in law cases, such as adultery or disrespect to the imperial family. They often made a living from their share of the confiscated estates, and were essentially a cross between a paparazzo and sleazebag lawyer.

²⁰Richlin 1981, 232.

fact public, and so *invite* prosecution. It is more likely that she is attempting to sidestep the adultery statutes altogether. As Richlin explains, "Vistilia's tactic would have exempted her not only from prosecution for adultery, since she was now *infamis*, but from the provisions of the Lex Pappia penalizing celibacy."²¹ In other words, as an official prostitute, the laws regarding adultery would not apply to her, and as a citizen's wife she likewise could not be punished for not attempting to bear children.

The fact that Vistilia's husband, Titidius Labeo, made no move to either divorce or prosecute her until he was forced into action by outside parties hints at an interesting line of inquiry. Either Titidius was ignorant of Vistilia's actions until they were brought to his attention, or he was "flagrantly complaisant" to her affairs. The second option would seem to indicate his allegiance to the subversive "counter-culture" of the elegists, attributing equal status to men and women ²³

Suetonius addresses the same issue, although he attributes the actions to a number of women, unlike Tacitus's isolated portrayal of the rebellious Vistilia. While discussing the increasing interference of Tiberius in the private lives of citizens, Suetonius relates how the emperor banished

> women of ill-fame, divesting themselves of the rights and dignity of matrons, [who] had now begun a practice of professing themselves prostitutes, to avoid the punishment of the laws (Suetonius Tiberius 35).

Vistilia and her fellow self-proclaimed prostitutes were not the only women to find and exploit weak points in the Julian-Papian legislation. Treggiari reports "as early as Seneca,

²¹Richlin 1981, 233.

²²Richlin 1981, 232.

²³Judith P. Hallett, "The Role of Women in Elegy: Counter-Culture Feminism," in *Women in the* Ancient World: The Arethusa Papers, ed. John Peradotto and J.P. Sullivan (Albany: State University of New York Press, 1984), 241-262.

moralists inveigh against men of modest means who were often hired to take the name of husband, in order to flout the laws against celibacy."²⁴ By paying men to become their husbands, these women were essentially buying the freedom to act as independent agents, without risking the penalties for not at least attempting to bear children for the state. In another incident, Suetonius reports how a single man sought to take advantage of the privileges allotted to married men alone, stating that

[Tiberius] dismissed another from the office of *quaestor*, for repudiating, the day after he had been lucky in drawing his lot, a wife whom he had married only the day before (Suetonius *Tiberius* 35).

Only married men could gain the office of *quaestor*, but the age and duration of the marriage was not specified. Thus a one-day marriage would make a man eligible, although it is clear from Tiberius's reaction that such an action was not supported by the intent of the legislation.

Although this is not a specifically feminine effort to subvert the law, there is no reason to suppose that the woman was not fully complaisant to the legal manipulation of which she was part.

Questioning whether or not Vistilia and her friends were actually all adulteresses or prostitutes seems an immaterial point. Far more important to consider is the possibility that these blatant misuses of the laws were in some ways conscious acts of social rebellion, the denial of the validity of a law by highlighting the inherent flaws. Despite, or perhaps because of, the anecdotal qualities of these references, they provide insight into the slightly more mundane workings of the legal code.

²⁴Treggiari, 79.

Julia -- an Imperial Icon

Feminine resistance was not confined to the sort of blatant legal machinations of Vistilia and her ilk. Indeed, the specter of resistance colored even the perceptions Augustus's imperial family. Amy Richlin, in her 1992 article "Julia's Jokes, Gallia Placidia, and the Roman Use of Women as Political Icons," explores the far more subtle form of resistance that found expression in the image of Julia. ²⁵

Historians and gossips²⁶ latched on to any hint of impropriety on the part of the first females, eager to defame them and, by extension, weaken the power of the men to whom they were connected.²⁷ Regardless of the historical realities of these women, the lingering characters and caricatures that remain of them can do much inform the modern scholar of what certain elements of Roman society were thinking. Julia, the daughter of Augustus, is a fascinating example of this phenomenon. Although grave authors such as Suetonius and Tacitus treat her sparingly and disparagingly, all that is needed to view her in a vastly different light is a different context. A series of jokes attributed to her, as recorded in Macrobius' Saturnalia, portray her in a uniquely non-hostile and sympathetically rebellious manner.

More than once when in disagreement with her father, Macrobius' Julia²⁸ not only triumphs by her wits, but also dismisses the objections of Augustus entirely.

> Livia [Julia's stepmother] and Julia had diverted the attention of the populace to themselves at the show of the gladiators because of the dissimilarity between their entourages:

²⁷Edwards, 57.

²⁵Amy Richlin, "Julia's Jokes, Gallia Placidia, and the Roman Use of Women as Political Icons," in Stereotypes of Women in Power, ed. Barbara Garlock, Suzanne Dixon, and Pauline Allen (Westport: Greenwood Publishing Group, Inc., 1992), 70.

The two categories are not so different as some might like to think.

²⁸The "Julia" to whom this section refers is not intended to represent the historical personage of Augustus's daughter. Instead, the character under discussion is the image of Julia as created by the text of the Saturnalia

while serious and important men surrounded Livia, Julia was flanked by a flock of young men, and profligate young men at that. Her father warned her in a note that "she should notice how great a difference there was between the first two ladies." She replied elegantly, "These men with me will also become old men" (Macrobius *Saturnalia* 2.5.6).

Not only does Julia win the last word over her father, she completely sidesteps the issue to which he objected. By changing the issue from sexuality to comparative age, she is ignoring the thrust of Augustan morality, denying the importance of the laws through which Augustus claimed his right to power.

Another of the quips is far less subtle in undercutting the authority of Augustan legislation (Macrobius *Saturnalia* 2.5.9):

And when those who knew of her sins used to marvel at how she gave birth to sons resembling Agrippa, when she made such public property of her body, she said. "Why, I never take on passengers until the hold is full."

Julia is making mockery of her father's laws, using the intended results (legitimate children) as means by which to safely mask the evidence of defiance. The futility of the law is shown in sharp relief, as is the naivety of the emperor himself, who had previously "blushed to doubt his daughter's chastity" (Macrobius *Saturnalia* 2.5.3) when he noted how closely Julia's children resembled her husband.

Therefore the Julia of this text, instead of being vilified for her faults, is lauded for her cleverness. Rather than being described as a woman given over to greed and indulgence, or to the inappropriate lust for power, ²⁹ she is described as

abusing the kindness of fortune as much as her father, although otherwise a love of literature and learning, which was

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²⁹As are the characters of Messalina (*Annals* 11) and Agrippina (*Annals* 12-14), respectively, portrayed by Tacitus.

easy in that household, along with a gentle humanity and a spirit in no way cruel, earned the woman great indulgence and favor, while those who were familiar with her vices marveled as well at such a contradictory personality (Macrobius *Saturnalia* 2.5.1-2).³⁰

This is hardly a scathing assessment of character. Richlin argues that the positive portrayal of Julia in the jokes attributed to her could be indicative of not only a subversive humor present in Augustan society, but of a distinctly feminine, upper-class humor. She argues that these jokes could well have been spread by young senatorial and equestrian wives, those who were of an age with Julia and familiar with the court circles, ³¹ adding that "although Julia's jokes may not have been revolutionary, they are likely to have been repeated by those who rejected traditional female norms." That those in the position of rejecting female norms may have themselves been female is a distinction not to be overlooked. Indeed, a joke closely associated with Julia's in the *Saturnalia* features a different woman, although the treatment is nearly identical.

A similar quip by Populia, daughter of Marcus: To someone wondering why it is that other beasts never desire a male unless when they want to become pregnant, she replied "Because they're beasts" (Macrobius *Saturnalia*. 2.5.10).

Concubinage — An Alternative

The final case of feminine resistance is far more conjectural. Gardner notes, "Under the empire for a number of reasons, particularly the social legislation of Augustus, relationships of concubinage probably became more commonplace."³³ Augustan statutes had severely limited the

³⁰Richlin 1992, 71.

³¹Richlin 1992, 76.

³²Richlin 1992, 77.

³³Gardner, 57.

pool of women eligible for marriage to the upper class, forbidding a senator, senator's descendant, or freeborn male to marry

[a woman who earns her living as a prostitute,] a procuress, a woman manumitted by a procurer or procuress, a woman taken in adultery, a woman condemned in a public court, and any woman who has formerly practiced the stage profession (Tituli Ulpiani 13.2).³⁴

As an even greater restriction, no senator could marry a freedwoman.³⁵ This branded the vast majority of females in the Roman empire ineligible for anything more than an affair. Concubinage developed as a legal bond between such socially disparate couples. Perhaps because of the prevalence of these unions, the legal status of the concubine began to evolve, until, by the time of Ulpian, concubines were often to be treated as wives, both in questions of inheritance and in cases of adultery.³⁶ According to Ulpian,

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 (Ulpian 22 *ad Sabinum*).³⁷

Likewise, the title of *materfamilias* was also applied to the concubine in discussions of the *lex Iulia*, indicating that the concubine was a respectable position, and therefore women who would claim it were as vulnerable to prosecution for adultery as wives.³⁸ This desire for the inclusion of concubines in the statutes was as much a form of resistance as Vistilia's attempts to be excluded from the penalties. By maintaining these relationships and thriving within them, concubines forced jurists to redefine the bounds of respectability, and to alter the workings of the *lex Iulia* to

³⁴Treggiari, 62. As above, note 15.

³⁵Treggiari, 50.

³⁶Thomas A.J. McGinn, "Concubinage and the Lex Iulia on Adultery," *Transactions of the American Philological Association* 121 (1991).

³⁷McGinn, 349.

³⁸McGinn, 352.

legitimize an alternate form of commitment. The institution was respectable enough that the emperor Vespasian and several senators were able to take freedwomen as concubines after the deaths of their wives, and not be penalized under the law for avoiding remarriage.³⁹

Despite the numerous restrictions on what women could be considered respectable concubines, 40 such women were "loved, honored, and expected to remain faithful." As such, the institution may have represented a second chance for convicted adulteresses. Although McGinn argues that for a woman to be considered eligible as a concubine was a grave indication of their lack of social status. 42 the long-term commitment implied in the bond may have been in many ways similar to the marriages the woman had escaped or lost through infidelity, and would have been undeniably preferable to being forced into prostitution. Although the adulteress was expressly forbidden to marry the man with whom she had an affair, nothing in the law seems to preclude the adulterous couple from engaging in this (nearly) equivalent bond. At times being classified as a concubine was preferable to being considered a wife. Presents bestowed from a husband to a wife were legally invalid, as a wife owned nothing that did not belong to her husband as well. 43 A freedwoman especially would have found the legal independence associated with concubinage beneficial if her partner were to die, as "gifts bestowed on a concubine cannot be revoked."44 In this way they would have circumvented another major aim of the Augustan legislation, the desire to keep all senatorial wealth within the senatorial class.

³⁹McGinn, 337.

⁴⁰For a detailed discussion on these stipulations, see McGinn.

⁴¹McGinn, 371.

⁴²McGinn, 343.

⁴³Treggiari, 55.

⁴⁴Treggiari, 55, from *Digest* 39.5.31 pr., Papinian *xii responsorum*.

CONCLUSION

Evidence for active feminine resistance to the morality of Augustus is admittedly slim and conjectural. This is to be expected, however, as evidence for active feminine resistance to almost anything in Graeco-Roman culture is notoriously slim and conjectural. After all, the men who were writing history usually had very little interest in the thoughts, feelings, and motivations of the females around them. Instances of misbehavior on the part of ancient women are admittedly quite frequent, but the majority of these occurrences are better arguments for male anxiety than feminine social movement. Indeed, isolating instances of feminine resistance or identifying certain outstanding individuals can be indicative of greater social trends, as Roman writers have an acknowledged tendency to explore the problems in their society through the behavior of their wives and daughters. 45

As scholars we have identified only a fraction of the voices that would have comprised the Roman chorus. As historians two thousand years removed from our subjects, we will likely never recover these voices, but their echoes serve to remind us of the diversity inherent in a world so expansive as the Roman empire. The presence of a Vistilia, or a Julia, trapped eternally in a measure of rebellion, serves only to tease the scholar with possibilities. The nameless whispers of adulteresses and concubines hint at how women might have adapted to changes in a society that allowed them about the same amount of influence as modern societies give to house pets. Wevertheless, by stripping away the layers of male anxiety, by actively searching for these echoes of dissent, scholars are able to come that much closer to recasting the large, if often ignored, chorus of this Roman play.

⁴⁵Witness the enormous and negative influence of Messalina over the mind of Claudius, the role of Sempronia in the downfall of the republic, or the tendency to sacrifice Vestals as a means to purify the city.

⁴⁶Hallett, 243.

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