

Omnes unius aestimemus assis: A Note on Liability for Defamation in Catullus V

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1. Catullus V

Vivamus, mea Lesbia, atque amemus	1
rumoresque senum severiorum	
omnes unius aestimemus assis!	3
soles occidere et redire possunt;	
nobis cum semel occidit brevis lux,	5
nox est perpetua una dormienda.	
da mi basia mille, deinde centum;	7
dein mille altera, dein secunda centum;	
deinde usque altera mille, deinde centum.	9
dein, cum milia multa fecerimus —	
conturbabimus illa, ne sciamus,	11
aut ne quis malus invidere possit,	
cum tantum sciat esse basiorum. ¹	13

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¹ K. Quinn, *Catullus: The Poems* (Bristol 1970), 3–4. See J. Godwin, *Catullus: The Short Poems* (Warminster 1999), 29:

Let us live, my Lesbia, and let us love
and let us count the gossip of over-strict
old men as all worth one penny!
The sun can set and return again;
when our short light has once set
it is one eternal night to be slept through.
Give me a thousand kisses, then a hundred,
then another thousand, then a second hundred,
then at once another thousand, then a hundred.
Then, when we have made many thousands

Lines 2–3 are translated by Godwin as “and let us count the gossip of over-strict old men as all worth one penny.”² Goold has “and value at one penny all the talk of stern old men.”³ Similarly Lee has “and value all the talk of stricter old men at one penny.”⁴ Regarding *rumor* in particular, the *Oxford Latin Dictionary* cites these lines in support of the meanings “unfavourable report” and “ill repute.”⁵ Quinn’s note to *rumor* reads “the jealous mutterings of those too old to have fun themselves” while Fordyce has “the gossip of puritan grey-beards.”⁶ As for *omnes unius aestimemus assis*, this is widely regarded as proverbial. To the extent that it attracts any comment at all, the weak metaphor inherent in the phrase is said to be drawn from accounting: it “prepares the way for the juggling with figures in lines 7–13.”⁷

However, on closer examination the traditional interpretation of these lines appears rather awkward. The counting of kisses later in the poem undoubtedly evokes the reckoning of beads on an abacus,⁸ or perhaps even finger-counting,⁹ but *rumores aestimare* (to place a value on rumors) is surely a different thing from counting kisses: lines 2–3 are concerned with the worth of the rumors, not their quantity. Godwin’s “count the gossip of over-strict old men as all worth one penny” relies on the ambiguity of “count” in modern English: it can mean both “reckon” and “esti-

we will muddle up the accounts, so we do not know
or so that no evil person can give us the evil eye
when he knows that there are so many kisses.

² Godwin (note 1), 29.

³ G. P. Goold, *Catullus*, 2nd ed. (London 1989), 37.

⁴ G. Lee, *The Poems of Catullus* (Oxford 1990), 6–7.

⁵ *OLD*, s.v. *Rumor*, 5a.

⁶ Both compare Prop. 2.30.13, *ista senes licet accusent convivia duri*, translated by Lee as “Insensitive old men can criticize these parties” (G. Lee, *Propertius: The Poems* (Oxford 1996), 64). See Quinn (note 1), 108; C. J. Fordyce, *Catullus: A Commentary* (Oxford 1961), 106. Cf. D. F. S. Thomson, *Catullus: Edited with a Textual and Interpretive Commentary* (Toronto 1997), 219: “. . . not ‘gossip’ here but rather ‘grumbling’ or ‘muttering’.”

⁷ Quinn (note 1), 108. Thus according to Pratt, “Number provides the main ‘action’ which is the movement from what can be called the ‘one’ section (1–6) to the ‘many’ section (7–13).” N. T. Pratt, “The Numerical Catullus 5,” *Class. Philol.*, 51 (1956), 99–100.

⁸ See e.g. H. L. Levy, “Catullus, 5, 7–11 and the Abacus,” *Am. J. Philol.*, 62 (1941), 222–24.

⁹ R. Pack, “Catullus, Carmen V: Abacus or Finger-Counting?,” *Am. J. Philol.*, 77 (1956), 47–51.

mate.”¹⁰ Both Goold and Lee prefer the more accurate “value,” but this breaks the link with lines 7–11. There is also the fact that lines 1–6 seem rather detached from the rest of the poem: it begins with two self-contained statements of three lines each, of which *Vivamus . . . assis* is the first.¹¹ This, too, seems to militate against the traditional interpretation of lines 2–3. So it does not seem as if the accounting metaphor at work in lines 7–11 can be detected in the opening lines of the poem after all.

In fact, a more attractive reading of lines 2–3 is available: *rumores aestimare* naturally refers to the calculation of damages payable in respect of a defamatory allegation. It is possible — although of course not certain — that Catullus intended a specifically legal metaphor here. Moreover, this hypothesis is supported by certain features of the text itself. First, it is tempting to see in *aestimare* a reference to the probable title of the so-called *edictum generale* (general edict) on *iniuria*, “de iniuriis aestimandis.”¹² However, even if this is rejected as too remote, it remains the case that *aestimare* was certainly the appropriate technical term for a claimant’s assessment of his damages before the praetor, both in the context of the *actio iniuriarum* in particular and in litigation more generally.¹³ Thus Catullus’s use of the word *aestimare* in itself supports the interpretation of these lines proposed here: *aestimare* is to be understood not exclusively figuratively — to estimate the ethical worth of a thing — but also literally, to refer to the assessment of damages.¹⁴ Secondly, although it is true that in Catullus’ time the word *as* was already being used figuratively to denote something of no value, surely it is likely that Catullus meant something more by *omnes unius aestimemus assis* than “to care as little as a halfpenny for, regard as worthless”?¹⁵ Read this way, lines 2–3 fall rather flat: Catullus and Lesbia are the subject of talk — or will be, if they “live and love” — and Catullus urges Lesbia to ignore it: not to give a penny, or a fig, or a damn. This

¹⁰ *OED*, s.v. Count, I 1a, 3.

¹¹ See e.g. Thomson (note 6), 218.

¹² Gell. *NA* 20.1.13, reporting Labeo. This hypothesis takes us prematurely to section 3: if lines 2–3 allude to the title of the general edict, then the *actio iniuriarum* must already have developed sufficiently to encompass cases like this one.

¹³ See e.g. G.3.224, on the mature *actio iniuriarum*: *Permittitur enim nobis a praetore ipsis iniuriam aestimare, et iudex vel tanti condemnat quanti nos aestimaverimus, vel minoris, prout illi visum fuerit.*

¹⁴ Cf. *OLD*, s.v. Aestimo, 2 (“to assess the damages or penalty in an action”) with 3 (“to estimate the worth of, value, assess, weigh”).

¹⁵ *OLD*, s.v. As, 2b.

comes perilously close to cliché. Surely it is preferable to read the genitive of price (*assis*) as a specific reference to damages for defamation? In fact, Catullus appears to have used it in that sense elsewhere. In Poem XLII, Catullus summons a crowd of hendecasyllables to carry out a *flagitatio* — an abusive, antiphonal chant — against a *moecha* (tart) in order to shame her into giving back the books he has lent her.¹⁶ In line 13 of the poem, Catullus bemoans the fact that his victim has failed to respond to his attack: his words are *non assis facis?*, usually translated something like “don’t you give a damn?” However, it is significant that *assis facere* here appears to express precisely the same idea as *assis aestimare* in Poem V. The *moecha* of XLII is unmoved by the public abuse heaped on her by Catullus’ hendecasyllables, just as in V, Catullus urges Lesbia to disregard the gossip of old men; in each case, the genitive *assis* is used to convey the idea of an ineffectual verbal attack. So *assis aestimare* may not be a stock phrase after all. Rather than the vanishingly weak accounting metaphor of the traditional interpretation, if the reading proposed here is adopted, *rumores unius assis aestimare* becomes a sharply focused image drawn from litigation. This image is no less successful in the context of the poem for being faintly ridiculous.

If the defamation metaphor be provisionally accepted, the next step must be to consider more carefully its meaning. If the Lesbia of Poem V was indeed Clodia Metelli, sister of P. Clodius Pulcher and wife of Q. Metellus Celer, then she was married until 59 BC when Metellus Celer died.¹⁷ In fact, Poem LXVIII itself makes it clear that “Lesbia” was married when it was written.¹⁸ So it seems that her relationship with Catullus was technically adulterous, at least initially. Moreover, Clodia’s reputation for sexual license is vividly evoked in Cicero’s *Pro Caelio*, argued in 56 BC.¹⁹ If there is any truth at all in Cicero’s account, it seems that by the time of the trial of M. Caelius Rufus, Clodia was no-

¹⁶ J. Kelly, *Roman Litigation* (Oxford 1966), 22–23; A. W. Lintott, *Violence in Republican Rome*, 2nd ed. (Oxford 1999), 9.

¹⁷ The identification of Lesbia with Clodia Metelli is widely accepted: see e.g. Quinn (note 1), xvi–xix. But see the doubts expressed by T. P. Wiseman, *Catullan Questions* (Leicester 1969), 50–60, and S. Dixon “The Allure of ‘La dolce vita’ in Ancient Rome,” in *Reading Roman Women: Sources, Genres and Real Life* (London 2001), 137–40.

¹⁸ Catullus LXVIII, 145–146.

¹⁹ Here she is cast “as a well-born *meretrix* [prostitute].” T. A. McGinn, *Prostitution, Sexuality and the Law in Ancient Rome* (Oxford 1998), 170; Cic. *Cael.* 49.

torious for her promiscuity. As for Catullus himself, even if the poem was written after 59 BC, in entering into an extra-marital relationship with an upper-class woman, particularly a widow, he was guilty of serious sexual impropriety.²⁰ This was the charge that Cicero had to avoid in his defense of Caelius, who had also been Clodia's lover.²¹ But in fact it is unnecessary to pursue the question of the historical Lesbia any further. As Catullus knew, the poem itself would have been enough to provoke anger among the guardians of the ancestral Roman values, the *mos maiorum*. The excessive nature of Catullus' declaration in lines 7–11 — and the sexual license which this excess signifies — offers an immediate target for the disapproval of censorious moralizers, regardless of Lesbia's identity.²²

Nevertheless, Catullus urges Lesbia simply to shrug off the disapproval of Roman society. In fact, he appears to be calling into question the validity of social norms themselves.²³ In loving one another, even adulterously or outside marriage, he and Lesbia are adhering to a higher moral code: it is the *senes* who are in the wrong.²⁴ This interpretation is borne out by the last two lines of the poem — *aut ne quis malus invidere possit / cum tantum sciat esse basiorum* — in which Catullus returns to the theme of the opening lines.²⁵ If the guardians of morality knew the real number of kisses, he says, they would hate Catullus and Lesbia. Yet such hatred would be born of “pure viciousness (*malus*, 5.12) and envy (*invidere*, 5.12) of a young lover's happiness and good luck in love.”²⁶ Thus if Catullus and Lesbia were to sue for defamation, they would seek only nominal damages. The lovers are in truth

²⁰ On traditional attitudes to affairs between social equals at this time, see R. O. A. M. Lyne, *The Roman Love Poets* (Oxford 1980), Ch. 1.

²¹ Cic. *Cael.* 37–38, 45–57. See T. P. Wiseman, *Catullus and His World: A Reappraisal* (Cambridge 1985), 86–87.

²² See e.g. D. Wray, *Catullus and the Poetics of Roman Manhood* (Cambridge 2001), 148–50.

²³ Wiseman (note 21), 139; E. A. Fredricksmeyer, “Observations on Catullus 5,” *Am. J. Philol.*, 91 (1970), 437–38, 442–43; Lyne (note 20), Ch. 2; Wray (note 22), 148.

²⁴ Fredricksmeyer (note 23), 443.

²⁵ *Invidere* is generally understood to refer to the evil eye (*fas-cinatio*): hence the need to *conturbare* the tally of kisses, so as to conceal their number and avert any ill-wishing. See e.g. Robinson Ellis, *A Commentary on Catullus*, 2nd ed. (Oxford 1889), 20; Fordyce (note 6), 108; Quinn (note 1), 109. However, the *quis malus* of the penultimate line is also to be identified with the *senes* of line 2: Fredricksmeyer (note 23), 441–43.

²⁶ Wray (note 22), 150.

untouched by the malicious *rumores* of the old men: what they regard as scandalous is in fact the right order of things, *vivere atque amare*.

Of course, Catullus' use of this metaphor does not mean that the praetor would actually have awarded an action in this case.²⁷ Legal considerations aside, it may be that the social norms of the time precluded defamation claims between social equals.²⁸ And once again, the success of the legal metaphor in the context of the poem depends to some extent on the fact that such a claim would have been ridiculous. But at the same time, such a metaphor could be effective only if the case was one in which liability could conceivably attach. Catullus' case need not itself have been actionable, but it must have concerned a type of defamation — *rumor* — which was. This brings us to the next stage of the inquiry: the question of the extent of liability for defamation in the mid-first century BC. Does the reading of Catullus V proposed here shed any light on this question?

2. Liability for defamation in Roman law

The classical delict of *iniuria* evolved from a series of praetorian edicts of the middle and late Republic. On the one hand, at least in classical law all cases covered by the so-called special edicts were also actionable under the *actio iniuriarum*, the action introduced by the general edict some time during the third century BC. On the other, the special edicts acted as markers for certain important instances of liability throughout the classical period. Particularly relevant here are the edicts *de convicio* and *ne quid infamandi causa fiat*. First, regarding *convicium*, this seems to have had its roots in the ancient social institution of *flagitatio*, ritualized chanting.²⁹ According to Ulpian, *convicium* concerned shouting (*vociferatio*) which was both contrary to public morals (*contra bonos mores*) and “directed to the disgrace and unpopularity of an individual” (*ad infamiam vel invidiam alicuius spectaret*).³⁰ Moreover, only *vociferatio* by the members of a crowd

²⁷ In particular, I will return to the question of the truth of the *rumores* below, notes 76 to 80 and accompanying text.

²⁸ This is one explanation for the fact that Catullus himself does not ever appear to have been sued for defamation: Wiseman (note 21), 132–34.

²⁹ See above, note 16 and accompanying text.

³⁰ Ulpian (77 *ad Edictum*), D.47.10.15.5 (trans. T. Mommsen, P. Krueger, and A. Watson, *The Digest of Justinian* (Philadelphia 1985) (“Watson Digest”). This second element shows the degree to which *con-*

counted as *convicium*.³¹ On the other hand, even that which was not said loudly and in a crowd might nevertheless be actionable under the special edict *ne quid infamandi causa fiat*.³² According to Ulpian, by means of this edict “the praetor bans generally anything which would be to another’s disrepute [*quid ad infamiam alicuius fieri*].”³³ As the wording of the edict itself shows, liability was made to turn almost exclusively on the defamatory intention of the defendant: in principle, any conduct was sufficient to found liability, as long as it was performed *ad infamiam alicuius*.³⁴ Thus one could be liable under the special edict *ne quid* if, for example, *ad infamiam vel invidiam alicuius* one wore mourning or dirty garments or let one’s beard grow or one’s hair down; or wrote a defamatory pamphlet; or sang a defamatory song.³⁵ Defamation might take place either in public, like *convicium*, or privately; it might be either written or spoken; it might occur directly, like the shouting of accusations or abuse or the writing of a defamatory pamphlet, or by innuendo, such as the wearing of mourning in order to cast aspersions on another. It follows that allegations of sexual impropriety made in private — the *rumores senum severiorum* of the poem — would certainly have been actionable under the special edict *ne quid*.³⁶ In any case, we can be sure that in the time of Labeo, writing perhaps fifty years after Catullus, the edictal wrongs of the Republic were actionable also under the *actio iniuriarum*.³⁷ Indeed, they came to be understood as expressions of a single principle, *contumelia* (contempt or hu-

vicium was assimilated to *ne quid* by the classical jurists: see D. Daube, “Ne quid infamandi causa fiat,” in *Atti del congresso internazionale di diritto romano e di storia del diritto* (Verona 1951), 441. Certainly the edict *de convicio* did not itself require that *convicium* be done *infamandi causa*: see Ulpian (77 *ad Edictum*), D.47.10.15.2.

³¹ Ulpian (77 *ad Edictum*), D.47.10.15.12.

³² The text of the edict is given by Ulpian (77 *ad Edictum*), D.47.10.15.25.

³³ Ulpian (77 *ad Edictum*), D.47.10.15.27 (trans. Watson Digest (note 30)).

³⁴ See in particular Daube (note 30), 417.

³⁵ Ulpian (77 *ad Edictum*), D.47.10.15.27.

³⁶ Doubts have been raised about the extent to which these rules were applied in practice, particularly in respect of political defamation. See J. Crook, “*Sponsione Provocare*: Its Place in Roman Litigation,” *J. Roman Studies*, 66 (1976), 136–37: “The Digest Title, 47.10, in which are stated all the fussy-looking rules of what constitutes *iniuria*, has a very theoretical look (it is much concerned with definitions, and Labeo is prominent in it).”

³⁷ See e.g. Ulpian (77 *ad Edictum*), D.47.10.15.3, 15.26, 15.32.

bris).³⁸ Thus classical *iniuria* encompassed any conduct capable of being characterized as contemptuous, including but not limited to the conduct already covered by the Republican edicts. Even cases which would not fit within either *convicium* or *ne quid* could be brought within *iniuria* via the productive generalization of *contumelia*.³⁹

Yet it is unclear how far liability for defamation had advanced by the middle of the first century BC, when Catullus was writing. This is due to uncertainty regarding the date at which the special edicts *de convicio* and *ne quid* were first introduced, how widely these edicts were interpreted, and what precisely their relationship to the general edict was. David Daube maintained that the special edict *ne quid* was probably introduced around 200 BC, and was initially quite independent of the general edict *de iniuriis*.⁴⁰ However, he thought that like the other special edicts of the Republic, *ne quid* was ultimately subsumed within the general edict.⁴¹ According to Daube, it is this process of incorporation which forms the subject matter of Seneca's *Controversia* 10.1, "The Grieving Poor Man's Son Who Followed The Rich Man."⁴² It is this case — or something like it — which Ulpian hints at in his account of *ne quid*, when he refers to one who *ad invidiam alicuius* wore mourning or dirty garments or let his beard grow or his hair down. Moreover, this appears to be the sort of case envisaged in the pattern formula appended to the edict by the praetor (Daube reconstructs this as *Quod Numerius Negidius capillum inmisit Aulo Agerio infamandi causa*⁴³). Seneca's case is as follows: Pauper's father has recently died; he dogs the footsteps of Dives, unkempt and in mourning, as if to suggest that Dives is responsible. Dives, enraged, wishes to sue for *iniuria* under the general edict. However, the argument is made on Pauper's behalf that he has done nothing wrong, *iniuria*: surely it is permitted to

³⁸ Ulpian (56 *ad Edictum*), D.47.10.1 pr.

³⁹ See e.g. P. B. H. Birks, "Harassment and Hubris: The Right to an Equality of Respect," *Irish Jurist*, 32 (1997), 5–14. An example of this productive generalization at work can be found in Ulpian (57 *ad Edictum*), D.47.10.13.7.

⁴⁰ Daube (note 30), 415, 442.

⁴¹ Daube (note 30), especially 414–18 and 433–50. See also M. Kaser, *Das römische Privatrecht*, 1, 2nd ed. (Munich 1971), 623–35; R. Wittmann, "Die Entwicklungslinien der klassischen Injurienklage," *ZSS* (RA), 91 (1974), 285–359.

⁴² Daube (note 30), 433–50.

⁴³ D. Daube, "Collatio 2.6.5," in I. Epstein, et al., eds., *Essays in Honour of J. H. Hertz* (London 1942), 111–29.

walk and to mourn? Indeed, piety requires it. For Dives the reply is made that walking, etc., carried out precisely in order to bring hatred upon another (*in alienum invidiam facere*) is actionable as an *iniuria* after all: “the element of ‘infamandi causa’ renders illicit and, consequently, *iniuria* an act otherwise innocent.”⁴⁴ Thus the *Controversia* describes the process whereby the special edict *ne quid* came to be subsumed within the general edict *de iniuriis*. Given the probable date of the debate described in the *Controversia* — Daube thought that it must have happened in the time of Labeo, or not long before⁴⁵ — such subsumption must have taken place around the end of the first century BC. It follows that if Daube is right about the evolution of liability for defamation, the *rumores* of Catullus’ poem could certainly have been litigated under the special edict *ne quid*, although not yet under the general edict *de iniuriis*.

Peter Birks, on the other hand, argued that *iniuria* was inherently wide from the start: in principle it dealt with any kind of wrongful behavior, although in practice it would have been limited in early law to behavior that was *prima facie* unlawful.⁴⁶ Thus the special edicts *ne quid* never existed outside the general edict. Rather, the role of the special edicts was to delineate the interior landscape of this wide *iniuria*: “the special edicts were from their beginning merely reinforcements inserted within it to kill off the argument that there could be no liability without ‘external unlawfulness.’”⁴⁷ Accordingly, Birks interpreted the debate described in the *Controversia* rather differently from Daube. For Birks, the debate recounted by Seneca is about liability *per se*, rather than about whether Dives’ case could be litigated under the general edict as well as under *ne quid*. Rather than being concerned with the subsumption of *ne quid* within the general edict, the *Controversia* contemplates the introduction of *ne quid* itself, at a date early in Augustus’ reign.⁴⁸ If this view is right, then it follows that defamation could have attracted only rather limited liability during most of the first century BC. Generally speaking, a plaintiff would have had to bring the conduct complained of within *convicium* in order to succeed; that the defen-

⁴⁴ Daube (note 30), 445.

⁴⁵ Daube (note 30), 443.

⁴⁶ P. B. H. Birks, “The Early History of *Iniuria*,” *TRG*, 37 (1969), 163–72, 194–207.

⁴⁷ Birks (note 39), 12 n.35.

⁴⁸ P. B. H. Birks, “*Infamandi causa facta in disguise?*,” *Acta Juridica*, (1976), 95.

dant had acted *ad infamiam alicuius* was not yet enough. Thus it is doubtful that *rumores* such as those described by Catullus — defamatory allegations spoken (rather than shouted) in private (rather than in a crowd) — could have been actionable before the introduction of *ne quid*, even in principle.

The paucity of evidence available to us makes it extremely difficult to resolve this question. Apart from the *Controversia* itself, there are very few attested instances of liability for defamation dating from our period. Birks, however, relied on two instances in particular to support his claim.⁴⁹ First, there are two cases of naming from the stage discussed in the *Rhetorica ad Herennium*:

Item: C. Caelius iudex absolvit iniuriarum eum qui Lucilium poetam in scaena nominatim laeserat, P. Mucius eum qui L. Accium poetam nominaverat condemnavit.⁵⁰

Although the *ad Herennium* was written during the eighties BC, the cases themselves appears to date from the late second century: Publius Mucius was consul in 133 BC.⁵¹ Thus it appears from these cases that actions were being granted in respect of certain vocal defamations even during the second century BC. Moreover, it appears from the text of the *ad Herennium* itself that these cases were litigated as *iniuriae*, under the general edict. The question then arises whether these *actiones iniuriarum* were “mediated” through the special edicts on *convicium* or even *ne quid*, or whether Accius’ successful claim perhaps rested on juristic extension of the general edict itself.⁵² It seems that the edict *ne quid* can be quickly excluded: as we have seen, even Daube, who argued for an early date for *ne quid*, did not believe it to have been subsumed under the general edict until the end of the first

⁴⁹ Birks (note 48), 95–97.

⁵⁰ “Again, Gaius Caelius, sitting in judgement, acquitted of the charge of injury [*iniuria*] the man who had by name attacked the poet Lucilius on the stage, while Publius Mucius condemned the man who had specifically named the poet Lucius Accius.” *Rhet. Her.* 2.13.19 (trans. H. Caplan, *Ad C. Herennium: de ratione dicendi* (London 1954)). Cf. *Rhet. Her.* 1.14.24.

⁵¹ A. Watson, *Law Making in the Later Roman Republic* (Oxford 1974), 38 n.4.

⁵² For Watson, this view is supported by the differing outcomes in the two cases: “[The *actio*] cannot have been under the *edictum ne quid infamandi causa fiat* or the *edictum de convicio* . . . or Caelius, one would think, would also have awarded the decision to the plaintiff.” Watson (note 51), 38 n.4.

century BC.⁵³ Thus the case appears initially to support Birks's view, in that it appears to have been litigated directly under the general edict itself. However, in fact it seems more likely to have been litigated under *convicium*. Elsewhere in the *ad Herennium*, *convicium* is explicitly identified as an instance of *iniuria*,⁵⁴ and indeed this may have been the case even fifty years earlier, when Lucilius and Accius brought their claims. Accius' claim in respect of an attack from the stage might have succeeded precisely because it was rather close to the core facts of *convicium*: although it involved no literal breach of the peace, the public quality of the naming militated in favor of its inclusion.⁵⁵ It may also have shared some of the other elements of *convicium*, i.e. shouting and chanting. However, the analogy with *convicium*, still fragile, was not extended in the same way in Lucilius' case. Thus these early instances of defamation are inconclusive.

There is, however, at least one first-century instance of defamation which seems to be rather difficult for Daube to explain, insofar as it appears to have been litigated directly under the unmediated general edict. According to Ulpian,

Item si quis pignus proscrisperit venditurus tamquam a me acceperit infamandi mei causa Servius ait iniuriarum agi posse.⁵⁶

The debtor's complaint was that the advertising of his property as if it were a pledge implied his insolvency.⁵⁷ Servius — praetor in 65 BC, to which date Daube at least attributes the decision⁵⁸ — permitted him to bring the *actio iniuriarum*. But unlike an attack from the stage, this case is quite remote from *convicium*: the de-

⁵³ Daube assumes that the cases described in 2.13.19 are instances of *convicium*. See Daube (note 30), 435.

⁵⁴ *Iniuriae sunt quae aut pulsatione corpus aut convicio auris aut aliqua turpitudine vitam cuiuspiam violant.* (“*Iniuriae* are those things which violate a person's life by physical assault or by shouting [*convicium*] or by some disgrace [*turpitudō*].”) *Rhet. Her.* 4.25.35.

⁵⁵ Daube argues that we might see this as an early stage in the assimilation of *convicium* to *ne quid*: “[C]onvicium gradually lost its warlike character and became railing against somebody before a crowd” Daube (note 30), 437.

⁵⁶ “If someone announce that he is selling a pledge to denigrate me, as though he had received it from me, Servius says that I can bring the action for insult [*iniuriarum agere*].” Ulpian (77 *ad Edictum*), D.47.10.15.32 (trans. Watson Digest, (note 30)).

⁵⁷ G.3.220.

⁵⁸ Daube (note 30), 436.

famatory allegation is not articulated at all, but arises by innuendo from the conduct of the defendant. In fact, if this case had been capable of being analysed as *convicium* / *iniuria*, there would have been very little left for *ne quid* to do: the case of Dives and Pauper described in the *Controversia* likewise concerns an innuendo arising from conduct. Thus Servius granted the *actio iniuriarum* on facts which fall outside even the extended *convicium*, well in advance of the date at which Daube believed *ne quid* to have been incorporated into the general edict. Daube dismissed the reference to the *actio iniuriarum* in this text as an anachronism introduced by Ulpian: “For Servius, it had not been an *actio iniuriarum*, the edict ‘*Ne quid . . .*’ being still independent.”⁵⁹ For Birks, however, this case shows that even at this early stage in the evolution of liability for defamation, certain instances of defamation not amounting to *convicium* could be litigated directly under the general edict itself.⁶⁰ In fact, as Birks pointed out, Servius’ case is in one important respect stronger than that described in the *Controversia*: Seneca’s Pauper could present his conduct as objectively lawful — mourning and walking — whereas the defendant in Servius’ case could not.⁶¹ Servius’ case was therefore “specially apt to carry a merely interpretative extension of the general edict to *infamandi causa facta*.”⁶² On the other hand, the special edict *ne quid* remained necessary in order to render actionable cases where the defendant’s conduct revealed no outward unlawfulness at all, “not even in the extended sense of illegitimacy according to prevailing standards.”⁶³ In speaking of the *actio iniuriarum* rather than *ne quid*, the case reported by Ulpian seems to show that the introduction of *ne quid* still lay in the future when it was heard. In other words, it seems to support Birks’s account of the evolution of liability for defamation.

⁵⁹ Id.

⁶⁰ Indeed, once *convicium* was recognized as an instance of *iniuria*, “it would be a cause for surprise if the line continued to be drawn at spoken words.” Birks (note 48), 96. Birks also points to the fact that the definition of *iniuria* in *Rhet. Her.* 4.25.35 (*aut aliqua turpitudine vitam cuiuspian violant*) appears to include *infamandi causa facta* as well as physical assault and *convicium*: Birks (note 48), 96. Daube interprets this as a reference to *adiemptata pudicitia*: Daube (note 30), 438.

⁶¹ “*Quod licet cuique facere* does not include advertising unmade pledges.” Birks (note 48), 96; also Birks (note 39), 12–13.

⁶² Birks (note 48), 96.

⁶³ Birks (note 39), 12.

3. The significance of Catullus V

What are the implications for this question of the legal metaphor employed by Catullus in Poem V? Unlike in the case where the plaintiff's property had been advertised for sale by the defendant as if it were a pledge, in our case it could not be shown from any other area of the law that the conduct in question was *prima facie* unlawful. Thus it does not seem that our case could have been litigated directly under the unmediated general edict. On the other hand, the possibility arises that instances of defamation akin to the gossip envisaged by Catullus might have been brought under the general edict via an extended notion of *convicium*. This would represent a further extension of the development which permitted Accius' successful claim in respect of naming from the stage described in the *ad Herennium*. According to Daube, by the time of Labeo "the main danger of *convicium* was no longer seen in the breach of the peace, but in the public blackening of a man's character."⁶⁴ Indeed, for Daube, Ulpian's insistence that defamatory remarks not made *in coetu* were not to be classed as *convicium* shows that at some point in the evolution of liability they had been so classed.⁶⁵ It was this widening of *convicium* that prepared the way for the incorporation of the special edict *ne quid into iniuria* itself.⁶⁶ Similarly, Birks construed the *convicium* of the late Republic very widely indeed. He saw in the *Controversia* in particular an attempt to exclude *convicium* on the basis that Pauper had not spoken;⁶⁷ it seems to follow from this that anything spoken *infamandi causa* may have been capable of attracting liability as *convicium / iniuria*.⁶⁸ Thus it is possible that by the late Republic, even wholly private verbal "blackening" might have been enough to found liability under the general edict, mediated through the special edict *de convicio*.⁶⁹ If this is right, then Catullus V, like the cases of naming from the stage in the *ad Herennium*, is neutral as between the views of Daube and Birks as to the evolution of liability for defamation during the first century BC.

⁶⁴ Daube (note 30), 441.

⁶⁵ Ulpian (77 *ad Edictum*), D.47.10.15.11–12; Daube (note 30), 441.

⁶⁶ Daube (note 30), 437, 439, 441.

⁶⁷ Birks (note 48), 87–91.

⁶⁸ Birks (note 48), 87.

⁶⁹ This interpretation derives support from Catullus' use of the verb *aestimare* in line 3, a possible allusion to the title of the general edict, *de iniuriis aestimandis*. See above, note 12 and accompanying text.

However, this argument appears after all to push first-century *iniuria / convicium* too far. As we have seen, Accius' case in the *ad Herennium* involved public defamation, if not actual *flagitatio*. The rumors of Catullus V, on the other hand, are clearly private: here there is not even the vestigial breach of the peace inherent in an attack from the stage. As for the *Controversia*, although it involved conduct rather than words, the following, weeping, etc. of Pauper was public: it took place in the street, precisely because that was the most efficient way to destroy Dives' reputation. Thus the exclusion of *convicium* identified by Birks does not necessarily mean that words spoken in private would have sufficed to found liability at that time. In fact, if written defamation was always excluded from *convicium*, as Daube believed,⁷⁰ it is difficult to see why our case should qualify; put another way, if our case had been admitted it would have become impossible to hold the line against written verses or pamphlets. Thus it appears that our case cannot be explained as an instance of *convicium / iniuria* either.

If our case reveals no *prima facie* unlawfulness — in contrast to that preserved in D.47.10.15.32 — and cannot be brought within the extended late Republican notion of *convicium*, then it can only have been litigated under the special edict *ne quid*. In the *Controversia*, Porcius Latro has Dives counter Pauper's argument about the outward lawfulness of his conduct by arguing that he followed, etc., maliciously (*malo animo*); according to Gallio, although it is permitted to weep, walk, etc., it is not permitted to act in such a way as to arouse hatred against another (*nihil licet in alienam invidiam facere*).⁷¹ This clearly evokes the special edict *ne quid*: we are reminded of Ulpian's formulation, *quaeque ad infamiam vel invidiam alicuius spectaret*.⁷² Similarly, in our case Catullus emphasizes the malice of the *senes*: by spreading rumors they seek to stir up hatred (*invidia*) against Catullus and Lesbia.⁷³ Here too, we seem to see a reference to *ne quid*. It follows that *ne quid* must have been in place by the time that Catullus wrote the poem. Thus it appears to vindicate Daube's view of the way in which the mature delict of *iniuria* evolved. The

⁷⁰ Daube (note 30), 441.

⁷¹ Sen. *Controv.* 10.1.9.

⁷² Ulpian (77 *ad Edictum*), D.47.10.15.5.

⁷³ Ulpian uses the phrases *ad infamiam alicuius* and *ad invidiam alicuius* interchangeably in his account of *ne quid*: Ulpian (77 *ad Edictum*), D.47.10.15.27.

Controversia seems after all to be about the incorporation of the special edict *ne quid* into the general edict. Alternatively, it may be that the debaters of the *Controversia* were not after all considering a live issue, but rather one which had been resolved at least half a century beforehand.⁷⁴ Either way, Catullus V appears to contradict Birks's view that *ne quid* was enacted only under Augustus.⁷⁵

4. A defense of truth?

One question remains: what of the fact that the rumors of Catullus' old men, though malicious, are after all grounded in truth? It is a mistake to see in the Roman law of defamation anything akin to the English defense of justification.⁷⁶ That said, common sense dictates that it must sometimes have been a defense to an action for defamation that the defendant had been entitled or indeed obliged to make the defamatory allegations in question.⁷⁷ For example, truth may have been a good defense to the charge of publicly accusing someone of being a criminal, perhaps even when the defendant had been motivated by malice.⁷⁸ Admittedly it does not seem that either adultery or any other (hetero)sexual lapse was subject to criminal sanction in Catullus' time.⁷⁹ But truthful reports of even socially reprehensible conduct might still have been treated as lawful. This appears to be the thinking behind a fragment of Paul preserved in D.47.10:

Eum, qui nocentem infamavit, non esse bonum aequum ob eam rem condemnari: peccata enim nocentium nota esse et

⁷⁴ This possibility is acknowledged by Birks (note 48), 100 n.79.

⁷⁵ Birks (note 48), 95. Catullus V does not, however, shed much light on whether the special edict concerned only behavior calculated to produce technical *infamia*, since in all likelihood adultery attracted at least censorian or praetorian *infamia* even under the Republic. Olivia Robinson in particular argues that Papinian (*De Adulteriis*), D.22.5.14 and Paul (2 *De Adulteriis*), D.22.5.18 "may go back to the Republican situation." See O. F. Robinson, *The Criminal Law of Ancient Rome* (Baltimore 1995), 58 n.65. As for prostitutes, "they suffer virtually every form of legal disability the Romans devised." McGinn (note 19), 65.

⁷⁶ See e.g. J. Crook, *Law and Life of Rome* (Ithaca 1967), 253–54.

⁷⁷ Birks (note 39), 14.

⁷⁸ Crook (note 76), 254.

⁷⁹ Robinson (note 75), 58. Cf. the *lex Scantinia* of 149 BC, which criminalized masculine *stuprum*. See also McGinn (note 19), 141: "Before the passage of the *lex Iulia*, the repression of sexual misbehavior was generally conceded to the private sphere."

oportere et expedire.⁸⁰

In fact, it may have been precisely the point of Catullus' metaphor that there could never have been liability on these facts. In response to his imaginary claim, the censorious *senes* would have protested that they were obliged by moral and civic duty to "noise abroad the sins of those who do wrong." But for Catullus this in itself would have been proof of their hypocrisy: in truth, they were motivated by envy and spite. In implicitly mocking the legal machinery designed to protect reputation, Catullus sought to distance himself from the very norms according to which such reputation was judged. Far from being the guardians of morality, the *senes* were malicious, deluded, shut off from life and love.

⁸⁰ "It would not be right and proper that a person should be condemned for putting to shame a wrongdoer; for the sins of those who do wrong should be noted and noised abroad." Paul (55 *ad Edictum*), D.47.10.18 pr. (trans. Watson Digest (note 30)). But Paul (10 *ad Sabinum*), D.47.10.33, suggests that it was the absence of injurious intention in such cases which excluded liability.