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LAW REFORM IN THE ANCIENT WORLD:
DID THE EMPEROR AUGUSTUS SUCCEED OR FAIL
IN HIS MORALS LEGISLATION?

DR. CHARLES J. REID, JR.*

ABSTRACT

This is an Article with a dual purpose. First, it is concerned with the process of law reform: how do we judge a given reform's success or failure? Do we adopt strictly linear metrics? Or do we look at non-linear impacts? For example, in the campaign against tobacco, do we judge it a success because it has reduced cigarette smoking? Or because it reduced the political power of the tobacco companies?

Secondly, in this Article, I apply this complex means of analyzing law reform to the Emperor Augustus's morals legislation. Legal historians have typically regarded Augustus's morals legislation as having achieved, at best, mixed results. These historians, however, have tended to perform a linear assessment of the legislation. Did Augustus achieve the results he professed to want; that is, were cases of adultery prosecuted more frequently? Was elite childbirth encouraged? I argue, in contrast, that the legislation must be seen against Augustus's larger political agenda, which was the subjection of elite families to the laws of the emerging Roman Empire. Seen in these political terms, I argue that the legislation can be judged in substantial measure as successful.

INTRODUCTION

I. THE EMPEROR AUGUSTUS: RISE TO POWER

- A. *Struggle for Ascendancy*
- B. *Conservative Restoration*

II. AUGUSTUS AND HIS CAMPAIGN FOR MORAL REFORM

- A. *Models for Reform*
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- C. *Reforming the Law of Wills*

CONCLUSION

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INTRODUCTION

This Article poses the question: how do we determine whether law reform succeeds? What is our measure of success? When, in contrast, can we speak of law reform as failing to accomplish its objectives? We think we know the answers to these questions, but on closer inspection we find complications.

We believe that we have a clear understanding of what law reform is. It is the enactment of legislation designed to extirpate some evil, or to promote some value, or to aim at the more efficient outcome or allocation of some good or service. Thus, we legislate against tobacco, say, in order to promote better public health.¹ And so we tax tobacco heavily,² or we forbid its use in public places.³ Smokers, at least those who wish to have a cigarette while on the job, must find some furtive corner near their place of employment where they meekly congregate,⁴ in some latter-day shunning and shaming ritual that anthropologists would recognize all too well.⁵

Or, we might decide that some good or service is valuable. And so we choose to offer a tax break—say, if you borrow to buy a home, we shall allow you to deduct the interest payments on the mortgage.⁶ Or, we legislate that holding long-term capital goods promotes economic stability, and so we tax such goods at a far lower rate than ordinary income.⁷ Or we regulate financial transactions in an effort

1. See, e.g., Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, 87 (codified at 15 U.S.C. §§ 1331–1338 (1970)) (a landmark piece of legislation).

2. Frank J. Chaloupka, Melanie Wakefield & Christina Czar, *Taxing Tobacco: The Impact of Tobacco Taxes on Cigarette Smoking and Other Tobacco Use*, in REGULATING TOBACCO 39, 60 (Robert L. Rabin & Stephen D. Sugarman eds., 2001) (on the use of the tobacco tax for public-health purposes).

3. See Jane E. Brody, *Fighting Smoking, 50 Years Later*, N.Y. TIMES, Jan. 28, 2014, at D5; see also Mark Bittman, *Rethinking Our 'Rights' to Dangerous Behaviors*, N.Y. TIMES (Feb. 26, 2014), <http://www.nytimes.com/2014/02/26/opinion/bittman-rethinking-our-rights-to-dangerous-behaviors.html> [<http://perma.cc/8JT8-8589>].

4. See NAT'L CANCER INST., U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE AND LOCAL LEGISLATIVE ACTION TO REDUCE TOBACCO USE, MONOGRAPH NO. 11, at 343–46 (2000) (providing model ordinance to govern smoking at places of employment).

5. See, e.g., Joe Soucheray, *Fairgoers, Behold the Caged Smoker!*, ST. PAUL PIONEER PRESS (Jan. 26, 2013, 11:21 PM), http://www.twincities.com/ci_22451683/joe-soucheray-fairgoers-behold-caged-smoker [<http://perma.cc/4XZ5-7YMU>].

6. 26 U.S.C. § 163(h) (2015). Originally, interest on most personal loans was tax deductible, but in 1986 most such deductions were eliminated, while the home mortgage deduction was retained for the purpose of promoting home ownership. Nicholas W. Norvell, Comment, *Transition Relief for Tax Reform's Third Rail: Reforming the Home Mortgage Interest Deduction After the Housing Market Crash*, 49 SAN DIEGO L. REV. 1333, 1340–41 (2012).

7. Lawrence B. Lindsey, *Rates, Realizations, and Revenues of Capital Gains*, in TAXES AND CAPITAL FORMATION 17, 20–21 (Martin Feldstein ed., 1987).

to promote transparency and reduce the potential for sharp dealing.⁸ Success or failure is judged by reference to linear projections of the actions promoted or regulated—whether the number of homeowners increases or falls; whether capital goods are kept for longer periods of times or they are not; whether greater transparency in financial markets is (or is not) detected.

Or we might conclude that it is necessary for a prosperous and cooperative economic world order to promote the rule of law in some foreign land, say, China. The adoption of predictable, stable, clear legislation is encouraged.⁹ Corruption is discouraged.¹⁰ A sense of constitutional limits, a recognition on the part of the State that it must abide within those limits, is supported, if only imperfectly.¹¹ Because of the vastness and amorphous quality of such an endeavor, the measurement of success is less certain. But we are confident that we have the tools to recognize when progress is taking place and why.¹²

8. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (standing in a lineage traceable at least as far back as the Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2015))).

9. See Vivienne Bath, *The WTO and China's Transparency Requirements*, in CHINA'S INTEGRATION WITH THE GLOBAL ECONOMY: WTO ACCESSION, FOREIGN DIRECT INVESTMENT AND INTERNATIONAL TRADE 53, 53 (Chunlai Chen ed., 2009) (expressing optimism about the possibility of legislative transparency); cf. Deborah Cao, *Is the Chinese Legal Language More Ambiguous and Vaguer?*, in OBSCURITY AND CLARITY IN THE LAW: PROSPECTS AND CHALLENGES 109, 112, 114 (Anne Wagner & Sophie Cacciaguidi-Fahy eds., 2008) (examining linguistic problems inherent in the Chinese legal vocabulary).

10. Indeed, China is currently experiencing one of its periodic anticorruption campaigns. See, e.g., Chris Buckley, *China Arrests Ex-Chief of Domestic Security in Graft Case*, N.Y. TIMES, Dec. 6, 2014, at A6; Didi Kirsten Tatlow, *Suicide Cases Across China Tied to Drive Against Graft*, N.Y. TIMES, Sept. 12, 2014, at A4; Chris Buckley & Kiki Zhao, *China's Anticorruption Campaign Unseats a Powerful Party Chief in Guangzhou*, N.Y. TIMES, June 28, 2014, at A6. On the structural aspects of Chinese corruption, see Minxin Pei, Op-Ed, *Crony Communism in China*, N.Y. TIMES, Oct. 18, 2014. For an insightful comparison between influence peddling in Chinese and American regimes, see Neil Irwin, *Degrees of Influence Peddling in China and U.S.*, N.Y. TIMES (Apr. 23, 2014) <http://www.nytimes.com/2014/04/24/upshot/how-influence-in-us-and-china-can-merely-be-a-difference-in-degree.html> [<http://perma.cc/99K2-V79N>].

11. See Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1, 2 (2002) (“[T]here is significant evidence of ongoing constitutional development in China.”); see also Larry Catá Backer & Keren Wang, *The Emerging Structures of Socialist Constitutionalism with Chinese Characteristics: Extra-Judicial Detention and the Chinese Constitutional Order*, 23 PAC. RIM L. & POL'Y J. 251, 253 (2014) (internal footnote omitted) (“China, like the vast majority of states since the eighteenth century, has adopted a written constitution.”).

12. See, e.g., MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* 7–8 (2008) (discussing “compiling a large number of subjective measures of institutional quality . . . and grouping them into . . . clusters”).

I have deliberately chosen modern examples to set the stage for my investigation of law reform in ancient Roman law. That is because these questions apply equally well to an historical society. How can we tell whether a particular reform was successful? Is there some linear, bright-line test that can be applied? Or is the answer more difficult to come by?

The chronological period that this Article focuses on is that brief span of years between the end of the Roman Republic and the birth of what is known as the Principate.¹³ It is in this time frame, in a brief period of time—something around two decades from 17 or so B.C. to 9 or so A.D.—that the Emperor Augustus adopted a series of law reforms designed to promote family stability while simultaneously bringing under the control of the state the leading families of the realm.¹⁴

So what are the metrics by which to judge the success or failure of morals legislation? The number of adultery prosecutions, say, or the number of inheritances partially confiscated by the state because the man never married or the husband and wife did not bear offspring? Or do we measure success by some more general, yet just as important, measure? Say, by the degree to which the leading families no longer raised private armies or provoked armed conflict among themselves and looked instead to the state as the final arbiter of disagreement and conflict?¹⁵ The Emperor Augustus's moral campaign had a political edge to it that transcended a mere concern with the restoration of old-fashioned Roman virtue and went to the heart of the meaning of state power in a new age of imperial authority.¹⁶ Yes, Augustus wanted moral improvement, but after decades of civil war he also sought stability.¹⁷

13. The Principate is a term of art used to designate the type of government that succeeded the Roman Republic upon its demise. An Emperor called the "*princeps*" or the "first citizen" exercised primary authority even while republican constitutional forms—the senate, the consuls, other constitutional offices—remained in place. See, e.g., SUSAN P. MATERN, *ROME AND THE ENEMY: IMPERIAL STRATEGY IN THE PRINCIPATE* 5 (1999); cf. SAM WILKINSON, *REPUBLICANISM DURING THE EARLY ROMAN EMPIRE* 3 (2012) (arguing for the coexistence of imperial and republican forms of government).

14. See Steven Fife, *Augustus' Political, Social, and Moral Reforms*, *ANCIENT HISTORY ENCYCLOPEDIA* (Jan. 18, 2012), <http://www.ancient.eu/article/116> [<http://perma.cc/XC32-PNYA>].

15. For different perspectives on the role of leading families in the raising of private armies and the promotion of violence, see ERICH S. GRUEN, *THE LAST GENERATION OF THE ROMAN REPUBLIC 376–77* (1974); S.N. EISENSTADT & L. RONIGER, *PATRONS, CLIENTS AND FRIENDS: INTERPERSONAL RELATIONS AND THE STRUCTURE OF TRUST IN SOCIETY* 56–57 (1984); see also WILFRIED NIPPEL, *PUBLIC ORDER IN ANCIENT ROME* 60 (1995).

16. See WILKINSON, *supra* note 13, at 3 ("Even if [the conservative sentiments] were not 'political' in origin (rather moral or literary), they were made political by their persecution by the emperors.>").

17. See RICHARD ALSTON, *ASPECTS OF ROMAN HISTORY, 31 BC–AD 117*, at 1–3, 37 (2d ed. 2014).

This Article will situate Augustus's morals legislation within this larger political context. Social historians who have analyzed Augustus's program of moral reform have quite rightly focused on the most obvious question: namely, did Augustus's enactments influence sexual or marital behavior in real and noticeable ways? The political and constitutional background, however, has remained largely unexamined. Was Augustus concerned exclusively with the adoption and enforcement of morals legislation? Or did he have larger, if unexpressed, concerns, such as rearranging the relationship of elite families with the State?

By broadening our inquiry in this way, it is hoped that light can be shed on the process of law reform more generally. Yes, it is good to conduct a narrow and focused assessment of the success or failure of a given course of legislative reform. It is genuinely helpful to know that tobacco use has been reduced or deterred by anti-smoking campaigns. But, sometimes, this is not the complete picture of what law reform accomplishes. What may matter more in a given instance are the ways in which power is reallocated among the segments of society most affected by the legislative changes. To use the example of tobacco again—it is also fair to assess anti-smoking campaigns by the impact they have on the political and economic power of the tobacco industry. Are the tobacco companies as free as they were in say, 1970, to dictate the tobacco policy of the nation?¹⁸

This Article is divided into three main sections. The first section, Part I, considers the Emperor Augustus's rise to supreme power in Rome. It will investigate the ways in which proposals for moral reform became an integral feature of his rise. The second section, Part II, analyzes the contents of Augustus's morals legislation in order to come to an understanding of the ways in which it affected Roman family life, particularly elite family life. A brief, concluding third section, then asks how we can judge the success of Augustus's reforms and considers whether what we have learned about Augustus can teach us anything more general about the process of law reform itself.

I. THE EMPEROR AUGUSTUS: RISE TO POWER

Marcus Crassus . . . declared that no amount of wealth was enough for the man who aspired to be

18. I chose the year 1970 deliberately because it was in that year that Congress enacted the Cigarette Advertising Act, which was the first substantial legislative defeat the tobacco industry would suffer. Many more would follow. See DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 87 (2003) (reprint of 1989 edition).

*the foremost citizen of the state, unless with the income from it he could maintain an army.*¹⁹

The Emperor Augustus (63 B.C. to 14 A.D.)²⁰ should be seen as the most important figure in the Roman world's transition from Republic to Empire.²¹ The Republic had developed a delicate constitutional structure that assigned governing responsibilities to the leading families of the realm.²² The Senate was composed of wealthy male heads-of-households, most of whom controlled large tracts of land and were able to rotate through the various political offices at Rome.²³

This system might have worked while Rome was still a regional Mediterranean power, but in its last decades of existence, it ceased to function effectively at all.²⁴ Rather, it broke down into a series of civil wars, plots, and acts of vengeance that were brought about largely by men like Crassus²⁵—powerful oligarchs, unconstrained by law or social obligation.²⁶ From the breakdown of this constitutional order there emerged the Emperor Augustus who, thanks to his long life, and his intelligent and ruthless exercise of power, was able to restore order and leave an empire that functioned efficiently, if not fairly, for centuries.²⁷

As Emperor, Augustus embarked on a series of legislative reforms. One of the most important reforms came in the area of marital and sexual conduct where he proposed legislation that was far reaching, if not entirely new.²⁸ Why did he do this? And how successful were these revolutionary reforms? Indeed, how do we measure or judge their success?

19. Marcus Cicero, *On Duties: Book I*, in CICERO DE OFFICIIS 25–27 (Jeffrey Henderson ed., Walter Miller trans., Harvard Univ. Press ed. 1913) (emphasis added).

20. ALSTON, *supra* note 17, at 22, 35.

21. *See id.* at 36.

22. *Id.* at 42–43.

23. *See* GEORGE MOUSOURAKIS, FUNDAMENTALS OF ROMAN PRIVATE LAW 20 (2012); *see also* DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 198 (1996).

24. *See* SIMON BAKER, ANCIENT ROME: THE RISE AND FALL OF AN EMPIRE 154 (2007).

25. *See* Mark Cartwright, *Marcus Licinius Crassus*, ANCIENT HISTORY ENCYCLOPEDIA (Nov. 5, 2013), http://www.ancient.eu/marcus_licinius_crassus [<http://perma.cc/6Q6P-5Q78>].

26. *See* CATHERINE STEEL, THE END OF THE ROMAN REPUBLIC, 146 TO 44 BC: CONQUEST AND CRISIS 224 (2013).

27. *See* ALSTON, *supra* note 17, at 37.

28. One historian has described these legislative efforts as a series of “radical reforms.” Calvin J. Roetzel, *Sex and the Single God: Celibacy As Social Deviancy in the Roman Period*, in TEXT AND ARTIFACT IN THE RELIGIONS OF MEDITERRANEAN ANTIQUITY 231, 234 (Stephen G. Wilson & Michel Desjardins eds., 2000).

A. Struggle for Ascendancy

Emperor Augustus, whose given name was Octavian, spent a lifetime immersed in the treacherous world of Roman politics.²⁹ He was first thrust into this turbulent environment at the age of nineteen following the assassination of his uncle, Julius Caesar, by Marcus Brutus, Gaius Cassius, and a group of senators.³⁰ Unexpectedly, the murdered leader declared in his will that his young nephew should be his heir.³¹ It was one thing to be named an heir, which carried with it only succession to Caesar's wealth, not his political office;³² it was another matter altogether to exploit that appointment to win supreme power.³³

Octavian proved expert at the maneuvering needed to make his way to the top.³⁴ First, there was the matter of dealing with Caesar's assassins. Octavian struck a tactical alliance with Marc Antony, Julius Caesar's chief military lieutenant and his chief rival, in order to defeat Brutus, Cassius, and their co-conspirators.³⁵ They were first declared outlaws and murderers by the Senate³⁶ and then were militarily defeated at the Battle of Philippi.³⁷

And then there was Cicero, the grand old man of the Republic. A one-time consul of Rome, a diplomat, an advocate,³⁸ a political thinker,³⁹ and a formidable man of letters, Cicero had not been among the conspirators, but his ringing defense of the ancient ideals

29. See ALSTON, *supra* note 17, at 22.

30. *Id.*

31. *Id.*

32. *Id.*

33. See Barbara Levick, *Caesar's Political and Military Legacy to the Roman Emperors*, in A COMPANION TO JULIUS CAESAR 209, 210 (Miriam Griffin ed., 2009).

34. See GEOFFREY S. SUMI, CEREMONY AND POWER: PERFORMING POLITICS IN ROME BETWEEN REPUBLIC AND EMPIRE 150–53 (2005) (detailing political maneuvering which began shortly after Julius Caesar's assassination).

35. RAYMOND ANGELO BELLIOTTI, ROMAN PHILOSOPHY AND THE GOOD LIFE 157–58 (2009).

36. *Id.* at 157.

37. WARFARE IN THE ROMAN REPUBLIC: FROM THE ETRUSCAN WARS TO THE BATTLE OF ACTIUM 137–38 (Lee L. Brice ed., 2014). Octavian was ill for most of the battle, leaving the hardest fighting to Antony. *Id.*

38. See Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 101–02, 108 (1994) (discussing Cicero as an advocate and his relevance to contemporary legal practice); Michael H. Frost, *With Amici Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 3 J. ASS'N LEGAL WRITING DIRECTORS 5, 8, 11–14, 45 (2006).

39. See Ryan Patrick Alford, *Is an Inviolable Constitution a Suicide Pact? Historical Perspective on Executive Power to Protect the Salus Populi*, 58 ST. LOUIS U. L.J. 355, 365 (2014).

certainly helped to inflame the assassins' passions.⁴⁰ This should have been Cicero's moment.⁴¹ And, indeed, Cicero still harbored dreams that republican traditions and aristocratic rule, which Caesar had overthrown and Cicero favored, might be restored.⁴²

Cicero saw as the main obstacle to such a restoration the person of Marc Antony,⁴³ and he opposed Antony in a series of courageous but ultimately futile speeches, entitled the *Philippics*.⁴⁴ For his efforts, the noble old Senator was first sidelined and then murdered in December of 43 B.C.⁴⁵ His severed head was put on public display in the Roman forum as a gruesome reminder about the risks of too bold an opposition to the sovereign.⁴⁶ Then, as now, severed heads conveyed powerful messages.⁴⁷

40. ROBERT T. RADFORD, *CICERO: A STUDY IN THE ORIGINS OF REPUBLICAN PHILOSOPHY* 62 (2002). On Cicero's political objectives, see Jon Hall, *Saviour of the Republic and Father of the Fatherland: Cicero and Political Crisis*, in *THE CAMBRIDGE COMPANION TO CICERO* 215–29 (Catherine Steel ed., 2013).

41. For a brief moment, in the late spring and early summer of 43 B.C., it seemed that Cicero was once again transported to the summit of political influence in Rome, although he would suffer a mighty fall come autumn. DIANA PRESTON, *CLEOPATRA AND ANTONY: POWER, LOVE, AND POLITICS IN THE ANCIENT WORLD* 142 (2009).

42. Cicero's strategy was to co-opt Octavian—whom he must have viewed as extremely callow and young—and then “discard him when propitious.” BELLIOTTI, *supra* note 35, at 13.

43. See KATHRYN TEMPEST, *CICERO: POLITICS AND PERSUASION IN ANCIENT ROME* 193 (2011) (“Antony was his personal and political enemy . . .”).

44. Cicero entitled the speeches the *Philippics* in conscious recollection of Demosthenes's famous speeches, delivered three hundred years before, warning of the aggressions of King Philip of Macedon. CECIL W. WOOTEN, *CICERO'S PHILIPPICS AND THEIR DEMOSTHENIC MODEL: THE RHETORIC OF CRISIS* 5, 12, 14 (1983). Still hopeful of winning Octavian's favor, Cicero also used the speeches as a way of signaling his support for Caesar's nephew. Clifford Ando, *The Origins and Import of Republican Constitutionalism*, 34 *CARDOZO L. REV.* 917, 926–27 (2013).

45. “Antony proscribed Cicero [i.e., marked him for death], and Octavian did not object. Cicero was killed on December 7, 43 [B.C.] . . .” VICTORIA EMMA PAGÁN, *CONSPIRACY THEORY IN LATIN LITERATURE* 76 (2012) (internal footnote omitted).

46. RICHARD JENKYN, *GOD, SPACE, & CITY IN THE ROMAN IMAGINATION* 13 (2013); Eric R. Varner, *Violent Discourses: Visual Cannibalism and the Portraits of Rome's “Bad” Emperors*, in *THE ARCHAEOLOGY OF VIOLENCE: INTERDISCIPLINARY APPROACHES* 121, 130 (Sarah Ralph ed., 2012).

47. Precursors to the Romans, the Etruscans severed the heads of enemy warriors for public display. ARTHUR M. ECKSTEIN, *MEDITERRANEAN ANARCHY, INTERSTATE WAR, AND THE RISE OF ROME* 124 (2006). In the middle ages, a head, alleged to be that of John the Baptist, was widely believed to possess miraculous power. Asa Simon Mittman, *Answering the Call of the Severed Head*, in *HEADS WILL ROLL: DECAPITATION IN THE MEDIEVAL AND EARLY MODERN IMAGINATION* 311, 325–26 (Larissa Tracy & Jeff Massey eds., 2012). And in the contemporary world, among drug lords in Mexico and Islamist terrorists in the Middle East, severed heads are used much as they were by Antony and Octavian—as a means to terrify and intimidate opponents. Cinthia Marlene Campos, Presentation at the 113th Am. Anthropological Ass'n Annual Meeting, *Severed Heads and Excised Human Hearts: Mimesis and the Resurgence of Pre-Columbian Terror Management in Modern Mexican Narco-Violence* 5–6, (Nov. 2013) (describing the roots of drug cartel violence);

Octavian, now barely twenty, and Marc Antony were left to contend with one another. Once again, they struck a tactical alliance. In November of 43 B.C., the two men, joined by Marcus Lepidus—another of Julius Caesar’s old military commanders—agreed to form what came to be known as the Second Triumvirate.⁴⁸ The Triumvirate gave Antony and Octavian the breathing space to move against any threat to their rule, real or perceived, and move they did.⁴⁹ Over a period of just a few years, they slaughtered approximately 3,000 members of aristocratic families.⁵⁰ Organized, elite opposition was thereby rendered futile.⁵¹

The Triumvirate was temporary; it was intended to be.⁵² By its terms, it was to last five years, although it was renewed for an additional five years in 37 B.C., at which time Octavian managed to force Lepidus out of the coalition.⁵³ Since the two sides knew in advance the expiration date of their arrangement, each sought decisive advantage.⁵⁴ Octavian remained in Rome and curried favor.⁵⁵ He distributed land to army veterans, even if that meant displacing some small Roman farmers.⁵⁶ He waged war and vanquished some local military threats⁵⁷ and seemed like a man who could deliver peace, security, and stability.⁵⁸

Antony, for his part, turned his attention to the East and to Egypt.⁵⁹ Egypt was among the Empire’s most important client states.⁶⁰

Clay Farris Naff, *Why Is ISIS So Awful? Evolution, Ideology, Culture, and Sex*, HUFFINGTON POST (Oct. 11, 2014, 5:59 AM), http://www.huffingtonpost.com/clay-naff-why-is-isis-so-awful-evol_b_5667686.html [<http://perma.cc/9BMQ-DHNF>] (describing ritual violence in the Middle East).

48. ALSTON, *supra* note 17, at 29; ANTHONY EVERITT, *AUGUSTUS: THE LIFE OF ROME’S FIRST EMPEROR 79–80* (2006).

49. *See* EVERITT, *supra* note 48, at 79–80.

50. *See* MELISSA BARDEN DOWLING, *CLEMENCY & CRUELTY IN THE ROMAN WORLD 41* (2006); HILARY SWAIN & MARK EVERSON DAVIES, *ASPECTS OF ROMAN HISTORY, 82 BC–AD 14* 223 (2010). But estimates of the number of victims varies, from as high as 4,700 to as low as 520. CHRISTOPHER J. FUHRMANN, *POLICING THE ROMAN EMPIRE: SOLDIERS, ADMINISTRATION, AND PUBLIC ORDER* 96 n.26 (2012).

51. *See* DOWLING, *supra* note 50, at 44.

52. F.E. ADCOCK, *ROMAN POLITICAL IDEAS AND PRACTICE* 69 (1959).

53. *Id.*; GEORGE MOUSOURAKIS, *A LEGAL HISTORY OF ROME* 48 (2007).

54. *See* ADCOCK, *supra* note 52, at 69.

55. *See* MOUSOURAKIS, *supra* note 53, at 48.

56. ELEANOR GOLTZ HUZAR, *MARK ANTONY: A BIOGRAPHY* 130–31 (1978).

57. *See, e.g.*, MATTHEW D.H. CLARK, *AUGUSTUS, FIRST ROMAN EMPEROR: POWER, PROPAGANDA AND THE POLITICS OF SURVIVAL* 67–69 (2010).

58. During this period, Octavian “was increasingly depicted in Italy as a peacemaker” DOWLING, *supra* note 50, at 53.

59. MOUSOURAKIS, *supra* note 53, at 48.

60. *See* Livia Capponi, *The Roman Period, in* 1 *A COMPANION TO ANCIENT EGYPT* 180, 181 (Alan B. Lloyd ed., 2010) (A client state is a state that is economically, politically, or militarily subordinate to another state.).

It was a “protectorate” of Rome,⁶¹ and served as Rome’s “breadbasket.”⁶² Discontented with simply holding Egypt, however, Antony sought success and glory on the battlefield but was badly defeated in a campaign against the Parthians in the territory of modern-day Azerbaijan.⁶³

Military defeat was disastrous enough, but Antony soon compounded his error: always restless, always questing after something new and exciting, Antony allowed himself to fall in love with Cleopatra, Egypt’s queen.⁶⁴ This was a problem, since he was even then betrothed and about to wed Octavian’s sister, Octavia, following his own wife’s unexpected death.⁶⁵ At the time, it must have seemed like a good opportunity to cement relations with his quondam partner turned competitor.⁶⁶ But now the infatuated Antony regretted having gone through with the marriage to Octavia.⁶⁷ Octavian’s wrath was kindled when Antony abandoned Octavia in favor of Cleopatra.⁶⁸

This was the advantage Octavian needed. He opened up a propaganda barrage against Antony, who was portrayed as exotic, eastern, and a non-Roman.⁶⁹ Antony was the sybarite; the faithless pursuer of reckless pleasure.⁷⁰ “Hearty, boisterous, physically powerful and attractive,”⁷¹ Antony lent himself to easy caricature.⁷² But

61. *Id.* at 180.

62. JASON THOMPSON, A HISTORY OF EGYPT: FROM EARLIEST TIMES TO THE PRESENT 134 (2008). “It is estimated that under Augustus well over one million tons of Egyptian grain may have arrived in Rome each year . . .” *Id.* at 135.

63. KAVEH FARROKH, SHADOWS IN THE DESERT: ANCIENT PERSIA AT WAR 144–45 (2007); GENE R. GARTHWAITE, THE PERSIANS 80 (2005).

64. See Capponi, *supra* note 60, at 181.

65. Eleanor G. Huzar, *Mark Antony: Marriages vs. Careers*, 81 CLASSICAL J. 97, 104 (1985–1986).

66. See ELAINE FANTHAM, JULIA AUGUSTI: THE EMPEROR’S DAUGHTER 24–25 (2006).

67. One marvels at the mental gymnastics Antony must have employed to justify his actions, since Cleopatra was pregnant with twins at the very time Antony was marrying Octavia. MARVIN ROSENBERG, THE MASKS OF ANTHONY AND CLEOPATRA 486 (Mary Rosenberg ed. 2006).

68. SARAH B. POMEROY, GODDESSES, WHORES, WIVES, AND SLAVES: WOMEN IN CLASSICAL ANTIQUITY 187 (1995). “When she first met Antony she sailed on a golden barge, dressed like Aphrodite . . . The two of them enjoyed immense luxury, Cleopatra playing the exotic companion to Antony’s pleasure . . .” *Id.*

69. The full scope of this campaign, and Antony’s own campaign to discredit Octavian, is portrayed in Kenneth Scott, *The Political Propaganda of 44–30 B.C.*, 11 MEMOIRS AM. ACAD. ROME 7, 7–49 (1933).

70. See Huzar, *supra* note 65, at 99.

71. *Id.* at 97.

72. One of the most devastating attacks came in the year 32, as the Triumvirate dissolved and Octavian and Antony prepared for war: Octavian claimed to have obtained Antony’s will, deposited for safekeeping in the Temple of the Vestal Virgins. John Robert Johnson, *The Authenticity and Validity of Antony’s Will*, 47 L’ANTIQUITÉ CLASSIQUE 494, 494–95 (1978). By the terms of the supposed will, Antony’s Italian property was to pass into Egyptian hands and Caesarian, Cleopatra’s son by Julius Caesar, was recognized

at the same time Octavian savaged Antony's reputation, he built up his own.⁷³ Thus Octavian became the defender of Roman purity and the ancestral Roman virtues.⁷⁴ While Antony was "weak, immoral, [and] servile," Octavian in contrast stood for "traditional, male, Roman values"⁷⁵ In monuments and in poetry, he was even depicted as the energetic young god Apollo.⁷⁶

Like few others before him, Octavian appreciated the value of manipulating public opinion.⁷⁷ Through his loyal ally, childhood friend, and patron of the arts, Maecenas, Octavian was enabled to court some of the great literary figures of this intensely learned and literate age.⁷⁸ The poet Virgil was drawn to Octavian, and already in the 30s had begun to celebrate his traditional Roman qualities—he was a lover of pastoral simplicity and a sustainer of the old ways of land, crops, and gentleness of birth.⁷⁹ So, too, the poet Horace enlisted in Octavian's cause.⁸⁰ Octavian's purpose was to enlist the arts in the service of his larger ambitions.⁸¹ War was inevitable and Octavian's victory was swift.⁸² Again, it was a misstep by Antony that triggered hostilities. No longer unable to maintain his dual relationships with Octavia and Cleopatra, Antony chose the politically

as Caesar's legitimate heir. *Id.* at 494. Questions have always surrounded this episode: was this just a final, epic forgery, a masterwork of propaganda, or was the document genuine? Compare Johnson, *supra*, at 494-503 (the case for authenticity), with Frank A. Sirianni, *Was Antony's Will Partially Forged?*, 53 *L'ANTIQUITÉ CLASSIQUE* 236, 236-241 (1984) (the case for at least a partial forgery).

73. Scott, *supra* note 69, at 45.

74. See Johnson, *supra* note 72, at 494-95.

75. ANNELISE FREISENBRUCH, *CAESARS' WIVES: SEX, POWER, AND POLITICS IN THE ROMAN EMPIRE* 28 (2010). Another historian observes: "Octavian was thus presented . . . as the champion of the *res publica* against a fearful foreign foe." David C. Braund, *The Legacy of the Republic*, in 1 *THE ROMAN WORLD* 55, 63 (John Wacher ed., 2002) (reprint of 1987 edition).

76. Marie-Laure Freyburger-Galland, *Political and Religious Propaganda Between 44 and 27 BC*, 55 *VERGILIUS* 17, 21-22 (2009). Antony, in contrast, was portrayed as a drunken Dionysus. *Id.* at 25.

77. *Id.* at 28.

78. As the ferociously ironic constitutional historian, Ronald Syme put it: "Augustus' chief of cabinet, Maecenas, captured the most promising of the poets at an early stage and nursed them into the Principate [Octavian's government]." RONALD SYME, *THE ROMAN REVOLUTION* 460 (1939).

79. See Chester G. Starr, *Virgil's Acceptance of Octavian*, 76 *AM. J. PHILOLOGY* 34, 42-44 (1955).

80. A beneficiary of Maecenas's patronage, Horace hesitated before committing to Octavian until very nearly the end of the 30s. See R.O.A.M. LYNE, *HORACE: BEHIND THE PUBLIC POETRY* 24-28 (1995). As a young man, at the time of Caesar's assassination, Horace served briefly in the army of Cassius and Brutus. Chester G. Starr, *Horace and Augustus*, 90 *AM. J. PHILOLOGY* 58, 58-59 (1969).

81. See Freyburger-Galland, *supra* note 76, at 28-29.

82. See William M. Murray & Photios M. Petsas, *Octavian's Campsite Memorial for the Actian War*, 79 *TRANSACTIONS AM. PHIL. SOC'Y* pt. 4, 131-32 (1989).

dangerous course of divorcing Octavian's sister.⁸³ The Senate was outraged by this final affront and granted Octavian's long-standing wish for war.⁸⁴

Both sides mobilized and met in battle in the summer and early autumn of 31 B.C.⁸⁵ The two armies skirmished indecisively, while the conflict was settled in the naval battle of Actium, fought on September 2, 31 B.C.⁸⁶ Antony's fleet consisted of vessels drawn from his own and the Egyptian navies.⁸⁷ A contingent of Antony's vessels unexpectedly retreated at the beginning of combat, causing his other forces to panic and flee.⁸⁸ The Battle was over soon enough and Octavian prevailed.⁸⁹

Joy prevailed at Rome.⁹⁰ The poet Horace wrote a commemorative ode to victory—*Nunc est bibendum*—"Now let the drinking begin!"⁹¹ In sexually charged verses, he described Cleopatra's military force as a troop of insane men, morally foul, drunk on eastern wine.⁹² Octavian, in contrast, was the swift, unerring Roman hunter who sought to capture his unnatural eastern prey (*fatale monstrum*) and to put it in chains (*catenis*).⁹³ Cleopatra, he concluded his song, faced with the humiliation of being made the main attraction in a Roman triumphal parade, took the honorable way out, killing herself with snake venom.⁹⁴

83. RICHARD A. BAUMAN, *WOMEN AND POLITICS IN ANCIENT ROME* 93 (1992).

84. WERNER ECK, *THE AGE OF AUGUSTUS* 35 (Deborah Lucas Schneider trans., 2003) When war was declared, it was against Cleopatra alone, not against Antony. *Id.* Antony, after all, still retained the sympathy of some members of the Senate, and some 300 (out of 1,000) senators had actually defected to his side. CHESTER G. STARR, *A HISTORY OF THE ANCIENT WORLD* 550 (3d ed. 1983).

85. See D.B. Saddington, *The Evolution of the Roman Imperial Fleet*, in *A COMPANION TO THE ROMAN ARMY* 201, 207 (Paul Erdkamp ed., 2011).

86. FRANÇOIS CHAMOIX, *HELLENISTIC CIVILIZATION* 6 (Michel Roussel trans., 2002). Chamoux wrote that after Actium, "Rome becomes the hub of the world . . ." *Id.*

87. Saddington, *supra* note 85, at 207.

88. Murray & Petsas, *supra* note 82, at 132–33.

89. *Id.* at 131–41 (reviewing the scholarship and reconstructing the likely order of battle).

90. ROBERT ALAN GURVAL, *ACTIUM AND AUGUSTUS: THE POLITICS AND EMOTIONS OF CIVIL WAR* 19–30 (1995).

91. Horace, *Ode* 1.37, reprinted in *HORACE: ODES AND EPODES* 92–95 (Jeffrey Henderson ed., Loeb Classical Library ed. 2004).

92. *Id.* at 92–93.

93. *Id.* Scholars have long debated whether Horace's attitude towards Cleopatra shifts at this point in the poem. *Monstrum*, in Latin, means something outside of nature. *Fatale* might mean "doomed" but might also convey the sense of "tragic," as if following some predetermined necessity. A prey hunted down and killed naturally arouses sympathy also. For analysis of this passage, see J.V. Luce, *Cleopatra as Fatale Monstrum* (*Horace, Carm. 1.37.21*), 13 *CLASSICAL Q.* 251, 251–57 (1963); Steele Commager, *Horace, Carmina 1.37, 12 PHOENIX* 47, 47–57 (1958); and Fred C. Mench, Jr., *The Ambiguity of the Similes and of Fatale Monstrum in Horace, Ode, I, 37*, 93 *AM. J. PHILOLOGY* 314, 314–23 (1972).

94. See Horace, *Ode* 1.37, *supra* note 91, at 94–95. Horace's poem is the earliest description extant of Cleopatra's death. For a close analysis, consult Robert A. Gurval, *Dying*

B. Conservative Restoration

Octavian marched on Alexandria, in Egypt, where Antony and Cleopatra had taken refuge, in the early summer of the year 30 B.C.⁹⁵ Judging the situation hopeless, Antony committed suicide.⁹⁶ Cleopatra did not immediately follow her lover's course. She negotiated with Octavian, hoping that he might spare the life of her children.⁹⁷ He hesitated to reassure her, and explained to her that if she remained alive, she would be brought to Rome and exhibited publicly as a monstrosity from the East.⁹⁸ She chose what Horace described as the better, more regal option, taking her own life.⁹⁹

Octavian was now the undisputed master of the Roman Empire.¹⁰⁰ But where did he fit within the constitutional scheme? Rome had always been a republic; it had always, with a few exceptions, been governed by elected consuls who served brief terms.¹⁰¹ Octavian had now served numerous terms as consul.¹⁰² What was his next step? He dare not take the title of "king," not after defeating Antony and Cleopatra on the pretext that they sought to establish an Eastern-style monarchy at Rome.¹⁰³

In January of 27 B.C., he entered the Senate and surrendered the title of consul, which he had held for several consecutive terms.¹⁰⁴ He

Like a Queen: The Story of Cleopatra and the Asp(s) in Antiquity, in CLEOPATRA: A SPHINX REVISITED 54, 62–66 (Margaret M. Miles ed., 2011).

95. PATRICIA SOUTHERN, ANTONY AND CLEOPATRA: THE DOOMED LOVE AFFAIR THAT UNITED ANCIENT ROME AND EGYPT 153 (2009).

96. See TOM HOLLAND, RUBICON: THE LAST YEARS OF THE ROMAN REPUBLIC 363 (2003).

97. STANLEY MAYER BURSTEIN, THE REIGN OF CLEOPATRA 31 (2007).

98. *Id.* at 31–32. In the end, Octavian spared most of Cleopatra's children. *Id.* at 32.

99. Horace, Ode 1.37, *supra* note 91, at 94–95. On the inconsistencies surrounding Cleopatra's suicide, which some have suggested was actually homicide, see MARY BEARD, THE ROMAN TRIUMPH 114–17 (2007).

100. See Murray & Petsas, *supra* note 82, at 1.

101. Usually two consuls were elected to govern for a year's term. The office was considered the highest office in the Republic even though its powers were generally left undefined. On the evolution of this office in the Republican period, see Hans Beck et al., *The Republic and Its Highest Office: Some Introductory Remarks on the Roman Consulate*, in CONSULS AND RES PUBLICA: HOLDING HIGH OFFICE IN THE ROMAN REPUBLIC 1–15 (Hans Beck et al. eds., 2011). Power was divided in various complex ways with other offices, such as praetors, tribunes, and censors. Andrew Lintott is surely correct in viewing the Roman Republican constitution as forming an elaborate system of checks and balances. ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 100 (1999).

102. At the time of his resignation from the consulate in 27 B.C., Octavian had held the office for seven terms. See, e.g., W. Eder, *Augustus and the Power of Tradition: The Augustan Principate as Binding Link Between Republic and Empire*, in BETWEEN REPUBLIC AND EMPIRE: INTERPRETATIONS OF AUGUSTUS AND HIS PRINCIPATE 71, 104 (Kurt A. Raaflaub & Mark Toher eds., 1990).

103. See RICHARD C. BEACHAM, SPECTACLE ENTERTAINMENTS OF EARLY IMPERIAL ROME 108 (1999).

104. L. DE BLOIS & R.J. VAN DER SPEK, AN INTRODUCTION TO THE ANCIENT WORLD 208 (Susan Mellor trans., 2d ed. 2008).

planned to restore the Republic he generously informed the gathered Senators.¹⁰⁵ But it was all a pretense.¹⁰⁶ The thirty-five-year-old Octavian was not abdicating. Rather, the Senate voted to confirm him as *princeps senatus*—roughly translated “first ruler” or “chief of the Senate.”¹⁰⁷ He would retain military and consular authority.¹⁰⁸ *Princeps*, furthermore, was a title that he would bear for the remainder of his term, and it was a title which his successors subsequently claimed.¹⁰⁹ He also ceased to be called Octavian—henceforth he was to be known as “Augustus,” the “grand” or the “mighty.”¹¹⁰ The next 300 years of Roman history—from 27 B.C. to 284 A.D.—would come to be known politically as the “principlate,” in recognition of this constitutional arrangement.¹¹¹

What, however, would be Augustus’s program now that he was given what amounted to a lifetime appointment to rule? The poet Horace suggested one: regeneration of the best of old Roman life.¹¹² It was a renewal of the golden age that once prevailed at Rome but disappeared during the years of civil war and strife; nothing less was worthy of the great new master of Rome.¹¹³ “[R]epair the crumbling temples and shrines of the gods;” their images and statues have become besmirched.¹¹⁴

And it wasn’t only the infrastructure that needed repair. Marriage, Horace continued, had fallen into disrepute.¹¹⁵ Girls in puberty

105. *Id.*

106. PATRICIA SOUTHERN, *AUGUSTUS 190–93* (2d ed. 2014) (internal footnote omitted).

107. He was given the further title *princeps universorum*, “leader of all.” LUIGI CAPOGROSSI COLOGNESI, *LAW AND POWER IN THE MAKING OF THE ROMAN COMMONWEALTH* 238 (Laura Kopp trans., 2014).

108. A.H.M. Jones, *The Imperium of Augustus*, 41 *J. ROMAN STUD.* 112, 112–19 (1951) (exploring the vast powers conferred on Augustus, including almost continuous grants of consular powers until his death in A.D. 14).

109. Augustus took other terms also—*pontifex maximus* (chief priest) and *pater patriae* (father of his country). THEODORE ZIOLKOWSKI, *HESITANT HEROES: PRIVATE INHIBITIONS, CULTURAL CRISIS* 31 (2004).

110. Herbert W. Benario, *Augustus Princeps*, in 2.2 *AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT* 75, 80 (1975).

111. S. E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES* 528 (1997).

112. See Horace, Ode 3.6, *supra* note 91, at 162–64. Ronald Syme observes, again at his ironic best, that it is in Horace’s “*Odes* [that it] may be discovered the noblest expression of the Augustan policy of social regeneration and the most illuminating commentary upon it.” SYME, *supra* note 78, at 462. The extent to which Horace operated as a kind of publicist for the Augustan program has long vexed historians. Certainly, Maecenas, Augustus’s liaison to what might be called “the creative class,” showered Horace with gifts, including a landed estate, something that a freedman’s son like Horace could never have hoped to obtain otherwise. See William Anderson, *Horace’s Friendship: Adaptation of a Circular Argument*, in *A COMPANION TO HORACE* 34, 38–39 (Gregson Davis ed., 2010).

113. See SYME, *supra* note 78, at 462.

114. Horace, Ode 3.6, *supra* note 91, at 163.

115. *Id.* at 162–63.

take dancing lessons, they study acting, they fornicate, and, after marriage, they “look[] for younger lovers . . .”¹¹⁶ Their husbands might even connive with them in their wicked indulgence.¹¹⁷ Horace composed these verses with force and power—his “language . . . laconic, monumental”¹¹⁸—he aimed to state a poetic case for moral reform through aggressive legislation.¹¹⁹

“Did Horace believe all this?” the classical historian L.P. Wilkinson asked.¹²⁰ It is a fair question, since Horace had shifted allegiances effortlessly—a Republican who fought for Cassius and Brutus,¹²¹ an Epicurean poet skeptical of the gods and partial to modest earthly pleasures,¹²² and now this, a campaigner for the rejuvenation of ancient religion and morality.¹²³ But whether Horace really believed his own verse is ultimately not the right question. He was in his politics a weathervane, accurately pointing to the course of Augustus’s future programmatic reforms.

Indeed, Augustus would govern by retaining the trappings of the old and the time-tested. Thus, he did not abolish the rich variety of ancient republican offices.¹²⁴ There were still consuls, praetors, tribunes, and a host of other offices that carried over from the old Republic.¹²⁵ There was still, too, the Senate, and while that body retained some important duties, it was clearly subordinated to Augustus’s will.¹²⁶

Walter Eder sees in the retention of the old forms a certain hesitancy on the part of Augustus and the Senate—they did not know the future and were not ready for a radical break with the forms of the old constitution.¹²⁷ Karl Galinsky similarly finds in the paradox of Augustus collecting sweeping powers while simultaneously maintaining constitutional niceties “the traditionalism of the Romans and their fixation on the *mores maiorum* [the customs of the ancestors]”.¹²⁸

116. *Id.* at 163.

117. *Id.* at 164–65.

118. Hans Christian Günther, *The First Collection of Odes: Carmina I–III*, in BRILL’S COMPANION TO HORACE 211, 402 (Hans-Christian Günther ed., 2013).

119. Gordon Williams, *Poetry in the Moral Climate of Augustan Rome*, 52 J. ROMAN STUD. 28, 46 (1962) (“The uniqueness of Horace’s odes lay in the explicit political statements, supporting the programme of moral reform.”).

120. L.P. WILKINSON, HORACE & HIS LYRIC POETRY 29 (1979).

121. Starr, *supra* note 80, at 58–59.

122. See DAVID ARMSTRONG, HORACE 48–49 (1989); see also Norman W. Dewitt, *Epicurean Doctrine in Horace*, 34 CLASSICAL PHILOLOGY 127, 127–28, 130, 133 (1939).

123. Suzanne Dixon notes the irony of “[t]he bachelor poet Horace preach[ing] the virtues of ancestral family life.” SUZANNE DIXON, THE ROMAN MOTHER 72 (1988).

124. See KARL LOEWENSTEIN, THE GOVERNANCE OF ROME 248–52 (1973).

125. *Id.* at 249–50; see also Walter Eder, *Augustus and the Power of Tradition*, in THE CAMBRIDGE COMPANION TO THE AGE OF AUGUSTUS 13, 14–17 (Karl Galinsky ed., 2005).

126. See J. BERT LOTT, DEATH AND DYNASTY IN EARLY IMPERIAL ROME 29 (2012).

127. See Eder, *supra* note 102, at 104–11.

128. KARL GALINSKY, AUGUSTAN CULTURE: AN INTERPRETIVE INTRODUCTION 76 (1986).

And so, while one can speak of Augustus as a conservative restorationist, given his devotion to tradition and form, it is a paradoxical conservatism, since he was simultaneously a radical innovator who permanently shattered all of the delicate checks and balances of the ancient Roman constitution.¹²⁹

The Roman Empire of the Augustan age was a time of precocious invention in the religious sphere.¹³⁰ A great multiplicity of cults and movements flourished.¹³¹ Still, Augustus resisted these larger trends and took particular pride in his restoration of the ancient religion.¹³² We know this because he boasted about it in his monumental memoir, the *Res Gestae*.¹³³ Revised and completed near the end of his long reign—Augustus died in 14 A.D.¹³⁴—the *Res Gestae* was intended for public display,¹³⁵ as a kind of memorial and justification of his long rule.¹³⁶

129. For one interpretation of the way Augustus struck this balance, see Chester G. Starr, *How Did Augustus Stop the Roman Revolution?*, 52 *CLASSICAL J.* 107, 107–12 (1956).

130. There was, for instance, the cult of the “Great Mother,” already deeply entrenched at Rome. THE ANCIENT MYSTERIES: A SOURCEBOOK 113–15 (Marvin W. Meyer ed., 1987). The worship of Isis was also spreading in Italy at this time. SHARON KELLY HEYOB, THE CULT OF ISIS AMONG WOMEN IN THE GRAECO-ROMAN WORLD 128 (1975). The Jewish Diaspora, furthermore, extended throughout much of the Eastern Mediterranean and also had a presence at Rome. LEE I. LEVINE, THE ANCIENT SYNAGOGUE: THE FIRST THOUSAND YEARS 105–06 (2d ed. 2005).

131. See HEYOB, *supra* note 130, at 128.

132. MARTIN GOODMAN, THE ROMAN WORLD: 44 BC–AD 180, at 212 (2d ed. 2012); see also Karl Galinsky, *Continuity and Change: Religion in the Augustan Semi-Century*, in A COMPANION TO ROMAN RELIGION 71–82 (Jörg Rüpke ed., 2011). Augustus revived the cult of the *lares* and *penates*, Rome’s ancestral protective deities, and made their worship mandatory in all of Rome’s neighborhoods. See, e.g., MARK P.O. MORFORD & ROBERT J. LENARDON, CLASSICAL MYTHOLOGY 630–31, 640–41 (7th ed. 2003).

133. The text I am using is CAESARIS AUGUSTI RES GESTAE ET FRAGMENTA (Herbert W. Benario ed., 2d ed. 1990) [hereinafter RES GESTAE].

134. The scholarly consensus is that the *Res Gestae* was composed in stages, with much of the work completed by the year 2 B.C., although Augustus indicates in the text of the *Res Gestae* that he completed the project in the last year of his life. On the composition of the *Res Gestae*, see ALISON E. COOLEY, RES GESTAE DIVI AUGUSTI: TEXT, TRANSLATION, AND COMMENTARY 42–43 (2009) (who cautiously favors the idea that the *Res Gestae* was composed quickly, in the final year of Augustus’s life). For contrasting views on the dating and method of composition, cf. JOHN RICHARDSON, THE LANGUAGE OF EMPIRE: ROME AND THE IDEA OF EMPIRE FROM THE THIRD CENTURY BC TO THE SECOND CENTURY AD 119–20 (2008); Edwin S. Ramage, *The Date of Augustus’ Res Gestae*, in 18 *CHIRON* 71–82 (1988).

135. A Latin text was engraved in bronze and put on public display in Rome. A Greek translation was publicly displayed in Ancyra, modern-day Ankara, in Turkey. See, e.g., Suna Güven, *Displaying the Res Gestae of Augustus: A Monument of Imperial Image for All*, 57 *J. SOC’Y ARCHITECTURAL HISTORIANS* 30, 30, 38 (1998).

136. Thus, one historian has summarized the purpose of the *Res Gestae*: “He wanted to present himself as a *salubris princeps*, who, like a good physician, took into his hands a disease-ridden body and succeeded in healing it.” Zvi Yavetz, *The Res Gestae and Augustus’ Public Image*, in CAESAR AUGUSTUS: SEVEN ASPECTS 13 (Fergus Millar & Erich Segal eds., 1984).

Augustus boasted of the ways in which he revived the ancient religion. By his own count, he restored eighty-two temples¹³⁷ and built lavish new ones.¹³⁸ He constructed the temple of Mars the Avenger (*Mars Ultor*) “with his own hands” (*ex manibiis feci*).¹³⁹ The god Apollo came in for special attention as a symbol of the new regime.¹⁴⁰ He took an active interest in his duties as *pontifex maximus*¹⁴¹ and he strengthened the cult of the Vestal Virgins.¹⁴² The historian Livy, like Horace, another member of Augustus’s stable of literary talent,¹⁴³ focused his tales of Roman greatness on the auspicious intervention of the gods.¹⁴⁴ And the continued public worship of the traditional gods, Livy made clear, was the key to Roman peace and prosperity.¹⁴⁵

If Augustus was willing to proclaim his devotion to Rome’s historic deities, the *Res Gestae* was silent on that other aspect of Roman revival of which Horace so fervently sang at the commencement of Augustus’s rule—the resuscitation of the traditionally strict ethical code governing sexual morality and marriage.¹⁴⁶ There were “calculated omissions” in the *Res Gestae*,¹⁴⁷ and this certainly appeared to

137. RES GESTAE, *supra* note 133, at 11.

138. JOHN W. STAMPER, THE ARCHITECTURE OF ROMAN TEMPLES: THE REPUBLIC TO THE MIDDLE EMPIRE 105 (2005).

139. RES GESTAE, *supra* note 133, at 11. On the construction of this Temple and its architectural novelty, see STAMPER, *supra* note 138, at 130–41. The Temple was built to commemorate the vengeance Augustus wreaked on the murderers of his uncle, Julius Caesar. *Id.* at 130.

140. See BEACHAM, *supra* note 103, at 107.

141. RUTH STEPPER, AUGUSTUS ET SACERDOS: UNTERSUCHUNGEN ZUM RÖMISCHEN KAISER ALS PRIESTER 40–45 (2003).

142. ROBIN LORSCH WILDFANG, ROME’S VESTAL VIRGINS: A STUDY OF ROME’S VESTAL PRIESTESSES IN THE LATE REPUBLIC AND EARLY EMPIRE 101 (2006).

143. ANDREW FELDHERR, SPECTACLE AND SOCIETY IN LIVY’S HISTORY 18–19, 19 n.51 (1998) (reviewing the scholarship on Livy’s relationship with Augustus, which varies substantially in its conclusions); see also P.G. WALSH, LIVY: HIS HISTORICAL AIMS AND METHODS 11 (1961) (arguing that while Livy’s sympathies were clearly with Augustus, he should not be seen as a “propagandist,” or as having “prostituted his talents to the service of the regime”).

144. D.S. Levene asserts: “That the gods intervene in human affairs is a position which appears to underlie much of the Roman state religion” D.S. LEVENE, RELIGION IN LIVY 2 (1993).

145. JASON P. DAVIES, ROME’S RELIGIOUS HISTORY: LIVY, TACITUS AND AMMIANUS ON THEIR GODS 22 (2004) (“Roman success is consistently linked with Romans’ piety and good relations with the gods.”); John Scheid, *Livy and Religion*, in A COMPANION TO LIVY 78, 80 (Bernard Mineo ed., 2015) (“The aim of Roman religion is always the earthly and material benefit of the Romans”). Whether or how strongly Livy believed in the state religion is a matter open to dispute. See LEVENE, *supra* note 144, at 10–13.

146. See Williams, *supra* note 119, at 28.

147. Güven, *supra* note 135, at 31. Augustus made only a single vague reference to the enactment of “new laws” (*legibus novis*) designed to promote and bring up to date the good examples of prior generations (*multa exempla maiorum*). RES GESTAE, *supra* note 133, at 7.

be a glaring one. Augustus did not wish to remind posterity of that failed social experiment.¹⁴⁸ Perhaps he did not even want to remember it himself.¹⁴⁹

II. AUGUSTUS AND HIS CAMPAIGN FOR MORAL REFORM

A. *Models for Reform*

Did Augustus have any models in mind as he embarked on his reform program? We can infer that he did from the content of the legislation he proposed and enacted. He wanted, first, to restore his own idealized vision of the Roman *paterfamilias*.¹⁵⁰

Paterfamilias translates as “father” and as “head of household” but the true meaning of this ancient expression can be described best not by some formula of words, but by watching the concept play out in action.¹⁵¹ And so, one might examine the behavior of that paradigm and model of a Roman *paterfamilias*, Cato the Elder.¹⁵²

Cato is famous for his military exploits and his political views.¹⁵³ At the age of seventeen he fought against Hannibal in the Second Punic War.¹⁵⁴ A reactionary and a xenophobe, an exponent of simplicity and an enemy of all pomp and luxury,¹⁵⁵ he sought to banish Greek oratory from Roman territory.¹⁵⁶ A militarist, he called for the utter destruction of Carthage.¹⁵⁷

But he was also a man of letters, and in his work on agriculture¹⁵⁸ he aimed to dispense a wealth of advice to his fellow heads-of-households on proper estate management, from the best means of cultivating olive trees and vineyards to the management of slave labor.¹⁵⁹ His work was not only practical but expressly ideological—his audience was the investing class, including senators, *equites*,

148. See Williams, *supra* note 119, at 28.

149. Indeed, Augustus even omitted all mention of his own family. RONALD T. RIDLEY, *THE EMPEROR'S RETROSPECT: AUGUSTUS' RES GESTAE IN EPIGRAPHY, HISTORIOGRAPHY AND COMMENTARY* 69–71 (2003).

150. Williams, *supra* note 119, at 28.

151. See *RES GESTAE*, *supra* note 133, at 108.

152. Plutarch, *Marcus Cato*, in 2 *PLUTARCH'S LIVES* 359–63 (Bernadotte Perrin trans., 1967).

153. See *id.* at 304–05.

154. *Id.*

155. See RONALD MELLOR, *THE ROMAN HISTORIANS* 17–18 (1999).

156. JAN H. BLITS, *TELLING, TURNING MOMENTS IN THE CLASSICAL POLITICAL WORLD* 89 (2011).

157. THOMAS R. MARTIN, *ANCIENT ROME: FROM ROMULUS TO JUSTINIAN* 78 (2013).

158. See CATO THE ELDER, *DE AGRI CULTURA*, reprinted in *MARCUS PORCIUS CATO ON AGRICULTURE*, *MARCUS TERENTIUS VARRO ON AGRICULTURE* 9, 25, 27 (1934).

159. *Id.* at 22–25 (on the proper management of olive groves); *id.* at 25–29 (proper viticulture); *id.* at 6–9 (slave management).

and the like¹⁶⁰—and his advice was to practice self-sufficiency and the generation of profits as the self-evident goals of what were large-scale family enterprises.¹⁶¹

Cato's biographer, Plutarch, emphasized that he was a gentle husband and father who never beat his wife and took time to teach his son to read.¹⁶² Following his wife's death, he satisfied his rather large sexual appetite with a favored slave girl, but when this proved embarrassing to his son, Cato took for a wife the young daughter of a client of his, a man who had once served as his clerk.¹⁶³

In all of this, Cato behaved much as a leading Roman head-of-household might be expected to comport himself. The *familia* of which he was the head was an economic unit and he meant to be its good steward.¹⁶⁴ He was a husband, a father, and a provider, but he also exercised some rights and privileges which we would find utterly abhorrent today. Wealth gave Cato independence and this independence made him a law unto himself with respect to many of the particulars of household management.¹⁶⁵

Other models of exemplary marital and sexual virtue can be gleaned from the opening books of Livy's great history of Rome. Given Livy's connections with the regime, it would not be surprising if these stories were inserted precisely to build the moral case for a return to ancient virtue.¹⁶⁶

160. A.S. Gratwick, *A Matter of Substance: Cato's Preface to the De Agri Cultura*, 55 *MNEMOSYNE* 42, 70 (2002).

161. See CATO THE ELDER, *supra* note 158, at 2–3; cf. JOHN R. LOVE, *ANTIQUITY AND CAPITALISM: MAX WEBER AND THE SOCIOLOGICAL FOUNDATIONS OF ROMAN CIVILIZATION* 73–74 (1991) (considering Cato's economic principles, including his thoughts on self-sufficiency, profitability, and the requirements of large landed estates).

162. Plutarch, *supra* note 152, at 360–63.

163. *Id.* at 374–77. I am here using the word “client” in the technical Roman usage; a client was a social subordinate who enjoyed a special relationship with a patron. In this case, Cato's client, a man named Salonijs, had once worked for Cato as an “under-secretary” and had clearly risen in society thanks to Cato's patronage. He owed Cato certain duties, including the happy surrender of his daughter to serve as the old Roman's wife. For some of the nuances of this system as it applied to Cato's case, see PAUL J. BURTON, *FRIENDSHIP AND EMPIRE: ROMAN DIPLOMACY AND IMPERIALISM IN THE MIDDLE REPUBLIC (353–146 BC)* 43–45 (2011).

164. Suzanne Dixon sees Cato as the vanguard of the transition from small-scale agriculture at Rome to the large-scale commercial exploitation of farming by senatorial families. SUZANNE DIXON, *THE ROMAN FAMILY* 44 (1992).

165. See JANE F. GARDNER & THOMAS WIEDEMANN, *THE ROMAN HOUSEHOLD: A SOURCEBOOK* 10 (1991).

166. Historians have made this point expressly. See MELISSA M. MATTHES, *THE RAPE OF LUCRETIA AND THE FOUNDING OF REPUBLICS* 49 (2000); see also KARL GALINSKY, *AUGUSTUS: INTRODUCTION TO THE LIFE OF AN EMPEROR* 96 (2012). The precise date on which Livy embarked on the writing of his monumental history is not known, although circumstantial evidence suggests that it was in the years just after Actium. A sense of

Thus, Livy wrote about the rape of Lucretia.¹⁶⁷ The story is set in the semi-mythical last days of the Roman monarchy around the year 510 B.C.¹⁶⁸ Collatinus, a young Roman nobleman and Lucretia's husband, boasted to his fellow soldiers while in the field with them that his wife was the most virtuous of all women.¹⁶⁹ The men, who were then besieging a neighboring village, rode back to Rome to spy on her and confirmed that this was indeed the case.¹⁷⁰ While other women caroused or flirted with young men, Lucretia remained quietly at home, working her spindle and knitting her wool.¹⁷¹ She was the very picture of contented domesticity.¹⁷²

This news inflamed Sextus Tarquinius, the king's son.¹⁷³ In a fury, he rode to Rome and raped Lucretia.¹⁷⁴ Defiled by the successor to the throne, Lucretia summoned Collatinus and his friends, made them swear to avenge her, and then took her life.¹⁷⁵ She was humiliated by this dishonor and the pain caused by even involuntary intercourse with another man was too much to bear.¹⁷⁶ Collatinus then organized a rebel band, overthrew the king, and established the monarchy.¹⁷⁷

The message was clear: nothing about sex was private. The health of the state itself depended on the purity of its members.¹⁷⁸

moral urgency pervades the work's preface, although Ronald Syme cautioned that this mood of decay and renewal cannot be linked precisely with any particular legislative program. See Ronald Syme, *Livy and Augustus*, 64 HARV. STUD. CLASSICAL PHILOLOGY 27, 42–43 (1959).

167. The story is found at Livy, 1 AB URBE CONDITA, reprinted in 1 LIVY IN FOURTEEN VOLUMES 196–209 (B.O. Foster trans., Loeb Classical Library ed. 1961).

168. On the setting, see T.P. Wiseman, *The Legend of Lucius Brutus*, in THE ROMAN HISTORICAL TRADITION: REGAL AND REPUBLICAN ROME 129, 137–39 (James H. Richardson & Federico Santangelo eds., 2014).

169. Livy, *supra* note 167, at 198–99.

170. *Id.*

171. *Id.*

172. *See id.*

173. *Id.* at 198–201.

174. *Id.* at 200–01.

175. Livy, *supra* note 167, at 200–03.

176. *Id.* at 202. “The residue of another man, Collatinus, is in your bed. But only my body has been violated, my spirit is untainted. Death will be my witness.” (I am here translating Livy's Latin text: “Vestigia viri alieni, Collatine, in lecto sunt tuo; ceterum corpus est tantum violatum, animus insons; moris testis erit.”) *Id.*

177. *Id.* at 204–09. Looking at Lucretia and a number of parallel examples in Roman literature, Nghiem Nguyen observes that the “idea of rape as political benefit” is a recurrent one in Roman legislation. Nghiem L. Nguyen, *Roman Rape: An Overview of Roman Rape Laws From the Republican Period to Justinian's Reign*, 13 MICH. J. GENDER & L. 75, 83 (2006).

178. *See, e.g.*, Friedrich Balke, *The Image of Lucretia: On the Creation of Republican Charisma in Livy*, 38 NEW GERMAN CRITIQUE 35, 44 (2011); Judith de Luce, *Roman Myth*, 98 CLASSICAL WORLD 202, 204 (2005).

Morals at Rome had gone into steep decline. If the well-being of this body politic was at stake, it followed that it was the duty of public officials to ensure the sound morals of the people.¹⁷⁹ And reform was on the way.¹⁸⁰

B. Reforming the Law on Adultery

Almost as soon as he was declared *princeps* and given lifetime powers, it seems Augustus embarked on his program to protect and promote marriage: although direct evidence does not survive, historians have inferred from circumstance that he introduced legislation into the Senate in 27 or 26 B.C., which either did not pass or was repealed within a few years.¹⁸¹ The survival of *controversiae*—essentially moot court exercises—that made use of hypothesized legislation on adultery also suggests that some law-making had taken place on the subject of adultery.¹⁸²

The public mood, however, must have favored a return to the ancient strictness. The Greek historian Dionysius of Halicarnassus, who wrote his *Roman Antiquities* in these years, recited the story of King Romulus, the legendary founder of Rome, and his strict law against adultery.¹⁸³ A husband who discovered his wife had committed adultery, or had merely drunk wine, could put her to death.¹⁸⁴ Romulus was fierce and uncompromising—alcohol led to adultery, so married women could not even drink.¹⁸⁵

Alan Watson has taken the position that Dionysius probably accurately described the legal situation in earliest Rome.¹⁸⁶ But it does not really contradict Watson to observe that Dionysius's narrative

179. See Diana C. Moses, *Livy's Lucretia and the Validity of Coerced Consent in Roman Law*, in *CONSENT AND COERCION TO SEX AND MARRIAGE IN ANCIENT AND MEDIEVAL SOCIETIES* 39, 42–45 (Angeliki E. Laiou ed., 1993).

180. Diana Moses draws close connections between this story and the Augustan campaign for moral reform. See *id.* at 41–45; cf. ARIADNE STAPLES, *FROM GOOD GODDESS TO VESTAL VIRGINS: SEX AND CATEGORY IN ROMAN RELIGION* 80–83 (1998) (further exploring Livy's politics in composing this myth).

181. Leo Ferrero Raditsa, *Augustus' Legislation Concerning Marriage, Procreation, Love Affairs and Adultery*, 2 *AUFSTIEG UND NIEDERGANG DER RÖMISCHEN WELT* 278, 295 (1980).

182. See SUSAN TREGGIARI, *ROMAN MARRIAGE: IUSTI CONIUGES FROM THE TIME OF CICERO TO THE TIME OF ULPIAN* 272–73 (1991).

183. DIONYSIUS OF HALICARNASSUS, *ROMAN ANTIQUITIES* bk. 2, at 381–85 (Loeb Classical Library ed. 1937).

184. *Id.* at 385.

185. *Id.*; cf. MATTHEW B. ROLLER, *DINING POSTURES IN ANCIENT ROME: BODIES, VALUES, AND STATUS* 116 (2006) (on the close connection drawn by Romans in the late Republic between wine consumption and sexual freedom).

186. Alan Watson, *Roman Private Law and the Leges Regiae*, 62 *J. ROMAN STUD.* 100, 101 (1972).

could have served political ends even while it described early Roman legal history.¹⁸⁷ After all, Augustus had a fascination with Romulus, and understood his own career in light of that legendary founder.¹⁸⁸

In the year 18 B.C., Augustus acted again. Significant historical evidence survives regarding his efforts in that year. Cassius Dio recorded the events giving rise to Augustus's final success in having the Senate enact legislation to outlaw adultery.¹⁸⁹ Senators had been prompting him to act for some time.¹⁹⁰ Indeed, some took the risky step of chiding Augustus about his own adventuresome youth and checkered marital history,¹⁹¹ speculating that this might be the reason for his continued hesitancy.¹⁹² They also reminded him that young people had lost respect for the old morality and were "disorderly."¹⁹³ It was almost as if the Senate had suddenly recalled to mind Augustus's promises of moral reform from just a few years before and now wanted him to make them a reality. For whatever reason, Augustus was now spurred to decisive action and saw the legislation through the Senate. And thus was passed the *Lex Julia de adulteriis*.

187. Dionysius was a trained Greek orator who resided and worked in Rome during the early years of Augustus's rule. His larger political project was to reconcile the Greek-speaking Eastern Mediterranean with Roman overlordship. The scholarship on his politics offers contrasting views of the position he took regarding Augustus's regime. *See, e.g.,* EMILIO GABBA, *DIONYSIUS AND THE HISTORY OF ARCHAIC ROME 190–215* (1991) (seeing Dionysius as building a history aimed at reconciling Greeks and Romans); STEFAN WEINSTOCK, *DIVUS JULIUS 228–29* (1971) (seeing Dionysius as endorsing Augustus's revival of the virtues); NICOLAS WIATER, *THE IDEOLOGY OF CLASSICISM: LANGUAGE, HISTORY, AND IDENTITY IN DIONYSIUS OF HALICARNASSUS 14–17* (2011) (reviewing the scholarship on Dionysius's politics while taking the position that as a Greek he took a condescending view of Roman politics); Matthew Fox, *History and Rhetoric in Dionysius of Halicarnassus*, 83 *J. ROMAN STUD.* 31, 40 (1993) (Dionysius was supportive of Augustus's principate as a state of affairs that "ultimately led to peace and prosperity rather than to strife.").

188. MARY BEARD, JOHN NORTH & SIMON PRICE, 1 *RELIGIONS OF ROME: A HISTORY 182–84* (1998); JANE DEROSE EVANS, *THE ART OF PERSUASION: POLITICAL PROPAGANDA FROM AENEAS TO BRUTUS 95–103* (1992); Rex Stem, *The Exemplary Lessons of Livy's Romulus*, 137 *TRANSACTIONS AM. PHILOLOGICAL ASS'N* 435, 468 (2007) ("Through his presentation of Romulus, Livy proposes a standard by which the victor at Actium could be measured.").

189. 6 CASSIUS DIO, *ROMAN HISTORY*, bk. 54, at 322–25 (Loeb Classical Library ed. 1917).

190. *Id.* at 322–23.

191. *See id.* at 323. Augustus had been married a total of three times. He divorced his first wife while still quite young. He was married to his second wife Scribonia in the year 39 B.C., when he met Livia, the daughter of a noble family who was also married to another man. Octavian and Livia fell into love, divorced their spouses, and married one another. ANTHONY A. BARRETT, *AGRIPPINA: SEX, POWER, AND POLITICS IN THE EARLY EMPIRE 13* (1996).

192. *See* DIO, *supra* note 189, at 323.

193. *Id.* Dio used the Greek noun *akosmia*, that is, something lacking *kosmos*, or "order." The noun euphemistically suggested sexual libertinism. *See* HENRY GEORGE LIDDELL & ROBERT SCOTT, *A GREEK-ENGLISH LEXICON* 53 (11th ed. 1968).

The most complete form of Augustus's adultery legislation is preserved in excerpted form in Justinian's *Digest* and the early third-century text, the *Sentences of Paul*. The *Lex Julia* imparted a narrow definition to adultery—adultery might only be committed where a man has sexual relations with a married woman, since the law's focus was on ensuring the legitimacy of the marriage's offspring.¹⁹⁴ Where an unmarried woman of free status—a widow or a virgin—had sex, the parties committed the crime of *stuprum*, sexual misconduct, but did not commit adultery.¹⁹⁵

The husband, by “husbandly right” (*iure mariti*) was empowered to prosecute his wife when he detected adultery.¹⁹⁶ This was, furthermore, both a right and a duty, since the husband simultaneously was under an obligation to bring the case,¹⁹⁷ and to do so speedily—within sixty days of discovering the crime.¹⁹⁸ Where the husband failed to act, the right of prosecution fell to the wife's father, provided the father remained alive.¹⁹⁹ If both husband and father brought the prosecution, the son's complaint should be given preference.²⁰⁰ And if neither the husband nor the father wished to bring a complaint, then third parties (*extraneis*—literally “those outside the family unit”) were given the power (“*accusandi facultas*”) of bringing charges.²⁰¹ Should

194. DIG. 48.5.6 (Papinian, De Adulteris 1). (“Sed proprie adulterium in nupta committitur, propter partum ex altero conceptum composito nomine . . .”). I have paraphrased this passage in English in the text.

195. *Id.* Regarding *stuprum*, one historian has written: “The word *stuprum* defies translation . . .” CRAIG A. WILLIAMS, ROMAN HOMOSEXUALITY 104 (2d ed. 2010). “[N]o single term can capture the semantic and tonal range of *stuprum*, which displays a characteristically Roman tendency to blur the distinction between the legal and the moral.” *Id.* It conveys a sense of “disgrace,” and is a violation of modesty and virtue. *Id.* at 106. The sex acts captured by this term might include both heterosexual and same-sex sexual acts, and are primarily characterized by the disgrace they bring upon the perpetrator. *Id.* at 106–07. Elaine Fantham stated: “[S]*tuprum* marks the spoiling of the young woman for marriage and motherhood, or the corruption of the young man, by preventing the proper development of his virility . . .” Elaine Fantham, *Stuprum: Public Attitudes and Penalties for Sexual Offences in Republican Rome*, 35 ECHOS DU MONDE CLASSIQUE 267, 271 (1991); cf. ADOLF BERGER, 43 ENCYCLOPEDIA OF ROMAN LAW 719 (1953) (who adopts a too-narrow definition of *stuprum*, seeing it as a crime that can only be committed by heterosexual couples).

196. DIG. 48.5.14(13) (Ulpian, De Adulteris 2) (using the term *iure mariti*).

197. DIG. 48.5.2 (Ulpian, Disputationum 8).

198. DIG. 48.5.15(14) (Scaevola, Regularum 4). One under the age of twenty-five was generally prohibited from bringing an accusation of adultery, except against his own wife. Julius Paulus, *Book I*, in S.P. SCOTT, 1 THE CIVIL LAW 263, 263 Title IX (1932).

199. See DIG. 48.5.2.8 (Ulpian, Disputationum 8). Both a natural father and an adoptive father possessed the power “to kill an adulterer caught in the act with his daughter” in certain circumstances. Julius Paulus, *Book II*, in S.P. SCOTT, 1 THE CIVIL LAW 263, 281 Title XXVI(1) (1932).

200. DIG. 48.5.2.8 (Ulpian, Disputationum 8).

201. DIG. 48.5.4.1 (Ulpian, Disputationum 8).

a marriage end in divorce because of the wife's adultery, she might still be prosecuted even after entering a second marriage.²⁰² To preserve evidence, the suspect and witnesses might be detained and questioned by aggrieved family members, i.e., the husband or the father and, presumably, rough-minded family retainers.²⁰³

If the husband failed to act, he placed himself in legal jeopardy, for he could be prosecuted as running a house of prostitution and effectively "pimping" his wife.²⁰⁴ In Latin, the offense of colluding in adultery, implicitly or explicitly, was known as *lenocinium*.²⁰⁵ *Lenocinium* was seen as an offense not only against the state, but against the gods, the family, and right order.²⁰⁶ It was also a charge that was almost never brought in practice.²⁰⁷ Indeed, classical literature contains examples, some humorous, some not, of men who "offered [their wives as] favours for material or political gain . . ." ²⁰⁸ Concubinage, furthermore, flourished even in spite of the law.²⁰⁹

The law continued to recognize a qualified right on the part of husbands and fathers to kill adulterers and their paramours. The father, but not the husband, might kill a woman caught in adultery, provided he surprised the pair, the adultery occurred in his house, or his son-in-law's house, and he killed the adulterous man at the same time.²¹⁰ The law seemed, however, to contemplate that usually the father would not exercise this right.²¹¹

A husband might also kill his wife's lover where he apprehended him together with his wife,²¹² but the law simultaneously imposed a number of class-based restrictions on the aggrieved husband. He could not kill anyone he pleased (*quemlibet*), but only men who fell into certain suspect classes, such as persons who were "infamous,"

202. DIG. 48.5.5 (Julianus, Digest 86).

203. Julius Paulus, *Book II*, in S.P. SCOTT, 1 THE CIVIL LAW 263, 281 Title XXVI(3) (1932).

204. See DIG. 48.5.2.2-3 (Ulpian, Disputationum 8).

205. DIG. 48.5.2.2 (Ulpian, Disputationum 8).

206. See JANE F. GARDNER, FAMILY AND *FAMILIA* IN ROMAN LAW AND LIFE 123 (1998).

207. *Id.*

208. Valerie A. Tracy, *The Leno-Maritus*, 72 CLASSICAL J. 62, 62 (1976).

209. Thomas A.J. McGinn, *Concubinage and the Lex Julia on Adultery*, 121 TRANSACTIONS AM. PHILOLOGICAL ASS'N 335, 336-38 (Ruth Scodel ed., 1991).

210. DIG. 48.5.23(22) (Papinian, De Adulteris 1); DIG. 48.5.21(20) (Papinian, De Adulteris 1) (where the right of killing has been conferred on the father it may not be exercised by the husband or by one of the father's sons).

211. DIG. 48.5.23(22).4 (Papinian, De Adulteris 1). Thus the law forbade the husband from killing his spouse since he might act impetuously in the heat of the moment (*ceterum mariti calor et impetus*). *Id.* The father, on the other hand, could be counted on to act with paternal devotion (*pietas paterni*). *Id.*

212. Julius Paulus, *Book II*, in S.P. SCOTT, 1 THE CIVIL LAW 263, 281 Title XXVI(4) (1932).

as well as actors, pimps, a freedman, or those convicted of a serious crime.²¹³ By imposing these restrictions, it seems, the law sought to encourage husbands to think carefully before killing, perhaps in the hope that the heated passion might prove transient. After all, in most circumstances it might be impossible at the moment of detection to know whether the adulterous man was an actor or a pimp or fell within one of the other permissible classifications. But where a husband did kill his wife and her lover, the law admonished that he be treated with lenience.²¹⁴

There is also a hierarchy observable in these arrangements. The husband who is victimized by the adultery is assumed generally to be young. The father is assumed to be still alive and capable of acting in the role of *paterfamilias*—the head of an extended Roman household. The detection of adultery is deemed to trigger a crisis in the larger family and it is uniquely and specially the father’s task—the father-in-law to the wife—to exercise sound judgment and take the appropriate measures.²¹⁵ The husband was considered sufficiently responsible to prosecute a claim in court, and so he was entrusted with this primary power.²¹⁶ But where killing was to take place, the father is assumed to be more mature and responsible than his son, the aggrieved “victim” of the adultery, and it was hoped that the father would exercise this power with the restraint and gravity called for.²¹⁷ And so the law succeeded both in curbing, or at least restricting, private acts of vengeance while at the same time vindicating the ancient authority of the *paterfamilias*—the heads-of-households.²¹⁸ The old patriarchy was thereby renewed but made subject to state-imposed rules.

In truth, the right to kill a wife’s lover had been fading from the Roman scene for some generations before the enactment of this law. True, it has been observed that in the Late Republic it remained the case that the husband had an almost “unfettered” right to kill a wife caught in adultery.²¹⁹ On the other hand, while the late Republic was characterized by a series of scandalous acts of adultery—most egregiously, Clodius’s seduction of Julius Caesar’s wife—these women

213. *Id.*

214. Julius Paulus, *Book II*, in S.P. SCOTT, 1 THE CIVIL LAW 263, 281 Title XXVI(5) (1932). For a summary of the law’s provisions regarding the spontaneous killing of perpetrators, see also Eva Cantarella, *Homicides of Honor: The Development of Italian Adultery Law over Two Millennia*, in THE FAMILY IN ITALY FROM ANTIQUITY TO THE PRESENT 229, 231–32 (David I. Kertzer & Richard P. Saller eds., 1991).

215. DIG. 48.5.23(22).4 (Papinian, De Adulteriis 1).

216. Cantarella, *supra* note 214, at 231.

217. *Id.* at 233.

218. See *id.*

219. Watson, *supra* note 186, at 103.

were invariably divorced, not put to death.²²⁰ The men also were not executed, but were merely publicly humiliated.²²¹ This was a right, in other words, the exercise of which was fading, assuming it had ever been vigorously prosecuted.²²²

And it is also the case that relatively few trials were ever conducted under Augustus's new law. Indeed, there is a record of only one such trial brought during the Emperor Augustus's tenure in office.²²³ The year was 12 B.C.²²⁴ The defendant is unnamed but was clearly politically connected since Maecenas, the Emperor's close advisor, was acting on the accused's behalf.²²⁵ The husband-accuser behaved badly while giving testimony, slandering not only his wife, but her relatives, her lover, and Maecenas for taking up the cause.²²⁶ Augustus then entered the courtroom, instructed the prosecuting husband to stop the insults, and then judged the case leniently.²²⁷ Adultery prosecutions undoubtedly occurred from time to time. This prosecution could not have been unique or singular, given the casualness with which Cassius Dio introduced its occurrence.²²⁸ But there could not have been very many such prosecutions, or the historical record would not be so sparse.

A century later, it was still the case that relatively few prosecutions for adultery were brought before the magistrates.²²⁹ Steven Rutledge reviewed an exchange of letters between the Emperor

220. See CATHARINE EDWARDS, *THE POLITICS OF IMMORALITY IN ANCIENT ROME* 46–47 (1993); Amy Richlin, *Approaches to the Sources on Adultery at Rome*, in *REFLECTIONS OF WOMEN IN ANTIQUITY* 379, 383–84 (Helene P. Foley ed., 1981).

221. See EDWARDS, *supra* note 220, at 47.

222. It is also an example of the State “effectively co-opt[ing] the victim’s vengeance.” Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 *HASTINGS L.J.* 195, 200 (1986).

223. Mary Alana Deminion, *Staging Morality: Studies in the Lex Iulia de Adulteriis of 18 BCE* 37 (2007) (unpublished M.A. thesis, Victoria University).

224. *Id.* at 37–38.

225. DIO, *supra* note 189, at 363.

226. *See id.*

227. *Id.*; cf. Deminion, *supra* note 223, at 37–39 (reviewing this case).

228. Cassius Dio opened his discussion of this trial almost casually, “on one occasion” when Maecenas happened to be in court. DIO, *supra* note 189, at 362–63.

229. Richlin, *supra* note 220, at 384 (“[T]he limited evidence suggests only that the law’s application was irregular . . .”). The specialized court that was created to hear adultery complaints largely vanishes from the historical record: “[T]he *quaestio perpetua* established by Augustus could have disappeared completely, for all the sources have to say about it.” *Id.* at 385. David Cohen reached a similar conclusion. Viewing the adultery legislation as an effort to regulate impulsive expressions of wounded male honor, he asserted that “[it] necessarily failed to eradicate the conduct that it prohibited.” David Cohen, *The Augustan Law on Adultery: The Social and Cultural Context*, in *THE FAMILY IN ITALY: FROM ANTIQUITY TO THE PRESENT* 109, 125 (David I. Kertzer & Richard P. Saller eds., 1991).

Trajan and his provincial governor, Pliny the Younger.²³⁰ A military tribune had caught his wife in adultery but did not want to prosecute her because he still loved her.²³¹ The Emperor told Pliny that if the tribune did not wish to bring the case, it was Pliny's duty to vindicate the public interest.²³² Rutledge concludes: "Pliny's letter raises yet another possibility . . . concerning why the adultery cases attested in our sources are so few, and that is the simple matter that . . . extra-marital liaisons are a personal matter, something to be worked out between a married couple."²³³

But even if prosecutions were haphazardly brought, the right to bring a prosecution belonged exclusively to males. There was no corresponding "wifely right" that permitted an aggrieved woman to prosecute her husband for adultery.²³⁴ No mother could vindicate a daughter's disgrace.²³⁵ "A married man who visits a prostitute, or who has sex with a woman of slave status, is not called *adulter* and is not considered to be committing any offense."²³⁶

For those who were convicted of adultery, the penalties were harsh. A man caught in adultery might suffer the forfeiture of one-half of his assets and be exiled to an island;²³⁷ a woman lost half of her dowry, a third of her estate, and might also be exiled to a different island.²³⁸ The philosopher Seneca the Younger was accused of adultery at least twice and suffered brief exile, although the charges may have been fabricated for political reasons.²³⁹

But if adultery was not often prosecuted, there was one instance of adultery that hurt Augustus deeply—the case of his own daughter,

230. STEVEN H. RUTLEDGE, *IMPERIAL INQUISITIONS: PROSECUTORS AND INFORMANTS FROM TIBERIUS TO DOMITIAN* 62 (2001).

231. *Id.*

232. *Id.*

233. *Id.* And a hundred years after Pliny, early Christian writers like Tertullian and Minucius Felix could be found to complain about the easy way in which adultery was joked about in Roman comedies. R.W. Reynolds, *The Adultery Mime*, 40 *CLASSICAL Q.* 77, 79 (1946).

234. Martha C. Nussbaum, *The Incomplete Feminism of Musonius Rufus, Platonist, Stoic, and Roman*, in *THE SLEEP OF REASON: EROTIC EXPERIENCE AND SEXUAL ETHICS IN ANCIENT GREECE AND ROME* 283, 305 (Martha C. Nussbaum & Juha Sihvola eds., 2002).

235. *See id.*

236. *Id.* (emphasis in original).

237. Julius Paulus, *Book II*, in S.P. SCOTT, 1 *THE CIVIL LAW* 263, 282 Title XXVI(14) (1932).

238. *Id.*; cf. O.F. Robinson, *Unpardonable Crimes: Fourth Century Attitudes*, in *CRITICAL STUDIES IN ANCIENT LAW, COMPARATIVE LAW AND LEGAL HISTORY* 117, 124 (John W. Cairns & Olivia F. Robinson eds., 2001) (further elucidating the punishments available under the *Lex Julia de adulteriis*).

239. EDWARDS, *supra* note 220, at 62 n.94; *see also* RICHARD A. BAUMAN, *WOMEN AND POLITICS IN ANCIENT ROME* 164 (1992); AMY RICHLIN, *THE GARDEN OF PRIAPUS: SEXUALITY AND AGGRESSION IN ROMAN HUMOR* 217 (1983).

Julia. She was the Emperor's only biological child, and by all accounts, he educated her well and cherished her deeply.²⁴⁰

Julia married three times—the first two marriages ended with the deaths of her husbands;²⁴¹ the third marriage, to the future Emperor Tiberius, terminated in scandal.²⁴² Her romantic liaisons were legendary.²⁴³ But in 2 B.C. she became involved with Iullus Antonius, Marc Antony's son.²⁴⁴ This was a relationship Augustus could no longer pretend not to see.²⁴⁵ He exiled Julia to an island, where her contacts with men could be carefully monitored,²⁴⁶ and Iullus was pressured into committing suicide.²⁴⁷ Thus did Augustus's campaign to deter, if not eradicate adultery, end in deep personal tragedy.

C. Reforming the Law of Wills

Augustus remained legislatively active in the years between 18 B.C. and 9 A.D. Around the time he won approval of the *Lex Julia de adulteriis* in the year 17 or 18 B.C., he also moved legislation through the Senate entitled the *Lex Julia de maritandis ordinibus*,²⁴⁸ the purpose of which was the encouragement of marriage and procreation.²⁴⁹ It was, in the words of Suetonius, "rather more severe"

240. Her education, in keeping with Augustus's commitment to moral reform, was strict and traditional, but clearly must have involved education in literature and the arts. SUSAN E. WOOD, *IMPERIAL WOMEN: A STUDY IN PUBLIC IMAGES*, 40 B.C.–A.D. 68, at 35 (2d ed. 2001); Robert S. Rogers, *Augustus the Man*, 36 *CLASSICAL J.* 449, 458 (1941); see also ELAINE FANTHAM, *JULIA AUGUSTI: THE EMPEROR'S DAUGHTER* 23 (2006).

241. ANDREW LINTOTT, *THE ROMANS IN THE AGE OF AUGUSTUS* 80–81 (2010) (Julia's first marriage, to Marcus Claudius Marcellus); BETH SEVERY, *AUGUSTUS AND THE FAMILY AT THE BIRTH OF THE EMPIRE* 64 (2003) (marriage to Augustus's close confidante Marcus Vipsanius Agrippa and Agrippa's subsequent death).

242. BRUCE W. WINTER, *ROMAN WIVES, ROMAN WIDOWS: THE APPEARANCE OF NEW WOMEN AND THE PAULINE COMMUNITIES* 51 (2003).

243. *Id.* (describing numerous reputed affairs with leading literary figures in Rome).

244. SYME, *supra* note 78, at 427 (the relationship with Marc Antony's son could not be tolerated).

245. Judith P. Hallett, *Women in Augustan Rome*, in *A COMPANION TO WOMEN IN THE ANCIENT WORLD* 372, 384 (Sharon L. James & Sheila Dillon eds., 2012) (on the tendency of the Emperor to overlook Julia's indiscretions).

246. Sarah T. Cohen, *Augustus, Julia and the Development of Exile Ad Insulam*, 58 *CLASSICAL Q.* 206–07 (2008) (Cohen argues that this "is the first time exile to a specific place was used as a punishment in Roman law . . .").

247. K.A. Raaflaub & L.J. Samons II, *Opposition to Augustus*, in *BETWEEN REPUBLIC AND EMPIRE: INTERPRETATIONS OF AUGUSTUS AND HIS PRINCIPATE* 417, 428 (Kurt A. Raaflaub & Mark Toher eds., 1990).

248. Pál Csillag makes a strong case to date this legislation to the year 17 B.C. PÁL CSILLAG, *THE AUGUSTAN LAWS ON FAMILY RELATIONS* 31 (1976).

249. Barbara Natalie Nagel, *The Tyrant As Artist: Legal Fiction and Sexual Violence Under Tiberius*, 25 *LAW & LITERATURE* 286, 301 n.58 (2013); see also Nikolaus Benke, *Women in the Courts: An Old Thorn in Men's Sides*, 3 *MICH. J. GENDER & L.* 195, 205 n.35, 229 n.168 (1995).

(*aliquanto severius*) in the way it intruded in the personal lives of those affected.²⁵⁰

One of its purposes was to preserve the respectability and dignity of the upper classes.²⁵¹ Thus, it legislatively decreed that neither senators, nor their sons or daughters, or even their grandsons and great-grandsons and daughters, might marry actors or actresses,²⁵² or persons who once worked in the prostitution business,²⁵³ or women who had been caught in adultery.²⁵⁴ A surviving fragment indicates as well that unmarried persons were discouraged, if not actually forbidden, from attending the games.²⁵⁵ Another portion of the law sought to affirmatively promote marriage and the birth of children.²⁵⁶ The law insisted that divorced and widowed men and women must remarry.²⁵⁷ It declared that freedwomen could not be compelled to swear an oath to their former master not to marry.²⁵⁸ Where they had sworn an oath, they were to be released from its obligation.²⁵⁹ Childless or unmarried men were forbidden from inheriting and were greatly restricted in whom they might name as heir of their own estates.²⁶⁰

Suetonius recorded that Augustus's efforts to enact the law were met with actual rioting (*prae tumulto*).²⁶¹ A group of *equites*—men of the aristocratic class ranking just below the senatorial²⁶²—staged

250. Suetonius, *The Deified Augustus*, in 1 LIVES OF THE CAESARS 61 (Catharine Edwards trans., Oxford World's Classics ed. 2008).

251. James A. Field, Jr., *The Purpose of the Lex Iulia et Papia Poppaea*, 40 CLASSICAL J. 398, 403 (1945).

252. DIG. 23.2.44 (Paul, Lex Julia et Papia 1).

253. TREGGIARI, *supra* note 182, at 61–63.

254. DIG. 23.2.43.12 (Ulpian, Lex Julia et Papia 1). Interpreting this provision, Ulpian explained that being captured in adultery amounted to judicial condemnation (*quasi publico iudicio damnata est*), and so the capture stood for the “public judgment.”

255. A.E. Cooley, *Beyond Rome and Latium: Roman Religion in the Age of Augustus*, in RELIGION IN REPUBLICAN ITALY 228, 233 (Celia E. Schultz & Paul B. Harvey, Jr. eds., 2006).

256. CSILLAG, *supra* note 248, at 146.

257. Galinsky, *supra* note 128, at 130; *see also* Suetonius, *supra* note 250, at 61–62. Korinna Zamfir indicates that this provision had a deep cultural impact, influencing even portions of the New Testament. KORINNA ZAMFIR, MEN AND WOMEN IN THE HOUSEHOLD OF GOD: A CONTEXTUAL APPROACH TO ROLES AND MINISTRIES IN THE PASTORAL EPISTLES 272–73 (2013).

258. MATTHEW J. PERRY, GENDER, MANUMISSION, AND THE ROMAN FREEDWOMAN 89 (2014).

259. *Id.*

260. GALINSKY, *supra* note 128, at 130.

261. Suetonius, *supra* note 250, at 61–62.

262. To qualify for membership in the class of the *equites* (the equestrian order) at the time of Augustus, one had to have a net worth of at least 400,000 sesterces. A substantial sum, though less than the million-sesterce minimum Augustus set for membership in the senatorial class. PETER GARNSEY & RICHARD SALLER, THE ROMAN EMPIRE: ECONOMY, SOCIETY AND CULTURE 136 (2d ed. 2014).

a public protest at what Suetonius called a *spectaculum*—probably a significant gladiatorial game.²⁶³ In the end, however, Augustus found it necessary to do a tactical retreat. He suspended the operation of the law, he increased the rewards it conferred, and he softened the requirement on remarriage after divorce or the death of a spouse.²⁶⁴

Augustus retreated, but he did not consider himself defeated on this subject. He would eventually return to the topic of forced marriage and child-bearing late in his life,²⁶⁵ but in the meantime, in the year A.D. 5, he caused the Senate to enact a tax on inheritances.²⁶⁶ According to Cassius Dio, Augustus recognized the need to fund pensions for retired military veterans—then, as now, a favored political class.²⁶⁷ Augustus encouraged others to donate to this fund,²⁶⁸ and to set a good example, he made a large bequest himself out of personal funds and pledged that annual donations would follow.²⁶⁹

When it became apparent that funds from voluntary contributions were insufficient, Augustus asked the senators to propose various schemes to raise additional monies on their own.²⁷⁰ And when that failed, he imposed a five percent tax on inheritances.²⁷¹ Exempted were bequests to close relatives and the estates of the extremely poor.²⁷² Dio's Greek was imprecise. He spoke only of "very near relatives" (*ton panu sungenon*) without specifying the degree of relationship and the "very poor" (*ton peneton*) without specifying the extent of poverty.²⁷³

Jane Gardner indicates that the tax was otherwise a general one, imposed regardless of social class, and that papyri and other legal sources indicate that it was enforced and paid in distant corners of the Empire.²⁷⁴ Attempting to discern Augustus's original category

263. See Suetonius, *supra* note 250, at 61–62. Suetonius's Latin is particularly forceful on this point—the *equites* "stubbornly" (*pertinaciter*) demanded action; indeed, they called for the law's repeal (*abolitionem*).

264. Suetonius, *supra* note 250, at 310 n.61.

265. See *infra* notes 306–19 and accompanying text.

266. For the dating, see Jane Gardner, *Nearest and Dearest: Liability to Inheritance Tax in Roman Families*, in *CHILDHOOD, CLASS AND KIN IN THE ROMAN WORLD* 205, 205 (Suzanne Dixon ed., 2001).

267. DIO, *supra* note 189, bk. 55, at 459.

268. *Id.* at 459–61. Initially, Augustus refused donations from private parties, although he did accept contributions from client kings of Rome and from some political communities. See *id.* at 461.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* Dio's Greek does not describe the law's exemptions with sufficient accuracy to determine exactly what degrees of relationship or poverty were covered.

273. DIO, *supra* note 189, bk. 55, at 461.

274. Gardner, *supra* note 266, at 205, 217 n.1.

of exemptions from a description of the law written ninety years later, Gardner also proposes that the familial relations exempted by it included immediate blood kin—parents, grandparents, sons and daughters, siblings, and children who shared the same father but not the same mother.²⁷⁵

This provision, however, was merely a prelude to Augustus's final—and successful—attempt in the year A.D. 9 to enact modifications to the law of estates to coerce men and women of childbearing years into fruitful marriages.²⁷⁶ Why did he revisit this issue after such an obviously painful defeat?

The scholarly consensus is that Augustus must have perceived a critical problem with elite families—they had simply stopped reproducing.²⁷⁷ An anxiety gripped the upper reaches of Roman society. The “privileged classes,” it was feared, were diminishing and in danger of disappearing.²⁷⁸ Manpower had to be rebuilt following the devastating civil wars.²⁷⁹ The eclectic, polymath professor of history and international relations, James A. Field, Jr.,²⁸⁰ reduced the law to its barest, bluntest essentials: “[it] was in fact purely eugenic and demographic in its conception, framed with the object of preserving and perpetuating the back-bone of the Augustan state, the senatorial and the equestrian orders.”²⁸¹

Augustus himself offered a lengthy defense of the need for such legislation in a speech preserved by Cassius Dio: the speech, Dio indicated, was delivered at an assembly of the *equites* gathered in the Roman forum after the occurrence of protests at some gladiatorial games.²⁸² Augustus addressed in turn the fathers in the crowd, those who had sired children; and then turned his attention to those who had not.²⁸³ He praised the fathers. Procreation, he insisted, was the

275. *Id.* at 211–12; cf. Jane F. Gardner, *Death, Taxes and Status in Pliny's Panegyricus*, in *CRITICAL STUDIES IN ANCIENT LAW, COMPARATIVE LAW AND LEGAL HISTORY* 51, 52–54 (John W. Cairns & Olivia F. Robinson eds., 2001) (developing this argument further).

276. Field, *supra* note 251, at 403–04.

277. BARBARA LEVICK, *AUGUSTUS: IMAGE AND SUBSTANCE* 130 (2010) (reviewing this scholarly consensus to conclude that it is “implausible”).

278. See JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* 58 (1988).

279. Judith Evans-Grubbs, *Marrying and Its Documentation in Later Roman Law*, in *TO HAVE AND TO HOLD: MARRYING AND ITS DOCUMENTATION IN WESTERN CHRISTENDOM, 400–1600*, at 43, 48 (Philip L. Reynolds & John Witte, Jr. eds., 2007).

280. Field wrote this article while on active duty with the United States Navy near the close of World War II. For insight into his multifaceted career, see *James Field, Jr.*, 80, *Historian of U.S. Navy*, N.Y. TIMES, June 27, 1996, at B12.

281. See Field, *supra* note 251, at 398–99.

282. DIO, *supra* note 189, bk. 56, at 5–25. There is no indication whether these were the same or different games than the protest recorded by Suetonius, *supra* note 250.

283. DIO, *supra* note 189, bk. 56, at 5.

backbone of Roman greatness.²⁸⁴ It was because of its large families that Rome expanded from a tiny city-state into a vast empire.²⁸⁵ He praised them for their devotion to the ancient gods.²⁸⁶ Even the gods, he proclaimed, are male and female.²⁸⁷ They enjoy sexual intercourse and they have themselves procreated.²⁸⁸ Emulate therefore the gods, was Augustus's message.²⁸⁹ In this way, like the gods, we may make ourselves immortal through the continuing passage of the generations.²⁹⁰ He even assigned a mystical significance to heirs, who succeed to their forebearers' biological endowments, their facial and physical appearance, and their wealth.²⁹¹

Then he turned to the childless in the crowd. They were committing a grave crime, he warned.²⁹² Murder is the destruction of a single human life.²⁹³ But refusal to procreate is the destruction of both state and society.²⁹⁴ It is a betrayal of natural and divine duties, and an attack on the gods and one's ancestors.²⁹⁵ Augustus invoked the heroes of old Rome—what would Romulus say to those who refused to have children?²⁹⁶ These people refrain from fatherhood out of a desire for “freedom;” Augustus denounced the childless contemptuously.²⁹⁷ Those who do not procreate are not exercising true freedom, but are behaving more like pirates or beasts since, like pirates or beasts, they refuse to make plans or to assume responsibility for the future.²⁹⁸

284. *Id.*

285. *Id.* at 5–7.

286. *See id.* (that “first and greatest god” (*ho protos kai megistos ekeinos theos*) who made the human race designed men and women to enjoy intercourse and to procreate).

287. *Id.* at 7.

288. *Id.*

289. DIO, *supra* note 189, bk. 56, at 7.

290. *Id.*

291. *Id.* at 7–9.

292. *Id.* at 13.

293. *Id.*

294. *Id.*

295. DIO, *supra* note 189, bk. 56, at 11–13.

296. *Id.* at 13–15.

297. *Id.* at 17–19.

298. *Id.* Adam Kemezis raises concerns about this speech. Adam M. Kemezis, *Augustus the Ironic Paradigm: Cassius Dio's Portrayal of the Lex Julia and Lex Papia Poppaea*, 61 PHOENIX 270, 275–78 (2007). He describes the speech as a kind of manifesto by Augustus on the purposes of marriage and the kind of speech that would fit as well in the circumstances surrounding the adoption of the *Lex Julia de maritandis* as in the lead-up to Augustus's next piece of legislation. *Id.* at 276–77. Kemezis therefore proposes that Cassius Dio, who was well known for his ambivalence toward Augustus, situated the speech at this point in his narrative history to take advantage of the embarrassing situation Augustus would have found himself in by A.D. 9. *Id.* He had exiled his only biological child, his daughter Julia. *Id.* He had no male heir, and he was forced to resort to the expedient of adopting a stepson from his third wife's first marriage. *Id.* at 277. By

Was Augustus justified in fearing that the health of the Roman state itself was at stake by a failure to reproduce? Had Romans truly ceased having children? The evidence suggests that his concerns were exaggerated, even if they were not entirely without foundation. To be sure, the death toll from nearly a century of civil strife was large. Writing in the 1940s, Pitirim Sorokin estimated that some 300,000 persons were killed in these wars.²⁹⁹ And while a fully reliable number may never be known, it is also the case that the practice of proscription left a deep emotional scar on the psyche of Roman elites.³⁰⁰ The use of proscription amounted to this—the chief protagonists in a given conflict would publish lists of names of leading citizens whom they wished to see killed and death squads would be organized to carry out the gruesome task.³⁰¹ Many thousands died.³⁰² Octavian used proscriptions, as did Marc Antony, as did others going back in time for much of the first century B.C.³⁰³ Perhaps, one might speculate, Augustus's encouragement of elite procreation was owing to his own youthful complicity in these mass murders.

But if the elites had engaged in fratricide, it was also true that the population of Italy was growing steadily, and that included the population of new Roman citizens.³⁰⁴ Various censuses were conducted over the course of the first century B.C., and while they reached widely divergent conclusions, they all showed a general upward trend in population.³⁰⁵ Recent demographic studies have confirmed this

irony and the strategic placement of this speech, Kemezis asserts, Dio hoped to bring embarrassment on the Augustan epoch. *Id.*

299. PITIRIM A. SOROKIN, *MAN AND SOCIETY IN CALAMITY: THE EFFECTS OF WAR, REVOLUTION, FAMINE, AND PESTILENCE UPON THE HUMAN MIND, SOCIAL ORGANIZATION, AND CULTURAL LIFE* 91 (2010) (reprint with some additions to the 1942 edition).

300. Alexandra Eckert, *Remembering Cultural Trauma: Sulla's Proscriptions, Roman Responses, and Christian Perspectives*, in *TRAUMA AND TRAUMATIZATION IN INDIVIDUAL AND COLLECTIVE DIMENSIONS: INSIGHTS FROM BIBLICAL STUDIES AND BEYOND* 262, 262–72 (Eve-Marie Becker, Jan Dochhorn & Else K. Holt eds., 2014) (exploring the long-term psychological and cultural damage caused by the proscriptions). The dictatorship of Sulla, and his massive reliance on proscription in the years 82 and 81 B.C. was the first use of proscriptions at Rome and the subject of this study. *Id.*

301. Proscription was meant to be a legal judgment. A given individual was outlawed, his estate was declared forfeit, and he could be killed on sight. FEDERICO SANTANGELO, *SULLA, THE ELITES AND THE EMPIRE: A STUDY OF ROMAN POLICIES IN ITALY AND THE GREEK EAST* 80–87 (2007). On the Sullan proscriptions, see NEIL FAULKNER, *ROME: EMPIRE OF THE EAGLES* 141 (2008) (use of proscription by Sulla); see also ALSTON, *supra* note 17, at 18 (the mass summary execution of the Catilinarian conspirators in 63 B.C.).

302. For one estimate of the number killed in the Sullan proscriptions, see JEFFREY WALKER, *RHETORIC AND POETICS IN ANTIQUITY* 74 (2000). For estimates of those killed in Octavian's and Antony's proscriptions, see *supra* note 48 and accompanying text.

303. See TEMPEST, *supra* note 43, at 205–06.

304. AXEL KRISTINSSON, *EXPANSIONS: COMPETITION AND CONQUEST IN EUROPE SINCE THE BRONZE AGE* 120 (2010).

305. Elio Lo Cascio, *Recruitment and the Size of the Roman Population from the Third*

conclusion. Even though different methodologies arrive at different sets of numbers, the trajectory is an unmistakable upward arc.³⁰⁶ Average life expectancy, however, even among the elites, was low if only because of staggering rates of infant mortality.³⁰⁷

Still, Augustus got his way, and the Senate enacted his *Lex Poppia Poppaea* in the year A.D. 9.³⁰⁸ Its terms fundamentally altered Roman family and estate law. Men of the upper classes between the ages of twenty-five and sixty were obliged to marry;³⁰⁹ women of like social position between twenty and fifty were similarly obliged.³¹⁰ Those who failed to marry were classified as *caelibes*—“celibates” by law, and were denied the right to inherit.³¹¹ Exceptions were made for inheritances passing among family members, but the sources are in conflict as to how extensively exceptions applied.³¹²

Those who were married but childless suffered a reduced level of legal disability. They were considered *orbi* or *orbati* under the law, and were to be deprived of half of their inheritance.³¹³ Again, exceptions were made for close family members³¹⁴ and it seems, at least initially, exceptions were also made for those who received inheritances through the operation of trusts (*fideicommissa*), although post-Augustan amendments foreclosed this option.³¹⁵ Similarly, Augustus exempted adoptive parents from the law, although again, subsequent amendments closed this door also.³¹⁶

to the First Century BCE, in DEBATING ROMAN DEMOGRAPHY 111, 116–19, 132–34 (Walter Scheidel ed., 2001); see also ALSTON, *supra* note 17, at 312–13.

306. See Walter Scheidel, *Roman Population Size: The Logic of the Debate*, in PEOPLE, LAND, AND POLITICS: DEMOGRAPHIC DEVELOPMENTS AND THE TRANSFORMATION OF ROMAN ITALY 300 BC–AD 14, at 17, 64 (Luuk de Ligt & Simon Northwood eds., 2008) and the sources cited therein.

307. Walter Scheidel, *Emperors, Aristocrats, and the Grim Reaper: Towards a Demographic Profile of the Roman Elite*, 49 CLASSICAL Q. 254, 266–68 (1999).

308. J. S. RICHARDSON, AUGUSTAN ROME 44 BC TO AD 14: THE RESTORATION OF THE REPUBLIC AND ESTABLISHMENT OF THE EMPIRE 119 (2012).

309. CSILLAG, *supra* note 248, at 81.

310. *Id.*

311. *Id.* at 85.

312. Compare Andrew Wallace-Hadrill, *Family and Inheritance in the Augustan Marriage Laws*, in AUGUSTUS 250, 257 (Jonathan Edmondson ed., 2009) (acknowledging the presence of exceptions based on kinship but expressing doubt as to how these exceptions extended), with TREGGIARI, *supra* note 182, at 73 (seeing exceptions extending to sixth degree of blood relationship).

313. TREGGIARI, *supra* note 182, at 72; see also Gaius, *Book II*, in THE INSTITUTES OF GAIUS 263–64 (W.M. Gordon & O.F. Robinson trans., 1988).

314. Wallace-Hadrill, *supra* note 312, at 258–59.

315. Gaius, *supra* note 313, at 263–65.

316. TREGGIARI, *supra* note 182, at 72. By the time one reaches the late second century, at least in a well-organized province like Egypt, the law was used aggressively to collect revenue from significantly sized estates. Richard I. Frank, *Augustus' Legislation on Marriage and Children*, 8 CAL. STUD. CLASSICAL ANTIQUITY 41, 45 (1975) (great attention was given to collecting lapsed inheritances and the aim was to penalize people of means).

The law also offered rewards for childbearing.³¹⁷ The highest reward was the “right of three children,” the *ius trium liberorum*.³¹⁸ This right, which was conferred upon the live birth of three children, exempted the recipient from certain taxes and made him eligible for certain public offices.³¹⁹ It was a right, however, that in certain worthy cases might be made honorary and conferred on worthy recipients who had not had the prerequisite number of children and who, indeed, might even be childless or even unmarried.³²⁰ On the other hand, there is certainly evidence that couples with three children applied for and received benefits under this provision of the Augustan law.³²¹

Was this law successful? The answer to that question depends on how one defines success. The second-century historian Suetonius certainly judged it to be a failure.³²² True, Suetonius conceded, Augustus prevailed upon the Senate and obtained passage of his law, but the fate of the morals legislation was one of subterfuge, disobedience, and desuetude.³²³ Under Augustus’s successor Tiberius (reigned A.D. 14–37), there can be found notorious cases of adultery that went unpunished.³²⁴ Women of distinguished birth surrendered their privileges so as to pursue lives of sexual freedom.³²⁵ There was even the case of a senator who married for a single day, so as to evade the force of the *Lex Papia Poppaea*.³²⁶

And under the Emperor Vespasian (69–81 A.D.), “sexual desire” and *luxuria*—“hedonism,” “extravagance”—generally prevailed.³²⁷ Vespasian acted legislatively against these extravagances, but

317. Jonathan Edmondson, *Roman Family History*, in *THE OXFORD HANDBOOK OF ROMAN EPIGRAPHY* 559, 576 (Christer Bruun & Jonathan Edmondson eds., 2015).

318. See RICHARD P. SALLER, *PERSONAL PATRONAGE UNDER THE EARLY EMPIRE* 54 (1982).

319. Edmondson, *supra* note 317, at 576.

320. The poet Martial was an honorary recipient of this right even before he was married. Pliny the Younger, similarly, received this right even though childless. SALLER, *supra* note 318, at 54; see also Walter Allen, Jr. et al., *Martial: Knight, Publisher, and Poet*, 65 *CLASSICAL J.* 345, 345 (1970).

321. See, e.g., the applications for the *ius trium liberorum* collected in MARTIN DAVID, *THE NEW PAPHYROLOGICAL PRIMER* 243–45 (1990).

322. Rebecca Langlands, *Exemplary Influences and Augustus’ Pernicious Moral Legacy*, in *SUETONIUS THE BIOGRAPHER: STUDIES IN ROMAN LIVES* 111, 112–13 (Tristan Power & Roy K. Gibson eds., 2014).

323. See *id.*

324. Suetonius, *Tiberius*, in *1 LIVES OF THE CAESARS* 115–16 (Catherine Edwards trans., 2008).

325. *Id.* at 116.

326. *Id.*

327. Suetonius, *Vespasian*, in *2 LIVES OF THE CAESARS* 288–89 (Jeffrey Henderson ed. 1997). The noun *luxuria* was a multifaceted one, carrying both positive and negative senses—a cultivated sense of luxury, on the one hand, or a sense of uncontrolled decadence, on the other. See Marianne Bergmann, *Portraits of an Emperor: Nero, the Sun, and Roman Otium*, in *A COMPANION TO THE NERONIAN AGE* 332, 355–57 (Emma Buckley & Martin T. Dinter eds., 2013).

Suetonius implied—even if he did not outright acknowledge—that law-making had very little effect.³²⁸

Modern historians share the pessimistic assessment of the ancient writers. As demographic encouragement, Suzanne Dixon sees the law as having failed: the Roman classes were not any more prolific, even while other groups were increasing in numbers.³²⁹ Robert Jütte dismisses any population gains achieved by the legislation as “small.”³³⁰ John T. Noonan, Jr., sees the impact of the law as “earnest, if mild.”³³¹

Andrew Wallace-Hadrill, on the other hand, sees the legislation as being concerned with regulating the transmission of estates. Taking account of the exceptions Augustus built into the law, he reached two conclusions: first, he expected a certain number of men and women to remain unmarried or childless; second, he wished to encourage these people to transmit their estates within the family rather than pass inheritances to “legal strangers” (*extranei*).³³² Emanuela Zanda largely agrees with Wallace-Hadrill, seeing the legislation as a means of “assur[ing] a stable transmission of property.”³³³

All of this is without a doubt true. But there is yet another level on which to assess the success or failure of the Augustan legislation—and that is the degree to which Augustus was enabled to assert control over the leading families. He did not greatly alter either marriage strategies or estate planning with this law, but he did indicate that families, even powerful ones, indeed, especially powerful ones, were now subordinate to the state.³³⁴ And, given the background of the tumultuous period of strife and civil war that preceded Augustus, this was accomplishment enough.

Tacitus, the second-century Roman historian, understood this well. That “sceptical,” ferocious writer, a defender of tradition and the aristocracy, apprehended that the world Augustus brought into being was both tyrannical and necessary.³³⁵ And he knew that with

328. Langlands, *supra* note 322, at 119 (evaluating Suetonius on Tiberius, Vaspasian, and Augustus’s legacy).

329. DIXON, *supra* note 164, at 120–21.

330. ROBERT JÜTTE, *CONTRACEPTION: A HISTORY* 14 (Vicky Russell trans., 2008).

331. JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS* 21 (1966).

332. See Wallace-Hadrill, *supra* note 312, at 260–61.

333. EMANUELA ZANDA, *FIGHTING HYDRA-LIKE LUXURY: SUMPTUARY REGULATION IN THE ROMAN REPUBLIC* 68 (2011). The evil the legislation combated, according to Zanda, were testamentary hunters—*captatores*—who sought to “prey” on the single and the childless in order to win their estates through flattery and blandishment. *Id.* at 67–68.

334. As Zanda put it, “With Augustus’ legislation, for the first time, the State itself became an active subject in the inheritance process.” *Id.* at 69.

335. RONALD SYME, *1 TACITUS* 408 (1958); cf. ANDREAS A.M. KINNEGING, *ARISTOCRACY*,

the *Lex Poppaea*, the constitutional order itself had been altered.³³⁶ This was where the revolution was completed. No longer were men and women free to decide whether to marry or to have children or to write their own wills.³³⁷ Individuals thereby ceased to be the masters of their own destinies; their private wills were now bent in favor of the public sphere, and the *populus* even assumed control of the intimacies of their private lives.³³⁸

Tacitus did not mean by this abstract noun, *populus*, or, the “people,” in some democratic sense.³³⁹ Rather, he used the word to point to the anonymous tyranny Augustus and his inner circle had established.³⁴⁰ They had put themselves in the position of the “parent of the nation” (*velut parens omnium*).³⁴¹ They assumed they knew what was good for others. And so, Tacitus grimly concluded, the chains of subservience (*vincula*) were made to “really bite” (*acriora*).³⁴²

CONCLUSION

It is time to take stock of Augustus’s entire program of moral reform. Seen on its own terms, it is hard to call Augustus’s campaign a success. Rome was a highly eroticized society, and neither Augustus nor anyone else could recreate the virtue of the imaginary golden age of earliest Rome.³⁴³ Roman ethics would never hold out marriage as the sole and exclusive outlet for sexual expression.³⁴⁴

ANTIQUITY & HISTORY: CLASSICISM IN POLITICAL THOUGHT 130 n.4 (1997) (while favoring republicanism, Tacitus had concluded that it had “become unattainable”).

336. See Tacitus, *Annales*, 3.28. in CORNELII TACITI ANNALIUM (C.D. Fisher ed., 1959).

337. See *id.*

338. See *id.*

339. The standard definition of *populus*, which Tacitus knew well, was “the Roman people as a whole.” ZVI YAVETZ, PLEBS AND PRINCEPS 144 (1988). *Populus*, for Tacitus, was often a term of derision. The *populus* was “vulgar” (*vulgus*), or “profoundly stupid” (*stultissimus*), or “the sordid part” (*sordida pars*). A.B. BREEBAART & FIK MEIJER, CLIO AND ANTIQUITY: HISTORY AND HISTORIOGRAPHY OF THE GREEK AND ROMAN WORLD 57–58, 57 n.12 (1987).

340. See SYME, *supra* note 335, at 411–13.

341. Tacitus, *supra* note 336, at 3.28.

342. *Id.*

343. See, e.g., Thomas A.J. McGinn, *Sex and the City*, in THE CAMBRIDGE COMPANION TO ANCIENT ROME 369, 369 (Paul Erdkamp ed., 2013); cf. CAROLINE VOUT, POWER AND EROTICISM IN IMPERIAL ROME 1–51 (2007) (examining eroticism in elite circles). The extent to which eroticism penetrated common culture can be seen in the art and architecture of Pompeii, buried by the eruption of Mt. Vesuvius in A.D. 79 and only now receiving proper appreciation. On Pompeii generally, see ANTONIO VARONE, EROTICISM IN POMPEII (2001).

344. See EMIEL EYBEN, RESTLESS YOUTH IN ANCIENT ROME 231 (Patrick Daly trans., 1993) (internal footnote omitted) (“In antiquity, sex was generally—but not always—taken completely for granted. Whoever is hungry eats, whoever is thirsty takes a drink, whoever feels his sexual urge rising satisfies it.”).

But if one looks at the law as embracing a different, hidden agenda, then we might well say it succeeded.³⁴⁵ Dieter Nörr has explained the entirety of the Augustan sexual and marital project as a demographic exercise, yes, but one that served larger purposes.³⁴⁶ As with so much else, Augustus meant to disguise a radical shift in social relations by a relentless appeal to the traditions of the past.³⁴⁷

And this observation seems to point the direction for my own conclusion. If the goal was to subject wealthy and powerful elites, who were accustomed to running the Roman state without interference but who had brought about its shipwreck, to a larger state authority, then one can say it succeeded. The Augustan law reforms may have failed on their face to impose a new morality or to stimulate childbirth. However, it achieved a different, but much-desired result: a reallocation of power between elites, on the one hand, and state authority on the other.

Are there any lessons in this story for judging the success or failure of law reform more generally? Only this: look carefully; cast your net widely. Law reform can certainly be about altering destructive behaviors, or incentivizing laudable social goals, or creating financial transparency, or accomplishing all of those other good things that modern society needs so badly. But law reform is also about the reallocation of power, and it might succeed in that ambition even if it fails in all its other objectives. And we should therefore always ask ourselves, “Is this what we really want?”

345. Mason Hammond, the Harvard classicist, has asked whether Augustus was “sincere” and concluded that “[e]ven those who most severely criticize Augustus for political hypocrisy usually accept as sincere his attempt to restore traditional social and moral values.” Mason Hammond, *The Sincerity of Augustus*, 69 HARV. STUD. CLASSICAL PHILOLOGY 139, 145 (1965). Ronald Syme doubted Augustus’s sincerity. *Id.* at 157 n.34 (Hammond collecting Syme’s references to Augustus’s hypocrisy on moral reform). I am agnostic on Augustus’s sincerity, but it is apparent that his moral reform, if not exactly pretextual, certainly aimed at double ends.

346. Dieter Nörr, *The Matrimonial Legislation of Augustus: An Early Instance of Social Engineering*, 16 IRISH JURIST 350, 350–51 (1981).

347. *Id.* at 351 (citing Augustus’s *Res Gestae* to argue that the Emperor viewed his reform legislation as a continuous “dialectic of new and old”).