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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
   B. Reforming the Law on Adultery
   C. Reforming the Law of Wills

CONCLUSION

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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. And so we tax tobacco heavily, or we forbid its use in public places. 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, in some latter-day shunning and shaming ritual that anthropologists would recognize all too well.

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. 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. Or we regulate financial transactions in an effort

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).
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. Corruption is discouraged. 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. 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.


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. 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.

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? 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. Yes, Augustus wanted moral improvement, but after decades of civil war he also sought stability.

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. MATTERN, 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).


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.”).

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

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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 in-
come from it he could maintain an army.\textsuperscript{19}

The Emperor Augustus (63 B.C. to 14 A.D.)\textsuperscript{20} should be seen as the most important figure in the Roman world’s transition from Republic to Empire.\textsuperscript{21} The Republic had developed a delicate constitutional structure that assigned governing responsibilities to the leading families of the realm.\textsuperscript{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.\textsuperscript{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.\textsuperscript{24} Rather, it broke down into a series of civil wars, plots, and acts of vengeance that were brought about largely by men like Crassus\textsuperscript{25}—powerful oligarchs, unconstrained by law or social obligation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{28} Why did he do this? And how successful were these revolutionary reforms? Indeed, how do we measure or judge their success?


\textsuperscript{20} \textit{ALSTON, supra} note 17, at 22, 35.

\textsuperscript{21} \textit{See id. at 36.}

\textsuperscript{22} \textit{Id. at 42–43.}

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

\textsuperscript{24} \textit{See SIMON BAKER, ANCIENT ROME: THE RISE AND FALL OF AN EMPIRE} 154 (2007).

\textsuperscript{25} \textit{See Mark Cartwright, Marcus Licinius Crassus, ANCIENT HISTORY ENCYCLOPEDIA} (Nov. 5, 2013), \url{http://www.ancient.eu/marcus_licinius_cras.png} [http://perma.cc/6Q6P-5Q78].


\textsuperscript{27} \textit{See ALSTON, supra} note 17, at 37.

\textsuperscript{28} One historian has described these legislative efforts as a series of “radical reforms.” Calvin J. Roetzel, \textit{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. 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. Unexpectedly, the murdered leader declared in his will that his young nephew should be his heir. It was one thing to be named an heir, which carried with it only succession to Caesar’s wealth, not his political office, it was another matter altogether to exploit that appointment to win supreme power.

Octavian proved expert at the maneuvering needed to make his way to the top. 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. They were first declared outlaws and murderers by the Senate and then were militarily defeated at the Battle of Philippi.

And then there was Cicero, the grand old man of the Republic. A one-time consul of Rome, a diplomat, an advocate, a political thinker, 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).
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).
certainly helped to inflame the assassins’ passions.\textsuperscript{40} This should have been Cicero’s moment.\textsuperscript{41} And, indeed, Cicero still harbored dreams that republican traditions and aristocratic rule, which Caesar had overthrown and Cicero favored, might be restored.\textsuperscript{42}

Cicero saw as the main obstacle to such a restoration the person of Marc Antony,\textsuperscript{43} and he opposed Antony in a series of courageous but ultimately futile speeches, entitled the Philippics.\textsuperscript{44} For his efforts, the noble old Senator was first sidelined and then murdered in December of 43 B.C.\textsuperscript{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.\textsuperscript{46} Then, as now, severed heads conveyed powerful messages.\textsuperscript{47}


\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{43} See KATHrEN TEMPEST, CICERO: POLITICS AND PERSuASION IN ANCIENT ROME 193 (2011) (“Antony was his personal and political enemy . . . .”).

\textsuperscript{44} Cicero entitled the speeches the Philippi\textsc{c}es 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 PHILIPPI\textsc{c}ES 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).

\textsuperscript{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).


\textsuperscript{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 115th 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. The Triumvirate gave Antony and Octavian the breathing space to move against any threat to their rule, real or perceived, and move they did. Over a period of just a few years, they slaughtered approximately 3,000 members of aristocratic families. Organized, elite opposition was thereby rendered futile.

The Triumvirate was temporary; it was intended to be. 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. Since the two sides knew in advance the expiration date of their arrangement, each sought decisive advantage. Octavian remained in Rome and curried favor. He distributed land to army veterans, even if that meant displacing some small Roman farmers. He waged war and vanquished some local military threats and seemed like a man who could deliver peace, security, and stability.


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).
54. See ADCOCK, supra note 52, at 69.
55. See MOUSOURAKIS, supra note 53, at 48.
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, and served as Rome’s “bread-basket.” 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.

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. 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. At the time, it must have seemed like a good opportunity to cement relations with his quondam partner turned competitor. But now the infatuated Antony regretted having gone through with the marriage to Octavia. Octavian’s wrath was kindled when Antony abandoned Octavia in favor of Cleopatra.

This was the advantage Octavian needed. He opened up a propaganda barrage against Antony, who was portrayed as exotic, eastern, and a non-Roman. Antony was the sybarite; the faithless pursuer of reckless pleasure. “Hearty, boisterous, physically powerful and attractive,” Antony lent himself to easy caricature. 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.
64. See Capponi, supra note 60, at 181.
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 MEMOIRES AM. ACAD. ROME 7, 7–49 (1953).
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 494–95 (1978). By the terms of the supposed will, Antony’s Italian property was to pass into Egyptian hands and Caesarion, Cleopatra’s son by Julius Caesar, was recognized
at the same time Octavian savaged Antony’s reputation, he built up his own.\textsuperscript{73} Thus Octavian became the defender of Roman purity and the ancestral Roman virtues.\textsuperscript{74} While Antony was “weak, immoral, [and] servile,” Octavian in contrast stood for “traditional, male, Roman values . . . .”\textsuperscript{75} In monuments and in poetry, he was even depicted as the energetic young god Apollo.\textsuperscript{76}

Like few others before him, Octavian appreciated the value of manipulating public opinion.\textsuperscript{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.\textsuperscript{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.\textsuperscript{79} So, too, the poet Horace enlisted in Octavian’s cause.\textsuperscript{80} Octavian’s purpose was to enlist the arts in the service of his larger ambitions.\textsuperscript{81} War was inevitable and Octavian’s victory was swift.\textsuperscript{82} Again, it was a misstep by Antony that triggered hostilities. No longer unable to maintain his dual relationship with Octavia and Cleopatra, Antony chose the politically

\textsuperscript{73} Scott, supra note 69, at 45. \textsuperscript{74} See Johnson, supra note 72, at 494–95. \textsuperscript{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).

\textsuperscript{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.

\textsuperscript{77} Id. at 28.

\textsuperscript{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).


\textsuperscript{81} See Freyburger-Galland, supra note 76, at 28–29.

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

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

Joy prevailed at Rome. The poet Horace wrote a commemorative ode to victory—"Nunc est bibendum"—”Now let the drinking begin!” In sexually charged verses, he described Cleopatra’s military force as a troop of insane men, morally foul, drunk on eastern wine. 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). 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.

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).
86. François Chamoux, 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).
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, 99 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. Judging the situation hopeless, Antony committed suicide. Cleopatra did not immediately follow her lover’s course. She negotiated with Octavian, hoping that he might spare the life of her children. 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. She chose what Horace described as the better, more regal option, taking her own life.

Octavian was now the undisputed master of the Roman Empire. 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. Octavian had now served numerous terms as consul. 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.

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

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


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).


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. But it was all a pretense. 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.” He would retain military and consular authority. 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. He also ceased to be called Octavian—henceforth he was to be known as “Augustus,” the “grand” or the “mighty.” The next 300 years of Roman history—from 27 B.C. to 284 A.D.—would come to be known politically as the “principate,” in recognition of this constitutional arrangement.

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. 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. “[R]epair the crumbling temples and shrines of the gods;” their images and statues have become besmirched. And it wasn’t only the infrastructure that needed repair. Marriage, Horace continued, had fallen into disrepute. Girls in puberty...
take dancing lessons, they study acting, they fornicate, and, after marriage, they “look[] for younger lovers . . . .” Their husbands might even connive with them in their wicked indulgence. Horace composed these verses with force and power—his “language . . . laconic, monumental”—he aimed to state a poetic case for moral reform through aggressive legislation.

“Did Horace believe all this?” the classical historian L.P. Wilkinson asked. It is a fair question, since Horace had shifted allegiances effortlessly—a Republican who fought for Cassius and Brutus, an Epicurean poet skeptical of the gods and partial to modest earthly pleasures, and now this, a campaigner for the rejuvenation of ancient religion and morality. 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. There were still consuls, praetors, tribunes, and a host of other offices that carried over from the old Republic. There was still, too, the Senate, and while that body retained some important duties, it was clearly subordinated to Augustus’s will.

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. 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].”

116. *Id.* at 163.
117. *Id.* at 164–65.
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.\textsuperscript{129}

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

\textsuperscript{129} For one interpretation of the way Augustus struck this balance, see Chester G. Starr, \textit{How Did Augustus Stop the Roman Revolution?}, 52 \textit{Classical J.} 107, 107–12 (1956).

\textsuperscript{130} There was, for instance, the cult of the “Great Mother,” already deeply entrenched at Rome. \textit{The Ancient Mysteries: A Sourcebook} 113–15 (Marvin W. Meyer ed., 1987).

\textsuperscript{131} The worship of Isis was also spreading in Italy at this time. Sharon Kelly Heyob, \textit{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, \textit{The Ancient Synagogue: The First Thousand Years} 105–06 (2d ed. 2005).

\textsuperscript{132} See Heyob, supra note 130, at 128.


\textsuperscript{134} The text I am using is \textit{Caesaris Augusti Res Gestae et Fragmenta} (Herbert W. Benario ed., 2d ed. 1990) [hereinafter \textit{Res Gestae}].

\textsuperscript{135} The scholarly consensus is that the \textit{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 \textit{Res Gestae} that he completed the project in the last year of his life. On the composition of the \textit{Res Gestae}, see Alison E. Cooley, \textit{Res Gestae Divi Augusti: Text, Translation, and Commentary} 42–43 (2009) (who cautiously favors the idea that the \textit{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, \textit{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, \textit{The Date of Augustus’ Res Gestae}, in 18 \textit{Chiron} 71–82 (1988).


\textsuperscript{136} Thus, one historian has summarized the purpose of the \textit{Res Gestae}: “He wanted to present himself as a \textit{salubris princeps}, who, like a good physician, took into his hands a disease-ridden body and succeeded in healing it.” Zvi Yavetz, \textit{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 temples and built lavish new ones. He constructed the temple of Mars the Avenger (Mars Ultor) “with his own hands” (ex manibiis feci). The god Apollo came in for special attention as a symbol of the new regime. He took an active interest in his duties as pontifex maximus and he strengthened the cult of the Vestal Virgins. The historian Livy, like Horace, another member of Augustus’s stable of literary talent, focused his tales of Roman greatness on the auspicious intervention of the gods. And the continued public worship of the traditional gods, Livy made clear, was the key to Roman peace and prosperity.

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. There were “calculated omissions” in the Res Gestae, and this certainly appeared to
be a glaring one. Augustus did not wish to remind posterity of that failed social experiment. Perhaps he did not even want to remember it himself.

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.

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. And so, one might examine the behavior of that paradigm and model of a Roman paterfamilias, Cato the Elder.

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

But he was also a man of letters, and in his work on agriculture 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. His work was not only practical but expressly ideological—his audience was the investing class, including senators, equites.
and the like—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.

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. 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.

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. 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.

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.

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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 Salonius, 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).
166. Historians have made this point expressly. See MELISSA M. MATTHEES, 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. The story is set in the semi-mythical last days of the Roman monarchy around the year 510 B.C. 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. 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. While other women caroused or flirted with young men, Lucretia remained quietly at home, working her spindle and knitting her wool. She was the very picture of contented domesticity.

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

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

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 HARY. STUD. CLASSICAL PHILOLOGY 27, 42–43 (1959).

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


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).
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

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184. Id. at 385.


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

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. Senators had been prompting him to act for some time. Indeed, some took the risky step of chiding Augustus about his own adventuresome youth and checkered marital history, speculating that this might be the reason for his continued hesitancy. They also reminded him that young people had lost respect for the old morality and were “disorderly.” 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 WINTER, 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.”).


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

190. *Id.* at 322–23.

191. 189. 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 *abosmia*, that is, something lacking *bosmos*, 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. 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.

The husband, by “husbandly right” (iure mariti) was empowered to prosecute his wife when he detected adultery. This was, furthermore, both a right and a duty, since the husband simultaneously was under an obligation to bring the case, and to do so speedily—within sixty days of discovering the crime. Where the husband failed to act, the right of prosecution fell to the wife’s father, provided the father remained alive. If both husband and father brought the prosecution, the son’s complaint should be given preference. 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.

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 CLASSEQU 267, 271 (1991); cf. ADOLF BERGER, 43 ENCyclopedic DICTIONARY 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, Disputationum 8).

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(I) (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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{204} In Latin, the offense of colluding in adultery, implicitly or explicitly, was known as lenocinium.\textsuperscript{205} Lenocinium was seen as an offense not only against the state, but against the gods, the family, and right order.\textsuperscript{206} It was also a charge that was almost never brought in practice.\textsuperscript{207} Indeed, classical literature contains examples, some humorous, some not, of men who “offered [their wives as] favours for material or political gain . . . .”\textsuperscript{208} Concubinage, furthermore, flourished even in spite of the law.\textsuperscript{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.\textsuperscript{210} The law seemed, however, to contemplate that usually the father would not exercise this right.\textsuperscript{211}

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

\begin{itemize}
\item \textsuperscript{202} Dig. 48.5.5 (Julianus, Digest 86).
\item \textsuperscript{203} Julius Paulus, \textit{Book II, in S. P. Scott, 1 The Civil Law} 263, 281 Title XXVI(3) (1932).
\item \textsuperscript{204} See Dig. 48.5.2.2–3 (Ulpian, Disputationum 8).
\item \textsuperscript{205} Dig. 48.5.2.2 (Ulpian, Disputationum 8).
\item \textsuperscript{206} See \textit{Jane F. Gardner, Family and Familia in Roman Law and Life} 123 (1998).
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Valerie A. Tracy, \textit{The Leno-Maritus, 72 Classical J.} 62, 62 (1976).
\item \textsuperscript{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).
\item \textsuperscript{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 (\textit{ceterum mariti calor et impetus}). Id. The father, on the other hand, could be counted on to act with paternal devotion (\textit{pietas paterni}). Id.
\item \textsuperscript{212} Julius Paulus, \textit{Book II, in S. P. Scott, 1 The Civil Law} 263, 281 Title XXVI(4) (1932).
\end{itemize}
as well as actors, pimps, a freedman, or those convicted of a serious crime.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{215} The husband was considered sufficiently responsible to prosecute a claim in court, and so he was entrusted with this primary power.\textsuperscript{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.\textsuperscript{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 \textit{paterfamilias}—the heads-of-households.\textsuperscript{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.\textsuperscript{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

\begin{flushleft}
\textsuperscript{213} \textit{Id.}
\textsuperscript{215} Dic. 48.5.23(22).4 (Papinian, De Adulteriis 1).
\textsuperscript{216} Cantarella, \textit{supra} note 214, at 231.
\textsuperscript{217} \textit{Id.} at 233.
\textsuperscript{218} \textit{See id.}
\textsuperscript{219} Watson, \textit{supra} note 186, at 103.
\end{flushleft}
were invariably divorced, not put to death.\footnote{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).} The men also were not executed, but were merely publicly humiliated.\footnote{See Edwards, supra note 220, at 47.} This was a right, in other words, the exercise of which was fading, assuming it had ever been vigorously prosecuted.\footnote{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).}

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.\footnote{Mary Alana Deminion, Staging Morality: Studies in the Lex Iulia de Adulteriis of 18 BCE 37 (2007) (unpublished M.A. thesis, Victoria University).} The year was 12 B.C.\footnote{Id. at 37–38.} The defendant is unnamed but was clearly politically connected since Maecenas, the Emperor’s close advisor, was acting on the accused’s behalf.\footnote{Dio, 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 “[i]t 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).} 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.\footnote{Id.; cf. Deminion, supra note 223, at 37–39 (reviewing this case).} Augustus then entered the courtroom, instructed the prosecuting husband to stop the insults, and then judged the case leniently.\footnote{Id., supra note 228, at 362–63.}

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.\footnote{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.} 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.\footnote{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 “[i]t 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).} Steven Rutledge reviewed an exchange of letters between the Emperor
Trajan and his provincial governor, Pliny the Younger. A military tribune had caught his wife in adultery but did not want to prosecute her because he still loved her. 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. 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.”

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. No mother could vindicate a daughter’s disgrace. “A married man who visits a prostitute, or who has sex with a woman of slave status, is not called adulterer and is not considered to be committing any offense.” 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; a woman lost half of her dowry, a third of her estate, and might also be exiled to a different island. 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.

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

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).
235. See id.
236. Id. (emphasis in original).
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.\textsuperscript{240}

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

\section*{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 \textit{Lex Julia de adulteriis} in the year 17 or 18 B.C., he also moved legislation through the Senate entitled the \textit{Lex Julia de maritandis ordinibus},\textsuperscript{248} the purpose of which was the encouragement of marriage and procreation.\textsuperscript{249} It was, in the words of Suetonius, “rather more severe”...
(aliquanto severius) in the way it intruded in the personal lives of those affected.\textsuperscript{250}

One of its purposes was to preserve the respectability and dignity of the upper classes.\textsuperscript{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,\textsuperscript{252} or persons who once worked in the prostitution business,\textsuperscript{253} or women who had been caught in adultery.\textsuperscript{254} A surviving fragment indicates as well that unmarried persons were discouraged, if not actually forbidden, from attending the games.\textsuperscript{255} Another portion of the law sought to affirmatively promote marriage and the birth of children.\textsuperscript{256} The law insisted that divorced and widowed men and women must remarry.\textsuperscript{257} It declared that freedwomen could not be compelled to swear an oath to their former master not to marry.\textsuperscript{258} Where they had sworn an oath, they were to be released from its obligation.\textsuperscript{259} Childless or unmarried men were forbidden from inheriting and were greatly restricted in whom they might name as heir of their own estates.\textsuperscript{260}

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

\textsuperscript{251} James A. Field, Jr., The Purpose of the Lex Iulia et Papia Poppaea, 40 CLASSICAL J. 298, 403 (1945).
\textsuperscript{252} DIQ. 23.2.44 (Paul, Lex Julia et Papia 1).
\textsuperscript{253} Trengari, supra note 182, at 61–65.
\textsuperscript{254} DIQ. 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.”
\textsuperscript{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).
\textsuperscript{256} Cislag, supra note 248, at 146.
\textsuperscript{258} Matthew J. Perry, GENDER, MANUMISSION, AND THE ROMAN FREEDWOMAN 89 (2014).
\textsuperscript{259} Id.
\textsuperscript{260} Galinsky, supra note 128, at 130.
\textsuperscript{261} Suetonius, supra note 250, at 61–62.
\textsuperscript{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-see grade 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*).


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


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.


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: “[i]t 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”).


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

Then he turned to the childless in the crowd. They were committing a grave crime, he warned. Murder is the destruction of a single human life. But refusal to procreate is the destruction of both state and society. It is a betrayal of natural and divine duties, and an attack on the gods and one’s ancestors. Augustus invoked the heroes of old Rome—what would Romulus say to those who refused to have children? These people refrain from fatherhood out of a desire for “freedom;” Augustus denounced the childless contemptuously. 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.
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. 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. 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. Many thousands died. Octavian used proscriptions, as did Marc Antony, as did others going back in time for much of the first century B.C. 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. 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. Recent demographic studies have confirmed this
conclusion. Even though different methodologies arrive at different sets of numbers, the trajectory is an unmistakable upward arc.\textsuperscript{306} Average life expectancy, however, even among the elites, was low if only because of staggering rates of infant mortality.\textsuperscript{307}

Still, Augustus got his way, and the Senate enacted his \textit{Lex Poppia Poppaea} in the year A.D. 9.\textsuperscript{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;\textsuperscript{309} women of like social position between twenty and fifty were similarly obliged.\textsuperscript{310} Those who failed to marry were classified as \textit{caelibes}—“celibates” by law, and were denied the right to inherit.\textsuperscript{311} Exceptions were made for inheritances passing among family members, but the sources are in conflict as to how extensively exceptions applied.\textsuperscript{312}

Those who were married but childless suffered a reduced level of legal disability. They were considered \textit{orbi} or \textit{orbati} under the law, and were to be deprived of half of their inheritance.\textsuperscript{313} Again, exceptions were made for close family members\textsuperscript{314} and it seems, at least initially, exceptions were also made for those who received inheritances through the operation of trusts (\textit{fideicommissa}), although post-Augustan amendments foreclosed this option.\textsuperscript{315} Similarly, Augustus exempted adoptive parents from the law, although again, subsequent amendments closed this door also.\textsuperscript{316}


309. Chilling, \textit{supra} note 248, at 81.

310. Id.

311. Id. at 85.

312. \textit{Compare} Andrew Wallace-Hadrill, \textit{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), \textit{with Trexggiari, supra} note 182, at 73 (seeing exceptions extending to sixth degree of blood relationship).


316. Trexggiari, \textit{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, \textit{Augustus’ Legislation on Marriage and Children}, 8 \textit{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. The highest reward was the “right of three children,” the *ius trium liberorum*. 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. It was a right, however, that in certain worthy cases might be made honorary and conferred on worthy recipients who had not had the requisite number of children and who, indeed, might even be childless or even unmarried. 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.

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. 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. Under Augustus’s successor Tiberius (reigned A.D. 14–37), there can be found notorious cases of adultery that went unpunished. Women of distinguished birth surrendered their privileges so as to pursue lives of sexual freedom. 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*.

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

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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).
323. See *id*.
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.\textsuperscript{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.\textsuperscript{329} Robert Jütte dismisses any population gains achieved by the legislation as "small."\textsuperscript{330} John T. Noonan, Jr., sees the impact of the law as "earnest, if mild."\textsuperscript{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).\textsuperscript{332} Emanuela Zanda largely agrees with Wallace-Hadrill, seeing the legislation as a means of "assur[ing] a stable transmission of property."\textsuperscript{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.\textsuperscript{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.\textsuperscript{335} And he knew that with

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\item\textsuperscript{328} Langlands, \textit{supra} note 322, at 119 (evaluating Suetonius on Tiberius, Vespasian, and Augustus’s legacy).
\item\textsuperscript{329} Dixon, \textit{supra} note 164, at 120–21.
\item John T. Noonan, Jr., \textit{Contraception: A History of Its Treatment by the Catholic Theologians and Canonists} 21 (1966).
\item\textsuperscript{332} See Wallace-Hadrill, \textit{supra} note 312, at 260–61.
\item\textsuperscript{333} Emanuela Zanda, \textit{Fighting Hydra-Like Luxury: Sumptuary Regulation in the Roman Republic} 68 (2011). The evil the legislation combated, according to Zanda, were testamentary hunters—captive—who sought to "prey" on the single and the childless in order to win their estates through flattery and blandishment. \textit{Id.} at 67–68.
\item\textsuperscript{334} As Zanda put it, "With Augustus' legislation, for the first time, the State itself became an active subject in the inheritance process." \textit{Id.} at 69.
\item\textsuperscript{335} Ronald Syme, \textit{I Tacitus} 408 (1958); cf. Andreas A.M. Kinneging, \textit{Aristocracy},
the Lex Poppaea, the constitutional order itself had been altered.\textsuperscript{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.\textsuperscript{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.\textsuperscript{338}

Tacitus did not mean by this abstract noun, populus, or, the “people,” in some democratic sense.\textsuperscript{339} Rather, he used the word to point to the anonymous tyranny Augustus and his inner circle had established.\textsuperscript{340} They had put themselves in the position of the “parent of the nation” (velut pares omnium).\textsuperscript{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).\textsuperscript{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.\textsuperscript{343} Roman ethics would never hold out marriage as the sole and exclusive outlet for sexual expression.\textsuperscript{344}

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\textsuperscript{337} See id.
\textsuperscript{338} See id.
\textsuperscript{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).
\textsuperscript{340} See SYME, supra note 335, at 411–13.
\textsuperscript{341} Tacitus, supra note 336, at 3.28.
\textsuperscript{342} Id.
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\textsuperscript{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).
\textsuperscript{344} See EMIIL 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.”).
\end{flushleft}
But if one looks at the law as embracing a different, hidden agenda, then we might well say it succeeded. Dieter Nörr has explained the entirety of the Augustan sexual and marital project as a demographic exercise, yes, but one that served larger purposes. 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.

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.


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”).