

legal imposition of the death penalty. The "re-introduction" of the death sentence against Caepio and Murena (p.206 above) had taken the form of a sentence of interdiction, but actual execution, and the same doctrine of "quick pursuit" may have been invoked against Antonius. It is suggested that this doctrine was limited to *maiestas*, so that if this was the manner of Antonius' death it is evidence of the nature of the charge against him. A similar conclusion is reached if Velleius' version of suicide (2.100.4) is accepted. The introduction of an allegation of *maiestas* would have reminded Antonius of the fate of Caepio and Murena. Faced with the prospect of a sentence of interdiction followed by an ignominious death, he chose suicide.¹ There is another piece of evidence to suggest that the charge was *maiestas*. L. Antonius, the son of Iullus Antonius, was exiled by Augustus after his father's death, and while still an "adulescentulus" who had not yet completed his studies (Tac. Ann. 4.44.5). He is nowhere mentioned as a paramour, and seems to have been too young to have got into political trouble on his own account. His crime may well have been that of mourning his father, in breach of the rule which prohibited mourning for those convicted of *maiestas*.²

It may be objected that if Gracchus and the rest were also charged with *maiestas* they should also have been pursued and executed, or driven to suicide in anticipation, instead of being allowed to go quietly into exile. The answer seems to be that there was an aspect of Antonius' conduct which aggravated his offence, and either prompted Augustus to pursue and execute him, or left him in no doubt that this would follow

1 It should not be assumed that his motive was to avoid confiscation of his property. Chilton's view (79-81) that this motive actuated suicides in *maiestas* cases does not outweigh the counter-arguments of Ciaceri (267-9); Rogers (Tijds 183-4); and Volterra (486.)

2 Dig. (3.2.11.3); cf. Tacitus (Ann. 5.10.1): "necatque est anus Vitia, Fufii Gemini mater, quod filii necem flevisset".

his condemnation. In order to take this question further it is necessary to consider the precise nature of the crime of Julia and her paramours, and to determine the relationship between the crime of "laesae religiones ac violatae maiestas" (Tac. Ann. 3.24.3) and the "crimen maiestatis populi Romani imminutae".

B. "GRAVI NOMINE LAESARUM RELIGIONUM AC VIOLATAE MAIESTATIS APPELLANDO"

The conspiracies against Augustus which have been discussed (pp. 189-215 above) do not require the assumption of a *maiestas* shift from the Roman People to Augustus in order to put them in their proper legal perspective. Whether as triumvir or as princeps, Augustus himself at all times fell under the category "quis magistratus populi Romani quive imperium potestatemve habet" (Dig. 48.4.1.1), so that all plots against him, at least until 2 B.C., are within the framework of acts which diminished 'maiestas populi Romani'. That no extraordinary principle had to be invoked for these attacks is shown by the fact that the plots attending the 'lectio senatus' in 18 B.C. were punished as having been directed against both Augustus and Agrippa (Dio 54.15.1,4), so that this is clearly a case where they were injured in a magisterial capacity. The punishment of adultery with Julia as *maiestas* cannot, however, be justified on any of the principles which have so far been considered. It may at a pinch be argued that any disgraceful conduct by a magistrate or senator could, without offending against Republican usage, be prosecuted as *maiestas* (cf. pp. 99-101 above), but this rule would not have applied to at least one of the friends of Julia, namely a certain Demosthenes (p. 216 above). Adultery could in general terms be regarded as an 'iniuria' to the woman's father (Mommsen, *Straf* 695, 798-9), but it was precisely for this reason that he shared a preferential right of prosecution with the husband (Mommsen, *Straf*

697; Hartmann, RE 1.433). To call *schultery maiestas* meant that an *'iniuria'* to Augustus, as a father, and not as the holder of imperium and potestas, was converted into a crime against the State. Caesar's *'ego et populus Romanus'* at the very least admitted the State as a junior partner, but how did the *populus Romanus* fit into *"ego et domus mea"*?

Pollack, correctly pointing out that the *populus Romanus*, meaning the State, was a juristic person,¹ says of Augustus (128): "Denn steht eine Person im Vordergrund des politischen und staatlichen Lebens, eine Person, die den Staat verkörpert, repräsentiert ..." (cf. Syme 519; De Francisci 73). Arangio-Ruiz (137) maintains that if *'in iussu principis'* in Digest (48.4.3; cf. pp.290-8 below) can be referred to Augustus, it would mean that he was a corporation sole² - which amounts to saying that a technical *maiestas* shift to Augustus would have meant the replacement of one juristic person (the *populus Romanus*) by another (the princeps). Evidence of such a transformation should first be sought in the constitutional position of Augustus, and a brief estimate will be attempted of the extent to which certain of his constitutional powers furnish evidence of a *maiestas* shift.

Whether the (probably) proconsular imperium³ on which Augustus based his provincial administration was effective over the governors of senatorial provinces in terms of the original

1 Pollack 127; cf. Mommsen (Staat 3.1.3-4); Greenidge (Public Life 34); Buckland 35; Siber (Verfassung 10.).

2 Contra Buckland (35): "There is nothing corporate about the Emperor - he is a man".

3 Mommsen (Staat 2.2.840, 845, and passim); Greenidge (Public Life 340); Frensdorff (226-32); Syme (313.1, 336 and n.2); Wickert (RE 22.2.2270-2). A consular imperium is assumed by Felham (69) and Grant (426, 437 and n.1). Salmon (464-8) believes in two contemporaneous imperia, a consular in Rome and Italy, and a proconsular in the provinces. As to whether any adjective at all should be attached to *'imperium'*, see Béranger 73.

settlement of 27 B.C.,¹ or whether the 'maius imperium' should be assigned to the settlement of 23 B.C.,² this power does not seem to furnish evidence of a maiestas shift. Mommsen (Staat 2.2.849 and n.3) holds that as Augustus had the exclusive right to levy troops (Dio 53.17.5), the sole criterion as to whether a governor was liable for maiestas was whether he had acted "iussu principis". Mommsen relies on Dio (53.1.5,6) for this proposition, but the evidence of Dio on this question can more conveniently be considered when the lex Julia maiestatis of Augustus is discussed (pp.365 ff below). At this stage it is sufficient to point out that Dio is against Mommsen, for he says that either the Senate or the princeps could authorize levies. It should also be pointed out that 'maius imperium' was not exclusive to Augustus, for it was also conferred on Agrippa in 18 B.C. (Syme 337, 389) and on Tiberius (Syme 431, 433). A corporation sole would not have derived its charter from a power which more than one could hold.

In Res Gestae (34) Augustus records his pre-eminence in 'auctoritas', but equality in 'potestas', with his magisterial colleagues. As 'potestas' was one of the attributes which enjoyed the protection of the maiestas law (Dig. 48.4.1.1), Augustus in effect attests that in his official capacity he received no special recognition from the lex maiestatis. The question is whether his pre-eminent auctoritas has any bearing on a maiestas shift.³ 'Auctoritas' expressed the Senate's function of sanctioning the People's acts and acting

1 Mommsen (Staat 2.2. 845.2; 847-8; 854-5; 859-61); cf. Fraenkelstein 226, 231.

2 Pelham 72; Syme 313.1; Wickert (RE 22.2.2271-5); Salmon (467, 469-70); Sattler 69.

3 De Francisci (72-3) believes that there is a vital connection: "Auctoritas rappresenta cioè un' idea che si accosta a quella di sovranità; idea che, data la contrapposizione a potestas, se non secondo la lettera ma secondo il contenuto, corrisponde al doppio concetto dell' imperium maiestatique populi Romani. Essa designa la posizione giuridicamente preminente dell' uomo, nella cui persona è conaturato il potere pubblico, in modo completamente diverso da quello con cui esso viene attribuito ai magistrati della Repubblica".

ex auctoritate eius responderent" (Dig. 1.2.2.49).¹

Mommsen (Staat 3.2.1033 and n.1) holds that in the Republic there was no identification of 'senatus auctoritas' with the maiestas of the People and its magistrates, although he believes that in the Principate the Senate possessed maiestas. It is clear that the latter view is not correct, if only because the Senate was not a corporate body. When Promerstein (188) says that the grant of 'potestas' to Augustus was not in the gift of the Senate, but remained vested in the sovereign People, which continued to exercise its power directly by legislation and indirectly by delegation, he in fact means that the Senate did not have maiestas, which remained with the *populus Romanus*. The transitive verb 'augere' does not have the same force as the intransitive 'maior esse'. Auctoritas is the active element, the factor which initiates an increase; maiestas is the relationship resulting from the activity of auctoritas. In 'maiestatem auxi' the auctor augments maiestas, and the result of his action is the passive concept 'maiestas aucta'. In like manner maiestas is the subject of activity when it is diminished, resulting in the passive concept 'maiestas minuta'. The auctoritas of Augustus is evidence not of a maiestas shift, but of his pre-eminent favourable position for the initiation of measures designed to augment maiestas.

It is presumably because it is not possible to show a technical transference of maiestas from the Roman People to Augustus that some authorities have postulated a different

1 Sattler (50.126) believes that Augustus exercised his auctoritas only in the field of private law, but the better view is that of Salmon (461) who, pointing out that 'auctoritas' is derived from the same root as 'augere' (cf. Mommsen, Staat 3.2.1034.1; Ferrabine 53), sees its significance in the privilege which it gave Augustus of being the initiator or 'auctor' of a policy. The expressions 'me auctores' and 'Caesaris auctoritate' do not mean that his auctoritas was the legal basis of the act (cf. Wheler, RE 22.2.2289; contra Grant 446), but that it derived from his initiative, that he was responsible for the original motion.

concept of *maiestas* for the princeps and his house. Pollack (135-6; cf. 127-8, 140) puts it as follows:

Der *populus Romanus* vindizierte sich Majestät als Souverän gegenüber den auswärtigen Staaten und den Gliedern der eigenen Gemeinde; der 'magistratus *populi Romani*' aber als der sichtbare Vertreter, also Organ des souveränen Gemeindekorpers. Dem Prinzipes eignet Majestät, nicht weil er Souverän, nicht weil er Organ ist, sondern weil er erster einer in sich gleichen Gemeinschaft ist und diese seine Qualität als 'primus inter pares' durch den ihm zugebilligten Majestätsschutz gewährleistet wird ... Die 'majestas' ist nicht mehr das Attribut einer öffentlich-rechtlichen Funktion, sondern das Insignium für das persönliche Ansehen des ersten Bürgers.¹

This characterisation is partly correct, in that it postulates a form of *maiestas* which is 'sui generis', but it goes too far in discarding the concept of '*maiestas populi Romani*' entirely in relation to Augustus. The better approach may be to assume the co-existence of two *maiestas* concepts. The concept of '*maiestas populi Romani*' still obtained, insofar as Augustus' official capacity² was concerned, for any act against him which mediatedly diminished the People's *maiestas* continued to be punished under the '*crimen maiestatis populi Romani immutae*'. It is believed that a second concept developed concurrently with '*maiestas populi Romani*', but independently of it, and it was for the protection of this new concept that a new crime came to be punished, the crime which Tacitus (Ann. 3.24.3) refers to as '*laesae religionis ac violata maiestas*'. The suggestion is that, at least for the Augustan period, it is not technically correct to describe this new offence as the '*crimen maiestatis populi Romani immutae*'. It was not connected with '*maiestas populi*'

1 Premerstein (13) stresses the personal position of the princeps, "bei dem nicht, wie in der Republik, die Person für das Amt, sondern umgekehrt das Amt für die Person da ist". Cf. Wickert (ib. 22.2.2098): "Träger der *maiestas* aber, in dem sie Gestalt gewonnen hat, ist nun der Princeps"; Levi (Augusto 159): "L'uomo che per la sua sacrosanctitas riassunse in sé la *maiestas* del popolo".

2 Pollack (135-6) is wrong to describe the Princeps as a *magistratus*. See Pelham (79.1). But Augustus held either a regular magistracy or *imperium* and/or *tribunicia potestas* continuously from 27 B.C. to 14 A.D., and therefore fell under Digest (48.4.1.1), on one or the other ground, throughout his Principate.

Romani', and did not derive its existence from the *leges maiestatis*.¹ At the same time, however, it did not derive from a mere arbitrary exercise of power, but from a series of valid principles.

The nature of the "new" *maiestas* has been skilfully analysed by Dumézil (16-18), who argues that *magisterial maiestas* in the Republic had two separate sources. On the one hand it was a derivative of '*maiestas populi Romani*', and on the other the magistrates were the successors to the kings. Ultimately both sources went back to Jupiter, 'puisque la *maiestas populi Romani* vient du pacte initial, des auspices et des promesses de Jupiter, valables pour toute la durée de Rome, et que si le rex avait la *maiestas*, c'était comme réplique terrestre de Jupiter'. "*Maiestas Iovis*" expressed something more than a 'maior-minor' relationship, something which corresponded not only to 'maior' but also to 'maximus', that is, to a 'maior' whose counterpart was all the rest. The notion of "superiority" which the word implies was elevated to "supremacy", thus tending to be a quality rather than a relationship. This quality was possessed not by a group, but by an individual, and it is from this sense of '*maiestas*' that the word "majesty"² is derived. This was the form of *maiestas* possessed by the kings as the earthly homologues of Jupiter. The Republic parcelled out the heritage of the kings, fragmenting "*maiestas Iovis*" among the magistrates, and emphasising '*maiestas populi Romani*' as the source, thus obscuring the ultimate origin in Jupiter. The fragments were re-assembled in one individual in the person of Augustus.

Dumézil's interpretation is a reasonable characterisation of the majesty of Augustus on the non-legal level, but

1 Cf. Balduinus Franciscus (1014): "Non temere tamē est quod Tacitus, ubi de iudiciis maiestatis queritur, admonet discernenda esse rei publicae et Caesarum; nam et sub his alia novae maiestatis definitio esse coepit".

2 "Majesty" in Dumézil (18).

it does not attempt to isolate the steps by which Augustan majesty reached a position of such general acceptance that it became possible to bring its protection within the ambit of the criminal law. It is proposed to examine certain principles which seem to have played the major part in the process of giving legal recognition and protection to the majesty of Augustus.

"Sacrosanctus in perpetuum ut esset et quoad viverem tribunicia potestas mihi esset per legem sanctum est" (Res Gestae 10). The authorities are fairly evenly divided between those who accept Dio (49.15,5-6; 53.32,5) for the grant of tribunician sacrosanctity, and no more, in 36 B.C., and the full tribunician power for life in 23 B.C.,¹ and those who follow Appian (B.C.5,132,548) and Orosius (6.18,34, 20.7) in postulating the full grant in 36 B.C.² But the important aspect for the present purpose is the grant of sacrosanctity, which on both traditions took place in 36 B.C.³ - 'eo nomine' according to Dio, and as part of the full power attested by Appian and Orosius,

"Sacro sanctis" meant "sanctified by an oath",⁴ and thus it was that tribunician sacrosanctity was originally protected by an oath of the plebs,⁵ the so-called "lex sacra" which Von Fritz (894, 901-3) believes was equated to "plebei scitum", connoting not a lex, but the plebeian oath to commit

1 Strack (360-3, 370, 381); Lengle (RE 7A.2, 2486); Syme 336; Grant (449-51); Broughton (2, 400); Jones (Augustus 115); Siber (Verfassung 281-2); Wickert (RE 22.2, 2285-6); Sattler (46-9). Hardy (64) and Kelly (17-18) accept Dio (51.19,6) for a full grant in 30 B.C. Hammond (81) and Salmon (468) are non-committal.

2 Mommsen (Staat 2.2, 872, 6; 873, 1); Greenidge (Public Life 338); Pelham 74; Premerstein (265-6) - with the rider that the power was abandoned in 27 B.C., to be granted anew in 23; Hohl (Caesar 67, 74). Strack argues rather well (360-3) that Orosius and Appian in fact mean the same as Dio.

3 Cf. Siber (Verfassung 282). Jones (Augustus 115-6), while decrying the rights which made up Augustus' full tribunician power, does not extend his criticism to sacrosanctity.

4 Mommsen (Staat 1, 236); Lengle (RE 7A.2, 2460).

5 Mommsen (Staat 2.1, 286-7); Niccolini (27, 48); Lengle (RE 7A.2, 2455-7).

namely, a crime to kill the violator of a tribune.¹ Subsequently a 'lex populi' - traditionally a Valerio-Horatian of 449 B.C. - indemnified the plebs against prosecution, but the oath remained the only effective guarantee.² Even in the period of Caesar and Augustus the traditional origin of sacrosanctity in an oath gave a "religiösen Schimmer" to the tribunicia potestas, although in law "sacro sanctus" now meant merely that particular form of inviolability for which the sanction was "sacrum esse".³ It is disputed whether the enforcement of this sanction by pure tribunician coercitio was lawful,⁴ or was based on a distortion of the tradition for party purposes in the late Republic.⁵ The sources reflect this uncertainty, and seem to suggest that the conflict between the principle of coercitio (or direct action), which derived from the tradition of inviolability "religiosa", and the principle of recourse to due process of trial, which derived from inviolability "lege", was never satisfactorily resolved.⁶ The cases in the late Republic perpetuate the confusion, for there are

1 Lenglé (RE 7A.2.2461) denies the historicity of the oath to kill. Cf. Kibler (RE 1A.2.1685, 1687).

2 Von Fritz (loc.cit.). Cf. Strachan-Davidson (L.13). For the view that the Valerio-Horatian substituted a legal for a sworn guarantee, although the plebs also insisted on a renewal of the oath, see Mommsen (Staat. 2.1.303-4; Straf 581 and n.3), and Niccolini (46-8). There were other forms of 'lex sacra', of which the most significant is that whereby a group bound itself by oath to a leader in a military undertaking (Niccolini 41; Von Fritz, 895-7), the oath being termed a 'sacramentum' (Niccolini 41) or 'coniuratio' (Von Fritz 895-6), and those bound by it being known as 'milites sacraei' (Niccolini 41; Von Fritz 895). The oath was frequently sworn by clients to their 'patronus' for the purposes of a military undertaking which he contemplated (Von Fritz 895).

3 Mommsen (Staat 2.1.303-4); cf. Strachan-Davidson (L.9+10); Siber (Verfassung 231 282). Kibler (RE 1A.2.1685) notices that popular regard for the 'sacrosancta potestas' was so great that it was even credited to other magistrates - "populi Romani magistratibus sacrosanctis" (Bell. Hisp. 42.4); but Struck (368.5) believes that this text is corrupt.

4 Mommsen (Straf 46); Strachan-Davidson (L.17); Niccolini 71; Lenglé (RE 7A.2.2475-6). Cf. Gellius' "summa coercendi potestatem" (13.12.9).

5 Mommsen (Staat 2.1.305; Straf 932) - against Straf 46; Siber (Analogie 30-1; Verfassung 229).

6 Dionysius (6.89) confuses the tradition of an oath in 494 B.C., and a lex in 449 B.C., when he describes the tribunate as having been made sacrosanct *νόμος τε καὶ ἔπος* binate as having been made sacrosanct *νόμος τε καὶ ἔπος* binate (cf. Lenglé, RE 7A.2.2460; Siber, Analogie 28), and attests the primitive sanction of *ἐξέδωκεν ἑσπερὰ καὶ ὀφθαλμοὺς ἀφαιρῆναι ἐκείνῳ*. Cf. Livy 3.55: "ut qui tribunus plebis ... nocuisset eius caput Iovi sacrum esset, familia ad aedem Cereris Liberi Liberisque venum iret". Cf. also Appian (B.C. 2.108).

examples of tribunes resorting to direct action against the "homo sacer" by attempting summary execution or consecration, while more or less contemporaneously the more mature procedure of a prosecution for perduellio or maiestas is invoked. It was pure coercitio, derived from the sworn rather than the legal aspect of sacrosanctity, when the tribune C. Atinius Labo attempted in 131 B.C. to hurl the censor Q. Metellus Macedonicus from the Tarpeian Rock for having omitted his name from the Senate list, but was prevented by a colleague's intercession.¹ Cicero (Dom. 47.123) says that Atinius consecrated Metellus' goods, but denies the legal efficacy of "ille furor tribuni plebis ductus ex non nullis perveterum temporum exemplis." The elder Pliny, the only source to discuss both the capital and the pecuniary measures against Metellus, says that after the intercession at the Rock "alieno beneficio postea vixit, bonus inde etiam consecratis a damnato suo" (N.H. 7.44.144), which suggests that the consecration was effective. An analogous case is the violent arrest of the consul L. Marcus Philippus for interrupting M. Livius Drusus in 91 B.C. (Val. Max. 9.5.2). But in other cases the affronted tribune prosecuted for perduellio or maiestas, such as the charge of maiestas brought by C. Fimælius against his father (p. 34 above), and the prosecution of P. Scipio by Ti. Claudius Asellus, "cui equum in censura ademerat" (Gell. 5.4.1) - clearly a maiestas charge: "P. Africanus 'pro se contra Tiberium Asellum' de multa ad populum" (Gell. 6.11.9). There are some borderline cases. When T. Annius Luscus criticised the action of Ti. Gracchus against M. Octavius, Gracchus both arrested (coercitio) and tried to prosecute him (Plut. Gracch. 14.4-5; Livy Per. 58). In 169 B.C. a freedman of the tribune P. Rutilius appealed to the tribunes against a directive of the censors C. Claudius Pulcher and Ti. Sempronius Gracchus. When Rutilius alone interceded, the censors indicted the freedman for maiestas. Rutilius having

¹ Livy Per. 59; Pliny N.H. 7.44.143-4. Mommsen (Straf 932. 1) compares the hurling of Sextus Iucilius from the Rock by Publius Laenas in 87 B.C. (Val. 2.24.2), but this is not a certain case of coercitio, for Velleius goes on to attest the regular prosecution of other Sullans by Laenas: "quibus diem dixerat".

proposed a law in the concilium plebis to invalidate the censor's location of public revenues, the censors appeared to speak against it. Claudius was interrupted and ordered a 'praeco' to restore order. Rutilius left the meeting, complaining that he had been deprived of his authority. The next day he consecrated the 'bona' of Gracchus (coercitio), for having prosecuted the freedman after he had appealed to a tribune, and indicted Claudius for having taken the meeting out of his hands. He then seems to have prosecuted both censors for perduellio. A day having been fixed for each accused, Claudius was tried first. It was a close finish, for the final acquittal was by a mere eight centuries. The case against Gracchus was dropped.¹ The significant fact emerging from all the confusion is that in the late Republic tribunician sacrosanctity was a particularly fertile field for extensive interpretation (cf. Mommsen, Staat 2.1.305 and n.1; Siber, Analogie 29).

Dio (49.15.5-6) describes the grant of sacrosanctity to Octavian in 36 B.C. as τὸ μῆτε ἐργε μῆτε λόγῳ τι ὑβρίζεσθαι, adding that the sanction was τοῖς αὐτοῖς τὴν τοιοῦτο τι ὁρῶντα ἐνέχεσθαι κύμαρ καὶ τῷ θυμῷ ἐκείνῳ. Dio does not at this point enlarge on "the penalties which had been prescribed in the case of a tribune", but elsewhere (53.17.9) he says: ἢ τε ἐξουσία ἡ δημοκρατικὴ καλονμένη ... δίδωσι σφίσι (the emperors in general) ... μὴδ' ὑβρίζεσθαι, καὶ ὅρα τι καὶ τὸ βραχέστατον μὴ ὅτι ἐργε. ἑλλὰ καὶ λόγῳ ἐδικεῖσθαι δέξωσι, καὶ ἔκριντον τὴν ποιήσαντα αὐτὸ φέρε καὶ ἐναγῇ ἀπολλέσθαι (cf. Zonaras 7.15). This was not, in Dio's opinion, an extension of the powers of Republican tribunes, but was specifically an aspect of their power δοῦναρ τὰ μέγιστα ἐγένετο (53.17.10). Furthermore, the tribunician power was one of the institutions which was taken over from the Republic ὅς κού καὶ ἕκαστα ἐνομήσθη

1. Livy 43.16.4-16. Schlesinger (58.1) believes that there was 'consecratio honorum' against both censors, but that it had to be confirmed by the People, hence the perduellio charge.

(53.17.11). As ἐπιτρον in Dio (53.17.9) means proceedings where provocatio was excluded (Mommsen, Staat 1.151.3; Strachan-Davidson, 1.17 and n.4), it seems that Octavian had the full tribunician power of coercitio. He would also, however, have had the alternative of prosecuting for perduellio or maiestas, with the same scope for extensive interpretation as in the case of the tribunes.

Dio (49.38.1) attests a comprehensive grant by Octavian to his sister Octavia, and to Livia, in 35 B.C.: (κατα) τὰ μὲν ἐκινύκρια ψηφισθέντα οἱ ἀνεβόλετο, τῇ δ' Ὀκταοβίῳ τῇ τε Διοσίῳ καὶ εἰκόνας καὶ τὰ τὰ σφέτερα ἔκρυπτο τινὲς δίδειν, τὰ τε ἀδελφὸς καὶ τὰ ἀνέγγιστον ἕκ τοῦ δημοφον τοῖς δημόχοις ἔχειν ἔδωκεν. Hohl (Caesar 70) finds a precedent for this grant in the traditional rule concerning the Vestals, whereby "(Nunna eas) ... venerabiles ac sanctas fecit" (Livy 1.20.3), but Strack (368.5) rightly points out that "sanctae ut essent" was not the same as "sacrosanctae ut essent". Dio (59.3.4) seems to support Strack, for he makes no reference to ἕκ τοῦ δημοφον τοῖς δημόχοις when he reports the grant of τὰ τῶν ἀεικαρθέλων to the sisters of the emperor Gaius. As no other precedent suggests itself, it is assumed that the grant of sacrosanctity to Octavia and Livia marked the introduction of a new principle in Roman public life, and a principle fraught with anomaly. Although the grant of the powers of an office, separated from the office itself, had been recognised since at least 211 B.C. (Siber, Verfassung 208, 214-8, 281), it is startling to find the rule applied to women, who were absolutely ineligible for office (Mommsen, Staat 1.493; Schulz, Principles 208). It is true that the separation of office and powers was often expressly designed to empower someone who was otherwise ineligible (Siber, Verfassung 214), and indeed this is precisely what happened when the patrician Octavian received tribunician powers (cf. Grant 450.7). But this was only a relative ineligibility, for Octavian could have become a plebeian by adoption, as Clodius had done in 59 B.C. Nothing, however, could have

made a woman eligible for office. And how were injuries to Octavia and Livia to be punished? They could obviously not have resorted to *coercitio*, nor does the power to prosecute seem to have been available to them. The general prohibition against prosecutions by women (Mommsen, *Straf* 369; Schulz, *Principles* 209) does not seem to have admitted of any exceptions in the *comitia*, while the limited special cases in the *iudicia publica* (Mommsen, *Straf* 369 and nn. 4,6,7) do not include the sort of charge which a violation of *sacrosanctity* would have involved. Mommsen (*Straf* 369 and n.6) asserts, on the authority of *Peninian* (Dig. 48.4.8), that women had an unlimited right of accusation for *maiestas*. But as *Papinian's* precedent is "*Iulia* (*Fulvia*?) *mulier*" who gave *Cicero* evidence of the *Catilinian* conspiracy, he probably means no more by "*etiam mulieres audiuntur*" than the admissibility of their evidence. In any event, the absolute inaccessibility of the *comitia* is decisive, for no conceivable extension of the *maiestas* statutes, as they stood in 35 B.C., could have made the *quaestio* available to Octavia and Livia.

Why was *sacrosanctity* granted to Octavian's womenfolk? Mommsen (*Staat* 2.819 and n.3) believes that Octavia was honoured as Antony's wife, rather than as Octavian's sister, but *Hohl* (*Caesar* 70) points out that Antony rebuffed her at Athens in 35 B.C., and on her return to Rome Octavian told her to leave Antony's house (*Plut. Ant.* 53.2,54.1). *Hohl's* argument can be taken further. The release of Octavia from tutelage, simultaneously with the grant of *sacrosanctity* (*Dio* 49.38.1), would not have been in Antony's interest if he had a 'manus' marriage with her, nor would the release in such a case have been within Octavian's power. It therefore seems that she was released from the agnatic tutelage of Octavian. And *Dio's* contrasted τὴ μὲν ἐκτελέσια ... τῇ δ' ὀκταωνίῃ (49.38.1) implies that Octavian deferred the immediate honour of a triumph, but approved an alternative which was no less an honour to him, although mediately. Furthermore, when

Octavia wanted to join Antony in Greece, Octavian agreed *ὁ δὲ οἱ κλεινὸς λέγοντι, οὐκ ἔπειθε χαρίζομενος, ἀλλ' ὥπως περιεβρίσθη καὶ καταμελῆθηται πρὸς τὸν πόλεμον αὐτῶν εὐπρεπῆ καὶ δόξοι* (Plut. Ant. 53.1). Plutarch here detects a pretext for war in language strikingly reminiscent of that which he uses when he credits Caesar with a similar pretext (p. 142 n.2 above). But the significant difference is that Caesar relied on an injury to actual tribunes, but Plutarch says that an affront to Octavia gave Octavian an equally valid excuse. This seems to make it clear that Octavia was not honoured for Antony's sake, but the matter goes even further. When Octavia was rebuffed, Octavian delivered polemics in the Senate and to the People (Plut. Ant. 54.1, 55.1). The incident is not to be explained as a stock example of Caesarian tendentiousness, nor as an error by Plutarch. Octavian would not have based a propaganda point on something which was demonstrably untenable (cf. p. 191 above), nor would Plutarch have recorded an event which depended on a striking constitutional novelty, unless the evidence had supported him. Octavian's polemics on the incident probably made much play of his 'dignitas', and Plutarch would have recalled that Caesar had also linked his dignity to tribunician sacrosanctity.

Although Mommsen (Staat 2.2.819.3) holds that Octavian, in making the grant to Octavia and Livia himself - *ἑξῆς* (Dio 49.38.1) - acted under his triumphal authority,¹ he elsewhere (Staat 2.2.872-81, 909 and n.1) suggests a better answer when he assumes that the grant to Octavian of the tribunician power for life in 36 B.C. (as Mommsen dates it) was made by a lex which was the prototype of the 'lex de imperio Vespasiani'.² Even if sacrosanctity alone was granted in 36, a lex can still be assumed (Dio 49.15.3-5; Res Gestae 10;

¹ Hammond (RE 17.2.1865) credits the grant to the Senate, while Mendelsohn (RE 13.1.905) assumes an unspecified legal process.

² Hammond (82) believes that Vespasian's law was the first of its kind. Syme (336.2) assumes a 'lex de imperio' in 23 B.C.

Wickert (RE 22.2.2284). A prototype of Vespasian's law would have included the discretionary clause which was passed for Vespasian: "utique quaecumque ex usu rei publicae maiestatemque Alvinarum humanarumque publicarum privatarumque rerum esse censebit ei agere facere ius potestatesque sit ita uti divo Augusto ... fuit (ILS 1.244). This may have been the source of Octavian's authority for the grant to Octavia and Livia. It is possible, therefore, that Octavian decreed, "ex maiestate publicarum rerum", that whoever injured Octavia or Livia would be deemed to have violated the sacrosanctity of Octavian himself. It would follow that a breach of the decree would have been punished by Octavian, either by coercion or by a prosecution for maiestas in the comitia tributa.

The grant of sacrosanctity to Octavia and Livia is one of the strands in the formation of the concept of "domus Caesaris" (cf. Mommsen, Staat 2.2.819 and n.3). Whether this concept is to be regarded as an extension of 'maiestas populi Romani' depends on the view taken of the relationship between tribunician sacrosanctity and the crimen maiestatis. Mommsen (Straf 578-9) has postulated that the crimen maiestatis originated in the revolutionary period, to protect the maiestas which he believes was originally the tribunician equivalent of the potestas of patrician magistrates. When the tribunes became proper magistrates the 'crimen maiestatis tribuniciae imminutae' became the 'crimen maiestatis populi Romani imminutae'. To the general arguments against this view (Pollack 162-4) may be added the objection that Mommsen's hypothesis must presuppose a 'maiestas plebis' from which tribunician maiestas was derived, but such a concept is not justified (p. 13 above). The passages on which Mommsen relies do not assist him. He cites Cicero (Invent. 2.17.52), claiming that it is a case of diminished tribunician maiestas. But Cicero says: "At enim qui patris potestate, hoc est privata quadam, tribuniciam potestatem, hoc est populi potestatem, infirmat, minuit maiestatem". The diminished maiestas is clearly that of the People, the source of 'tribunicia potestas'.

Mommsen also relies on Asconius (61C), but that was merely an unsuccessful attempt at extensive interpretation.¹ It is not clear what comfort Mommsen gets from Livy (3.24.9), for the only *maiestas* in issue there is that of the consuls (cf. Pollack 166; Kùbler 545). Some support for Mommsen is furnished by Greenidge (Public Life 100.1), who believes that in the later law resistance to the will of any other magistrate was charged as *vis*, while resistance to a tribune was always *maiestas*. The inference to be drawn from this would be far-reaching, for it would mean not only a tribunician origin for *maiestas*, but also the restriction of Saturninus' law to injuries to tribunes. But Greenidge has not noticed that the resistance of P. Rutilius' freedman to the will of the censors was *maiestas* (p.234 above), while Caesar's resistance to Bibulus was one of the matters on which the Optimates were so anxious to interview him (p.109 above).

Niccolini (49-50), accepting the crime of "tribunicia potestas minuta", believes that it was capable of extension to persons other than tribunes. He cites the case of the lictor who was hurled from the Tarpeian Rock for interfering with the 'viator' of the tribune Icilius (Dionys. 10.31), and argues that the tribune's sacrosanctity extended to the person of the official who was charged with the execution of the tribune's orders. Ciaceri (253-4) takes the argument further by postulating sacrosanctity as the source of the extension of the *maiestas* law to the person and dignity of the princeps.² He argues that it is because of the sacrosanctity of the princeps that Digest (48.4.1pr) equates the *crimen maiestatis* to *sacrilegium*, but this view is based on a misunderstanding of the crime of *sacrilegium* (p.308-9 below). Ciaceri also relies

¹ See pp. 82-7 above. See also the arguments of Pollack (165-6) and Schiassi (8-10).

² Levi (152) makes substantially the same point as Ciaceri when he says: "La condizione sacrosanta riconosciuta alla sua persona era la sanzione giuridica di quella eccezionalità personale superiore, che si realizzava già nel campo religioso con la serie degli onori di carattere sacrale."

on Tacitus (Ann. 3.56.2): "id summi fastigii vocabulum (sc. potestatem tribuniciam) Augustus repperit, ne regis aut dictatoris nomen adsumeret ac tamen appellatione aliqua cetera imperia praemineret". Tacitus clearly has in mind the legislative¹ and executive (cf. Grant 446-53) aspects of the power, when he loosely compares it with "cetera imperia". If it had been the source of the crimen maiestatis, Tacitus would not have failed to mention his bugbear at this point.

Although the tribunician origin of the crimen maiestatis is not accepted, it should be pointed out that the apparent inability of the Romans to resolve the conflict between "religio" and "Lex" as the theoretical basis of sacrosanctity cannot be overlooked, and it is possible that this conflict remained unresolved when tribunician sacrosanctity became the special preserve of the emperor and his house. The particularly wide field of extensive interpretation which was inherent in the concept, and the possibility of arbitrary action offered by the notion that the tribunes were "religione inviolati", made tribunician sacrosanctity one of the principal avenues for the importation of new aspects into the crimen maiestatis.

"Iuravit in mea verba tota Italia sponte sua et me belli quo vici ad Actium ducem depoposcit. Iuraverunt in eadem verba provinciae Galliae Hispaniae Africa Sicilia Sardinia" (Res Gestae 25). The 'coniuratio' of 32 B.C. is the basis of Premerstein's analysis of a fundamental facet of the Augustan Principate.² His argument is that the key to Augustus' position is his vast expansion - the 'clientela' concept, rather than his constitutional powers (6,13,22,25; cf. Grant 318-9). The Republic had known oaths to faction leaders, such as the Italian oath to Drusus in 91 B.C., Cinna's

¹ Which is the aspect stressed by Augustus himself in Res Gestae (6).

² Premerstein's hypothesis is approved, among others, by Kolbe (32) - "eine grundstürzende Erkenntnis"; Syme (288 and n.3); Wickert (Review of Premerstein) - with reservations.

oath to Sulla in 88, and the oaths to Catiline in 63 and Antony in 44 (27,30,31,61,1; cf. Syme 285). The oath was extra-constitutional,¹ and did not furnish a legal basis for Octavian's position, but was sworn to him in his private capacity as a party leader, and as the contemplated commander in the coming war (36,40,92,44). His formal appointment as commander by the Senate and People was a mere formality, for the oath was a universal suffrage which silenced opposition (43; cf. *Homo* 210; Grant 419), and would have been effective even without an appointment as commander (51). The deponents were in the 'fides' of Octavian, being bound to assist him with arms (44-5); "in fides sese dare" also (significantly) expressed a client relationship between Rome and an ally (18). Mommsen (*Staat* 2.2.792-3; cf. *Hammond* 104) believes that the only oath was the military service-oath (*sacramentum*), sworn at a princeps' accession and at each anniversary thereof, but Premerstein shows that soldiers took the oath of allegiance together with civilians (73-5). The oath was termed a "sacramentum" because it replaced the old military service-oath, but unlike the true sacrament it was sworn to a commander in his personal capacity, not as the holder of imperium; it was therefore a personal tie between the princeps and his troops, sworn before his formal recognition (78, 81). The oath was not affected by the "restoration of the Republic", for it had nothing to do with the "res publica".

Premerstein reconstructs the terms of the oath, relying on the oath of Gangra (*Deissau* 2,8781), which was sworn to mark either Augustus' 12th consulship in 5 B.C., or the incorporation of Paphlagonia in Galatia in 3 B.C.; the oath of Arimium (*Deissau* 1.190), sworn to Gaius on his accession; and the oaths of Assos (*Dittenberger* 2.481-5), sworn to Gaius at the same period, and of Sestium (*CIL* 11. 5998a). The argument

1 Contra Levi (135-6), who believes that the oath gave Octavian a new form of imperium superior to the triumphal, and "sancì la posizione legale di Ottaviano".

which Premierstein (47-52) bases on these inscriptions¹ is that the basic element of these oaths is the formula introduced by Octavian in 32. The provision in the Aritium oath, whereby the "inimici" of the princeps are also the "inimici" of the deponents, corresponds to the situation in 32, when there was a private feud (inimicitia) between Octavian and Antony, but Antony was not declared a "hostis"². But war was declared on Cleopatra (37.51; cf. Syme 291; Grant 419), so that the "inimici" of Octavian became associated with the "hostes populi Romani". This is reflected in the Aritium oath: "enim- que, qui in eum hostili animo fuerint, mki hostes esse ducam". The oath of Gangra has the same basic elements, but with an overlay of Hellenism: the attestation by Greek gods and Augustus; the express undertaking of an obligation to the patron's children, whereas in the West a duty to the patron's family was an assumed result of 'patrocinium';³ and the duty to report hostile acts by the princeps' enemies (47-8, 66). In the oath of Gangra ἐχθροί expresses both "inimici" and "hostes", but the absence of κολλήμιοι, which can only mean "hostes", is significant (51). Both the oath of Gangra and that of 32 were sworn by provincials as well as Roman citizens (50).

While the oath of Aritium required mutuality of "inimici" and "hostes" only, that of Gangra imposed the same φιλοί and ἐχθροί. Premierstein's explanation (48-9) is that the oath of Gangra corresponded to the typical "Köntelvertrag" - that is, to a 'maiestas' treaty - while that of Aritium

1. Homo (232-3) discusses the first three oaths, but without linking them to the oath of 32.

2. 37, 48. Cf. Syme (288, 291-2); Grant (417, 419); Siber (Verfassung 272). For the view that Antony was a "hostis" see Levi (136) and Sattler 20.

3. The (Western) oath of Aritium does indeed not refer to the children, but Dio (59.3.4) says that Gaius granted his sisters τὰ . . . τοὺς ὄρκους τοὺς ἐκ τῆν ἀρχὴν αὐτοῦ ψέροντας καὶ ὑπὲρ ἐκείνων δημοῶς γίνεσθαι. Dio cannot be dismissed as having been influenced by the Eastern oath, for his account of the terms of the oath - that the deponents would respect Gaius and his sisters (59.9.2) - corresponds closely to Suetonius' version (Gai. 15.3). If the oath of Sestinius refers to this grant by Gaius (which is doubted by Gelzer, RE 10.1.365), a significant innovation in the Western oath must be assumed.

followed a less common form; in the West the main concern was a front against the *principes'* enemies, while the Eastern division of states into "subject" and "free and federate" cast the emphasis on solidarity with like-minded persons in other cities. But this view is weakened by Premerstein's own observation (48) that the Italian oath to Drusus provided for τὸν αὐτὸν φίλον καὶ πολέμιον ἡγήσασθαι; Ἀρδου. And in fact the typical *'maiestas'* treaty confined mutuality to enemies, such as those with the Aetolians, Rhodes, and Mitylene.¹ In any event there were no mutual friends in the oath of 32, for Premerstein (49) deletes this part of the Gangra oath in order to arrive at Octavian's "Urformel".

The official line emphasised the voluntary nature of the oath - "sponte sua" (Res Gestae 25) - in order to present Octavian's *'clientela'* as the lineal descendant of the Republican "Gefolgschaft" (62-3). But the provincial oath (Res Gestae 25) is not described as spontaneous, for there was no need to show that subjects had acted voluntarily (62). In fact there was considerable pressure, even in Italy (42, 62, 81; cf. Syme 784, 287, 289). The Republican tendency for a *'clientela'* to be inherited² made it a simple matter for the following of Augustus to pass to Tiberius by an oath to the latter³ which, although extra-constitutional, strengthened Tiberius' hand when he negotiated his accession with the Senate (56-9). After Tiberius the oath became a standing formality on accession, with annual renewals (59-60). Renewal became associated with the oath to the *principes'* *'acta'*, whose compulsory nature tended to deprive the oath of allegiance of its voluntary character (51). The absence of Thrasesa Paetus from the annual

1 Thubler 63; 64; 50-1, 56, 456. The negotiations preceding the Aetolian treaty contemplated the same enemies and friends (Thubler 64.1), but the Aetolians appealed to the Senate against Scipio's terms before the final draft (Thubler 44).

2 Cf. Mommsen (Staat 3.1.65); Greenidge (Public Life 8-9); Grant 320.

3 Wickert (Review of Premerstein 334-7) is critical of this attempt to derive a dynastic principle from the oath. Decision would be easier if there were currently any measure of agreement as to precisely when and how a man became emperor.

renewal in 66 A.D. was *maiestas* (68; cf. Tac. Ann. 16.22,28).¹

The relationship recognised by the oath of 32 was not unlike a *maiestas* relationship. Octavian was the 'maior' as against Italy and the Western provinces, in a relationship which was not created by law, and which depended on physical force for its maintenance. There was also the typical bilaterality of rights and duties - "do ut des" - for the 'beneficium' which the deponents received was 'libertas' (cf. Kunkel 335-6). But there are important differences. As the 'patrocinium' was extra-constitutional, there can be no suggestion that Octavian's position as the sole 'maior' made him a corporation sole, and indeed there is clear evidence that his 'maiestas' was not the same as that of the *populus Romanus*. The oath imposed an obligation on the deponents vis-à-vis the members of the house of the 'maior', a concept quite inconsistent with 'maiestas *populi Romani*'. The only possible possessors of *maiestas* proper were the *populus Romanus*, and the magistrates who derived their *maiestas* from it. There is no reason to believe that in the Republic the members of a magistrate's household enjoyed the protection of the *maiestas* law. Indeed this was probably impossible in law, for "delegatus delegare non potest". In any event, the protection which the oath gave to the princeps' family did not arise derivatively, but was an original incident of the 'clientela' relationship - by implication in the West, and expressly in the East. It is this

¹ Premierstein (117-31) is on less safe ground when he postulates a "cura et tutela rei publicae universae" granted to Augustus in 27 B.C. by lex, and extending to the whole State the personal 'patrocinium' recognised by the oath of 32. The theory is based (118.1,120-2) on Dio's *παροτρων* (53.12.1), which Premierstein takes to mean "patronatus", but which probably means "principatus". Cf. Mommsen (Staat 2.2.774, 5); Gent (452.5); Wickert (RE 22.2.2068; Review of Béranger 543-4); Sattler (38 and n.91; 39 and nn. 92, 93). Premierstein seems to have overlooked the implication of his belief (129) that his lex of 27 included the discretionary clause known for Vespasian (p.239 above), for Dio's *ἐποπτικὴ καὶ παροτρωνία* (p.239 above), for Dio's *ἐποπτικὴ καὶ παροτρωνία* (p.239 above) is clearly not the text of the clause *ἐπὶ καὶ τῇδε* (p.239 above), but only Dio's interpretation of "quaecumque ... censebit", 'ipsisssima verba' "cura et tutela rei publicae universae" in the lex is to postulate an unusually succinct style for a Roman statute.

aspect which made the 'patrocinium' a better instrument than sacrosanctity for the creation of the "domus Caesaris". Sacrosanctity was limited to those to whom it had been expressly granted, but τοῖς τέτοιοις ἐγγράφοις αὐτοῦ (Oath of Ganga, Dessau 2,8781) was indeterminate and elastic. Apart from Octavian's polemics in respect of the affront to Octavia (p. 238 above), there seems to be no case where the sacrosanctity of a female member of the house had significant consequences.¹ But the oath of allegiance had results which appear with some prominence in the sources. Tiberius Gemellus would not have the guard officers take part in his enforced suicide, ἀς οὐκ ἔστιν ἀποκτείνεσθαι ἀκούοντες πρὸς ἐξέρον ἀναι-περοῦσι (Philo Leg. ad Gai. 5). Burrus advised Nero that the praetorians would not execute Agrippina: "praetorianos toti Caesarum domi obstrictos esse" (Tac. Ann. 14.7). It may be that the grant of sacrosanctity in 35 B.C. was not repeated, as the oath of 32 was regarded as an adequate safeguard as far as women were concerned. In a certain sense the oath was not so much a substitute for sacrosanctity, as a cognate notion, for its roots were similar. Sacrosanctity went back in the final analysis to a 'lex sacra', a sworn obligation to protect inviolability (pp. 232-3 above); the coniuratio of 32 likewise originated in another form of 'lex sacra', the 'sacramentum' or 'coniuratio' sworn by clients to a patron who contemplated a private military undertaking (p. 232 n.2 above).

Premmerstein (70-1; cf. Klingmüller, RE 1A, 2, 1672) asserts that the oath had only a moral and religious force, but that the perjurer was guilty of "impietas" (= ἀσεβεία), and that this concept was invoked for those injuries to the princeps which could not be punished under the lex maiestatis; but as the Principate evolved the concept approached maiestas more and more closely. Premmerstein's hypothesis is acceptable, but with modifications. In the first place,

1 Unless the man whom Augustus condemned to the galleys for claiming to be the son of "clarissimae ac sanctissimae sororis eius Octaviae" (Val. Max. 9.15.2) is an example.

Premerestein states his proposition too narrowly when he describes the perjurer's crime as "impietas". He correctly cites Tacitus' "laesura religionum" (Ann. 3.24.3) as an example of "impietas", but he does not notice that Tacitus goes further: "ac violatae maiestatis". The full significance of Tacitus' criticism of Julia's case now begins to be clear. The "maiestas" which was "violata" was not, and did not claim to be, 'maiestas populi Romani', for the latter would have been "imminuta" or "minuta", and not "violata". Tacitus was perfectly familiar with the expression "maiestas populi Romani minuta" (Ann. 1.72.3), and intended to convey quite a different notion by "violata maiestas", namely, the "majesty" of Augustus. This new form of 'maiestas' arose from the twin concepts of tribunician sacrosanctity and 'patrocinium', both of which had respectable Republican antecedents. From both was derived the notion that the respect due to the new "majesty" was founded on an oath, so that a violation was "laesa religio". From 'patrocinium' came the additional feature of a relationship close enough to a maiestas relationship to lead to the eventual adoption of the same word to characterise Augustus' position. From both concepts, but in particular from 'patrocinium', came the "domus Caesaris", the extension of the emperor's "majesty" to the members of his house. The word 'maiestas' is used to describe both the personal "majesty" of Augustus and the "majesty" which members of his house possessed through him. When Augustus introduced the practice of addressing his soldiers as "milites" instead of "comeditones", he forbade the use of the latter expression by members of his family, "ambitiosius id existimans quam aut ratio militaris aut temporum quies aut sua domusque suae maiestas postulare" (Suet. Aug. 25). The "majesty" of Augustus was widely proclaimed by the Augustan poets: "neque parvum carmen maiestas recipit tua" (Hor. Ep. 2.1.257-8); "maiestas tua" (Ovid Trist. 2.512). And the general recognition was extended to members of his house. Ovid, instructing his wife to intercede for him with Livia, tells her not to hide her nervousness, but "sentiat illa te maiestatem pertinuisse suam" (Pont. 3.1.155-6). The most striking passage is Suetonius (Aug. 37): "Exegit

etiam ut quotiens consulatus sibi daretur binos pro singulis collegas haberet, nec optinuit reclamantibus cunctis satis maiestatem eius imminui quod honorem eum non solus sed cum altero gereret". Here the maiestas which was diminished by a collegiate consulship was clearly not "maiestas consulis", for that owed its very existence to a collegiate office. The "majesty" of Augustus was diminished precisely because it was associated with magisterial maiestas, which meant its subordination to "maiestas populi Romani".

It is this use of the same word to express two different ideas which is responsible for much of the confusion in regard to the crime of maiestas in the Principate. This is precisely the anomaly which troubled Tacitus: "legem maiestatis ... cui nomen apud veteres idem, sed alia in iudicium veniebant, si quis ... maiestatem populi Romani minuisset" (Ann. 1, 72, 3). Suetonius is similarly conscious of ambiguity when he says that Vespasian, on his accession, lacked "auctoritas et quasi maiestas quaedam" (Vesp. 7). If injuries to the princeps had been consistently termed "impietas",¹ an important constitutional principle - that the populus Romanus was still the State - would not have been obscured, and the crimen maiestatis, as distinct from the "crimen laesae pietatis", would have been spared much criticism.

As the penalty for violations of sacrosanctity matured from direct action into recourse to the public criminal law (pp. 232-5 above), so the sanction for breaches of the oath of allegiance assumed a less primitive form. The oath to the

1 As they were in Greek: ἐπεὶ τὸ γε ἀποφράει τρεῖς τιμὸς ἢ καὶ τὸ ἀπεργασθαι τρεῖς τιμὸς (κατασκευάζει τὸ γὰρ ἴδιον καὶ τὸ κοινόν ἀνδραγαθόν καὶ δίκας ἐκ' αὐτῶν πολλὰς βοηγόν) (Dio 57.9.2). Because the Greek historians had no single equivalent for "maiestas" (p. 1 above) they were able to avoid the ambiguity of the Latin. For the crimen maiestatis proper, at least in the form of plots against the State or its magistrates, the almost invariable expression is ἐκρίβουλας, or τὰ ἐκρίβουλεῖσιν. It is only for affronts to the emperor's majesty that τοῖσι τοῖσι is used.

Republic, sworn before Camoes in 216 B.C.,¹ has the primitively phrased sanction: "me Iuppiter optimus maximus domum familiam remque meam pessimo leto adficiat". The oath of Aritium has greater precision of expression: "expertem patria incolunitate fortunibus omnibus faxiant". This is almost a literal equivalent of the penalties under Caesar's maiestas law (pp. 172-84 above): "expertem patria incolunitate" is interdiction; "expertem fortunibus omnibus" is confiscation, although of the whole property, instead of the half prescribed by Caesar - but when the oath of Aritium was sworn to Gaius, the prescribed penalty for maiestas was already total confiscation (cf. Tac. Ann. 3.50.6). It is suggested that the oath, without any violation of tradition, could be and probably was given a more effective sanction than a mere moral and religious force. The concept of 'clientela' was a legal one (Mommson, Staat 3.1.76), and from an early date the criminal law concerned itself with a patron's breach of his duty to his client.² But the public law did not interfere when the client breached his duty, leaving it to the patron to proceed in his "Hausgericht".³ It has been maintained (Mommson, Straf 566; Siber, Verfassung 20) that the old 'clientela' was obsolete in the historical period, and had no connection with the great political 'clientelae' of the late Republic; but this proposition is too wide. When C. Herennius refused to testify against L. Marius, on the ground that the Marii were clients of the Herennii, Marius did not deny the 'clientela', but claimed that his aedileship had released him from it (Plut. Mar. 5). And when Proculus (Dig. 49.15.7.1) equates the position of a 'maiestas' ally to "clientes nostros", he shows that the legal principles developed by the old 'clientela' were still valid in his day. There is no reason in principle why some of those rules should not have been taken over by the

1 Livy 23.53.10ff. Niccolini (41) regards this oath as a "lex sacra", while Premerstein (51.2) understands it as the formal ancestor of the oath of 32.

2 "Patronus si clienti fraudem faxit sacer esto" - Servius (ad Aen. 6.609), supposedly citing the XII Tables.

3 Mommson (Straf 566.1); Siber (Verfassung 19). Greenidge (Public Life 8) mistakenly regards the client's breach as perduellio.

great political allegiances, and in particular the institution of the "Hausgericht". The survival of that tribunal would explain the precision of the oath of Arrium. A domestic tribunal, although only a quasi-judicial body, was expected to conform to certain rules. Thus, a father who killed his son while hunting, for adultery with his step-mother, was deported by Hadrian "quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere" (Dig. 48.9.5). The oath of Arrium dealt with a relationship which was in several ways analogous to a *maiestas* relationship, and it laid down for Octavian's guidance that when he punished offenders in his domestic tribunal, the penalties prescribed for the *crimen maiestatis* were to be imposed.

Some authorities have maintained that Julia and the par- amours were dealt with by Augustus' domestic tribunal, but it has been suggested that the forum was a public criminal court (pp. 221-2 above). The question is whether there existed concurrently under Augustus both a domestic tribunal ("Hausgericht") and a public criminal court presided over by the princeps ("Kaisergericht"), as Vollmann (63-93, 105-26) and Kelly (26) believe. It is generally agreed that there was an imperial criminal court under Augustus,¹ but there is less agreement on the extent of its jurisdiction and the manner of its creation. Mommsen (Straf 260-5) postulates a jurisdiction extending throughout the empire, independent of the categories laid down by the criminal statutes, and having an arbitrary discretion on sentence. Other authorities limit the jurisdiction to the ambit of certain criminal statutes only, namely those concerning murder, adultery, *maiestas*, and forgery (Vollmann 89), to which Jones (Jurisdiction 481) adds extortion. The better view is that of Kelly (38-46), who makes out a good case for the restriction of the jurisdiction to cases of *maiestas*, and even then only in the case of acts which concerned Augustus himself.

¹ Mommsen (Straf 260-5); Vollmann (63-93); Jones (Jurisdiction 481-2, 485-7); Kelly (38-46); Lengle (Straf 74-5). Siber (Verfassung 292-3) is not convinced of the court's existence, and serious doubts are expressed by McFayden (231-42).

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If, however, violations of imperial majesty were punished in the imperial criminal court, the use of the domestic tribunal for the same purpose would have been an unnecessary duplication. It is not likely that Augustus arbitrarily tried some of these cases in his criminal court, and others in his domestic tribunal.¹ It is suggested that the distinction drawn between the imperial court and the domestic tribunal is unrealistic. Volkmann (106) correctly sees 'renuntiatio amicitiae' as the social penalty suffered by "amici" who incurred Augustus' displeasure, but this was surely independent of any forensic or quasi-forensic procedure. When Tiberius said of Cn. Piso that in certain circumstances "odero seponamque a domo mea, et privatas inimicitias non vi principis ulciscar" (Tac. Ann. 3,12,4), he made it clear that renunciation of friendship was divorced from the exertion of "vis principis". When Appuleia Varilla was charged with adultery and maiestas, Tiberius absolved her of the maiestas charge, and urged her family to banish her for the adultery (Tac. Ann. 2,50,1,4). The only domestic tribunal in question was that of Appuleia's family, despite the fact that she was a great-niece of Augustus - "Caesari conexa". Tiberius' part in the case was limited to the public criminal law. It seems safe to postulate that the only court of the princeps was the imperial court. But this does not mean the abandonment of the suggestion (pp. 248-50) that the oath of 32 was originally sanctioned in Octavian's domestic tribunal. The suggestion is that the domestic tribunal of Augustus was gradually elevated to the status of a public criminal court, and that it took cognisance of the crime which flowed from the oath - "laesa religio ac violata maiestas" - and imposed the penalty "suggested" by the oath, namely interdiction and confiscation. As the quaestio maiestatis could not deal with a crime which did not touch on 'maiestas populi Romani', the alternatives were either to amend the lex maiestatis, or to create a new court. The former course would have been a blatant revelation of the realities of the

1. For the confusion which can arise from the separation of the "Hausgericht" and the "Kaisergericht" see Kelly's conflicting assertions that Julia's peramours were tried in the "Hausgericht" (10-11) and in the "Kaisergericht" (36-7).

new majesty, but a new court was practicable, particularly if it could be introduced gradually, by Augustus' "back door technique". It is doubtful whether the imperial criminal court was established under an enabling lex,¹ and indeed no lex was needed. The super-patrocinium of 32 B.C. was qualitatively and quantitatively different from its predecessors, for it contributed substantially to the new majesty which, without formal legal recognition, successfully challenged the maiestas of the State. It was equally capable of gradually giving the domestic tribunal of a 'patronus' a status which put it on a par with the public court established under the maiestas laws. As Augustus became more sure of his ground, he was able to extend the jurisdiction of his court to cases properly falling under the crimen maiestatis,² and so to initiate that blurring of the demarcation line between majesty and maiestas, which was eventually to lead to the appropriation of 'maiestas' as the exclusive property of the emperor.³ But sufficient of the dividing line survived under Augustus to lend weight to Tacitus' criticism (Ann. 3.24.3) that, by bringing "majesty" under the crimen maiestatis, Augustus exceeded the limits of the lex maiestatis.

There remain three questions arising out of Julia's case. Why was Julia herself, one of the beneficiaries under the new dispensation, charged with "laesa religio ac violata maiestas"? Why did Julius Antonius anticipate harsher treatment than that which the other adulterers received? And why was it precisely in 2 B.C. that Augustus found it necessary to take action against a state of affairs which had prevailed for

1 Thus Volkmann (89) and Kelly (42, 64, 70). Mommsen (Straf 260 and n.2) sees the court's formal basis in the grant in 30 B.C. of the right *ἐκκλησιον ἐκδικεῖν* (Dio 51.19.7), but Kelly's arguments against this view (15-22) are decisive. See also Jones (Jurisdiction 485-7).

2 Kelly (40-2) particularly notices the conspiracy of Cinna (pp. 210-5 above) as a case dealt with by the imperial criminal court, although in his view (37) this was because the maiestas of Augustus was identified with that of the State.

3 For imperial 'maiestas' in the Dominate see Kihler (543).

a number of years, and which was known to him a long time before he acted? (Cf. Dio 55,10,13; Macrobius, Sat. 2.5,3,4,5,6, 8,9).

The first question becomes significant when the case of Julia is compared with that of Appuleia Varilla, a great-niece of Augustus, who was prosecuted in 17 A.D. (Tac. Ann. 2.50). The charge was a twofold one of *maiestas*; insulting remarks about "divus Augustus", Tiberius and Livia; and the commission of adultery by one who was "Caesari conexa". It was held that the adultery fell to be dealt with under the *lex Julia de adulteriis* - "de adulterio satis curari lege Julia visum" (Ann. 2.50.2) - and Tiberius urged that instead of suffering the penalty prescribed by the *lex*, she be banished by her family's domestic tribunal (2.50.4). Tiberius not only refused (uncharacteristically) to follow an Augustan precedent, but by leaving the case to the domestic tribunal he seems to have gone out of his way to make it clear that adultery by a member of the imperial house was not *maiestas*. Even her paramour, one Manlius, was merely interdicted from Italy and Africa, instead of being relegated to an island (2.50.5). Koestermann (91) suggests that Tiberius acted leniently because the case was not politically important, as Appuleia did not represent a threat; he proceeds (94-5) to compare the case of Lepida (Tac. Ann. 3.22-3) where, on charges of adultery and *maiestas*, Tiberius was more severe, possibly because he had a political motive against M. Lepidus, the brother and defender of the accused. This view seems to be supported by the case of Claudia Pulchra, a cousin of Agrippina and a descendant of Augustus (Tac. Ann. 4.52.1,4). In 26 A.D. she was charged with adultery with Furnius, and with having attempted to use poison and spells against Tiberius. As both she and Furnius were condemned (4.52.6), it is clear that the adultery charge succeeded (cf. Claessens 254), but that the case had a purely political motive is shown by Agrippina's taunt to Tiberius, that the real reason for Claudia's downfall was her association with Agrippina (4.52.5). It would seem that,

although the punishment of adultery with a member of the imperial house as "violata maiestas" was always inherent in the 'patrocinium', the principle was not invoked except in cases of pressing need.

Before attempting an answer to the questions which have been posed (pp. 252-3), it is necessary to identify what is believed to have been the last of the three great concepts which shaped the majesty of Augustus, namely, the grant of the title "pater patriae". The title had been applied to Augustus long before it was officially conferred,¹ so that the official grant on the 5th February, 2 B.C., by the unanimous action of Senate and People,² was simply the formal recognition of a position which had long obtained. This 'de facto' occupation of a superior position, followed by 'de iure' recognition, conforms to the postulated manner of a maiestas shift (pp. 133-4 above), and in addition there are all the marks of a maiestas relationship.³ There is, firstly, the constant comparison of Augustus and Jupiter, which goes back to the original concept of maiestas as an attribute of the gods (pp. 4-8 above). Thus Ovid, when discussing the title of 'pater patriae': "Hoc tu per terras quod in aethere Iupiter alto nomen habes. Hominum tu pater, ille deum Romule concedas" (Fast. 2.131-3). To Ennius (Ann. 6.153) Jupiter was "divomque hominumque pater rex" (Dumezil 17), and in an obvious allusion to this Manilius (1.7) has: "tu Caesar, patriae princepsque paterque". Jupiter was "invictus" (Ovid Fast. 5.126), and so was Augustus as 'pater patriae': "sit pater invictus patriae".

1 Dio 55.10,10; Horace Carm. 1.2.50; 3.24.25-9; Ovid (Fasti 2.127-30): "Sancte pater patriae, tibi plebs, tibi curia nomen hoc dedit; hoc dedimus nos tibi nomen eque. Res tamen ante dedit. Sero quoque vera tui isti nomina: iam pridem tu pater orbis eras". See also Alföldi 2.115.

2 Res Gestae 35.1; Suet. Aug. 58.1-2; Ovid Fast. 2.127-8.

3 Cf. Alföldi on the title of 'pater patriae': "ein Oberbegriff, der das ganze Wesen des Prinzeips umfasst" (2.116); "diese namen (sc. Caesar Augustus, Divi filius, pater patriae) bezeichnen viel genauer seine wahre Position als die sorgfältig gezählten Iterationsziffern der 'republikanischen' Funktionen" (2.118); and particularly, "den neuen, väterlichen Majestätsbegriff" (2.121.)

(*Manil.* 1.925). Augustus stood next to Jupiter in the maiestas hierarchy: "tu secundo Caesare regnes" (*Nor. Carv.* 1.12.51-2; cf. *Dumézil* 16.3); "quodcumque est alto sub Iove, Caesar habet" (*Ovid Fast.* 2.138 - the 'pater patriae' passage). There is, secondly, the emphasis on the 'beneficia' enjoyed by the 'minor', for 'clementia' was one of the principal virtues of the 'pater patriae': "sed placidus facilisque parens veniaque paratus".¹

The crucial aspect is the relationship between paternism and 'maiestas populi Romani'. Premerstein (186-7), observing that "pater" often meant "patronus" from the point of view of the clients, believes that the concept of 'pater patriae' was derived from that of 'clementia'. This would mean that the conferment of the title in 2 B.C. was the culmination of the process which began with the oath of 32. It would follow, on the view of 'patrocinium' which has been submitted, that the 'pater patriae' was the possessor of "majesty", but not of technical maiestas. Alföldi (2.119) rejects Premerstein's hypothesis, although he concedes that the Republican 'pater patriae', before the transformation of the concept under Caesar and Augustus, was sometimes addressed as "patronus", and that Caesar's position as 'parens patriae'² took on "die Farben des Patronates". Indeed Caesar's title had much more than the "colour" of 'patrocinium', for Nicolaus of Damascus (Jacoby, t.407) attests simultaneous decrees concerning the oath of allegiance to Caesar in 44 B.C., and the grant to him of the title of 'parens patriae'.³ The sources are inclined to stress the connection between the exclusively Roman concept of 'patria potestas' (cf. *Gaius* 1.55; *Inst.* 1.9.2) and the Augustan title of 'pater patriae'. Seneca (*Clem.* 1.14.2) observes that the title of 'pater patriae' was not merely honorific, but expressed the 'patria potestas' which

¹ *Ovid Pont.* 2.2.117. Cf. Alföldi (2.114), who also cites *Res Gestae* 3.1; *Velleius* (2.86.2); *Seneca Clem.* 1.10.3; 1.13.4-5.

² Which Alföldi (2.106-14) regards as the lineal ancestor of the Augustan title.

³ Cf. pp. 152-3 above, for Premerstein's analysis of the oath to Caesar as the forerunner of the oath of 32.

bound princeps and citizens. Dio (53.18.3) notices that the title gave the emperors the authority which fathers had over their children. (Strabo (6.4.2, p.288C) uses language which suggests that the title involved something approaching a technical transfer of power: *χάσεν δὲ ἄλλως διοικεῖν τὴν πολιτικὴν ἡγεμονίαν ἢ ἐνὶ ἐπιτρέψεσσι δὲ πατρί.*

Salmon (477) believes that the title marked the transfer of the State into the potestas of Augustus, as if into the power of a paterfamilias, and gave his Principate its final form. The testimony of Augustus himself seems to confirm the latter point, for he ends *Res Gestae* (35.1) with the conferment of the title (cf. Hohl Augustus 336), and he described it as the achievement of his supreme ambition (Suet. Aug. 58.2). There are strong associations between patria potestas and maiestas, for 'patria maiestas' was used as the equivalent of 'patria potestas'.¹ It seems to follow from Cicero (Quirif. 2.5) that patria potestas could be raised to a public level, as an attribute of the People itself: "Vestros denique honores, quos eramus gradatim singulos adsecuti, nunc a vobis universos habemus, ut quantum antea parentibus ... tantum hoc tempore universum cuncto populo Romano debeamus".² There is perhaps most significantly of all, the strong identification of the 'pater' and the State suggested by Valerius Messalla when saluting Augustus as 'pater patriae': "Quod bonum ... faustumque sit tibi domique tuae, Caesar Augustus (sic enim nos perpetuum felicitatem rei publicae et lasta huc praeteri existimamus)..." (Suet. Aug. 58.2). But the same passage tends to indicate the final stage in the development of Augustan "majesty", rather than a technical maiestas shift, for "tibi domique tuae" is not difficult as an incident of 'alien-tela', but is quite inconsistent with 'maiestas populi Romani'.³

1 Livy 4.45.8; 8.7.15; Val. Max. 7.7.5; Quint. Decim. 376.
2 Cf. Livy (44.13.4-5): "Prolemaei legati ... gratias egimus quod eis eorum senatus populoque Romano quam parentibus suis habere".

3 The grant to Livia of the title 'parens patriae' or 'mater patriae', although vetoed by Tiberius (Tac. Ann. 1.14.2-3), was also an easy development of the patrocinal concept, but could not have been contemplated as an extension of technical maiestas.

It is not possible to follow Mommsen¹ in regarding the title as merely honorific. Apart from the evidence of Seneca, Dio and Strabo (p. 256 above), there is the statement of Suetonius (Aug. 58.1) that it was conferred on Augustus as a cognomen, which leads Alföldi (2.120 and n.448) to suggest that it had acquired the character of "einer Herrsch. Bezeichnung, eines kaiserlichen Monopols". Alföldi (loc. cit.) holds that the appropriation of the title by others would have fallen under the crimen maiestatis, and cites the charge against Cn. Piso, who allowed his soldiers to call him "parens legionum" (Tac. Ann. 2.55.4, 80.4; 3.13.3). This is not an apt example, for Tiberius consistently refused the title of 'pater patriae' (Tac. Ann. 1.72.2; 2.87.2), and it would be going too far to suggest, as an alternative argument, that in Piso's case Tiberius defended the memory of "divus Augustus". Piso's unofficial title is rather to be regarded as part of his general abuse of his proconsular imperium. There is better evidence that the title had legal significance: "Relegatus morari non potest Romae ... quia communis patria est, neque in ea civitate in qua moratur princeps vel per quam transit: his enim solis permissum est principem intueri, qui Romam ingredi possunt, quia princeps pater patriae est" (Dig. 48.22.18). Furthermore, the literary choice which greeted the new title, and subsequently stressed its significance,² is not paralleled by the reception accorded to Augustus' other titles and offices and seems to show a realisation that an event of profound significance had taken place. Ovid (Trist. 4.4.13-15) is particularly significant: "Ipse pater patriae ... sustinet in nostro carmine saepe legi. nec prohibere potest, quia res est publica Caesar" (cf. Pont. 2.8.19-20). And the very fact that it was found advisable to give formal

¹ Staat 2.2.779.2; cf. Frensterstein (173) and Salmon (477). Jones (Augustus 117) rather sweepingly dismisses "harmless offices and titles, such as ... pater patriae".

² Ovid: Fasti 2.127-48; Trist. 2.39.181, 574; 4.4.13-15; Pont. 2.117-22. Manilius 1.7.925. Seneca: Octavia 477-8; Clem. 1.5.7; 1.10.3; 1.13.4-5; 1.18.2. Strabo 6.4.2 p.288. Velleius 2.86.2. Suetonius Aug. 58.1-2. Dio 53.18.3; 55.10.10.

acknowledgement to a title which had long enjoyed unofficial currency, suggests that a formless concept was converted into a constitutional element.

The 'domus Caesaris' does not fall under the concept of the paterfamilias, for it was of the essence of patria potestas that the 'pater' stood alone, as against his entire 'familia' - in this case, the State. The inclusion of the 'domus' would, however, mean that the 'paterfamilias' was made up of the princeps and some of his dependents, as against the rest of the community. It is safer to assume that elements of both patrocinium and patria potestas were fused in the position which was finally achieved in 2 B.C. In his capacity as the supreme 'patronus', Augustus could demand that the respect and protection owing to him be extended to his house; but as the supreme 'pater' he could demand respect and protection from all the rest, including the members of his own house.

The majesty of Augustus, in common with the 'maiestas populi Romani' with which it co-existed, was an unstable relationship, requiring constant vigilance for its survival (cf. pp. 8-11 above). Instinsky (21-6) shows that under Nero the concept of 'Securitas Augusti' was officially expressed as a legend on coins, to be followed under Galba and Otho by coins inscribed 'Securitas Populi Romani', which was a concept quite distinct from 'Securitas Augusti'. Although Instinsky (16-17) believes that the word "securitas" as used in relation to the Augustan period (Vell. 2.89.4, 103.3) had only a general meaning in regard to the community as a whole, and had not yet acquired the differentiated conceptual values which it afterwards expressed, he at least concedes that Augustan "securitas" was "Vorspiel, ... Vorklang späterer Jahrzehnte". The suggestion is that this "Vorspiel, Vorklang" can be expressed by the formula: maiestas populi Romani - crimen maiestatis populi Romani imminuit; 'maiestas' Augusti - crimen laesarum religionum ac violatae maiestatis.

The moral aspect of "majesty" is important. Notice has already been taken (p. 6 above) of the stress placed by Ovid (*Fasti* 5.11-52) on the moral values which were involved in the birth of Maestas, but these should be briefly recapitulated in the light of Dumezil's view (14-15) that this passage in Ovid is the most valuable source for the nature of the new "majesty". The birth of Maestas is described thus: "Honor placidoque decens Reverentia voltu corpora legitimis inposuere toris. hinc nata Maestas" (vv. 23-5). Maestas sat resplendent in purple and gold, and next to her were "Pudor et Metus" (vv. 27-9). The assault of the Giants having been broken by Jupiter (vv. 35-42), "his bene Maestas armis defensa deorum restat et ex illo tempore culta manet; assidet inde Iovi, Iovis est fidissima custos et praestat sine vi accepta tenenda Iovi" (vv. 43-5); Maestas having come down to earth (47), "illa patres in honore pio matresque tuetur" (49). These concepts should be linked to the moral obligations which were regarded as resting on the 'pater patriae': "Si quaeret PATER URBUM subscribi statuis, indomitam audent refricare licentiam" (Hor. *Carm.* 3.29.27-9).¹

In 2 B.C. the seal of full official recognition was placed on the personal majesty which Augustus had been steadily building up since the days of the triumvirate. His position now was such that it was no longer possible for him to condone the irregular conduct of Julia. What may previously have been merely the exercise by Julia of "the prerogatives of her station" (Syme 426) now became a direct threat to the new majesty. Lawful wedlock was the hallmark of Maestas, Pudor was her companion, and "refrenare licentiam" was the duty of the 'pater patriae'. The continuance of a situation in which these values were flouted would have exposed the new majesty to grave danger. An example had to be set, and its setting was so managed that the action taken to defend "majesty" would, at the same time,

1. For the identification of 'pater urbium' with 'pater patriae' (although prior to the official conferment of the latter title) see Wickham (1.259, s.v. "pater urbium").

underline the true nature of the new concept. The procedure which was adopted encompassed all three elements which had made the principal contribution to the creation of majesty. The paramours had breached their sworn duty of respect towards a member of the imperial house, and this was "laesae religiones". But in so doing they had injured Augustus, not only in his tribunician sacrosanctity ("laesae religiones" again), but also as the universal 'pater'. In the latter regard the crime was now for the first time given a name - "violata maiestas". This crime was now meaningful in the sphere of the public criminal law, because the title 'pater patriae' had been officially conferred, and was legally significant, Julia was an injured party from the point of view of the protection which the patrocinal oath gave her, but she was a transgressor vis-à-vis the 'pater patriae'. In the final analysis it was the situation resulting from the new official title of 'pater patriae' which was emphasised by the prosecutions. The universal paterfamilias stood in splendid isolation on a peak from which even the members of the 'domus Caesaris' were excluded. At that level his immediate 'familia' was merged with the general body of citizens, although at a lower level it occupied a superior position as against the rest. For the protection of this unique pre-eminence the *lex maiestatis* and the *lex de adulteriis* were both legally inapposite and politically inadequate. It was not a question of statutory categories of crimes and periods of prescription. There was only one principle in issue: "Memento impune lacescit". And, to give the final point to the lesson, Iulius Antonius was chosen to receive the most severe treatment of all, for the precise reason that he was married to Marcella, the daughter of Octavia and the niece of Augustus (Jell, 2,100, 3-4). The point having been made, the other paramours could be allowed peaceful exile. In the case of a member of the imperial house the supreme penalty had to be exacted, so that those who stood closest to the throne might know that there was only one Father of the State. Dessau (L,467) believes that the

precedent established by Augustus in 2 B.C. was responsible for "die vielen missbräuchlichen Anwendungen des Majestätsgesetzes unter den folgenden Regierungen". It would perhaps be more correct to say that Augustus, by introducing the crime of "violated majesty", and by deliberately allowing the dividing line between this new concept and the *crimen maiestatis* to remain obscure, set the pattern for the ambiguity which marked the crime of *maiestas* under Tiberius and succeeding emperors, an ambiguity which was probably not resolved until the age following that of the great classical jurists of the late second and the third century A.D., when majesty and *maiestas* were fused in the person of the emperor.

The disgrace of the younger Julia (the daughter of the Julia who was relegated in 2 B.C.) is of interest both in regard to the principle of "violated majesty", and because the poet Ovid was in some way involved in it. The facts are that Julia¹ died in exile in 28 A.D., twenty years after her condemnation and relegation for adultery (Tac. Ann. 4,71.6-7; cf. Suet. Aug. 85); that Tacitus classed her case with that of her mother as an abuse of the laws (Ann. 3,24.2-3); that her husband, L. Aemilius Paullus, conspired against Augustus and was executed (Scholiast ad Juvenal 6,158); and that D. Silanus, one of her paramours, was excluded from the friendship of Augustus, went into voluntary exile without having been prosecuted, and was allowed to return in 20 A.D. (Tac. Ann. 3,24.5-7). Julia's death in 28 A.D., twenty years after her relegation, seems to suggest that her trial was in 8 A.D.,² but a more complex position is attested by the Scholiast on Juvenal (6,158), who says that Paullus was executed, Julia was relegated and recalled, but subsequently again exiled for her vices, and her brother Agrippa Postumus was relegated to Sicily because of his incest with her and his "feritas". Hohl (Augustus 339-42)

1 Who, as Hohl (Augustus 340) observes, inherited "die Nymphomanie ihrer Mutter".

2 Dessau (1,467); Syme (332).

notices that Paullus was consul ordinarius in 1 A.D., but was replaced by M. Herennius Picens as suffect consul, and argues that the conspiracy took place in 1 A.D.,¹ and that Julia was relegated on this occasion, and thereafter recalled and again relegated in 8 A.D. This is not inconsistent with the view which the 'pater patriae' took of his majesty. Julia's first relegation would have been because of her involvement in her husband's conspiracy, rather than because of her infidelities, which means that she was guilty of a serious form of the crimen maiestatis proper. For this she was treated much more leniently than her mother, which perhaps shows that Augustus was disposed to use greater severity against the 'crimen violatae maiestatis' than against the 'crimen maiestatis imminutae', even when the latter was directed against him in his official capacity. Subsequently, when Julia was exiled for her vices,² leniency was abandoned, for on this occasion the crime was that of "violated majesty"; and, like her mother, she died in exile.

The reasons for Ovid's relegation to Tomi in 8 A.D. are obscure.³ The poet himself speaks of "duo crimina, carmen et error" (Trist. 2.207). The "carmen" which resulted in his being charged as "obsceni doctor adulterii" (Trist. 2.212)

1 Norwood (153) prefers 5 A.D. Syme (432) believes that part of Paullus' crime was connivance at his wife's adulteries, but there is no discernible objective which he hoped to achieve by his aberration.

2 Scholiast ad Juvenal 6.158. Norwood (151) may be right to suggest that the Agrippa whom the Scholiast attests as having corrupted her was not her brother, Agrippa Postumus, but Herodes Agrippa.

3 Norwood (154-9) believes that Julia and Agrippa Postumus were implicated in a plot against Augustus, and that Augustus, not wanting to let it be known that there was a plot in his own family, gave out that Postumus was mentally deranged, and trumped up the story of Julia's misconduct, using Silanus as a scapegoat. Ovid was a friend of Postumus and Julia, and learnt of matters which Augustus did not want made public, namely, that the real reason for the punishment of Augustus' grandchildren was a plot. Ovid was exiled in order to keep him quiet. If this hypothesis is correct it in fact supports the postulated distinction between the crimen maiestatis and the postulated distinction between the crimen maiestatis and "violata maiestas". When it was not convenient to proceed with a prosecution for maiestas proper, "violated majesty" was a suitable alternative expedient.

can probably be identified as his "Ars Amatoria",¹ but as this had been published eight years before it looks more like a pretext than an instant cause of complaint (cf. Dessau 1.469; Syme 468). Ovid cannot specify the "error" without re-opening a wound which it was bad enough to have inflicted on Augustus in the first place (Trist. 2.208-10), but insists that it had nothing to do with either external treason or conspiracy,² nor with verbal injury,³ nor indeed with the contravention of any law: "Nec quicquam, quod lege veteri committere, feci" (Pont. 2.9.71). Taken with Ovid's complaint that he was punished without trial,⁴ which means by the exercise of *coercitio* (Dessau 1.469; Vollmann 185), and with the fact that the *crimen maiestatis* was excluded where 'mens rea' was absent (Dig. 48. 4.7.3), the evidence suggests that in Ovid's view his offence fell outside the ambit of the public criminal law. Indeed he says so quite explicitly: "Illa dies veniet, nea qua lugubria ponam: causaeque privata publica maior erit" (Trist. 4.2.73-4). His crime had something to do with "violated majesty", and in this regard it is significant that his appeal for clemency is addressed to Augustus in his specific capacity as 'pater patriae': "parce, pater patriae".⁵ There is no information as to the nature of the "error", except that it consisted in inadvertently seeing something which should not have been seen (Trist. 2.103-5; 3.5.49-50), and probably also in making known what he had seen (Trist. 3.5.51-2; 3.6. 35). It has been reasonably assumed that his forbidden knowledge related to the adulteries of the younger Julia (Vollmann 185; Dessau 1.468). His offence was far removed from the *crimen maiestatis imminutae*, and was even too nebulous to be prosecuted in the imperial court as the *crimen violatae maiestatis*. This explains why he was dealt with extra-judicially, and why his punishment was comparatively

1 Dessau (1. 469,532); Vollmann (185); Norwood (150).

2 "Qui nec contraria dicor arma, nec hostiles esse secutus" (Trist. 2. 51-2); "Cum poenae non sit causa eruent mea" (Trist. 3.5.44).

3 "Non aliquid dixi, violentaque lingua locuta est, lapsae sunt nimio verba profana mero" (Trist. 3.5.47-8).

4 "Nec mea decreto damnavisti facta senatus, nec mea selecto iudice iussa fuga est" (Trist. 2.131-2).

5 Trist. 2.181; cf. Trist. 2.39; 2.574; 4.4.13-14; Pont. 1.1.36.

lenient, in that he was left in full possession of his property (Trist. 2.137-8). But as lenient as the 'pater patriae' might be, his majesty weighed heavily on his "children".¹ The concept which, under the relatively stable regime of Augustus, was employed with moderation and a minimum of injustice, was fundamentally a dangerous notion, and lent itself only too readily to the abusive extensions which characterised the *crimen violatae maiestatis*, as it was steadily brought closer to the *crimen maiestatis imminutae* under his successors.

1. Cf. Ovid Pont. 2.6:29-30: "perque tori sociam ... cui maiestas non onerosa tua est".

CHAPTER XII

"DE FAMOSIS LIBELLIS"

"(Apud veteres) facta arguebantur, dicta impune erant. Primum Augustus cognitionem de famosis libellis specie legis eius (sc. maiestatis) tractavit, commotus Cassii Severi Libidine, qua viros feminasque illustres procacibus scriptis diffamaverat" (Tac. Ann. 1.72.3-4). Tacitus' criticism should be evaluated by investigating the extent to which the crimen maiestatis was used as an instrument for the suppression of freedom of speech, both in the Republic and under Augustus.

In 206 B.C. the poet Naevius was imprisoned "ob assiduum maledicentiam et probra in principes civitatis de Graecorum poetarum more dicta" (Gell. 3.3.15; cf. Plaut. Mil. Glor. 211-2). The poet is supposed to have said "Fato Metelli Romae fiunt consules", and so to have levelled an insult by name - "de Graecorum poetarum more" - against Q. Metellus, consul in 206 B.C.¹ Naevius also insulted Scipio Africanus: "Etiam qui res magnae manu saepe gessit gloriuse, cuius facta viva nunc vigent, qui apud gentes solus praestat, eum meus pater cum pallio uno ab amico abduxit" (Gell. 7.8.5). Fraenkel (RE Supp. 6.623; contra Mattingly 417) takes this as another example of "nominatio", an attack on a named person. The existence of a sanction for criminal defamation in Naevius' day depends on the meaning of Cicero (Rep. IV ap. Augustine Civ. Dei 2.9), who has Scipio comment on Attio Old Comedy's freedom *ὁνομαστικὴ κακώδεια* as follows: "Nos- trae, inquit, contra duodecim tabulas cum perpaucos nec capere sanxissent, in his hanc quoque sancientiam putaverunt, si quis occentavisset sive carmen condidisset, quod infamiam faceret

1 Ps-Ascon. ad Cic. Verr. 1.10.29, Fraenkel (RE Supp. 6.623) and Mattingly (415) accept Naevian authorship of the verse. Fraenkel (RE Supp. 6.623-4) also accepts the historicity of Q. Metellus' reply: "habuit malum Metelli Naevio poetae" (Ps-Ascon. loc.cit.); but Mattingly (420-1) regards it as apocryphal.

flagitiumve alteri".¹ Despite the attempts which have been made to restrict this passage to a sanction against magic spells and incantations,² the better view is that Cicero means a capital sanction against the publication of defamatory verses.³ The question is whether this provision was used against Naevius. Gellius (3.3.15) says that while in prison he composed his "Harriculus" and "Leon", thereby purging the injuries which he had previously inflicted; the tribunes therefore released him. If the tribunes interceded for this reason, and not because his imprisonment was unlawful, weight is lent to the view⁴ that his punishment was an exercise of coercion. But there is a tradition that Naevius was exiled, for Jerome⁵ says that he died at Utica, "pulsus Roma factione nobilium ac praecipue Metelli". This suggests voluntary exile to avoid condemnation.

The next appearance of defamation in the criminal law is linked to a corrupt passage in Cicero (*Fam.* 3.11.2). Congratulating P. Claudius on his acquittal of maiestas, Cicero says: "De arbitrio vero quid interest, inquis, an de maiestate? Ad rem nihil: alterum enim non attigisti, alteram auxisti. Verum tamen est maiestas etsi Sulla voluit ne in quovis impune declamari liceret: ambobus vero ita apertum vim habet ut aut accusetur improbe aut defendatur".

The general sense is that there is no difference between

1 Cf. Cic. *Tusc.* 4.4: "duodecim tabulae declarant cond. ius tuum solitum esse carmen: quod ne liceret fieri ad alterius iniuriam lege sanxerunt"; *Hor. Sat.* 2.1.82-3: "si mala condiderit in quem quis carmina, ius est iudiciumque."

2 Strachan-Davidson (*L.* 107.3); Buckland 325; Mattingly 417.13.

3 Fraenkel (Review of Bejerman - passing); Jolowicz (175 and n.1); Momigliano (Review of Robinson 121-3); Smith (169-70); Daut. (25). Fraenkel does not sufficiently stress a strong argument in his favour, namely that Cicero's purpose is to contrast the provision in the XII Tables with the free political satire of Greek Comedy.

4 Girard (*Organisation* 256-7); cf. Smith (170); Mattingly (419).

5 *a. Abr.* 1405 = 201 B.C. On the chronological difficulty see Fraenkel (*RE Supp.* 6.625) and Mattingly (422-3).

maiestas and ambitus "ad rem", which cannot mean "in one sense" (as suggested by Smith 176), for in the context the similarity of the two crimes is considered in relation to the specific charges against Appius. There was no difference as far as he was concerned, for he was innocent of both. It then occurs to Cicero that there is a difference, which could have prejudiced Appius. Despite "alterum auxisti", a conviction had been possible because ... (?). On the other hand, the scope of ambitus was so clear that a man's guilt or innocence could be predicted in advance. The lack of similar clarity in the case of maiestas had provoked Sullan legislation which had something to do with people being "declained against". The answer to the crux seems to lie in a rule designed to obviate the disadvantage of being charged with maiestas.

Some of the proposed emendations are violent: "ea est maiestatis vis, et sic involuta, ut in quemvis impune declamare liceat" (Frühlich, RE 4,1562); "verumtamen est maiestas (etsi Sulla voluit ne in quemvis impune declamari liceret) ambigua" (Glyn Williams 232); "verumtamen ea est maiestas (etsi Sulla noluit) ut in quemvis impune declamari liceret" (Tyrell and Purser 213). Köhler's reading (547) is: "est maiestas (et sic Sulla voluit) ne in quemvis declamari liceat" (italics mine). A.H. McDonald (cited by Smith 176,3) suggests: "varia tamen est maiestas etsi Sulla voluit ne in quemvis impune declamari liceret" (italics mine). This amends only a single word, and gives the desired contrast between the uncertainty of maiestas and the "aperta vis" of ambitus.

The crisp question is: What was it that Sulla did or did not intend? The answer depends on "in quemvis declamari", which is taken by Grunidge (Treason 235 n. 'b') to mean the publication of defamatory statements, and by Smith (176) as referring to a punishment for bringing a prosecution not falling under Sulla's maiestas law. On Grunidge's view, Sulla introduced a substantive rule prohibiting defamation, while Smith's interpretation implies a procedural rule. At first sight the lex Roscia is against Smith.

This law, which is first attested by Cicero (Sex. Rosc. 19, 55), punished "calumnia", which was an intentional prosecution on false grounds (Schol. ad Cic. loc.cit; Dig. 48.16.1.1-5; 22.5.13). No special charge was brought. The procedure was that the court, when acquitting the accused, punished the accuser (Ascon. 29C). The law is dated between the first quaestio perpetua and Sulla (Mommsen Straf 491-2), or before 80 B.C. (Broughton 2.13.473). On either view it was in force when Sextus Roscius was tried in 80. There is no suggestion that it was not of general application,¹ but on Smith's view it would follow that Sulla made special provision for calumnia in maiestas cases. Greenidge's opinion is open to the more serious criticism that a substantive ban on defamation seems to have nothing to do with the "variability" or lack of "aperta vis" of maiestas. It would be illogical for Cicero to have said: "Maiestas is uncertain, although Sulla made defamation a form of the crime".

It is possible, however, to support Smith by assuming that the very uncertainty of maiestas made the Roman remedy ineffective. In the case of ambitus, on given facts the guilt or innocence of the accused was ascertainable in advance, and on an acquittal it would have been clear whether there should be a conviction for calumnia. But even on admitted facts a conviction for maiestas was not certain, for the outcome of "maiestatem auxi" versus "maiestatem iniusti" could not be known beforehand. A court acquitting on the ground of "maiestatem auxisti" could not say that the accuser had intentionally prosecuted on false grounds. For example, the accuser of A. Gabinius (pp. 88-9 above) could have had no reason to anticipate that unauthorized departure from a province would not be regarded as maiestas. The rule was: "Nemo damnatur nisi qui intellegit non recte se agere ... calumnia enim in adfectu est" (Gaius 4.178). A maiestas jury could scarcely condemn an accuser under the lex Remia for not having known what the jury itself had just discovered.

¹ Gaius 4.178; Dig. 48.16.1. Cf. Mommsen (Straf 491-2); Greenidge (Procedure 468-9).

The result was practically a white ticket for accusers, for nearly every charge of *calumniā* could be met with the answer: "*varia tamen est maiestas*". Sulla therefore devised a special rule, giving those accused of *maiestas* the protection against malicious prosecution which the *lex Remia* did not supply. It is proposed to adopt McDonald's "*varia*" and Kibler's "*sic*", and to punctuate as follows: "*Varia tamen est maiestas: et sic*" Sulla voluit ne in quemvis impune declamari liceret". This gives the desired contrast: Because of the variability of *maiestas*, Sulla introduced a special rule against *maiestas* prosecutions without good cause; but as for *ambitus*, its scope is quite clear, so that the ordinary rule of the *lex Remia* applies.

The evidence so far considered does not assist greatly in refuting Tacitus' "(apud veteres) facta arguebantur, dicta impune erant" (Ann. 1.72.3). The ill-tempered remark of Claudia (p.30 above) was *maiestas*, but it was not a case of criminal defamation. Smith (177) suggests that, independently of anything in Sulla's *maiestas* law, defamation, as a form of '*iniuria*', could lead to a *maiestas* charge if directed at a magistrate: "*Iniuriam fecisti, sed quia magistratui, maiestatis actio est*" (Quint. Inst. Orat. 5.10.39). But this suggestion overlooks the import of Tacitus' criticism that Augustus associated defamation and *maiestas* because Cassius Severus "*viros feminasque illustres ... diffamaverat*" (Ann. 1.72.4). Given the existence of magisterial *maiestas*, there is nothing un-Republican in the proposition that any attack on a magistrate's dignity was a mediate diminution of '*maiestas populi Romani*'. But Tacitus does not mean "*iniuria magistratui facta*". His point is that injuries to "*viros feminasque illustres*" (*italice minime*) became *maiestas*. The inclusion of women excludes magisterial *maiestas*, and suggests an un-Republican innovation.

1. "*sic*" in the sense of "under these circumstances, accordingly, hence" is attested, although rare. See Lewis and Short, 1690 s.v. "*sic*".

For the Caesarian period there is some evidence to support Carcopino's opinion (Cicero 2.390) that Caesar as dictator suppressed writings which displeased him, condemned the authors to exile, and organised a police system to maintain his grip on public opinion. But there is nothing to suggest that Caesar's conditioning policy involved the inclusion of defamation under the *crimen maiestatis*. His quarrels with Calvus and Catullus, as a result of their libellous verses (Taylor, *Politics* 145-7, 230.28), did not lead to criminal proceedings, and indeed Suetonius (Laes. 75.5) attests his liberal attitude towards insults, citing in particular his condonation of the libels of M. Voltacilius Pitholeus and A. Caecina. Pitholeus produced the pungent comment on the appointment of Caninius Rabilius as consul for a day: "Ante flamines nunc consules diales fiunt" (Macrob. Sat. 2.2.13). If this was not punished it is difficult to fault Suetonius' assertion of Caesar's liberal attitude. Caecina published "Querellae" which were probably seditious (Carcopino, Cicero 2.413), but his exile after Thapsus was probably due to his service under Cato in Africa (Bell. Af. 89.5), rather than to his writings, despite his own assertion to the contrary: "Mens error exalio corrigitur: cuius summa criminis est, quod amatus adversario male dixi" (Cic. Fam. 5.7.1). It is true that Suetonius (Caes. 75.5), by saying that Caesar preferred to discourage libels rather than to punish them, implies that punishment was a possible alternative (cf. Carcopino, Cicero 2.413), but there is no reason to believe that the crime involved in attacks on Caesar was other than the type of *maiestas* which consisted in "iniuria magistratui facta".

As in the case of Caesar, there is some evidence that Augustus was tolerant of personal attacks. He did not react strongly to "famosi libelli" posted against him in the Senate (Suet. Aug. 55), confined himself to replying by edict to insulting jokes circulating about him (Suet. Aug. 56.1), vetoed a law which prohibited freedom of expression in wills (Suet. Aug. 56), and did not press a charge "quod male opinari de Caesare soleret" against Aemilius Aelianus Cordubensis, but

confined himself to the threat of retaliation in kind (Suet. Aug. 51). When Tiberius complained of his leniency, his advice was: "Noli in hac re indulgere et nimium indignari, quoniam esse, qui de me male loquatur. Satis est enim si hoc habemus, ne quis nobis male facere possit" (Suet. Aug. 51). Seneca was able to say of him: "Sub divo Augusto nondum hominibus verba sua periculosa erant, iam molesta" (Sen. 3.27.1). Even Tacitus (Ann. 4.34.9) was able to make a favourable estimate of the attitude of Caesar and Augustus to insults, as against that of Tiberius.

Horace (Sat. 2.1.18-20) seems to imply some inhibition of freedom of speech: "nisi dextro tempore Flacci verba per attemptam non ibunt Caesaris aures; cui male si palpare, recalcitrant undique tutus". But this need mean no more than Octavian's protection of his tribunician sacrosanctity. In the same poem (Sat. 2.1.82-3) Horace is warned by Trebatius that the composition of satires may bring him into conflict with the law: "si mala confiderit in quem quis carmina, ius est iudicisque". This passage has been understood as a reference to the enactment against defamation in the XII Tables (Fraenkel, Review of Beckmann 195), and as an allusion to Sulla's *lex de iniuriis* (Smith 178), but it is not certain that Horace intends a serious reference to any law. In the same satire (2.1.7-9) he has Trebatius advocate a remedy for insomnia, in language similarly reminiscent of an ancient statute: "ter uncti transanto Tiberim, somno quibus est opus alto, irigunusque mero sub noctem corpus habento". This is surely on a par with Cicero's parodies of Trebatius' legal pedantry.¹ And Horace's reply to Trebatius' warning suggests that his sole purpose is to lead

1 "Tantum moneo neque amicitiae confirmandae clarissimi ac liberalissimi viri neque uberioris provinciae neque aetatis magis idoneum tempus, si hoc audiveris, te esse ullum unquam reperiturum; hoc, quumdoctum vos scribere soletis in vestris libris, Lisen Q. Cornelio videbatur" (Fam. 7.17); "Sed tu in ista epistula nihil mihi scripseris de tuis rebus, quoniam mehercule mihi non minori curae sunt quam meae, valde metuo ne frigida in hibernis: quam ob rem caedro luculento utendum censeo (idem Mucio et Manilio placebat) praesertim qui sagis non abundares" (Fam. 7.10).

up to a witticism: "Esto, si quis mala: sed bona si quis iudice
condiderit laudatus Caesare?"

Suetonius (Aug. 51) notes with approval that Iulius Novatus escaped with a fine after publishing a serious defamation - "aspernam epistulam" - of Augustus, under the name of Agrippa Postumus. The charge may have been based on the *senatus-consultum* attested by Suetonius (Aug. 55): "Censuit (sc. Augustus) cognoscendum ... de iis qui libellos aut carmina ad infamiam cuiuspiam sub alieno nomine eederent" (PASSAGE A). A similar rule is stated in more general terms by Ulpian (Dig. 47.10.5.9): "Si quis librum ad infamiam alicuius pertinentem scripturum composuerit ediderit dolove malo fecerit quid eorum fieret, etiamsi alterius nomine ediderit vel sine nomine, uti de ea n. agere liceret, et si condemnatus sit qui id fecit, inest-ina-1 'is ex lege esse iubetur" (PASSAGE B). Ulpian (Dig. 47.10.

then mentions a senatusconsultum which apparently extended the law: "Eadem poena ex senatus consulto tenetur etiam is, qui *scripserit* aliquid sine scriptura in notam aliquorum produxerit: item qui emendum vendendum curaverit" (PASSAGE C). Elsewhere (Dig. 28.1.18.1) Ulpian says: "Si quis ob crimen famosum damnetur, senatus consulto expressum est, ut intestabilis sit" (PASSAGE D). The same topic is discussed by Paul (Sent. 5.4.15), who says: "Qui crimen famosum in iniuriam alicuius vel alia quaelibet certis, quo agnosci possit, composuerit, ex auctoritate amplissimi ordinis in insulam deportatur: interest enim publicae discipline opinione uniuscuiusque a turpi carminis infamia vindicare" (PASSAGE E). Paul also says (Sent. 5.4.17): "In eos auctores, qui famosas libello in contumeliam alterius proposuerunt, extra ordinem usque ad relegationem insulae vindicatur" (PASSAGE F). Paul says further (Dig. 47.10.6): "Quod senatus consultum necessarium est cum nomen adiectum non est eius, in quem factum est: tunc ei, quia difficilis probatio est, voluit senatus publica quaestione non vindicari" (PASSAGE G).

Levy (Paul 286-7) believes that E refers to the same

decree as G, arguing that "quo agnoscitur possit" in E refers to the same rule regarding an unnamed victim as "cum nomen adiectum non est eius in quem factum est" in G. Although E attests deportation, and G intestability, they can be reconciled if Levy (Paul 286) rightly postulates that "in insulam deportatur" in E is a later addition to Paul's original text. Levy (Paul 286) emends B as follows: "si quis ... sine nomine, (senatus consulto cautum est) uti de ea re (ex lege) agere liceat et ... intestabilis [ex lege] esse iubetur". The decree attested by this reading is then identified by Levy (Paul 286) with E and G. His argument then is (Paul 287; cf. Schulz, *Classical Law* 598) that the lex Cornelia de iniuriis applied only to real injuries (Dig. 47.10.5pr). The Senate extended the lex¹ to 'carmina famosa', and so subjected them to a criminal quaestio, as well as to a 'iudicium privatum' under the Edict, and at the same time introduced intestability as a new penalty, and provided for the anonymous wrongdoer and the unnamed victim. Finally, Levy (Paul 287) surmises that "in insulam deportatur" found its way into the text of E by contamination of two matters discussed by Paul in succession, namely, the decree extending the lex Cornelia to 'carmina famosa', and the association of defamation and maiestas attested by Tacitus (Ann. 1.72.3-4).

Smith (173) criticizes Levy's emendation of B, arguing that there is no sign of the lacuna for which Levy supplies "senatus consulto cautum est". Smith's reading, incorporating part of Digest (47.10.5.8), and re-punctuating, is: "Sed Sabinus in adessorio etiam praetores exemplum legis secuturos ait: et ita res se habet: si quis librum ... ediderit ... sine nomine, uti de ea re agere liceat ... iubetur". This

1 That is, the lex Cornelia de iniuriis. (cf. Smith (173). Moenssen (Sira? 800.7), who holds that it means the XII Tables, and Maschke (cited by Monigiano 123), who believes that the Digest lex Cornelia maiestatis is meant, fail to notice that the Digest (47.10.5), where B appears, names the lex Cornelia de iniuriis eight times, clearly implies it four other times, and nowhere refers to any other lex.

reading may well, as Smith contends, supply "ita res se habet" as the required antecedent to "uti ... liceret", although the change of tense is awkward. It also preserves the reference in the text to a "lex" which dealt with "libri". This forms the basis of Smith's hypothesis (174, 176) that "libri" were dealt with by the lex Cornelia itself, and that a senatusconsultum extended the law to "libelli" and "carmina". The argument is that "carmen", "libellus", and "liber" were not interchangeable. "Librum" in B should be restricted to longer written compositions, as against "libelli", which were short writings capable of transmission by word of mouth, and "carmina", which were meant to be sung or spoken, even if reduced to writing for propagation.

Smith's denial of interchangeability to "libri" and "libelli" is not persuasive. "Libellos aut carmina" in A suggests a distinction between written defamation of all kinds on the one hand, and oral defamation on the other, but not a subdivision of the written forms. And as far as the excerpts from Ulpian are concerned, if "librum" in B is restrictively interpreted, and if C and D are confined to "carmina", there is no mention of "libelli" at all. Conversely, Paul (E and F) does not mention "libri". Furthermore, the "famosi libelli" of Cassius Severus (Tac. Ann. 1.72.4) must have been the same type of publication as the "libri" of T. Labienus (Sen. Controv. 10 Praef.5). And the title "de iniuriis et famosis libellis" (Dig. 47.10) suggests that "libelli" had a general meaning.

It is difficult to avoid the impression that a senatusconsultum lurks somewhere in B, as Levy believes. In B itself "etiamsi ... sine nomine" looks like a later addition to the original provision "si quis ... ficeret", and, in the light of Daube's analysis (8-23, 90) of the use of "licere" in legislation, it is doubtful if "uti ... liceret" is statutory. And "ex senatus consulto tenetur scribi is" (italics mine) in C suggests that a senatusconsultum was also discussed in B.

Perhaps the stronger proof is furnished by "quod senatus consultum..." in G. These words (Dig. 47.10.6) cannot refer solely to the provisions attested in Digest (47.10.5,10-11), but follow logically on Digest (47.10.5.9), that is, B. The most serious criticism of Smith is that his hypothesis drives him to an unreasonable expedient. Faced with the Augustan senatusconsultum against defamation "sub alieno nomine" (A), and with the inclusion, on his theory, of a similar rule against written defamation "alterius nomine" in the lex Cornelia (B), Smith (179) unconvincingly proposes that the purpose of the Augustan decree was not to create a new rule, but merely to provide machinery for the detection of anonymous authors; by putting the onus on the Senate, Augustus avoided the odium of being the inquisitor himself.

It is significant that the special case of anonymous and pseudonymous defamation is limited by Ulpian (B) to publication ("ediderit"), while the general case applies to composition and publication ("scripserit composuerit ediderit"). There is a similar limitation in the Augustan senatusconsultum: "qui sub alieno nomine edere" (A). It is probable that, at least to the extent of "etiamsi ... sine nomine", Ulpian (B) is referring to a senatusconsultum, and therefore to that which was procured by Augustus. Insofar, therefore, as the anonymous or pseudonymous publication of written defamatory matter is concerned, it is postulated that there was only one piece of legislation, the Augustan senatusconsultum. But there was also a decree which dealt with oral defamation (A, C,D and E). According to Suetonius (A) it did not introduce a general rule for oral defamation, but a special rule dealing with anonymous publication in both the written and the oral forms. This suggests that the general case of oral defamation had been previously introduced, and in the absence of evidence of another source it seems reasonable to assign it to the lex Cornelia. It is therefore proposed to accept

Smith's hypothesis that the *lex Cornelia* dealt with "*libri*", subject to the amplification that it also dealt with "*libelli*" and "*carmina*", and to the restriction that for all three types it dealt only with the general case of composition and publication. The special cases of the anonymous or pseudonymous publisher, and the unnamed victim, were introduced by the *senatusconsultum* which was carried on the initiative of Augustus.

Cassius Severus was probably the most able orator of his day, although inclined to spoil a case by virulence.¹ He appeared in a number of criminal cases, but with little success either as accuser or defender (Macrob. Sat. 2.4.9), and was often in trouble because of his outspokenness. He was brought before the praetor for inciting his advocates to a '*convicium*' against L. Varus Epicurius, a friend of Augustus, but parried the charge with the neat "*nescio, Inquit, qui conviciati sint, et puto Stoicos fuisse*" (Quint. Inst. Orat. 6.3.78). Although Quintilian (loc.cit.) describes this case as a "*crimen*", it was a civil action if, as Vollmann (207) believes, it was based on that provision of the Edict which is attested in Digest (47.10.15.2).² But there seems to be a clear reference to Sulla's law in the charge which Cassius brought against Cestius Pius: "*Postulavi ut praetor hominem eius reciperet luge inscripti maleficii*".³

When Aspreus Nonius, a close friend of Augustus, was prosecuted by Cassius on a charge of poisoning, Augustus attended the trial with the Senate's approval, but took no part in the proceedings (Suet. Aug. 56). This case may have had a

1 Tac. Hist. 1.19.1; 26.4; Sen. Controv. 3 Praef. 1-8; Quint. Inst. Orat. 10.1.116.

2 Cf. Quintilian's equally inaccurate "*malestavis actio*" (italics mine) (Inst. Orat. 5.10.39).

3 Sen. Controv. 3 Praef. 17. M. Maen (Straf 387 and n.1) holds that this means a crime not provided for in the laws, and assigns the case to "den parodischen Quästionen" of the principate, but his view is opposed by Vollmann (203-4) and, to a certain extent, by Brzeska (RE 3.2010).

sequel of importance to the circumstances under which Augustus associated defamation and maiestas. The crucial passage is in Dio (55.4.3), who records, under the year 9 B.C., that Augustus stood by a friend who was accused, after having communicated his purpose to the Senate. Although Dio does not name the accused, his facts are strikingly similar to those in Asprenas' case, as attested by Suetonius. Dio adds that Augustus saved his friend. Although Suetonius does not give the outcome of Asprenas' trial, it is probable that there was an acquittal. Asprenas was defended by C. Asinius Pollio (Quint. Inst. Orat. 10.1.22), who died in 5 A.D. (Syme 512.7), which means that Asprenas' trial was not later than 5 A.D. But Asprenas was suffect consul in 6 A.D. (Syme 424.2), an office which he is not likely to have achieved if he already had a criminal record. Dio next records that Augustus was not only not angry with his friend's accuser (whom Dio does not name) because of his extreme outspokenness - *παρρησία* - but also acquitted him when he appeared before him *ἐθευόμεν ἐπὶ τοῖς ῥέμοις*.

The legal principle involved in an investigation *ἐπὶ τοῖς ῥέμοις* was that enunciated in the Edict: "Ait praetor: qui adversus bonos mores convictum cui fecisse ... dicetur ... in eum iudicium dabo" (Dig. 47.10.15.2; cf. Volkmann 207). Although "convictum" represents the "accusant" of the XII Tables (Kaser 521.6, Jörs 259), it can be taken as equivalent to the general term "iniuria verbia" (Mönnsen, Straf 794.4). Vollmann (207), correctly assuming that the accused friend of Augustus, to whom Dio refers, was Asprenas, and therefore that the accuser was Cassius Severus, believes that the accused in the prosecution before Augustus *ἐπὶ τοῖς ῥέμοις* was Cassius, and that the charge against him arose out of his *παρρησία* at Asprenas' trial. The only difficulty is the last assumption. Dio says that no action was taken against Cassius as a result of his outspokenness against Asprenas, from which it seems to follow that the proceedings which were instituted *ἐπὶ τοῖς ῥέμοις* were brought on a subsequent occasion, which had nothing to do

with Asprenas' trial. A charge against Cassius which may be identified as the proceedings ἐπὶ τοῖς τρέποισι is that which was brought by Paullus Fabius Maximus. Cassius addressed to Fabius the virulent remark: "quasi disertus es, quasi formosus es, quasi divus es: unus tantum es non quasi, vappa"; he was prosecuted for this, but acquitted (Sen. Controv. 2.4. 11; 3. Praef. 5). A further clue is furnished by Dio (55.4.4) who, immediately after the acquittal of Cassius ἐπὶ τοῖς τρέποισι, says: ἄλλους γὰρ μὴν ἐπιβουλεύειν οἱ μνησθέντας ἐνόησε. When Dio uses ἐπιβουλεύειν he means the crimen maiestatis proper (p.248 n.1 above), so that his sense is: "Cassius Severus was acquitted of 'convicium'". But others, who were alleged to have conspired against Augustus, were convicted of maiestas. It seems that Cassius was tried at a time when conspiracy was in the air. In Dio's context it also appears that the 'convicium' of which Cassius was acquitted was analogous to τὸ ἐπιβουλεύειν, that is, the crimen maiestatis proper.

Cassius' trial for 'convicium', as attested by Dio (55.4.3), seems to be the "cognitio de famosis libellis" against him which Tacitus mentions (Ann. 1. 72.4), for the charge of 'convicium' was based on the maiestas law, and Tacitus' "cognitio" was also conducted "specie legis (sc. maiestatis)". But Cassius was acquitted of 'convicium', while it is widely assumed¹ that he was convicted as a result of Tacitus' "cognitio". If so, the trial to which Dio refers was earlier than that of which Tacitus speaks, for the exile of Cassius to Crete "iudicio iurati senatus" (Tac. Ann. 4.21.5) would have been on the occasion of his conviction by the "cognitio de famosis libellis". There can be no suggestion that Cassius was allowed to return to Rome after his exile to Crete, thus making it possible to assume a later date for Dio's trial, for in 24 A.D. Cassius'

¹ Homanen (Straf 800.1); Brzozka (RE 3.1745); Kähler (551); Langle (Straf 62); Volkman (65); Syme (487 and n.3); Anderson (47); Kelly (44).

punishment was increased to confiscation and interdiction, and he was relegated to the island of Seriphus (Tac. loc.cit.). This sentence was imposed because Cassius "illic (sc. Cretae) eadem accitendo recentia veteraque odia advertit" (Tac. loc. cit.), which implies continuous exile from the time of the relegation to Crete. If the chronology of Jerome (ad a. Abr. 2048 = 32 A.D.) is correct,¹ Cassius died in 32 A.D., in the 25th year of his exile. This would date the relegation to Crete to circa 8 A.D.² But if Dio's trial was earlier than that of Tacitus, the latter is wrong when he says (Ann. 1.72.4) that the "cognitio" against Cassius was the first of its kind. Tacitus, however, does not say that Cassius was convicted, but only that Augustus "cognitionem ... tractavit". This inconclusive expression rather suggests an acquittal, for it was not Tacitus' practice to fail to mention a condemnation for maiestas. Furthermore, Dio's trial was held in Augustus' imperial criminal court (Vollmann 207 and n.4), and Tacitus' "cognitio" was probably in the same forum (Vollmann 178). Indeed, it seems clear from "Augustus ... tractavit" that there was an exercise of jurisdiction by Augustus personally. But the exile to Crete was decreed by the Senate (Tac. Ann. 4.21.5).

It may be possible to identify the occasion of Cassius' acquittal more accurately. Great popular unrest followed the famine and the fire of 6 A.D., with much seditious talk, and the posting of pamphlets by night: *βιβλία νύκτωρ ἐκείθεν* (Dio 55.27.1). One Publius Rufus³ was said to be the ringleader, but it was believed that the real leaders were making use of his name, in furtherance of the revolt which they were planning: *ἔρεποι δὲ τῶ ἐκείθεν ἰδύματι καταρχήμενοι τοις τοις ἐκείθεν* (Dio 55.27.2). The Senate decreed an investigation, and offered rewards for information

1 As is believed by Brzozka (RE 3.1746); Fitzler-Seock (RE 10.372); Vollmann (88.2).

2 This date is accepted by Brzozka (RE 3.1746) and Vollmann (88.2). Fitzler-Seock (RE 10.372), allowing a margin for error, prefers 6 A.D. Anderson (47) takes the date as 17 A.D.

3 Possibly the Flautius Rufus mentioned as a conspirator by Suetonius (Aug.19).

(Dio 55.27.3). It is probable that the pamphlets posted by night were lampoons on Augustus, for famine had previously produced similar attacks on him. During the triumvirate, his dinner-party at which the guests came dressed as gods and goddesses provoked the anonymous lampoon cited by Suetonius (Aug. 70); and criticism was particularly severe because there was a famine at the time: "Auxit cenae rumorem summa tunc in civitate penuria ac fames adclamatumque est postidie, omne frumentum deos comedisse et Caesarem esse plane Apollinem, sed Tortorem ..." (Suet. loc.cit.). It is probable that in 6 A.D. the use which the real ringleaders made of Rufus' name was to post pamphlets of a similar type, purporting to have been composed by Rufus.

It should be noticed that the senatusconsultum which extended the lex Cornelia de iniuriis to cases of anonymous and pseudonymous publication (pp. 275-6 above) included a provision which has not yet been discussed, namely, the authorisation of rewards to informers: "et ei, qui indicasset, sive liber sive servus sit, pro modo substantiae accusatae personae aestimatione iudicis praemium constituitur, servo forsitan et libertate praestanda" (Dig. 47.10.5.11). Ulpian's comment on this provision is: "quid enim si publica utilitas ex hoc emergit?" (Dig. loc.cit.). In the result there is a striking correspondence between the senatusconsultum and the events of 6 A.D. In that year lampoons on Augustus were published "alterius nomine" (cf. PASSAGES A, B and E); the Senate decreed an investigation (cf. PASSAGES A and E, and Levy's reading of E); and the Senate offered rewards to informers (cf. Dig. 47.10.5.11). The lampoons in the name of Rufus were far more serious than mere 'iniuriae', for they were published in furtherance of a seditious conspiracy, so that there was a clear involvement of "publica utilitas" (cf. Dig. 47.10.5.11).

It was at this point, in 6 A.D., that the Senate extended the lex Cornelia de iniuriis, and did so in such a way as to associate defamation and maiestas. The crimen maiestatis

already included any conspiracy "quo homines ad seditionem convocentur" (Dig. 48,4,1,1), and it was precisely in pursuance of such a conspiracy that the pamphlets in Rufus' name had been published. But although incitement to sedition was already *maiestas*, the 'ipissima verba' of the *maiestas* law did not cover the particular evil of the pamphlets. The Senate could have simply extended the *maiestas* law by decreeing that defamations "alterius nomine" would be deemed to be incitement to sedition. But then the new rule would have had to be restrictively phrased, so as to limit it to publication "ad infamiam principis", for only in that case was it realistic to speak of sedition; a rule against publication "ad infamiam alicuius" could scarcely be associated with sedition. But "ad infamiam principis" in the *maiestas* law would have seriously undermined the fiction that the concept of '*maiestas populi Romani*' still survived.

The solution was an extension of the *lex Cornelia de iniuriis*, in which "ad infamiam alicuius" would not be out of place, while at the same time there would be no need in practice to apply the new rule except against attacks on the princeps. But while this would give the desired rule of substantive law, there was a procedural difficulty. The criminal action under the *lex Cornelia de iniuriis*¹ can fairly be described as "sui generis". It was brought before a tribunal consisting of a quasi-magisterial president and a *consilium*, which assimilated it to a criminal trial; but it was known as an "actio", and never as an "accusatio", and was in fact "eine hinsichtlich der Bildung des Schwurgerichte modifizierte Zivilklage" (Mommesen, *Straf* 803, 804 and n.1; cf. 368). The plaintiff proposed a specified amount as damages, and if the court condemned it was bound to award precisely that amount; in addition, condemnation carried 'infamia' (Mommesen, *Straf* 805). Two differences:

1 Known as "actio iniuriarum legis Corneliae", as distinct from the purely civil action, "actio iniuriarum praetoria". Mommesen (*Straf* 804.1).

between this action and a prosecution before a *quaestio* are significant. Firstly, there was no general right of accusation, the action being available only to the injured party. It follows that there was no room for informers. Secondly, there could be no question of imposing any of the recognised criminal penalties, such as interdiction or confiscation. The '*actio iniuriarum*' did not, therefore, furnish a suitable means of bringing anonymous publication under the public criminal law. The '*actio*' could have been converted into a '*crimen iniuriarum*', but there were probably two objections to this course. It would have meant the attachment of an outright criminal sanction to real injuries, with consequent disturbance of the system of honorary law which had been built around '*iniuria*' as a civil delict. Furthermore, it was convenient not to remedy the position by creating a '*crimen iniuriarum*', for the existing state of the law gave Augustus a convenient pretext for accomplishing, in an unobtrusive way, something which he was in any event determined to bring about - the punishment of attacks on him as *maiestas*. In order to bring criminal defamation under a '*iudicium publicum*', a two-fold procedure was followed. The category of verbal injury in the *lex Cornelia de iniuriis* was extended to "*qui alterius nomine ediderit*" by *senatusconsultum*, which gave the desired enlargement of the substantive law. But this left '*iniuria*', even as extended, without a *quaestio perpetua* before which transgressors could be prosecuted. As it had been decided not to create a *quaestio de iniuriis*, jurisdiction had to be conferred on one of the existing *quaestiones*. The *quaestio maiestatis* was chosen for this purpose. The *senatusconsultum* therefore went on to provide that anyone composing or publishing defamatory matter was to be punished "*ex lege maiestatis*", possibly in the form: "*ut si quis librum ... ad infamiam alicuius pertinentem scripserit ... etiamsi alterius nomine ediderit vel sine nomine, ea poena teneatur, qua tenentur qui homines ad seditionem convocasse iudicati sunt*". Although worded in the general form "*ad infamiam alicuius*", in practice the rule

could easily be confined to attacks on the princeps and his family.¹ It is probably the selection of the *questio maiestatis* for this purpose that Paul has in mind when he says: "voluit senatus *publica questione* rem vindicari" (PASSAGE F; italics mine). A provision such as that suggested would have been no different in principle from that attested by Ulpian (Dig. 47.22.2), whereby the Senate (Dig. 47.22.1.1) brought unlawful associations, for which there was no *questio*, under the *questio maiestatis*: "quisquis illicitum collegium usurpaverit, ea poena tenetur, qua tenentur, qui hominibus armatis loca publica vel templa occupasse iudicati sunt" (Cf. Dig. 48.4.1.1: "locave occupentur vel templa"). Jurisdiction having been given to the *questio maiestatis*, there could be an assumption of that jurisdiction by the Senate and the imperial criminal court, which would have been impossible under the '*actio iniuriarum*'. It was also possible to introduce rewards for informers (Dig. 47.10.3.11), for the regular accusatory procedure now applied. Furthermore, a full-scale criminal penalty could be introduced, namely relegation (PASSAGE F; cf. PASSAGE E and Paul, Sent. 5.4.16). The penalty was "extra ordinem", as attested by PASSAGE F, precisely because the '*actio iniuriarum legis Corneliae*' had been abandoned, as far as criminal defamation was concerned.

It is therefore suggested that the "cognitio" against Cassius Severus (Tac. Ann. 1.72.4), which has been identified as the prosecution for 'convictum' attested by Dio (55.4.3), was conducted in 6 A.D.,² and was the first trial to be held under the *senatusconsultum* which was introduced as a result of

1 If the Sossius who was charged with *maiestas* because "apud matronas diserebat liberos non esse tollendos" (Sen. Suas. 2.21) was the C. Sossius who was consul in 39 B.C. (Edward 115), or 32 B.C. (Syme 276, 278), his crime would not have been brought under the new rule; rather was it a general diminution of '*maiestas populi Romani*', similar to the remark of Claudia (p. 30 above.)

2 Fitzler-Seeseck (RE 10.372) suggests, although they put it forward only as a bald possibility, that Cassius was exiled during the disturbances of 6 A.D. But on the hypothesis developed in the text, this was not the occasion of his relegation.

the unrest that year, and which, in effect, brought defamation under the crimen maiestatis. Cassius was acquitted, but convictions were secured against the leaders of the conspiracy who had furthered their purpose by publishing lampoons in the name of Rufus. These leaders are the ἄλλοι ἐκβουλεύεσθαι μνησθέντες to whom Dio (55.4.4) refers. It may be supposed that, although Cassius had no part in the conspiracy, some of his many enemies denounced him when an investigation was held (Dio 55.27.3) to determine the true author of the Rufian pamphlet. Although Cassius' record made him an obvious suspect, the evidence must have satisfied Augustus of his innocence.

But Cassius was an incorrigible slanderer (Tac. Ann. 4.21.5), and in or about 8 A.D. he was in trouble again, and was relegated to Crete under the senatusconsultum. It is possible that his offence on this occasion was connected with the proceedings against Titus Labienus, the son of Caesar's defecting lieutenant and an inveterate Pompeian (Kroll, RE 12.270; Syme 486), whose virulence caused him to be known as "Rabienus" (Sen. Controv. 10. Praef. 5). His enemies contrived to have all his writings publicly burned, a punishment previously unknown (Sen. loc. cit.). This was probably linked to a maiestas charge against Labienus (Carcopine, Cicero 2.560.2), and the burning of the books was authorised by the Senate (Sen. Controv. 10. Praef. 6; Suet. Calig. 16.1). As Labienus' works went up in flames, Cassius remarked: "Nun: me, inquit, vivum uri oportet qui illos edidici" (Sen. loc. cit.). It is known that Cassius' works were burnt also by decree of the Senate (Suet. Calig. 16.1), and it is probable that this took place soon after the destruction of Labienus' books. But then this general bonfire must be that attested by Dio (56.27.1), who reports that in 12 A.D. Augustus conducted an investigation into pamphlets which had been composed ἐν ὅππῃ τινίᾳ, and had the offending works burned both in Rome and elsewhere, and punished some of the authors. These measures were clearly taken under the senatusconsultum of 6 A.D., with the possible exception of the book-burning, which may have formed the subject of a later addendum by the Senate. Dio's chronology is not consistent with the date of Cassius' exile to Crete as established by Jerome (p. 279 above), but the inconsistency does not seem to have any bearing on the general picture of the course of events.

CHAPTER XIII

"AD LEGEM IULIAM MAIESTATIS"

Under the above heading Digest (48.4) sets out eleven excerpts from the works of seven classical jurists - Ulpian (48.4.1.2.11); Marcian (48.4.3.5); Scaevola (48.4.4); Venuleius Saturninus (48.4.6); Modestinus (48.4.7); Papinian (48.4.8); and Hermogenian (48.4.9.10). The same heading introduces the discussion of Paul (Sententiae 5.29), and two collections of imperial constitutions (Code Th. 9.5; Code J. 9.8). A "lex Iulia maiestatis" is also attested by Institutes (4.18.3) and, to judge from the misplaced excerpt in Code J. (9.8.6),¹ by Marcian (De Publicis Iudiciis I). Information about maiestas is, of course, ascertainable from many other juristic sources², but without mention of 'lex Iulia maiestatis'.

It has been widely assumed³ that the lex Iulia maiestatis was some sort of consolidating statute, which re-enacted the previous maiestas laws, with additions, and so went down to the Principate as the sole statutory source of the crime, subject only to the extensions introduced from time to time by decrees of the Senate, imperial constitutions, and judicial interpretation. In view of the fact that the laws of both Caesar and Augustus are known as "leges Iuliae", and that a given "lex Iulia" cannot be identified as having been introduced by Caesar or Augustus, unless there is extraneous evidence

1 On this passage see Mommsen-Krüger (2.374.2); Volterra 488-9.

2 For example, Digest (3.2.11.3); 28.1.18.1; 47.10.5-6; 48.18.10.1; Code J. (1.49.1; 4.1.2; 8.11.10; 9.5.1; 9.42.3.4; 9.49.10.5.11; 9.50.1; 11.9.4); Code Th. (9.11.1; 9.21.9; 10.21.3; 16.10.12.1; 15.1.33); Paul (Sent. 5.4.15-17; 5.21); Collatio (1.15.2); Edictum Constanti de accusationibus

3 Rein (515, 516 and n.); Zumpt (2.2.475-6); Mommsen (Straf 541); Greenidge (Treason 235); Farnsiaux (1.141); Pollack (200, 204); Botsford (855, 9.548); Strachan-Davidson (2.156); Girard (Leges 321.1); Ciaceri (251); McFayden (219); Kähler (548); Lengle (Straf 31); Rogers (Trials 6-7); Siber (Analogie 22; Verfassungen 290); Arango-Ruiz (137); Grant (413); Leir (23); Chilton (73).

pointing to a probability one way or the other,¹ the authorities are divided mainly on the authorship of this consolidating statute. Some assign it entirely to Augustus,² others to Caesar.³ It has also been suggested⁴ that the material in the texts is a composite commentary on statutes of both Caesar and Augustus; or that the definitive *maiestas* statute was made up of laws of Sulla and Augustus (Follack 199-200). There is also the courageous view that the *lex Julia maiestatis* was introduced by Tiberius.⁵

The strongest argument against a *lex* of Augustus is its omission from the literary sources which deal, although in the most scanty manner, with his legislation. Suetonius does not mention it in his brief resumé: "*Leges retractavit et quasdam ex integro sanxit, ut sumptuarum et de adulteris et de pudicitia, de ambitu, de maritandis ordinibus*" (Aug. 34.1; cf. *Res Gestae* 2.12.14). Dio (54.12-18), reviewing the measures of 18 and 17 B.C., says nothing which can be interpreted as a reference to a *maiestas* law; his nearest approach to the subject is his assertion (54.18.1) that Augustus adopted Gaius and Lucius [τὸν ἐκιστολάσαντα]. It can be urged that Suetonius does not purport to give a complete list, and it has been pointed out (Rein, 516 n.) that he also fails to notice Caesar's known *maiestas* law. The crisp question is, however, whether Suetonius omits from the resumé any other major laws known to have been introduced by Augustus. No reference point of absolute reliability is furnished by any Julian law, but a strong majority view regards Augustus as the author of the '*leges Iuliae iudiciorum publicorum et privatorum*' (p. 304 n.1 below). These laws are absent from

1 The only exception is Augustus' adultery law, for which there is internal juristic evidence: "*haec lex lata est a divo Augusto*" (Dig. 48.5.1).

2 Zumpt (2.2.476); Mommsen (Straf 541); Langle (Straf 31); Botsford (455.9); Furneaux (1.141); Cicerri (251); Grant (413); Lezr (23); Chilton (73).

3 Rein (516 n.); Greenidge (Treason 235); Arangio-Ruiz (137).

4 See the authorities cited by: Rein (516 n.); Zumpt (2.2.475); Rotondi (422, 453); Mühlcr (548).

5 See the authorities cited by Rotondi (453).

the resumé, but the inference to be drawn from this fact is seriously weakened by Suetonius' mention of at least some of their provisions elsewhere (Aug. 32). Similarly, the *lex de collegiis*, which was Augustan (Arangio-Ruiz 104-5), is not included in the resumé, but is noticed by Suetonius elsewhere (Aug. 32). The significance of this law is that it applied the penalty laid down for incitement to sedition (Dig. 47. 22.2), that is, for a form of *maiestas*. It may therefore be argued that when Suetonius consulted this *lex*, his attention would have been drawn to the *maiestas* law. It would perhaps follow that if there had been anything to say about an Augustan *lex maiestatis*, Suetonius would have said it. Of the Julian criminal laws set out in the Digest (48.4,5,6,7,11,12, 13,14), those on adultery and *ambitus* are included in the resumé, and the extortion law was Caesarian (Zumpt 2.2.294, 475; Mommsen *Straf* 709). The authorship of the rest is too uncertain to base an inference on their omission by Suetonius, but at all events there is no certain case of the total failure by Suetonius to mention a law known to have been introduced by Augustus, and therefore some weight should be given to his omission of a *lex maiestatis*.

Mommsen (*Straf* 541 and n.3; cf. Lengle, *Straf* 31), infers an Augustan *maiestas* law from the statement which Tacitus (*Ann.* 4.34.2-3) attributes to Crematius Cordus: "*Verba mea, patres conscripti, arguntur: adeo factorum innocens sum, sed neque haec in principem aut principis parentem quos *lex maiestatis* amplectitur*". Girard (*Revue* 321.1), assuming that Mommsen's (unspecified) reasoning is that "*principem aut principis parentem*" means Augustus and Caesar,¹ believes that the rule which Tacitus attests was introduced by a *senatusconsultum*. Arangio-Ruiz (137) takes Tacitus to refer to Caesar's *maiestas* law which, he believes, expressly named Caesar as the subject protected, the Senate having extended the protection to Augustus. But in view of the conclusion reached as to

1 The rendering "the emperor or the emperor's mother" (Church and Brodribb 163) is one of the curiosities of classical scholarship.

the "maiestas" of Caesar and the probable content of his law (Chapters VII and IX), it is unlikely that he was the personal subject of the crime. Furthermore, the association of defamation and maiestas (Chapter XII) leaves no room for a Caesarian senatusconsultum as the instrument whereby "verba" were included in the crime. In addition, a law protecting a named person could not readily have been extended to another named person, or to "princeps" in general. It is also not certain that Augustus would have wanted to associate himself with Caesar so openly.¹ The other possibility (Arangio-Ruiz 137) is an Augustan lex or senatusconsultum which was retroactively extended to "divus Iulius"; but this means an equally inexpedient perpetuation of Caesar's memory.

The charge against Cordus, according to Tacitus (*Ann.* 4.34.1), was that in his 'Annales' he had praised Brutus, and described Cassius as the last of the Romans.² This gives a basis for a maiestas charge without a Caesarian or Augustan law at all, for Ciaceri (296) holds that praise of an act punished by the lex Pedia was itself culpable, and it has already been suggested (pp. 187-8 above) that the lex Pedia was a maiestas law. But, against Ciaceri's view, Cordus' history was recited to and approved by Augustus (*Suet.* *Tib.* 61.3; *Dio* 57.24.2), which tends to rebut Tacitus' suggestion (*Ann.* 4.34.1) that publication was still recent in 25 A.D. Although Cordus had not been particularly complimentary to Augustus

1 On the effacement of Caesar's memory by Augustus, see Carcopino (*Cicero*, Vol. 2 - *passim*); cf. Syme (317-8).

2 Cf. *Suet.* *Tib.* 61.3. *Dio* (57.24.3) that a further allegation was that Cordus had praised Brutus and Cassius. Seneca (*ad Maro.* 1.22.4) does not mention the praise of Brutus and Cassius. (Seneca) *insecratur illi ob unum aut alterum liberius dictum*; this agrees with the fact that the accusers were clients of Sejanus (*Tac. Ann.* 4.34.2; *Sen. loc. cit.*) Marsh (*Tib.* 293; cf. Rogers, *Isidore* 87) believes that the charge attested by Tacitus was a preliminary introduced to create bias, and would have been followed by more substantial allegations if Cordus had not committed suicide. Ciaceri (296; cf. Cichorius, *RE* 4.1703) says that the speech of Cordus is fictitious, although the trial is historic.

(Dio 57.24.3; Suet. Aug. 35), he managed to avoid trouble until 25 A.D. (Dio 57.24.2), which suggests that, although his "verba" were "in Caesarem", Augustus, who encouraged a Pompeian rather than a Caesarian tone in the literature of his age (Syme 317-8), had not regarded them as "in se". It follows that "neque (verba) in principem aut principis parentem" (Tac. Ann. 4.34.3) does not refer to Caesar at all. Cordus meant Augustus (principis parens) and Tiberius (princeps). It would indeed have been strange for Cordus, speaking in 25 A.D., to have used "princeps" to mean "the previous emperor", rather than "the present incumbent". Tacitus (Ann. 4.34.1) describes the charge against Cordus as "novo ac tunc primum audito crimine", and in view of his similar language in regard to Cassius Severus (p. 265 above) it would seem that he is either deliberately inaccurate, or in fact means what he says, namely, that both cases were unprecedented. The difference probably is that Cassius was charged with the composition of pamphlets defaming a named person, Augustus, while it was alleged against Cordus that his attack on Caesar was an injury to persons not named, Augustus and Tiberius. The accusers, for want of a better case, sought an extreme extension of the "quo agnoscere possit" rule attested by Paul (E, p. 272 above). In reply Cordus said, in effect: (My words may well have attacked Caesar) but they were not directed against Tiberius or Augustus."

Tacitus (Ann. 4.34.3) therefore means that the maiestas law protected Augustus and Tiberius against verbal injury. But Augustus derived his protection from the senatusconsultum of 6 A.D. (pp. 272-85 above). There is no reason to assume any further legislation in his favour on the same subject, and it is suggested that the "lex maiestatis" to which Tacitus refers is that senatusconsultum. There may have been a supplementary decree extending the protection to Tiberius, but it would not have been necessary, for the rule was stated in

1 Cf. Dio (57.24.2): οὐδὲν ἔγκλημα ἐκαίτιον ἡδούην ἡδυστήρη ὥστε ἐπὶ τῷ ἱστορίῳ ἦν ... κατὰ τὸν τῷ Ἀδριανῷ παραῖντων συνετελεσμένοι χρίσθαι.

the general form "ad infamiam alioiuius". Dio (57.24.4) reports the burning of Cordus' writings in terms very similar to those in which he describes the burning of the works of Labienus and Cassius Severus (56.27.1); in particular, there is the identical mention that the burning in Rome was conducted by the aediles, and elsewhere by the magistrates of each place. It is probable that in both cases the burning was conducted under the same authority, namely, the *senatusconsultum* of 6 A.D.

Arangio-Ruiz (136) believes that the best argument for an Augustan *maiestas* law is Digest (48.4.3 - Marcian): "Eodem lege (sc. lege Iulia maiestatis) tenetur et qui iniussu principis bellum gesserit dilectum habuerit exercitum comparaverit" (italics mine). A similar rule is attested by Paul (Sent. 5.29.1): "Lex Iulia maiestatis tenetur is ... qui (ve) iniussu imperatoris bellum gesserit dilectumve habuerit exercitum comparaverit ..." (italics mine). The words "iniussu principis (imperatoris)" have been described as an interpolation for "iniussu populi Romani" (Kühler 550), and as incompatible with the Augustan constitution, although closer to reality than "iniussu populi aut senatus" in Marcian's day,¹ but it should be noticed that Marcian is supported by Ulpian (Dig. 48.4.1.1): "quo (sc. maiestatis crimine) tenetur is, cuius opera dolo malo consilium initum erit, quo obsides iniussu principis interciderent". According to Marcian, then, a lex Iulia maiestatis prohibited levies and warfare "iniussu principis", and according to Ulpian the same criterion applied to the execution of hostages. Of the material in Digest (48.4), the excerpts which purport to cite the text of a lex Iulia maiestatis are 48.4.1.4 (Lear 40), and perhaps 48.4.10.11 as well (Greenidge, Treason 236; but see pp. 306-7 below). Of these, 48.4.11 is in any event adjectival, so that the substantive rules which may represent part of the text of a lex Iulia are 48.4.1.1 (from "quo tenetur"); 48.4.2 (excluding

¹ Rein (517 - second note); McFayden (228); Arangio-Ruiz (137).

"nam ... enumeratur"; 48.4.3 (from "qui in bellis"); 48.4.4pr;¹ and 48.4.10. The only references to the princeps in these passages are those of Marcian and Ulpian (p.290 above). In all other instances the subject, where specified, is "populus Romanus" or "res publica".² For example, Ulpian (Dig. 48.4.1.1) prefaces the rule against the execution of hostages with a 'definition': "Maiestatis autem crimen illud est, quod adversus populum Romanum vel adversus securitatem eius committitur".³ In the same passage Ulpian consistently refers to "populus Romanus" and "res publica", including the significant "hostes populi Romani".⁴ In the context, the execution of "hostages" "in iussu principis" was an act directed "adversus populum Romanum", and was therefore not a violation of the princeps' majesty, but a diminution of the maiestas of the Roman People. Similarly, Marcian (48.4.3) includes warfare and levies "in iussu principis" among various categories which he sets out to illustrate the proposition: "lex autem Julia maiestatis praecipit eum, qui maiestatem publicam laeserit, teneri"; he includes the case "qui (ve) imperium exercitumve populi Romani deseruerit". It should not be assumed that Ulpian and Marcian "modernised" the text in some respects only, while ignoring other cases where "improvements" would no doubt have been equally justified. If they had interfered at all, they would presumably have done so to an extent comparable

1 Although Schulz (Legal Science 175) doubts this passage.

2 Paul (Sent. 5.29.1), in his summary of acts falling under a lex Julia maiestatis, adds or substitutes "imperator" in several cases where Digest (48.4.1-4) has "populus Romanus" or "res publica". For the full list see Lear (40-1), who describes this variation as "a significant shift from republican to imperial emphasis in Paulus". The variation should, however, be considered in the light of the probability that Sententiae is a post-classical anthology of Paul's writings, abounding in interpolations and "modernisations". See Levy (Paul - passim); Jolowicz (476); Schulz (Legal Science 176).

3 Beseler (164) deletes "vel adversus securitatem eius". Paul - passim; Jolowicz (476); Schulz (Legal Science 176).

4 There was a substitution of "hostes principis" when the oath of allegiance recognised a relationship analogous to, but not identical with, "maiestas populi Romani" (p.243 above.)

to that attested by Paul's 'Sententiae'.

It will be noticed that the provisions regarding the princeps are concerned with external relations, and consist of matters which presuppose a positive function with which the princeps was vested. The *populus Romanus*, as the subject of a *maiestas* law, played a passive or an active role, depending on the particular act in issue. An overt act against the State, such as incitement to sedition or the murder of a magistrate, was culpable not because it had been done without authority, but because it had been done at all.¹ But making war and raising levies were only relatively culpable, being valid if carried out under a prescribed authorisation. It is only in this relative sphere that Ulpian and Marcian portray the princeps as the subject of a *lex Julia*, namely, the sphere of external affairs. It is unnecessary for Arangio-Ruiz (137) to take "*iniussu principis*" as evidence of the substitution of the princeps as a corporation sole, for all that the provision indicates is the transfer of a particular executive jurisdiction from the *populus Romanus* to the princeps. In the Republic external relations were the province of People and Senate, and Sulla made it *maiestas* to do certain things "*in-ussu populi aut senatus*". If at some stage the power of authorisation passed to the emperor, a new *lex maiestatis* was needed, but it did not have to be a "general" *maiestas* law. It merely had to provide, within the framework of '*maiestas populi Romani*', for the fact that a new agency had taken over the function of expressing the People's will in external affairs. The fact that the Senate was a joint agent with the *populus*, in exercising this function under Sulla's law, did not mean any derogation from the principle that technical *maiestas* was vested exclusively in the People and its

1 The fact that the wrongdoer had acted under a '*senatus-consultum ultimum*' might save him if the *factio* which had procured the decree happened to be in control when his conduct came to be queried, but this keenly-contested "higher legality" of which the Senate claimed to be the arbiter was something which operated in spite of, and not because of, the *maiestas* law.

magistrates. There is no need to assume any different result when the princeps became such an agency.

It is suggested that "in iussu principis" in Ulpian and Marcian is probably an authentic citation from the lex, subject only to the qualification that, consistently with Augustus' general policy towards the Senate, the full expression in his law was "in iussu principis aut senatus". It can be assumed that "aut senatus" was subsequently discarded, possibly by the classical jurists, but more probably by the compilers of the Digest, or their predecessors.¹ It remains to identify the lex which made Augustus a joint agency with the Senate in external affairs. The question is linked to the arbitration of war and peace which, according to Strabo (17.3.25, p.840), was granted to Augustus at the inception of the Principate: *τολῆμον καὶ εἰρήνης καθύστεν ἕως οὗ τὸν βίον*. The contemporary evidence of Strabo is corroborated by Dio (53.15.5), who says that in 27 B.C. Augustus received the right *πολέμους τε διαχειροῦσθαι καὶ εἰρήνην συνάγειν*. Mommsen² accepts Strabo, and holds that the power was conferred by the Augustan prototype of the lex de imperio Vespasiani. Thubler (171-83) infers from the renewal of the *aeternitas* treaty with Mithridates in 25 B.C. that the role of the People was taken over by Augustus, with the Senate fulfilling a merely executory function. Thubler refuses, however, to deduce a general rule from this case. Perhaps the most pertinent argument against the grant of the exclusive power of war and peace to Augustus in 27 B.C. is advanced by Sattler³ who holds that the non-participation of Augustus in the trial of M. Fulvia, except as a witness (p.200 above), means that he had not been injured in

1 For the view that many interpolations and changes attributed to the compilers should be credited to earlier editors, see van Warmelo (510-13).

2 Staat (2.2.954. and n.2; 955 and n.1); cf. Premerstein (181, 182 and nn. 1 and 2.)

3 46; for other arguments see Sattler (loc.cit.) and Atkinson (454).

his own sphere of competence, for otherwise he would have brought Primus before his own court. Sattler concludes that under the settlement of 27 B.C. Augustus became the arbiter of war and peace only in his own 'provincia', which seems to be a reasonable corollary to the division of provinces between Augustus and the Senate.

Marcian (Dig. 48.4.3; cf. Ulpian, 48.4.2), after citing the rule against levies and warfare "iniussu principis", ascribes another rule to the same *lex Julia maiestatis*: "quive, cum ei in provincia successum esset, exercitum successori non tradidit". The evidence is, therefore, that the *lex*: (a) reserved matters of war and peace for the decision of the princeps; (b) made it an offence for a provincial governor not to hand over to his successor. It does not seem to have been noticed that there is a striking parallel to these rules in certain legislation which Dio (53.15.6) assigns to 27 B.C.: ἐκτετα δὲ ἐπὶ πᾶσιν ὁμοίως (proconsuls, propraetors, and procurators - 53.15.4) ἐνομοθετήθη μήτε καταλόγους σφέας ποιεῖσθαι μήτε ἀγέριον ἔξω τοῦ τεταγμένου ἐκπράσσειν, αἱ μὴ ἦτοι ἡ βουλὴ ψηφίσαι το ἢ ὁ ἀστυκράτωρ κέλευσεν. ὅταν τέ τῷ ὁ διδωχός ἔλθῃ ἐκ τοῦ ἔθνους ἀντίχα ἀντὶν ἐξορμῆσθαι καὶ ἐν τῇ ἀνακομιδῇ μὴ ἔγχευεσθαι, ἀλλ' ἐντὺς τριῶν μηνῶν ἐπανιέναι. The only material differences between the rules assigned by Dio to 27 B.C., and those ascribed by Marcian to a *lex Julia maiestatis*, are that Dio states the rule as "iniussu senatus aut principis", and omits the equivalent of Marcian's "qui bellum gesserit". But elsewhere (53.17.5) Dio attests an arbitration of war and peace, which he also assigns to 27 B.C., and "aut senatus" may well be accurate (p.293 above). It follows that in 27 B.C. rules were introduced which corresponded in all material respects to those which Marcian ascribes to a *lex Julia maiestatis*. Furthermore, these rules were part of the constitutional settlement of 27 B.C., which is generally accepted as having

been established not only by *senatusconsultum*, but also by *lex*.¹ *Prima fauie*, therefore, the law which introduced these provisions in 27 B.C. was a *lex maiestatis*, but the difficulty is that the authorities consulted do not date the legislative activity of Augustus as early as 27 B.C.² Yet it is not clear why a *lex Julia* in 27 B.C. is impossible. The selection of 18-17 B.C. for all the '*leges Iuliae*' seems to be based on Augustus' statement (*Res Gestae* 6) that he rejected a "*cura legum morumque*" in 19, 18 and 11 B.C., and introduced legislation under his tribunician power. But that legislation need not have gone beyond matters which would have fallen under the "*cura*" if he had accepted it, namely, laws of a "moral" nature. Indeed it is precisely to such laws that Suetonius (*Aug.* 34.1) confines his resumé, although he elsewhere mentions "non-moral" laws (pp. 286-7 above). It may well be that the laws mentioned in the resumé should not be dated earlier than 19 B.C., but no such limitation need be imposed on other legislation. Sulla's *maiestas* law accompanied the establishment of a new provincial regime (pp. 87-8 above), and it is probable that Augustus likewise made the necessary adjustments in the *lex maiestatis* when the need arose, rather than at a much later date. Regardless of the nature of the *imperium* under which Augustus administered his '*provincia*' (pp. 226 and n.3; 227 above), adjustments to the *maiestas* law were needed, for "*in iussu populi aut senatus*" was not appropriate in the

1 Dfo 53.12.1 Cf. Palham (83-6); Premerstein (129, 230-1); Syme (331); Wickert (RE 22.2.2272); Siber (Verfassung 270-1, 274, 280); Sattler (37, 45-6).

2 The entire series of '*leges Iuliae*' is assigned to 18-16 B.C. by Girard (*Leges* 304-7 - although he says (300) that Augustus began his legislative programme after 27 B.C.); and to 18-17 B.C. by Arangio-Ruiz (102-3; cf. Fittler-Seeck, RE 10.353; Premerstein 157); and is believed by Siber (Verfassung 357) to have begun in 22 B.C. Wlassak (Process 1.174) finds the '*leges Iuliae*' undatable, but believes (1.182-3) that the revision of special criminal statutes was completed before 17 B.C. Rotondi (439-40) dates the earliest *lex Julia* (apart from those of Caesar) to 32 B.C. (*lex Julia de tutela*) but queries the date. The *lex Julia maiestatis* is dated to 19-17 B.C. by Rotondi (453), and to "den aller-letzten Jahren des Augustus" by Koestermann (77). No date is assigned to the *maiestas* law by Zumpt (2.2.476); Mommsen (*Straf* 541); Fournier (7.141); Pollack (199, 3.200); Botsford (455.9); Cicero (251); Kühler (548); Grant (413); Brecht (*Maiestas* 357-8); Chilton (73); or Lear (23).

provinces which were transferred to Augustus. Even if Augustus did not have the full tribunician power, including the power of initiating legislation, until 23 B.C.,¹ he could, as consul, have introduced a 'lex Julia' in 27 B.C. in the comitia centuriata, or a lex could have been introduced in the concilium plebis by a tribune at the instigation of Augustus, and named for the instigator (p.107 n.2 above).

It must, however, be supposed that the law went further than the mere adjustments occasioned by the settlement of 27 B.C. Marcellian (Dig. 48.4.3) introduces his enumeration of categories as follows: "lex duodecim tabularum iubet eum, qui hostem concilaverit quive civem hosti tradiderit, capite puniri. lex autem Julia maiestatis praecipit eum, qui maiestatem publicam laeserit, teneri: qualis est ille, qui ...". In addition to unauthorised levies and warfare, and wrongful retention of a province, Marcellian cites acts falling under the concept of proditio,² namely, the surrender of positions to the enemy, and desertion. Ulpian attests two cases of proditio, aiding the enemy (48.4.1.1) and desertion (48.4.2). Scaevola (48.4.4) gives a full list, and Hermogenian (48.4.10) notices two cases. It has been argued with some force that in the Republic proditio was not a formulated criminal concept, but a group of acts punished by consular coercitio, or under the arbitrary power of military commanders, and that it did not fall under the public criminal law until legislation absorbed these acts into the crimen maiestatis.³ This view requires the assumption

1 See the authorities cited at p.232 n.1 above. For the power of legislation under the tribunician potestas see particularly Grant (448-53); Salmon (469); Béranger (99-101).

2 In the general sense of treacherously handing over the person or interests of another to a hostile third party (Brecht, Perduellio 1,27; cf. Fuhrmann, RE Supp. 9,1223); this also includes the defection of an ally and the more serious military crimes (Brecht, Perduellio 26).

3 Brecht (Perduellio 26-112, 225.2, 259-64); Fuhrmann (RE Supp. 9,1224-30). Lfgr (18,25,112,20,117,64) believes that proditio was a form of perduellio, but does not give enough weight to the research since Mommsen.

that Marcian's reference to the XII Tables is merely a general reference to customary law (Führmann: RE Supp. 9, 1225), which may well be the case. In any event, the material fact is that there was legislation which brought various forms of prodition under the criminal *maiestas*. There is nothing against the supposition that these matters were dealt with as part of the arbitration of war and peace which was included in the legislation of 27 B.C. It is therefore postulated that, as far as external affairs were concerned, there was a comprehensive *maiestas* law in 27 B.C., which consolidated the traditional body of customary law, and provided for the new provincial system.

It will be objected that the powers granted to Augustus in 27 B.C. were to endure only for 10 years, and that, although they were in fact renewed from time to time, this could not have been anticipated, so that a general statute should not be assumed for a situation which was not necessarily permanent. But the permanence of the new system is correctly stated by Syme (324-5): "This time the domination of a faction was to be permanent and unshaken ... Definition of powers and extent of provinces might later be modified how and when he pleased. One thing could never change, the source and origin of his domination". There is a strong suggestion of a legislative programme in 27 B.C., in Tacitus (Ann. 3, 28, 3): "Sexto demum consulatu Caesar Augustus, potentiae securus, quae triumviratus iusserat abolivit deditque iura quis pace et principe uteretur". It is not necessary to take "deditque iura" as a Tacitean compression of a lengthy period of time, for if he did not mean that the laws were introduced "sexto consulatu" he would rather have said: "... abolivit. mox dedit iura ...". There is some support for legislation in 27 B.C., in Cassiodorus (Chron., ad 27 B.C.), although his chronology is not always reliable: "Caesar leges protulit, iudices ordinavit, provincias disposuit et ideo Augustus cognominatus est". It may be contended that the grant in 23 B.C. of the troublesome '*maius imperium*' (p. 227 and nn. 1, 2 above), or more accurately,

"imperium (proconsulare) maius quam ..." (Börsinger 92-6; Wickert, RE 22.2.2272), ought to have been accompanied by a maiestas law, but this would be so only if the new settlement of 23 had made "iusu principis aut senatus" meaningless. That this was not the case appears not only from Atkinson's analysis of the trial of M. Priscus (pp. 202-3 above), but also from the arguments of Söber (Verfassung 276, 280-1), who shows that "maius imperium" had no military content, and "war eine rein bürgerliche Gewalt zur Aufrechterhaltung der statthalterlichen Verwaltung der Senatsprovinzen".^{1,2}

The proposed lex Julia maiestatis of 27 B.C. does not account for all the substantive material in Digest (48.4.1-4,11). Ulpian (Dig. 48.4.1.1), apart from the rules which can be ascribed to the law of 27 B.C., discusses the following: "quo (sc. maiestatis crimine) tenetur is, cuius opere dolo malo consilium initus erit ... quo armati homines cum talis lapidibus in urbe sint convenientes adversus rem publicam, locave occupentur vel templa" (PASSAGE A); "quoque coetus conventusve fiat homines ad seditionem convocentur" (PASSAGE B); "cuiusve

1 See also Stroux-Wenger (63.3); Salmon (470); Sattler (69). There is no reason to say that the Augustan intervention in a senatorial province attested by the Edicts of Cyrene was in the military sphere.

2 Atkinson (456-9), following an entirely different line of reasoning from that of the author, finds that the lex Julia maiestatis was introduced in order to give Augustus sole control of levies and declarations of war, and so indirectly of the armed forces. She holds that "the real foundation of the Principate as a permanent institution was the Lex Julia Maiestatis (of 18 B.C.)". She dates the lex to 19-17 B.C., on the ground that the trial of M. Priscus had shown the need for clarification of the question of jurisdiction in matters of war and peace. When Augustus returned to Rome in 19 B.C. he began legislating, and the maiestas law was probably the first lex Julia to be introduced in 18 B.C. It received precedence because the first decade of his proconsular imperium was about to expire. With this law in operation, it was possible in 18 B.C. to grant Agrippa a proconsular imperium similar to that of Augustus, for the latter's exclusive control of war and peace furnished the required differentiation between two commanders who were otherwise on an equal footing. The present author, while agreeing neither with Atkinson's date, nor with her belief that the law gave Augustus sole control of levies and war, nor with her reasons for the law's introduction, believes that her hypothesis is the first of its kind, and acknowledges it as the incentive which stimulated the independent line of investigation pursued here.

opera consilio malo consilium initum erit, quo quis magistratus populi Romani quive imperium potestatemve habet occidatur" (PASSAGE C); "quoque quis contra rem publicam arma ferat" (PASSAGE D); "quive milites sollicitaverit concitaveritve, quo seditio tumultusve adversus rem publicam fiat" (PASSAGE E).

These categories are not introduced by an expression such as "lege Julia maiestatis tenetur is qui ...", as is customary. Ulpian's introductory words are: "Maiestas autem crimen illud est, quod adversus populum Romanum committitur. quo (sc. 'maiestatis crimine', not 'lege Julia') tenetur is ..." (48.4.1.1). It is most unusual for Ulpian to cite a statutory provision without naming the lex, senatusconsultum, or imperial constitution. In respect of the 'crimina publica' which he is known to have discussed in Books 7 and 8 of his 'de officio proconsulis' (Lenel, 2,975-8), the relevant law is named in the case of the lex Cornelia de siceris et veneficiis (Coll. 1.3.6; Dig. 48.8.4); the lex Julia de vi publica (Dig. 48.6.7); the lex Julia peculatus et de sacrilegio et de residuis (Dig. 48.13.8.1); and the lex Cornelia de falsis (Dig. 48.10.9; Coll. 8.7). In the case of the lex Pompeia de parricidiis, the only excerpt from 'de officio proconsulis' is a brief discussion of a disputed point (Dig. 48.9.6); and even then another jurist (Mucianus) is cited by name. Only in the case of maiestas does Ulpian seem to have omitted all reference to his source. It is true that truncation of Digest (48.4.1.1) by the compilers cannot be excluded. For example, the senatusconsultum which Ulpian cited on the lex Cornelia de falsis (Coll. 8.7) is omitted from the same excerpt in the Digest (48.10.9.3); but even then the citation of the lex Cornelia itself is retained in the Digest excerpt. The absence of citation in Digest (48.4.1.1) is particularly striking if regard is had to the comprehensive list of acts

which Ulpian sets out.¹ The evidence suggests that Ulpian did not cite a *lex Julia maiestatis* in 'de officio proconsulis'. He composed his own 'definition' of the crime and then gave a number of illustrations. The random order in which these are set out is also significant. The first, concerning the execution of hostages, relates to external affairs. Next come A, B, C and D, which concern internal matters.² Adding the enemy is a reversion to the external field, and the excerpt concludes with E, which is internal rather than external. This haphazard sequence does not appear to have been taken en bloc from any one statute, and the suggestion is that Ulpian selected his illustrations from more than one *lex*.

There is a striking similarity between A and a provision of the *lex Julia de vi* (Paul. Sent. 5.26.1): "*guive cum telo in publico fuerit, templa portasse aliunde quid publicum armatis obsiderit cinxerit clausuravit occupaverit*". Mommsen (*Straf* 563.1.3; 564; 657) explains the close agreement between *vis* and the "violent" form of *maiestas* by supposing that the crime was *maiestas* against the instigators and ringleaders, and *vis* against subordinates. Flore (242), rejecting this view, holds that *Sententiae* (5.26.1) is spurious. Zumpt (2.1.270-5) argues, rather plausibly, that the distinction between the two crimes turned on whether '*maiestas populi Romani*' was involved; Norbanus was acquitted of *maiestas*, although he had used force, but would have been convicted on the same facts under the *lex Plautia de vi*. Although Zumpt does not consider the effect

1. An idea of Ulpian's method when he dealt extensively with a criminal topic in 'de officio proconsulis' can be gathered from *Collatio* (15.2 - 'de mathematicis et victimatoribus'), where he begins with a brief statement of the nature of the crime (cf. Dig. 48.4.1.1), cites the earliest relevant legislation (absent from Dig. 48.4.1.1), gives a full exposition of the substantive law (cf. Dig. 48.4.1.1) and penalties (absent from Dig. 48.4.1.1), touches on changes in the law (absent from Dig. 48.4.1.1), and cites imperial constitutions (absent from Dig. 48.4.1.1).

2. For Ulpian's curious concentration on domestic matters, in a work written for the guidance of provincial governors, see Schüller (333-7).

of a plea of "maiestatem auxi", his argument amounts to saying that this plea was available on a charge of maiestas, but not on a charge of vis on the same facts. The difficulty, however, is Cicero (Cael. 29,70): "De vi quaeritis: quae lex ad imperium, ad maiestatem, ad statum patriae, ad salutem omnium pertinet". It is not possible to assume an indictment under the lex maiestatis when magistrates and senators were charged, and under the lex de vi against all other persons, for magistrates could also be charged de vi (Dig. 48.6.7). Furthermore, Caesar's maiestas law made the crime applicable to all classes (p. 176 above), so that from then on anyone could be charged either with maiestas or de vi. The position was probably similar to that whereunder, on the same facts, there could be a charge of maiestas or extortion (pp. 97-9 above). Given an act of violence, the lex de vi was probably preferred if there was a danger that the jury might be persuaded to return a verdict of "maiestatem auxi".

A, B, D and E, as examples of 'maiestas minuta per vim', would have been quite at home in Caesar's maiestas law. But there would have been no pressing reason for their inclusion in the law of 27 B.C., and the Romans did not legislate unnecessarily (p. 81 and n.1 above). It follows either that Ulpian took this material from Caesar's law, or that Augustus introduced a second law at some time after 27 B.C. The disturbances attending the consular elections from 22 to 19 B.C. (Syme 371-2) could have supplied the incentive for a "violent" maiestas law, but the silence of Suetonius and Dio (p. 286 above) is particularly significant in the light of their express mention (Suet. Aug. 34.1; Dio 54.15) of the lex de ambitu, for that law owed its introduction in 11 B.C. to the same disturbances (Mommson, *Strof* 867.7). Faced with a known law of Caesar which readily accounts for A, B, D and E, and in the absence of any evidence of an equivalent Augustan lex, it should be assumed that Ulpian derived this material from Caesar's law.

G is a special case. Pollack (201 and n.1) points out that there is no suggestion in this passage of any special rule regarding assassination of the princeps. It should be noticed that the rule as stated by Ulpian is wholly Republican in form, but the date of its first introduction is not clear. It would not have been brought in under the Appuleian, Varian, or Cornelian laws, for in 63 B.C. the comitia, and not the quaestio, provided the forum for the trial of C. Rabirius (pp. 35-7 above). Furthermore, the lex Pedia of 43 B.C. would have been unnecessary if C had been included in Caesar's law. It is probable that C was introduced by the lex Pedia. In this regard it should be noticed that, although a "lex Pedia" is expressly attested by some sources (Vell. 2.69.5; Suet. Nero 3.1; Galba 3.2), others attribute the law to Octavian (Livy Per. 120; App. B.C. 3.14.95; Dio. 46.48.2; Plut. Brut. 27.3). If the law was instigated by C. Iulius Caesar (Octavian), a variant tradition may have known it as a "lex Iulia". Indeed Augustus would have wanted his name to be associated with the law with which Res Gestae opens (Res Gestae 1). It has been suggested (pp. 187-8 above) that the lex Pedia was a maiestas law, so that it may very well have been known as a "lex Iulia maiestatis".

The foregoing suggestions do not account for all the material in Digest (48.4.1-4), for the following do not fit readily into the laws which have been assumed for either Caesar or Augustus. "quive sciens falsum conscripsit vel recitaverit in tabulis publicis" (Dig. 48.4.2) (PASSAGE F); "quive privatus pro potestate magistratus quid sciens dolo malo gesserit" (Dig. 48.4.3) (PASSAGE G); "item qui confessum in iudicio reum et propter hoc in vincula coniectum miserit" (Dig. 48.4.4) (PASSAGE H). It may be argued that G and H are quite inconsequential in their respective contexts, having no conceptual connection with what goes before, and having the appearance of "odd lots" which have simply been tagged on in order to get rid of them. But F is documented, for Ulpian (Dig. 48.4.2) says of it: "nam et hoc capite primo lege maiestatis enumeratur".

The difficulty occasioned by G and H is perhaps not great, for it may be accepted that any act which constituted the crime of vis could also have been included in a statute dealing with 'maiestas minuta per vim'. A recognised form of vis was "Vollziehung eines magistratischen Actes von Seiten eines dazu nicht befugten Beamten oder eines Privaten" (Mommsen, *Straf* 663); this is on all fours with the position contemplated by G. It is also possible to regard H as an example of the general rule laid down in G, for the release of a confessed criminal was clearly a usurpation of magisterial authority. It may be accepted that G and H are not irreconcilable with Caesar's law, from which it follows that Marcian and Scaevola, like Ulpian, selected their material from more than one lex. It is less easy, however, to dispose of F. It may be argued that it is a short step from the exercise of authority by one who is not authorised, to the improper exercise of an authority which is in fact possessed. It would follow that the case mentioned in F contemplated a false entry by someone in an official capacity, who had access to the public records, and who was under a duty to make proper entries. It can also be pointed out that abuse of authority was in fact a form of vis (Dig. 48.6.7). But the argument is not entirely satisfactory, for in Digest (48.6.7) it is the special case of a magistrate doing violence to a citizen in contempt of provocatio, which does not warrant the assumption that vis covered the improper exercise of authority in general.

If F cannot be satisfactorily reconciled with Caesar's law, and if it does not by its nature commend itself as an ingredient of the Augustan law of 27 B.C., a further search should be made for a second Augustan lex. In this regard there is an avenue which merits exploration. A century ago Zumpt (Z.l. 51-4, 70-92; cf. 131-2, 136, 184-5) argued that the judiciary law of C. Gracchus not only laid down rules of criminal procedure, but also set out substantive categories of crimes. This theory has been restated by Henderson (*passim*,

and cf. p. 25 n.2 above). Although the theory has not been accepted for Gracchus' law, it is worthwhile considering whether there is any room for the application of a similar hypothesis to the *lex Julia iudiciorum publicorum*, a general judiciary law which, on the majority view, was introduced (in 17 B.C.) by Augustus, rather than by Caesar.¹ Although a strong body of opinion² holds that this law was only a general code of criminal procedure, and that the substantive categories of individual crimes remained the subject of special laws, it is proposed briefly to test the possibility that in this statute, which contained at least 88 chapters (McFayden 220), there were chapters on particular crimes, including a chapter which consolidated the substantive categories of *maiestas*. The first piece of evidence is Digest (48.14.1.4): "*si qui reus vel accusator domum iudicis ingreditur, per legem iudiciariam in legem (sc. Iuliam) ambitus committit*". The rule against visiting a juror was included in the Augustan judiciary law (Girard, *Leges* 330), and the *lex Julia ambitus* was Augustan (Arangio-Ruiz 110). It may seem that the *lex de ambitu* formed a chapter in the judiciary law, for the explanation (Girard, *Leges* 304.3) that the penalty of the *ambitus* law was merely borrowed by the judiciary law is strained. The typical expression, where one lex applied the penalty of another, was: "*lege Pompeia de parricidiis cavetur, ut, si quis ... occiderit ... poena ea teneatur, quae est legis Corneliae de sicariis*" (Dig. 48.9.1). And "*in legem committere*" (Dig. 48.14.1.4) suggests a contravention of the particular statute mentioned, rather than a "borrowing", as in: "*divus Claudius edicto praecipit iudicendum legi Corneliae ut, si quis ... scripserit, proinde teneatur, ac si commisisset in legem Corneliae*" (Dig.

1 Augustan authorship is accepted by Wlassak (*Process* 1.173, 180-90, 198); Girard (*Leges* 304-52); Rotondi (448-9); Weiss (*RE* 12, 2364); Volkmann (214-5); Arangio-Ruiz (105-9). The law is ascribed to Caesar by Mommsen (*Straf* 128, 655) and McFayden (219-27).

2 Wlassak (*Process* 181-3); Girard (*Leges* 321-31, 356-64); Arangio-Ruiz (105-10).

48.10.15pr). Secondly, there are the curious duplications: "famosi quoque accusantes sine ulla dubitatione admittuntur" (Dig. 48.2.13) (J); and "famosi, qui ius accusandi non habent, sine ulla dubitatione admittuntur ad hanc accusationem" (Dig. 48.4.7pr) (K); "milites quoque, qui causas alienas deferre non possunt, qui pro pace excubant, vel magis ad hanc accusationem admittendi sunt" (Dig. 48.2.13) (L); and "sed et milites, qui causas alias defendere non possunt: nam qui pro pace excubant, magis magisque ad hanc accusationem admittendi sunt" (Dig. 48.4.7.1) (M); "servi quoque deferentes audiuntur" (Dig. 48.2.13) (N); and "servi quoque deferentes audiuntur et quidem dominos suos" (Dig. 48.4.7.2) (O). Passages J, L and N are from Marcian (De Publicis Iudiciis I), and appear in Digest (48.2 - 'de accusationibus et inscriptionibus'), a title which is largely concerned with the *lex Julia iudiciorum publicorum*. K, M and O are from Modestinus (Pandecta XII), and appear in Digest (46.4 - 'ad legem Iulianam maiestatis'). It may be felt that Marcian and Modestinus must be commenting on the same *lex*, namely the judiciary law, which may suggest that maiestas formed a chapter in that law.

On balance, however, it is not possible to disturb the view that the judiciary law did not include substantive categories. The decisive passage is Digest (48.1.1): "Non omnia iudicia, in quibus crimen vertitur, et publica sunt, sed ea tantum, quae ex legibus iudiciorum publicorum veniunt, ut *Iulia maiestatis*, *Iulia de adulteriis*, *Cornelia de vicariis et veneficiis*, *Pompeia parricidii* ... *Cornelia de testamentis* ... *Iulia ambitus* ...". The inclusion of two Cornelian laws and one Pompeian excludes the possibility that "quae ex legibus iudiciorum publicorum veniunt" means that the individual laws which follow formed part of a Julian judiciary law. In any event, such a derivation would have been expressed as "quae

1 "alienas deferre", Mommsen-Krüger (245.1).

ex legge iudicio^{um} publico^{rum} veniunt". Furthermore, two of the laws mentioned, *Iulia de adulteriis* and *Iulia ambitus*, are known to have been introduced by Augustus as independent laws (Suet. Aug. 34.1).¹

In the result, it does not seem possible to locate an Augustan *maiestas* law, other than the law of 27 B.C., so that the rule against false entries in public records (F) should be assigned to Caesar's category of '*maiestas minuta per vim*'. It is therefore found that the substantive material in Digest (48.4.1-4, 10) consists of citations from the *maiestas* laws of both Caesar and Augustus, and possibly from the *lex Pedia (Julia)* as well.

In conclusion, three other problems raised by Digest (48.4) may be briefly noticed. Ulpian (48.4.11) says that the death of the accused before judgment extinguishes the charge, but adds: "*nisi forte quis maiestatis reus fuit; nam hoc crimine nisi a successoribus purgatur, hereditas fisco vindicatur, plane non quisque legis Iuliae maiestatis reus est, in eadem condicione est, sed qui perduellionis reus est, hostili animo adversus rem publicam vel principem animatus; ceterum si quis ex alia causa legis Iuliae maiestatis reus sit, morte crimine liberatur*". It is generally agreed that there is no question here of the survival of *perduellio* as a separate crime distinct from *maiestas*, but only of its employment by Ulpian as a convenient way of distinguishing the more serious from the lesser forms of *maiestas*.² Kibler (553) believes that "*perduellionis*" is an interpolation, and indeed the entire section "*plane ... liberatur*" is suspect. Not

1 Digest (48.1.1) is against McFayden's theory (219, 226, 69 - following Mommsen, *Straf* 128-9, 655) that the Julian laws de vi publica and de vi privata were, respectively, the same statutes as the public and private judicial laws. The *leges de vi* are included among the various individual laws "*quae ex legibus iudicio^{rum} publico^{rum} veniunt*".

2 Rein (509); Greenidge (*Treason* 237); Pollack (169.1); Brecht (*Perduellio* 213-4).

only is "plane" one of the typical signs of an interpolated passage (Wenger 584), but the phrase "adversus rem publicam vel principem" does not ring true, in the light of Ulpian's own 'definition' of maiestas as directed "adversus populum Romanum", without including the princeps" (Dig. 48.4.1.1). Furthermore, Digest (48.4.11) is misplaced, for it should have been grouped with the other excerpts from Ulpian, under the Sabinian mass¹ which heads the material in the title. Such a displacement is an indication that two titles have been combined (Wenger 584), so that it is a fair inference that Digest (48.4.11) is not "ad legem Iuliam maiestatis" at all. The important aspect of the passage, for the present purpose, is the reference to "legis Iuliae maiestatis reus", for if the passage were authentic it would have a twofold significance. It would be an attestation by Ulpian of a specific lex Julia maiestatis, which would weaken the submissions which have been based on his failure to cite the lex in his 'de officio proconsulis'. And it would tend to support the opinion of Greenidge (Treason 236-7), that the lex Julia was divided into two sections, covering in part the same acts, but viewed separately, depending on whether they were or were not committed "hostili animo"; if Greenidge's findings were valid, it would be difficult to avoid a single consolidating Augustan statute, in substitution for all previous legislation. But the decisive argument against the authenticity of the passage, at least insofar as Ulpian is to be understood as intending to cite provisions of the lex Julia, has been advanced by Volterra (488-90). He shows that posthumous maiestas charges were first introduced by a constitution of Marcus Aurelius (Code J. 9.8.6pr, 62), and were not, and could not have been, provided for in a law of Caesar or Augustus. The precedent created by Marcus Aurelius was expanded under the Severi, and it was then that the contemporary classical jurists transmitted it: Ulpian (Dig. 48.4.11); Paul (Code J. 8.6pr); and Marcian (Code J. 9.8.6.2-4).

¹ On Bluhme's theory of "masses" see Jolowicz (493-4); Schulz (Legal Science 319-21); Wenger (583-4).

"Proximum sacrilegio crimen est, quod maiestatis dicitur" (Dig. 48.4.1pr). If this statement was made by Ulpian in Book 7 of his 'de officio proconsulis' it does not, of course, mean that a term to this effect appeared in a lex Julia maiestatis (cf. Matthaeus 311). But it would tend to show that, as early as the third century A.D., the majesty of the princeps had acquired the force of a technical legal concept, in substitution for 'maiestas populi Romani'.

It is not, however, certain that the statement was made by Ulpian. In its primary meaning¹ "sacrilegium" did not convey the notion of the English word "sacrilege", for it simply meant "das Furtum bezogen auf das Göttergut".² As such it was dealt with by the lex Julia peculatus et de sacrilegis et de residuis (Dig. 48.13). In his commentary on this law, Ulpian, in the same Book 7 of his 'de officio proconsulis' (Dig. 48.13.7), discusses sacrilegium in terms which clearly show that he understood it as the theft of "res sacrae": "Sacrilegii poenam debeat proconsul ... statuere ... sed moderanda poena est usque ad bestiarum damnationem eorum qui manu facta templum effregerunt et dona dei in noctu tulerunt". Why does Ulpian say that maiestas is "proximum" to the theft of "res sacrae", particularly as he then proceeds to 'define' maiestas (Dig. 48.4.1.1) in terms which have nothing to do with theft or with "res sacrae"? If "proximum" is intended to convey a resemblance between the two crimes, Ulpian's statement is meaningless, and must be marked as a suspected interpolation.³ It may, however, be possible to retain the passage by interpreting "proximum" in a temporal sense as "next to, in point of time". The purpose of 'de officio

1 For the secondary meaning, which became significant with the rise of Christianity, see Mommsen (Straf 569.2; 600.4; 760.7).

2 Mommsen (Straf 760); cf. Matthaeus (311-2); Pfaff (RE 1A.2.1678-80).

3 The difficulty does not seem to have been noticed by Lenel (2.975 and n.2), who assumes a title "de sacrilegis" (in De Officio Proconsulis VII), which is supposed to have dealt with sacrilegium in the sense of "sacrilege".

proconsulis' was to provide provincial governors with a succinct restatement of the laws which they needed to know (Schulz, *Legal Science* 243-4), and it may well be that Ulpian found it convenient to follow a chronological method when he dealt with criminal law (Books 7 and 8 - Lenel 2,973-83). If *maiestas* was "proximum" to *sacrilegium* in a temporal sense, it means that immediately before he came to *maiestas* Ulpian had discussed *sacrilegium*. He had done so because *sacrilegium* was chronologically antecedent to *maiestas*, in the sense that the earliest *questio* which was set up 'de sacrilegis' was the *questio auri Tolosani* of 104 B.C., which investigated the plundering of the temple at Tolosa by Q. Servilius Caepio (pp. 44-8 above). The next *questio* in date order was the *questio maiestatis*, under the *lex Appuleia* of 103 B.C., and therefore *maiestas* was "proximum sacrilegio".¹

"Qui statuas aut imagines imperatoris iam consecratas conflaverint aliudve quid simile adiserint, lege Iulia maiestatis tenentur" (Venuleius Saturninus, Dig. 48.4.6). This is the only excerpt in Digest (48.4) which, at first sight, suggests that imperial statues were dealt with by an actual *lex Julia*. The other references to the same subject expressly attest a decree of the Senate (48.4.4.1) and imperial rescripts (48.4.5). Köbler (552) takes the case postulated by Venuleius Saturninus as one of extensive interpretation, but the question needs discussion in view of the proceedings attested by the Second Edict of Cyrene, of 7-6 B.C.² The general meaning of the Edict³ is that Publius Sextius Scaeva, the proconsul of Cyrenaica,⁴ sent Aulus Stlaccius Maximus, Lucius Stlaccius Macedo, and Publius Lacutanius Phileros as prisoners to Augustus,

1 This argument may be used in favour of 103 B.C., rather than 100, as the date of the *lex Appuleia maiestatis*.

2 For the text see Stroux-Wenger (10); Anderson (35).

3 For the linguistic difficulties, see Stroux-Wenger (35-7).

4 Laqueur (passim) holds that Scaeva was not the governor, but a delator, arguing that the exculpation of Scaeva, on which the Edict lays much stress, would not have been needed for a governor who was merely doing his duty, but was necessary to protect an informer.

because they alleged that they had information concerning the safety of Augustus and the public welfare - ὁ πρὸς τὴν ἀσφάλειαν αὐτοῦ καὶ τῆς δημόσιας ἀσφάλειας ἀνέκειναι - and wished to speak of it. Augustus released them, as they had no such information, and as they made it clear to him that what they had said in the province was false.¹ But Aulus Stlaccius Maximus, who was accused by the Cyrenaican envoys of having removed statues from public sites, including one which the city had inscribed with Augustus' name, was ordered to remain in Rome until Augustus had investigated the matter.

The removal of the statue has been explained as a case of maiestas (Anderson, 39; Stroux-Wenger, 72.2), but the juristic basis of the charge should be further considered. It is clear that the quaestio maiestatis did not try the case, for Augustus dealt with it in his imperial criminal court: *ἔτι δὲ περὶ τοσούτοις πράγμασι διαγνώσκει*. Aulus Stlaccius seems to have been on a frolic of his own, as far as this particular incident was concerned, for the other two would not have been unconditionally released if there had been any suggestion of a plot, in which the removal of the statue was an element. The charge looks very much like an afterthought on the part of the Greek envoys from Cyrenaica, who apparently appeared before Augustus when the three accused were arraigned. Having failed on the main count, the Greeks seem to have brought up the escapade of Aulus Stlaccius, in a last attempt to secure a conviction. As the Stlaccii were Roman citizens (Anderson 39), the entire case may well have been an incident in that vendetta between Cyrenaican Greeks and Roman citizens, which seems to be attested by the First Cyrene Edict. If the *lex maiestatis* had specifically provided for the case of the statue, the Greeks would have prepared their brief on that charge as well, before going to Rome. In that event the separate trial of Aulus Stlaccius would have been disposed of at the same time, instead of being remanded

1 So Anderson (39). Stroux-Wenger (11.36) prefers: "They made it clear that the statement which they were alleged to have made in the province had been falsely attributed to them."

for further investigation. The basis on which Augustus entertained the second charge was probably the principle of "violated majesty". Although the title of 'pater patriae' had not yet been officially conferred when Stlaccius was charged in 7-6 B.C., it was already in common use, and was particularly employed as an inscription on provincial statues, (Hor. Carm. 3,24,27-8; cf. p. 259 above; cf. also Alföldi 2,115). It was very possibly a statue inscribed to Augustus as "pater urbium" which Stlaccius had removed, and Augustus was not unwilling to receive the Cyrenaican complaint.

The legal basis on which the three Roman citizens were originally sent to Augustus is not clear. At first sight it seems that information "about the safety of the princeps" fell under the ban on consulting astrologers and soothsayers "de salute principis vel summa rei publicae" (Paul Sent. 5,71,3; Ulpian Coll. 1,15,2) - κατὰ τὴν ἐμὴν σωτηρίαν καὶ τὰ ἐμὰ ὄσια κρᾶγματα (Second Cyrene). There are, however, two objections to a charge of this nature in 7-6 B.C. The earliest legislation against the consultation of astrologers seems to have been a senatusconsultum of 17 A.D., judging by Ulpian's well-documented discussion of the topic (Coll. 1,15,2). This would have been the decree (Tac. Ann. 2,32,5) which followed the trial of Libo Drusus (Tac. Ann. 2,27-32). And there is no suggestion in the Second Cyrene that the accused had consulted astrologers, but only that they had information, or said that they had it. There is much merit in the suggestion (Stroux-Wenger 72,2) that μὴ should be added at the end of line 45 (Second Edict). The position then would have been that the accused, when confronted by the governor with the demand that they disclose this information, refused to do so. This would have made it a straight case of τὸ ἐκβουλεύεσθαι, for the governor would then have been entitled to treat them as possible accomplices in a suspected conspiracy.

CONCLUSIONS

In regard to the two propositions which the thesis has attempted to defend, it is felt that "the theory of the little laws" has fared reasonably well. The balance of probability seems to lean rather distinctly in favour of the view that the Appuleian, Varian, Sullan, and Caesarian laws did not go beyond the respective categories which, on the evidence, should be allocated to them. A similar finding in the case of the Augustan law is untenable only if there is sufficient reason to say that all the substantive statutory material in the juristic sources derives from a single *lex maiestatis*. If this conclusion were inevitable, the single statute would have to be identified as Augustan rather than Caesarian, for two reasons. Firstly, the probability that Caesar's law should be limited to '*maiestas minuta per vim*' disqualifies it as a general statute. Secondly, at least part of the *lex Julia maiestatis* of the juristic sources must be Augustan, if the proposed identification of the Law of 27 B.C., as attested by Dio, with the provisions of a *lex Julia maiestatis*, as attested by Marcian and Ulpian, is valid. The problem largely depends, however, on the validity of the attempt which has been made to identify elements of three different laws in Digest (48.4). It is not possible to be dogmatic on this issue, but it may be felt that the arguments advanced leave it at least an open question as to whether a single statute or several statutes should be assumed in respect of the legislative material referred to 'A' this title of the Digest.

It is felt that the four other "little laws of maiestas" which have been postulated may have been correctly identified. The question is mainly whether or not breaches of these laws were referred to the *quaestio maiestatis*, and it is submitted that the evidence favours that *quaestio* rather than any other. In addition, the categories prescribed by the *lex Papia*, the *lex Licinia Iunia*, the *lex Hirtia*, and the *lex Pedia* are essentially *maiestas* categories.

The author is both reasonably satisfied, and somewhat dissatisfied, with "the theory of the unchanged 'maiestas populi Romani'". On the one hand it is felt that, as far as the enquiry has been taken, it may have thrown some light on the thorny problems of the constitutional positions of Caesar and Augustus, insofar as those problems can be approached by way of the *crimen maiestatis*. Furthermore, the finding that there was no transformation of the concept of 'maiestas populi Romani' as the technical focal point of the 'crimen maiestatis populi Romani *imminutae*' may have clarified certain aspects of the crime. It may also be felt that the distinction which has been proposed between the crimes of "diminished maiestas" and "violated majesty" assists in understanding the apparent anomalies in the concept of the 'domus Caesaris'.

On the other hand, the scope of the study has imposed limitations on the development of the theme that the concept of "violated majesty" was parallel to that of "diminished maiestas", but independent of it. It has been noticed in passing that the two concepts seem to have coalesced at some time subsequent to the Augustan period, but the further pursuit of this question has not been possible within the framework of the thesis. It is felt, in particular, that an investigation of "violated majesty" from Tiberius to Domitian may have interesting results, and the author hopes, at another time, to develop the preliminary survey which he has made in this regard.

The major areas in which the author believes that he may have made some contribution are as follows:

- (a) The two propositions whose defence has been undertaken;
- (b) the theory as to the origin of the *crimen maiestatis*;
- (c) the theory as to the date, content, and surrounding circumstances of Caesar's *maiestas* law;
- (d) the theory as to the association of defamation and *maiestas* by Augustus;
- (e) the theory as to the date, content, and surrounding circumstances of Augustus' *maiestas* law.

It is believed that the following minor aspects may also be original:

- (i) The demonstration that the "uncertainty" of the *lex Appuleia maiestatis* was confined to one aspect only;
 - (ii) the detection of the significance of the plea of '*maiestatem auxi*'.
 - (iii) the suggestion that the expression '*maiestas*' was appropriated by the Senate in an attempt to circumvent the *lex Appuleia*;
 - (iv) the suggestion that the trial of Sex. Titius was '*lege Appuleia*';
 - (v) the analysis of the circumstances leading to the *lex Varia maiestatis*;
 - (vi) the explanation of the execution of Varius under his own law;
 - (vii) the analysis of the attempt to extend the *lex Cornelia maiestatis*, at the trial of C. Cornelius;
 - (viii) the explanation as to why Ammius Marcellinus attests the laws of Sulla as the source of torture in *maiestas* cases;
 - (ix) the explanation of the difference between the *lex Cornelia maiestatis* and the *lex Julia repetundarum*;
 - (x) the analysis of the prosecution of Vatinius, and the attempted prosecution of Caesar;
 - (xi) the solutions proposed to various problems arising out of the trials during Caesar's dictatorship;
 - (xii) the solutions offered to various problems arising out of the conspiracies against Augustus;
 - (xiii) the solution, adapted from the work of others, which is offered to the problem of defamation under Sulla;
 - (xiv) the explanation as to why Ulpian says that *maiestas* is "*proximum*" to sacrilegium;
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—	<u>Codex</u> * Code J.
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(B)

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