

## **Something Old, Something New...**

### **Augustan Legislation and the Challenge of Social Control**

Augustus' interest in social control is easily demonstrated. The division of the city of Rome into fourteen districts, the revival (if that is the correct word) of the post of city prefect, and the constitution of the *vigiles*, urban cohorts, and praetorians are obvious examples of this. His administrative reforms (for example, in the judiciary and in city planning) were thorough and, to judge from the fact that they were maintained and elaborated by his successors, effective. He used magisterial powers to revise the rolls of citizens, senators, and equestrians. What did he hope to accomplish through legislation?

The answer is to be sought in an area of social control I define as status-maintenance. My concern lies with the category of laws often described as social or moral legislation. These are typically thought to consist of the laws on electoral misbehavior, ostentatious consumption, marriage, adultery, and the manumission of slaves. A number of difficulties are worth exploring, above all, how to define the category, which laws to include and which to exclude. I argue that the theme of social control, as crystallized in the issue of status-maintenance, does a better job of characterizing Augustus' legislative aims than the traditional tags of 'moral' or 'social'. By referring to some statutory trends often overlooked in this context, such as regulations on clothing, public performance by members of the elite, and even taxation, common programmatic elements can be illustrated without over-stressing the coherent design of the program itself. We

can then perhaps better understand the legislation I would argue to lie at the core of Augustus' program of social control, the laws on ostentatious consumption, manumission, marriage, and adultery.

The idea of social control, defined, for reasons that will soon become obvious, in terms of a general concern with status-maintenance, also makes possible a clearer understanding of the success these measures enjoyed, as calibrated against what can reasonably be inferred about Augustus' intentions. It also allows a better comparison with legislation in these areas both before and after his reign. Of no small interest in this connection is the reception of his laws by later emperors and jurists. What emerges is a better appreciation of how Augustus managed a system of symbols, tied to the manipulation of status, that aimed to achieve a sophisticated and at times subtle exercise of social control.

Let's begin with the modern concept of social and/or moral legislation. Of course Augustus tells us himself in the *Res Gestae* (6) that on three occasions (in 19, 18, and 11 B.C.), he refused the offer by Senate and People of the post of *curator legum et morum* with supreme power and without a colleague, instead carrying out the Senate's mandate through the exercise of his tribunician power. This claim is buttressed by details in Suetonius and Dio (Suet. *Aug.* 27.5; Dio 54.10.5), somewhat inconsistent as they are. Scholars have - logically enough perhaps - concluded from this that the series of *leges Iuliae* passed in 18-16 B.C. represent the core of a program of moral and/or social legislation. Most do not stop there, however, including in this category for example the manumission laws passed in 2 B.C. and A.D. 4, which had of course

other sponsors than Augustus himself.<sup>1</sup> Is this extension consistent with Augustus' own statements about his legislative activity? Not literally, to be sure, but is it correct to include a law that, in chronological terms, technically **is** consistent with his claims, such as the *lex Iulia de ambitu*, but otherwise hard to justify?<sup>2</sup>

I don't mean to imply for moment that I consider electoral bribery to be anything but antisocial and immoral,<sup>3</sup> but want to question the usefulness of that reflection in understanding the emperor's purpose. If Augustus had passed a murder statute at this time I think we could all agree that killing people is antisocial and possibly immoral so that this law too would fit the rubric. But why stop with electoral bribery, manumission, or even theater-seating?<sup>4</sup> All laws

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<sup>1</sup> Gardthausen 1896/1964 902-912 has the laws on marriage, adultery, ostentatious consumption, manumission, electioneering, theater-seating, treason, and violence; Last 1934 has the manumission, marriage, and adultery laws; Jones 1970 63, 131-143 has the laws on marriage, adultery, ostentatious consumption, manumission, and electioneering; Kienast 1992 has marriage, adultery, ostentatious consumption, and electioneering; Galinsky 1996 128-140 has the marriage and adultery laws on a primary level, manumission on a secondary level; Treggiari 1996 has the laws on marriage, adultery, manumission, and ostentatious consumption.

<sup>2</sup> For a sophisticated attempt, only partially successful in my view, to link anti-electioneering to sumptuary legislation, see Daube 1969 125-127. Daube's thesis suggests that some laws might lie along a spectrum of legislation that is more or less social/moral in nature rather than fall into distinct "either/or" categories. Even so, the *lex Iulia de ambitu* would fall outside the core classification.

<sup>3</sup> See Severy 2003 50 for a cogent argument on this point.

<sup>4</sup> Resistance to the theater had a long history at Rome, as did its popularity. Regulation, such as the assignment of seating based on rank in the *lex Iulia theatralis* (c. 20 B.C.), was part of Augustus' response to both trends. This law, like his sumptuary legislation, had Republican precedent, in this case the *lex Roscia* of 67 B.C.: Rawson 1987/1991; Edmondson 1996 84-95, 99-101, 109-110; Gunderson 1996 123-126, 132-133.

were ideally grounded in *mores*.<sup>5</sup> Suetonius helpfully asserts that the first emperor received the *morum legumque regimen* for life, buttressing the assumption that all of his salubrious statutes might qualify for this status.<sup>6</sup> This way, incidentally, we could take the different lists of moral and/or social laws set forth by various scholars and regard them not as mutually exclusive where they fail to coincide, but as components of one BIG LIST. This conclusion depends in part in taking phrases like *legum et morum* and *morum legumque* as hendiadys, not a good idea, perhaps, at least in the sense of completely overlapping categories.<sup>7</sup> But I think I've already said enough to suggest that the modern conception of Augustan moral and/or social legislation is neither logical nor coherent.

Now that we've taken that notion apart it remains to put it back together. The theme of social control, with particular emphasis on defining and maintaining status-distinctions, I argue is well-suited to this task. I don't claim to be able to illustrate the significance of every detail of every law passed under Augustus, a self-defeating enterprise, as we've already seen. The end result will be less an iron-clad category of laws than a sense of what impelled Augustus to pass so many of them. That Augustus himself conceived of, or at least wished to present, his legislation as a unity is suggested by the reference he makes to his *novae leges* in Chapter 8 of the *Res Gestae*. The use of the adjective "new" is striking, not just because of the apparent

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<sup>5</sup> On the (ideal) relationship between law and custom, i.e. generally accepted notions of morality, see Bellen 1984 322-329; Treggiari 1994 86-87.

<sup>6</sup> Cf. Bellen 1984 315.

<sup>7</sup> In other words, the words *et* and *-que* are both conjunctive and disjunctive, not just the former, as Bellen 1984 311-315 317 argues.

pleonasm, but also because of its idealizing, non-pejorative sense. Augustus describes these statutes as both 1) a restoration of practices of the ancestors (*maiores*) that had fallen into oblivion and 2) an institution of practices at his own initiative to be imitated by posterity. This Janus-like insistence on looking forward and backward is of course an essential element of Augustus' political message and can notionally be taken to describe his entire legislative agenda.<sup>8</sup> It is also important for comprehending the role that social control played in this program.

I propose to begin with three aspects of the Augustan program that have received little or no attention in terms of social and/or moral reform: restrictions on public performances by members of the elite, regulations on clothing, and taxation. The issue of public performance seems first to have arisen in 46 B.C. when a senator volunteered to fight in the arena as a gladiator (Dio 43.23.5). Julius Caesar vetoed this debut, but did allow equestrians to compete. In 38 B.C. yet another senatorial volunteer was thwarted, and this time a *Senatusconsultum* was passed banning the practice outright to senators and their sons (Dio 48.43.2). The ban probably extended to the stage as well as the arena; in any case this was the law at the date of yet another extension in 22 B.C., which embraced grandsons of senators and probably equestrians as well. We have evidence that these strictures were repeatedly violated, so much so that in A.D. 11 Augustus actually retreated, and allowed equestrians to fight in the arena (Dio 56.25.8).<sup>9</sup> New

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<sup>8</sup> So Bellen 1984 315, though I would dispute the assertion (316) that these are the same laws as those referenced at *Res Gestae* 6.

<sup>9</sup> For the violations, see Levick 1983 107-108, who has a useful discussion of the history of this legislation. See also Edwards 1993 123-166; Edmondson 1996 104-108; Gunderson 1996

restrictions were not long in coming however and in that same year an SC was passed forbidding making agreements to perform in public by all freeborn persons under 20 years if female and under 25 if male (*Tab. Lar.* 17-21). Tiberius however granted another exemption for equestrians in games given by his sons in A.D. 15 (Dio 57.14.3). For us this legislative history culminates in the SC of 19 recorded on the Larinum tablet that attempts to close a series of loopholes and effectively prevent members of the senatorial and equestrian orders from appearing on stage or in the arena.

To make a series of brief observations. First and most obvious, the concern of this legislation was with status-appropriate behavior, a concern that characterizes much of Augustus' legislation.<sup>10</sup> Next, its unpopularity and lack of success is palpable. Both Augustus and Tiberius thought it politic to attempt to maintain the integrity of the ban by granting exemptions from time to time, at least to equestrians. Finally, the reliance on SCC instead of comitial legislation hardly puts these initiatives into a separate category of sorts. I note that Augustus' claim at *Res Gestae* 6 to have carried out the Senate's mandate through promulgating legislation on the basis of his *tribunicia potestas*, while usually understood as a reference to the comitial laws passed in 18-16 B.C., can also embrace his sponsoring of SCC, at least in these years. We now know that the main function of the *tribunicia potestas* under the early Principate was to conduct proceedings in the Senate.<sup>11</sup>

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136-142.

<sup>10</sup> Kienast 1992 98, 137-139 emphasizes this aspect, though almost exclusively with the senatorial order. See also Baltrusch 1989 158.

<sup>11</sup> Rowe 2002. See also Millar 1984 52; Moreau 2003 477.

Next, clothing regulations.<sup>12</sup> Augustus famously enjoined the aediles to enforce public wearing of the toga by males in the center of Rome and forbade wearers of dark-colored garments (i.e. NOT the toga) to sit in the *media cavea* of the theater.<sup>13</sup> He renewed the annual equestrian *transvectio*, whose participants wore a uniform of *trabea* and crown of olive leaves. Members of the Senate and their sons were allowed the privilege of the *latus clavus*, the broad purple stripe on the tunic that signified membership in that order.<sup>14</sup> Cassius Dio reports that Augustus allowed only senatorial magistrates to wear purple clothing (Dio 49.16.1). Finally, I argue that the *lex Iulia* on adultery prescribed the toga for adulteresses, on the basis of an analogy with the usage of prostitutes, for whom the law may have stipulated the same garment, legislating what had only been a customary association of that garment with that profession. The regulation of the clothing of adulteresses was a novelty, however, in that the only sources that mention this are written after the passage of the law. In just this one detail, then, the adultery law lives up to the title of this talk.

Clothing regulations were perhaps particularly difficult to enforce. There is a lot of evidence for the usurpation of elite status symbols by unqualified Romans, a phenomenon that

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<sup>12</sup> What follows is taken from McGinn 1998 154-155.

<sup>13</sup> Suet. *Aug.* 40.5, 44.2. Resistance to the theater had a long history at Rome, as did its popularity. Regulation, in the form of the assignment of seats and apposite clothing contained in the *lex Iulia theatralis* (of uncertain date), might be read as Augustus' response to both trends, and so perhaps as more than just a remedy for the problem of confusion and disorder in the distribution of ranks mentioned by Suetonius (*Aug.* 44.1). Like his sumptuary legislation, this attempt at status-maintenance had Republican precedent, notably the *lex Roscia* of 67 B.C., though it was more thorough in its design and probably extended to the amphitheater as well: see Rawson 1987/1991.

<sup>14</sup> See Henderson 1963 66.

has been well studied, notably by Meyer Reinhold.<sup>15</sup> On the other hand, we know from the grumblings of Juvenal and Martial that many Romans regarded the toga as a cumbersome garment at best, and one has the sense that a number of them wore this only when absolutely necessary. The aediles must have been awfully busy. As for prostitutes, the sources attest a variety of interesting items of clothing for them that had nothing to do with the toga. Convicted adulteresses may have been kept to their togas while relegated to whatever barren, rocky, and remote island spelled their destiny, if anyone cared.

Despite these challenges, I think it difficult to assume that these regulations were not meant to be enforced, or obeyed.<sup>16</sup> That is to say that although it's sufficiently clear that they were concerned with the management of symbols, there was nothing exclusively or inertly symbolic about the rules themselves, a theme to which I shall return, in the context of the Augustan sumptuary law.<sup>17</sup>

Finally, there is law on taxation, namely the *lex Iulia de vicesima hereditarium*, strictly of uncertain date, though conventionally located in A.D. 6. This established a tax rate of 5% on estates, whether left through bequest or on intestacy, provided they were above a certain value - though we don't know the precise cutoff - and were not left to close relatives - here again the

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<sup>15</sup> Reinhold 1981/2002. On the theme, see more recently Lendon 1997.

<sup>16</sup> Cf. Culham 1997 197-198.

<sup>17</sup> Compare the sometimes broad responsibilities of the officials in Greek cities tasked with enforcing women's clothing regulations: Ogden 2002.



precise range eludes us (Dio 55.25.5-6).<sup>18</sup> The proceeds went to fund the military treasury that provided pensions for veterans.<sup>19</sup> Dio asserts that Augustus got the idea from Caesar, and that it had been tried before, but discarded. The law stipulated a vigorous regime for its enforcement governing the opening of wills, establishing for example when, where and before whom this should happen.<sup>20</sup>

We cannot be certain how effective this enforcement regime was, though no immediate difficulties are reported in funding the *aerarium militare*.<sup>21</sup> What is of interest is the way in which the law set forth a failsafe way of accomplishing its goals. One aim was to support the maintenance of status in families over the generations; another was to fund the treasury.<sup>22</sup> So those liable to the tax had a choice. Keeping bequests within the family promoted the first goal. Here it would seem good to know the precise range of family members exempted under the law. There are two plausible models.<sup>23</sup> One was laid down by the mid-Republican *lex Furia*

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<sup>18</sup> Plin. *Pan.* 40 attributes the exemption of small estates to a reform by Trajan: Gardner 2001 205.

<sup>19</sup> For other sources of funds for this treasury see Wesener 1958 2471.

<sup>20</sup> On provisions for enforcement introduced by the law and subsequent to its passing, see Wesener 1958 2475. For evidence of the administration for the collection of the tax, see De Ruggiero 1922 729-733.

<sup>21</sup> Caracalla found himself constrained to launch an aggressive campaign to increase revenue, including doubling the tax rate and expanding the base: Dio in *Exc. Val.*, Xiph. 77.9.4; Ulp. D. 1.5.17; Ulp. *Coll.* 16.9.3.

<sup>22</sup> See Nicolet 1984 108-111.

<sup>23</sup> The notoriously fluid social usages, including language, surrounding the Roman family reveal its nature as a social construct, and one moreover heavily penetrated by political considerations, especially after the establishment of the Principate: see Frier and McGinn 2003

*testamentaria* (before 169) on eligible legatees, which embraced relatives including the sixth degree, seventh in the case of second cousins, and was taken up by the Augustan marriage law, which allowed bequests to stand when made to such family members even when they had violated its strictures.<sup>24</sup> An inner circle of family entitlement however was recognized by the praetorian regime on undutiful wills, which effectively extended only to the third degree.<sup>25</sup> For once, the uncertainty over the content of the rule doesn't matter very much, since the evidence we have on testamentary practice suggests that most willmakers kept their bequests within that range.<sup>26</sup> Husbands and wives may have been exempted as well, simply on the basis that Augustus favored marriage as a matter of public policy.<sup>27</sup> Refusal however to keep within the statutory limits, whatever they were, meant supporting the other goal pursued by the law, funding the *aerarium militare*.

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3-10. For an analogy from another culture, see Davidoff et al. 1999 9-10, 79, 83.

<sup>24</sup> This is the majority view: De Ruggiero 1922 728. On the *exceptae personae* under the marriage law, see Wallace Hadrill 1981 73-76.

<sup>25</sup> The idea that the exemption embraced only the *sui heredes* overlooks the praetorian regime on succession: Wesener 1958 2472. The same might be said of Wesener's proposal (2474) that only relatives in the first degree (parents and children) were exempted before the time of Trajan, which is moreover based on a misreading of Plin. *Pan.* 39.2.

<sup>26</sup> Champlin 1991 103-130. Champlin's evidence undercuts the argument of Gardner 2001 213 that a "chronic shortage of heirs in the immediate family" encouraged testators "to dissipate property outside the family" and explains in turn the wide range of eligibility under the *lex Furia*, for example. It is risky to read social practice so directly from legal provisions. Gardner concludes that the tax exempted at most, aside from spouses, relatives within the third degree, a solution that remains possible though far from proven.

<sup>27</sup> Gardner 2001 214 argues for this exemption on the basis that property from both parents eventually went to their mutual children. The policy behind the *lex Iulia et Papia*, which rewarded both marriage and the raising of children, suggests however that if husbands and wives were exempt from the tax, even childless couples might so qualify.

While it might be possible to entertain a modest optimism on the enforceability of the Augustan inheritance tax, this is much more difficult for the *lex Iulia sumptuaria*, a statute that stands at the heart of the Augustan program on social control. This law, passed, probably, in or near 18 B.C., placed limits on certain forms of ostentatious consumption, at minimum concerning expenditures on banquets.<sup>28</sup> It is the last of a long series of sumptuary legislation passed throughout the mid- to late Republic, a series notorious for its utter ineffectiveness.<sup>29</sup>

A wealth of comparative evidence on sumptuary legislation from late medieval and early modern Europe encourages no great confidence in the efficacy of these measures - there are even some indications that legislators in these later periods knew from the start that, as we say in Tennessee, this dog would just not hunt.<sup>30</sup> One scholar has been encouraged by these facts to propose that Roman sumptuary legislation was purely symbolic, that is, it was exclusively intended to make a statement about values rather than directly influencing behavior.<sup>31</sup>

But it seems hazardous to try to read legislative intent from legislative effect. Let one example suffice, the hoary chestnut of the Mann Act.<sup>32</sup> What's more, we simply don't have much information on how most of these laws were enforced, with one important exception, the

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<sup>28</sup> Some scholars propose clothing regulations were embraced by this law as well: Rotondi 1912/1990 447; Sauerwein 1970 159.

<sup>29</sup> See de Ligt 2002 3-5 for a recent summary. More detail in Baltrusch 1989 40-131.

<sup>30</sup> See Hunt 1996 325-356.

<sup>31</sup> De Ligt 2002 11-12.

<sup>32</sup> See the classic statement in Levi 1949 27-57.

one passed by Julius Caesar in 46 B.C. Suetonius tells us that Caesar placed guards in the markets to seize foods that were illegal and, when this provision failed, sent soldiers to banquets to do the same.<sup>33</sup> There is nothing especially symbolic about snatching food from the jaws of a hungry diner.<sup>34</sup>

We know nothing for certain about the enforcement of the Augustan sumptuary law, though we might reasonably infer from later measures of Tiberius that the Senate and/or the aediles played a role.<sup>35</sup> It seems unreasonable in any case to assume that this was any less vigorous than that which Caesar devised for his statute. As for the matter of its failure, we do well to remember that our chief witness for this is the Tacitean Tiberius, whose testimony we might well hesitate to accept at face value.<sup>36</sup> Livy, in his presentation of the debate over the abrogation of the *lex Oppia* (Liv. 34.1), has been thought to reflect contemporary concerns over the Augustan legislation.<sup>37</sup> If so, the fuss raised in the context of the debate, along with the mere fact that it was thought necessary to repeal a sumptuary law, might encourage some skepticism

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<sup>33</sup> Suet. *Iul.* 43.2, supported though vaguely by Dio 43.25.2. Cicero's sarcasm, though hardly probative of the law's success, does at least suggest Caesar was serious about enforcement: *Att.* 13.7.1, *Fam.* 9.15.5, 9.26.3.

<sup>34</sup> It is sometimes assumed that other sumptuary laws had no penalties. Wyetzner 2002 27 describes them as *leges imperfectae*. Both Gellius (2.24.1) and Macrobius (3.17.6) mention penalties. They do not, however, say what they were.

<sup>35</sup> Suet. *Tib.* 34; cf. Tac. *Ann.* 2.33; Dio 57.15.1.

<sup>36</sup> Tac. *Ann.* 3.52-54. Baltrusch 1989 101 argues for the law's failure both on the basis of Tiberius' declaration, which is supposed to justify his refusal to legislate, as well as his own modifications of the Augustan statute. This is just too paradoxical for me.

<sup>37</sup> Nörr 1974 74.

about the utter ineffectiveness of the later statute.<sup>38</sup>

More to the point perhaps is that we may not fully understand the law's purpose, a problem in attempting to assess its effects. If it is correct to argue that Augustus in promulgating the *lex Iulia sumptuaria* had goals that set him apart from the legislators of the mid-Republic, namely, to discourage rivals from arising within the senatorial order and further to prevent its members, many of whom suffered financially amid the political disorders of the late Republic, from bankrupting themselves through ostentatious expenditure,<sup>39</sup> the law might on the whole be judged a success. If so, Tiberius' famous refusal to legislate in A.D. 22 can well be read as an acknowledgment of that fact, as well as an indication that he had discovered other, more effective means to promote the very same aims.<sup>40</sup>

Later emperors seem by and large to have taken Tiberius as a model in this regard, but it seems reductionist to assume that Augustus' law was completely pointless. It may have turned out that the real challenge to the policymaker here was not the strength of the political class, but its weakness. So the success of the legislation may not have depended on its enforcement, at

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<sup>38</sup> According to the Tiberian-era Valerius Maximus, in 97 B.C. a tribune deemed it necessary to abrogate a sumptuary law, for which action the censors expelled him from the Senate: Val. Max. 2.9.5.

<sup>39</sup> See Baltrusch 1989 153-154 (for the political, economic, and social motives behind the Republican tradition see 102). Conserving patrimony had an obvious, if indirect, connection with the aims of the *lex Iulia et Papia*: below.

<sup>40</sup> For some of Tiberius' non-legislative methods, see Baltrusch 1989 155-157.

least not in any obvious sense.<sup>41</sup> In any case, the experience of the sumptuary law in fact points up a central challenge to Augustus' legislative approach to social control in relation to the upper classes. This was a lot more counterintuitive than it might seem, and not just because of the oft-cited intractability of the *mos maiorum*.<sup>42</sup>

Status-maintenance is an obvious theme of the Augustan laws regulating manumission of slaves, which begin with the *lex Fufia Caninia* of 2 B.C., continue with the *lex Aelia Sentia* of A.D. 4 and the *lex Iunia (Norbana)*, which rounds off this category even if it dates as late as A.D. 19.<sup>43</sup> Simply by limiting the numbers of slaves freed, Augustus sought to make better slaves and better masters.<sup>44</sup> Richer ones too, for the latter case, in that the law helped preserve patrimonies by discouraging dissipation of a major asset class.<sup>45</sup> The criteria for manumission remained, aside from the exceptions to the rules permitted under the *lex Aelia Sentia*, under the discretion of owners, who were bound to exercise their judgment all the more carefully now,

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<sup>41</sup> A similar point holds for the *lex Iulia de ambitu*. See Mod. D. 48.14.1 pr. Daube's argument that sumptuary laws were designed to protect the interest of the stingy among the Roman elite presupposes a higher level of adhesion among that group than is usually granted for this legislation: Daube 1969 121-128.

<sup>42</sup> See the comments of Black 1998 1-2, 68-70, 163-164 on the behavior of law with respect to social status.

<sup>43</sup> See Bellen 1984 340-342.

<sup>44</sup> For a sense of the problems envisaged, see Dion. Hal. 4.24. Cf. the Discipline Ordinance of Reformation Augsburg (1537), which encouraged better behavior on the part of servants so that they might with greater moral justification claim their place in civic society, at the same time it insisted on comportment from masters and mistresses consistent with their elevated status, all in the service of a return to an idealized past: Roper 1989 55.

<sup>45</sup> See Daube 1969 119-121.

while slaves would in theory be compelled to compete for this privilege, as part of the operation of a meritocracy of virtue visible in other aspects of Augustan legislation.<sup>46</sup> Though sumptuary legislation obviously can be concerned only with wealthy persons, these laws would have touched persons with only a slave or two, and of course the slaves themselves, suggesting that Augustus' concerns with status-maintenance reached far beyond the upper classes.<sup>47</sup> The details of enforcement, though of interest, are not controversial, and cannot detain us here.<sup>48</sup>

The Augustan marriage legislation, to take two laws as one, known by the composite title *lex Iulia et Papia*, was concerned with status-maintenance in myriad ways, too many to offer more than a sense of the main lines right now.<sup>49</sup> It is worth observing that marriage in many societies serves as perhaps the ultimate status-marker.<sup>50</sup> The law stipulated two sets of marriage prohibitions predicated on status - one for members of the senatorial order, for which it famously provided the first definition at law, the other for all other freeborn persons. Augustus himself did

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<sup>46</sup> See McGinn 1998 80-84.

<sup>47</sup> Persons of decidedly modest means might own slaves in the Roman world: Bradley 1994 10-12. Thus a chief concern of Augustus' was perhaps to order hierarchy on the sub-elite level. Here (though admittedly among the upper classes as well) some master-slave relations would have been more symmetrical than others, generating a potential for conflict, even violent conflict: see Gould 2003 103, 108.

<sup>48</sup> Especially telling is documentary evidence that extends, albeit sporadically, over centuries: Bradley 1994 10-11, 156-157. Daube's theory of protection of interests of the stingy among the elite has some attraction regarding the manumission laws, explaining their appeal to many owners who did not wish to free large numbers of slaves but felt social pressure to do so, until the law gave them an excuse not to manumit: see Daube 1969 119-121, an expressive law theorist *avant la lettre*.

<sup>49</sup> More detail and bibliography in McGinn 1998 Chapters 3 and 4; McGinn 2002.

<sup>50</sup> See McGinn 2002 for Rome.

not invalidate marriages contracted contrary to his rules, evidently responding to the principle that “[w]hat the law would control, it first legalized”.<sup>51</sup> It also created two new privileged statuses - married persons and an even loftier category of married with children. The law also defined for each of these a corresponding underprivileged status, namely *caelibes* and *orbi*.<sup>52</sup>

Encouraged by the fierce ancient polemic over the law, modern scholarship has tended to take a dim view of its efficacy in moral and/or demographic terms.<sup>53</sup> There are of course some notable exceptions. Dieter Nörr argues that the statute established a mechanism for enforcement that, because balanced between the goals of revenue and reproduction, was in a sense fail-safe. The state could not lose in that one aim succeeded in proportion to the failure of the other.<sup>54</sup> Andrew Wallace-Hadrill identifies the purpose of redistribution as operating on one further level, in that the state’s income from confiscated bequests enhanced its ability to support the fruitful but needy.<sup>55</sup> Finally, it seems likely that the marriage prohibitions were rarely disregarded on the level of the elite, since upper-class spouse selection was much more

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<sup>51</sup> Hartog 2000 168. Cf. Grossberg 1985 335 n. 70 on a modern instance of a preference for penalties over nullification of marriages contracted contrary to law.

<sup>52</sup> The unmarried were forbidden to attend public spectacles and banquets, and were evidently allotted less desirable seats in the theater, perhaps as a later softening of an absolute ban. Like soldiers, the married, at least married men, were publicly recognized for their service to the state. In this way the marriage legislation tied in directly or indirectly the *lex Iulia theatralis*: see Rawson 1987/1991 esp. 525-526, 542.

<sup>53</sup> See for example Raditsa 1980, a contribution distinguished by its pessimism and modernism.

<sup>54</sup> Nörr 1981 354.

<sup>55</sup> Wallace-Hadrill 1981 72.



conservative than the dictates of the law.<sup>56</sup> Worth noting is that the criticism, though it occasionally suggests resentment at the fact of the law, does not impugn the law's moral and demographic purposes, as though these were beyond question.<sup>57</sup> This may be taken as a sign that Augustus had successfully appropriated the symbolic capital of the Roman tradition on these matters, an impression that is confirmed by the readiness of later emperors to legislate in its support.<sup>58</sup>

The Romans recognized a public interest in marriage both before and after the law was passed.<sup>59</sup> The jurists were no less enthusiastic than Augustus' successors, to judge from the frequency and substance of their holdings on the interpretation of the law. There is a programmatic statement - such statements are rare in the sources that have come down to us - from the second-century jurist Terentius Clemens that is worth repeating: "...the statute was enacted for the common good, namely, to promote the procreation of children, [and so] is to be furthered through interpretation."<sup>60</sup>

With the adultery law too Augustus relied on or, better, reinvented a series of traditional

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<sup>56</sup> McGinn 2002. See Wiesner-Hanks 2001 222 for a cross-cultural statement.

<sup>57</sup> See for example Nörr 1974 76-78, 104-106. The mere fact of the law occasioned some resentment: Tac. *Ann.* 3.???

<sup>58</sup> Augustus' successors came to employ a similar principle of social control through status-maintenance in their promotion of local aristocrats throughout the Empire: see White 1995 esp. 56; White 1998 esp. 334.

<sup>59</sup> For an apposite parallel from eighteenth-century England, see Staves 1990 5-7, 11.

<sup>60</sup> Ter. Clem. (*5 ad legem Iuliam et Papiam*) D. 35.1.64.1.

statuses in an effort to shape behavior, namely, the disgraced husband-pimp, overly complaisant in his wife's adultery, the lowly adulteress configured as a prostitute, and the exalted *materfamilias* or *matrona*.<sup>61</sup> Modern reaction to this statute has been even more uniformly negative than that for the marriage legislation.<sup>62</sup>

Much of the twentieth-century opinion on the Augustan social/moral legislation in its various shades of black traces its roots to the views of Ronald Syme in *The Roman Revolution*. The idea that any part of this reform program might have largely or exclusively symbolic purposes seems to fit well with Syme's argument that Augustus hid his quest for power behind a constitutional facade.<sup>63</sup> This idea has met with notable resistance in recent years. One scholar has questioned the nature of the facade as facade, describing this as a structural element and not mere window-dressing: "...the elusive form of the principate was also its substance."<sup>64</sup> In a related vein, others have pointed out that recovering the actual motivations of the ancients is often impossible and that perceptions and representations form an important aspect of the reality we can study.<sup>65</sup> Still others have attacked Syme's reliance on "crisis theory" as an explanatory

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<sup>61</sup> For more detail on the *lex Iulia de adulteriis coercendis*, see McGinn 1998 Chapters 4 and 5. The law contained a clause prohibiting a husband from alienating Italic land in his wife's dowry without her consent, just as the *lex Iulia et Papia* forbade him to manumit a dotal slave without her permission: Moreau 2003 469-473. The aim was to raise the status of women within marriage.

<sup>62</sup> See again Raditsa 1980.

<sup>63</sup> See for example Syme 1939/1960 7.

<sup>64</sup> Linderski 1990 (the quotation is at 48).

<sup>65</sup> Millar 1984 40, 56; Crook 1996b 113-177, and below.

model for political developments during Augustus' reign and cast doubt on the very existence of a facade, chiefly by denying that Augustus ever claimed to restore the Republic.<sup>66</sup>

These criticisms are substantial,<sup>67</sup> yet Syme's influence on subsequent scholarship has been sufficiently strong to justify a closer appraisal of his views. Syme focused his attention almost exclusively on political relationships among members of the elite and was notoriously uninterested in ideology, prejudice, religious sentiment or even moral conviction, except perhaps as a function of such relationships.<sup>68</sup> Self-interest for Syme consistently trumped ideals as an explanation both of political action and of political structure, prompting Momigliano's famous complaint about the book "Spiritual interests of people are considered much less than their marriages."<sup>69</sup> It's hard to imagine Sir Ronald taking the social legislation very seriously.

In fact, that's exactly what he does. Syme's treatment of the Augustan "moral and sumptuary legislation", as he terms it, is more nuanced and sophisticated than one might expect from such broad characterizations of his work.<sup>70</sup> He describes the purpose of the laws as "to bring the family under the protection of the state" and views them as responding to a real need, the collapse of morals in the late Republic as evidenced above all in the sexual and marital

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<sup>66</sup> Crook 1996a; Crook 199b; Judge 1997.

<sup>67</sup> Even if Augustus did not claim to restore the Republic, Augustan archaism was more than just an aesthetic, as Judge 1997 72 (in criticism of Galinsky 1996) might be taken to imply.

<sup>68</sup> See Stone 1971 56, 62-65.

<sup>69</sup> Momigliano 1940 76.

<sup>70</sup> For the phrase see Syme 1939/1960 442.

behavior of women.<sup>71</sup> He is alert, as we might expect, to what he terms the “duplicity” of Augustus’ social program, which he identifies chiefly in his claims to resurrect a glorious past that was “imaginary or spurious”. He does try to have it both ways here, claiming that such measures were unnecessary back when the urban aristocracy was in its prime, while strongly implying that a Golden Age never in fact existed. But he insists all the same that suspicion of fraud is not enough to cast doubt on the effectiveness of these statutes.<sup>72</sup> So they are far from symbolic, and far more than a facade.

Syme’s attitude toward the moral / social legislation is in tune with his position on the Principate itself, in that he recognizes this as something terrible, deplorable, but necessary, at least in the sense of better than the likely alternative. In other words, he’s a legislator from perspicacious despair of human nature. Where his outraged moral sentiment seems to have misled him is in his focus on women’s behavior inside and outside marriage as the sole or main driving force behind the legislation.<sup>73</sup> It is reductionist to postulate women’s indulgence in serial monogamy or extramarital sex as the heart of the problem, as though members of the other gender were no more than shocked bystanders to these pursuits, and naive to assume that a good deal of the contemporary complaints registered on this score were more than a matter of perception or even fabrication.<sup>74</sup> Beyond this familiar theme Syme cites the alleged

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<sup>71</sup> Syme 1939/1960 443-449 (quotation at 449).

<sup>72</sup> Syme 1939/1960 452-453.

<sup>73</sup> See Syme 1939/1960 444-445.

<sup>74</sup> For salutary skepticism over the high rate of adultery in the late Republic, see Edwards 1993 36. See also Culham 1997 194.

emancipation of Roman women, specifically as reflected in the separate marital property regime that allowed *sui iuris* women ownership and control of their own estates, notwithstanding tutors. It is widely recognized today however that upper-class Roman women were never “emancipated” and in fact scarcely in need of such a thing. There was nothing new in the first century B.C. about non-*manus* marriage, which predates the XII Tables and for all we know was common by the mid-Republic, or the rules on separate marital property, which legal sources seem to suggest was grounded in the *mores*.<sup>75</sup> If Augustus shared Syme’s analysis he might have been tempted to pass a law abolishing non-*manus* marriage or at least the peculiar rules governing marital property, but there is no evidence for this of course. If anything the legislation he did promote, not to speak of the establishment of the monarchy itself, tended to raise women’s status.<sup>76</sup> So much can we say for *cherchez la femme* as an explanation of the Augustan social program in both its purpose and its effects.<sup>77</sup> A better alternative is to take these laws, as

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<sup>75</sup> On the (misleading) idea of emancipation for Roman women, which ultimately derives from nineteenth-century feminist critiques of contemporary marriage, see Winter 2003 8-9. On marriage without *manus* see Treggiari 1991 32-34. The date of the introduction of the separate marital property regime is equally uncertain, but it flourished in the mid-Republic, to judge from Cato’s complaints about it in 169 B.C. (*apud* Gell.17.6.1). Emperors and jurists strictly attribute the ban on gifts of significant value between spouses to the *mores* or *maiores*, though this prohibition must be reckoned as an essential aspect of the separate property regime: Ulp. D. 24.1.1; Caracalla *apud* Ulp. D. 24.1.3 pr.-1.

<sup>76</sup> On the legislation, see McGinn 1998 Chs. 3-6; McGinn 2002; on the Principate, see Syme 1986 80; Culham 1997. In late medieval and early modern England, the growth of the Yorkist and early Tudor monarchy promoted elite woman’s access to patronage and physical presence at court, enhancing their status and role overall: Harris 2002 12-13. I note the unpersuasive (to me) thesis of Arthur that woman’s status diminished under the Principate: Arthur 1977 78-86 (= [with minor changes] 1987 96-104).

<sup>77</sup> As Syme himself comes very close to doing in his later work, where he argues that the position of women in the late Republic should be read as a sign of cultural vitality and not moral decadence: Syme 1964 16-17; Syme 1986 443; cf. 168.

with other aspects of Augustus' policies, neither as reflecting a response to crisis nor as a product of a long-meditated design, but instead as part of a series of experiments, some of which proved more successful than others.<sup>78</sup>

To return to the adultery statute, despite modern misgivings, the reception of this law by emperors and jurists was as enthusiastic as that for the marriage law, if not more so. It is hardly unusual for an elite to seek to define its collective identity through sexual regulation.<sup>79</sup> This is not to say that enforcement was at all times rigorous. Enforcement of the *lex Iulia* on adultery seems to have operated in cycles, with aggressive campaigns launched by emperors such as Domitian and Septimius Severus.<sup>80</sup> All the same, it is rash to conclude that the law was somehow a failure. It contained some rather serious deterrents, such as severe penalties and the complicated self-help provisions of the *ius occidendi*.<sup>81</sup> There is no evidence Augustus was interested in enacting a zero-tolerance policy on adultery, any more than Sulla hoped perhaps to eliminate homicide through the *lex Cornelia*. The law's requirement that a woman accused of adultery be divorced prior to prosecution is sufficient proof of that. Augustus, an experienced adulterer himself, may have accepted that not all adultery could be curbed, but he could reasonably expect to reduce its incidence and discourage, or at least punish, some more

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<sup>78</sup> See Levick 2003.

<sup>79</sup> Wiesner-Hanks 2001 62, 222.

<sup>80</sup> For a discussion of the effectiveness of the law see Treggiari 1991 294-298.

<sup>81</sup> Those with a knowledge of the details of the *ius* can begin to appreciate its role in status-maintenance. For cogent observations on the related subject of 'crimes of honor' and relative status, see Gould 2003 79.

egregious instances. His seriousness in this matter can be gauged from the fact that this is the only criminal law statute in the group of laws I am discussing.<sup>82</sup>

One way to arrive at a sense of the effectiveness of Augustus' social legislation is to reevaluate what is meant by legal symbolism in this context. There are at least two useful ways to do this. First we can recognize that law plays a part in a symbolic exchange between the emperor and his subjects. This relationship has been relatively well studied in such areas as imperial cult,<sup>83</sup> building programs (especially as part of a cultural program to be received and imitated),<sup>84</sup> and in various other types of political relations, above all those operating between ruler and provincial communities. These were carried on by means of a repertoire of symbols that included rituals, buildings, coinage, and public expressions of gratitude.<sup>85</sup> Law, as Fergus Millar points out, is but one element in the exchange of symbols that characterized this relationship, as he cites, among other examples, the Edicts of Cyrene which together with one or more statues of Augustus represented the emperor both verbally and visually.<sup>86</sup>

A second way of reevaluating the role played by symbolism with this legislation is to recognize that legal symbolism is not necessarily inert or passive, nor is it inconsistent with the

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<sup>82</sup> This is not to say that it was the only criminal law statute promulgated by Augustus. On his criminalization of offenses against the *mos maiorum* see Bellen 1984 338.

<sup>83</sup> Price 1984; Fishwick 1987-1991; Gradel 2002.

<sup>84</sup> Zanker 1988 esp. 265-333.

<sup>85</sup> Millar 1984.

<sup>86</sup> Millar 1984 47-53.

enforcement of the rules. Far from a mere literary exercise, “[i]n the law, language is an instrument of power.”<sup>87</sup> In the last decade there has been a great deal of interest in what is called “expressive law”, the idea that people obey legal rules not out of a rational calculation of how this fits with their own preferences, but because law has the power to change those preferences by altering the social meaning of a particular action, whether it is wearing a seatbelt while driving, not smoking in a bar, or cleaning up after one’s dog.<sup>88</sup> The new law finds a justification in social morality in large part because of the appearance, or even the reality, that a community consensus supports it. The law wields enormous symbolic power then, by prompting an internalization of the norms it expresses.

This is not to say of course that law necessarily entails control. The move from the ideology of order and status-maintenance as enshrined in statute to a real and measurable impact on social behavior is never assured. Expressive law theory is no better than traditional economic rationalism in predicting law-abiding behavior or in illustrating exactly why some laws are notably unsuccessful, just as its analysis of the mechanism of cause and effect in the popular reception of legal norms remains a tad murky. In part this is explained by the complexity of human psychology and sociology: the same rules have different effects on different groups and individuals.<sup>89</sup> A Foucauldian would point out, rightly, that reform has the potential to undermine

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<sup>87</sup> Grossberg 1985 302.

<sup>88</sup> For a good survey of recent work in this field see Geisinger 2002, to whom this summary owes a great deal.

<sup>89</sup> See Gould 2003 109, 126, 136, 167.



rather than strengthen the values it attempts to enforce.<sup>90</sup> To get a sense of how this works we may usefully compare the engagement of the tradition of Rabelaisian literature with the sixteenth-century Reform movement(s) with Ovid's reception of the adultery law of Augustus.<sup>91</sup> From the poet's perspective this legislation seems downright antisocial. On a broader level it would be incorrect merely to assume that the political changes attendant upon the advent of the Principate could sustain the burden of global social change, at least in the short run.<sup>92</sup>

It's not difficult, all the same, to find evidence of a positive reception of Augustus' work. An illuminating example comes from one of his own freedmen, the fable-purveyor Phaedrus. In one story (3.10) a freedman, hoping for an inheritance, wrongly accuses his mistress of an adulterous affair to her husband, his former master. This man, beset by rage, bursts into his wife's bedroom, finds a man in her bed and runs him through with a sword. When the dust settles, he discovers that he has slain their son, whom the wife had placed in her bed to safeguard his chastity. He then kills himself out of remorse. Prosecutors drag the wife to the centumviral court in an effort to deny her succession to her husband's property, on the ground of adultery. The result is a hung jury; the case is simply too complicated for the jurors to reach a verdict. Then Augustus, as *princeps ex machina*, enters to dispense justice.

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<sup>90</sup> In support of this perspective see just Tac. *Ann.* 3.24-25 with Edwards 1993 57.

<sup>91</sup> On the former, see Roper 1994 5-8; on the latter, Gibson 2003 25-37.

<sup>92</sup> See Roper 1994 148-150.

The normative function of storytelling has been well-studied in regard to other cultures.<sup>93</sup> Because our story invokes Augustus as the problem solver in a legal case, the connection between emperor, law, and social control could not be clearer.<sup>94</sup> Nor should we view this reception of imperial justice as an isolated example. This much is suggested for example by a glance at the pro-adultery-law tradition of the declamations, with which Phaedrus' fable bears a more than superficial resemblance.<sup>95</sup>

Perhaps it's not surprising that someone like Phaedrus on the margins of the elite would have a relatively big stake in the matter of status-maintenance. But the implications of Augustus' interest in using law as a tool of social control loom larger. Thanks to the work of Roger Gould, we now understand better than ever how ambiguity over relative rank produces conflict that is more frequent and more violent the greater the uncertainty and/or rate of change.<sup>96</sup> This lack of clarity over status and social hierarchy and its disorderly consequences, in highly simplified form, represents the condition of Roman society in the late Republic that Augustus sought to counter with his legislation. Interestingly enough, some of the same developments that posed a challenge to the lawgiver also helped equip him with a cadre of trained professionals, the

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<sup>93</sup> Meyer and Bogdan 1999.

<sup>94</sup> See Henderson 2001 33-55, who to be sure detects a certain subversive streak in Phaedrus' tale, about which I remain skeptical. Cf. Phaedrus 1.1.1-2.

<sup>95</sup> Henderson 2001 47-51 has useful examples of the treatment of the *ius occidendi* in the rhetorical exercises. For contemporary claims of success for Augustus' legislation, see the evidence gathered by Edwards 1993 58-59.

<sup>96</sup> Gould 2004.

jurists, to assist him in his labors.<sup>97</sup> But it is perhaps best to regard as Augustus' own contribution the design of legislation that attempted to appropriate the future by defining the present moment in ideological terms borrowed from the past.<sup>98</sup>

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<sup>97</sup> See Frier 1985 esp. 269-287; Wallace-Hadrill 1997 14-16; McGinn 2001.

<sup>98</sup> See Bellen 1984 320-321.