

TRIBUNICIAN SACROSANCTITY IN 44, 36 AND 35 B. C.

Dio attests three grants of tribunician sacrosanctity¹ in the years leading up to the Principate – to Caesar in 44; to Octavian, together with the right to sit with the tribunes, in 36; and to Octavia and Livia, together with statues and release from tutelage, in 35²). All three grants have been attacked, but neither the doubts that have been cast on the tribunician character of the grant to Caesar³) nor Appian's (apparent) attestation of a grant of the full *tribunicia potestas* in 36⁴) stands up to scrutiny, and no more will be needed here than a few brief additions to what has already been said in Dio's defence⁵). The neglected case is the grant to Octavia and Livia, for Willrich's contention that the precedent here was not the tribunes but the Vestals⁶) has attracted very little attention⁷). There are other matters in even more urgent need of consideration. For example, not nearly enough has been said about the juristic nature of the grants and the basis on which they were made. Furthermore, what prompted Caesar in 44 and Octavian in 36 and 35 to seek special protection against injury? Finally, was the experiment represented by these grants subsequently repeated? It is proposed to begin with the juristic nature of the grants: this question will be examined on the assumption that Dio is right. Attention will then be given to a brief validation of Dio's evidence for Caesar and Octavian and a refutation in some depth of Willrich's theory in regard to Octavia and Livia. The paper will conclude with

1) As to whether the grants in question should be so described, see below.

2) Dio 44.5.3; 49.15.5 ff.; 49.38.1.

3) See at n. 38.

4) See at n. 47.

5) See nn. 46, 51, 52.

6) H. Willrich, *Livia*, Leipzig/Berlin 1911, 54f.

7) It has been briefly noticed by E. Hohl, "Besatz Cäsar Tribunengewalt?", *Klio* 32 (1939), 61 ff. at 70; P. L. Strack, 'Zur tribunicia potestas des Augustus', *Klio* 32 (1939), 358 ff. at 368 n. 5; H.-W. Ritter, 'Livias Erhebung zur Augusta', *Chiron* 2 (1972), 313 ff. at 333 n. 162. I have not come across any other references.

some observations on the reasons for the grants and on the subsequent history of the institution.

In the case of Caesar, Dio says that ‘they voted that he was to enjoy what had been given to the tribunes, so that if anyone insulted him by deed or word the wrongdoer would be *sacer* and under a curse’ – τὰ τοῖς δημάρχοις δεδομένα καρποῦσθαι, ὅπως, ἂν τις ἢ ἔργῳ ἢ καὶ λόγῳ αὐτὸν ὕβριση, ἱερός τε ἦ καὶ ἐν τῷ ἄγῳ ἐνέχηται⁸). In the case of Octavian, ‘they voted him protection against insult whether by word or by deed (and stipulated that) whoever violated his protection would be liable to the same penalties as those which had been laid down for the tribunes’ – τὸ μήτε ἔργῳ μήτε λόγῳ τι ὕβριζεσθαι. εἰ δὲ μή, τοῖς αὐτοῖς τὸν τοιοῦτο δρᾶσαντα ἐνέχεσθαι οἷσπερ ἐπὶ τῷ δημάρχῳ ἐτέτακτο⁹). In the case of the women, ‘he gave them security and protection against insult on a similar basis to the tribunes’ – τὸ ἀδεῆς καὶ τὸ ἀνύβριστον ἐκ τοῦ ὁμοίου τοῖς δημάρχοις ἔχεν ἔδωκεν¹⁰).

The most striking feature of these passages is that the grants are expressly made by analogy, not by attempting to detach ‘tribunician sacrosanctity’ from the aggregate of the tribunes’ powers¹¹). This is shown most clearly by the grant to Octavian, where the link with the tribunes is established by an analogy based on the penalties: ‘the same penalties as those which had been laid down for the tribunes’ is exactly how a Roman draftsman would have worded it¹²), and as far as this piece of evidence goes Dio’s credibility seems to be enhanced. The analogy for the women is stated by Dio somewhat differently, for ‘on a similar basis to the tribunes’ appears to make the protection rather than the penalty the frame of reference; but a different technical formulation from that used for Octavian is unlikely, and Dio is probably paraphrasing here. In Caesar’s case Dio does not use language indicative of an analogy in the passage quoted above, but he does do so elsewhere – ὃν ἐξ ἴσου τοῖς δημάρχοις ἄστυλον ἐπεποιήκεσαν¹³) –, although here too he paraphrases by comparison with the standard formula which he

8) Dio 44.5.3.

9) Ibid. 49.15.5 f.

10) Ibid. 49.38.1.

11) Cf. n. 35 and the text there. See also Hohl, o.c. 70 and pass.

12) See for example D. 48.10.15 pr. Cf. Bauman, ‘The *leges iudiciorum publicorum* and their interpretation: *ANRW* II 13 (1980), 103 ff. at 159 ff.

13) Dio 44.50.1.

gives for Octavian – and which was, not surprisingly, the one to reach him intact¹⁴).

So far so good, but what is the exact meaning of ‘the same penalties as those which had been laid down for the tribunes’ on which Dio bases the analogy, and how does his use of this phrase affect his credibility? The problem is one of some complexity, but it does not seem to have been sufficiently confronted in the literature¹⁵). An interpretation needed to be anchored to a *lex*, and here the *prima facie* candidate is the *lex Valeria Horatia* of 449 which provided that whoever injured a tribune, aedile or decemviral judge would become *sacer*, that is, consecrated to a god (originally to the gods) and liable to be killed with impunity by the first comer¹⁶). Dio does not specify the penalties which had been laid down for the tribunes in the Octavian passage, but in the Caesar passage he describes the sanction in terms which seem to point clearly, if inelegantly¹⁷), to the sacral remedy. But that remedy had become largely obsolete in the developed law¹⁸) and had for most practical purposes been replaced, so far as injuries to tribunes were concerned, by the regular criminal process – more precisely, by the *lex maiestatis*¹⁹). It cannot be supposed that Octavian restored the ancient remedy to full vigour, and the question therefore is whether Dio has cut himself loose from his sources and given us a garbled mixture of contemporary veracity and ancient history in his account of these events. The answer is, of course, that Dio has done no such thing. At the

14) Cf. at nn. 23–29 on Livy’s discussion of tribunician sacrosanctity.

15) It is not noticed, for example, in the works cited in nn. 7, 34, 51, 52.

16) Livy 3.55.7. On *sacratio* in general see Mommsen, *Strasr* 900ff., 46f.; J.L. Strachan-Davidson, *Problems of the Roman Criminal Law*, Oxford 1912, 1.3 ff.; M. Kaser, *Das altrömische Ius*, Göttingen 1949, 42 ff.; K. von Fritz, ‘Leges sacrae and plebei scita’, St. Robinson, St. Louis 1953, 2. 893 ff.; R. M. Ogilvie, *A commentary on Livy*, Oxford 1965, 500 ff. The most recent discussion, by J. Bleicken, *Lex Publica*, Berlin 1975, 88 ff., is thrown out of focus by an attempt to confine the sacral remedy to the protection of plebeian institutions.

17) No more than *ἰερός ἦ* was needed for *sacer esto*; καὶ ἐν τῷ ἀγναι ἐνέχεται is a gloss for the benefit of Dio’s readers.

18) But not entirely so. See n. 20.

19) The *maiestas minuta* concept was brought into it even before the first *lex maiestatis*. Bauman, *The crimen maiestatis in the Roman Republic and Augustan Principate*, Johannesburg 1967, 1970, 31; id., ‘Maiestatem Populi Romani Comiter Conservanto’, *Acta Juridica* 1978, 19 ff. at 28 f. On the protection of the tribunes by the *maiestas* statutes see Bauman, *Crimen maiestatis* 53 f., 71 ff. See also n. 30 below.

very worst he does no more than reflect the confusion between remedies *religione* and remedies *lege* which is something of a feature of the Late Republic, manifesting itself not only in fleeting glimpses of the sacral remedy in public life²⁰) but, even more pertinently, in Livy's account of the controversy surrounding the origins of tribunician sacrosanctity. Livy tells us that L. Valerius and M. Horatius, the consuls of 449, made the tribunes inviolate both *religione* and *lege* – the former by reviving neglected ceremonies and the latter by the *lex Valeria Horatia* which I have referred to above²¹). Livy goes on to say that *iuris interpretes* deny that this *lex* confers sacrosanctity: they argue that it merely prescribes a penalty (= the sacral remedy) and that the tribunes (but not the aediles or decemviral judges) derive their sacrosanctity from the oath sworn by the plebs when the tribunate was created²²). The important point is that the controversy between *religio* and *lex* was contemporaneous, or nearly so, when Livy wrote. Cato argued that the plebeian aediles were sacrosanct²³); the argument perhaps dates either to Cato's aedileship or to the Hostilius Mancinus affair²⁴). Livy's version may be more recent, for its smooth handling of the legal technicalities suggests a source versed in public law rather than an annalist, in which case the earliest possibility is one of the publicists who

20) On such appearances see esp. Strachan-Davidson, o.c. 1.11 ff. Cf. Mommsen, *Strafr* locc. citt.; Bauman, *Crimen maiestatis* 213 ff. On the survival of the remedy otherwise than in cases of injuries to tribunes see also Bauman, 'Five pronouncements by P. Mucius Scaevola', *RIDA* 25 (1978), 223 ff. at 232 f.

21) Livy 3.55.6 f. On the passage see Ogilvie, o.c. 500 ff.

22) Livy 3.55.8. Cf. Ogilvie, loc. cit. See also n. 22 i. f.

23) Festus 422 L.

24) On 199 as the date of Cato's aedileship see Broughton, *MRR* 1.327. On the case of A. Hostilius Mancinus see Bauman, 'Criminal prosecutions by the aediles', *Latomus* 33 (1974), 245 ff. at 253. The case dates to before 149, Broughton, *MRR* 1.460 n. 5, and therefore to a time when Cato was still alive. The question of aedilician inviolability was in issue, although Mancinus as a curule aedile will have (unsuccessfully) claimed general magisterial inviolability rather than the sacrosanct variety; but the whole question of the inviolability of aediles may have been canvassed at the time, in which case Cato may have sought to draw a distinction between plebeian and curule incumbents. Cato's opinion (whether given at this time or earlier) was fraught with consequence, for it threatened to give plebeian aediles a higher status than curule. This danger may have prompted Livy's *iuris interpretes* to rule as they did. Their ruling will not have been decisive, as Cato was also a jurist. Cf. W. Kunkel, *Herkunft u. soz. St. d. röm Juristen*², Graz 1967, 9.

wrote in the Gracchan period²⁵). The matter would also have been of interest to Q. Aelius Tubero, who wrote on public law in Caesar's day²⁶), and it can also be supposed that Livy would not have injected second century material into a fifth century institution unless it was relevant at his time of writing²⁷).

We may conclude that Dio has not burdened his narrative with irrelevant material. But can we credit him with something more specific than a general reference to the controversy between *religio* and *lex*? Can we suppose, in other words, that he reflects the language actually used by the law of 36, in which case that law will have brought the *lex maiestatis* into it without express nomination, by simply laying down, as Dio says, that violations were to attract the same penalties as those prescribed for the tribunes? The locus classicus for this type of subsumption is D. 47.22.2: 'Quisquis illicitum collegium usurpaverit, ea poena tenetur, qua tenentur, qui hominibus armatis loca publica vel templa occupasse iudicati sunt'. This clause sufficed, without any further identification, to subsume ringleaders under the *lex maiestatis* and their followers under the *lex de vi*²⁸), and it would similarly have sufficed if the law of 36 had provided that 'qui illum nocuerit, ea poena tenetur, qua tenentur, qui tr. pl. nocuisse iudicati sunt': given that injuries to tribunes had been sanctioned by the *lex maiestatis* (or the equivalent) since at least

25) That is, M. Iunius Gracchanus with his *De potestatibus* and C. Sempronius Tuditanus with his *Libri magistratuum*, on which see F. Schulz, *Roman Legal Science*, Oxford 1946. 46, 90.

26) On Tubero see Schulz, o.c. 48 and pass.; Kunkel, o.c. 37. His special interest in antiquity, Pomponius D. 1.2.2.46, would have directed him towards the aedilician problem on which the jurists differed.

27) Cf. Ogilvie, o.c. 503. The exact grounds of relevance can perhaps be conjectured. Livy's *iuris interpretes* had given an interpretation most welcome to Octavian if the latter had the special interest in the tribunate that the sources imply. On Octavian's attempt to stand for the tribunate in 44 see H. Last, 'On the *tribunicia potestas* of Augustus', *Rend. Ist. Lomb. Sc. e Lett.* 84 (1951), 93 ff. (= *Augustus*, ed. W. Schmitthenner, Darmstadt 1969, 241 ff.). Last o.c. 93 ff. does not believe that Octavian made such an attempt and prefers Appian's statement that he was merely nominated by popular clamour. But Appian in fact attests a candidacy which he, in common with the other sources, has Antony frustrate, and the only difference is that he has Octavian 'drafted' whereas Suetonius, Plutarch and Dio have him stand of his own accord. Suetonius gave the matter careful thought, for he is aware, *Aug.* 10.2 of the anomaly of a patrician seeking the office, but says that he did seek it.

28) Bauman, *ANRW* II 13 (1980), 124f.

the third century²⁹), such a formula would have been understood to refer to the *lex maiestatis*³⁰). On this basis Dio is cleared of suspicion. His exposition of the sacral remedy in the Caesar passage is something more than a mere historical excursus³¹); he does not repeat the exposition in the Octavian passage, but he does revert to it in his account of the emperor's powers in the Severan period³²).

Analogy was used not only because it was the favourite way of extending any concept to a new case³³), but also because there was, as Last has pointed out³⁴), no such thing as an entity known as *tribunicia sacrosanctitas* capable of being detached from the aggregate of the tribunes' powers: *tribunicia potestas* was an entity which could be conferred as such, but the same did not hold good for sacrosanctity³⁵). This is confirmed by *Res Gestae* 10, where Augustus attests his acquisition of *tribunicia potestas* eo nomine but merely says in regard to sacrosanctity that it was decreed that he be sacrosanct: *sacrosanctus ut essem in perpetuum et quoad viverem tribunicia potestas mihi esset, per legem sanctum est*. The form *sacrosanctus ut essem* (or its equivalent) is general³⁶), and that of course is what Dio found in his source for the Octavian grant: the status itself was conferred directly, not by analogy; as such it made no mention of the tribunes, and it was only with reference to the penalty that the analogy placing Octavian on the same footing as the tribunes was formulated. Dio gives a

29) Cf. n. 19.

30) I previously saw difficulties in the enforcement of their remedies by Octavia and Livia. Bauman, *Crimen maiestatis* 218. But on the analogical basis now identified there is nothing against the enlistment of the *lex maiestatis* – by the women themselves if they had a right of accusation, otherwise by any male citizen.

31) The use of awe-inspiring language in the enabling decree will not have been unwelcome to Caesar – as long as the legal position could be accurately ascertained. Caesar's employment of the duumviral process in 59 was aimed at a specific legal objective, Bauman, *Historia: Einzelschr.* 12 (1969), but it also paid an additional dividend in the shape of an awe-inspiring setting.

32) Dio 53.17.9. Cf. n. 107.

33) Bauman, *ANRW* II 13 (1980), pass.

34) O. c. 98f. Cf. P. L. Strack, 'Zur tribunicia potestas des Augustus',

Klio 32 (1939), 358ff. at 358 n. 1.

35) Last, loc. cit. Even the bare '*sacrosanctitas*' is unknown.

36) Livy 4.44.5; 29.20.11; 4.3.6; 27.38.3; 9.8.15; 3.19.10; 2.33.1; 3.55.6; 3.55.9; 4.6.8; 9/9.2; 3.55.11; 3.55.8; *Per.* 116. Fest. s. v. *sacramentum*. Pliny *NH* 7.143.

different impression in the cases of Caesar and the women, but as already observed he is merely paraphrasing there³⁷).

We now have a sufficient base for consideration of the attacks that have been made on Dio's accuracy. In Caesar's case the attack seems to have originated with Hohl, who argued that Caesar had been made *sacrosanctus* ('sanctified by an oath') by the oath of allegiance sworn to Caesar early in 44 and not by any link with the tribunes: Caesar in fact wanted nothing to do with the tribunes, but when Dio came across the word *sacrosanctus* he assumed that it meant the tribunician form of inviolability – an assumption that he made all the more readily because it gave the sacrosanctity of the emperors a Caesarian precedent³⁸). The suggestion that a Caesarian precedent was wanted, and that the evidence was distorted in order to furnish it, scarcely calls for an answer³⁹); nor do Caesar's differences with the tribunes during his dictatorship⁴⁰) justify Hohl's inference, for in the case of Antony and Cassius, and even earlier in the prosecution of Rabirius, Caesar had shown himself most assiduous in upholding the inviolability of the tribunes⁴¹). Moreover, if there was an oath of allegiance to Caesar at all, it will have been on similar lines to the oath to Octavian in 32 and subsequent oaths⁴²), and Caesar's protection will have been against physical

37) For some further observations on the nature of tribunician sacrosanctity see nn. 106–108 and the text there.

38) Hohl, o.c. (n. 7) pass.

39) Augustus' ambivalent attitude towards Caesar is well known. See for example Syme, *RR* 317f.; J. Carcopino, *Cicero*, tr. Lorimer, London 1951, vol. 2 pass. Augustus' successors had no greater interest than Augustus himself in finding Caesarian precedents.

40) More particularly the trouble with Epidius Marullus and Caesetius Flavus in 44, on which see M. Gelzer, *Caesar*⁶, Wiesbaden 1960, 295f. Cf. Bauman, *Crimen maiestatis* 152f.; S. Weinstock, *Divus Julius*, Oxford 1971, 319f. See also n. 82 below and the text there.

41) On Antony and Cassius cf. F. Adcock, *CAH* 9, 637. The point is somewhat weakened by Caesar's treatment of L. Caecilius Metellus in the same year (Gelzer, o.c. 192), but Caesar saw Metellus not as a tribune but as the instrument of his enemies. B.C. 1.33.3. On the trial of Rabirius see Bauman, *Historia: Einzelschr.* 12 (1969) with lit.

42) On doubts as to the existence of the oath to Caesar see Strack, o.c. 365; Weinstock, o.c. 223 ff. On the character of the oath (if there was one) see A. v. Premerstein, *Vom Werden und Wesen des Prinzipsats*, repr. N. Y. 1964, 32 ff.; Hohl, o.c. 69. Hohl appears to attach importance to the fact that Caesar was *parens patriae*, but the link between this and the supposed clause in the oath of allegiance escapes me.

danger only⁴³); but the tribunician type of inviolability lay against attacks on dignity and reputation as well as against physical attacks, and that is what Dio says was given to Caesar⁴⁴). Furthermore, there is nothing to suggest that one who was protected by an oath of allegiance was even known as 'sacro-sanctus': the evidence indicates that the expression was used only for tribunician inviolability⁴⁵). These few points will suffice for Caesar⁴⁶), and we now take up the case of Octavian.

The crux of the dispute in Octavian's case is Appian's assertion that in 36 Octavian was elected tribune for life – *αὐτὸν ... εἴλοντο δῆμαρχον ἐς αἰεὶ* – in the hope of persuading him to lay down his triumviral powers⁴⁷). This not very lucid statement has been taken by some scholars to mean that Octavian was given the full *tribunicia potestas* at this time⁴⁸) – largely, it would seem, because Orosius' *ut in perpetuum tribuniciae potestatis esset, senatu decretum est*⁴⁹) is presumed to refer to the same occasion⁵⁰) – , and Dio is thus said to be mistaken when he attests only a grant of tribunician sacrosanctity. Last's vindication of Dio has, however, virtually achieved the status of a *communis opinio*⁵¹) – as indeed it should have done, if only because of the unreal sequence of grants, abandonments and reinstatements to which Appian's supporters are driven in their attempts to find a place for Dio's attestation of, probably, the *ius auxilii* in 30 and the full *tribunicia potestas* in 23⁵²). All that need be added here is that if

43) This at all events is the effect of passages like App. *BC* 2.106.342: *τὸ σῶμα ἱερός καὶ ἀσυλὸς εἶναι* – 'he was to be sacred and inviolable in respect of his body', which excludes non-physical attacks.

44) Dio 44.5.3.

45) More precisely, in its uses other than those listed in n. 36 it does not mean personal inviolability. See e.g. Cic. *Balb.* 33 (quat.); Cic. *Cat.* 2.18; Val. Max. 5.3 i.f.; Pliny Ep. 7.11.3.

46) For a more detailed defence of Dio see Strack, o.c. 365 ff. See also Weinstock, o.c. 220 ff.

47) App. *BC* 5.132.548 f.

48) Mommsen, *Staatsr.* 2.872 and n. 6; v. Premerstein, o.c. 260 ff. For other lit. see F. De Martino, *Storia della costituzione romana*², Napoli 1974, 4.171 n. 9.

49) Oros. 6.18.34.

50) But there is merit in Strack's suggestion, o.c. 360, that Orosius' Christian conscience led him to substitute *tribuniciae potestatis* for *sacro-sanctus* in Livy's version (cf. Livy *Per.* 116) of the grant.

51) See Last, o.c. pass. Cf. the review of the lit. in De Martino, o.c. 4.171 n. 9 and the discussion at 169 ff. See however n. 52.

52) See e.g. the sequence advocated by v. Premerstein, o.c. 260 ff. For criticisms see Strack, o.c. 371 ff.; Last, o.c. 96 ff. But Last, o.c. 100 ff.,

there is one tribunician question on which Dio is absolutely consistent, it is sacrosanctity; and Dio's accurate handling of the analogy based on the penalty is also a significant point in his favour. It is tempting, of course, to suggest that both Appian and Dio may be right, because if sacrosanctity had to be conferred separately⁵³) there would seem to be no objection in principle to Octavian having received both *tribunicia potestas* and *sacrosanctus ut essem* in 36, with Appian attesting the one and Dio the other; but this would simply perpetuate the mischief of reiterated grants of the full power⁵⁴), and for that reason the crux of 36 cannot be resolved in this way and our only proper course is to endorse the whole of Last's argument.

What of Willrich's postulate of a Vestal rather than a tribunician basis for the grant to Octavia and Livia in 35? Willrich's case may be summarised as follows: Prior to 35 the Vestals were the only women to enjoy a privileged status; in 35 Livia (and Octavia, but Willrich bases his argument on Livia) received only the sacrosanctity of a Vestal and release from tutelage; thereafter in 9 B.C. she received another Vestal privilege in the shape of the *ius liberorum*; after Augustus' death she was given a lictor, a privilege that the Vestals had enjoyed since 42; and ten years later she received the right to sit with the Vestals in the theatre⁵⁵). Livia thus received the Vestal rights only by degrees (and in Willrich's view ranked after the Vestals throughout Augustus' reign⁵⁶)), but Caligula on his accession conferred all those rights on Antonia in a single conferment: Suetonius says that a single *senatus consultum* granted Antonia all the honours that Livia had ever received – *quidquid umquam Livia Augusta honorum cepisset, uno senatus consulto concessit*⁵⁷) –, while Dio's version is that Antonia was forthwith made Augusta and priestess of Augustus and was given at once all the privileges of

is no more successful than his opponents in reconciling Dio with Appian, nor does De Martino's invention, o.c. 171, of a *ius tribunicium* which was something less than *tribunicia potestas* carry conviction. Both Last and De Martino might have had less difficulty with a simple grant of the *ius auxilii* in 30 if they had been alive to the analogical character of the grant.

53) Nn. 34, 35, 106–108 and the text there.

54) No amount of juggling can make sense of the grants of 36, 30 and 23 if the full power was granted in 36.

55) Willrich, o.c. 54f.

56) Ibid. 55, citing Dittenberger, *OGIS* 456.56. But Dittenberger's reading of *ΑΙΟΥΛΙΑ* for *ΙΟΥΛΙΑ* is quite gratuitous.

57) Suet. *Cal.* 15.2.

the Vestals – ταύτην τε γὰρ Αὔγουσταν τε εὐθὺς καὶ ἰέρειαν τοῦ Αὔγουστων ἀποδείξας πάντα αὐτῇ καθάπαξ, ὅσα ταῖς ἀειπαρθένους ὑπάρχει ἔδωκε⁵⁸). Willrich combines these two passages, thus equating *quidquid umquam Livia Augusta honorum cepisset* with πάντα ὅσα ταῖς ἀειπαρθένους ὑπάρχει.

Willrich might not have felt the need for a non-tribunician precedent so acutely if he had recognised the analogical character of the grant, but he is entitled to be judged on his own terms. He does well enough with the right to sit with the Vestals, but that was intended to increase their status rather than Livia's⁵⁹). Livia had a lictor if Dio is preferred to Tacitus, but that was at best a borrowing by one sacerdotal office from another, not a general policy of equating Livia with the Vestals⁶⁰). Willrich goes badly astray on the *ius liberorum*, for far from Livia borrowing from the Vestals the latter in fact borrowed from Livia, the privilege having been granted to Livia in 9 B.C. and to the Vestals only eighteen years later⁶¹). Willrich also does not do very well with his assertion that Livia received Vestal sacrosanctity, for the Vestals were not *sacrosanctae* but *sanctae*⁶²), and Dio would scarcely have been reminded of the tribunician parallel by a case in which no oath was involved. That leaves the release from tutelage. Here the Vestals certainly anticipated Livia, for they traditionally owed this privilege to the XII Tables⁶³), and this must be accounted the one unequivocal Vestal precedent in Augustus' lifetime – and the only precedent at all which is not weakened in one way or another. But there is a price to be paid, for Dio reports this grant to Octavia and Livia in the same passage as their tribunician inviolability⁶⁴), and if we accept Dio for the one we can hardly reject him for the

58) Dio 59.3.4.

59) Tac. *Ann.* 4.16.6.

60) In Tac. *Ann.* 1.14.3 Tiberius refuses to allow the senate to decree a lictor for Livia. Dio 56.46.2 says that Livia was given a lictor when performing her duties as priestess of Augustus. Ritter, o.c. 324 thinks both versions are true: Tiberius forbade her to have it qua Augusta but did not object to it for religious purposes. But why did Tiberius not consider the latter *muliebri fastigium in deminutionem sui* (Tac. loc. cit.)? B. Gladigow, *ANRW* 2 (1972), 299f. avoids the problem of Livia by concentrating on Agrippina.

61) Dio 55.2.5 ff. (to console Livia for Drusus' death); 56.10.2 (a concession to the Vestals at the time of the *lex Papia Poppaea*).

62) Strack, o.c. 368 n. 5. Cf. Livy 1.20.3.

63) *FIRA* 1.37.

64) Dio 49.38.1.

other. It can thus be seen that the evidence for Livia by no means unequivocally favours Willrich's view. This impression is strengthened by the fact that Vestal sanctity was as much an obligation (of chastity) on the Vestal as a protection for her⁶⁵), which is scarcely what Octavian had in mind for Livia. Moreover, given that the pontifex maximus had a part, even if a limited one, in punishing offences against Vestals, Octavian will not have wanted Livia's rights to depend in any way on the judgment of his recently deposed triumviral colleague, Lepidus⁶⁶). Nor, we may safely assume, would he have wanted his wife to enjoy a status which was even beyond the reach of tribunician intercession⁶⁷).

Willrich sets great store by the honours conferred on Antonia, but in fact Suetonius and Dio cannot easily be combined. Suetonius records a single comprehensive grant with Livia as the frame of reference – *quidquid unquam Livia ... cepisset*; but Dio begins with two honours not included in the comprehensive grant, namely the title of Augusta and the priesthood of Augustus, and only after that (*ἀποδείξας ... ἔδωκε*) were the Vestal privileges conferred. Dio thus differs from Suetonius in three respects: he gives separate mention to two honours which in Suetonius are presumably included in *quidquid ... cepisset*; he gives the comprehensive grant a different frame of reference – the Vestals instead of Livia; and he gives Antonia more honours than those possessed by Livia, for we know of a number of Vestal privileges, such as exemption from the praetor's jurisdiction, a special power of asylum and the dipping of the *fasces* (both aspects of Vestal sanctity), and the right to make a will, of whose

65) Mommsen, *Strafr* 18ff., 928f. So far were chastity proceedings from regular criminal process (trials before either the people or a *questio perpetua*) that they are not properly describable as *indicatio* at all, but as *coercitio*. Kunkel, *Untersuchungen* 23.

66) Jurisdiction in chastity matters rested exclusively with the pontifex maximus as against both the Vestal and the man. Mommsen, *Strafr* 20. The Vestals were also subject to the pontifex maximus in respect of offences other than breaches of chastity. Mommsen, *Staatsr* 2.55. That relations between Octavian and Lepidus were never cordial after Octavian deposed Lepidus from the triumvirate needs no documentation.

67) This aspect of Vestal sanctity is well illustrated by the case of Ap. Claudius Pulcher, *cos.* 143, who celebrated a triumph on his own authority and frustrated a tribunician veto by having his daughter, a Vestal, ride with him. Broughton, *MRR* 1.471.

68) C. Koch, 'Vesta', *RE* 2 ser. vol. 8 (1958), 1717ff. at 1734f.

conferment on Livia there is no trace⁶⁹) but which were presumably included in the πάντα ὅσα ταῖς ἀειπαρθένοις ὑπάρχει given to Antonia.

Which of the two versions of the *senatus consultum*⁷⁰) is correct – *quidquid Livia ... cepisset* or πάντα ... ἀειπαρθένοις ὑπάρχει? Suetonius does not invent technical terms, but is *quidquid ... cepisset* technical? There are examples of generalisation, but they do not exceed the limits of the *lex de imperio Vespasiani*, where each individual power is itemised separately but the generalised *uti licuit divo Augusto* is added to each item⁷¹). We might therefore think the senate's decree had itemised each honour granted to Antonia (cf. Suetonius' *concessit*) and had added something like *uti licuit Liviae Augustae* to each item. If so, Suetonius' *quidquid ... cepisset* would simply be a summary of the effect of the decree. On the other hand, Dio seems sure enough of his ground, because he goes on to say that Caligula gave his sisters the same privileges as privileges as Antonia – ταῦτα τὰ τῶν ἀειπαρθένων⁷²). But τὰ τῶν ἀειπαρθένων does not look technical: *iura virginum Vestalium* does not occur, and when Vestal privileges are expressed in technical language it is in the form *ius testamenti faciundi*, that is, without incorporating *virginum Vestalium* in the phrase⁷³).

Two alternatives are open to us. We may simply dismiss the problem as insoluble, or we may make a last attempt at reconciliation based on the fact that Dio does not lump everything under his generalisation. By making the title of Augusta and the Augustan priesthood anterior to the Vestal package Dio attests two stages of conferment as against Suetonius' one, and the question is whether there were in fact two decrees for Antonia, the one based on *uti licuit Liviae Augustae* and the other on *uti*

69) The case of Urgulania (at n. 103) does not indicate Livia's exemption from the praetor's jurisdiction.

70) That Dio also implies a decree of the senate is certain. The *ius liberorum* was conferred by the senate. Dio 55.2.6. Tiberius vetoed a decree of the senate giving Livia a lictor. Tac. *Ann.* 1.14.3. If Livia was given a lictor as priestess of Augustus the conferring authority was the same as that responsible for Augustus' consecration and Livia's priesthood (Dio 56.46.1f.), which means the senate. Livia's seat among the Vestals was probably by *senatus consultum*, because *lata lex* in Tac. *Ann.* 4.16.5 does not refer to this grant.

71) *FIRA* 2.154ff.

72) Dio 59.3.4.

73) Cf. Koch, o.c. 1734.

licuit virginibus Vestalibus. The proposition is not quite conclusive, but some mileage can be got out of it. The two honours that Dio keeps separate would certainly have been appropriate to *uti licuit Liviae Augustae*, and *uti licuit virginibus Vestalibus* in a *senatus consultum* seems quite possible even if *iura virginum Vestalium* is out of the question. The difficulty is, of course, that on this basis Suetonius has omitted an important group of Antonia's honours. Curiously enough he does the same thing in the case of Caligula's sisters, for the Vestal privileges attested by Dio⁷⁴) are absent from Suetonius' account⁷⁵), and no satisfactory explanation for Suetonius' systematic neglect of the Vestals suggests itself⁷⁶). Indeed his emphatic *uno senatus consulto concessit* is almost an aggressive assertion of accuracy. But on the other hand Dio's *πάντα καθάπαξ* is equally emphatic. We are forced to conclude that one of the versions is wrong, and on balance it seems likely that there were in fact two *senatus consulta* concerning Antonia and that Suetonius has lost sight of one of them. In any case one thing is certain, and that is that Willrich has not succeeded in equating *quidquid umquam Livia ... cepisset* with *πάντα ὅσα ταῖς ἀεπαθῆνοις ὑπάρχει*.

We now turn to the reasons for the grants of sacrosanctity in 44, 36 und 35. For Caesar little more than conjecture is possible. If he had owed his inviolability to the oath of allegiance the grant might have been intended to lull him into the false sense of security which the sources link to the oath⁷⁷), but this does not apply if the connection was tribunician⁷⁸). Gelzer connects the grant with the right to sit with the tribunes at the games⁷⁹); this is plausible enough, but Dio allocates the two

74) Dio 59 3.4.

75) Suet. *Cal.* 15.3.

76) The incident in Tac. *Ann.* 14.7.5, when Burrus refuses to execute Agrippina because she is protected by the oath of allegiance, might suggest that she was no longer protected by Vestal sanctity due to the annulment of Caligula's acts under a *memoriae damnatio*, thus possibly helping to account for Suetonius' unawareness of the Vestal conferment. But a *memoriae damnatio* against Caligula is uncertain at best. Cf. Gelzer, *RE* 10.1 (1917), 417. And in any event other acts of Caligula in respect of his sisters were known to Suetonius. The alternative argument is, of course, that Burrus said nothing about Vestal sanctity because Agrippina had never possessed it, in which case Dio is guilty of falsification. But this, too, cannot be pressed.

77) See v. Premerstein, o. c. 32 ff. and esp. 33.

78) The sources (v. Premerstein, o. c. 33) link the false sense of security specifically to the oath of allegiance.

79) Gelzer, o. c. 292 and n. 207.

items to different parts of his narrative⁸⁰). Another possibility is that the embarrassment of the diademed statue, the salutation as 'rex' and the interference by the tribunes persuaded Caesar that only tribunician sacrosanctity could save him from similar problems in the future⁸¹). As for the grants of 36 and 35, Mommsen thought that the *domus divina* of the Principate was taking shape and that Octavia had been honoured not as Octavian's sister but as Antony's wife⁸²). But there was no thought of the Principate as early as this⁸³), even if the grants could be so seen in retrospect⁸⁴); and Antony, far from wishing to see Octavia honoured, was already exposing her to humiliation⁸⁵). It is also not possible to link the grant of 36 to Octavian's desire to 'restore the Republic'⁸⁶). What we need is some mischief which precipitated a decision to seek the protection of the tribunician *τὸ μήτε ἔργῳ μήτε λόγῳ ὑβρίζεσθαι*. Antony's treatment of Octavia is a case in point, and indeed Octavian made much of this violation of her sacrosanctity⁸⁷); but this did not affect Livia, nor does it explain why a grant was needed in 36. We may find what we need in the series of attacks on Octavian attested by Suetonius⁸⁸), including 'the banquet of the twelve gods' at which Octavian appeared as Apollo: Antony criticised the entertainment in his letters and an anonymous pamphlet charged Octavian with impiety; an aggravating feature was the famine then raging, and it was said that the gods had eaten all the grain and that Octavian was Apollo Tortor⁸⁹). Octavian was also criticised for his fondness for costly furniture, Corinthian

80) Dio 44.4.2 (*ius subsellii*); 44.5.3 (sacrosanctity).

81) My colleague, Dr. P.M. Brennan, suggests that in a non-technical sense sacrosanctity had a positive force, in as much as it had a restraining influence on those who proposed doing things that one did not wish to be done. The theory in the text emanates from that suggestion. On the diademed statue, the salutation and the tribunes see the references in n. 40. Caesar might have avoided much of the criticism that his actions evoked if he could have treated the diadem and the salutation (alleging *regnum affectare* against a tribune!) as an affront to tribunician sacrosanctity.

82) Mommsen, *Staatsr* 2.818f., 819 n. 3.

83) Willrich, o.c. 54; Hohl, o.c. 70.

84) Bauman, *Crimen maiestatis* 220.

85) M. Hammond, *RE* 17 (1937), 1862f.

86) Last, o.c. 96, discussing App. *BC* 5.132.548.

87) Bauman, *Crimen maiestatis* 218f.

88) Suet. *Aug.* 70.

89) Famine regularly sparked off defamatory attacks on the illustrious. Cf. n. 94.

bronze and gambling: Suetonius quotes epigrams circulating against him, including one during the Sicilian war which insinuated that having lost two fleets he was devoting himself to the dice in the hope of gaining a victory. The chronology of these events fits in with our dates well. The famine is clearly that which Appian dates to 36 (and which he says inspired a dangerous riot against Octavian⁹⁰), thereby adding a mischief *ἔργον* to those *λόγον* attested by Suetonius), and thus nearly all the attacks can be securely allocated to 36. The effect of the grant of 36 was, of course, to bring these insults under the *lex maiestatis*⁹¹) (Suetonius says that Octavian refuted the calumnies by his conduct⁹²), but it is a habit of Suetonius to play down penal innovations in this way⁹³). It must be emphasised, however, that this enlistment of the *maiestas* law in no way pre-empted the steps taken to subsume *famosi libelli* under *maiestas* in the last decade of Augustus⁹⁴), for although anonymous pamphlets were just as prominent in 36, quite a different juristic basis was used⁹⁵). We cannot be quite so specific about the causative factor in 35, since the only attested mischief is the humiliation of Octavia. But reasonable conjecture should enable us to account for the inclusion of Livia: scurrilous stories about her had been current at the time of her marriage to Octavian⁹⁶) and may well have carried over to 35 under the stimulus of the intensified propaganda war between the triumvirs; moreover, she was undoubtedly one of the goddesses at the banquet of 36 and may well have been one of the targets of public criticism despite Suetonius' failure to note her as such.

Finally, the history of the institution subsequent to the grants of 36 and 35. Two questions arise. First, is there any force in the contention that the grant to Octavia and Livia was made by Octavian personally in his capacity as triumvir⁹⁷) and that the

90) App. *BC* 5.67–68.

91) Cf. nn. 19, 28 and the text there.

92) Suet. *Aug.* 71.

93) Cf. Bauman, *Impietas in principem*, Munich 1974, 28.

94) *Ibid.* 25 ff. Famine gave rise to the mischief which precipitated the enlistment of the *lex maiestatis*.

95) In 36 such pamphlets were actionable only if aimed at the sacrosanct. In the last decade of Augustus they became actionable if aimed at any *inlustris*.

96) Suet. *Aug.* 62.2; Dio 48.44.

97) So Mommsen, *Staatsr* 2.819 n. 3. De Martino, o.c. 4.447 thinks that Octavian made the grant under the *ius tribunicium*, but how that right

grant lapsed with his triumviral authority? And second, is there any reason to believe that a grant of tribunician sacrosanctity became a regular feature of the investiture of a new emperor?

On the first question, the only reason for thinking that Octavian made the grant of 35 personally is Dio's *ἔδωκεν*⁹⁸). But Dio commonly attributes acts to rulers when formally they emanated from some other organ, and indeed *ἔδωκε* plainly implies a *senatus consultum* in the case of Caligula's grant to Antonia, so that a legislative act (by *lex* rather than by *senatus consultum*⁹⁹) can safely be postulated here. The practical employment of the protection is not strongly attested, for the only cases known are the man whom Augustus condemned to the galleys for claiming to be the son of Octavia and the naked men who encountered Livia and were only saved from execution by her assurance that to chaste women they were no different from statues¹⁰⁰). Even these cases raise difficulties, for condemnation to the galleys looks more like an exercise of *imperium* than a sentence resulting from a regular trial. (It is not an example of the sacral remedy, for that authorised nothing except death – and confiscation.) The case of the naked men might seem to support Willrich's theory of a Vestal origin for the women's sanctity, but oddly enough Willrich himself describes the case as *maiestas*¹⁰¹), and as there is no trace of the subsumption of injuries to Vestals under that *crimen* the case does no damage to our position. These cases are not dateable, but if Valerius Maximus' reference to 'Augustus' in the case of the man condemned to the galleys¹⁰²) can be taken at face value, Octavia's rights survived into the Principate. It is also possible that the case of Urgulania in A.D. 16 confirms such survival: Urgulania, a close friend of Livia, was cited in a civil suit by L. Piso but ignored the summons and went to Tiberius' house; but Piso persisted, and this caused Livia to complain that she felt herself violated and diminished – *Augusta se violari et imminui quereretur*¹⁰³) –, which is appropriate language if a charge of *maiestas* was in contemplation.

which De Martino distinguishes from *tribunicia potestas* gave Octavian power to make such a grant is not clear.

98) So Mommsen, loc. cit.

99) Cf. *Res Gestae* 10.

100) Val. Max. 9.15.2. Dio 58.2.4.

101) Willrich, o.c. 54.

102) Val. Max. loc. cit. *Sanctissimae Octaviae* here is non-technical.

103) Tac. *Ann.* 2.34.3 ff.

There are no other cases in point, despite Willrich's (mistaken) reliance on Livia's part in the case of Appuleia Varilla¹⁰⁴), and despite the persistent myth which interprets Cremutius Cordus' *principis parentem* as a reference to Livia¹⁰⁵); but there is enough in the cases cited above to make survival after the triumvirate probable.

The question of whether tribunician sacrosanctity became a regular feature of investitures of new emperors depends almost entirely on what we are able to extrapolate from a point made by Last. That scholar argued that sacrosanctity was separate from *tribunicia potestas* not only in the case of a non-tribune who received a grant of the one or the other, but also in the case of the tribunes themselves, for their sacrosanctity resulted from their appointment to the office, not from their possession of *tribunicia potestas*¹⁰⁶). It would seem to follow this that a separate grant of sacrosanctity to the emperor, or to those to whom he gave a share in his *tribunicia potestas*, was always needed, as it had been by Augustus when *sacrosanctus ut essem* was conferred on him quite separately from *ut tribunicia potestas mihi esset*. It is true that there is no mention of a separate grant of sacrosanctity other than in *Res Gestae* 10, and in his account of the emperor's powers in the Severan period Dio seems to regard protection against insult (and the sacral remedy) as consequences of *tribunicia potestas*¹⁰⁷),

104) Willrich, o.c. 55. The case has nothing to do with sacrosanctity. See Bauman, *Impietas in principem* 77 ff.

105) This mistaken belief goes back at least to v. Premerstein, o.c. 269. It is perpetuated by Ritter, o.c. 333 and n. 159; and De Martino, o.c. 4.447 and n. 45. In fact *principis parentem* is Divus Augustus. Bauman, *Impietas in principem* 100 ff. Cf. id., *Crimen maiestatis* 269 and n. 12. It is claimed by Ritter, loc. cit., that Tac. Ann. 5.3.1 supports the identification of Livia as *principis parentem*, but the argument is without substance.

106) Last, o.c. 98 f. Cf. Dion. Hal. 6.89; App. BC 2.108; Fest. s.v. *sacrosanctus*; Livy 2.33.1; *Res Gestae* 10. Mommsen's exposition, *Staatsr* 2. 286 ff., of *tribunicia potestas* as a *potestas sacrosancta* is not overlooked by Last, but he draws a distinction between '*potestas* in the concrete sense of the word (which) could be described as "sacrosancta"' and '*potestas* in the abstract sense of power to act (which) should probably not be conceived to have included the inviolability of the agents, which was a quality enjoyed by ... officers of the Plebs while they held their offices, but was scarcely to be reckoned part of their powers'. Last, o.c. 99. To repeat a point made before, *Res Gestae* 10 is the most cogent proof of the position contended for by Last. It is also the most cogent proof of the corollary being developed here. See below.

107) Dio 53.17.9: ἡ τε ἐξουσία ἡ δημαρχικὴ καλουμένη δίδωσι φισι ...

but it is reasonable to suppose that the two tribunician attributes continued to be conferred by one and the same *lex* (as they had been in *Res Gestae* 10 – *per legem sanctum est*) and that sacrosanctity tended in the course of time to be obscured by, and in the common view to be merged with, the dominant attribute.

University of Sydney

R. A. Bauman

μήθ' ὑβρίζεσθαι, κἄν ἄρα τι καὶ τὸ βραχύτατον μὴ ὅτι ἔργῳ ἀλλὰ καὶ λόγῳ ἀδικεῖσθαι δόξωσι, καὶ ἄκριτον τὸν ποιήσαντα αὐτὸ ὡς καὶ ἑναγῆ ἀπολλύναι.