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The Tyrant as Artist: Legal Fiction and Sexual Violence under Tiberius

Barbara Natalie Nagel*

Abstract: Imagine that it is illegal to execute a virgin, so one must therefore violate a virgin prior to her execution—it is this legal crux from the reign of the second Roman emperor Tiberius that is the main object of this investigation. Tacitus', Suetonius', and Dio's portrayals of Tiberius present the latter as the emperor of dissimulation, duplicity, hypocrisy, and pretense and at the same time as the self-proclaimed "justest emperor." This article attempts a rhetorical analysis of Tiberius' ironical dialogue with the law. It focuses on how Tiberius employs the genre of legal fiction to justify particularly gruesome punishments: Tiberius treats virginity as a legal fiction in order to literalize and thereby fix the concept of virginity. In effect, virginity is considered by the law not as a stable concept but rather as something transitory, which can be altered or molded.

Keywords: violence / rape / virginity / Tiberius / Sejanus / Junilla / legal fiction / precedent / rhetoric / dissimulation / pretense / literalization

"I am aware that much of what I have described, and shall describe, may seem unimportant and trivial," warns Tacitus (CE 56–117) in his *Annals of Imperial Rome*, before continuing: "Yet even apparently insignificant events such as these are worth examination. For they often cause major historical developments." With this, Tacitus switches to the historical present tense:

Similarly, now that Rome has virtually been transformed into an autocracy, the investigation and record of these details concerning the autocrat may prove useful. Indeed, it is from such studies—from the experience of others—that most men learn to distinguish right and wrong, advantage and disadvantage. Few can tell them apart instinctively. So these accounts have their uses. But they are distasteful. (Tac. Ann. IV.32–33)¹

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What Tacitus intends to teach his readers—to “learn to distinguish right and wrong,” to “tell them apart”—describes the (impossible) desire for justice that beats at the heart of this article. As justice is too diffuse and grandiose a notion to be of particular help for textual analysis, we will deal instead with the vicissitudes of legality. More precisely, this article circles around a judgment that seems ethically wrong yet manages to present itself as legally right by adhering to the letter of the law. The object of this study is a scandalous legal crux found in Tacitus: because it is illegal to execute a virgin, one must therefore violate a virgin prior to her execution. The question is therefore that of the rhetoric of quasi-legality in Roman law. In other words: what are the tropes and turns performed by these perversions of law?

I. DISSIMULATION, DUPLICITY, HYPOCRISY, PRETENSE

The autocrat, whom Tacitus accuses of “distasteful” deeds, “cruel orders, unremitting accusations” (Tac. Ann. IV.33) is Tiberius (42 BCE–CE 37), who reigned over the Roman Empire as its second monarch from CE 14 to 37. The scholarship on Tiberius reveals a contested figure whose shifting fortunes follow broader historical and political trends.² As a literary scholar, my ambition is not to find out the truth about Tiberius; rather, I will treat the so-called sources—Tacitus, Suetonius (ca. CE 69 or 72 to after 130), and Dio Cassius (CE 150–235)—as works of fiction that give a quite coherent picture of Tiberius and his relation to the law. Roman legal scholars Barbara Levick and Robin Seager have both written extensively on Tiberius, concentrating on Tiberius’ treatment of the law of *maiestas*,³ of treason. Levick emphasizes that

Tiberius prided himself on his knowledge of Roman law, both sacred and secular, and on his respect for it . . . The Princeps for whom *iustitia* was a cardinal virtue was called ‘*iustissimus princeps*’ by those who sought to do him honour; and he liked to be thought of as ‘*senator et iudex*’, a member of the House, exercising his judicial functions like his peers.⁴

And yet there is a more than puzzling tension between the high moral standards upon which Tiberius prided himself and the cynical cruelty for

which, later in his life, he became infamous. Whoever has a soft spot for the toughest moments in Roman history will know Tiberius as someone whose violence was far more calculated than, for instance, Caligula's infantile sadism.⁵ The question therefore is how the two sides go together: Tiberius' adherence to the law and his tendency to punish his opponents mercilessly. My sense is that Tiberius is in a constant, ironical dialogue with the law: he sometimes "mimes" the exact wording of a law, even as he turns its intention on its head. Although his perversions of law have not yet been the object of a detailed rhetorical analysis, the rhetorical figure that can be seen to motivate these abuses has received substantial scholarly attention:

He never let what he desired appear in his conversation, and what he said he wanted he usually did not desire at all. On the contrary his words indicated the exact opposite of his real purpose; he denied all interest in what he longed for, and urged the claims of what he hated. . . . In short, he thought it bad policy for the sovereign to reveal his thoughts. (Dio LVII.1.1)

What the Roman administrator and historian Dio describes here by way of a series of antitheses is Tiberius' famous hypocrisy, or in Latin: his *dissimulatio*.⁶ *Dissimulatio* is also the feature that dominates Tacitus' portrayal of the emperor, prompting the Tiberius biographer Robin Seager to conclude, "Tiberius was a hypocrite. So the keynote of his character in Tacitus is dissimulation[.]" Seager himself by and large complies with this characterization: "Tiberius could act with consummate hypocrisy, bore grudges and could be cruel to his enemies, was always suspicious, hated to be forced to make his meaning clear."⁷ Similarly, Sir Ronald Syme wrote, "The dissimulation of Tiberius is an integral part of the tradition. It is also confirmed by facts. Slow, cautious, and secretive, he had learned to cloak his thoughts and repress his feelings."⁸ Quintilian defines the trait to which Syme and Seager refer, *dissimulatio*, as "that of one who feigns not to understand another's meaning."⁹

In the case of Tiberius, this pretense of ignorance manifests itself as well in the interpretation of law. For we will see that Tiberius has the habit of bending the law by pretending to not understand its true intention. The advantage of this strategy is obvious: the emperor can act mercilessly without having to take responsibility for his actions. In this sense, Dio tells us that "Tiberius refrained from giving orders outright" (Dio

LVIII.10.2), that he was eager to “avoid the reputation of having killed” people by forcing them to commit suicide (Dio LVIII.15.4), or generally by finding “pretexts for murders” (Dio LVII.19.4).¹⁰

One is left to wonder about the nature of these “pretexts” about which Dio talks. Identifying them might help us to come to a technical account of how dissimulation works in conjunction with the law. But what exactly is legal dissimulation? False pretense—understood as the conscious false presentation of past or future facts with the intent or acquiescence of harming someone—appears as the crucial notion in this context. “Pretense”—a term, not coincidentally, that proliferates in the portraits of Tiberius. The notion marks furthermore an intriguing intersection of the psychological, the juridical, and the rhetorical. The Latin notion of *simulatio* that Suetonius refers to when speaking of Tiberius’ earlier, seemingly more good-natured years, in which he allegedly ruled through *moderationis simulatione*¹¹ (Suet. Tib. LVII.1) is rendered in English as a “pretence of moderation.” This is to say that Suetonius assumes that Tiberius “showed only gradually what kind of emperor he was, for a long time presenting himself as merely unpredictable” (Suet. Tib. XXXIII.1).

Formulations like these try to explain the enigma of why in the first half of Tiberius’ life (before CE 15) he did not yet act like a tyrant. He instead seemed passive, reclusive, having been “dominated to the point of near-destruction by adherence to Augustus’ wishes and requirements,”¹² as David Shotter points out. After his stepfather’s death, Tiberius changes the cast but not the script when he allows his politics from then on to be “dominated first by [Tiberius’ closest confidant, the prefect of the praetorian guard] Sejanus himself and subsequently by his equally corrupt successor, Sutorius Macro.”¹³ After the death of Tiberius’ only son Drusus in CE 23, Tiberius exiles himself to the island of Capri, leaving the control over the city and its administration in Sejanus’ hands. When Tiberius eventually is informed that Sejanus is trying to seize power from him, and for this purpose instructed Drusus’ wife, with whom Sejanus had an affair, to poison her husband, “a time of sheer crushing tyranny” begins (Tac. Ann. V(VI).3). The betrayal by Sejanus is generally considered to be the main catalyst for the emperor’s wrath: “The emperor himself became tyrannical—or gave tyrannical men power. The cause and beginning of the change lay with Lucius Aelius Sejanus, commander of the Guard” (Tac. Ann. IV.1).

II. THE RAPE OF PRECEDENT

Every new regime needs a foundational act, even a government that turns tyrannical. And what in Roman history could serve better as such than the rape of a *matrona*, or even better a virgin? In her reading of Shakespeare's poem *The Rape of Lucrece*, the literary scholar Coppélia Kahn laconically sketches out the mechanism that binds rape to revolution: "Rape authorizes revenge; revenge comprises revolution; revolution establishes legitimate government."¹⁴ But let us start with a more general equation: woman works as a common allegory for the city so that, for example, "Roma" functions as the city goddess of the *urbs*. Virgins more specifically are often taken to symbolize the impenetrability of the city, this being the main function of the Vestal Virgins: "[W]omen embody the state and their inviolability is objectified as the inviolability of the community," observes the classicist Holt N. Parker, who continues, "Just as she [the Vestal Virgin] embodied the city of Rome, so her unpenetrated body was a metaphor for the unpenetrated walls of Rome."¹⁵ What makes a virgin the perfect emblem or embodiment for such fantasies is that she, as the classicist Sarah B. Pomeroy remarks, "belongs to no man, she can incarnate the collective, the city: she can belong to everyone."¹⁶

But virginity is always on the verge of being destroyed, one might object, and often in Latin literature this destruction occurs through an act of rape. Among the famous rape scenes in Roman myth are the rape of Lucretia by Sextus Tarquinius, and later the attempted rape of the plebeian virgin Verginia by Appius Claudius. Livy compares the effect of Verginia's suicide to that of Lucretia because in both cases the death of a woman who was raped or about to be raped by the power holder results in the overthrow of the ruling party, and in the institution or restitution of the Roman Republic (Livy III.44.1).¹⁷ For the history of law, the Verginia myth is of particular importance because Verginia is about to be "rightfully" raped by Appius Claudius, a *decemvir* who decided on the code of law, and who presided over the legal show trial against Verginia. Law, virgins, and tyrants often seem to go together in Roman founding myths, insofar as the abuse of the law against virgins is taken as evidence for tyrannical behavior. In this way, the rape of a woman is made to parallel not only the oppression of the city but also the tyrannical abuse of law. In Livy's account of the Verginia myth, Appius attempts to seduce the girl Verginia.

After this attempt failed, he resolved to have recourse to cruel and tyrannical violence (“ad crudelem superbamque uim animum conuertit”, Livy III.44.4)—which is to say that Appius changed his mind but also his *desire* (if we take into account the use of *anima* by Livy’s contemporary, Cicero) toward cruel and prideful (*superbus*) violence. Now, with the last two words (*superba, vis*) Livy further strengthens the sexual implications in the text insofar as *vis* in (Cicero’s construction) *alicui vim afferre* means “to do sexual violence to someone.” In addition, *superbus* probably alludes to none other than Tarquinius Superbus, the final King of Rome until the uprising in 509 BCE that famously followed the rape of Lucretia. Tarquinius Superbus, of course, was the father of Tarquinius Sextus, the man who raped Lucretia.

Now, taking up Appius Claudius’ plot to get Verginia for himself, it seems as if he had learned a bit from Roman history, in that Appius does not simply rape Verginia (as Tarquinius Sextus had violently forced Lucretia). Rather, Appius has the idea—absurd as it was effective—to have a proxy accuse Verginia of not being a freeborn woman but rather a slave, with the goal of making her his own sex slave. It is this way of instrumentalizing or abusing the law, I argue, that foreshadows Tiberius’ politics. One could even make the argument that this maneuver, in a certain sense, anticipates those moments in recent U.S. politics where what Maine in *Ancient Law* calls the “status”¹⁸ of a person is put into question in order to diminish that person’s rights—for instance, the right to be eligible for presidency. Whereas in the case of Barack Obama the question of whether he legally is a natural-born citizen of the United States aims at his nationality as well as his race,¹⁹ in the case of Verginia the question if she is a free Roman citizen aims not only at her citizenship but at her gender as well.

Coming back to the myth of Verginia, her father kills his daughter to save her from rape. The legal historian Marie Theres Fögen emphasizes the importance of Verginia’s attempted violation for the foundation of law. The question that is of utmost interest for Fögen is why the founding myth of law must be a violation of law. Fögen’s systems-theoretical answer is that, for the system of law to become a system of communication (i.e., one that develops a differentiated code of “lawful” vs. “unlawful”), the law must first be misunderstood and abused; only then it can be problematized and interpreted anew. Fögen imagines this process as follows: “The myth of Verginia activates the dead text, in the trial it becomes communication.

Right is brought to life qua injustice. Verginia's sacrifice absolves the violent birth of the system of law."²⁰ According to Fögen, Verginia has to be raped in order for the law to come into being. Verginia hence has the function of a sacrifice in René Girard's sense: her pending rape and subsequent death are violent acts that are necessary for the establishment of a community and the prevention of future violence.²¹ Fögen's interpretation is right on when it comes to Livy's tentatively optimistic tale of the positive outcomes of rape. The attempted rape of Verginia indeed has a cathartic effect on the city. Consequently, in Livy we find words of revenge and words of hope. As horrible as Verginia's story is, the girl in a way is never alone: when Appius Claudius' men approach her on the Forum, she is defended first by her nurse, then by her fiancé, then by her father. Her trial is public, and the "multitude" of Rome will mourn and then avenge her violent death.

There is some violence, however, that does not found, and this violence might thereby dismantle the tendency of arguments like that of Girard to ultimately redeem violence as founding. Nobody seems to know this better than the notoriously pessimistic Tacitus. Far from believing in the possibility of a felicitous sacrifice, in Tacitus' historically inspired narrative, sacrifice marks the beginning of violence, not its end. Tacitus writes that after Tiberius finds out that Sejanus plotted against him, he has Sejanus arrested in the senate on October 18, CE 31. On the same afternoon, Sejanus is condemned to death by the senate in the temple of Concordia, his corpse being mutilated for several days by the plebs. On October 24, Sejanus' elder son Strabo is executed. "Then in late November or early December, though popular fury had by this time died down, the senate decreed the execution of Sejanus' two remaining children, Capito Aelianus and Junilla," Robin Seager writes.²² Tacitus reports in detail on the circumstances of these killings:

The general rage against Sejanus was now subsiding, appeased by the executions already carried out. Yet retribution was now decreed against his remaining children. They were taken to prison. The boy understood what lay ahead of him. But the girl uncomprehendingly repeated: "What have I done? Where are you taking me? I will not do it again!" She could be punished with a beating, she said, like other children. Contemporary writers report that, because capital punishment of a virgin was unprecedented, she was violated by the executioner, with the noose beside her. Then both were

strangled, and their young bodies thrown on to the Gemonian Steps. (Tac. Ann. V(VI).9)

As we see from the quote, Junilla's rape is not explicitly associated with Tiberius—neither Tacitus nor Suetonius nor Dio tell us that Tiberius ordered the executioner to rape Junilla so that she can be executed. Instead, the rape happens “on a legal principle.” (In Ben Johnson's Baroque rendition of the rape scene, it is Tiberius' right hand, “the strangely cruel Macro,”²³ who orders the rape of the girl.) Thus, the emperor is not part of the scene—and yet it is exactly this unaccountability of the power holder, I would suggest, that makes the event appear so perfidious—and so typical for Tiberius. Precisely in the fact that the punishment seems to be self-generated does it bear the hallmarks of Tacitus', Suetonius', and Dio's characterizations of the Tiberius who notoriously abstained from taking responsibility for (or simply taking a position on) the cruelties occurring under his reign. Consequently, in Tacitus' imagination of the events,²⁴ the rape of a virgin, as a form of violence that remains violence, no longer works as sacrifice. The rape is not sublated into a founding act, that is, a tragic figure of historical reversal such as revolution or liberation from tyranny. A mark or scar of this violence seems to be the omission of the girl's name—Junilla²⁵—which could be read as symptomatic of the violence specific to rape. For according to Mieke Bal, “rape makes the victim invisible. It does that literally first—the perpetrator “covers” her—and then figuratively—the rape destroys her self-image, her subjectivity, which is temporarily narcotized, definitely changed and often destroyed.”²⁶

Though Tacitus and Livy both use thematically the abuse of the law against virgins as proof for tyrannical behavior, there are still major differences in their narrations. First of all in style: Sir Ronald Syme (who is still considered to be the most important expert on Tacitus) describes the style of the *Annales* as “condensed, austere, and enigmatic. In short, Sallust rather than Livy”; Tacitus, according to Syme, “refuses the precise detail of scandalous revelations.”²⁷ This elliptical style of Tacitus also informs the scenery: whereas Verginia is threatened in public, Junilla's ordeal is removed from sight, and occurs in the isolation of a nowhere place that is likely to be a torture chamber. Thus, the horror of the scene of Junilla's rape stems as well from the absence of an empathetic other that could give voice to her suffering, as did first Verginia's nurse on the forum, to be

followed in succession by her father, her fiancé, and finally the multitude. Furthermore, whereas Livy, in his rendition of the Verginia myth, envisions a joint new beginning, Tacitus' all too laconic tableau resembles a crypt, a dark space at the threshold to death; Tacitus' famous brevity leaves no space for mourning. Or, to say it once more with Syme: "His theme was savage and sinister, with no place for hope or ease of happiness."²⁸ Tacitus' terseness in tone could be called melancholic in that the loss—the loss of virginity, of innocence, of the Roman Republic—remains unmentioned, unmourned, and thus presents a *lost loss* in the sense of the Freudian *melancholia*.²⁹ But *brevitas* is of course also a rhetoric style that mirrors and exacerbates to a certain extent the force of the rape scene—the shorter the utterance, the greater the force—with the Latin noun *vis* (force) encompassing the abstract as well as the all too concrete sexual force that dominates the gruesome scene.

As there is no hope, Tacitus presents Junilla's rape as no more than another wasted life, a failed sacrifice, one more proof for the legal and moral deterioration of the Principate. It is at this point, I would suggest, that Tacitus' melancholy borders on cynicism—and perhaps that's not by chance, given that cynicism is so often a reproach wherever there is talk of rape. Recall the last presidential election, in which Republicans accused Democrats of treating rape in a cynical manner as female identity politics, just as Democrats criticized the cynicism inherent to the formulation "legitimate rape," coined by the Republican member of the United States House of Representatives Todd Akin. Actually, the cynicism of the quasi-legal notion of "legitimate rape" seems to be surprisingly similar to the cynicism Tacitus indirectly associates with Tiberius. This is because Tacitus, as I would like to suggest in the following, implicitly seems to accuse Tiberius of presenting some kind of rape—like that of the girl Junilla—as "illegitimate rape."

Nevertheless, Junilla's rape was generally condemned as illegal by Tiberius' contemporaries. Although there are no references in the law codes concerning the illegality of the execution of virgins, most of what we have in the way of written law is much later. My sense is that it was the case that executing a virgin was merely without precedent, not that there was any explicit written law against it: Dio describes it as "unlawful" (οὐχόσιον), Tacitus as "unheard of" (*inauditum*); Suetonius, for his part, writes that "ancient usage made it impious" (*more tradito nefas esset*). In addition, the

choice of words in the Latin clearly expresses the obscenity of the deed: first, Sejanus' daughter was raped by the public executioner, "a carnifice . . . compressam." So dishonorable was the office of the *carnifex* in Rome that only slaves or strangers could be *carnifex*, thus not even allowed to live within the walls of the city. As a headman and hangman, the *carnifex* performed crucifixions, and—as in the case of Sejanus' daughter—was responsible for beatings and tortures that preceded the killing.³⁰ Second, the word *compressam* in its infinitive (*comprimere*) literally means "to compress," and only seldom is used as here in its vulgar sense of *to defile, to rape, to violate*.³¹

There is only one scholarly text on the topic, from 1930 by the historian René Lugand, who treats, among other things, the murder of Sejanus' daughter.³² Lugand compares the rape and subsequent murder of the girl with other customary ways of killing women,³³ and concludes that it is the only clear example in Roman history of submitting a virgin to capital punishment.³⁴ Yet the question for Lugand too remains: Why the rape before the execution?³⁵ Following Lugand, the gradual punishment of Sejanus' daughter anticipates that of Christian martyrs who were raped before being thrown in the arena. Saint Agnes, for instance, was condemned to prostitution in a brothel because Roman law did not permit the execution of virgins.³⁶ But I do not agree with Lugand's hypothesis that the rape only had the function of aggravating the punishment. Instead, Tacitus suggests something far more cynical.

Let us look at the text once more. Tacitus renders Junilla's rape as follows: "tradunt temporis eius auctores, quia triumvirali supplicio adfici virginem inauditum habebatur, a carnifice laqueum iuxta." (Contemporary authors record that, because capital punishment of a virgin was unprecedented, she was violated by the executioner, with the noose beside her. (Tac. Ann. V(VI).9)). Now, if we turn to Suetonius's account of the rapes of virgins (for he speaks in the plural), it says: "immaturae puellae, quia more tradito nefas esset uirgines strangulari, uitiatas prius a carnifice, dein strangulatae." (Because, according to an ancient custom, it was supposedly not lawful to strangle virgins, the young girls were first deflowered by the executioner, and afterwards strangled. Suet. Tib. LXI.5). It is noteworthy that both Tacitus and Suetonius use the causal conjunction *quia* (because) to indicate how smoothly the rape is bound to the legal precedent. In general, the word *quia* is one of a number of conjunctions that can express

causality; although usually translated as “because,” it is derived from the ablative *quo* + *iam* and so denotes something like “whereby now.”³⁷ This means one could translate Tacitus’ citation ultra-literally as: “The authorities of the time relate that, by the fact [because] now that it was held (to be) unheard-of for a virgin to be consigned to capital punishment, she was violated by the executioner, with the noose beside her.” Here, *quia* comes very close to the other causal conjunction *quod*, which always introduces a determining reason for the action. It should be distinguished, then, from *quoniam*, which introduces causal circumstances (i.e., the general context for the action, but not necessarily the directly determining cause). In effect, *quia* operates like *quod* in the sense that it clearly names the determining reason for the rape.

However, if we want to distinguish the use of *quia* in Tacitus from its usage in Suetonius, it is important to point out that *quia* can govern either the indicative or subjunctive mood. With the indicative (as in the Tacitus quote), it simply asserts a fact; and in the subjunctive (as Suetonius uses it), it states an assumption or assumed reason. Thus, Tacitus gives us the basis for linking the executioner’s violation to legal precedent with the word *auctores*. That is to say, the straightforward assertion (*quia* plus the indicative) is an assertion underwritten by the “authorities” and one, moreover, that Tacitus accepts in abstaining from the use of the subjunctive. In Tacitus, one might infer, the causality is not put into question; instead, the force of *quia* presents it as a necessary determinant. To conclude, *quia* seems to be the operator that turns the not quite raw materials of history into the causal connections of historical narration or a binding legal account. It elides or collapses the distinction between causality as such and necessity in the strong sense, and thereby enables the initial intertextual transfer from the pretext of the Twelve Tables to Tiberius, thus enabling the translation of one mode of necessity into a heightened one.

The result is a perversely prescriptive logic. Logic is generally understood as the study of *if* . . . *then* clauses. If we try to derive logical clauses from Tacitus, then one would expect that the *if*-clause takes the position of contingency, whereas the *then*-clauses takes that of necessity: *If a woman is raped, then she can be punished*. Yet, something must have happened to the traditional logical *if* . . . *then* relation because the more accurate representation of the status of contingency in Tacitus is: *In order for there to be punishment, a woman must be raped*.³⁸ There is, however, another aspect

that aggravates the rape of precedent, which has to do with the status of negative limitations in law. The negative condition in Tacitus' case is: *Virgins must not be subject to capital punishment*. This sentence pertains to the logical relation between negation and affirmation: if something must not happen, does that imply that something else must happen? If it does, we would deal with a classic, restricted law of thought: the law of excluded middle, according to which either a proposition is true or its negation is true.

III. VIRGINITY AS LEGAL FICTION

Another way of approaching this problem is to focus on the shift from *if . . . then* to *as if*. One could describe this shift as the passage from logic to fiction—except that the logical formulae themselves are to a certain degree fictional, in that they are formulated in an anticipatory tense. One might say that the mode of *as if* shapes Tiberius' broader attitude toward life insofar as Tiberius was allegedly obsessed with mythology and *emblemata* (Suet. Tib. LXX.3) and liked to restage the latter in obscene *tableaux vivants*. In what German media theorist Friedrich Kittler refers to as the “Arcadian hardcore porn”³⁹ that Tiberius supposedly staged on Capri, boys and girls were ordered to behave *as if* they were Pans and nymphs and to reenact the erotic works of Elephantis. Furthermore, young boys were made to behave *as if* they were “little fishes, to slip between his thighs when he was swimming and provoke him playfully with their licking and biting. And he even had well-grown infants, not yet weaned, suck on his male member, as if (*ceu* = as, like as, just as) it were a breast” (Suet. Tib. XLIV.1).

It appears that for Tiberius life is conceived in emblematic terms: life is supposed to imitate *emblemata* to the extent that the point of life becomes that of producing emblems. The sovereign is the artist who uses strategy to produce these *exempla*. Another of these *exempla* is *Junilla being raped by the hangman with the noose lying next to her*—an image that burns into one's mind on account of its brutality as well as its eminent theatricality achieved by the translation of diachrony into synchrony. In the tableau of Junilla's rape, legal violence and extra-legal violence lie side by side with one another, so to speak. Moreover, as it is Sejanus' daughter who is punished in this scene, the execution seems to present the extension of an act of auto-

immunization insofar as the emperor is killing his right hand in an exemplary fashion.⁴⁰

What is the nature, one is left to wonder, of the link between Tiberius' perversions of right and the pornographic reenactments, which Suetonius reports in such loving detail? Ernst Kantorowicz's unparalleled essay "The Sovereignty of the Artist: A Note on Legal Maxims and Renaissance Theories of Art" might bridge the two, seemingly disparate areas of obscenity. Kantorowicz's point of departure is his observation that in Renaissance Italy artists were often lawyers by training, which prompts Kantorowicz to make his main claim, namely that there must be a trajectory from the legislator, to the poet, to the artist. When taking recourse to legal fiction, Kantorowicz argues, jurisprudence imitates nature just as every other art "by means of an artistic fiction."⁴¹ He thus considers "the legislator as an artist, because he was one who *ex officio* imitated nature." The link between Tiberius' legal perversion and pornographic *emblemata* is thus first "law's desire for the body"⁴² and second a drive for imitation that induces Tiberius to entertain a peculiar relation to pretexts, both literary and legal. Tiberius awards his pretexts a binding force that partakes in the performative aspect of *proscriptions* in the sense that words are written down in order to be then violently acted upon. As Kantorowicz points out while contemplating Curtius' idea of the poet as creator, in the process of legal *fictioning* imitation is intensified to a degree that makes it indistinguishable from creation.

Let us dwell a little longer on the formula of fictionality, that is, the notion of *as if*. It is no coincidence that Hans Vaihinger's book on the link between knowledge and fictionality—a book famous for its discussion of legal fictions—has the title *The Philosophy of As if* (inspired by the Kantian notion of *Als Ob* in the sense of a hypothetical truth). Vaihinger reasons the need for legal fictions with the inability of law (as the general) to cover all possible, particular cases: "[S]ince law cannot include within their formulae all particular instances, certain special examples of an unusual nature are treated as if they belonged to them."⁴³ Legal fictions hence are to be understood as conscious analogical maneuvers of "subsuming a single case under a conceptual construct not properly intended for it, so that the apperception is, in consequence, merely an analogy."⁴⁴

But the true *scandalon* that Vaihinger introduces is that of how, with the help of consciously false ideas, we can reach conclusions that appear right.

Junilla, if she were still alive, is likely to respond: *well, we can't*—as would Jeremy Bentham, the most ardent critic of juridical fictions, who accused the legal fiction of affording “presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed.”⁴⁵ Admittedly, an apt description of Tiberius’ recourse to legal fiction that seems manipulative and hence challenges positive prejudices toward legal fictions as “invaluable expedients for overcoming the rigidity of law,”⁴⁶ to quote Maine again, or as “a great advantage” and “a positive function in the life of human beings”⁴⁷ that extends the law, following philosopher-poet-lawyer Owen Barfield, so that the law can show more generosity. Tiberius’ implementations of legal fictions leave—to say the least—a bitter aftertaste. In the last part of this article we will ask what makes his legal fictions so dubious.

In his portrayal of Tiberius, Dio characterizes Tiberius’ use of punishments: “he either banished or destroyed for various reasons, most of them fictitious” (Dio LVII.22.4b). The word “fictitious”—*πεπλασμέναις* in the Greek text—derives from the verb *πλάσσω* that means “to form, mould, shape,” “to make up, fabricate, forge,” “to speak from invention,” that is, not the truth.⁴⁸ But what exactly is it that is fictionalized in Junilla’s rape? Given that legal fictions are usually invented to solve a legal problem, the preliminary question would be: what’s the problem? The initial situation is as follows: Tiberius wants not only the conspirator Sejanus but also his children dead, for terror tends to be directed not only against individuals but the family as a whole. It is likely that the pretext for these killings was the law of *maiestas*⁴⁹; the senate considered both Sejanus and his children as enemies of the state, though not Sejanus’ wife, who committed suicide upon being informed of the execution of both her children. Throughout his text, Tacitus criticizes Tiberius and the senate for having exploited the law of *maiestas* to get rid of the emperor’s opponents.⁵⁰ Olga Tellegen-Couperus describes how under Tiberius the senate (and not as previously only the *quaestiones*) began to judge criminal cases: “The senate . . . developed into a tribunal dealing with more or less political cases. At first it was mainly trials connected with *laesio maiestatis* [insulting the Roman people and/or the Roman emperor] . . . which were brought before the senate.”⁵¹ Tellegen-Couperus argues that the senate under Tiberius functioned as a *forum privilegiatum* insofar as “the accused were generally senators or members of the senatorial elite.” In consequence, the senators

put people on trial who were of their own class. But when Tiberius and the senate extend the law of *maiestas* in this manner to Sejanus' offspring, they are confronted with a juridical dilemma: Sejanus' daughter is just a girl—and there is no precedent for executing virgins.⁵²

At this point one might wonder: but why doesn't Tiberius simply try Sejanus' daughter as a non-virgin? Barbara Levick's hypothesis that Tiberius "liked to be thought of as '*senator et iudex*'" and *iustissimus princeps* seems to prove true here because Tiberius, as evoked by Tacitus and Dio, does not simply ignore or overwrite the law of precedent. Rather, he seems to take a certain perverse pleasure in proceeding in seeming adherence to the letter of the law.⁵³ Junilla's punishment hence is cunningly presented as being strictly dictated by what she is: the daughter of Sejanus—and a virgin. "What have I done? Where are you taking me? I will not do it again!" Junilla's cries suggest that her suffering, just like that of Verginia, is not caused by any doing of her own—instead her legal position is being determined by her *status*, "by what (s)he *is* rather than by what (s)he may choose to *do*." More specifically, her status is "determined by the kind of father (s)he had."⁵⁴ Whereas in the case of Verginia the first essence, that is, her family relation, was fictionalized when Appius Claudius had some-one claim that Verginia was the daughter of a slave, Tiberius and his right hand Macro fictionalize the concept of virginity instead.

But how do you fictionalize virginity? Here, the juridical fiction comes into play: legal fictions, to speak with Lon L. Fuller, are "intended to solve" or to bridge "a gap between concept and reality."⁵⁵ As there is no precedent for executing a virgin, the sovereign is in need of a legal fiction that allows him to extend the concept of virginity. Tiberius solves this riddle by cutting the Gordian knot, so to speak: In accordance with Quintilian's insight that nothing is more useful for an act of dissimulation than ambiguity ("For this kind of jest, ambiguity doubtless affords the most frequent opportunity." (Quint. VI.3.87)), Tiberius detects—or produces—an ambiguity in the precedent and uses it quite artfully for an act of dissimulation. It appears that the unwritten law according to which a virgin must not be subject to capital punishment fails to make explicit whether one must not be a virgin at the time of the crime, or at the time of the execution.

So what is the temporality of virginity? The temporality of Junilla's ordeal certainly is odd, in that it resembles the anticipatory mode of

juridical fiction. As the German jurist Hans Kelsen pointed out in his *Theory of Pure Law*, the law itself relies fundamentally on a fiction or “presupposition,” which paradoxically “founds” the law.⁵⁶ One could illuminate the strange temporality of legal fictions further in saying, like Geórgios Mitsopoulos, that legal fictions make *new* law by applying already existing law.⁵⁷ If we compare this anticipatory temporality of juridical fiction with Junilla’s punishment, then we see that the fictive, hybrid Tiberius of the historiography treats the precedent that virgins are not subject to capital punishment in fact as pretext or pretense to *preempt* the law. To put it as bluntly as possible, Junilla is raped so that she can *then* be executed. Because the precedent for a legal consequence to become effective is not *yet* given—the girl is still a virgin—Tiberius retrospectively fulfills this condition by having the girl raped so that the legal consequence (i.e., the execution) may *become* possible. Obviously, such a necessitation of precedent overlooks the contingency of precedent itself, which, after all, is a mere historical fact and is therefore itself unprecedented at the time of its emergence. This procedure is even more problematic because it violates the legal principle that a law must never be applied *ex post facto*. To sum it up, Tiberius seems to use the temporal omission in the precedent, which fails to specify the precise “moment of virginity,” and treats virginity not as a stable concept but rather as something transitory, which can be altered or molded.⁵⁸ According to the logic that Tiberius applies, a woman is not a virgin if she can be raped. In effect, no virgin is a virgin.⁵⁹

Let us pause here for a moment. Is it really the act of *fictioning* that proves to be fatal in this incident? Or is it rather another, additional process? I mentioned earlier that Tiberius is known as the emperor of dissimulation, and I then asked how to imagine an act of legal dissimulation. In general, the main objection to juridical fictions is that one might forget about their fictionality: “I employ the expression ‘Legal Fiction,’” writes Maine in his entry on legal fictions, “to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. . . . The *fact* is in both cases that the law has been wholly changed; the *fiction* is that it remains what it always was.”⁶⁰ More recent scholarship, such as Georgios Mitsopoulos’ comprehensive book on legal fictions, contradicts Maine’s definition insofar as Mitsopoulos demands that the seeming similarity of two different cases that are analogized in the act

of legal *fictioning* must rest on the knowledge of their innate difference, that is, on the awareness that the seeming similarity really hides a prior dissemblance.⁶¹ To speak once more with Fuller: “[T]he fiction, *as such*, is not intended to deceive. It may, perhaps, be held accountable as accomplice in a process of deception, but not as principal.” In other words, fictions are usually consciously false, and thus “the danger of the fiction varies inversely with the acuteness of this awareness. A fiction becomes wholly safe only when it is used with a complete consciousness of its falsity.”⁶² Therefore, the real danger does not lie in the first step, the fiction, but in the second step: the (motivated, Freudian) “forgetting” and fixing of the fiction. If according to the logic of precedent no virgins must be executed, then this means in effect that the very fictionality of virginity has to be forgotten for the other law to come to power.

So how do you fix a fiction? For instance, by literalizing it. I understand literalization as the violent attempt to reduce ambiguity.⁶³ Suetonius gives ample examples, often horrifically funny, of Tiberius’ use of this rhetorical technique to invent punishments.⁶⁴ Tiberius likewise is taking the concept of virginity all too literally in that he treats virginity as defined by the seemingly irreversible breaking of the hymen. One could object to such a narrow understanding that the hymen, to quote Derrida, is not a place of irreversibility but of undecidability, “*a medium, a pure medium, of fiction.*”⁶⁵ Tiberius, one could say, wants to touch the concept of identity, something like the ontological essence, where law touches bodies. But even at this point there is always mediation, Derrida insists, and this mediation is usually rhetorical in nature—even if “the law” becomes tyrannical, as under Tiberius’ reign, even if it denies its own rhetoricity and attempts to close the gap of reference. Derrida renders undecidable the decisive question, *Is she still a virgin?* The hymen is the revolving door where truths of fact turn into truths of fiction and vice versa. Long before Derrida, Augustine of Hippo already commented on the absurdity of such an act of forcing, that is, of thinking one could destroy virginity by destroying the hymen. As a reaction to the rapes of Christian virgins during the sack of Rome in CE 410, Augustine famously defended the spiritual integrity of the virgins who were raped, writing, “I do not suppose that anyone is so foolish, as to deem that the young woman has lost any part of her body’s holiness merely because the integrity of this part is now lost.”⁶⁶ Similarly, in his exegetic writings in *De Doctrina Christiana* Augustine objects in

a more theoretical manner to the temptation of becoming “a slave to the letter” by literalizing figurative utterances.⁶⁷ More specifically, Quintilian addresses the dangers of subjecting legal texts to a literalizing interpretation: “[W]e cannot always adhere to the letter,” Quintilian cautions his students. Rather, in certain cases the rhetorician must “prove that the legislator intended something different from what is expressed” (Quint. VII.6.7–8).⁶⁸ The example that Quintilian brings for such an impermissible outcome of legal interpretation is uncannily akin to our case: “an infant will surely not be put in prison” (VII.6.5).

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1. Cornelius Tacitus, *The Annals of Imperial Rome*, trans. and intro. Michael Grant (London: Penguin, 1996 [1956]), IV.32–33 [hereinafter, Tac. Ann.].
2. Although Tiberius was considered for the longest time a tyrant, with the end of the nineteenth century came a new appreciation for him as an effective leader and a tragic figure, culminating in Ernst Kornemann’s *Tiberius* (Stuttgart: Kohlhammer, 1960), published fourteen years after it had been finished. With the sixties, a “more recent generation of writers has shown itself less ready to believe in the merits of men in power,” as the British ancient historian Barbara Levick sums things up in *Tiberius the Politician* (London: Thames and Hudson, 1976), 223. The evaluations of Tiberius’ character tend to run opposite but parallel to that of his most prominent biographer: whoever criticizes Tiberius does so by referring to Tacitus, and whoever praises Tiberius tends to discredit Tacitus.
3. “Maiestas is short for *maiestas minuta populi Romani*, ‘the diminution of the majesty of the Roman people’, a crime first introduced by L. Appuleius Saturninus in the *lex Appuleia* c. 103 B.C. The charge was vague enough that it could cover a variety of actions, including failure in one’s duty or revolt. It was reworked by Sulla in his *lex Cornelia maiestatis* of 81 B.C. Later, Caesar revised it, making the main punishment for maiestas banishment. Under the emperors it came to cover not only treason and conspiracy, but also libel and slander, with the case presented to the senate. Under Tiberius, the usual punishment was death and confiscation of property, rather than exile.” Dacre Balsdon et al., *The Oxford Classical Dictionary* (Oxford: Oxford University Press, 1949). Robin Seager emphasizes that Tiberius did not, as Tacitus claims, “revive” the law of *maiestas*—it was never suspended. Seager, *Tiberius* (Berkeley: University of California Press, 2005), 126. Still, the “vagueness of the concept of *maiestas* had made the law a two-edged weapon” (*id.* at 126), Seager admits, even more so because the *maiestas* over the imperial house took precedence over constitutional law (see *id.* at 224).
4. Levick, *supra* note 2, at 180.
5. One instance, in which Suetonius’ portrayal attributes the same cynical legal cunning to Caligula that is characteristic for Tiberius, is the account of Caligula prostituting his sisters so that it was easier for him to later accuse them of adultery: “He habitually indulged in incestuous relations with all his sister . . . [and] he often prostituted them to his catamites. Thus, during the trial of Aemilius

- Lepidus it was all the easier for him to condemn them as adulteresses involved in the plot against him.” Suetonius, “Caligula,” in *Lives of the Caesars*, trans. Catharine Edwards (New York: Oxford University Press, 2000), 24 [hereinafter, Suet.]. That this sort of cynical reasoning of rape is not limited to antiquity is demonstrated by a recent incident of a “Tunisia Woman Raped by Police Then Accused of Violating Modesty Laws,” reported by Bouazza Ben Bouazza for *Huffington Post*, Oct. 2, 2012, at http://www.huffingtonpost.com/2012/10/03/tunisia-woman-raped-police_n_1935523.html (accessed June 2013), and by Ed Payne, “Rights group: Police rape woman in Tunisia, then charge her with indecency,” Oct. 2, 2012, at <http://www.cnn.com/2012/10/02/world/africa/tunisia-rape-protest> (accessed June 2013): “This case first shocked public opinion since the innocent woman was raped by policemen [said Salah Eddine El Jorshi of the *Tunisian League of Human Rights*.] But when the verdict was announced, we were shocked even more that they tried to take this to another level by targeting the victim herself.”
6. Manfred Baar dedicates a subchapter to the topic of Tiberius’ “*simulatio/dissimulatio*”: *Das Bild des Kaisers Tiberius bei Tacitus, Sueton und Cassius Dio* (Stuttgart: Vieweg + Teubner, 1990), 146–50. Baar comes to the conclusion that (*dis*)*simulatio* is the most prominent trait in the portrayals of Tiberius, especially in Tacitus.
 7. Seager, *supra* note 3, at 236. Tacitus even reasons Tiberius’ seclusion from Rome with “a desire to hide the cruelty and immorality which his actions made all too conspicuous.” (Tac. Ann. IV.57).
 8. Sir Ronald Syme, *Tacitus* (Oxford: Clarendon Press, 1958), I:422–23.
 9. Quintilian, *Institutes of Oratory*, ed. Lee Honeycutt, trans. John Selby Watson (Ames: Iowa State University, 2006), VI.3.85 [hereinafter, Quint.], at <http://rhetoric.eserver.org/quintilian/> (accessed June 2013).
 10. In *Minima Moralia*, Theodor W. Adorno invokes a similar case, in which a legal negative condition is necessitated: “But if someone is shouted at to ‘run’,” Adorno writes, “the prisoner ordered by his escort to flee so that they have a pretext for murdering him, the archaic power makes itself heard that otherwise inaudibly guides our every step.” *Minima Moralia: Reflections on a Damaged Life*, trans. E.F.N. Jephcott (London, New York: Verso, 2005 [1951]), aphorism 102. Adorno unmasks the pseudo-causality of the argument: whoever commands a prisoner to flee in order to “rightfully” shoot him produces a false pretense, a *Vorwand*.
 11. Quintilian defines the figure of *simulatio* as “the act of one who pretends to feel a certain persuasion in his mind” (Quint. VI.3.85).
 12. David Shotter, *Tiberius Caesar* (London, New York: Routledge, 2004), 2. Augustus not only destroyed the marriage of Tiberius’ parents but also asked Tiberius to leave his first, beloved wife Vipsania and their son and coerced him to wed her stepmother, Augustus’ promiscuous daughter Julia (Suet. Tib. IV.3). Furthermore, Augustus ordered Tiberius to leave the battlefields of Northern Europe—where allegedly Tiberius was very content—and return to the place that Tiberius tried to avoid at all costs: Rome and its dynastic politics. If Suetonius reports that “Augustus clearly and with no concealment disapproved of Tiberius’ fearsome disposition” (Suet. Tib. XXI.2) then, in psychoanalytic terms, one could speak of a classic double-bind (or at least *chuzpe*) on Augustus’ part; after all, it was Augustus who seemed to have made Tiberius so fearful in the first place. After a long period of accommodating Augustus’ wishes, Tiberius announced in 6 BCE his withdrawal from public life to Rhodes. Augustus was anything but amused—but after all, Tiberius was equally anything but the emperor’s first choice as successor. Yet, after the death of Augustus’ premier general Agrippa (Vipsania’s father), both of Augustus’ adopted sons (i.e., his biological grandsons), the demise of Tiberius’ younger brother Drusus, as well as Tiberius’ nephew Germanicus—whom Tiberius had adopted upon Augustus’ wish and later might have given command to be poisoned—there was no living alternative to Tiberius as Augustus’ successor.
 13. Shotter, *id.*

14. Coppélia Kahn, "Lucrece: The Sexual Politics of Subjectivity," in *Rape and Representation*, eds. Lynn A. Higgins & Brenda R. Silver (New York: Columbia University Press, 1991), 141.
15. Holt N. Parker, "Why Were the Vestals Virgins? Or the Chastity of Women and the Safety of the Roman State," in 125. *The American Journal of Philology* 563–601, 564, 568 (2004). Parker's article departs from the question of why Vestal Virgins were routinely murdered in moments of political crisis. His hypothesis is that "(d)anger to the *urbs* is warded off by the punishment of women, both Vestals and wives, and the foundation of public cults of chastity with admonitory and apotropaic functions." *Id.* at 563.
16. Sarah B. Pomeroy, *Goddesses, Whores, Wives, and Slaves* (New York: Schocken, 1975), 210.
17. Livy, *Ab urbe condita*, ed. & trans. Robert Seymour Conway & Charles Flamstead Walters (Oxford: Oxford University Press, 1914). Marie Theres Fögen dedicates two chapters in her book *Römische Rechtsgeschichten: Über Ursprung und Evolution eines sozialen Systems* (Göttingen: Vandenhoeck & Ruprecht, 2002) to the stories of Lucretia and Verginia and its foundational function for the Republic and Roman law.
18. According to Henry Sumner Maine, there was "a movement from *Status to Contract*," in *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London: John Murray, 1883), 170.
19. See Michael Tomasky, "Birthers and the Persistence of Racial Paranoia," in *The Guardian* (London), April 27, 2011, at <http://www.guardian.co.uk/commentisfree/michaeltomasky/2011/apr/27/barack-obama-obama-administration> (accessed June 2013); "A Certificate of Embarrassment," in *The New York Times*, April 27, 2011, at http://www.nytimes.com/2011/04/28/opinion/28thu.html?_r=0 (accessed June 2013); Dan Vergano, "Study: Racial Prejudice Plays Role in Obama Citizenship Views," in *USA Today*, April 27, 2011, at <http://content.usatoday.com/communities/sciencefair/post/2011/04/social-scientists-look-at-racisms-role-in-birther-viewpoint/1> (accessed June 2013).
20. Fögen, *supra* note 17, at 103 & 112–13 (my translation).
21. René Girard, *La Violence et le sacré* (Paris: Hachette, 1972).
22. Robin Seager calls this the "hideous climax to the terror and degradation that had ravaged Rome in the weeks since Seianus' fall." Seager, *supra* note 3, at 186.
23. Ben Jonson, *Sejanus*, Act V, l.851.
24. See also Dio Cassius, *Roman History* (Cambridge MA: Harvard University Press, 2000), LVIII.11.5 [hereinafter, Dio]: "His [Sejanus'] children also were put to death by decree, the girl [whom he had betrothed to the son of Claudius] having been first outraged by the public executioner on the principle that it was unlawful for a virgin to be put to death in the prison."
25. The girl's name "Junilla" is recorded in V. Ehrenberg & A.H.M. Jones, *Documents Illustrating the Reigns of Augustus and Tiberius* (Oxford: Clarendon Press, 1949), 42.
26. Mieke Bal, "Reading with the Other," in *Theory between the Disciplines: Authority/Vision/Politics*, eds. Martin Kreiswirth & Mark A. Cheetham (Ann Arbor: University of Michigan Press, 1990), 142. On the place of the subject in literary representations of sexual violence, see also Ellen Rooney's essay "A Little More than Persuading: Tess and the Subject of Sexual Violence," in *Rape and Representation*, eds. Lynn A. Higgins & Brenda R. Silver (New York: Columbia University Press, 1991), 87–114.
27. Syme, *Tacitus*, *supra* note 8, at I:340, 342.
28. *Id.* at 348.
29. Sigmund Freud, "Trauer und Melancholie (1917)," in *Studienausgabe*, vol. III, ed. Alexander Mitscherlich et al. (Frankfurt/M.: Fischer, 2000), 193–212.
30. Karl Ernst Georges, "carnifex," in *Ausführliches lateinisch-deutsches Handwörterbuch*, vol. I (Hannover: Hahnsche Buchhandlung, 1962 [1913]), col. 1004–1005.
31. Georges, "comprimere", *id.*, col. 1370–72.

32. The rape is listed in Kirstin Olsen's *Chronology of Women's History* (Westport CT: Greenwood Press, 1994) under the year 31, at 18.
33. René Lugand, "Le viol rituel chez le Romains," in *Revue archéologique* 32 (1930), 36–57. "Je propose de voir dans le supplice de la fille de Séjan deux rites: la mort de faim (figurée par l'étranglement) dans une prison souterraine, avec viol préalable; la précipitation du cadavre dans le Tibre." *Id.* at 49. Lugand concludes: "Le viol de la fille de Séjan est expliqué, comme une survivance du viol rituel: le bourreau joua le rôle de l'époux divin, autrefois tenu par le roi-prêtre." *Id.* at 55.
34. *Id.* at 56. On the killing of Sejanus' children in Tacitus, *Annals* VI.39.1, by strangulation as a form of capital punishment, see J. N. Adams, "The Uses of *neco* 1," in *Glotta* 68 (1990), 230–55, 244. By contrast to Lugand, Suetonius evokes the impression that the violation of virgins prior to punishment became custom under Tiberius: "Since by tradition it was forbidden that virgins should be strangled, young girls were strangled after first being violated by the executioner." ("... immaturae puellae, quia more tradito nefas esset uirgines strangulari, uitiatæ prius a carnifice, dein strangulatae."), (Suet. Tib. LXI.5). Robin Seager criticizes this in *Tiberius* as an example of Suetonius' "habit of generalizing from unique instances, for instance the fates of Asinius Gallus and Junilla." Seager, *supra* note 3, at 240.
35. Lugand, *supra* note 33, at 50.
36. Saint Agnes became a martyr at the age of twelve or thirteen under Diocletian when she refused to marry anyone but God. The Prefect Sempronius to whose son Agnes was promised, condemned Agnes to death. Even though the narratives of Saint Agnes are very late and thus to be taken with several grains of salt, as historiography they might be important as depictions of a cultural-legal theme.
37. These comments are particularly indebted to a conversation with John Hamilton.
38. If we compare these literary formulae with G. W. Leibniz' philosophical distinction between necessity and contingency, the changing status of contingency becomes apparent: Leibniz distinguishes between necessary truths and contingent truths: "Truths of reasoning are necessary, and their opposite is impossible; those of fact are contingent, and their opposite is possible." Leibniz, *Monadology*, in *Philosophical Texts*, eds. and trans. R. S. Woolhouse & Richard Francks (Oxford, New York: Oxford University Press, 1998), 267–81, here § 33. See also § 13 of the "Discourse on Metaphysics (1686)." *Id.* at 63–66. Possibility for Leibniz is hence logical: something has to be able to happen, but whether it actually happens has to do with contingency or facts. Significantly, in the *Theodicy*, Leibniz uses the rape of Lucretia as an example, precisely, of a truth of fact. See the conclusion of the *Theodicy* (Middlesex, UK: Echo Library, 2008), §§ 409–17.
39. Friedrich Kittler, *Musik und Mathematik*, Vols. I, II: *Hellas, Eros* (München: Wilhelm Fink, 2009), 253.
40. The depictions of the abuse of Sejanus' corpse by the mob are particularly gruesome: "By their order he [Sejanus] was executed and his body cast down the Stairway, where the rabble abused it for three whole days and afterwards threw it into the river." (Dio LVIII.11.5). One could say that the way in which Tiberius makes an exemplum of Sejanus' execution and that of his children anticipates Machiavelli's depiction of Borgias' execution of his former right hand, Messer Remirro de Orco, in the seventh chapter of *The Prince*. Just like Sejanus, Remirro is described as "a cruel, efficient man," who suddenly falls into disgrace with his emperor. Machiavelli depicts the tableau of Remirro's execution: "one morning, Remirro's body was found cut in two pieces on the piazza at Cesena, with a block of wood and a bloody knife beside it: the brutality of the spectacle kept the people of the Romagna at once appeased and stupefied." Anselm Haverkamp discusses the image at length in his essay "The Future of Violence," in *Shakespearean Genealogies of Power* (London, New York: Routledge, 2011), 73–86, pointing out that "Borgia does not emerge in the hypo-critical mode of the judge who restitutes the injured right; . . . the second violence prolongs the first: no self-healing catharsis but an incurable self-destruction is its form of appearance." *Id.* at 77–78.

41. Ernst H. Kantorowicz, "The Sovereignty of the Artist: A Note on Legal Maxims and Renaissance Theories of Art," in *Selected Studies* (New York: J. J. Augustin, 1965), 354. According to Kantorowicz, adoption is the paradigmatic case of legal fiction because in the juridical process of adoption, it becomes obvious that nature and continuity depend on *techné*. In the case of Augustus, the juridical fiction of adoption is responsible for the ramified growth of his family tree: Augustus adopted Tiberius when the latter was already 46, and then ordered Tiberius to adopt his nephew Germanicus to create the semblance of an organic sequence of succession. By this, Tiberius eventually became the grandfather of (his former grand-nephew) Caligula, whose father Germanicus (Tiberius' adopted son) Tiberius probably had poisoned. The different ways in which Tiberius and Augustus mobilize legal fictions could be described as the difference between perversion (Tiberius) and naturalization (Augustus). The legal fiction that satisfies Augustus' desire of naturalness through procreation is, naturally, adoption.
42. Anselm Haverkamp & Cornelia Vismann, "Habeas Corpus: The Law's Desire to Have the Body," in *Violence, Identity, and Self-Determination*, eds. Samuel Weber & Hent de Vries (Stanford CA: Stanford University Press, 1997), 225.
43. Hans Vaihinger, "Juristic Fictions," in *The Philosophy of 'As if': A System of the Theoretical, Practical and Religious Fictions of Mankind*, trans. C. K. Ogden (London: Routledge, 1949), 33.
44. *Id.*
45. Jeremy Bentham, *Works*, ed. John Bowring, vol. IX (Edinburgh: William Tait, 1843), 77.
46. Maine, *supra* note 18, at 27.
47. Owen Barfield, "Poetic Diction and Legal Fiction," in *The Importance of Language*, ed. Max Black (Englewood Cliffs NJ: Spectrum, 1962), 59, 63.
48. Henry George Liddell & Robert Scott, "πλάσσω" [to form, mould, shape], in *An Intermediate Greek-English Lexicon* (Oxford: Clarendon Press, 1889).
49. Baar assumes that the law of *maiestas* was the legal pretext under which Sejanus' children were killed. Baar, *supra* note 6, at 91. Baar considers it as rather typical that after a tyrant had been overthrown, the children were killed, even as he admits that the treatment of Junilla was especially gruesome. *Id.* Also, David Shotter points out that "Sejanus' family was treated with especial violence." Shotter, *supra* note 13, at 55. Yet, Baar (and Shotter) ignore(s) the specific circumstances of these killings, as Stefan Borzsák criticized in his review of Baar's book in 64.4 *Gnomon* 355–57, 356.
50. "It is indisputable that the operation of the law [of *maiestas*] was a major source of evil." Seager, *supra* note 3, at 137. Nevertheless, Seager doesn't see an alternative in the *Principate* to the law of treason. This viewpoint might, however, be due to the fact that Seager generally limits his analysis to the recorded cases of *maiestas* before the death of Drusus, that is, before Tiberius' reign turned tyrannical, as Tacitus claims.
51. Olga Tellegen-Couperus, *A Short History of Roman Law* (London: Routledge, 1993), 92.
52. Tacitus seems to associate the girl's virginity with a virginity of the mind, with *naïvité* in the sense of not-knowing: "The boy understood what lay ahead of him. But the girl uncomprehendingly repeated: 'What have I done? Where are you taking me? I will not do it again!' She could be punished with a beating, she said, like other children." This association becomes even more explicit in Ben Jonson's baroque rendering of the story of *Sejanus*: "Nuntius. . . . A son and daughter to the dead Sejanus / —Of whom there is not now so much remaining / As would give fast'ning to the hangman hook— / Have they drawn forth for farther sacrifice; / Whose tenderness of knowledge, unripe years / And childish silly innocence was such, / As scarce would lend them feeling of their danger; / The girl so simple, as she often asked / Where they would lead her? For what cause they dragged her? / Cried, she would do no more. That she could take / Warning with beating. And because our laws / Admit no virgin immature to die, / The wittily and strangely cruel Macro / Delivered her to be deflow' red and spoiled / By the rude lust of the licentious hangman, / Then to

- be strangled with her harmless brother.” Ben Jonson, *Sejanus*, ed. Jonas A. Barish (New Haven CT, London: Yale University Press, 1965), Act V, l.849–56.
53. Levick, *supra* note 2, at 180.
 54. Barfield, *supra* note 47, at 60.
 55. Lon L. Fuller, *Legal Fictions* (Stanford CA: Stanford University Press, 1967), xii.
 56. Hans Kelsen, *Pure Theory of Law*, trans. Max Knight, 2nd ed. (rev.) (Berkeley, Los Angeles, London: University of California Press, 1978), 44–45.
 57. Geórgios Mitsopoulos, *Le Problème de la Notion de Fiction Juridique*, trans. Fabienne Vogin (Athens: Research Center for Greek Philosophy, 2001), 257.
 58. Similarly, already Augustus at times treated the concept of maleness as volatile: “O—what shall I call you? Men? But you are not performing any of the offices of men.” (Dio LVI.4.2–3), Augustus thus objects in a speech that he gave as a response to a public demonstration at the games by the *equites* who demanded the repeal of a law on marriage, presumably the *Lex Julia*. Augustus gathered the protesters in the Forum, and divided the married from the bachelors, finally castigating the bachelors. Augustus’ reproductive laws have been object of much critical attention: the *Lex Papia Poppaea* (9 BCE), which was a companion statute to the *Lex Iulia de Maritandis Ordinibus* that was brought eleven years earlier before the *concilium plebes* by Augustus, who acted on the authority of his *tribunicia potestas*. The laws induced unmarried, divorced, or widowed Romans to marry by granting them various privileges—and threatened to inflict economic restrictions and social penalties if they did not. Granted: whereas Junilla’s virginity is negated by rape, these men’s maleness is not annihilated by a physical act of castration. Nevertheless, in the sentence “O—what shall I call you? Men? But you are not performing any of the offices of men,” “man” is redefined by its ability to reproduce. The sentence holds at least two contradictory ideas of Man: (1) *Man has to reproduce*. This statement posits an essence (virility), and then takes the empirical (man) as falling short of this essence. This first move of redefining the essence presupposes, however, that the essence *Man* itself is open to redefinition. This leads us to the second implicit clause: (2) *Man has no nature, and thus needs legal fictions*. And yet, as in the case of virginity, this initial openness is immediately disavowed—with the effect that a man is not a man if he doesn’t prove his virility by producing offspring. Augustus continues: “For you are committing murder in not begetting in the first place” (Dio 56.5.2–3). One could argue that the idea that not producing children equals murder, is itself a virtual form of murder because it takes away men’s status as Man. Here we have a general crux of all legal fictions: legal fiction is always about qualities—whether virginity or masculinity—that are posited and generalized. See James A. Field Jr., “The Purpose of the Lex Iulia et Papia Poppaea,” in 40.7 *The Classical Journal* 398–416 (1945); Adam M. Kemezis, “Augustus the Ironic Paradigm: Cassius Dio’s Portrayal of the *Lex Julia* and *Lex Papia Poppaea*,” in 61.3–4 *Phoenix* 270–285 (2007); Thomas A.J. McGinn, *Prostitution, Sexuality, and the Law in Ancient Rome* (New York: Oxford University Press, 2003), Ch. 3.
 59. There is, however, also a movement from the artistry of the legislator to the counter-artistry of the marginal female citizen: the idea of a female, civic analogue of the legal fiction. A woman named Vistilia is said to have employed *against* the law of the sovereign, a technique akin to that of the juridical fiction. Tacitus writes: “In the same year [during Tiberius’ reign in CE 19] the senate passed stringent decrees against female immorality [the *lex Julia de adulterii coercendis* from 18 BCE]. The granddaughters, daughters, and wives of Roman gentlemen were debarred from prostitution. A woman called Vistilia, belonging to a family that had held the praetorship, had advertised her availability to the aediles, in accordance with the custom of our ancestors who believed that an immoral woman would be sufficiently punished by this shameful declaration.” (Tac. Ann. II.84). “What makes Vistilia noteworthy” is, as the classicist and legal theorist David Cohen remarks in his short investigation of the case, “that she had inscribed herself on the aedile’s

list of public prostitutes.” David Cohen, “The Augustan Law on Adultery: The Social and Cultural Context,” in *The Family in Italy from Antiquity to the Present*, eds. David I. Kertzer & Richard P. Saller (New Haven CT: Yale University Press, 1993), 109. Catharine Edwards assumes, in *The Politics of Immorality in Ancient Rome* (Cambridge: Cambridge University Press, 2002), that the “*lex Iulia de adulteriis* was specifically aimed at punishing the extra-marital affairs of married women.” *Id.* at 38. Suetonius seems to take this trend (if there was indeed one) of women voluntarily registering themselves as prostitutes as a disconcerting expression of women’s new juridical self-empowerment: “Women of ill-repute had started registering themselves as prostitutes, in order to lose the field by the law, and the most profligate young persons of both the senatorial and equestrian orders were voluntarily assuming the status of the legally infamous, in order to free themselves from the restrictions which senatorial legislation had placed on their appearances in the theatre and arena.” (Suet. Tib. XXXV.2). What allegedly happened is this: actresses and prostitutes were excluded from Augustus’ law punishing adulterers; in addition, earlier legislation seems to have stipulated as part of the punishment for adulterers, the prohibition upon going to public places like the theater or the arena. In Suetonius’ depiction of the situation, the adulteress is not concerned with questions of death or life, exile or non-exile (Vistilia was eventually exiled), as in Tacitus; she wants, rather, to ensure that, even though convicted, she will still be able to frequent places of public amusement in the future. Suetonius claims that adulteresses identified themselves as prostitutes so they would not be subjected to the law. Cohen assumes that a similar strategy motivates Vistilia’s actions: “Vistilia, then, had attempted to remove her private life from the regulation of the law by exploiting a loophole in the statute.” Cohen further reconstructs the situation: “Although Vistilia’s ploy did not protect her from prosecution and conviction, her case was either representative or notorious enough that a *senatus consultum* closed the loophole by ruling that no woman whose father, grandfather, or husband had been a Roman knight could prostitute herself.” Cohen, *supra* note 59, at 109. Having oneself be registered as prostitute to avoid punishment is similar to a juridical fiction insofar as both strategies rely on a transfer that is metaphorical in nature. Vistilia bends the notion of legal status or essence, and thereby widens the notion of “prostitute” so that the latter term can ironically become a sanctuary for the convicted adulteress. “Prostitute” works as a metonymy, the *tertium comparationis* being that neither the adulteress nor the prostitute lives monogamously. According to Barfield, one can hardly overestimate the role that this kind of metaphorical transfer plays in the *factio iuris*. Barfield explains that just as metaphor’s function is to express things in a new way, legal fictions express law in new ways. Barfield hence compares the way in which legal fictions work with the impalpable process of metaphors becoming “meaning”: “Has new law been made?” Barfield asks. “It is much the same as asking whether new language has been made when a metaphor disappears into a ‘meaning.’” One could thus say that Barfield’s definition of metaphor in “Poetic Diction and Legal Fiction” (*supra* note 47, at 64) anticipates the gist of Paul Ricoeur’s *La métaphore vive* (Paris: Seuil, 1975) insofar as for Barfield, as for the French hermeneut, metaphor is all about innovation. One is left to wonder, like Nelson Goodman, “Is a metaphor, then, simply a juvenile fact, and a fact simply a senile metaphor?” Goodman, *Languages of Art: An Approach to a Theory of Symbols* (Indianapolis, Cambridge MA: Hackett, 1976), 68.

60. Maine, *supra* note 18, at 26.

61. “La fiction concerne soit un fait réel soit une relation ou une situation juridique, et sert à contourner un obstacle réel ou juridique par la création d’une nouvelle situation juridique. . . . La fiction avait deux traits caractéristiques essentiels: l’assimilation de cas dissemblables et la conscience de la dissemblance empirique ou juridique des cas assimilés.” Mitsopoulos, *supra* note 57, at 6–7. Mitsopoulos offers an overview of the different conceptions of juridical fictions: historical, German, French, Belgian, Italian, Spanish, British, American, Scandinavian, and Greek.

62. Fuller, *supra* note 55, at 7.

63. For more detailed analysis of the structure of literalization, see Barbara Natalie Nagel, *Der Skandal des Literalen. Barocke Literalisierungen bei Gryphius, Kleist, Büchner* (München: Wilhelm Fink, 2012).
64. According to Suetonius, Tiberius had mirror-punishments executed on people who dared to make jokes at the emperor's expense by violently literalizing a verbal ambiguity in the joke: "When a buffoon called out loud to the corpse, as a funeral went by, he should tell Augustus that the people had not yet received the legacies he had bequeathed them, Tiberius ordered that he be brought in and be given what was coming to him; when he was executed, he would tell Augustus the truth. Soon afterwards in the senate, when a certain Roman knight called Pompeius stouidly maintained his opposition on some issue, Tiberius threatened him with imprisonment, asserting that from being Pompeius he would become a Pompeian, thus exulting over him with a nasty play on the man's name and the eventual fate of the party." (Suet. Tib. LVII.2). See also the scene, in which upon Tiberius' arrival in Capri, a fisher makes the mistake of giving the paranoid emperor a large mullet as a welcome gift: "Filled with alarm that the fisherman had clambered up to him through the rugged and wild area in the furthest part of the island, he gave orders that the man's face should be scrubbed with the fish he had brought. Indeed, when the man gave thanks, in the course of his punishment, that he had not brought the emperor the enormous lobster which was also in his catch, Tiberius gave orders that his face should also be mangled with the lobster." (Suet. Tib. LX.1). If I call these instances "mirror-punishments," it is because they anticipate in a certain sense Dante's mirror-punishments, on which the Dante scholar John Freccero elaborates in "Infernal Irony: The Gates of Hell," 99.4 *Modern Language Notes* 769–86, 783 (Sept. 1984): "In each of these cases the ordinary dynamism of language is turned back on itself, immobilized in literalisms that are ironically irreducible. . . . It is therefore correct to say that the punishments *are* the sins."
65. "(T)he hymen, 'a medium, a pure medium, of fiction,' is located between present acts that don't take place. What takes place is only the *entre*, the place, the spacing, which is nothing, the ideality (as nothingness) of the idea." Jacques Derrida, "The Double Session," in *Dissemination*, trans. & intro. Barbara Johnson (Chicago: The University of Chicago Press, 1981), 214.
66. Saint Augustine, *The City of God against the Pagans*, ed. R. W. Dyson (Cambridge: Cambridge University Press, 2002), Book I, chapter 28.
67. "To begin with, one must take care not to interpret a figurative expression literally. What the apostle says is relevant here: 'the letter kills but the spirit gives life.' [2 Cor. 3:6]. For when something meant figuratively is interpreted as if it were meant literally, it is understood in a carnal way. No 'death of the soul' is more aptly given than name than the situation in which the intelligence, which is what raises the soul above the level of animals, is subjected to the flesh by following the letter. . . . It is, then, a miserable kind of spiritual slavery to interpret signs as things, and to be incapable of raising the mind's eye above the physical creation as to absorb the eternal light." Saint Augustine, *On Christian Teaching*, trans. & ed. R.P.H. Green (Oxford, New York: Oxford University Press, 1997), Book III, 5, 9, 20–21. The object of Augustine's critique in this passage is the alleged literalism of Judaism.
68. Quintilian comments upon the legality of proceedings, writing that every law gives rise "to inquiries either with regard to its wording, or to its intention. As to its wording, it is either clear, obscure, or equivocal." (Quint. VII.5.5). The portrayals of Tiberius suggest that Tiberius did not only deploy ambiguities in legal phrasings but that he had a gift for actively *making* juridical formulations that seemed rather obvious appear obscure.